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Demystifying Enrichment Without Cause

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Demystifying Enrichment Without Cause

Nikolaos A. Davrados*

TABLE OF CONTENTS

Introduction	1224
I. Historical Foundations of Enrichment Without Cause.....	1226
A. Roman Law Foundations.....	1226
1. <i>Condictio</i> and <i>Actio de in Rem Verso</i>	1227
2. Ulpian’s <i>Causa</i>	1232
B. European Civil Codes—The French-German Separation	1234
1. The French Model—Causality and <i>Actio de in Rem Verso</i>	1234
2. The German Model—Abstraction and <i>Condictio</i>	1242
II. Scope of Application of Enrichment Without Cause	1248
A. General Principles.....	1248
1. Enrichment Without Cause as <i>Lex Generalis</i>	1248
2. Enrichment Without Cause as a Juridical Fact.....	1249
3. Enrichment Without Cause as Restitution, Not Restoration	1253
B. Requirements for an Action of Enrichment Without Cause	1254
1. Material Requirements	1255
a. Enrichment.....	1255
i. Performance or Benefit Conferred on Obligor at Obligee’s Expense	1256

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ii.	Obligor's Interference with Obligee's Patrimony.....	1262
iii.	Obligee's Expenses on Obligor's Property	1264
b.	Impoverishment	1266
c.	Causal Link Between Enrichment and Impoverishment	1266
2.	Juridical Requirements.....	1270
a.	Lack of Cause for Retaining Enrichment	1270
i.	Valid Juridical Act.....	1271
ii.	The Law.....	1275
ii-a.	Failed Juridical Acts	1275
ii-b.	Natural Obligations	1277
ii-c.	Quasi-Contracts	1279
ii-d.	Judicial Decisions.....	1279
b.	Absence of Other Remedy: Subsidiarity of the Action	1280
	Conclusion.....	1287

INTRODUCTION

Enrichment without cause was introduced into the Louisiana Civil Code as revised Article 2298.¹ As indicated in the revision comments,² this provision codified preexisting jurisprudence that had imported the theory

1. LA. CIV. CODE ANN. art. 2298 (2018); Act No. 713, § 1, 1995 La. Acts No. 1041 (codified as LA. CIV. CODE art. 2298 (1996)). The Quasi-Contracts Committee of the Louisiana State Law Institute, chaired by Professor A.N. Yiannopoulos, prepared the initial draft of this revised Article. *See* Cheryl Martin, *Louisiana State Law Institute Proposes Revision of Negotiorum Gestio and Codification of Unjust Enrichment*, 69 TUL. L. REV. 181 (1994).

2. Art. 2298 cmt. a.

of *actio de in rem verso*,³ together with the mysteries⁴ of this theory's jurisprudential past.

Generally, liability for enrichment without cause requires a displacement of wealth in favor of the enriched obligor at the expense of the impoverished obligee. Moreover, this displacement is not justified by the will of the parties or by operation of law.⁵ The remedy provided is subsidiary. It is intended to restore this patrimonial imbalance while at the same time rectifying the inequity of the situation pursuant to the moral directives of equity and commutative justice.⁶

This Article explores two mysteries surrounding the theory of enrichment without cause that still bedevil scholars and the courts—the theory's foundation and its scope of application. Part I examines the history, characteristic features, and underlying principles of enrichment without cause as a source of obligations and a special expression of the more general principle of unjustified enrichment.⁷ Part II applies this

3. In France, the *actio de in rem verso* was introduced in the seminal decision of the Cour de cassation in the *Boudier* case. Cour de cassation [Cass.] [supreme court for judicial matters] req., June 15, 1892, D. 1892, 1, 596, S. 1893, 1, 281, note J.-E. Labbé (Fr.); HENRI CAPITANT ET AL., 2 LES GRANDS ARRETS DE LA JURISPRUDENCE CIVILE, OBLIGATIONS, CONTRATS SPECIAUX, SURETES No. 241 (13th ed. 2015) (Fr.). The Louisiana Supreme Court recognized the *actio de in rem verso* in the landmark cases *Minyard v. Curtis Prod., Inc.*, 205 So. 2d 422 (La. 1967) and *Edmonston v. A-Second Mortgage Co.*, 289 So. 2d 116 (La. 1974). ALAIN A. LEVASSEUR, LOUISIANA LAW OF UNJUST ENRICHMENT IN QUASI-CONTRACTS 344, 355–60 (1991).

4. A.N. Yiannopoulos, Presentation to the Civil Law Property Students at the Loyola University New Orleans College of Law: *Mysteries of the Louisiana Civil Code* (Oct. 19, 2015), <https://vimeo.com/143021101> [<https://perma.cc/V3DW-8L8K>] (discussing “truths, half-truths, and falsehoods” of Louisiana civil law).

5. *Scott v. Wesley*, 589 So. 2d 26, 27 (La. Ct. App. 1991) (“The root principle of an unjustified enrichment . . . is that the plaintiff suffers an economic detriment for which he should not be responsible, while the defendant receives an economic benefit for which he has not paid.”).

6. See 9 CHARLES AUBRY & CHARLES RAU, COURS DE DROIT CIVIL FRANÇAIS No. 578 (Etienne Bartin ed., 5th ed. 1897–1923).

7. LA. CIV. CODE ANN. arts. 1757, 2298. Courts often use the terms “unjust(ified) enrichment” and “enrichment without cause” interchangeably. These two terms, however, should be distinguished. “Unjustified enrichment” is a general principle of law, whereas “enrichment without cause” is a specific source of obligations. This Article does not discuss the general principle of unjustified enrichment, the expression of which is found in several areas of the law, including enrichment without cause. See DIG. 12.6.14 (Pomponius, Ad Sabinum 21) (“For it is by nature fair that nobody should enrich himself at the expense of another.”) and DIG. 50.17.206 (Pomponius, Ex Variis Lectionibus 9) (“By the law of nature it is fair that no one become richer by the loss and injury

historical and comparative information in an attempt to decipher the precise scope of application of enrichment without cause in Louisiana law, in hopes that this contribution will prompt a more general discussion on the formulation of a coherent Louisiana model of enrichment without cause.⁸

I. HISTORICAL FOUNDATIONS OF ENRICHMENT WITHOUT CAUSE

The foundation of enrichment without cause is the first mystery to explore. This mystery is an ancient one, dating back to a historical misunderstanding among early French and German jurists as to the meaning of certain Roman legal concepts. Exploring these Roman concepts and this French-German misunderstanding will perhaps help solve this first mystery.

A. Roman Law Foundations

The historical foundation of enrichment without cause, as a modern source of obligations, is traced back to Justinian and his *Corpus Iuris Civilis*.⁹ The compilers of the Roman texts enunciated the principle of unjustified enrichment based on two actions of the classical Roman period—the *condictio* and the *actio de in rem verso*.

of another.”); cf. LA. CIV. CODE ANN. art. 2055; Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7, 42–47 (1994) (referring to unjustified enrichment as an example of the application of the principle of equity by Louisiana courts); David W. Gruning, *Codifying Civil Law: Principle and Practice*, 51 LOY. L. REV. 57, 64 (2005) (using the principle of unjustified enrichment as an example of a principle of law interacting with practice). Also, this Article does not cover issues concerning the consequences of enrichment without cause.

8. In essence, this Article attempts to uncover hidden truths, clarify half-truths, and dispel falsehoods concerning the mysterious *actio de in rem verso*. See Yiannopoulos, *supra* note 4.

9. Translated texts from the Digest are taken from THE DIGEST OF JUSTINIAN (Theodor Mommsen et al. eds., 1985). Translated texts from the Institutes of Justinian are taken from THOMAS COLLETT SANDARS, THE INSTITUTES OF JUSTINIAN WITH ENGLISH INTRODUCTION, TRANSLATION, AND NOTES (12th rev. ed. 1917) (1898). Translated texts from the Institutes of Gaius and from Justinian’s Code are taken from SAMUEL P. SCOTT, THE CIVIL LAW (1932). Bracketed terms are additions by the author. Translations from the original texts in French, German, and Greek are by the author.

1. *Condictio and Actio de in Rem Verso*

A substantive concept of enrichment without cause was unknown in classical Roman law.¹⁰ Instead, Roman lawyers had developed several actions intended for the restoration or restitution of displaced wealth.¹¹ The modern concept traces its roots to two such nominate actions of the classical Roman law—the *condictio* and the *actio de in rem verso*.¹²

The *condictio* authorized recovery by the plaintiff of a certain object or money in the hands of the defendant.¹³ The *condictio* was an abstract action.¹⁴ The plaintiff was not required to state the cause for his demand.¹⁵ In its early form, the *condictio* was restricted to the recovery of identifiable objects or money¹⁶ found in the hands of the defendant without just cause.¹⁷ The purpose of the *condictio* was restoration in the strictest sense:

10. MICHAEL STATHOPOULOS, AXIOSIS ADIKAILOGITOU PLOUTISMOU [CLAIM OF UNJUSTIFIED ENRICHMENT] 2 (1972) (Greece) [hereinafter STATHOPOULOS, UNJUSTIFIED ENRICHMENT].

11. See Barry Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law: Part I*, 36 TUL. L. REV. 605, 606–07 (1962) [hereinafter Nicholas I]; 1 GEORGE PETROPOULOS, HISTORIA KAI EISIGISEIS TOU ROMAIKOU DIKAIΟΥ [HISTORY AND INSTITUTES OF ROMAN LAW] 610–14 (2d ed. 1963, reprinted 2008) (Greece) [hereinafter PETROPOULOS I].

12. See PETROPOULOS I, *supra* note 11, at 1042–43; Shael Herman, *The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana*, 56 LA. L. REV. 257, 276–80 (1995) (comparing the civil and common law history of the general principle of unjustified enrichment).

13. See MAX RADIN, HANDBOOK OF ROMAN LAW 293–97 (1927).

14. ALAN WATSON, THE LAW OF OBLIGATIONS IN THE LATER ROMAN REPUBLIC 10 (1965, reprinted 1984); LEOPOLD WENGER, INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE 166 (Otis Harrison Fisk trans., rev. ed. 1986); PAUL FRÉDÉRIC GIRARD, MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN 649 n.1 (Félix Senn ed., 8th ed. 1929).

15. See WATSON, *supra* note 14, at 10; WENGER, *supra* note 14, at 166; GIRARD, *supra* note 14, at 649 n.1.

16. *Condictio dare oportene certam rem*. Later, the action also included incorporeal things, such as obligations [*causa liberationis*]. See FRITZ SCHULZ, CLASSICAL ROMAN LAW 614 (1951); 2 MAX KASER, DAS RÖMISCHE PRIVATRECHT § 270 (2d ed. 1975).

17. See JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW 419 (2006) [hereinafter GORDLEY, FOUNDATIONS] (citing Windscheid “a person was liable for ‘a thing which he has without just basis [*justa causa*]’” and DIG. 25.2.25, 12.7.1.3). In classical Roman law, the term *causa*, when used to describe the *condictio*, was not a technical term of art. Depending on the context, *causa* referred to the Latin word for “reason,” “situation,” or specific objects—*res*. See RADIN, *supra* note 13, at 297–300; SAÚL LITVINOFF, OBLIGATIONS § 203, in 6 LOUISIANA CIVIL LAW

an object held by the defendant without lawful cause ought to be returned to the plaintiff who had never lost ownership of this object.¹⁸ The element of enrichment was noticeably missing from the original concept of *condictio*, although in most cases the defendant was indeed enriched at the expense of the plaintiff by withholding the object in question.¹⁹

Especially for the cases of enrichment of a master caused by his servant's acts or transactions, a special and very specific remedy was given—the *actio de peculio*,²⁰ which later developed into the praetorian *actio de in rem verso*.²¹ This praetorian action was a *causal action*, meaning that the plaintiff bore the burden of specifying the cause for his demand.²² Since its inception, this action directly entailed the element of restitution of assets that had exited the patrimony of the plaintiff and entered the defendant's patrimony through the acts of the defendant's

TREATISE (1969) [hereinafter LIVTINOFF, OBLIGATIONS I]. Aristotle identified four types of cause: matter—material cause; form—formal cause; agent—efficient cause; and purpose—final cause. Aristotle, *Physics* II.3 192–95. *Causa finalis* was eventually adopted under the civilian theory of cause. See CHRISTOS FILIOS, HAITIA STIS ENOCHIKES SYMVASEIS [THE CAUSA CONTRAHENDI] 30, 101–25 (2007) (Greece); cf. GORDLEY, FOUNDATIONS, *supra*, at 292–93 (discussing Aristotle's influence on the postglossators' theories of cause).

18. See MAX KASER, DAS ALTRÖMISCHE JUS 286–88 (1949). The defendant in a *condictio* was considered a borrower who was charged with returning the object. The resemblance of the Roman *condictio* to the modern-day loan for use (*commodatum*) and consumption (*mutuum*) is striking. See *id.* at 287; cf. LA. CIV. CODE ANN. arts. 2891, 2901 (2018). The affinity of the early *condictio* with the loan contract also explains the legal nature of the obligation of compensation for enrichment without cause. This obligation attaches to the acquirer of the enrichment, thus resembling a *propter rem obligation*, or a “real obligation,” to refer to the inaccurate term of art that has prevailed in France and Louisiana. See GASTON MAY, ELÉMENTS DE DROIT ROMAIN 416 (18th ed. 1935). For a discussion of real obligations, see generally A.N. YIANNPOULOS, PROPERTY § 9:29, in 2 LOUISIANA CIVIL LAW TREATISE (5th ed. 2015) [hereinafter YIANNPOULOS, PROPERTY]; A.N. Yiannopoulos, *Real Rights in Louisiana and Comparative Law: Part I*, 23 LA. L. REV. 161 (1963); A.N. Yiannopoulos, *Real Rights in Louisiana and Comparative Law: Part II*, 23 LA. L. REV. 618 (1963); L. David Cromwell & Chloé Chetta, *Divining the Real Nature of Real Obligations*, 92 TUL. L. REV. 127 (2017).

19. See 2 HENRY JOHN ROBY, ROMAN PRIVATE LAW IN THE TIMES OF CICERO AND OF THE ANTONINES 76–77 (1902, reprinted 1975).

20. DIG. 15.1.41 (Ulpian, Ad Sabinum 43).

21. See GIRARD, *supra* note 14, at 710–11, 715–16.

22. See ROBY, *supra* note 19, at 245–46; WILLIAM W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 533–34, 536 (2d ed. 1932) [hereinafter BUCKLAND, TEXTBOOK].

servant.²³ It is aptly said, therefore, that this action more closely resembles modern concepts of unjustified enrichment, especially in civilian systems modeled after the Code Napoleon.²⁴

The idea of unjustified enrichment appeared at the time of the *Corpus Iuris Civilis*.²⁵ A general principle of restitution for unjustified enrichment, based on notions of Aristotelian commutative justice²⁶ and Christian values,²⁷ appeared in the Digest.²⁸ This general principle of law later influenced several Roman institutions²⁹ of property and obligations law.³⁰

23. Thus, a typical *actio de in rem verso* imposes liability on the defendant master who was enriched at the expense of the plaintiff third party through the acts of the master's servant. See REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 878–84 (1990, reprinted 1992); STATHOPOULOS, UNJUSTIFIED ENRICHMENT, *supra* note 10, at 6–7.

24. See ZIMMERMANN, *supra* note 23, at 878–84; STATHOPOULOS, UNJUSTIFIED ENRICHMENT, *supra* note 10, at 6–7; PAUL JÖRS & WOLFGANG KUNKEL, RÖMISCHES PRIVATRECHT 267 (3d ed. 1949).

25. See GORDLEY, FOUNDATIONS, *supra* note 17, at 419.

26. *Id.* at 12, 424; see also JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 10–11, 30–31 (1991, reprinted 2011) [hereinafter GORDLEY, ORIGINS].

27. See JOHN DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 52–53 (1951); ULTRICH VON LÜBTOW, BEITRÄGE ZUR LEHRE VON DER CONDUCTIO NACH RÖMISCHEN UND GELTENDEM RECHT 22–24 (1952).

28. See DIG. 12.6.14 (Pomponius, Ad Sabinum 21) (“For it is by nature fair that nobody should enrich himself at the expense of another.”) and DIG. 50.17.206 (Pomponius, Ex Variis Lectionibus 9) (“By the law of nature it is fair that no one become richer by the loss and injury of another.”); see also GEORGES RIPERT, LA REGLE MORALE DANS LES OBLIGATIONS CIVILES 249 (4th ed. 1949).

29. See Gruning, *supra* note 7, at 64 (using the principle of unjustified enrichment as an example of a principle of law interacting with practice).

30. For example, the regulation of the rights and obligations of the owner vis-à-vis a possessor of a thing is based on precepts of unjust enrichment. See *infra* note 234. Likewise, the restitution interest in the area of the law of conventional obligations is a manifestation of the principle of unjust enrichment. Cf. SAÚL LITVINOFF, LAW OF OBLIGATIONS § 14:2, in 6 LOUISIANA CIVIL LAW TREATISE (2d ed. 2001) [hereinafter LITVINOFF, DAMAGES]; L.L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 54 (1936); see also 2 BORIS STARCK, DROIT CIVIL, OBLIGATIONS, CONTRAT ET QUASI CONTRAT, RÉGIME GÉNÉRAL No. 1797 (Henri Roland & Laurent Boyer eds., 2d ed. 1986) (referring to accession, improvements by possessors, community property, nullity especially for incapacity, payment of a thing not due, and improvements made by lessees as expression of the general principle of unjustified enrichment).

This principle also augmented the Roman nominate actions, adding to them the element of enrichment.³¹

The *condictiones* were grouped into nominate categories.³² Thus, a *condictio* could be instituted when the plaintiff had given a thing or money: (a) in contemplation of a future result that did not follow;³³ (b) for a reason disapproved by law or repugnant to public policy;³⁴ (c) by mistake because payment was not actually due;³⁵ or (d) without a good reason for the transaction.³⁶ Further, the *actio de in rem verso* gradually developed and expanded to cover instances in which third parties were enriched at the expense of the impoverished obligee.³⁷ More importantly, enrichment without cause was recognized as a source of obligations under the heading of “quasi-contract.”³⁸

31. See Werner Flume, *Der Wegfall der Berwicherung in der Entwicklung vom römischen zum geltenden Recht* 103, in *FESTSCHRIFT FÜR HANS NIEDERMEYER* (Universität Göttingen ed., 1953).

32. ZIMMERMANN, *supra* note 23, at 838–57; CARL SALKOWSKI, *INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW* 682–85 (E.E. Whitfield trans., 1886, reprinted 1994); FREDERICK TOMKINS & HENRY JENCKEN, *A COMPENDIUM OF THE MODERN ROMAN LAW* 396–401 (1870, reprinted 2000).

33. DIG. 12.4 (*condictio causa data causa non secuta*—otherwise known as *condictio ob causam datorum*). See PETROPOULOS I, *supra* note 11, at 1048–49.

34. DIG. 12.5 (*condictio ob turpem vel iniustam causam*). See PETROPOULOS I, *supra* note 11, at 1048.

35. DIG. 12.6 (*condictio indebiti*). See PETROPOULOS I, *supra* note 11, at 1044–48.

36. DIG. 12.7 (*condictio sine causa*). See PETROPOULOS I, *supra* note 11, at 1049. This type of *condictio* seems to be a residual category, encompassing situations in which the enrichment was attributed to a cause that had expired (*causa finita*—see DIG. 12.7.2 (Ulpian, Ad Edictum 32)) or where the enrichment itself was not a thing given by the plaintiff but a promise made by the plaintiff, from which he is now seeking a release (*causa liberationis*—see DIG. 12.7.1 (Ulpian, Ad Sabinum 43) and 12.7.3 (Julian, Digestorum 8)). See STATHOPOULOS, *UNJUSTIFIED ENRICHMENT*, *supra* note 10, at 3–4.

37. DIG. 17.2.82 (Papinian, Responsorum 3); CODE JUST. 4.26.7 (Diocletian & Maximian 290/293) (*actio de in rem verso utilis*). See 2 GEORGE PETROPOULOS, *HISTORIA KAI EISIGISEIS TOU ROMAIKOU DIKAIΟΥ* [HISTORY AND INSTITUTES OF ROMAN LAW] 1146–47 (2d ed. 1963, reprinted 2008) (Greece). See generally ANDREAS VON TUHR, *ACTIO DE IN REM VERSO* (1895).

38. J. INST. 3.13 (“A further division separates [obligations] into four kinds, for they arise either from [contract, quasi-contract, delict, or a quasi-delict].”). Gaius had initially identified contracts and delicts as sources of obligations and later added quasi-contracts and quasi delicts as “other sources.” See DIG. 44.7.1.pr (Gaius, Aureorum 2) (“Obligations arise either from contract or from wrongdoing, or by some special right from various types of causes.”) (emphasis added). Traditionally, the heading of quasi-contract included the management of

The concept of unjustified enrichment, as an institution of substantive law, is therefore a product of Justinian's law. It is an amalgamation of Roman pragmatism with equitable considerations and moral principles of Greek philosophy.³⁹ Although this body of law was well received by the post-glossators⁴⁰ and eventually by the European civil codes, the compiled texts were less than clear about the requirements and scope of application of enrichment without cause.⁴¹ The foundation of enrichment without cause is one of its mysteries, tracing its roots to conflicting interpretations of a passage written by the Roman jurist Ulpian concerning the cause—*causa*—of contracts.

affairs of another [*negotiorum gestio*]; tutorship [*tutela*] and curatorship [*cura*]; co-ownership [*communio incidens*]; and enrichment without cause [*condictiones* and *actio de in rem verso*]. See WILLIAM W. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW § 123 (2d ed. 1953, reprinted 1981) [hereinafter BUCKLAND, MANUAL]; WILLIAM W. BUCKLAND, ELEMENTARY PRINCIPLES OF THE ROMAN PRIVATE LAW No. 133 (1912) [hereinafter BUCKLAND, PRINCIPLES]; 2 BERNHARD WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS § 421 (7th ed. 1891); FERDINAND MACKELDEY, HANDBOOK OF THE ROMAN LAW § 491 (Moses Dropsie trans., 8th ed. 1883); RUDOLPH SOHM, THE INSTITUTES: A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW § 83 (James Crawford Ledlie trans., 3d ed. 1907, reprinted 1994); WILLIAM BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 476–84 (1938, reprinted 1989); PETROPOULOS I, *supra* note 11, at 1035–50.

39. This expansion of Roman ideas occurred through several interpolations and misinterpretations of Roman texts. See STATHOPOULOS, UNJUSTIFIED ENRICHMENT, *supra* note 10, at 13.

40. See FRÉDÉRIC ZENATI-CASTAING & THIERRY REVET, COURS DE DROIT CIVIL: CONTRATS, THÉORIE GÉNÉRALE, QUASI-CONTRATS No. 226 (2014) (discussing the efforts of Baldus to enunciate a general and unitary action of enrichment without cause).

41. See SCHULZ, *supra* note 16, at 611 (“The classical law was sound and cleverly contrived in spite of some gaps which ought to have been filled in; but the compilers have completely ruined the classical law. They unwisely extended the scope of these actions and unhappily modified their content by numerous interpolations which have obscured and confused the classical law without giving a clear exposition of the Byzantine law. [Unjust enrichment] law is one of the worst parts of Justinian's law; it has confused and irritated generations of lawyers and exercised an evil influence on continental codifications down to our times. The German Civil Code (*BGB*) is a warning example.”).

2. *Ulpian's Causa*

In the classical Roman law of obligations, the concept of *causa*⁴² was marginal because of the strict formalism in the creation of contracts.⁴³ The significance of cause slowly began to emerge during the post-classical period and became more evident during the Middle Ages when the heightened formality requirements for contracts were gradually reduced, thus enabling the speedier and more informal formation of contracts.⁴⁴ This shift toward informality, however, created a void in contract law and theory concerning the requirements for the validity of contract.⁴⁵ This gap was filled by the civilian theory of cause as it is known today. In short, the old formalism was replaced with causality in contemporary contract law.⁴⁶

This movement is evidenced in the *Corpus Iuris Civilis*, in which several excerpts, original or interpolated older texts, emphasizing the *causa* of conventional obligations began to appear.⁴⁷ Perhaps the most notable and debated⁴⁸ excerpt comes from Ulpian's "Commentary of the Edict."⁴⁹

42. Cause of conventional obligations is a topic extensively discussed and debated elsewhere. *See, e.g.*, LITVINOFF, OBLIGATIONS I, *supra* note 17, §§ 196–242; Ernest G. Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621 (1919). For the purposes of this Article, the discussion adopts the prevailing theory of cause as accepted in Louisiana. *See* Saúl Litvinoff, *Still Another Look at Cause*, 48 LA. L. REV. 3 (1987) [hereinafter Litvinoff, *Cause*].

43. *See* SCHULZ, *supra* note 16, at 471; LITVINOFF, OBLIGATIONS I, *supra* note 17, § 202; John Denson Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 2, 4 (1951).

44. *See* ZIMMERMANN, *supra* note 23, at 553.

45. *See* SCHULZ, *supra* note 16, at 471; LITVINOFF, OBLIGATIONS I, *supra* note 17, § 208; Smith, *supra* note 43, at 4.

46. LITVINOFF, OBLIGATIONS I, *supra* note 17, § 208; Smith, *supra* note 43, at 4.

47. *See* FILIOS, *supra* note 17, at 25–35.

48. *Id.* at 2–3; *see also* WILLIAM W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW AND COMMON LAW 229–30 (Frederick H. Lawson, 2d rev. ed. 1952) (referring to Ulpian's excerpt as "the famous passage on which the whole theory of cause was based" and noting that "[it] was taken to mean that every contract must have a cause, [when] in reality [it] says nothing of the kind"); GORDLEY, ORIGINS, *supra* note 26, at 49–50; LITVINOFF, OBLIGATIONS I, *supra* note 17, § 205; Lorenzen, *supra* note 42, at 624–25.

49. DIG. 2.14.7 (Ulpian, Ad Edictum 4).

In this text, Ulpian refers to certain innominate “synallagmatic⁵⁰ contracts” in which agreed performances were exchanged by the parties.⁵¹ These contracts, not belonging to the recognized nominate types of contracts,⁵² generally were not actionable under classical Roman law.⁵³ Ulpian suggests that these contracts may, nevertheless, become actionable if they have a *causa*. In Digest 2.14.7.4, Ulpian writes, “when no [*causa*] exists, it is settled that no obligation arises from the agreement.”⁵⁴ As Ulpian explains, the term *causa* here refers to the fact that one of the parties has already performed.⁵⁵ Thus, if the innominate contract is executory, the fact that one party performed will give rise to an action demanding that the other party perform.⁵⁶

Centuries passed, Roman formalism was abandoned completely, and the need for an updated commentary to Ulpian’s text became necessary.⁵⁷ Two prominent jurists formulated their decisive theories relying on conflicting interpretations of this same passage—the French judge and jurist Domat and the German law professor Savigny.

50. The term refers to the Aristotelian “synallagma,” which means an equal trade of performances. *See also* DIG. 50.16.19 (Ulpian, Ad Edictum 11) (using the Greek work *synallagma* to describe a transaction). This term ultimately found its way into the Greek, French, and Louisiana civil codes as a synonym for bilateral contracts. *See, e.g.*, LA. CIV. CODE ANN. art. 1908 (2018).

51. Under this type of agreement, the parties exchanged promises to give, do, or not do something (*do ut des, facio ut facias, do ut facias, and facio ut des*). *See* BUCKLAND, MANUAL, *supra* note 38, § 119; LITVINOFF, OBLIGATIONS I, *supra* note 17, § 200. This Roman category of contracts is the precursor to modern *commutative contracts*. *See, e.g.*, LA. CIV. CODE ANN. art. 1911.

52. The nominate contracts of the classical period included the contracts *verbis, litteris, re, and consensus*. *See* PETROPOULOS I, *supra* note 11, at 873–1000 (providing a detailed discussion of all Roman nominate contracts); Ronald J. Scalise, Jr., *Classifying and Clarifying Contracts*, 76 LA. L. REV. 1063, 1068–72 (2016) (providing an overview of the Roman categories of contracts).

53. *See* MACKELDEY, *supra* note 38, §§ 443–448; SCHULZ, *supra* note 16, at 522–24; BUCKLAND, TEXTBOOK, *supra* note 22, at 521–22; GORDLEY, FOUNDATIONS, *supra* note 17, at 291.

54. *See* F.P. Walton, *Cause and Consideration in Contracts*, 41 L. Q. REV. 306, 312 (1925) (explaining that an innominate contract without a cause is an unenforceable *nudum pactum*).

55. *Id.* at 311.

56. *See* BUCKLAND, PRINCIPLES, *supra* note 38, No. 104; LITVINOFF, OBLIGATIONS I, *supra* note 17, § 205.

57. *See* FILIOS, *supra* note 17, at 37–73 (discussing in detail the development of the notion of cause in the *ius commune* era).

B. European Civil Codes—The French-German Separation

Domat interpreted Ulpian's text expansively and enunciated his theory of cause, which formed the basis of the French model of unjustified enrichment, also applicable in Louisiana.⁵⁸ Savigny, on the other hand, construed this text more narrowly and formulated his theories of abstraction and separation, from which the German model of unjustified enrichment emerged and was later expanded by German and Greek legal scholars.⁵⁹

1. The French Model—Causality and Actio de in Rem Verso

In France and Louisiana, restitution for enrichment without cause is restricted to cases in which the several requirements for the *actio de in rem verso*⁶⁰ are met.⁶¹ The Roman *condictiones*, on the other hand, were not developed⁶² because restoration is achieved through the expanded theories of cause and nullity of juridical acts.⁶³ This French model of unjustified enrichment traces its roots to Domat's reading of Ulpian.

58. *Id.* at 69–71.

59. *Id.* at 80–86.

60. This name was given to the action in a judgment of the Court of Appeal of Rennes of August 28, 1820, and, according to several scholars, it should not be confused with the action that bore the same name in Rome. See DAWSON, *supra* note 27, at 98 n.101; Paul Roubier, *La position française en matière d'enrichissement sans cause*, in 4 TRAVAUX DE L'ASSOCIATION CAPITANT 38, 44 (Association H. Capitant ed., 1948); 9*bis* CHARLES BEUDANT & PAUL LEREBOURS-PIGEONNIERE, COURS DE DROIT FRANÇAIS No. 1751 n.2 (R. Rodière ed., 2d ed. 1951–52); Nicholas I, *supra* note 11, at 619. Nevertheless, it is submitted here that the modern *actio de in rem verso* does bear some similarity with its ancient ancestor, predominantly because both refer to restitution as a remedy and are causal in nature. See STATHOPOULOS, UNJUSTIFIED ENRICHMENT, *supra* note 10, at 17.

61. See LEVASSEUR, *supra* note 3, at 370–427.

62. With the exception of the *condictio* for a payment of a thing not due (*condictio indebiti*), which was included in the civil codes of Louisiana and France. LA. CIV. CODE art. 10 p. 320 (1808); LA. CIV. CODE art. 2279 (1825); LA. CIV. CODE art. 2301 (1870); LA. CIV. CODE art. 2299 (rev. 1995); LEVASSEUR, *supra* note 3, at 145–232; CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1376 (1804) (Fr.); CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1302 (rev. 2016) (Fr.).

63. See Roubier, *supra* note 60, at 42; J.-B. BÉGUET, L'ENRICHISSEMENT SANS CAUSE No. 26 (1945); STATHOPOULOS, UNJUSTIFIED ENRICHMENT, *supra* note 10, at 18–19.

In his treatise,⁶⁴ Domat enunciates the French theory of cause.⁶⁵ Commenting on Ulpian's passage mentioned above, Domat quickly dispenses with the Roman categorization of contracts, and in its place he identifies four types of contracts based exclusively on the former innominate category⁶⁶ of the Roman law.⁶⁷ Referring to the Roman category of innominate contracts as controlling in his classification of contracts, Domat then directly cites Ulpian in Digest 2.14.7.4⁶⁸ when stating that "no [contract⁶⁹] is obligatory without a *causa*."⁷⁰ Cause, therefore, is proclaimed a mandatory requirement for the validity of all contracts.⁷¹

At first blush, it seems that the logical sequence of Domat's reliance on Ulpian is faithful and, perhaps, unoriginal.⁷² A closer examination of his treatise reveals, however, that Domat radically departs from Ulpian and revolutionizes contract theory in two important respects.⁷³ First, Domat furnishes a fundamentally different definition of *causa*. According to the French jurist, *causa* is not the fact that one of the parties has already performed, as Ulpian suggested—rather it is the obligation of the other

64. JEAN DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* 161 (William Strahan trans., Luther Cushing ed., 1853).

65. 2 MARCEL PLANIOL, *TREATISE ON THE CIVIL LAW*, pt. 1, Nos. 1029–32 (La. State L. Inst. trans., 12th ed. 1959, reprinted 2005) [hereinafter 2 PLANIOL I]; LITVINOFF, *OBLIGATIONS I*, *supra* note 17, § 209. German and Greek legal scholars, on the other hand, recognize several nominate categories of objective cause dating back to Roman law. These categories include the following causes: to receive a counter-performance from the other party—*causa credendi* or *acquirendi*; to fulfill a preexisting obligation—*causa solvendi*; to make a gift, liberal cause—*causa donandi*; to renew an obligation by novation—*causa novandi*; and, arguably, to create a trust—*fiduciae causa*. See 2 ANDREAS VON TUHR, *DER ALLGEMEINE TEIL DES DEUTSCHEN BÜRGERLICHEN RECHTS II*, § 72, at 67–80 (1918); GEORGE BALIS, *GENIKAI ARCHAI TOU ASTIKOU DIKAIYOU [GENERAL PRINCIPLES OF CIVIL LAW]* § 34 (8th ed. 1961) (Greece); LITVINOFF, *OBLIGATIONS I*, *supra* note 17, § 245.

66. See *supra* notes 50–51 and accompanying text.

67. DOMAT, *supra* note 64, at 161; BUCKLAND, *TEXTBOOK*, *supra* note 22, at 522–23.

68. See *supra* note 54 and accompanying text.

69. A precise translation from the French original is "covenant." DOMAT, *supra* note 64, at 161.

70. *Id.* at 161–62.

71. See Litvinoff, *Cause*, *supra* note 42, at 5–6.

72. One author suggests that Domat's views simply expressed the prevailing opinion in French law of that time. See Walton, *supra* note 54, at 315.

73. FILIOS, *supra* note 17, at 69–71.

party to perform.⁷⁴ This definition accords fully with the meaning of objective cause as it is known today.⁷⁵ The party obligates herself because she looks forward to receiving the other party's performance and not because the parties followed a ceremonial form or the other party performed first.⁷⁶

Second, Domat expressly dismisses Roman formalism and brings forward a consensual form of contracting.⁷⁷ By doing so, he effectively broadened the concept of *causa* by removing it from the strict domain of formal validity of contracts and placing it within the purview of the doctrine of nullity. Indeed, a contract with no extant and valid cause is an absolute nullity.⁷⁸

More importantly, and returning to the topic of enrichment without cause, Domat cites the excerpts of Justinian's Digest on *condictio sine causa*⁷⁹ alongside Ulpian's passage to support his theory of cause.⁸⁰ This reference has been interpreted to mean that the Roman *condictiones* are instances of an inexistent or faulty *causa* and, therefore, ought to be

74. See HENRI CAPITANT, DE LA CAUSE DES OBLIGATIONS 166–67 n.1 (3d ed. 1927). According to French scholars, Domat's expansive reading of Ulpian was justified because of the elimination of the earlier formal contracts of the classical Roman law. See 3 C.B.M. TOULLIER, DROIT CIVIL FRANÇAIS, TITRE III Nos. 166–173 (Duvergier ed., 6th ed. 1846–48). On the development of the doctrine of cause in French law, see 2 AMBROISE COLIN & HENRI CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS No. 57 (Julliot De La Morandiere ed., 8th ed. 1935); 12 GABRIEL BAUDRY-LACANTINERIE & LOUIS J. BARDE, TRAITE THEORIQUE ET PRATIQUE DE DROIT CIVIL, DES OBLIGATIONS, VOL. 1 No. 300 (3d ed. 1906); 6 MARCEL PLANIOL & GEORGES RIPERT, TRAITE PRATIQUE DE DROIT CIVIL FRANÇAIS, DES OBLIGATIONS, PART 1 No. 250 (Paul Esmein et al. eds., 1930).

75. See, e.g., LA. CIV. CODE ANN. art. 1908 cmt. b (2018) (“The doctrine of cause makes the obligations arising out of a bilateral contract correlative. In such a contract, indeed, *the obligation of each party is the cause of the other.*”) (emphasis added); CAPITANT, *supra* note 74, at 6; LITVINOFF, OBLIGATIONS I, *supra* note 17, §§ 208–209.

76. FILIOS, *supra* note 17, at 69–70. As a result, the *causa finalis* replaced the *causa efficiens* in contract theory, as Bortolus and Baldus had previously advocated. See *supra* note 17; see also GORDLEY, ORIGINS, *supra* note 26, at 49–51.

77. See LITVINOFF, OBLIGATIONS I, *supra* note 17, § 209.

78. DOMAT, *supra* note 64, at 162, 191; COLIN & CAPITANT, *supra* note 74, No. 62.

79. DIG. 12.7 (*de condictione sine causa*). See *supra* note 36 and accompanying text.

80. DOMAT, *supra* note 64, at 162. See CAPITANT, *supra* note 74, 166–67 n.1. Cf. PETER BIRKS, UNJUST ENRICHMENT 87 (2003) (arguing in favor of a remedy for restitution on the basis of the defendant's enrichment *sine causa*).

governed by the provisions on nullity.⁸¹ This observation admits at least one exception—the payment of a thing not due,⁸² which is treated separately under the heading of quasi-contract.⁸³

Domat's theory later appeared in the writings of Pothier,⁸⁴ who in turn referred solely to the *condictio indebiti* as a separate action, thus tacitly placing all other *condictiones* under the scope of the doctrine of nullity.⁸⁵ Although Domat's theory of cause found its way into the civil codes of France⁸⁶ and Louisiana,⁸⁷ the notion of enrichment without cause remained forgotten and uncodified,⁸⁸ only to be discovered in the 19th and 20th centuries in French textbooks⁸⁹ and the jurisprudence of France and

81. 2 GABRIEL MARTY & PIERRE RAYNAUD, DROIT CIVIL. LES OBLIGATIONS, vol. 1 No. 347 (1962).

82. *Condictio indebiti*. DOMAT, *supra* note 64, at 595–603. Domat also seems to include the *condictio ob turpem vel iniustam causam* in his discussion of quasi-contract, *id.* at 599, although this type of *condictio* clearly falls within the ambit of unlawful cause. For a definition of these categories of *condictio*, see *supra* notes 32–36 and accompanying text.

83. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1371 (1804) (Fr.); CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1300 (rev. 2016) (Fr.); LA. CIV. CODE art. 2293 (1870, repealed 1995). See LEVASSEUR, *supra* note 3, at 9–15 (critiquing the concept of quasi-contract at civil law).

84. See 1 ROBERT JOSEPH POTHIER, A TREATISE ON OBLIGATIONS CONSIDERED IN A MORAL AND LEGAL VIEW 28–33, 72–73 (Francois-Xavier Martin trans. 1802, reprinted 1999); DAWSON, *supra* note 27, at 95–98; LITVINOFF, OBLIGATIONS I, *supra* note 17, §§ 210–211.

85. See ANDRE MOREL, L'ÉVOLUTION DE LA DOCTRINE DE L'ENRICHISSEMENT SANS CAUSE. ESSAI CRITIQUE 34–36 (1955); ZIMMERMANN, *supra* note 23, at 883.

86. See CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 1108, 1131–1133 (1804) (Fr.). It is noteworthy that the requirement of cause has been removed from the French Civil Code in the latest 2016 revision. Though many commentators describe this revision as a “revolution,” the concept of cause as a mandatory requirement still appears in the revised provisions. See, e.g., CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 1162, 1169 (2018) (Fr.); see also Solène Rowan, *The New French Law of Contract*, 66 INT'L & COMP. L. Q. 805 (2018).

87. LA. CIV. CODE art. 31 p. 264 (1808); LA. CIV. CODE art. 1887 (1825); LA. CIV. CODE art. 1893 (1870); LA. CIV. CODE art. 1966 (rev. 1984).

88. J.-M. Augustin, *Introduction historique à l'enrichissement sans cause en droit français*, in L'ENRICHISSEMENT SANS CAUSE: LA CLASSIFICATION DES SOURCES DES OBLIGATIONS 31 (V. Mannino & C. Ophèle eds. 2007).

89. See AUBRY & RAU, *supra* note 6, No. 578. Their theory on enrichment without cause first appeared in the 4th edition of their treatise (1869–1876) and was adopted by the French Court of Cassation in the *Boudier* case. See *supra* note 3.

Louisiana under the heading of quasi-contract.⁹⁰ Eventually, the jurisprudence was codified in Louisiana⁹¹ and, quite recently, in France.⁹²

The implications of Domat's theory of cause to the foundation and scope of application of the modern *actio de in rem verso* can be understood fully in light of the theory of juridical acts.⁹³ In France and Louisiana, all patrimonial juridical acts are causal, that is, dependent upon the validity

90. 2 JACQUES FLOUR, JEAN-LUC AUBERT & ERIC SAVAUX, DROIT CIVIL, LES OBLIGATIONS, LE FAIT JURIDIQUE No. 34 (14th ed. 2011) [hereinafter FLOUR ET AL., FAIT JURIDIQUE]; FRANÇOIS TERRÉ, PHILIPPE SIMLER & YVES LEQUETTE, DROIT CIVIL. LES OBLIGATIONS No. 1063 (11th ed. 2013); PHILIPPE MALAURIE, LAURENT AYNES & PHILIPPE STOFFEL-MUNCK, LES OBLIGATIONS No. 1057 (7th ed. 2015).

91. LA. CIV. CODE ANN. art. 2298 (rev. 1995) (enrichment without cause). For a more detailed account of the history of quasi-contract in Louisiana, see Barry Nicholas, *Unjustified Enrichment in Civil Law and Louisiana Law, Part II*, 37 TUL. L. REV. 49 (1962) [hereinafter Nicholas II]. For an analysis of quasi-contract under Louisiana law, see LEVASSEUR, *supra* note 3, at 26–52.

92. CODE CIVIL [C. CIV.] arts. 1303, 1303-1, 1303-2, 1303-3, and 1303-4 (rev. 2016) (*enrichissement injustifié*) (Fr.). See Valerio Forti, *Enrichissement injustifié, Généralités, Conditions matérielles* No. 1, JurisClasseur Civil, Art. 1303 à 1304-4, Fascicule 10, Jun. 2, 2016 (Dec. 10, 2017). In essence, Louisiana lawyers accomplished with one concise article that was drafted more than 20 years ago to codify enrichment without cause more efficiently compared to the five new and debated articles in the French Civil Code. On this topic, the student has become the teacher!

93. A juridical act is defined as a “manifestation [or declaration] of will intended to have legal consequences.” LA. CIV. CODE ANN. art. 492 cmt. b (2018). A juridical act “may be a unilateral act, such as an affidavit, or a bilateral act, such as a contract. It may be onerous or gratuitous.” LA. CIV. CODE ANN. art. 3471 cmt. c. According to Litvinoff and Tête, based on a systematic categorization of civilian topics, juridical acts can be *patrimonial* or *extra-patrimonial—personal*. *Patrimonial juridical acts* are those that involve

the creation, modification or [r] extinction of rights of a pecuniary value . . . Thus, a sale . . . or the letting out of services for a fee or stipend, are examples of juridical acts that are patrimonial. Those juridical acts are *extra-patrimonial* which involve rights that escape a pecuniary evaluation, or, to use a different technical terminology, are out of commerce. Such is the case with family rights and the so-called rights of personality. Thus, marriage, adoption, emancipation, are all examples.

SAÚL LITVINOFF & W. THOMAS TÊTE, LOUISIANA LEGAL TRANSACTIONS: THE CIVIL LAW OF JURIDICAL ACTS 140 (1969); 1 MARCEL PLANIOL, TREATISE ON THE CIVIL LAW pt. 1, Nos. 264–66 (La. State L. Inst. trans., 12th ed. 1959, reprinted 2005) [hereinafter 1 PLANIOL I]; 1 BERNHARD WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS, ALLGEMEINER TEIL § 69 (Theodor Kipp ed., 8th ed. 1900); BALIS, *supra* note 65, § 32.

of their cause.⁹⁴ In principle, patrimonial juridical acts are also unified⁹⁵ in the sense that they combine personal elements—for example, a promise to transfer ownership—and real elements—for example, conveyance of the object of the contract.⁹⁶ Nullity of the juridical act is retroactive,⁹⁷ meaning that the parties' patrimonies are restored to the situation that existed prior to the formation of the null act.⁹⁸ In the example of a null contract of sale, ownership of the thing sold reverts back to the seller, and the buyer's

94. 2 PLANIOL I, *supra* note 65, Nos. 1042–46.

95. With reference to a contract of sale, *see id.* No. 1416.

96. As noted, civilian doctrine classifies juridical acts into several categories, depending on different factors. Based on their object, patrimonial juridical acts, for example, can be *personal* or *real*. As Professor Yiannopoulos explained, *Personal juridical acts* are those that create, transfer, alter or terminate *obligations*. *Real juridical acts* are those that create, transfer, alter, or terminate *real rights*. . . . Quite frequently, both kinds of juridical acts are combined in a single transaction. The sale of property, for example, involves a personal juridical act—the promise to transfer ownership, as well as a real juridical act—the delivery or transfer of possession.

A.N. YIANNOPOULOS, CIVIL LAW SYSTEM, LOUISIANA AND COMPARATIVE LAW 449 (2d ed. 1999) [hereinafter YIANNOPOULOS, CIVIL LAW SYSTEM]. Depending on their effects, patrimonial juridical acts can be *promissory* or *dispositive*.

A promissory juridical act contains merely a promise to render a performance and gives rise to an obligation to give, to do, or not to do something *A dispositive juridical act* effects a disposition, namely, a transfer, alteration, encumbrance, or termination of a right The notion of a personal juridical act is broader than that of a dispositive juridical act. Indeed, a personal juridical act may involve the transfer or termination of an obligation, namely, a disposition, as in the case of the remission of a debt.

Id. (emphasis added). These categories must be examined separately; however, there is a degree of overlap between them. All real juridical acts are dispositive. All promissory juridical acts are personal. Most personal juridical acts are promissory but not all.

97. In other words, a juridical act is null *ex tunc*. In some instances, however, a prospective, *ex nunc*, effect of nullity coupled with an award for damages is warranted. Such is the case, for example, in contracts of continuous or periodic performance like a lease. Because restoration in kind obviously is impracticable, an award of damages ought to be granted instead. LA. CIV. CODE ANN. art. 2033 para. 1 (2018). This principle also appears in the Louisiana Civil Code for cases of dissolution of contracts and effects of conditions. *Id.* arts. 1776, 2019. *See* SAÚL LITVINOFF, LAW OF OBLIGATIONS § 5.12, in 5 LOUISIANA. CIVIL LAW TREATISE (2d ed. 2001) [hereinafter LITVINOFF, OBLIGATIONS IN GENERAL].

98. LA. CIV. CODE ANN. art. 2033.

ownership of the tendered price is restored.⁹⁹ Because of the retroactive effects of nullity, the putative buyer is now possessing or detaining a thing that she no longer owns.¹⁰⁰ Thus, the putative seller is entitled to bring a real action to revendicate the thing in the hands of the putative buyer.¹⁰¹ It should be clear that an action for enrichment without cause would be inadmissible in this case. The reason for this inadmissibility is that the general rule prohibiting enrichment without cause must yield to the more specific rules of nullity and subsequent revendication.¹⁰² The French approach of unity and causality initially focuses on the protection of the contracting parties and then affords protection to third parties when necessary.¹⁰³

As a result, in Louisiana and France, the modern doctrines of cause¹⁰⁴ and nullity¹⁰⁵ govern situations of restoration with the exception of the quasi-contractual claim for restoration of a payment of a thing not due.¹⁰⁶ Delictual actions lie for the recovery of damages as a result of an offense or a quasi-offense.¹⁰⁷ The remaining cases of restitution may fall within the purview of an *actio de in rem verso*, that is, enrichment without cause.¹⁰⁸

The fact remained, however, that the *actio de in rem verso* dwelled outside the civil codes and legal theories of France and Louisiana. When this action was discovered in the seminal French *arrêt Boudier* of the French Cour de cassation,¹⁰⁹ it was received with skepticism by scholars,

99. *Id.* The same result is obtained in the case of dissolution of the sale. *Id.* art. 2018; DIAN TOOLEY-KNOBLETT & DAVID W. GRUNING, SALES §§ 15:9, 15:16, in 24 LOUISIANA CIVIL LAW TREATISE (2012).

100. Art. 2033. *See* YIANNOPOULOS, PROPERTY, *supra* note 18, § 13:14.

101. LA. CIV. CODE ANN. art. 526; *see* YIANNOPOULOS, PROPERTY, *supra* note 18, §§ 11:7, 13:7, 13:13.

102. According to a long-standing maxim, *lex specialis derogat lege generali*, meaning “the special law overrides the general law.” *See* YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 96, at 239.

103. LA. CIV. CODE ANN. art. 2035. *See* Ronald J. Scalise, Jr., *Rethinking the Doctrine of Nullity*, 74 LA. L. REV. 663, 684–85 (2014) (discussing the effect of nullity on third persons).

104. LA. CIV. CODE ANN. art. 1966.

105. *Id.* art. 2029.

106. *Id.* art. 2299.

107. *Id.* art. 2315. *See* YIANNOPOULOS, PROPERTY, *supra* note 18, § 13:13.

108. LA. CIV. CODE ANN. art. 2298.

109. Cour de cassation [Cass.] [supreme court for judicial matters] req., June 15, 1892, D. 1892, 1, 596, S. 1893, 1, 281, note J.-E. Labbé (Fr.) (impoverished provider of fertilizer performed at the request of an agricultural lessee on the land of the enriched lessor and subsequently claimed compensation from the lessor after the

starting with Labbé, who was the first to criticize the decision for its overly broad and “dangerous” application of a general principle of law.¹¹⁰ The courts were receptive to this criticism and added juridical requirements to the admissibility of the action, thus restricting and demoting it to a subsidiary action.¹¹¹ Several contemporary French scholars believe that this restrictive trend has perhaps gone too far, and the action has been unduly constrained.¹¹² The same can be said with regard to the seminal Louisiana Supreme Court decisions in *Minyard v. Curtis Products, Inc.*¹¹³

lessee became insolvent). For a detailed discussion of this case, see Nicholas I, *supra* note 11, at 622–24.

110. Cour de cassation [Cass.] [supreme court for judicial matters] req., June 15, 1892, D. 1892, 1, 596, S. 1893, 1, 281, note J.-E. Labbé (Fr.); *see also* ALAIN BÉNABENT, *DROIT DES OBLIGATIONS* No. 484 (14th ed. 2014); Nicholas I, *supra* note 11, at 624–26.

111. *See* Cour de cassation [Cass.] [supreme court for judicial matters] civ., May 12, 1914, S. 1918, 1, 41, note Nayret (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] civ., Mar. 2 1915, D. 1920, 1, 102 (Fr.).

112. FLOUR ET AL., *FAIT JURIDIQUE*, *supra* note 90, No. 56; *see also* MALAURIE ET AL., *supra* note 90, No. 1058 (arguing that the contours of unjust enrichment have been perhaps unduly restricted to a particular category of persons, including those persons who have common interests within the outskirts of a legal patrimonial relationship, such as unmarried partners, spouses under a separate property regime, a child attending to an elderly parent, and parties to an inexistent contract). According to Dawson, the inherent suspicion toward jurisprudential rules may have been an additional factor prompting an undue restriction of this action. *See* DAWSON, *supra* note 27, at 105 (“[I]t is a difficult matter for courts to introduce large-scale correctives, by case law methods, into a system of codified law.”). Nevertheless, it should be remembered that *jurisprudence constante* is a venerated civilian institution and, at least in theory and by some courts, a recognized primary source of law in the form of a custom. *See* YIANNOPOULOS, *CIVIL LAW SYSTEM*, *supra* note 96, at 149–52. In any event, codification of this action in Louisiana and France has rendered this debate moot.

113. *Minyard v. Curtis Prods., Inc.*, 205 So. 2d 422 (1967) (providing that a subcontractor brought contractual “action in indemnity” against a third party whose fault triggered the payment of damages in the absence of another remedy at law). For a detailed commentary to the decision, see LEVASSEUR, *supra* note 3, at 403–08; Saúl Litvinoff, *Work of the Appellate Courts—1976–1968, Obligations*, 29 LA. L. REV. 200 (1969) [hereinafter Litvinoff, *Appellate Courts*]; Albert Tate, *The Louisiana Action for Unjustified Enrichment*, 50 TUL. L. REV. 883 (1976) [hereinafter Tate I]; Albert Tate, *The Louisiana Action for Unjustified Enrichment. A Study in Judicial Process*, 51 TUL. L. REV. 446 (1977) [hereinafter Tate II]; John St. Claire, *Actio de in Rem Verso in Louisiana: Minyard v. Curtis Products Inc.*, 43 TUL. L. REV. 263 (1969); Robert Fritz, Note, *Sales—Article 1965—Civil Law Action of Unjust Enrichment: De in Rem Verso*, 14 LOY. L. REV. 434 (1968). It is noteworthy that the Court based its

and *Edmonston v. A-Second Mortgage Co.*¹¹⁴ A proper understanding of the historical foundations and the general principles of enrichment without cause should eliminate tendencies to broaden unduly or restrict the scope of application of this remedy. The French/Louisiana approach also is better understood if compared with the German/Greek model of unjustified enrichment.

2. The German Model—Abstraction and *Condictio*

Ulpian's passage¹¹⁵ received a different reading and commentary under the German jurist Savigny.¹¹⁶ While Domat adopted an expansive reading of Ulpian's excerpt, Savigny construed this passage quite narrowly.¹¹⁷ Savigny noted that Ulpian's passage referred only to the innominate contracts and not to the nominate contract of *stipulatio*.¹¹⁸

decision on the general provisions of the 1870 Civil Code on equity—former Articles 21 and 1965, current Articles 4 and 2055—and not on the more germane provisions on quasi-contracts—former Articles 2293 and 2294, which were repealed in the 1995 revision. See Barry Nicholas, *The Louisiana Law of Unjustified Enrichment Through the Act of the Person Enriched*, 6 TUL. CIV. L. F. 3, 10–13 (1991–1992) [hereinafter Nicholas III]; Tate I, *supra*, at 894 (arguing in favor of basing the action on former Article 21); Tate II, *supra*, at 458–60 (discussing the difficulties associated with basing the action on former Article 21). Codification of this action now renders this point moot. *But see* Bruce V. Schewe & Vanessa Richelle, *The “New and Improved” Claim for Unjust Enrichment—Codified*, 56 LA. L. REV. 663, 669 (arguing in favor of the subsidiarity principle on the basis of Article 4 of the Louisiana Civil Code on equity).

114. *Edmonston v. A-Second Mortg. Co.*, 289 So. 2d 116 (La. 1974) (describing how landowner brought action of enrichment without cause against second mortgagee when first mortgage was discharged by payment of life insurance benefits). For a detailed commentary, see LEVASSEUR, *supra* note 3, at 408–11; Stewart McCaa Thomas, *Conditions For the Application of Actio De In Rem Verso*, 36 LA. L. REV. 312 (1975); Charles Verderame, *Unjust Enrichment Remedy: Actio de in rem verso*, 21 LOY. L. REV. 219 (1975).

115. DIG. 2.14.7.4 (Ulpian, Ad Edictum 4). See *supra* note 48 and accompanying text.

116. 2 FRIEDRICH CARL VON SAVIGNY, *DAS OBLIGATIONENRECHT ALS TEIL DES HEUTIGEN RÖMISCHEN RECHTS* 249, 253–54 (1853) [hereinafter SAVIGNY, *OBLIGATIONS*]; ARCHIBALD BROWN, *AN ÉPITOME AND ANALYSIS OF SAVIGNY'S TREATISE ON OBLIGATIONS IN ROMAN LAW* 122–24 (1872).

117. SAVIGNY, *OBLIGATIONS*, *supra* note 116, at 249, 253–54; BROWN, *supra* note 116, at 122–24.

118. The *stipulatio* was the most widely known and used nominate contract. Originally, it was a verbal (*verbis*) contract formed in a ceremony of a question and answer between the parties. Later, the *stipulatio* was designated a mandatory

From this, Savigny posited that the *stipulatio* is an abstract contract, that is, a contract that is valid notwithstanding the invalidity or inexistence of its *causa*.¹¹⁹ This radical proposition laid the foundation for the recognition of abstract juridical acts¹²⁰ in the German and Greek civilian systems under the principle of abstraction.¹²¹

Based on this observation of the abstract nature of the *stipulatio*, Savigny then turned his attention to the *traditio*. Under Roman law, *traditio* was the act of delivery of a corporeal thing.¹²² *Traditio* was a causal act in the classical period¹²³ but had become abstract by the time of the *Corpus Iuris Civilis*.¹²⁴ Faithful to the Roman system, Savigny distinguished sharply between the promissory element of a transaction and the dispositive element of the same transaction, thus enunciating the famous theory of separation.¹²⁵ Savigny then characterized the *traditio* as

written form. See WATSON, *supra* note 14, at 1–9; SCHULZ, *supra* note 16, at 473–83; PETROPOULOS I, *supra* note 11, at 873–86; GORDLEY, FOUNDATIONS, *supra* note 17, at 290.

119. SAVIGNY, OBLIGATIONS, *supra* note 116, at 249, 253–54; BROWN, *supra* note 116, at 122–24; ZIMMERMANN, *supra* note 23, at 91–92.

120. A juridical act is abstract when the validity of the act is independent of the validity or existence of its cause. Most promissory juridical acts are causal. Conveyance of movables, assignment of rights, and remission of debts are popular examples of abstract dispositive juridical acts that remain valid notwithstanding the invalidity of their cause. See YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 96, at 449–51; LITVINOFF, OBLIGATIONS I, *supra* note 17, § 248.

121. “Abstraktionsprinzip.” See FILIOS, *supra* note 17, at 80–86; BASIL MARKESINIS ET AL., THE GERMAN LAW OF CONTRACT, A COMPARATIVE TREATISE 27–37 (2d ed. 2006); ZIMMERMANN, *supra* note 23, at 866–68.

122. The term “tradition” is used in contemporary civilian theory and its application appears in modern civil codes. See, e.g., LA. CIV. CODE ANN. arts. 722, 2477 (2018).

123. A valid cause of tradition, *iusta causa traditionis*, was required for the validity of the transfer of a thing. PETROPOULOS I, *supra* note 11, at 676–78.

124. *Id.*; see also DIG. 41.1.9.3 (Gaius, Rerum Cottidianarum sive Aureorum 2); J. INST. 2.1.40 (accepting the validity of a transfer of property without reference to an underlying cause).

125. “Trennungsprinzip.” See 3 FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 312–13 (1840); see also J.B. MOYLE, THE CONTRACT OF SALE IN THE CIVIL LAW 3, 110, 135 (1892, reprinted 1994) (discussing the difference between the Roman promissory concept of sale with the English sale as an “ipso facto transfer of property” and citing DIG. 50.16.67 and CODE JUST. 2.3.20); ZIMMERMANN, *supra* note 23, at 271–72. The promissory act usually serves as the principal and objective cause of the dispositive act, while, through the dispositive act, the obligation incurred in the promissory act is discharged. See MARKESINIS ET AL., *supra* note 121, at 27–37.

a dispositive and abstract juridical act and the *stipulatio* as a promissory and abstract juridical act.¹²⁶

The potential inequities produced by the disassociation of cause from the validity of these abstract juridical acts are mitigated by recourse to the doctrine of unjustified enrichment.¹²⁷ Savigny postulated that the several Roman abstract *condictiones*, if read together, stand for the proposition of a general action of unjustified enrichment as a *condictio generalis*, which ought to be available if the actual cause of an abstract juridical act is inexistent or invalid.¹²⁸

Savigny's theory was commented on and further elaborated by Jhering and was eventually incorporated in the modern German and Greek civil law.¹²⁹ As a result, the concept of unjustified enrichment is considerably broader and more frequently invoked in Germany and Greece to address issues of restitution as well as restoration for failed juridical acts.¹³⁰ German and Greek legal doctrines base their theory of unjustified enrichment on the Roman *condictiones* from which a general action of

126. SAVIGNY, OBLIGATIONS, *supra* note 116, at 255–77 and note m. On the distinction between promissory and dispositive juridical acts, *see supra* note 96. In essence, if an abstract juridical act involving transfer of property fails upon performance, the transferee will maintain ownership of the thing. *See* MICHAEL STATHOPOULOS, CONTRACT LAW IN GREECE 50 (2d ed. 2009) [hereinafter STATHOPOULOS, CONTRACT LAW].

127. BALIS, *supra* note 65, § 65.

128. 5 FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 503, 522–23, 526–27, 567 (1841); Nicholas I, *supra* note 11, at 611. As Professor Yiannopoulos explained,

A debtor sued for the performance of obligations undertaken by [an abstract] juridical act may not defend the action on the ground that the juridical act was without cause or that its cause was immoral or illegal. The harshness of this solution is mitigated by application of the principle of enrichment without cause. In certain circumstances, the debtor may avoid performance of an obligation he has assumed by raising the exception of lack or unlawfulness of cause and, if he performed, he may reclaim whatever he paid by an action grounded on the unjustified enrichment of the defendant.

YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 96, at 450.

129. *See* FILIOS, *supra* note 17, at 83; MARKESINIS ET AL., *supra* note 121, at 11–13. The German approach of *separation* and *abstraction* is aimed initially at protecting third parties and the public trust but also endeavors to protect the contracting parties when deemed necessary. *See* DIETER MEDICUS, ALLGEMEINER TEIL DES BGB, No. 226 (8th ed. 2002); STATHOPOULOS, CONTRACT LAW, *supra* note 126, at 50–51.

130. *See* 1 MAX KASER, DAS RÖMISCHE PRIVATRECHT § 139.3 (2d ed. 1971).

unjustified enrichment¹³¹ appeared in the German¹³² and Greek¹³³ civil codes. Nevertheless, several German scholars¹³⁴ questioned the effectiveness of a unitary remedy to govern such a multitude of cases.¹³⁵ Following this trend, German legal doctrine distinguishes between several nominate types of enrichment.¹³⁶

The two most prominent German categories of enrichment are enrichment because of a performance rendered by the obligor to the obligee¹³⁷ and enrichment occurring in some other way.¹³⁸ Proponents of this categorization also argued in favor of the application of a different subset of rules for each category.¹³⁹ This strict categorization of the types of enrichment only prompted further debate and was not particularly helpful for the courts.¹⁴⁰

One celebrated example of the overcomplicated German doctrine of unjustified enrichment is the “air-travel case.”¹⁴¹ A 17-year-old boy

131. See STATHOPOULOS, UNJUSTIFIED ENRICHMENT, *supra* note 10, at 20–22.

132. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 812 (2018) (Ger.); Martin Schwab, *in* 5 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 812 (Franz Jürgen Säcker et al. eds., 6th ed. 2013); GERHARD DANNEMANN, THE GERMAN LAW OF UNJUSTIFIED ENRICHMENT 3–20 (2009); ZIMMERMANN, *supra* note 23, at 887–91 (1990, reprinted 1992).

133. ASTIKOS KODIKAS [AK] [CIVIL CODE] art. 904 (2018) (Greece); Michael Stathopoulos, Arthro 904 [Article 904], *in* 4 ASTIKOS KODIX, KAT’ ARTHRO ERMINEIA, EIDIKO ENOCHIKO [CIVIL CODE COMMENTARY, SPECIAL LAW OF OBLIGATIONS] (Apostolos Georgiades & Michael Stathopoulos eds., 1982) (Greece); STATHOPOULOS, CONTRACT LAW, *supra* note 126, at 243–57.

134. Most notably, see WALTER WILBERG, DIE LEHRE VON DER UNGERECHTFERTIGEN BEREICHERUNG NACH ÖSTERREICHISCHEM UND DEUTSCHEM RECHT—KRITIK UND AUFBAU (1934); Ernst von Caemmerer, Grundprobleme des Bereicherungsrechts, *in* ERNST VON CAEMMERER: GESAMMELTE SCHRIFTEN 370 (H.G. Leser ed., 1968); Ernst von Caemmerer, *Problèmes Fondamentaux de l’enrichissement sans Cause*, 18 REVUE INTERNATIONALE DE DROIT COMPARÉ 573 (1966).

135. See GORDLEY, FOUNDATIONS, *supra* note 17, at 419–21, 426–32; STATHOPOULOS, UNJUSTIFIED ENRICHMENT, *supra* note 10, at 22–27; Nicholas I, *supra* note 11, at 614–17.

136. See DANNEMANN, *supra* note 132, at 21–44; BIRKE HÄCKER, CONSEQUENCES OF IMPAIRED CONSENT TRANSFERS 25–35 (2009).

137. “*Leistungskondition*.” See DANNEMANN, *supra* note 132, at 45–74.

138. “*Nichtleistungskondition*.” See *id.* at 87–122. This broad subcategory encompasses cases of restitution not based on performance rendered by the impoverished obligee. The most notable example is the enrichment occurring from the enriched obligor’s interference with the impoverished obligee’s patrimony (*Eingriffskondition*). *Id.*

139. See STATHOPOULOS, CONTRACT LAW, *supra* note 126, at 247–48.

140. *Id.*

141. “*Flugreisefall*.” Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 7, 1971 Neue Juristische Wochenschrift [NJW] 609, 1971 (Ger.). Partial translation

somehow managed to board a flight from Hamburg to New York without a valid ticket.¹⁴² His plot was unraveled when the aircraft arrived in New York, and immigration officials denied him admission into the United States.¹⁴³ The airline then presented a written agreement to the boy to fly him back to Germany.¹⁴⁴ The boy signed the agreement, and when he returned to Germany, he refused to pay.¹⁴⁵ The airline brought suit against his parents.¹⁴⁶ Under German law, the contract signed by the minor for the return flight was absolutely null;¹⁴⁷ the airline did maintain a claim, however, against the parents on the basis of *negotiorum gestio* for the return flight to Germany.¹⁴⁸ But what about the outbound flight to New York? The court found that the boy had been unjustly enriched at the expense of the airline.¹⁴⁹ The boy's parents were ordered to make restitution for the cost of the airfare regardless of the fact that the boy did not retain his enrichment¹⁵⁰ and that he was a minor.¹⁵¹

available in DANNEMANN, *supra* note 132, at 242–49; *see also* MARKESINIS ET AL., *supra* note 121, at 235–36.

142. DANNEMANN, *supra* note 132, at 242–45; MARKESINIS ET AL., *supra* note 121, at 235–36.

143. DANNEMANN, *supra* note 132, at 242–45; MARKESINIS ET AL., *supra* note 121, at 235–36.

144. DANNEMANN, *supra* note 132, at 242–45; MARKESINIS ET AL., *supra* note 121, at 235–36.

145. DANNEMANN, *supra* note 132, at 242–45; MARKESINIS ET AL., *supra* note 121, at 235–36.

146. DANNEMANN, *supra* note 132, at 242–45; MARKESINIS ET AL., *supra* note 121, at 235–36.

147. DANNEMANN, *supra* note 132, at 245–49; MARKESINIS ET AL., *supra* note 121, at 235–36. In Louisiana, the contract would be relatively null at the behest of the minor. LA. CIV. CODE ANN. arts. 1919, 2031 (2018).

148. DANNEMANN, *supra* note 132, at 245–49; MARKESINIS ET AL., *supra* note 121, at 235–36; *cf.* LA. CIV. CODE ANN. art. 2292.

149. MARKESINIS ET AL., *supra* note 121, at 236.

150. *Id.* (“[A] change of position . . . cannot be invoked if the debtor knew that he was not entitled to the service.”). The problem of change of position concerns the consequences of the action of enrichment without cause, which are not examined in this Article. *See generally* James Gordley, *Restitution without enrichment? Change of position and Wegfall der Bereicherung*, in UNJUSTIFIED ENRICHMENT, KEY ISSUES IN COMPARATIVE PERSPECTIVE 227 (David Johnston & Reinhard Zimmermann eds., 2002); GORDLEY, FOUNDATIONS, *supra* note 17, at 433–44.

151. MARKESINIS ET AL., *supra* note 121, at 236. The facts of this case clearly indicate an enrichment and a corresponding impoverishment. Yet these facts still prompted extended controversy among German commentators as to the precise nature of the enrichment. Was this flight “provided” to the boy by the airline or did the boy “interfere” with the airline’s patrimony? Was the airline actually impoverished?

Greek legal doctrine has followed a more flexible and practical approach.¹⁵² Based on German theory, Greek scholars acknowledge three basic types of enrichment: (1) performance or other benefit conferred on the enriched obligor at the expense of the impoverished obligee; (2) enriched obligor's interference with the impoverished obligee's patrimony; and (3) expenses incurred by the impoverished obligee on the property of the enriched obligor.¹⁵³ The same scholars recognize, however, that these categories are flexible, may overlap, and are intended solely for practical use and ease of reference rather than strict categorizations warranting a separate regulation.¹⁵⁴ This approach will be used when discussing the requirements for the action of enrichment without cause.

A comparison of the French and German models of unjustified enrichment will become more evident by reference to an example: if X sells her bicycle to Y and, upon delivery of the bicycle, X discovers that the cause of the contract of sale was false¹⁵⁵ or illegal,¹⁵⁶ X can bring an action for annulment of the contract.¹⁵⁷ In France and Louisiana, the juridical act of sale typically encompasses both the promise to transfer ownership and the conveyance of the bicycle. The validity of the cause is a mandatory requirement for the validity of this sale. As a result of the nullity of the contract of sale, ownership of the bicycle will revert back to X, who can now revendicate the bicycle in Y's hands by instituting a real action and not an action for enrichment without cause.

In Germany and Greece, however, this transaction contains two distinguishable juridical acts—the promise to sell and the dispositive act of conveyance. The dispositive act is abstract and, therefore, nondependent upon the validity of the promissory act of sale. Invalidity of the former act therefore will not affect the validity of the latter act. Thus, Y remains owner of the bicycle and is immune to any real actions for its recovery. But because

Obviously the boy took an empty seat on the airplane—a seat that was not reserved or used by anyone else. Finally, what was the boy's enrichment? Did he retain this enrichment, having been flown back to Germany? Cases such as this one illustrate the futility of the attempt to strictly categorize the cases of enrichment. In Louisiana, these facts would possibly fall within the scope of the tort of conversion and, therefore, a delictual action would be available. *See infra* notes 239, 241.

152. STATHOPOULOS, UNJUSTIFIED ENRICHMENT, *supra* note 10, at 37–39.

153. *Id.*

154. *Id.*

155. LA. CIV. CODE ANN. art. 1948 (2018).

156. *Id.* art. 1968.

157. Naturally, if the contract is relatively null, the action is for rescission of the contract. If the contract is absolutely null, an action for a declaratory judgment is initiated. *See id.* arts. 2030, 2032.

Y has no just cause to retain this enrichment in her patrimony, X will be entitled to reclaim the bicycle on grounds of unjustified enrichment.

From this illustration, it should become clear that both systems provide for the recovery of property that has been conveyed without “just cause.” Each system, however, arrives at this result via different routes. What is accomplished by the German approach of unjustified enrichment is equally achieved by the French doctrines of cause and nullity. In other words, the German device of unjustified enrichment is broader than the French enrichment without cause. Conversely, the French doctrines of cause and nullity are broader than the German theory of invalidity of juridical acts. Understanding the history and characteristics of the French/Louisiana model of enrichment without cause will prove useful when formulating the general principles for the application of this remedy.

II. SCOPE OF APPLICATION OF ENRICHMENT WITHOUT CAUSE

The second mystery to be explored is the precise scope of application of the theory of enrichment without cause. Louisiana and French courts have delineated this scope of application by enunciating several requirements for this remedy. This jurisprudence has been codified.¹⁵⁸ These requirements are explored with reference to general principles drawn from the characteristics of the French model of enrichment without cause. Discussion refers to Louisiana jurisprudence and solutions reached by French courts. German and Greek ideas compatible with the French/Louisiana model are also used.

A. *General Principles*

Solving the first mystery concerning the foundation of the theory of enrichment without cause reveals three characteristic features of this theory: (1) the general and residual character of the remedy; (2) the legal source of the obligation; and (3) the concept of restitution. Exploring and understanding these features is necessary before addressing the requirements for application of the theory of enrichment without cause.

1. *Enrichment Without Cause as Lex Generalis*

The first principle derived from the characteristics of the French/Louisiana model of enrichment without cause is the general nature of the remedy.¹⁵⁹ Courts steadily characterize enrichment without cause as a “gap-filling” device of equitable origin, having exceptional application, pursuant to a judicially

158. *Id.* art. 2298.

159. *See* Nicholas I, *supra* note 11, at 606–07.

crafted principle of substantive subsidiarity.¹⁶⁰ Perhaps a more accurate description of this characteristic feature can be found in the civilian maxim of statutory construction, *lex posterior generalis non derogat priori speciali*.¹⁶¹ As discussed above, the French approach to enrichment without cause focused primarily on the doctrines of cause and nullity of juridical acts. Nevertheless, enrichment without cause was given exceptional application, which, according to another civilian maxim, *exceptio est strictissimae interpretationis*,¹⁶² should be interpreted strictly. Therefore, application of the provision of Article 2298 of the Louisiana Civil Code must yield to more specific rules on cause, nullity, and dissolution of juridical acts, as well as legal rules on delictual or quasi-delictual liability.

In essence, expression of the general principle of unjustified enrichment is found in the doctrines of cause and nullity as well as in the concept of enrichment without cause. When it comes to restoration, the former rules are *lex specialis*.

2. Enrichment Without Cause as a Juridical Fact

Scholars have advanced several theories concerning the legal nature of enrichment without cause.¹⁶³ These theories can be separated into two broad categories. The first category includes theories claiming that enrichment without cause is a form of *quasi-delict*, generating legal obligations on the basis of the acts of the enriched obligor.¹⁶⁴ The second

160. *Walters v. MedSouth Record Mgmt., L.L.C.*, 38 So. 3d 243, 244 (La. 2010) (citing *Mouton v. State*, 525 So. 2d 1136, 1142 (La. Ct. App. 1988)); *Bd. of Sup'rs of La. State Univ. v. La. Agric. Fin. Auth.*, 984 So. 2d 72 (La. Ct. App. 2008); *see also Carriere v. Bank of La.*, 702 So. 2d 648, 657 (La. 1996); *Coastal Env't Specialists, Inc. v. Chem-Lig Intern., Inc.*, 818 So. 2d 12, 19 (La. Ct. App. 2001) (“[W]here there is a rule of law directed to the issue, an action must not be allowed to defeat the purpose of said rule. . . . Stated differently, unjust enrichment principles are only applicable to fill a gap in the law where no express remedy is provided.”).

161. A posterior general law does not abrogate the provisions of a prior special law. *See* YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 96, at 239.

162. Exceptional provisions are not susceptible of expansive interpretation or analogous application. *See id.* at 258.

163. SAÚL LITVINOFF, OBLIGATIONS § 259, *in* 7 LOUISIANA CIVIL LAW TREATISE (1975) [hereinafter LITVINOFF, OBLIGATIONS II]; André Rouast, L'enrichissement sans cause et la jurisprudence civile, REVUE TRIMESTRIELLE DE DROIT CIVIL [RTDCIV] 1922, p. 35.

164. *See* 2 PLANIOL I, *supra* note 65, No. 937; Litvinoff, *Appellate Courts*, *supra* note 113, at 207–08; Georges Ripert & Michel Teisseire, *Essai d'une théorie de l'enrichissement sans cause*, REVUE TRIMESTRIELLE DE DROIT CIVIL [RTDCIV] 1904, p. 727 (arguing that the legal basis for unjustified enrichment can

category comprises theories proposing that enrichment without cause is *quasi-contractual* in form, thus generating an obligation as if there were an implied contract between enriched obligor and impoverished obligee.¹⁶⁵

The quasi-delictual theories are historically more accurate and closer to the true and original legal nature of the Roman law *condictiones*.¹⁶⁶ These theories, however, focus too much on the subjective element of the obligor's behavior, thus failing to account for cases in which the obligor is held strictly liable for her enrichment.¹⁶⁷ The quasi-contractual theories

be found in the theory of risks); Stephen Smith, *Unjust Enrichment: Nearer to Tort than Contract*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT 181 (Robert Chambers et al. eds., 2009); Reihnard Zimmermann, *Unjustified Enrichment: The Modern Civilian Approach*, 15 OXFORD J. LEGAL STUD. 403, 403–04 (“The law of unjustified enrichment, in a way, is the mirror image of the law of delict.”).

165. Aubry and Rau adopted this approach by advancing their special theory of balancing the patrimonies between the enriched obligor and the impoverished obligee. See AUBRY & RAU, *supra* note 6, No. 578; see also Nicholas III, *supra* note 113, at 6–10 (discussing the dilemma between delict and quasi-contract in the pre-*Minyard* Louisiana jurisprudence).

166. See STATHOPOULOS, UNJUSTIFIED ENRICHMENT, *supra* note 10, at 4–6 (explaining that the early *condictiones* were focused solely on the act of enrichment and sanctioned an illicit misappropriation of wealth).

167. 2 PLANIOL I, *supra* note 65, No. 938; BEUDANT & LEREBOURS-PIGEONNIÈRE, *supra* note 60, No. 1759; 2 GEORGES RIPERT & JEAN BOULANGER, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL No. 1275 (1952); 7 MARCEL PLANIOL & GEORGES RIPERT, DROIT CIVIL FRANÇAIS, LES OBLIGATIONS, PT. 2, No. 752 (Paul Esmein et al. eds., 1931); 2 LOUIS JOSSEAND, COURS DE DROIT CIVIL POSITIF FRANÇAIS No. 758 (3d ed. 1939) (all arguing that admissibility of the *actio de in rem verso* is independent of the capacity or incapacity of the defendant). Protection of the incapable obligor is warranted, however, when assessing the effect of a successful claim of enrichment without cause. It has been suggested that in the case of an incapable enrichee, restitution ought to be made on the assets that remain in the hands of the enrichee, if there is no fraud on his part. See 2 HENRI MAZEAUD ET AL., LEÇONS DE DROIT CIVIL, VOL. 1, OBLIGATIONS, THEORIE GENERALE No. 711 (François Chabas ed., 8th ed. 1991).

appeared later and prevailed in doctrine,¹⁶⁸ jurisprudence,¹⁶⁹ and the law.¹⁷⁰ The real difficulty with this group of theories lies in the imperfect, and much debated, definition of the term “quasi-contract.”¹⁷¹ Further, this group of theories focuses mainly on the objective factor of enrichment

168. Unjustified enrichment has been compared to a special and implied type of loan between the borrower-obligor and the lender-obligee. See LITVINOFF, OBLIGATIONS I, *supra* note 17, § 199, at 360; MARTY & RAYNAUD, *supra* note 81, No. 623 (citing French writers who have characterized the payment of a thing not due as a particular quasi-contract *pro mutuum*); see also WILLIAM W. BUCKLAND, THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW § 107 (1931, reprinted 1994). Other scholars have understood unjustified enrichment as an abnormal *negotiorum gestio*. See 31 CHARLES DEMOLOMBE, COURS DE CODE NAPOLEON, No. 49 (2d ed. 1882). The French jurisprudence initially followed this approach, but it was quickly dismissed by French doctrine. See Cour de cassation [Cass.] [supreme court for judicial matters] req., July 16, 1890, D. 1891, 1, 49, note M. Planiol, S. 1894, 1, 19 (Fr.); FLOUR ET AL., FAIT JURIDIQUE, *supra* note 90, No. 35. On the quasi-contractual nature of *negotiorum gestio*, see Coastal Env't Specialists, Inc. v. Chem-Lig Intern., Inc., 818 So. 2d 12, 20 (La. Ct. App. 2001); City of Shreveport v. Caddo Parish, 658 So. 2d 786, 795–96 (La. Ct. App. 1995). On the differences between *negotiorum gestio* and enrichment without cause, see JOHN DENSON SMITH, LOUISIANA AND COMPARATIVE MATERIALS ON CONVENTIONAL OBLIGATIONS 417–18 (4th ed. 1973).

169. Canal/Claiborne, LTD v. Stonehedge Dev., L.L.C., 156 So. 3d 627, 633–34 (La. 2014) (“That a claim of enrichment without cause under La. Civ. Code art. 2298 is a quasi-contractual claim is well-settled in our jurisprudence.”); Arc Indus., L.L.C. v. Nungesser, 970 So. 2d 690, 694–95 (La. Ct. App. 2007) (holding that a quasi-contractual claim of enrichment without cause is sufficient to support the application of LA. CODE CIV. PROC. art. 76.1 on venue); Our Lady of the Lake Reg'l Med. Ctr. v. Helms, 754 So. 2d 1049, 1052 (La. Ct. App. 1999).

170. See SMITH, *supra* note 168, at 417–19 (discussing the introduction of the notion of *quasi-contract* and enrichment without cause in French and Louisiana law).

171. The Mazeaud brothers concur with Josserand in saying that quasi-contract is a “legendary monster that should be banished from the juridical vocabulary.” JOSSERAND, *supra* note 167, No. 10; MAZEAUD ET AL., *supra* note 167, No. 649. Mousourakis prefers a more subtle renunciation of this term, calling it “unsatisfactory.” GEORGE MOUSOURAKIS, FUNDAMENTALS OF ROMAN PRIVATE LAW 239 (2012). Levasseur and Terré et al. also aptly note that the Latin term “*quasi ex contractu nasci videntur*” refers not to a source of the obligation but to the effect of such an obligation “*as if a contract were formed.*” See LEVASSEUR, *supra* note 3, at 9–15; TERRÉ ET AL., *supra* note 90, No. 1026. The Louisiana Legislature acted wisely in removing this term from the civil code. LA. CIV. CODE arts. 2292–2293 (1870, repealed 1995). Interestingly, the term still remains in the revised French Civil Code. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1376 (1804) (Fr.); CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1302 (rev. 2016) (Fr.).

without inquiring into the subjective factor of the enriched obligor's behavior.¹⁷²

A more accurate and systematic approach would be to characterize enrichment without cause as a type of *juridical fact*.¹⁷³ The distinction between juridical acts and juridical facts as sources of obligations is well known in civilian theory.¹⁷⁴ A juridical fact is a conduct or event to which the law attaches legal consequences regardless of whether those consequences are in fact desired.¹⁷⁵ The conduct of a person can be licit or illicit.¹⁷⁶ Capacity and fault of the obligor in a licit juridical fact are irrelevant factors, whereas culpability and liability are usual factors in the case of illicit juridical facts.¹⁷⁷ “Quasi-contracts,” including *negotiorum*

172. 4 JEAN CARBONNIER, *DROIT CIVIL, LES OBLIGATIONS* 471 (9th ed. 1976).

173. 3 GABRIEL BAUDRY-LACANTINERIE & JULIEN BONNECASSE, *TRAITE THEORIQUE ET PRATIQUE DE DROIT CIVIL, SUPPLEMENT* No. 113 (1926).

174. 1 RENE DEMOGUE, *TRAITE DES OBLIGATIONS EN GENERAL* No. 11 (1923); 2 GABRIEL BAUDRY-LACANTINERIE & JULIEN BONNECASSE, *TRAITE THEORIQUE ET PRATIQUE DE DROIT CIVIL, SUPPLEMENT* Nos. 248–613 (1925); 1 JACQUES FLOUR, JEAN-LUC AUBERT & ERIC SAVAUX, *DROIT CIVIL, LES OBLIGATIONS, L'ACTE JURIDIQUE*, No. 60 (16th ed. 2014); ZIMMERMANN, *supra* note 23, at 10–21. A more detailed and technical theory of juridical acts prevails in Germany and Greece. *See* LUDWIG ENNECCERUS & HANS CARL NIPPERDEY, *ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS* § 145 (15th ed. 1960); Jochem Schmitt §§ 104–115 and Christian Armbrüster §§ 116–124, *in* 1 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH (Franz Jürgen Säcker et al. eds., 7th ed. 2015); BALIS, *supra* note 65, §§ 32–34; Marianos Karasis, *Eisagogi sta Arthra* 127–200 [Introduction to Articles 127–200], *in* 1B ASTIKOS KODIX, *KAT' ARTHRO ERMINEIA, GENIKES ARCHES* [CIVIL CODE COMMENTARY, GENERAL PRINCIPLES] 1–28 (Apostolos Georgiades & Michael Stathopoulos eds., 2d ed. 2016) (Greece).

175. CARBONNIER, *supra* note 172, at 449. It is noteworthy that the recent 2016 revision of the French Civil Code includes definitions of juridical acts and facts in two new Articles: CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1100-1 (2018) (Fr.) (defining *actes juridiques* as “exercises of will that are intended to produce legal effects”) and CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1100-2 (2018) (Fr.) (defining *faits juridiques* as “conduct or events to which the law attaches legal consequences”). These articles were added in defiance of the stern injunction by Portalis, original drafter of the Code Napoléon, against the inclusion of doctrinal material in the code. *See* YIANNOPOULOS, *CIVIL LAW SYSTEM*, *supra* note 96, at 252; Gruning, *supra* note 7, at 63–64. The German and Greek civil codes, although more verbose and heavily influenced by the Pandectists, do not contain definitions of juridical acts and facts.

176. CARBONNIER, *supra* note 172, at 449.

177. Aline Tenenbaum et al., *Juridical Acts, Juridical Facts*, *in* EUROPEAN CONTRACT LAW 72–76 (Bénédicte Fauvarque-Cosson & Denis Mazeaud eds., 2008); *cf.* CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1100-2 para. 2 (2018) (Fr.) (“Obligations arising from a juridical fact are governed, as the case may be, by

gestio, payment of a thing not due, and enrichment without cause, are licit juridical facts.¹⁷⁸

This classification seems to accommodate the co-existence of objective and subjective factors in an obligation from enrichment without cause. Although the obligor is strictly liable merely from the occurrence of an unjustified appropriation of wealth, her good or bad faith is taken into account when addressing issues of compensation.¹⁷⁹ Further, the obligee is charged with a duty of good faith, the breach of which may impair the causal link between enrichment and impoverishment.¹⁸⁰ As a juridical fact, enrichment without cause generates a legal obligation of restitution.

3. *Enrichment Without Cause as Restitution, Not Restoration*

Enrichment without cause binds the enriched obligor to make restitution for the unjustified enrichment she received, which corresponds to an impoverishment of the obligee. This observation necessarily means that the object of the enrichment has exited the obligee's patrimony and is now part of the obligor's patrimony.¹⁸¹ If, however, there is no lawful cause for retaining this enrichment, the law holds the enriched party accountable for returning that same benefit or its traceable product to the impoverished obligee.¹⁸²

This particular consequence of restitution ought to be distinguished from restoration of a thing or benefit already belonging to the "obligee."¹⁸³ When a benefit or a particular thing is merely withheld by another, it is

the sub-chapter relating to extra-contractual liability or the sub-chapter relating to other sources of obligations.").

178. Tenenbaum et al., *supra* note 177, at 73; CARBONNIER, *supra* note 172, at 449, 451; LITVINOFF, OBLIGATIONS IN GENERAL, *supra* note 97, § 1.6; Arc Indust., L.L.C. v. Nungesser, 970 So. 2d 690, 694 (La. Ct. App. 2007) (citing Litvinoff's definition of quasi contracts as "willful and lawful acts [that] give rise to obligations without the concurrence of wills, that is, without the agreement of the persons involved that is necessary for the formation of a contract").

179. TERRÉ ET AL., *supra* note 90, Nos. 1069–71.

180. See Georges Bonet, La condition d'absence d'intérêt personnel et de faute chez l'appauvri pour le succès de l'action de in rem verso, in MELANGES PIERRE HEBRAUD 59 (Université Toulouse ed., 1981).

181. Nicholas I, *supra* note 11, at 607–08; ROBY, *supra* note 19, at 77 ("If ownership had not passed, condition was not applicable." (citing DIG. 12.1.14)).

182. 2 PLANIOL I, *supra* note 65, No. 938A.

183. See WILLIAM W. BUCKLAND, EQUITY IN ROMAN LAW 33–37 (1911, reprinted 1983) (discussing restoration in cases of relative nullity on the basis of the Roman *restitutio in integrum*).

still owned by the “obligee” in question, who can reclaim it from the “obligor” by bringing a real action.¹⁸⁴ This is particularly the case with nullity of a juridical act¹⁸⁵ and dissolution of a contract.¹⁸⁶ The purpose of restoration is a reversal of the failed act.¹⁸⁷

This general principle finds application particularly in the consequences of the action of enrichment without cause,¹⁸⁸ but it also complements the previous two principles. Under the guidance of these general principles, and with reference to comparative civilian jurisprudence and doctrine, focus is now placed on the greatest mystery of enrichment without cause—its requirements.

B. Requirements for an Action of Enrichment Without Cause

The jurisprudence identifies five requirements for enrichment without cause: (1) enrichment of the obligor; (2) impoverishment of the obligee;

184. LA. CIV. CODE ANN. art. 526 (2018). See YIANNOPOULOS, PROPERTY, *supra* note 18, §§ 11:7, 13:7. This distinction is long accepted in civil law and is not unknown at common law where the potential misunderstanding of the term “restitution” has been noticed. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmts. a, c, e (AM. LAW INST. 2011).

185. LA. CIV. CODE ANN. art. 2033. If a contract of sale is rescinded after the thing sold has been delivered to the putative buyer and the price has been paid by the putative buyer, ownership of the thing sold reverts back to the putative seller while the buyer’s ownership of the funds is reinstated. *Id.* The same result is reached in cases of dissolution of a sale. *Id.* art. 2018. TOOLEY-KNOBLETT & GRUNING, *supra* note 99, §§ 15:9, 15:16.

186. When a contract is dissolved, the primary effect is that of *restoration*—the parties are restored to their preexisting patrimonial situations, such restoration being made in kind or by value. Art. 2018 para. 1. Nevertheless, if partial performance of a value has been rendered to the party seeking performance and that party keeps that performance, compensation is due to the other party for this enrichment. *Id.* para. 2 & cmt. d. See TOOLEY-KNOBLETT & GRUNING, *supra* note 99, § 15:3 n.15; LITVINOFF, OBLIGATIONS II, *supra* note 163, § 271.

187. Restoration of a payment of a thing not due (*condictio indebiti*) historically served the same purpose. See CARBONNIER, *supra* note 172, at 463–64. This concept appears in the pertinent provisions of the Louisiana Civil Code, pursuant to which the payee must *restore* what she has received. See LA. CIV. CODE ANN. arts. 2299, 2304; see also YIANNOPOULOS, PROPERTY, *supra* note 18, § 13:13 (explaining that the quasi-contractual action of a payment of a thing not due is intended for restoration purposes).

188. This Article does not discuss the consequences of the action for enrichment without cause. For discussion of the consequences, see generally LEVASSEUR, *supra* note 3, at 429–37; Gordley, *supra* note 150, at 227–42; GORDLEY, FOUNDATIONS, *supra* note 17, at 433–44.

(3) causal link between the enrichment and the impoverishment; (4) lack of cause for the enrichment; and (5) unavailability of another remedy at law.¹⁸⁹ French legal doctrine has grouped these requirements into material requirements—enrichment, impoverishment, and causal link¹⁹⁰—and juridical requirements—lack of cause and inexistence of other remedy.¹⁹¹ The following discussion will focus on this categorization.¹⁹²

1. Material Requirements

There are three material requirements for an action of enrichment without cause: (1) enrichment of the obligor; (2) impoverishment of the obligee; and (3) a causal link between the enrichment and the impoverishment. These requirements are discussed with reference to French and Louisiana doctrine and jurisprudence and to compatible German and Greek ideas.

a. Enrichment

Enrichment of the obligor occurs when “his patrimonial assets increase or his liability diminishes.”¹⁹³ The concept of enrichment is broad, encompassing any advantage appreciable in money and taking diverse forms.¹⁹⁴ It can manifest itself as a positive gain, such as the acquisition of

189. See *supra* note 3; see also SMITH, *supra* note 168, at 418–19.

190. See Valerio Forti, Enrichissement injustifié, Conditions juridiques, *JurisClasseur Civil*, Art. 1303 à 1304-4, Fascicule 10, June 2, 2016 (Dec. 10, 2017).

191. See Valerio Forti, Enrichissement injustifié, Effets, *JurisClasseur Civil*, Art. 1303 à 1304-4, Fascicule 20, June 2, 2016 (Dec. 10, 2017).

192. The usefulness of this classification lies in the burden of proof. Material conditions are positive, whereas juridical conditions are negative. Although the plaintiff must prove each of the five requirements, the defendant usually will base her defense on the lack of a juridical requirement and bears the burden of establishing peremptory exceptions against the action. *Indust. Cos., Inc. v. Durbin*, 837 So. 2d 1207, 1213–16 (La. 2003); *Fagot v. Parsons*, 958 So. 2d 750, 752–53 (La. Ct. App. 2007) (both discussing the requirements for the success of a peremptory exception of no cause of action against an action for enrichment without cause). The plaintiff also shoulders the burden of proving the lack of a cause for the enrichment because the existence of the cause is presumed. See BÉNABENT, *supra* note 110, No. 485.

193. LA. CIV. CODE ANN. art. 2298 cmt. b (2018).

194. The advantage received by the enriched obligor can be pecuniary or moral or both. George Challies provides the example of attending a concert without paying for admission as an example of an enrichment that “would be intellectual and aesthetic rather than material.” See GEORGE CHALLIES, *THE DOCTRINE OF UNJUSTIFIED ENRICHMENT IN THE PROVINCE OF QUEBEC* 71–72 (2d ed. 1952); see

property, an expense avoided, or the extinction of an obligation.¹⁹⁵ Not all enrichments, however, are actionable.¹⁹⁶

Because French doctrine has not provided a satisfactory taxonomy of the possible types of enrichment,¹⁹⁷ it may be useful to refer here to the German classification of enrichment, as simplified by Greek scholars, who acknowledge three basic types of enrichment that, in some cases, may overlap: (1) performance or other benefit conferred on the obligor at the expense of the obligee; (2) obligor's interference with the obligee's patrimony; and (3) expenses incurred by the obligee on the property of the obligor.¹⁹⁸

i. Performance or Benefit Conferred on Obligor at Obligee's Expense

Performance or other benefit conferred on the obligor at the expense of the obligee can be direct or indirect. It is direct when the benefit passes from the obligee's patrimony directly to the obligor's patrimony.¹⁹⁹ It is indirect when the patrimony of a third person is involved.²⁰⁰ This category of enrichment applies frequently in Germany and Greece because it

also Nicholas I, *supra* note 11, at 642–43. This example, however, also seems to include a pecuniary advantage—not paying for admission. Perhaps attending uninvited a private concert to which only certain attendees are invited by private and gratuitous invitation would be a more accurate example of an enrichment that is moral only. Be that as it may, the weight of authority in France and Quebec accept that a “*profit moral*” can be claimed by means of an *actio de in rem verso*. CHALLIES, *supra*, at 71–72; 7 PLANIOL & RIPERT, *supra* note 167, No. 753; 3 RENÉ DEMOGUE, TRAITÉ DES OBLIGATIONS No. 150 (1923); JOSSERAND, *supra* note 167, No. 569.

195. FLOUR ET AL., FAIT JURIDIQUE, *supra* note 90, No. 39; MALAURIE ET AL., *supra* note 90, No. 1063; Nicholas I, *supra* note 11, at 641.

196. *Garber v. Badon & Ranier*, 981 So. 2d 92, 101 (La. Ct. App. 2008) (“Not every unjust enrichment warrants usage of equity.” (citing *Edmonston v. A-Second Mortg. Co.*, 289 So. 2d 116, 122 (La. 1974)); *see also* FLOUR ET AL., FAIT JURIDIQUE, *supra* note 90, No. 33.; TERRÉ ET AL., *supra* note 90, No. 1062.; BÉNABENT, *supra* note 110, No. 482.

197. Forti admits that the French term “enrichissement” is too broad and defies systematic categorization. *See* Forti, *supra* note 190, Nos. 15, 17.

198. MICHAEL STATHOPOULOS, GENIKO ENOCHIKO DIKAIΟ [GENERAL LAW OF OBLIGATIONS] 869 (4th ed. 2004) (Greece) [hereinafter STATHOPOULOS, OBLIGATIONS]; 2 PANAGIOTIS ZEPOS, ENOCHIKON DIKAION. EIDIKON MEROS [LAW OF OBLIGATIONS. SPECIAL PART] 686, 690–91 (2d ed. 1965) (Greece).

199. *See* Forti, *supra* note 190, Nos. 38–40; *see also infra* note 249.

200. *See* Forti, *supra* note 190, Nos. 38–40; *see also infra* note 249.

typically refers to restoration on the basis of the Roman *condictiones* and not restitution through the *actio de in rem verso*.²⁰¹ As noted, in France and in Louisiana, recovery of performances from a failed contract is achieved by application of the theory of cause²⁰² and the doctrines of nullity or dissolution,²⁰³ as the case may be.²⁰⁴ This category of enrichment also finds application in the restoration of the payment of a thing not due.²⁰⁵

201. This category typically forms the basis for a *condictio causa data causa non secuta*, that is, a claim for the recovery of performances rendered under a failed contract or third-party beneficiary arrangement involving the obligor and obligee. See STATHOPOULOS, OBLIGATIONS, *supra* note 198, at 907.

202. There are cases, however, that lie beyond the realm of cause. An example would be a failure of cause occurring after the discharge of all conventional obligations under the contract. Because the contract is no longer executory, belated failure of cause is inoperative. In such a case, restoration is clearly excluded and restitution seems to be the only remedy for any inequities. A celebrated example in the French jurisprudence is that of an insurer who was entitled to bring the *actio de in rem verso* against the insured in a policy of theft insurance, when the insurer paid the coverage and the thing stolen was later recovered by the insured. Cour d'appel [CA] [regional court of appeal] Lyon, 1e ch., Mar. 18, 1981, JurisData 40817 (Fr.). This situation closely resembles the example of the *condictio sine causa* in DIG. 12.7.2 (Ulpian, Ad Edictum 32) (concerning the unjustified enrichment of the owner of lost clothes who was previously indemnified for the loss by a cleaner under a laundry contract, and the clothes were later found).

203. There can be cases that lie beyond the scope of breach of contract. An example would be the case of *underpayment* of an insured who was not paid the full sum of interest due from the insurer. Payment was ordered on the basis of the *actio de in rem verso*. See, e.g., Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 10, 1980, JCP 1981, II, 11678, obs. L. Mourgeon (Fr.). Likewise, a company not paying full compensation to an employee of a company is unjustifiably enriched at the expense of said employee. See Cour d'appel [CA] [regional court of appeal] Reims, soc., Nov. 9, 1981, JurisData 42488 (Fr.).

204. See Forti, *supra* note 190, No. 31.

205. There may be cases, however, that lie within the “gray area” between *condictio indebiti* and *actio de in rem verso*. This ambiguity is particularly true in cases of *overpayment* for a performance received. Cour d'appel [CA] [regional court of appeal] Paris, 25th ch., Mar. 29, 1985, JurisData 22168 (Fr.) (finding unjustified enrichment of a contractor who had received from the owner sums greater than what was justified by the progress of the works). The dividing line is also blurred in cases of mistaken payment of the debt of another. The payor (*solvens*) will have an action for payment of a thing not due against the payee (*accipiens*). An action for enrichment without cause would be subsidiary to the first action and must be brought against the actual debtor who is enriched. See Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Apr. 4, 2001, D. 2001, 1824, note M. Billiau (Fr.) (ordering the actual debtor to make restitution of insurance benefits paid by mistake). Cf. LA. CIV. CODE ANN. art. 2302 (2018).

Nevertheless, there is room for the application of the French/Louisiana model of enrichment without cause to this category of enrichments as well. The remedy of restitution will apply when the contemplated performance is extra-contractual, that is, a thing given or a benefit conferred outside the realm of conventional obligations.²⁰⁶ An extra-contractual performance can be direct or indirect.²⁰⁷

Instances of direct, extra-contractual performances typically involve services rendered by the obligor directly to the obligee in the absence of a contractual relationship. Two famous examples from the French jurisprudence can be cited here: (1) the enrichment of the owner of a vehicle that was repaired by the proprietor of a garage who believed in good faith that a contract for the repairs existed,²⁰⁸ and (2) the enrichment of an heir who used information advertised to him by a genealogist to establish his rights to a succession of a distant relative without ever hiring the genealogist.²⁰⁹ In Louisiana jurisprudence, claims for *quantum meruit* in the absence of an agreement²¹⁰ also fall under this category.²¹¹

206. See *supra* notes 181–188 and accompanying text; see also *infra* notes 281, 282, 294, 295 and accompanying text.

207. Cf. Forti, *supra* note 190, Nos. 38–40 (discussing the more general concept of direct and indirect causal link between enrichment and impoverishment, which also applies here); see also *infra* note 249.

208. Cour d'appel [CA] [regional court of appeal] Paris, 8e ch., Mar. 19, 1976, JurisData 242 (Fr.). Here, the fact that the garage proprietor acted in his own interest, based on the erroneous belief of the existence of a contract, possibly excludes the application of the provisions of *negotiorum gestio*. Cf. LA. CIV. CODE ANN. art. 2292 cmt. d. Compare with *Standard Motor Car Co. v. State Farm Mut. Auto Ins. Co.*, 97 So. 2d 435 (La. Ct. App. 1957) (characterizing the garage owner as a depositary and allowing subrogation claim for the repairs against insurer).

209. Cour d'appel [CA] [regional court of appeal] Poitiers, Dec. 2, 1907, D. 1908, 2, 332 (Fr.); see also Nicholas I, *supra* note 11, at 625. The French Cour de cassation, however, later considered that this type of enrichment finds its cause in the rules on devolution of the estate. See Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 28, 1991, JurisData 1466, REVUE TRIMESTRIELLE DE DROIT CIVIL [RTDCIV] 1992, p. 96, obs. J. Mestre (Fr.).

210. Reference is made here to the civilian concept of *quantum meruit*. *Baker v. Maclay Props. Co.*, 648 So. 2d 888, 896 (La. 1995) (finding that the civilian concept of *quantum meruit* in the absence of an agreement “is more correctly referred to as unjust enrichment, also known as *actio de in rem verso*”). Upon codification of the *actio de in rem verso*, cases of quasi-contractual *quantum meruit* are now governed by Article 2298 of the Louisiana Civil Code. See *Jackson v. Capitol City Family Health Ctr.*, 928 So. 2d 129, 132–33 (La. Ct. App. 2005). This terminology is discussed *infra* note 303.

211. *Quantum meruit* can be contractual or quasi-contractual. Compare *Ricky's Diesel Serv., Inc. v. Pinell*, 906 So. 2d 536, 539 (La. Ct. App. 2005)

Other examples of direct, extra-contractual performances concern cases of voluntary work performed in the absence of any domestic or cohabiting relationship.²¹² Yet other cases involve voluntary services between spouses and family members, and courts confront the difficult question of enrichment from gratuitous dispositions.²¹³ In a number of decisions, courts have sustained a claim of compensation made by a spouse in a regime of separate property for payment of the spouse's separate debts or for assistance provided in the other spouse's business or profession.²¹⁴ Compensation, however, was denied for services provided by a spouse when the spouses were under a regime of acquets and gains,²¹⁵

(applying quasi-contractual *quantum meruit* for repairs to a diesel engine without a valid services contract), *with* Morphy, Makofsky & Masson, Inc. v. Canal Place 2000, 538 So. 2d 569, 573 (La. 1989) (using contractual *quantum meruit* to calculate remuneration of subcontractor when the existing agreement did not address the issue and characterizing *quantum meruit* as a device for measurement of damages rather than a method of recovery per se). *See infra* notes 294, 303.

212. *See, e.g.*, Cour d'appel [CA] [regional court of appeal] Paris, 15e ch., Mar. 10, 1978, JurisData 187 (Fr.) (involving unjustified enrichment of the heirs of a farm owner for improvements made to the farm by plaintiff voluntary worker); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 6, 1979, Gaz. Pal. 1979, 2, 237 (Fr.) (awarding compensation to voluntary employee of a company).

213. For an in depth discussion of this issue, see Nicolas Le Rudulier, *La modernité de l'enrichissement sans cause en droit de la famille*, in MELANGES RAYMOND LE GUIDEC 147 (V. Zalewski-Sicard et al. eds., 2014); Marlène Burgard, *L'enrichissement sans cause au sein du couple: quelles différences de régime entre époux, partenaires et concubins?*, LES PETITES AFFICHES [LPA], May 2010, No. 101, p. 35.

214. *See, e.g.*, Lee v. Lee, 868 So. 2d 316, 319 (La. Ct. App. 2004) (awarding compensation on the theory of unjustified enrichment to husband for payments he made on wife's separate debts with his separate funds). The same solution is obtained when the claim is made following divorce proceedings. *See* Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Apr. 6, 1968, D. 1968 Somm. 101 (Fr.); *see also* Françoise Conneau, *Inadéquation de l'application de la théorie de l'enrichissement sans cause à l'indemnisation de l'épouse séparée de biens*, in MELANGES JEAN-PIERRE BEGUET 111 (Université de Toulon ed., 1985); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 16, 1997, JurisData 5376, DROIT & PATRIMOINE 1998, No. 1923, obs. Chauvel (Fr.) (involving a mother who provided assistance to the operation of a business belonging to her son and daughter-in-law).

215. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 10, 1984, JurisData 871, DEFRÉNOIS 1985, art. 33560, p. 865, note G. Champenois (Fr.). For discussion of the Louisiana law on this issue, see Kimberly D. Higginbotham, *Reimbursement for Satisfaction of Community Obligations with Separate Property: Getting What's Yours*, 68 LA. L. REV. 181, 213 (2007) ("[I]nstead of using the doctrine of enrichment without cause between spouses,

as well as when the assistance provided did not exceed that imposed by the spousal obligation of assistance.²¹⁶ The jurisprudence has also admitted claims of unjustified enrichment for assistance provided or expenses incurred within concubinage,²¹⁷ so long as a valid justification for retention of the enrichment cannot be ascertained.²¹⁸

courts employ article 2365 [of the Louisiana Civil Code], which provides the alternative remedy of reimbursement for situations involving satisfaction of community obligations with separate property.”); *see also* ANDREA CARROLL & RICHARD MORENO, *MATRIMONIAL REGIMES* § 8:9, *in* 16 *LOUISIANA CIVIL LAW TREATISE* (4th ed. 2016).

216. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 9, 1979, Bull. civ. I, No. 11, DEFRENOIS 1980, art. 32174, p. 44, note Posnard and art. 32348, p. 915, obs. J.-L. Aubert (Fr.). *Cf.* LA. CIV. CODE ANN. art. 98 (2018). It should be remembered, however, that the general claim for unjustified enrichment among spouses must yield before any other provisions of family law that will supply the rule of decision as *lex specialis*. For instance, claims for contributions to education and training are governed by a special provision. *See* LA. CIV. CODE ANN. art. 121.

217. Cour d’appel [CA] [regional court of appeal] Paris, Jan. 14, 1987, D. 1987, inf. rap. 36 (Fr.) (involving unjust enrichment of companion from loan repayments, payment of notarial deeds, and building materials, relating to personal property and made by concubine); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 15, 1996, D. 1997, 177, note R. Libchaber, *REVUE TRIMESTRIELLE DE DROIT CIVIL* [RTDCIV] 1997, p. 636, obs. J. Hauser, and p. 657, obs. J. Mestre (Fr.) (concubine providing assistance to her partner’s business and profession).

218. *See* Succession of Pereuilhet, 23 La. Ann. 294, 295–96 (1871) (awarding compensation to a concubine for her nursing services in the absence of proof that concubinage was the motive for the parties’ cohabitation and that the services rendered were incidental to such cohabitation). *But see* Moncrief v. Succession of Armstrong, 939 So. 2d 714, 722 (La. Ct. App. 2006) (dismissing concubine’s *quantum meruit* claim against decedent’s estate for services provided to decedent). The Greek courts have gone a step further. The Greek Supreme Court awarded compensation to a concubine for her substantial gifts to her late partner, under the theory that the considerable value of these gifts signified an implied promise to marry that was never fulfilled because of her partner’s death. *See* Areios Pagos [AP] [Supreme Court] 1751/2014, Athens Bar Association Database (Dec. 10, 2017), <http://www.dsanet.gr> (Greece) [<https://perma.cc/QY2D-H4J2>]. The court’s reasoning here is highly questionable. Although it is true that parties can add a condition on their contract which shall furnish the *causa*, such a condition—and any accompanying enrichment—cannot be unilaterally imposed on the other party. *See* KASER, *supra* note 130, § 139.3, at 597. *Cf.* Succession of Joublanc, 5 So. 2d 762, 764 (La. 1941) (“One who renders valuable services to another on his promise that in his will he will compensate to the extent of the value of the services the party rendering them is entitled to collect their value from the succession of the party for whom the services were rendered if he dies without having fulfilled his promise.”); Broussard v. Compton, 36 So. 3d 376, 377 (La.

Direct extra-contractual performance can also occur in cases of a null contract in which restoration based on the nullity of the contract is insufficient or impracticable.²¹⁹ Two illustrative examples from the French jurisprudence involve the unjustified enrichment of the seller for improvements made to the property by the purchaser following a purchase agreement²²⁰ that was later annulled²²¹ and the unjustified enrichment of a retailer for work performed on his premises under a brewery contract that subsequently was annulled.²²²

An extra-contractual performance can be indirect. Here, a third person receives an advantage from an unpaid performance rendered on an original contract. Usual examples from the jurisprudence involve a lessor benefiting from improvements made to her property by a contractor hired by the lessee who later defaulted on her obligations.²²³ The enrichment of the owner of property at the expense of an unpaid subcontractor following

Ct. App. 2010) (plaintiffs made improvements on defendant's land relying on defendant's oral promise to donate property to plaintiffs). LA. CIV. CODE ANN. art. 1967; David V. Snyder, *Comparative Law in Action: Promissory Estoppel, The Civil Law, and The Mixed Jurisdiction*, 15 ARIZ. J. INT'L & COMP. L. 695, 720 (discussing the revision of Louisiana Civil Code article 1967 and the introduction of detrimental reliance in the Louisiana civil law).

219. In Louisiana, it is questionable whether such a situation would be adequately addressed by the "award of damages" contemplated in the first paragraph of Article 2033 of the Louisiana Civil Code. *See* LA. CIV. CODE ANN. art. 2033 para. 1 ("If it is impossible or impracticable to make restoration in kind, it may be made through an award of damages."). An award of damages also is contemplated when the cause of nullity is fraud or duress. *Id.* arts. 1958, 1964. When the cause of nullity is error, the reliance interest of the innocent party may be protected either through an award of damages or by upholding the contract. *Id.* art. 1952. *See* Saúl Litvinoff, *Vices of Consent, Error, Fraud, Duress, and an Epilogue on Lesion*, 50 LA. L. REV. 1, 39–45, 76–79, 101–03 (1989).

220. *Cf.* LA. CIV. CODE ANN. art. 2623.

221. Cour d'appel [CA] [regional court of appeal] Reims, Nov. 2, 1981, JurisData 42546 (Fr.) (involving unjustified enrichment of the seller of an immovable for improvements made by the buyer in a purchase agreement that was subsequently annulled due to the seller's fraud).

222. Cour d'appel [CA] [regional court of appeal] Paris, Dec. 23, 1980, JurisData 1094 (Fr.).

223. The seminal *Boudier* case from France is an example. *See supra* note 3. Several other examples from the French jurisprudence concern the enrichment of an issuer of a check that was drawn on the wrong account. *Cf.* Cour d'appel [CA] [regional court of appeal] Paris, 15e ch., May 6, 1983, JurisData 23439 (Fr.).

default of the main contractor is another example.²²⁴ An action based on indirect enrichment, however, often will stumble upon the usual existence of a lawful cause that will excuse retention of the enrichment in the hands of the third party, as discussed *infra*.²²⁵

The “performance” contemplated in this category is not limited only to conventional obligations. Performance of a legal obligation having a cause that has failed can also give rise to an action of enrichment without cause.²²⁶ Again, enrichment here can be direct or indirect. The landmark decision of the Louisiana Supreme Court in *Minyard*²²⁷ furnishes an example of indirect enrichment. The holding in this case seems to stand for the proposition that an *actio de in rem verso* will lie in a contractual or delictual “action in indemnity” against a third party whose fault triggered the payment of damages in the absence of another remedy at law.²²⁸

ii. Obligor’s Interference with Obligee’s Patrimony

The second category of enrichments entails an obligor’s interference with the obligee’s patrimony through unauthorized use of the latter’s property or services. When such interference satisfies the requirements for

224. See, e.g., *Vandervoort v. Levy*, 396 So. 2d 480 (La. Ct. App. 1981) (involving unjustified enrichment of owner of immovable property from additional work performed by contractor who was instructed by architect to perform additional work).

225. The existence of a lawful cause, usually found in the legal relationship between third-party enricher and original obligor, also explains the complex situations of third-party enrichments stemming from payment of a thing not due. Thus, the situation in which obligor A is instructed by obligee B to pay C who is B’s obligee presents many variations, all dependent on the validity of the obligation between B and C. For a detailed discussion, see Nicholas I, *supra* note 11, at 609–10. Existence of a lawful cause for retention of the enrichment also explains the non-availability of a claim for unjustified enrichment against a third person who in good faith and for value obtained the object of the enrichment from the obligor. Cf. LA. CIV. CODE ANN. art. 2305 cmt. d. For a detailed discussion of third party enrichments, see Nicholas I, *supra* note 11, at 626–33.

226. See, e.g., Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Feb. 1, 1984, JurisData 89 (Fr.) (awarding compensation to first husband who successfully disavowed paternity against the second husband of the mother for past child support payments). But see Cour d’appel [CA] [regional court of appeal] Douai, Nov. 8, 1978, JurisData 2296 (Fr.) (refusing to extend such compensation to past child support payments).

227. *Minyard v. Curtis Prods., Inc.*, 205 So. 2d 422 (1967).

228. See Litvinoff, *Appellate Courts*, *supra* note 113, at 203–05.

delictual liability, the action against the obligor will sound in tort.²²⁹ Here, a non-delictual interference is contemplated,²³⁰ usually because the requirements for delictual liability have not been met.²³¹ Thus, the unauthorized use of one's image²³² may be actionable as enrichment without cause. Enrichment without cause can also result from the exploitation of the intellectual property of others, such as the publication of an operetta without authorization from the composer's heirs,²³³ or the

229. LA. CIV. CODE ANN. art. 2315. Similarly, when the interference is beneficial to the owner and satisfies the requirements of *negotiorum gestio*, this quasi-contractual remedy ought to apply as *lex specialis*. See, e.g., Cour de cassation [Cass.] [supreme court for judicial matters] civ., Jan. 15, 1866, D.P. 66, 1, 75, S. 66, 1, 52 (Fr.) (dismissing plaintiff's claim for restitution of expenses incurred when plaintiff put out a fire on defendant's property). See DEMOGUE, *supra* note 194, No. 149; 7 PLANIOL & RIPERT, *supra* note 167, No. 753; RIPERT & BOULANGER, *supra* note 167, No. 1277; JOSSERAND, *supra* note 167, No. 569; BEUDANT & LEREBOURS-PIGEONNIÈRE, *supra* note 60, No. 1751; MARTY & RAYNAUD, *supra* note 81, No. 350 n.7 and No. 382.

230. See Nicholas III, *supra* note 113, at 14.

231. German and Greek scholars usually refer to the example of a stowaway using a means of transportation without paying a fare. According to their analysis, recovery in delict or quasi-delict is unsatisfactory because the only "damage" caused would be the unauthorized use or enjoyment of any complimentary onboard services and the additional fuel consumed, if it can be calculated, but not the value of the fare, since the stowaway occupied an empty seat. See STATHOPOULOS, OBLIGATIONS, *supra* note 198, at 881. Especially in the German "air-travel case," delictual liability may be excluded when the alleged tortfeasor is not culpable because of age or mental capacity. See *supra* note 141 and accompanying text. Cf. LA. CIV. CODE ANN. arts. 2318–19. Louisiana tort law seems more amenable to full recovery in such cases, based on the Louisiana law concept of the tort of conversion. See FRANK L. MARAIST & THOMAS C. GALLIGAN, LOUISIANA TORT LAW § 2-6(i) (1996, Supp. 2003); WILLIAM CRAWFORD, TORT LAW § 12:13, in 12 LOUISIANA CIVIL LAW TREATISE (2d ed. 2009); see also *Dual Drilling Co. v. Mills Equip. Inv.*, 721 So. 2d 853 (La. 1998) (enunciating "principles of civilian conversion," which can be exercised through one of the following actions: (a) by means of a revendicatory action under LA. CIV. CODE art. 526; (b) by an action for *restitution* based on payment of a thing not due under LA. CIV. CODE art. 2299; or (c) by a delictual action for damages under LA. CIV. CODE art. 2315). It is only when the requirements for these actions are not met that an *actio de in rem verso* may become available. Based on the above, if the boy in the "air-travel case," discussed *supra* notes 141–151, had *mistakenly* boarded the wrong airplane and this mistake was not actionable under Louisiana Civil Code article 2316, then an action for enrichment without cause likely would be available.

232. See Patrick N. Broyles, *Intercontinental Identity: The Right to the Identity in the Louisiana Civil Code*, 65 LA. L. REV. 823 (2005).

233. Cour de cassation [Cass.] [supreme court for judicial matters] civ., July 6, 1927, S. 1928, 1, 19 (Fr.).

unauthorized use of an invention, even if it was not patented by the inventor or his successors.²³⁴

The unauthorized enjoyment or temporary use of an asset or a right²³⁵ belonging to another may also constitute enrichment. Thus, the original purchaser of equipment who continued using the equipment upon dissolution of the sale was held liable to compensate the original seller for this unjustified enrichment.²³⁶ Unauthorized use may occur when a legal cause for using the property of another has lapsed by operation of law.²³⁷

iii. Obligee's Expenses on Obligor's Property

The third category of cases includes expenses avoided on the part of the obligor or improvements to the obligor's property as a result of work performed by the obligee. This category is residual in character and it usually comprises cases in which the liability of the enriched party

234. Cour d'appel [CA] [regional court of appeal] Paris, Nov. 8, 1963, ANNALES DE LA PROPRIÉTÉ INDUSTRIELLE [ANN. PROP. IND.] 1964, art. 1245, note Mathély (Fr.).

235. See Cour d'appel [CA] [regional court of appeal] Paris, 23e ch., Jan. 21, 1983, JurisData 20908 (Fr.) (concerning the lease of a billboard without the consent of the real owner). The same result obtains in the example of a creditor seizing property not belonging to his debtor or his debtor's surety. Cour d'appel [CA] [regional court of appeal] Paris, 1e ch, Feb. 28, 1983, JurisData 21462 (Fr.).

236. Cour de cassation [Cass.] [supreme court for judicial matters] com., Dec. 14, 1965, Bull. civ. III, No. 645 (Fr.). Because the continued use of the contractual object occurred after the dissolution, this situation is best addressed by the provisions on enrichment without cause. Cf. LA. CIV. CODE ANN. art. 2298. On the other hand, if the use occurred before the dissolution, an award of damages according to the more specific rules on dissolution is the appropriate remedy. Cf. LA. CIV. CODE ANN. art. 2018. Absent such a specific provision in the French Civil Code, the French courts resort to the *actio de in rem verso* in such cases. Cour d'appel [CA] [regional court of appeal] Paris, June 15, 1983, JurisData 24607 (Fr.) (involving the use of property by purchaser prior to dissolution of purchase agreement). On the contrary, circumstances may reveal that the plaintiff did not intend to make any profit from the transaction at issue. In such a case, the gratuitous nature of the disposition furnishes justification for the enrichment. See Cour de cassation [Cass.] [supreme court for judicial matters] comm., Mar. 4, 1974, JURISCLASSEUR CIVIL ARTICLES 1370 À 1381, fascicule 8/1988, No. 153 (1988) (Fr.) (concerning a machine which had been lent by the plaintiff on the basis of what seemed to have been a situation resembling a gratuitous loan for use). Cf. LA. CIV. CODE ANN. art. 2891.

237. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 15, 1976, Bull. civ. I, No. 409 (Fr.) (divorced spouse was ordered to pay rent to her former spouse for use of his apartment that she had occupied with her two children from the date of final judgment of divorce).

diminishes.²³⁸ The usefulness of this category is twofold. First, this category highlights situations involving an enrichment that cannot be easily characterized as a “performance” or “interference.” Examples include extinguishing an obligation of the obligor to a third party, either by paying off an obligor’s debt to a third party²³⁹ or performing an obligation incumbent upon the obligor,²⁴⁰ or receiving an enrichment without payment.²⁴¹ Second, because this subcategory focuses on the obligee’s acts, a closer examination of the obligee’s duty of good faith is warranted.²⁴² Especially in cases of improvements to land by adverse possessors, the rules on accession will apply nevertheless as *lex specialis*.²⁴³

238. This category will usually overlap with the preceding two categories. Indeed, a situation involving improvements made to leased property by an unpaid contractor hired by the lessee potentially fits under both categories. It could be used as an example of an indirect extra-contractual performance rendered by the contractor. It can also serve as an illustration of an expense avoided on the part of the lessor who decides to keep the improvement. *See* Cour d’appel [CA] [regional court of appeal] Paris, 23e chapter, Dec. 12, 1978, JurisData 592 (Fr.) (considering both options and choosing to characterize the enrichment as a cost avoided by the lessor). Further, unauthorized use of an asset belonging to another may also be seen as avoiding the expense of paying for the asset.

239. *See* Cour de cassation [Cass.] [supreme court for judicial matters] civ., June 4, 1924, D. 1926, 1, 102 (Fr.). Such cases, however, may overlap with situations involving payment of a thing not due. *See supra* note 205.

240. *See* Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Lille, July 2, 1957, JURISCLASSEUR CIVIL ARTICLES 1370 À 1381, fascicule 8/1988, No. 84 (1988) (Fr.) (demanding the child’s estranged father compensate the non-custodian grandfather, who cared for the child of his deceased daughter, to the extent exceeding the grandfather’s natural obligation to care for the child). *See infra* note 305.

241. *See, e.g.,* Cour d’appel [CA] [regional court of appeal] Paris 15e ch., Oct. 8, 1981, JurisData 27696 (Fr.) (involving unjustified enrichment of a company receiving services that were paid in error by another company).

242. As discussed *infra* notes 255–263 and accompanying text, the obligee will not be able to claim compensation when she acted in her own interest and at her own risk and peril. *See* FLOUR ET AL., FAIT JURIDIQUE, *supra* note 90, No. 50–51; STATHOPOULOS, OBLIGATIONS, *supra* note 198, at 875–76.

243. *See* YIANNOPOULOS, PROPERTY, *supra* note 18, § 11.22; Symeon Symeonides, *Developments in the Law: 1983-84, Property*, 45 LA. L. REV. 541, 542–43 (1984) (noting that the gaps in the pre-1984 law of accession “could be filled only by analogical interpretation of [several Civil Code] articles . . . resorting to the general principle of unjust enrichment.”). *See* Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Jan. 26, 1972, Bull. civ. III, No. 65 (Fr.) (applying the rules on accession for improvements to land by a construction company that was later declared insolvent). For a detailed discussion of the concept of good faith with relation

b. Impoverishment

Impoverishment of the obligee occurs when “his patrimonial assets diminish or his liabilities increase.”²⁴⁴ In this sense, impoverishment is the negative aspect of enrichment. Cases of impoverishment without a cause, therefore, should not differ from cases of enrichment without cause.²⁴⁵ The plaintiff must establish that the transfer of value was made at the expense of her patrimony, and this claim must be appreciable in money.²⁴⁶

c. Causal Link Between Enrichment and Impoverishment

According to the prevailing opinion in civilian doctrine, the term causal link is described as a correlation between enrichment and impoverishment, which must be the incontestable result of the same event.²⁴⁷ In most cases,²⁴⁸

to adverse possessors, *see* John A. Lovett, *Good Faith in Louisiana Property Law*, 78 LA. L. REV. 1163 (2018).

244. LA. CIV. CODE ANN. art. 2298 cmt. b (2018); Nicholas I, *supra* note 11, at 643–44.

245. *See* RIPERT & BOULANGER, *supra* note 167, No. 1278 (“What shocks equity is not that a person is enriched, which is indeed permissible; it is that it be at the expense of others.”).

246. In essence, the plaintiff also must establish that she received no counter-performance or compensation for her impoverishment. *See* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ, May 6, 2009, JurisData 48116 (Fr.) (holding that the “impoverishment” of a companion who built a house on his concubine’s land is not established if it was offset by his occupation of the house without charge for a number of years); *see also* RÉMY CABRILLAC, DROIT DES OBLIGATIONS No. 206 (11th ed. 2014) (discussing this issue as a lack of justification of the obligor’s enrichment).

247. *See* Georges Bonet, *Enrichissement sans cause*, in JURISCLASSEUR CIVIL ARTICLES 1370 A 1381, fascicule 8/1988, No. 115 (1988); FLOUR ET AL., FAIT JURIDIQUE, *supra* note 90, No. 41; BENABENT, *supra* note 110, No. 489; PHILIPPE MALINVAUD ET AL., DROIT DES OBLIGATIONS No. 812 (13th ed. 2014); BERTRAND FAGES, DROIT DES OBLIGATIONS No. 452 (5th ed. 2015).

248. There have been cases in which such correlation was absent automatically, that is, without any act or fault of the parties. For example, an original plaintiff in civil proceedings and her attorney could not claim unjustified enrichment of subsequent plaintiffs who relied on that attorney’s work on the case, absent any indication of additional work performed. *St. Pierre v. Northrop Grumman Shipbuilding, Inc.*, 102 So. 3d 1003, 1014–15 (La. Ct. App. 2012); *Lyons v. City of Shreveport*, 339 So. 2d 466, 499 (La. Ct. App. 1976); *Kirkpatrick v. Young*, 456 So. 2d 622, 624 (La. 1984); *see also* *Baron v. Baron*, 286 So. 2d 480 (La. Ct. App. 1973) (holding that an attorney appointed by certain heirs to

establishing such a correlation will be a relatively straightforward exercise.²⁴⁹

On the other hand, an established causal link between enrichment and impoverishment can be severed by acts of the obligee. It is a rigorous principle of the law of obligations that the obligee to a claim for damages is held to a duty of good faith.²⁵⁰ Thus, in cases of contractual or delictual liability, the doctrine of comparative fault,²⁵¹ or the obligee's failure to abide by reasonable mitigating duties,²⁵² will reduce the amount of damages sought from the breaching obligor. This reduction occurs because the obligee's acts or omissions severed or impaired the causal link between the obligor's liability and the direct damage sustained by the obligee. The same principle ought to apply to cases of liability for enrichment without cause. Although the obligor is strictly liable for her enrichment that correlates with the obligee's impoverishment, the obligee's breach of the duty of good faith may impair this causal link.²⁵³

recover assets of the succession to the benefit of all the heirs was entitled to seek payment only from the persons who employed him).

249. The correlation can be direct or indirect, that is, through the patrimony of a third person. Also, it does not matter that impoverishment has not been the only condition for enrichment, as long as there is a correlation between the two. *See* 7 PLANIOL & RIPERT, *supra* note 167, No. 755 n.2 (noting the lack of such a link in the example of a contractor who may not claim unjustified enrichment when his impoverishment resulted mainly from his own mismanagement or misfortune).

250. *See* LITVINOFF, DAMAGES, *supra* note 30, §§ 5.32–5.33, 10.6.

251. *Id.*; *see also* LA. CIV. CODE ANN. arts. 2003, 2323 (2018).

252. *See* LITVINOFF, DAMAGES, *supra* note 30, §§ 5.32–5.33, 10.6; *see also* LA. CIV. CODE ANN. art. 2002.

253. Examining the obligee's duty of good faith in the context of the causal link between enrichment and impoverishment is preferred by this author as a simpler and more straightforward approach. French doctrine, on the other hand, discusses the obligee's duty of good faith when examining the juridical requirement of lack of cause or justification for the enrichment. According to this view, the obligee's failure to abide by her duty of good faith serves as a cause for the justification of the obligor's enrichment. To justify this approach, several authorities identify two elements in the juridical requirements of unjustified enrichment, namely, a "technical" and a "moral" element. The technical element refers to the traditional requirements of lack of cause and subsidiarity of the remedy for unjustified enrichment. The moral element focuses on the behavior of both the obligor and obligee and sanctions their bad faith. *See* TERRÉ ET AL., *supra* note 90, Nos. 1068–71; P. Rémy, Des autres sources d'obligations, in *POUR UNE REFORME DU REGIME GENERAL DES OBLIGATIONS* 44, 45 (F. Terré ed., 2013). The addition of this moral element prevailed in the revision of the French Civil Code and has been criticized for abruptly departing from the past understanding of cause. *See* CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1303-2 (2018) (Fr.) (reducing

The obligee clearly breaches her duty of good faith²⁵⁴ when the impoverishing act was performed by the obligee in pursuit of her own personal interest and at her own risk or by her own wrongful act.²⁵⁵ Such is the case when a contractor agrees to rebuild a school while fully aware of the risks associated with the collection of his fee and the legality of the contract.²⁵⁶ Similarly, a business consultant cannot claim compensation for his impoverishment that was a result of a failed business deal.²⁵⁷

Voluntary improvements made to the property of another with knowledge of a lack of any juridical cause will negate any action for unjustified enrichment.²⁵⁸ The French jurisprudence refers to several other examples of improvements made by bad faith possessors,²⁵⁹ although, in

the recovery of an obligee who pursues a personal interest or who is in bad faith) and CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1303-4 (2018) (Fr.) (increasing the amount of compensation owed by a bad faith obligor).

254. With reference to the juridical requirement of lack of cause, French writers distinguish cause of the enrichment from cause of the impoverishment and discuss the fault of the obligee in relation to cause of the impoverishment. *See* STARCK, *supra* note 30, Nos. 1818–19. For a discussion of this requirement with reference to the Louisiana jurisprudence, see LEVASSEUR, *supra* note 3, at 399–403.

255. *Charrier v. Bell*, 496 So. 2d 601, 603 (La. Ct. App. 1986) (affirming trial court's finding "that any impoverishment claimed by plaintiff was a result of his attempts 'for his own gain' and that his presence and actions on the property of a third party placed him in a 'precarious position, if not in legal bad faith.'"); BEUDANT & LERBOURS-PIGEONNIÈRE, *supra* note 60, No. 1752; Bonet, *supra* note 180, at 59–64.

256. *Bamburg Steel Buildings, Inc. v. Lawrence Gen. Corp.*, 817 So. 2d 427, 438 (La. Ct. App. 2002). French jurisprudence steadily dismisses claims of unjustified enrichment brought by contractors who were compelled to perform additional work when the need for this work is attributed to the contractor's own fault. *See* Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Jan. 13, 1982, JurisData 112 (Fr.).

257. *Zeising v. Shelton*, 648 Fed. App'x 434, 441 (5th Cir. 2016).

258. Cour de cassation [Cass.] [supreme court for judicial matters] soc., Mar. 18, 1954, JCP 1954 II 8168, note P. Ourliac and M. de Juglart. (Fr.) (denying unjustified enrichment claim of evicted farmer who continued cultivating land knowing that he was no longer a lawful possessor).

259. Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., June 7, 1974, Bull. civ. III, No. 240 (Fr.) (dismissing unjustified enrichment claim of an adverse possessor who had built a hotel on the property of the owner); *see also* the following French Cours d'appel [CA] [regional courts of appeal] decisions: CA Pau, Apr. 19, 1983, JurisData 42112 (dismissing unjustified enrichment claim for improvements made by a companion to his concubine's dwelling in which he had stayed rent free for a considerable period of time); CA Reims, Oct. 17, 1983, JurisData 44092 (dismissing an enrichment claim for

Louisiana, such situations are governed by rules of property law as *lex specialis*.²⁶⁰

An obligee acts in her own interest particularly when she imposes the enrichment on the other party who normally would not incur such an expense. Thus, the owner of a mill who incurred expenses for widening a river cannot claim the unjustified enrichment of the owners of the mills downstream who were also benefitted by this action.²⁶¹

Lastly, when the enrichment consists of expenses avoided by the obligor because of acts of the obligee, the obligee's actions should be carefully scrutinized to determine whether the obligee abided by her duty of good faith.²⁶² Thus, a homeowner who moved her home onto the property of

improvements to land made by a prospective purchaser when the final sale was not concluded because of that purchaser's fault); CA Pau, Apr. 30, 1986, JurisData 41332 (dismissing an enrichment claim for improvements to a building made by an occupant who had no semblance of title).

260. See YIANNOPOULOS, PROPERTY, *supra* note 18, § 11.22; Symeonides, *supra* note 243, at 542–43; Lovett, *supra* note 243. The rules on accession, however, do not always exclude the admissibility of equitable remedies. See, e.g., Brankline v. Capuano, 656 So. 2d 1, 6 (La. Ct. App. 1995) (finding that the previous owner of a building who lost ownership under Louisiana Civil Code article 493 could bring an action for damages under a theory of *quantum meruit*); Broussard v. Compton, 36 So. 3d 376 (La. Ct. App. 2010) (affirming trial court judgment ordering owner to compensate adverse possessor for improvements made under a theory of unjustified enrichment). A cause of action for improvements may also be established in contract if an accession clause is found in a contract between the parties. See LA. CIV. CODE ANN. art. 2695 (2018); Davis v. Elmer, 166 So. 3d 1082, 1088 (La. Ct. App. 2015). *But see infra* note 287 and accompanying text.

261. Cour de cassation [Cass.] [supreme court for judicial matters] req., June 22, 1927, S. 1927, 1, 338; see also Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 19, 1976, Bull. civ. I, No. 300 (Fr.) (dismissing unjustified enrichment claim of landowner who extended the power grid to his own land by facilitating the connection of his neighbor); Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., May 20, 2009, JurisData 48239 (Fr.) (dismissing unjustified enrichment claim of association of riparian landowners that performed work to maintain the navigability of two rivers thereby benefitting neighboring landowners).

262. See *supra* note 242 and *infra* note 342. Cf. Fox v. Sloo, 10 La. Ann. 11 (La. 1855) (“The equitable doctrine, that one at whose expense another is benefited must be indemnified, cannot be extended to a person who intrudes his services on another against his will and the policy of a statute.”). Accord Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 6, 1953, D. 1953, 609, note Goré (Fr.).

another and, upon being evicted, abandoned it, has no action for enrichment without cause.²⁶³

2. Juridical Requirements

French and Louisiana jurisprudence developed the juridical requirements to restrict the number of cases in which the remedy of the *actio de in rem verso* would be available. Traditional doctrine identifies two such requirements—lack of cause and unavailability of another remedy at law.

a. Lack of Cause for Retaining Enrichment

The existence of a lawful cause for enrichment excludes any claim for restitution.²⁶⁴ The term “cause” in this context should be understood in its broader sense, encompassing any legal justification²⁶⁵ for the retention of the enrichment in the hands of the enrichee.²⁶⁶ The Louisiana Civil Code explains that “[t]he term ‘without cause’ is used in this context to exclude

263. *Rougeou v. Rougeou*, 971 So. 2d 466 (La. Ct. App. 2007). In the same vein, see *MJH Operations, Inc. v. Manning*, 63 So. 3d 296 (La. Ct. App. 2011) (dismissing repair shop’s unjustified enrichment claim against vehicle owner for unpaid repairs because plaintiff made no genuine effort to collect payment and failed to enforce any other statutory remedy, such as the repairman’s privilege on automobiles); *Meyers v. Denton*, 848 So. 2d 759 (La. Ct. App. 2003) (dismissing landowners’ reimbursement claim for improvements made to road because they knew or should have known that the road was public); *MKM, L.L.C. v. Revstock Marine Transp., Inc.*, 773 So. 2d 776 (La. Ct. App. 2000) (dismissing reimbursement claim brought by sellers of vessel who refurbished vessel after parties had signed purchase option agreement).

264. See *Roubier*, *supra* note 60, at 47.

265. The revised French Civil Code refers to “unjustified enrichment,” *enrichissement injustifié*—thus preferring the term “justification” to “cause.” This change is semantic and does not change the law. See *Forti*, *supra* note 92, No. 2.

266. Cf. *Edmonston v. A-Second Mortg. Co. of Slidell*, 289 So. 2d 116, 122 (La. 1974) (“‘Cause’ is not in this instance assigned the meaning commonly associated with contracts.”). Traditional French doctrine interpreted “cause” in this context to mean the regular mode of acquisition of a right. See *RIPERT & BOULANGER*, *supra* note 167, No. 1280. In this sense, cause is tantamount to the Roman *iusta causa*, that is, the broad notion of cause which is defined as the reason why a person holds a right (any right) in the civil law. See *MARTY & RAYNAUD*, *supra* note 81, No. 353. The existence of a legal cause is presumed. The plaintiff bears the burden of proving the absence of a justification for retention of the enrichment. See *JOSSERAND*, *supra* note 167, No. 573; *Cour de cassation [Cass.] [supreme court for judicial matters] req.*, Nov. 21, 1917, S. 1920, 1, 293 (Fr.).

cases in which the enrichment results from a valid juridical act or the law.”²⁶⁷ The following discussion is based on this classification.

i. Valid Juridical Act

A valid juridical act is a volitional justification for the retention of the enrichment.²⁶⁸ Emphasis here is placed on the will of the impoverished party who voluntarily places the enrichment in the hands of the enriched party. Here, cause of the enrichment coincides with the cause of conventional obligation.²⁶⁹ Also, the will of the impoverished party gives effect to the alienation of her property and excludes belated complaints under the guise of enrichment without cause by application of the civilian maxim *non venire contra factum proprium*.²⁷⁰

The juridical act can be unilateral, such as a testament, or bilateral, such as a contract.²⁷¹ Contracts are the most significant causes for the retention of the enrichment,²⁷² especially when the contract is between the

267. LA. CIV. CODE ANN. art. 2298 (2018). See Gruning, *supra* note 7, at 65–66 (arguing that the definition of “cause” in Louisiana Civil Code article 2298 is didactic but still useful to avoid any misunderstandings in practice).

268. FLOUR ET AL., FAIT JURIDIQUE, *supra* note 90, No. 44; TERRÉ ET AL., *supra* note 90, No. 1068.

269. LA. CIV. CODE ANN. arts. 1966–70.

270. “[N]o one is allowed to go against (the consequences) of one’s own act.” LITVINOFF, OBLIGATIONS I, *supra* note 17, § 88 n.32. See Cour de cassation [Cass.] [supreme court for judicial matters] civ., May 17, 1944, S. 1944, 1, 132 (Fr.) (holding that the *actio de in rem verso* cannot enable a contracting party to bring forward belated complaints of a bad bargain and noting that “it is not up to the judge to modify a contract concluded between the parties, nor to deprive of the seller the profit that has its legal cause in a lawful contract, entered into freely by the parties.”); see also JCD Mktg. Co. v. Bass Hotels & Resorts, Inc., 812 So. 2d 834 (La. Ct. App. 2002) (holding that the enrichment accruing to hotel from renting rooms above standard rates allegedly promised to tour operator was not unjust because hotel would be justified in seeking such rates). Therefore, the impoverished party cannot invoke enrichment without cause in the presence of a contract, even if it is lesionary for one of the parties. See RIPERT & BOULANGER, *supra* note 167, No. 1280 (“The unfairness of enrichment exists only if the defendant had no right to retain it, and there can be no question here of an abuse of the right because it is a perfectly defined right.”).

271. BÉNABENT, *supra* note 110, No. 491.

272. Drs. Bethea, Moustoukas & Weaver, L.L.C. v. St. Paul Guardian Ins. Co., 376 F.3d 399, 408 (5th Cir. 2004) (“Louisiana law provides that no unjust enrichment claim shall lie when the claim is based on a relationship that is controlled by an enforceable contract.”) (emphasis added); see Edwards v. Conforto, 636 So.

enriched and impoverished parties.²⁷³ A contract can be solemn or consensual;²⁷⁴ onerous, such as a contract of sale,²⁷⁵ lease,²⁷⁶ insurance,²⁷⁷ partnership²⁷⁸ or distribution agreement;²⁷⁹ or gratuitous, such as a donation²⁸⁰ or mandate.²⁸¹

A contract also may serve as a cause for the retention of the enrichment, even if it is concluded between the enriched party and a third person.²⁸² A typical situation involves unpaid contractors hired by the lessee to make improvements to leased property. If the lease contract supplies a justification for the lessor's retention of these improvements, the contractor's claim against the lessor must fail.²⁸³ Similar cases involve

2d 901, 907 (La. 1993) (“[I]f there is a contract between the parties it serves as a legal cause, an explanation, for the enrichment.”) (emphasis added).

273. Cour de cassation [Cass.] [supreme court for judicial matters] com., Jan. 18, 1994, JurisData 125 (Fr.).

274. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 5, 2009, Gaz. Pal. 2010, No. 6, p. 25, obs. D. Houtcieff and No. 141, p. 48, obs. H. Lecuyer (Fr.).

275. Cour de cassation [Cass.] [supreme court for judicial matters] civ., May 17, 1944, S. 1944, 1, 132 (Fr.).

276. Conn-Barr, L.L.C. v. Francis, 103 So. 3d 1208, 1214 (La. Ct. App. 2012) (holding that the sale of interest in a company constitutes legal justification for retention of enrichment). *Accord* Cour de cassation [Cass.] [supreme court for judicial matters] civ., Mar. 28, 1939, S. 1939, 1, 265 (Fr.).

277. Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Oct. 23, 2008, JurisData 45474 (Fr.).

278. Cour de cassation [Cass.] [supreme court for judicial matters] com., Oct. 4, 1976, Bull. civ. IV, No. 242 (Fr.).

279. Cour de cassation [Cass.] [supreme court for judicial matters] com., Oct. 23, 2012, JurisData Nos. 23935 and 23923; REVUE TRIMESTRIELLE DE DROIT CIVIL [RTDCIV] 2013, p. 114, obs. B. Fages (Fr.).

280. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Feb. 6, 2001, JurisData 8163 (Fr.).

281. Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Mar. 16, 1977, Bull. civ. III, No. 130 (Fr.).

282. *Edmonston v. A-Second Mortg. Co.*, 289 So. 2d 116, 122 (La. 1974). *See* TERRÉ ET AL., *supra* note 90, No. 1068; BÉNABENT, *supra* note 110, No. 491.

283. *See supra* note 258; *see also* Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., May 28, 1986, JCP 1986 IV 226 (Fr.) (holding that an accession clause in lease contract excluded claim for restitution brought by unpaid contractor who was hired by lessee to install a pool on the leased property); FLOUR ET AL., FAIT JURIDIQUE, *supra* note 90, No. 47; TERRÉ ET AL., *supra* note 90, No. 1068; BÉNABENT, *supra* note 110, No. 491. *But see infra* note 287 and accompanying text.

construction contracts,²⁸⁴ real estate sales,²⁸⁵ and mortgages.²⁸⁶ Nevertheless, a contract between the enriched party and a third person will not furnish a valid justification if such contract is a product of collusion between the parties.²⁸⁷

In all cases, however, a contract will justify retention of the enrichment if such enrichment falls within the purview of the contract.²⁸⁸ If additional performance is rendered, which is outside the agreed scope of the contract, enrichment of the recipient of such performance is not justified by the contract.²⁸⁹ Similarly, performances rendered in the pre-contractual or post-contractual phase do not find justification in the contract.²⁹⁰

284. *See, e.g.*, *Century Ready Mix Corp. v. Boyte*, 968 So. 2d 893 (La. Ct. App. 2007) (finding that a loan contract between a bank and a subcontractor supplied justification for retention of the bank's enrichment).

285. *See, e.g.*, *Giordano v. Riverbend Rentals Co.*, 674 So. 2d 444 (La. Ct. App. 1996) (finding that payments due from sale of a house find their cause in the valid contract of sale, irrespective of the fact that ownership of the house was lost); *see also* *Sheets Family Partners-La., Ltd. v. Inner City Refuge Econ. Dev. Corp.*, 94 So. 3d 964, 972 (La. Ct. App. 2012) (holding that monies paid by prospective purchaser to mortgagee found their cause in a lease agreement between the two and are not recoverable by the seller upon dissolution of the sale upon theory of enrichment without cause).

286. *See, e.g.*, *Carriere v. Bank of La.*, 702 So. 2d 648 (La. 1996) (finding that mortgage contract furnishes justification for mortgagee's enrichment from collection of rentals and occupation of the mortgaged property).

287. *Cour d'appel [CA] [regional court of appeal] Paris*, June 26, 1899, S. 1901, 2, 167 (Fr.) (holding that an accession clause in a lease contract providing that lessor would keep improvements is unopposable to a contractor making such improvements if "there was collusion between the lessor and lessee to frustrate the contractor's payment of his fee").

288. *See* FLOUR ET AL., FAIT JURIDIQUE, *supra* note 90, No. 45.

289. *Id.*; *Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ.*, May 24, 2005, JurisData 28528 (Fr.) (finding no justification for the enrichment occurring when a mechanic performed more extensive repairs than those agreed with the client).

290. *See, e.g.*, *Hertz Lease Plan, Inc. v. Urban Transp. & Planning Assoc., Inc.*, 342 So. 2d 886 (La. Ct. App. 1977) (awarding compensation to lessor for lessee's continued peaceable possession after termination of the lease); *Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ.*, July 13, 2004, JurisData 24673, REVUE TRIMESTRIELLE DE DROIT CIVIL [RTDCIV] 2005, p. 120, obs. J. Mestre et B. Fages (Fr.) (finding no justification for use of a billboard sign by an advertising company even though negotiations with the owner of the sign never resulted in formation of a contract); *Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ.*, May 31, 2006, JurisData 33725 (Fr.) (awarding compensation to lessee for

Nevertheless, French and Greek scholars²⁹¹ have supported a more expansive construction of the term “just cause” to include any type of “counter-performance”²⁹² given by a good faith enricher for the enrichment, even in the absence of a juridical act. According to this theory, there is no enrichment for voluntary services provided in exchange for some material benefit received for such services, even in the absence of a contract.²⁹³ Likewise, enrichment from use of one’s property is justified if “rent” was paid, even in the absence of a valid lease agreement.²⁹⁴

improvements to the leased property made after the judgment pronouncing the termination of the lease).

291. See STATHOPOULOS, UNJUSTIFIED ENRICHMENT, *supra* note 10, at 102–30; Rouast, *supra* note 163, 35–40

292. The term “counter-performance” here is used as a literal translation of the French term *contrepartie*, denoting a counter-prestation or a value given in return for the enrichment. See STATHOPOULOS, UNJUSTIFIED ENRICHMENT, *supra* note 10, at 105 n.17, 108, 110 n.36.

293. Such material benefit need not be monetary or even corporeal. See Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 19, 1969, Bull. civ. I, No. 187 (Fr.) (holding that the education received during an apprenticeship was a fair counter-performance for the apprentice’s voluntary services); Tribunal de grande instance [TFI] [ordinary court of original jurisdiction] Cambrai, Feb. 2, 1967: D. 1967 Somm. 97 (Fr.) (voluntary worker on a farm received material benefit of free room and board). Also, enrichment deriving from services or other material benefit provided within concubinage can find justification in the common life of the couple. See *Lagarde v. Dabon*, 98 So. 744 (La. 1923); *Simpson v. Normand*, 26 So. 266 (La. 1899); *Purvis v. Purvis*, 162 So. 239 (La. Ct. App. 1935); see also *supra* note 218.

294. This broader concept of “counter-performance for the enrichment” adequately explains the complex situations involving third party enrichments. This concept also provides a solid basis for the enforceability of *implied in fact contracts* (*de facto contracts*, *contrats réels*). See *Morphy, Makofsky & Masson, Inc. v. Canal Place 2000*, 538 So. 2d 569, 573 (La. 1989) (defining such a contract as “one which rests upon consent implied from facts and circumstances showing mutual intention to contract [and] not different in their legal effect from express, written agreements”); see also *Succession of Pereuilhet*, 23 La. Ann. 294, 295 (1871) (“For actions without words, either written or spoken, are presumptive evidence of a contract, where they are done under circumstances that naturally imply a consent to such a contract.”). In essence, the justification of the enrichment is the legal cause for such contracts. See STATHOPOULOS, UNJUSTIFIED ENRICHMENT, *supra* note 10, at 103–04; ZIMMERMANN, *supra* note 23, at 22–24. Cf. Cour de cassation [Cass.] [supreme court for judicial matters] com., May 9, 1985, JurisData 1232 (Fr.) (involving a *de facto* lease in which the lessee remained in the property after the termination of the lease); Cour d’appel [CA] [regional court of appeal] Paris, 5e ch., May 22, 1984, JurisData 23657 (Fr.) (concerning a *de facto* employment contract

ii. The Law

When a specific legal rule justifies retention of the enrichment, “an action must not be allowed to defeat the purpose of said rule.”²⁹⁵ Several legal provisions directly furnish a title for retention of the enrichment on the basis of the overarching principle of unjustified enrichment. This category is broad and encompasses many situations that involve several areas of the law, including the laws of property,²⁹⁶ family,²⁹⁷ and successions.²⁹⁸ The most frequently occurring situations specific to the law of obligations include failed juridical acts, natural obligations, “quasi-contracts,” and judicial decisions.

ii-a. Failed Juridical Acts

When a juridical act fails, the usual remedy calls for restoration of the parties to their pre-existing patrimonial positions by application of the rules on nullity as *lex specialis*. Nevertheless, retention of a performance

in which the employee continued working despite the invalidity of the original employment contract).

295. *Carriere v. Bank of Louisiana*, 702 So. 2d 648, 657 (La. 1996); Bd. of Sup’rs of La. State Univ. v. La. Agric. Fin. Auth., 984 So. 2d 72, 81 (La. Ct. App. 2008); *Coastal Envtl. Specialists, Inc. v. Chem-Lig Int’l, Inc.*, 818 So. 2d 12, 19 (La. Ct. App. 2001).

296. The laws of accession, for instance, regulate the ownership of improvements made on the property of another and provide for compensation based on considerations of unjustified enrichment. *See supra* note 243 and accompanying text. *But see also supra* note 260.

297. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 2, 1979, D. 1979, inf. rap. 432 (Fr.) & Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 7, 1995, JurisData 3824 (Fr.) (finding that marital obligations of support and assistance between spouses provide justification for any claimed enrichment). *Cf.* LA. CIV. CODE ANN. art. 98 (2018). *See supra* notes 215–216 and accompanying text.

298. *See supra* note 209. Other examples can be found in the Louisiana Revised Statutes, such as LA. REV. STAT. § 9:4801 (2018) (Louisiana Private Works Act); *see J.P. Mack Indus., L.L.C. v. Mosaic Fertilizer, L.L.C.*, 970 F. Supp. 2d 516, 521 (E.D. La. 2013) (availability of remedy under Private Works Act precluded subcontractor to recover under a theory of enrichment without cause); *see also* LA. REV. STAT. § 12:1-622(C) (Louisiana Business Corporation Act) (imposing personal liability on shareholders who receive corporate distributions in excess of what may be authorized by law); GLENN G. MORRIS & WENDELL H. HOLMES, BUSINESS ORGANIZATIONS § 44:17, *in* 8 LOUISIANA CIVIL LAW TREATISE (2d ed. 2017) (discussing shareholders’ liability for wrongful distributions under the “unjust enrichment type of liability”).

or benefit from the failed contract may still be justified by application of the provisions on nullity or dissolution. If the contract is null, restoration can be excluded under the clean hands doctrine.²⁹⁹ Thus, collection of commission payments to a real estate broker on the basis of a commission agreement that was void *ab initio* will not be restored if the payer knew or should have known of the nullity.³⁰⁰ Likewise, claims for restoration and restitution arising from a failed “agreement” between the proprietor of a casino establishment and a patron concerning the exclusive use of a slot machine that would “hit the jackpot soon” were not actionable.³⁰¹ In this context, however, null juridical acts should be kept separate from inexistent acts. If an act is inexistent,³⁰² that is, if a contract was never formed, then the provisions on enrichment without cause could apply.³⁰³

299. LA. CIV. CODE ANN. art. 2033 cmt. b. See LITVINOFF, OBLIGATIONS II, *supra* note 163, § 94 (discussing the clean hands doctrine in the context of the bona fide purchase doctrine); Saúl Litvinoff, *Contract, Delict, Morals, and Law*, 45 LOY. L. REV. 1, 6–8 (1999) (comparing theories of recovery under contract and tort). In the case of dissolution of a contract, retention of a performance or recovery for a performance will be permitted “[i]f partial performance has been rendered and that performance is of value to the party seeking to dissolve the contract.” LA. CIV. CODE ANN. art. 2018. See *supra* notes 186, 236. The doctrines of nullity and dissolution also provide for the protection of innocent third parties whose interests are not impaired by the effects of restoration. LA. CIV. CODE ANN. arts. 2021, 2035.

300. *Pique Severn Ave. P’ship v. Ballen*, 773 So. 2d 179, 181 (La. Ct. App. 2000); LA. CIV. CODE ANN. art. 2033.

301. *Master v. Red River Entm’t, L.L.C.*, 188 So. 3d 284, 285 (La. Ct. App. 2016). Also, there is no recovery on theory of unjustified enrichment if the implied contract is illegal. See *Jary v. Emmett*, 234 So. 2d 530 (La. Ct. App. 1970); *Fox v. Sloo*, 10 La. Ann. 11 (1855). If, however, the contract is void as being *malum prohibitum* and not *malum in se*, recovery on the basis of enrichment without cause is allowed. See *Jones v. City of Lake Charles*, 295 So. 2d 914, 917–18 (La. Ct. App. 1974); *Coleman v. Bossier City*, 305 So. 2d 444 (La. 1974). The recovery in these cases can also be based on the *de facto* contract theory discussed *supra* note 294.

302. On the difference between inexistent and absolutely null juridical acts, see 3 BAUDRY-LACANTINERIE & BONNECASE, *supra* note 173, Nos. 11–26; 1 PLANIOL I, *supra* note 93, Nos. 345, 348; see also Scalise, Jr., *supra* note 103, at 696–97 (“[A] third and lesser-known subclass of these types of [absolute] nullities exists. This final subclass . . . consists of acts that are null not because they violate public policy but because they are permanently defective insofar as they are not really juridical acts at all; they are inexistent acts.”).

303. This distinction becomes relevant in light of the discussion of *quantum meruit* in Louisiana law. See generally LITVINOFF, DAMAGES, *supra* note 30, § 14.25; Nicholas II, *supra* note 91, at 56–62 (discussing the types of *quantum meruit* in Louisiana law); Jeffrey Oakes, *Article 2298, the Codification of the Principle Forbidding Unjust Enrichment, and the Elimination of Quantum Meruit*

ii-b. Natural Obligations

Natural obligations provide lawful justification for retaining the enrichment.³⁰⁴ Judicial decisions are consistent with this approach.³⁰⁵

as a Basis for Recovery in Louisiana, 56 LA. L. REV. 873, 880–85 (1995) (discussing the history of *quantum meruit* in Louisiana law). As discussed in *Cent. Facilities Operating Co. v. Cinemark USA, Inc.*, 36 F. Supp. 3d 700, 707 (M.D. La. 2014),

Louisiana law recognizes two types of quantum meruit: contractual quantum meruit and quasi contractual quantum meruit. . . . To recover on a contractual quantum meruit theory, an agreement must exist between the parties. . . . To recover under a quasi-contractual quantum meruit theory, the plaintiff must confer a benefit on the defendant pursuant to a contract it believed to be valid but was actually *void*.

(emphasis added). Perhaps more accurately, if a contract is *null*, recovery of a price will be governed by the provisions of nullity. Art. 2033. If a valid contract is *dissolved*, recovery will be subject to special rules. LA. CIV. CODE ANN. arts. 2018–21. But if there never was a contract, that is, if a contract is *inexistent*, restitution will be made pursuant to the rules of enrichment without cause. LA. CIV. CODE ANN. art. 2298. Thus, a lack of the meeting of the minds between customer and diesel engine repair company as to the price for repair works leads to an *inexistent* contract. Recovery of a fair market price will be based on enrichment without cause. *Ricky’s Diesel Serv., Inc. v. Pinell*, 906 So. 2d 536, 539 (La. Ct. App. 2005); *Villars v. Edwards*, 412 So. 2d 122 (La. Ct. App. 1982); *see also* *Mark A. Gravel Prop., L.L.C v. Eddies BBQ, L.L.C.*, 139 So. 3d 653, 657–58 (La. Ct. App. 2014) (“[W]here there is no meeting of the minds between the parties the contract is *void* for lack of consent.”) (emphasis added). *But see also* *Lyons Milling Co. v. Cusimano*, 108 So. 414 (La. 1926) (characterizing a lack of the meeting of the minds as a case of mutual error). Restoration because of rescission of a contract, however, will be governed by the rules on nullity, unless additional performances have been rendered after the rescission of the contract. *But see* *Semco, L.L.C. v. Grant, Ltd.*, 221 So. 3d 1004, 1030 (“If rescission is granted, there is no enforceable contract and the equitable doctrine of unjust enrichment may apply.” (citing LA. CIV. CODE art. 2298)).

304. *See* LA. CIV. CODE ANN. art. 1761; *see also* LITVINOFF, OBLIGATIONS IN GENERAL, *supra* note 97, §§ 2.1, 2.7 (defining natural obligations and discussing their effect on quasi-contracts); Smith, *supra* note 43, at 17–18 (discussing the usefulness of natural obligations in the characterization of contracts within the theory of cause).

305. *See, e.g.*, *Webb v. Webb*, 835 So. 2d 713 (La. Ct. App. 2002) (dismissing nephew’s claim that his aunt was unjustly enriched by his unpaid services because nephew’s natural obligation justified aunt’s enrichment); Cour de cassation [Cass.] [supreme court for judicial matters] req., June 25, 1872: D. 74, 1, 16, S. 73, 1, 129 (Fr.) (finding that grandmother’s maintenance and education expenses for the benefit of her grandchild constituted a natural obligation that excluded her unjustified enrichment claim); *see also supra* note 240.

When a gratuity is prompted by beneficence of the grantor or by feelings of affection or devotion toward the beneficiary, an action *de in rem verso* cannot be brought against the beneficiary.³⁰⁶ Such a feeling obviously hinders the enrichment action between the person who felt it and the person who inspired it.³⁰⁷ Services provided among family members are presumed gratuitous.³⁰⁸ The provision of gratuitous services will serve as a cause for the retention of the enrichment in the hands of the recipient of such services, even in cases in which the provision of these services was prompted by an ulterior motive that was not realized.³⁰⁹

A prescribed action also gives rise to a natural obligation,³¹⁰ thus justifying retention of enrichment. This justification, in turn, explains why

306. This rule has been accepted since the early jurisprudence. *See* *New Orleans, Ft. J. & G.I.R. Co. v. Turcan*, 15 So. 187, 189 (La. 1894); *Watson v. Ledoux*, 8 La. Ann. 68, 68 (1853) (holding that “services rendered voluntarily to preserve another man’s property from destruction [by flood] are presumed to be gratuitous, and give no cause of action”). *But see* LA. CIV. CODE ANN. art. 2292; *see also* *Tilghman v. Lewis’s Estate*, 8 La. 105 (1835); *Jacob v. Ursuline Nuns*, 2 Mart. (O.S.) 269 (1812); *Aylard v. Rice*, 23 La. Ann. 75 (1871); *White v. Jones*, 14 La. Ann. 681 (1859) (all holding that no compensation can be awarded for services that are purely gratuitous in nature).

307. It is questionable whether third persons who have benefited from a donation are answerable for this benefit under the theory of enrichment without cause. The answer is clearly negative if the third person is an intended beneficiary. LA. CIV. CODE ANN. art. 1978. The issue, however, is not as straightforward if the third person is an incidental beneficiary. *See* *Cour d’appel [CA] [regional court of appeal] Nancy*, Apr. 29, 1893, S. 95, 2, 209 (Fr.) (awarding compensation to plaintiff who donated money to a religious community for improvements made to a school operated by the community but owned by a local municipality that later took over the operation of the school and was sued by plaintiff on theory of enrichment without cause); *see also* *McWilliams v. Hagan*, 4 Rob. 374, 376 (La. 1843) (“In the absence of any privity [between plaintiff and defendant], a very strong case must be made out, to justify the application of the maxim, that no man should be permitted to enrich himself at the expense of another, as a ground of recovery.”).

308. *See* *Kiper v. Kiper*, 38 So. 2d 507 (La. 1948); *Succession of Berthelot*, 24 So. 2d 185 (La. Ct. App. 1945); *Latour v. Guillory*, 64 So. 130 (La. 1914); *see also supra* note 213 and accompanying text.

309. *Hanger One MLU, Inc. v. Unopened Succession of Rogers*, 981 So. 2d 175 (La. Ct. App. 2008) (dismissing unjustified enrichment claim of plaintiff who provided gratuitous services for collection and storage of defendants’ damaged aircraft in hopes of securing a lease of a hangar from the defendants who eventually refused to lease to plaintiff).

310. LA. CIV. CODE ANN. art. 1762(1). *See* LITVINOFF, OBLIGATIONS IN GENERAL, *supra* note 97, § 2.5.

courts steadily dismiss claims of enrichment without cause when a personal action has prescribed.³¹¹

ii-c. Quasi-Contracts

The more specific provisions governing *negotiorum gestio*³¹² and restoration of a payment of a thing not due³¹³ also will exclude recovery on the basis of the more general action for enrichment without cause. Similarly, a claim of enrichment without cause can compensate³¹⁴ for an adverse enrichment claim, thus providing justification for retention of “counter-enrichments.” For instance, a purported business partner’s unjustified enrichment claim for making improvements to his putative partner’s building was offset by an adverse unjustified enrichment claim of the latter partner for the former partner’s exclusive use of the building.³¹⁵

ii-d. Judicial Decisions

Civilian theory accepts that judicial decisions can constitute lawful justification for retention of the enrichment.³¹⁶ Thus, if a decision is

311. See, e.g., *Dugas v. Thompson*, 71 So. 3d 1059 (La. Ct. App. 2011).

312. LA. CIV. CODE ANN. art. 2292.

313. *Id.* art. 2299.

314. *Id.* art. 1893.

315. *Munro v. Carstensen*, 945 So. 2d 961, 966 (La. Ct. App. 2006).

316. An example is the judicial determination of the liability of solidary obligors. See LA. CIV. CODE ANN. art. 1804 cmt. b; LITVINOFF, OBLIGATIONS IN GENERAL, *supra* note 97, §§ 7.78–7.82; see also Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Nov. 14, 1973, Bull. civ. III, No. 580 (Fr.) (holding that the lower court’s judicial allocation of responsibility among two solidary obligors constituted “just cause” that prevented any claim of unjustified enrichment made by the obligor who was charged with the larger virile portion). Cf. *Ill. Cent. Gulf R. Co. v. Deaton, Inc.*, 581 So. 2d 714 (La. Ct. App. 1991); *St. Paul Fire & Marine Ins. Co. v. Standard Cas. & Sur. Co.*, 3 So. 2d 463 (La. Ct. App. 1941) (both holding that a joint tortfeasor who only is statutorily liable and makes payment to injured party has a quasi-contractual right of contribution against the responsible tortfeasor); see also *Scott v. Wesley*, 589 So. 2d 26, 28 (La. Ct. App. 1991) (“[I]n cases where a claim has been exercised and a judgment obtained, it is most apparent that there is a practical remedy available at law,” precluding application of the theory of enrichment without cause.); *Gasaway–Bankston v. C.P. Land, L.L.C.*, No. 2014-CA-1749, 2015 WL 3548099, at *3 (La. Ct. App. June 5, 2015) (dismissing architectural firm’s unjustified enrichment claim against the buyer of the immovable because the architectural firm had already secured a judgment against the developer for the full amount owed under the contract).

overturned on appeal, there is no lawful justification for retaining payments made on the basis of the overturned decision.³¹⁷

b. Absence of Other Remedy: Subsidiarity of the Action

Enrichment without cause is a subsidiary remedy, meaning that this action is admissible only when there is no other available remedy at law.³¹⁸ This juridical requirement has been debated in several civilian jurisdictions, including Louisiana.³¹⁹ The controversy stems from the fact that there is a great degree of overlap between lack of cause and subsidiarity. Some writers argue that a proper understanding of cause should provide adequate guidance to the courts, which instead rely too heavily on the subsidiary nature of this remedy.³²⁰ Other writers, as well as the prevailing jurisprudence in France and Louisiana, consider subsidiarity the prevalent

317. *City Fin. Corp. v. Bonnie*, 762 So. 2d 167 (La. Ct. App. 2000) (holding debtor responsible for restitution but not debtor's attorney who had a cause for retaining the funds as attorney's fees). *But see also* *Phipps v. Chesson*, 682 So. 2d 935, 938 (La. Ct. App. 1996); *Stegall v. Orr Motors of Little Rock, Inc.*, 165 So. 3d 264, 268 (La. Ct. App. 2015) (both holding that amounts paid in excess of a judgment are subject to restitution).

318. LA. CIV. CODE ANN. art. 2298 ; *cf.* CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1303-3 (2018) (Fr.).

319. Subsidiarity of this action is accepted, with variations, in most civilian jurisdictions, but not without debate. *See* Alexis Posez, *La subsidiarité de l'enrichissement sans cause: étude de droit français à la lumière du droit comparé*, 67 REVUE INTERNATIONALE DE DROIT COMPARE 185 (2014); *see also* P. Drakidis, *La "subsidiarité", caractère spécifique et international de l'action d'enrichissement sans cause*, REVUE TRIMESTRIELLE DE DROIT CIVIL [RTDCIV] 1961, p. 577, 589 (characterizing this requirement as "equivocal"); G. Viney, note under Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 3, 1997, JCP 1998, II, 10102 (Fr.) (arguing that this requirement is "obscure"). The initial draft of Article 2298 of the Louisiana Civil Code, as proposed by the Quasi-Contracts Committee of the Louisiana State Law Institute, had eliminated subsidiarity as a requirement. *See* A.N. Yiannopoulos, Editor's note under article 2298, in WEST'S LOUISIANA CIVIL CODE, VOL. I (2017); Martin, *supra* note 1, at 69; Oakes, *supra* note 303, at 900 n.175.

320. *See* Tate I, *supra* note 113, at 888–89; Martin, *supra* note 1, at 69.

juridical requirement³²¹ while acknowledging that there is some overlap with the lack of cause.³²²

The truth lies somewhere in the middle.³²³ The overlap between lack of cause and subsidiarity is considerable but not complete. Subsidiarity coincides with lack of cause whenever there is a lawful justification for retention of the enrichment. Indeed, if a juridical act or the law furnishes title for retention of the enrichment, the action for unjustified enrichment will fail predominantly because of the lack of cause.³²⁴ Also, when the law provides for a more specific remedy, such as in the case of a null juridical act or the dissolution of a contract, these provisions will supply the rule of decision as *lex specialis*.³²⁵ In such cases, the requirement of subsidiarity is redundant because justification of the enrichment or the existence of more special legal rules will exclude the action anyway.³²⁶

321. *Walters v. MedSouth Record Mgmt., L.L.C.*, 38 So. 3d 243, 244 (La. 2010); *Bd. of Sup'rs of La. State Univ. v. La. Agric. Fin. Auth.*, 984 So. 2d 72, 80–81 (La. Ct. App. 2008); *Coastal Env'tl. Specialists, Inc. v. Chem-Lig Int'l, Inc.*, 818 So. 2d 12, 19 (La. Ct. App. 2001) (all finding that “where there is a rule of law directed to the issue, an action must not be allowed to defeat the purpose of said rule . . . stated differently, unjust enrichment principles are only applicable to fill a gap in the law where no express remedy is provided.”); Nicholas II, *supra* note 91, at 66 (noting that the requirement of subsidiarity existed in the early, pre-*Minyard* Louisiana jurisprudence); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 18, 2014, JCP 2014, 998, note G. Loiseau (Fr.); P. Rémy, *Le principe de subsidiarité de l'action de in rem verso en droit français*, in *L'ENRICHISSEMENT SANS CAUSE. LA CLASSIFICATION DES SOURCES DES OBLIGATIONS* 59 (V. Mannino & C. Ophèle eds., 2007).

322. See MAZEAUD ET AL., *supra* note 164, No. 706; Drakidis, *supra* note 319, at 577; Schewe & Richelle, *supra* note 113, 663, 666–70 (arguing in favor of the subsidiarity principle despite the overlap with lack of cause).

323. Subsidiarity, as a requirement, appeared in the writings of AUBRY & RAU, *supra* note 6, No. 578, but it was adopted by French jurisprudence as a reaction to the rather extensive holding in the *Boudier* case. See Cour de cassation [Cass.] [supreme court for judicial matters] civ., May 12, 1914, S. 1918, 1, 41 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] civ., Mar. 2, 1915, D. 1920, 1, 102 (Fr.); Rouast, *supra* note 163, at 35–40; 2 PLANIOL I, *supra* note 65, No. 935.

324. 7 PLANIOL & RIPERT, *supra* note 164, No. 763; MARTY & RAYNAUD, *supra* note 81, No. 354; MAZEAUD ET AL., *supra* note 164, No. 710.

325. MAZEAUD ET AL., *supra* note 164, No. 710.

326. FLOUR ET AL., *FAIT JURIDIQUE*, *supra* note 90, No. 54. See 2 PLANIOL I, *supra* note 65, No. 937A, at 550 (“In reality, if in these different cases, the action *de in rem verso* does not lie, it is because the relations of the parties, being fixed by the contract or by the legal rule of responsibility, there is no need to make use of the concept of unjust enrichment. The person enriched has the right to keep the enrichment, and the measure in which he is held is determined by the application

The subsidiarity rule actually comes into play when there is no justification for the retention of the enrichment, but there is still another available remedy at law.³²⁷ French scholars, however, do not mention any concrete examples of such a situation.³²⁸ It is submitted that actions in delict or quasi-delict are the main cases in which the rule of subsidiarity is not overshadowed by the requirement of lack of cause. For instance, in a case of a tort by conversion, the tortfeasor has no justification for retaining the thing, yet the victim has an action in tort that precludes an action for enrichment without cause pursuant to the subsidiarity rule. It is further submitted that, although the cases of delict and quasi-delict present examples of direct application of the subsidiarity rule, subsidiarity seems impractical here. Indeed, a litigant would be ill-advised to pursue mere restitution on the basis of enrichment without cause instead of seeking redress and full recovery by application of the law of damages.³²⁹ Further, the preference in favor of the delictual action is better achieved through application of the civilian maxim *lex specialis derogat lege generali*.³³⁰ Thus, the debate on subsidiarity presents a false dilemma. Be that as it may, the jurisprudence overwhelmingly endorses this rule.³³¹

of other juridical rules.”). This approach is gaining support in Greek jurisprudence. *See* Areios Pagos [A.P.] [Supreme Court] 859/2003, ELLINIKI DIKAIOSYNI (HELLENIC JUSTICE JOURNAL) 2004, p. 144 (Greece) (“[S]ubsidiarity is not an additional requirement for an unjustified enrichment claim. It simply derives from . . . the basis of the claim for unjustified enrichment, which is the lack of legal cause.”).

327. MAZEAUD ET AL., *supra* note 164, No. 710.

328. *Id.* *But see* Nicholas III, *supra* note 113, at 14–26 (discussing variable situations in which the question of subsidiary may arise).

329. One plausible, albeit theoretical, explanation could be the plaintiff’s inability to establish liability on the part of the tortfeasor. *See* STATHOPOULOS, CONTRACT LAW, *supra* note 126, at 248; Nicholas III, *supra* note 113, at 15. Especially with respect to the Louisiana tort of conversion, *see supra* note 231.

330. “The special law overrides the general law.” *See* YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 96, at 239; *see also* Posez, *supra* note 319, at 185. When a delictual action is available, application of the special rules for a shorter prescription of the delictual action also will apply and establish a natural obligation serving as the lawful cause for the enrichment. *See supra* notes 304, 311.

331. MARTY & RAYNAUD, *supra* note 81, No. 354. The accessory nature of the *actio de in rem verso* is appealing to French and Louisiana judges because it also achieves a necessary “economy of means” in civil procedure. *See* BÉNABENT, *supra* note 110, No. 485. Conversely, an action for a payment of a thing not due is rightly characterized as an independent, not subsidiary, action. A good illustration of the need for this distinction can be found in the case of an enrichment *ob turpem vel injustam causam*. In the case of a tort of conversion, for

Enrichment without cause, therefore, is excluded when the impoverished plaintiff can seek another remedy. This alternative remedy can be legal,³³² contractual,³³³ quasi-contractual,³³⁴ delictual,³³⁵ or quasi-delictual.³³⁶ Usually, the available action will be directed against the enriched party.³³⁷ It is possible, however, that the existence of a remedy against a third party, that is, a person other than the enriched, will exclude

example, two separate causes of action can be contemplated—that of the tort itself, which is subject to a liberative prescription of one year; and that for the claim of restitution of the thing as a “thing not due,” which is subject to a ten-year prescriptive period. *See* LA. CIV. CODE ANN. art. 2299 cmt. c (2018); *see also* Whitten v. Monkhouse, 29 So. 2d 800, 804 (La. Ct. App. 1947); Cumis Ins. Soc’y, Inc. v. Hill, 574 F. Supp. 174 (M.D. La. 1983).

332. An example would be a claim for child support payments or fulfillment of other parental obligations. *See* Vaccari v. Vaccari, 50 So. 3d 139, 142 (La. 2010); Guillot v. Munn, 756 So. 2d 290, 295–96 (La. 2000); State Dep’t. of Children and Family Servs. v. Charles, 131 So. 3d 1054, 1058 (La. Ct. App. 2013). For other examples from the Louisiana Revised Statutes, *see supra* note 298.

333. Audio Plus, Inc. v. Lombardino, 105 So. 3d 725 (La. Ct. App. 2012) (contract for remodeling); Pinnacle Operating Co. v. Ettco Enter., Inc., 914 So. 2d 1144 (La. Ct. App. 2005) (contract of assignment of rights); Hall v. James, 986 So. 2d 817 (La. Ct. App. 2008) (mineral lease); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 24, 1973, Bull. civ. I No. 280 (Fr.) (contract of assignment of rights); Cour de cassation [Cass.] [supreme court for judicial matters] com., Apr. 23, 2013, JurisData 7881 (Fr.) (services contract); Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., 1 Feb., 1989, JurisData 399 (Fr.) (contract of lease). This should include actions stemming from the nullity or dissolution of a contract.

334. *See* Symeon C. Symeonides & Nicole Duarte Martin, *The New Law of Co-Ownership: A Kommentar*, 68 TUL. L. REV. 69, 99–102 (1993) (arguing that a co-owner’s action for enrichment without cause is subordinate to an existing action in *negotiorum gestio*); *see also* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 16, 2004, JurisData 22990 (Fr.) (*negotiorum gestio*); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., July 5, 1989, JurisData 702693 (Fr.) (payment of a thing not due).

335. Walters v. MedSouth Record Mgmt., L.L.C., 38 So. 3d 245 (La. 2010); Cour d’appel [CA] [regional court of appeal] Paris, Jan. 28, 1982, JurisData 20867 (Fr.).

336. The alternative remedy may also include breach of the duty of good faith and fiduciary duties. *See* Westbrook v. Pike Elec., L.L.C., 799 F. Supp. 2d 665 (E.D. La. 2011); Zaveri v. Condor Petroleum Corp., 27 F. Supp. 3d 695 (W.D. La. 2014).

337. 7 PLANIOL & RIPERT, *supra* note 164, No. 763; Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 24, 1973, Bull. civ. I, No. 280 (Fr.).

the action of enrichment without cause.³³⁸ The term “remedy” has been construed broadly to include not only personal but also real actions.³³⁹

But it may happen that the action the plaintiff normally has against her direct debtor cannot be exercised because of a factual obstacle that is beyond the plaintiff’s control or without any negligence on her part. When that is the case, the requirement of subsidiarity is waived, and the plaintiff will be allowed to bring the *actio de in rem verso* against the party holding the enrichment if the other requirements for the action are met.³⁴⁰ Insolvency of the debtor is a usual example of such a factual obstacle.³⁴¹ When allowing the action in such cases, French courts have scrutinized closely the obligee’s duty of good faith. Thus, courts have refused the

338. See *Soileau v. ABC Ins. Co.*, 844 So. 2d 108, 111 (La. Ct. App. 2003) (client who had a claim against accountant could not sue third person for restitution of funds embezzled by accountant and given to third person); *Coastal Env’tl. Specialists, Inc. v. Chem-Lig Int’l, Inc.*, 818 So. 2d 12, 19–20 (La. Ct. App. 2001) (environmental cleanup company had a remedy at law against lessee that contaminated soil that precluded company’s claim of unjust enrichment against lessor); *Insulation Techs., Inc. v. Indus. Labor & Equip. Servs., Inc.*, 122 So. 3d 1146, 1151 (La. Ct. App. 2013) (existence of contractual remedy against general contractor precluded subcontractor from maintaining cause of action for unjust enrichment against the owner of the project); see also *Marseilles Homeowners Condo. Ass’n, Inc. v. Broadmoor, L.L.C.*, 111 So. 3d 1099 (La. Ct. App. 2013); *Pinegrove Elec. Supply Co., Inc. v. Cat Key Constr., Inc.*, 88 So. 3d 1097 (La. Ct. App. 2012); *Bd. of Sup’rs of La. State Univ. v. La. Agric. Fin. Auth.*, 984 So. 2d 72 (La. Ct. App. 2008) (availability of remedy under the Public Works Act precludes a claim for enrichment without cause).

339. *Finova Cap. Corp. v. IT Corp.*, 774 So. 2d 1129, 1132 (La. Ct. App. 2000) (holding that plaintiff who held security interest in subcontractor’s equipment had other available remedies, including foreclosing on equipment and seeking writ of sequestration); *Builders Supply of Ruston, Inc. v. Qualls*, 750 So. 2d 427, 431 (La. Ct. App. 2000) (finding that supplier of building materials failed to avail himself of statutory rights and remedies governing claims and privileges). See *Jim Walter Homes, Inc. v. Jessen*, 732 So. 2d 699, 706 (La. Ct. App. 1999) (finding that contractor failed to take measures to secure his claim of unpaid fee for constructing a house).

340. 7 PLANIOL & RIPERT, *supra* note 164, No. 763; Cour de cassation [Cass.] [supreme court for judicial matters] req., Nov. 23, 1908, S. 1910, 1, 425, note Naquet (Fr.) (holding that the *actio de in rem verso* must fail if a justification for retention of the enrichment exists in a contract between the third party and the original insolvent debtor).

341. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 14, 2003, JurisData 17242, DEFRENOIS 2003, p. 259, obs. J.-L. Aubert, REVUE TRIMESTRIELLE DE DROIT CIVIL [RTDCIV] 2003, p. 295, obs. J. Mestre et B. Fages (Fr.). See Nicholas I, *supra* note 11, at 640.

action when the plaintiff, out of gross negligence, neglected to secure her claim or to bring suit prior to her debtor's insolvency.³⁴²

This exception does not apply, however, when the plaintiff's alternative remedy is barred because of a legal obstacle. In such a case, subsidiarity is not waived and the action for enrichment without cause must fail. Liberative prescription of the alternative action is the prime example of a legal obstacle.³⁴³ *Res judicata* is another example.³⁴⁴ Arguably, failure to produce evidence to sustain an alternative remedy is a third example.³⁴⁵ The mere

342. Cour de cassation [Cass.] [supreme court for judicial matters] req. July 11, 1889, S. 1890, 1, 97, note Labbé (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] civ. Feb. 12, 1923, 1, 129, note Rouast (Fr.). This opinion is also supported in doctrine. *See* 7 PLANIOL & RIPERT, *supra* note 164, No. 762.

343. *See, e.g.*, Dugas v. Thompson, 71 So. 3d 1059 (La. Ct. App. 2011). Especially for the case of liberative prescription, explanation for the exclusion of the action can be found in the theory of cause, given that a prescribed action constitutes a natural obligation. LA. CIV. CODE ANN. art. 1762 (2018). *But see* Nicholas I, *supra* note 11, at 636–39 (discussing the difficulties in distinguishing a “legal” obstacle from a “factual” one).

344. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 27, 2010, REVUE JURIDIQUE PERSONNES ET FAMILLE [RJPF] 2010, p. 20, obs. T. Garé (Fr.) (holding that, if the preclusive effect of a divorce decree does not extend to patrimonial issues, a claim of enrichment without cause would be admissible).

345. *See, e.g.*, Troxler v. Breaux, 105 So. 3d 944, 949–50 (La. Ct. App. 2012) (failure of a plaintiff cohabitant to produce evidence of an agreement for shared costs with defendant cohabitant did not provide grounds for an action in enrichment without cause); Johnson v. State, 510 So. 2d 87, 90–92 (La. Ct. App. 1987) (employee failed to prove a cause of action for workers' compensation); Current French jurisprudence, however, seems split on this issue. *Compare* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 3 1997, JCP 1998 II 10102, note G. Viney (Fr.) (*actio de in rem verso* allowed although plaintiff had failed to prove delictual fault), *with* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 31, 2011, JurisData 4877, D. 2011, p. 2891, obs. I. Gelbard-Le Dauphin (Fr.) (dismissing an *actio de in rem verso* of a plaintiff who had failed to produce evidence of the existence of a loan agreement). Courts sometimes have relied erroneously on this solution, however, when the exclusion of the action should be sought on other grounds. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Apr. 29, 197, REVUE TRIMESTRIELLE DE DROIT CIVIL [RTDCIV] 1971, p. 872, obs. Loussouarn (Fr.) (providing that contractor's unjustified enrichment claim against his former concubine for improvements he made to defendant's property was dismissed because of his inability to produce evidence of the existence of a contract). Perhaps a better explanation would have been that the plaintiff's liberality served as a cause for the defendant's enrichment. Be that as it may, this case also illustrates the great degree of overlap between cause and subsidiarity.

existence of an alternative remedy, and not the remedy's likelihood of success, will suffice.³⁴⁶

These variations in the jurisprudence should be seen as evidence of the functional role of subsidiarity, which is the only aspect that realistically sets it apart from lack of cause.³⁴⁷ Indeed, as an instrument of equity, the *actio de in rem verso* must be deployed when not doing so would bring about an unfair result. Although it may seem contrary to equity to allow a plaintiff who fails to present proof for her cause of action to be heard on different grounds, sometimes resorting to equity may be excused, even in such circumstances.³⁴⁸

Finally, the rule of subsidiarity, as crafted by French and Louisiana jurisprudence, is substantive rather than procedural. Thus, the plaintiff is precluded from bringing an action for enrichment without cause when another remedy is available. It should not mean, however, that the same plaintiff should be precluded from pleading enrichment without cause in the alternative. In fact, the litigant is only charged with presenting the facts of the case, which are characterized appropriately by the court, pursuant to the long standing civilian maxim *iura novit curia*.³⁴⁹ Although this is

346. See *Garber v. Badon & Ranier*, 981 So. 2d 92, 100 (La. Ct. App. 2008) (“[I]t is not the success or failure of other causes of the action, but rather the *existence* of other causes of action, that determine whether unjust enrichment can be applied.”).

347. See *Tate II*, *supra* note 113, at 466 (“In an action by an impoverished plaintiff against a defendant enriched without legal justification, subsidiarity has functional value.”).

348. See also Rémy, *supra* note 321, at 59–60; Y.-M. Laithier, observations under Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 25, 2008, JurisData 44518, REVUE DES CONTRATS 2008, No. 4, p. 1138 (Fr.).

349. “The court knows the law.” See *Gulfstream Servs., Inc. v. Hot Energy Servs., Inc.*, 907 So. 2d 96, 101 (La. Ct. App. 2005) (“Although Gulfstream did not plead enrichment without cause by name, Louisiana remains a fact pleading state and ‘[n]o technical forms of pleading are required.’ LA. C.C.P. art. 854; *Baker v. Maclay Props. Co.*, 648 So. 2d 888, 896–97 (La. 1995), . . . Thus, the threshold inquiry is whether Gulfstream pled or raised, without objection, a claim for enrichment without cause.”).

clearly the case in France³⁵⁰ and Greece,³⁵¹ it only *appears* to be the case in Louisiana.³⁵²

This overview of the requirements of enrichment without cause under the lens of its true general characteristics reveals a falsehood: Enrichment without cause is not a gap filling device. It is a remedy for restitution that is more scarcely deployed because of the broad conception of restoration and restitution on the basis of the doctrines of cause and nullity.

CONCLUSION

Civilian equity is not a separate branch of the law, living outside the civil code.³⁵³ Equity permeates the civil law system in the form of long standing general principles of the law. It is true that unjustified enrichment is one of these fundamental principles of equity. It is partly true that unjustified enrichment and enrichment without cause are one and the same. Rather, enrichment without cause is only one expression of the principle of unjustified enrichment. The doctrines of cause and nullity also express this principle by virtue of several specific legal rules. It is a sheer falsehood that enrichment without cause, formerly *actio de in rem verso*, “intruded” the Civil Code as a judge-made device and must therefore be

350. See Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 23, 2010, JurisData 9986, REVUE DES CONTRATS 2010, No. 4, p. 1370, obs. C. Goldie-Genicon (Fr.).

351. Also, nothing should prevent a defendant from arguing enrichment without cause as a defense in the form of an *exception*. Justification for this conclusion can be found in a long-standing Roman maxim allowing the defendant to use a subordinate action as a shield instead of a sword. See DIG. 50.17.156.1 (Ulpian, Ad Edictum 70) (“It has been said that a[n] [exception] falls even more readily to someone to whom we grant actions.”) and 43.18.1.4 (Ulpian, Ad Edictum 70) (“For when we grant an action to anyone, he will be considered all the more entitled to a[n] [exception].”); BALIS, *supra* note 65, § 136, at 362–63.

352. *Perez v. Util. Constructors, Inc.*, 2016 WL 5930877, at *2 n.5 (E.D. La. Oct. 12, 2016) (“The Court acknowledges that there appears to be a degree of confusion on this issue. Some sections of this Court have held that unjust enrichment can never be pled in the alternative, while other sections have held that alternative pleading is permissible.” (citing *Carriere v. Bank of Louisiana*, 702 So. 2d 648, 658 (La. 1996))). In *Carriere*, the Supreme Court of Louisiana discussed plaintiffs’ claims for enrichment without cause which were pleaded in the alternative to contract claims without dismissing claim because of the alternative pleading). *Carriere*, 702 So. 2d at 671–74.

353. See YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 96, at 182 (“In Louisiana and in France, there is no formal division between strict law and equity. . . Equity is built into the law.”).

kept in austere confinement. In fact, this remains one of the most long-lived misunderstandings in the law, dating back to Domat and Savigny.

This Article attempts to reintroduce enrichment without cause, through a historical, critical, and comparative examination of its scope of application. It is hoped that Louisiana doctrine and the jurisprudence will engage in further discourse, leading to a Louisiana model of enrichment without cause devoid of mysteries. Finally, it is true, sadly, that the “Beautiful Civil Law of Louisiana,”³⁵⁴ enriched by the monumental work of one of her most prolific admirers—Professor A.N. Yiannopoulos—is now impoverished by his passing. We pay tribute to our departed teacher, colleague, and friend, as we continue to guard Thermopylae.³⁵⁵

354. A.N. Yiannopoulos, *On the Bicentenary of the Louisiana Supreme Court: Chronicle of the Creation of a Unique and Beautiful Legal Tradition*, 74 LA. L. REV. 649, 651 (2014).

355. *Id.* at 649, introductory footnote.