Now, are the appellants such *tiers?* There can be no doubt that the position of the creditors of an insolvent as regards his rights is not identical with his, nevertheless the general rule unquestionably is that the creditors represent the debtor. The exception to this rule is when the creditor has done something in fraud of his creditor, or something which the law deems to be fraud. I therefore think, that in the absence of any allegation of fraud, the appellants cannot go behind the declarations of the debtor they represent, to upset the rights of one they admit to be an innocent holder. In a word the subsequent insolvency of Bartley cannot affect Moat. It seems to me that this view of the case recommends itself so completely to the understanding, that I should not have considered it necessary to go further had the case been submitted to me alone in the first instance. But out of deference to the opinions of my learned colleagues, to that of the learned Judge who dissented in Review, and to that of the learned Judge of first instance, I feel constrained to offer some observations on the opposite side of the question.

In support of appellants' pretensions it is said that although the view just expressed is generally true, where the law prescribes a certain mode of doing a thing, that mode must be followed, that this is a conventional subrogation, that consequently the payment of the debt, without a simultaneous subrogation, extinguished the hypothec, and that it could not be revived, whatever might be declared in the deed. And here I would make the preliminary remark, that it seems to me that if the payment annulled anything it was the debt; and to say that it annulled the hypothec and left the debt subsisting is to get into an illogical position. This is so self-evident that it hardly requires authority to support it, nevertheless, I may quote what Toullier says on the point:—"Si le paiement éteint la créance, et tous les droits des créanciers, dès l'instant où le paiement est fait, le créancier est sans pouvoir pour transmettre ou céder des droits qu'il n'a plus."—(Vol. 7, p. 137). "Celui qui a payé ne peut plus avoir contre le débiteur que l'action *negotiorum gestorum*, ou telle autre action nouvelle, qui n'a plus aucun rapport avec celle du créancier."—*Ib.*

Again, it seems perfectly clear that appellants' pretension cannot extend to what was unquestionably paid by Mulholland & Baker, for, as has been already said, they were the *cautions* of Bartley, and having an interest to pay the debt, by its payment they were subrogated *de plano* in all the rights of Hamilton. The only question then that remains is as to the amount of $11,000 paid by Bartley's cheque. We have, therefore, only to consider paragraph 2 of Art. 1155 C. C. It is evident that with paragraph 1 we have nothing to do in this case. Paragraph 1 only provides for the payment made by a *tiers*, and consequently it cannot affect a payment made by the debtor Bartley to Hamilton. Paragraph 2 provides for the debtor borrowing a sum for the purpose of *paying* his debt, and of subrogating the lender in the rights of the creditor. Now, what are the formalities he must pursue? It is necessary to the validity of the subrogation in this case, (1.) That the act of loan and the acquittance be notarial [or be executed before two subscribing witnesses] (2) That in the act of loan it be declared that the sum has been borrowed for the purpose of paying the debt, and (3) That in the acquittance it be declared that the payment has been made with the money furnished by the new creditor for that purpose. If these three conditions are complied with the law positively declares that the subrogation is valid. It will be observed that there is not a word to require that the deed shall be made at the time of the payment. The old notion of the subrogation being necessarily made at the time of the payment, and which gave rise to so much difficulty in practice, is confined to payments under paragraph 1—that is, to payments made by a third party. Not only it is not applied, but it was not intended to apply it to payments by the debtor with borrowed money. This becomes evident if we look at the last sentence of Art. 1155, which is declared to be new law: "If the act of loan and the acquittance be executed before witnesses, the subrogation takes effect against third persons from the date only of their registration," &c.; so that the object of these formalities is to fix the date of the deed, so that third parties pleading fraud may have a certain date to go by. This system is absolutely contradictory of the idea that the test of absence of fraud should be that it was all done at once.