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 restitution[3] 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

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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 below[11] 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]

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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

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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

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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).

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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

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

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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 management[42] 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.

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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 derived[45] 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 interventions[46] 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 mechanically[48] 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 said[53] 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

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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

enrichment. Subsidiarity cannot therefore be in question. Under this heading falls *V8 Taxicab Service Inc. v. Hayes*, which has already been discussed.[56]

2. *An action in tort*[57] *is available.* This action will usually be more advantageous than the *actio de in rem verso*, but there may be special reasons for preferring the latter, such as the availability of a writ of attachment.[58] Is plaintiff entitled to elect? If one applies what one may call the simple *Minyard* test and asks whether there is another remedy at law, there can be no election, but if one looks to the underlying rationale for the test, also given in *Minyard*, and asks whether the allowing of an election would defeat the purpose of a rule of law directed to the matter at issue, the conclusion may be different.[59] The argument that there should be no election assumes that the two actions serve in substance the same purpose, or, in the words of Cole J. in *Aetna Life & Casualty Co. v. Dotson*,[60] "that any remedy provided by an action *de in rem verso* would be identical in substance and relief to an action in tort." But it can be said that the two remedies do not serve in substance the same purpose and are not identical in substance and relief. The purpose of the tort action is to compensate plaintiff for damage suffered, regardless of any benefit to defendant; the purpose of the *actio de in rem verso* is to give to plaintiff restitution of any benefit to defendant, but only to the extent of plaintiff's impoverishment. Or, to apply the *Minyard* rationale, the allowing of the *actio de in rem verso* will not defeat the purpose of any rule of law directed to the matter at issue.[61]

As we have seen,[62] a long line of decisions in the period before *Minyard* established the right of election, under the title of waiver of tort. To deny the *actio de in rem verso* because an action in tort is available against the same defendant would therefore mean going back on well-established jurisprudence.[63]

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sense that the action will in principle lie, even though in the instant case it is prescribed. In the text here it is used in the former sense.

56. *See* text at note 34, *supra*; *cf.* Daspit v. City of Alexandria, note 35, *supra.*

57. Or an analogous action, as in Sheets v. Yamaha Motors Corp., note 54, *supra.*

58. Nicholas II.52.

59. *See* Nicholas I.639-40.

60. 346 So. 2d 762 (La. App. 1st Cir. 1977) at 765.

61. In the *Aetna Life* case, Cole J. arrived at the opposite conclusion; *see* note 71, *infra.*

62. Text at notes 11-13, *supra.*

63. Justice Tate's view is not clear. In Tate I.904 and II.461, with n.48, he seems to exclude the action for unjustified enrichment if the impoverished person

3. *An action in tort was available, but is now prescribed.* The short period of prescription for tort actions in Louisiana makes this of course the main practical case. If the conclusion under the previous heading is right, viz. that where both the tort action and the *actio de in rem verso* are available, plaintiff is entitled to his election, the same should prima facie apply here also. The question is whether in the particular case the granting of the *actio de in rem verso* would defeat the purpose of the rule of prescription or, in other words, whether the rule of prescription was intended to permit this particular enrichment. If the argument under the previous heading is accepted, the answer to this question in the case of the ordinary tort action should be that the rule of prescription was intended to free defendant from tortious liability in damages, not to entitle him to retain an unjustified enrichment.[64]

The pre-*Minyard* jurisprudence was clear that whether or not the action in tort was barred, plaintiff was entitled to sue in quasi contract.[65] The position since *Minyard* is less certain.[66] There seem to be two cases unequivocally in point.[67] The first is *Aetna Life and Casualty Co. v. Dotson.*[68] Plaintiff was the insurer of an employer under a policy against the infidelity of his employees. Defendant, one of those employees, unlawfully took $10,000. Plaintiff, having paid up on the policy, was subrogated to the rights of the employer and framed an action against defendant in quasi contract (the action in tort being prescribed). The court first concluded that the claim could not be founded on article 2301 of the Civil Code.[69] It then went on to hold that if the claim were treated as an *actio de in rem verso*, it would also fail, the ground being the requirement of subsidiarity laid down in

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actually has another remedy either against the enriched person or against a third party; but he then (II.461-62) arrives at "the unavoidable conclusion that no real end is served by a subsidiary principle that defeats the action because the plaintiff could recover as well against *the enriched defendant* upon a different action or ground."

64. French law seems, however, to be settled in the opposite sense by Cass. civ., Apr. 29, 1971, Gaz. Pal. 1971.2.554.

65. Kramer v. Freeman, note 9, *supra*; Schouest v. Texas Crude Oil Co., note 11, *supra*; *cf.* Nicholas II.52-43.

66. *See* Wisdom J. in Fidelity & Deposit Co. of Maryland v. Smith, 730 F.2d 1026, (5th Cir. 1984) at 1030-31.

67. On situations where the action prescribed is contractual see sections B(2) and C(2)(a)(iii), *infra*. (text at notes 83-85 and after note 106).

68. Note 60, *supra*.

69. The reasons were those which we have already considered (text at notes 7-11, *supra*), viz (a) that article 2293 requires a quasi contractual "act" to be lawful, and defendant's act had been unlawful, (b) that art. 2301 applies to a person who "receives" what is not due, whereas defendant had *taken* the $10,000.

Minyard. For "any remedy provided by an action *de in rem verso* would be identical in substance and relief to an action in tort."[70] In other words, the court took the opposite view to that put forward above, though without referring to the countervailing arguments.[71]

The second case in point is *Sheets v. Yamaha Motors Corp. U.S.A.*[72] Plaintiff devised a solution to a problem encountered by defendant's tri-motorcycles. Defendant made use of plaintiff's idea and plaintiff sued. He framed his claim in unjustified enrichment because, the court found, he had lost his remedy under the Louisiana Trade Secrets Act by failing to make reasonable efforts to maintain secrecy. The court had doubts about the existence of any enrichment, but concluded that the claim must fail in any case on the ground of subsidiary. The court said, following *Austin v. North American Forest Products Inc.*,[73] that a court applying Louisiana law could not resort to equity even though the remedy at law was barred by prescription. But whether or not this broad proposition is accepted, the court's more particular reasoning was persuasive. It was concerned that to apply what it called the quantum meruit doctrine[74] would contravene the more particularised requirements of the Trade Secrets Act. In other words the barring of the remedy under the Act could be seen as intended to put an end to all claims arising out of the alleged use of trade secrets.

Other cases ostensibly decided on the issue of subsidiarity seem on examination to be referable to other grounds. In *Flowers v. U.S. Fidelity & Guarantee Co.*[75] (insofar as it is relevant here) plaintiff had been injured in an accident caused by a person insured by defendant. The action in tort being barred, plaintiff based his claim on unjustified enrichment. The court rejected the claim, not on the ground of subsidiarity, but because defendant's enrichment was justified by the rule of prescription, "which is an imperative rule of law permitting the enrichment." The court's opinion on this point is very brief, and there is no explanation of what the enrichment was taken to be. If it was the exemption from the need to pay damages, then it did indeed have its cause or justification in the rule of prescription. And there would then also be another ground for the failure of the claim, viz. that there was

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70. The court further held that since the *actio de in rem verso* fell under the heading of quasi contract it would, like the claim under art. 2301, also be excluded by art. 2293, since the act was not lawful.

71. The court cited in support of its conclusion Nicholas I.639-41, but this propounds the opposite view.

72. Note 54, *supra*.

73. Note 53, *supra*.

74. *Cf.* Nicholas II.56-62; Burke, *Quantum Meruit in Louisiana*, 50 TUL. L.R. 631 (1976).

75. 367 So. 2d 107 (La. App. 4th Cir. 1979).

not the necessary connexion between this enrichment and plaintiff's impoverishment, which was presumably the loss suffered as a result of the accident.[76]

In *Slocum v. Daigre*[77] Slocum had sold land to *C* in ignorance of a pipe-line servitude in favour of Humble Oil. *C* had begun building on the land and had borrowed money for the purpose from the Louisiana Savings Association, but on being made aware of the servitude he had been required to demolish what he had built. *C* had thereupon brought an action against Slocum for compensation, and the Savings Association had successfully intervened in the action to recover the amount of its loan. Slocum now claimed from the Association the return of this payment on the ground that the carelessness of the Association's surveyor in not discovering the pipeline disentitled the Association to claim. The court, in rejecting Slocum's argument, held that it did not satisfy either the fourth or the fifth of the prerequisites laid down in *Minyard*. It did not satisfy the fourth prerequisite (absence of cause) because, the court in effect said, the justification of the payment to the Association was to be found in the judgment of the court in the first action. This is obviously right. But the court also held that plaintiff did not satisfy the fifth prerequisite (absence of another remedy). He could have taken various steps to counter the Association's intervention in the first action or to appeal the trial court's judgment. But this really does no more than restate the decision on the fourth prerequisite. For the rules as to the time within which procedural steps in an action must be taken or within which an appeal must be lodge are intended to secure finality for judgments. The remedies which he might have invoked were directed to preventing plaintiff's impoverishment and defendant's enrichment, not to correcting it once it had occurred.

Owl Construction Co. Inc. v. Ronald Adams Constructor Inc.[78] offers a further example. Defendant had caused plaintiff to pay interest at an improper rate and to pay attorney fees not authorised by the contract between them. Defendant argued that since plaintiff could have pursued other legal avenues to prevent the money from being collected, he was now debarred by the principle of subsidiarity from claiming restitution. This argument in fact raises the question (though this was not the court's approach)[79] whether plaintiff's fault in

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76. It seems likely that the enrichment in Brenham v. South Pacific Co., 328 F. Supp. 119 (W.D. La. 1971) presents a similar problem.

77. 424 So. 2d 1074 (La. App. 3d Cir. 1982).

78. 642 F. Supp. 475 (E.D. La. 1986).

79. The case would have been better decided under articles 2301, 2302 of the Civil Code, as indeed the court itself says (and in that connexion adverts to the question of fault).

allowing the enrichment is an obstacle to recovery. This question, which has in recent years been the subject of debate in France,[80] cannot be pursued here. The court, however, was content to dismiss defendant's argument on this point by saying that it was sufficient that plaintiff "presently has no other legal remedy to recover the sums improperly paid." This proposition, which, on the view taken here, is correct insofar as it implicitly rejects the approach adopted in *Aetna Life & Casualty Co. v. Dotson*,[81] is nevertheless too wide in that it makes no allowance for an exceptional case such as *Sheets v. Yamaha Motors Corp. U.S.A.*[82]

Our conclusion under this heading is therefore that, on grounds both of principle and of long-established Louisiana jurisprudence, the test applicable should be based on what we have called the rationale given by the Supreme Court in *Minyard* for the requirement of subsidiarity. The test should be whether the granting of the *actio de in rem verso* would defeat the purpose of the rule of prescription in question. In the case of the ordinary action in tort the answer to this question should be No, but in special circumstances, such as those in *Sheets v. Yamaha Motors Corp. U.S.A.*,[83] the answer may be different.

B. Enrichment through the act of the person impoverished or through a transaction between the person impoverished and the person enriched.

The act in question will usually be the making of a contract between the person impoverished (plaintiff) and the person enriched (defendant).

1. *A contractual action is available.* Here there will be no action for unjustified enrichment, but this is because the enrichment has its cause or justification in the contract. (The contractual action will in any case usually be the more favorable.)

2. *An action was available, but is now prescribed.* This will obviously be a rare case, since the period of prescription for an ordinary contractual action is the same as for the *actio de in rem verso* and in any event, if the enrichment was conferred in pursuance of a contract between plaintiff and defendant, there will be, as in the preceding paragraph, justification or cause. But the question did arise

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80. *See* Bouet, *Enrichissement sans cause*, in JURIS CLASSEUR CIVIL, App. art. 1370-1381, at 190-213.

81. Note 60, *supra*.

82. Note 54, *supra*.

83. Note 54, *supra*.

as one of the issues before the court in *Austin v. North American Forest Products*.[84] Plaintiff had bought defective goods from *X*, who had bought them from defendant manufacturer. Plaintiff's main proceedings were against *X*, but he wished in the alternative to claim against the manufacturer. The redhibitory action was, however, prescribed, and plaintiff therefore had recourse to the *actio de in rem verso*. This claim was rejected on grounds of subsidiarity. It is not at all clear, however, that the *actio de in rem verso* could ever be available in such a case. To go no further, the report does not reveal what *X*'s enrichment was claimed to be. It must presumably have been the profit he made from supplying the goods. But this had its cause or justification in the contract between defendant and *X*. If, however, one assumes that the *actio de in rem verso* could lie in such circumstances, the decision on subsidiarity seems to be right. The *actio de in rem verso* would inevitably turn on the same question as the redhibitory action, viz. the defectiveness of the goods, since only this could provide the necessary connection between enrichment and impoverishment. The extension of the redhibitory action to a third-party manufacturer is an exceptional inroad on the principle of privity in favour of a potentially very large number of claimants. It can be said therefore that greatly to lengthen the period of the manufacturer's liability by allowing the *actio de in rem verso* would defeat the purpose of the rule of prescription.

3. *A contractual action is not available because a rule of law declares the agreement between plaintiff and defendant not to be a contract or to be unenforceable.* The contract may be void or unenforceable either wholly or to the extent of the enrichment in question. For example, an agent exceeds his authority and thereby confers a benefit on the principal; or a builder performs work for a municipality in execution of an agreement which was made in good faith but which was void for noncompliance with certain requirements imposed by statute on contracts with public authorities. The contractual action for the agreed remuneration being excluded by statute, there could certainly be said to be no other remedy. Indeed here there never was a remedy, whereas in the case in (2), above, there had at one time been a remedy. But once again the appropriate question is whether the rule as to the unauthorised acts of an agent or the rule on public contracts was intended to permit this enrichment; or, in other words, whether the granting of the *actio de in rem verso* would defeat the purpose of that rule.

There are a number of cases under this heading. In *Roberson Advertising Service Inc. v. Winfield Life Insurance Co.*[85] plaintiff, an

84. Note 54, *supra*.

85. 453 So. 2d 662 (La. App. 5th Cir. 1984).

advertising agency, had exceeded its authority. Its *actio de in rem verso* against the principal was rejected. The *actio*, said the court,

> must be rejected when the relief sought would subvert the purpose of a rule of law. The purpose of the rule of law on an agent's authority is to protect the principal from contracts which it does not wish or need and which may harm it. If the courts allowed the action in a case like this, the principal could not be protected from the acts of agents even if he took affirmative action to protect himself.

On the other hand, the decision in *Liles v. Bourgeois*[86] presents difficulties. Plaintiff, an attorney, had acted for defendant under a contingent fee agreement providing for plaintiff to receive, in return for acting in connexion with the interdiction of and succession to defendant's mother, a quarter of what defendant received from her estate. The court held the agreement to be unenforceable because of the legal prohibition on dealing in the succession of a living person, but, citing *Minyard*, allowed recovery on a claim in what it called quantum meruit.[87] Two points, however, were passed over. The question of subsidiarity was not considered and there is therefore no discussion of whether the allowing of the action would defeat the purpose of the rule against dealing in the succession of a living person. And the measure of recovery was not that of enrichment limited by impoverishment, but that of "reasonable reward." Both points arise also in a long line of public contract cases, in which plaintiff has performed a contract made with a public authority, but void for noncompliance with statutory requirements relating to advertisement, competitive bidding, etc.

The line of authority begins with two Supreme Court cases decided before *Minyard*.[88] In *Boxwell v. Department of Highways*,[89] in which the court, accepting the distinction between *mala prohibita* and *mala in se* and applying an unjust enrichment theory based on article 1965 of the Civil Code, held that, since the parties had acted in good faith, the failure to comply with the statutes was only a *malum prohibitum* and therefore that plaintiff was entitled to recover the actual cost to him of his performance of the contract, without any allowance for overheads or for profit. This decision was followed on similar facts in *Smith v. Town of Vinton*.[90]

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86. 517 So. 2d 107 (La. App. 3d Cir. 1987).
87. Note 74, *supra*.
88. *See* Nicholas II.59-60.
89. 203 La. 760, 14 So. 2d 627 (1943).
90. 216 La. 9, 43 So. 2d 18 (1949).

The Supreme Court returned to the matter in the light of *Minyard* in *Coleman v. Boissier City*.[91] The court, observing that no actual fraud was involved and that the parties had acted in good faith, held that

> since the public body had received the actual value of the materials or services furnished by the supplier in reliance on the contract, fairness required that the latter be returned the actual cost of such material and labor so furnished; for the public body should not be allowed to deny any payment at all to him because of the invalid contract, yet obtain the value of the materials or services obtained from him because of it.

Since the value to the public body of the materials and services was no doubt less than the cost of them to the supplier, the measure of recovery was in substance defendant's enrichment limited by plaintiff's impoverishment.

The majority's answer to the question whether allowing this measure of recovery would defeat the purpose of the relevant statutes was presumably implicit in the distinction between *mala prohibita* and *mala in se*. The purpose of the statutes, in the court's view, was presumably to prevent corruption in the making of public contracts. Where there was no bad faith and no actual corruption, this purpose would be sufficiently achieved by denying to plaintiff any gain. On the other hand, by implication, if the parties had been in bad faith, there would have been no recovery. Summers J., however, in his dissenting opinion, took a stricter view. The purpose of the statutes, he said, was to prevent a public body from incurring any obligations without complying with the specified requirements. The majority's view conflicted with the requirement, laid down in *Minyard* and *Edmonston v. A-Second Mortgage Co.*,[92] that the granting of the action should not be allowed to defeat the purpose of a rule of law directed to a matter at issue.[93]

The Supreme Court followed its decision in this case in *State of Louisiana through the Department of Highways v. City of Pineville*,[94] but, since both parties were public bodies, it is difficult not to agree with the dissent of Dennis J., who doubted the merits of the claim and

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91. 305 So. 2d 444 (1974); *see also* the discussion in Tate II.900-01. (Tate, J. wrote the majority opinion in the case).

92. Note 37, *supra*.

93. French law is in accord with the majority opinion: Nicholas I.609, 620; Tate II.901.

94. 403 So. 2d 49 (1981).

observed that "both parties should be equally charged with knowledge of the statutory requirements."[95]

C. Enrichment through the act of a third party (*T*) or through a transaction between T and the person enriched.

1. *Without plaintiff's consent and at plaintiff's expense* T *enriches defendant.* For example, *T*, having come into possession (innocently or wrongfully) of plaintiff's oil, makes a gift of it to defendant, or sells it to him for less than its full value, and defendant consumes it. Plaintiff may or may not have a remedy against *T*, but an *actio de in rem verso* against defendant will fail because defendant's enrichment is justified by the gift or the contract of sale.[96]

2. *A transaction between plaintiff and* T *enriches defendant.* The transaction will usually be the performance of a contract between plaintiff and *T*. For example, in pursuance of a contract with *T*, plaintiff makes improvements to a building which *T* has on lease from defendant, or supplies materials with which *T* makes the improvements; or, in pursuance of a contract with *T*, plaintiff repairs a car which *T* believed to be his, but which in fact belongs to defendant.

a. *There is a contract between* T *and defendant which obliges* T *to confer on defendant the enrichment in question or entitles defendant, as against* T, *to retain the enrichment.* For example, the lease requires *T* to improve the building or provides that defendant shall not be required to compensate *T* for any improvements made. Plaintiff cannot bring the *actio de in rem verso* (as he may wish to do if *T* is insolvent or has disappeared) because the contract between *T* and defendant provides a cause or justification for the enrichment. The question of subsidiarity does not arise.

Under this heading there falls *F.P.S. Inc. v. Continental Contractors Inc.*[97] F.P.S., an insurance agency, had sold policies to Continental Contractors. South Central Bell was not a party, but was added to the policies to cover obligations owed to them by Continental. F.P.S. had difficulties in getting payment of premiums from Continental, and one of the claims before the court was therefore by

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95. *See also* Marceaux v. Town of Lake Arthur, 392 So. 2d 783 (but the opinion is difficult to interpret because it proceeds by reference to paragraphs in plaintiff's petition, which is not included in the report) and Hagberg v. John Bailey Constructor, 435 So. 2d 580 (La. App. 3d Cir. 1983).

96. On gift as a justification or cause, see Nicholas I.633.

97. 537 So. 2d 831 (La. App. 5th Cir. 1989).

plaintiff against South Central Bell on the ground of unjust enrichment. The court applied the five requirements in *Minyard* and held that if South Central Bell was enriched, the enrichment had its cause in a contract between them and Continental. Further, F.P.S. had another remedy, against Continental.

b. *The contract between* T *and defendant neither obliges* T *to confer the enrichment nor entitles defendant, as against* T, *to retain it; or there is no contract at all between* T *and defendant.* For example, the lease does not require *T* to make improvements and entitles him to compensation for any which he does make; or *T* is the bona fide possessor of defendant's car (in the example given above) and is in no contractual relationship with defendant. There is in such cases no cause or justification for defendant's enrichment, and the question can only be one of subsidiarity. The answer to that question may depend on further distinctions.

(1) *Plaintiff has an effective remedy against* T (e.g., in the examples given above, plaintiff has a contractual action for the making of the improvements or for the repair of the car; and *T* is both solvent and present within the jurisdiction). Of course, plaintiff will usually find the contractual remedy against *T* more advantageous than an *actio de in rem verso* against defendant, but does plaintiff have the right of election? Here the answer must surely be different from that given under heading A(2) and B(1), above.[98] For there can be no reason why defendant should be put to the trouble of defending plaintiff's action when the primary source of plaintiff's claim lies in the contract which he made with *T*.[99] Here therefore the subsidiarity principle should exclude the *actio de in rem verso*.[100]

A case under this heading is *Abbeville Lumber Co. v. Richard*.[101] Plaintiff supplied materials to *X*, who used them in building on land which he held on lease from defendant. Plaintiff claimed *inter alia* against defendant on the ground of unjustified enrichment. The court rejected this claim because plaintiff had a remedy against *X*.[102]

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98. Text at notes 57-63 and 83-84, *supra.*

99. *See* further, Tate II.462-64; Nicholas I.638.

100. This can be seen as an application of the proposition in *Minyard* that subsidiarity 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; *see* Nicholas I.638.

101. 350 So. 2d 1293 (La. App. 1977).

102. The facts are not clear on this point. Plaintiff had succeeded against *X* below and *X* had not appealed. The court also held that the defendant's enrichment had its

Another case in point is *V & S Planting Co. v. Red River Waterway Commission.*[103] Plaintiff was a sub-lessee of land belonging to defendant from which he had been lawfully evicted by defendant. He brought an *actio de in rem verso* on the ground that defendant had been enriched by plaintiff's improvement of the land before he was evicted. The remedy was denied because plaintiff had an action against his sub-lessor on the warranty of peaceful possession.

(2) *Plaintiff has a remedy against* T, *but it is ineffective because of* T*'s insolvency or disappearance.* Here the argument should go the other way. Defendant has been unjustifiably enriched at plaintiff's expense, there is no other way of correcting the imbalance, and to allow the remedy will not defeat the purpose of any rule of law directed to the matter at issue.[104] French law is clear in this sense,[105] and there is a Louisiana decision to the same effect.[106]

(3) *Plaintiff has a remedy against* T, *but it is ineffective because prescribed.* Here the criterion to be applied will be the same as under headings A(3) and B(2),[107] viz. whether the granting of the *actio de in rem verso* would defeat the purpose of the rule of prescription. There seems to be only one case directly in point. In *Acme Refrigeration of Baton Rouge Inc. v. Caljoan Inc.*,[108] plaintiff had, in consequence of an erroneous assessment, paid property tax which was in fact due from defendant. By the time plaintiff became aware of the error, its remedy against the taxing authority was prescribed. It therefore resorted to the *actio de in rem verso* against defendant. The court held that the principle of subsidiarity was no obstacle to the claim. In so doing, it did not, however, apply the criterion set out above, but simply said that the issue was "whether these plaintiffs had an available remedy at law against these particular defendants." The natural meaning of this is that the existence of a remedy against a third party could never be an obstacle to the *actio de in*

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justification in the lease, but since it appears that *X* was under no obligation under the terms of the lease to undertake any building, this conclusion is difficult to justify.

103. 472 So. 2d 331 (1985).

104. On the objection that plaintiff should not be allowed to become in a sense a preferred creditor of *T*, see Nicholas I.640.

105. Nicholas I.634.

106. Carter v. Flanagan, 455 So. 2d 689 (La. App. 2d Cir. 1984). The decision went the other way in Equilease Corp. Inc. v. Smith International (note 33, *supra*) on a number of grounds, including a consideration of the plaintiff's fault (as to which see text at notes 79-80, *supra*).

107. *See* text at notes 62-83 and 83-85, *supra.*

108. 346 So. 2d 743 (La. App. 1st Cir. 1977).

rem verso, even if the remedy against the third party were not prescribed and the third party were solvent. The court in *V & S Planting Co. v. Red River Waterway Commission*,[109] went out of its way to say that, though it agreed with the actual decision in the *Acme* case, it dissented from the test laid down there, unless it bore some meaning other than the natural one. It is probably best to accept the decision in *Acme*, but to treat the reason given as unintentionally too sweeping.[110]

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109. Note 103, *supra*. The point was not of course directly at issue in the case.

110. This derives support from the fact that the court that decided *Acme* also on the same day decided *Aetna Life & Casualty Co. v. Dotson* (note 60 and text at note 68, *supra*), in which it did apply the criterion of whether the granting of the remedy would defeat the purpose of the rule of prescription (though we have suggested above that it should have arrived at the opposite conclusion). The decision in *Aetna* can be reconciled with the test applied in *Acme* only if it is assumed that a prescribed action is nevertheless "available"; *cf.* note 55, *supra*.