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Reception in Real Time: Reinhard Zimmermann and the Influence of the German Law of Unjustified Enrichment in Scotland and South Africa

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I. BACKGROUND

In 1897 Oliver Wendell Holmes said the following in his famous essay, “The Path of the Law”:¹ “Sir Frederick Pollock’s recent little book² is touched by the felicity which marks all his work, and is wholly free from the perverting influence of Roman models.”³ Warming to the subject, he continues thus: “The advice of the elders to young men is very apt to be as unreal as a list of the hundred best books. At least in my day I had my share of such counsels, and high among the unrealities I place the recommendation to study Roman law.” The gravamen of his complaint was that to gain a knowledge of Roman law that would be useful involves so much effort as to render the game not worth the candle. Just about a century later, however, a book would be published that would make the advice of the elders (certainly as far as the law of obligations is concerned) eminently more possible—not only in common-law countries, but everywhere, including the mixed jurisdictions of Scotland and South Africa. In 1981 the University of Cape Town appointed a young scholar from Germany to the W. P. Schreiner Chair of Roman and Comparative Law. A defining act during his time in Cape Town was the writing of the greater part of *The Law of Obligations: Roman Origins of the Civilian Tradition*.⁴ This book would turn out to be an example of the rare phenomenon of an academic law book having a profound impact across a great many jurisdictions and legal cultures. On the face of it, a book on Roman law, published in the last decade of the twentieth century, is probably the least likely candidate for such a role—and yet, there it is: a book that has spread its influence far and wide across the globe. In this book, important intellectual contours of the author’s life-work are already apparent: First, history matters—and it is vital to study it with the present firmly in mind. Secondly, because that is true with regard to every legal system, comparative law without historical perspective paints an imperfect picture. And, thirdly, historically informed comparative law matters because it reveals that the law of any country does not develop in isolation and thus cannot be understood—or improved—from an isolationist position.

1. 10 HARV. L. REV. 457 (1897) at 464.

2. The reference is of course to A FIRST BOOK OF JURISPRUDENCE FOR STUDENTS OF THE COMMON LAW (1896).

3. Although, in the Preface (at vii) Sir Frederick acknowledges that “[a]mong the authors of past generations I owe most, so far as I can judge, to Savigny; among recent and living ones to Maine, Ihering, and my friend Mr. Justice Holmes of Massachusetts.”

4. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION (1990).

The book made the Roman law of obligations and its second life since the Middle Ages come alive. The standard Roman-law textbooks had always set out to describe classical and/or Justinian Roman law, and therefore to most lawyers the Roman foundations were only perceptible as shimmerings in the modern law. And, since the scholarship tracing the subsequent development of substantive Roman law was typically focused on specific issues, even specialists had only a partial view of the cathedral. *The Law of Obligations* changed that with what was simultaneously an original (and accessible) rendering of the intricacies of this vast area of substantive Roman law as well as a synthesis of the specialist scholarship on its many facets. It describes Roman law and its fate through its various incarnations in different countries during its long history, and, depending on the issue at hand, it draws into the narrative the learning of the Glossators and the Commentators in the Middle Ages, of the Humanists during the Renaissance, of the *Usus Modernus Pandectarum* in the seventeenth and eighteenth centuries, and of the Historical School in the nineteenth century) as well the manifestations of Roman law in the modern law of Germany, South Africa, and England. This book was an early step in an extraordinarily productive career, in which Reinhard Zimmermann would use the historical-comparative method to surface the continuing underlying unity of civilian legal systems (as well as, in many instances, also between the civil law and the common law) to bring a better understanding of the status quo and how it could be changed, and indeed actively to encourage and facilitate change on many different fronts. Importantly, as this book and his subsequent writings show, the Roman foundations of a legal system are sometimes inadequate to deal with modern situations and radical intervention is appropriate in order to create law that is suitable for the present. With this contribution, I want to pay tribute to him by tracing his role in one instance where the Roman foundations proved inadequate and he opened a gateway to improvement, namely the development of the modern law of unjustified enrichment in South Africa and Scotland.

II. WHERE IT ALL BEGAN: “A ROAD THROUGH THE ENRICHMENT FOREST?”

In chapter six of *The Law of Obligations* (devoted to the making of the category of unjustified enrichment in the law of obligations in the civil law) we read the following assessment of the South African law, directly after a description of how in the seventeenth century the courts in the

Netherlands had (under the influence of Hugo Grotius) developed a general enrichment action:

Strangely enough, the modern South African courts have not followed suit. . . . As a result, a principle ‘vibrant with life and struggling for growth [has been] locked . . . in tight compartments, a prisoner of the past.’⁵ An odd assortment of individual enrichment actions (to wit the *condictiones indebiti*, *causa data causa non secuta*, *ob turpem vel iniustam causam* and *sine causa*, the *actiones negotiorum gestorum*, the action against persons with limited capacity to act and the one arising from *accessio* or processing—though not, apparently, the action *de in rem verso*) is still at hand to clank the ancient chains. Only here and there have some of the remedies been modernized, rather coyly, by means of what is usually referred to as ‘ad hoc extensions.’ The law relating to unjustified enrichment has, as a result, become one of the most awkward and perplexing dungeons within the edifice of South African private law.

The position, at least as far as the positive law is concerned, has not really changed in the almost forty years since he made this statement, although there are indications that the Supreme Court of Appeal is moving towards a more generalized view of enrichment liability.⁶ In the meantime, the individual actions continue to hold sway and there is a danger of increased uncertainty as evidenced by instances of the Supreme Court of Appeal applying individual *condictiones* without examining their elements and only formulating the principles of unjustified enrichment at the highest level of abstraction, that is to say without articulating why in the particular instance enrichment liability is either appropriate or not.⁷ In other words, as a matter of positive law, there is no discernible rational structure that can be gleaned from the case law underpinning unjustified enrichment claims.

Turning to Scotland, we see that the law of unjustified enrichment in that jurisdiction is a better state than in South Africa, even though Scotland arguably was in a more uncertain and complex position at the time when Zimmermann made his assessment of South African law. Stair, the principal institutional writer of Scots law, inspired by natural law and influenced by Grotius, had divided obligations into conventional and obediencial obligations, the former being obligations arising from contract

5. He was quoting Weeramantry J in *Da Costa v. Bank of Ceylon*, (1970) 72 New Law Reports (Ceylon) 457 at 544.

6. *McCarthy Retail Ltd v. Shortdistance Carriers C.C.*, 2001 (3) S.A. 482 (S.C.A.) at 487-89; *First National Bank of Southern Africa Ltd v. Perry*, 2001 (3) S.A. 960 (S.C.A.) at 969-70.

7. See, for instance, *Municipal Employees Pension Fund v. Mongwaketse*, [2020] ZASCA 181.

and the latter from an expansive set of obligations (some of which were moral and others legal obligations, with some of the latter kind falling under what is recognized as unjustified enrichment in modern Scots law). The obediational obligations were subdivided according to “whether the content of the obligation was to give restitution, recompense or reparation.”⁸ Reparation was concerned with delictual liability and is thus not relevant to the development of enrichment law, while the other two were. Over time the later institutional writers split restitution into two categories: restitution, which was the obligation to restore property (*certa res*), and repetition, which was the obligation to repay money (*certa pecunia*) and they were seen to relate to the subject matter of the Roman *condictiones*, which over time were woven into the fabric of these two kinds of obligations.⁹ Together with recompense (which pertained to enrichment that arose outside of the ambit of the *condictiones*, e.g. for services rendered or expenses incurred) they formed the “three r’s” which were for a long time the primary organizing feature of Scots enrichment law, that is to say according to the content of the obligation: restitution, repetition, and recompense.¹⁰ This classification was the object of numerous theories, but consensus was never reached as to what underpinned it, and, instead of enlightening, the classification tended to cause confusion, since the three r’s did not “illuminate the reasons why the pursuer should be entitled to the remedy”¹¹ and the lack of clarity as to how the Roman *condictiones* related to the natural-law classification added to the muddle.¹²

8. ROBIN EVANS-JONES, UNJUSTIFIED ENRICHMENT—ENRICHMENT BY DELIBERATE CONFERRAL: CONDUCTIO, Vol. I (2003) para 1.10.

9. Niall R. Whitty, *Unjustified Enrichment*, in THE LAWS OF SCOTLAND: STAIR MEMORIAL ENCYCLOPAEDIA, Reissue (2021) para 84.

10. The details of the story of this classification of the Scots law of unjustified enrichment can be found in, inter alia, the following sources: Phillip Hellwege, *Rationalising the Scottish Law of Unjustified Enrichment*, 11 Stellenbosch L. REV. 50 (2000); Evans-Jones, *supra* note 8, at paras 1.04-1.28; *Id.*, UNJUSTIFIED ENRICHMENT—ENRICHMENT ACQUIRED IN ANY OTHER MANNER, Vol. II (2013) paras 1-36-1.43; *Id.*, *Unjustified Enrichment*, in Kenneth Reid and Reinhard Zimmermann (eds.), A HISTORY OF PRIVATE LAW IN SCOTLAND—II. OBLIGATIONS, Vol. II (2000) 369 at 372-96; Hector MacQueen and David Sellar, *Unjust Enrichment in Scots Law*, in Eltjo J. H. Schrage (ed.), UNJUST ENRICHMENT: THE COMPARATIVE LEGAL HISTORY OF RESTITUTION (1999) 289.

11. Jacques Du Plessis, *Towards a Rational Structure of Liability for Unjustified Enrichment: Thoughts from Two Mixed Jurisdictions*, 122 S. AFRICAN L.J. 142 (2005) at 152.

12. Hellwege, *supra* note 10, at 51.

Then came the enrichment revolution: in three landmark cases¹³ the Scots law of enrichment was transformed. Morgan Guaranty¹⁴ affirmed that the Scots law of unjustified enrichment rested on a general principle and Shilliday¹⁵ rid Scots law of the confusion of the three “r’s” by declaring them to be mere remedies that the courts will employ when an obligation in unjustified enrichment is found to exist—and indicating that the *condictiones* are descriptions of fact-situations in which enrichment would typically be unjustified.¹⁶ But, as Hellwege points out, although Shilliday abolished the confusing and unhelpful taxonomy of the three “r’s,” it did not create an alternative taxonomy.¹⁷ So, although the Scottish courts had taken the step that their South African counterparts are still hesitating to take, namely to recognize a generalized approach to enrichment liability, they have left the law of unjustified enrichment without a clear roadmap—and in this respect Scotland is in the same position as South Africa.

The obvious question engendered by the state of the Scots and South African law of unjustified enrichment is of course: is there a way out of this uncharted territory? And Zimmermann said yes,¹⁸ there is “a road through the enrichment forest,” first in a journal article under that title,¹⁹ then in *The Law of Obligations*,²⁰ and again at a conference held in Edinburgh, subsequently published in the *Oxford Journal of Legal Studies*.²¹ His proposal was that the map drawn by Walter Wilburg²² and Ernst von Caemmerer²³ for German and Austrian law could also help other legal systems find the road. Before I tell the story of the impact of this proposal, I will first outline briefly what this map is.

13. Morgan Guaranty Trust Co of New York v. Lothian Regional Council, 1995 S.C. 151; Shilliday v. Smith, 1998 S.C. 725; and Dollar Land (Cumbernauld) Ltd v. CIN Properties, 1998 S.C. (H.L.) 90.

14. See *supra* note 13.

15. See *supra* note 13.

16. See Hellwege, *supra* note 10; but see the critical view of Whitty, *supra* note 9, at para 94.

17. Hellwege, *supra* note 10, at 60-61.

18. Zimmermann, *supra* note 4, at 889-91.

19. Reinhard Zimmermann, *A Road through the Enrichment-Forest—Experiences with a General Enrichment Action*, 18 COMP. & INT’L L.J. S. AFR. 1 (1985).

20. Zimmermann, *supra* note 4, at 889-91.

21. Reinhard Zimmermann, *Unjustified Enrichment: The Modern Civilian Approach*, 15 OXFORD J. LEGAL STUD. 403 (1995).

22. DIE LEHRE VON DER UNGERECHTFERTIGTEN BEREICHERUNG NACH ÖSTERREICHISCHEM UND DEUTSCHEM RECHT (1934).

23. *Grundprobleme des Bereicherungsrechts*, in GESAMMELTE SCHRIFTEN, Vol. I (1968) 374.

III. THE WILBURG/VON CAEMMERER TAXONOMY AND WHAT IT DID FOR GERMAN LAW

Unlike South Africa, Germany, largely under the influence of Savigny, did develop a general enrichment action, but the road to it was long and winding and, in the words of Zimmermann, this general action (as also the whole title on unjustified enrichment) was not “a legislative masterpiece”²⁴ and engendered much uncertainty and practical difficulties. This was the result of the general action in § 812 I BGB being spatchcocked (only in the final draft of the German Civil Code) onto the Roman *condictiones* as a subsidiary general clause, while the specific rules contained in the rest of the title on unjustified enrichment had been developed earlier with basically the *condictio indebiti* in mind, and were thus not adapted to inform the far wider reach of enrichment liability established by the general enrichment clause.²⁵

There followed a long, but ultimately fruitless, search to find a unitary basis for the whole of the law of unjustified enrichment.²⁶ The essential reason for the inability to formulate such a basis was, as Nils Jansen has renewedly demonstrated, the fact that the kind of enrichment liability that grew out of the Roman *condictiones* rested on completely different ideas than those that underpinned other forms of enrichment liability.²⁷ Savigny had contemplated only the *condictiones* in constructing his notion of generalized enrichment liability, and this carried through to the formulation of enrichment liability in the *Bürgerliches Gesetzbuch* of 1900. For Savigny the *condictio* was typically aimed at the return of what had formerly been the property of the plaintiff, but had voluntarily but erroneously been transferred to the defendant—and thus constituted a kind of substitute vindicatory action.²⁸ But this was not a construct that could be squared with the other recognized instances of unjustified enrichment: when someone enriched you by improving or preserving your property or where someone enriched himself by interfering in your rights, the “substitution for vindication” idea could not provide a convincing basis.

24. Zimmermann, *supra* note 4, at 887.

25. *Id.*, at 888.

26. *Id.*

27. Nils Jansen, *Gesetzliche Schuldverhältnisse—Eine historische Strukturanalyse*, 216 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 112 (2016) at 132ff; *id.*, *Nils Jansen, Farewell to Unjustified Enrichment*, 20 EDINBURGH L. REV. 123 (2016).

28. Jansen, *supra* note 27 *Gesetzliche Schuldverhältnisse*, at 140, with reference to Friedrich Carl von Savigny, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS, Vol. 5 (1841) 513ff. and 521ff.

As Zimmermann spells out, a general enrichment action on its own cannot bring order to the law of enrichment: although recognizing a generalized approach to enrichment liability is perhaps an inevitable development for any legal system, it should not be the endpoint—clarity and legal certainty demand a rational organization of the subject-matter.²⁹ In fact, without such a rational organization, introducing a general enrichment action may be worse than the unwieldy collection of ancient forms of action.³⁰ The difficulties that could be brought about by “over-generalization” has been a (legitimate) ongoing source of worry in all countries that have struggled with the question of how to structure the law of enrichment.³¹ And this is where the Wilburg/von Caemmerer taxonomy comes in, which I describe in brief outline below.

A consequence of the earlier assumption that a unitary basis for the enrichment action in § 812 I BGB could be found was a general acceptance that the elements of enrichment liability (enrichment of the defendant, at the expense of the plaintiff, which is unjustified) should be interpreted in the same way in all instances of unjustified enrichment. Wilburg, however, argued that the distinction made in § 812 I BGB between (a) enrichment based on a transfer (*Leistung*) and (b) “enrichment in other ways” (*in sonstiger Weise*) is appropriate, not only from an historical perspective, but also as a matter of sound dogmatics.³²

In the case of enrichment resulting from a transfer, the concepts of *Leistung*³³ and *causa* play a key role in identifying whether the enrichment is unjustified. In terms of the courts’ interpretation of the concept, someone who receives something as a result of a performance without legal ground is under a duty to make restitution; and the performance will be without legal ground (*sine causa*)—bringing the *Leistungskondiktion* into play—“when a transfer of wealth is made by the transferor to the recipient with

29. Zimmermann, *supra* note 4, at 889-91; *id.*, *supra* note 21, at 405 (at footnote 9), where he remarks as follows: “The differentiation between ‘Leistungs-’ and ‘Nichtleistungskondiktion’ is prefigured in § 812 I 1 BGB, but its significance was only recognized some thirty years after the code had been enacted by Walter Wilburg.” Reinhard Zimmermann & Jacques du Plessis, *Basic Features of the German Law of Unjustified Enrichment*, 2 RESTITUTION L.R. 14 (1994) at 24ff. See also Helen Scott, *Comparative Taxonomy: An Introduction*, in Elise Bant, Kit Barker & Simone Degeling (eds.), RESEARCH HANDBOOK ON UNJUST ENRICHMENT AND RESTITUTION (2020) 144 at 154.

30. See generally Zimmermann, *supra* note 19, at 18.

31. Zimmermann, *supra* note 19, at 18-20; Helen Scott, *Change and Continuity in Unjust Enrichment*, ACTA JURIDICA 469 (2019) at 471ff.

32. Zimmermann, *supra* note 19, at 11.

33. Defined as “a purposive transfer of wealth”: Martin Schwab, *Ungerechtfertigte Bereicherung [Herausgabeanpruch]*, in MÜNCHENER KOMMENTAR ZUM BGB, § 812 marginal note 47 (8th ed., 2020).

a specific legal relationship in mind . . . [and the] relationship does not exist, or is invalid or cannot form a basis for the specific transfer.”³⁴ A simple example is this: the purpose of a payment is usually to discharge a debt; if such a debt in fact exists, the purpose of the payment is fulfilled by that payment and that fact creates for the recipient the legal ground to retain it; if, on the other hand, the debt does not exist, the purpose cannot be fulfilled, with the result that the recipient has no legal ground for the retention of what he or she has received and it can therefore be reclaimed. Helen Scott has argued persuasively that the normative force of this approach is that “the failure of the claimant’s purpose implicates both claimant and defendant” and that “[t]he reason for restitution—the failure of the claimant’s purpose in making the performance—is bilateral in the sense that . . . corrective justice requires.”³⁵ This development meant that both the requirements of “without legal ground” and “at the expense of” are wrapped up in this test and are automatically satisfied when it is shown that a purposive transfer has failed, making it unnecessary to engage separately with these elements.

In the case of enrichment in other ways, i.e. where the enrichment did not result from a transfer, the concept of *sine causa* is not useful and in these instances one has rather to rely on demonstrating positive reasons why the recipient should make restitution.³⁶ Von Caemmerer³⁷ (some twenty years after Wilburg made his original distinction between enrichment by transfer and enrichment in other ways) divided enrichment in other ways into further subcategories, namely (i) the *Eingriffskondiktion* (the claim based on infringement by the defendant of a right of the plaintiff),³⁸ (ii) the *Verwendungskondiktion* (the claim based on the plaintiff having made unauthorized expenditure on the property of another, or having preserved the property)³⁹ and (iii) the *Rückgriffskondiktion* (the claim based on the plaintiff having discharged the debt of the defendant).

The *Eingriffskondiktion* applies when someone has been enriched by interfering in the rights of another, for example by using or consuming another person’s property without his or her permission. This is enrichment that comes about when an asset has been “taken” from the

34. Sonja Meier, *Enrichment ‘at the expense of’ another*, ACTA JURIDICA 453 (2019) at 459-60.

35. Scott, *supra* note 31, at 484.

36. Wilburg, *supra* note 8, at 18.

37. Whitty, *supra* note 9.

38. Schwab, *supra* note 33, at marginal note 278.

39. Schwab, *supra* note 33, at marginal note 355.

plaintiff (by the defendant, but necessarily by the defendant personally)—and here the test that has found favor (also ultimately stemming from Wilburg) is the “theory of attribution,” i.e. whether the advantage that the defendant gained is one that the legal order attributes solely to plaintiff (*Die Lehre von der Zuweisungsgehalt*)—and the circumstances under which the legal order will do so have been given practical embodiment in the case law and the literature. The basis for this claim is totally different from that of the *Leistungskondition*: “The mere fact that the defendant holds something that he is not, but someone else is, justified to hold infringes the precepts of *iustitia commutativa*.”⁴⁰ Where the defendant has therefore arrogated to him- or herself the advantages of a right that the law attributes solely to the plaintiff, the defendant will be considered to be unjustifiably enriched at the expense of the plaintiff.⁴¹

The *Verwendungskondition* is available where the plaintiff has made outlays on the property of the defendant without having the fulfilment of a specific legal relationship in mind and those outlays improve or preserve the property in question. An example is where someone improves the property of another while under the impression that it is his own. (This claim plays only a minor role in German law, due to the fact that where improvements are made by someone who is in possession of the property a separate, detailed regime contained in §§ 994ff. BGB—the so-called “owner-possessor model”—obtains.)⁴² In this context the questions about when such enrichment will be unjustified and when it will be at the expense of the defendant are important as limiting devices to prevent improvements being foisted on unwilling recipients and to ensure that incidental benefits (e.g. someone’s property fortuitously becoming more valuable because I happen to have improved my property)—and various tests have been developed to determine when this will be the case.⁴³ The *Rückgriffskondition* applies where the defendant is enriched as the expense of the plaintiff by being freed of an obligation in circumstances where there is no purposive transfer intended to perform an obligation

40. Zimmermann, *supra* note 21, at 404.

41. Schwab, *supra* note 33, at marginal note 287.

42. This drafting decision led to unfortunate contradictions in German law, on which see generally Reinhard Zimmermann & Jacques du Plessis, *Basic Features of the German Law of Unjustified Enrichment*, 2 RESTITUTION L.R. 14 (1994) at 30; and in more detail Dirk Verse, VERWENDUNGEN IM EIGENTÜMER-BESITZER-VERHÄLTNIS (1999) 43-63, 157-67. These contradictions are not relevant here though, since only the general principles distinguishing this kind of enrichment from other kinds are important for present purposes.

43. See generally Schwab, *supra* note 33, at marginal note 355-64.

owed to the defendant.⁴⁴ Together these two claims are examples of enrichment “imposed” on the defendant by the plaintiff.

The Wilburg/von Caemmerer typology teaches us that enrichment typically occurs in identifiably and fundamentally different ways (by transfer, by interference and by imposition) and that to define these different ways accurately in a legal system is key to formulating the basic elements of unjustified enrichment correctly, because the reasons for allowing restitution differ depending on how the enrichment came about, which in turn means that the policy factors relevant to balancing the interests of plaintiff and defendant differ and, as a consequence, the constituent elements of enrichment are differently defined and play a different role in each instance.

IV. THE ROLE OF THE WILBURG/VON CAEMMERER TAXONOMY IN THE LAW OF UNJUSTIFIED ENRICHMENT IN SOUTH AFRICA AND SCOTLAND

A. *The Genesis of Serious Scholarly Cooperation Between Scotland and South Africa*

The taxonomical seeds that Reinhard Zimmermann had sown fell mostly on good soil—all the more because he was also preparing the ground. To understand the German-law influence on South African and Scots law, it is important to know something of the background of the blossoming of scholarly exchanges between Scotland and South Africa after the fall of Apartheid.

Kenneth Reid has pointed out that Professor Sir Thomas (T.B.) Smith was perhaps the first lawyer in a mixed legal system to go beyond paying lip-service to the natural affinity between such systems by actually reading the leading texts of other mixed systems and spending time in Louisiana and South Africa.⁴⁵ He also arranged for South Africans to take up positions in Scotland (Robert Leslie and David Carey Miller) as well as visits by South African scholars to Edinburgh—Ben Beinart and Tom Price of the University of Cape Town, J. C. de Wet of the University of Stellenbosch, and J. C. Scholtens of the University of the Witwatersrand—but his vision of intensive cooperation between the two jurisdictions came

44. *Id.*, at marginal note 389.

45. Kenneth Reid, *While One Hundred Remain*, in Elspeth Reid and David L Carey Miller (eds.), *A MIXED LEGAL SYSTEM IN TRANSITION: T B SMITH AND THE PROGRESS OF SCOTS LAW* (2005) 1 at 10. *See also* David Carey Miller, *Sibling Mixed Systems: Reviewing South African/Scottish Comparative Law*, 20 *EDINBURGH L. REV.* 257 (2016).

to naught because the policies and actions of the Nationalist government in South Africa eventually made all formal contact impossible.⁴⁶ However, after the fall of Apartheid, a new and extremely productive era of collaboration was inaugurated—and Reinhard Zimmermann played a leading role in this.

When *The Law of Obligations* was written, Zimmermann had not yet “discovered” Scots law, but that did not prevent Scots lawyers from immediately realizing the value of the book for Scots law.⁴⁷ The Scottish scholars were therefore very much aware of Reinhard Zimmermann, and he began making active contact with colleagues in Scotland from the early 1990s. This contact and his eight-year sojourn in South Africa led him to develop a special interest in these two systems⁴⁸—and he, having actually read the texts and cases of these systems like Smith, began an active program to encourage contact and cooperation. This was well-received in Scotland, where Kenneth Reid and George Gretton had wasted no time at the beginning of the democratic era in South Africa to make contact with their South African counterparts. The resulting connections between South African and Scotland would be of benefit to many fields of private law—but it started with the law of unjustified enrichment in the seminal year of 1994.⁴⁹

In that year, I was on a most agreeable sabbatical in Regensburg at the Zimmermann *Lehrstuhl* with the late Marius de Waal: I was working on unjustified enrichment and he on trusts, and we used to joke that we were living our best life, since we could devote all our attention to our subjects and our only obligation was to have lunch with Reinhard. In this year our host organized a symposium on unjustified enrichment, to which he invited Niall Whitty of the Scottish Law Commission. I was delighted to meet him in person, since we had been corresponding after Laurens Winkel of the Erasmus University in Rotterdam had put us in touch with

46. Carey Miller, *supra* note 45, at 260-64; Reinhard Zimmermann, “*Double Cross*”: *Comparing Scots and South African Law*, in Reinhard Zimmermann, Daniel Visser & Kenneth Reid (eds.), *MIXED LEGAL SYSTEMS IN HISTORICAL PERSPECTIVE: PROPERTY AND OBLIGATIONS IN SCOTLAND AND SOUTH AFRICA* (2004) 1 at 22-3.

47. See Hector MacQueen, *Reinhard Zimmermann and Scots Law*, in Antoni Vaquer (ed.), *EUROPEAN PRIVATE LAW BEYOND THE COMMON FRAME OF REFERENCE: ESSAYS IN HONOUR OF REINHARD ZIMMERMANN* (2008) 33 at 34; and Niall Whitty remembers saying at a conference in Aberdeen in the 1990s that it is one of the best books on the history of Scots law because it is a history of the civilian tradition, which is part of Scots law.

48. Zimmermann, *supra* note 46, at 4.

49. The story of 1994 and the start of Scottish-South African cooperation is told by Zimmermann, *supra* note 46, at 23; and see also Daniel Visser, *THE UNIVERSITY OF CAPE TOWN LAW FACULTY: A HISTORY 1859-2004* (2004) 131-32.

one another. Whitty's visit to Regensburg was the start of a conversation about, and collaboration on, enrichment law that is still continuing today. In the same year Zimmermann arranged a visit for Marius de Waal and myself to give guest lectures in Edinburgh and Aberdeen. From the point of view of collaboration on the law of unjustified enrichment, this visit was particularly fruitful for me, since it allowed me to meet, or to renew my acquaintance, with colleagues interested in unjustified enrichment: John Blackie, Eric Clive, Robin Evans-Jones, Martin Hogg, Hector MacQueen, Kenneth Reid, David Sellar, Andrew Steven, and Niall Whitty.⁵⁰ Then, in October 1994, Whitty invited Zimmermann and myself to take part in a conference on unjustified enrichment held at the University of Edinburgh, during which there were some memorable moments, about which more below.

The encounters of 1994 between Scots and South African lawyers bore immediate fruit and academic exchanges multiplied. These exchanges happened in various fields of law, but I will tell only of those that are relevant to the development of the law of unjustified enrichment. In 1995 I invited Whitty to Cape Town as a guest lecturer and arranged for him to visit a number of South African universities. In the same year I was invited by David Carey Miller to a conference in Aberdeen to celebrate the quincentenary of Aberdeen University. In 1996 I hosted a conference in Cape Town on the borderline between the different areas of obligations and that gave me the opportunity to invite Blackie, MacQueen, and Reid to Cape Town. I had been asked by Zimmermann to co-edit a volume of essays on South Africa as a mixed legal system, which was published under the title *Southern Cross: Civil Law and Common Law in South Africa*,⁵¹ and when this work was published (also in 1996) it provided the opportunity to invite MacQueen once again—and I had another invitation to Edinburgh at year's-end. The momentum was ratcheted up a notch when Zimmermann won the prestigious Leibniz Prize and decided that he would devote a considerable portion of its generous purse to the cooperation between Scotland and South Africa. First up, he and Reid planned to do a companion volume to *Southern Cross* that examined Scotland as a mixed jurisdiction. They decided to invite seven South Africans (Marius de Waal, Jacques du Plessis, Duard Kleyn, Gerhard Lubbe, Alistair Smith, Philip Sutherland, Cornie van der Merwe, and me)

50. See Daniel Visser, *UNJUSTIFIED ENRICHMENT* (2008) vi.

51. Reinhard Zimmermann & Daniel Visser (eds.), *SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA* (1996).

to contribute to the book, which was dubbed “Northern Cross”⁵²—and the production of the book included a gathering of all the authors in Regensburg on Burns Night in 1998 (which featured haggis smuggled in from Scotland, it can now be revealed). This was an ideal opportunity for further strengthening the informal bonds that contribute so much to successful cooperation. Already at that meeting Zimmermann, Reid, and I began thinking about a third volume to complement *Southern Cross* and *Northern Cross*, in which the current law of the two jurisdictions would be compared—and this idea was realized as a book featuring a paired South African and Scots author in each chapter (inevitably christened “Double Cross”⁵³ by David Johnston, then Regius Professor of Civil Law at Cambridge). In the course of the production of the book the co-authors were able, due to Zimmermann’s generous use of his Leibnitz prize money, to meet in both Edinburgh and Cape Town. In 2001 I created a Master’s course at UCT in which the authors taking part in “Double Cross” could co-teach, to assist each of them in the understanding of the other’s legal system and to allow them to develop the ideas for their chapter in close proximity to each other. Du Plessis did the same at Stellenbosch University. In 1992 Du Plessis had been a research assistant of Zimmermann, and in 1993 a tutor in jurisprudence at Aberdeen, where he went on to do a Ph.D. under Evans-Jones in 1998, after completing his professional qualification and joining the University of Stellenbosch, where he is currently Distinguished Professor of Private Law. Another key player of the younger generation is Helen Scott, who is a graduate of the University of Cape Town and Oxford and held professorships at both institutions (and is since October 2022 Regius Professor of Civil Law at Cambridge). Both of them are playing a leading role in the development of the South African law of unjustified enrichment.

In the meantime there were other developments that also had a bearing on the development of the collaborative Scottish/South African research relationship in private law. In 2000 the Law Faculty invited Evans-Jones to teach Roman Law as a visiting professor, and he was so successful in this that at the time of writing this contribution, twenty-three years later, he is still doing service in that capacity. His presence was the opportunity for many discussions between us about the law of unjustified enrichment, and his contributions on South African law and Scots law have had a central role in the conversation between the two jurisdictions.

52. Kenneth Reid & Reinhard Zimmermann (eds.), *A HISTORY OF PRIVATE LAW IN SCOTLAND*, VOL. I: INTRODUCTION AND PROPERTY; VOL. II: OBLIGATIONS (2004).

53. Zimmermann, Visser & Reid, *supra* note 46.

He was intimately involved in all the collaborations described above that took place under the aegis of Zimmermann, and he also had other connections to the German legal world by having spent time in both Freiburg and Munich. In the same way, the guiding hand of the elder statesman of Scots enrichment law, Niall Whitty (Honorary Professor at Edinburgh University and former Law Commissioner) cannot be overestimated. The collaboration also began to have an effect in the courts and the citation of South African authors in Scots courts and of Scottish authors in South African courts happened quite regularly.

The point of narrating the details of this cooperation is to show, first, that a critical mass of scholars from different jurisdictions interacting on an intensive and regular basis is bound to provide the material for meaningful developments in each of these jurisdictions; and, second, that consciously steering the process multiplies the chances of successful cooperation and meaningful comparison. The fact that a critical mass of scholars from South Africa and Scotland was achieved and the fact that they could meet so often, was, it will be clear by now, in large measure attributable to Zimmermann's interventions—and that set the scene for the reception of the Wilburg/von Caemmerer taxonomy in both countries.

B. *The Reception of the Wilburg/von Caemmerer Taxonomy in Scotland and South Africa*

1. Scotland

Whitty was, as far as I can establish, the first scholar in either Scotland and South Africa after Zimmermann's 1985 contribution to take active steps to promote the Wilburg/von Caemmerer taxonomy as a blueprint for systematizing the law of enrichment beyond the jurisdictions for which it had first been designed. Whitty had read Zimmermann's article and he likes to relate that he could immediately see its potential to make sense of Scots law: "It fitted like a glove" he always says.⁵⁴ It is

54. Recently he remembered his first encounter with the orthodox German typology: "At that time [that is in the early 1990s] one of my tasks at the Scottish Law Commission was to research the rule preventing recovery for error of law with a view to its abolition. I found our law difficult to understand until I discovered a seminal article of 1985 by Reinhard Zimmermann suggesting the adoption in South African enrichment law of the Wilburg-von Caemmerer typology. (Footnote omitted.) That hit the spot. I still remember the strong feeling of discovery and relief at finding the way forward for the Scots law."—Niall Whitty, *Unjustified Enrichment in Scots Law: Time for Consolidation, not Reappraisal?* Edinburgh Private Law Blog available at https://blogs.ed.ac.uk/private-law/2022/05/05/unjustified-enrichment-in-scots-law-time-for-consolidation-not-reappraisal/#_ftn22

therefore no surprise to read the following in a discussion paper of the Scottish Law Commission in 1993, in which we see Whitty's hand:

Among the civilian legal systems it seems generally accepted that German law has gone the furthest towards systematising the law of unjustified enrichment. We note that Professor Zimmermann has recommended the German law as a possible recognition in South African law of a 'general enrichment action' and the development of a modern taxonomy based on the Wilburg-von Caemmerer typology of enrichment claims.⁵⁵ . . . Our preliminary and provisional view . . . is that the German example recommended for South African law, suitably adapted, is more likely than any other legal taxonomy so far seen to serve as a useful model for Scots law. It has assisted us greatly in identifying the different uses of unjustified enrichment doctrines and the way in which the specific principles and rules may be organised and classified . . .⁵⁶

Whitty also underlined the suitability of this taxonomy a month after the release of the discussion paper at a conference held in Edinburgh⁵⁷ and at the 1994 Edinburgh conference organized by the Scottish Law Commission, he gave a paper explaining the Commission's work on the reform of the law of unjustified enrichment,⁵⁸ while Zimmermann's paper "Unjustified Enrichment: The Modern Civilian Approach" set out the underlying assumptions of the Wilburg/von Caemmerer taxonomy in considerable detail and now recommended it as a guide for any system seeking a rational typology.⁵⁹ He ended his paper by presenting an English translation of a draft law of unjustified enrichment prepared by the late Professor Detlef König under the auspices of the German Minister of Justice. Although this draft was never enacted, Zimmermann describes it as "a most valuable restatement of German enrichment law as it has evolved over the last hundred years"—and in this restatement, König had preserved the Wilburg/von Caemmerer taxonomy.⁶⁰ At the same conference, I had been asked to present a paper on what a possible codification of the South African law of enrichment might look like, which I did, and it earned me the wrath of the plain-spoken Lord Prosser, who

55. Scottish Law Commission, DISCUSSION PAPER NO 95 ON RECOVERY OF BENEFITS CONFERRED UNDER ERROR OF LAW (September 1993), Vol. 1 para 3.25.

56. *Id.*, para 3.27.

57. N. R. Whitty, *The Taxonomy of Unjustified Enrichment in Scots Law* (paper delivered at seminar on the law of unjustified enrichment held in Edinburgh on 23 October 1993).

58. Published, in a German translation: Niall Whitty, *Die Reform des schottischen Bereicherungsrechts*, 3 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT (ZEUP) 216 (1995).

59. This was the paper that was to be published the next year in the OXFORD JOURNAL OF LEGAL STUDIES: Zimmermann, *supra* note 21.

60. Zimmermann, *supra* note 21, at 424-25.

memorably commented that the common law is recognizably deficient, while codifications are unrecognizably deficient. In time I came to see that he was right, but my draft also took its lead from the Wilburg/von Caemmerer typology and, although I no longer think that the South African law of unjustified enrichment should be codified, I do think that this typology should inform any description of or restatement of this field of South African law.⁶¹ And the bumper advocacy year for the merits of the German map of enrichment law was still not over. Zimmermann and Du Plessis published an English version of an article that they had written previously in Afrikaans for a special issue of *Acta Juridica* in honor of the doyen of South African law of unjustified enrichment, Wouter de Vos, in which they explained the German law of unjustified enrichment, including the Wilburg/von Caemmerer model. And Whitty reiterated the value of this taxonomy in an article in the *Juridical Review*,⁶² as he would again do in 2001⁶³ and 2002.⁶⁴

It would soon become clear that Whitty was not alone. In 2003 Evans-Jones published the first of his two-volume treatise on the Scots law of unjustified enrichment, and in this book he adopted the modern German typology as containing the basic elements that could also explain the different categories of enrichment in Scots law⁶⁵—subtitled the first volume “Enrichment by deliberate conferral: *condictio*” and the second “Enrichment acquired in any other manner.”⁶⁶ This latter category he subdivided into the following manners of acquisition: interference, imposition and discharge of another’s debt. Whereas Hogg wrote in 2006 of the “growing consensus as to how the subject matter of unjustified enrichment should be divided up” (having introduced the Wilburg/von Caemmerer scheme in his own book),⁶⁷ the consensus is by now complete

61. See Daniel Visser, *Draft Rules on Unjustified Enrichment and Commentary*, unpublished paper, University of Edinburgh and Scottish Law Commission Conference, University of Edinburgh, 1994.

62. Niall R. Whitty, *Some Trends and Issues in Scots Enrichment Law*, JUR. REV. 127 (1994).

63. *Id.*, *The Scottish Enrichment Revolution*, 6 SCOT. L. & P.Q. 167 (2001) 181-83.

64. *Id.*, *Rationality, Nationality and the Taxonomy of Unjustified Enrichment*, in David Johnston and Reinhard Zimmermann (eds.), UNJUSTIFIED ENRICHMENT: KEY ISSUES IN COMPARATIVE PERSPECTIVE (2002) 658 at 686-87.

65. Evans-Jones, *supra* note 8, at para 1.71-1.87; *id.*, *Some Reflections on the Condictio Indebiti in a Mixed Legal System* 110 SOUTH AFR. L.J. 759 (1994) at 766ff.

66. *Id.*, UNJUSTIFIED ENRICHMENT—ENRICHMENT ACQUIRED IN ANY OTHER MANNER (2013) para 2.01-2.43.

67. Martin Hogg, OBLIGATIONS, 2d ed. (2006) para 4.04.

in the literature—MacQueen ordered his books in this way⁶⁸ and now Whitty’s magnum opus is on the table, published in 2021 and ordered along the lines of the taxonomy that he has championed. And he now has the satisfaction of seeing its adoption by all the leading writers in one form or another.⁶⁹ And, equally, there cannot but be a feeling of “mission accomplished” for Zimmermann that the plan that he laid so carefully to export the explanatory power of this taxonomy has had such success in Scotland.

There are subtle differences between the various Scottish authors’ adoption of the taxonomy.⁷⁰ This is understandable, because introducing the German model can never be a straightforward “pasting” onto Scots law. It must be appropriately adapted to ensure a “fit” with Scots law as a whole, as Whitty already noted in 1993,⁷¹ and opinions can differ as to how exactly that must be done.

The Scottish courts have not yet adopted the approach to which all the writers subscribe—but it is difficult to see how that can be resisted in the long run, given the undeniable explanatory power of the typology. This is all the more true, because Scotland has historically distinguished between claims based on repetition and restitution on the one hand and recompense on the other (although these claims were originally not seen as enrichment claims specifically, but rather resorted under the rubric of obediational obligations) and, as Whitty and I commented recently, “[t]herefore the ‘modern civilian’ approach, which organises the law of unjustified enrichment according to the manner in which it occurs, had a natural appeal for Scottish authors.”⁷²

2. South Africa

In South Africa it all started with Zimmermann’s 1985 article and all developments in respect of this issue ultimately go back to that call—and all the South African scholars who engaged with the Willburg/von Caemmerer taxonomy were inspired by exchanges with Scottish colleagues on the issue of its usefulness for our own system. In 2003, in a book devoted to the comparative law of unjustified enrichment, I

68. Hector MacQueen, *UNJUSTIFIED ENRICHMENT (LAW BASICS)* 3d ed. (2013); The Right Hon. Lord Eassie & Hector MacQueen (eds.), *GLOAG AND HENDERSON, THE LAW OF SCOTLAND*, 15th ed. (2022) ch 24 (forthcoming).

69. See generally Whitty, *supra* note 9, at paras 120-133.

70. Evans-Jones, *supra* note 8, at para 2.38-2.39.

71. And see now Whitty, *supra* note 9, at para 106.

72. Daniel Visser & Niall R. Whitty, *The Role of Interest in Unjustified Enrichment Claims*, 25 *EDIN. L. REV.* 48 (2021) at 75.

described South African law in a manner broadly based on the Wilburg/von Caemmerer taxonomy,⁷³ and in a joint contribution in 2004, comparing the law of unjustified enrichment in South Africa and Scotland, Whitty and I confirmed that any future taxonomy of both South African and Scots law should feature three main categories, namely enrichment by transfer, enrichment by invasion of the rights of the plaintiff or pursuer, and imposed enrichment, and that this division should be introduced in a way that is appropriately adapted to fit into South African and Scots law.⁷⁴

The next move in the introduction of the modern German way of organizing enrichment liability was a 2005 article by Du Plessis,⁷⁵ in which he made a detailed analysis of this taxonomy and, referring to the various calls in South Africa and Scotland (starting with Zimmermann's 1985 call) for it to be employed to organize South African law, he added his own voice to the list. In doing so, he also thoroughly examined the reasons why this would be appropriate. For him, on a general level, the "broad structural similarities can be ascribed to a shared civilian heritage"⁷⁶ and that gives the first strong clue "that the division in . . . German law is the most modern, rational structure on which the underlying civilian materials can hang."⁷⁷ Secondly, he cites, with regard to enrichment by transfer, that the categories of the German typology can lead South African law to a position where the *condictiones* are regarded as examples of typical fact-patterns in which a transfer is without legal ground, rather than having to rely on them as causes of action, and so avoiding the rather sterile debate about which *condictio* is applicable in a particular situation.⁷⁸ Thirdly, he sees considerable advantage in the potential of the taxonomy to bring rational order to the motley collection of enrichment actions outside of the *condictiones*.⁷⁹ Like Whitty did in 1993 in regard to Scotland, he too warned that the adoption of this organizational scheme in South Africa must take into account that German law and South African law are different in many respects.⁸⁰

73. See Daniel Visser, *South African Law*, in Jack Beatson & Eltjo Schrage (eds.), *CASES, MATERIALS AND TEXTS ON UNJUSTIFIED ENRICHMENT* (2003) 376-88.

74. Niall R. Whitty & Daniel Visser, *Unjustified Enrichment*, in Zimmermann, Visser & Reid, *supra* note 46, at 414-16.

75. Jacques Du Plessis, *Towards a Rational Structure of Liability for Unjustified Enrichment: Thoughts from Two Mixed Jurisdictions*, 122 S. AFRICAN L.J. 142 (2005).

76. *Id.*, at 176.

77. *Id.*

78. *Id.*, at 177.

79. *Id.*, at 178.

80. *Id.*, at 179.

The next opportunity that presented itself to cast the South African law of unjustified enrichment into the Wilburg/von Caemmerer mold was the 2006 edition of *Wille's Principles of South African Law*,⁸¹ in which I was responsible for the chapter on unjustified enrichment—and of course I used the opportunity, explaining under the heading “An appropriate organizational matrix for enrichment liability” and echoing Du Plessis, that it makes intuitive sense to use its broad outlines “because (i) they neatly summarize the broad contours under which enrichment will be considered to be unjustified; (ii) they move the emphasis from the variety of remedies, which is the current focus of the typology of the [South African] law of enrichment; and (iii) there is nothing in this organisational plan which conflicts with any of the basic principles of South African law.”⁸²

In the next year I published my own textbook on the South African Law of unjustified enrichment,⁸³ again organizing the material according to the Wilburg/von Caemmerer taxonomy, and so did Du Plessis when he published his textbook in 2012.⁸⁴ In her 2013 book, Scott also supports this taxonomy as appropriate for South African law. Referring the fact that Du Plessis’ and my organization of the South African material being modelled on the German taxonomy as the most significant feature of our accounts, she states:

This neo-civilian approach is an appropriate one for South African law, given that German and South African law share a common historical root: the principal distinction between enrichment by transfer and enrichment ‘in another way’ which informs the Wilburg/von Caemmerer model broadly reflects the traditional civilian distinction between the *condictiones* and other enrichment claims. Once such a taxonomy is adopted, it becomes possible to move beyond the patchwork of the uncodified *ius commune*; to introduce a degree of abstraction and systematisation into South African law without seeking to suppress its complexities.⁸⁵

81. Daniel Visser, *Unjustified Enrichment*, in François du Bois (ed.), *WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW*, 9th ed. (2007) 1041-88.

82. *Id.*, at 1056.

83. Visser, *supra* note 50, 78-85 and *passim*.

84. Jacques du Plessis, *THE SOUTH AFRICAN LAW OF UNJUSTIFIED ENRICHMENT* (2012) 10-13 and *passim*.

85. Helen Scott, *UNJUST ENRICHMENT IN SOUTH AFRICAN LAW—RETHINKING ENRICHMENT BY TRANSFER* (2013) 5.

Finally, in 2018, when I was asked to rewrite the title “Enrichment” in the encyclopaedia of South African law, *The Law of South Africa* (LAWSA) I also cast the material in this mode.⁸⁶

Unlike Scots law, the absorption of the taxonomy by academic commentators in South Africa (the country for which it was first suggested by Zimmermann as a guide) is, however, not complete and, like Scots law, the courts have not yet adopted the scheme. Graham Glover is broadly sympathetic to the idea, and although he has not committed himself,⁸⁷ he does say that “[t]here now seems to be a developing consensus that the Wilburg/Von Caemmerer typology . . . constitutes a suitable way of conceptualising basic forms of sine causa enrichment in South African law.” The authors of the standard casebook on the South African law of unjustified enrichment remarked in the preface to the fourth edition that the approach adopted by Du Plessis and me “is quite revolutionary in its own way, but has not yet found favour with the courts.”⁸⁸ And that is presumably why they had not chosen to follow our example. However, writing on his own, one of the authors, Sieg Eiselen, revealed a more sympathetic ear to the calls for this taxonomy:

Adopting a principled approach may also open the way for a different taxonomy based on the principle of unjustified enrichment law, as proposed by Visser and Du Plessis breaking away from the interim position as evidenced in the works of Lotz and Brand,⁸⁹ and Eiselen and Pienaar. It may also open the way for developing an extension of enrichment liability to deal with factual situations currently not covered by any form of liability such as enrichment by invasion of rights as advocated by Visser and Du Plessis. This will, however, require a paradigm shift from an action-based liability to a principle-based liability which is more in conformance with the modern Roman-Dutch common law of South Africa.⁹⁰

86. Daniel Visser, in W. A. Joubert (founding editor) *THE LAW OF SOUTH AFRICA*, 3d ed., Vol. 17 (2018) para 210 and *passim*.

87. Graham Glover, *Reflections on the Sine Causa Requirements and the Conditiones in South African Law*, 20 *STELLENBOSCH L. REV.* 468 (2009).

88. Sieg Eiselen & Gerrit Pienaar, *UNJUSTIFIED ENRICHMENT—A CASEBOOK*, 4th ed. (2017) v.

89. Eiselen is referring to Jan Lotz, who did the first edition of *LAWSA* (*supra* note 86) and Judge Fritz Brand who did the subsequent additions until I took over the enrichment title.

90. Sieg Eiselen, *The Transformation of South African Enrichment Law*, in Marita Carnelley, Shannon Hoctor & André Mukheiber, *DE IURE GENTIUM ET CIVILI—FESTSCHRIFT IN HONOUR OF ELTJO SCHRAGE* (2014) 82 at 97-98. (footnotes omitted.)

Only Jean Sonnekus has pointedly ignored the debate,⁹¹ so it does seem as though the taxonomy is almost in the same place in South Africa as it is in Scotland as far as its scholarly acceptance is concerned. It is, however, important for both jurisdictions that the courts also appreciate the value of this organizational scheme. The next Part explains why this is so.

V. THE DANGERS OF OVERGENERALIZATION

Whenever a legal system moves to a generalized approach to unjustified enrichment, the danger lurks that it will be difficult to define its limits. The motley collection of actions stemming from Roman law and its *ius commune* afterlife that make up the South African law of unjustified enrichment has many things that can be said against it, but one thing that can be said *for* it is that, at least, through its particularity, this collection of actions kept a tight rein on this area of the law.⁹² But the arcane requirements of the *condictiones* and the other common-law enrichment actions that evolved over time can be difficult to understand and apply correctly. Eiselen describes how Lotz's approach in the first edition of LAWSA, namely to state the general principles (which had been extracted by De Vos⁹³ from the specific enrichment actions) as prerequisites for all instances of enrichment liability led to a subtle paradigm shift that was focused more on the general principles than on requirements of the specific actions, even though the latter remained firmly in place.⁹⁴ Viewing the individual actions in the light of the principles that underlie them has the obvious benefit of surfacing whether the requirements of the individual actions (as they have been handed down by history) make rational sense in today's world. But there is also a very real danger: general principles are of necessity stated at a high level of abstraction and when one starts to view them as a cause of action in their own right, the specter of overgeneralization looms. Several commentators have observed a tendency in

91. Jean Sonnekus, UNJUSTIFIED ENRICHMENT IN SOUTH AFRICAN LAW (2017), 2-3. He relies on the Savignian view that all the *condictiones* rest on the notion of "enrichment of the defendant out of the patrimony of the plaintiff" (that is to say that their role is that of substitute vindicatory actions). It is therefore not surprising that he includes only the *condictiones* in his book (although, somewhat incongruously, *negotiorum gestio* is also included).

92. Scott, *supra* note 31, at 490, where she says: "Perhaps the conservatism of South Africa's enrichment law—its adherence to causes of action derived from the *ius commune* and indeed from Roman law itself, and its slow pace of change—has safeguarded it against mistakes made by more adventurous and fast-moving jurisdictions."

93. Wouter de Vos, VERRYKINGSAANSPREKLIKHEID IN DIE SUID-AFRIKAANSE REG, 3d ed. (1987) ch 7.

94. Eiselen, *supra* note 90, at 83.

the South African courts, even without a generalized approach to liability having been formally adopted, to drift towards referencing the general principles of liability for enrichment liability (enrichment of the defendant, at the expense of the plaintiff, that is unjustified) without any regard to the requirements of the specific action applicable to the facts.⁹⁵ When a court abandons the requirements that historically govern a specific fact situation and replaces them with the general principles that underlie them—in other words, when it treats the general principles as a cause of action in their own right,⁹⁶ the obvious question that arises is how these general principles must now be interpreted, for they do not have any fixed meaning in themselves.⁹⁷

The Wilburg/von Caemmerer taxonomy has the ability to guide how these general principles must be interpreted; to transcend the historical actions in a way that is faithful to their roots; to reveal gaps in the law; and to be a guide to future development.⁹⁸ One convincing illustration of these abilities is Scott's analysis of the South African courts' jurisprudence aimed at providing redress to the victims of the theft of incorporeal money (i.e. where money is stolen through the manipulation of bank accounts).⁹⁹ She shows that the courts have underpinned the remedial assistance that they have provided in these instances with a model that essentially extends the *rei vindicatio* to incorporeal money,¹⁰⁰ but that such a model is in fact unworkable because in terms of South African law, money in a bank account assumes an incorporeal character that cannot be the subject of a vindicatory action. The courts' attempt at finding a solution along these lines arises from the fact that the category enrichment arising from interference is underdeveloped in South African law and as a result there is little or no awareness of this category of unjustified enrichment. Scott shows that if these cases are analyzed in terms of non-consensual

95. See Eiselen, *supra* note 90, at 84-95, who discusses this tendency in *Nissan South Africa (Pty) Ltd v. Marnitz N.O. (Stand 186 Aeroport (Pty) Ltd intervening)* 2006 (4) All S.A. 120 (S.C.A.); *Glenrand MIB Financial Services (Pty) Ltd v. Van den Heever N.O.* 2013 1 All S.A. 511 (S.C.A.); Glover, *supra* note 87, at 475ff., who discusses *Kudu Granite Operations (Pty) Ltd v. Caterna Ltd* 2003 (5) SA 193 (SCA) 202; *Mndi v. Malgas* 2006 (2) SA 182 (E); *St Helena Primary School v. MEC, Department of Province Education, Free State Province* 2007 (4) SA 16 (O).

96. Scott, *supra* note 31, at 490.

97. Glover, *supra* note 87, at

98. Scott, *supra* note 31, at 490.

99. *Id.*, at 358ff.

100. The cases concerned are: *First National Bank of Southern Africa v. Perry* NO 2001 (3) SA 960 (SCA); *Nissan South Africa v. Marnitz N.O.* 2001 (5) SA 441 (SCA); *Absa Bank v. Lombard Insurance* 2012 (6) 569 (S.C.A.); *Trustees, Estate Whitehead v. Dumas* 2013 (3) SA 331 (SCA); and *Absa Bank v. Moore* 2016 (3) 97 (S.C.A.).

enrichment (that is to say, not as instances of enrichment by transfer/deliberate conferral, but as enrichment arising from interfering with the rights of the plaintiff, without reference to ownership in the stolen money) a perfectly sound basis for the decisions is revealed. The theft demonstrates that the money left the plaintiff's bank account without his or her consent and without any intention of the part of the plaintiff to confer a benefit on another; indubitably this amounts to interference with the plaintiff's rights to transact on the bank account (which the law attributes solely to the holder of the account); this gives the plaintiff a claim based on the unjustified enrichment and to constitute this claim it is unnecessary for the plaintiff to establish ownership of the money.¹⁰¹ This example demonstrates how analyzing a fact-situation in terms of the Wilburg/von Caemmerer model can alert one to both where the current law has gone wrong and how it can be set on a firm footing.

VI. CONCLUSION

Legal transplants are complex. Moving concepts from their home territory to foreign climes tends to have varying degrees of success, and mostly such moves are not once-off events and depend for their success on a variety of factors, including that they receive constant care as they embed themselves in the new soil.¹⁰² Both Scots and South African law, as mixed legal systems, have much experience of transplants and should remain open to them, for in that openness to outside influence lies much of their success.¹⁰³ Reinhard Zimmermann had the foresight to recognize that the Wilburg/von Caemmerer taxonomy was eminently transplantable to foreign climes and that it had the potential to unlock the tight historical compartments in which the principle against unjustified enrichment was held prisoner.¹⁰⁴ And the developments in Scots and South African law over the last three decades proved him right. (Indeed, it is clear that because this model reveals so accurately what the parameters of unjustified enrichment are or could be in any particular legal system, it is also beginning to be referenced in the analysis of unjust enrichment in the common-law world.¹⁰⁵) The imbrication of this organizational model in

101. Scott, *supra* note 31, at 359.

102. See generally Markus G. Puder, *Legal Transplants under the Magnifying Glass: A Bridging Study from Louisiana to Germany and Back*, 35 TUL. EUR. & CIV. L.F. 1 (2020).

103. John W. Cairns, *Watson, Walton, and the History of Legal Transplants*, 41 GA. J. INT'L & COMP. L. 637 (2013) 686ff.

104. See *supra* note 5.

105. Scott, *supra* note 29, at 164-65.

both South Africa and Scotland is an ongoing endeavor which now awaits judicial recognition in order fully to unlock its potential to steer the law of unjustified enrichment to its full potential in these jurisdictions.