

LIENS, NECESSITY AND UNJUST ENRICHMENT

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I. Introduction: The Lost Prince

A person with an interest in property, who – for reasons of necessity or compulsion or the like – saves a superior interest in the property or the property itself, is often entitled to an equitable lien over the interest or property thereby saved. This lien thrived in chancery in both England and Ireland until the late nineteenth century; thereafter, it continued to find favour in Irish courts, but hostile *dicta* largely saw it fall first into disfavour and then into obscurity in England. In many ways, therefore, this equitable lien for compulsion or necessitous intervention might well be regarded as equity's lost prince.

Nevertheless, the House of Lords has subsequently approved not only the lien itself but also an analogous extension; and – in the context of the recent discernible general trend towards the re-utilisation of the lien as an equitable remedy – the time may now therefore be ripe for a re-examination, and perhaps even a re-adoption, of this once-venerable species of equitable lien.

This article is intended as just such a re-examination. It has two themes. The first, considered in part II of the article, is the nature of the equitable lien for compulsion or necessitous intervention itself and on its own terms. The analysis strikes out from a fact-pattern common in the cases, first to locate essence of this lien as responsive to compulsion, necessity or the like, and then to distil its further elements. From this, there emerges a relatively precise set of conditions necessary to establish this species of lien, against which the hostile late nineteenth century English *dicta* (though all of a piece with contemporary attitudes to liens generally) will be measured and found wanting.

The second theme of this article is a consideration of the place of this lien in the modern law. Moving from the particular to the more general, this part of the article considers its possible and potential relationships with other doctrines which resemble it, the better to understand the nature of the lien already described. Early in part II, an analogous extension will already have been discussed; but the main location for this theme is part III of this article, where the lien's connections with other similar doctrines and principles will be examined. As well as a consideration of its maritime echoes, the lien's elements will be tested against the principle against unjust enrichment, concluding that the aim of the lien may very well be the reversal of unjust enrichment. If so, then elements of the lien may have much to contribute to the development of the modern law of unjust enrichment, and *vice versa*. In particular, the understanding of necessity emerging from this lien could go a

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long way towards securing necessity as a factor rendering an enrichment unjust, and explaining otherwise problematic cases. Furthermore, some of the early authorities draw analogies between the lien and subrogation, and this in turn raises the issue of the proprietary nature of the lien; part III therefore concludes by rejecting the analogies with subrogation but defending the lien's proprietary nature.

In the event, therefore, what emerges is a lien which, if and when re-adopted, may very well provide the modern law with an example of an equitable proprietary response to unjust enrichment, especially in the context of the unjust factors of compulsion and necessity. A prince, once lost, might yet be found again.

II. The Equitable Lien for Compulsion or Necessitous Intervention

The Essence of the Lien

Consider the common chain of head-landlord, tenant, and sub-tenant. At common law, if the head-landlord were to terminate the head-lease – on the grounds, for example, of non-payment of rent by the tenant – then the sub-lease carved out of it would fall with it.¹ To avoid this, such a sub-tenant might pay the head-landlord the arrears of rent to keep the head-lease and thus the sub-lease on foot. It came to be established at common law,² and statute subsequently confirmed,³ that the sub-tenant could deduct such payments over time from the rent payable to the tenant.

Furthermore, a claimant compelled by operation of law to pay a debt primarily owed by the defendant can have restitution from the defendant in the amount so paid. Hence, a sub-tenant who has been compelled⁴ to pay the

¹ On the effects of such a hostile termination by the head-landlord (as opposed to a surrender by the tenant), see, e.g. *Baron Sherwood v Moody* [1952] 1 All E.R. 389 (Ormerod J.); *Viscount Chelsea v Hutchinson* [1994] 2 E.G.L.R. 61 (CA); *Pennell v Payne* [1995] Q.B. 192 (CA); *Barrett v Morgan* [2000] 2 A.C. 264 (HL); *Kay v London Borough of Lambeth* [2006] UKHL 10 (8 March 2006) [142], [147] *per* Lord Scott; *Consultation Paper on the General Law of Landlord and Tenant* (LRC CP 28-2003) (Law Reform Commission, Dublin, 2003), 68-69 [3.22]-[3.23], 176-177 [14.24]-[14.25]. Statutes have ameliorated this in various ways: e.g. s.146(4) of the Law of Property Act 1925 (England and Wales) (*Bland v Ingrams Estates* [2001] Ch. 767 (CA)); s.137(2) of the Rent Act 1977 (*John Lyon School (Keepers) v James* [1996] Q.B. 163 (CA)); see also s.4 of the Conveyancing Act, 1892; ss.13 and 78 of the Landlord and Tenant (Amendment) Act, 1980 (Ireland); ss.15, 32(1) and 116 of the Residential Tenancies Act, 2004 (Ireland).

² *Sapsford v Fletcher* (1792) 4 T.R. 511; 100 E.R. 1147; *Waters v Weigall* (1795) 2 Anst 575; 145 E.R. 971; *Taylor v Zamira* (1816) 6 Taunt 524; 128 E.R. 1138; *Carter v Carter* (1829) 5 Bing 406; 130 E.R. 1118; *Jones v Morris* (1849) 3 Ex 742 at 746-747; 154 E.R. 1044 at 1046-1047 *per* Pollock C.B.; *Graham v Alsopp* (1848) 3 Ex 185 at 198; 154 E.R. 809 at 814 *per* Rolfe B.; *Ahearne v McSwiney* (1874) I.R. 8 C.L. 568 at 574 *per* O'Brien J.

³ See ss.20 and 21 of the Landlord and Tenant Law (Amendment) (Ireland) Act, 1860 (Deasy's Act). In Ireland, the Law Reform Commission has recommended the repeal of these sections (see LRC CP 29-2003, n.1 above, 67-71 [3.24]).

⁴ As where the head-landlord demands payment, or distrains, or threatens or takes proceedings to recover it: *Graham v Alsopp* (1848) 3 Ex 185 at 199; 154 E.R. 809

tenant's arrears to the head-landlord would also have an action for money had and received against the tenant. In *Ryan v Byrne*,⁵ the sub-tenant had paid the head-landlord after ejectment orders had been obtained by the head-landlord against both the claimant sub-tenant and the defendant tenant. Palles C.B. held that the claimant sub-tenant, having paid the head-landlord under compulsion of law, was entitled to recover the amount so paid from the defendant tenant.⁶ Indeed, even where the sub-tenant has not been compelled, if the tenant subsequently adopts the benefit of the sub-tenant's payment, then the sub-tenant has an action for money had and received against the tenant.⁷ Moreover, if there is a number of sub-tenants, and one pays off arrears of head-rent in order to save the estate from eviction, the payer is entitled to contribution from the other sub-tenants.⁸

This is a claim at law, but equity too plays a role here,⁹ granting the sub-tenant a lien in the property or estate thereby preserved; this will often be attractive to sub-tenants: a tenant who did not have the money to pay the head-landlord is unlikely to be a satisfactory mark for a personal obligation to the sub-tenant.¹⁰ In *Locke v Evans*,¹¹ the claimant made various payments to the head-landlord to prevent the defendant tenant's ejectment, and was entitled to a lien in that amount over the tenant's interest in priority to all other charges upon it. In *O'Geran v McSwiney*,¹² O'Sullivan M.R. described this outcome as:

at 814-815 *per Rolfe B.*; *Ahearne v McSwiney* (1874) I.R. 8 C.L. 568 at 574 *per O'Brien J.*; *Grogan v Regan* [1902] 1 I.R. 196 at 198 *per Madden J.*

⁵ (1894) 17 I.L.T.R. 102.

⁶ *ibid.*, 103 *per Dowse B.*, Andrews J., concurring; followed in *Murphy v Davey* (1884) 14 L.R. Ir 28 at 30 *per Murphy J.*: claimant "did not make a voluntary payment, all, but acted under the strongest compulsion, namely to save himself from being turned out of possession of a house which he had built on the lands".

⁷ *Ahearne v McSwiney* (1874) I.R. 8 C.L. 568. This is a clear case of free acceptance. Although the claimant had not been compelled to make the payment, the defendant adopted it two years later by claiming credit for it when the head-landlord sought the head-rent, and the claimant's claim for money had and received succeeded on the ground that the defendant had adopted and enjoyed the benefit of the claimant's payment ((1874) I.R. 8 C.L. 568 at 571, 572 *per Whiteside L.C.J.*, 575 *per O'Brien J.*, 577 *per Fitzgerald J.*; following *Osborne v Rogers* (1681) 1 Wms Saund 264; 85 E.R. 318 n.1 (money laid out, the defendant's request recoverable; subsequent conduct evidence of that request)). Furthermore, the action was commenced more than six years after the payment but less than six years after it was adopted by the defendant, but it was not time barred, as time did not begin until the payment had been adopted.

⁸ *Allison v Jenkins* [1904] 1 I.R. 341 at 346 *per Porter M.R.*, drawing an analogy with general average (below n.205); *Craig v A.G.* [1926] N.I. 218 (CA NI), 220-221, 230 *per Moore C.J.* (though not established on the facts).

⁹ R. Sutton "Payment of Debts charged Upon Property" in A. Burrows (ed.) *Essays on the Law of Restitution* p.71.

¹⁰ *O'Geran v McSwiney* (1874-1875) 8 Ir. Rep. Eq. 501 at 503 *per O'Sullivan M.R.*

¹¹ (1848) 11 Ir. Eq. Rep. 52n (decided 1823) (Court of Exchequer in Equity); see also *Warnock v Leslie* (1882-1883) 10 L.R. Ir 68.

¹² *O'Geran v McSwiney* (1874-1875) 8 Ir. Rep. Eq. 501 (following *Locke v Evans*); *aff'd* (1874-1875) 8 Ir. Rep. Eq. 624. The claim was not affected by the claimant's statutory remedy in Deasy's Act (n. 3 above) against the defendant ((1874-1875) 8 Ir. Rep. Eq. 501, 503 *per O'Sullivan M.R.*).

“a most reasonable one; if the sub-tenant, in a case like the present, does not make the advance, his own interest and that of his landlord will be lost for ever. To save his own interest from the gross default or misconduct of his landlord, who will neither discharge his duty to his tenant or to the person from whom he holds, the sub-tenant has to pay down his money to the landlord, the effect of this payment is, of course, to set up not merely his own interest but the actual interest of the defaulting mesne landlord himself. What is more reasonable than that this interest, so set up by the payment of the sub-tenant’s money, should be made to answer for the money which has saved it? It appears to me that there are many heads of equity which do not rest on grounds so high.”¹³

Hence, a party with an interest in property making payments for the preservation of superior interest in the property which would otherwise have been lost or destroyed can have a lien over the interest so preserved.¹⁴ The traditional justification for such a claim is said to be the element of compulsion under which the payer acted, and the benefit which accrued to all concerned. In *Fetherstone v Mitchell*,¹⁵ Brooke M.C. said that he had:

“always understood the priority which Courts of Equity give to the . . . [claimant] is this, that *the payment is in a manner compulsory* and that, in the common danger, *it is for the benefit of all* to encourage the advance of money, with which the mortgagor himself and every one of his creditors must suffer a serious loss. It is considered beneficial for all parties to give the most ample remedies to him who has saved the common security, provided that they are confined to that property which, but for his advance, would have been lost to every one concerned.”¹⁶

¹³ (1874-1875) 8 Ir. Rep. Eq. 501 at 504. His smugness was replicated, less ungrammatically, by Barry L.J. in the later *Ferguson v Ferguson* (1886-1887) 17 L.R. Ir. 552 at 579: “it seems to me consonant to natural justice to hold that there is a lien on this property for the expenditure, and I am fond of believing, that if you arrive, the natural justice between the parties, you arrive, what is the law or equity of the case” (*cp ibid.*, 571 *per* Naish L.C.). Similar sentiments have been expressed in respect of equitable liens more generally, see, *e.g.* *Todd v Moorhouse* (1874) L.R. 19 Eq. 69, 71 *per* Jessel M.R.; *In re Johnson* (1880) 15 Ch.D. 548 at 555-556 *per* Jessel M.R.; *Whitebread v Watt* [1902] 1 Ch. 835 at 838-840 *per* Stirling L.J.; *Davies v Littlejohn* (1923) 34 C.L.R. 175 (HCA) 185 *per* Isaacs J.; *Hewett v Court* (1983) 149 C.L.R. 639 (HCA) 667 *per* Deane J.

¹⁴ *E.g.* A. Lyall *Land Law in Ireland* (2nd ed., 2000) pp.408-409, 826; J. Wylie *Irish Landlord and Tenant Law* (Butterworths, Dublin, looseleaf, 1990-present) [10.36]; J. Wylie *Irish Land Law* (3rd ed., 1997) p.798 [13.158]. See also Anon “The Doctrine of Salvage Payments” (1913) 47 I.L.T.S.J. 119 (Part I), 125 (Part II); Anon “Salvage Payments in Equity” (1953) 87 I.L.T.S.J. 145 (Part I), 151 (Part II).

¹⁵ (1848) 11 Ir. Eq. Rep. 35. Followed: *O’Geran v McSwiney* (1874-1875) 8 Ir. Rep. Eq. 501 at 505 *per* O’Sullivan M.R.; *O’Loughlin v Dwyer* (1884) 13 L.R. Ir. 75 at 81 *per* Chatterton V.C.

¹⁶ (1848) 11 Ir. Eq. Rep. 35 at 42 (emphasis added).

The claimant was the assignee of a judgment creditor whose judgment attached to the defendant's lease for lives renewable forever, and Brooke M.C. and Jackson J. awarded him a lien on the defendant's leasehold interest in respect of payments of the defendant's arrears of rent to redeem the lands from eviction. Moore J, who agreed as to the principle, dissented on the grounds that the claimant had not been compelled but rather had made the "the advance solely with a view to his own interest . . . [hoping that] when the value of the estate is realised the fund will reach his demand. . .".¹⁷ Similarly, if the risk of eviction is brought about not by the defendant tenant but by the claimant sub-tenant himself or herself, then the claim for such a lien will fail.¹⁸ The sub-tenant payment cases provide an excellent example of Brooke M.C.'s principle, as all of the successful claimants had acted under the compulsion of a demand made or distress levied or the threat of legal action or the enforcement of a judgment by the head-landlord.

Furthermore, the underlying personal claim extends from compulsion of law¹⁹ at least to cases of a kind of compulsion variously described as circumstantial compulsion, compulsion in fact, practical compulsion, moral compulsion, or necessity.²⁰ Similarly, the lien extends from cases of compulsion of law (such as the sub-tenants cases²¹) to cases of necessity,²² such as that arising from the need to preserve the income-producing capacity of the property,²³ or to carry out necessary repairs or reconstruction on the property.²⁴ For example, in *In re Lisnavagh Estate*,²⁵ on the application of the tenant for life of settled land, Dixon J. held that the such a lien would be available as a remedy for the prevention of an imminent loss to a sufficient

¹⁷ *ibid.*, 46.

¹⁸ *Craig v A.G.* [1926] N.I. 218 (CA NI).

¹⁹ *Moule v Garrett* (1872) L.R. 7 Exch 101; *East Cork Foods v O'Dwyer Steel* [1978] I.R. 103 (Ir SC).

²⁰ The word "necessity" is used generically in this article to encompass the various descriptions of this extension. On it, see *Exall v Partridge* (1799) 8 T.R. 308; 101 E.R. 1405; *England v Marsden* (1866) L.R. 1 C.P. 529 (CA); *Peel v Canada* (1993) 98 D.L.R. (4th) 140 (SCC); and below, text with and in nn.157-185; *cp* R. Sutton, n.9 above, 99-103.

²¹ See also *In re Smith's Settled Estates* [1901] 1 Ch. 689 at 691 *per* Buckley J. (tenant for life compelled to pay expenses incurred by the local authority "entitled to be recouped and to keep the charge alive in his own favour").

²² Indeed, the sub-tenants could also be described as having paid pursuant to the necessity to save their interests from "absolute destruction" (*O'Geran v McSwiney* (1874-1875) 8 Ir. Rep. Eq. 501 at 503 *per* O'Sullivan M.R.).

²³ *In re McDonnell's Estate* [1900] 1 I.R. 295 (Ross J.); *Neill v Neill* [1904] 1 I.R. 513 (Kenny J.).

²⁴ *In re Johnson's Settlement* [1944] I.R. 529 (Gavan Duffy J.). *Ferguson v Ferguson* (1886-1887) 17 L.R. Ir. 552 at 577 *per* Palles C.B., 578 *per* FitzGibbon J.

²⁵ *In re Lisnavagh Estate; Lord Rathdonnell v Colvin* [1952] I.R. 296 (Dixon J.); *cp* *Bank of Ireland v Geoghegan* (1955-1956) Ir. Jur. Rep. 7 (Budd J.). See also *Frith v Cameron* (1871) L.R. 12 Eq. 169 (Mallins V.C.); *In re Jackson* (1882) 21 Ch.D. 786 (Kay J.) applying *Glover v Barlow* (1831) (1882) 21 Ch.D. 788n; *In re Household* (1884) 27 Ch.D. 553 (Bacon V.C.); *In re Hotchkys* (1886) 32 Ch.D. 408 (CA); *Conway v Fenton* (1888) 40 Ch.D. 512 (Kekewich J.); *In re Freman* [1898] 1 Ch. 28 (North J.).

part of the estate,²⁶ and authorised the expenditure by the trustees of capital monies in respect of substantial necessary works on the mansion house on the estate. In such cases, the lien is again justified on the grounds of compulsion – not compulsion of law, however, but rather a practical compulsion or necessity arising from the circumstances of the estate itself.

The cases also illustrate another extension of the lien, from the protection of interests in property to the preservation of the property itself. Of course, a “man spends money in improving another man’s property at his peril”²⁷ unless there is compulsion or something akin to it, and such compulsion was made out in *Dent v Dent*.²⁸ The claimant, tenant for life, worked a mine sufficiently to prevent the Columbian government taking it over, in the process converting it from loss-making to profit-making; and Romilly M.R. held that he was entitled to a lien against the interest of the defendant remainderman in the amount of his expenditure.²⁹ The work preserved both the interest (it prevented forfeiture to the government) and the property itself (it prevented desuetude and produced an incoming-producing asset). But there are also many cases in which the work merely preserved the property and not the interest. In *Dent* itself, the claimant’s lien covered not only the saved mine but also the completion of a mansion house begun by the testator; and in *Hibbert v Cooke*,³⁰ a testator commenced the construction of a mansion house upon the estate, and the tenant for life was entitled to a lien over it for its completion.

In *Ferguson v Ferguson*,³¹ the executors of an estate, at the request of the tenants for life, completed the construction of 13 houses on the testator’s property, preventing them from falling into disrepair and allowing them to be rented out for the benefit of the estate. The tenants for life were held liable to the executors, and the Court of Appeal held that the tenants for life in turn had a lien against the remaindermen over the property preserved. Palles C.B. went so far as to say that “the authorities not only authorize, but coerce us to hold that the appellants are entitled to this lien”.³²

²⁶ [1952] I.R. 296 at 302.

²⁷ *Ferguson v Ferguson* (1886-1887) 17 L.R. Ir. 552 at 565 *per* Porter M.R.; *cp Taylor v Laird* (1856) 25 L.J. Ex. 329 at 332 *per* Pollock B.: “One cleans another’s shoes, what can the other do but put them on?” See also nn.69-76, 110, 189-200 below.

²⁸ (1862) 30 Beav. 363; 54 E.R. 929.

²⁹ *ibid.*, 370, 932.

³⁰ (1824) 1 Sim. & St. 552; 57 E.R. 218; *cf Gilliland v Crawford* (1868-1870) Ir. Rep. 4 Eq. 35 at 41 (Chatterton V.C.) (testator commenced construction of houses for letting; but tenant for life who completed construction not entitled to a lien; *Dent* and *Hibbert* distinguished; see below n.32).

³¹ (1886-1887) 17 L.R. Ir. 552.

³² *ibid.*, 573; *cp* 571 *per* Naish L.C. 577-578 *per* FitzGibbon J. 579 *per* Barry J. Palles C.B. described *Dent v Dent* as doing no more than to “apply a well-settled principle to a striking example” (*ibid.*, 574) and distinguished *Gilliland v Crawford* on the ground that there was no evidence there that the property had been “saved from total loss” (*ibid.*, 575). There is an element of practical compulsion about the completion of a mansion house on an estate (as in *Hibbert*) or the working of a mine to prevent it being lost to the government (as in *Dent*) which is absent in the completion of the construction of the houses (as in *Gilliland*) unless the completion prevents the total loss of the property, as to which

On the other hand, it seems that, to justify the lien, the cases take the view that the tenant for life of settled land will have been sufficiently compelled only where the property is preserved from destruction, and not where it merely needs improvement or current maintenance. In *In re Hurst*,³³ Porter M.R. considered that only repairs absolutely necessary to preserve the property and make it modestly habitable would attract a lien. Again, in *In re De Teissier's Settled Estate*,³⁴ Chitty J. held that a lien would arise where the work was done because property had been condemned by the sanitary authority as a dangerous structure,³⁵ but would not arise where the tenant for life merely sought to make some improvements to the settled estate. In *In re Legh's Settled Estate*,³⁶ a tenant for life had incurred significant expenditure working on the mansion house of a settled estate. Kekewich J. held that he was entitled to claim some of the expenditure under statute,³⁷ but that no lien arose in respect of the remainder, since it was impossible to say that that it had been spent on preserving the property from destruction rather than on mere improvements.³⁸ In allowing the lien in cases of preservation or repairs on the one hand, but in denying it in cases of maintenance or improvements on the other, the courts have taken the relatively strict view that claimants will properly have been acting out of necessity only in the former cases.

The settled land cases demonstrate not only the application of the lien itself, but also an important analogical extension of that application. Where the emergency work has been done, the cases award the tenant for life a lien over the estate; but some tenants for life, rather than doing the work and seeking a remedy afterwards, instead sought judicial *laissez passer* in advance. Unsurprisingly, courts applied the same principles, holding that the necessity which would subsequently justify a lien would also justify an order in

there was no evidence in *Gilliland*, but which was the case in *Ferguson* (*ibid.*, 573, 577 *per* Palles C.B.), where non-completion would have had a serious and negative impact upon the remainder of the testator's property (*ibid.*, 578 *per* FitzGibbon L.J.).

³³ (1892-1893) 29 L.R. Ir. 219; *Caldecott v Brown* (1842) 2 Hare 144; 67 E.R. 60 (Wigram V.C.); *Dunne v Dunne* (1855) 3 Sm. & Giff. 22 at 28-29; 105 E.R. 546 at 549 *per* Stuart V.C.; *Floyer v Bankes* (1869) L.R. 8 Eq.115 (Lord Romilly M.R.); *Landowners West of England and South Wales Drainage and Inclosure Co v Ashford* (1880-1881) 16 Ch.D. 411 at 433 *per* Fry J.; *In re Montagu* [1897] 2 Ch. 8 (CA) 11 *per* Lopes L.J.; *In re Cobden's Estate* [1923] 1 I.R. 1 at 3 *per* Wylie J.

³⁴ [1893] 1 Ch. 153.

³⁵ *ibid.*, 161-162, discussing *In re Hurst*.

³⁶ [1902] 2 Ch.274.

³⁷ Settled Land Act, 1890, s.13; *cp In re Dunham Massey Settled Estates* (1906) 22 T.L.R. 595 (Kekewich J.); see also *De Vere v Perceval and Cole* [1945] Ir. Jur. Rep. 9 (Gavan Duffy J.) (giving s.13 an expansive interpretation); *In re O'Farrell; O'Farrell v Stapleton* [1959] I.R. 387 (Dixon J.) (discussing various sections of the Settled Land Act, 1882); *cf In re De Teissier's Settled Estate* [1893] 1 Ch. 153 at 161 *per* Chitty J.

³⁸ [1902] 2 Ch. 274 at 281; claims in respect of improvements (*Dent*) or the repair of dry rot (*Hibbert*) were not included in the liens; *In re Cobden's Estate* [1923] 1 I.R. 1 at 4 *per* Wylie J. (repairs to an embankment to prevent an immediate breach were compelled, the improvement of the draining system did not). Indeed, the underlying personal claim in respect of the preservation of property likewise does not extend to the improvement of property: S. Stoljar *The Law of Quasi-Contract* (2nd ed., 1989) p.208; G. Virgo *Principles of the Law of Restitution*, p.315.

advance allowing such work. Often, this would be accomplished by the court's amending the terms of the settlement, and not just settlements but of trusts generally. This therefore came to be established as a judicial power to vary trusts generally for reasons of necessity, in the exercise of the inherent jurisdiction of the court of chancery to administer trusts.³⁹ Hence, in *In re New*, Romer L.J. held that, although it is a jurisdiction to be exercised with caution, if there are peculiar circumstances of emergency, the court can sanction actions by the trustees not otherwise authorised by the trust deed.⁴⁰ This was approved by the House of Lords in *Chapman v Chapman*,⁴¹ declining an invitation to expand this into a general power to alter trusts as an aspect of the inherent jurisdiction, and holding that, since there was no emergency, there was no basis to sanction a variation of the trust. Of course, the doctrine at issue in *Chapman* is not an equitable lien for compulsion or necessitous intervention but rather an analogous extension, where the analogy is built upon the common element of necessity which is the basis both of the lien and of this aspect of the inherent jurisdiction.⁴²

Chapman was one of three cases which came before the Court of Appeal in *In re Downshire Settled Estates*⁴³ seeking the court's sanction, in the exercise of its inherent jurisdiction, to amend various settlement trusts, for tax reasons. In the Court of Appeal, Denning L.J., dissenting in part, saw this aspect of the inherent jurisdiction as an example of a more general inherent jurisdiction to amend trusts, and would have sanctioned all three amendments.⁴⁴ However, the majority, Evershed M.R. and Romer L.J., held that this aspect of the inherent jurisdiction was of a limited character:

“It is a power or jurisdiction to confer upon trustees, *quoad* items of trust property vested in them, administrative powers to be exercised by them as the persons in whom the property is vested (notwithstanding that such powers were not conferred

³⁹ On this jurisdiction, see D. Hayton *Underhill and Hayton on the Law Relating to Trusts and Trustees* (16th ed., 2003) pp.493-529, Article 47. On this aspect of the jurisdiction, see O. Marshall “Deviations from the Terms of a Trust” (1954) 17 *M.L.R.* 420; J. Harris *Variation of Trusts*, chap.2. Of course, the court's inherent jurisdiction to supervise trusts covers a large range of matters which have their roots in various places; this particular aspect of the jurisdiction arises by analogy with the liens which have been discussed so far in this article.

⁴⁰ *In re New* [1901] 2 Ch. 534 (CA) 544-545; Underhill & Hayton, *ibid.*, 523-524; see also n.25 above; *In re Tollemache* [1903] 1 Ch. 457 at 463-464 *per* Kekewich J.; *aff'd.* [1903] 1 Ch. 955 (CA) (no emergency) (*New* the “high-water mark” of the jurisdiction: *ibid.*, 956 *per* Cozens-Hardy M.R.; *cp Rafidain Bank v Saipem* (Court of Appeal, unreported, 2 March 1994) *per* Stuart Smith L.J.); *In re Foster's Settlements* [1954] 3 All E.R. 714 (Harman J.) (no emergency). *In re de Malahide* (1952) 86 I.L.T.R. 191 (Gavan Duffy J.) is probably a case of this type.

⁴¹ [1954] A.C. 429 (HL).

⁴² Hence, the variation of trust cases are discussed here for what they say about *necessity*, and not for what they might or might not say about liens which trustees acting properly will have over the trust for their expenses (see, *e.g.* Underhill & Hayton, n.39 above, p.810 at pp.818-821, Article 83 para. 2; *Re Spurling* [1966] 1 W.L.R. 920; *Armitage v Nurse* [1998] Ch. 241; *X v A, B and C* [2000] 1 All E.R. 49 (Arden J.); see also n.67 below).

⁴³ [1953] 1 Ch. 218 (CA); The three cases were *In re Downshire Settled Estates*, *In re Chapman's Settlement Trusts*, and *In re Blackwell's Settlement Trusts*.

⁴⁴ [1953] 1 Ch. 218 at 269, 275.

by the trust instrument) where a situation has arisen in regard to the property (particularly a situation not originally foreseen) *creating what may be fairly called an emergency* – that is a state of affairs which has to be presently dealt with, by which we do not imply that immediate action then and there is necessarily required – and such that *it is for the benefit of everyone interested under the trusts* that the situation should be dealt with by the exercise of the administrative powers proposed to be conferred for the purpose.”⁴⁵

Hence, this did not amount or extend to a general power to modify settlement trusts,⁴⁶ and Evershed M.R. and Romer L.J. held that the limited aspect of the inherent jurisdiction did not apply in any of the three cases. However, on the basis of a wide interpretation of an exception in respect of compromises to benefit infants,⁴⁷ they sanctioned the amendments in two of the cases, though not in *Chapman*.⁴⁸

The claimants in *Chapman* appealed. The House of Lords⁴⁹ rejected the claimants’ assertion of a broad power to amend trusts⁵⁰ and approved the approach of the Court of Appeal on this issue.⁵¹ However, their Lordships significantly reined in the infants’ compromise jurisdiction,⁵² confining it to

⁴⁵ *ibid.*, 235 (emphasis added).

⁴⁶ *ibid.*, 233, 265.

⁴⁷ *ibid.*, 239-240; on this exception, see *Brooke v Lord Mostyn* (1864) 2 DeG.J.&S. 373; 46 E.R. 419; *In re Trenchard* [1902] 1 Ch. 378 (Buckley J.); *In re Wells* [1903] 1 Ch. 848 (Farwell J.); *cp In re Duke of Leeds* [1947] Ch. 525 (Jenkins J.); *In re Lucas* [1947] Ch. 558 (Jenkins J.); see also s.42 of the Conveyancing Act, 1881. See further, n.52 below.

⁴⁸ *Downshire* was not within the limited inherent jurisdiction ([1953] 1 Ch. 218 at 258, discussing *New*), but was within the infants’ compromise exception (*ibid.*, 258-260, discussing *Trenchard*). *Blackwell* was not within the inherent jurisdiction, but was within the compromise exception (*ibid.*, 268-269). *Chapman* was within neither the inherent jurisdiction nor the exception (*ibid.*, 264-266).

⁴⁹ [1954] A.C. 429 (HL); see O. Marshall, n.39 above; R. Megarry “The Remoulding of Trusts” (1954) 70 *L.Q.R.* 473; J. Mitchell “The Finality of Settlements” (1954) 17 *M.L.R.* 473.

⁵⁰ *ibid.*, 443 at 446 *per* Lord Simonds L.C., 466 *per* Lord Morton (Lords Oaksey and Cohen concurring on this point), 470 *per* Lord Asquith.

⁵¹ *ibid.*, 444-445 *per* Lord Simonds L.C., 455 *per* Lord Morton (Lords Oaksey and Cohen concurring on this point), 469 *per* Lord Asquith.

⁵² *ibid.*, 446-447 *per* Lord Simonds L.C., 462-464 *per* Lord Morton (Lord Oaksey concurring), 470-471 *per* Lord Asquith; *cf.* 472-474 *per* Lord Cohen, dissenting on this point. See *Re Lord Hylton’s Settlement* [1954] 2 All E.R. 647 (CA) (variation approved); *Re Powell-Cotton’s Re-Settlement* [1956] 1 All E.R. 60 (CA) (variation not approved); *Re Heyworth’s Contingent Reversionary Interest* [1956] Ch. 364 (Upjohn J.) (same); *Re Barbour’s Settlement* [1974] 1 All ER 1188 (Megarry J.) (variation approved); *Allen v Distillers* [1974] Q.B. 384 (Eveleigh J.) (variation approved, but not for *Chapman* reasons); *Mason v Farbrother* [1983] 2 All E.R. 1078 (Blackett-Ord V.C.) (variation approved). See also the power to vary maintenance: s.43 of the Conveyancing Act, 1881; *Revel v Watkinson* (1748) 1 Ves. Sen. 93; 27 E.R. 912 (Lord Hardwicke L.C.); *Greenwell v Greenwell* (1800) 5 Ves. Jun. 194; 31 E.R. 541 (Lord Loughborough L.C.); *Errat v Barlow* (1807) 14 Ves. Jun. 202; 33 E.R. 498 (Lord Eldon L.C.); *Havelock v Havelock* (1800) 17

cases where the beneficial interests under the terms of a trust are genuinely in dispute, and dismissed the appeal. The outcome demonstrated the need for a broader judicial power to vary trusts⁵³ which was soon supplied by the legislature;⁵⁴ but this aspect of the inherent jurisdiction still remains alongside the statutory powers,⁵⁵ and arises where “some event or development unforeseen, perhaps unforeseeable, and anyhow unprovided against by the settlor or testator, threatened to make a shipwreck of his

Ch. D. 807 (Malins V.C.); *In re Collins* (1886) 32 Ch.D. 229 (Pearson J.); *In re Walker* [1901] 1 Ch. 879 (Farwell J.).

⁵³ It had been argued in *Chapman* that many such orders had in fact been made ([1954] A.C. 429 at 434-435 *arguendo*, 447 *per* Lord Simonds L.C. (recording that counsel had submitted that he had made such orders whilst a judge of the High Court, though he failed to recollect it), 464, 466 *per* Lord Morton; see *In re Brook's Settlement* [1968] 3 All E.R. 416, 424 *per* Stamp J. (it “had often been done”); *cp In re St John's Chelsea* [1962] 2 All E.R. 850 (London Consistory Court) 857 *per* Deputy Chancellor, G.H. Newsom Q.C.; in the immediate aftermath of the decision of the House, Roxburgh J. (who had been the first instance judge in *Downshire* and *Blackwell*, the companion cases to *Chapman* in the Court of Appeal) recalled various orders made before that decision but not perfected, and the Court of Appeal approved this action: see in *In re Harrison's Share under a Settlement* [1955] Ch. 260 (Roxburgh J., and CA); followed: *Charlesworth v Relay Roads Ltd.* [1999] 4 All E.R. 397 (Neuberger J.). However, the decision of the House did not affect orders made but not appealed: see [1954] A.C. 429 at 474 *per* Lord Cohen; *In re Gale* [1966] Ch. 236 (CA) 247 *per* Russell L.J.; *Warr v Warr* [1975] 1 All E.R. 85, 94 *per* Bagnall J.

⁵⁴ After *Chapman*, implementing the Law Reform Committee Sixth Report (*Court's Power to Sanction Variation of Trusts*) (Cmnd 310, 1957), the then-existing partial statutory powers of trust amendment (ss.53 and 57 of the Trustee Act, 1925 (see O. Marshall “The Scope of Section 53 of the Trustee Act 1925” (1957 *Conv. (ns)* 448) and s.64 of the Settled Land Act, 1925 (which was held to be satisfied by the Court of Appeal in *Downshire* [1953] 1 Ch. 218, 258-260) as extended by the Settled Land and Trustee Acts (Courts' General Powers) Act 1943 as amended by s.9 of the Emergency Laws (Miscellaneous Provisions) Act 1953) were supplemented by the comprehensive Variation of Trusts Act 1958 (see J. Harris, n 39 above; D. Evans “The Variation of Trusts Act in Practice” (1963) 27 *Conv (ns)* 6; *Goulding v James* [1997] 2 All E.R. 239 (CA)). The 1958 Act was almost immediately pressed into service to sanction a scheme very similar to that which had been before the House in *Chapman* (see *In re Chapman's Settlement Trusts (No 2)* [1959] 1 W.L.R. 372 (Vaisey J.)). It was extended to Northern Ireland (The Trustee (Northern Ireland) Act 1958) and Scotland (The Trusts (Scotland) Act 1961) and replicated in many other common law jurisdictions, such as New Zealand (s. 64A of the Trustee Act 1956 (NZ)), some Australian territories (s. 63A of the Trustee Act 1958 (Vic); s.90 of the Trustees Act 1962 (WA); s.95 of the Trusts Act 1973 (Qld)) and Canadian Provinces (s. 29A of the Trustee Act 1952 (New Brunswick); s.63 of the Trustee Act 1954 (Manitoba); s.31A of The Trustee Act 1955 (Alberta); The Variation of Trusts Act 1959 (Ontario); The Variation of Trusts Ordinance 1963 (Northwest Territories); The Variation of Trusts Act 1963 (Prince Edward Island); The Variation of Trusts Act 1967 (Nova Scotia); The Variation of Trusts Act 1968 (BC); The Variation of Trusts Act 1969 (Saskatchewan); The Variation of Trusts Ordinance 1971 (Yukon Territory)). See, generally, A. McClean, “Variation of Trusts in England and Canada” (1965) 43 *Can. Bar Rev.* 181.

⁵⁵ *Rafidain Bank v Saipem* (Court of Appeal, unreported, 2 March 1994) (*New and Chapman* applied and followed).

intentions; and it was imperative that something should be saved from the impending wreck”.⁵⁶ It requires that level of compulsion or necessity, “mere expediency [i]s not enough to found the jurisdiction”.⁵⁷

In sum, then, a party with an interest in property who, for reasons of compulsion or necessity, preserves a superior interest in the property or the property itself, can have a lien over the interest or property so preserved. Some tenants for life of settled lands who made necessary repairs to settlement property successfully claimed such liens, though others sought judicial approval before acting out of such necessity; this often required the variation of the settlement itself, and – as exemplified in *Chapman* – this came to be understood as an aspect of the inherent jurisdiction of the court to supervise trusts. However, both the equitable lien and the analogical *Chapman* extension turn on compulsion, necessity or the like; and whilst the *Chapman* jurisdiction is about the extent of the court’s powers to supervise trusts, it arose by analogy with this species of equitable lien, and is constructed upon the same view of necessity that is of the essence of the lien.

The Further Elements of the Claim Giving Rise to the Lien

Although something akin to compulsion or necessity would seem to be essential to the lien, it is not sufficient. There are further elements which also need to be established. In *In re Power’s Policies*,⁵⁸ Holmes L.J. set out three further conditions for a payment to generate a lien:

1. It [the payment] must have had the effect of saving for the benefit of everyone interested property which would otherwise have been lost.
2. It must be made by a person having a charge on or an interest carved out of the estate of the ultimate owner of such property.
3. The [payer] must make it voluntarily for his own advantage, and not in pursuance of an obligation or in the performance of a duty, or as the agent of another.⁵⁹

This passage is neither comprehensive nor entirely accurate. It is not comprehensive for four reasons: it does not refer to the requirement that the claimant have been compelled or have acted out of necessity; it does not contemplate the application of the lien to property rather than to interests in property; it does not contemplate actions other than payments; and it does not encompass the analogous extension into the inherent jurisdiction. And it

⁵⁶ [1954] A.C. 429 at 469 *per* Lord Asquith; followed by Hobhouse L.J. in *Rafidain (ibid)*.

⁵⁷ [1954] A.C. 429 at 445 *per* Lord Simonds L.C. There is no authority directly applying *Chapman* in Ireland; see R. Keane *Equity and the Law of Trusts in the Republic of Ireland*, pp.129-130, [10.31]-[10.32]; H. Delany *Equity and the Law of Trusts in Ireland* (3rd ed., 2003) pp.439-443; though, of course, its application should be unproblematic given the solid Irish basis of the underlying doctrine. Neither is there variation of trusts legislation, although the Law Reform Commission has recommended its introduction: *Report on the Variation of Trusts* (LRC 63-2000) (Law Reform Commission, Dublin, 2000).

⁵⁸ [1899] 1 I.R. 6.

⁵⁹ [1899] 1 I.R. 6 at 27; followed: *In re McDonnell’s Estate* [1900] 1 I.R. 295 at 297 *per* Ross J.; *Munster and Leinster Bank v McCann* [1936] I.R. Jur. Rep. 40 at 41 *per* Kennedy C.J., 42 *per* FitzGibbon J.

is not entirely accurate in that in the analysis below, some of the wording – particularly of the third condition – will be found wanting. Nevertheless, Holmes L.J.’s three conditions provide helpful structure for this part of the analysis.

(i) *The payment must have had the effect of saving, for the benefit of everyone interested, property which would otherwise have been lost.*

The sub-tenant cases are excellent examples of the fulfilment of this first condition: the payment by the sub-tenant protects his own interest, that of the tenant, and those of the owners of any other interests subsidiary to the tenant’s. Similarly, where renewal fines or the like are paid to preserve the property to the benefit of all concerned, the payer will be allowed a lien on the property.⁶⁰ In *Hamilton v Denny*,⁶¹ the parties were joint-lessees, the claimant had twice paid the renewal fine to renew the lease, and Lord Manners L.C. held that the payments made by the claimant for the benefit of the estate should be recovered out of it.

(ii) *The payment must be made by a person having a charge on, or an interest carved out of, the estate of the ultimate owner of such property.*

This second condition makes eminent sense; and, again, the sub-tenant cases are excellent examples of its fulfilment: sub-tenants plainly have a sufficient interest carved out of the estate of the ultimate owner of the property. Similarly, tenants for life and trustees of settlements,⁶² mortgagees of property,⁶³ and judgment creditors,⁶⁴ have all been held to have such an interest.⁶⁵ As Brooke M.C. put it in *Fetherstone v Mitchell*,⁶⁶ the “remedies and privileges yielded to the creditor who saves the estate are founded on the principle that every just encouragement should be given to any interested party who, in the common emergency, will advance money for the good of all”.⁶⁷ As FitzGibbon L.J. put it in *Power’s*, Equity does not give a lien for

⁶⁰ *Manlove v Bale* (1688) 2 Vern. 84; 23 E.R. 664; *Lacon v Mertins* (1743) Atk 1; 26 E.R. 803; *Brice v Williams* (1781) Wall L. 325 (Lord Lifford L.C.).

⁶¹ (1809) 1 Ball. & B. 199 (see also n.153 below); see also *Jones v Jones* (1846) 5 Hare 440; 67 E.R. 984 (Wigram V.C.).

⁶² See above, text with and in nn.23-57. However, the settlement cases are of less direct relevance in the United Kingdom after the Trusts of Land and Appointment of Trustees Act 1996, of which there is as yet no Irish equivalent.

⁶³ *Kelly v Staunton* (1826) 1 Hogan 393 (McMahon M.R.); *Hill v Browne* (1844) 6 Ir. Eq. Rep. 403 (Sugden L.C.); *In re McDonnell’s Estate* [1900] 1 I.R. 295 (Ross J.); *Munster and Leinster Bank v McGlashan* [1937] I.R. 525 (Meredith J.; and Ir SC) (*semble*); *Hibernian Bank v WJ Yourrell* [1918] A.C. 372 (HL (Ir)).

⁶⁴ *Kehoe v Hales* (1843) 5 Ir. Eq. Rep. 597; *Fetherstone v Mitchell* (1848) 11 Ir. Eq. Rep. 35.

⁶⁵ See also R. Sutton, n.9 above, pp.73-75.

⁶⁶ (1848) 11 Ir. Eq. Rep. 35.

⁶⁷ *ibid.*, 43. For similar reasons, where litigation by one party benefits others connected with funds, trusts, companies, pension funds, and the like, that party is often entitled to have the costs of that litigation taxed and proportionately met by the others who also received the benefit; see *Re McRea* (1883) 32 Ch.D. 613 (Kay J.) (funds); *In re Beddoe*; *Downes v Cottam* [1893] 1 Ch. 547 (CA) (trust); *In re Bayly* (1906) 40 I.L.T.R. 81 (CA) (same); Underhill & Hayton, n.39 above, pp.810-818 Article 83 para.1 (same); *Wallersteiner v Moir (No 2)* [1975] Q.B. 373 (CA) (derivative action); *Smith v Croft* [1986] 1 W.L.R. 580 (Walton J.) (same);

money paid for, or with the effect of, preserving property “unless there is some recognised privity or relation between the parties or between the preserver and the property”.⁶⁸

Furthermore,⁶⁹ since the payment must be made by a person having a charge on, or an interest carved out of, the estate of the ultimate owner of such property, it follows that neither the ultimate owner⁷⁰ nor a claimant with no interest at all carved out of the ultimate estate will get benefit of the lien. Hence, in *O’Loughlin v Dwyer*,⁷¹ Chatterton V.C. said that it is “a fundamental rule” in claims for such liens “that a mere third person who voluntarily makes a payment by which an estate or interest is preserved for the benefit of the persons interested therein cannot claim a lien for money so paid”.⁷² O’Loughlin assigned his tenancy to Dwyer, who got into arrears, which the landlord compelled O’Loughlin to pay. However, since he had retained no interest in the property after assignment to Dwyer, he had “no interest authorising him”⁷³ to make a payment which would give rise to the lien. Again, in *Munster and Leinster Bank v McCann*,⁷⁴ the deceased owed a debt to the Land Commission in respect of certain property; and, at his request, his brother paid that amount; but the latter’s claim to a lien failed

McDonald v Horn [1995] I.C.R. 685 (CA) (pension fund). In principle, it would seem to follow that such claimants would be entitled to liens over the relevant funds if the other elements of the lien at issue in this article are also fulfilled. Since such claimants will usually apply to the court in advance for a costs order (*cp* the *Chapman* jurisdiction, nn.39-57 above), and trustees acting properly are always entitled to a lien for their expenses, emergency or not (*cp* n.42 above), such a lien is unlikely to arise in the ordinary course of events, though it ought to be available in respect of extra work necessarily undertaken (*cp* Sheehan, n.108 below, 277).

⁶⁸ [1899] 1 I.R. 6 at 25; which is an entirely accurate statement of this condition, provided that “privity” is understood as a synonym for “relation” in that passage. For another example of the rather unfortunate usage of the word “privity” to express the link between the claimant and the property, see *Ferguson v Ferguson* (1886-1887) 17 L.R. Ir. 552, 565 *per* Porter M.R.

⁶⁹ And reflecting a distinction between primary and secondary liability which also holds in respect of the underlying personal claim; see, *e.g.* A. Burrows *The Law of Restitution* (2nd ed., 2002) pp.273-276.

⁷⁰ *Angell v Bryan* (1845) 2 J. & Lat. 763 (Sir Edward Sugden L.C.) (no lien where the first mortgagee pays); *In re Regent’s Canal Ironworks Co* (1876) 3 Ch.D. 411 (CA) 422-423 *per* Mellish L.J., 425 *per* Brett J. (vendor in possession not a subsidiary party and thus not entitled to the lien); *cp. Clack v Holland* (1854) 19 Beav. 262, 276-277; 52 E.R. 350, 355-356 *per* Lord Romilly M.R. See also A. Underhill and A. Cole *Fisher* (6th ed, below n.95) p.282, [526] (no lien in favour of the owner of an incumbered estate), and text with and in nn.82, 108-109 below.

⁷¹ (1884) 13 L.R. Ir. 75.

⁷² *ibid.*, 80. *Kavanagh v Waldron* (1846) 9 Ir. Eq. Rep. 279 at 283 *per* Sugden L.C. (voluntary payment); *Fetherstone v Mitchell* (1848) 11 Ir. Eq. Rep. 35 at 46 *per* Moore J. (third party, not having any interest to preserve); *Clack v Holland* (1854) 19 Beav 262 at 276-277; 52 E.R. 350 at 355-356 *per* Lord Romilly M.R. (stranger gets no such lien); *Munster and Leinster Bank v McCann* [1937] Ir. Jur. Rep 40 at 42 *per* Kennedy C.J. (voluntary payment).

⁷³ (1884) 13 L.R. Ir. 75 at 84, though of course he would still have had his personal action for money had and received: *ibid.*; see *Moule v Garrett* (1872) L.R. 7 Exch. 101; *In re Healing Research Trustee Ltd* [1992] 2 All E.R. 481 at 484-485 *per* Harman J.

⁷⁴ [1937] Ir. Jur. Rep. 40 (Ir SC).

because he was “not a claimant against, nor a person having an interest in or a charge on, the estate”.⁷⁵ Similarly, in *In re Kavanagh Ltd*,⁷⁶ the claimant was a shareholder in, director of, and solicitor to, a company, for which he paid rent and rates to prevent forfeiture. Nevertheless, as he had no interest in the property, his claim failed.

(iii) *The payer must make it voluntarily for his own advantage, and not in pursuance of an obligation or in the performance of a duty, or as the agent of another.*

The pith of this condition is plain enough: the claimant must have acted in effect for himself, rather than in the performance of some other duty; but Holmes L.J.’s language is more than a little awkward, if not unwelcome, for at least three reasons.

First, it is unfortunate that that he should have described such a claimant as having acted voluntarily, not least because in many of the cases relating to Holmes L.J.’s second condition that the payment must be made by a person having a sufficient interest in the property, persons without such an interest are often described as having paid voluntarily. Plainly, he cannot have meant to require by the second condition that claimants not have acted voluntarily and by the third that they have done so.

Second, if it were strictly the case that claimants must not have acted in the performance of an obligation or duty, then those sub-tenants compelled by operation of law to pay the head-rent would fail to fulfil this condition. Rather, it seems that what Holmes L.J. had in mind was that not only must the claimant be a party interested in the property (the second condition) but also that the payment must be made *in that capacity* and thus not on foot of another *primary* obligation (which seems to be the essence of the third condition).

Third, not only do Holmes L.J.’s three conditions not take any account of *Fetherstone v Mitchell*, but if it were strictly the case that the claimant must have made the payment voluntarily (albeit “voluntarily for his own advantage”), then the third condition would contradict the *Fetherstone v Mitchell* requirement that in such cases “the payment is in a manner compulsory” – if it is compelled, it can hardly be voluntary. On the other hand, if all that is meant by Holmes L.J.’s third condition is a requirement that the payment be made in the claimant’s capacity as a party interested in the property and not on foot of a primary obligation, then there is no conflict with *Fetherstone v Mitchell*, where the claimant claimed in his capacity as judgment creditor.

⁷⁵ *ibid.*, 42 *per* Kennedy C.J., 42 *per* FitzGibbon J. (stranger in interest), 43 *per* Murnaghan J. (payment “must be made by a person having an interest in the property saved by the payment”; nevertheless, he would – dissenting – have held for claimant for other (vague) equitable reasons); *cp Hooper v Eyles* (1704) 2 Vern. 480; 23 E.R. 908 (guardian borrowed to pay off an incumbrance on the infant’s estate; lender to the guardian failed in a claim to have the loan repaid out of the estate).

⁷⁶ [1952] Ir. Jur. Rep. 38 (Dixon J.).

All of this confusion would be avoided if the word “voluntary” were eschewed in the context of this third condition, the essence of which is that not only must the claimant be a party interested in the property but the payment must also be made in that capacity, and not on the basis of some other capacity or in the performance of another duty or obligation – the claimant must have acted in effect out of the compulsion or necessity to protect his or her interest, rather than in the performance of some other duty or obligation on which he or she is primarily liable.

The sub-tenant cases once again provide an excellent example of the fulfilment of this third condition: a sub-tenant compelled to pay arrears of the head-rent has a sufficient interest in the property and pays in that capacity and not on the basis of some other capacity or in the performance of another duty.⁷⁷ On the other hand, in *Power’s* the claim failed in part; and, where it failed, it did so because the payment was made by the claimant not in his capacity as a *puisne* mortgagee but in the performance of a primary obligation which he already owed in another capacity, as solicitor or agent for the mortgagor.

A loan to Mrs Power was secured by a mortgage in favour of Mrs Hearne on two policies of assurance upon Mrs Power’s life. When Mrs Power died, Mrs Hearne claimed the proceeds; and she was met by a claim by representatives of Pierce Kelly, who had paid *premia* to preserve the policies. When he made the payments, Kelly was solicitor for both Mrs Hearne and Mrs Power, himself a *puisne* mortgagee on the policies, and land agent both for Mrs Power and – for a time at least – also for one of her sons. Mrs Hearne initially knew only of Kelly’s capacity as her solicitor, though in subsequent correspondence he informed her that he had paid the *premia* for the previous six years to keep the policy alive “for her benefit” and that he would continue to do so; she sent a studiously ambiguous reply, on foot of which he continued to pay.

At first instance, Chatterton V.C. held in Kelly’s favour in respect of all of his payments, and awarded a lien with a priority over all other incumbrancers (especially Mrs Hearne) for the amount of all of the payments plus interest;⁷⁸ but the Court of Appeal reversed in part and upheld in part.

As to that part of Chatterton V.C.’s judgment which was reversed, Fitzgibbon L.J. held that Kelly’s payments for the six years prior to his letter could be recovered neither at law⁷⁹ nor in equity on the basis of a lien, because he had made the payments on behalf of and as agent and solicitor for Mrs Power and not in his capacity as *puisne* mortgagee.⁸⁰ Likewise, Holmes L.J. held that it “would have been part of the business of the land agent . . . to pay the premiums on those policies out of the rents received” and that the correspondence showed that “up to that time Kelly had been paying the

⁷⁷ *Cp In re McDonnell’s Estate* [1900] 1 I.R. 295 (Ross J.); *Hamilton v Tighe* [1898] 1 I.R. 123 (Porter M.R.).

⁷⁸ [1899] 1 I.R. 6 at 11.

⁷⁹ *ibid.*, 20.

⁸⁰ *ibid.*, 21-22.

premiums on behalf of Mrs Power, the mortgagor”.⁸¹ Thus, these payments did not give rise to a lien.⁸²

As to that part of Chatterton V.C.’s judgment which was upheld, the Court of Appeal held that because Mrs Hearne’s reply knowingly allowed Kelly to keep the policies up at his own expense for the protection of his own interest as *puisne* mortgagee, he would be entitled to a lien in respect of the payments after the date of his letter to Mrs Hearne.⁸³

Hence, for the Court of Appeal, in respect of the first six years’ worth of payments, Kelly, though as a *puisne* mortgage he had an interest in the property, nevertheless made those payments not in that capacity but rather in the performance of another duty or obligation arising in his capacities as land agent and solicitor for the mortgagor; whilst in respect of his payments after his letter to Mrs Hearne, he made those payments in his capacity as a *puisne* mortgage and not in the performance of another duty arising in his other capacities. On this view of the facts,⁸⁴ the decision is an excellent illustration of this understanding of Holmes L.J.’s third condition in *Power’s* itself.

The cases seem therefore to establish four conditions necessary to generate the lien. (i) The claimant must have been acting under compulsion or necessity or something akin to it. (ii) The claimant’s actions must have had the effect of saving, for the benefit of everyone interested, property, or an interest or estate in property, which would otherwise have been lost. (iii) The claimant must have had a subsidiary rather than the main interest in the property or estate or interest thereby saved, or something akin to such an interest, such as a sufficient relationship with the owner of the main interest in the property or with the property itself. (iv) The claimant must have made the payment in that capacity, and not on the basis of some other capacity or in the performance of another duty or obligation on which he or she is primarily liable.⁸⁵

Finally, here, something must be said about the label which the cases ascribe to this species of lien. In *Power’s*, Holmes L.J. said that the conditions are necessary “to constitute a good *salvage* payment”.⁸⁶ In *Hill v Browne*,⁸⁷ a tenant for life had allowed arrears to build up which were about to be fatal to his estate and to all others with an interest in it (such as a mortgagee), and Sugden L.C. posed the question: “If the estate is about to be lost, what is the mortgagee to do? I apprehend he is entitled to *salvage*. If he does not, the

⁸¹ *ibid.*, 28.

⁸² *Cp In re Kavanagh Ltd* (n.76 above). Similarly, therefore, payments made in the ordinary course of business do not trigger the lien: *In re Regent’s Canal Ironworks Co* (1876) 3 Ch.D. 411 (CA) 421-422 *per* James L.J.; *Hibernian Bank v WJ Yourrell* [1918] A.C. 372 (HL (Ir)).

⁸³ [1899] 1 I.R. 6 at 24-25 *per* FitzGibbon L.J., 29 *per* Holmes L.J.

⁸⁴ It might be thought that this view of the facts is a little odd: why does Mrs Hearn’s knowledge change the capacity in which Mrs Kelly made the payments? For a better view of the importance of Mrs Hearne’s knowledge, see below n.154.

⁸⁵ Depending on how, if at all, the lien comes to be accommodated in the modern law, there may need to be some modification of these conditions; see, for example, the paragraph with nn.152-154 below.

⁸⁶ [1899] 1 I.R. 6 at 27 (emphasis added).

⁸⁷ (1844) 6 Ir. Eq. Rep. 403.

estate is lost to all parties . . .”⁸⁸ And in *Fetherstone v Mitchell*,⁸⁹ Brooke M.C. referred to “the priority which Courts of Equity give to the *salvage creditor*” in such cases. Indeed, the *Chapman* jurisdiction to vary trusts in circumstances of necessity or emergency is also described as a salvage jurisdiction.⁹⁰ These passages demonstrate that, in all of the relevant cases, the lien has been described as a salvage lien, the payments described as salvage payments, the jurisdiction described as the salvage jurisdiction, and the doctrine described as the doctrine of equitable salvage.⁹¹ Salvage is an evocative label, picturesque, vivid, even apt. Nevertheless, it adds nothing to the substance of the analysis; it has maritime echoes; and it has in part been responsible for some of the opprobrium visited upon the lien. For these reasons, the label has been avoided in the analysis thus far. At this point, however, with the elements of the lien secure, and with the label’s echoes postponed until part III, the analysis turns in the next section to the objections to the lien, especially those associated with its label.

Objections to the Lien

The equitable salvage lien for compulsion or necessitous intervention was relatively common in England and Ireland until the last third of the nineteenth century; thereafter, the histories divide: the lien survived and prospered in Ireland but, although the salvage aspect of the inherent jurisdiction has still found a home in English chancery courts, the salvage lien itself by and large has not. The tide may have been turning as early as the 1850s. When Sir Edward Sugden was Lord Chancellor of Ireland, he decided *Hill v Browne* in 1844;⁹² subsequently, as Lord St. Leonards, Lord Chancellor of England, he decided *In re Tharp* in 1852,⁹³ commenting:

“*In Ireland, it is a very common equity to have as a prior charge to all other incumbrances, what is called salvage money. Where a lease-hold estate, or an estate held for lives to which half a dozen people are entitled in succession, many of them being mortgagees, according to certain priorities, the last man of all who is entitled after everybody, being in possession, redeems, I may say, the estate by paying the landlord, who otherwise would have recovered the estate and taken it from everybody: this payment is what is called salvage money. That is an established equity and a very proper equity. He that pays the salvage has a prior incumbrance to every other charge and interest, because, so far as any interest is left to anyone beyond*

⁸⁸ *ibid.*, 406 (emphasis added).

⁸⁹ (1848) 11 Ir. Eq. Rep. 35 at 42 (emphasis added).

⁹⁰ *E.g. Chapman v Chapman* [1954] A.C. 429 (HL) 445 (Lord Simonds LC), 454-455 (Lord Morton (Lord Oaksey concurring)), 469-470 (Lord Asquith).

⁹¹ See, *e.g.* n.14 above.

⁹² (1844) 6 Ir. Eq. Rep. 403; he also decided the later salvage cases of *Angell v Bryan* (1845) 2 J. & Lat. 763 and *Kavanagh v Waldron* (1846) 9 Ir. Eq. Rep. 279; see above nn.63, 70, 72, 87-88, and below nn.240, 247-249.

⁹³ (1852) 2 Sm. & G. 578; 65 ER 533; followed: *Morrison v Morrison* (1855) 2 Sm. & G. 564, 575; 64 E.R. 527 at 532 *per* Stuart V.C.

the charge, it is acquired by that payment in the shape of redemption money.”⁹⁴

But there was something of King Canute about this; not only did it not turn back, but the incoming tide swept away many of the traces of equitable salvage on English shores.⁹⁵ In *In re Leslie, Leslie v French*,⁹⁶ Fry L.J. held the Lord Chancellor “was referring to a practice in the Irish law of conveyancing, which probably had its basis in agreement; and . . . the proposition would seem to be inconsistent with the general law of the land”.⁹⁷ The deceased had effected an insurance policy on her own life; when she married, her husband took over the payments, and when he died, they were paid out of his estate. Upon her death, his estate claimed a lien on the proceeds in respect of the *premia* so paid. Plainly, no salvage lien could have arisen here; the first of the four conditions distilled above – that the claimant must have been acting under compulsion or something akin to it – is plainly not fulfilled.⁹⁸ Nevertheless, counsel for the husband’s estate sought

⁹⁴ (1852) 2 Sm. & G. 578 at 578-579; 65 E.R. 533 at 533 (emphasis added); approved: *In re Power’s Policies* [1899] 1 I.R. 6 at 26 *per* Holmes L.J. Sugden was Lord Chancellor of Ireland in 1834, and again from 1841 until 1846, and kept the Great Seal in Lord Derby’s first, short-lived, government in 1852. See J. Getzler “Sugden, Edward Burtenshaw, Baron St Leonards (1781-1875)” *Oxford Dictionary of National Biography*.

⁹⁵ There are many English cases in the footnotes thus far, but, apart from the *Chapman* variation of trusts context, both salvage in general and the salvage lien in particular seem almost to have disappeared without a trace. For example, in one leading textbook, the doctrine appeared in every edition from the first (W. Fisher *The Law of Mortgage* (1st ed., 1856) p.152 [230], p.278 [493], p.408 [726]) to the sixth (A. Underhill and A. Cole *Fisher on The Law of Mortgage and Other Securities Upon Property* (6th ed., 1910) pp.278-284 [520]-[530], p.596-599 [1169]-[1176]) where there is a detailed treatment of the salvage lien. However, other contemporary texts so disparaged it (see n.115 below) that when the seventh edition was substantially revised and rewritten (J. Lightwood *Fisher and Lightwood’s Law of Mortgage* (7th ed., 1931) pp.253-256) the treatment became far more circumspect; the lien chapter was removed from the eighth edition (E. Tyler (ed.) *Fisher and Lightwood’s Law of Mortgage* (8th ed., 1969) p.vii) and does not appear in the most recent (W. Clark *et al* (eds.) *Fisher and Lightwood’s Law of Mortgage* (11th ed., 2002)). Hence, as R. Sutton (n. 9 above, p.71) puts it, such principles “appear to have atrophied through lack of use” (*cp ibid*, p.79), and do not appear in modern texts such as A. Silverton *The Law of Lien*.

⁹⁶ (1883) 23 Ch.D. 552; followed: *In re Earl of Winchilsea’s Policy Trusts* (1888) 39 Ch.D. 168 (North J.); *Strutt v Tippett* (1889) 61 L.T. 460 (Chitty J.); *aff’d* (1890) 62 L.T. 475 (CA).

⁹⁷ (1883) 23 Ch.D. 552 at 562 *per* Fry L.J. (in a judgment delivered by Pearson J.); *cf* R. Sutton, n.9 above, p.90.

⁹⁸ Though it had been in the earlier *Sherman v British Empire Assurance Co* (1872) L.R. 14 Eq. 4 (Lord Romilly M.R.) (payments of *premia* on a policy on his life by a bankrupt after bankruptcy held to constitute salvage payments; widow of the deceased bankrupt held entitled to recover them in the proceeds of the policy). See also *Burridge v Row* (1842) 1 Y. & C.C.C. 185 at 191-192; 62 E.R. 846 at 850 *per* Knight-Bruce V.C. (necessary payments of insurance policy do not give ownership of the policy but do give rise to a lien in the amount of the payments); *West v Reid* (1843) 2 Hare 249; 67 E.R. 104 (Wigram V.C.); *Norris v Caledonian Insurance Co* (1869) L.R. 8 Eq. 127 (Lord Romilly M.R.); *Gill v Downing* (1873-1874) L.R. 17 Eq. 316 (Hall V.C.). See, generally, R. Sutton, n.9 above, pp.86-96.

to rely upon *Hamilton v Denny* and *In re Tharp*.⁹⁹ Fry L.J. held that a lien could arise¹⁰⁰ by contract, by subrogation,¹⁰¹ and by “reason of the right vested in mortgagees, or other persons having a charge upon the policy, to add to their charge any moneys which have been paid by them to preserve the property”.¹⁰² This formulation, far from rejecting the equitable salvage lien, is, rather, a classical statement thereof.¹⁰³ It emphasises the compulsion or necessity under which the claimant as the owner of a subsidiary interest must operate; indeed, Fry L.J. held that voluntary payments and payments by the full owner do not qualify.¹⁰⁴ Consequently, he could have decided the case as he did, against the claim of salvage on the facts, without disparaging the salvage lien, which he described accurately in his fourth ground for lien, but which he fundamentally misrepresented in his comments on *Tharp*: salvage rarely arises in conveyancing cases and has nothing to do with agreement; and beyond mere assertion, he gave no reason why the Irish doctrine was inconsistent with the general English law.¹⁰⁵ Nevertheless, in the later *Falcke v Scottish Imperial Insurance Company*,¹⁰⁶ he expressed the wish that the expression “salvage” had “remained on the other side of the

⁹⁹ (1883) 23 Ch.D. 552, 555-556; counsel opposing the application had sought to dismiss *Hamilton v Denny* as “an Irish case” (*ibid*, 557) and said of *Tharp* that it “depended on the right of a consignee of West Indian estates and on Irish law, both of which are peculiar” (*ibid*, 558)! *Cp Cadogan Estates Ltd v McMahon* [2001] 1 A.C. 378 at 394 *per* Lord Millett (not following an *obiter* in the Irish case of *In re Drew* [1929] I.R. 504 (Johnston J.) which had been “referred to without adverse comment in successive editions of Megarry on the Rent Acts, though the latest edition adds the words ‘in Ireland’, which may be the author’s equivalent of ‘*sed quaere*’!”). Indeed.

¹⁰⁰ As to whether this list was exhaustive, see R. Sutton, n.9 above, p.92 at pp.94-96; and *Hewett v Court* (1983) 149 C.L.R. 639 (HCA), text below, with and in nn.127-128, 144-145.

¹⁰¹ (1883) 23 Ch.D. 552, 560: he held that a lien would arise either by reason of the right of trustees to an indemnity out of the trust property for money expended by them in its preservation, or by subrogation to this right of trustees of some person who may, their request have advanced money for the preservation of the property. On the limits of such subrogation, see *Foskett v McKeown* [2001] 1 A.C. 102 (HL) 118-119 *per* Lord Hope, 140 *per* Lord Millett (payor not compelled, no subrogation).

¹⁰² (1883) 23 Ch.D. 552 at 560. C. Rotherham *Proprietary Remedies in Context*, p.325 comments that this categorisation of lien “amounts simply to an enumeration of different cases in which a lien arises rather than an effort to explain why the right should be available in these cases and why it should be denied in others”.

¹⁰³ It was so treated in *Moore v Ulster Bank* (1909) 43 I.L.T.R. 136 at 138 *per* Meredith M.R. Indeed, in *Landowners West of England and South Wales Drainage and Inclosure Co v Ashford* (1880-1881) 16 Ch.D. 411, Fry J. expressed no objections to the doctrine, holding only that mere improvements by second mortgagee did not give rise to the lien.

¹⁰⁴ (1883) 23 Ch.D. 552 at 561 (‘payments by a mere stranger ... are a mere impertinence’), 563.

¹⁰⁵ In *In re Power’s Policies* [1899] 1 I.R. 6 at 23-24, FitzGibbon J. made this point a little more stridently, and he took care to demonstrate that the outcome in that case was entirely consistent with *Leslie* and *Falcke*.

¹⁰⁶ (1886) 34 Ch.D. 234; see R. Sutton, n.9 above; N. Allen “Necessity, Incapability and Emergency” in S. Hedley and M. Halliwell (eds.) *The Law of Restitution*, pp.353-359 [16.9]-[16.30].

channel where it seems to have arisen. I doubt whether any doctrine which is expressed by the word ‘salvage’ applies to cases of this description”.¹⁰⁷

In *Falcke*, Emanuel, the owner of the equity of redemption of a life assurance policy, paid a year’s premium; the policy was later sold at the application of the widow of the holder of a charge over it; but it was held that Emanuel had no lien over the proceeds. As with *Leslie*, plainly no salvage lien could have arisen here; the second of the four conditions distilled above – that the claimant must have had a subsidiary rather than the main interest in the property or estate or interest thereby saved – is plainly not fulfilled: as the owner of the equity of redemption, Emanuel was the owner of the main interest in the policy.¹⁰⁸ Indeed, this is the basis upon which Bowen L.J. rejected his claim.¹⁰⁹ All three members of the Court of Appeal also held that a stranger paying a premium acquires no lien on the policy or its proceeds,¹¹⁰ and though an action might be founded upon a request by the owner to the stranger,¹¹¹ there was no such request here. This is a famous holding, but it should not be pushed further than it actually goes: it excludes a *stranger* from the lien; but it does not preclude the equitable salvage lien, which is confined to part-owners and is also not available to strangers.¹¹² Nevertheless, Bowen and Fry L.J.J. went further, in effect rejecting the equitable salvage lien altogether. Bowen L.J. held that no doctrine similar to maritime salvage “applies to things lost upon land, nor to anything except ships or goods in peril at sea”,¹¹³ and Fry L.J. “exceedingly doubt[ed] whether that word [“salvage”] can with any propriety be applied to cases of this description”.¹¹⁴ However, as the elements of the lien were not established in this case, Bowen and Fry L.J.J. could have decided the case as they did, against the claim for an equitable salvage lien, without disparaging the lien itself.

¹⁰⁷ (1886) 34 Ch.D. 234 at 254.

¹⁰⁸ J Kortmann *Altruism in Private Law. Liability for Nonfeasance and Negotiorum Gestio* p.113 (Emanuel “acted ‘out of a self-oriented desire to preserve the value of his own interest’”); Virgo, n.38 above, p.314 (claimant “was acting to protect his own interest in the property rather than that of the defendant”); P. Birks “*Negotiorum Gestio* and the Common Law” (1971) *C.L.P.* 110 at 112; P. Birks *Introduction to the Law of Restitution* (rev. ed., 1987) p.195; R. Sutton, n.9 above, pp.93-94; D. Sheehan “*Negotiorum Gestio: A Civilian Concept in the Common Law?*” (2005) 55 *I.C.L.Q.* 253 at 261.

¹⁰⁹ (1886) 34 Ch.D. 234 at 250-251, *cp* 253 *per* Fry L.J.

¹¹⁰ *ibid.*, 241 *per* Cotton L.J.; 248 *per* Bowen L.J. (“Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will”); 253 *per* Fry L.J.; *In re Cleadon Trust* [1939] Ch. 286 (CA); see also nn.27, 69-76, above and nn.189-200 below.

¹¹¹ *ibid.*, 241 *per* Cotton L.J.; 249 *per* Bowen L.J.

¹¹² *Cp* R. Sutton, n.9 above, p.76. Recall the second of Holmes L.J.’s conditions in *In re Power’s Policies* that the payment giving rise to the lien “must be made by a person having a charge on or an interest carved out of the estate of the ultimate owner of such property” ([1899] 1 I.R. 6 at 27; above, text with and in nn.62-77).

¹¹³ (1886) 34 Ch.D. 234 at 249; *cp* 239 *per* Bowen L.J. responding to counsel: “If that were the law salvage would prevail, common law as well as in maritime law, which it certainly does not”; see below, text with and in nn.129, 202-212.

¹¹⁴ (1886) 34 Ch.D. 234 at 254. On the basis of such *dicta*, Sheehan (n.108 above, 261) identifies *Falcke* as “the case where the tide turned decisively against such [salvage] liens in England”.

Nevertheless, that attitude took hold.¹¹⁵ In *In re De Teissier's Settled Estate*,¹¹⁶ Chitty J. described many salvage claims as “very often of a very loose character indeed, and the Court has to examine with care to see whether the case is one of salvage or not”.¹¹⁷ In *De Teissier*, properly treating the salvage claim with care, Chitty J. held that work, compelled by a local authority and necessary to protect the property of a settled estate, could amount to salvage, but that mere repairs would not.¹¹⁸ Again, the result, denying the salvage claim for mere repairs, is entirely consistent with the elements of the equitable salvage lien, as the repairs were neither compelled nor necessary.

Furthermore, this retrenchment is consistent with the contemporary English approach to liens more generally. In *Nicholson v Chapman*,¹¹⁹ Lord Eyre C.J. suggested that the claimant might have had a personal claim for “some reasonable recompense”¹²⁰ for saving timber from floating downstream, but not a lien over the timber.¹²¹ Similarly, in *British Empire Shipping Co v Somes*,¹²² it was held that, whilst shipwrights, who had repaired a ship which had remained in dock during a dispute over payment for the repairs, might have a claim for “a reasonable sum for the use of the dock”¹²³ from the owners of the ship, nevertheless they would have no lien over the ship for

¹¹⁵ Hence, the salvage lien is disparaged in W. Ashburner *A Concise Treatise on Mortgages, Pledges and Liens*, pp.99-102; W. Webster (ed.) (2nd ed., 1911) pp.121-125.

¹¹⁶ [1893] 1 Ch. 153 (Chitty J.); see also *In re Willis* [1902] 1 Ch. 15 (CA).

¹¹⁷ [1893] 1 Ch. 153 at 161; *cp In re Staffordshire Gas and Coke Co* [1893] 3 Ch. 523 at 538 *per* Kekewich J. (though salvage claims often prove “troublesome” matters, the lien was established on the facts). Indeed, care is also properly counselled in the parallel variation of trusts context: in *Chapman v Chapman* [1954] A.C. 429 (HL) 452-455 *per* Lord Morton (Lords Oaksey and Cohen concurring on this point) characterised it as an “exceptional” jurisdiction, to be exercised with “great caution”.

¹¹⁸ [1893] 1 Ch. 153 at 161-162.

¹¹⁹ (1793) 2 H. Bl. 254; 126 E.R. 536; *cf Raft of Timber* (1844) 2 W. Rob. 251 (Dr. Lushington) (a raft of timber, flotsam, not a proper subject of maritime salvage); there is an excellent discussion of *Nicholson v Chapman* in Kortmann, n.108 above, pp.111-112, 115-117.

¹²⁰ (1793) 2 H. Bl. 254 at 258; 126 E.R. 536, 539; Birks, n.108 above, pp.111-112; J. McCamus “Necessitous Intervention: The Altruistic Intermeddler and the Law of Restitution” (1979) 11 *Ottawa L.R.* 297 at 316; *cf Glenn v Savage* 13 p.442 (Or, 1887); Kortmann, n.108 above, p.112.

¹²¹ As there was no right to retain the timber, doing so rendered the defendant liable in trover. For the view that *Nicholson* stands with *Falcke* in resisting a general salvor’s lien, English law, see C. Rotherham, n.102 above, p.315; P. Birks and C. Mitchell “Unjust Enrichment” in P. Birks (ed.) *English Private Law*, vol. 2, p.580 [15.157].

¹²² (1858) 2 El. Bl. & El. 353; 120 E.R. 540 (QB); *aff’d* (1858) 2 El. Bl. & El. 367; 120 E.R. 545 (Exch Ch); *aff’d* (1860) 8 H.L.C. 338; 11 E.R. 459 (HL).

¹²³ (1860) 8 H.L.C. 338 at 344; 11 E.R. 459 at 462 *per* Lord Cranworth. See also *Peruvian Guano v Dreyfus Bros & Co* (1887) [1892] A.C. 166 (HL) 174-177 *per* Lord Macnaghten (the absence of a lien did not preclude a personal claim for recompense); *China Pacific v Food Corp’n of India (The Winson)* [1982] A.C. 939 (HL) 962-963 *per* Lord Diplock (see n.163 below).

that amount.¹²⁴ Again, in *Great Northern Railway v Swaffield*,¹²⁵ a stable which took in a horse unclaimed at a railway station had a personal claim against the owner for the livery charges, but not a lien¹²⁶ over the horse. Indeed, in none of these cases could an equitable salvage lien have arisen, as in none had the salvors the necessary interest in the property to begin with. Nevertheless, the rejection of the liens proceeded on rather more general grounds, reflecting the attitude of Fry L.J. in *Leslie*, that liens arose only in limited categories of case;¹²⁷ an attitude which resulted in unnecessary narrowness even in the existing categories.¹²⁸

The law could have taken another turn; despite the modern position, there is old authority in which finders of animals have had liens over them for their

¹²⁴ The shipwrights had refused to return the ship until the full amount of the cost of the repairs and their charge for the use of the dock had been discharged; the owners paid the full amount, and sued for the return of the dock charges. It was held, every level that no lien for the charges arose either by contract or by operation of law, and that the charges were therefore recoverable by the owners. The shipwrights do not seem to have pursued the claim (suggested only by Lord Carnwarth, *obiter*) that they might have had a (personal) claim for a reasonable sum to justify retention of the dock charges.

¹²⁵ (1874) L.R. 9 Ex. 132; *cp China Pacific v Food Corpn of India (The Winson)* [1982] A.C. 939 (HL) (see n.163 below).

¹²⁶ (1874) L.R. 9 Ex. 132 at 137 *per* Pollock B.; *cp* 139 *per* Amphlett B. (*dubitante*); *cf* 136 *per* Piggot B. (leaving the question aside). As to the personal claim, in *Guildford Borough Council v Hein* [2005] EWCA Civ. 979 (27 July 2005) Clarke L.J. likewise accepted as a matter of principle that where a local council retained possession of rescued dogs as a matter of necessity, they would have a correlative right to be paid reasonable expenses ([25]; *cp ibid.*, [80] *per* Waller L.J.) (though necessity was excluded on the facts because the council were in fact obliged to return the dogs to the owner who had been seeking them (*ibid.*, [24] *per* Sir Martin Nourse, [50] *per* Clarke L.J., [80] *per* Waller L.J.)). However, there is no right, common law to *retain* a rescued animal pending payment of such expenses (*ibid.*; see also *Binstead v Buck* (1777) 2 Wm.B. 1117; 96 E.R. 660 (pointer-dog); *Flannery v Dean* [1995] 2 I.L.R.M. 393 (Costello J.) (horse)); hence, although the owner must tender for any damage caused by the animal, there is no obligation to tender for keep (*Sorrell v Paget* [1950] 1 K.B. 252 (CA) (horse)). Similarly, in the U.S., a personal claim will lie but a lien will not arise (*Meekins v Simpson* 176 N.C. 130; 96 S.E. 894 (1918) (dog); *Bailey v West* 105 R.I. 61; 249 A. 2d. 414 (1969) (horse)). However, in respect of the expenses of public authorities (such as the police), the position has been amended by statute both in the U.K. (*e.g.* s.3(1) of the Dogs Act 1906; s.7(3) of the Protection of Animals Act 1911; ss.4(1)(b) and 7(2) of the Animals Act 1971; s.149(5) of the Environmental Protection Act 1990) and in Ireland (*e.g.* s.4 of the Animals Act, 1985; s.11(5)(c) of the Control of Dogs Act, 1986; s.39(2)(b) of the Control of Horses Act, 1996).

¹²⁷ See, *e.g.* D. Waters "Where is Equity Going? Remedying Unconscionable Conduct" (1988) 18 *U.W.A.L.R.* 3 at 24 ('list of equitable liens . . . something of a themeless rag-bag'); J. Phillips "Equitable Liens – A Search for a Unifying Principle" in N. Palmer and E. McKendrick (eds) *Interests in Goods* (2nd ed., 1998) p.975 at 975; D. Wright "The Place of the Equitable Lien as a Remedy" in E. Cooke (ed) *Modern Studies in Property Law. Volume I: Property 2000*, p.41 at 42; F. Burns "The Equitable Lien Rediscovered: A Remedy For the 21st Century" (2002) 25 *U.N.S.W.L.J.* 1 at 7. D. Wright *The Remedial Constructive Trust*, pp.109-111, [3.59] provides a full list of such categories.

¹²⁸ S. Worthington "Equitable Liens in Commercial Transactions" [1994] *C.L.J.* 263.

keep;¹²⁹ and despite the generality of the *dicta* in *Falcke*, the salvage lien continued to prosper at Irish law. Of course, the Irish courts were well aware of these English developments; some judges simply chose not to follow them,¹³⁰ while others expressed bafflement at them: in *Power's*, FitzGibbon L.J. did not believe:

“that there is any difference in principle between the equities which are recognised in England as ‘incidental or accessorial’ and those which we metaphorically describe in Ireland as ‘salvage’ and ‘graft’. It is remarkable that these terms, so long and familiarly known here, like some other Irish products, do not seem to find favour in England. Our English brethren have objected to the introduction into equitable terminology of a word borrowed from Admiralty law, . . . Our calling such payments ‘salvage payments’ where they confer a lien, or give rise to an equity, is merely a matter of nomenclature, and describing a ‘salvage claim’ as ‘incidental or accessorial’ is merely translating a good metaphor into prose.

I do not know, or admit, that ‘salvage’ or ‘graft’ has ever been rightly established in Ireland upon any ground which would not have supported the same claim in England, though, . . . the instances in which ‘salvage claims’ have been discussed and recognised by our Courts of Equity have been much more numerous in this country.”¹³¹

There were many salvage lien cases in Ireland in the century after the English retrenchment;¹³² so that, whatever about its status in England, the salvage lien is well established as a matter of Irish law. Furthermore,

¹²⁹ With the cases in n.126 above, contrast *Robinson v Walter* (1617) 3 Bulst. 269; 81 E.R. 227 (horse); and, with the cases in n.211 below, contrast *Hartford v Jones* (1698) 1 Ld. Raym. 383, 91 E.R. 1161; (1689) 2 Salk 654, 91 E.R. 556 (Holt C.J. KB) (recognising a right at common law to retain salvaged goods until paid for), but this was not followed in *Nicholson v Chapman* (1793) 2 H. Bl. 254 at 257; 126 E.R. 536 at 538 (Lord Eyre C.J. referring to “the case which has been cited from Raymond and Salkirk” the two reporters of *Hartford*); W. Kennedy and F. Rose *The Law of Salvage* (6th ed., 2002) pp.68-77, [129]-[149].

¹³⁰ *In re Power's Policies* [1899] 1 I.R. 6 at 18 *per* Ashbourne L.C.; *In re McDonnell's Estate* [1900] 1 I.R. 295 at 297 *per* Ross J.; *Munster and Leinster Bank Ltd v McCann* [1937] Ir. Jur. Rep. 40 at 41 *per* Kennedy C.J.; *Neill v Neill* [1904] 1 I.R. 513 (Kenny J); *In re Lisnavagh Estate*; *Lord Rathdonnell v Colvin* [1952] I.R. 296 at 302-303 *per* Dixon J.; *De Vere v Perceval and Cole* [1945] Ir. Jur. Rep. 9 (Gavan Duffy J.).

¹³¹ [1899] 1 I.R. 6 at 23-24 *per* FitzGibbon L.J.; on “graft”, a species of constructive trust liability for breach of fiduciary duty associated with the taking up of leases which ought to have been renewed for the benefit of another, see A. Power “The Eighteenth Century Origins of the Irish Doctrine of Graft” in O. Breen, J. Casey and A. Kerr (eds.) *Liber Memorialis Professor James C. Brady*, p.326, discussing *inter alia* eighteenth century English cases which form the basis for the Irish development.

¹³² The most recent cases seem to have been in the 1950s: *In re Lisnavagh Estate*; *Lord Rathdonnell v Colvin* [1952] I.R. 297; *In re Kavanagh Ltd* [1952] Ir. Jur. Rep. 38; *Bank of Ireland v Geoghegan* (1955-1956) Ir. Jur. Rep. 7. But then, so is *Chapman v Chapman* [1954] A.C. 429!

notwithstanding *Leslie*, *Falcke* and *De Teissier*, there are still authoritative traces of the equitable salvage lien in English law. It has been relied upon in settled land cases;¹³³ and it has subsequently been approved by the House of Lords. In *Hibernian Bank v W.J. Yourell*,¹³⁴ the claimant bank sought salvage liens for payments in respect of mortgages securing loans owed by the defendant customer. In the Irish courts, O'Connor M.R. at first instance held that the payments were not salvage payments but instead loans from the bank to the defendant,¹³⁵ but the Court of Appeal reversed and imposed the lien.¹³⁶ However, the House of Lords reinstated the decision of O'Connor M.R.; and their Lordships did so, not on the basis that the doctrine did not exist, but on the basis that its terms had not been fulfilled.¹³⁷ For example, Lord Parker held that "there can be no doubt that a mortgagee has a lien on the mortgaged premises for moneys paid by him to preserve the subject-matter of his security".¹³⁸ Similarly, in *Chapman v Chapman*,¹³⁹ though they declined to expand it, the House of Lords nevertheless strongly affirmed an analogous extension, also founded on notions of necessity and also described as salvage. Furthermore, a salvage argument was entertained on its merits in *In re Downer Enterprises Ltd.*¹⁴⁰ Pennycuik J. held that a party, Schick, who was secondarily liable for rent and had paid it, was entitled to be subrogated to the landlord's claims against the party primarily liable for the rent. Schick's case was also put in salvage terms, that "by paying the rent, Schick had preserved this asset for the benefit of the company in liquidation and, accordingly, Schick ought to be recouped its expense in so preserving the asset".¹⁴¹ For Pennycuik J., the "answer to that attractive argument . . . [was that Schick had] paid this sum not by arrangement with the liquidator, but because Schick was bound to pay it under the general law . . .".¹⁴² The "attractive" salvage failed, not because such an argument was unstateable, but instead for a reason entirely consistent with the elements of the lien: the fourth of the four conditions distilled above – the claimant must not have made the payment in the performance of another duty or obligation for which he or she is not primarily liable – is plainly not fulfilled because Schick was bound to make the payment under the general law.

These cases are consistent with recent academic commentary arguing for the resurgence of equitable lien¹⁴³ and with high modern judicial authority once again recognising its importance. For example, the High Court of Australia in *Hewett v Court*¹⁴⁴ liberalised the lien from the shackles of the recognised

¹³³ See above, text with and in nn.23-57, 62.

¹³⁴ [1918] A.C. 372 (HL (Ir))

¹³⁵ [1916] 1 I.R. 313.

¹³⁶ *ibid.*

¹³⁷ [1918] A.C. 372 at 390 *per* Lord Kinson, 394 *per* Lord Parker, 401 *per* Lord Wrenbury.

¹³⁸ [1918] A.C. 372 at 394.

¹³⁹ [1954] A.C. 429 (HL) (nn.41-57 above); see also *Rafidain Bank v Saipem* (CA, unreported, 2 March 1994).

¹⁴⁰ [1974] 2 All E.R. 1074.

¹⁴¹ *ibid.*, 1084.

¹⁴² *ibid.* However, an alternative claim in subrogation succeeded: see n.220 below.

¹⁴³ See nn.127-128 above.

¹⁴⁴ (1983) 149 C.L.R. 639 (HCA); see I. Hardingham "Equitable Lines for the Recovery of Purchase Money" (1985) *M.U.L.R.* 65; M. Christie "The Equitable

categories and unselfconsciously imposed a lien over a pre-fabricated home to secure the part-payment of the purchase price, where the contract to purchase the home had gone off due to the builder's insolvency;¹⁴⁵ whilst the House of Lords in *Napier and Ettrick v Kershaw*¹⁴⁶ held that, having indemnified the insured, the insurer has a lien over any sums recovered by the insured. To be sure, the purchaser's lien at issue in *Hewett* differs in important respects from the insurer's lien at issue in *Napier*, and they both differ in turn from the salvage lien at issue here. Nevertheless, they are relevant to each other by analogy to illustrate the ongoing revitalization of liens generally; in particular, the fact of that development with the purchaser's and insurer's liens provides strong support for the argument that a similar development is also possible in the context of the salvage lien.

Hence, although the equitable salvage lien for compulsion or necessitous intervention has been lost outside of Ireland, nevertheless, the effect of the hyperbole in *Leslie* and *Falcke* can be diluted or displaced by *Yourell* and *Chapman*, and this species of lien could quite easily form part of the emerging *zeitgeist* represented by *Hewett* and *Napier*. A minimal development would simply accept the salvage lien as just another recognised category of lien; more expansively, it could form a central element in the current rediscovery of the equitable lien.¹⁴⁷ Either way, an appreciation of how the equitable salvage lien for compulsion or necessitous intervention fits into the modern landscape of the law is crucial, and that is the work of the next part of this article.

III. The Place of the Equitable Salvage Lien in the Modern Law

Connections and Accommodation

The equitable salvage lien might simply be a *sui generis* doctrine, occupying its own obscure corner of Irish equity, and susceptible of no further explanation. Nevertheless, the doctrine plainly has echoes of, if not indeed connections with, at least¹⁴⁸ three relatively well established categories in the modern law: unjust enrichment, maritime salvage, and subrogation. An analysis of these three possible homes in which the equitable salvage lien

Lien in a Commercial Context: Some Recent Australian Developments' (1986) 14 *A.B.L.R.* 435; D. Malcolm "The Penetration of Equity Principles into Modern Commercial Law" (1987) 2 *Aust. Bar. Rev.* 185.

¹⁴⁵ Worthington, n.128 above; Burns, n.127 above, 13-24. *Morris v Morris* [1982] 1 N.S.W.L.R. 61; *Electrical Enterprise Retail v Rodgers* (1989) 15 N.S.W.L.R. 473. In *In re Barrett Apartments* [1985] I.R. 350; [1985] I.L.R.M. 679 (noted Coughlan "Land Law – Equitable Mortgages and Charges" (1992) 14 *D.U.L.J. (ns)* 171) the Irish Supreme Court declined to extend this to a lien over property to secure a booking deposit paid in respect of the intended purchase of such property.

¹⁴⁶ [1993] A.C. 713 (HL); W. Gummow "Names and Equitable Liens" (1993) 109 *L.Q.R.* 159; Rotherham, n.102 above, pp.281-292; cf *Foskett v McKeown* [2001] 1 A.C. 102 (HL).

¹⁴⁷ Another route is to track the similarities with the constructive trust: H. Monaghan "Constructive Trust and Equitable Lien: Status of the Conscious and the Innocent Wrongdoer in Equity" 38 *U. Det. L. Rev.* 10 (1960); Wright, n.127 above.

¹⁴⁸ The analogous *Chapman* extension has already been discussed (see text with and nn.41-57, 139 above).

might be accommodated in the modern law is the work of this part of the article.

Whilst assimilation of the equitable salvage lien with its maritime counterpart or its absorption by the law of subrogation may ultimately prove neither necessary nor profitable, an unjust enrichment explanation of the equitable salvage lien is entirely plausible: claims for the recovery of benefits transferred pursuant to compulsion or necessity form a significant part of the modern law of restitution for unjust enrichment, and the equitable lien for compulsion or necessitous intervention might easily find a comfortable home with them. If so, then elements of the lien might come to be better understood and explained in unjust enrichment terms. Moreover, because the equitable salvage lien cases demonstrate that a finding of necessity is certainly possible, this could contribute to, and perhaps even secure, necessity as a factor rendering an enrichment unjust. In so doing, problems with cases relating both to the equitable salvage lien and to the unjust factor of necessity can be resolved, and some light might even be shed on the fraught question of the principled availability of proprietary restitutionary claims. It is to these issues that the analysis in the following sections of this part is directed.

Unjust Enrichment and the Equitable Salvage Lien

The connections between unjust enrichment and equitable liens have long been recognised,¹⁴⁹ and it is in fact a very straightforward task to align the four conditions necessary to establish a salvage lien with the terms of the principle against unjust enrichment.

Recall that, to make a successful claim to an equitable salvage lien (i) the claimant must have been acting under compulsion or necessity or something akin to it; (ii) the claimant's actions must have had the effect of saving, for the benefit of everyone interested, property, or an interest or estate in property, which would otherwise have been lost; (iii) the claimant must have had a subsidiary rather than the main interest in the property or estate or interest thereby saved, or something akin to such an interest, such as a sufficient relationship with the owner of the main interest in the property or with the property itself; and (iv) the claimant must have made the payment in that capacity, and not on the basis of some other capacity or in the performance of another duty or obligation on which he or she is primarily liable. Moreover, on any claim for restitution of unjust enrichment, four questions arise:¹⁵⁰ is there (i) an enrichment to the defendant (ii) at the

¹⁴⁹ *Cp* R. Sutton, n.9 above. See also D. Waters "Restitution. The Need for Reform" (1964) 17 *C.L.P.* 42 at 52 (suggesting that the courts could "evolve a true equitable restitutionary lien" by analogy with the vendor's lien cases); M. Cope *Constructive Trusts*, p.35 (on the use of the equitable lien more generally to prevent unjust enrichment). In *Cadorange Pty Ltd v Tanga Holdings Pty Ltd* (1990) 20 N.S.W.L.R. 26, Young J. imposed a lien by analogy with *Hewett v Court* in support of a personal claim to reverse an unjust enrichment.

¹⁵⁰ The terms of the principle against unjust enrichment emerge, for example, from, Birks, n.108 above, pp.7, 21; *Dublin Corporation v Building and Allied Trades Union* [1996] 1 I.R. 468 (Ir SC) 483 *per* Keane J. (noted E. O'Dell "Restitution and *Res Judicata* in the Irish Supreme Court" (1997) 113 *L.Q.R.* 245; E. O'Dell "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20

expense of the claimant, (iii) in circumstances in which the law will require restitution (that is, the ‘unjust’ phase of the enquiry), (iv) where there is no reason why restitution will be withheld (defences and policy).

The four conditions necessary to establish a salvage lien align smoothly with the terms of the principle against unjust enrichment: the lien’s requirement of compulsion or necessity or something akin to it can be seen as a requirement of an unjust factor; the requirement that the lien benefit everyone, including the defendant, can be seen as a strict requirement of enrichment;¹⁵¹ and the requirements that the lien claimant be the owner of an interest in property (or something akin to that) and pay in that capacity can be seen as a very tight requirement that the enrichment be at the expense of the claimant. In this way, the four conditions emerging from the cases as necessary to establish the equitable salvage lien equiperate with ease with the three elements of the principle against unjust enrichment that establish causes of action in restitution, and the conclusion that the lien is entirely directed to reversing unjust enrichment becomes almost impossible to resist.

Perhaps the strongest indication that the salvage lien is a response to unjust enrichment follows from that fact that when causes of action in restitution other than necessity are made out and the other three conditions are satisfied, a claim for a salvage lien will lie. Thus, we have already seen the extension from compulsion of law to practical compulsion or necessity; but there are cases in which mistaken payments¹⁵² have generated salvage claims; and the aspect of *In re Power’s Policies* in which the salvage claim succeeded is a classic example of free acceptance:¹⁵³ Mrs Hearne knowing that the benefit would not be conferred gratuitously and with the opportunity to reject it nevertheless permitted Kelly to continue to make the payments.¹⁵⁴ That

D.U.L.J. (ns) 101); *Banque Financière de la Cité v Parc (Battersea)* [1999] 1 A.C. 221 (HL) 227 *per* Lord Steyn. Birks’ restatement in P. Birks *Unjust Enrichment* (2nd ed., 2005), seeking to replace unjust factors with an overarching absence of basis, does not expressly consider cases of compulsion and necessity; and it is difficult to see how it can accommodate them; see n.171 below.

¹⁵¹ Indeed, since there can be difficulties associated with establishing enrichment in necessity cases (Kortmann, n.108 above, 170-171) such a strict requirement would mean that enrichment is more easily established in the salvage cases than it is in many necessity cases.

¹⁵² *In re Sargent’s Trusts* (1897) 7 L.R. (Ir) 66 (Sullivan M.R.) (estate of mistaken payor of premiums had lien on proceeds of policy); *cp Cooper v Phibbs* (1867) L.R. 2 H.L. 149 (after rescission of a contract of sale of a fishery from uncle to nephew on the grounds that the nephew already owned the fishery, the House held that the uncle was entitled to a lien to secure his expenditure on it); see also R. Sutton, n.9 above, p.96.

¹⁵³ In *Hamilton v Denny* (1809) 1 Ball. & B. 199 (n.61 above) the claimant made two payments; in respect of both, the unjust factor probably is practical compulsion; but in respect of the second, it might also be free acceptance: knowing that the claimant had paid the first renewal fine, the defendant permitted him to make the second. See also *Ahearne v McSwiney* (1874) I.R. 8 CL 568 (n.7 above).

¹⁵⁴ Indeed, this may be a more satisfactory explanation for the importance of Mrs. Hearne’s letter, which the Court of Appeal treated as changing the capacity in which Mr Kelly acted (nn.83-84 above). It might, therefore, have been better to hold that he acted in the same capacity throughout, and that whilst there was no unjust factor before the letter, her response to it generated the unjust factor of free acceptance.

being so, it would follow that the first condition necessary to establish the salvage lien would need modifying, to provide that the claimant must have been acting under compulsion or necessity or something akin to it, *such as another cause of action in restitution*.

Consequently, a restitutionary explanation of salvage may be not only possible but also wholly appropriate. If so, then the equitable salvage lien, founded on notions of compulsion and necessity, would have much to contribute to modern debates about the extent to which such concepts should properly found claims to restitution for unjust enrichment. Recall, for example, that compulsion, necessity and the like, are of the essence of the salvage lien,¹⁵⁵ and that the courts have been careful not to make such findings too easily, in particular, where they find that preservation or repairs may be necessary but that maintenance or improvements will usually not be.¹⁵⁶ Hence, not only do the salvage lien cases quite properly counsel caution in finding that a claimant has acted out of necessity, but they also demonstrate that where the facts so warrant, a finding of necessity is entirely possible. Indeed, to the extent that compulsion and necessity do constitute causes of action in restitution, then the equitable salvage lien cases would stand as examples where causes of action were properly and successfully established.

For example, just as the common law action for money had and received extended recovery from cases of legal compulsion to cases of practical compulsion or necessity, so too has the equitable salvage lien extended from cases of compulsion to cases of necessity.¹⁵⁷ The extension of the common law action has been tentative,¹⁵⁸ reflecting an unresolved (perhaps irresolvable) tension between the Victorian “philosophy of robust individualism”¹⁵⁹ underlying the hyperbolic *dicta* in *Falcke* and a more

¹⁵⁵ See text with and nn.13-26 above.

¹⁵⁶ See text with and nn.33-38 above.

¹⁵⁷ See text with and in nn.22-57, 62, 133 above.

¹⁵⁸ With the cases nn.19-20 above, contrast *Edmunds v Wallingford* (1885) 14 Q.B.D. 811 (CA); see also *Beresford v Kennedy* (1887) 21 I.L.T.R. 17 (Andrews J.); *Gormley v Johnston* (1895) 29 I.L.T.R. 69 (Gibson J.).

¹⁵⁹ *Peel v Canada* (1993) 98 D.L.R. (4th) 140 (SCC) 152 per McLachlin J. On that ethic, see, e.g. Kortmann, n.108 above, pp.84-90, 164; E. Hope “Officiousness” 15 *Cornell L.Q.* 25 (Part 1), 205 (Part 2) (1929-1930) at 29-30. L. Aitken “*Negotiorum Gestio* and the Common Law: A Jurisdictional Approach” (1988) 11 *Syd. L. Rev.* 566 suggests that this ethic was stronger in the common law courts hostile necessity claims than in admiralty or ecclesiastical courts which were more influenced by civilian conceptions less hostile to necessity claims (on the civilian approach, cp C. von Bar *et al*, *Principles of European Law on Benevolent Intervention in Another’s Affairs*; see also J. Dawson “*Negotiorum Gestio*. The Altruistic Intermeddler” 74 *Harv. L. Rev.* 817 (Part 1), 1073 (Part 2) (1961); S. Stoljar “*Negotiorum Gestio*” in E. von Caemmerer and P. Schlechtriem (eds) *International Encyclopedia of Comparative Law* vol X “Restitution – Unjust Enrichment and *Negotiorum Gestio*”, chpt.17; T. Krebs “Unrequested Benefits in German Law” in J. Neyers, M. McInners and S. Pitel (eds.) *Understanding Unjust Enrichment*, p.247; Kortmann, n.108 above, pp.44-50, 99-111; Sheehan, n.108 above). Victorian classical economics are reflected in modern neo-classical theories of law and economics, which take a similarly narrow view of claims based upon necessity; see, e.g. W. Landes and R. Posner “Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of

altruistic philosophy encouraging good Samaritan intervention¹⁶⁰ underlying potential necessity claims. Nevertheless, *Falcke* itself is now rather easily brushed aside;¹⁶¹ and there are several pockets of authority (for example, the burial cases,¹⁶² agency of necessity,¹⁶³ and cases concerning the supply of necessary services to an *incapax*¹⁶⁴) in which there are clear and strong traces of necessity as an unjust factor.¹⁶⁵ Moreover, there are good arguments that the lines between these pockets have been “too firmly drawn” in the cases,¹⁶⁶

Law and Altruism” 7 *J.L.S.* 83 (1978); R. Long “A Theory of Hypothetical Contract” 94 *Yale L.J.* 415 (1984).

¹⁶⁰ H. Dagan *The Law and Ethics of Restitution*, chpt. 4; *cp* H. Dagan “In Defense of the Good Samaritan” 97 *Mich. L. Rev.* 1152 (1999); Kortmann, n.108 above, pp.91-98, 165. See, generally, T. Nagel *The Possibility of Altruism*; J. Mansbridge (ed) *Beyond Self-Interest*; E. Paul, F. Miller and J. Paul (eds) *Altruism*.

¹⁶¹ *Surrey Breakdown Ltd v Knight* [1999] R.T.R. 84 (CA) (however, the claim failed on the facts: police request, and not necessity, set the claimants in motion; *cf* Kortmann, n.108 above, pp.167-168, 184-185).

¹⁶² Kortmann, n.108 above, pp.118-120, 122-123; Sheehan, n.108 above, 272; M. Marasinghe “The Place of *Negotiorum Gestio* in English Law” (1976) 8 *Ottawa L. Rev.* 573; *Jenkins v Tucker* (1788) 1 H. Bl. 90; 126 E.R. 55; *Tugwell v Heyman* (1812) 3 Camp. 298; 170 E.R. 1389; *Rogers v Price* (1829) Y. & J. 28; 148 E.R. 1080; *Shallcross v Wright* (1850) 12 Beav. 558; 50 E.R. 1174; *Ambrose v Kerrison* (1851) 10 C.B. 776; 138 E.R. 307; *Bradshaw v Beard* (1862) 12 C.B. (NS) 344; 142 E.R. 1175; s.46(5) of the Public Health (Control of Disease) Act 1984 (UK).

¹⁶³ G. Jones (ed.) Lord Goff of Chieveley and G. Jones *The Law of Restitution* (6th ed., 2002) pp.448-452 [17.002]-[17.007]; W.B. Williston “Agency of Necessity” (1944) 22 *Can. Bar. Rev.* 492; G. Treitel “Agency of Necessity” (1953) 3 *U.W.A.L.Rev.* 2; Kortmann, n.108 above, pp.127-136, 166-169; Sheehan, n.108 above, 269-272; *Prager v Blatspiel Stamp and Heacock* [1924] 1 K.B. 566 (McCardie J.); *Burns Philp v Gillespie Bros* (1947) 74 C.L.R. 148 (HCA); *China Pacific v Food Corpn of India (The Winson)* [1982] A.C. 939 (HL) (after salvage pursuant to contract came to an end, a bailment of necessity arose in respect of the salvaged goods, so that the salvors were entitled both to a salvage award for the rescue of the goods and remuneration for the expenses of their subsequent storage; and the House of Lords declined to answer the question whether the claimants would have been entitled to a lien for the expenses; see, generally, Kortmann, n.108 above, pp.136-139); *Surrey Breakdown Ltd v Knight* [1999] R.T.R. 84 (CA); *Guildford Borough Council v Hein* [2005] EWCA Civ. 979 (27 July 2005) (n.126, above). *Cf* F. Reynolds “Agency of Necessity” [1990] *J.B.L.* 505; I. Brown “Authority and Necessity in the Law of Agency” (1992) 55 *M.L.R.* 414.

¹⁶⁴ J.P. Dawson “Rewards for the Rescue of Human Life?” in K.H. Nadelmann, A.T. von Mehren and J.N. Hazard (eds.) *Twentieth Century Comparative and Conflicts Law: Legal Essays in Honour of H.E. Yntema* p.142; reprinted J.M. Ratcliffe (ed) *The Good Samaritan and the Law*, p.63; R.A. Albert “Restitutionary Recovery for Rescuers of Human Life” 74 *Calif. L. Rev.* 85 (1986); Sheehan, n.108 above, 272-274; *Nelson v Duncombe* (1846) 9 Beav. 211; 50 E.R. 323; *In re Rhodes* (1890) 44 Ch.D. 94 (CA); *Matheson v Smiley* (1932) 2 D.L.R. 787 (Man CA).

¹⁶⁵ See generally *In re F (mental patient: sterilisation)* [1990] 2 A.C. 1 (HL) 74-76 *per* Lord Goff. Indeed, even *Nicholson v Chapman, British Empire Shipping Co v Somes*, and *Great Northern Railway v Swaffield* (text above, with and in nn.119-126) all seem to support the possibility of a personal claim, though they deny that it could be secured by a lien.

¹⁶⁶ Goff & Jones, n.163 above, pp.447-448 [17.001].

and that these pockets should be generalised into a single category of necessity as an unjust factor or cause of action in restitution.¹⁶⁷

Common law diffidence about necessity might once have cast cases in which necessity claims have failed on the facts¹⁶⁸ as undermining, even denying, necessity as an unjust factor. However, in many of these cases, the claims failed not because the law did not recognize actions founded upon necessity but simply because essential elements of such actions were not made out. Furthermore, whilst the equitable salvage cases quite properly counsel caution in finding that a claimant has acted out of necessity, they also demonstrate that where the facts so warrant, a finding of necessity is both possible and proper. If the equitable salvage lien is indeed to be understood as responding to unjust enrichment, then the salvage cases which turn on necessity would provide another pocket of authority containing clear and strong examples of necessity as an unjust factor.¹⁶⁹ Moreover, since necessity is understood in the equitable salvage cases to arise by analogy with compulsion, the assimilation of the salvage lien into an unjust factor of necessity lends support to the view that such an unjust factor indeed arises by analogy with compulsion¹⁷⁰ rather than in response to a general policy to encourage intervention to preserve health and property,¹⁷¹ though of course the policy serves to bolster the conclusion drawn from the analogy with compulsion. Besides, there are at least two authorities in which personal

¹⁶⁷ *ibid.*, p.467 [17.026]; Virgo, n.38 above, pp.300, 315, Burrows, n.69 above, pp.314-316; Sheehan, n.108 above; McCamus, n.120 above, Marasinghe, n.162 above. The limits of such an action are explored in E. Hope, n.159 above; J. Wade "Restitution for Benefits Conferred Without Request" 19 *Vand. L. Rev.* 1183 (1966) 1186-1205. Birks and Mitchell, n.121 above, pp.582-583 [15.159]-[15.160] are less confident; and S. Hedley *A Critical Introduction to Restitution*, chpt. 3 is decidedly sceptical. For a different generalisation from the cases, see S. Stoljar "Unjust Enrichment and Unjust Sacrifice" (1987) 50 *M.L.R.* 603. See also Kortmann, n.108 above, pp.164-191.

¹⁶⁸ *E.g.* personal claims in money had and received failed in *Macclesfield Corporation v Great Central Rly* [1911] 2 K.B. 528 (CA) and *Hackett v Smith* [1917] 2 I.R. 508 (Lord Campbell C.J.) (on *Hackett*, cf *Ferguson v Ferguson* (1886-1887) 17 L.R. Ir. 552 at 563-564 *per* Porter M.R.; *Gebhart v Saunders* [1892] 2 Q.B. 452 (QBD)); whilst proprietary claims for liens failed in the cases in nn.119-126, personal claims may have been available in those cases (n.165 above).

¹⁶⁹ *Cp* Sheehan, n.108 above, 261.

¹⁷⁰ Birks, n.108 above, pp.193-203; Virgo, n.38 above, pp.302-304 (thereby constituting a consent-related unjust factor).

¹⁷¹ Burrows, n.69 above, p.315; Birks and Mitchell, n.121 above, p.580 [15.156]; Sheehan, n.108 above (thereby constituting a policy-motivated unjust factor). Of course, on Birks' final restatement, it makes no sense to speak in terms of unjust factors at all. In the first edition of *Unjust Enrichment* (2003) he excluded all necessity cases (*ibid.*, pp.21-22); in the second edition (n.150 above), he accepted a small category of unjust enrichment by necessity (*ibid.*, p.24; presumably for policy reasons (*cp* Birks and Mitchell, n.121 above). Either way, for him, the excluded *negotiorum gestio* cases would not trigger gain-based remedies in unjust enrichment (n.150 above 22-26), potentially leaving them in a (perhaps Germanic (Sheehan, n.108 above 263)) reliance-based category (*cp* Stoljar (n.167 above); P. Jaffey *The Nature and Scope of Restitution*, pp.77-84) of reimbursement (Birks and Mitchell, n.121 above 583 [15.160]) possibly along the lines suggested by von Bar (above n. 159).

claims to restitution of the value of benefits transferred out of necessity succeeded, and the salvage cases directly influenced their outcomes.

The first example is the decision of Porter M.R. in the Irish case of *In re Pike*.¹⁷² The hall door of 2 Synge Street, Dublin being ajar, the Dublin Metropolitan Police were called, and they found an old lady semi-unconscious, helpless and dying. They brought her to hospital, and took the necessary steps to protect the house and contents, including cash, jewellery, and bank-books, by posting a guard on the house until the old lady had died. The Commissioner successfully claimed in the administration of her estate for the amount of the pay of the constables who had guarded the property and therefore been “the means of preserving, for the benefit of the persons now entitled to it, this large amount of property . . .”.¹⁷³

It is a short judgment; no cases are cited, and no doctrines expressly adverted to; but it has been treated as a salvage case in the literature.¹⁷⁴ Of course, it shares with the salvage cases a similar understanding of necessity; and in so far as those cases were the foremost source of necessity reasoning in Irish law at the time when *Pike* was decided, it is unsurprising that echoes of salvage can be heard in that case. But it should now be regarded as a straightforward example of necessity,¹⁷⁵ without any recourse to salvage. Indeed, it is difficult to see how all four elements of the salvage lien are satisfied. The element of necessity satisfies the first; and the actions of the police did have the effect of saving the vulnerable property of the dying old lady, thus satisfying the second; but the police had neither an interest in the property saved nor a sufficient relationship with the old lady or the property, thus failing to fulfil the third condition; and because they did not have such an interest or relationship, the fourth condition, requiring that the claimant have acted in that capacity, cannot be fulfilled; indeed, because the police presumably acted out of their general duty, the fourth condition would also not be satisfied for that reason.¹⁷⁶ *Pike* then should be regarded as an example not of a claim for an equitable salvage lien but rather as a straightforward claim to restitution of the value of services rendered in which necessity supplied the relevant unjust factor (and the penumbra of salvage cases in the Irish courts provided support for necessity as the basis of the claim).

Salvage cases also influenced the decision of Edward Nugee Q.C., sitting as a Deputy High Court Judge, in *In re Berkeley Applegate*,¹⁷⁷ which, like *Pike*,

¹⁷² *In re Pike. Burke v Burke* (1889-1890) 23 L.R. I.R. 9.

¹⁷³ *ibid.*, 12.

¹⁷⁴ See the sources cited in n.14 above.

¹⁷⁵ This is how it is regarded in McCamus, n.120 above, 317; Hedley, n.167 above, pp.69, 78 n.4; Goff & Jones, n.163 above, p.454 [17.010] n 65; *cp Restatement of Restitution* (American Law Institute, 1937) §117 comment b (restitution for claimants who take possession of property in an emergency, such as on the death of the owner).

¹⁷⁶ Indeed, because they were performing their public duty, it may be that there should have been no finding of necessity either. *Cf Surrey Breakdown Ltd v Knight* [1999] R.T.R. 84 (CA) in which there was no necessity where the police requested the claimant to remove the defendant’s car from a pond.

¹⁷⁷ *In re Berkeley Applegate (Investment Consultants) (in liq)* [1989] Ch. 32 (Edward Nugee Q.C.). See also *In re Regent’s Canal Ironworks Co* (1876) 3 Ch.D. 411 (CA); *In re Staffordshire Gas and Coke Co* [1893] 3 Ch. 523 (Kekewich J.); *In re*

probably stands as another example of necessity as an unjust factor. Here, the judge was influenced by the *Chapman* salvage element of the inherent jurisdiction to administer trusts. One aspect of that jurisdiction, at issue in *In re Duke of Norfolk's Settlement Trusts*,¹⁷⁸ is the power of the court to authorize the payment of remuneration to trustees or to increase the remuneration authorised by the trust instrument;¹⁷⁹ and this was in turn applied by analogy in *Berkeley Applegate*. An investment company went into voluntary liquidation. Most of the company's assets were held on trust for its investor clients; the few remaining assets were insufficient to pay the expenses of the liquidation; and the liquidator sought an order that, notwithstanding the absence of statutory authority, he was entitled to be paid out of the trust assets. Edward Nugee Q.C. held that, as with *Downshire*,¹⁸⁰ the "situation which existed in the present case immediately before the commencement of the winding up could similarly fairly be called an emergency",¹⁸¹ and that by his work, the liquidator had "added to the estate in the sense of carrying out work which was *necessary* before the estate could be realised for the benefit of the investors".¹⁸² He discerned in the analogy with salvage an "underlying unity"¹⁸³ in various aspects of the inherent jurisdiction of the court to administer trusts, including *Norfolk's*. As a consequence, he held that ". . . where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised . . ." ¹⁸⁴ but one which he was prepared to exercise on the facts before him.

Berkeley Applegate, though not a direct¹⁸⁵ application of salvage, nevertheless proceeds by analogy with it, drawing on *Chapman*-type salvage

Northern Milling Co [1908] 1 I.R. 473 (Barton J.); *Parsons v Thompon* (High Court of New Zealand, unreported, 19 February 2003, Venning J.). The policies identified in J. Dawson "Lawyers and Involuntary Clients: Attorney Fees From Funds" 87 *Harv. L. Rev.* 1597 (1974) might, *mutatis*, also underpin the outcome in these cases.

¹⁷⁸ [1979] 1 Ch. 37 (Walton J.); [1982] 1 Ch. 61 (CA); see also *Foster v Spenser* [1996] 2 All E.R. 672 (Judge Paul Baker Q.C.) (treated as an example of reimbursement rather than restitution in Sheehan, n.108 above, 277).

¹⁷⁹ At first instance in *Norfolk's*, Walton J. saw "the cases in which the court acts to secure the services of a particular trustee. . . [as] closely analogous to 'salvage'" ([1979] 1 Ch. 37 at 59; *cp* [1982] 1 Ch. 61 (CA) 77 *per* Fox L.J.). This power was derived by analogy with the salvage aspect of the inherent jurisdiction, but see now Trustee Act 2000, Part V.

¹⁸⁰ Above, text with and in nn.43-48.

¹⁸¹ [1989] Ch. 32 at 52.

¹⁸² *ibid.*, 50; the work is outlined *ibid.*, 39-41.

¹⁸³ *ibid.*, 51.

¹⁸⁴ *ibid.*, 50; see also n.236 below.

¹⁸⁵ In the end, nor could it be: the standard salvage lien pattern requires three parties (recall, for example, the common chain of head-landlord, tenant, and sub-tenant, which forms the core of the discussion in part II, above) but *Berkeley Applegate* – like *Pike* – is a classic two-party case, where the claimants conferred the benefits directly upon the defendants without any trace of additional parties with superior interests.

cases – in particular, *Downshire* and *Norfolk's* – for their understanding of necessity. They provide a context to explain an otherwise curious case; in particular, they constitute the source for the necessity reasoning upon which the judge relied; and they afford a basis upon which to regard the case as an example of the unjust factor of necessity.

Plainly, therefore, the equitable salvage lien cases assist in establishing or bolstering necessity as an unjust factor in the modern law of restitution for unjust enrichment. Of course, necessity might underpin several legal claims other than unjust enrichment¹⁸⁶ and give rise to several remedies other than restitution.¹⁸⁷ Indeed, generalisations of necessity from this patchwork of various doctrines might well go all the way towards establishing necessity as a broad category of claim in its own right.¹⁸⁸ Be that as it may, the point here is the much more limited one that the salvage cases provide support for the modest development of necessity as an unjust factor the law of restitution for unjust enrichment rather than for any more radical project.

The support the salvage cases give to necessity as an unjust factor is not the only contribution they are capable of making; on the fraught issue of voluntariness,¹⁸⁹ – that is, on the question of whether the actions of any given claimant should properly be characterised as motivated by necessity or simply by self-interest¹⁹⁰ – the salvage lien cases reveal a deftness of touch largely absent in other necessity contexts.

For example, in considering the first of the four conditions necessary to establish a salvage lien (that is, whether compulsion, or necessity, or another unjust factor, or the like, has been made out on the facts), the courts have been astute to exclude liens in cases where the necessary degree of compulsion was not in fact made out because the claimant was motivated simply by self-interest¹⁹¹ and was therefore held to have acted voluntarily. Moreover, the third and fourth conditions are directed to ensuring that the

¹⁸⁶ Kortmann, n.108 above, pp.111-164 considers various legal bases for granting a claim to the necessitous intervener: implied promise, agency of necessity, bailment, tort (*cp* E. O'Dell "Danger Invites Rescue. The Tort of Negligence and the Rescue Principle" (1992) 14 *D.U.L.J.* (ns) 65), see also the Good Samaritan Bill, 2005), equity (where, presumably, the salvage lien would find a home), and maritime salvage.

¹⁸⁷ Kortmann, n.108 above, pp.80-83, 179-183 distinguishes between five (reimbursement, compensation, remuneration, reward and restitution), whilst Birks and Mitchell, n.121 above, p.583 [15.160] distinguish between three (reward, restitution of enrichment, and reimbursement of expenses).

¹⁸⁸ This is the theme of Kortmann, n.108 above, *passim*.

¹⁸⁹ In this context "voluntary" and "officious" are both used, often interchangeably, in the cases and the literature. However, because "officious" carries pejorative judgmentalist overtones, it is left aside here, except where those overtones are intended.

¹⁹⁰ Hope, n.159 above; Wade, n.167 above; McCamus, n.120 above; J. Dawson "The Self-Serving Intermeddler" 87 *Harv. L. Rev.* 1409 (1974); D. Friedmann "Unjust Enrichment, Pursuance of Self-Interest, and the Limits of Free Riding" 36 *Loyola. LA. L. Rev.* 831 (2003).

¹⁹¹ See above, nn.17-18. Indeed, un compelled maintenance and improvements (see above, text with and nn.33-38, 156) can similarly be described as motivated simply by self-interest and therefore voluntarily. Likewise, mere expediency is insufficient to found the *Chapman* jurisdiction (n.57 above).

claimant did not act voluntarily, or officiously. Thus, for example, the (third) requirement that the claimant have a subsidiary interest in the property or estate or interest saved, excludes from the lien both the ultimate owner and strangers to the estate: the actions of the ultimate owner in paying off his or her own debts are motivated simply by self-interest; whilst those of strangers are regarded by the law as entirely voluntary.¹⁹² This is all reinforced by the additional requirement (in the fourth of four salvage conditions) that the claimant must have made the payment in the capacity of a party interested in the property rather than on the basis of some other capacity or in the performance of another primary duty or obligation.¹⁹³ Performance pursuant to some other capacity or obligation is a performance motivated simply by self-interest; as with the excluded claims of the ultimate owner, such claimants are motivated simply by the self-interest of discharging obligations for which they are already *primarily* liable. Hence, a claimant who discharges a primary liability (because the claimant is the full owner or is acting pursuant to another obligation) is – or will be regarded as – motivated simply by self-interest; whilst a paying stranger is – or will be regarded as – acting voluntarily; and, in neither case, will such a claimant get an equitable salvage lien.

In all of these ways, therefore, claims are excluded where claimants' actions are voluntary or motivated entirely by self-interest. This is as it should be. "Except in special cases (such as marine salvage) English law does not reward someone who voluntarily confers a benefit on another".¹⁹⁴ Hence, if a volunteer cannot maintain the underlying personal claim in an action for money had and received,¹⁹⁵ then neither should one be able to maintain the more potent proprietary claim to a lien. Indeed, many of the difficult leading cases relating to the underlying personal claim make more sense in the light of the insights to be gained from the salvage lien cases. For example, the burial cases¹⁹⁶ only arise because the person with the primary responsibility to bury the deceased has not done so, and someone else is – *secondarily* – compelled by the circumstances to act instead. On the other hand, in *Falcke v Scottish Imperial Insurance Company* the claim of the owner of the main interest in the policy quite properly failed because it was a payment in

¹⁹² Above, text with and in nn.69-76; see also text with and in nn.27, 110-112.

¹⁹³ Above, text with and in nn.76-84, 140-142.

¹⁹⁴ *Stovin v Wise (Norfolk C.C., 3rd party)* [1996] A.C. 923 (HL) 945 *per* Lord Hoffmann; see also nn.27 and 110 above.

¹⁹⁵ See, generally, Goff & Jones, n.163 above, p.51 [1.063], pp.64-68 [1.078]-[1.082]; *Mara v Ryan* (1838) 2 Jones 715; *Taylor v Laird* (1856) 25 L.J. Ex. 329, *Re Leslie*; *Leslie v French* (1883) 23 Ch.D. 552 (see above, nn.96-105, esp. n.104); *Leigh v Dickeson* (1884) 15 Q.B.D. 60 at 64-65 *per* Brett M.R.; *Falcke v Scottish Imperial Insurance Co Ltd* (1886) 34 Ch.D. 234 (see above, nn.106-114, esp. nn.110-111); *Macclesfield Corporation v Great Central Rly* [1911] 2 K.B. 528 (CA); *Hackett v Smith* [1917] 2 I.R. 508 (Lord Campbell C.J.); *In re Cleadon Trust* [1939] Ch. 286 (CA). The principle is sound, though such voluntariness might too readily have been found on the facts in some of these cases. On the exclusion of the personal claim on voluntariness grounds in the context of the head-landlord, tenant, and sub-tenant chain, see *Ahearne v McSwiney* (1874) I.R. 8 CL 568 at 574 *per* O'Brien J., 576 *per* Fitzgerald J.; *Ryan v Byrne* (1894) 17 I.L.T.R. 102 at 103 *per* Palles C.B.; *Grogan v Regan* [1902] 1 I.R. 196.

¹⁹⁶ See n.162 above.

discharge of a *primary* liability.¹⁹⁷ Similarly, in *Owen v Tate*,¹⁹⁸ the defendant had taken a loan from a bank, secured by way of a legal mortgage over the property of a friend who was then replaced as guarantor by the claimant. After the bank recovered from the claimant, he sought to recover in turn from the defendant. The case turned on the Court of Appeal's controversial characterisation of the claimant's actions in replacing the friend as guarantor as voluntary and not compelled; and the claimant's claim therefore failed. Whatever about the merits of this characterisation, it is nevertheless clear, in the light of the salvage cases, that a principled legal distinction between voluntariness and compulsion such as that drawn in *Owen v Tate* can successfully be maintained.¹⁹⁹

Characterisation of claimants' conduct as voluntary serves in many contexts to ensure that not 'just anyone' can intervene in the affairs of another; but, beyond that, it is notoriously difficult to pin down this concept of voluntariness.²⁰⁰ Conduct sufficient to preclude a personal claim in money had and received or a proprietary one to an equitable salvage lien is spread along an extended spectrum of intervention, from the straightforward officious intermeddling of strangers, through the pursuit of self-interest of those primarily liable, to genuinely altruistic volunteers. The salvage cases, simply by providing more examples in which these issues have been grappled with, help to clarify how and when this conduct defeats such claims.

Since the four conditions emerging from the cases as necessary to establish the equitable salvage lien equiperate so effortlessly with the three elements of the principle against unjust enrichment that establish causes of action in restitution,²⁰¹ the conclusion that the lien is entirely directed to reversing

¹⁹⁷ (1886) 34 Ch.D. 234 (CA) 250-251 *per* Bowen L.J.; 253 *per* Fry L.J. (see above, text with and in nn.106-114, esp. nn.108-109); *cp Re Leslie; Leslie v French* (1883) 23 Ch.D. 552 at 563 *per* Fry J. (see above, text with and in nn.96-105, esp. n.104).

¹⁹⁸ *Owen v Tate* [1976] Q.B. 402; W. Cornish "Interveners and Unjust Enrichment" (1975) 38 *M.L.R.* 563; A.J. Oakley "The Position of the Officious Surety" [1975] *C.L.J.* 202; J. Beatson and P. Birks "Unrequested Payment of Another's Debt" (1976) 92 *L.Q.R.* 188 [reprinted in J. Beatson *The Use and Abuse of Unjust Enrichment*, p.177]; D. Friedmann "Payment of Another's Debt" (1983) 99 *L.Q.R.* 534; G. Muir "Unjust Sacrifice and the Officious Intervener" in P.D. Finn (ed) *Essays in Restitution*, p.297.

¹⁹⁹ As a consequence, relying on *Owen v Tate*, it was subsequently held that an unrequested payment by a surety where the principal debt is not in fact due is a voluntary payment, unless the surety was compelled or acted out of necessity: *The Zuhul K and the Selin* [1987] 1 Lloyd's Rep. 151 at 156 (Sheen J.); P. Watts "Guarantees Undertaken Without the Request of the Debtor" [1989] *L.M.C.L.Q.* 7. See generally Kortmann, n.108 above, pp.153-155, 169-173, esp. 154: "The fact is that the courts in both cases [*Owen* and *Zuhul*] *did* conclude that necessity could be a justification for recovery".

²⁰⁰ E.g. Goff & Jones, n.163 above, p.130 [3.015] ("mercurial"); S. Hedley *Restitution: Its Division and Ordering*, p.123 ("the 'weasel word'"); see also *ibid.*, pp.127-132.

²⁰¹ Missing in this equiperation is the fourth question mandated by the principle against unjust enrichment (n.150, above), that is, whether there was any reason (by way of defences or policy) to withhold restitution. It would follow from a

unjust enrichment becomes overwhelmingly irresistible. As a consequence, and despite Victorian scepticism, the equitable salvage lien cases stand as excellent examples of cases where unjust factors such as necessity were successfully established, and they directly influenced the outcomes in *Pike* and *Berkeley Applegate* in which personal claims to restitution of the value of benefits transferred out of necessity succeeded. Moreover, the salvage cases demonstrate adroit handling of the vexing issue of voluntariness, illustrating that claims will properly fail for the straightforward officious intermeddling of strangers or the pursuit of self-interest of those primarily liable. All of these benefits flow readily from a restitutionary understanding of the equitable salvage lien. However, unjust enrichment is not the only category in the modern law with which the equitable salvage lien has potential connections; it has obvious affinities with the maritime salvage lien as well, and considering them is the work of the next section.

Equitable Salvage and Maritime Salvage

On the one hand, the elements of the equitable salvage lien are not dissimilar to the elements of maritime salvage. “A salvage service may be briefly described as a necessary service voluntarily rendered which assists in saving a recognised subject of salvage from danger at sea”.²⁰² More particularly, the salvage service must have been rendered in respect of a danger on the high seas which was not brought about by the fault of the claimant; it must relate to a recognised subject of salvage, such as a ship or cargo, or one of the statutory extensions, including aircraft, and lives; it must have been carried out by someone from the recognised categories of salvors; it must have been rendered voluntarily rather than pursuant to a pre-existing obligation; and it must have achieved some success.²⁰³ Hence, both the equitable salvage lien and the maritime salvage lien require that the claimant have been acting under something akin to necessity, that the claimant’s actions have achieved some benefit or success, that the claimant be properly connected with the property rescued, and that the claimant not be under a duty from some other source to effect that rescue. As a consequence, parallels have been drawn between the two species of lien.²⁰⁴ Moreover, there are strong arguments that both species of lien are restitutionary in nature.²⁰⁵ Hence, if there are

restitutionary understanding of the equitable salvage lien that any defences to restitution claims should therefore, in principle, to equitable salvage claims.

²⁰² Goff & Jones, n.163 above, p.470 [18.001]. See, generally, Kennedy & Rose, n.129 above; and Kortmann, n.108 above, pp.158-163, 173-174.

²⁰³ Goff & Jones, n.163 above, pp.471-478 [18.004]-[18.014]. See, generally, Kennedy & Rose, n.129 above, p.1 [1].

²⁰⁴ See, e.g. W. Fisher (1st ed., n 9 above, 5) pp.408-409 [726]; cf J. Lightwood *Fisher* (7th ed., n.9 above, 5) p.253.

²⁰⁵ For assessments of the extent to which the maritime salvage lien is properly restitutionary, see F. Rose “Restitution for Inland Salvage” (1986) 102 *L.Q.R.* 185; F. Rose “Restitution for the Rescuer” (1989) 9 *O.J.L.S.* 167; F. Rose “Restitution and Maritime Law” in E. Schrage (ed.) *Unjust Enrichment and the Law of Contract*, p.367. See also F. Rose “General Average as Restitution” (1997) 113 *L.Q.R.* 569 for the argument that general average, a sub-species of maritime salvage, is restitutionary (but cf Sheehan, n.108 above, 275). For an equitable salvage case where an analogy is drawn with general average, see *Allison v Jenkins* [1904] 1 I.R. 341 at 346 per Porter M.R.. For an assessment of

connections between the two species, then if one species is restitutionary, this would lend support to the argument that the other species ought also to be so regarded.

On the other hand, although the equitable and maritime salvage liens share some similar elements, nevertheless, there are also some important differences between the two species of lien. In particular, the recognised categories of salvors are far more limited for the equitable lien than for the maritime lien,²⁰⁶ and the remedy available for the equitable lien is confined to the benefit conferred by the service whilst that for the maritime lien encompasses such benefit but goes far beyond it, to reward individual salvors and to encourage other salvages in the future.²⁰⁷ Furthermore, although there are some affinities between maritime salvage and restitution, the general view is that because maritime salvage is “a mixed question of private right and public policy”,²⁰⁸ reflected in the reward and encouragement aspects of the remedy, it is not entirely directed to the reversal of unjust enrichment;²⁰⁹ rather “the salvage ‘reward’ serves to compensate, reimburse, remunerate, and reward the salvor”.²¹⁰ Moreover, there are several judicial denials that maritime salvage can apply on land,²¹¹ which would – to say the least – tend against the assimilation of the equitable salvage lien with the maritime salvage lien. However, these are objections to allowing *strangers*, who would have the benefit of a maritime lien for rescues at sea, to have the benefit of a lien for rescues on land; but they do not impugn the much more limited equitable salvage lien where any intervention is not by strangers but by parties having an interest in the property preserved.

Overall, while there are plainly some affinities between the maritime and equitable liens, there are also some significant differences; the affinities

the extent to which the equitable salvage lien is properly restitutionary, see above, text with and in nn.149-156 above.

²⁰⁶ The equitable lien is available only to those with an interest in the property saved (see above, text with and in nn.62-77, 112) but not to strangers, whereas the maritime lien is available not only to those with such an interest but also to strangers who have in fact rendered the salvage services (see Goff & Jones, n.163 above, pp.472-473 [18.006]; Kennedy & Rose, n.129 above, chpt.6).

²⁰⁷ Goff & Jones, n.163 above, pp.478-483 [18.015]-[18.022]; Kennedy & Rose, n.129 above, p.647 [1399], pp.672-674 [1453]-[1455].

²⁰⁸ Goff & Jones, n.163 above, p.470 [18.001].

²⁰⁹ Birks, n.108 above, pp.307-308; Virgo, n.38 above, pp.320-321; Hedley, n.167 above, pp.61-62; Birks and Mitchell, n.121 above, p.583 [15.160].

²¹⁰ Kortmann, n.108 above, p.162.

²¹¹ *Nicholson v Chapman* (1793) 2 H. Bl. 254, 257; 126 E.R. 536, 538 *per* Lord Eyre C.J.; *Mason v Ship Blaireau* 6 U.S. (2 Cranch) 240 (US SC, 1840) 266 *per* Marshall C.J.; *Aitchison v Lohre* (1879) 4 App. Cas. 755 at 760 *per* Lord Blackburn; *Falcke v Scottish Imperial Insurance Company* (1886) 34 Ch.D. 234 (CA) 239 at 249 *per* Bowen L.J. (n. 113 above); *Sorrell v Paget* [1950] 1 K.B. 252 (CA) 260 *per* Bucknill L.J.: “salvage on land is not a recognised head of claim in the common law as it is by maritime law, sea”; 265 *per* Asquith L.J.: “‘salvage’ . . . strictly speaking, [is] not in law recoverable for services rendered on land, all; salvage by land is a legal chimera”; *The Tojo Maru* [1972] A.C. 242 (HL) 268 *per* Lord Reid; *The Goring* [1988] A.C. 831 (HL) 846, 857 *per* Lord Brandon (Lords Bridge, Fraser, Ackner and Oliver concurring): “salvage . . . unknown to the common law in respect of services voluntarily rendered to property in danger on land”.

should not be pushed too far, while the differences ought to be respected. On balance, then, while the two liens may be related, they are at best no more than long-lost cousins rather than siblings or even twins. In particular, the maritime salvage lien has little to contribute one way or the other to the discussion of whether the equitable salvage lien is or ought to be susceptible of a restitutionary explanation. Of course, the overwhelming preponderance of the argument on that discussion is that it would seem to be so susceptible. So also is the modern law of subrogation.²¹² Like salvage, it operates on a three-party fact-pattern. Here, too, therefore, there are resemblances giving rise to potential family connections which will be considered in the next section.

Equitable Salvage and Subrogation

That equitable salvage and subrogation are closely related emerges from a number of cases.²¹³ In *Lord Harborton v Bennett*,²¹⁴ Lord Hart L.C. held that a surety who pays a debt relating to land held by the principal debtor is entitled to be recouped out of the land,²¹⁵ which is a subrogation case which comes very close to salvage; *Carter v Carter*²¹⁶ is another example from the subrogation side of the line; and in *Patten v Bond*²¹⁷ Kay J. held that “the doctrine of subrogation applies: it is a clear salvage case”.²¹⁸ In *Hamilton v Denny*,²¹⁹ an example from the salvage side of the line, Lord Manners L.C. granted a salvage lien by analogy with subrogation principles. Indeed, as *Downer* demonstrates, the doctrines are often pleaded in parallel, though – since, in that case, the subrogation claim succeeded²²⁰ but the salvage lien

²¹² See, generally, C. Mitchell *The Law of Subrogation*.

²¹³ See, e.g. *In re Leslie, Leslie v French* (1883) 23 Ch.D. 552 at 560 *per* Fry L.J.; *Moore v Ulster Bank* (1909) 43 I.L.T.R. 136 at 138 *per* Meredith M.R.; *Foskett v McKeown* [2001] 1 A.C. 102 (HL) 118-119 *per* Lord Hope, 140 *per* Lord Millett; text with and in nn.95-104 *supra*. *Cp* R. Sutton, n.9 above, pp.79-86, 98-99.

²¹⁴ (1829) Beatty 386.

²¹⁵ But this principle will not apply where the creditor is a landlord and the principal debtor his tenant; in such circumstances, the remedy of a landlord when a tenant fails to pay the rent is to distrain or to forfeit the lease by re-entry; and the right of distress is neither a security within the meaning of s.5 of the 1856 Act nor a remedy which a surety paying the principal debtor’s debt is entitled to use: *B.S.E. Trading v Hands* (Court of Appeal, unreported, 23 May 1996).

²¹⁶ *Carter v Carter* (1829) 5 Bing. 406; 130 E.R. 1118; *In re Johnson* (1880) 15 Ch.D. 548; *cp* D. Wright “Proprietary Remedies and the Role of Insolvency” (2000) 23 *U.N.S.W.L.J.* 143 at 147 comparing “remedial subrogation and remedial equitable liens”.

²¹⁷ (1889) 60 L.T. 583.

²¹⁸ *ibid.*, 585; and this, despite a reference to *Falcke!* *Cp* A. Underhill and A. Cole *Fisher* (6th ed, n.9 above) pp.597-598 [1172].

²¹⁹ (1809) 1 Ball. & B. 199. *Ulster Railway v Banbridge, Lisburn and Belfast Railway* (1868) I.R. 2 Eq. 190 might be seen as a salvage claim very close to the *Wenlock* species of subrogation (see *Baroness Wenlock v The River Dee Company* (1884-1885) 10 A.C. 354; (1887) 19 Q.B.D. 155). In *Hewett v Court* (1983) 149 C.L.R. 639 (HCA) 645-646, Gibbs C.J. saw the purchaser’s lien as close to subrogation; see J. Phillips, n.127 above, 978-979. See also *In re Smith’s Settled Estates* [1901] 1 Ch. 689 at 691 *per* Buckley J. (n.21 above).

²²⁰ [1974] 2 All E.R. 1074 at 1082-1084 *per* Pennycuick V.C.; *Kumar v Dunning* [1989] Q.B. 193 at 196 *per* Browne-Wilkinson V.C..

claim failed, both quite properly – it also suggests that they are separate doctrines. Whether this is right, or whether salvage can be assimilated by subrogation, can be assessed in two ways: first, by testing the lien against the various explanations of subrogation which have been advanced;²²¹ and, then, by comparing and contrasting how the lien and subrogation might actually work on any given set of facts.

As to the various explanations of subrogation, on the view taken by Meagher, Gummow & Lehane,²²² subrogation largely follows a similar pattern in a series of otherwise unconnected islands: they are content to set out the categories, which, for them, are not closed, and to conclude that there are no universally applicable criteria for the intervention of equity in such cases. On this view, salvage might simply form another such island. But even if it does, this atomistic view of subrogation would merely accept the existence of salvage as another head of subrogation without in any sense explaining it. Something more is required if subrogation is to guide the development of or provide an explanation for salvage.

On another view of subrogation, taken by Hedley,²²³ and by Lord Salmon in *Orakpo v Manson Investments*,²²⁴ there are some relatively loose connections between the specific contexts but only at an abstract level: Hedley argues for a broad general principle that (subject to defences) the claimant can exercise whatever rights the creditor would, but for the claimant's payment, have had against the debtor;²²⁵ whilst Lord Salmon argued for an "entirely empirical . . . principle . . . that the doctrine will be applied only when the courts are satisfied that reason and justice demand that it should be".²²⁶ But this too can be dismissed as an explanation of salvage; notwithstanding *dicta* referring loosely to concepts of natural justice,²²⁷ nevertheless, because four precise conditions must be fulfilled to establish a salvage lien, it is not as open-textured as these views of subrogation suggest.

A third view of subrogation would seem to be open on the cases, that the claimant can be subrogated to the third-party's claims against the defendant because this was the presumed or actual intention of the parties.²²⁸ Whatever

²²¹ Of the various theories, none seems entirely satisfactory, and although one is in the ascendant at present, it doesn't really matter for the purposes of this analysis whether a universally accepted theory is just around the corner or not.

²²² R. Meagher, J. Heydon and M. Leeming *Meagher, Gummow and Lehane's Equity. Doctrines and Remedies* (4th ed., 2002) chpt. 9.

²²³ S. Hedley, n.200 above, chpt. 5.

²²⁴ [1978] A.C. 95 (HL).

²²⁵ *ibid.*, 119-120, 124-125, 131, 148; *cp* S. Stoljar, n.38 above, 174.

²²⁶ [1978] A.C. 95 at 110; *cf* Rotherham, n.102 above, pp.248-249; *In re TH Knitwear (Wholesale) Ltd* [1988] 1 Ch. 275 (CA) 286 *per* Slade L.J.; *Highland Finance v Sacred Heart College of Agriculture* [1998] 2 I.R. 180 (Ir SC) 192 *per* Blayney J.; C. Doyle "Reason and Justice in the Law of Subrogation" (1994) 12 *I.L.T. (ns)* 10; *cp Niru Battery Manufacturing v Milestone Trading (No. 2)* [2003] EWHC 1032 (Comm) (8 May 2003) [52]; [2003] 2 All ER (Comm) 365, 380 *per* Moore-Bick J. (*aff'd* on different grounds [2004] EWCA Civ. 487 (28 April 2004); [2004] 2 All ER (Comm) 289 (CA); below, n.232).

²²⁷ Above, text with and in n.13.

²²⁸ *E.g. Ghana Commercial Bank v Chandiram* [1960] A.C. 732 (PC) 745 *per* Lord Jenkins. See also *Patten v Bond* (1889) 60 L.T. 583 (Kay J); *Chetwynd v Allen*

the merits of this view of subrogation,²²⁹ there is no trace whatsoever in the cases of salvage being explained in intention terms, and it is not easy to see how any such explanation might work.

However, a fourth view of subrogation has recently emerged: for Mitchell²³⁰ and the House of Lords in *Banque Financière de la Cité v Parc (Battersea) Ltd*,²³¹ there are tight connections and similarities where the specific contexts are united and explained by the principle against unjust enrichment. Given that salvage may also be susceptible of an unjust enrichment explanation, it may therefore be possible to bring the salvage cases under subrogation's wing.

On the other hand, the unjust enrichment explanation of salvage arises independently of any analogy with subrogation²³² and works in its own terms; moreover, it is exceedingly difficult to see quite how subrogation can accommodate salvage. In subrogation, where one party, the claimant, subrogates to the position of a second *vis-à-vis* a third, the second party simply drops out of the picture and the claimant exercises the second party's rights against the third. Though there are three parties at the start of the story, there are only two at the end. Conversely, in salvage, where one party makes a payment to a second party for the benefit of the third, all three parties continue: for example, in the common chain of head-landlord, tenant, and sub-tenant, if the sub-tenant pays the tenant's outstanding rent to the head-landlord, there is no sense in which the sub-tenant takes over the landlord's rights against the tenant, the landlord necessarily continues in the picture, and the tenant – far from subrogating to the landlord's position²³³ – instead gets an entirely separate right, the lien over the tenant's estate which the payment has salvaged. There are three parties at the start of the story, and – unlike subrogation – there are still three at the end. Furthermore, the rights available to the tenant would be different under both doctrines. The salvage lien allows the tenant to have an interest over the head-lease, and ultimately to have it sold to realize the debt for which the lien is the security.

[1899] 1 Ch. 353 (Romer J); *Butler v Rice* [1910] 2 Ch. 277 (Warrington J); *Wylie v Carlyton* [1922] 1 Ch. 51 (Eve J); *Evandale Estates Pty v Keck* [1963] V.R. 647 (Hudson J); *Paul v Speirway* [1976] Ch. 220 (Oliver J); *Boodle Hatfield v British Films Ltd* [1986] F.L.R. 134 (Nicholls J.); *Highland Finance v Sacred Heart College of Agriculture* [1998] 2 I.R. 180 (Ir SC).

²²⁹ It has been the subject of serious criticism: Mitchell, n.212 above, pp.12-14; *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 A.C. 221 (HL) 234 *per* Lord Hoffmann.

²³⁰ See n.212 above.

²³¹ [1999] 1 A.C. 221 (HL).

²³² So that if the unjust enrichment view of subrogation were to fall (see the limitation of *Parc* in *Halifax Plc v Omar* [2002] EWCA Civ. 121 (20 February 2002) and *Eagle Star Insurance Co Limited v Karasiewicz* [2002] EWCA Civ. 940 (25 April 2002) rejected in *Cheltenham and Gloucester plc v Appleyard* [2004] EWCA Civ. 291 (15 March 2004) and *Filby v Mortgage Express (No 2)* [2004] EWCA Civ. 759 (18 June 2004)); see also *Niru Battery Manufacturing v Milestone Trading (No. 2)* [2004] EWCA Civ. 487 (28 April 2004) [27]-[28], [41], [53-56]; [2004] 2 All ER (Comm) 289 (CA) 298, 301, 304 *per* Clarke L.J.) the unjust enrichment view of salvage would not have to fall with it, or *vice versa*.

²³³ Though of course this might happen *as well*.

On the other hand, subrogation of the tenant to the head-landlord's position would not achieve the same end: in the ordinary course of events, the head-landlord possesses nothing to which the sub-tenant might seek to subrogate; all that the head-landlord possesses to which the sub-tenant might seek to subrogate is the right to forfeit the lease, the very thing the sub-tenant wants to avoid!

In sum, therefore, any analogy with subrogation should not be pushed too far; in particular, although both operate in three-party configurations, and each is capable of an explanation in terms of the reversal of unjust enrichment, nevertheless it would seem that salvage cannot be rationalised as a species of subrogation. Salvage makes sense in its own terms, regardless of what might be said about subrogation. There is, however, one characteristic which subrogation and salvage share in common, and which in the modern law always needs separate explication. It is the proprietary nature of the claim, and it is to this that the analysis in the next section is directed.

The Proprietary Consequences of the Equitable Salvage Lien

Recall the common chain – of head-landlord, tenant, and sub-tenant – with which this article began. If the sub-tenant discharged the tenant's liability to the head-landlord, the sub-tenant would then have various common law and statutory claims against the tenant,²³⁴ but these are personal claims and are therefore vulnerable to the tenant's insolvency.²³⁵ On the same facts, therefore, the equitable salvage lien, as a proprietary claim against the tenant's estate rather than as a personal claim against the tenant, is a very attractive proposition.²³⁶ Because of this very great difference between the underlying common law claims and the lien,²³⁷ such proprietary consequences – here as elsewhere²³⁸ – call for justification.

As with common law possessory liens, the maritime salvage lien and other species of equitable lien, there is a certain logic and practical efficiency in locating the equitable salvage lien in the property preserved by the salvage payment. Moreover, in the early cases it is unsurprising the find property lawyers seeking the remedy in the property preserved. For example, recall that in *O'Geran v McSwiney*, O'Sullivan M.R. asked rhetorically: “[w]hat is

²³⁴ See text with and in nn.1-8 above.

²³⁵ For example, the (unsuccessful) salvage and (successful) subrogation claims in *In re Downer Enterprises Ltd* [1974] 2 All E.R. 1074 (text with and in nn.140-142, 220 above) were motivated by insolvency. On the vulnerability of personal claims to an insolvency, see generally *Shanahan's Stamp Auctions v Farrelly* [1962] I.R. 386 (Ir HC) 444-445, 448 *per* Budd J.

²³⁶ See above, text with and after n.9 above. *Quaere* whether in *In re Berkeley Applegate* (above, text with and in nn.177-185), the priority afforded the liquidator was the equivalent of proprietary? If so, then it too would require similar justification.

²³⁷ See above, text with and in nn.119-126, 165, 168, where the personal common law claims were available, but the claimed proprietary liens were not.

²³⁸ See generally, S. Worthington *Proprietary Interests in Commercial Transactions*; R. Grantham “Doctrinal Bases for the Recognition of Proprietary Rights” (1996) 16 *O.J.L.S.* 561; Rotherham, n.102 above; E. O'Dell “Fermat's Last Theorem and the Context of Proprietary Remedies” (2005) 19 *T.L.I.* 97. Similarly, on justifying proprietary subrogation; see Mitchell, n.212 above, chpt. 3.

more reasonable than that this interest, so set up by the payment of the sub-tenant's money, should be made to answer for the money which has saved it? It appears to me that there are many heads of equity which do not rest on grounds so high".²³⁹ Again, in *Tharp*, Lord St Leonards L.C. held that the salvage payer "has a prior incumbrance to every other charge and interest, because, so far as any interest is left to anyone beyond the charge, it is acquired by that payment in the shape of redemption money".²⁴⁰

Moreover, if the salvage lien is accepted as responding to unjust enrichment, then all of this is reinforced by refracting the last three conditions necessary to generate a salvage lien through a restitutionary prism. Since they seem to be particularly burdensome fulfilments of the restitutionary requirement that the enrichment be at the expense of the claimant, they might even be presented as a sufficient justification to regard the remedy not only as restitutionary but also proprietary, not least because the salvage lien fulfils the leading modern tests for the imposition of a proprietary remedy. First, the authorities are dotted with comments as to the equity or justice of the case which could easily ground an unconscionability argument.²⁴¹ Second, the payer plainly does not take the risk of the insolvency of the party benefited – in the sub-tenant cases, for example, it is precisely because the sub-tenant does not take the risk of the tenant's insolvency that the sub-tenant pays the head-landlord.²⁴² Third, if non-assumption of risk needs to be combined with another element such as the swelling of the defendant's assets, this will by definition be satisfied where the salvage payment has saved the defendant's interest.²⁴³ Fourth, if proprietary liability is somehow tied into the defendant's awareness of the claimant's claim, the defendant whose interest has been saved by the claimant's payment will by definition be aware of the persistence of the interest thereby saved, and will thus by definition be aware "of the factors which are alleged to affect his conscience".²⁴⁴

In sum, then, though proprietary status is never easy to justify, there would nevertheless seem to be sound arguments in favour of the proprietary nature of the equitable salvage lien.

²³⁹ (1874-1875) 8 Ir. Rep. Eq. 501, 504; *aff'd* (1874-1875) 8 Ir. Rep. Eq. 624.

²⁴⁰ (1852) 2 Sm. & G. 578, 578-579; 65 E.R. 533, 533; *cp Hill v Browne* (1844) 6 Ir. Eq. Rep. 403 at 406 *per* Sugden L.C. (above, text with and in nn.87-88, 92).

²⁴¹ On this role for unconscionability, see Goff & Jones, n.163 above, pp.87-89 [2.010]-[2.014].

²⁴² On risk, see, *e.g. Space Investments v Canadian Imperial Bank of Commerce Trust Co* [1986] 1 W.L.R. 1072 (PC) 1074 *per* Lord Templeman; *cf In re Goldcorp Exchange* [1995] 1 A.C. 74 (PC) 104-105, 109 *per* Lord Mustill. See, generally, A. Burrows "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 *L.Q.R.* 412.

²⁴³ On risk combined with the swelling of the defendant's assets, see, *e.g. C. Rotherham*, n.102 above, pp.84-85.

²⁴⁴ On awareness, see *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 (HL) 705 at 709 *per* Lord Browne-Wilkinson. On the role of awareness in the salvage lien *cp e.g. In re Power's Policies* [1899] 1 I.R. 6 at 18-19 *per* Lord Ashbourne L.C..

The Irish Doctrine of Equitable Salvage: An Equitable Proprietary Restitutionary Lien

The equitable salvage lien, far from being an obscure Irish curiosity, has the capacity to shed important light on several important modern debates in the law relating to restitution for unjust enrichment.²⁴⁵ Since the four conditions necessary to establish the salvage lien align so easily with the principle against unjust enrichment, it follows that the lien ought to be understood as restitutionary. The salvage cases therefore stand as excellent examples of the unjust factor of necessity in themselves and support that understanding of analogous cases; they help to clarify the vexed question of when such restitutionary claims will be met with a voluntariness bar; and they fulfil modern tests for proprietary liability. Many equitable proprietary doctrines often have a restitutionary pattern or component, and yet prove on closer analysis not be exclusively restitutionary;²⁴⁶ however, the equitable salvage lien does not seem to be of this nature: if the analysis in this article is correct, then that lien is entirely directed to reversing unjust enrichment. On the other hand, despite affinities, the equitable salvage lien does not have sufficient connections with maritime salvage and subrogation to be assimilated with either. In conclusion, therefore, the Irish doctrine of equitable salvage provides an important modern example of an equitable proprietary restitutionary lien.

IV. Conclusion: Lost and Found – Equitable Salvage Liens and Unjust Enrichment

The principle of equitable salvage can give a person with an interest in property, who makes a payment which preserves a superior interest or the property itself which would otherwise have been lost or destroyed, a lien over the property or interest thereby preserved, provided that four conditions are satisfied. (i) The claimant must have been acting under compulsion or necessity or something akin to it, such as another cause of action in restitution. (ii) The claimant's actions must have had the effect of saving, for the benefit of everyone interested, property, or an interest or estate in property, which would otherwise have been lost. (iii) The claimant must have had a subsidiary rather than the main interest in the property or estate or interest thereby saved, or something akin to such an interest, such as a sufficient relationship with the owner of the main interest in the property or with the property itself. (iv) The claimant must have made the payment in that capacity, and not on the basis of some other capacity or in the

²⁴⁵ As well as supporting the analogical *Chapman* extension into the inherent jurisdiction.

²⁴⁶ The leading example is the constructive trust. The traditional atomistic view (see now M. Cope *Constructive Trusts*; A.J. Oakley *Constructive Trusts* (3rd ed., 1997)) had been challenged by the argument that the constructive trust is exclusively restitutionary (see D.M.W. Waters *The Constructive Trust*) but further analysis suggests that whilst restitution may be one reason why constructive trusts arise, there are also others (see G. Elias *Explaining Constructive Trusts*. But subrogation (see Mitchell, n.212 above) and resulting trusts (see R. Chambers *Resulting Trusts*) have recently both moved from atomistic to exclusively restitutionary explanations; *quaere* whether explanations admitting of other bases as well can be far away?

performance of another duty or obligation on which he or she is primarily liable.

This seems to have been a well-accepted doctrine in chancery courts in both Ireland and England until perhaps the middle of the nineteenth century. Thereafter, the equitable salvage lien for compulsion or necessitous intervention largely fell into desuetude in English – though not in Irish – law. In retrospect, the break-point in English law can be seen rather starkly in the career of Sir Edward Sugden. He was the leading chancery barrister of his day,²⁴⁷ and, as Lord Chancellor of Ireland, he decided three equitable salvage cases in the 1840s.²⁴⁸ Yet, in 1852, as Lord St Leonards L.C., after he had been translated to the Woolsack in Westminster, he decided what seems to have been the last English case on this doctrine²⁴⁹ before it was dismissed as an aberrant Irish doctrine and all but swept away²⁵⁰ as part of the late nineteenth century's general retrenchment against expansive applications of equitable liens. It was disparaged in leading textbooks or dropped from them completely.²⁵¹ All the same, the hostile *dicta* are manifestly overstated; the lien has flourished in the Irish courts; and authoritative traces have quietly persisted even in England – for example, the House of Lords treated of it without demur in 1918;²⁵² it continued to be applied in settled land cases;²⁵³ and the *Chapman* jurisdiction endured.²⁵⁴ These clusters of authority may yet enable – perhaps even herald – the revitalization of the equitable salvage lien as part of the recent, current and ongoing revival of liens generally.²⁵⁵

This development would both buttress and draw great reinforcement from an analysis of the lien in restitutionary terms, an analysis which is virtually compelled by the ready equivalence of the lien's four conditions and the principle against unjust enrichment, where the salvage cases have much to contribute to the modern law's understanding both of necessity as an unjust factor and of voluntariness as a bar to such a claim. This assimilation into the modern law of an equitable proprietary restitutionary salvage lien would commendably rescue from unwarranted obsolescence an ancient (but not archaic) doctrine of great substance and utility. A prince, once lost, may yet be found again!

²⁴⁷ See J. Getzler, n.94 above.

²⁴⁸ See n.92 above.

²⁴⁹ See n.93 above.

²⁵⁰ See nn.96-118 above.

²⁵¹ See nn.95, 115 above.

²⁵² See nn.134-137 above; admittedly, this was in an appeal from Ireland, though if their Lordships had concerns with the doctrine, one would have expected that they might have voiced them.

²⁵³ See nn.23-57, 64, 133 above.

²⁵⁴ See nn.41-57, 139 above.

²⁵⁵ See nn.127-128, 143-146 above.