

**THE LOUISIANA LAW OF UNJUSTIFIED
ENRICHMENT
THROUGH THE ACT OF THE PERSON ENRICHED**

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It was thanks to Ferd Stone that I was invited to visit the Tulane Law School for the Spring semester of 1960, and it was no doubt his idea that I should give a course on Quasi Contract. From what I learned from that course there emerged an article in the Tulane Law Review in 1962,¹ and that led, five years later, in the landmark decision of *Minyard v. Curtis Products, Inc.*,² to the acceptance by the Supreme Court of Louisiana of the *actio de in rem verso* as part of the law of Louisiana. It therefore seems appropriate that my contribution to this issue in honor of a much-loved friend should return to the subject which he caused me to take up.

It is indeed probably time, twenty-five years on from *Minyard* and after more than a hundred subsequent reported decisions in the courts, for a review of the whole of the Louisiana law of unjustified enrichment, but I propose on this occasion to confine myself to the frontier between unjustified enrichment and Ferd's favored field, the law of tort or delict.

Introductory - Common Law and Civil Law

In the Common law, largely for historical reasons, the acquisition of a benefit by the defendant's own wrongful act is seen as a separate head of restitution or unjustified enrichment. Thus the fundamental division in the leading English treatise on restitution³ is between benefits acquired by the defendant (a) from or by the act of the plaintiff, (b) from a third party, (c) through the defendant's own wrongful act. Since this analysis turns on *how* the benefit was acquired, the fact in the third case that it was acquired wrongfully is a necessary element in founding the defendant's liability. In the Civil law, on the other hand, neither the question *how* nor the question of

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1. Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law*, Part I, 36 TUL. L. REV. 605 (1962), Part II, 37 TUL. L. REV. 49 (1962) [hereinafter cited as Nicholas I and Nicholas II].

2. 251 La. 624, 205 So. 2d 422 (1967).

3. GOFF AND JONES, *THE LAW OF RESTITUTION* (3rd ed. 1986).

wrongfulness plays a necessary part in the analysis.⁴ Thus the five prerequisites laid down in *Minyard*⁵ are (1) an enrichment of the defendant, (2) an impoverishment of the plaintiff, (3) a connection between the enrichment and the impoverishment, (4) the absence of "justification" or "cause," and (5) the absence of any other remedy. These prerequisites leave no room for either of the Common-law questions (except insofar as they may in any particular case be relevant to items (3) or (4)). The wrongfulness or otherwise of the defendant's acquisition of the enrichment is never relevant. It is true that if the defendant has by his own act acquired a benefit in circumstances which satisfy the five prerequisites, he will in most cases have also committed a wrong, but when this is not so (e.g., because he acted in pursuance of a reasonable but mistaken claim of right), the remedy for unjustified enrichment will still be available.⁶

Nevertheless, enrichment by the defendant's own act does present some special difficulties in Louisiana law and has given rise to some divergences in the jurisprudence. It is with these difficulties and divergences that this paper is concerned.

Difficulties in Louisiana Law Before *Minyard*

Extensive Interpretation of Article 2301 of the Civil Code and the Requirement in Article 2293 of a Lawful Act

In the jurisprudence before *Minyard* there was difficulty in accommodating enrichment by the act of the defendant within the limits of the Civil Code.⁷ Where the act consisted in obtaining, usually by deception, a payment by the plaintiff, the defendant could be required to make restitution under article 2301:

He who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it.

But even where there was no payment, but simply a taking by the defendant, a number of cases applied the same article. And it is true

4. German law concerns itself with the question *how* in the sense that it distinguishes between enrichment arising from a "performance" or "in any other way"; Nicholas I.615.

5. 205 So. 2d 422, 432.

6. Of course the scope of the Common law of torts is wider than that of the Civil law of delict in that many Common-law torts do not require fault.

7. On what follows, see Nicholas II.51-56.

that, taken literally, the article requires only that the defendant should have "received" what was not due to him, but it plainly takes it for granted that this receipt has resulted from a payment by the plaintiff (as do the subsequent articles 2302-2310).

Moreover, there was a further difficulty. Even if the extensive interpretation of article 2301 was accepted, the receipt of what was not due fell into the general category of quasi contracts. Article 2293 provides that quasi contracts are "the *lawful* and purely voluntary acts of a man" and since, in the case of enrichment by the act of the person enriched, the act will normally be unlawful, there can logically be no recovery in quasi contract. In most cases this difficulty was simply ignored, but in *Roney v. Peyton*⁸ the point was taken. Defendant had in bad faith received from a third party a mortgage note belonging to plaintiff and had collected on it. The tort action being prescribed, the court applied the extensive interpretation of article 2301. In response to defendant's objection that by virtue of article 2293 the quasi contractual provisions of the Code could not apply to unlawful acts, the court made two points: (a) though defendant's knowing receipt of the note was unlawful in that he acquired no legal title to the proceeds, it was not, said the court, unlawful in the sense that it was a tort; (b) if defendant's objections were well founded, article 2301, "stating specifically that such a transaction gives rise to a quasi contract, would be expunged from the Code." As far as point (a) is concerned, it is difficult to see why defendant's act was not a tort and certainly the court's distinction would be inapplicable in other cases, such as *Kramer v. Freeman*⁹ where defendant violently dispossessed plaintiff and yet was held liable under articles 2293, 2294 and 2301. Point (b) is overstated, since article 2301 would still apply to cases in which defendant's receipt was lawful (i.e., where he mistakenly believed the payment to be due). It would be better to face the difficulty head on. For article 2301 does expressly provide for the case where defendant knowingly receives what is not due to him and there is in consequence an inescapable contradiction between this article and article 2293. And it would be intolerably paradoxical to assume, as defendant's argument in *Roney v. Peyton*¹⁰ would require, that the legislator intended that the culpable recipient should be allowed to retain his dishonest gain, when (and this at least is plainly the law) the innocent recipient is required to make repayment.

The problem of the word 'lawful' in article 2293 is considered further below¹¹ in the context of the law after *Minyard*.

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8. 159 So. 469 (La. App. 1935).
 9. 198 La. 244, 43 So. 2d 609 (1941).
 10. Note 8, *supra*.
 11. Text at notes 44-45.

*The Option Between an Action in Tort and an Action in
Quasi Contract*

It was well established by a line of decisions beginning in 1907 with the Supreme Court case of *Morgan's Louisiana & T.R. & S.S. Co. v. Stewart*¹² that where plaintiff had two independent actions, one in delict for damages and the other in quasi contract for restitution, he was entitled to make a choice (or, as was more likely to be the case, to sue in quasi contract because the action in delict was time-barred).¹³ The choice was commonly expressed as waiver of tort, though this was a misapplication of the Common-law term.

On the other hand, there is a long line of cases, many of them in the Supreme Court, dealing with the question of prescription and laying down the rule that where defendant has taken something from plaintiff, or has received it (whether knowingly or not) without plaintiff's consent, it is necessary to ask whether plaintiff's action is for the thing itself or for its value. If it is for the value of the thing, it is an action in tort and the prescriptive period is one year, but if it is for the thing itself the period is ten years. It seems to follow from this that if the thing no longer exists or is no longer in the hands of the defendant, the action can only be in tort, even though the claim is not for damages. The question first came before the Supreme Court in 1903 in *Shields v. Whitlock & Brown*,¹⁴ a case of timber trespass, defendant having entered on plaintiff's land and removed timber without claim of right. The court adopted the rule, but did so with reluctance, declaring that it was very much inclined to the view that there ought to be a difference in prescriptive period between a claim in damages for trespass and a claim for the value of property belonging to plaintiff which defendants had appropriated to their own use. The court concluded, however, that this view "does not seem to be accepted by the law or jurisprudence of this state."¹⁵

12. 119 La. 392, 44 So. 138 (1907); see also *Kramer v. Freeman*, note 9, *supra*; *State v. Younger*, 20 So. 2d 305 (1945); *Devoe v. Reynolds*, 109 So. 2d 226 (La. App. 1959); *Schouest v. Texas Crude Oil Co.*, 141 So. 2d 155 (La. App. 1962); *Edward Levy Metals Inc. v. New Orleans Public Belt Railroad*, 148 So. 2d 580 (1963); *Dantagnan v. I.L.A. Local 1418, A.F.L.-C.I.O.* 496 F.2d 400 (5th Cir. 1974).

13. Or because, as in *Morgan's* case itself, plaintiff was seeking a writ of attachment.

14. 110 La. 714, 34 So. 747 (1903).

15. It is surprising that the court was willing, over the dissent of Blanchard, J., to concede the point since the authorities were not overwhelming; see further, *Weir, Prescription, Classification and Concurrence of Obligations*, 36 TUL. L.R. 556 (1962) (*Weir* is, however, too restrictive in saying that all the cases have to do with timber or

The same rule was applied by the Supreme Court in the closely similar case of *Ducros v. St. Bernard Cypress Co.*¹⁶ and it was extended to seismographic operations by the Federal Court of Appeals for the Fifth Circuit in *Iberville Land Co. v. Amerada Pet. Corp.*¹⁷ Defendant had conducted seismographic operations on plaintiff's land without his consent and plaintiff claimed the value of the information so obtained, relying on article 2301. The court held that the suit was in tort and therefore prescribed. In doing so it said:

[Article 2301] calls for the restoration of the specific thing wrongfully acquired. If the thing thus acquired exists and can be restored, the plaintiff either may sue for damages for the wrongful act by which he has been deprived of the thing, or he may sue for the restoration of the thing. One is an action in tort, or for a quasi offense; the other is an action in quasi contract . . . It is well settled in Louisiana that where, as here, the acts and conduct which give rise to the cause of action are treated as wrongful and illegal and amount in law to an offense or quasi offense, and where, as here, the demand is for a money judgment for the value of property illegally taken, the suit is a tort action to recover damages for an offense or quasi offense . . .¹⁸

In all these three cases defendant was acting in bad faith and had undoubtedly committed an offense. In two other Supreme Court cases, however, defendant was not at fault. In *Martin v. Texas Co.*¹⁹ defendant had received plaintiff's oil in good faith from a third party and had resold it. Plaintiff's claim for the value of the oil was nevertheless held to be in tort. The suit, the Supreme Court held, did not "grow out of a contract or a quasi contract, but out of the violation of the law prohibiting a person from buying the property of another from one who is not the owner and who had no authority to sell it, and from converting it . . . Such being plaintiff's cause of action, it is one for damages . . ." Similarly in *Liles v. Barnhart*²⁰ second defendant

oil trespass.). Of course if the claim is for damages, it must be in tort, but not if it is for defendant's enrichment; *Schouest v. Texas Crude Oil Co.*, note 12, *supra*.

16. 164 La. 787, 114 So. 654 (1927).

17. 141 F.2d 384 (5th Cir. 1944).

18. The case presents all the problems discussed above (text at notes 7-11) and in addition the difficulty of treating information as a specific thing. There is a more cautious statement of the principle in *Delta Theaters Inc. v. Paramount Pictures Inc.*, 158 F. Supp. (E.D. La. 1958); see Nicholas II.54.

19. 150 La. 566, 90 So. 922 (1921).

20. 152 La. 419, 93 So. 490 (1922).

had taken a lease of land in ignorance of the fact that plaintiff owned a one-fifth share and had not consented to the lease. In response to plaintiff's claim for a proportionate part of the value of the oil and gas which defendant had extracted, defendant pleaded the one year's prescription. Following *Shields v. Whitlock & Brown*,²¹ the Supreme Court upheld this plea.

It is difficult to know what to make of these cases. There are two questions. The first is how they are to be reconciled with the line of cases recognizing plaintiff's right to "waive the tort" and opt to sue in quasi contract. It might be said perhaps that this can formally be done by reference to the rule that prima facie it is for the plaintiff to determine the form and character of his action.²² If he does not do so, the court has to make the determination and will do so by reference to the cases now under consideration. Thus in *Kramer v. Freeman*,²³ the Supreme Court, before allowing plaintiff's claim in quasi contract, even though he had a (time-barred) action under article 2315 of the Civil Code, first noted that plaintiff had clearly exercised the option. Even formally, however, this reconciliation is unsatisfactory. In *Iberville Land Co. v. Amerada Petroleum Corporation*,²⁴ for example, plaintiff clearly framed his action as a claim under article 2301 of the Civil Code, but the court applied the rule laid down in *Shields v. Whitlock & Brown*²⁵ and the other cases cited above to disallow this claim. And the rule is in any case presented as a fundamental one, governing the nature and availability of the actions referred to. It is, in other words, a rule by which the plaintiff is bound whatever his expressed choice. In short, the answer to our first question must be that the two lines of cases are irreconcilable.

The second question is as to the substantial merits of the second line of cases. The central proposition is that an action for the value of a thing cannot be founded in quasi contract. This seems to be based on the formulation of article 2301,²⁶ laying down an obligation on the receiver of what is not due to him to "restore it to him from whom he has unduly received it." Since the action is to enforce an obligation to restore the thing (so the argument seems to run), it is not available if the thing does not exist or if defendant is not in a position to restore it. But this interpretation, which seems to reduce the quasi contractual action to a claim for specific restitution, is ruled out by articles 2312 and 2313, which expressly provide for cases in which the thing cannot be

21. Note 14, *supra*.

22. *Liles v. Producer's Oil Co.*, 99 So. 339 (1924).

23. Note 9, *supra*.

24. Note 17, *supra*.

25. Note 14, *supra*.

26. See text at notes 7-8, *supra*.

specifically restored. If defendant received the thing in bad faith, he is liable for its value. If he received it in good faith, he is liable for loss or injury caused by his fault and, if he has sold the thing, he is liable for the price he received--in other words he is liable for his enrichment or for any loss caused by his fault.

The formulations of the rule in the jurisprudence seem in fact to telescope the action in quasi contract and the real action by way of revendication (which is not mentioned in any of the cases). The distinction in terms of the thing itself or its value would no doubt be well founded in relation to a real action. And the remedy against a bona fide recipient, as in *Martin v. Texas Co.*²⁷ and *Liles v. Barnhart*²⁸ should surely be either a real action or an action in quasi contract.²⁹ The Common law does indeed treat the innocent conversion of goods as a tort, but the Common law has no revendication.

In short, the second line of cases is both irreconcilable with the first line and unsatisfactory in itself. The better view is that expressed in the dissent of St. Paul J. in *Liles v. Barnhart*.³⁰ If defendant's act causes damage without any benefit to defendant, the action should be in tort, but if his act also enriches him, there is available both an action in tort and an action in quasi contract and plaintiff is entitled to his election.

There remains the question of the present status of the rule in the post-*Minyard* era. It has in fact been little noticed in the jurisprudence. In *White v. Phillips Petroleum Co.*³¹ the court applied the rule, though only with the very reluctant acquiescence of Tate J. In *Northcott Exploration Co. Inc. v. W.R. Grace & Co.*,³² however, the same court thirteen years later refused to follow this decision, holding that the rule was based upon the "harsh and unduly technical doctrine" of the "theory of the case" and that this doctrine had been suppressed by the enactment of article 862 of the current Code of Civil Procedure. It is to be hoped that this decision will be sufficient to bury the rule (which does not seem to have surfaced in the subsequent jurisprudence).

27. Note 19, *supra*.

28. Note 20, *supra*.

29. See, e.g., the opinion of Summers, J., in *Edward Levy Metals Inc. v. New Orleans Public Belt Railroad*, *supra*, note 12.

30. Note 20, *supra*.

31. 232 So. 2d 83 (La. App. 3d Cir. 1970).

32. 430 So. 2d 1077 (La. App. 3d Cir. 1977).

Louisiana Law After *Minyard*

Removal of Need for Extensive Interpretation of Article 2301

Once *Minyard* had established the *actio de in rem verso* as a general remedy for unjustified enrichment, there was no need to attempt to force claims on this ground into the straitjacket of article 2301.³³ If defendant had received the enrichment without a payment by plaintiff, or had not received it at all, but had acquired it by his own unilateral act, or if the enrichment consisted in some benefit other than the receipt or acquisition of a specific thing or sum, an action would lie (provided that the other four *Minyard* requirements were met). Thus, in *V8 Taxicab Service Inc. v. Hayes*,³⁴ defendant used plaintiff's emblem (without which he could not operate a cab) without plaintiff's permission. The court held that (1) defendant had been enriched by the use of the emblem, (2) plaintiff had been impoverished by not receiving any fee, (3) there was a clear connexion between the enrichment and the impoverishment, (4) in the absence of plaintiff's consent there was no justification for the enrichment, and (5) plaintiff had no other remedy. Plaintiff was therefore entitled to the amount of the fee which defendant would have had to pay.³⁵

The facts of *Iberville Land Co. v. Amerada Petroleum Corp.*³⁶ would likewise now present no difficulty. Defendant had conducted seismographic operations on plaintiff's land without plaintiff's consent and had derived valuable information from those operations. There was therefore enrichment, impoverishment, absence of justification and absence of any other remedy. In the actual case plaintiff claimed the value of the information obtained (i.e., defendant's enrichment), but on *Minyard* principles his recovery would be limited by the extent of his impoverishment. He would therefore recover the amount of the fees which defendant would have had to pay (provided this was not more than the amount of defendant's enrichment).

Basis of the Actio de in rem verso

There has been little discussion in the jurisprudence of the basis of the action established by *Minyard*. In *Minyard* itself Justice Summers, writing the majority opinion, was not categorically clear on the subject. He first cited article 21 of the Civil Code, requiring the

33. The attempt is still sometimes made, however. See, e.g., *Equilease Corp. Inc. v. Smith International Inc.* 588 F. 2d 919 (5th Cir. 1979).

34. 322 So. 2d 442 (La. App. 4th Cir. 1975).

35. Cf. *Daspit v. City of Alexandria*, 342 So. 2d 683 (La. App. 3d Cir. 1977).

36. Note 17, *supra*.

judge to decide according to equity where there is no express law, and the moral maxim enshrined in article 1965 that "no one ought to enrich himself at the expense of another." These articles, he said, were the underlying reasons for the action for indemnity, of which the action in *Minyard* was an extension. He then, however, went on to cite articles 2292, 2293 and 2294, enunciating the general concept of quasi contract, which itself, he said, is based on the principle of restitution of unjustified enrichment. It is under this general theory of quasi contractual obligations that he places the *actio de in rem verso*.

The only other case in which the Supreme Court has considered the matter is *Edmonston v. A-Second Mortgage Co.*³⁷ There the majority opinion, also written by Justice Summers, based the action on articles 21 and 1965, without reference to the quasi contractual articles.

Justice Tate, writing extra-judicially,³⁸ was also ambivalent on the matter. In the first of his two articles on the Louisiana action for unjustified enrichment,³⁹ he took the view that the then article 1965, though dealing only with the interpretation of contracts, could, when taken together with the various particular instances in which the Civil Code can be seen as remedying unjustified enrichment, enable the courts to find that the Code permits a generalized action. But he preferred to see the true basis of the Louisiana action in article 21. In the second of his two articles, however,⁴⁰ he found that to base the action on article 21 was open to valid intellectual objection on the ground that article 1760 (as it then was) and article 2292 limited the sources of obligations to contracts, quasi contracts, offenses, quasi offenses and obligations imposed by law (e.g., tutorship, neighbourhood). There was accordingly no room for an obligation based on article 21. He therefore preferred to found the action on the quasi contract articles, viz. 2293 and 2294:

Art. 2293. Quasi contracts are the lawful and purely voluntary acts of a man, from which there results any obligation whatsoever to a third person, and sometimes a reciprocal obligation between the [two] parties.

Art. 2294. All acts, from which there results an obligation without any agreement, in the manner

37. 289 So. 2d 31 (La. 1971).

38. Tate, *The Louisiana Action for Unjustified Enrichment*, 50 TUL. L.R. 883 (1976) and *The Louisiana Action for Unjustified Enrichment: A Study in the Judicial Process*, 51 TUL. L.R. 446 (1977). These articles are cited hereinafter as Tate I and Tate II.

39. Tate I.894.

40. Tate II.458-60.

expressed in the preceding article, form quasi contracts. But there are two principal kinds which give rise to them, to wit: The transaction of another's business, and the payment of a thing not due.

There are two objections, one theoretical and the other practical, to founding the action on these articles. The theoretical objection is that it is difficult to see quasi contract, as Justice Tate needed to,⁴¹ as based on the principle of unjustified enrichment. Of the two principal acts listed in article 2294, the payment of a thing not due can indeed be seen as being founded on unjustified enrichment, but not the transaction of another's business (or the management of another's affairs as the Code thereafter calls it). In the first place the primary obligation created by the act of management is that of the person undertaking the management⁴² and that has nothing to do with enrichment. What is usually seen as expressing the idea on unjustified enrichment is what article 2293 calls the reciprocal obligation of the person whose affairs have been managed. But even there the person obliged need not have been enriched; all that is necessary is that the management should have been initially useful and necessary, even though in the event no benefit results. And the measure of his liability is not limited to his enrichment, if any, but extends to all the other party's "useful and necessary expenses."⁴³

The practical objection to founding the *actio de in rem verso* on the quasi contract articles is the difficulty of the word "lawful" in article 2293. This we have already encountered.⁴⁴

The position has changed in one important respect since Justice Tate wrote. In the 1984 revision of the Civil Code articles on obligations the new article 1757 provides a revised list of the sources of obligations:

Art. 1757. Obligations arise from contracts and other declarations of will. They also arise directly from the law, regardless of a declaration of will, in instances such as wrongful acts, the management of the affairs of another, unjust enrichment and other acts or facts.

41. And as Summers J. did in *Minyard* (see text immediately above).

42. See articles 2295, 2296, 2297, 2298 Civil Code.

43. Civil Code, art. 2299.

44. Text at notes 7-11, *supra*. See also *Aetna Life and Casualty Co. v. Dotson*, *infra*, at notes 60 and 68, and *Stelly v. Gerber Products Co.*, 299 So. 2d 529 (La. App. 3d Cir. 1974).

This for the first time establishes unjust enrichment as an independent source of obligations, but leaves unclear what the relationship is to be between this article and the as yet unrevised article 2292. This latter article derives nonconventional obligations from two sources: either the law or acts (or facts). And into the category of acts or facts come quasi contracts or offenses or quasi offenses. The article is therefore inconsistent with the new article 1757, which embraces acts or facts in the single large category of obligations arising directly from the law. Pending the revision of article 2252 it may, however, be permissible to assume at least that unjust enrichment does not have to be subjected to article 2293 and therefore that the difficulty of the word "lawful" can be bypassed.

The Principle of Subsidiarity

The fifth of the prerequisites laid down in *Minyard* for a successful suit by *actio de in rem verso* was that "the action will only be allowed when there is no other remedy at law, i.e., the action is subsidiary or corrective in nature." This principle of subsidiarity is the source of considerable doctrinal debate in French law (where it mainly originates) and gives rise to a number of difficulties in the post-*Minyard* jurisprudence in Louisiana. In retrospect it can perhaps be seen as unfortunate that the five propositions were laid down by the court categorically as prerequisites, whereas in the article from which they were derived⁴⁵ they were no more than the headings under which the requisites of the action were to be discussed. And the headings, it was said, were convenient provided it was realised that there was a good deal of overlapping between them and that different systems, or different writers within the same system, might therefore rely more heavily on one than on another. This is particularly true of the requirements of subsidiarity and of absence of justification or cause. The conclusion to which the article came, and at which Justice Tate in his two important interventions⁴⁶ also arrived, was that the proper place of the principle of subsidiarity was very small. (In German law the principle plays no part at all).⁴⁷ What is at any rate inescapable is that for Louisiana law the prerequisite that there should be "no other remedy at law" cannot be literally or mechanically⁴⁸ applied as if it were a legislative proposition. Indeed, the Supreme Court itself in *Minyard* went on to qualify it by saying that it "is simply an aspect of the principle that the action must not be allowed to defeat the purpose of a rule of law directed to the matter at issue. It must not, in the language

45. Nicholas I.610.

46. *Supra*, note 37.

47. Nicholas I.617, 641.

48. Tate I.893.

of some writers, "perpetrate a fraud on the law."⁴⁹ Plainly there is here considerable overlap with the requirement of absence of cause.⁵⁰ This requirement we may, with Justice Tate, define as the absence of legal justification for the enrichment by reason of a contract or provision of law intended to permit the enrichment or to bar attack upon it.⁵¹ It may be argued that the requirement of subsidiarity has been weakened by the enactment of the new article 1757 of the Civil Code, which, as we have seen,⁵² formally establishes unjust enrichment as a source of obligations. For it is commonly said⁵³ that the reason for the requirement in French law is that the *actio de in rem verso* is an extra-codal product of jurisprudence and therefore available only to fill gaps in the law. The same attitude can be found in Louisiana decisions which, before the enactment of the new article 1757, founded the requirement on the recourse to "equity" which is allowed by article 21 of the Civil Code "where there is no express law."⁵⁴

It may make for clarity if we attempt an analysis of the typical situations in which the question of subsidiarity may arise, or seem to arise, and consider for each situation such jurisprudence as there has been. Since all applications of the principle of subsidiarity must be mutually consistent, the analysis is not confined to cases of enrichment through the act of the person enriched, but it is with that category that we begin.

The Principal Situations in Which the Question of Subsidiarity May Arise and the Relevant Jurisprudence

A. Enrichment through the act of the person enriched.

No third party is involved. Defendant by his own act (which may or may not be tortious) has enriched himself at the expense of plaintiff.

1. *No other action is available.*⁵⁵ Defendant's act is not tortious, and the only possible remedy is for unjustified

49. 251 La. 624, 205 So. 2d 422 at 433 (1967); cf. Nicholas I.634, 640.

50. Nicholas I.633-35.

51. Tate I.904; cf. Nicholas I.625-26.

52. Text at notes 44-45, *supra*.

53. Nicholas I.639; Tate II.457-58.

54. *See, e.g.,* Austin v. North American Forest Products Inc., 656 F.2d 1076 (5th Cir. 1981); Sheets v. Yamaha Motors Corp., 849 F.2d 179 (5th Cir. 1988).

55. The word "available" is used in the cases sometimes in the sense that the action is one which plaintiff is in the instant case free to bring, but sometimes in the