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case seem to indicate that a state legislature can make an otherwise unconstitutional tax constitutional by rephrasing a statute so that it purports to tax a local incident, such as the form of doing business, rather than the privilege of doing interstate business. This distinction is, however, justified as a means of safeguarding the federal-state taxing dichotomy created by the commerce clause, as construed by the United States Supreme Court.

Judy F. Pierce

CONDITIONS FOR THE APPLICATION OF
ACTIO DE IN REM VERSO

Defendant, A-Second Mortgage Co., which held a second mortgage on the plaintiff's property, agreed to accept the property in full settlement of its claim and to pay the plaintiff's first mortgage notes on the property as they matured.¹ A-Second was relieved of the additional obligation when the first mortgage was satisfied from proceeds of a life insurance policy which the plaintiff had previously purchased from and assigned to the first mortgagee. Realizing that she had lost both the insurance proceeds and the property, plaintiff sued the first and second mortgagees for recovery of the amount of insurance proceeds applied to the first mortgage. Reversing the First Circuit Court of Appeal,² the Louisiana Supreme Court held that A-Second had been unjustifiably enriched and that the plaintiff could recover the sum on the basis of an *actio de in rem verso*.³ *Edmonston v. A-Second Mortgage Co.*, 289 So. 2d 116 (La. 1974).

1. Whether A-Second legally assumed the mortgage was never determined. The trial court judge stated that such a determination was not material to the ultimate issues in dispute. Trial Record, 22d J.D.C., Parish of St. Tammany, #28,064 at 106 (Wallace A. Edwards Div. "B"; June 9, 1972) [hereinafter cited as Trial Record].

2. *Edmonston v. A-Second Mortgage Co.*, 273 So. 2d 707 (La. App. 1st Cir. 1973).

3. The *actio de in rem verso* derives from Roman law, which provided the action for the recovery of necessary expenses incurred by a slave, as an unauthorized agent, for the benefit of his master. W. HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW IN THE ORDER OF A CODE 616 (3d ed. 1897) [hereinafter cited as HUNTER].

Relief from unjustified enrichment is a fundamental principle of the civil law.⁴ Although the Louisiana Civil Code contains many provisions for remedying specific instances of unjustified enrichment,⁵ such as the articles governing accession⁶ and those providing for sales with right of redemption,⁷ no article in the Code provides for a general remedy from unjustified enrichment.⁸

Despite a lack of statutory authority, the Louisiana Supreme Court in two early cases⁹ drew upon Roman sources¹⁰ and employed the *actio de in rem verso* as a general remedy for unjustified enrichment without indicating any guidelines for its application. Later Louisiana courts ignored the action.¹¹ To provide relief from unjustified enrichment in situations not specifically provided for in the Civil Code,¹² the courts either turned to common law remedies such as waiver-of-tort¹³ and quantum meruit¹⁴ or expanded *negoti-*

4. Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law, Part I*, 36 TUL. L. REV. 605, 606 (1962) [hereinafter cited as Nicholas I]; Gutteridge & David, *The Doctrine of Unjustified Enrichment*, 5 CAMBRIDGE L.J. 204, 206 (1933).

5. A concordance table of articles in the Civil Codes of France, Quebec, and Louisiana which includes fifty-six articles of the LA. CIV. CODE is found in G. CHALLIES, *THE DOCTRINE OF UNJUSTIFIED ENRICHMENT IN THE LAW OF THE PROVINCE OF QUEBEC* 187 (2d ed. 1952) [hereinafter cited as CHALLIES].

6. LA. CIV. CODE art. 502 grants the good faith possessor the products of the thing possessed, precluding the owner from benefiting from the possessor's labors.

7. LA. CIV. CODE art. 2577 gives a purchaser under a condition of redemption the right of removal of or indemnity for augmentations produced at his own expense.

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

9. *Garland v. Estate of Scott*, 15 La. Ann. 143 (1860) (suit on a debt acknowledged by means of a "due bill" executed by an intestate decedent's agent; the money had been turned to the use of the intestate); *Payne & Harrison v. Scott*, 14 La. Ann. 760 (1859) (suit on debts personally incurred by tutor which benefited minors).

10. The court in *Payne* cited the Justinian Digest and the *Garland* decision was based on the authority of *Payne*.

11. Nicholas II at 49-58.

12. See text at notes 5-8, *supra*.

13. The common law remedy allows a plaintiff to "waive the tort" and sue in assumpsit (quasi-contract) when the commission of a tort results in enrichment of the defendant. Nicholas II at 51-56. *E.g.*, *Kramer v. Freeman*, 198 La. 244, 3 So. 2d 609 (1941).

14. Literally, "as much as he deserves." Nicholas II at 58-60. *E.g.*, *Town & Country Contractors, Inc. v. Henderson*, 231 La. 131, 90 So. 2d 863 (1956).

*orum gestio*¹⁵ and *condictio indebitati*¹⁶ beyond their intended applications.

In *Minyard v. Curtis Products, Inc.*,¹⁷ the Louisiana Supreme Court again turned to the *actio de in rem verso* as a general remedy for unjustified enrichment. To limit application of the doctrine, the court, borrowing from French jurisprudence,¹⁸ set forth five conditions limiting its use.¹⁹ The three material conditions²⁰ are that there be an enrichment, an impoverishment, and a connection between the enrichment and the impoverishment. The court also stated two juridical conditions:²¹ that there be an absence of "justification" or "cause"²² for the enrichment and impoverishment and that no other remedy at law be available to the plaintiff. The restrictive conditions set out in *Minyard* severely limits application of the remedy and expressly classes the action as subsidiary to other modes of relief.²³

In the instant case, the Louisiana Supreme Court, in allowing the plaintiff to recover on the basis of *actio de in rem verso*, reaffirmed the five prerequisites outlined in *Minyard*. Since A-Second had acquired the plaintiff's property by means of an oral engagement to pay plaintiff's first mortgage, but was relieved of that obligation when the plaintiff herself paid with the insurance proceeds,²⁴ it was patrimonially enriched. Because the plaintiff paid the mortgage herself, she

15. A quasi-contract resulting from the management of another's affairs. LA. CIV. CODE art. 2295; *Police Jury v. Hampton*, 5 Mart. (N.S.) 389 (La. 1927); HUNTER at 661; Nicholas II at 50.

16. The remedy for a quasi-contract resulting from the payment of money by mistake. LA. CIV. CODE art. 2301; *Roney v. Peyton*, 159 So. 469 (La. App. 2d Cir. 1935); HUNTER at 657-60; Nicholas II at 51.

17. 251 La. 624, 205 So. 2d 422 (1967).

18. Nicholas I at 610 and cases cited therein.

19. The conditions originated in French doctrine and were refined by the courts in both France and Quebec. Nicholas II at 58. For a comparison of French and German law on the subject of conditions for exercising the remedy for unjust enrichment, see Nicholas I at 610-46.

20. Material conditions are concerned with the facts of the occurrence. CHALLIES at 59.

21. Juridical conditions relate to the legal conditions required to implement the remedy. *Id.*

22. "Cause" is used in its normal sense to mean "justifiable reason" and should not be confused with the theory of "cause" in contracts.

23. *Minyard v. Curtis Products, Inc.*, 205 So. 2d 422, 432 (1967).

24. The first mortgagee acquiesced in the transaction between A-Second and the plaintiff and her husband, but refused to release plaintiff from personal liability. Although the legality of the prior assignment of the insurance proceeds was dubious, the court upheld the payment on the ground that

was deprived of the benefit of A-Second's promise of payment and suffered patrimonial impoverishment.²⁵ The necessary connection between the impoverishment and the enrichment existed because the same act of payment caused both conditions to arise.²⁶ Thus, the three material conditions on the use of *actio de in rem verso* were satisfied.

The facts in *Edmonston* also warranted a judicial finding that the two juridical conditions for implementation of the remedy were fulfilled.²⁷ The court construed the "absence of justification" requirement as mandating the lack of a valid juridical act, either between the impoverishee and the enrichee or between the enrichee and a third party, which justified the enrichment. The only juridical act between the impoverishee-plaintiff and the enrichee-defendant was the *dation*²⁸ of plaintiff's property in satisfaction of the second mortgage.²⁹ Since the terms of the *dation* did not specify any circumstances which would relieve A-Second of its promise to pay the first mortgagee and since A-Second did not execute any act with a third party, including the first mortgagee, the court held the first juridical condition satisfied. Finally, the majority determined that because the plaintiff would not be entitled to recover under any other remedy at law,³⁰ the subsidiary character of *actio de in rem verso* would be preserved.³¹

Although the court's application of *actio de in rem verso* in *Edmonston* was justified, the opinion may be questioned on

plaintiff executed a release in favor of the first mortgagee with full knowledge of its consequences. 289 So. 2d at 120.

25. *Id.* at 121.

26. *Id.*

27. *Id.* at 122-23. See text at notes 21, 22, *supra*.

28. A *dation en paiement* is the giving of a thing to a creditor by his debtor in payment of a sum which is due. LA. CIV. CODE art. 2655.

29. 289 So. 2d at 122.

30. Plaintiff pleaded the following theories: marshalling of assets, lesion beyond moiety in the *dation*, breach of a fiduciary obligation by the first mortgagee. The trial judge gave no explanation for his conclusion that plaintiff could not recover under those theories. Trial Record at 107. Assuming, therefore, the trial judge's acceptance and defendant's answer, marshalling of assets was rejected because of the rights granted under the assignment; lesion beyond moiety was rejected because the value exceeded the statutory formula of LA. CIV. CODE art. 1861; and breach of a fiduciary obligation was rejected either because no obligation was due, or if due, it was not breached. The Louisiana Supreme Court determined that plaintiff could not recover as a *negotiorum gestor* because she did not have an intent to benefit A-Second. 289 So. 2d at 122-23.

31. 289 So. 2d at 123.

three grounds. First, the court's discussion of enrichment did not indicate whether an *actio de in rem verso* might arise where the form of enrichment is one other than a material addition to patrimony. In France and Quebec, where *actio de in rem verso* is frequently invoked,³² other forms of enrichment, such as service rendered,³³ avoidance of a loss or of an otherwise necessary expenditure,³⁴ acquisition of a legal right,³⁵ or even the acquisition of a moral advantage³⁶ have satisfied the enrichment requirement. The *Edmonston* opinion should not be interpreted so as to preclude a similar expansion of "enrichment" in Louisiana.

The second basis for question arises from the court's narrow definition of absence of justification. Courts in Quebec have held factors besides a juridical act between the impoverishee and the enrichee or the enrichee and a third party to be "justification" for an enrichment.³⁷ In Quebec the action is precluded when the impoverishee intends to bestow a gratuity,³⁸ or when the enrichment results from performance of a service by a close relative.³⁹ Likewise, some jurisdictions bar the action when the impoverishee acts in his own interests,⁴⁰ when the enrichee has forbidden the impoverishee to act for his benefit,⁴¹ and when the impoverishment results from operation of law or from a natural obligation.⁴² The

32. CHALLIES at 13.

33. *Marion v. Marion & Corp de St. Roch de l'Achigan*, 63 S.C. 385 (1925) (Boyer) (secretary-treasurer of a municipal corporation acting in good faith though irregularly appointed was able to retain salary paid him); CHALLIES at 63-66.

34. *Alguire v. Leblond*, 75 S.C. 130 (1937) (J.B. Archambault) (husband condemned to reimburse father-in-law for room and board provided his wife when she took refuge with him).

35. Civ. 6 juil. 1927, S. 1938.1.9 (editor who used operetta without permission condemned to indemnify composer's heirs).

36. Challies gives as an example of an unjustified moral advantage: the intellectual and aesthetic enrichment of one attending a concert without paying for his seat. CHALLIES at 71-72. The weight of authority in France and Quebec favors the view that such is a sufficient enrichment for the action if either the enrichment or impoverishment is estimable in money. CHALLIES at 71-72 and citations therein.

37. CHALLIES at 13 and citations therein.

38. *Gelinas v. Quessy*, 71 S.C. 136, 138 (1933) (Laliberté); CHALLIES at 97.

39. *Brassard v. St. Marie*, [1922] 33 K.B. 62, 64.

40. *Alain v. Frenette*, 75 S.C. 177, 180 (1937) (Langlais).

41. *Adams v. Adams*, [1919] 28 K.B. 278.

42. *Nyczka v. Soeurs de Charite*, (1944) S.C. 119 (Casgrain) (inmate in mental hospital unable to recover value of labors because statute authorized defendant to retain benefit of such work).

court's failure to recognize expressly these additional justifications for enrichment may result in relief being granted when circumstances are inappropriate in later cases.

The most serious criticism of the court's opinion concerns its conception of the subsidiary character of the remedy,⁴³ an interpretation which might unduly restrict future application of the action. The court's statement that the action will be allowed only when the plaintiff has no other remedy at law adopts earlier, more conservative views of the action.⁴⁴ In contrast, modern civilian jurisprudence reflects the more liberal doctrinal notion that the action is subsidiary only in a limited sense.⁴⁵ Current French and Canadian theory asserts that so long as no imperative rule of law is contravened,⁴⁶ the action will lie even though another equally advantageous action can be taken presently or could have been taken had the impoverishee acted in time.⁴⁷

The court's acceptance of the more conservative theory apparently results from a misunderstanding of the conceptual basis of the action. Doctrine is divided on the issue of the legal basis of *actio de in rem verso*, with the following theories advanced in explanation: extraordinary *negotiorum gestio*,⁴⁸ a

43. Confusion and apparent misapplication of the fourth requirement are evident, in light of *Edmonston*, in the one *actio de in rem verso* case occurring between the dates of *Minyard* and *Edmonston*. In *Joslyn v. Manship*, 238 So. 2d 20 (La. App. 1st Cir. 1970), the court formulates the issue as whether defendants' actions were justified, rather than whether the resulting enrichment was justified.

44. "L'action *de in rem verso*" (lies only when the impoverishee) "ne jouirait pour obtenir ce qui lui est dû d'aucune action naissant d'un contrat, d'un quasi-contrat, d'un délit ou d'un quasi-délit." C. AUBRY ET C. RAU, 9 COURS DE DROIT CIVIL FRANÇAIS, n° 578 at 361 (5th ed. 1917).

45. See CHALLIES at 118-44 (comparison of the doctrine and jurisprudence in Quebec and France); GUTTERIDGE & DAVID at 212; Nicholas I at 633-41. See, e.g., *Harris v. Royal Victoria Hospital*, [1948] K.B. 28, 32; *Ville de Louisville v. Ferron*, [1947] K.B. 438, 443.

46. The prohibition against indirect contravention of imperative rules of law is usually expressed as "no *fraude a la loi*." CHALLIES at 119. Such a non-restrictive view of subsidiary character would allow the action in all cases where positive law would not otherwise preclude plaintiff's recovery, rather than permitting its assertion only when plaintiff has no other mode of recovery.

47. The court's language in *Edmonston* indicates a failure to recognize the distinction between the two competing views of "subsidiary character," as evidenced by its interchangeable use of the terms "fraud on the law" and "no remedy available." 289 So. 2d at 122-23.

48. The action is considered as an auxiliary of *negotiorum gestio* and is to be used when the technical requirements of that quasi-contract cannot be

quasi-offense of the enrichee,⁴⁹ an equitable obligation of an enrichee to restore enrichment due to an act of the impoverishee,⁵⁰ the equitable right to preserve one's patrimony,⁵¹ the imposition of a moral duty by equity,⁵² the jurisprudential creation of unjust enrichment as a separate source of obligations—ultimately a product of both morals and equity,⁵³ and quasi-contract.⁵⁴

The Louisiana Supreme Court in *Minyard* clearly stated that an *actio de in rem verso* is quasi-contractual in nature⁵⁵ under the express law of Louisiana Civil Code articles 2293 and 2294.⁵⁶ The court also cited article 21⁵⁷ and thereby introduced the concept of "equity" into the action. In *Edmonston* the court abandoned its previous referencé to quasi-contract and relied exclusively upon article 21 and "natural justice" as the source of the *actio de in rem verso*.⁵⁸ Of the theories advanced as the basis of *actio de in rem verso*, the *Edmonston* position seems more nearly to coincide with either moral duty⁵⁹ or jurisprudential creation. The former has been

fulfilled, as for example when one manages the affairs of another while under the impression that they are his own. C. DEMOLOMBE, COURS DE CODE NAPOLEON 46 (1882).

49. 2 M. PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL n° 935 at 359 (11th ed. 1939).

50. CHALLIES at 38-41.

51. 3 R. DEMOGUE, TRAITE DES OBLIGATIONS EN GENERAL, n° 79 at 124 (1923).

52. G. RIPERT, LA REGLE MORALE DANS LES OBLIGATIONS CIVILES n° 138 at 257 (2d ed. 1927).

53. 2 A. COLIN ET H. CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS n° 6 at 6 (8th ed. 1934).

54. 15 G. BAUDRY-LACANTINERIE ET L. BARDE, TRAITÉ THEORIQUE ET PRATIQUE DE DROIT CIVIL, n° 2849 at 519 (3d ed. 1908).

55. *Minyard v. Curtis Products, Inc.*, 205 So. 2d 422, 432 (1967).

56. The language of LA. CIV. CODE art. 2294, "but there are two principal kinds . . ." indicates other quasi-contracts exist besides those specifically mentioned therein. Toullier is of the opinion that there are many quasi-contracts. 11 M. TOULLIER, LE DROIT CIVIL FRANÇAIS, n° 112 at 135 (1824).

57. The article is a mandate to the judiciary to decide cases where there is no express law and to apply the equity of natural law and reason or received usages where positive law is silent.

58. 289 So. 2d at 120. The court also cited LA. CIV. CODE art. 1965, a maxim prohibiting unjust enrichment in the judicial construction of ambiguous contracts. In light of the purposes of the article, it is difficult to perceive the court's reasons for citing it. Nicholas I at 605.

59. The moral duty not to enrich oneself at the expense of another can be viewed as correlative to the moral duty not to injure another, which is the

criticized as vague,⁶⁰ while the latter is deemed unacceptable since it is also vague⁶¹ and, more importantly, violates the principle of Louisiana Civil Code articles 1760 and 2292, which limit the sources of legal obligations to contracts, quasi-contracts, offenses, quasi-offenses and obligations imposed by law.⁶² The idea that the *actio de in rem verso* is founded upon article 21 and natural justice is open to the same criticism.

On the other hand, quasi-contract has been favored as the basis of the action⁶³ because it gives as a basis for the obligation a legal institution recognized by express legislation to be a source of obligations.⁶⁴ In addition, since Louisiana Civil Code article 21 is to be used only in the absence of express law, recognition that *actio de in rem verso* is quasi-contractual in nature may more readily allow the remedy to be applied even when the plaintiff has other remedies at law, so long as no positive rule of law is contravened,⁶⁵ aligning Louisiana law with modern civilian theory.⁶⁶

The Louisiana courts should draw on the extensive doctrine and jurisprudence of those jurisdictions in which the action *de in rem verso* has been more fully developed to formulate the proper conceptual basis of the action and allow greater flexibility in its application. The five conditions imposed upon the use of the action in other civilian jurisdictions, especially the expanded interpretation of the absence of justification requirement, would adequately contain the potential abuses of unbridled judicial discretion which troubled the *Minyard* and *Edmonston* courts.

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basis of civil responsibility. G. RIPERT, LA REGLE MORALE DANS LES OBLIGATIONS CIVILES n° 3 at 7 (2d ed. 1927).

60. CHALLIES at 44.

61. *Id.* at 45.

62. The latter include tutorship and other legal administrations. *Cf.* LA. CIV. CODE arts. 1760, 2292.

63. CHALLIES at 46-57.

64. *Id.* at 49.

65. Analogy is made from French and Canadian theory. *See* text at notes 47, 48, *supra* and CHALLIES at 46-47.

66. The statement assumes that the court's view of "subsidiary character" was predicted at least to some extent by the text of LA. CIV. CODE art. 21 as is indicated at 289 So. 2d at 122.