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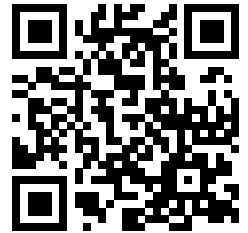


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Unjust Enrichment: A Comparative Analysis

The principle that no one should be enriched at another's expense is ancient. It was enunciated by the Romans, although it was far too general to explain the cases in which Roman law actually gave relief. As we will see, it was imported into English law and used to explain remedies that rested, initially, on a quite different basis. Indeed, its influence has been so pervasive that both Civil and Common lawyers have been tempted on various occasions to treat it as a rule: to recover, a party need only prove that another was enriched at his expense.

In this study, we will see that this temptation should be resisted. The law of restitution, in Civil and Common Law countries, is a law of particular types of cases in which relief may be obtained, cases which cannot be reduced to a single principle. That is not to say that we can have no comprehensive vision of law of restitution. Our vision, however, must be one in which different types of cases arise presenting different Problems. These problems are linked together so that the way in which a legal system resolves one of them affects the way it resolves others. By seeing how different systems approach the Same problems, we can learn much about the Problems themselves. Examining such approaches will be the basic task of this article. The more carefully we undertake this task, however, the more clearly we will see why we cannot see the law of restitution as a single answer to a single problem.

FROM QUASI-CONTRACTS TO UNJUST ENRICHMENT IN ANGLO-AMERICAN LAW

The seed from which the modern law of restitution has sprung is very different from quasi-contractual remedies of Roman law (*condictio*, *negotiorum gestio*, *actio de in rem verso*). In the beginning, English quasi-contracts (*quantum valebat*, *quantum meruit*, *money had and received*) were no more than an extension of contractual remedies (*assumpsit*) to cases in which someone had performed a contract which was void because a necessary element was lacking such as full agreement on the consideration.

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The history of English quasi-contracts begins four hundred years ago, in the seventeenth century. Even after Slade's Case and the appearance of a general remedy (*assumpsit*) in contract law,¹ the English contractual system remained a bit rigid, and, we can say, hieratic. For instance, if someone commissioned a tailor to manufacture a dress without fixing

the exact amount of the consideration, the tailor had no remedy to obtain compensation for his work. The same was true if a seller delivered something to the buyer without previous exact determination of the money due.²

Here the issue at stake was the elements required for the conclusion of a valid contract. If the parties have determined all relevant matters, such as what is to be performed, the consideration, and when and where the performance is to be made, they have certainly concluded a valid contract.³ The same probably holds true if the parties have not determined when and where to perform.⁴

The question becomes more complicated if the parties have not determined with precision the object of the performance or the amount of the consideration; for instance the quality or quantity of the wares to be delivered, or their exact price. In these cases it is harder to find a valid agreement. The outcome depends on the level of formality and rigidity of the system: in a formalistic system only very complete agreement can be upheld; in a less formal system a less complete agreement can be enforced.

In England also after the Slade's Case, if the parties had not determined the exact amount of the price to be given the contract was not considered binding, and if it were performed, there was no remedy to obtain compensation. This solution, especially when the contract had actually been performed, appeared very unjust. So just seven years after the Slade's Case, the English courts decided for the first time that an innkeeper was entitled to be paid for services actually rendered, despite the lack of a previous agreement on the price

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to be paid (*quantum meruit*).⁵ Similarly, a year later, a tailor was allowed to recover for services rendered without previous exact agreement on the price.⁶

After these decisions this solution was widely accepted. Whoever had performed services or delivered wares in execution of a contract considered unenforceable, for the lack of determination of the amount of the consideration, or for certain other reasons, was entitled to be paid for his services (*quantum meruit*), or for his wares (*quantum valebat*).

From a comparative point of view we can notice a difference between the English and Roman approach to quasi-contracts, especially as to the Roman *condictio*. While a *condictio* entitled the person who had delivered goods or wares in execution of a void contract to obtain back his specific goods, the English law of quasi-contracts entitled him only to the value of the goods (*quantum valebat*). This rule is less harsh; specific restitution can be granted for goods of particular value, beauty or artistic value.

In any event it seems clear that the advent of the English law of quasi-contracts was a consequence of the rigidity of the contractual system of that period. Modern systems are certainly more flexible and adaptable, with the consequence that an agreement can be enforced without the previous exact agreement on the consideration. In England in the seventeenth century by means of quasi-contracts, a system of remedies arose which, in a certain sense, have contractual nature, but which is more simplified, and which has joined the main body of contract law; in other words the inflexibility of the primary contractual system, opened the way to a cadet system of remedies of a contractual nature by means of which, given the essential elements of a contract, that is, agreement and consideration, restitutionary obligation arises when the agreement has been in fact performed.

The quasi-contract *quantum valebat* contains the primitive idea of the contract of sale founded on the actual delivery, in which the obligation to pay the price doesn't arise as a consequence of the agreement (*consensu*), but only at the moment of the delivery (*re*). In primitive society the pure consensual contract (a promise for a promise) is not recognized, because there are no means by which such promises can be enforced. Only the actual delivery of the goods can be considered sufficient to require payment of the price. The same holds true for contracts for services. Only later will the law recognize promises about something to be done in the future.

Consensual contracts are certainly of later origin than contracts

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grounded on actual performance.⁷ In modern societies, dominated by consensual contracts, the previous kind of contract grounded on the *datio rei*, retains a certain importance. For instance in Civil Law countries donations and gratuitous "real" contracts, such as deposit, commodatum and so on, become binding only at the moment of actual delivery (*datio rei*).⁸

But there are also other cases where it could be useful to ground the contractual obligation to pay the price not on the agreement, but on the actual performance of the agreement itself. We can consider for instance the original English system of quasi-contracts (*quantum meruit* and *quantum valebat*). The concept of a contractual obligation founded on the actual performance of the agreement is certainly more simple than that of consensual contracts (agreement + consideration); and perhaps for this reason *quasi-contracts* often can ground a remedy for the payment even when the contract is unenforceable. In this way, in Anglo-American law one who has the economic purpose of selling a good can clearly choose between two ways:

- (a) to make a valid consensual contract;
- (b) to make a "real" contract.

In this second case the agreement become perfect only at the moment of the delivery; and the obligation to pay the consideration arises only as a consequence of the actual performance. If the Parties have not agreed in advance on all the terms (for instance the price), the agreement can be completed by supplementary rules provided by the law (*quantum valebat*). The same holds true in cases of contracts of services (*quantum meruit*).

One might even say that, because agreement has to be performed in order for an obligations to arise, the actual performance validates the contract. From this point of view, the actual Performance of the contract takes the place of the element lacking in the contract itself.

It is not my intention to go deeper into these questions, but only to emphasize the particular origin of the quasi-contracts (*quantum meruit*, *quantum valebat*). They arise as a consequence of the rigidity of the English system of contracts in the seventeenth century. It is important to consider this origin because quasi-contracts, in their original configuration, were more nearly related to contracts than to unjust enrichment; a quasi-contractual obligation did not require the

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proof of an unjust enrichment, but the proof of a request or acceptance of the wares or services performed (*acceptio*).

Owing to this particular configuration it is easy to ground a restitutionary obligation when an unenforceable contract has been performed. In a contractual agreement, no matter how invalid, after performance it is always possible to find out some request or acceptance (*acceptio*) of the wares delivered (*quantum valebat*), or of the services performed (*quantum meruit*).

The question become[s] more complicated if we leave the field of contracts. It is complicated, for example, in those cases where one party is enriched because the other party who is impoverished has improved the property of the enriched without previous request or subsequent acceptance, or has performed some unrequested service for his benefit (imposed enrichment).⁹

It is complicated as well when someone in an emergency tries to safeguard the interests of another without previous authority (for instance extinguishing a fire which endangered the property of a neighbor: *negotiorum gestio*).¹⁰

In such cases, in Common Law countries, it has been difficult to give a remedy. The lack of a previous request or a subsequent acceptance clearly hinders the applicability of English quasi-contractual remedies (*quantum meruit* and *quantum valebat*) as originally understood.

In a second and more limited group of cases, a remedy has been developed based on liability in tort. In such cases unjust enrichment is a consequence of the behavior of the partly enriched who derived a benefit in an unauthorized way from the rights and protected interests of another. A remedy was developed because of the possibility, acknowledged for the first time by Lord Mansfield, of waiving the tort.

The doctrine of waiver was introduced in order to escape the rigidity and formalism of tort law. In origin tort liability came to an end as a consequence of the death of the wrongdoer (*actio personalis moritur cum persona*). Lord Mansfield, in order to escape this rule, introduced the possibility of waiving the tort, that is the possibility of ratifying the behavior of the wrongdoer and asking for the money obtained as a consequence of the tort instead of seeking damages.¹¹ For instance in case of conversion, if someone sells the goods of another, the owner by waiving the tort can seek the price paid, instead of damages. In this way, by waiving the tort, it was possible to be compensated even after the death of the wrongdoer; it

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is still possible to waive the tort. In this way it is possible to choose between claiming damages, or asking for the money obtained as a consequence of the wrong committed.

In Anglo-American law, as these two groups of remedies show, there is a basic distinction between cases in which the enrichment is due to the behavior of the person impoverished, and cases where it is the consequence of a wrongful behavior of the person enriched. The first group of remedies (*quantum meruit* and *quantum valebat*) has developed from contract law; the second group is derived from tort law (*waiver of the tort*).

In any event this basic distinction corresponds to two different models of unjust enrichment: if the enrichment is due to the behavior of the person impoverished who improves the properties of the enriched, or performs some other kinds of services for the benefit of another, the question to decide is if the impoverished person should be entitled to be compensated for his unrequested service. To compel the person enriched to pay for an unrequested good or service can lead to an undesired change in the assets he owns.

The question seems less problematic if the enrichment is the consequence of the wrongful behavior of the person enriched; in these cases it is enough to identify the protected interests injury to which can ground a claim for unjust enrichment. In the last century Anglo-American lawyers have reconsidered the whole field of restitution, and they have tried to unify all quasi-contractual remedies. The new unifying principle of the whole law of restitution has been found in the general principle that no one should be enriched without reason at the expense of another,¹² a principle whose origin can be traced back to Roman law.¹³

For instance Goff and Jones affirm that to ground a claim for unjust enrichment it is sufficient to demonstrate that someone has been enriched (received a benefit), at the expense of another, without a just cause or reason.¹⁴

We can find nearly the same principle in Civil Law countries, and particularly in Germany where § 812 BGB clearly states that no one is allowed to enrich himself without reason at the expense of another (*auf dessen Kosten*). Presumably this similarity is the result of reciprocal influence and borrowing of legal models between Civil Law and Common Law countries.

In any event this evolution and the superimposition of the new general principle on the previous English quasi-contractual remedies

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has not remained without effect. In particular, as we noted, originally the English quasi-contracts were more nearly related to contract law, than to unjust enrichment. In order to ground a claim for restitution it was not necessary to prove the unjust enrichment of the other, but his previous request or subsequent acceptance (*acceptio*) of the wares delivered (*quantum valebat*), or the services performed (*quantum meruit*).

Very different is the new logic founded on the concept of unjust enrichment: the only thing which needs to be proved is that someone has been enriched without reason at the expense of another.

The conflict between these two different conceptions appears as soon as we consider what Anglo-American experts on restitution say about the concept of benefit. For instance Palmer explains that: "the term benefit has no single meaning. . . The two most important are, first, *that there has been an addition to the defendant's wealth or an increase in his estate and, second, that a performance requested has been rendered*."¹⁵

Also Woodward notices that: "The word enrichment has been employed by previous writers to describe this element of quasi-contractual obligation. But the term is unsatisfactory in that it connotes an actual increase of the defendant's estate. Such an increase of estate. . . must sometimes appear. . . *but there are many cases, on the other hand, where it is sufficient to show that the defendant has received something desired by him, and the question whether he is thereby enriched. . . is irrelevant*."¹⁶

The introduction of the concept of unjust enrichment has clearly not led to an abolition of the previous character of English quasi-contract, but to the coexistence of traditional rules with new ones. The term "benefit" has a double meaning, signifying not only that someone has been enriched at the expense of another, in conformity to the new conception, but also that a performance requested has been rendered in conformity with the old one.

It may be that at this moment, the Anglo-American law of restitution is in a period of transition from the old to the new conception. In the future perhaps it will be enough to demonstrate that someone has been enriched without reason at the expense of another. But this achievement would not be free from risks. The main problem is to avoid arriving at a general principle of liability that leads to "palm-tree justice."¹⁷

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UNJUST ENRICHMENT FROM ROMAN LAW TO MODERN TIMES IN CIVIL LAW COUNTRIES

Early Roman law knew no general remedy for unjust enrichment but offered three specific ones: the *condictio*, the *negotiorum gestio* and the *actio de in rem verso*.

Condictio was shaped by Roman lawyers to enable one who had paid money or delivered goods in error to obtain back the money or goods. In Roman law, unlike in English, there were no remedies for the recovery of the value of performed services. *Condictio* also required a transfer of property (*datio*), and so was useless if someone had performed under a void contract.

Negotiorum gestio was shaped in close relation with agency (*mandatum*) in order to enable one who acted in an emergency in the interest of another, without previous authority, to be compensated for this altruistic behavior. The *actio de in rem verso* was introduced in order to compel the father (*pater familias*) to give back what he had obtained as a consequence of a contract executed by the son. In classical Roman law the vicarious liability of the father for the contractual obligations contracted by the son was very strictly conceived, and attached only if he had received something under the contract concluded by the son (*actio de in rem verso*).

Thus classical Roman law, like early English law, permitted only specific remedies under specific conditions. This situation started to open up with the compilation of the Roman Digest in late Roman law. This law, unlike classical, had a positive attitude towards generalization and was less rigorous, especially in the field of restitution. The foundation of the new system was the old maxim of Pomponius, *Jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiores*.

The maxim was applied by extending the three traditional quasi-contractual remedies. Riccobono has shown that starting with late Roman law, with the compilation of the Justinian Digest, the original, classical shape of *negotiorum gestio* changed to compensate in part for this lack of a general remedy in the field of unjust enrichment.¹⁸ In this way developed the so-called *negotiorum gestio utilis*, which, unlike the classical conception of the *negotiorum gestio*, no longer required the intention to act in the interest of another (*animus aliena negotia gerendi*).

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The *actio de in rem verso* and the *condictio*, also were extended well beyond their original field of application. Again, starting from late Roman law, the former *actio* was extended by practice and doctrine to compel infants and incompetents to return what they had obtained as a consequence of the performance of a contract invalidly concluded with them. Likewise, the field of application of the *condictio* was extended in order to enable the good-faith improver to be compensated for his improvements.¹⁹ Both were cases which the *condictio* of classical Roman law could not solve.

In medieval times these solutions, which appeared in the Justinian Compilation, were further consolidated and spread throughout continental Europe.²⁰ Medieval lawyers concentrated their attention on three main problems: a) good-faith improvement of the property of another; b) appropriation of value by using or disposing of the goods of another; c) indirect enrichment.

The tendency mentioned to extend the original remedies opened the way to the development of a general remedy of unjust enrichment, but its achievement took until the very end of the nineteenth century.

In France, in the years immediately before the codification, nothing seemed to have changed in the field of restitution. For instance, Pothier, a leading French lawyer of the eighteenth century, first reaffirmed *negotiorum gestio* in its original, classical shape.²¹ Nevertheless, in cases in which there was no intention to benefit another, Pothier accommodated the medieval relaxation of the Roman rules by endorsing a principle completely opposed to these rules. He admitted a remedy "on the case" (*in factum*), based on the old maxim stated by Pomponius: "*neminem aequum est cum detrimento*

alterius locupletari." In this way Pothier was able to satisfy the need for rigor, which compelled him to restate *negotiorum gestio* in its original, classical configuration, and the need for a remedy for cases of what today we simply call unjust enrichment.

The *Code Napoléon* did not provide a general remedy for unjust enrichment, and regulated only the two traditional quasi-contracts: *negotiorum gestio* and *condictio* (art. 1371-1381). And for the first half century following the codification, French lawyers, following the Code, considered only the two traditional quasi-contractual remedies of *condictio* and *negotiorum gestio*, though some of them reaffirm *negotiorum gestio utilis*.²²

The situation started to clarify only with the work of Aubry and

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Rau, the two most important French lawyers of the last century, who were the first clearly to separate the new action, the general remedy for unjust enrichment, from *negotiorum gestio*.²³ In their system there is no more room for *negotiorum gestio utilis*. They reaffirm *negotiorum gestio* in its original, classical form; in this way instead of requiring that someone has been enriched at the expense of another (*utiliter gestum*), they require only that the intervention could have been considered useful in the circumstances (*utiliter coeptum*). When someone interferes voluntarily in the affairs of another for his own interest, however, they consider it necessary to demonstrate the existence of an enrichment and its lack of justification (*utiliter gestum*).

This clarifying intervention of Aubry and Rau proved to be very useful, but it was only in 1892 that the French Supreme Court clearly separated the new action from *negotiorum gestio*, and created a general remedy for the recovery of unjust enrichment.²⁴ The new action was quickly accepted; shortly thereafter the Court stated more clearly the limits and character of the new action,²⁵ while reaffirming *negotiorum gestio* in its original configuration, based on the intention to take care of the interest of another.²⁶ In the end everything seemed to have found its own doctrinal position. *Negotiorum gestio*, without the burden of unjust enrichment, regained its original form based on the *animus aliena negotia gerendi*; while the new-born action was able to find a place in the uncertain world of the law.

At the end of the last century the situation was no less confused in Germany than in France. As in France, the lack of a general remedy for the recovery for unjust enrichment was partly compensated by the *negotiorum gestio*, and especially by *negotiorum gestio utilis*, which did not require an intention to take care of the interests of another.²⁷

Only towards the end of the last century was German doctrine able to separate the two remedies. Section 687 of the BGB eliminates every kind of misunderstanding by stating that there is no room for *negotiorum gestio* when someone has interfered in the affairs of another with the intention to take care of his own interest. In effect, in the system of the Code there was no more need of *nego-*

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tiorum gestio utilis. The BGB, unlike the Code Napoléon, straightforwardly creates a very general remedy for unjust enrichment (§§ 812-822). During the preparatory work for the new Code, German lawyers had debated whether to introduce a general remedy for unjust enrichment, or to regulate only the various *condictio* remedies derived from Roman law. In the end, owing to the influence of Savigny, the first solution was preferred.

Savigny was the first German lawyer to unify the various *condictio* remedies derived from Roman law. In his "System of Actual Roman Law," he expressed the opinion that the various kind of *condictiones* could have been brought together under the same unifying principle.²⁸ This principle could be found in the concept of unjust enrichment and in the duty to compensate for an enrichment obtained without justification.²⁹ Savigny enunciated not only this general unifying principle, but also considered the various traditional *condictio* remedies derived from Roman law.

Similarly, the BGB not only states in general that no one is allowed to enrich himself at the expense of another without a just cause or reason (§ 812 BGB), but also enumerates the various traditional *condictio* remedies: the *condictio indebiti* (§§ 813-814), the *condictio causa data causa non secuta* (§ 815), the *condictio ob turpem vel injustam causam* (§ 817), and so forth. In this way the BGB adopted a hybrid system based on a general principle and on the enumeration of various particular remedies.

The subsequent evolution has partly changed this situation. After the adoption of the BGB, German jurists, unable to manage the general principle, immediately tried to delineate particular grounds of unjust enrichment and their specific

corresponding rules. In doing so, however, they did not follow the old system of Roman remedies based on the enumeration of various kind of *condictiones*, but tried to elaborate a new systemization.

At the beginning of the 20th century Schultz tried to subsume the restitutionary obligation under the concept of violation of a right.³⁰ In his opinion the restitutionary obligation is grounded on a wrongful act; that is, an unauthorized interference (*Eingriff*) in the rights and protected interests of another. In this way unjust enrichment becomes a branch of tort law.³¹

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Schultz was followed by Wilburg, who a few years later made a clear distinction between cases of unjust enrichment based on the performance of a void or voidable contract (*Leistungskondiktion*),³² and all the other cases. Later this concept was developed by Kötter³³ and von Caemmerer.³⁴ While Kötter concentrated on the cases of unjust enrichment based on the performance of an invalid contract (*Leistungskondiktion*), von Caemmerer considered all the other cases and distinguished a few recurrent hypothesis. In his system he accepted the idea of Schultz that enrichment is a consequence of the commission of a wrong (*Eingriffskondiktion*); then he distinguished between cases of improvement of the property of another (*Verwendungskondiktion*) from cases in which someone extinguished the obligation of another (*Rückgriffskondiktion*).

In this way the new systemization was nearly complete; and the classification, founded on the distinction between cases of *Eingriffskondiktion* and cases of *Leistungskondiktion*, as well as these other hypotheses were accepted and further developed in the German doctrine.³⁵

Thus, in Germany after the reunification of the various *condictio* remedies derived from Roman law and the elaboration of a general remedy in the field of restitution (BGB § 812), the subsequent German evolution has contributed to the delineation of recurrent patterns of unjust enrichment. At the same time, this process has supported the convergence of restitution with the German system of tort law, which is also based on a system of specific violations.

3) Money Paid Without Duty

In every legal system there is agreement that an obligation to pay can arise only when there is no original duty to pay. In many systems, however, the lack of duty to pay is not considered sufficient to ground a restitutionary obligation, if it is not proved that the payor acted under the influence of a mistake. This second approach, whose origin can be traced back to Roman law, is the most widespread: In France, Germany, England, and United States it is generally considered necessary to prove not only the lack of duty, but also the mistake of the payor. Only in Italy is it now clear that the restitutionary obligation may be based on the lack of an original

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duty to pay alone. Nevertheless, even in the former countries there is emerging a certain tendency to reduce the relevance of the mistake requirement.

The need to prove that the payor acted under the influence of a mistake can be traced back to Roman law. Gaius mentioned the need to prove the mistake (Inst. 3, 91), but it is not completely clear what he meant. According to some scholars, Gaius merely wished to deny that one could obtain restitution of gifts and donations.³⁶ In any event his opinion was followed and accepted until modern times. Even in Italy it was long necessary to prove the mistake in order to support a restitutionary obligation. Now, however, the situation has changed. The Italian Civil Code of 1942 eliminated the need to prove mistake; in order to obtain back money paid without reason it is now enough to prove the absence of a duty to pay the money.

This peculiarity of the Italian legal system can be understood if we consider that in Italy, in order to make a donation,³⁷ particularly solemn formalities are required. Every property transfer made without a valid reason or justification, or without the formality required in order to make donations, can be recovered by demonstrating the absence of the duty to pay or of the needed formality required, without the necessity to prove any kind of mistake. The mistake requirement retains a residual relevance only in the field of the so called "indebito soggettivo"; that is when someone has paid, under the influence of a mistake, the debt of another. In these cases, as the Italian Civil Code states, the money or property may be recovered only if he has paid or transferred by mistake.³⁸ The reason for this rule is clear if we consider that in the Italian legal system it is perfectly possible for someone to voluntarily extinguish the debt of another.³⁹

Not only in Italy but also in other countries we can observe a tendency to reduce the relevance of the mistake

requirement. In Common Law countries it is not difficult to find situations in which it is not considered necessary to prove mistake. For instance, if someone performs an invalid contract, it is not necessary to prove the mistake of the payor in order to support a restitutionary obligation.⁴⁰ The same holds true if someone has paid taxes without the duty to do so,⁴¹ and in cases of duress of goods.⁴² In all these cases

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the absence of a duty to pay is considered sufficient to ground a restitutionary obligation because it is self evident that the payor, in spite of the lack of mistake, had no intention to make a gift or a donation.

In Germany the BGB itself requires mistake in order to support a restitutionary obligation (BGB § 814), yet there too this rule has been modified. Starting from the beginning of the twentieth century, German case law has reversed the burden of the proof. It is no longer the payor who has to prove mistake; rather the receiver of the money now has to prove that the payor intended to make a gift, or some other reason which excuses restitution.⁴³ Not very different is the situation in France, where well-known writers have supported elimination of the mistake requirement.⁴⁴

This tendency is to be encouraged. In effect, the best solution shifts the burden of proof from the payor to the recipient of the money. This solution, which is already well established, especially in German law, seems to be the most efficient and rationale one. In effect, between a payor who tries to avoid a loss and a recipient who tries to hold on to an improper benefit, the former is to be preferred. In this way, one who pays something not due should be entitled to claim back the money without the need to prove mistake. If there are reasons entitling the recipient to keep the money paid, he should be required to establish them.

So far we have considered only the recovery of money by means of a remedy *in personam* (money had and received = *condictio*). We should now also consider the so-called remedies *in rem*, for cases in which the former remedies prove ineffective. In particular, personal remedies are ineffective in three situations:

- (a) when whoever receives the money is insolvent and there are a number of creditors;⁴⁵
- (b) when the money or goods have been transferred to third persons;⁴⁶ and
- (c) when the goods or the money have changed form the money having been spent to buy goods, or the goods sold and transformed into money.⁴⁷

In all these cases the equitable remedies available in Common Law countries, such as constructive trust and tracing are much more

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efficient than the remedies derived from Roman law. The concept of a constructive trust makes it possible to obtain preference in the cases of competing creditors;⁴⁸ and thanks to the possibility of "tracing" it is possible to recover goods even when they have been transferred to others, provided that they did not buy the goods in good faith and for a valuable consideration.⁴⁹

To a civil lawyer, the most surprising thing is that by means of these remedies it is possible to follow and to obtain the restitution not only of goods, but also of money.⁵⁰

In Civil Law countries there is no corresponding concept of property of the fund, and no remedies to trace and to follow money comparable to "constructive trust" and "tracing."

4) Performance Under an Invalid Contract and Restitution

In Common law countries the delivery of goods and the conveyance of property normally transfers legal title even if the contract is void.⁵¹ Common Law remedies for the recovery of one's own property are not useful because title has been transferred. The only possibility is to try to obtain restitution by means of quasi-contractual remedies. In effect, the main work of quasi-contracts is precisely here, in awarding at least the value of a performance rendered in actual or supposed conformity with a contractual obligation.⁵² In these cases it is not necessary to obtain a declaratory judgement that the contract is void. As in Roman law, void contracts are simply considered nonexistent; one who has entered into a void contract can simply refuse to perform and defend himself by demonstrating that infirmity.

More difficult is the question when a contract is performed in spite of its invalidity; this too is one of the main fields of application of the law of quasi-contracts. Here the recovery of money is subject to different requirements. First, it is

necessary to prove the absence of a duty to pay—that is, the invalidity of the contract; second, that the payor has received nothing as a consequence of the payment (total failure of consideration),⁵³ an element replacing the mistake requirement already discussed in the prior context.⁵⁴ The situation changes again if goods are delivered or services

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performed in execution of an invalid contract. In order to obtain restitution here it is necessary to prove that the performance had been requested under the invalid contract. The reason for this rule can be understood if we go back to the origin of English quasi-contracts (*quantum meruit, quantum valebat*). As already mentioned,⁵⁵ English quasi-contracts originally integrated a system of remedies of a contractual nature, which could operate whenever someone had performed under an invalid contract.

German law is very close to Anglo-American law. In Germany, too, delivery of goods in execution of a void contract normally transfers title to the property. The transferor of the goods is no longer their owner and thus is not entitled a remedy allowing one to reclaim one's own property. This is one of the main fields of application of the law of quasi-contracts in Germany, too; the main difference being that while in Anglo-American law it is normally only possible to obtain the value of the goods (*quantum valebat*), in Germany one who has delivered goods is normally entitled to obtain back the same goods.

In Germany it is certainly possible to obtain declaratory judgments,⁵⁶ in general, but not when it is already possible to obtain a judgment of a different nature. Thus it is considered possible to obtain a declaratory judgment of the invalidity of a contract only before its performance; thereafter, the only possibility is to demand restitution of the goods delivered.

Likewise, in France, one who has concluded a void contract can simply neglect it, or defend against the demand of performance by demonstrating the void nature of the contract. Nowadays, in France, it is also considered possible to obtain a declaratory judgment of the void nature of the contract,⁵⁷ but this is a very recent evolution. As late as the beginning of the 20th century the *action en nullité*, aimed at restitution of what had been delivered in execution of a contract, could be brought only after the contract had been performed.⁵⁸

The main function of this remedy (*action en nullité*) is very close to the corresponding Anglo-American and German ones: Whenever a voidable contract is performed, it is possible to obtain the restitution at least of the value of what have been delivered by means of all these remedies of quasi contractual nature (*action en nullité, quantum valebat, condictio*).

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What has to be proved (*causa petendi*) is always the same; that is, the void nature of the contract. The same holds true for what is asked (*petitum*); that is, restitution of what has been delivered, or at least of its equivalent. In this field, the mistake requirement completely disappears, in France, as elsewhere. The remedy (*action en nullité*) does not presuppose the proof of a mistake by the performing party.⁵⁹

Another big difference can be noticed in the effects of the judgment on third parties. The declaration of voidness extends to all third parties, it does not matter if they have received the goods in good or bad faith, for value or without consideration. As a consequence of the decision, those parties are compelled to give the goods back.⁶⁰

In the Italian legal system the situation is a little different from the French one. The corresponding Italian remedy (*azione di nullità*) has only a declaratory function. The action can be brought not only, as in Germany, while the void contract is still executory, but also after performance under the void contract, in either case the judgment can only declare the contract to be void. After performance, in other words, in order to obtain restitution it is necessary to bring another remedy, such as the *condictio* or the *revindica*, separately or at least jointly in order to compel the transferee of the goods to return them.⁶¹

So far I have considered only the delivery of goods in implementation of a void contract, but the treatment of services is similar in the legal systems under discussion. In Anglo-American law, a restitutionary remedy is available on proof that the services were requested; that is, performed in implementation of a void contract, does not matter how invalid (*quantum meruit*). In Germany, too, the question is resolved by means of the concept of a de facto contractual relationship (*faktisches Vertragsverhältnis*); in this way an employee is always entitled to the wages agreed upon, whether or not the services enriched the employer.⁶² In Italy the question is ex-

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pressly covered by the Civil Code, which states that the infirmity of a contract has no effect to the degree it has been executed (art. 2126 C.C.) . In this way the employee is always entitled to the wages agreed upon for the period of performance.

French law is a little bit less favorable towards employees. In effect, the question is resolved by reference to the general principles of unjust enrichment; the employee is only entitled to be compensated if the work has enriched the employer.

This separate treatment of services is certainly interesting, because it discloses that restitution operates under different rules depending on the societal context. There are cases in which reference to the normal principles of unjust enrichment is not deemed to grant adequate protection. This is particularly clear in the field of labor law, where for equitable reasons employees are entitled to their whole wages.

In other cases it is the complexity of the relationship itself that can suggest the appropriateness of hypothesizing de facto contractual relationships, for example, when someone has performed under a void partnership agreement or has invalidly leased a house. In these cases it is possible to regulate the relationship, to the degree the contract has been executed, by reference to the contractual regime.⁶³

5) Unjust Enrichment Through Using or Interfering with the Rights of Another

Enrichment is a necessary element of the restitutionary obligation in all legal systems. Very different is the situation about the requirement of damage. In effect, while in France and Italy damage and a correlation between damage and enrichment are considered necessary requirements to support the remedy of restitution, the proof of damage is no longer an element of action in Common Law countries and Germany.

In the former it is enough that the enrichment was produced at the expense of another; that is, by using his rights, protected interests and so on without justification.⁶⁴ This expression, "at the plaintiff's expense," is close to the corresponding German one, *auf dessen Kosten* (BGB § 812), a coincidence perhaps explained by reference to the borrowing of legal models.⁶⁵

Very different is the situation in France and Italy, where the lack of damage, or of correlation between damage and enrichment, precludes the possibility of obtaining restitution. In these countries

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the general remedy for the recovery of unjust enrichment is very strictly conceived. It is necessary to prove not only enrichment, damage, and a correlation between them, but also the absence of justification for the property transfer, and the unavailability of any other specific remedy. In these countries, the strictly subsidiary character of the action, together with the damage requirement, strongly limit the possibility of application of the general unjust enrichment remedy.

This particular treatment of the action, especially prevalent in French and Italian law, can be traced back to Aubry and Rau, who were the first to clearly separate the new remedy of unjust enrichment from *negotiorum gestio*.⁶⁶ Aubry and Rau accepted the new action, but only within very strict limits; in particular, they required not only enrichment, but also damage (that is, a transfer of property) and a correlation between the property loss and the enrichment.⁶⁷ They also attributed to the new remedy a strictly subsidiary character.⁶⁸

This particular approach was first accepted by the French Supreme Court,⁶⁹ then by the Italian jurisprudence,⁷⁰ and finally, in 1942, by the Italian legislator.⁷¹ Thus, in these two countries, with many types of cases there is no remedy available.

It is generally considered that tort and contract remedies are enough to satisfy the needs of justice. This view is not correct; in fact, in a number of situations the only adequate remedy is unjust enrichment. These are all the cases in which someone enriches himself at the expense of another; that is, by interfering with or using his rights and protected interests, yet without producing damages.⁷² In these cases, in which someone, without previous authorization, uses the goodwill copyright, and similar goods, German and Anglo-American law make it easy to obtain restitution in spite of the lack of damage.

This different configuration of the remedy - the lack of the damage requirement, and the possibility to waive the tort⁷³ and recover the unjust enrichment instead of asking for damages - explains the vitality of the action for unjust enrichment in German and Anglo-American law.

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More agreement can be found about the need for the enrichment to be unjust, whatever the damage situation. Only enrichment obtained without reason or justification can support the restitutionary obligation. Further, in Common Law as well as Civil Law countries, not only the interference with rights, but also with certain kinds of protected interests may support a restitutionary obligation; for example, use of another's profit making, but not legally protected ideas nonetheless may be subject to a restitutionary obligation.⁷⁴

Not every kind of interference with or appropriation of value from the rights or protected interests of another should subject the user to a restitutionary obligation. However, there are cases where the appropriation of value from the rights and protected interests of another it is not forbidden. Both in England and in Germany, for example, it has been decided that a professional photographer is entitled to take photographs of a private building of particular interest in order to sell them; there is no restitutionary obligation because there is no law against taking a photograph.⁷⁵ This example can help us to understand that not every kind of appropriation of value from the rights or protected interests of another can be forbidden.⁷⁶ The main question thus is to clarify which kind of appropriation of value from the rights and protected interests of another should create a restitutionary obligation.

In Germany the first attempt to find a solution was to require a restitution only if there had been a transfer of assets (*Vermögensverschiebungstheorie*). Today this theory is no longer followed;⁷⁷ many cases grant restitution in spite of the absence of such a transfer, as when someone makes a profit by using the good of another without authorization.

More recently another theory has been developed in Germany based on the concept of *Zuweisungsgewalt*, or exclusion.⁷⁸ Pursuant to this theory, developed by von Caemmerer, every right or protected interest allows the owner to exclude all others (*ius excludendi alios*) from the enjoyment of the benefits offered by the "good". Unclear is how far this faculty of exclusion can extend. Von Caemmerer says only that it is a question to be solved case by case by comparing the various playing competing interests.⁷⁹

In any event, in order to support a restitutionary obligation it is

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not enough that someone benefited from using or interfering with the goods of another; it is also important to ask what kind of appropriation should or should not be allowed. No one is allowed to use the house of another or to dispose of it without permission, but it is certainly acceptable to admire another's house from the outside, or to take photographs of it, even if the photographer has the intention of selling them for profit.

When it is clear that someone has been enriched at the expense of another without justification, the further question arises, "What should be given back?"

The answer seems easy when the enrichment is the consequence of a transfer of value, and there is a correlation between the damage (loss) of the one and the enrichment of the other. In these cases, such as when someone has performed a void contract, whoever has been enriched should give back exactly what was obtained without justification.

When there is no correlation between damage and enrichment the issue is more difficult. There are cases where the enrichment is higher than the loss suffered by the other, such as when a fiduciary makes a profit by illegitimately investing the money of another; and in the case where there is no damage or loss at all, such as when someone makes money by using the rights and protected interests of another, as in the photography example.

Leading writers have expressed the opinion that normally only what has been taken should be given back (*Werthaftung*), barring particular circumstances, such as bad faith (e.g., of a fiduciary), which can justify a greater liability extending to recovery of the entire profit realized (*Gewinnhaftung*).⁸⁰ Another school holds that the whole profit should be equally divided among the various factors (goods, copyrights, labor, enterprise, and so on) that have combined to produce the wealth, in proportion to each contribution.⁸¹

The reality is much more complicated. In Common Law countries the restitution of the entire profits (accounting of profits) is an equitable and thus discretionary remedy, one that can be discretionally granted on a finding of wrongful behavior.⁸² Likewise, in Germany, only on a finding of wrongful behavior (*schuldhaft*) can the restitution of the entire profits be granted. In these cases, however, the restitutionary obligation is not grounded, as we would have expected, on the general remedy of unjust enrichment (BGB § 812),

but on *negotiorum gestio* (BGB § 687 Abs. 2),⁸³ or on tortious liability.⁸⁴

In my opinion the best solution is to divide the profit equally among the various factors which have contributed to its creation, in proportion to the contribution of each, save in particular circumstances that might justify a greater liability. Thus, if someone makes money by using the goods, rights or copyrights of another, he should be allowed to keep the profits, save the obligation to remunerate the owner of the goods or rights utilized.

Against this solution it is possible to argue that it may encourage wrongful behavior. If the wrongdoer is only liable for damages, and is entitled to the profits realized, he has an incentive to behave wrongfully. From this perspective, the obligation to pay damages would be considered no more than one of the costs of producing the profit. In my opinion, however, this consideration is not enough to justify a duty of restitution extending to the entire profit: The production of new wealth has a social function and should always be encouraged.

Restitution of the entire profit can be justified only by the particular gravity of the violation, or when the wrong assumes the aspect of an offense of personal character; for example, when a fiduciary, after having worked for years at a project on another's account, at the last moment and before the principal can protect his invention, wrongfully obtains a patent thereon in his own name, or when an advertiser makes a profit by utilizing the image of a well-known actor or politician, who never would have given his consent to that use. Save for these cases, whoever makes a profit by using the rights or protected interests of another should be allowed to keep it, provided that he has remunerated all the other producing factors for their utilization.⁸⁵

6) Imposed Enrichment

The prior section considered enrichment wrongfully obtained by using the rights or protected interests of another. In a certain sense, the opposite situation occurs when the person enriched is not the active subject but the passive one, as when someone improves the property of another in the mistaken belief of being the owner; or erects a protective wall against the sea that indirectly benefits also his neighbors. The distinction is well-known and clear.

In these cases, while the enrichment is clear, it is debatable whether the acting party should have the right to be compensated

for his unrequested services. In effect, his right to be repaid collides with the right of each one of us to enjoy full dominion over our property. Moreover, to compel the enriched to pay for an unrequested good or service can lead to an undesired modification of the properties he owns.

All these issues of integrity and composition of the assets, and of the owner's freedom of disposition, are particularly strongly felt in Common Law countries. In Anglo-American law, the one who improves the goods or provides services to another is entitled to compensation only if the improvements or services were previously requested or subsequently accepted.⁸⁶

In this field we find application of nearly the same principles that are applied when someone performs an invalid contract.⁸⁷ At first this may seem surprising, but we should consider that in all these cases the enrichment is due to the behavior of one who performs an invalid contract, or for whatever other reason performs services in the interest of another. Moreover, in Anglo-American law the same remedies of a quasi-contractual nature, which were introduced in order to compensate who had performed an imperfect agreement (*quantum meruit quantum valebat*),⁸⁸ later were extended to all other cases of unjust enrichment due to the voluntary behavior of the one seeking restitution or reimbursement. This can help us understand why in Anglo-American law it has been and continues to be very difficult to find a restitutionary obligation when the goods or the services were not previously requested or subsequently accepted (*acceptio*).⁸⁹

The situation now has started to change also in Common Law countries. For instance, thanks to an early clarifying intervention by Judge Story in the United States, and, a later one by Lord Denning in England, it is accepted that the good faith improver is entitled to be compensated for the unrequested improvements.⁹⁰

Indeed, some authors have expressed the opinion that in certain circumstances even the bad faith improver should be

entitled to be compensated, provided that the improvements could be considered of "incontrovertible benefit,"⁹¹ this being understood to include all those expenses that the owner in any event would have made.

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In Civil Law countries the situation is not very different. Roman law did not provide any remedy in favor of the improver of the properties of another. During the Middle Ages the right at least of the good faith improver to be compensated for gratuitous improvements was recognized. Later this solution spread and was accepted by most modern continental Codes.⁹²

In this way in Civil Law countries the question of improvements is analytically resolved by the legislator. This is particularly true in France, where in spite of the lack of a general statutory remedy of unjust enrichment, the specific question of gratuitous improvements is provided for in the Code (Code Napoléon art. 551-555). The same holds true in Italy where, while the general remedy of unjust enrichment is treated in only two articles, a number of articles treat the specific question of improvements (Codice civile art. 934 ff).

At first glance this may seem surprising, but the question of gratuitous improvements arises so frequently that the need for specific statutory resolution is much more apparent than in other fields of unjust enrichment. Consider what would happen if suddenly all specific dispositions in this field of gratuitous improvements were to disappear. Presumably judges, without the aid of a statutory basis, would become much more cautious, and would grant restitution only in favor of the good faith improver. For instance, in France until a few years ago the tenant was not allowed compensation for improvement made to the premises without the authorization of the lessor.⁹³

It is only thanks to a statutory provision that this rule has now been changed in France;⁹⁴ and, indeed, it remains the (statutory) rule in Italy to this day (C.C. art. 1592). This example can help us to understand the difficulties which arise in Civil Law countries in the field of improvements in the absence of a legal provision when the beneficiary has not consented to them. These difficulties, it must be admitted, are not typical of Anglo-American law. They are mitigated in Civil Law countries only thanks to their treatment, for the most part, by the legislator.

In any event it seems clear that the cases of unjust enrichment due to the gratuitous behavior of a person who improves the property of another or performs some other kind of unrequested service pose particular problems and deserve separate analysis.

In effect, if the beneficiary has not previously requested or subsequently accepted the services or the improvements (*acceptio*), it is not always possible to postulate a restitutionary obligation in all

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events. Otherwise, whoever chose to impose on others his services, improvements or goods in order to be paid for them could roam the town cleaning cars, painting houses, cutting lawns, and so on; whoever repaired cars could perform extra work, could substitute at his complete discretion parts of the engine, sure to be paid even against the will of the owner. It is not surprising to discover that the few cases to discuss the question have completely rejected this kind of claim.⁹⁵

A somewhat different question can arise when the behavior only indirectly enriches other people. If someone builds a wall in order to protect his field from the sea, presumably also the fields of his neighbors became more protected. Should a contribution for this type of work be required? Here, too, the question is that someone with this behavior could impose obligations on others obligations against their will (imposed enrichment), though the motive to abuse the possibility would be less intense.

Nevertheless, it is not surprising to discover that in Common Law countries this kind of indirect enrichment (windfall) also cannot support a restitutionary obligation.⁹⁶ The same holds true in Civil Law countries where it is clear that a restitutionary obligation can arise only when the benefit is the purpose at which the activity directly aims.⁹⁷

7) Indirect Enrichment

Particular problems arise also when the enrichment is a consequence of the performance of a contract concluded between other persons. For instance, if a builder makes improvements as a consequence of a contract concluded with the possessor, the owner is indirectly enriched. In these cases, when the contractor is not able to get his money from the possessor directly, the question arises whether the owner can be compelled to pay for the improvements.⁹⁸

The owner is certainly enriched as a consequence of the Performance of the contract; but on the other hand he has never acquiesced to the contract itself. So the question is complicated by the need to avoid requiring the owner to pay money for goods or services against his will (imposed enrichment).

In this field, there is a well-known contrast between French

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law, where, after the *Boudier* case⁹⁹ recovery for indirect enrichment is widely allowed¹⁰⁰, and German law where, traditionally recovery is not allowed.¹⁰¹ The traditional Anglo-American solution is very close to the German one. Less clear is the situation in Italy where the case law swings between the two solutions.

The country in which recovery for indirect enrichment is most widely allowed is certainly France. The facts of the *Boudier* case,¹⁰² which recognized a general remedy, are well-known. The tenant of a farm had bought some fertilizer, which was subsequently scattered in the fields. Later, the tenant became insolvent. The unpaid seller of the fertilizer sought compensation from the owner of the land, who had obtained back his property. The French courts held the owner of the land liable in words that suggested there was a very general remedy for the recovery of unjust enrichment. Afterwards, the courts said that the liability of the owner can arise only in case of insolvency of who has concluded the contract.¹⁰³

Another limitation was derived from general principles, and in particular, from the requirement that the enrichment should be without justification. The contractor is not allowed to proceed against the final beneficiary if the beneficiary has already given money to the intermediary for the improvements, or if, on the basis of the contract concluded with the tenant, he is entitled to all improvements without contribution.¹⁰⁴

In still another group of cases the services contracted for are not aimed to improve some property, but another person. In a few cases, a teacher who had been hired by parents to teach their children, proceeded successfully against the children themselves when he was not paid by the parents.¹⁰⁵

In another group of cases the fathers of young soldiers promised money to other men undertook to perform military service in place of their sons. In these cases the French judges have always condemned the sons to pay if the fathers are not able to do so.¹⁰⁶

The situation in Italian law is less clear. When the Codice Civile of 1865 was in force the courts rejected claims for indirect enrichment,¹⁰⁷ a few exceptions.¹⁰⁸ After the enactment of the Italian Civil Code of 1942, the courts initially allowed claims for indirect en-

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richment,¹⁰⁹ but more recently the Italian Supreme Court has rejected such claims.¹¹⁰

In any event, close analysis of a few fully published decisions shows that often judges reject claims for quite different reasons. For instance, in a case decided by the Tribunale of Naples,¹¹¹ a contractor had done work on a leased apartment. The tenant was insolvent, so the contractor sought payment by the owner; but the Tribunale of Naples rejected the claim. The ground of the decision is clear when we consider that in Italian law, the tenant himself is not allowed compensation for his improvements, if the owner has not consented to them (art. 1592 C.C.).

So this rule, which protects the owner against the imposition of an obligation against his will (imposed enrichment), also forbids the contractor to be compensated. But if we except cases where the tenant himself cannot be compensated for improvements, there seems to be no particular reasons to forbid the contractor to claim directly against the party enriched by his work when the tenant or whoever else has contracted directly with him is insolvent.¹¹²

Let us now consider German law and Anglo-American law. As we already know, in Germany the traditional solution is to deny recovery for indirect enrichment.¹¹³ German lawyers consider that whoever enters into a contract assumes the risk of the insolvency of the other party. In Common Law countries, as in Germany, the traditional solution is also to deny recovery,¹¹⁴ although recent developments have reduced the relevance of this rule. For instance it is now clear that if the owner of the improved properties promises to pay the improver, that person can proceed against him even though the promise is grounded on a past consideration.¹¹⁵

The situation is more difficult if an express promise is lacking. An eminent American writer has expressed the opinion that

in

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these cases as well, a restitutionary claim can be made, provided that the person enriched has in some way consented to or accepted the improvements or the services (*acceptio*).¹¹⁶

There are also cases in Common Law countries where judges have awarded restitution for indirect enrichment,¹¹⁷ provided that the person who concluded the contract is insolvent,¹¹⁸ and that the beneficiary has not already given money to the intermeddler.¹¹⁹ These cases are certainly limited. Moreover the beneficiary and the intermeddler are often close relatives.¹²⁰ In any event these decisions show a growing tendency to give compensation when someone has been indirectly enriched at the expense of another.

The cases that we have considered show us that a question of recovery of indirect enrichment can arise only when the contract was entered into to improve the properties of another or to give him a benefit of personal nature. This need for limitation is clear because the performance of contracts can very often indirectly enrich other people. For instance if a contractor builds a wall in order to protect some fields from the water, the neighbors are indirectly enriched (windfall), but as we already have seen, the law can't consider these kind of indirect consequences of our behavior.¹²¹

There is only one exception. In all the legal systems considered, the husband, who is deemed to be a tacit agent, is considered liable for the debts incurred by his wife for necessities.¹²²

In any event, when a contract was entered into to improve another's property or to confer a personal benefit on another there seems to be no particular reasons why the contractor should not have a direct claim against the person enriched, when the tenant or whoever else has directly contracted with him is insolvent,¹²³ provided that the person enriched has not already given money to the intermeddler for the improvements. In such cases, however, the person enriched must also be protected against the imposition of liabilities against his will (imposed enrichment). Accordingly, the Person who has performed the contract concluded with the third party should be allowed to proceed against the Person enriched only when the third party, for example the tenant, or possessor, is entitled to

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be compensated for his improvements.¹²⁴

8) Negotiorum gestio

Negotiorum gestio is an old remedy whose origin can be traced back to Roman law. *Negotiorum gestio* was shaped by Roman lawyers in close connection with agency (*mandatum*) in order to allow a person who has acted in an emergency in the interest of another without previous authority to obtain compensation for his altruistic behavior. An example would be a person who extinguished a fire that endangered the property of another.

As we have already seen,¹²⁵ this remedy in its various applications, and particularly so called *negotiorum gestio utilis*, proved to be very powerful from the Middle Ages until modern times. In Civil Law countries, since the *Boudier* case,¹²⁶ the situation was changed because the remedy for *negotiorum gestio* is no longer confused with the general remedy for the recovery of unjust enrichment. With the appearance of this general remedy, the courts reaffirmed *negotiorum gestio* in its original, classical configuration, based on the proof of the intention to take care of the interest of another, the so called *animus aliena negotia gerendi*.¹²⁷

The situation is very different in Common Law countries where there is no comparable distinction between unjust enrichment (*actio de in rem verso*), *negotiorum gestio*, and *condictio*. Instead, as noted earlier, in Anglo-American law, a principal distinction is between cases of enrichment due to an undue interference of the Person enriched in the rights and protected interests of another, and cases of unjust enrichment due to the behavior of the person impoverished who improves the properties of another or performs some other kind of services.

In the latter case, the traditional quasi-contractual remedies of *quantum meruit* and *quantum valebat* were eventually extended to all the other cases of enrichment due to the behavior of the impoverished person which we have described as "imposed enrichment,"¹²⁸ and also to the cases of *negotiorum gestio*. As we have seen, these two remedies were introduced in order to give a remedy to one who had performed an invalid contract. Recovery was allowed only if the performance had been previously requested or subsequently accepted, a requirement that remains today.¹²⁹

Thus there is very strong protection against imposing liability

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without the consent of the person enriched (*acceptio*). But this is also why in Anglo-American law it has always been very difficult to give a remedy in the cases of *negotiorum gestio*. In effect there is an incompatibility between *negotiorum gestio* and the original configuration of English quasi-contract (*quantum meruit* and *quantum valebat*).

The peculiarity of *negotiorum gestio* is that it operates when someone has taken care of the interests of another in an emergency, without previous authority. Only if the intervention was not previously requested or subsequently accepted it is possible to speak of *negotiorum gestio*. And it is exactly the absence of this request or acceptance that in Common Law countries, is the main obstacle to giving a remedy.

But all this shouldn't be surprising. Although *negotiorum gestio* is in principle admitted in Civil Law countries, nevertheless it is strongly limited in its applications for the same reasons which lead Common lawyers to reject it. For instance, a person who has taken care of the interests of another against his express will cannot recover.¹³⁰

This limitation clearly aims to safeguard the freedom of each one of us, to dispose of our property. This freedom can be limited only when it collides with superior values. Thus every country acknowledges that this limitation does not work when contrary to the law or the public order (§ 679 BGB; art. 2031 C.C.). For instance if someone feeds a starving child, he would certainly be entitled to be compensated even if his intervention was against the will of the parents. Except such cases, the intervention against the express will of the interested person not only cannot ground restitutionary Obligation, but can open the way to tortious liability (*culpa est immiscere se rei ad se non pertinenti*: § 678 BGB).¹³¹

In Civil Law countries *negotiorum gestio* has another important limitation as well. It is possible to give restitution only if the person benefited would not have been able to take care of his own interests; for instance when, because the owner of a house not at home, a neighbor intervenes without authority to extinguish a fire. But if our analysis is correct, we should also consider that in this field, the differences between Civil Law and Common Law countries are far less great than could appear at first sight. In effect, while negoti-

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orum gestio is admitted in Civil Law countries, in practice its application is sharply limited in order to avoid the imposition of obligations without the consent of the person benefited (imposed enrichment). In Common Law countries, these same exigencies, which are felt much more strongly, lead to the exclusion of *negotiorum gestio* itself.

Today, however, in practice, there are many cases in Common Law countries where restitution is awarded in cases of *negotiorum gestio*. Thus the gap with Civil Law countries is narrowed.

Nevertheless, there are still great differences, when someone pays the debts of another. In effect in Common Law countries it is not considered possible for such a person to be reimbursed by the debtor. That could lead to a change in the identity of the person of the creditor, which is not considered permissible in Common Law countries.¹³² In any event if an agent in an emergency (agency of necessity) extinguishes a debt of the principal, he can claim reimbursement.¹³³

A more difficult question arises if the person who intervenes in an emergency is not an agent. Still, if the person who extinguishes the debts of another, operates also in his own interest, he is allowed reimbursement.

For instance in *Exall v. Partridge*¹³⁴ the owner of some properties distrained for rent a few coaches that someone had put there. The owner of the coaches, in order to obtain them back, paid the rent due instead of the tenant. He subsequently proceeded against the tenant and obtained reimbursement. The underlying rule is that one who extinguishes the debts of another in pursuit of his own interest is entitled to be reimbursed.

In other areas, the differences between Civil Law and Common Law countries are even smaller. For instance he who supplies necessities in place of another, for instance feeding a child in place of the parents, has nearly the same opportunities to be reimbursed in Civil Law and Common Law countries.¹³⁵

At one time, very different results were reached in a situation in which someone had intervened in order to safeguard the properties or the life of another. In Common Law countries the person who intervened not only could not be reimbursed,¹³⁶ but was subject to liability in tort (*culpa est immiscere se rei ad se non per-*

tinenti).¹³⁷ Today, the situation has deeply changed thanks to the application of the law of maritime salvage, agency of necessity and bailment.¹³⁸ In the United States this trend has led to the explicit admission that whoever has intervened in an emergency is entitled to be reimbursed, provided that his intervention was urgent and necessary ("only where the need is immediate, absolute and imperative").¹³⁹

This whole trend has clearly reduced the differences between Civil Law and Common Law countries in the field of *negotiorum gestio*. Now, in Common Law countries, with the sole exception of the payment of the debt of another, reimbursement can be obtained nearly in the same cases in which in Civil Law countries allow *negotiorum gestio*.¹⁴⁰

9) The Elements of Liability for Unjust Enrichment

We have seen in this study that proof that someone has been enriched at the expense of another it is not enough to ground a restitutionary obligation. Consequently, we must be distrustful of the growing belief, both in Civil Law and Common Law countries, that a general remedy for the recovery of unjust enrichment can be based solely on the proof that someone has been enriched at the expense of another. The clearness and simplicity of this conception explains its increasing success, especially in Common Law countries where there is a growing tendency to repudiate the traditional system of quasi-contracts which were based on the contractual idea of request or acceptance (*acceptio*), or the tort idea of culpability (*waiver of the tort*), rather than on the idea of unjust enrichment.¹⁴¹

As we have seen, this traditional system has not been completely rejected. If the enrichment is the consequence of the behavior of the impoverished person who performs an invalid contract (§ 4), improves the properties of another or performs services for the benefit of another (§ 6), or intervenes in an emergency in order to safeguard the property or the life of another (*negotiorum gestio*: § 8), it is not easy to award restitution if the person enriched has not previously requested or subsequently accepted the benefit (*acceptio*), provided that there are not other factors which can ground a restitutionary obligation.

But if our analysis is correct, the old theories which assimilated quasi-contracts to the general category of contracts were partly true. When enrichment is due to the behavior of the impoverished person (§§ 4,6,8), contracts and quasi-contracts are very close. A contractual obligation requires not only the will of the contractor, but the consent of each parties supported by a valid consideration. Far less is necessary in order to ground a quasi-contractual obligation: the previous request or the subsequent acceptance of the performance (*acceptio*), united with the actual delivery of the goods or performance of the services, it is enough to award at least the value of the Performance (*quantum meruit* and *quantum valebat*).

From this perspective quasi-contracts are more simple than contracts; and may be it is for this reason that often by means of quasi-contracts it is possible to obtain at least the value of a performance when a contract is invalid.

The more difficult question arises when acceptance of a Performance (*acceptio*) is also lacking. Other factors are then relevant; for instance the wrongfulness of the behavior. Moreover, the commission of a wrong has always been considered sufficient to ground obligations, as in those cases in which unjust enrichment has been obtained by using or interfering with the rights or protected interests of another (§ 5). These cases are very close to liability in tort; this is particularly true in Anglo-American law where, as we have seen since the time by Lord Mansfield, a remedy has been developed by allowing a person to waive the tort, that is to ask the restitution of the wealth obtained as a consequence of the tort, instead of claiming damages.

As we go further in our analysis, we are led to be more and more skeptical about a general remedy for the recovery of unjust enrichment based on the only proof that someone has been enriched without justification at the expense of another. Other factors must also be proven, such as an acceptance by the person enriched (*acceptio*: §§ 4,6), or injury to a protected interest (§ 5), impossibility that the Person benefited could intervene in cases of *negotiorum gestio* (*absentia domini*: § 8), the good faith of the improver (§ 6), or the presence of an "incontrovertible benefit" (§§ 3, 6).

The presence of an "incontrovertible benefit" can support a claim of restitution in spite of the lack of an acceptance by the Person enriched (*acceptio*). The money is certainly incontrovertible benefit. If the enrichment is the consequence of the payment of money not due it is always possible to award restitution (§ 3). The same holds true if someone has delivered some goods and it is possible to obtain specific restitution as in Civil Law countries. When it is possible to award specific

restitution, the assets of the person en-

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riched are not modified as a consequence of the restitution; the same holds true for the proportion as assets in money as opposed to goods.

More difficult is the situation where a party awarded the value of his performance. Then the remedy does modify the assets of the person enriched since he has less money and more goods. That is why, in Common Law countries especially, there must be a previous request or the subsequent acceptance (*acceptio*), of the performance (*quantum meruit* and *quantum valebat*).

That is why courts have recognized as an incontrovertible benefit whatever has been transformed in money, or can easily be transformed in money by means of contracts of exchange. A few writers have also expressed the opinion that can recognize every kind of inevitable expense as an incontrovertible benefit.¹⁴²

Nevertheless, while Common lawyers consider only inevitable expenses to be an incontrovertible benefit, in Civil Law countries restitution has been allowed for necessary and useful expenses as well.¹⁴³

The belief in a general remedy for the recovery of unjust enrichment can be misleading also for another reason. As we have seen in the previous pages, there are different cases of unjust enrichment which create very different problems.

In Civil Law countries a general remedy for the recovery of unjust enrichment has been shaped in the particular context of unjust enrichment wrongfully obtained by using or interfering with the rights or protected interests of another (§ 5). It is in this context that all the elements of the new action have been determined: the enrichment, the damage, the correlation between damage and enrichment, the lack of justification, and the subsidiary character of the action. Consequently, the concept of injustice has been determined by reference to the concept of injury to a right.

In any event, because the action was shaped in this context, it was never completely satisfactory. In particular, it does not take account of all the cases of unjust enrichment due to the behavior of the person impoverished, which creates completely different problems (§§ 4,6,8). With the exception of Germany, in Civil Law countries these cases have been considered separately in connection with the study of particular fields of law, such as the relationships between possessor and owner, lessor and tenant, and so on. Consequently, one did not arrive at a more comprehensive vision of the whole field of restitutions which could have explored the existing links between all the cases of unjust enrichment due to the behavior of the person impoverished (§§ 4,6,8). The situation in Common

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Law countries is preferable where all these cases are considered together as problems of restitution.

The continental system which is closest to the Anglo-American one is the German. The BGB treats the various cases of unjust enrichment together (§§ 812-822), with the sole exception of *negotiorum gestio* (§ 677-687 BGB). The analogies are very strong in the cases of performance of an invalid contract (§ 4), and in the cases of enrichment obtained as a consequence of the wrongful interference with the protected interests of another (§ 5). Both in Germany and Common Law countries the delivery of goods transfers the property even if the contract is invalid. Thus, the only means to obtain restitution is quasi-contract (§ 4).

Moreover, the analogies are very strong also in the field of unjust enrichment. While both in France and in Italy, in order to obtain restitution, one must prove not only the enrichment, but also damage and the lack of any other particular remedy, the situation in Common Law countries and in Germany is very different. There is no more damage requirement and the remedy is not considered strictly subsidiary (§ 5). These similarities have encouraged Anglo-American and German lawyers to take a more comprehensive view of the law of restitution. Indeed, most studies of the law of restitution have been the work of Anglo-American and German lawyers. Presumably, the reason, in part, is that in both systems the restitution of what has been delivered in execution of an invalid contract take place by means of quasi-contractual remedies (§ 4).¹⁴⁴

The breadth of vision of Anglo-American and German writers is desirable because it illuminates the way in which different problems of unjust enrichment are linked together. Nevertheless, a striving for comprehensiveness should not be allowed to obscure the ways in which these problems, while related, are different. The differences are lost when one imagines all

claims for unjust enrichment as depending on a proof of a single element: that one person was enriched at another's expense. As we have seen, relief is not given unless the case can be reduced to one of the various typical cases we have tried to describe in this study.

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¹ (1602) 76 E.R. 1072.

² Ames, "The History of assumpsit," 2 *Harv. L.R.* 58 (1888): "Services would be rendered, for example, by a tailor or other workman, an innkeeper or common carrier, *without any agreement as to the amount of compensation. Such cases present no difficulty at present day, but for centuries there was no common law action by which compensation could be recovered.*"

³ *Pylatte v. Pylatte*, 135 Ariz. 346, 661 P.2d 196 (1982): "Although the terms and requirements of an enforceable contract need not be stated in minute detail, it is fundamental that in order to be binding, an agreement must be definite and certain so that the liability of the parties may be exactly fixed. Terms necessary for the required definiteness frequently include time of performance, price or compensation, penalty provisions, and other material requirements of the agreement."

⁴ Normally in these cases the agreement can be completed by supplementary rules provided by the law. See for instance art. 1182, 1183 of the Italian Codice Civile.

⁵ *Warbrooke v. Griffin* (1609) 2 Brownl. 254.

⁶ *Six Carpenter's Case* (1610) Rep. 147a.

⁷ Gorla, *Il contratto*, (Milano 1954); Grosso, *Il sistema romano dei contratti* (2d ed., Torino 1950); Carlini, "Contratto e patto nel diritto medievale e moderno," in, *Digesto* (4th ed., Sez. civ., Tourin 1989).

⁸ P. Gallo, "Deposito (diritto comparato)," in, *Digesto* (4th ed., Tourin 1989, Sez. civ.).

⁹ These cases are more fully considered in § 6.

¹⁰ These cases are considered in § 8.

¹¹ *Hambly v. Trott* (1776) 98 E.R. 1136.

¹² *Restatement of the Law of Restitution, Quasi contracts and Constructive Trust* § 1 (1937); Dawson, *Unjust Enrichment* (1951).

¹³ Pomponius: D. 12,6,14; D. 50,17,206.

¹⁴ Goff and Jones, *The Law of Restitution* 16 (3d ed., 1986).

¹⁵ Palmer, *The Law of Restitution* 44-45 (1978).

¹⁶ Woodward, *The Law of Quasi Contract* 9 (1913).

¹⁷ *Supra* n. 14 at 16.

¹⁸ Riccobono, "La gestione degli affari altrui e l'azione di arricchimento nel diritto moderno," in, *Rivista di diritto commerciale* I, 367 (1917); and, more diffusely, Riccobono, "Dal diritto romano classico al diritto moderno," in, *Annali Seminario Giuridico Palermo* vol. III, IV, p. 164 (Palermo 1917); Scragge, "Qui in fundo alieno aedificavit, Die actio negotiorum gestorum utilis als Vorstufe einer allgemeinen Bereicherungsklage," in, *Revue internationale des droits de l'antiquité* 401 (1989).

¹⁹ Riccobono, *Dal diritto romano classico al diritto moderno*, cited, p. 398.

²⁰ Riccobono, id.; Kupisch, *Ungerechtfertigte Bereicherung. Geschichtliche Entwicklungen* (Heidelberg 1987).

²¹ Pothier, *Oeuvres* III, p. 160 (ed. Paris 1845-48).

²² Larombière, *Théorie et pratique des obligations* V, 601 (Paris 1857); Demolombe, *Cours de Code Napoléon XXXI*, n. 48; Laurent, *Principes de droit civil français* XX, n. 333 (ed. Bruxelles-Paris, 1893).

²³ Aubry and Rau, *Cours de droit civil français* IV, § 441, p. 725,726 (4th ed., Paris 1871).

²⁴ *Affaire Boudier*, Req. 15 June 1892, D.P. 92, 1,596.

²⁵ Civ. 12 May 1914, S. 1918, 1, 41; Civ. 2 March 1915, D.P. 1920, 1, 102.

²⁶ Civ. 28 October 1942, D.C. 1943, 29.

²⁷ Windscheid, *Pandekten* II, § 431; Ihering, *Abhandlungen aus dem Römischen Recht* 46 (Leipzig 1844); Dernburg, *Pandekten*, § 121.

²⁸ Savigny, *System des heutigen Römischen Rechts* V, 507 (1840-1848).

²⁹ Savigny, id. at 564, 565.

³⁰ Schultz, *System der Rechte auf den Eingriffserwerb* 105 AcP (1909).

³¹ While at first glance this achievement appears astonishing, we should note that in France, too, there were attempts to ground unjust enrichment on tortious or contractual liability. Ripert and Teisseire, "Essai d'une théorie de l'enrichissement sans cause en droit civil français," *Rev. trim.* 727 (1904); Planiol, "Classification des sources des obligations," *Rev. critique* 229 (1904). For further references, P. Gallo, *L'arricchimento senza causa* Cap. III, § 6 (Padua 1990).

³² Wilburg, *Die Lehre von der ungerechtfertigten Bereicherung nach österreichischem und deutschem Recht* (Graz 1934).

³³ Kötter, "Zur Rechtsnatur der Leistungskondiktion," 153 AcP 193 (1954).

³⁴ von Caemmerer, "Bereicherung und unerlaubte Handlung," in, *FS Rabel* 193 (1954).

³⁵ Reuter and Martinek, *Ungerechtfertigte Bereicherung* (Tübingen 1983); Koppenstainer and Kramer, *Ungerechtfertigte*

Bereicherung (2a ed., Berlin, New York 1988).

³⁶ San Filippo, *Condictio indebiti* 28 (Milan 1943).

³⁷ Art. 783 C.C., with the only exception of very small gifts of money (hand gifts).

³⁸ Art. 2036 C.C.

³⁹ Art. 1180 C.C.

⁴⁰ On the whole question see § 4.

⁴¹ Woodward, *The Law of Quasi Contract* (1913); Palmer, *The Law of Restitution* III, 143, 239, 333 (1978).

⁴² Astley v. Reynolds (1731) 2 Str. 915.

⁴³ Gerota, *La théorie de l'enrichissement sans cause dans le code civil allemand* (1925); Staudinger, *Kommentar zum BGB* § 812, Vm. § 3 (12th ed. 1986).

⁴⁴ Carbonnier, *Droit civil, Les obligations* IV, 496 (11th ed. 1982); Ghestin, "Répétition de l'indu," in, *Enc. Dalloz*; Malaurie and Aynes, *Droit civil, Les obligations* n. 572, p. 407 (1985); for further references, P. Gallo, *supra* n. 31 at Cap. IV, § 4.

⁴⁵ P. Gallo, *supra* n. 31, Cap. IV, § 7.

⁴⁶ P. Gallo, *supra* n. 31, Cap. IV, § 8.

⁴⁷ P. Gallo, *supra* n. 31, Cap. IV, § 9.

⁴⁸ Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd. (1981) Ch. 105.

⁴⁹ Ames, "Following Misappropriated Property into its Product," 19 *Harv. L. R.* 511 (1906).

⁵⁰ Denning, "The Recovery of Money," 65 *L.Q.R.* 37 (1949).

⁵¹ P. Gallo, *supra* n. 31, Cap. V, § 2.

⁵² Dawson, *Unjust Enrichment* 23 (1951); Woodward, *The Law of Quasi Contract* 204 (1913).

⁵³ Whincup v. Huges (1871) L.R. 6 C.P. 78.

⁵⁴ § 3.

⁵⁵ § 1.

⁵⁶ ZPO § 256.

⁵⁷ Ponsard and Blondel, "Nullité," in, *Enc. Dalloz*.

⁵⁸ One of the first French lawyers who admitted the experibility of the action en nullité also before the performance, has been Japiot, *Des nullités en matière juridiques, essai d'une théorie nouvelle* 430, 436 (Thèse Dijon 1909).

⁵⁹ Ponsard and Blondel, "Nullité," in, *Enc. Dalloz*; Marty and Raynaud, *Droit civil, Les obligations* 660 (1962); Malaurie and Aynes, *Droit civil, Les obligations* 267 (1985).

⁶⁰ Ghestin, *Le contrat* 798 (1980); Malaurie and Aynes, *supra* n. 44, p. 266, 405, n. 570; Weill and Terre, *Droit civil, Les obligations* 344 (1986); Poisson and Drocourt, "Les restitutions entre les parties consécutives à l'annulation d'un contrat," *D. Chron.* 85, 1983; Bouziges, *Les restitutions après annulation ou résolution d'un contrat* (1982); Malaurie, *Le droit civil des restitutions, Cours de droit civil approfondi* (1974-75).

⁶¹ Moscati, "Del pagamento dell'indebito," in, *Commentario* 150 (cured by Scialoja and Branca 1981); Chiovenda, *Principi di diritto processuale* 38 (1965); Balzano, "L'azione di restituzione di un immobile alienato," in, *Rivista diritto processuale* II, 233 (1953); Bigiavi, *La rivendicazione del venditore* n.35, 78 (1935).

⁶² Franceschelli, *I rapporti di fatto* (1984).

⁶³ P. Gallo, *L'arricchimento senza causa*, Cap. V, § 15.

⁶⁴ Goff and Jones at 23.

⁶⁵ P. Gallo, Cap. II, § 9.

⁶⁶ § 2.

⁶⁷ Aubry and Rau, *Cours de droit civil français* IV, § 441, p. 725 (4th ed. 1871).

⁶⁸ Aubry and Rau, IX, n. 578, p. 355.

⁶⁹ *Affaire Boudier*. Req. 15 june 1982, D.P. 92, 1,596; Civ. 12 may 1914, S. 1918, 1, 41; Civ. 2 march 1915, D.P. 1020, I, 102.

⁷⁰ Cass. Tourin, 10 december 1987, in, *Giurisprudenza torinese* 39 (1898); Cass., Florence, 24 february 1898, in, *Foro italiano* I, 321 (1898).

⁷¹ [Art. 2041 Codice Civile](#) .

⁷² P. Gallo, VI, §§ 5,6,7.

⁷³ P. Gallo, VI, § 2.

⁷⁴ *International News Serv. v. Associated Press*, 248 U.S. 215 (1918); *Goldstein v. California*, 412 U.S. 546 (1973).

⁷⁵ *OLG Celle* MDR 1980, 311; *BGH NJW* 1975, 778; *Bernstein v. Skyways & General Ltd.*, (1978) Q.B. 479.

⁷⁶ P. Gallo, VI, § 4.

⁷⁷ Reuter and Martinek, *Ungerechtfertigte Bereicherung* 237 (1983).

⁷⁸ Reuter and Martinek, p.234.

⁷⁹ Von Caemmerer, "Grundprobleme des Bereicherungsrechts," in, *Gesammelte Schriften* I, 234 (1968).

⁸⁰ Von Caemmerer, "Bereicherung und unerlaubte Handlung," in, *Gesammelte Schriften* I, p. 232, 235;

Trimarchi, *L'arricchimento senza causa* Ch. II (1962).

⁸¹ Schultz, "System der Rechte auf dem Eingriffserwerb," 105 *AcP* 1 (1909); Sacco, *L'arricchimento ottenuto mediante*

fatto ingiusto (1959); Kellmann, *Grundsätze der Gewinnhaftung* 139 (1969).

⁸² P. Gallo, Ch. VI, § 8.

⁸³ BGHZ 34, 320. For further references, P. Gallo, Ch. VI, § 8.

⁸⁴ Koppenstainer and Kramer, p. 80; RGZ, 35, 63; BGHZ 44, 372.

⁸⁵ P. Gallo, Ch. VI, § 8.

⁸⁶ P. Gallo, Ch. VII.

⁸⁷ § 4.

⁸⁸ § 1.

⁸⁹ Taylor v. Laird (1856), 25 L.J.Ex. 329, 156 E.R. 1203; The Isle Royale Mining Co. v. Hertin, 37 Mich. 332 (1877), in Keener's *Casebook*, II, p. 319. For further references, P. Gallo, Ch. VII.

⁹⁰ Bright v. Boyd (1841) 1 Story 478, in Keener's *Casebook*, II, 319; Greenwood v. Bennett (1973) 1 Q.B. 195; Tort (Interference with Good) Act, 1977, S. 6,1; Goff and Jones, p. 145.

⁹¹ Goff and Jones, p. 144.

⁹² § 924 BGB; art. 1150 Codice Civile.

⁹³ Douai, 11 august 1877, S. 78, 2, 150; Trib. Paix Paris, 9e arr., 29 january 1937, D.H. 1938, Somm. 5; GORE', *L'enrichissement aux dépens d'autrui* 239 (1949).

⁹⁴ Art. 37 décret loi 30 september 1953 an *baux commerciaux*. Gore and Saujot, "Enrichissement sans cause," in, *Enc. Dalloz* (2nd ed. 1987).

⁹⁵ Com. 8 june 1968, Bull. civ., IV, n. 180; Req. 27 july 1852, D.P., 52, 1, 225; Cass., Naples, 27 july 1923, in, *Foro Italiano* I, 1072 (1923).

⁹⁶ Dawson, "The Self-Serving Intermeddler," 87 *Harv.L.R.* 1409 (1974).

⁹⁷ Trimarchi, p. 21; P.Gallo, Ch. VII, § 6.

⁹⁸ *Affaire Boudier*, Req. 15 june 1892, D.P. 92, 1, 596. König, *Der Bereicherungsanspruch gegen den Drittempfänger einer Vertragsleistung nach französischem Recht* (Frankfurt, Berlin 1967).

⁹⁹ Req. 15 june 1892, D.P. 92, 1, 596.

¹⁰⁰ P. Gallo, Ch. VIII, § 2.

¹⁰¹ P. Gallo, Ch. VIII, § 2.

¹⁰² Req. 15 june 1892, D.P. 92, 1, 596.

¹⁰³ Esmein, "note," S. 1941, 1, 121.

¹⁰⁴ Civ., 28 february 1939, D.P. 1940, 1, 5, with an annotation of Ripert.

¹⁰⁵ Pau, 19 january 1852, D.P. 52, 2, 198; Montpellier, 5 february, 1969, D.P. 69, 2, 214.

¹⁰⁶ Mosoiu, *De l'enrichissement injuste, étude de droit comparé* 199 (Paris 1932).

¹⁰⁷ Cass. Tourin, 1st january 1919, in *Rivista Diritto Commerciale*, 1919, II, 209 annotated by Brugi; Cass. Rome, 1st march 1890, in *Foro Italiano*, 1890, I, 281; Cass., Rome, 21 december 1889, in *Legge* 1890, I, 692.

¹⁰⁸ Appello Palermo, 31 july 1896, in *Giurisprudenza Italiana* 1896, I, 659; Cass. Tourin, 8 february 1883, in *Giurisprudenza Torinese* 336 (1883).

¹⁰⁹ Cass., 17 march 1947, n. 391; Cass., 20 october 1962, n. 3057; Cass., 17 may 1962, n. 1111; Tribunale Florence, 13 May 1963; Tribunale Milan 14 luglio 1972: all these materials can be found in Frattarolo, *L'azione di arricchimento nella giurisprudenza* 197 (Padua 1974). Cass. 30 december 1962, n. 2985, in *Giustizia Civile* 1965, I, 478.

¹¹⁰ Cass., Sez. Un., 2 february 1963, n. 183, in *Giustizia civile*, 1963, I, 259; Tribunale Naples, 14 june 1982, in *Giustizia civile*, 1983, I, 285; Cass., 4 may 1978, n. 2087; Cass., 16 december 1981, n. 6664.

¹¹¹ Tribunale of Naples, 14 june 1982, in *Giustizia civile* 1983, I, 285.

¹¹² P. Gallo, Ch. VIII, § 4.

¹¹³ For further references, P. Gallo, Ch. VIII, § 4.

¹¹⁴ P. Gallo, Ch. VIII, § 2.

¹¹⁵ Edson v. Poppe, 24 S.D. 466, 124 N.W. 441 (1910); Fraser Lumber & MFG. Co. v. Laeyendecker, 243 Wis. 25, 9 N.W. 2d 97(1943).

¹¹⁶ Dawson, "The Self-Serving Intermeddler", *Harv. L.R.* 1450 (1974).

¹¹⁷ Bush v. Kramer, 185 Neb. 1, 173 N.W. 2d 367 (1969); De Gasperi v. Valicenti, 198 Pa. Super. 455, 181 A. 2d 862 (1962); Midland Diesel Service & Engine Company v. Sivertson, Supr. Court N. Dakota, 1981, 307 N.W. 2d 555.

¹¹⁸ Paschall's Inc. v. Dozier, 219 Tenn. 45, 407 S.W. 2d 150 (1966).

¹¹⁹ Seagers v. Sprague, 70 Wis. 2d 997, 236 N.W. 2d 277 (1975).

¹²⁰ Beacon Homes, Inc. v. Holt, S.C. of N.C., 266 N.C. 467, 146 S.E. 2d 434 (1966).

¹²¹ § 6.

¹²² P. Gallo, Ch. VIII, § 3.

¹²³ P. Gallo, Ch. VIII, § 3.

¹²⁴ P. Gallo, Ch. VIII, § 4.

¹²⁵ § 2.

¹²⁶ Req. 15 june 1892, D.P. 92, 1, 596.

¹²⁷ § 2.

¹²⁸ § 6.

¹²⁹ § 6.

¹³⁰ § 678 BGB; art., 2031 C.C.; Scialoja, "Della negotiorum gestio prohibente domino," in *Foro Italiano* 1889, I, 941; Scalfi, *Gestione d'affari altrui proibita dall'interessato*, *Giur. It.*, 1970, I, 2, c. 963. Req. 27 July 1852, D.P. 52,1, 225; Trib. civ., Seine, 19 June 1906, D.P. 1906, 5, 71. Also in common law countries it is not admitted restitution for services performed against the express will of the benefited: "in spite of their teeth," Lord Mansfield in *Stokes v. Lewis* (1895) 1 T.R. 20, 99 E.R. 949, 950.

¹³¹ P. Gallo, Ch. VII, IX.

¹³² Bowen L.J., in *Falcke v. Scottish Imperial Ins. Co.*, (1886) 34 Ch. D. 234, 248.

¹³³ Goff and Jones, p. 332.

¹³⁴ (1799) 8 T.R. 308.

¹³⁵ P. Gallo, Ch. IX, § 3.

¹³⁶ *Macclesfield Corporation v. Great Central Railway* (1911) 2 K.B. 528.

¹³⁷ *Prager v. Blatspel Stamp and Heacock Ltd.*, (1924) 1 K.B. 566; *Nicholson v. Chapman* (1793) 2 H.Bl. 254; *Binstead v. Buck* (1773) 2 Wm. Bl. 1117.

¹³⁸ *China Pacific S.A. v. Food Corporation of India (The Winson)* (1892) A.C. 939; Goff and Jones, p. 20; P. Gallo, Ch. IX.

¹³⁹ *Wilder Grain Co. v. Felker*, Mass., 5 N.E. 2d 207; *Berry v. Barbour*, Okl., 279 P.2d 335.

¹⁴⁰ Stoljar, "Negotiorum Gestio," in, *Int. Enc. Comp. L.* 4 (Tübingen 1984).

¹⁴¹ § 1.

¹⁴² For further references: Goff and Jones, p. 144; P. Gallo, Ch. VII, § 2.

¹⁴³ P. Gallo, Ch. VII, § 7.

¹⁴⁴ Special mention deserve in particular the studies of Dawson (USA), and von Caemmerer (RFA). For further references P. Gallo, *L'arricchimento senza causa* (Padua 1990) Ch.I, § 1.

Referring Principles:

IX.1 - Basic rule