THE ALL ENGLAND LAW REPORTS

1977

Volume 3

Consulting editor
R N G HARRISON BA
of Lincoln's Inn,
Barrister

Acting editor
WENDY SHOCKETT
of Gray's Inn,
Barrister

London
BUTTERWORTHS

ENGLAND: Butterworth & Co (Publishers) Ltd
London: 88 Kingsway, WC2B 6AB

AUSTRALIA: Butterworths Pty Ltd
Sydney: 586 Pacific Highway, Chatswood, NSW 2067
Also at Melbourne, Brisbane, Adelaide and Perth

CANADA: Butterworth & Co (Canada) Ltd
Toronto: 2265 Midland Avenue, Scarborough, M1P 4S1

NEW ZEALAND: Butterworths of New Zealand Ltd
Wellington: T & W Young Building, 77-85 Customhouse Quay

SOUTH AFRICA: Butterworth & Co (South Africa) (Pty) Ltd
Durban: 152-154 Gale Street

USA: Butterworth & Co (Publishers) Inc
Boston: 19 Cummings Park, Woburn, Mass 01801

ISBN 0 406 85119 0

Printed in Great Britain by R J Acford Ltd, Industrial Estate, Chichester, Sussex

REPORTERS

House of Lords

Mary Rose Plummer Barrister

Privy Council

Mary Rose Plummer Barrister

Court of Appeal, Civil Division

Mary Rose Plummer Barrister
Sumra Green Barrister
A S Virdi Esq Barrister
Gavin Gore-Andrews Esq Barrister
L I Zysman Esq Barrister
J H Fazan Esq Barrister

Court of Appeal, Criminal Division

N P Metcalfe Esq Barrister
Sepala Munasinghe Esq Barrister

Courts-Martial Appeals

N P Metcalfe Esq Barrister

Chancery Division

Jacqueline Metcalfe Barrister
Evelyn Budd Barrister
Diana Brahams Barrister

Queen's Bench Division

Jacqueline Charles Barrister
M Denise Chorlton Barrister
J M Collins Esq Barrister
Janet Harding Barrister
Lea Josse Barrister
Gwynedd Lewis Barrister
Deirdre McKinney Barrister
K Mydeen Esq Barrister
Gerald Price Esq Barrister

Family Division

Georgina Chambers Barrister

Revenue Cases

Rengan Krishnan Esq Barrister

Admiralty

N P Metcalfe Esq Barrister

Employment Appeal Tribunal

S H J Merali Esq Barrister

MANAGER

John W Wilkes Esq

House of Lords

The Lord High Chancellor: Lord Elwyn-Jones

Lords of Appeal in Ordinary

Viscount Dilhorne
Lord Wilberforce
Lord Diplock
Lord Simon of Glaisdale
(retired 30th September 1977)
Lord Salmon
Lord Edmund-Davies
Lord Fraser
Lord Russell of Killowen
Lord Keith of Kinkel
Lord Scarman
(appointed 30th September 1977)

Court of Appeal

The Lord High Chancellor

The Lord Chief Justice of England: Lord Widgery

The Master of The Rolls: Lord Denning

The President of the Family Division: Sir George Gillespie Baker

Lords Justices of Appeal

Sir John Megaw
Sir Denys Burton Buckley
Sir Edward Blanshard Stamp
Sir John Frederick Eustace Stephenson
Sir Alan Stewart Orr
Sir Eustace Wentworth Roskill
Sir Frederick Horace Lawton
Sir Leslie George Scarman
(appointed Lord of Appeal in Ordinary, 30th September 1977)
Sir Roger Fray Greenwood Ormrod
Sir Patrick Reginald Evelyn Browne
Sir Geoffrey Dawson Lane
Sir Reginald William Goff
Sir Nigel Cyprian Bridge
Sir Sebag Shaw
Sir George Stanley Waller
Sir James Roualeyn Hovell-Thurlow Cumming-Bruce
Sir Edward Walter Eveleigh
(appointed 30th September 1977)

Chancery Division

The Lord High Chancellor
The Vice-Chancellor: Sir Robert Edgar Megarry

Sir John Patrick Graham
Sir Peter Harry Batson Woodroffe Foster
Sir John Norman Keates Whitford
Sir John Anson Brightman
Sir Ernest Irvine Goulding
Sir Sydney William Templeman
Sir Raymond Henry Walton
Sir Peter Raymond Oliver
Sir Michael John Fox
Sir Christopher John Slade
Sir Nicolas Christopher Henry Browne-Wilkinson

Queen's Bench Division

The Lord Chief Justice of England

Sir Aubrey Melford Steed Stevenson
Sir Gerald Alfred Thesiger
Sir Basil Nield
Sir Bernard Joseph Maxwell MacKenna
(retired 30th September 1977)
Sir Alan Abraham Mocatta
Sir John Thompson
Sir Helenus Patrick Joseph Milmo
Sir Joseph Donaldson Cantley
Sir Hugh Eames Park
Sir Ralph Vincent Cusack
Sir Stephen Chapman
Sir John Ramsay Willis
Sir Graham Russell Swanwick
Sir Patrick McCarthy O'Connor
Sir John Francis Donaldson
Sir John Robertson Dunn Crichton
Sir Samuel Burgess Ridgway Cooke
Sir Bernard Caulfield
Sir Hilary Gwynne Talbot
Sir Edward Walter Eveleigh
(appointed Lord Justice of Appeal, 30th September 1977)
Sir William Lloyd Mars-Jones
Sir Ralph Kilner Brown
Sir Philip Wien
Sir Peter Henry Rowley Bristow
Sir Hugh Harry Valentine Forbes
Sir Desmond James Conrad Ackner
Sir William Hugh Griffiths
Sir Robert Hugh Mais
Sir Neil Lawson
Sir David Powell Croom-Johnson
Sir Tasker Watkins VC
Sir John Raymond Phillips
Sir Leslie Kenneth Edward Boreham
Sir John Douglas May
Sir Michael Robert Emanuel Kerr
Sir Alfred William Michael Davies
Sir John Dexter Stocker
Sir Kenneth George Illtyd Jones
Sir Peter Richard Pain
Sir Kenneth Graham Jupp
Sir Robert Lionel Archibald Goff
Sir Stephen Brown
(transferred from Family Division, 3rd October 1977)
Sir Gordon Slynn
Sir Roger Jocelyn Parker
Sir Ralph Brian Gibson
Sir Derek Hodgson
(appointed 30th September 1977)

Family Division

The President of the Family Division

Sir Charles William Stanley Rees
Sir Reginald Withers Payne
Sir Neville Major Ginner Faulks
Sir John Brinsmead Latey
Dame Elizabeth Kathleen Lane
Sir Henry Vivian Brandon
Sir Robin Horace Walford Dunn
Sir Alfred Kenneth Hollings
Sir John Lewis Arnold
Sir Charles Trevor Reeve
Sir Francis Brookes Purchas
Sir Haydn Tudor Evans
Dame Rose Heilbron
Sir Stephen Brown
(transferred to Queen's Bench Division, 3rd October 1977)
Sir Brian Drex Bush
Sir Alfred John Balcombe
Sir John Kember Wood
(appointed 30th September 1977)

CITATION

These Reports are cited thus:

[1977] 3 All ER

REFERENCES

These reports contain references, which follow after the headnotes, to the following major works of legal reference described in the manner indicated below.

Halsbury's Laws of England

The reference 35 Halsbury's Laws (3rd Edn) 366 para 524, refers to paragraph 524 on page 366 of volume 35 of the third edition, and the reference 2 Halsbury's Laws (4th Edn) para 1535, refers to paragraph 1535 on page 708 of volume 2 of the fourth edition of Halsbury's Laws of England.

Halsbury's Statutes of England

The reference 5 Halsbury's Statutes (3rd Edn) 302 refers to page 302 of volume 5 of the third edition of Halsbury's Statutes of England.

English and Empire Digest

References are to the replacement volumes (including reissue volumes) of the Digest, and to the continuation volumes of the replacement volumes.

The reference 44 Digest (Repl) 144, *1240*, refers to case number 1240 on page 144 of Digest Replacement Volume 44.

The reference Digest (Cont Vol B) 287, *7540b*, refers to case number 7540b on page 287 of Digest Continuation Volume B.

The reference 28(1) Digest (Reissue) 167, *507*, refers to case number 507 on page 167 of Digest Replacement Volume 28(1) Reissue.

Halsbury's Statutory Instruments

The reference 12 Halsbury's Statutory Instruments (Third Reissue) 125, refers to page 125 of the third reissue of volume 12 of Halsbury's Statutory Instruments; references to subsequent reissues are similar.

Cases reported in volume 3

Orakpo v Manson Investments Ltd and others

HOUSE OF LORDS
LORD DIPLOCK, VISCOUNT DILHORNE, LORD SALMON, LORD EDMUND-DAVIES AND LORD KEITH OF KINKEL
4th, 5th, 9th MAY, 6th JULY 1977

Moneylender – Security – Enforcement – Security given by the borrower or his agent – Subrogated rights – Unenforceable loan contract – Sum advanced used to pay off existing charge on property – Term of contract that loan to be secured by charge on property in respect of which loan made – Charge executed but unenforceable – Lender entitled by subrogation to security represented by existing charge on property – Whether subrogated right a 'security given by the borrower' – Whether subrogated right enforceable – Moneylenders Act 1927, s 6(1).

Subrogation – Circumstances in which doctrine applicable – Unenforceable loan contract – Charge executed pursuant to contract unenforceable – Moneylender's contract – Sum advanced pursuant to contract used to pay off existing charge – Moneylender's contract failing to comply with statutory requirements – Contract and charge executed pursuant thereto valid but unenforceable – Common intention of parties that sum advanced should be used to pay off existing charge – Whether, having acquired valid but unenforceable charge, moneylender entitled to be subrogated to security represented by existing charge.

Subrogation – Circumstances in which doctrine applicable – Loan used to pay off existing debt to third party – No express contractual term that moneys advanced should be applied in any particular manner – Common intention of parties that moneys advanced should be used to pay off existing debt – Moneys in fact used for that purpose – Whether sufficient to entitle lender to be subrogated to charge in favour of third party.

Moneylender – Limitation of action – Proceedings for recovery of money lent by moneylender – Proceedings for enforcement of security taken in respect of loan made by moneylender – Unenforceable loan contract – Loan and charge securing loan unenforceable – Subrogation of moneylender to rights of paid-off creditor – Action by moneylender in exercise of subrogated rights to recover amount of loan – Whether 'proceedings . . . for the recovery . . . of . . . money lent' by moneylender – Whether 'proceedings . . . for the enforcement of any . . . security taken . . . in respect of any loan made' by moneylender – Whether proceedings subject to 12 month limitation period – Moneylenders Act 1927, s 13(1).

On various dates in 1972 and 1973 the borrower entered into eight contracts of loan with the lenders. The purpose of each of those contracts was to enable him to acquire a good freehold or long leasehold title to eight different dwelling-houses which he proposed to convert for multiple occupation. Each loan was to be secured by a first legal charge in favour of the lenders on the property in respect of which the loan was made. In two cases the money was required to pay on completion the purchase price of houses which the borrower had contracted to purchase. In other cases it was required to pay off prior legal or equitable charges on the property. In respect of each of the contracts of loan it was the common intention of both parties that the money lent should be so applied and, to ensure that, completion of the various transactions by which the title of the borrower was to be perfected and the new legal charges in favour of the lenders executed, were carried out on behalf of both parties by their solicitors pursuant to certain instructions and undertakings. Each loan was applied

to its intended purpose; the borrower acquired legal title to the properties and the legal charges in favour of the lenders, as mortgagees, were duly executed. Through inadvertence, however, the written memorandum of each contract left out one of the terms of the contract. That omission made the contracts for the repayment of the loans and the legal charges given as security for the loans unenforceable under s 6(1)[a] of the Moneylenders Act 1927. The borrower, who had fallen behind in his interest payments, brought an action for a declaration that each of the contracts was unenforceable, and for an injunction restraining the lenders from taking steps to sell or otherwise dispose of the properties subject to the legal charges. The lenders counterclaimed as alternative remedies either (1) repayment of the loans and interest or (2) a declaration that they were entitled to a lien on the properties for such part of the money lent as had been applied to defray the purchase price or to redeem prior charges affecting the properties in question. Walton J held that since the written memorandum did not contain all the terms of the contracts both the contracts and the legal charges were unenforceable. Nevertheless, on the counterclaim, he held that to the extent that the money lent had been applied to defray the purchase price or to pay off prior charges affecting the properties, the lenders were entitled by subrogation to the security represented by the previously existing unpaid vendors' liens and equitable charges. He accordingly declared that the lenders were entitled to such liens and to such equitable charges and ordered that the properties be sold to enable those securities to be realised. The borrower appealed against the judgment given against him on the counterclaim. The Court of Appeal[b] allowed the appeal on the ground that the counterclaim was time-barred under s 13(1)[c] of the 1927 Act, in that the cause of action in respect of the alleged subrogated securities had arisen more than 12 months before the date on which the counterclaim had been served, and that the counterclaim to enforce the securities to which the lenders had been subrogated were 'proceedings . . . for the recovery by a moneylender of any money lent by him', within s 13(1). The lenders appealed.

Held – The appeal would be dismissed for the following reasons—

(i) (per Lord Diplock, Lord Salmon, Lord Edmund-Davies and Lord Keith of Kinkel) The lenders were not entitled to enforce the subrogated rights which they had asserted against the borrower because—

(a) (per Lord Diplock) If it was not a term of any of the contracts between the borrower and the lenders that the moneys advanced to the borrower should be used by him to discharge his secured liabilities to the chargees or vendors of the properties in question, the lenders were not entitled to be subrogated to the secured rights of the chargees and vendors by reason of the fact that it was the expectation of the parties that the moneys advanced should be so used, even though the moneys had been so used (see p 7 *h*, p 8 *c* and *d* and p 9 *e*, post).

(b) (per Lord Salmon and Lord Keith of Kinkel) Subrogation was the legal result of carrying out the contract entered into whether it was an express term of the contract that the money lent should be used to pay off the existing charges or it was the common intention of the parties that the money should be so used, for in the latter case the common intention would be a term of the contract. If (Lord Diplock concurring) such a term had been incorporated in the contract, not only should it have been expressly set out in the memorandum, but also the subrogated rights constituted a 'security given by the borrower', within s 6(1), and therefore the defects in the memorandum had the effect under s 6(1) of rendering unenforceable not only the legal mortgages taken by the lenders, but also the secured rights to which they had subsequently been subrogated (see p 8 *c* to *e*, p 12 *d* and *g*, p 13 *d* and *e*, p 20 *e* to p 21 *c* and *h* to p 22 *a*, post).

a Section 6(1) is set out at p 18 *g* and *h*, post

b [1977] 1 All ER 666

c Section 13(1), so far as material, is set out at p 18 *j*, post

(c) (per Lord Salmon and Lord Edmund-Davies) The contract and legal charges obtained by the lenders, although unenforceable under s 6, were nonetheless valid and the lenders were not entitled to claim relief in equity under the doctrine of subrogation for, by doing so, they could not avoid setting up their own breach of s 6 to support that claim. In any event, since the legal charges obtained by the lenders were valid, although unenforceable, once those charges had been duly executed and delivered to the lenders, the latter were to be treated as having abandoned their claim to the subrogated rights for they had obtained all that they had bargained for under the contract (see p 13 *a* to *c*, p 15 *h* and p 16 *c* to *f* and *h* to p 17 *b*, post).

Dictum of Lord Radcliffe in *Kasumu v Baba-Egbe* [1956] 3 All ER at 270, *Hanyet Securities Ltd v Mallett* [1968] 2 All ER 960 and *Capital Finance Co Ltd v Stokes* [1968] 3 All ER 625 applied.

Nottingham Permanent Benefit Building Society v Thurstan [1900-3] All ER Rep 830 distinguished.

Congresbury Motors Ltd v Anglo-Belge Finance Co Ltd [1970] 3 All ER 385 overruled.

(ii) In any event, since the lenders' cause of action had accrued more than 12 months before the date of the counterclaim, the latter was time-barred under s 13(1) of the 1927 Act because (Lord Diplock dissenting) the words 'proceedings . . . for the recovery . . . of . . . . money lent' in s 13(1) were not limited to proceedings for the recovery of the debt itself but included all proceedings by which, either directly or indirectly, the recovery of the money lent was sought; alternatively (per Lord Diplock, Lord Salmon and Lord Keith of Kinkel), the equitable charges by subrogation were securities taken in respect of the lenders' loan and the counterclaim therefore constituted 'proceedings . . . for the enforcement of any . . . security taken . . . in respect of any loan made by' the lenders, within s 13(1) (see p 8 *e*, p 9 *f*, p 10 *j* to p 11 *a* and *e f*, p 12 *a* and *d*, p 13 *e* and *f*, p 17 *g* to p 18 *a* and p 22 *c* to *g*, post); *Re Martin's Mortgage Trusts, C & M Matthews Ltd v Marsden Building Society* [1951] 1 All ER 1053 applied.

Decision of the Court of Appeal [1977] 1 All ER 666 affirmed on other grounds.

Notes

For the equitable doctrine of subrogation, see 16 Halsbury's Laws (4th Edn) para 1438, and for a case on the subject, see 20 Digest (Repl) 542, *2521*.

For the necessity for a note or memorandum of a moneylender's contract, see 27 Halsbury's Laws (3rd Edn) 31, para 49, and for cases on the subject, see 35 Digest (Repl) 241-243, *401-426*.

For the limitation of actions to recover money lent by a moneylender, see 27 Halsbury's Laws (3rd Edn) 40, 41, para 72.

For the Moneylenders Act 1927, ss 6, 13, see 22 Halsbury's Statutes (3rd Edn) 709, 717.

The 1927 Act is to be repealed by the Consumer Credit Act 1974, s 192(3)(*b*), Sch 4, Part I, as from a date to be appointed under s 192(4).

Cases referred to in opinions

Brocklesby v Temperance Building Society [1895] AC 173, 64 LJCh 433, 72 LT 477, 59 JP 676, 11 R 159, HL, 35 Digest (Repl) 431, *1235*.

Capital Finance Co Ltd v Stokes, Re Cityfield Properties Ltd [1968] 3 All ER 625, [1969] 1 Ch 261, [1968] 3 WLR 899, 19 P & CR 791, CA, Digest (Cont Vol C) 635, *590a*.

Cohen v J Lester Ltd [1938] 4 All ER 188, [1939] 1 KB 504, 108 LJKB 276, 159 LT 570, 35 Digest (Repl) 245, *435*.

Congresbury Motors Ltd v Anglo-Belge Finance Co Ltd [1970] 3 All ER 385, [1971] Ch 81, [1970] 3 WLR 683, 21 P & CR 889, CA; *affg* [1969] 3 All ER 545, [1970] Ch 294, [1969] 3 WLR 502, Digest (Cont Vol C) 635, *660a*.

Egan v Langham Investments Ltd [1938] 1 All ER 193, [1938] KB 667, 107 LJKB 337, 159 LT 118, 35 Digest (Repl) 242, *417*.

Hanyet Securities Ltd v Mallett [1968] 2 All ER 960, [1968] 1 WLR 1265, CA, Digest (Cont Vol C) 711, *436a*.

Holiday Credit Ltd v Erol [1977] 2 All ER 696, [1977] 1 WLR 704, HL.
Kasumu v Baba-Egbe [1956] 3 All ER 266, [1956] AC 539, [1956] 3 WLR 575, PC, 35 Digest (Repl) 243, **239*.
Lodge v National Union Investment Co Ltd [1907] 1 Ch 300, [1904-7] All ER Rep 333, 76 LJCh 187, 96 LT 301, 35 Digest (Repl) 236, *348*.
Marlow v Pitfeild (1719) 1 P Wms 558, 2 Eq Cas Abr 516, 24 ER 516, 28(2) Digest (Reissue) 697, *335*.
Martin's Mortgage Trusts, Re, C & M Matthews Ltd v Marsden Building Society [1951] 1 All ER 1053, [1951] Ch 758; *affg* [1951] Ch 378, CA, 35 Digest (Repl) 585, *2585*.
Nottingham Permanent Benefit Building Society v Thurstan [1903] AC 6, [1900-3] All ER Rep 830, 72 LJCh 134, 87 LT 529, 67 JP 129, HL; *affg* [1902] 1 Ch 1, CA, 32 Digest (Repl) 348, *707*.
Wylie v Carlyon [1922] 1 Ch 51, 91 LJCh 93, 126 LT 225, 8(2) Digest (Reissue) 635, *130*.

Appeal

This was an appeal by the defendants, Manson Investments Ltd ('the lenders'), against the judgment of the Court of Appeal[1] (Buckley, Orr and Goff LJJ) dated 3rd December 1976 allowing an appeal by the plaintiff, Ikechukwu Ifoloma Orakpo ('the borrower'), against the judgment of Walton J dated 23rd February 1976 whereby (1) he granted the declaration claimed by the borrower that eight loan contracts between the borrower and the lenders, and the securities given by the borrower to the lenders thereunder were unenforceable pursuant to the Moneylenders Act 1927; but (2), on the lenders' counterclaim, he declared that the lenders were entitled by subrogation to certain liens and charges over the property of the borrower. The judgment of Walton J was given in an action in which the lenders were the defendants and the borrower was the plaintiff and to which Landon & Co (a firm) and Cyril Ralton & Co (a firm) were joined as third parties by the lenders and Landon & Co were joined as fourth parties to Cyril Ralton & Co. The facts are set out in the opinion of Lord Diplock.

G B H Dillon QC and *E C Evans-Lombe* for the lenders.
The borrower appeared in person.

Their Lordships took time for consideration.

6th July. The following opinions were delivered.

LORD DIPLOCK. My Lords, the Moneylenders Acts 1900 to 1927, which are to be construed as one Act, were designed to protect unsophisticated borrowers from being overreached by unscrupulous moneylenders. As the present case shows, however, they are capable of being used by unscrupulous borrowers to avoid paying their just debts to moneylenders who, in the words of the learned judge referring to the appellants in the instant case, did not do 'anything which was not perfectly straightforward, agreed in advance and perfectly understood by the borrower, who . . . is well able to look after himself in these matters'.

There are three main ways in which borrowers from licensed moneylenders such as the appellants are protected by the Moneylenders Acts 1900 to 1927: unconscionable bargains may be reopened by the court; the full terms of the contract must be set down in writing signed by the borrower before the loan is made; and a 12 months limitation period applies to moneylenders' actions.

1. The provision for reopening unconscionable bargains ante-dates the other two protective measures, and is to be found in s 1 of the Moneylenders Act 1900 which provides that—

1 [1977] 1 All ER 666

> 'where proceedings are taken in any court by a moneylender for the recovery of any money lent . . . or the enforcement of any agreement or security made or taken . . . in respect of money lent,'

the court may relieve the borrower of his liability for any amount which the court regards as excessive and—

> 'may re-open the transaction . . . and may set aside, either wholly or in part . . . any security given or agreement made in respect of money lent by the moneylender.'

2. The necessity for a written memorandum of all the terms of the contract was imposed by s 6(1) of the Moneylenders Act 1927 which provides:

> 'No contract for the repayment by a borrower of money lent to him . . . by a moneylender . . . or for the payment by him of interest on money so lent and no security given by the borrower . . . in respect of any such contract shall be enforceable . . .'

unless a note or memorandum in writing containing 'all the terms of the contract' was signed by the borrower before the money was lent or before the security was given.

3. The 12 months limitation period was created by s 13(1) of the 1927 Act, which provides:

> 'No proceedings shall lie for the recovery by a moneylender of any money lent by him . . . or of any interest in respect thereof, or for the enforcement of any agreement made or security taken . . . in respect of any loan made by him, unless the proceedings are commenced before the expiration of twelve months from the date on which the cause of action accrued . . .'

It is to be observed that s 13 of the 1927 Act reflects the language of s 1 of the 1900 Act in drawing a distinction between proceedings for the recovery of money lent and proceedings for the enforcement of any agreement or security in respect of money lent. So do the other sections, ss 10 and 11 of the 1927 Act, which refer to legal proceedings by a moneylender.

Again, s 6 of the 1927 Act, which deals with enforceability, draws a similar distinction between the contract for the repayment by the borrower of money lent and interest and any security given by the borrower in respect of such contract. While it is true that to proceed to enforce a security which is held for money lent provides a means by which that money may be recovered and in some contexts such proceedings might be capable of falling within the description 'proceedings for the recovery of money lent', in the context of s 13 which refers specifically both to proceedings for the recovery of money lent and to proceedings for the enforcement of a security, I do not find it possible to construe the former phrase so widely as to include the kind of proceedings referred to in the latter. To do so would be to render otiose any reference in the section to proceedings for the enforcement of any security.

The instant case is concerned with proceedings which on the face of them were proceedings by a moneylender for the enforcement of a security. The circumstances are set out in detail in the judgments of the Court of Appeal[1].

In brief, on various dates in 1972 and 1973 the respondent ('the borrower') entered into eight contracts of loan with the appellants ('the lenders'). The purpose of each of these contracts was to enable him to acquire a good freehold or long leasehold title to eight different dwelling-houses which he proposed to convert for multiple occupation. Each loan was to be secured by a first legal charge in favour of the lenders on the property in respect of which the loan was made. In two cases the money was required to

1 [1977] 1 All ER 666, [1977] 1 WLR 347

pay on completion the purchase price of houses which the borrower had contracted to purchase. In other cases it was required to pay off prior legal or equitable charges on the property. In respect of each of the contracts of loan it was the common intention of both parties that the money lent should be so applied, and to ensure this, completion of the various transactions by which the title of the borrower was to be perfected and the new legal charges in favour of the lenders executed were carried out on behalf of both parties by their solicitors pursuant to instructions and undertakings of which the details are to be found in the judgments of the Court of Appeal. Each loan was applied to its intended purpose; the borrower acquired legal title to the properties and the legal charges in favour of the lenders, as mortgagees, were duly executed.

Through inadvertence, however, the written memorandum of the contracts left out one of their terms, of which, however, the borrower was well aware and had expressly consented to. Nevertheless, under s 6 of the 1927 Act this omission as is now conceded by the lenders made the contracts for the repayment of the loans and the legal charges in respect of the loans unenforceable. The borrower who had fallen behind in his interest payments brought an action for a declaration that each of the contracts was unenforceable, and for an injunction restraining the lenders from taking steps to sell or otherwise dispose of the properties subject to the legal charges. The lenders counterclaimed as alternative remedies either (1) repayment of the loans and interest or (2) a declaration that they were entitled to a lien on the properties for such part of the money lent as was applied to defray the purchase price or to redeem prior charges affecting the properties in question.

The case was tried by Walton J who held that the written memorandum did not contain all the terms of the contracts and that accordingly both the contracts and the legal charges were unenforceable. Nevertheless, on the counterclaim, he held that this was governed by the decision of the Court of Appeal in *Congresbury Motors Ltd v Anglo-Belge Finance Co Ltd*[1] and that to the extent that the money lent had been applied to defray the purchase price or to pay off prior charges affecting the properties, the lenders were entitled by subrogation to the security represented by the previously existing unpaid vendors' liens and equitable charges. He accordingly declared that the lenders were entitled to such liens and to such equitable charges and ordered that the properties be sold to enable the securities to be realised. The borrower appealed against the judgment against him on the counterclaim. The Court of Appeal, which was also bound by the *Congresbury Motors* case[1], allowed the borrower's appeal on the ground that the counterclaim was time-barred under s 13 of the Moneylenders Act 1927. They held, correctly in my view, that the cause of action in respect of the alleged subrogated securities arose at the time that the moneys were applied to paying off the purchase price or redeeming the prior equitable charges, as the case might be; and that the date of the proceedings was the date on which the counterclaim was served. This was more than 12 months after the moneys were so applied. They held that the counterclaim to enforce the securities to which the lenders were subrogated were 'proceedings ... for the recovery by a moneylender of any money lent by him' within the meaning of s 13(1) of the 1927 Act.

For reasons which I have already given, I do not think that, in the context of s 13(1) of the 1927 Act, it is permissible to construe 'proceedings for the recovery of money lent' so widely as to include proceedings for the enforcement of a security. Nevertheless I would uphold the judgment of the Court of Appeal on another ground.

The Court of Appeal was bound by its own decision in *Congresbury Motors Ltd v Anglo-Belge Finance Co Ltd*[1] which on those facts that are relevant to the issue which your Lordships have to decide is in my view indistinguishable from the instant case. In the *Congresbury Motors* case[1] the moneylender had paid directly to the vendor the purchase price of property which the borrower had contracted to buy and the

1 [1970] 3 All ER 385, [1971] Ch 81

borrower had executed in favour of the moneylender a legal charge on the property for the amount so paid. The memorandum of the contract under s 6 was defective; the contract was unenforceable; so was the legal charge. As in the instant case the moneylender brought proceedings by way of counterclaim to enforce the unpaid vendor's lien to which he claimed to have been subrogated. No question of limitation under s 13 was raised; but it was contended by the borrower that the vendor's lien by subrogation was unenforceable under s 6 as a security given by the borrower in respect of a contract for the repayment of money lent to him by a moneylender. The Court of Appeal, applying by analogy the decision in *Nottingham Permanent Benefit Building Society v Thurstan*[1], held that the lien by subrogation did not fall within these words. Probably it was for this reason that in the instant case the Court of Appeal did not go on to consider whether the lien by subrogation did not also fall within the third limb of s 13 as a security taken by a moneylender in respect of a loan made by him.

Your Lordships, on the other hand, are free to hold that the judgment of the Court of Appeal in the *Congresbury Motors* case[2] is wrong. For reasons which I shall now attempt to give I think it was and ought to be treated as overruled.

My Lords, there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based on the civil law. There are some circumstances in which the remedy takes the form of 'subrogation', but this expression embraces more than a single concept in English law. It is a convenient way of describing a transfer of rights from one person to another, without assignment or assent of the person from whom the rights are transferred and which takes place by operation of law in a whole variety of widely different circumstances. Some rights by subrogation are contractual in their origin, as in the case of contracts of insurance. Others, such as the right of an innocent lender to recover from a company moneys borrowed ultra vires to the extent that these have been expended on discharging the company's lawful debts, are in no way based on contract and appear to defeat classification except as an empirical remedy to prevent a particular kind of unjust enrichment.

This makes particularly perilous any attempt to rely on analogy to justify applying to one set of circumstances which would otherwise result in unjust enrichment a remedy of subrogation which has been held to be available for that purpose in another and different set of circumstances.

One of the sets of circumstances in which a right of subrogation arises is when a liability of a borrower B to an existing creditor C secured on the property of B is discharged out of moneys provided by the lender L and paid to C either by L himself at B's request and on B's behalf or directly by B pursuant to his agreement with L. In these circumstances L is prima facie entitled to be treated as if he were the transferee of the benefit of C's security on the property to the extent that the moneys lent by L to B were applied to the discharge of B's liability to C. This subrogation of L to the security on the property of B is based on the presumed mutual intentions of L and B; in other words where a contract of loan provides that moneys lent by L to B are to be applied in discharging a liability of B to C secured on property, it is an implied term of that contract that L is to be subrogated to C's security.

The mere fact that money lent has been expended on discharging a secured liability of the borrower does not give rise to any implication of subrogation unless the contract under which the money was borrowed provides that the money is to be applied for this purpose: *Wylie v Carlyon*[3]. Furthermore, even where the contract does so provide, the implication may be displaced by the presence in the contract of express terms which are inconsistent with the acquisition or retention by the lender of a right of subrogation. An express provision that the borrower shall create a legal charge on

1 [1903] AC 6, [1900-3] All ER Rep 830
2 [1970] 3 All ER 385, [1971] Ch 81
3 [1922] 1 Ch 51

the property in favour of the lender as security for the money lent does not necessarily displace the implication that pending the execution of the legal charge the lender is to be subrogated to any equitable security on the property in discharge of which his loan is to be applied. On the execution of the legal charge, however, the equitable charge by subrogation will merge in the higher ranking legal charge in favour of the same chargee.

Much as I should like to be able to do so, there seem to me to be insuperable obstacles to relying on this particular kind of subrogation to mitigate the harshness to the moneylender and the undeserved enrichment of the borrower which would otherwise follow from a technical failure to observe the provision of s 6 of the Moneylenders Act 1927.

In the first place the origin of the right of subrogation is the contract *between the borrower and the moneylender* for the loan of money by the moneylender to the borrower. The contract either will or will not incorporate a term that the moneys lent shall be applied in discharging a security on the property of the borrower in favour of a third party. If they do, the term that the moneys shall be so applied must be included in the note or memorandum under s 6. If they do not and there is no contractual obligation on the borrower to apply the moneys in this way (as was held to be the case in *Hanyet Securities Ltd v Mallet*[1]), the expectation of the parties that the money will in fact be used by the borrower for this purpose does not give rise to any right of subrogation in the moneylender even if the money is so applied.

My Lords, if one compares these two contracts, one of which does and the other does not have the legal effect of discharging a security on the property of the borrower in favour of a third party and in its stead creating a like security in favour of the moneylender, it seems to me that the security in favour of the moneylender created pursuant to the former contract is properly described, for the purposes of s 6, as a security given by the borrower in respect of a contract for the repayment of money lent to him; for the purposes of s 13, as a security taken by a moneylender in respect of a loan made by him; and, for the purposes of s 1 of the 1900 Act, as a security given or taken in respect of money lent.

So far I have been considering a contract of loan which contains no provision for the grant to the moneylender of a security of higher rank than that to be discharged by the money lent. In the instant case as in *Congresbury Motors v Anglo-Belge Finance Co Ltd*[2] a legal charge on the borrower's property in favour of the lenders was to be executed as near as may be simultaneously with the discharge of the previous equitable charge in favour of a third party. The effect of failure to comply with the provision of s 6 is not to make void ab initio the contract of loan and any security given by the borrower in respect of it, but to make them unenforceable, and by s 17 they may even become enforceable in the hands of an assignee for value without notice of any defect due to the operation of the 1927 Act.

Agreements or securities that are unenforceable are not devoid of all legal effect. Payments made voluntarily pursuant to their terms are not recoverable and I regard it as open to question whether the unenforceability of a higher ranking security which is not void ab initio excludes the doctrine of the merger in it of a lower ranking security in respect of the same charge, at any rate when the higher ranking security remains potentially enforceable in the hands of an assignee.

I mention this because in *Nottingham Permanent Benefit Building Society v Thurstan*[3] which the Court of Appeal applied by analogy in the *Congresbury Motors* case[2] the relevant statute, the Infants Relief Act 1874, made the contracts of loan to infants void ab initio, not merely unenforceable. Contracts for purchase of land made by an infant, however, were voidable only and could be adopted by the infant on coming

1 [1968] 2 All ER 960, [1968] 1 WLR 1265
2 [1970] 3 All ER 385, [1971] Ch 81
3 [1903] AC 6, [1900-3] All ER Rep 830