The province of the doctrine of Unjustifed Enrichment in Continental Law

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ANYONE who attempts to speak on Unjustified Enrichment in these dynamic days is instantly haunted by the reflection that he is somehow embarking on a discussion of some new-fangled political creed. Certainly the familiar French axiom *nul ne doit s'enrichir injustement aux depens d'autrui* sounds attractive enough to be mistaken for a slogan, while its implications appear at first blush to be no less pregnant with political meaning. No one, it is said, must enrich himself unjustly at his neighbour's expense : and is not this a palatable way of saying that no one is permitted to acquire riches or to retain them? Beyond doubt, it is true to say that in an economic system where the means of production are State-owned and State-controlled, the acquisitive propensities of the individual are restricted to the wages he is capable of earning from the State, and nothing more besides. Accordingly, if a purely collectivist society is contemplated, it becomes fundamental to hold that to enrich one's self is necessarily to do so at the expense of one's neighbour; and further, if by injustice is meant "social injustice", as the French school of social solidarity would have the early twentieth centry jurists believe, then it soon begins to look obvious that any variety of enrichment is unconscionable.

But so much for what is ,at best, robot jurisprudence, and at worst, fanciful speculation. The fact of the matter is that Unjustifiable Enrichment has been accepted as a rule of law in countries with a political and economic outlook as widely different as that of the United States and Soviet Russia. What is more, the doctrine is formulated in almost identical terms in both countries. Thus Sec. I of the American Restatement on Restitution, published in 1937, says : "A person who has been unjustly enriched at the expense of another is required to make restitution to the other", while Art. 399 of the Soviet Civil Code of 1923 lays it down : "Alui qui s'est enrichi aux dépens d'autrui sans cause suffisamment fondée sur la loi ou un contrat est tenu de restituer ce qu'il a reçu indûment". This legal affinity is remarkable, and alone should go far to rid the principle of any alleged flirtation with current political ideologies.

Elsewhere on the Continent the principle has been gathered up and embodied in Art. 812 of the Grman Civil Code of 1900, Art. 62 of the Swiss Federal Code of Obligation of 1911, Art.s 1041-1043 of the Austrian Civil Code of 1811, Art. 2041 of the Italian Civil Code of 1942, Art. 904 of the Greek Civil Code of 1946 ,Art. 123 of the Polish Code of Obligations of 1934, Art. 1750 of the Hungarian Draft Civil Code of 1928, and Art. 73 of the Franco-Italian Draft Code of Obligations of 1927. A fair specimen is afforded by Art. 123 of the Polish Code of Obligations : "A person who has unjustly derived a benefit from the property of another is required to restore the benefit so obtained, or if that is no longer possible, to refund its value". Or again, let us take Art. 904 of the Greek Civil Code : "A person who has been enriched at the expense of another without legal ground is required to make restitution. In particular, this obligation exists where money has been paid over when it was not due or where it has been paid over for a lawful purpose which has failed of accomplishment, or has remained outstanding or has become unlawful or immoral".

In France. Belgium, Spain, Portugal, and Rumania, the prohibition against Unjustified Enrichment is not incorporated into a single text of law, but it is recognised in a number of Articles scattered throughout the length and breadth of the Civil Codes of these countries. Thus, for example, where money is paid without the payment being due, that money can be recovered back. A person devoid of capacity may avoid a contract into which he has entered, but he must restore any benefit which he has received under the contract. The owner must compensate a person who is in *bona fide* possession of immovable property for any expense necessarily incurred in connection with the preservation of the property or for any improvement which has increased its value. Even outside these special cases, however, the doctrine has long ago been established as a broad doctrine and a separate source of obligation by French, Belgian, Spanish, Portuguese, and Rumanian judges and textbook-writers.

On the other hand, there is no general theory of Unjustifiable Enrichment in Dutch Law. The reason is that when Dutch Law was codfied in the beginning of the 19th century, it was expressly provided that there could be no room for Private Law other than that laid down in statutes. Now the principles of Dutch Private Law are contained in the *Burgerlijk Wetboek* (Civil

Code) and the *Wetboek van Koophandel* (Code of Law Merchant), and neither of them makes any mention of Unjustified Enrichment. Consequently, an action grounded on the broad rule that no person must benefit himself unjustly at the next man's expense is inadmissible in modern Dutch Law, although of course relief can be obtained if the case happens to come under one of the numerous special applications of the principle included in the Civil Code.

Again, none of the Scandinavian countries has a wide all-embracing principle of Unjustified Enrichment. What they do have at the moment is a tidy row of pigeon-holes each containing a labelled head of Unjustified Enrichment (Vide Knopl, Björling, Much-Petersen, and Ussing). In theory, this means that if a plaintiff cannot fit his claim into one of the recognised heads of liability, he has no legal grievance. But it is almost certain that in practice the position is not as iron-bound as all that. For one thing, Law in these northern countries is a very malleable affair. It is, in the main, customary law created by the practice of the judges and the critical opinions of legal commentators, who are both in some sense regarded as the interpreters of the living spirit of the people—"*der Volksgeist*"; and the salient point is that neither judge nor jurist is bound to follow precedents or to adhere to previous doctrine. Secondly, the tendency in Scandinavia is for equity to become identified with law. This no doubt derives from the pre-eminent position occupied by custom, for it is evident that what the majority of the community considers just and equitable will sooner or later receive the imprint of legal recognition. In the result, therefore, there is, one would think, very little likelihood of genuine cases of Unjustified Enrichment being unrestored.

This prefaced, I propose to attempt a discussion of the problem along comparative lines. This method of approach will involve, in the first place and by way of general background, a brief exploration of the position under the Roman system. The next step will be to take account of the historical antecedents on the Continent, and more particularly, in France and Italy, and thereafter, to examine the operative limits and incidents—the reach and function—of the resulting modern rules in their proper setting.

I propose also to refer incidentally to American law, which should prove especially interesting in this connection, if only for

the curious fact that a system sprung from the same roots English law and with a similar technical structure, should h developed a general rule very similar to that prevailing on Continent.

English law, on the other hand, I do not propose to co der—for two reasons. In the first place, I am naturally desir of reducing this lecture to reasonable dimensions. And second I should doubt my own ability to render the English law on subject in legal terms which are at once intelligible to the M tese lawyer unacquainted with English Law and its history faithful to the spirit and tenor of the original.

ROMAN ORIGIN OF THE DOCTRINE

We begin then, as is proper in any discussion on the pe gree of a legal concept in Continental countries, with Rom Law.

That the principle was not unknown to the Romans, it certain; in fact, the Roman Law provided various remedies bringing to book anyone who sought to enrich himself unjus at another's expense. The Praetor could, for example, by vir of his *imperium*, place a party in the position he occupied bef a particular event took place, if an inquiry into the circumst ces of the case showed that it would be inequitable to allow m ters to take their course. This reinstatement, or *restitutio integrum*, as it was called, was normally granted *ob aetatem*, *absentiam*, *ob errorem*, *ob metum*, *ob dolum*, and *ob capitis minutionem*, and stemmed directly from the Praetor's anxi to do what was just and equitable. Equitable considerations, t played an important part in the formulation by the Praetor of t various *actiones in factum*, and the *actiones fictitiae et util* But the real roots of the doctrine of Unjustified Enrichment found embedded in the *condictio* and *the actio de in rem verso*

The historical evolution of the *condictio* makes an intrigui study, but is difficult to delineate with finality. Ulpian tells that, according to Sabinus, the *veteres* already had an action gu ranteeing the restitution of anything acquired *ex iniusta caus perpetuo Sabinus probavit veterum opinionem exsistimantium quod ex iniusta causa apud aliquem sit, posse condici, in q sententia etiam Celsus sit* (D. 12.5.6). On this authority, Gira has been quick to argue that there existed in Roman Law a wi general principle of unjust enrichment and that it was very a

cient. With more reason, Sobbé-Duval and Buckland have pointed out that these *veteres* need not have been very ancient and that, in any case, the passage merely referred to the particular cases for which the *condictio ob turpem causam* was the sanction.

At all events, it is probably true to say that at that period relief could only be obtained by the injured party through the complicated remedies of *sacramentum* and *judicis postulatio*. The *condictio* came later (probably towards the end of the 3rd century, B.C.) and, according to Gaius, caused no little speculation : *quare autem haec actio desiderata sit, cum de eo quo nobis dari oportet, potuerimus aut sacramento aut judicis postulatione agere, valde quaeritur* (Gaius, 4, 20).

In Classical Law, the *condictio* was a *stricti juris, in personam* action, so flexible that it could be used both as a contractual and an extra-contractual remedy. In the contractual field, it might be brought against the debtor *ex mutuo* for the recovery of a certain sum of money (*condictio certae pecuniae*) or some other certain thing (*condictio triticaria* or *certae rei*). The literal contracts relied on the *condictio* for the recovery of *certa pecunia*, while the verbal contracts could give rise to the action when they had as their object either a sum of money or some other certain thing. Outside of contract, the *condictio* was the remedy available to the impoverished party against any person who had enriched himself unjustly at the former's expense.

Gradually, however, the development of the *condictio* became marked by an attempt on the part of the jurists to extricate it so far as possible from the root idea of contract. The old *condictio* was parcelled out into a number of *conditiones*, each having its own peculiar features; and so there emerged the *condictio furtiva*, the *condictio indebiti*, and the *condictio ob rem* (*causam*) *dati*. On the whole, the result was to restrict the range and scope of the *condictio*.

Justinian established a new classification and modified to some extent the traditional terminology. He was particularly concerned with the *condictiones* which sanctioned cases of wrongful enrichment. The chief cases were the following. First, the *condictio indebiti* which was for the recovery of a sum not due and paid by mistake. Then, the *condictio causa data causa non secuta* for the recovery of anything surrendered to another in consideration of an advantage which had not materialized. In *condictio ob turpem* and *condictio ob injustam causam*, the prin-

ciple in either case was that where money was received for a immoral or illegal purpose, or by illegal or immoral means, th law imposed a duty of compensation upon the person receivin the benefit. Finally, there was the *condictio sine causa* whic covered a group of cases of unjustified enrichment which di not come under any of the foregoing heads. It is important t note, however, that the action did not apply indiscriminately t all those cases outside the ambit of the other *condictiones*.

Alongside these *condictiones*, Roman Law had a large num ber of relatively unimportant actions through which a perso could, in certain specified cases recover an unjust benefit. Onl one need detain us. This is the *actio de peculio et de in rem vers* which has achieved perpetuation by the merest juristic freak. I France, the traditional name for the broad general action agains Unjustified Enrichment is *actio de in rem verso*; and the term found convenient, has been retained. Its employment in curren legal language, however, is misleading for there is only a remot connection between the modern French action and the Roma one.

The Roman action was essentially narrower in scope. It wa the action brought against a *pater familias* by the creditors of hi *filius familias* or slave where the latter had acted without expres or implied authority. The liability of the *pater familias* was limit ed to the amount of the *peculium* unless it could be shown by the plaintiff that the *pater familias* had himself derived an advantage from the contract, in which case his liability would be co-extensive with the benefit gained. The amount by which the *pate familias* had profited was spoken of as having been *in rem versum*. Again, the old action "de in rem verso" never enjoyed a separate existence, but was just one head of a two-pronged condemnation contained in the *actio de peculio et de in rem verso*. In other words, there was just one action with two condemnations, the judge having the power to condemn either in the amount by which the master had profited or in the amount of the *peculium* : *licet enim una est actio qua de peculio deque eo quod in rem domini versum sit agitur, tamen duas habet condemnationes*. (Jus. IV, 7, 4).

Finally, the Roman action was an action *adjectitiae qualitatis*, that is to say, one of those actions that sought to remedy the unfairness of the rule that while all rights acquired under a contract by a subordinate member of the family, son or slave,

vested in the *pater familias*, the corresponding liabilities incurred were none of his affair. Consequently, the action does not find its justification in any principle of natural justice—despite the fact that it would have been inequitable to allow the *pater familias* to enrich himself at the expense of a third party—but rather in the realm of practical politics, it being in the interest of the *pater familias* to safeguard his credit vis-à-vis third parties.

It will be apparent, therefore, that no broad general principle that unjust enrichment must be refunded existed in Roman Law, but only a rather haphazard list of cases in which recovery was possible under certain conditions. It was not every enrichment at another's expense that called for restitution; it was important that there should exist special circumstances rendering the enrichment an unjust enrichment: *constat id demum posse condici alicui quod vel non ex iusta causa ad eum pervenit, vel redit ad non iustam causam* (D. 12. 7. 1. 3). Thus, although the purpose of each separate action is that of preventing an unjustified enrichment from going unrestored, the fact is that, in the words of Pacchioni, "ciascuna ha un fondamento e un oggetto suo proprio". And there were of course cases where a person could not obtain restitution from another who had been enriched at his expense; we know, for instance, that the *bona fide* possessor could not recoup the expenses made on another's property directly, however much he might be entitled to exercise a right of retention, the *jus retinendi*.

Pomponius' celebrated dictum *jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletatiorem*, purporting to enunciate a general principle, can be explained by the simple expedient of relating it to its context, the chapter in Digest XII on *condictio indebiti*, and is to-day no more than an interesting museum piece. The Romans were an intensely practical people, little addicted to theoretical generalisations. Singularly empirical in outlook, they were much more interested in in arriving at an equitable solution of the individual case than in fashioning general rules and principles. Moreover, it is hardly to be supposed that in Roman times social relations were sufficiently involved as to give rise to an appreciably large number of cases of unjust enrichment. It is only in a highly complex social milien, with its varied play of circumstances, that instances of unjustified financial disparity are found to be at all numerous.

Summing up the Roman position, therefore, we may say this. The Romans never evolved a coherent theory of Unjustified Enrichment; the various *condictiones*, and in particular the *condictio sine causa*, covered part of the ground, but they did not go far enough. On the other hand, it is almost certain that having regard to the relatively straightforward character of everyday transactions in Roman times, the need for such a wide principle was never very pressing.

HISTORICAL ANTECEDENTS IN FRANCE AND ITALY

Turning to consider the historical antecedents of the doctrine on the Continent we find that little headway towards the establishment of a general theory of Unjustified Enrichment was made in the old French law. A careful study of the old French authorities reveals nothing more than infrequent and rather vague allusions to the French version of the old Roman principle : *nul ne doit s'enrichir injustement aux dépens d'autrui*. They were content to speak of it as a rule of natural equity which could somehow always be relied upon to do justice between the parties when the testing time arrived.

In Beaumanoir's *Coutume de Beauvoisis*, for instance, the principle of Unjust Enrichment is, without further explanation given as the basis for the rule that anyone who in good faith has put up houses upon the land of another is entitled to recoupment. Likewise, we find it stated in the *Grand Coutumier de France* : "Vous savez que le droit veult, et aussi raison et bonne foy s'y accordent, que nul oultre raison et sans cause ne tiengne à autru chastel". And again Boutellier, in his Somme Rural ,cites the maxim *locupletari non debet quis ex alterius jactura* as a "regle de droict'".

Dornat, though merely reproducing the Roman system of *condictiones* in his *Lois Civiles*, was the first writer to give prominence to the idea of unjust benefit, and one passage from his book is well worth quoting : "A person who finds himself in possession of another's thing without a just cause must restore it, as also must a person to whom a thing has been handed over on a legal ground which subsequently disappears or subject to a condition which has not verified itself, since he has no longer any ground for retaining it". Pothier, too, was alive to the importance of the principle, but his reflections on the subject took a wrong turning with the result that unjust benefit became firmly

identified in his mind with *negotiorum gestio*. Pothier realized that cases might arise in practice in which the pre-requisites of *negotiorum gestio* were lacking. It was obvious, for example, that if A had done something for B's benefit, but contrary to the express behest of B, A could not exercise the *actio negotiorum gestorum contraria*. What was the position in these circumstances? Pothier had no difficulty in ruling that A had an action for the reimbursement of the amount which had turned to B's profit; it was a case of abnormal *negotiorum gestio* grounded upon natural justice.

This theory is inviting in its simplicity, but it cannot bear close inspection. It is confronted with two unanswerable objections. In the first place, "abnormal negotiorum gestio" is not a precise juridical notion; and this is patently true. Secondly, the elements that go in the make-up of the two actions are vastly different. Thus *negotiorum gestio* is only operative within a restricted field; its essence is a spontaneous interference for another's advantage in urgent cases. In addition, unlike the *gestor* who, *inter alia*, is bound to render an account of his management, the impoverished party in cases of undue enrichment is never under any form of obligation to the person enriched. Furthermore, the person who has been enriched at another's expense is only liable up to the amount of the profit obtained, while the *maître* must reimburse the *gérant* for all useful or necessary expenses; the *gérant*, too, has the advantage over the impoverished party in that he is not required to prove that the benefit still exists at the date of the action. Finally, Unjustified Enrichment lacks the intention on the part of the *gestor* to manage the affairs of the principal, which is one of the very vital traits of *negotiorum gestio*.

The year 1804 heralded the promulgation of the Code of Napoleéon, and with it the dawn of a new era in the legal world. But there was still no sign of any general theory of Unjustifiable Enrichment. Far from formulating such a theory, the new Code did not so much as state the principle underlying it. All it contained were several special Articles spread throughout its length and breadth providing relief in odd cases of unjust enrichment. The immediate result was that the French courts, faced with the question whether or not they should argue the existence of an embracing principle of unjust enrichment, answered it in the negative. Thus in 1850 where a partner brough an action against

the partnership for the amount of the profit realized by the partnership out of the sale of certain goods originally purchased by him in his own name, the *Cour de Cassation* dismissed the claim.

During the latter part of the 19th century, however, the attitude of the Courts changed. Influenced not a little by the vast legal literature of the time, the judges were busy producing a "second edition" of the *negotiorum gestio*—revised and enlarged. The intention of the *dominus*, the *contemplatio domine*, was henceforth to be a merely casual element in its make-up. It was enough if the service performed by the *gestor* turned out to be at once beneficial to the *dominus* and detrimental to himself. In short, *negotiorum gestio* came to be looked upon as a strictly objective conception. And of course, the whole object of this judicial prostitution of *negotiorum gestio* was to widen the ambit of the action brought under *negotiorum gestio* so as to include the ever-increasing number of cases of unjust enrichment which came up before the courts and which were not provided for by special provisions of the Code Civil.

This state of things lasted until the opening years of the last decade of the 19th century. At about this period a small group of writers, led by Aubry et Rau and the *arrêtiste* Labbé, began to condemn this unseemly liaison with *gestion d'affaires* and to press for the recognition of unjust enrichment as an independent source of obligation. In 1892 their efforts met with success; in that year a famous decision of the *Chambres des Requêtes* established unjust enrichment as a separate right of action and released it from the shackles of *gestion d'affaires* in no uncertain manner. The judgment ran : "Seeing that this action is derived from the principle of equity which forbids a man to enrich himself at the expense of another, and that it has not been regulated by any text of our law, its exercise is not subject to any fixed conditions : it is sufficient to make the action competent that the plaintiff alleges, and offers to prove, the existence of a benefit which he has by a sacrifice or a personal act procured for the defendant".

It will be at once apparent that in its alacrity to do the right thing the *Cour de Cassation* went to the opposite extreme. It laid down the principle in far wider terms than its most fervent adherents had dared to hope. As the rule was actually stated, the mere fact of the plaintiff showing that his personal act or sacrifice had proved useful to the defendant was enough to sustain

the action. So applied, the rule would create utter confusion for, as Amos and Walton have pointed out, "every judge would be free to decide cases in accordance with his own ideas of equity". But although the danger inherent in this situation was apprehended, it was not until 1914 that the *Cour de Cassation* took it upon itself to formulate a comprehensive theory of wrongful enrichment with all the necessary qualifications and restrictions. The Court now reproduced the exact wording of the fourth edition of Aubry et Rau's commentary: "The action *de in rem verso* based on the principle of equity which forbids one man to enrich himself at the expense of another is to be admitted in all those cases in which the estate of one person being enriched without lawful cause at the expense of another person, the latter in order to obtain what is due to him does not enjoy the benefit of any action based upon contract, quasi-contract, delict or quasi-delict".

And so at the present time the veteran rule *nul ne doit s'enrichir injustement aux dépens d'autrui* is as much a part of French Law as any of the Articles of the Code Civil. Though theoretically always open to challenge, no lawyer who valued his reputation would question its existence at this time of day. Indeed, if the Code were to be revised to-morrow, that principle would beyond doubt figure among the new additions. Proof of this is Art. 73 of the Franco-Italian draft Code of Obligations published in 1937. It runs: "Chi si arricchisce senza causa a danno di un'altra persona è tenuto, nei limiti del proprio arricchimento, ad indennizzarla di ciò di cui si è impoverita".

Elsewhere on the Continent, too, the rule against unjust enrichment had a chequered history. This was particularly true of Italy where, throughout the last quarter of the 19th century, the various provincial courts kept contradicting themseves, and one another, with humdrum regularity. As in France, the absence in the Italian Code of a general provision against unjustified enrichment was materially the source of this unedifying confusion of thought.

Four main phases—all short-lived—may perhaps be detected amid this welter of opinion. In the first of these, the courts either denied the existence of the *actio de in rem verso* altogether or only admitted its application within a restricted field. Thus in May 1833, the Turin Court of Cassation doubted the existence of the action, while in July of the same year the corresponding

court in Florence acknowledged the action but limited its operation to cases where obligations were entered into by persons incapable of so doing. However, a new phase opened in 1890. In March of that year the Turin Appeal Court categorically laid it down that the action was to afford relief in all cases of unjust enrichment where the plaintiff had no other remedy. And this view seemed to predominate until 1895, when a reaction set in Two judgments delivered in 1895, one by the Turin Court of Cassation and the other by the Florence Court of Cassation, contain certain passages which unfortunately leave no room for doubt that the Judges were once more denying the existence of the action. But the curious feature was that the Turin and Florence Courts were now found pulling in the same direction, though which direction that was was a matter of arbitrary caprice. In all truth, there can be no other explanation for the remarkable *volte face* accomplished by both Courts within two years. Here is what the Turin Court said in 1897 : "l'obbligazione corrispondente all'azione di versione utile, non dipende da vincoli contrattuali o quasi-contrattuali, ma unicamente e direttamente dalla legge che non permette l'indebito arricchimento a danno altrui". And so the century closed with the bold assertion that the law then afforded a comprehensive remedy against unjustified enrichment.

The twentieth century brought no relapse into the old aggravating habit of the judges of blowing hot and cold every few years. Rather the principle proceeded to take firm root in the minds of Bench and Bar alike. It operated against a man and his wife who had derived an advantage from the grant of a gift subsequently declared void owing to defect of form. It could compel the father of an illegitimate child to pay a third party any expenses incurred by him in maintaining the time until such time as its paternity had been legally established. It did not permit a wife to benefit by any improvements made by the husband on property forming part of her marriage settlement; and it mattered not if the two spouses were already legally separated. It intervened to prevent the joint-owner of a publishing firm from making use of the firm's machinery in the publication of a new periodical on his own account.

These are a few random examples, but enough to demonstrate that the *actio de in rem verso had come* to stay as far as the Italian Courts were concerned. On the other hand, the battle among

the text-writers outside still raged with undiminished vigour. The field was a formidable one. On the side of the new action were ranged some of the keenest legal brains in the country, and in particular, Chironi, Pacchioni, Riccobono, De Ruggiero, Marioni, Scuto, Castion, Graziani, and Giorgi. Opposing the action were a team of jurists which, if slightly less illustrious than their rivals, were certainly no less opinionated, and among others, Scialoja, Bruno, Gabba, Buonamici, Palazzo, Nattini, Ascoli, Rotondi, and Ricca-Barberis. Even as late as 1924, in an article in the *Rivista del diritto commerciale*, Rotondi could roundly say: "It is certain that the action is far from being that panacea which certain judicial pronouncements and the fanfares of some of its adherents would lead one to believe".

Howver that may be, the former opinion prevailed at the Franco-Italian Conference on the Law of Obligations in 1927, though the controversy was not finally settled until the advent of the new Italian Civil Code of 1942. For the first time the Code now incorporates a new head under the title: "Dell'arricchimento senza causa", and Art. 2041 states: "Chi, senza giusta causa, s'è arricchito a danno di un'altra persona, è tenuto, nei limiti dell'arricchimento, a indennizzare quest'ultima della correlativa diminuzione patrimoniale".

THE DOCTRINE IN THE MODERN CIVIL LAW

Having traced the general history of the doctrine, it now lies upon us to determine the province of the doctrine in the modern Civil Law and to mark off its contours with some precision. Far from being the magic panacea it is sometimes taken for, there are on the contrary certain very exact conditions which must be satisfied before the doctrine can be brought into play and an action-at-law accrue on this score. They are:—

(1) An enrichment derived by the defendant.
(2) An impoverishment sustained by the plaintiff.
(3) A causal nexus between the enrichment of the one and the impoverishment of the other.
(4) Th enrichment of the defendant must be "*sine causa*".
(5) The absence of any other remedy at the disposal of the plaintiff.

We must consider these in detail.

for instance, if A, who is travelling on the Calais to Paris train with a Calais-Amiens ticket in his pocket, becomes so intrigued with a fellow-passenger's frock that he misses his Amiens stop and goes on to Paris, the Railway Company cannot bring an action *de in rem verso* against him for the fare from Amiens to Paris, because the loss sustained by the Company has not in fact resulted in a corresponding benefit to A.

So much is simple, but beyond this lies the question, what is meant by enrichment? This is the real core of the problem and, as may be expected, a wide divergence of opinion exists on the point. On one view, enrichment comprises any type of benefit, be it economic, intellectual or moral. In the illustration given, this means that the Railway Company would be able to recover the additional fare on the ground that the contemplative traveller must be presumed to have derived a certain amount of moral gratification from his meditations on the floral luxuriance of the frock on the Amiens-Paris lap. Now it will be observed at once that any such sweeping interpretation of enrichment tends to stultify the whole concept. Yet thus, or something perilously near it, appears to be the system adopted in the United States. According to Woodward, who as far back as 1913 had suggested that the word "benefit" should be substituted for "enrichment" in this context, the plaintiff is not required to point to an actual increase in the defendant's estate; it is enough if he can show that the defendant has received something desired by him or something advantageous to him. And the authors of the American Restatement on Restitution (1937) seem to confirm this view. "A person confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word "benefit", therefore, denotes any form of advantage. The advantage for which a person ordinarily must pay is pecuniary advantage; it is not, however, necessarily, so limited, as where a physician attends an insensible person who is saved subsequent pain or who receives thereby a greater chance of living"' (American Restatement, p. 12).

However that may be, American law is not alone in its preference for an elastic definition of enrichment. In Austrian law, too, enrichment has a very wide connotation. In fact, the actual word used is "profit", and it is common ground in the Courts as well as in the lecture-rooms that "profit" may be either a "profit patrimonial", an actual increase of the defendant's estate by

money or money's worth, or a "profit personnel", that is to say, an enrichment of the defendant which, although it cannot itself be expressed in terms of money, is yet capable of being measured by reference to the corresponding prejudice sustained by the plaintiff. The notion underlying "profit personnel" is a subtle one, and it is perhaps best to take a concrete case. B accepted A's invitation to stay at his house. While he was there, he somehow contracted small pox and A incurred a certain amount of expense in disinfecting the room and the furniture. Now it is clear that B did not obtain the pecuniary advantage from this precautionary measure. Nevertheless, it was held by the Austrian Supreme Court that he had derived a "profit personnel" corresponding to, and within the measure of, the expenditure laid out by the plaintiff.

It will be realized at once that, so stretched, the notion of enrichment is liable to wear thin under the strain. Accordingly, it is not surprising to find that the Austrian view has, on the whole, found scant support in other Continental countries. Both German and Swiss law have rejected the conception of "profit personnel" outright, while French law, if it can be said to have accepted it at all, has only done so with considerable reservations.

On the one hand, in Germany as in Switzerland, enrichment means an advantage acquired by the defendant which is of an economic or patrimonial character. Thus the *Reichsgericht* has held that "a benefit having no real economic value — the mere fact of procuring some purely moral satisfaction—will not ground an action for restitution unless such moral satisfaction has also had its effect upon the recipient's estate in the shape of a saving of some necessary expense". So, also, the Swiss Federal Court, only more succinctly: "la notion d'enrichissement est avant tout, économique". It must be noted, however, that a certain suppleness has been imparted to this restricted conception of enrichment by a rather wide interpretation of what constitutes economic advantage. A striking illustration is afforded by the following case. A wished to run a coffee-house in a town where the law was that there was to be no two coffee-houses in the same street. As there was already one coffee-house where his immovable was situated, he promised B, the coffee-house proprietor, that if B gave up his licence he, A, would purchase the whole place from him. B agreed and gave up his licence. A then obtained a new licence and rapidly abandoned the idea of buying

the place. It was held by the *Reichsgericht* that A had been u justifiably enriched, since B's act in giving up the old licence h held out to A the prospect of obtaining the new one.

Opinion in France, on the other hand, seems to have wav ed between two alternatives. Originally, it was believed th every enrichment, in addition to bearing an economic charact had to emanate from an actual transmission of value from t plaintiff to the defendant. It soon became apparent, howev that the very narrowness of the formula was apt to work inj tice in deserving cases. As a result, the law has now settled do to the view that any advantage the value of which can be esti ated in money is an actionable enrichment. The keynote here appraised in terms of cash; for the rest, enrichment comprehen in the words of Planiol, Ripert, et Esmain, "toute satisfacti pécuniaire, physique ou sentimentale, qu'elle soit ou non de n ture patrimoniale".

It remains to add that where the defendant has suffered loss at the same time as he has reaped an advantage, the rule all Continental legal systems is that the enrichment is here p presented by the subtraction of the quantum of the loss from t quantum of the advantage.

§2 IMPOVERISHMENT

The second requirement is that the plaintiff must have be impoverished, so that where no impoverishment is manifest, action is sustainable. What is frowned upon by equity is not much the fact that one person has been enriched as the fact th he has been enriched at someone else's expense. Thus, for exa ple, an engineer who hits upon an invention while doing wo for an employer, cannot maintain an action for the equivalent the enrichment thereby accruing to the latter, for the simple re son that he has not himself been impoverished in any way.

But even in those cases where a *prima facie* detriment e ists, it must still be determined whether the detriment suffered an impoverishment in the accepted legal sense. Speaking ger rally, the legal notion of impoverishment is the obverse of that enrichment. This is so in German and Swiss law, where it is i perative that the impoverishemnt, like the enrichment, should patrimonial in character, though here again a very large int pretation is put on patrimonial impoverishment. In Austri law, on the contrary, the all too liberal concept of enrichme

does not find its analogue in a like concept of impoverishment. One searches in vain for a doctrine of "prejudice personnel"; and in fact, all the reported Austrian decisions appear to insist that no prejudice sustained by the plaintiff which is not reducible to a money value will ground an action *de in rem verso*.

In French and Belgian law, it is commonly agreed that the impoverishment lends itself to the same reasonably wide interpretation attributed to enrichment. Therefore, a plaintiff is said to be impoverihed not only where he has suffered a money loss or the loss of an estate or of its enjoyment, but also where he has done work or rendered services for which payment is usual, or where he has refrained from exercising a right to which he is entitled. Thus if a female shop assistant agrees to serve without a salary in consideration of a promise on the part of her employer that he would marry her, and the latter then suddenly changes his mind, the girl is entitled to remuneration for the services which she has rendered gratuitously. Moreover ,it is not necessary that the nature or the value of the impoverishment should correspond exactly with that of the enrichment. So in the case where A renders services to B, A's impoverishment is his failure to gain by them, while B's enrichment consists in the expense which he has been spared. Similarly, A's services may possibly be worth more to B than they are worth to A himself in the open market.

On the other hand, two limiting conditions attach to impoverishment. In the first place, it is essential that the plaintiff himself, and none other, should have sustained the loss or detriment of which he complains. Thus if A's servant performs a piece of work for B, a stranger, in his spare time, the rightful plaintiff in any action for recovery is the servant and not A. Secondly, there are decisions of the Courts in support of the proposition that the impoverishment must not be attributable to the plaintiff's fault or negligence. One very recent judgment has gone further and refused to entertain the claim of a husbandman for certain works carried out by him on the land he was farming, on the ground that these had been undertaken "dans son intérêt et à ses risques et périls". It is not yet certain what construction the Courts will put upon this new formula, but it is clear that if it is interpreted too literally it would, as de la Morandière has pointed out, narraw very considerably the field of application of the whole doctrine of Unjustified Enrichment.

§3 CONNECTION BETWEEN ENRICHMENT AND IMPOVERISHMENT

A third essential of the action for Unjustified Enrichment is the existence of a causal link or nexus between the enrichment of the one party and the impovrishment of the other. It is not enough to prove that the defendant has been enriched and that the plaintiff has been impoverished; it must further appear that no enrichment would have accrued to the defendant if the plaintiff had not been impoverished. In a word, the enrichment of the defendant must proceed from the impoverishment of the plaintiff.

There is no question, then, that a causal connection is required; that is admitted on all sides. But there still remains the controversial point, what kind of causal connection? As far as Germany is concerned, the judges and text-writers give an unhesitating answer. The connection must be a direct one *eine direkte Bereicherung*), that is to say, no independent transaction should intervene between the plaintiff's loss and the recipient's gain. An example will make this clear. A bought a certain chattel from B, who employed a carrier to deliver it and paid the transport charges himself (which A later refunded). It so happened, however, that B had overpaid the carrier, so that the latter could properly be said to have been unjustly enriched. Accordingly, A sued for the overpayment. But the *Reichsgericht* would have none of it and firmly dismissed the claim. The reason for the decision was of course that the carrier's enrichment could not be said to proceed directly from A's impoverishment, B's intervention having snapped the link of causation.

If we turn to the French law, we are at once in the midst of doctrinal controversy. One school argue that the enrichment must arise directly from the impoverishment, while the opposite school insist that the acti on is also admissible where the enrichment of the defendant has been brought about indirectly and through the intervention of a third party. It would appear at first sight that the Courts favour the latter view, for there are many cases where an indirect causal link has been held sufficient to found an action *de in rem verso*. A typical case is the following: A tradesman had sold and delivered manure to a farmer on credit and the farmer had dug it into the land. The farmer became insolvent and his tenancy of the farm was determined. The seller of the manure brought an action *de in rem verso* against the landlord of the farmer and claimed the price of the manure

on the ground that the value of the soil had been increased. The landlord disputed the claim maintaining that the farmer had contracted to preserve and improve the quality of the land. The Court of Cassation, nevertheless, held that the seller was entitled to recover. Similarly, where a woman who owned a house jointly with her children contracted for certain improvements to be carried out in the house without consulting the children, it was held by the Court of Cassation that, if she later became insolvent, the contractor was entitled to bring an action against the children on the basis of Unjustified Enrichment. There are other cases, but it is extremely doubtful whether they ought to be regarded as conclusive on the point in issue. As will be seen presently, there are many decisions the other way, and it would perhaps be more consonant with modern trends to suggest that an enrichment of the defendant which results from a contract between himself and a third party is grounded on a "just cause", and is, therefore, unimpeachable.

In Austrian law, on the contrary, the action is maintainable despite the fact that the enrichment of the defendant may have been procured through the instrumentality of a third person.

§4 ABSENCE OF A "JUST CAUSE"

"Cause" is undoubtedly the crux of the problem under investigation, for it will be readily appreciated that some definite criterion is required which will enable us to determine the occasions (and they are many) in which the restitution is possible from a person who has been enriched at the cost of another. The concept is of the very essence of the obligation, and its purpose will become manifest when we consider for a moment the strange results which would follow if we ignored it. It would mean for one thing, the virtual disappearance of all commercial contracts, for the parties would soon be made aware of the sheer futility of doing business at all, if any economic advantage obtained by one of them was subsequently going to be challenged, and challenged effectively, by the other. The whole commercial way of life would be crippled and the circulation of economic wealth seriously hindered. Secondly, the principle as such would come into sharp conflict with other provisions of the law which, in given circumstances, authorized one person to retain certain benefits at the expense of another. And, of course, conflicting rules of law cannot be regarded with equanimity by any thinking lawyer, for it

is pretty evident that they tend to upset the whole balance of a legal system.

Having thus established the *raison d'être* of "cause", let us now in the first place attempt to define the notion and then proceed to dissect and examine it more closely. First, then, what is "cause"? Laying aside the conscious refinements of theory and elaborate academic jargon of Dernburg, Jung, Renard, Scuto and others, we may say quite simply that in this context "cause" signifies "l'acte juridique qui explique, qui justifie l'acquisition d'une valeur". Now obviously this is not "cause" in the sense used in the law of contract, where "cause" refers to the immediate end, as distinct from the motive, which the parties have in view. "Cause" here is a more tangible concept; it denotes an effective or operative "cause"— a *cause efficiente*, as the French would say. In practice, this means that the Courts will not extract from the defendant the benefit gained, if he is able to point to some legal ground or recognized title. What is more, and contrary to the impression created by the phrase *enricchissement sans cause*, such ground or title does not attach solely to the enrichment, but extends to the impoverishment as well. To bar restitution, it is sufficient if either the enrichment or the impoverishment is grounded on "cause"; and conversely, for the action *de in rem verso* to be entertained it is vital that both the one and the other element should be devoid of "cause". It will be understood, therefore, that "cause" falls naturally under two headings; the "cause" of the enrichment, and the "cause" of the impoverishment. The analysis which follows of this twofold aspect of the notion is substantially true of the French, Belgian, Italian, German and Swiss systems.

The enrichment is regarded as justified if it was obtained by the defendant either on the strength of some rule of law or in compliance with the terms of a contract. In regard to the first part of the proposition, there is no difficulty in perceiving that public policy will not, and cannot, permit a person to circumvent an embarrassing situation rooted in positive legality by an eventual recourse to the doctrine of Unjustified Enrichment. The following is a neat case in point. A vendor sold a piece of allotment land to several purchasers and later undertook certain repairs on it. No mention of these had been made in the deed of sale, but according to a *loi* of July 19, 1924, they were to be paid for by the vendor himself. This notwithstanding, the latter brought

an action against the purchasers alleging that they had been unjustly enriched at his expense. The Court of Rouen, however, was not impressed and speedily dismissed the claim. The rule contained in the second part of the proposition is equally well settled. It will not now be suggested that the *actio de in rem verso* can be brought to recover a benefit emanating from a contractual transaction between the parties. Accordingly, it is very seldom that a tenant will be able to recover any useful expenses incurred during the continuance of the lease, since a claim is usually inserted in the contract freely conferring their benefit on the landlord. So, too, if a policy of fire insurance gives the insurer the option either to pay the amount insured or to build new premises, and the insurer chooses the latter alternative, he will not afterwards be heard to say that the assured has been unjustly enriched thereby.

A much more difficult question, however, is this. Can the enrichment be still considered as justified where it results, not from a contract between the defendant and the plaintiff as in the foregoing cases, but from the existence of a legal relationship between the defendant and a third party? As we have already noticed when dealing with the problem of the kind of connexion required between the enrichment and the impoverishment, judicial opinion in France has not been laudably consistent on this point. According to one line of decisions ,including the famous *Arrêt Bondier* of 1892, the existence of a contract between the defendant and a third party is not a good defence to an action *de in rem verso*. The argument commonly adduced in support of this view is that the converse rule would go against the principle expressed in Art. 1165 of the Civil Code, namely, that a contract has effect only between the parties to it and can neither prejudice nor benefit third parties : *res inter alios acta, tertius neque nocere neque prodesse debet*. However, the difficulty here is more apparent than real, as Colin and Capitant have shown. "That rule", they write, "merely means that a contract can neither create a credit in favour of a third party nor impose any liability on him, but this in no way affects the principle that a contract constitutes a source of law between the parties, which third parties themselves are bound to acknowledge". This is sound legal logic, and the view now widely held by the Courts and academic writers is that some of the older decisions on this point are not good law at the present day and that an enrichment must

now be considered as justified where it proceeds from a contract between the defendant and a third party. The reports are replete with illustrative cases, but it is enough if we select one or two instances. A tenant-farmer became insolvent and quite incapable of paying the wages of a labourer who had done work for him on the farm. It was held that the latter had no remedy against the owner of the farm however much he might have benefited by the work done. Likewise, a contractor who has done work on leased premises at the bidding of the lessee cannot claim to be recouped from the landlord where the contract of lease contained a clause empowering the latter to retain any improvements made. It would appear, however, from a case of 1899, that collusion between the landlord and the tenant will vitiate the defence.

So much for justified enrichment; there remain to be considered justified impoverishment. An impoverishment is regarded as justified where it results either from the intention to make a gift or from the rendering of services under a contract or from the performance of a legal duty. The impoverishment is also justified where it proceeds from the miscarriage of some venture engaged in by the plaintiff in his own interest. A felicitous illustration of this latter proposition is afforded by a well-hypothetical case contained in a German collection for students. A rich Berlin landowner carried on an affair with a ballet-dancer. One day when they were walking down a luxury thoroughfare together, she took a fancy to a bracelet displayed in a jeweller's shop. The landowner expressed himself willing to pay 4,000 marks for it, but as the jeweller held to his price of 6,000 marks, no sale was effected. Next day, however, the girl called at the shop again and offered the jeweller 2,000 marks cash down if he promised to sell the bracelet to her lover for 4,000 marks and did not disclose their private transaction. The jeweller agreed and sold the bracelet to the landowner for 4,000 marks, whereupon the latter made a gift of it to his wife. The dancer sued the wife for the 2,000 marks on the ground that she had been unjustly enriched at her expense to that extent. It seems, however, that at German law the ballet-dancer's impoverishment would be held to be justified for the jeweller, by selling to the landowner as he had promised, had earned the 2,000 marks; and that in any case the enrichment was too indirect.

§5 THE SUBSIDIARY CHARACTER OF THE ACTION

There is no general agreement among the modern Civil Law systems on the question whether this element is in fact of the essence of the action of Unjust Enrichment. So far as Italy is concerned, the subsidiary nature of the action is now made statutory by Art. 2042 of the new Civil Code, which runs: "L'azione di arricchimento non è proponibile quando il danneggiato può esercitare una altra azione per farsi indennizzare del pregiudizio subìto". In Germany, opinion is sharply divided; on the whole, however, the Courts and the vast majority of text-writers, including Stammler, Cierke, Planck, Plessen, Cosack, Enneccarus, Dernburg and Standinger, incline to the view that the *Bereicherungsklage* is available concurrently with other remedies. And this view, if we are to believe Rutsaert, has also found favour with the Belgian Courts. On the other hand, de Page in his monumental treatise on Belgian law published in 1942 is vigorously insistent on the subsidiary character of the remedy.

Turning to French law, we find the rule as to the subsidiary character of the *actio de in rem verso* categorically laid down by the *Cour de Cassation* on several occasions. Subsidiary, however, does not mean that the plaintiff is at liberty to fall back on this remedy should he come to grief in some other form of action. For example, a plaintiff who has lost his action for the recovery of a loan owing to his failure to produce the written evidence required by law will not afterwards be heard to say that the defendant has been unjustly enriched at his expense. What subsidiary means in this context is that the action for Unjustified Enrichment is only available when the plaintiff has no other remedy open to him based upon contract, quasi-contract, delict, or quasi-delict. The formula, which can be traced to Aubry et Rau's commentary, is acquiesced in by the bulk of modern French writers. Some, it is true, have objected to what they regard as a belated attempt to revive the old forms of action, but the majority are firmly convinced that any other rule would only tend to undermine the stability of legal relations and to transform the action into a charitable institution.

§6 RESTITUTION

Finally, two additional points invite attention.

First, as to the measure of restitution. The general rule on

this subject in the French, Belgian, and Italian systems is that restitution is restricted within a twofold limit : it must never exceed (a) the quantum of the enrichment reaped by the defendant, and (b) the quantum of the impoverishment sustained by the plaintiff. That is to say, where the amount of the enrichment is less than the amount of the impoverishment, the plaintiff cannot recover more than the former amount; and conversely, where the amount of the impoverishment is less than the amount of the enrichment, the plaintiff cannot recover more than the actual amount of his own impoverishemnt. The reason for the rule is of course this, that the essential scope of the *actio de in rem verso* is to re-establish the economic equilibrium between two competing estates. It is instructive to note, however, that in Austrian law the measure of restitution is always co-extensive with the amount of the enrichment accruing to the defendant.

The second point is that the *punctum temporis* at which the enrichment and the impoverishment are to be estimated is that of the date of the action. In particular, a plaintiff is not permitted to recover a benefit which no longer exists at the time the action is brought. The rule appears to be general throughout the modern civil law systems—France, Italy, Germany, Hungary and Switzerland, to mention only a few. Russian and Austrian law, however, form an exception. Thus in Austrian law the relevant moment is fixed at the time of the acquisition of the enrichment (Art. 1041), and it matters not if it subsequently ceases to exist, while Art. 400 of the Soviet Civil Code has it that "a person who has enriched himself unjustly is bound to restore or refund the value of all the advantages which he has derived or ought to have derived from the thing thus acquired, from the moment he knew or ought to have known of the non-existence of a cause justifying the enrichment".

Such, then, is the architecture of the modern *actio de in rem verso* on the Continent; and it will be conceded by one and all, I think that it is a highly-developed remedy which appears to work substantial justice in the overwhelming majority of cases coming up for decision.

What made the eminent French authorities, Planiol et Ripert, therefore, point a warning forefinger at the doctrine of Unjustified Enrichment as being, "susceptible, si on lui laissait le champ libre, de bouleverser les institutions du droit positif et l'ordre social"?

Planiol et Ripert do not themselves offer any further explanation, but it is probable that they were uneasy about two things.

In the first place, it is conceivable that what purports to secure an equipoise between rights vested in different persons, may in effect provoke serious inroads on the liberty of the individual. Like all indefinite expressions of an ethical principle the doctrine is capable of being put to an infinite variety of uses, and it may be employed to invade almost any sphere of human activity for the purpose of subordinating the individual to the demands of the State. Above all, it can be an extremely dangerous instrument in the hands of the revolutionary, furnishing a convenient legal façade behind which he can put into operation his pet political theories.

Secondly, the *actio de in rem verso* being essentially an equitable remedy, there is always the danger that the judge might on occasion be tempted to depart from the strict letter of the law in order to achieve the intrinsically just solution in the particular case before him. In other words, there is always a very real element of vagueness and subjectivity.

On the other hand, it is obvious that the possibility of the doctrine being employed as a political weapon only exists in times of violent social upheaval; and even then the evidence of the last hundred years is all the other way. Accordingly, too much should not be made of this aspect of the problem.

The other argument is a more serious one from the legal standpoint It sees in the principle of Unjustified Enrichment an application of the relation between law and corrective equity, classically stated by Aristotle. By equity, it will be remembered, Aristotle meant justice, but not justice according to law. Law, in his view, professes to lay down general rules and principles and in so doing will inevitably ignore cases of particular hardship. Equity is "the correction of the law where it is defective on account of its universality". So understood, equity represents that discredited modern movement towards *Freirechtslehre* or "free law" which purports to individualize legal rules to near vanishing point by encouraging the judges to rely on their own subjective sense of justice.

What, then, is the defence advanced to this formidable count in the indictment?

It is vigorously urged in answer by Ripert in his excellent monograph : "La règle morale dans les obligations civiles", that

there is nothing particularly vague about the doctrine; once the distinction between "unjust" and "unjustified" is fully grasped, that is to say, once it is realized that the moral obligation not to enrich one's self *unjustly* has in process of time ripened into the legal obligation not to enrich one's self *unjustifiably*. Thus it is, if the argument may be paraphrased somewhat, that a core of very precise legal rules and principles have so far crystallized the doctrine that the equity known to underlie it has all but been transformed into a kind of "technical" equity, or equity in the sense used by English lawyers. In point of fact,, the modern doctrine is only operative under a system of strict rules and conditions which allows the individual judge very little latitude and, in the last analysis, tends towards restricting litigation. Evidence of this is found by the well-known Belgian *civiliste* Henri de Page in the significant "indigence de la jurisprudence belge au regard d'une théorie appareinment si prometteuse".

Finally—one last "finally"—it seems to me that any criticism of the doctrine of Unjustified Enrichment is to a large extent a criticism of Law in general where the difficulty of reconciling stability with flexibility, always present, is rendered particularly acute when there are implicated notions of morality and fair play. In the forceful language of Professor Winfield:

> "Like the observation balloon under experiment, the moral idea is continually being pulled earthwards until it is too low to see much, and is then continually released skywards where it may be too much in the clouds to see anything. So long as we have case law and so long as the judicial process is what it is, we shall never escape this oscillation between the extremes of useless freedom and mischievous technicality. If the happy mean is achieved it must be by accident as much as by anything else, for very few men have acute enough perception to see exactly where the mean lies, and the mean itself is often variable over a period of time".