LAW OF ENRICHMENT

A COMPARATIVE STUDY
OF THE GERMAN AND SOUTH AFRICAN LEGAL SYSTEMS

6 Law

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ABBREVIATIONS

A.D. = Appellate Division

Betr. = Der Betrieb (year and page)

BGB = Bürgerliches Gesetzbuch

BGH = Bundesgerichtshof

Buch. = Buchanan. Cape Supreme Court, 1868-79.

C. = Cape Provincial Division

C.P.D. = Cape Provincial Division. 1910-46

E.D.L. = Eastern Districts Local Division. 1910-46

H.C.G. = High Court Griqualand West. 1882-1946

intr. = introduction

J.R. = Juristische Rundschau (year and page)

J.W. = Juristische Wochenschrift (year and page)

J.Z. = Juristen-Zeitung (year and page)

L.M. = Lindenmaier/Möhring: Nachschlagewerk des BGH in Zivilsachen (reference book of the BGH in civil cases).

N.J.W. = Neue Juristische Wochenschrift (year and page)

N.L.R. = Natal Law Reports. 1873-1910

N.P.D. = Natal Provincial Division. 1910-46

O.P.D. = Orange Free State Provincial Division. 1910-46

par. = paragraph

R.G. = Reichsgericht

S.A. = South African

S.A.L.J. = South African Law Journal

S.C. = Supreme Court, Cape. 1880-1910

sent. = sentence

S.R. = Southern Rhodesia. 1910-46

S.W.A. = South-West Africa. 1919-46

T. = Transvaal Provincial Division

T.H.RH.R.= Tydskrif vir Hedendaagse Romeins-Hollandse Reg

T.P.D. = Transvaal Provincial Division. 1910-46

T.S. = Transvaal Supreme Court. 1902-10

Vw VfG = Verwaltungsverfahrensgesetz

W.L.D. = Witwatersrand Local Division. 1910-46

W.P.M. = Zeitschrift für Wirtschaft und Bankrecht, Wertpapiermitteilungen, part IV (year and page)

LAW OF ENRICHMENT

A COMPARATIVE STUDY OF THE GERMAN AND SOUTH AFRICAN LEGAL SYSTEM

INTRODUCTION

One of the most important questions in S.A. law of enrichment is whether it recognizes a general enrichment action or not. Before the case Nortje en 'n ander v. Pool had been decided in 1966[1], the predominant view of S.A. writers was that S.A. law had developed a general enrichment action, which could be used in those cases of unjustified enrichment not covered by the old actions[2]. Court decisions in this respect were not uniform, and though in many cases the existence of a general enrichment action was denied[3], other cases[4] showed a clear recognition of the existence of a general enrichment action.

The view that S.A. law had taken the step of recognizing a general enrichment action was based on a number of extensions of the scope of application of the old actions of Roman and Roman-Dutch law[5].

The development received a sharp set-back in the case of Nortje en 'n ander v. Pool[6] in which the Appeal Court unequivocally declared that S.A. law did not recognize a general enrichment action[7]. This decision has led to trenchant criticism. "If the view in Nortje's case be correct we have, with much respect, reached the end of the development of the principle of unjust enrichment. A principle vibrant with life and struggling for growth would then be locked for ever in tight compartments, a prisoner of the past. Such a view bodes ill for the future, for it cramps development in what truly is and surely ought to be an area of significant advance. We cannot thus cry halt at one of the vital frontiers of our law"[8]. De Vos[9], the most important authority on modern S.A. law of enrichment, criticized this decision, because it allowed only ad hoc extensions of enrichment liability in suitable cases, and the law in this regard now suffers from a great measure of uncertainty, because "Die vraag sou nog steeds bly of 'n aksie toegestaan sou word onder omstandighede wat sig nog nie voorheen voorgedoen het nie. Met respek, skep die nie juis daardie toestand van onsekerheid waarteen appèlregter Botha wou waak nie?"

De Vos is of the opinion that the majority judgment in Nortje en 'n ander v. Pool is incorrect because S.A. law had, in fact, advanced to the stage where a general enrichment action was recognized. Furthermore, he believes that a modern legal system needs a general enrichment action; in support of this he refers to the many modern systems which recognize such an action, among others the German BGB[10]. The solution favoured by De Vos is legislation on the pattern of the German Code.[11] These statements convey the impression that the German law of enrichment is an ideally structured part of the law based on a single comprehensive general principle. However, the predominant view among German writers is that the law of enrichment is one of the most impenetrable spheres of law, very complex and most obscure due to a distinction between different types of condictiones[12]. Furthermore, if one bears in mind that both systems find their roots in Roman law[13], it would indeed be surprising if these two Romanistic legal systems had developed so differently that the one recognized a general enrichment action whereas the other did not.

The purpose of this thesis is to compare the S.A. law of enrichment with the German BGB, to answer the question whether both systems are so similar that in both of them a general enrichment action could exist. Before this question can be answered in the affirmative, it has to be investigated whether, first of all, a basic structural similarity of these two Romanistic legal systems exist and (secondly), whether the BGB recognizes a general enrichment action. The comparison would be fairly easy if one could say that at least the basic principles of each system were of a firmly developed and undisputed nature. But this is far from true! Voluminous works have been written not only concerning the law of enrichment in general, but even concerning each specific element of enrichment liability[14]. I do not intend to add another compendium to this huge number. Nor do I intend to discuss the actio negotiorum gestorum. This thesis is aimed at giving a short outline of both systems of unjustified enrichment, and elaborating basic principles of enrichment liability; thereafter the difference between the two systems will be highlighted by examples and, finally, special attention will be paid to the problem of a general enrichment action.

CHAPTER I: GERMAN LAW OF ENRICHMENT

1. General Survey

Otherwise than in the law of delict[1] the German legislator did not lay down individual definitions of different aspects of enrichment liability, but established a general rule. According to §812 par.1 sent.1 BGB "a person who acquires something without legal cause at the expense of another as a result of an act performed by the latter ("Leistung", i.e. prestation) or in any other manner, is bound to return it to him". The legally binding admission of the existence or nonexistence of a debt is also deemed to be an act of performance (§812 par.2 BGB).

Despite this general rule German law of enrichment has developed a complex and intricate system of condictiones. The starting point to this typology is given by the general rule itself, namely by its distinction between enrichment by transfer (prestation) (§812 par.1 sent.1 first alternative BGB) and enrichment arising otherwise (§812 par.1 sent.1 second alternative BGB).

In §812 par.1 sent.2 BGB the condictio ob causam finitam and the condictio causa data causa non secuta are mentioned. The condictio ob turpem vel iniustam causam is laid down in §817 BGB. The following §§813-823 BGB expand this system, because they cannot be applied uniformly to the "enrichment rule" but, according to their meaning and purpose, only to special individual condictiones. So, for example, the exclusion of a condictio set up in §814 BGB only refers to a condictio based on enrichment by transfer, whereas the exclusion-rule of §815 BGB can only be applied to the condictio causa data causa non secuta in §812 par.1 sent.2 second alternative BGB. §§819 par.2, 820 and 821 BGB, too, only refer to the condictio based on enrichment by transfer. Furthermore, §§989 ff BGB and §951 BGB deal with important cases of unjustified enrichment. In this respect the relationship between §§989 ff BGB and §951 BGB as well as §§812 ff BGB is problematic[2].

Finally one finds many cross references in the BGB to the law of enrich-

ment[3]. Already this short survey shows that in German law enrichment liability is not solely covered by the general rule in §812 BGB, but that the principle of unjustified enrichment runs through the whole of German law, and is dealt with at very different places in the German legal system.

The coexistence of the general rule of §812 par.1 sent.1 BGB and the old condictiones shows that the codification of the BGB was, as far as the law of enrichment is concerned, a half-hearted attempt to move away from the fragmentation which prevailed in Roman law.

Roman law tried to help a person regain his goods if some economic asset passed into the ownership of another without a legally recognized cause or ground, e.g. if somebody, believing that he owed something, paid what was in fact not owing. In this situation he could avail himself of the rei vindicatio if he had remained owner. However, if the recipient had become owner, special actions for recovery were needed which were based on the unjust retention of another's property. These claims for adjustment were an original and significant Roman creation[4]. The Romans associated these claims with the "condictio" and since the condictio is the model of an actio stricti iuris, they kept these actions within narrow limits. The condictio was a special remedy within the framework of the early Roman legis actio procedure; under the formulary system of procedure the condictio was a strict civil actio in personam for certam pecuniam dari or aliam certam rem dari. The intentio of this actio was framed abstractly, that is, it did not state the source of the obligation. It therefore accommodated all cases of a civil obligation concerning a certum dare[5]; accordingly, it was the suitable action for mutuum, literal contracts and stipulations, as well as in cases of theft, and it could also be employed in the cases of retention without cause[6]. When in postclassical times the formulae fell away and the classical concept of an "actional law" broke down, the term "condictio" in its original broad and procedural sense was no longer meaningful. Justinian followed the East Roman academic doctrine which was influenced by Christianity, in placing the law of condictiones under the dominant principle of equity, particularly by emphasizing the rule of Pomponius: neminem cum alterius detrimento fieri locupletiorem[7]. If the classical law conceived of the condictio as a unit because the two formulae (for certa pecunia and alia certa res) invariably remained the same in all their applications, the East Roman school on the one hand

generalized the idea that unjustified shifts of assets have to be redressed; on the other hand, the relevant situations were further classified and the condictio (now as a term of substantive law) was split up into several independant claims: condictio indebiti, where per errorem a performance had been made which was not owing; condictio ob turpem vel iniustam causam, where the purpose of the performance had been illegal or immoral; and condictio causa data causa non secuta, where a performance had been made in view of a specific result or occurrence which later did not take place. Besides these, a condictio sine causa was recognized, overlapping to a large extent with the other condictiones, but also providing for various situations which were not already covered by the other claims[8].

This scholastic systematization provided the basis for the treatment of the law of unjustified enrichment in the European Roman common law. In Germany as late as in 1887 the first commission for the preparation of a code in what has become known as the "first draft"[9] proposed a codification of these four specific types of condictiones plus a further condictio ob causam finitam[10]. At that time, however, the tides had already turned and a general enrichment action was in the air. Windscheid, who had been a member of this first commission until 1883 and who had worked out an alternative draft[11], had conceived the five condictiones merely as specific expressions of his "Voraussetzungstheorie" (presupposition-doctrine)[12]. But it had been Friedrich-Carl von Savigny who in the 5th volume of his great work "System des heutigen Römischen Rechts"[13] had conceived with great lucidity the idea of a basic, uniform principle to which all the different condictiones could be reduced. The true basis of all condictiones, Savigny said, consists in claiming back something derived from the estate of someone else; as common feature of all condictiones he perceived the enlargement of one estate through diminution of another either without legal cause from the beginning or without legal cause any longer[14]. Under the influence of Savigny and the - by then - prevailing opinion among legal writers[15], the second commission for the draft of the BGB finally decided to adopt a general enrichment action into the codification. However, the BGB did not entirely move away from the old condictiones, but still specifically mentioned them.

2. Unjustified Enrichment Pursuant to "Leistung" (Enrichment by-Transfer Claim)

a. § 812 par.1 sent.1 first Alternative BGB

§812 par.1 sent.1 first alternative BGB in general covers cases in which a shift of assets has occurred without a valid causa. This happens, for example, if the "Verpflichtungsgeschäft" (i.e. the underlying obligatory transaction providing the basis for the shift of assets) was invalid, or if an obligation is discharged which was in fact not due. This rule, therefore, deals with cases which were covered by the condictio indebiti of Roman Law. The enrichment-by-transfer claim is applicable even in the case where the "Verpflichtungsgeschäft" as well as the "Verfügungsgeschäft" (i.e. the conveyance), are void, and the plaintiff could therefore recover his assets by means of the rei vindicatio as well[16]. The rei vindicatio and claims based on unjustified enrichment are not mutually exclusive, but can be applied interchangeably[17]. This might be of importance in certain cases, because the claims based on §812 par.1 sent.1 first alternative BGB are aimed at the recovery of the object obtained including fruits and surrogates, whereas by means of the vindicatio only the object obtained itself can be reclaimed. Furthermore, if the transferred thing has been lost, the rei vindicatio would often by useless, whereas in this case one can claim compensation for the value by means of §§812 par.1 sent.1, 818 par.2 BGB.

The discharge of an obligation affected by a defence which bars the enforcement of the claim permanently ("peremptorische Einrede") is placed on the same footing as the performance that has been made sine causa (§813 par.1 sent.1 BGB). However, the discharge of an obligation, which has prescribed (§ 812 par.1 sent.2 BGB), and the premature discharge of an obligation which was due at a later date (§813 par.2 BGB) are excluded from this category. It is not a prerequisite for the application of the enrichment-by-transfer claim that the creditor acted in error either of fact or of law. Only if the transferor knew that he was not obliged to do so, or if the performance was in compliance with a moral duty - such as providing for maintenance of relatives who were not legally entitled to claim maintenance[18] - will an enrichment claim be excluded (§814 BGB). The onus in this respect rests on the debtor[19].

§814 BGB is based on the idea that, if a person makes a performance to another person knowing that he is not obliged to do so, this performance is similar to a donation and that this is the causa which excludes an enrichment action. Thus §814 BGB has the character of being an exceptional rule to the general legal remedy of §812 par.1 sent.1 first alternative BGB; it does only apply if the debtor had positive knowledge of the legal situation[20].

b. § 812 par.1 sent.2 first alternative BGB: condictio ob causam finitam

According to this rule the obligation to return what has been acquired, also exists, if the legal cause for the transfer has subsequently disappeared. The reason for the lapse of the legal cause - for example rescission (§142 BGB), or the fulfilment of a resolutive condition, is immaterial[21].

c. § 812 par.1 sent.2 second alternative BGB: condiction causa data causa non secuta

According to this rule the debtor is liable to return what he has received if the purpose for which the assets have been transferred cannot be achieved. The parties must have had a certain purpose (of a legal or factual nature) in mind, which has, however, failed. Thus the condictio causa data causa non secuta lies where something has been performed not pursuant to an already existing obligation but in order to induce the recipient to a certain conduct (either in the form of a legal transaction or some factual act). A typical example is the case where a housemaid renders services for a considerable period of time and is remunerated only by board, accommodation and pocket money, because she assumed she would become heir, which, in the end, she did not become. In this case there exists a valid contract of services, so that one could get, prima facie, the impression that no enrichment action is applicable. The dominant opinion in German law, however, considers that only that portion of the services which is equivalent to board, accommodation and pocket money is covered by this contract of services. The rest of the services are performed sine causa, and therefore a condictio causa data causa non secuta can be applied[22]. Due to §815 BGB the right to demand return is barred where the attainment of the purpose was impossible ab initio, and the person performing was aware of this fact, or where the person performing has prevented the occurrence of the result mala fide. Thus §815 BGB and §814 BGB are comparable rules.

d. §817 BGB: condictio ob turpem vel iniustam causam

If the purpose of an act of performance was such that by accepting it the recipient violated a legal prohibition, or offended public morals, then the recipient is bound to make restitution (§817 sent.1 BGB). However, the scope of application of this rule is fairly restricted, because illegality and immorality will normally invalidate the obligatory contract[23], so that §812 par.1 sent.1 first alternative BGB can be applied, unless this rule is excluded due to §814 BGB. The predominant opinion among German lawyers[14] is that §817 sent.1 BGB has its own scope of application though only a very limited one. Usually the bribery of public officers (§331 StGB) is given as example; in this case the predominant opinion argues that there is an offence of public morals in the sense of §817 sent.1 BGB, but the obligatory contract is nevertheless valid, thereby excluding an enrichment-by-transfer claim (§812 par.1 sent.1 BGB). However, a very strong opinion among German lawyers[25] denies the validity of the "Verpflichtungsgeschäft" in these cases and thus advocates the view that §817 sent.1 BGB is meaningless, because its entire scope of application is covered by §812 par.1 sent.1 BGB.

According to §817 sent.2 BGB the recovery is excluded if the transferor, too, has committed an offence as described in §817 sent.1 BGB, if, in other words, he himself, by making that performance, violated a legal prohibition or contravened public morals. This rule is one of the most controversial in the entire law of enrichment[26]. The BGH, in a most surprising statement, contends that this rule intentionally disregards justice (BGH 8, 348 (373)). Above all function and justification of the legal policy pursued by this rule are disputed; in connection herewith there is a conflict of opinion whether §817 sent.2 BGB is a rule only referring to the law of enrichment, or whether it is a general principle which is applicable to other claims, as well (for example the rei vindicatio, delictual claims or claims for the reimbursement of expenses)[27].

However, it is accepted that §817 sent.2 BGB does not only refer to §817 sent.1 BGB, but to all types of enrichment-by-transfer claims[28]. The reason for this extension is the very limited scope of application (if there is one at all) of §817 sent.1 BGB. If one were to restrict the "in pari turpitu-

dine"-rule to the condictio ob turpem vel iniustam causam, one would for all practical purposes eliminate it from the legal system[29].

Furthermore, contrary to its clear and unambiguous wording, §817 sent.2 BGB has to be applied in cases of turpitudo solius dantis[30]. The practical effect of §817 sent.2 BGB is that the person who has received something under an illegal or immoral contract may keep it. It would seem to be utterly unreasonable if only a recipient who had acted immorally himself were allowed to keep these assets whereas the condictio against a blameless receiver would not be barred[31]. Finally the prevailing opinion requires in this respect not only an objective offence but awareness of the illegality or immorality[32].

3. Unjustified Enrichment Arising Otherwise

Because of their diversity it is very difficult to give a positive definition of all types of condictiones which are included in what the BGB refers to as enrichment arising "in any other manner"[33]. An initial characterization has to take place by means of a negative demarcation: a condictio based on enrichment arising otherwise lies where a person (namely the debtor of the enrichment claim) has acquired an unjustified increase in assets at the expense of another person (the creditor of the enrichment claim) without this increase resulting from an act of performance on the part of the creditor.

Nowadays, German law distinguishes between the following types of condictiones based on enrichment arising otherwise: condictio based on interference ("Eingriffskondiktion"), for claiming reimbursement of impensae ("Verwendungskondiktion") and based on fulfillment of somebody else's debt ("Rückgriffskondiktion")[34].

a. Condictio based on interference: §812 par.1 sent.1 second alternative BGB

This type of condictio is in fact the most important one concerning enrichment arising otherwise[35]. Typical examples are cases where an unauthorized person uses, or consumes, the thing of another person. The modern opinion in German law of enrichment considers the criterion as to whether or not the enrichment

was unjustified, to be (not the unlawfulness of the act, but) the interference with the content of a right à propos the person who is entitled to the use of this right (i.e. an interference with the "Zuweisungsgehalt"[36]).

Thus a person is liable on the basis of a condictio based on interference, if he has acquired, by consuming or alienating somebody else's thing, its real value, or its (temporary) utility value by using the object, because in these cases the person appropriates something to his use which (according to the "Zuweisungsgehalt") is not due to him but to another person.

Furthermore, the enrichment must have been at the expense of the creditor of the enrichment claim. This prerequisite is fulfilled if the acquired advantage was, according to the "Zuweisungsgehalt" of whatever right was infringed, due to the creditor[38]. In this respect a specific detriment to the creditor's assets need not necessarily have occurred. It is sufficient that the advantage was due to him; whether or not the creditor had in fact made use of this advantage or intended to do so is immaterial[39]. Thus the criterion of the infringement of this "Zuweisungsgehalt" is of crucial importance to answer the questions whether or not the enrichment occurred "sine causa", and at whose expense the enrichment accrued. Already at this stage I would like to mention that the criterion "at the expense" is aimed at determining who the creditor of the enrichment claim is[40].

b. §§ 816, 822 BGB

§816, too, is a type of condictio based on interference[41]. If an unauthorized person disposes of somebody else's thing and this disposition is effective as against the person having title, then the unauthorized person is liable to surrender what he has acquired by the disposition (§816 par.1 sent.1 BGH). Typical examples are cases where a non-owner alienates a thing and a third person acquires ownerhsip of this object in good faith[42]. In these cases the non-owner has obtained the real value of the thing by means of the unauthorised alienation not unlike the case where a person has consumed a thing belonging to another. Thus it is guaranteed that the law of unjustified enrichment does not run counter to the system of bona fide acquisition of ownership. If the disposition is made gratuitously the same obligation is imposed upon the person

who acquires a legal advantage directly through the disposition (§816 par.1 sent.2 BGB). Thus in this case the third person is debtor of the enrichment claim. The reason for this regulation is that the gratuitous bona fide acquisition of ownership is less deserving of protection than the lucrative one is[44].

The question whether §816 par.1 sent.2 BGB can be applied correspondingly to the case where an unauthorized person disposes of a thing without a legal basis is not answered uniformly. Consider the case where A buys a book from B which B does not own. Supposing that the contract of sale between A and B is void, A nevertheless obtains bona fide ownership of the book. If here one were to allow the analogous application of §816 par.1 sent.2 BGB then the (former) owner of the book could reclaim this book directly fom A[45]. However, this view is mostly rejected in the German literature, above all because A would be deprived of possible defences[46]: he could, for example, not raise the fact not raise the fact that he has paid B the price for the book[47]. Consequently B is only granted an enrichment-by-transfer claim (§812 par.1 sent.1 BGB), against A, and the owner is granted a condictio against B ("Zweikondiktionentheorie")[48].

The acceptance of an act of performance is generally not regarded as a disposition over the claim[49]. Thus the case where performance is made to an unauthorized person, and this act is effective as against the entitled person[50], is not covered by §816 par.1 sent.1 BGB. Therefore it had to be regulated in §816 par.2 BGB explicitly, because in this case, too, the recipient has acquired something which he was (neither) entitled to, nor was it due to him according to the "Zuweisungsgehalt" of the right in question.

The regulation of §822 BGB has to be seen in close connection with §816 BGB. If A bona fide but sine causa obtains the ownership of a thing which belonged to B, then A is liable to return the enrichment. However, if A as the person who is now entitled in rem[51] transfers by another legal act the ownership gratuitously to C, then A is no longer enriched[52] and an enrichment claim of B against A must fail. In this case §822 BGB states that B can reclaim the thing directly from C. Here again we find the reasoning that the interests of the (former) owner B are given preference to those of C, who has

obtained ownership of the thing gratuitously.

c. Condictio for claiming reimbursement of expenses

The cases where someone expends money, services or material on things which he believes belong to him, or where someone assigns erroneously his own instead of another's resources to an object are dealt with at different places in the BGB. In this regard claims based on management without mandate ("Geschäftsführung ohne Auftrag", §§677 ff BGB) come into question[53]; a condictio based on enrichment arising otherwise (§812 par.1 sent.1 second alternative BGB) may be applicable; furthermore §§994 ff BGB deal with compensation for expenditures; and finally one has to mention §951 BGB. The main problems encountered are the relations of these rules to one another[54] as well as the question of unwanted enrichment ("aufgedrängte Bereicherung")[55].

Reimbursement of expenses according to § 812 BGB par.1 sent.1 BGB

Here I would like to underline two important points: first of all the expenses incurred must not be a misdirected act of performance because in this case an enrichment-by-transfer claim is applicable, which excludes a condictio based on interference[56]; secondly, the law of enrichment is not concerned with cases where a valid contractual basis exists[57].

Compensation for incurred expenses based on §§994 ff BGB

The claim for compensation based on §§994 ff BGB lies only if a so called owner-possessor relationship ("Eigentümer-Besitzer-Verhältnis") exists, i.e. if the original owner of an object has not been deprived of his right of ownership, and the actual possessor has no right to keep the object[58]. The legal purpose of this special regulation of the owner-possessor relationship is to protect the bona fide possessor[59]. In other words: the owner-possessor relationship is the recognition of the value of "possession". I will have to come back to this reasoning on several occasions[60]. Where an owner-possessor relationship exists, §§987 ff BGB (being the more special regulations) basically displace §§812 ff BGB[61].

The rule of §951 BGB

According to §951 BGB a person who has sustained a loss of right by virtue of the rules relating to accessio, confusio, committio and specificatio (§§946 - 950 BGB) is entitled to claim compensation pursuant to the provisions concerning the return of unjust enrichment. This is a cross-reference to the condictio based on enrichment arising otherwise (§812 par.1 sent.1 second alternative BGB) which means that compensation can only be granted if all requirements of the condictio based on interference are fulfilled[62] - and if an enrichment-by-transfer claim is not applicable[63].

However, according to the opinion of the BGH, a precondition for the applicability of §951 BGB is that e.g. the acquisition of ownership by virtue of accession etc. is based on outlays within an owner-possessor relationship, because §§994 ff BGB are taken to establish an exclusive ruling and thus to displace §951 BGB[64]. Yet, at the same time, the BGH regards as "expenditures" in the sense of §§994 BGB only such outlays which benefit the thing without changing its basic structure[65]. The consequence of this opinion is that a person who builds a house on somebody else's land is not entitled to claim compensation either on the basis of §§994 ff BGB (because the building of the house does not fall under this narrow concept of "expenditure"), or on the basis of §951 BGB (because this rule is displaced by §§995 ff BGB)[66]. The reasoning behind this view is to protect the owner against claims for compensation for improvements, if he can materialize the value of these improvements only by alienating his property.

d. Condictio Based on Fulfillment of Somebody Else's Debt

This type of condictio deals with cases where the creditor of the enrichment claim has released the debtor of the enrichment claim from an obligation towards a third person. However, the scope of application of this condictio if fairly restricted because the recourse is usually regulated by rules concerning management without mandate (§§677 ff BGB) or by a special legal transfer of claim[67]. Therefore I will not enter into further discussion of this condictio.

4. Extent of Liability

a. Return of What has been obtained

Basically the condictio is aimed at the return of what has been obtained (§812 par.1 sent.1 BGB). This claim for restitution in kind ("Naturalrestitution") is the primary claim in the law of enrichment. If the debtor has obtained ownership, then he has to retransfer the ownership; if he has gained (only) possession, then he has to restore this possession[68]; if a claim has been assigned to him sine causa, then he has to transfer this claim.

One exception to this primary claim for restitution in kind is established by §951 par.1 sent.2 BGB. According to this rule, the creditor is not entitled to claim restitution in kind in the cases where the ownership has been acquired by virtue of accessio, committio, confusio or specificatio.

However, no exception to the primary claim for restitution in kind is envisaged by the condictio based on §816 par.1 sent.1 BGB: the claim is aimed at the return of that which has been obtained by the disposition. Consequently if the enrichment-debtor alienated the object for a price less then its objective value, this influences the enrichment claim: the enrichment creditor has to bear the risk of such "under-value-alienation". This is more or less the unanimous opinion in German law[69]. But the consequencs of the contrary situation, namely where the debtor obtains a <u>profit</u> by alienating the thing, is hotly debated[70]. The opinion which in this case limits the claim for restitution to the objective (market-) value of the thing is mainly based on the argument that the profit is not due to the owner, according to the "Zuweisungsgehalt" of the infringed ownership; also it is inequitable that the special skills and the efficiency of the debtor should benefit the creditor[71]. In my opinion both arguments are inconclusive. The first argument fails to appreciate that essentially the right to draw profits is one due to the owner; with reference to the second argument, one could hold without any doubt the opinion that the person who, on the one hand, has to bear the risk of an under-value-alienation ought to be entitled, on the other hand, to take advantage of a profitable alienation[72].

b. Emoluments and substitutes

According to §818 par.1 BGB the obligation to return extends to emoluments derived, and to whatever the recipient acquires either by virtue of a right obtained by him, or as compensation for the destruction, damage or deprivation of the object obtained. Emoluments of a thing or a right are its direct (as well as indirect, i.e. resulting from a legal transaction[73]) fruits (§99 BGB) and benefits arising from the utilization of the thing or right (§100 BGB). The debtor has to restore only such uses and benefits which he has in fact drawn. It is immaterial whether or not the enriched person has omitted to draw possible uses and benefits; on the other hand he has to restore even such uses and benefits which the creditor would not have drawn or would not have been able to draw[74]. However, this view is not accepted insofar as the uses and benefits result from the special skills and efficiency of the enriched person (for example: profits)[75]. But this distinction, in my view, is as inappropriate as it was in connection with §816 par.1 sent.1 BGB[76].

"Acquired by virtue of a right" means that at which a right is aimed. By virtue of a claim, for example the object of the act of performance; by virtue of a lien, the proceeds derived from obtaining satisfaction from the lien. Compensation for the destruction, damage or deprivation includes payments of insurance or any indemnifications from third persons. However, the proceeds derived from a legal transaction ("lucrum ex negotiatione") are not considered to be a substitute; here §818 par.2 BGB provides compensation for the value[77] of the enrichment. As far as cases are concerned where an owner-possessor relationship[78] exists, one has to distinguish basically between uses and benefits drawn before commencement of legal proceedings in respect of the claim and those drawn post litem motam. Only the mala fide possessor (§990 par.1 BGB) and the gratuitous possessor (§988 BGB) have to restore uses and benefits drawn before pendency (litispendence) of the claim[79]. The bona fide possessor is not liable in this regard (§993 par.1 BGB at the end). Uses and benefits drawn post litem motam have to be restored by all kinds of possessors (§987 BGB).

c. Compensation for the value

The debtor has to pay compensation for the value if restitution of what has been obtained is impossible, (§818 par.2 BGB), either on account of the nature of the object obtained, or for any other reason. Typical examples of impossibility due to the nature of the object of the performance are compensation for the value of services or for the use of a thing: in these cases the value obtained is the performed operation itself, or the actual use of the object, and not the indirect effect on the creditor's assets in the form of the completed work or saved expenses[80]. Furthermore, §818 par.2 BGB covers all those cases where the item obtained is lost, for example by destruction or consumption. A hotly debated point is the basis on which the compensation for the value should be calculated[81]. Indeed this is a very important question not only for the practical consequences of an enrichment action, but also regarding the doctrinal background to the law of enrichment; and it is of direct importance not only as far as §818 par.2 BGB is concerned, but also where the problem of unwanted enrichment arises. The question is whether according to §818 par.2 BGB compensation has to be paid for the objective market value of the obtained enrichment only, or whether the creditor can reclaim profits acquired by the debtor as well. The predominant opinion (at least in the past, but presumably still today)[82] is that only the objective market value has to be compensated. This value need not necessarily be equivalent to the actual enrichment of the debtor; it can be less or more than this enrichment. The actual enrichment is only important insofar as §818 par.3 BGB is concerned: according to this rule the debtor can raise the objection that his enrichment has fallen away[83]. A modern opinion[84] combines §818 par.2 BGB with §818 par.3 BGB.
According to this opinion the basis of the calculation of the compensation is not the objective market value of the thing, but its subjective value or its utility value from the debtor's point of view. Thus, if the debtor has obtained, by using the object, profits which surpass the objective value of the use, then he has to restore these profits as well. I agree with this opinion as regards its conclusion, but for different reasons, on which I will elaborate in the next chapter[85]. As far as the condictio for claiming reimbursement of expenses on the basis of §§994 ff BGB is concerned, one has to distinguish basically between the bona fide and the mala fide possessor[86]. The bona fide possessor is entitled to claim compensation for necessary expenditure and extra-

ordinary charges (§§994 par.1 sent.2 BGB). For useful expenses he can claim compensation only if the real value is still enhanced (§996 BGB). The mala fide possessor is only entitled to claim compensation for necessary expenses and necessary charges (§§995 par.2, 683, 684 BGB); as for the rest, he is not entitled to claim compensation (§996 BGB). The rights of the possessor in this respect are firstly a right to remove the enrichment (§997 BGB) (if possible) or a ius retentionis (§1000 BGB); he can only bring an action for compensation if the owner has approved the expenditure, or if the owner has recovered the object (§1001 BGB)[87].

d. Cessation of enrichment: §818 par.3 BGB

According to §818 par.3 BGB the obligation to return or compensate for the value is excluded if the recipient is no longer enriched, i.e. if the debtor's enrichment has fallen away. This happens if what had been obtained has been destroyed without the debtor having acquired a claim for compensation, or if the debtor has consumed the thing without having saved expenses which otherwhise he would have incurred. Correspondingly, the enrichment is diminished if the object has been partly consumed. Whether or not there is cessation of enrichment has to be determined by a comparison of the assets as they would have appeared without the obtained advantage, and the actual assets[88].

Furthermore, the debtor can bring into account certain deductible items, for example, costs of acquisition (such as freight charges, tariffs, taxes) or expenses incurred[89]. The courts have held that all expenses and even damages may be deducted if they are causally connected to the acquisition[90]. In addition to this causality, German writers require that the debtor has relied on the fact that what he has acquired was to remain his[91]. To avoid unsatisfactory results caused by the liquidation of bilateral contracts, the courts have developed the so-called "Saldotheorie" (Theory of balancing the claims), in contrast to the "Zweikondiktionentheorie" (Theory of the two condictiones)[92] Consider the case where A purchases a car from B and this contract of sale is void; A pays the purchase price and obtains the car; now the car is stolen from A. In this case (according to the "Zweikondiktionentheorie") A could reclaim the purchase price from B by means of an enrichment-by-transfer claim (§812 par. 1 sent.1 BGB). B could claim compensation for the value of the car (§818

par.2 BGB), but in this respect A could rely on the defence that his enrichment has fallen away (§818 par.3 BGB). This inequitable result is avoided by the "Saldotheorie" because, according to this theory, the value of the car has to be deducted from A's enrichment claim. If in the example above the car was worth 5,000 DM and the stipulated purchase price was 5,500 DM, then A can only reclaim 500 DM. But the "Saldotheorie" is subject to important restrictions. For example the protection of minors has precedence; the "Saldotheorie" is not applicable if it is to the disadvantage of that party to a contract who has rescinded the contract because of fraudulent misrepresentation; or where the debtor is not to blame for the fact that it is impossible to return the thing[93].

In connection with §818 par.3 BGB one has to mention the problem of unwanted enrichment ("aufgedrängte Bereicherung"). This problem may arise where a person uses his own resources for the preservation or improvement of somebody else's thing, and now claims compensation by means of a "Verwendungskondiktion". In this case it may be that the expenses incurred are not advantageous to the owner of the thing. If A paints the fence of B, but B intended to pull down this fence and replace it with a hedge, then B does not benefit by this improvement. A number of ways have been proposed to solve this problem. First of all the debtor is granted a right to require removal (on the basis of §1004 and §§823, 249, and 251 par.2, BGB); then he can ask the creditor to remove that which he effected for the purposes of preservation or improvement.

But very often these remedies will not help the debtor, because either the requirements of §§1004 and 823 BGB are not fulfilled (especially the fault-requirement), or because it is impossible to take away what has been attached to the thing[94]. In this case the predominant opinion in German law calculates the "enrichment" of the enrichment-debtor not on the basis of the objective increase in value of the debtor's assets, but on the basis of the actual advantage which the debtor can draw from the preservation or improvement: with the consequence that in the example above he would not be liable[95].

e. Increased liability

According to §§819 par.1, 818 par.4 BGB, the person who was aware of the lack of a legal basis at the moment of acquisition (who was "mala fide"), is

liable under the general provisions[96]. In practice that means that this person is not entitled to bring the defence that his enrichment has fallen away. Furthermore this defence is not applied post litem motam (§818 par.4 BGB), or from the moment when the recipient learns ex post facto of his lack of legal right, (§819 par.1 BGB). In this regard positive knowledge is necessary[97].

CHAPTER II: BASIC PRINCIPLES OF GERMAN LAW OF ENRICHMENT

In this chapter I do not want to discuss the specific requirements of each condictio, such as that a performance has to be made "sine causa", or that the enrichment has to be "at the expenses of" the creditor. I would rather like to elaborate on typical features of enrichment liability which are common to all condictiones, and thus elucidate the nature of the law of enrichment in general. Of course, these basic principles cannot be seen separately from the specific requirements of the condictiones: the latter supplement these basic principles.

1. The Law of Enrichment is an Autonomous Part of Law

As we have seen,[1] an enrichment action lies against a seller who has alienated a thing belonging to another person wihtout being authorized to do so, with the effect that the acquirer has obtained ownership of that object in good faith. This was the main reason why the law of enrichment has often been considered to be an adjustment based on justice and equity, "um, soweit tunlich, die Wunden zu heilen, welche (das Recht) selbst schlägt"; (in order, so far as possible, to heal the wounds which (the law) itself inflicts)[2]. Also, one has to think of the principle of abstraction in this context; due to the fact that ownership can be transferred, even though the underlying obligatory act might be invalid, the transferor can often not avail himself of the rei vindicatio to redress the situation. The Reichsgericht itself once spoke of "Billigkeitsrücksichten, auf welchen die durch den Bereicherungsanspruch vom Gesetz erstrebte Ausgleichung von Vermögensverschiebungen, die auf Grund formalen Rechtes eingetreten sind, beruht"; (considerations of equity ... which are the basis for the

re-adjustment, by way of enrichment claims, for legal effects which have occurred according to the strict rules of the law)[3]. According to modern opinion, this view is antiquated[4]. The law of enrichment is of considerable importance in places where the principle of abstraction has no role to play, as where for example services are rendered by the plaintiff sine causa[5] or as far as the condictio based on interference[6] is concerned. The above-mentioned "adjustment" is rather designed, on the basis of special features of German law, to achieve a compromise between the protection of commercial certainty on the one hand and, on the other hand, protection of that party to an agreement who has performed although this agreement was invalid[7]. Today the law of enrichment has neither a higher nor a lower rank than other parts of private law. This is the reason why it is not subsidiary to a claim based on the rei vindicatio[8]. Of course, one has to admit that the law of enrichment is founded on equity and justice and the idea of loyalty and good faith, but so are most other parts of private law, and to no lesser degree. Historically speaking, claims for enrichment may always have been traced to aequitas or the natural law; perhaps this was necessary at a time wehen these claims still had to fight for recognition alongside those resting on contract or tort[9]. Today, however, if somebody has delivered something to the wrong person, or has paid his creditor twice, or has made a down payment on a contract which never eventuates, his right to restitution is of the same order of worthiness as a claim for the repayment of a loan or one that is based on the cancellation of a contract[10].

2. The Enrichment Action leads to a mere Redhibition of Shifts in Assets which have taken place without conferring to the Receiver a Right to keep them

Enrichment liability has to be distinguished sharply from contractual liability, and liability based on the law of tort. In contrast to the law of tort, enrichment libalility does not presuppose fault or blame arising from negligence or intention. Also an error of whatever kind is not a prerequisite of an enrichment claim[11]. Basically one can say that any delictual influence is alien to German law of enrichment. As far as the law of contract is concerned, whe have seen[12] that it is immaterial for what reasons a transfer is considered to be made "sine causa": whether a contract was void ab initio or has been rescind-

re-adjustment, by way of enrichment claims, for legal effects which have occurred according to the strict rules of the law)[3]. According to modern opinion, this view is antiquated[4]. The law of enrichment is of considerable importance in places where the principle of abstraction has no role to play, as where for example services are rendered by the plaintiff sine causa[5] or as far as the condictio based on interference[6] is concerned. The above-mentioned "adjustment" is rather designed, on the basis of special features of German law, to achieve a compromise between the protection of commercial certainty on the one hand and, on the other hand, protection of that party to an agreement who has performed although this agreement was invalid[7]. Today the law of enrichment has neither a higher nor a lower rank than other parts of private law. This is the reason why it is not subsidiary to a claim based on the rei vindicatio[8]. Of course, one has to admit that the law of enrichment is founded on equity and justice and the idea of loyalty and good faith, but so are most other parts of private law, and to no lesser degree. Historically speaking, claims for enrichment may always have been traced to aequitas or the natural law; perhaps this was necessary at a time wehen these claims still had to fight for recognition alongside those resting on contract or tort[9]. Today, however, if somebody has delivered something to the wrong person, or has paid his creditor twice, or has made a down payment on a contract which never eventuates, his right to restitution is of the same order of worthiness as a claim for the repayment of a loan or one that is based on the cancellation of a contract[10].

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ed, whether there has been a misrepresentation of a party to a contract, error or duress. All these questions deal with the law of contract, and only if it has been determined according to the rules of the law of contract that there was no legal basis for an act of performance, it is the task of the law of enrichment to skim off the unjustified increase of one's assets. The underlying legislative idea is that the enrichment claim should not cause any loss to the defendant[13]. For this reason enrichment in German law traditionally means an economic increment, the amount by which all the advantages accruing to the recipient from the transaction, outweigh the disadvantages connected with this transaction. It is inferred from this that the recipient may set off against the enrichment any disadvantages he suffered in connection with the acquisition of the benefit, or disadvantages which he would suffer in consequence of making restitution. Thus the plaintiff must bear the risk of all the events which negative or neutralize the economic benefit acccruing to the defendant. It must be stressed that the law of enrichment is not aimed at a compensation of damages or the adjustment of a decrease in the creditor's assets: the only starting point is the property of the enriched person[14]. The principle that enrichment is a mere redhibition of shifts in assets clearly comes out when it is pointed out that it is considered immaterial for the extent of an enrichment action whether the debtor has omitted to draw possible uses or profits[15], and when in connection with §818 par.3 BGB reference is made only to the actual enrichment of the debtor[16]. This, too, is a reason for the solution of the case, discussed above (in the context of §816 par.1 sent.1 BGB), where the debtor has alienated an article below its objective (market-) value: he only has to restore whatever amount of money he actually obtained. As far as the law of enrichment is concerned, he is not to blame for having not bargained better[17]. Again, this principle supports the opinion that with reference to §816 par.1 sent.1 BGB the debtor has to return even a profit which he has made by alienating the article: only the actual enrichment of the debtor's assets is important; whether or not this enrichment is a consequence of special skills and abilities of the debtor is immaterial[18]. A further consequence of this principle is that it is not a prerequisite of an enrichment claim that the creditor has suffered a decrease in his assets[19]. Impoverishment of the plaintiff and enrichment of the defendant are not "two indispensable factors"[20] which must arise simultaneously[21].

At first sight one could get the impression that the condictio ob turpem vel iniustam causam does not fit into this principle. But this view should be treated with some reservation. I would rather say that, because of this principle, §817 sent.2 BGB, the in pari turpitudine rule, is nowadays not regarded as a rule of punishment[22], but as an expression of the common idea that there is no judicial relief if the creditor has to refer to his own unlawful or immoral conduct to substantiate his claim[23] ("nemo auditur turpitudinem suam allegans")[24]. Therefore this idea should not only be limited to the law of enrichment but should be extended to other claims as well, such as the rei vindicatio, claims of tort or claims for the reimbursement of outlay[25].

But one has to admit that §§818 par.4, 819 BGB[26] and the distinction between a bona fide and a mala fide possessor in §§987 ff[27] are indeed exceptions to this basic principle, because here one cannot deny a delictual influence. However, these exceptions are based on an obvious and necessary difference in appraisal. In this context I have to mention that if one says that the law of enrichment does not refer to fault or blame, this does not mean that solutions by the law of enrichment are not often based on a distribution of risks or a weighing of legal merits. I have to come back to this point later[18].

Another question is, how we can determine whether or not someone has a "right to keep" the enrichment. As far as the enrichment-by-transfer claim is concerned, this question is not too difficult: "sine causa" in this case means that there is no valid legal basis to which the debtor could refer. As far as the condictio arising "otherwise" is concerned, this question needs a more detailed discussion. If there is for example a merchant A who, due to his bargaining skills, extends his sales and thus diminishes the sales of neighbour merchant B, then A is enriched at the expense of B. But no one could say that this enrichment is "unjustified". So how can we describe the criterion "unjustified" if there is no relationship based on an act of performance between creditor and debtor? The predominant opinion in German law considers an enrichment as "unjustified" if it is not due to the debtor, if the debtor has obtained the enrichment because he has broken the protected legal sphere of another, if the enrichment infringes what has been described as "Zuweisungsgehalt" of a legally protected right of someone else[29].

3. The Redhibition has to take place on specific "Leistungsebenen" (levels of performance)

This principle deals mainly with cases where more than two persons are involved. In practice it is a very important part of the law of enrichment, but unfortunately one of the most controversial ones as well. Formerly one spoke in this respect of the need for "directness of transfer" ("Unmittelbarkeit der Vermögensverschiebung")[30]: the loss of the plaintiff and the benefit of the defendant must result from one and the same transaction. But, as we have seen[31], in modern law a loss of the plaintiff is no longer considered necessary. Therefore one should no longer use the doctrine of "directness of transfer", but rather refer to the different levels of performance ("Leistungsebenen")[32]. According to this principle an enrichment claim lies only against that party to whom the plaintiff conferred the benefit, and not against third parties who benefited indirectly by this transfer. It is obvious that the definition of the conception of "Leistung" is of greatest importanc, because otherwise one cannot determine the different "Leistungsebenen". According to the prevailing opinion in German law[33], "Leistung" can be defined as a conscious and purpose-orientated (intentional) transfer of benefits. This definition is indeed satisfactory as far as two-person-relationships are concerned; but as soon as there are more persons involved difficulties arise. Consider the following examples: A owes money to B. A directs his bank C to transfer the amount of money due from A's account into B's account. Is the transferred money a "Leistung" of the bank C or of A[34]? Or: A owes money to B. A directs his bank to transfer the amount due (1,000 DM) from A's account into B's account. The bank does not transfer 1,000 DM, but 1,500 DM. Is the exceeding amount of 500 DM a "Leistung" of the bank C or of A[35]? Other examples are: transfer due to an obligation which was supposed to be an own obligation but, in fact, was the obligation of another person[36]; or the discharge of an obligation of another person, without this other person having given reason for him to do so[37].
A further difficulty in this respect is that, as far as enrichmernt arising "otherwise" is concerned, there is no "Leistung"; in these cases the different levels have to be determined by means of the criterion "at the expense of another"[38].

Because of these difficulties the strict conceptualization of the "Leistung"-re-

quirement has been severely criticized[39]. One of the most well known critics in this regard is Canaris[40]. Canaris advocates a farewell to the concept of "Leistung" as the determining factor in solving enrichment-cases because he is of the opinion that equitable results cannot be achieved by means of this notion[41]. Instead he refers to policy-considerations such as the attribution of risks ("Risikozurechnung") and the legal protection for bona fide acts ("Vertrauensschutz"). However, his proposals in order to achieve equitable results are dominated by so many different factors, rules, exceptions and counter-exceptions, that they do make it virtually impossible to solve cases where more than two persons are involved in an easy and convincing way[42]. Therefore Canaris' theory has been rejected[43].

Despite all criticism the courts today still use the concept of "Leistung" to determine between whom the redhibition has to take place[44] and refuse an actio de in rem verso[45]. A consequence of this principle is the subsidiary nature of a claim based on enrichment arising otherwise[46]: where a person has been enriched by means of a "Leistung" of someone else, he is only liable to that person and only on the basis of an enrichment-by-transfer claim; he cannot be sued on the basis of a condictio based on interference. The enrichment-by-transfer claim excludes any condictio based on enrichment arising otherwise[47]. Thus, if a building sub-contractor under contract to the builder, uses bricks and mortar in building the house of the customer, he can only sue the main contractor: on the contract, if it is valid, for unjustified enrichment, if it is not; he cannot sue the customer for any increase in the value of the house attributable to his work and materials. It is true that the customer has been enriched by the sub-contractor: not by way of "Leistung", but "otherwise". However, because this enrichment is regarded as "Leistung" of the main contractor, a (possible) condictio based on enrichment arising otherwise (in this case it would be a condictio for claiming reimbursement of impensae) of the sub-contractor against the customer is excluded by the enrichment-by-transfer claim of the main contractor against the customer[48].

But the principle of the "Leistungsebenen" as well as this consequence, namely the subsidiary nature of the other condictiones, is subject to a number of modifications. As far as the principle itself is concerned, German law seems to become increasingly casuistic[49]: the application of the concept of "Lei-

stung" is not determined in general, but with reference to certain types of cases. Special groups of cases are recognized, such as "transfer at the expense of a third person", "transfer to discharge someone else's obligation, without this other person having given cause to do so", "payment on the grounds of a non-existing or invalid order", "payment to discharge an obligation which was supposed to be one's own, but which was, in fact, someone else's obligation" or "acquisition of ownership by the processing of things delivered by a third person"[50]. As far as the subsidiary nature of a condictio of interference is concerned, the law itself states exceptions in §816 par.1 sent.2 BGB and in §822 BGB[51]. Furthermore, some writers extend the scope of application of §951 BGB to cases like the sub-contractor example mentioned above[52]. The reason for this fragmentation and for these exceptions is the fluctuating background of all these disputed cases: the crucial point is always to find an equitable distribution of risks by means of a weighing of legal merits. Therefore exceptions are necessary to the basic rule that the creditor should not acquire an additional debtor just because the object transferred happens to have ended up amongst the assets of a third party and that, indeed, he must look, for the purposes of restitution, to the party to whom he has transferred the object. Similar questions arise when solving the problem from whose point of view the question must be determined, whether a "Leistung" has taken place: from the viewpoint of the transferor or that of the recipient[54]. The opinion of the BGH, namely that only the viewpoint of the recipient ("Empfängerhorizont") is relevant, has been criticized. The BHG determines this "Empfängerhorizont" by means of objective criteria. This is criticized because if the purpose (an element of the subjective intentions of the party = the "Parteiwille") is an important criterion of the notion of "Leistung", then it is inconsistent to rely on objective aspects in determining between which persons an act of performance has taken place[55]. The advocates of this view prefer a determination by means of an interpretation of the intentions of the party that has made the performance.

4. The Enrichment Claim is aimed at the Redhibition of all (unjustified) Increases of someone's Assets

The contents of an enrichment action are as comprehensive as possible. Where the

object is still "in esse", it has to be re-transferred; thus the statement that a written declaration of honour is no increase in someone's assets and therefore cannot be recovered by an enrichment action[56], is at least very doubtful. A consequence of this principle is that the mere possession of an object (in contrast to ownership) is a suitable target of an enrichment claim[57].

The main problem in this respect is whether or not an enrichment claim covers profits obtained by the enriched person. As far as §816 BGB is concerned, we have seen that it does[58]. Regarding §818 par.2 BGB, however, the predominant opinion is that compensation for the value covers only the current value, the ordinary market value of the transferred object[59]. If services have been rendered, the current value is that amount of money which the enriched person is saved spending on ordinary workers. If someone else's legally protected invention has been used illegally, the compensation would be the amount of money the enriched person would have to pay for an ordinary licence. The modern opinion in German law[60] extends the enrichment liability to profits as well. This is backed mainly by three arguments: 1) §816 BGB is one kind of a claim based on enrichment arising "otherwise"; it would not be plausible if other claims based on enrichment arising otherwise did not cover profits. 2) If, on the one hand, the creditor bears the risk of an under-value-alienation, then, on the other hand, he should have the benefits arising from a profitable alienation. 3) If the debtor has alienated a thing of which he was the owner but which had been transferred to him "sine causa", then (as a consequence of the predominant view) he is liable to restore (only) the ordinary market value of this object (§§812 par.1 sent.1, 818 par.2 BGB)[61] whereas, in the case of §816 (where the debtor has alienated a thing which he did not own) he is liable to return profits as well. However, both cases are so similar that a different treatment (based solely on the principle of abstraction) seems to be unjust[62].

In my opinion the solution to this problem should be based on an extensive interpretation of §818 par.1 BGB. This rule does imply that the extent of an enrichment claim is comprehensive and covers profits. Thus the compensation for the value is only one part of the whole ambit of enrichment liability; it replaces only the retransfer of the prestation set up in §812 par.1 sent.1 BGB. Additional profits ar covered by §818 par.1 BGB[63].

Furthermore the principle that the enrichment claim is aimed at the redhibition of all (unjustified) increases of someone's assets can be seen to interfere with the doctrine of the "Zuweisungsgehalt"[64]: if according to this doctrine the enrichment is unjustified only if it has been gained contrary to the "Zuweisunsgehalt" of a legally protected right, then an enrichment action does lie only where such objects of legal protection have been impaired. In German law the opinion prevails that only absolute rights are such objects of legal protection[65]. Consequently, an enrichment action lies where copyright is impaired, but not where patent rights and registered rights are affected[66].

This opinion has been criticized[67] and I share the point of view of these critics: the BGB itself states in §816 par.2 BGB that an enrichment action is applicable where a mere relative right is infringed. Therefore rights which provide legally protected spheres and which consequently can be subject to an enrichment claim, are all those rights which aim at the legal protection of an individual person in contrast to rights which protect public interests. To determine this, one should refer to the question whether or not the individual person can waive the protection of this right[68].

5. The Extent of the Enrichment Claim is limited to the Actual Enrichment of the Debtor

This principle has been dealt with in chapter I, 4 d. Though it is very often considered to be the heart of the law of enrichment[69], an important exception to this principle exists. As I have already pointed out[70], the "Saldotheorie" has been developed to deal with mutual enrichment claims arising from bilateral contracts that have failed. However, it is subject to essential exceptions[71] and that is the reason why it has been criticized severely in recent years[72]: if (according to the "Saldotheorie") the enrichment which has to be returned is not more than the balance of value between performance and counterperformance, then even the defrauder is enriched to no further extent than this difference - a consequence the "Saldotheorie" does, however, not accept. A new opinion in German law comes to the same results as the "Saldotheorie", but bases its conclusions on the idea that the creditor is not entitled to rely on the defence of cessation of enrichment (§818 par.1 BGB) if the cause

for the cessation lay in his "sphere of risks"[73]. In my opinion the reference to a "sphere of risks" is very similar to the question whether or not the debtor is to blame for the cessation. Thus, alien delictual influences are imported into the law of enrichment.

No matter from what angle one looks at the "Saldotheorie" (or the new opinion), it is an important exception to the basic principle that the extent of enrichment liability is limited to the actual enrichment of the debtor. The BGH itself has described this theory as an adjusting of law due to reasons of equity[74]. Though this means a retreat from doctrinal purity, one has to admit that the results provided by the "Saldotheorie" are a practical necessity. One has to swallow the lesser evil!

CHAPTER III: THE SYSTEM OF S. A. LAW OF ENRICHMENT SEEN FROM THE POINT OF VIEW OF THE GERMAN SYSTEM

For the purpose of comparing these two Romanistic legal systems I will outline in this chapter the different condictiones of the S.A. law which correspond to the rules in German law. I am aware of the danger that either this comparison can lead to unproductive repetitions if it is too comprehensive, or that it can become unintelligible if the the comparison is too superficial. Nevertheless I will try to find a middle path which provides a sufficient basis to enable the reader to follow the discussion in chapter V.

1. Unjustified Enrichment arising pursuant to "Leistung"

a. Enrichment-by-transfer claim

The condictio indebiti of S.A. law corresponds to §812 par.1 sent.1 first alternative BGB. This condictio is used to recover money or property which was paid or delivered by the plaintiff to another, in the mistaken belief that it was due to such person. A general prerequisite of this action is that the ownership of the property must have been transferred by the act of the parties[1]

Thus where ownership has not passed, the legal remedy would be the rei vindicatio[2], because "there can hardly be any question of enrichment where the owner still retains his ownership and his right to the possession of the thing. His action is clearly a rei vindicatio and not an enrichment action"[3].

A further requirement of the condictio indebiti is that performance must have been made in the mistaken belief that the debt was due[4]. The distinction between mistake of fact and mistake of law has been a long-standing subject of controversy[5]; nowadays it is accepted that the mistake must be one of fact and not one of law[6]. Furthermore the mistake must be excusable, i.e. the ignorance must not be "supina aut affectata"[7]. According to Voet[8], ignorance of fact is supina aut affectata either if it is ignorance of a fact concerning the affairs of another when such a fact is known to almost everybody in the community, or if it is ignorance of fact concerning one's own affairs. Nowadays the courts consider even ignorance of fact concerning one's own affairs as material if the mistake has been induced by the defendant[9]. An exception to the requirement that the mistake must be one of fact and not of law is the case where transfer takes place in terms of a contract of sale which is void for failure to comply with formal requirements. In this case recovery is allowed without inquiry as to whether the plaintiff was aware of the invalidity or not, or whether his mistake was one of fact or one of law[10]. However, performance or tender of performance by the other party excludes the condictio in this case[11]. As in German law (see §813 par.1 sent.1 BGB) the condictio indebiti lies if performance has been made even though there existed a peremptory exception to the claim[12]. However, it is not applicable if the transfer has been made in discharge of a debt that has become prescribed[13] and a debt that is due at a future date[14] (see §§813 par.1 sent.2. 813 par.2 BGB). Furthermore, the action does not lie if it was a voluntary performance[15], or if there was a reasonable cause for making the payment, for example if a payment is made "pietatis causa"[16] (this corresponds to §814 BGB). Concerning the question whether or not an act of performance has been made voluntarily, the modern view in S.A. law seems to be that only positive knowledge of the fact that the performance was not due excludes the condictio indebiti[17]. Finally, the transfer is considered to be involuntary if it is made under duress. This is the case if it is made under protest as a result of force or a threat of force to the person or property of the transferor,

including a threat to withhold a right to which the transferor is presently entitled[18]. In German law, under the same circumstances, the application of §814 BGB is excluded[19].

As far as cases are concerned where more than two parties are involved, S.A. law is confronted with basically the same difficulties as German law. Generally, the question is between which parties the re-transfer of assets has to take place. Usually this is considered to be an aspect of the requirement that the enrichment must be "at the expense" of the plaintiff[20]. In a recent decision[21] this problem was disguised as the question who could be considered to be the "recipiens" of a prestation. It was argued that the condictio indebiti does not entitle the solvens to pursue what was mistakenly paid, wherever it is to be found. The recovery of the undue payment from its recipient is the sole objective of the action. This means that the condictio indebiti is enforceable against the recipient of the undue payment, but against nobody else. The recipient is not necessarily the person into whose hands the money was actually put when it was paid. He is the one who must be considered, in all the circumstances of the case, truly to have received the payment. All that matters is whether one can appropriately be said to have received the payment in some or other way[22]. This corresponds in German law to the definition of the term "Leistung", by which the creditor and debtor of an enrichment-by-transfer claim are determined[23].

Recently there have been two cases of "three-party relationships" discussed fully in S.A. law: firstly, the payment of somebody else's debt[24] and secondly, a bank's right to recover payments made by mistake[25].

The solution favoured in the former case is to distinguish between an action on negotiorum gestio and an enrichment action, the latter being applicable where the intervention was not in accordance with the interests of the actual debtor. By means of the action for negotiorum gestio the dominus is liable for the full expenses of the gestor, irrespective of the result achieved, while by means of the enrichment action the right of the gestor is based simply on the enrichment of the dominus[26]. This solution corresponds with German law, where the distinction is drawn between a legitimate management without mandate (§§683, 670 BGB) and an illegitimate management without mandate

(§§684, 818 BGB)[27].

In the latter case it is considered that if a bank pays a cheque because it has made a mistake concerning the existence or extent of the customer's instruction to pay, the payment is sine causa and may be recovered by the bank from the recipient's unjust enrichment[28]. This solution is similar to the treatment of those cases where German lawyers speak of "want of instruction"[29].

b. The condictio ob causam finitam as a Type of condictio sine causa specialis

This type of condictio covers §812 par.1 sent.1 first alternative BGB. It lies where the ownership of property is transferred to the defendant in terms of a valid cause which later falls away[30].

c. The condictio causa data causa non secuta

This condictio of S.A. law is equivalent to §812 par.1 sent.2 second alternative BGB. It is available to recover that which has been transferred on the assumption that a particular event will take place in the future, when that event does in actual fact not take place; as well as that which has been transferred subject to a modus which is disregarded or frustrated[31]. However, if a person gives a thing with the full knowledge that the counter-performance is impossible, this condictio cannot be applied because the transferor must be held to have intended a gift[32], (see §815 BGB). Furthermore, this condictio is also unavailable if the impossibility of counter-performance is due to the fault of the transferor[33]. As we have seen, German law does not go so far: according to §815 BGB, mere fault of the transferor is not sufficient; rather, the transferor must have acted contrary to the principles of loyalty and good faith.

d. The condictio ob turpem vel iniustam causam

In S.A. law, the condictio ob turpem vel iniustam causam covers the situation where §817 ABGB applies in German law. Thus, where money or other property has been transferred in terms of an illegal agreement, the condictio ob turpem vel iniustam causam is available to recover what has been thus transferred or

the value thereof[34]. The transfer must have taken place in terms of an illegal agreement, i.e. where concluding an agreement or its performance or object is prohibited by law or is contrary to good morals or public policy[35]. If both parties knew of the turpis causa, or even if the plaintiff alone knew of it, no condictio will lie, (cf. §817 sent.2 BGB)[36].
The true purpose of this rule, which is based on the maxim "in pari delicto potior est condicio defendentis", is punitive[37]. However, nowadays this "par delictum rule" is no longer applied rigidly, with the effect that this rule may be relaxed "where it is necessary to prevent injustice or to promote public policy"[38].

As far as the relation of the condictio ob turpem vel iniustam causam with other condictiones is concerend, the statement of Lotz[39] is relevant: "Agreements are sometimes prohibited by law but are nevertheless valid if concluded in contravention of the prohibition, the only sanction attached by the contravention being a fine or penalty ... In such cases there can, of course, be no question of condictio of what has been performed in terms of the (valid) agreement. The condictio ob turpem vel iniustam causam finds application only in those cases where the agreement is void for illegality". Thus, in cases where German lawyers cnsider that this condictio has a remaining scope of application of its own[40], S.A. lawyers refuse to apply the condictio ob turpem vel iniustam causam.

However, as in German law, the question arises whether there are cases imaginable where a contract though contravening the boni mores or offending public policy is nevertheless valid. It seems to be more likely that such a contract is void[41].

2. Unjustified Enrichment arising Otherwise

a. Condictio of Interference

In S.A. law there is no equivalent to the rule of §812 par.1 sent.1 second alternative BGB. I may repeat[42] that this condictio is of greatest importance in German law: above all it covers such essential cases as the unauthoriz-

ed use or consumption of someone else's property or cases of tortious acts. This gap in S.A. law is mainly due to the following reasons: firstly, where ownership has not been transferred, the plaintif is only entitled to rely on the rei vindicatio; enrichment liability does not exist[43]. Consequently cases of unlawful dispossession or disturbance of possession (which are covered by the German law of enrichment), are excluded from the S.A. law of enrichment[44]. As a typical example in this respect, I would like to mention the case Union Government v. Lombard[45], where a servant of the Government picked, contrary to the instructions of the Government forester, a camphor-bush not on Government ground but on the ground of the plaintiff. This is the typical situation where under German law a condictio based on interference (§812 par.1 sent.1 BGB) could be applicable. Gardiner, J., in this case, however, stated[46] that if the bags were still in the Government's possession, then it had no answer to a vindicatory action (and one has to add that this would be the only legal remedy the S.A. law provides in this situation).

Secondly, in most of the cases where unauthorized use and occupation is concerned, no enrichment liability exists[47]: "where a contract of sale of immovable property was, unbeknown to both parties, void ab initio, ..., there is no principle in our law which allows the owner to claim from the "purchaser" the value of the use of the land, whilst the "purchaser" was in occupation"[48], or "where in pursuance of an unenforceable agreement of sale of land, the purchaser is placed in possession of the land and pays portion of the purchase price, the seller who refuses to carry out the agreement, must refund the whole of the purchase price paid, and is not entitled to compensation for the purchaser's use and occupation of the land"[49]. The reason for this limitation of enrichment liability is given in Rademeyer v. Rademeyer[50]. In this case it was argued that the bona fide possessor did not have to deduct from his claim for expenses the value of occupation of the premises, because this was not part of the fruits he had gathered: occupation value is not covered by the concept "fruits". This is a remnant of the view that an enrichment action does not lie for the recovery of a "factum"[51]. It is true that as far as the condictio of incurred expenses of a bona fide occupier is concerned[52], an equitable amount may be deducted from his enrichment claim, in respect of the use and occupation of the land. However, this deduction has to be classified not as an equivalent of a condictio based on interference, but rather as a counterpart of

the harmful events which the debor of an enrichment claim is entitled to set off as deductible items[53], (damna cum lucro): the deduction in respect of use and occupation of the improver's claim has to be conceived as lucrum cum damno. Therefore De Vos states[54]: "dat ons hier met 'n ontwikkelde verrykingsaksie te doen het".

Only in the relationship of landlord and tenant does the S.A. law recognize an action for compensation for use and occupation[55]. In earlier cases[56] it was held that rent could be claimed as long as the lessee remained in occupation, i.e. even after termination of the lease. Nowadays it is submitted that these cases have been wrongly decided[57] and thus in modern S.A. law a claim for compensation for use and occupation after the termination of a lease is based on the law of enrichment[58]. However, one has to bear in mind that compensation for use and occupation is only awarded where this special relationship between landlord and tenant is present.

b. Disposition of someone else's Property - § 816 BGB

The condictio sine causa specialis lies in cases where according to German law §816 BGB is applicable: this condictio lies against a person who has bona fide disposed of the property of another[59]. The requirements of this claim are as follows: firstly, it must be (de facto) impossible for the plaintiff to vindicate the property, because where vindication is still possible, a condictio is excluded[60]. As Voet states: "but though an owner of stolen property can vindicate it, he nevertheless, if it has been sold off (sc.: but is still in esse!), has no right of vindicating the price realized from it, or perhaps not yet paid but still due. The price of my property which has been sold off by another not in my name is not mine, nor does it take the place of the property in particular proceedings. Thus it is not put by substitutuion into the place of the property stolen and is not itself of the nature of stolen property"[61].

Secondly, if the receiver acted in good faith this condictio is excluded[62]. The reason for this requirement is clearly shown by Voet: whereas it appears that no mercy should be shown to those who, by purchasing stolen property in bad faith and with knowledge and then in turn, sold it off, a

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different rule should be laid down "in the case of those who, just as they came by the stolen property in good faith, so again sold it off in good faith as well. That is because on account of their good faith they cannot appear to be bound either on wrongdoing or on any contract or quasi-contract or by natural fairness, inasmuch as they have not been in any way enriched to the loss of another"[63]. This clearly refutes the English doctrine of conversion according to which any person who, however innocently, otains possession of the goods of a person who has been fraudulently deprived of them and disposes of them, whether for his own benefit or that of any other person, is guilty of conversion and therefore liable to the true owner[64].

In accordance with §816 par.1 sent.2 BGB, one can see the tendency in S.A. law nowadays that in all cases where the property is received ex causa lucrativa, the condictio sine causa specialis should lie against the receiver[65].

c. Condictio of incurred expenses

Cases dealing with the bona/mala fide possessor correspond to those covered in German law by §§994 ff BGB. In this context a possessor is a person who holds the property of another animo domini, i.e. either believing himself to be the owner (bona fide possessor) or else, knowing that he is not the owner but professing to be the owner and acting as if he were (mala fide possessor)[66]. A bona fide or mala fide possessor who has expended his money or material on the preservation or improvement of the immovable property of another, has an action for compensation against the person who is the owner of the property[67]. The same rules apply to a bona fide possessor who has improved the movable property of another[68].

d. Specificatio and Accessio

The condictio sine causa specialis is (furthermore) applicable in cases which, according to German law, are covered by §951 BGB, i.e. in cases where a new thing is made by the defendant from the plaintiff's property and the plaintiff has therefore lost his ownership (bona fide specificatio)[69]. The same rules apply in the case of accessio[80].

3. Extent of Liability

a. Restoration of what has been obtained

As in German law the debtor must primarily return what he has obtained; the enrichment claim is a claim for restitution in kind[71]. Thus by means of the condictio indebiti everything which has been transferred without being due is reclaimed. This action does not only deal with consumable things, but also with other things, whether movable, immovable or incorporeal[72]. Whether or not an enrichment action lies to recover the value of a factum, cannot be answered generally. There is some authority for the view that the conditio indebiti also lies for the recovery of the value of a factum[73], but the predominant opinion is that none of the condictiones could be used[74]. As far as the condictio sine causa specialis is concerned, in cases where the defendant has, in good faith, disposed of the property of another, the defendant is obliged to account for any profit he has had from the property. Thus if he sold the property under the bona fide belief that it was his, he has only to account for the price which he received[75]. This corresponds to the interpretation of §816 BGB[76].

b. Fruits and substitutes

The property must be returned with fruits and accessions[77] (compare §818 par.1 BGB). Interest which the defendant received on a sum of money paid to him indebite is not regarded as "fruits" and need not be restored[78]. The reason for this view is that the interest has been obtained from a new obligation[79] or, as Voet argues[80]: if the person to whom money had been paid indebite invests it, he is entitled to the benefit derived from the investment on the ground that he takes the risk of the investment. Thus interest is only payable a tempore morae, i.e. from the date of payment, if the payer was in bad faith; otherwise from the date of demand[81].

Furthermore, in Krueger v. Navratil[82] the court laid down "that a claim based on undue enrichment includes (even) profit which the defendant may or could have derived from the use of the stolen property". Contrary to German law[83], the value of any fruits gathered by the possessor before litis con-

testatio, less production costs, is set off against his expenses[84]. If the recipient is unable to restore what he has obtained but has gained a substitute, then this substitute can be recovered from him[85].

c. Compensation for the value

If neither the (transferred) object nor a substitute can be restored, then the value of the object may be recovered from the defendant, if he remains enriched through the receipt of the object[86]. Value in this context means "market value" of the object[87].

If one party has by his work or services, conferred sine causa a benefit on the other, he may claim compensation for these services not exceeding the value of the said benefit. Benefit means an increase in the value of the defendant's estate, relative to its estimated value but for the plaintiff's act[88]. The amount of the defendant's enrichment has sometimes been determined by reference to the contract price and the unfinished portion of the work[89], because the enrichment of the defendant will usually take the form of expenses saved "and the only practical way of determining the amount of expenses so saved will normally be by reference to the stipulated wage"[90]. The extent of the condictio of incurred expenses is dependent upon the different kinds of outlay: impensae necessariae, impensae utiles and impensae voluptuariae or luxuariae. Impensae necessariae are expenses necessary to preserve property from loss, deterioration or destruction. Impensae utiles are expenses which increase the value or yield of property. Impensae voluptuariae are expenses neither necessary nor useful[91]. The bona fide possessor is entitled to reimbursement of all his necessary expenses[92]. Where he has effected useful improvements to the property, he is entitled either to his expenses or to the amount by which the value of the property has been enhanced, whichever is the lesser[93]. In the case of luxurious improvements no compensation is payable, save where the yield of property has been increased or the owner intents selling the property, and the price has been icnreased as a result of the improvements[94]. Nowadays it seems that a mala fide possessor has more or less the same remedies as a bona fide possessor[95]. So he, as well, is entitled to compensation for useful expenses not exceeding the value of the benefit conferred on the owner, "because what applies to the bona fide possessor applies equally to the mala fide posses-

sor, for in either case the owner should not be enriched at the expense of another"[96].

The remedies of a bona fide possessor are similar to German law: firstly, on refusal of the owner to pay compensation, he is entitled to remove such improvements made by him as can be removed without material damage to the property[97]; secondly, he may retain possession of the owner's property until he is paid the compensation due to him (lien)[98]; thirdly, in the case of immovable property, he may surrender possession of the property and bring an action for compensation[99]. The mala fide possessor is entitled, before the owner demands possession, to remove such improvements as can be removed without damage to the property[100]. But in contrast to the bona fide possessor, he has no ius retentionis to enforce his claim for compensation for useful expenses[101], unless the owner was aware of his activities and failed to protest[102].

As far as these remedies of the bona/mala fide possessor are concerned, the court has a wide discretion to adjust the rights of the parties in an equitable manner[103]. "The doctrine upon which the right to compensation is based is an equitable one, and it must not be applied in such a way as to produce inequitable results. Probably in the majority of cases it will be found that it is fair and equitable that the owner of the land should pay for the improvements to the extent to which the land has been enhanced in value, subject, of course, to this limitation that, inasmuch as the possessor is to be compensated for the expense to which he has been put, he can in no circumstances recover more than the amount of such expenses. At the same time it is easy to suggest cases in which the application of this rule would be most unfair to the owner of the land"[104].

d. Cessation of enrichment

As under German law, the defendant's liability is confined to the amount of his actual enrichment at the time of the action[105] (see §818 par.3 BGB). Cessation of enrichment is consequently a good defence against a plaintiff's claim for the full value of the transferred property[106]. Where the defendant has lost or disposed of the thing, his liability is confined to the amount

by which he is still enriched at the time of action. Harmful events are taken into account insofar as the defendant is entitled to compensation for his incurred expenses. On the other hand, with reference to the condictio of incurred expenses of the bona/mala fide possessor the value of any fruits gathered by him before litis contestatio, less production costs, is set off against his expenses[107]. "Fruits" include the rent received where the possessor has leased out the property, but not the use and enjoyment of the property nor fruits yielded by the improvements themselves[108]. Furthermore, where the defendant has made counter-performance, he is entitled to the return of that which he has performed or, where the plaintiff is no longer in possession of it, its value[109]. The denfendant may refuse to restore until the plaintiff tenders restitution on his side[110].

Just as German law, S.A. law faces the problem of "enrichment against will"[111]. So, for example, when fixtures cannot be removed without damage to the land, compensation must be paid, "provided, in the case of improvements, that the owner might reasonably have effected them himself"[112]. In general, the transferor is not entitled to compensation in respect of expenses, in respect of which the owner will derive no benefit when the thing is restored to him[113]. Thus, an employer need not pay for a useless borehole[114], and the owner of a car need not pay for repairs to his car which do not enable him to use it safely[115]. This principle that the person who has been enriched might be released from liability to compensate, if the improvements were not useful to him and the expenditure excessive, with regard to his means and position[116], is one feature of the wide discretion of the court mentioned above[117].

e. Increased liability

The defendant loses his right to plead a cessation of his enrichment under the following circumstances (which correspond to German law - see §§818 par. 4, 819 par.1 BGB): firstly, from the moment that the defendant becomes aware that he has been enriched sine causa at the expense of another, his liability is reduced or extinguished only if he is able to prove that the diminution or loss of enrichment was not due to his fault[118]. However, there are two exceptions to this rule. The liability of a spouse who has been enriched by a prohib-

ited donation made by the other spouse[119], or a minor who has been enriched by performance to him arising from an unauthorized contract[120] remains restricted to the amount of his or her actual enrichment at the time of litis contestatio, unless in the case of a donation between spouses the donee spouse acted fraudulently to defeat the donor spouse's claim[121].

Secondly, from the moment that a defendant is in mora his liability is reduced or estinguished only if he is able to prove that the event which diminished or extinguished his enrichment would also have operated against the plaintiff, if performance had been made timeously[122].

CHAPTER IV: SOUTH AFRICAN LAW OF ENRICHMENT CONTINUED

There is a considerable number of important cases where rules of the S.A. law of enrichment cannot be dirctly related to a German counterpart. I will deal with these cases in this chapter.

1. Enrichment Liability where no Reciprocal Benefit for a Performance has been Obtained

Where one party to a contract transfers something to the other in pursuance of his promise, but the other party fails to make full performance, the former is entitled, according to the circumstances, to reclaim all or a portion of what he has given[1] by means of the condictio causa data causa non secuta[2]:
if the failure is total, the plaintiff may reclaim all that he has given; if the failure is partial only, he may recover a proportionate share of what he has transferred. Thus where a lessee pays rent in advance for a certain period and he obtains no beneficial occupation at all, he may recover the whole amount paid by him[3], but where he receives beneficial occupation for a portion of the period, he may reclaim from the lessor only so much of the rent as is proportionate to the period when he had no beneficial occupation[4]. Similarly, a purchaser of goods who pays the price in advance, may recover the payment if the goods turn out to be so defective as to entitle him to reject them, "because the

causa for which (the purchaser) handed over the money to (the vendor) was that (he) should receive, in return for that money, a certain class of (goods)"[5]. In all these cases the condictio causa data causa non secuta is, according to S.A. law, applicable, because payment was made for a causa futura which did not occur at all or which occurred only partially. So one can say in general that, according to S.A. law, in cases where one person has given something to another person without "just" causa, that is "without receiving any reciprocal benefit", enrichment liability exists[6]. Cases where a contract for work has been badly carried out, are treated in a like fashion. In Hauman v. Mortje[7] there was a contract for an addition to be made to a house and the contract price was £ 60. The work was badly done, but the owner of the house made use of the addition and paid part of the contract price. The builder sued him for the balance and he refused to pay. It was held that in such case the builder had no right to sue ex contractu, because his right to claim the sum agreed upon became enforceable only when he had made full performance. As the owner had not rejected the benefit, however, and as he was clearly enriched at the expense of the builder, he was held liable on the basis of enrichment. He had to pay the contract price less the amount which it would cost to have the defects rectified. This case, despite having been subjected to severe criticism[8], has been followed in a long line of decisions[9]. I will discuss these cases in the next chapter: differences between the German and S.A. law of enrichment.

2. Occupier[10]

In the S.A. law of enrichment (bona/mala fide) occupiers are distinguished from (bona/mala fide) possessors. An occupier is a person holding or occupying the property of another: not animo domini, but recognizing the title of the owner; but also not holding precario, that is at the pleasure of the owner. Occupiers can be divided into three groups[11]: firstly, bona fide occupiers, i.e. people who believe that they occupy under title but in fact do not; secondly, mala fide occupiers, i.e. people who know that they have no title but act as if they have; thirdly, occupiers under title, such as lessees, pledgees, usufructuaries, borrowers, buyers of property under a suspensive condition with respect to the passing of ownership. Among this group lessees are subdivided again: les-

sees of rural tenements are in a special position, because they are governed by the placaats, i.e. the legislation of the States of Holland[12], which was received into S.A. law[13]. The bona fide possessor's action for compensation and ius retentionis have been extended to bona fide occupiers[14]. Thus a bona fide occupier who has expended his money or material on the preservation or improvement of another's property is in the same position as a bona fide possessor, save that in the case of a bona fide occupier, unlike that of a bona fide possessor, an equitable deduction may be made in respect of the occupier's use and possession of the land ("damna cum lucro")[15]. The reason for this distinction is given in Rademeyer and others v. Rademeyer and others[16]: "The bona fide possessor who thinks he is owner, does not envisage that he could be called upon to pay for his occupation: he occupies as owner. The bona fide occupier generally envisages that he will be called upon to pay for his occupation. This difference brings about a difference in the equities in these two cases, and it is this difference in the equities that moved the Court of Appeal in Rubin's case to take into reckoning the value of the use and occupation when assessing the expenses the occupier was entitled to recover".

Whether or not a mala fide occupier who has expended his money or material on the preservation or improvement of someone else's property is entitled to compensation, has not yet been decided. It is submitted, however, that in view of the extension of the bona fide possessor's action to a bona fide occupier, the mala fide possessor's action must by analogy be taken to have been extended to a mala fide occupier[17].

The bona fide possessor's action for compensation and ius retentionis have been extended to occupiers under title (lawful occupiers) as well[18]. In these cases again an equitable amount may be deducted in respect of the use and occupation of the land[19]. Though fiduciaries and usufructuaries are in lawful occupation of property, they require separate treatment, because their respective rights to compensation for improvements to the propery are governed by special rules. As far as compensation for improvements is concerned, a fiduciary is treated as a bona fide possessor[20]. He is, however, not entitled to compensation for day to day repairs to the property, and the value of the fruits that he has had from the property cannot be set off against his claim for compensation[21].

In German law, on the other hand, this situation is covered by the enrichment--by-transfer claim (§812 par.1 sent.1 BGB)[30].

CHAPTER V: DIFFERENCES BETWEEN S.A. AND GERMAN LAW OF ENRICHMENT

There are a number of differences which, in my opinion, are of minor importance for the purpose of this thesis. Among these differences I would like to mention for example the applicability of the condictio causa data causa non secuta: according to S.A. law, this condictio does not lie where the counter-performance cannot be made due to the fault of the giver; in German law the mere fault of the transferor would not be sufficient: he must, rather, have acted against the principles of loyalty and good faith[1]. Furthermore, S.A. law does not regard interest received on a sum of money as fruits which have to be returned; in German law the contrary view is advocated[2]. Or: the mala fide possessor has, according to the BGB, a claim only for necessary expenses; this was the opinion of Grotius[3], too, but his opinion did not prevail, so that nowadays in S.A. law a mala fide possessor is entitled to useful expenses as well, which is, as Kotzé, J. has stated[4], to be regretted.

I rather want to draw the attention to differences which, in my opinion, refer to more essential features of the law of enrichment.

1. The Relationship between the rei vindicatio and Enrichment Actions

In the case of Akbar v. Patel[5], plaintiff and defendant entered into a written contract in terms whereof the plaintiff indicated to sell to the defendant, who indicated to purchase from the plaintiff, a certain plot for a purchase price of R. 25,000. Pursuant to this contract, the defendant was given occupation of the plot. Defendant had paid the plaintiff the sum of R.16,000. The contract was null and void and of no effect in law, by virtue of the fact that it did not comply with the provisions of the formalities in respect of Contracts of Sale of Land Act[6]. Plaintiff had tendered payment of the said sum of R. 16,000, and had demanded that defendant vacate the plot, but defendant

had rejected the tender and had refused to accede to this demand. These were the plaintiff's particulars of claim and the defendant contended that they were defective and bad in law for want of any averment that the defendant was unwilling or unable to carry out his part of the inchoate agreement. (A plaintiff has to show that the defendant is unwilling or unable to implement the terms of an inchoate agreement, if his claim is based on unjustified enrichment; this is not necessary where his remedy is his ius vindicandi)[7]. In this case Trengove, J.A., came to the conlusion that, where the ownership of a thing had not yet been transferred, the transferor was "entitled to avail himself of the rei vindicatio"[8]. But this statement does not suffice to answer the question whether an enrichment action is still applicable where the ownership has not been transferred.

De Vos deals more clearly with this problem and he undoubtedly answers this question in the negative: "In die geval waar dit die eienaar van die saak is wat die besit oorhandig het, kan mens natuurlik nie die aksie waarmee hy die besit terugvorder as 'n condictio indebiti of enige verrykingsaksie bestempel nie. In die eerste plek het al die condictiones sine causa eiendomsoordrag as vereiste gestel, behalwe in die geval waar 'n condictio indebiti gegee is aan iemand wat die besit van 'n saak waarvan he nie die eienaar was nie, oorhandig het (die sogenaamde condictio possessionis) en die uitsonderlike gevalle onder die condictio sine causa specialis, wat nie hier van toepassing is nie. In die tweeede plek kan daar kwalik sprake van verryking wees waar die eiser nog sy eiendomsreg en sy reg om die besit van sy saak te hê, behou het. Sy aksie moet klaarblyklik 'n rei vindicatio wees, en nie 'n verrykingsaksie nie"[9]. Therefore in the case Akbar v. Patel the defendant's exception was dismissed because the plaintiff had based (as he had to!) his claim on his ius vindicandi.

This case reveals two features of the S.A. law of enrichment which are unknown to German law. First of all, there is no doubt that in German law the rei vindicatio and an enrichment action are applicable simultaneously and interchangeably[10]. Sometimes it will be easier for the plaintiff to give evidence to fulfil the requirements of the rei vindicatio; sometimes it will be to his advantage to rely on an enrichment action, because in this case the defendant is obliged to return not only the transferred thing itself (as is the case where the plaintiff relies on his ius vindicandi), but fruits and accessions as well.

That the defendant is enriched even though the ownership of the thing was not transferred to him is beyond doubt in German law: it is true that the plaintiff remains owner and he has a right to possession of the thing; however, the transferred possession itself causes an (unjustified) shift in the assets of plaintiff and defendant, which entitles the plaintiff to rely on an enrichment action. In my opinion S.A. law neglects and underestimates the (economic) value and the actual importance of the legal concept "possession"; a feature which we will find again when we deal with the question of the recovery of a "factum"[11]. Secondly, the principle which had been developed in Carlis v. Mc Cusker[12], namely that a plaintiff who based his action on unjustified enrichment must aver that the defendant is unwilling or unable to carry out his part of an inchoate agreement could not exist in German law. "The reason for this requirement is self evident", as Trengove, J.A. stated[13]: "As long as the defendant is ready and able to give effect to such an agreement, there cannot be any question of unjust enrichment on his part at the expense or to the detriment of the plaintiff".

This principle diminishes the importance of formality requirements. These formality requirements have been developed above all to protect the layman from thoughtless and inconsiderate actions. If a contract does not comply with such necessary requirements but one party to the contract nevertheless can force the other party to stick to this contract by averring that he is willing and able to carry out his part of the undertaking, this protection would be undermined. The case of CD Development & Co. (Pty) Ltd. v. Novick[14] elaborated all these doubts and it was held "that there was no merit in the rule" developed in Carlis v. Mc Cusker. Among other criticisms, Baker, J. refers to the relationship between the rei vindicatio and an enrichment action. He says: "An even greater inequity is the fact, that the seller who had parted with possession but not ownership of the property ... can at any time reclaim possession by a vindicatory action, provided he returns the payments received (...) but the buyer, even though willing and able to complete the payments contracted for, cannot compel transfer, for willingness and ability to pay has no legal effect in preventing the seller-owner from evicting him from the property"[15]. As Professor Kahn, to whom Baker refers as well[16], puts it: "The rule in Carlis v. Mc Cusker is suspect. It permits the one party to play ducks and drakes with the other. He who has not performed may elect to stand by the void contract ... ".

As far as formality requirements are concerned, it was held that a contract which failed to comply with these requirements "was entirely void; and furthermore it was void on the ground of public policy"[17]. In this case it was clearly shown that it is not for the Court to give effect indirectly to contracts which Parliament had decided should be devoid of effect. With reference to basic principles of the law of enrichment, the rule developed in Carlis v. Mc Cusker contradicts the fundamental purpose of the law of enrichment, namely the mere redhibition of actual shifts in one's assets. Whereas we know that in calculating the damage arising from a breach of contract or a tortious act, hypothetical or future events are taken into account, (for example the possibility that one party could resell the object profitably to a third person if the debtor had duly performed in terms of the contract), this is not possible in calculating the enrichment of the debtor of an enrichment action: here only the actual assets (that which has been transferred sine causa, or the value of an unauthorized use) turn the scale. Thus, the fact that the defendant is willing and able to carry out his part of the undertaking (in the future!) must not be taken into account in determining the enrichment of the plaintiff.

In this context I have to mention again that S.A. law does not consistently follow the principle of the special nature of a rei vindicatio: there are cases where by means of the rei vindicatio even the value of a thing can be recovered[18] and the condictio sine causa is applicable where a vindication is "de facto"[19] impossible. However, as far as the "de facto" impossibility is concerned, I doubt whether this is an accurate means of distinguishing between the application of a rei vindicatio and an enrichment action: is it de facto impossible to vindicate the property if the owner could trace the third person to whom the object had been sold? How much effort does the owner have to undertake to find this person? Is it de facto impossible to vindicate the property, for example sacks of corn, if these sacks have been mixed with other sacks of corn of the same kind in the warehouse of the third party?

2. The Requirement of a Mistake of Fact

In Miller and Others v. Bellville Municipality[20] the plaintiffs had decided to develop land owned by them by building on it, and for this it was necessa-

ry to obtain the approval of the defendant municipality. In terms of clause 8A(i) of the defendant's town planning scheme, the plaintiffs had to surrender, free of charge, a certain portion of the land for street purposes, which they did. Subsequently the Appellate Division, in another action, decided that this clause was ultra vires. Plaintiffs sought to recover the land which they had donated and transferred to the defendant. It was considered that both parties to the transfer of land were in common error as to the powers and duties conferred by law upon the defendant under the Township Ordinance, 33 of 1934 (C); that the plaintiffs transferred the land to defendant because the latter intimated to plaintiffs that it would only pass the plans for the building on the lot if plaintiffs did so; and plaintiffs (and defendant) thought that the defendant was entitled to impose such a condition precedent to its consent[21]. It was held that the plaintiffs' claim was based on a condictio indebiti, that the transfer was the result of an error of law and that relief could not be obtained from the results of an act undertaken in mistake of law. Furthermore, it was held that the error was inexcusable and consequently that the action of the plaintiffs had to fail.

According to German law, the decision would have been in favour of the plaintiffs. Briefly the decision would have taken the following steps: Suppose the transfer of land had been a contract of private law, then both parties to this contract would have laboured under a mutual subjective error as to the powers of the defendant. The plaintiffs would not have entered the said contract had they known that the defendant was not entitled to impose such a clause. Because this was obvious to the defendant, it would be a violation of the principle of loyalty and good faith (§242 BGB) if the plaintiffs were obliged to stand by the terms of the contract. In German law these facts are coverd by the clausula rebus sic stantibus (Fehlen der Geschäftsgrundlage, lack of basis of the transaction)[22], with the consequence that first of all the contract should be adjusted to the new circumstances or, if this is not possible (which is the case here), the contract should be cancelled[23]. However, and this is important to keep in mind, thus far the law of enrichment is not involved at all. These considerations are based exclusively on the law of contract. Not before it has been decided that a contract is void or cancelled can we refer to the enrichment-by-transfer claim (§812 par.1 sent.1 BGB), because only then can we say that a thing has been transferred "sine causa". Only after having concluded that

the contract had been cancelled because its basis had been frustrated would the plaintiffs be entitled to recover the transferred land on the basis of §812 par.1 sent.1 BGB. Whether or not the plaintiffs acted under an error of law is immaterial[24].

Another example of this kind is the case Delponte's Estate v. Barnes and Another[25]. Here the executors under the will of one D brought an action to set aside a certain bequest made by the testator on the ground that the beneficiary was a married woman with whom the testator had committed adultery. The plaintiffs also claimed the repayment of certain instalments of money which had been paid to the beneficiary in terms of the will. The woman admitted her adultery with the testator, but claimed that such adultery did not render the bequest to her invalid. It was held that the bequest to the woman was null and void by reason of her adultery with the testator. The action to recover the money paid would have been the condictio indebiti, but it was considered that the requirements of this condictio were not fulfilled, because the instalments were made to the woman in ignorance of the law: as a matter of fact, the executors had continued the payments for some time after they had acquired knowledge of the law that a woman living in adultery with a man could not take bequests under his will[26]. According to German law, again, this case would have been decided in favour of the plaintiffs: if the requirements of a so-called "mistress-testament" ("Geliebtentestament") had been fulfilled, namely that the bequest had been promised in order to promote or reward the adulterous relationship[27], then this bequest would have been immoral and void (see §138 par.1 BGB)[28]. Consequently, money paid due to this bequest would have been paid sine causa and could have been recovered by means of the enrichment-by-transfer claim (§812 par.1 sent.1 BGB). Whether or not the money had been paid erroneously (either by a mistake of fact or one of law), is immaterial under German law.

3. Enrichment Liability where no "Reciprocal Benefit" has been received

Here I have to come back to cases which I have already mentioned before[29]. Wessels states[30] that "if a lease of a house is executed and it turns out that the house was burnt down before the lease was executed, there is a total failure of consideration. If rent had been paid in advance, the lessee could re-

cover the money paid by the condictio sine causa ...". In this respect in German law one has to distinguish between three different situations: firstly, if the house was burnt down before the contract had been concluded, this contract would be void because it was aimed at an impossible performance (§306 BGB: initial objective impossibility); consequently rent paid in advance could be recovered by means of the enrichment-by-transfer claim (§812 par.1 sent.1 BGB), because no legal basis existed for the performance. Secondly, if the debtor is in a position where it is impossible for him to perform the contract but another person could do so (for example in the case where A sells a car to B and before the contract is concluded this car is stolen from A), there is no place for enrichment liability: if B had paid the price in advance, he could sue A either for performance (if the impossibility is only temporary) or for damages due to non-performance (if the impossibility is permanent). This situation is known as "initial subjective impossibility"; here, in fact, a contract does come into existence, because the debtor is supposd to guarantee the performance of his part of the contract[31]; this is the reason why the payment of the contract price has not been made "sine causa" and enrichment liability does not exist. Thirdly, if a contract had been concluded and only subsequently was the house burnt down or the car stolen[32], this contract is valid without any question. Now in this case §323 par.3 BGB states that if a counter-performance has already been made, then it may be demanded back under the provisions relating to the return of an unjustified enrichment. However, this cross-reference to the law of enrichment does not mean that the claim is an enrichment claim; reference is only made to the consequences of the law of enrichment, namely to the extent of the restitution, and not to the requirements[33]. This claim remains a (secondary) contractual claim. Thus, as far as the statement of Wessels is concerned, I doubt whether one can accept his view in this generality. It is remarkable that Wessels refers to a passage of Voet[34], where Voet deals with "the contract of purchase", and clearly distinguishes between the case where a thing sold has wholly been destroyed before the contract is concluded, with the consequence that there is no effect on either side and the case where it has been partially destroyed with the consequence that the contract holds good.

Where the lessee received beneficial occupation for a portion of the period, he may reclaim from the lessor by means of the condictio sine causa only so much of

the rent paid in advance as is proportionate to the period when he had no beneficial occupation[35]. Thus in the case Holtshausen v. Minnaar[36], M., the lessee, hired from H., the lessor, certain premises at a monthly rental, payable in advance. M paid the first month's rent in advance, and ten days after he had obtained occupation, the premises were destroyed by fire through no fault or negligence on the part of M. M was entitled to claim the balance of the rent paid in advance for the period of 20 days, during which he had been deprived of occupation by the destruction of the premises. In Hughes v. Levy[37] a lessee who had paid rent in advance and had, owing to war, been deprived of the beneficial occupation of the leased premises for portion of the period in respect of which rent was apid, was granted a right to reclaim the rent paid for such portion. In both cases it was held, with reference to Voet[38], that the correct legal remedy was the condictio sine causa. In German law the result would have been the same, but the reasoning would have been different. According to §542 BGB, the lessee was entitled to terminate the contract without notice as soon as he had been deprived of occupation by the destruction of the premises. Rent paid in advance for a period after the termination could be recovered on the basis of §557 a, par.1 BGB, which refers to the provisions dealing with unjustified enrichment. Here, again[39], we find a cross-reference only to the consequences of the law of enrichment; the claim itself is a contractual claim[40].

In the case Schultz v. Morton & Co.[41] maize was purchased for export free on rail at the seller's station to be delivered at Durban, subject to the suspensive condition that the maize had to be approved by the Government grader there. The buyers, Morton & Co., had paid purchase price in advance. After portion of the maize had been delivered and passed by the grader, the balance was railed but was rejected by the grader while still in the possession of the railway authorities. The rejected maize was never returned to Schultz, the seller, but there was no evidence that the buyers or their agents had ever had the custody of this maize. It was held that there was no completed sale until the approval of the grader had been obtained, that the periculum rei venditae lay with the seller and that the railway authorities were the agents of the seller. Therefore the buyers could recover the money paid with the condictio sine causa[42] and the seller could not under the circumstances resist the claim on the ground that the rejected maize had not been returned to him.

Though the court considered the contract as having lapsed[43] because the suspensive condition was not fulfilled, it did not take the logical step to consider this lapse of contract in terms of the sine-causa-requirement of the enrichment action[44]. Instead Wessels J. argued: "... Directly we come to the conclusion that the mealies were rightly rejected, I do not see what defence the defendant can advance against the claim of the plaintiffs. They asked for a refund of the money paid to the vendors sine causa, because the causa for which they handed over the money to Schultz was that they should receive, in return for that money, a certain class of mealies. The mealies were not handed to them, therefore the vendors held the money, and a condictio sine causa would lie against them for that money. That is the case here ..."[45].

This reasoning with due respect, seems to be a misinterpretation of the requirement "sine causa". The "causa" of an act of performance is not its compliance with the special qualitites stipulated in the contract[46], but the existence of the contract itself.

In the case Miller v. Larter[47] the plaintiff (a plumber) and the defendant entered into a contract for the installation of a geyser. The plaintiff sued the defendant for £ 3,10 s, being the balance outstanding on the contract price. The defendant admitted that there was still a balance of £ 3,10 s not paid on the contract price, but pleaded that this amount was not due since the work done was not efficiently or workmanlike. It was shown that the defendant had been in possession of the geyser for nine months and had had some use from it. On appeal it was held that the judment should be one in favour of plaintiff for £ 2, this being the amount claimed less the cost of remedying the installation, or, in other words, the extent to which defendant had been enriched at plaintiff's expense, notwithstanding that plaintiff had not pleaded enrichment. The Court arrived at this conclusion by means of the following considerations: first of all it was argued that the plaintiff was not entitled to succeed under the contract, because he had not performed his part of this contract and, as pointed out by De Villiers, C.J., in Hauman v. Nortje[48], "the general principle applicable to all bilateral contracts undoubtedly is that the one party cannot, in the absence of any special agreement, call upon the other party to perform his contract without himself having performed or being ready to perform his part of the contract" (exceptio non adimpleti contractus)[49]. That was considered to be

the position of the plaintiff: his part of the contract had not been duly performed and thus he was not entitled to succeed under the contract[50]. Then Lansdown, J.P., reasoned that the defendant had been enriched at the expense of the plaintiff by the value of the job which he put at £ 5,10 s. less the £ 2 instalment paid and less the amount necessary to effectively complete the job. Consequently he granted judgment for the plaintiff in the amount of £ 2[51]. Under German law, again, the law of enrichment would not have been involved in this case. According to the BGB, this contract would be classified as a contract for work (§631 BGB). Because this contract had been fulfilled badly by the plaintiff, the defendant is entitled to claim subsequent improvement (removal of the defect, "Nachbesserung": §633 BGB), and until that has been done, the defendant is entitled to raise the plea of unperformed contract (§320 par.1 BGB). This would lead to a judgment to pay the balance of the contract price against subsequent improvement (§322 par.1 BGB: court order for contemporaneous performance, Verurteilung zur Leistung Zug um Zug)[52]. A German judge would therefore not by referring to the law of enrichment, ignore the valid contract.

There is one recent decision in S.A. law which seems to me to show the correct way in which these cases should be handled. In the very complex case of BK Tooling (Edms) Bpk v. Scope Precision Engineering (Edms) Bpk[53], a creditor in a reciprocal contract was prevented from fully performing by the failure of the other party to give his necessary co-operation. The creditor, despite his own incomplete performance, was entitled to claim payment by the other party, but subject to a deduction by the costs which he saved due to the fact that he did not have to perform fully himself. It was reasoned that in cases of this kind the employer normally has the right to withhold his own performance until the contractor has counter-performed in full. However, on the grounds of considerations of fairness, a contractor should sometimes, despite the principle of reciprocity, still be permitted to claim compensation for an incomplete performance[54]. To determine when the employer is no longer entitled to his right to withholding payment, Jansen, J.A., delineates three different points of view advocated by S.A. courts:

1. According to Lord De Villiers, C.J.[55] such an exception can be recognized if (a) the employer has applied the incomplete performance to his benefit,

i.e. has utilized it, and (b) the contractor, at the time when the action is instituted, believes in good faith that he has duly performed. 2. The point of view of Innes, J.A.[56]: An exception should be made only where the employer has applied the incomplete performance to his own benefit, i.e. has utilized it. Here no subjective requirement on the part of the contractor is laid down, although Innes, J.A. said that there is a presumption that the contractor's fraud will operate against him. As regards costs, the position is stated as follows: "The practical effect would be that an owner who utilized the work as done would be placing himself in the position of having to tender a reasonable amount when sued, with the risk of being cast in costs if the tender proved insufficient"[57]. 3. According to Maasdorp, J.[58] the exception must be recognized "where the parties have arrived at such a pass that the terms of the contract cannot any longer be strictly carried out or enforced"[59]. The court will have to ascertain in such case whether the employer has acted in such a manner that it is no longer open to him to insist upon the contractor continuing the work[60]. As regards costs, Maasdorp, J. stated that "this question of the actual enrichment of the owner is a matter of such difficulty that justice is generally done between the parties by reference to the contract price and the portion of the work that has been left incomplete. This is not done on the understanding that the contract is still enforced"[61].

In deciding on the question as to which of the three aforementioned points of view is correct, Jansen, J.A. refers to basic principles which are of the greatest importance for the further development of the law of enrichment in South Africa. "As uitgangspunt moet die gevalle waar die opdraggewer geldiglik op grond van die aannemer se wanprestasie teruggetree het en die gevalle waar geen sodanige terug trede geskied het nie, onderskei word. Verrykingsaanspreeklikheid skyn meer gepas te wees by die eersgenoemde as by laasgenoemde, terwyl kontraktuele aanpreeklikheid, wat strek tot nakoming van die verbintenis, by laasgenoemde tuishoort"[62].

The point of view of Maasdorp, J., belongs to rescission while those of Lord De Villiers and Innes, J., are applicable to cases where there has been no rescission. Referring to these two latter points of view, Jansen, J.A., observes that "dit sou wenslik wees om in die toekomns in hierdie verband eenvoudig van 'n (kontraktuele) eis om 'n verminderde kontrakprys te praat, en benamings soos

quantum meruit en die taal van verrykingsaanspreeklikheit te vermy"[63]. This decision (guided to a large extent by the view of De Vos)[64]), has for the first time given an exact distinction between contractual liability and enrichment liability.

4. No Enrichment Liability for the Use and Occupation of an Object

In Van Der Berg v. Shaw, N.O.[65], in respect of a verbal and therefore void agreement for the sale of land by respondent to appellant for £ 450, the appellant was credited with £ 83 and had to pay the balance in monthly instalments of £ 6. Appellant took possession of the land and defaulted on payments as from 1st July, 1931. In February 1932, the respondent gave the appellant notice to quit as from 1st April. Nevertheless, the appellant remained in occupation until September 1932. The respondent sued the appellant for eviction and payment in respect of use and occupation, (or alternatively in respect of a monthly tenancy). The appellant counterclaimed for repayment of the amount paid in respect of the purchase price, less an amount for use and occupation from April to September, 1932. The claim for eviction was granted, but subject to the repayment of the amount paid in respect of the purchase price, less an amount for use and occupation after the notice to quit. Compensation for use and occupation before the notice to quit was not granted.

In Wepener v. Schraader[66] the plaintiff sued the defendant for eviction from certain premises and for rent for the use and occupation thereof from 1896 till the date of eviction. The defendant had been placed in possession of the premises during the course of certain negotiations between the parties regarding the sale of the premises in 1896. It was held that the agreement did not comply with the formalities required by sec.17 of Law. No. 20 of 1895. It was held furthermore, that the circumstances of the case were such as to rebut any implied contract to pay rent for use and occupation; and that the plaintiff therefore could not claim rent except as from the date on which he gave defendant notice to vacate the premises.

In both cases (Barry, J., in Van der Berg's case largely applied the view of Innes, C.J., in Wepener's case), the courts were of the opinion that, unless

there was no notice to quit, payment for use and occupation of land could only be claimed on a contractual basis, even if it is on the basis of an implied contract. The possibility of enrichment liability in this respect was not mentioned at all.

According to German law, in both cases the plaintiff would not only have been entitled to recover the possession of the premises (subject, of course, to repayment to the defendant of the monies received from the latter), but he would have been entitled to claim compensation for use and occupation of the land as well. In this regard the result is uncontested in German law; there are only differing opinions as far as the way to this result is concerned. The courts apply §988 BGB not only in the way where the possessor has obtained the possession of a thing gratuitously, but also in the case where possession has been obtained without legal basis[67]. This analogy is justified by the following reasons: if the obligational agreement ("Verpflichtungsgeschäft") and the performance of the transaction, i.e. the transfer of ownership ("Verfügungsgeschäft") are void, (so that an owner-possessor-relationship existed), then the possessor could keep the profits (§993 par.1 BGB at the end); if, on the other hand, only the obligational agreement is void, (and therefore no owner-possessor-relationship existed), the possessor would be liable (§§812 par.1, 818 par.1 BGB). Thus, where there was such a grave defect that the "Verpflichtungsgeschäft" as well as the "Verfügungsgeschäft" were void, the transferor (who has remained owner!) would be worse off than in the case where the agreement was less defective, so that only the "Verpflichtungsgeschäft" was void. To avoid this paradoxical result §988 is applied by analogy. German writers reject this analogy[68]. They argue that the owner in these cases is entitled to avail himself of an enrichment-by-transfer claim (§812 par.1 sent.1 BGB), and consequently deny in these cases the exclusivity of §§ 987 ff BGB. Above all, however, one should bear in mind that the result, namely that the possessor has to pay for use and occupation, is uncontested.

This specific feature of S.A. law that enrichment liability does not exist for the use and occupation of an object, is not limited to cases concerning immovables. In Dugas v. Kempster Sedgwick (Pty) Ltd.[69] the applicant sought an order against the respondent for payment of £ 586,10 s, being the amount he had paid to the respondent in respect of a second-hand motor car which he had pur-

ported to purchase from the respondent in terms of a hire-purchase agreement: this agreement, he had now ascertained, was of no force and effect inasmuch as the agreement had not stipulated for payment of at least one-third of the purchase price on the conclusion of the contract, as required by section 7 of the Hire-Purchase Act, 36 of 1942, as amended. He tendered return of the motor car to respondent. The respondent opposed the order on the ground that applicant had enjoyed the use of the car for a stated period and that the car must have depreciated considerably. It was reasoned that where there is an intention to sell, when occupation is given to the purchaser, it is on the supposition that the purchaser will buy the property; and that that negatives or rebuts a right to claim for use and occupation except possibly a tempore morae. Therefore it was held that there was no principle in law which allowed the owner to claim from the purchaser the value of the use of the car[70]. Furthermore, with reference to enrichment liability, the reasoning culminates in the statement that "enrichment of the purchase as a result of the bona fide use of the article in which he has been placed in possession pursuant to an invalid agreement of sale, is not unjust enrichment within the law. It is not something that can be compared with the possession of a bona fide possessor, because the purchaser has been given possession in terms of an agreement and his whole possession depended on that agreement. One cannot say that applicant has been enriched merely because he has had the use of the vehicle. It might be that he is worse off than he would have been, had he not had such use, because of the expenses incurred in running the same. ... It must be borne in mind that respondent has meanwhile had the use and enjoyment of applicant's money. ... it cannot be said that the enrichment on either side is unjust. The car and the purchase price must be taken to have been of equal value when the bargain was entered into. Both have depreciated in value, the car by use and the money - apart from any question of depreciation of currency - by an inability of applicant to put it to use to earn interest or profit, because it was in respondent's possession"[71].

For a German lawyer this reasoning would make strange reading. First of all, he would not see the logic of the argument that the mere supposition that the purchaser will buy the property negatives or rebuts a right to claim for use and occupation even if the purchase contract is void[72]. In German law the solution, namely that the seller is entitled to claim compensation for use and occupation, is taken for granted[73]. Furthermore, the view that a person who

has had the use of a vehicle, has not been enriched cannot, in my opinion, be reconciled with the realities of daily life. In addition one should not mix the actual question of enrichment with the problem of the assessment of damna cum lucro and thus deny any enrichment a limine. The actual enrichment of Dugas was the advantage arising from the use of the car. This enrichment can be calculated by referring to the amount which Dugas would have to pay to hire a similar car. On the other hand he may claim his expenses incurred by means of an action for (necessary) improvements.

Finally, the argument that "if there is any enrichment of applicant at respondent's expense, there is also an enrichment of respondent at applicant's expense", (because the respondent had meanwhile had the use and enjoyment of applicant's money), does not seem to be convincing: Henochsberg, J., reasons that, corresponding to the depreciation of the car by its use, is the inability of applicant to put the money to use to earn interest or profit. But this does not seem to be correct; what does correspond to the depreciation of the car by its use is the depreciation of the money as currency. The value of the use of the car itself corresponds to the value of putting the money to use (to earn interest or profit). Thus, according to the BGB, the applicant has to pay compensation for the use of the car, which would be calculated by referring to the costs for the rent of a comparable car, and the respondent had to restore interest, if he had received any[74].

5. No Enrichment Liability of a bona fide Purchaser who has resold the Object

In Van der Westhuizen v. Mc Donald and Mundel[75] the military authorities had taken possession, during the war, of tobacco belonging to W. They sold it to D, who was in the belief that they could pass good title. D resold the tobacco and was subsequently sued by W for its value. It was held that D, having purchased in good faith from the military authorities, was not liable.

Referring to Voet[76], the leading reasons in this case were as follows:
"... on account of their bona fides they (sc.: the bona fide purchasers) cannot be taken to be liable ex delicto, nor upon contract or quasi-contract, or in natural equity, seeing that in no way have they been enriched at another's expen-

se"[77]. With reference to stolen articles the reasoning continues: "The stolen article left his (the bona fide purchaser's) hands in the same condition, presumably, as it came into them. There has been no transaction or relationship between himself and the true owner of any kind whatever. Any damage caused to the owner has been due to the thief, not to the intermediary; and the gain which the latter makes has been the result of his own negotiations, and has not injured either the property or the owner. Moreover, it is difficult to follow the reasoning by which a bona fide purchaser is liable to account for the profits of a resale if the thing has been destroyed, but is not liable to account for the same profits if the stolen property be recovered, no matter in how deteriorated or damaged a condition"[78].

According to German law, the plaintiff would have succeeded: if D has not acquired ownership of the tobacco by purchasing from the military authorities, then he is liable on the basis of §816 par.1 BGB - he has resold the tobacco, though he was not entitled to do so, because he was not the owner of the tobacco, and this alienation would be effective as against the plaintiff, because he lost his ownership (at least after having ratified the disposition)[79]; according to §816 par.1 BGB, D is liable to return what he obtained by alienating the tobacco. Whether D had bona fide or mala fide bought the tobacco from the military authorities, is immaterial. However, that does not mean that in the end the loss rests upon D: he is entitled to recourse against the military authorities, because they failed to transfer ownership as they were obliged to under the contract of sale (see §§434, 440 BGB).

If D had acquired ownership of the tobacco, he could not be sued on the basis of § 816 BGB, because he was not an unauthorized person in the sense required by this section. In this situation W could sue only the military authorities by means of a condictio based on interference (§812 par.1 sent.1 BGB): if the confiscation by the military authorities was illegal, W would succeed.

Thus under German law in both situations all (unjust) shifts in assets are retransferred: the owner is compensated for the loss of his property and the purchaser D is entitled to recoup his loss from the military authorities - a well-balanced result.

Returning to the reasoning in Van der Westhuizen's case I doubt whether one can say that a bona fide purchaser who resells the object has "in no way been enriched at another's expense"[80]; he takes advantage of a thing which does not belong to him and in respect of which (with reference to the "Zuweisungsgehalt" of ownership)[81] only the true owner is entitled to draw the profits and enjoy the benefits. Therefore I would rather say that the bona fide purchaser has indeed been enriched at the owner's expense, although, admittedly, he is not to blame. But this is a different matter which involves the law of tort and not the law of enrichment. As far as enrichment liability is concerned, the bona fide purchaser is protected by the defence of cessation of enrichment (§818 par.3 BGB). Only in that respect is it material, in German law, whether the defendant purchased the object bona or mala fide, because in the latter case he cannot rely on the defence of cessation of enrichment (§§819 par.1, 818 par.4 BGB)[82].

The second argument in Van der Westhuizen's case was that it would be unreasonable if a bona fide purchaser were to be liable to account for the profits of a resale if the thing has been destroyed (this is the case if the condictio sine causa specialis were applicable to a bona fide purchaser/reseller), but were not liable to account for the same profits if the stolen property could be recovered, no matter in how deteriorated or damaged a condition they were (because in this case the owner's remedy is only his rei vindicatio). This argument would no longer be effective if enrichment actions were applicable where the ownership of a thing has not been transferred. In my opinion this, again, shows the necessity of an interchangeable application of the rei vindicatio and claims of unjustified enrichment. The owner of a thing is entitled to decide how to proceed with this object; thus it is only logical to allow him to choose between the recovery of the (damaged) thing itself or (having waived his ownership) the recovery of what the unauthorized person has obtained by alienating the object[83].

6. The Distinction between Possessor and Occupier

As we have seen, possessor and occupier have been placed "on the same footing"[84]. However, as Innes, J., stated in Rubin v. Botha[85], "the distinction between the legal position of a possessor (whether bona or mala fide),

and that of an occupier in whom the animus domini was wanting, was a distinction the consequences of which were important in more than one branch of the civil law. And it is one which in my judgment should be maintained in determining the rights of a person, who has with his own materials improved the land of another". This distinction is not at all a merely academic question, but has important practical consequences: in contrast to a bona fide possessor, the claim of a bona fide occupier may be subject to an equitable deduction in respect of the occupier's use and occupation of land. Consequently the question arises whether it is necessary and, with regard to doctrinal principles, proper to distinguish between the possessor and the occupier.

In Rubin v. Botha[86], the plaintiff and the defendant entered into an agreement of lease under which the plaintiff was to have the use and occupation of the defendant's farm for ten years without payment of rent, and was to erect a building thereon, which, at the expiration of that period, was to become the property of the defendant. After the plaintiff had erected the building and had been in the occupation of the premises for three years, the defendant gave him notice to quit on the ground that the agreement was null and void as it had not been notarially executed as required by the Transvaal law. The plaintiff was held to be a bona fide occupier and it was held that he was entitled to be paid for the improvements he had effected to the extent that the value of the defendant's farm had been increased, less the value of the plaintiff's use and occupation for three years. This reduction was based on the following reasons: a bona fide possessor believes that the land is his own, and the extent to which the land has been enhanced in value by the improvement is, therefore, the appropriate standard in this situation. But the same "cannot be said of an occupier lacking civilis possessio, since the latter envisages only a limited interest in the land"; it is enjoyment of this interest that is withheld from the occupier[87]. In other words, as it was stated in Rademeyer and others v. Rademeyer and others[88]: the bona fide possessor who thinks he is owner does not envisage that he could be called upon to pay for his occupation; the bona fide occupier, however, generally envisages that he will be called upon to pay for his occupation. This difference brings about a difference in the equities in these two cases and is reason enough to deduct from the bona fide occupier's action for compensation an equitable amount in respect of his use and occupation of the land. Under German law the relationship between plaintiff and defendant

in cases like Rubin v. Botha is classified as an owner-possessor-relationship without distinguishing whether the plaintiff purchased the farm (and the purchase contract was void), or whether he leased the farm (and the lease was void). The only important point under German law is that, in fact, the contract was void and therefore no legal cause for the shifts in assets existed. The transferee is entitled to claim compensation for his improvement on the basis of §§994 ff BGB but has to pay compensation for his use and occupation of the land, (no matter whether he was "possessor" or "occupier"): §988 BGB[89].

I do not think that the distinction between possessor and occupier can be reconciled with the basic principles of unjustified enrichment. By referring to the nature of the void or cancelled contract, the extent of the enrichment is determined on the basis of questions located in the law of contract. The objective market value of premises does not depend on the intention or expectation of the transferee, namely on whether he believed himself to be the owner or (only) the lessee of these premises. Enrichment liability is aimed at the redhibition of shifts in assets[90]; these assets have to be calculated by reference to objective criteria! In this respect the distinction between possessor and occupier is unneccessary and confusing because both possessor and occupier are entitled to claim for compensation for their improvements. As far as the deduction for use and occupation is concerned, this distinction is dangerous and leads to an incorrect result. The putative lessee is enriched because he could use and occupy premises, and so too is the putative owner, because he used and occupied the land though he had no legal right to do so. I have to emphasize that in these cases S.A. courts and writers do not deny that the putative owner is enriched; but it is supposed that this enrichment is justified on the grounds of a void and non-excisting contract or even on the grounds of the (wrong) expectations of a person. It does, however, not seem to be appropriate to interpret the requirement "sine causa" of an enrichment action in this manner.

The inadequacy of the distinction between possessor and occupier is even more apparent in cases like Fletcher and Fletcher v. Bulawayo Waterworks[91]. In this case the defendant company leased from one S a piece of ground for a term of three years, renewable for two successive similar periods. The lease entitled the lessee to sink wells, lay pipes and erect buildings and machinery upon the

property. Thereafter the defendant company sunk a well within what it believed to be the boundary of the land leased and erected a plant by means of which it pumped water for the use of the town of B for a period of some months. In fact the well and portion of the plant fell just beyond the boundary of the leased property and whithin the limits of plaintiff's adjoining land. The plaintiff having instituted an action for ejectment and damages, and for an account of all water taken from the well and payment of profits, the defendant company claimed to be entitled to retain possession of the land until having been compensated for improvements. It was held (as far as is relevant for this research) that the defendant company was entitled to be compensated for the improvements to the extent to which the value of plaintiff's land had been enhanced thereby and to retain possession of the land until such compensation had been paid. The underlying reasons where that "clearly the company was not in law a possesor of the ground upon which it trespassed; it did not hold the land or effect the improvement pro domino, but as a mere occupier, entitled to do what it did but laying no claim to the ownership of the soil"[92].

I do not intend to enter into further discussion of the final judgment given in this case, (which would be the same under German law); I would rather like to direct the attention again to the classification of the defendant as possessor or occupier. How can the position of the plaintiff in cases like this one be affected by the opinion or expectation of the defendant, which is based on a contract between the defendant and a third (!) party? Why should the plaintiff in cases like this one bear the disadvantages (namely not being compensated for the use and occupation of the land by the defendant, which would be the case if the latter had been a putative purchaser) arising out of a contract in which he was not involved at all and which he could not influence? The relationship which is relevant for the judgment is that between the plaintiff anbd the defendant and not between the defendant and a third party. I think this case clearly shows the unacceptability of the distinction between possessor and occupier. As far as enrichment liability is concerned, one should refer only to the fact that there was no legal connection between the defendant and the plaintiff which would have entitled the former to sink a well and erect a plant on the plaintiff's land. South African law, to my mind, takes a very generous attitude (as far as compensation for improvements made by a possessor are concerned) in treating bona fide and mala fide possessors alike[93]; here, S.A. law refers only to the objec-

tive enrichment, the intention of the possessor being considered to be of no importance[94], though here it would, indeed, not seem to be unreasonable to argue that because of his bad faith the mala fide possessor should be treated differently from the bona fide possessor[95]. However, as far as the distinction between possessor and occupier is concerned, S.A. law disregards the objective criterion of enrichment[96] and refers to subjective requirements, even though in this situation a distinction seems to be incompatible with basic principles of the law of enrichment.

7. Lawful Occupiers

As has already been mentioned before[97], this category of occupiers includes e.g. lessees, pledgees, usufructuaries, fiduciaries and borrowers. Being (probably) the most important and interesting types of lawful occupiers, I would like to enter in a more detailed discussion of the position of usufructuaries/ fiduciaries and lessees.

a. Usufructuaries and Fiduciaries

The differential treatment of usufructuaries and fiduciaries[98] in modern S.A. law is based mainly on the case Brunsdon's Estate v. Brunsdon's Estate and Others[99]. In this case testators provided that the whole of the property bequeathed under their will should remain in the undisturbed possession of the survivor until his or her death, but without power to sell or mortgage any part of the said property. The testator, after the death of the testatrix, had expended certain sums of money in effecting improvements to the property. It was held that the survivor was usufructuary and not a fiduciary; furthermore, that a fiduciary is entitled to claim compensation for those expenses and improvements for which a bona fide possessor would have a right to claim; and that a usufructuary is, in the absence of special circumstances, not entitled to claim for improvements. In my opinion, this decisions is based on a misinterpretation of the case Rubin v. Botha[100]. With reference to this case the principle argument of Kotzé, J. is as follows: "Regarding, ..., the question as one of principle, it seems to me that the usufructuary, like the lessee who has built on the land,

or made other permanent improvements, without the consent of the owner, is not a possessor, and as he knows that he is dealing with the property of another, he must be taken to have intended the consequences of this voluntary act. If, therefore, he has placed or done anything of a permanent character on the property subject to the ususfruct, the rule solo aut domino cedit will apply. ... The maxim of unjustified enrichment is not of universal application. If it were, the right to recover for permanent improvements would likewise have to be accorded a lessee, who has made them without the consent of the owner. But not being a possessor and knowing that he holds or occupies the land of another, the law does not allow him such improvements. The same principle should apply and does apply to the usufructuary, who is in the same position as regards the proprietor or owner"[101]. However, nowadays it is recognized that Rubin v. Botha was in fact an extension of enrichment liability and that it was one of the first steps to place possessors and occupiers on the same footing[102]. Consequently an occupier is today in the same position as a possessor[103] (subject to what has been said under V 6 above) and has a right to claim compensation for permanent improvements. Therefore I doubt whether one can uphold the opinion any longer that a usufructuary is not entitled to claim for improvements.

Under German law a usufructuary is entitled to claim compensation for improvements on the basis of negotiorum gestio: either on the ground of §§683, 670 BGB if the negotiorum gestio was legitimate, or on the ground of §§ 684 sent.1, 818 BGB if it was not in accordance with the interest and the actual or presumptive wishes of the principal. Furthermore, the usufructuary has a ius retentionis (§273 par.2 BGB) or he can use a right of removal[104].

b. Lessees

If a lessee has incurred outlays in respect of the leased object and there had been no express or implied agreement between the parties as far as the question of reimbursements for these outlays is concerned, then, according to S.A. law, the lessee is entitled to relcaim these outlays on the basis of unjustified enrichment. Thus the complex relationship between lessor and lessee is split up into one part which is covered by the contract and another part where contractual stipulations are lacking and therefore enrichment liability exists.

German law does not follow this path of splitting up the complex legal relationship between lessor and lessee: even if the (valid) lease does not provide rules for the compensation of expenses, the entire relationship of lessor and lessee is covered by the contract. According to §547 par.1 BGB the lessor is obliged to compensate the lessee for any necessary outlays incurrred upon the thing. This is a contractual claim. Compensation for any other outlay (i.e. for everything not falling under necessary outlays) may be claimed by the lessee according to the provisions relating to negotiorum gestio (§§677 ff, 547 par.2 BGB). The BGH has explicitly stated[105)], that enrichment liability is only of subsidiary application. A similar regulation for the situation of a borrower is provided in §601 BGB. Of course, these legal rules take effect only if the parties have not stipulated otherwise in their contract.

CHAPTER VI: CONCLUSION

In this chapter I will try to answer the questions set out in the introduction, namely whether a basic structural similarity between the German and S.A. law of enrichment exists and whether German law recognizes a general enrichment action.

1. Basic Structural Differences

Although there is similarity in many parts of German and S.A. law of enrichment, particularly where the complex three-party relationships are concerned[1)], there nevertheless exist considerable structural differences in other parts.

a. Casuistic and subsidiary nature of S.A. enrichment law as a consequence of its equity-orientation

S.A. law of enrichment is entirely based on equity. Statements like "the equitable rule of Dutch law"[2)], or "a doctrine which is founded entirely on equity"[3)] can be found in most cases which deal with the law of enrichment. This equity-orientation has led to decisions of the Courts, in which rules have

been established, which cannot be reconciled with the basic principles of the Roman-Dutch law of condictiones, but which are firmly established and will be followed[4]. As a consequence thereof S.A. law of enrichment is based very much on casuistry. For example: the condictio indebiti lies when property has been transferred by mistake. This mistake must be one of fact and not of law. But where transfer takes place in terms of a contract of sale which is void for failure to comply with formal requirements, recovery is allowed without an inquiry as to whether the plaintiff was aware of the invalidity or not, or whether his mistake was one of fact or one of law[5]. In this case, however, performance or tender of performance by the other party excludes the condictio[6]. A plaintiff must therefore allege in his pleadings that the defendant was unwilling or unable to perform his side of the void contract. However, where a hire-purchase contract is void on formal grounds, the buyer's condictio indebiti is not excluded by the seller's preparedness to make full performance; it is excluded only when both parties have made full performance[7].

Furthermore, the scope of application of an enrichment action is not comprehensive: in S.A. law enrichment liability basically does not exist where the plaintiff is still the owner of the transferred thing; the rei vindicatio excludes the applicability of the law of unjustified enrichment[8]. Moreover an enrichment action does not lie for the recovery of a "factum"[9]. This subsidiary nature and restricted scope of application gives the impression that this branch of law is of minor quality and not an autonomous part of the law as it is in German law[10].

In this regard I would like to mention again the decision of the German Reichsgericht[11], in which it spoke of considerations of equity which are the basis of the adjustment of benefit and detriment which the law seeks to achieve by means of the claim for enrichment. This statement, without any doubt, applies to modern S.A. law as well. But since the days of the Reichtsgericht German law of enrichment has experienced a substantial development and a considerable change. In modern German law, this statement of the Reichsgericht could no longer be accepted[12].

b. Delictual influence

A special consequence of this equity-law-basis is the delictual influence one often finds in the S.A. law of enrichment.

As we have seen, the condictio indebiti is only applicable if transfer has been made under a mistake of fact. But this alone is not sufficient. "Where it is essential to the success of a plaintiff's claim, ..., for him to establish a mistake of fact, he must do more than establish that he paid under a mistaken belief that the full amount was due. He must establish that the underlying cause for that mistaken belief was a justifiable mistake of fact"[13]. In other cases this requirement is described as "an excusable error"[14]. Terms like "justifiable " and "excusable" lack certainty and can be interpreted in different ways. Statements like "as the ignorance of the plaintiff was not so gross as to be inexcusable, the exception had to be dismissed"[15] can be found in a variety of cases. A typical example of the principle of fault in S.A. law of enrichment is that nowadays the courts consider even ignorance of fact concerning one's own affairs as material if the mistake has been induced by the defendant[16]. This principle was even further extended in Barclays Bank International Ltd. v. African Diamond Exporters (Pty.) Ltd.[17], where it was "held that it was not a correct proposition to state that a solvens who had made a mistake through his own negligence could not recover his money by means of the condictio indebiti unless he could show that the mistake had been induced by the defendant, i.e. it did not follow that all ignorance of one's own affairs which had not been induced by the defendant or a third party was automatically classed as being supina aut affectata". Decisions like this one digress from well established rules due to equitable considerations and thus give full licence to legal uncertainty.

Another example of delictual influence in the S.A. law of enrichment is the rule that "a contractor who knowingly, wilfully and without the consent of his employer departs from the terms of his contract" has no claim whatsoever[18]. In Jansen v. Rosenbaum[19] the appellant, plaintiff in the court below, claimed from respondent payment of the sum of £ 45, being the balance of a contract according to which the appellant should paint the inside of the bake house of the respondent and supply his own paint. The appellant did not complete his

work under the contract and it was assumed that the value of the work done was not less than £ 37: and that respondent had benefited to the extent of £ 37 to the detriment of appellant, inasmuch as the respondent had paid only £ 8 in respect of work admittedly worth £ 45 to him. It appeared that there had been a dispute between the appellant and the respondent during the course of the work. The respondent alleged that appellant had been dilatory in his work and appellant alleged that his work had been interfered with by respondent in that he had been required to work according to the exigencies of the bakery and had been not allowed to work on the premises during periods when bread was being baked. But appellant himself did not go to the length of saying that he had left the work because of unlawful interference amounting to a breach of the contract by respondent, nor did he say that he thought he had a lawful reason for quitting the work. On this evidence it was considered that the appellant had abandoned the work without any just cause and therefore was "entitled to no equitable relief"[20].

Under German law the plaintiff could have claimed the sum of £ 45 on the basis of the still existing contract (§631 par.1 BGB). Against this contractual claim the defendant could rely upon the remedies provided in §§636 par.1 sent.1, 634 par.1 BGB: according to these rules, the customer is allowed to claim a reduction of the stipulated price if the entrepreneur did not perform fully and timeously after the customer has stipulated a reasonable time limit for doing so. In addition the customer was entitled to the remedies provided in §§636 par.1 sent.2, 286 BGB (compensation for default), if the plaintiff was to blame for the delay. That is the situation if the contract still existed. If the contract had been rescinded for some reason, the plaintiff could, of course, reclaim the actual enrichment from the defendant, namely £ 37, by means of the enrichment-by-transfer claim (§812 par.1 sent.1 BGB). To sum up, one can say that delictual influence is, generally speaking, alien to the German law of enrichment; a fundamental principle in German law is that the law of enrichment is aiming at a mere redhibition of shifts in assets which have taken place without justification[21]. However, no rule exists without exception; in this regard I have to mention §819 BGB and the distinction between bona fide and mala fide possessor in §§987 ff BGB. Besides last mentioned exceptions which exist in S.A. law as well, the S.A. law of enrichment's strong delictual influence is in sharp conflict to the lack of such influence in German

exceptions which exist in S.A. law as well, the S.A. law of enrichment's strong delictual influence is in sharp conflict to the lack of such influence in German law.

c. Intermixture of the law of contract and the law of enrichment

It has been pointed out already[22] that the S.A. law neglects to draw a strict distinction between claims based on a contract and claims based on enrichment. The importance of this distinction cannot be overestimated; it reaches right to the roots of the law of enrichment, because it deals with the all important question whether or not the enrichment was "without legal ground" ("sine causa").

The disregard for that distinction (together with the underestimation of the value of possession in S.A. law) has also given rise to difficulties and confusion in cases where a person ("intermediary") who had been in possession of an article belonging to another, has handed over the possession of that article to a third person with instructions to the third person to repair or maintain the article. The intermediary had in each case acted in his own name, and had contracted with and placed himself under an obligation to the third person. The third person was allowed a ius retentionis (lien) against the owner until he had been compensated[23]. These decisions have been strongly criticized. So, for example, De Vos stated[24]: "Fortunately for our law, however, sound first principles seem to be gaining ground in this respect and the trend seems to be definitely away from this unacceptable line of reasoning". To prove this statement, De Vos refers to a number of cases[25]. In my opinion one has to eliminate from this number cases like Vadas (Pty) Ltd. v. Philip, Frame v. Palmer and Knoll v. S.A. Flooring Industries Ltd.[26], because in all these cases the third person had not acquired possession of the object; no lien was in question - in all these cases the problem was to determine the requirement "at the expense of another"[27]. There remains the case of Gillingham v. Harris and Morgan[28], where, in contrast to the cases mentioned above[29], indeed no lien was granted because of lack of privity of contract between the owner of the object and the third person. Here the distiction between claims based on the law of contract and those based on the law of enrichment sheds light on a very complex and confusing part of the law. There exists in none of these cases a

privity of contract between the owner and the third person: nevertheless these cases are not all alike as we shall see shortly. The feature of a lack of privity between owner and third person therefore cannot by the only element on which the solution to these cases is based. In Land Bank v. Mans, Savory v. Baldochi, Ford v. Reed Brothers and New Club Garage v. Milborrow[30], the intermediary was always allowed (or even obliged) to hand over possession; the legal relationships of owner-intermediary and intermediary- third person were not defective. Consequently, according to the BGB, no owner- possessor-relationship exists and §§994 ff BGB, including the remedy of a ius retentionis (§1000 BGB), are not applicable in these cases[31]. The remedies of the third person, as far as his expenses are concerned, cannot be based on unjustified enrichment, because two valid contractual relationships exist and therefore the basic requirement for every enrichment action, namely enrichment "sine causa", is not fulfilled. The remedies in these cases are of a contractual nature[32]. In contrast to these cases, in Colonial Cabinet Manufacturing v. Wild, Holmes Garage v. Levin[33] and Gillingham v. Harris and Morgan[34], the intermediary committed a breach of contract (against the owner) by transferring the possession of the object to the third person. According to the BGB, this affects the position of the third person as well: he has no right of possession against the owner, an owner-possessor-relationship exists and the third person is entitled to rely on his ius retentionis (§1000 BGB) against the owner until compensated for his expenses. Clearly this is an exception to the principle that the retransfer of unjustified enrichment has to take place in each "Leistungsebene" (level of performance)[35]; however, this exception is justified by the value which is attributed to the possession of an object in German law. The S.A. law, in the contrary, does not accept this exception, but adheres strictly to the requirement "at the expense of another": in the absence of a contractual relationship between third party and owner, a lien can be granted only if the owner has been unjustifiably enriched at the third party's expense[36].

A striking example of a situation where German law avoided mixing of the law of contract and the law of unjustified enrichment, is the development of the rules of so-called "positive breach of contract" (positive Vertragsverletzung)[37]. The draftsmen of the BGB were of the opinion that all types of impairment of performance ("Leistungsstörung") were covered by the regulations

of impossibility (§§275, 280, 323, 324, 325 BGB), undue delay (§§284, 326 BGB) and warranty claims (e.g. §§459 ff BGB). However, there are a number of cases of breach of contract which cannot be placed under either of these regulations. One important example in this respect is the case where an employee performs bad services: in this situation it would be unjust to award the employee his full contractual remuneration: yet if one were to do so, there would be no unjustified enrichment in the legal sense, because the contract for services is, though badly performed, still valid. To cover cases like that, the rules of "positive breach of contract" have been developed, by which the creditor (in this example the employer) is given a secondary contractual claim for compensation[38].

Otherwise S.A. law: this case (as well as cases which under German law are covered by warranty claims)[39], is covered by the law of enrichment. Where a contract of locatio conductio operis or operarum has not been duly performed or has remained incomplete after part of it has been carried out, S.A. law normally approaches the problem of adjusting the rights of the parties from the angle of unjust enrichment. A considerable number of cases have been decided along these lines, and the principles on which the presence of absence of unjust enrichment may be decided, have become fairly well established[40].

The credit for bringing some clarity of principle in this area of the S.A. law is due to De Vos[41] and the decision BK Tooling (Edms) Bpk v. Scope Precision Engineering (Edms) Bpk.

2. A general enrichment action in German law?

In addition to these structural differences, the German legal system does, in fact, no longer recognize a general enrichment action[42].

a. The general distinction between enrichment arising from transfer and enrichment arising otherwise

After the BGB came into operation, it was attempted to attribute all enrichment claims to one overriding general principle[43]. The fundamental works of

Wilburg[44] and von Caemmerer[45], however, led to the development of the predominant view among courts and writers nowadays that basically one has to distinguish between enrichment by transfer and enrichment arising otherwise[46]. Von Caemmerer, who has developed a systematic scheme of enrichment claims, emphasized that form and limits can be given to an enrichment claim only by means of such scheme, not be applying general criteria[47]. Wacke[48], too underlines the contrast between the general rule in §812 par.1 sent.1 BGB and the systematization of the different condictiones in modern practice. He says that it is not possible to give an unanimous answer to the question when an enrichment is unjustified. Enrichment arising from transfer is part of what he calls "Recht der Rechtsgüterbewegung" (law relating to - voluntary - shifts of assets between two members of the legal community), whereas enrichment arising otherwise is part of "Recht des Rechtsgüterschutzes" (i.e. law relating to the protection of such assets). Thus a basic structural difference between these types of enrichment exists[49].

As a consequence of this, the German law of enrichment has developed from a general enrichment principle to a highly sophisticated and multi-facetted system of special condictiones[50]. In this system the old condictiones (condictio indebiti, condictio causa data causa non secuta, condictio ob causam finitam, ...) have become merged within the new framework of enrichment-claims, such as the enrichment-by-transfer claim, the condictio based on interference, or the condictio for the reimbursement of outlay. Thus the distinction between the old condictiones is no longer relevant.

b. Subsidiary nature of the condictio based on interference

As we have seen before, in cases where more than two persons are involved, the re-allocation has to take place within the various "Leistungsebenen" (levels of performance). As a consequence of this, a claim based on enrichment arising otherwise is subsidiary to an enrichment-by-transfer-claim[51]. If the BGB recognized a general enrichment action, then either the essential distinction between these two types of enrichment would be obsolete or, at least, these two types of claims could be applied interchangeably. But that, as we have seen, is not the situation[52]. Furthermore, in this connection I have to refer once more[53] to the relationship between §§987 ff BGB and §§812

ff BGB. It may be recalled that §§987 ff BGB are considered to constitute an exclusive regulation which displaces §§812 ff BGB. However, §§987 ff BGB themselves deal with very important cases of unjustified enrichment. These unjustified enrichment claims falling under §§987 BGB, due to special elements, would not be adequately dealt with by the general rule of §812 BGB; thus, they required special treatment: allowing for a deviation from certain basic principles[54].

Another example of the non-existence of a general enrichment action in German law is a distinction which is similar to the one drawn in S.A. law between possessor and occupier: German law distinguishes between the proprietary possessor (a person who possesses a thing as belonging to him: §872 BGB) and the person who possesses on behalf of somebody else (possessor as bailee). However, whereas S.A. law links up with this distinction a consequence relating to substantive law, namely to deny the owner a claim for compensation for use and occupation against the possessor, German law attaches to this distinction only a technical consequence[55]: where the bailment is terminated, restitution is governed by the provisions relating to the contract on which the bailment was based; these special contractual rules displace §§987 ff BGB[56].
This shows clearly that liability concerning "unjust" enrichment is not only treated by §§812 ff BGB or §§987 ff BGB, but by special contractual rules as well. In this context it is interesting to mention an expert opinion for the revision of German enrichment law[57]. This expert opinion offers a reform proposal which in a very detailed manner distinguishes between the enrichment-by-transfer claim, the concitio based on interference and the condictio for the reimbursement of outlay. Besides a special rule for third-party-relationships, it provides a general clause as well. This clause, however, is only of a subsidiary nature, and its purpose is to allow the courts sufficient flexibility to develop new special condictiones[58].

c. Nortje v. Pool

Finally, the absence of a general enrichment action in German law can be demonstrated by applying the German law of unjustified enrichment to the facts of Nortje v. Pool[59], i.e. the very case which has given rise to the demand, by S.A. lawyers, to introduce a general enrichment action. The facts of this case were, shortly, that A and B had entered into an agreement in terms of which

case were, shortly, that A and B had entered into an agreement in terms of which A would have the right to prospect for kaolin on the land of B against payment of a small annual sum. Should kaolin be discovered in sizable quantitites, A was to have the right to exploit the deposits, against payment of a larger annual amount to B. A spent a considerable amount of money and, in the end, did discover sizable deposits of kaolin. Subsequently, it was discovered, however, that the agreement was defective because certain formal requirements had not been met. After B had died, A alleged that B's estate had been unjustifiably enriched at the expense of A by the discovery of the kaolin because the market value of his land had increased. A thus claimed compensation for his expenditure, rather than the actual enrichment as being the lesser of these two amounts. Exception was taken to the declaration as disclosing no cause of action. The majority judgment, delivered by Botha, J.A., with which Williamson and Wessels, J.J.A., concurred, upheld the exception. It was held that the action of a bona fide possessor to claim compensation for improvements, which had been extended to occupiers, lay only for visible or tangible improvements, such as a building or a well. If A were to have an action because he had enriched B by disclosing qualities in the land of B which had always existed, but which had hitherto been unknown, it would have been a general enrichment action. However, it was held that S.A. law had not yet reached the stage where a general enrichment action could be recognized.

Minority judgments were deliverd by Ogilvie Thomson, J.A., and Rumpff, J.A.. Ogilvie Thompson, J.A., decided that it was unnecessary to determine whether S.A. law in fact recognized a general enrichment action, as he felt that those cases in which occupiers had been given an action in the past, were clearly wide enough to cover a case like the present one. The exact way in which the enrichment came about, whether it was by way of an accretion to the land or by way of increasing the market value of the land by discovering hitherto unknown qualities, was of no relevance. He thus rejected the exception.

Rumpff, J. A., also found it unncessary to determine whether modern S.A. law recognizes a general enrichment action. In his view the condictio indebiti of modern law is wide enough to cover cases like the present one.

These judgments have been criticized by De Vos. He argued that the action in

Nortje's case could not be a condictio indebiti because the plaintiff had not made a performance which he mistakenly thought he owed: he acted in the exercise of a right which he mistakenly thought he had. Any other condictio is excluded because he did not hand over anything either into possession or into ownership.

Under German law the judgment would have been in favour of the plaintiff. However, this is not a question of a general enrichment action: the general rule of §812 BGB is not involved at all. According to §996 BGB a possessor is entitled to claim reimbursement of other than necessary expenditures, if these expenses had been incurred bona fide and if the value of the object is still enhanced at the time when the owner repossesses his object. This claim is limited either to the extent to which the value of the object is still enhanced, or to the expenses incurred, whichever is the lesser[60]. Thus under German law A could claim reimbursement for his expenditure from B. If, incidentally, the facts of the case Nortje en 'n ander v. Pool would have been slightly different, namely that kaolin had not only been discovered but had already been exploited, the solution is surprisingly to be found in a very different part of the BGB: §102 BGB states that "a person who is obliged to hand over fruits may demand compensation for the expense incurred in the production of the fruits, insofar as these were incurred by regular business methods and do not exceed the value of the fruits". Fruits in this sense comprise especially mineral resources of land[61]. The plaintiff was obliged to hand over the fruits (§§100 and 988 BGB, which is applied analogously in this situation)[62], because an owner-possessor-relationship existed between him and the defendant. Thus the plaintiff is entitled to claim compensation of his expenses on the basis of §102 BGB. This claim is comprehensive; it covers all outlays incurred in the production of natural resources[63] as well as own services[64]. This case shows again that under German law the scope of enrichment liability is considered to be as comprehensive as possible, but that well-balanced results cannot be achieved on the basis of a single general rule, but that special provisions for enrichment liability have to be established.

d. Recent Developments

Though the overwhelming majority of German lawyers accepts the distinction between an enrichment-by-transfer claim and a condictio based on interference[65], the advocates of the overarching general enrichment action have

rence[65], the advocates of the overarching general enrichment action have never disappeared. In modern German law Wilhelm[66] and Kellmann[67] are the main protagonists. According to Wilhelm an increase in assets which the debtor has obtained out of the property of the creditor, has to be returned if the increase of the debtor's assets is not justified by a legal transaction or a legal norm ("... die Vermögensmehrung, die der Schuldner aus dem Vermögen des Gläubigers hat, d.h. die nach den Rechten oder Rechtspositionen des Gläubigers in dessen Vermögen gehört, ist herauszugeben, wenn das Haben des Schuldners nicht durch ein Rechtsgeschäft oder unmittelbar durch eine Norm des objectiven Rechts gerechtfertigt ist")[68]. Kellmann merges both types of condictiones (the enrichment-by-transfer claim and the condictio based on interference) into a claim based on enrichment without a legally relevant intention of the person at whose expense the enrichment takes place ("wegen Bereicherung ohne rechtserheblichen Willen desjenigen, auf dessen Kosten sie geht")[69]. However, these theories are not likely to gain any practical importance. They are generally regarded as of little value, because the terms in which the general enrichment action is couched, are very vague and hide more than they elucidate[71].

3. Desirability and Adequacy of a General Enrichment Action

a. Possible disadvantages of a general enrichment action

After having shown the extensions of enrichment liability in modern S.A. law, De Vos refers to miscellaneous cases in which the recognition of a general enrichment principle appears as well[72].

In Knoll v. S.A. Flooring Industries Ltd.[73] the defendant contracted with her husband to complete the building of a house. The defendant's husband, thereupon, contracted with the plaintiff company to put in certain floors, but failed to pay the company. The company discovered that the defendant was the owner of the house and sued the defendant, claiming, among other things, that the expenses incurred were necessary and/or useful, that the property of the defendant had been enhanced in value and that the defendant had been unjustly enriched at the expense of the plaintiff. It appeared that defendant had made provision of

the full cost of the building by a loan from a building society and that this had been exhausted by her husband in building the house. The leading reasoning in this case was that because the defendant had made provision for the full cost of the building (including the flooring) and this provision was exhausted, she was not enriched; "if she paid, she would be paying for flooring done (by the plaintiffs) twice over"[74]. This reasoning does not concentrate on the essential point: the crucial problem, to my mind is not that the defendant had been enriched; it is rather the question at whose expense this enrichment had been. Knoll's case is precisely covered by an example given by de Vos[75]. He states that the reason that the subcontractor cannot sue the owner, "is not, as has been suggested on occasion by those who instinctively felt that such an action could not be allowed but failed to appreciate the true reason for the necessity to refuse it, that because (the owner) has incurred a debt towards the ((main-)contractor) in respect of the building of the house he is not enriched, since it is possible that the value of the house might exceed the contract price and to that extent there <u>is</u> enrichment (but not enrichment sine causa). Neither is the reason that (the owner) was entitled by virtue of a contract to have his house built by the ((main-)contractor) for the agreed amount, because one person cannot invoke a right he has against a specific person to justify his enrichment at the expense of another". To allow the sub-contractor an action against the owner would be a breach of the rule of paritas creditorum, the rule that one unsecured creditor may not be accorded rights preferential to other unsecured creditors[76].

In Krueger v. Navratil[77] the plaintiff sued the defendant for recovery of the amount by which the defendant had been enriched at plaintiff's expense through the wrongful and unlawful appropriation of plaintiff's property. It was held that the plaintiff was entitled to include in his claim the benefit which the defendant may or could have derived from the use of such property. This again is a striking example of the penetration of the S.A. law of enrichment by different, alien influences, expecially delictual ones. If an enrichment claim covers even the benefit which the defendant may or could have derived, then one of the main requirements of every enrichment action, namely enrichment itself, is no longer present. Two of the most important principles of enrichment law are that the enrichment action is a mere redhibition of shifts in assets, which have taken place without justification, and that every enrichment action is limited

to the actual enrichment of the debtor. These basic principles are the reason why the debtor can plead that his enrichment has fallen away, that the debtor why the debtor can plead that his enrichment has fallen away, that the debtor has to retransfer even a profit he obtained by alienating an object of a third person or that he is not liable for a loss occasioned by alienating the object. The continued existence of all these consequences would be doubtful if one accepted the opinion expressed in Krueger v. Navratil. An action with which one claims the benefit which a person may or could have derived from the use of one's own property, can only be entertained in the law of delict. If one accepted this view that the mere possibility or chance to obtain benefits is a suitable object for an enrichment action, then one would, as far as German law is concerned, contradict the predominant view (especially in constitutional law) that the assets of a person do not include his mere interest in probable profits[78].

With reference to Pretorius v. Van Zyl[79], De Vos himself states[80] that in this case a condictio causa data causa non secuta would have been competent. The Court, however, never canvassed this matter, but thought that the plaintiff had to succeed under a general action. All these cases show that by referring to a general enrichment action, sound principles and well established requirements of enrichment law might be neglected and thus misjudged, because one is inclined to rely too flippantly on the omnibus-clause of a general enrichment action. This threat has clearly been faced in Phillips v. Hughes; Hughes v. Maphumulo[81]. Here it weas held that the "condictio indebiti, ..., was designed for equitable relief. But that does not mean that the Court has a general discretion to uphold it, whenever it is invoked, on what may be thought to be equitable grounds. The remedy is circumscribed by rules of law".

b. Requirements and limits of a general enrichment action

De Vos proposes certain requirements for a general enrichment liability[82]. These are: (1) the defendant must be enriched (2) the enrichment must be at the expense of the plaintiff (3) the enrichment must be unjustified ("sine causa")[83] (4) the case must not fall under one of the classical enrichment actions (5) there must be no rule of law which, in spite of the requirements (1) - (4) above being satisfied, prevents the person impoverished from recovering.

Thus a general enrichment action would find its limits in "legal policy, public interest, considerations of morality or any other relevant considerations"[84]. To underline this reasoning, De Vos puts the rhetorical question[85]: "Why cannot a person who had made performance in terms of an immoral agreement and whose performance is itself held to have been turpis, reclaim what he had given? Why cannot a thief, who has improved the property he has stolen, claim the value of the improvements from the vindicating owner[86]? Why are the rights of compensation of a lessee so much more limited than the rights of a bona fide possessor or even a mala fide possessor[87], why are the rights of compensation of the usufructuary so much more limited than those of a fiduciary[88], and why is a person who made a solutio indebiti per errorem iuris in general denied a condictio indebiti?"[89] Does public policy militate against enrichment liability in all these cases? Do different considerations of public policy exist under German law? In my opinion the limitation proposed by De Vos is inadequate because it is too indefinite. One could go on questioning: why should the creditor be entitled to institute an enrichment action if the debtor had used the creditor's object in a way only he (the debtor) could use the object and consequently only he could obtain enrichment from it? Does not public policy militate against the solution found in Gouws v. Jester Pools (Pty) Ltd.[90]? In this case A entered into a contract with B for the construction of a swimming bath on what A believed to be B's property. In fact C was the owner and not B. B had left the country and A's contractual claim against B was useless. Here it was held that enrichment liability did not exist, because C, if enriched, had not been enriched at the expense of A. This case induced Scholtens[91] to trenchant criticism; in his opinion, the "enrichment-at-the-expense-of" -requirement does not lay down "some fundamental principle which by any innate necessity should apply to any system of law"[92]. To be sure, a further development of the S.A. law of enrichment is necessary to close such gaps as exist concerning compensation for use and occupation of an object or compensation for intangible improvements. But I doubt whether it is advisable to close these gaps by means of a general enrichment action.

In a recent analysis of the practicability of a general enrichment action, Martinek comes to the conclusion that the disintegration of any general action for the recovery of unjustified enrichment into different types of claims is unavoi-

dable[93]. A consequence of this feature of a general enrichment action then is that the differences between a legal system based on special condictiones do not seem to be too vast: in the former, the special condictiones appear disguised as requirements of the general action; whether one refers to these elements as separate claims or as requirements of a general action seems to be of lesser importance[94].

It is necessary to extend the scope of application of S.A. law of enrichment. Many gaps can be closed by extending the old condictiones. This could be achieved e.g. by leaving behind the error-requirement of the condictio indebiti and the bona-fide-requirement of the condictio sine causa specialis; by abolishing the general requirement of transfer of ownership and the remains of the view that condictiones cannot be applied for the recovery of a factum, and for compensation of intangible improvements; finally by refraining from distinguishing between possessor and occupier.

Above all, the scope of application of the condictio sine causa specialis has to be extended to cover cases where under German law the conditio based on interference is applicable. At present the condictio sine causa specialis lies against a defendant who has, bona fide, disposed of or consumed the property of another if (a) he obtained possession of the property through a negotium between himself and the owner, or (b) he obtained possession otherwise than through such negotium and the property consisted of a sum of money which was received ex causa lucrativa[95]. To the bona fide-requirement reference has already been made[96]. In addition one should repeal the requirements (a) and (b) so that the condictio sine causa specialis would lie against a defendant who has used or consumed[97] the property of another. This condictio would cover cases like Krueger v. Navratil[98]. Here the defendant's representative had wrongfully and unlawfully appropriated property of the plaintiff, used it to the benefit of the defendant and had thus enriched the defendant at the expense of the plaintiff. It was held that the condictio furtiva was not applicable and that "the liability in such cases rests upon unjust enrichment at the expense of the owner"[99]. Significantly the court did not mention a special condictio, because none of the old condictiones properly fits this situation. Furthermore, this extension of the condictio sine causa specialis would lead to a separate actio for compensation for use and occupation of the property of another. At

present, this can only come into consideration by way of deduction from the claim for improvements of the occupier. But what if a long-term-occupier does not bring an action of his improvements, because they were of little importance? In my opinion it is neither necessary nor advisable to close these gaps by introducing a general enrichment action.

Footnotes

INTRODUCTION

1) 1966 (3) S.A. 96 (A).
2) Wessels: §§3501, 3515; Scholtens: Annual Survey of S.A. Law, 1956, p.185 and 1960, p.152; Hahlo-Kahn: The Union of South Africa, p.570; De Vos: p.140.
3) Wium v. Smit, 1916 O.P.D. 21; Pucjlowski v. Johnston's Executors, 1946 W.L.D. 1; Le Roux v. Van Biljon and Another, 1956 (2) S.A. 17 (W).
4) Pretorius v. Van Zyl, 1927 O.P.D. 226; Knoll v. S.A. Flooring Industries Ltd., 1951 (1) S.A. 404 (T); Krueger v. Navratil, 1952 (4) S.A. 405 (S.W.A.).
5) Whereas, according to the old law, occupiers (with some exceptions as far as occupiers under title are concerned: see De Vos: p.216) had no right to claim compensation for improvements, such right was granted in cases like Bellingham v. Bloometje, 1874 Buch. 36; Rubin v. Botha, 1911 A.D. 568 and Fletcher and Fletcher v. Bulawayo Waterworks Co. Ltd., 1915 A.D. 636. Furthermore, as far as compensation for work was concerned, a landowner who cancelled the agreement with a contractor because of imperfect performance was liable to return what he had received but not, according to the old law, for enrichment flowing from that part of the performance which, on account of its nature, he could not return. Now in Hauman v. Nortje, 1914 A.D. 293, the Appeal court granted an enrichment claim even in a legal situation of this nature. Finally, as far as compensation for services is concerned, an important extension has been granted in Spencer v. Gostelow, 1920 A.D. 617. In this case an employee who had been justifiably dismissed, was allowed to claim on the basis of enrichment for the work he had done during the current month, which he would not have been allowed according to the old law.
6) 1966 (3) S.A. 96 (A).
7) This result was questioned again in Rulten NO v. Herald Industries (Pty) Ltd., 1982 (3) S.A. 600 (607).
8) Weeramantry, J., in De Costa v. Bank of Ceylon, New Law Reports (Ceylon), Vol. LXXII., pp.544, 545.
9) De Vos: p.283

10) De Vos: p.109.

11) De Vos: in Juridical Review, 1960, p.241.

12) Larenz II: p.466.

13) See e.g. Wille: p.1: Zweigert/Kötz: pp.287, 161 ff.

14) For a detailed study of both systems I refer to the sources cited in this thesis.

CHAPTER I: GERMAN LAW OF ENRICHMENT

1) See §823 BGB.

2) See chapter I 3c aa

3) See e.g.: §§323 par.3; 325 par.1; 684 sent.1; 2021 BGB.

4) Kaser M.: Das Römische Privatrecht, S.592. For an analysis of the condictiones in Roman Law cf. v. Lübtow U.: Beiträge zur Lehre von der Condictio nach römischem und geltendem Recht; Honsell: Rückabwicklung.

5) On the extension to incertum dare cf. Kaser, op. cit. p.598 f; v.Lübtow, op.cit. p.137.

6) Kaser, Op.cit. p.593.

7) D 12, 6, 14.

8) Kaser, M.: Das Römische Privatrecht, p.304-308.

9) §§737-748; cf.Mugdan: Gesamte Materialien, pp.464 ff.

10) For cases where the causa for the performance was not lacking from the beginning but subsequently fell away.

11) The influence of Windscheid on the first draft as far as unjustified enrichment is concerned is traced by Schubert, Windscheid und das Bereicherungsrecht des 1. Entwurfs des BGB, pp.186 ff.

12) For an analysis of this doctrine cf. Westermann, Die causa im französischen und deutschen Zivilrecht.

13) System des heutigen Römischen Rechts, p.503 ff.

14) V. Savigny, op.cit., p.525.

15) For an analysis cf. Wilhelm, J.: Rechtsverletzung und Vermögensverschiebung als Grundlangen und Grenzen des Anspruchs aus ungerechtfertigter Bereicherung, pp.38 ff.

16) See Palandt-Thomas: No.4 of intr. to §812 BGB; BGH LM §812 Nr.15;

Larenz II, p.465.

17) See Köpensteiner-Kramer, p.213.

18) See Palandt-Thomas: §814 No.3.

19) See Palandt-Thomas: §814 No.4; RG 90, 314.

20) See Palandt-Thomas: §814 No.2a; BGH LM §625 Nr.69; BGH Betr.68, 612; BGH WPM 72, 283.

21) See Palandt-Thomas: §812 No. 6 A c; Lieb in MüK: §812, No.144; v. Caemmerer: Gesammelte Schriften I, p.219.

22) See Koppensteiner-Kramer: p.71.

23) See §§134, 138 BGB.

24) Cf. e.g. Koppensteiner-Kramer: p.73; Larenz II, p.495.

25) Honsell, Rückabwicklung, pp.10 ff, 32 ff; Erman-H.P. Westermann, §817 No.6; Zimmermann: p.159.

26) Cf. e.g. the detailed analysis of Zimmermann: pp.156 ff.

27) See Palandt-Thomas: §817 No.1b; this problem I shall treat in chapter II 2.

28) BGH 36, 395; 50, 90.

29) Zimmermann: p.159.

30) Palandt-Thomas: §817 No. 1a; BGH loc.cit.

31) Zimmermann: p.159.

32) BGH LM §817, No. 12; BGH 50, 90; BGH NJW 80, 452.

33) Koppensteiner-Kramer: p.78.

34) Larenz: p.472 f.; Koppensteiner-Kramer: pp.72 ff.

35) Koppensteiner-Kramer: p.79; v. Caemmerer: Gesammelte Schriften I, p.228.

36) Palandt-Thomas: §812 No. 6B; v. Caemmerer: Gesammelte Schriften I, p.229; Koppensteiner-Kramer: pp.89 ff.; Larenz II: p.474; Reuter-Martinek: §7 I.

38) Larenz II: p.474; Palandt-Thomas: §812, No. 6B.

39) Koppensteiner-Kramer: pp.86 ff.; Larenz II: p.475; chapter II 2.

40) Chapter II 3.

41) Palandt-Thomas: §816, No.1; Larenz II: p.500.

42) See §§929 ff., 932 ff. BGB.

44) Koppensteiner-Kramer: p.107; Larenz II: p.503.

45) Palandt-Thomas: §816, No. 3b; Grunsky: Bereicherungsansprüche bei rechtsgrundloser Verfügung eines Nichtberechtigten, JZ 62, 207.

46) Palandt-Thomas: loc.cit.; Larenz II: p.504.

47) Palandt-Thomas: §818, No. 6 Cb; BGH 55, 126.

48) Chapter I 4 d.

49) See Medicus: Bürgerliches Recht, No.26.

50) Due to §§407-409 BGB e.g.

51) And this is where §816 par.1 sent.1 BGB differs, because here the person is not entitled to dispose of the thing.

52) §818 par.3 BGB; see chapter I 4 d.

53) As already mentioned I shall not discuss this part of law.

54) See the following pages.

55) Chapter I 4 d.

56) Chapter II 3 and VI 2 b.

57) Cf. chapter V 3.

58) See Medicus: Bürgerliches Recht, No. 573 ff; Baur: Sachenrecht, §11 A.

59) Medicus, in MüK, No. 4-7 of intr. to §987 BGB.

60) E.g. chapter V 1 and VI 1 c.

61) This is a very complex and confusing part of the German law of enrichment where most questions are contorversial (see Palandt-Bassenge: intr. to §987 and intr. to §994, No. 1a; and Reuter-Martinek: §20). The practical consequences of this relationship between §§987 ff BGB and §812 BGB are shown for example in chapter V 4.

62) Palandt-Bassenge: §951, 1a; Baur: Sachenrecht, §53 cI.

63) See chapter II 3.

64) BGH 41, 157; BGH WPM 73, 560; Palandt-Bassenge: §951, No. 3b; Baur: Sachenrecht, §11 c IV 1.

65) BGH 10, 177; 41, 157; BGH in NJW 55, 340.

66) BGH 41, 157; Medicus: Bürgerliches Recht, No. 895 ff. But this court decision dealt with a very special case (see Palandt-Bassenge: §951, No. 3b). To avoid the outlined solution German writers prefer an extension of the meaning of "expenditure" or deny the exclusiveness of §§994 ff BGB in these cases (see Palandt-Bassenge: loc.cit.). As far as the loss of rights by processing is concerned, the BGH has accepted this latter view: BGH 55, 176.

67) E.g. §426 II 1 BGB and §774 I 1 BGB.

68) See already chapter I 2 a.

69) BGH LM §812 Nr. 15; Palandt-Thomas: §816, No.5b; Larenz II:

p.501; Koppensteiner-Kramer: p.129.

70) Koppensteiner-Kramer: p.161 ff.

71) See Koppensteiner-Kramer: p.129 f; Larenz II: p.502.

72) In this sense: Koppensteiner-Kramer: p.162 (with further references); Lieb in MüK.: §816, No.28 ff.

73) Cf. chapter IV 1.

74) RG 72, 152; Palandt-Thomas: §818, No.3 b.

75) BGH 7, 208; BGH LM §818 II No. 7.

76) See chapter I 4 a; Lieb in MüK: §818, No.16 ff.

77) BGH 24, 106; Palandt-Thomas: §818, 4a; Larenz II: p.509.

78) Chapter I 3 c aa.

79) The delictual possessor is liable on the basis of the law of tort (§992 BGB).

80) Gursky: Ersparnisgedanke und Reserveursache im Bereicherungsrecht, JR 72, 279; Koppensteiner-Kramer: pp.126-129 (with further references); of different opinion: BGH 38, 356; BGH NJW 64, 1853.

81) Koppensteiner-Kramer: pp.161 ff.; Lieb in MüK. §818, No. 34 ff.

82) Larenz II: p.509 f.; Palandt-Thomas: §818, No. 4c; BGH NJW 82, 1154.

83) Chapter I 4 d.

84) Koppensteiner-Kramer: p.162; Esser: B.T. §105 I 2; Haines: Bereicherungsansprüche, pp.121, 127 ff.

85) Chapter II 4.

86) The bona fide possessor post litem motam is put on the same footing as the mala fide possessor (§989 BGB).

87) Palandt-Bassenge: intr. to §994, No.5 and §1001, No.1.

88) Palandt-Thomas: §818, No. 6Aa; RG 163, 348; BGH 1, 75.

89) Palandt-Thomas: §818, No. 6C; Larenz II: p.512.

90) RG 106, 7; 170, 67; BGH 1, 81.

91) Larenz II: p.513; Palandt-Thomas: §818, 6 C d; Lieb in MüK: §818, No. 57 ff.

92) See Palandt-Thomas: §818, 6D; Larenz II: p.515 ff; BGH NJW 63, 1870; BGH 53, 144.

93) BGH 57, 137; 53, 144; Lieb in MüK: §818, No. 95; Palandt-Thomas: §818, No. 6Dc.

94) See Palandt-Bassenge: §951, No. 2c dd; Koppensteiner-Kramer: p.171 ff.

95) BGH WPM 69, 296; Larenz II: pp.513 ff.

96) In §819 par.2 BGB the recipient who by accepting the prestation contravenes a legal prohibition or disobeys public morals (see p.9) is put on the same footing.

97) BGH 26, 256; Palandt-Thomas: §819, No. 2.

CHAPTER II: BASIC PRINCIPLES OF GERMAN LAW OF ENRICHMENT

1) Chapter I 3 b.

2) Dernburg: Die Schuldverhältnisse nach dem Rechte des Deutschen Rechs and Preussens, p.677 f.; Koppensteiner-Kramer: p.16/17.

3) RG 86, 343 (348).

4) Koppensteiner-Kramer: loc.cit.; Zweigert-Kötz: p.233; Wacke: p.143; Lieb in MüK: §812, No.19, 20; Reiter-Martinek: pp.39 ff., especially p.55.

5) Chapter I 4 c.

6) Chapter I 3 a.

7) Koppensteiner-Kramer: pp.16/17; Martinek: p. 328.

8) Chapter I 2 a. It must be pointed out, of course, that an enrichment claim does not lie where there are contractual claims. However, this is not a question of it being subsidiary, but rather a question whether or not a performance has been obtained "sine causa".

9) Zweigert-Kötz: p.233; Wacke: p.143.

10) V. Caemmerer: Gesammelte Schriften I, p.215/216.

11) Chapter I 2 a.

12) Chapter I 2 b.

13) Zweigert/Kötz: pp.251/252; BGH 1, 75 (81); 55, 128 (134); BGH WPM 1978, 708 (711).

14) As far as the requirement of an impoverishment of the creditor is concerned, see next page below.

15) Chapter I 4 b.

16) Chapter I 4 d.

17) Chapter I 4 a.

18) Chapter I 4 a.

19) Zweigert-Kötz: p.125; chapter I 3 a; Koppensteiner-Kramer: pp.29, 95 and

194 ff.; Larenz II: p.475; Reuter-Martinek: pp.237 ff.

20) Nortje v. Pool, 1966 (3) 104 D.

21) Therefore S.A. law burdens itself with unnecessary difficulties; see for example, the reasoning in order to determine impoverishment in Nortje v. Pool on p.107 (4).

22) In this sense, however: RG 99, 161 (167); 105, 270; 161, 52 (58); BGH 39, 87 (91); 63, 365 (369).

23) Zimmermann: p.162 f.; Honsell: Rückabwicklung, pp.58 ff.

24) For an analysis of this rule as well as the rule "in pari turpitudine melior est condictio possidentis", cf. Honsell: Rückabwicklung, pp.60-64, 88 ff., 93 ff.

25) Koppensteiner-Kramer: p.76; Zimmermann: p.159 f.

26) Chapter I 4 e.

27) Chapter I 4 b and c.

28) Chapter II 3.

29) Chapter I 3 a.

30) BGH 36, 30; 46, 260.

31) Chapter II 2.

32) BGH 48, 73; 56, 239 ff.; BGH NJW 72, 865; Reuter-Martinek: p.33, pp.237 ff.; Larenz II: pp.470, 475 f.; Lieb in MüK: §812, No.16 ff.

33) BGH 40, 272 (277); BGH 56, 239 ff.; 61, 291; Palandt-Thomas: §812, No. 2a; Koppensteiner-Kramer: p.25; Larenz II: p.466; Lieb in MüK: §812, No. 23.

34) It is regarded to be an act of performance of A: BGH 50, 227; BGH WPM 67, 482; Palandt-Thomas: §812, No. 5 B b cc.

35) It is supposed to be an act of performance of the bank: Larenz II: p.582; v. Caemmerer: Gesammelte Schriften I, p.329; Koppensteiner-Kramer: pp.46 ff.

36) Here the BGH is of the opinion that if the receiver could reasonably assume that the transfer was an act of performance of the party who was actually effecting the transfer, then enrichment liability only exists at this level. If the receiver could reasonably assume that the transfer was an act of performance of the actual debtor, then the performing party is not entitled to an enrichment action. According to this opinion only the viewpoint of the recipient is relevant. Larenz II: p.484 f.; BGH 36, 30; 40, 272.

37) Here one has to distinguish between the case where the discharge was in accordance with the interests of the actual debtor and where it was not. In the former situation the discharge is considered to be an act of performance of the actual debtor. The person effecting the transfer is regarded as a mere intermediary who is entitled to claim reimbursement of his outlay from the actual debtor on the basis of §§683, 670 BGB (legitimate management without mandate). In the latter situation the discharge is considered to be an act of performance of the person who is effecting the transfer. He is entitled to enrichment-by-transfer claim (§812 par.1 sent.1 BGB) against the receiver: against this claim, however, cessation of enrichment (§818 par.3 BGB) can be raised. Against the actual debtor he is entitled to a condictio of recourse on the basis of §684 BGB (illegitimate management without mandate). Larenz II: pp.480 ff.; Koppensteiner-Kramer: pp.55 ff.; Köndgen: Wandlungen im Bereicherungsrecht, p.67 f.

38) See chapter I 3 a.

39) See Lieb in MüK: §812, No. 23-29.

40) Canaris: Der Bereicherungsausgleich im Dreipersonenverhältnis.

41) Canaris: op. cit., p. 857 ff.

42) Reuter-Martinek: p.115.

43) Kupisch: Gesetzespositivismus im Bereicherungsrecht, pp.11 ff., 42; Köndgen: Wandlungen im Bereicherungsrecht, pp.65 ff.; Fikentscher: Schuldrecht, p.582.

44) See e.g. Larenz II: pp.466 ff.

45) In post-classical times this action had become a general action for the reimbursement of expenses if someone's assets had been used to the advantage of someone else. The speciality of this action was that it required neither an act of performance nor an interference at the expense of the creditor: the third person was directly liable. The BGB refuses an actio de in rem verso because every party to a contract should only be entitled to claim from the other party to this contract and not from a third person. This rule does not apply to valid contracts but also to void contracts (and thus cases where the law of enrichment is relevant). See Reuter-Martinek: pp.18-20; Zweigert-Kötz: pp.213, 235.

46) Koppensteiner-Kramer: pp.114 ff.; BGH 40, 272 (278); Palandt-Thomas: §812, No.2; Larenz II: p.476; Reuter-Martinek: p.33.

47) BGH 56, 228 (240 f.); Esser: Schuldrecht, B.T. §104 to I; Ehmann: NJW 71, 613. Of course, the question of the subsidiary nature of the condictio based on interference has been attacked in connection with the rejection of the notion of "Leistung" (see e.g. Lieb in MüK: §812, Nos.21-22-240-245 with further refs.).

48) A claim of the sub-contractor against the entrepreneur on the basis of §951 BGB does not lie, because §951 BGB refers only to the condictio based on interference; here, however, the enrichment is due to an act of performance of the main contractor (see pp.27/28 supra).

49) See for example the typology in Wolf: Der Stand der Bereicherungslehre, pp.164 ff.

50) Larenz II: pp.477 ff.; see already p.51 supra.

51) See chapter I 3 b.

52) See p.55, especially No.48.

53) De Vos in Juridical Review, p.247.

54) See p.51, especially No.36.

55) Weitnauer: in NJW 74, 1729 (1731) and in NJW 79, 2008 (2010); Picker: in NJW 74, 1790 ff.

56) BGH LM No. 6 to §812 BGB; contra: Staudinger-Lorenz: §812 BGB, No.64; Erman-Seiler: §812 BGB, No.6.

57) See chapter I 2 a.

58) See chapter I 4 a.

59) See chapter I 4 c.

60) See p.35 No.84.

61) See the example on p.23.

62) Koppensteiner-Kramer: pp.163 ff.

63) This view is accepted by BGH 63, 365 (368); BGH NJW 78, 1578; Lieb in MüK: §818 BGB, No.16, 20.

64) See chapter I 3 a.

65) Koppensteiner-Kramer: p.90 f.; Reuter-Martinek: p.248 f.

66) RG 121, 258 (261).

67) See e.g. Lieb in MüK: §812, Nos.217 ff.; and recently BGH 68, 90; BGH NJW 1979, 101.

68) Koppensteiner-Kramer: pp.92, 94.

69) BGH 1, 75 (81); Lieb in MüK:: §818, No.49.

70) See chapter I 4 d.

71) See chapter I 4 d.

72) See e.g. Koppensteiner-Kramer, pp.144 ff.

73) Lieb in MüK: §818, No.84.

74) BGH 53, 147.

CHAPTER III: THE SYSTEM OF S.A. LAW OF ENRICHMENT SEEN FROM THE POINT OF VIEW OF THE GERMAN SYSLTEM

1) Lotz: No.67 a, c; De Vos: p.23, 172.

2) Lotz: 67, No.20.

3) Akbar v. Patel, 1974 (4), S.A. 109 (C); De Vos: p.172, pp.63 ff. On the other hand S.A. law recognizes a condictio possessionis. (See Voet: 12.6.12)

4) Lotz: No.67 c; Lee-Honoré: No.684; Wessels: §3637; Hosten: No.2.3.2; Wille: pp.475 ff.; De Vos: p.23; Nkosi v. Totalizator Agency Board (Transvaal) 1980 (1) S.A. 122 (T) (129 F-G).

5) See the summary of Wessels: §§982 ff. with further references and §3691; Wille: pp.476 ff.; and recently: Barker v. Bentley, 1978 (4) S.A. 204 (N.); and the comparison by Weeramantry: §§1034 ff.

6) Lotz: No.67 c; Wessels: §§989, 990; Wille: p.476; Hosten: No.2.3.2.; Lee-Honoré: No.686; chapter V 2.; Hahlo-Kahn: p.567.

7) See e.g. the recent case LMS Electrical Engineers (PVT) LTD v. Tassburg Screw Industries (PVT) LTD 1980 (3) S.A. 1043 (Z) on p.1048 B.

8) Voet: 22.6.7.

9) Barclays Bank International Ltd. v. African Diamond Exporters (Pty) Ltd 1977 (1) S.A. 298 (W): Lotz: No.67c; Lee-Honoré: No.686; Wessels: §3686; Hosten: No.2.3.2.; Wille: p.477; chapter VI 1 b.

10) Carlis v. Mc Cusker, 1904 T.S. 917; Wilken v. Kohler, 1913 A.D. 135; Kennedy and Kennedy v. Lanyon, 1923 T.P.D. 284; Van der Berg v. Shaw, 1933 T.P.D. 242; Mattheus v. Stratford, 1946 T.P.D. 498; Pucjlowski v. Johnston's Executors, 1946 W.L.D. 1; Botha v. Kelder, 1948 (3) S.A. 248 (T); Van Vuuren v. Boshoff, 1964 (1) S.A. 395 (T).

11) Cf. the cases cited in No.10 supra.

12) Wessels: §3644

13) Lee-Honoré: No.685; Wessels: §3646; Lotz: No.67 b; Prescription Act 68 of 1969 s 10 (3); Wille: p.476; Lubbers & Canisius v. Lazarus, 1907 T.S. 901; Pentecost & Co. v. Meat Supply & Co., 1933 C.P.D. 472.

14) Lee-Honoré: op.cit.; Wessels: §§3661, 3662; P.P.I.-Spicers (Pvt) Ltd. v. Darten Products (Pvt) Ltd., 1976 (1) S.A. 559 (R), (560 H).

15) Wessels: §3678; Wille: p.477; Hosten: No.2.3.2.; Lee-Honoré: No.686; Lotz: No.67 c.

16) Wessels: §3670.

17) Wille: p.495; Wessels: §§3689, 3690.

18) Wessels: §3679; Wille: p.477; Lee-Honoré: No.687 with further references; Lotz: No.67 c; Cranborne Road Council v. Derbyshire Estates Ltd, 1967 (1) S.A.8 (R); Port Elizabeth Municipality v. Uitenhage Municipality, 1971 (1) S.A. 724 (A), (741-742).

19) Larenz II: p.491; Koppensteiner-Kramer: p.67.

20) See for example De Vos in Juridical Review, pp.244 ff.

21) Phillips v. Hughes; Hughes v. Maphumulo, 1979 (1) S.A. 225 (N).

22) Loc.cit.: pp.228 H-229 D.

23) Chap. II 3; see in this regard also Wessels: §§3693, 3697, where he states that the person who is entitled to bring the action is he who is "considered in law" to have made the payment and, vice versa, the action is brought against the person to whom "in law" the money is considered to have been paid.

24) Odendaal v. Van Oudtshoorn, 1968 (3) S.A. 433 (T); Scholtens: An Old Question of Enrichment Liability: Payment of Another's Debt, (1969) 86 S.A.L.J., 131.

25) Cowen: in the Comparative and International Law Journal of Southern Africa, 1983, p.1.

26) Scholtens, loc.cit. on p.135.

27) See p.52, No.37 supra.

28) Cowen, loc.cit., on p.37.

29) See p.51, No.35 supra.

30) Lotz: No.76; De Vos: p.144.

31) Lotz: No.73; Wessels: §§3721 ff.; Veuter's Executor v. Lombard, 1919 T.P.D. 177; African Reality Trust Ltd. v. Holmes, 1922 A.D. 389 (400-402); Gulamhussen & Co. (Pty) Ltd. v. Kennedy N.O., 1952 (3) S.A. 366 (T); Shell Co. of S.A. Ltd. v. Gerrans Garage (Pty) Ltd., 1954 (4)

S.A. 752 (G.W.); Levin v. Levin, 1960 (4) S.A. 469 (W); De Vos: p.141.

32) Wessels: §3741.

33) Wessels: §3731.

34) Lotz: No.70; Hosten:: No.2.3.; Wessels: §§661 ff.

35) Lotz: No.71 b; Lee-Honoré: No.691.

36) Wessels: §664.

37) Peiris: p.71; as far as German law is concerned, the prevailing opinion rejects this view (see chap. II 2).

38) Lotz: No.71 c; Lee-Honoré: op.cit.; Hosten: No.2.2.; Jajbhay v. Cassim, 1939 A.D. 537, particularly on pp.544, 550; Petersen v. Jajbhay, 1940, T.P.D. 182; Padayachey v. Lebese, 1942 T.P.D. 10.

39) Lotz: No.71.

40) See chapter I 2 d.

41) See p.17, especially No.25.

42) Chapter I 3 a.

43) Chapter III 1 a.

44) However, there are exceptions in which the S.A. law comes to the same result as German law. This is due to the fact that S.A. law recognizes the condictio furtiva as an alternative to the rei vindicatio. A thief can be compelled by this action to pay the value of the stolen article to the owner; Minister van Verdediging v. Van Wyk en andere, 1976 (1) S.A. 397 (T) (400 D). So it was held in Leal & Co. v. Williams, 1906 T.S. 558 (followed for example in Van der Westhuizen v. McDonald and Mundel, 1907 T.S. 952, 953) that the owner of stolen property may follow his property and vindicate it anywhere, provided it is still in esse. And he may bring an action ad exhibendum to recover the property or its value (should it have been sold or consumed), against the thief or his heirs, or against any person who has received it with knowledge of the tainted title. Similarly it was held in Aspeling, N.O. v. Joubert, 1919 A.D., pp. 170, 171 (followed for example in Vulcan Rubber Works (Pty) Ltd v. S.A.R. & H., 1958 (3) S.A. 289 A-B) that by means of a rei vindicatio a plaintiff is entitled to succeed in an action for the recovery of property or its value, if the defendant has parted with the possession subsequent to receiving notice of the plaintiff's claim. In these cases the S.A. law very much resembles the English doctrine of conversion, which is basically not accepted in South African law (see chapter III 2 b).

45) 1926, C.P.D., 150.

46) Loc.cit.: p.153.

47) See e.g. Hahlo-Kahn: p.570.

48) Le Roux v. Van Viljon and Another, 1956 (2) S.A. 17 (W).

49) Pucjlowski v. Johnston's Executors, 1946 WLD 1.

50) 1967 (2) S.A. 702 (K), on pp.710, 711; see too chapter V 6 and IV 2.

51) See chapter III 3 a.

52) Chapter IV 2.

53) See chapter III 3 d and I 4 d.

54) De Vos: p.222.

55) Wessels: §3471; Woodfall: §§1033, 1052; Cooper: p.144; Pucjlowski v. Johnston's Executors, loc.cit., p.7.

56) Sapro v. Schlinkmann, 1948 (2) S.A.L.R. 637 (A.D.); Tooth v. Maingard and Mayer (Pty) Ltd., 1960 (3) S.A. 127 (N); Bourbon-Leftley v. Turner, 1963 (2) S.A. 104 (C).

57) Lotz: Vol.14, No.159; Alphedie Investments (Pty) Ltd v Greentops (Pty) Ltd, 1975 (1) S.A. 161 (T) (164 E).

58) Lobo Properties (Pty) Ltd v. Express Lift Co. (Pty) Ltd, 1961 (1) S.A. 704 (K), (709 H); Alphedie Investments (Pty) Ltd v. Greentops (Pty) Ltd, loc.cit.; Cooper: p.144; Hahlo-Kahn: pp.565 ff.; under German law these cases are covered by the special contractual rule of §557, which states that if a lessee does not return the leased thing after the termination of the lease, the lessor may demand the rent agreed upon as compensation for the time during which the thing is retained. This claim is applicable besides enrichment claims and claims based on the owner-possessor relationship; (BGH 44, 241; BGH NJW 68, 197; WPM 74, 260).

59) Lotz: No.76; ambiguous in this respect Wessels: §§3750 ff.; as to the nature of the condictio sine causa specialis, in general see Parkin v. Smuts, 1978 (3) S.A. 55 (T) (from p.56 H onwards).

60) Lotz: 76, No.2; chapter III 1 a.

61) Voet: 6.1.10, in the translation by Gane.

62) VAn der Westhuizen v. Mc Donald and Mundel, 1907 TS 941 ff.; Leal & Co. v. Williams, 1906 TS 554; Morobane v. Bateman, 1918 A.D. 460; John Bell & Co. Ltd. v. Esselen, 1954 (1) S.A. 147 (A); De Vos: p.188; unclear in this respect Lotz: No.76.

63) Voet: 6.1.10, as translated by Cane.

64) Leal & Co. v. Williams, loc.cit., p.558.

65) Campbell v. Blue Lime Association, 1918 T.P.D. 309 (312); Union Government v. Lombard, 1926 C.P.D. 150; Lotz: No.76, 2. This is undoubtedly the position in cases where money is concerned: Trahair v. Webb and Co., 1924 WLD 227; De Vos: p.189.

66) See De Vos: p.214.

67) Lotz: No.84; Hosten: Nos.2.3., 2.3.1.; Lee-Honoré: No.713; De Vos: pp.214 ff.; Wille: p.479; chapter V 6.

68) Rondalia Bank BPK v. Pieter Nel Motors (Edms) Bpk, 1979 (4) S.A. 467 (T), (on p.472 F-G); De Vos in (1974) 37, THRHR 308; Lotz: No.88.

69) Lee-Honoré: No.695; De Vos: pp.99/100.

70) De Vos: in Juridical Review 1960, p.141.

71) See chapter I 4 a; Lotz: No.68.

72) Voet: 12.6.1.

73) Voet: 12.6.12.; Lotz: No.67 a, 4; Frame v. Palmer, 1950 (3) S.A. 340 (K); Rumpff, J.A., in Nortje v. Pool, 1966 (3) S.A. 96 (A); Hahlo-Kahn: The Union of South Africa, p.566.

74) Gouws v. Jester, 1968 (3) S.A. 563 (T) 575; Nortje v. Pool, 1966 (3) S.A. 134 E-F; De Vos: pp.16-17; Lotz: loc.cit.

75) Le Riche v. Hamman, 1946 A.D. 648 (656); King v. Cohen Benjamin & Co., 1953 (4) S.A. 641 (W), (649 C); Hahlo-Kahn: The Union of South Africa, p.568; Wessels: §3708; Lotz: No.68, 5; Voet: 12.6.12.

76) See chapter I 4 a and II 2.

77) Lotz: No.68; Lee-Honoré: No.684, 5; Wessels: §§3702 ff.; Hahlo-Kahn: The Union of South Africa, p.568.

78) Balliol Investment Co. (Pty) Ltd. v. Jacobs, 1946 T.P.D. 269 (272-274); Lotz: No.68. Contrary to this, under German law enrichment liability covers the interest which the debtor actually received (Palandt-Thomas: §818 BGB, No.3 c).

79) Balliol Investment Co. (Pty) Ltd. v. Jacobs, loc.cit., on p.272.

80) Voet: 12.6.12.

81) Wessels: §§3708, 3710; Lee-Honoré: No. 684, 5; Hahlo-Kahn: The Union of South Africa, p.568.

82) 1952 (4) S.A. 405 (S.W.A.), (409).

83) See chapter I 4 b.

84) Fletcher and Fletcher v. Bulawayo Waterworks Co. Ltd., 1915 A.D. 636

(650-651); Rademeyer and others v. Rademeyer and others, 1967 (2) S.A. 702 (K), (706-707); Lotz: No.85; Pucjlowski v. Johnston's Executors, 1946 W.L.D. 1, (5); Wille: p.480.

85) Lotz: No.68.

86) Le Riche v. Hamman, 1946 A.D. 648; King v. Cohen Benjamin & Co., 1953 (4) S.A. 641 (W); Lotz: No.68; Lee-Honoré: No.710, 4.

87) Willoughby's Consolidated Co. v. Copthall Stores Ltd., 1918 AD 1(20); Le Riche v. Hamman, loc.cit. on p.658.

88) Lee-Honoré: No.710; Meyer's Trustee v. Malan, 1911 T.P.D. 559 (571); Fletcher and Fletcher v. Bulawayo Waterworks Co. Ltd., loc.cit. on p.648; Williams Estate v. Molenschoot and Schep (Pty) Ltd., 1939 CPD 306(368); Spencer v. Gostelow, 1920 AD 617; Lotz: No.98 ff.

89) See e.g. Van Rensburg v. Straughan, 1914 A.D. 317 (329-333); Lotz: No.99.

90) Lotz: No.100; see, too, De Vos: pp.253, 254.

91) See e.g. Hosten: No. 2.3.1.; Lee-Honoré: No.714; De Vos: pp.203, 204.

92) De Beers Consolidated Mines v. London and SA Exploration Co., (1893) 10 S.C. 359; Lechoana v. Cloete and others, 1925 A.D. 536 (547); Nortje v. Pool, 1966 (3) S.A. 96 (A) 131; Lotz: No.85; Wille: p.480; Lee-Honoré: No.713.

93) Hosten: No.2.3.1.; Lotz: No.85; Lee-Honoré: No.713; Bellingham v. Bloometje, 1874 Buch 36; Rubin v. Botha, 1911 A.D. 568; Rademeyer and others v. Rademeyer and others, 1967 (2) S.A. 702 (K) 706; and the cases cited in No.92; Wille: p.480; Harrison v. Marchant, 1941 W.L.D. 16. As far as German law is concerned, this view has been accepted since RG 106, 149; Erman-Hefermehl: §996 BGB No.2.

94) Fletcher and Fletcher v. Bulawayo Waterworks Co. Ltd. loc.cit. on p.648; Nortje v. Pool, loc.cit., pp.106, 124; De Vos: pp.50-51, 91, 202-203; Lotz: loc.cit.; Lee-Honoré: No. 713, 6; Hosten: No.2.3.1.

95) Lotz. No.85, 3 with further references; Wille: p.480; Lee-Honoré: No.717.

96) Lechoana v. Cloete and others, 1925 A.D. 536 (548).

97) Lee-Honoré: No. 716; De Beers Consolidated Mines v. London and S.A. Exploration Co., loc.cit. on p.372; Fletcher and Fletcher v. Bulawayo Waterworks Co. Ltd., loc.cit. on p.648; Wille: p.480.

98) Lee-Honoré: No.716; Lotz: No.87; United Building Society v. Smookler's Trustees and Golombick's Trustees, 1906 T.S. 623; Kommissaris van Binnelandse Inkomste v. Anglo American (OFS) Housing Co., Ltd., 1960 (3) S.A.

642 (A).

99) Lee-Honoré: No.716.

100) Lee-Honoré: No.717; Stupart v. Cross (1905) 22 S.C. 538.

101) Lotz: No.87; De Beers Consolidated Mines v. London and S.A. Exploration Co., loc.cit., p.372; United Building Society v. Smookler's Trustees and Golombick's Trustees, loc.cit., on p.633; Rencken v. Suyman, 1946 N.P.D. 551; Louw v. Riekert, 1957 (4) S.A. 170 (T), (178).

102) Lotz: loc.cit.; Lee-Honoré: No. 717; Phillips and Gordon v. Adams, 1923 EDL 104; Wille: p.480.

103) Lotz: No.86 with further references; Lee-Honoré: N.713.

104) Fletcher and Fletcher v. Bulawayo Waterworks Co. Ltd., loc.cit. on p.656.

105) Lotz: No.64 a; Wessels: §§3702, 3711.

106) Le Riche v. Hamman, 1946 A.D. 648; King v. Cohen Benjamin & Co., 1953 (4) S.A. 641 (W); African Diamond Exporters (Pty) Ltd. v. Barclays Bank International Ltd., 1978 (3) S.A. 699 (AD); Lotz: No.68.

107) Fletcher and Fletcher v. Bulawayo Waterworks Co. Ltd., loc.cit., on pp.650-651; Rademeyer and others v. Rademeyer and others, 1967 (2) S.A. 702 (K), (706-707); Lotz: No.85 with further references.

108) See No.107.

109) De Vos: pp.148-152, 175; Lotz: No.68 with further references.

110) De Vos: p.175; Lotz: No.68, 11; 72, 5; 77,6; Dugas v. Kempster Sedgwick (Pty) Ltd., 1961 (1) S.A. 784 (D); Lydenburg Voorspoed Ko-op v. Els, 1966 (3) S.A. 34 (T).

111) See chapter I 4 d.

112) Fletcher and Fletcher v. Bulawayo Waterworks Co. Ltd., loc.cit., on p.648; Lee-Honoré: No. 710, 4.

113) De Vos: p.28; Lotz: No.68, 10.

114) Fletcher and Fletcher v. Bulawayo Waterworks Co. Ltd., loc.cit., on p.648.

115) B. and B. Foundry Engineers v. Cilliers, 1950 (1) S.A. 257 (O).

116) See No.114.

117) Chapter III 3 c.

118) De Vos: p.293-294; Wessels: §§3709, 3708, 3703; Lotz: No.64 a; African Diamond Exporters (Pty) Ltd. v. Barclays Bank International Ltd., 1978 (3) S.A. 699 (AD) 711.

119) Duffil v. Duffil's Executors, (1900) 21 N.L.R. 1.

120) Edelstein v. Edelstein N.O., 1952 (3) S.A. 1 (A) (12).

121) Lotz: No.64, 8.

122) De Vos: loc.cit.; Wessels: §3710; Lotz: loc.cit.

CHAPTER IV: SOUTH AFRICAN LAW OF ENRICHMENT CONTINUED

1) Wessels: §§3744, 3764, 3765; Voet: 12.7.1.; 18.1.21.

2) Though this is not stated expressis verbis in many court decisions; but see Wessels: §3765; Lee-Honoré: Nos.693, 694; Wille: pp.475, 478; Wiley, N.O. v. Mundinch & Co., (1902) 19 S.C. 447 (452); Dickinson Motors (Pty) Ltd. v. Oberholzer, 1952 (1) S.A. 443 (A) 452.

3) Wessels: §3764.

4) Hughes v. Levy, 1907 T.S. 276, (279); Holtshausen v. Minnaar, (1905) 10 H.C.G. 50.

5) Schultz v. Morton & Co., 1918 T.P.D. 343 346.

6) Wille: p.474; Weeramantry: §1046.

7) 1914 A.D. 293; Voet: 19.2.40.

8) De Vos: in Juridical Review, 1960, p.232.

9) Breslin v. Hitchins, 1914 A.D. 312; Van Rensburg v. Straughan, 1914 A.D. 317; Viljoen v. Visser, 1929 CPD 473; Lievaart v. Strydom, 1938 T.P.D. 586; Kam, N.O. v. Udwin, 1939 W.L.D. 339; Miller v. Larter, 1941 E.D.L. 98; Wegerle v. Pretoria Machinery Sales, 1946 T.P.D. 319; B. and P. Foundry Engineers v. Cilliers, 1950 (1) S.A. 257 (O).

10) For a discussion of the rights of a precarist see De Vos: pp.235-237; Lotz: No.97.

11) De Vos: p.215 f.; Lotz: nos. 90-92.

12) Lotz: No.96, 3 with further references.

13) See e.g. Oosthuizen v. Oosthuizen's Estate, 1903 T.S. 688 (692); Rubin v. Botha, 1911 A.D. 568 (575, 579); Van Wezel v. Van Wezel's Trustee, 1924 A.D. 409 (416); Lessing v. Steyn, 1953 (4) S.A. 193 (T) 201.

14) See e.g. Rubin v. Botha, loc.cit.; Fletcher and Fletcher v. Bulawayo Waterworks Co. Ltd., 1915 A.D. 636; Nortje en 'n ander v. Pool N.O., 1966 (3) S.A. 96 (A) 129,130; Lotz: No.90; Lee-Honoré: No.713, 4; Wille: pp.479/480; Hosten: No.2.3.; De Vos: pp.214 ff.

15) Rubin v. Botha, loc.cit.; De Vos: p.222; Lotz: No.90.

16) 1967 (2) S.A. 711 (G).

17) Lotz: No.91.

18) Salzer v. Salzer, 1919 E.D.L. 221; Brown v. Brown, 1929 N.P.D. 41; Harrison v. Marchant, 1941 W.L.D. 16; De Jager v. Harris N.O. and the Master, 1957 (1) S.A. 171 (S.W.A.); Kommissaris van Binnelandse Inkomste v. Anglo American (OFS) Housing Co., Ltd., 1960 (3) S.A. 642 (A); De Kock N.O. v. Van Schalkwyk, 1966 (1) S.A. 696 (O); Nortje en 'n ander v. Pool N.O., 1966 (3) S.A. 96 (A) 130; Banjo v. Sungrown (Pty) Ltd., 1969 (1) 401 (N); Lotz: No.92.

19) Brown v. Brown, loc.cit.; Lotz: loc.cit.

20) Brunsdon's Estate v. Brunsdon's Estate, 1920 C.P.D. 159; chapter V 7.; Lee-Honoré: No.713, 2.

21) Du Plessis v. Estate Mayer, 1913 C.P.D. 1006; Brunsdon's Estate v. Brunsdon's Estate, loc.cit.; Engelbrecht v. Mundell's Trustee, 1934 C.P.D. 111; Ex parte Boshoff, 1943 O.P.D. 56; Ex parte Van Zyl, 1948 (2) 210; Lotz: No.94.

22) Brunsdon's Estate v. Brunsdon's Estate, loc.cit.; Lotz: No.95; Lee-Honoré: No. 713, 2.

23) 1914 A.D. 312.

24) Kam, N.O. v. Udwin, 1940 W.L.D. 137; Muller v. Grobbelaar, 1946 O.P.D. 272; Jansen v. Rosenbaum, 1948 (1) S.A. 578 (T); Morgan v. Moodley, 1965 (2) S.A. 734 (N); Grunow N.O. v. Sieberhagen, 1959 (3) S.A. 900 (K); De Vos: in Juridical Review, 1960, p.233.

25) See No.24.

26) For a criticism of this paradoxical distinction see De Vos: p.255.

27) Muller v. Grobbelaar, 1946 OPD 272; Lee-Honoré: No.711.

28) De Vos: p.190; as to the nature of this condictio see John Bell & Co. Ltd. v. Esselen, 1954 (1) S.A. 147 (A) 151; Minister van Verdediging v. Van Wyk en Andere, 1976 (1) S.A. 397 (T); see p.75 No.44.

29) De Vos: pp.195 ff.

30) See chapter I 2 a; Lieb in MüK: §812 No.147.

CHAPTER V: DIFFERENCES BETWEEN S.A. AND GERMAN LAW OF ENRICHMENT

1) Chapter III 1 c.
2) Chapter III 3 b.
3) Grotius: The Introduction to Dutch Jurisprudence, 2.10.8., Translation by A.F.S. Maasdorp, 3rd ed., S.A. Juta & Co., 1903.
4) Brunsdon's Estate v. Brunsdon's Estate, 1920 C.P.D. 159 (173).
5) 1974 (4) S.A. 104 (T).
6) 71 of 1969.
7) See Patel v. Adam, 1977 (2) S.A. 653 (AD) on p.669 E-H.
8) Loc.cit. p.109 F.
9) De Vos: p.172; Akbar v. Patel, loc.cit., on p. 109 C-D.
10) Chapter I 2 a.
11) Chapter V 4.
12) 1904 T.S. 917; followed in Kennedy and Kennedy v. Lanyon, 1923 T.P.D. 284; Balliol Investment Co. (Pty) Ltd. v. Jacobs, 1946 T.P.D. 269-274; Mattheus v. Stratford, 1946 T.P.D. 498, (503); Pucjlowski v. Johnston's Executors, 1946 W.L.D. 1 (7-8); De Villiers, N.O. v. Summerson, 1951 (3) S.A. (T) (80); Bushney v. Joliffe, 1953 (4) S.A. 273 (W); Van Vuuren v. Boshoff, 1964 (1) S.A. 395 (T) 401-402; Botes and Others v. Toti Development Co. (Pty) Ltd, 1978 (1) S.A. 205 (T) 212 G; and still applied in Rand vir Rand (Edms) Bpk. v. Boswell, 1978 (4) S.A. 468 (W) 476 C-D. 13) Akbar v. Patel, loc.cit., on pp.106 (H) - 107 (A).
14) 1979 (2) S.A. 546.
15) Loc.cit., on p.555 D.
16) (Loc.cit., p.558 B); Kahn: Contract and Mercantile Law Through the Cases, p.192.
17) Loc.cit., p.559 H; the BGB provides for a curing of the nulllity of a contract which is void because of lack of compliance with formal requirements only if the obligation arising from such contract have in fact been carried out (see §§313 sent.2, 518 par.2 BGB).
18) See p.75 No.44.
19) Chapter III 2 b.
20) 1973 (1) S.A. 914 (C).

21) Loc.cit., p.917 (F) - 918 (A).

22) See e.g. Palandt-Heinrichs: §242, 6.

23) BGH NJW 53, 1585; NJW 58, 785; BGH 47, 52; BGH NJW 67, 1082.

24) If one considers this contract to be based on public law, the result would not have been different: according to §§59 par.2 No.4, 56 par.1 VwVfG, this contract is void and rules of unjustified enrichment can be applied analogously.

25) 1910 C.P.D. 118.

26) Loc.cit., p.126.

27) BGH 53, 376; Palandt-Keidel: §2077, 1 A b bb.

28) BGH NJW 73, 1645; Palandt-Heinrichs: §138, 5 f.

29) Chapter IV 1.

30) Wessels: §3764; see, too: Lee-Honoré: No.695; Wille: pp.475, 478.

31) BGH 8, 231; 11, 22; 47,269; Betr. 72, 1336.

32) Here no distinction is made between objective and subjective impossibility (see §275 par.2 BGB).

33) RG 139, 22; BGH 64, 324; BGH LM §818 III No.6.

34) 18.1.21.

35) Wessels: §§3765, 3744; Wille: pp.475, 478; Lee-Honoré: No.693; Holtshausen v. Minnaar, 1905 10 H.C.G.50; Hughes v. Levy, 1907 T.S. 276.

36) Supra, No.35.

37) Supra, No.35.

38) 12.7.1.

39) See p.121.

40) BGH 54, 347.

41) 1918 T.P.D. 343.

42) In this situation it is a condictio sine causa specialis in the form of a condictio ob causam finitam: the purchase agreement, which was valid at the beginning, later fell away when the suspensive condition could not be fulfilled (see chapter III 1 b; as far as German law is concerned, see Palandt-Thomas: §812 BGB, 6 A c aa; Koppensteiner-Kramer: p.47). It is not a condictio causa data causa non secuta, because the purchase price had not been handed over to induce Schultz to a certain future conduct, but was merely meant to be the counter-performance of the purchase agreement (see chapter I 2 c; Palandt-Thomas: §812 BGB, 6 A d).

43) See on p.348.

44) In German law the BGH takes the view that if a suspensive clause is not fulfilled, the contract has lapsed and retransfer of performance has to take place on the basis of unjustified enrichment (BGH LM No.1 to §159 BGB). Other writers are of the opinion that in this situation the agreement has not vanished entirely and that redhibition has to take place on a contractual basis (Palandt-Heinrichs: §159 BGB, No.1).

45) By Wessels, J., on p.346.

46) Whether the performance measures up to the contractual stipulations or not, is, in German law, a matter of warranty claims, ("Gewährleistungsansprüche"; see e.g. §459 BGB).

47) 1941 E.D.L. 98.

48) 1914 A.D. 293.

49) Loc.cit. on p.296.

50) Miller v. Larter, loc.cit., p.103.

51) Loc.cit., p.105.

52) BGH 26, 337; Palandt-Thomas: intr. to §633 No.4 a.

53) 1979 (1) S.A. 391 (A).

54) Loc.cit., on pp.420/421.

55) In Hauman v. Nortje, 1914 A.D. 293, on pp.297/298.

56) In Hauman v. Nortje, loc.cit., on pp.304/305.

57) Loc.cit., p.304.

58) In Van Rensburg v. Straughan, 1914 A.D. 317.

59) Loc.cit., on p.329.

60) Loc.cit., p.331.

61) Loc.cit., on p.333.

62) Tooling-case on p.424 c.

63) Loc.cit., on pp.422 H/423 A. Compensation for work and labour on a quantum meruit basis was still granted in Sifris en 'n Ander, N.N.O. v. Vermeulen Broers, 1974 (2) S.A. 218 (T) and in Florencio v. Kreuter, 1969 (2) S.A. 674 (S.R.) on p.677 E-F.

64) Loc.cit., on p.424. In this sense, too, Kerr, Breaches of Building Contracts: Is the action one on the Contract or for a Quantum Meruit? (1969) 86 S.A.L.J. 396.

65) 1933 T.P.D. 242.

66) 1903 T.S. 629.

67) RG 163, 348; BGH 10, 350 (357); 32, 76 (94); see Palandt-Bassenge:

§988, 4.

68) Baur: Sachenrecht §11 B II 3; Fikentscher: Schuldrecht, p.616; Erman-Hefermehl: intr. to §987, No.28; v. Caemmerer: Gesammelte Schriften I, p.308 No.42.

69) 1961 (1) S.A. 784 (D).

70) Loc.cit., p.790 (E).

71) Loc.cit., p.793.

72) This reasoning is similar to the distinction between possessor and occupier: chapter V 6.

73) The solution follows the same steps as that outlined on p.133.

74) As far as interest under S.A. law is concerend, see chapter III 3 b.

75) 1907 T.S. 933.

76) Voet: 6.1.10.

77) Loc.cit., p.941.

78) Loc.cit., p.942.

79) According to the BGB, the plaintiff has the choice either to vindicate the object by means of the rei vindicatio or to waive his ownership, by affirming the alienation of the unauthorized person, and bring an enrichment action, (Palandt-Thomas: §816 No.2 c BGB; Reuter-Martinek: §8 I 2).

80) See supra No.77.

81) Chapter I 3 a.

82) Chapter I 4 e.

83) See p.140, especially No.79.

84) Fletcher and Fletcher v. Bulawayo Waterworks Co. Ltd., 1915 A.D. 636, on p.650.

85) 1911 A.D. 568, on p.581.

86) See No.85 supra.

87) Peiris: p.23.

88) 1967 (2) S.A. 702 (K) 711 G.

89) See chapter V 4.

90) See chapter II 2.

91) 1915 A.D. 636.

92) Loc.cit., pp.646/647.

93) Chapter III 3 c.

94) See the statement in Lechoana v. Cloete and others, 1925 A.D. 526, on p.

584 = chapter III 3 c.

95) German law, indeed, distinguishes between bona fide and mala fide possessor: see chapter I 4 b and c.

96) A swing towards the German position in this regard seems to be evident: (D). Glaser & Sons (Pty) Ltd. v. The Master and another N.O., 1979 (4) S.A. 780 (C), where it was held (on p.790 F-G), that "if a builder is given possession of a site, knowing he is not the owner, then whether you call him a possessor or an occupier does not seem ... to make much difference; if he enriches the owner of the building on the site he ought to get the rights of a bona fide possessor ...".

97) Chapter IV 2.

98) Chapter IV 2.

99) 1920 C.P.D. 159.

100) Supra p.143 No.85.

101) Loc.cit., p.177.

102) See p.143 No.85.

103) Chapter IV 2.

104) §1049 BGB, RG 106, 50; Palandt-Bassenge: §1049, No.1.

105) BGH WPM 67, 1147.

CHAPTER VI: CONCLUSION

1) See chapter III 1 a.

2) Rubin v. Botha, 1911 A.D. 568, on p.576.

3) Breslin v. Hitchins, 1914 A.D. 312, 315.

4) De Vos: pp.167-171.

5) Carlis v. Mc Cusker, 1904 T.S. 917; Wilken v. Kohler, 1913 A.D. 135; Kennedy and Kennedy v. Lanyon, 1923 T.P.D. 284, 285; Van der Berg v. Shaw, 1933 T.P.D. 242; Mattheus v. Stratford, 1946 T.P.D. 498; Pucjlowski v. Johnston's Executors, 1946 W.L.D. 1; Botha v. Kelder, 1948 (3) S.A. 248 (T); Van Vuuren v. Boshoff, 1964 (1) S.A. 395 (T); De Vos: loc.cit.; Lotz: No.67 c.

6) Cf the cases cited in No.5 supra; and chapter V 1.

7) Denton v. Haldon's Furnishers (Pty) Ltd., 1951 (1) S.A. 720 (T); M.C.C.

Bazaar v. Harris and Jones (Pty) Ltd., 1954 (3) S.A. 158 (T); Lodge v. Modern Motors Ltd., 1957 (4) S.A. 103 (S.R.); Dugas v. Kempster Sedgwick (Pty) Ltd., 1961 (1) S.A. 784 (D); Lotz: loc.cit.

8) Chapter V 1 and III 1 a.

9) Chapter III 2 a and V 4.

10) Chapter II 1.

11) RG 86, 343 (348); see chapter II 1.

12) See the criticism in Zweigert-Kötz: pp.232 ff.; as to the requirement of "detriment" see chapter II 2.

13) Cranborne Road Council v. Derbyshire Estates Ltd., 1967 (1) S.A. 8 (R).

14) See e.g. Miller and Others v. Bellville Municipality, 1973 (1) S.A. 914 (C), 919.

15) Calder v. S.A. Mutual Life Assurance Society, 1972 (4) S.A. 285 (R).

16) See chapter III 1 a.

17) 1977 (1) S.A. 298 (W).

18) See e.g. Breslin v. Hitchins, 1914 A.D. 312 (315); De Vos: p.254 f.; Lotz: No.101; Lee-Honoré: No.711.

19) 1948 (1) S.A. 578 (T).

20) Loc.cit., p.581.

21) Chapter II 2.

22) Chapter IV 1 and V 3.

23) Land Bank V. Mans, 1933 C.P.D. 16; Savory v. Baldochi, 1907 T.S. 523; Ford v. Reed Brothers, 1922 T.P.D. 266; Colonial Cabinet Manufacturing v. Wild, 1927 C.P.D. 198; Holmes Garage v. Levin, 1924 G.W.L. 58; New Club Garage v. Milborrow & Son, 1931 G.W.L. 86.

24) De Vos: in Juridical Review, 1960, p.250.

25) Colonial Government v. Smith (1885) 4 S.C. 194; Gillingham v. Harris and Morgan, 1905 T.S. 94; Vadas (Pty) Ltd. v. Philip, 1940 C.P.D. 267; Frame v. Palmer, 1950 (3) S.A. 340 (K); Knoll v. S.A. Flooring Industries Ltd., 1951 (1) S.A. 404 (T).

26) See No.25 supra.

27) See chapter VI 3 a.

28) See No.25 supra.

29) See No.23 supra.

30) See No.23 supra.

31) BGH 27, 317; 34, 122; BGH WPM 60, 879.

32) However, the BGH accepts a subsidiary application of §§994 ff BGB in these cases, if the contract does not provide special regulations, because otherwise the lawful possessor would be in a worse situation than the unlawful possessor: BGH NJW 79, 716.

33) See No.23 supra.

34) See No.25 supra.

35) Chapter II 3.

36) De Vos: pp.300 ff.

37) Palandt-Heinrichs: §276, 7.

38) BGH 11, 84; BGH LM §276 (H) No.3; BGH NJW 69, 975.

39) See chapter V 3.

40) Middleton v. Carr, 1949 (2) S.A. 374 (A) 386.

41) Chapter V 3; see the criticism of the case Hauman v. Wortje by De Vos: pp.237 ff.

42) Martinek: p.326 ff.; for a detailed analysis see Reuter-Martinek: §2.

43) Martinek: p.327 No.182; Koppensteiner-Kramer: p.18.

44) Wilburg: Die Lehre von der ungerechtfertigten Bereicherung nach österreichischem und deutschem Recht, Festschrift der Universität Graz, (1934).

45) v. Caemmerer: Bereicherung und unerlaubte Handlung: Gesammelte Schriften I: pp.209 ff.

46) See e.g. Larenz II: p.466 with further references.

47) v. Caemmerer: Gesammelte Schriften, p.213.

48) Wacke: p.137.

49) v. Caemmerer: Gesammelte Schriften, p.219. Martinek: p.328.

50) Larenz II: p.466; Martinek: p.329.

51) Chapter II 3.

52) See e.g. p.54, No.46.

53) See e.g. chapter I 3 c.

54) For example the distinction between bona fide and mala fide possessor: chapter VI 1 b; the ius retentionis of the possessor (§1000 BGB) in certain cases: chapter VI 1 c; or the regulation in §987 par.2 BGB.

55) As far as the owner-possessor-relationship is concerned, Baur states that there is no reason in law to distinguish between a "Eigenbesitzer" and a "Fremdbesitzer": Baur: Sachenrecht, §11 B I 3.

56) Palandt-Bassenge: No. 1 d to §987 BGB.

57) König: Gutachten und Vorschläge zur Überarbeitung des Schuldrechts.

58) König: loc.cit., on p.1590.

59) 1966 (3) S.A. 96 (A).

60) RG 106, 143 (149).

61) Münchener Kommentar: §99 BGB No.4; Palandt-Heinrichs: §99 BGB No.2 a.

62) See chapter V 4.

63) RG JW 38, 3040.

64) BGH LM No. 1.

65) See e.g. Larenz II: p.466 with further references; Fikentscher: Schuldrecht, p.574 f.; Koppensteiner-Kramer: p.17 f.; BGH 36, 30; 40, 272.

66) Wilhelm: Rechtsverletzung und Vermögensentscheidung als Grundlagen und Grenzen des Anspruchs aus ungerechtfertigter Bereicherung.

67) Kellmann: Grundsätze der Gewinnhaftung.

68) Wilhelm: op.cit., on p.173.

69) Kellmann: op.cit., on p.108.

70) See e.g. Martinek: p.327, No.184 and BGH 72, 246 (248), where the BGH sticks deliberately to the distinction between enrichment-by-transfer claim and condictio based on interference.

71) See e.g. Reuter-Martinek: pp.38, 40 ff.; Fikentscher: Schuldrecht, p.575.

72) De Vos: pp.256-261; Knoll v. S.A. Flooring Industries Ltd., 1951 (1) S.A. 404 (T); Krueger v. Navratil, 1952 (4) S.A. 405 (SWA); Pretorius v. Van Zyl, 1927 OPD 226.

73) See No.72 supra.

74) Loc.cit., p.408 (F).

75) De Vos: in Juridical Review, 1960, p.247.

76) See chapter II 3.

77) See No.72 supra.

78) See e.g. Mangoldt-Klein: Das Bonner Grundgesetz, p.425.

79) No.72 supra.

80) De Vos: p.256-257.

81) 1979 (1) S.A. 225 (N).

82) De Vos: pp.285-317; De Vos: in Juridical Review, 1960, pp.241 ff.

83) In this respect De Vos admits that "it is to be doubted, whether the sine causa requirement can be expressed in a truly satisfactory, comprehensive formula. In any event, it does not appear that this requirement is likely to give rise to any great problems in practice" (De Vos: Juridical Re-

view, p.252; De Vos: p.310). I may point out that in this respect German law distinguishes strictly between the sine causa-requirement of an enrichment-by-transfer claim and the sine causa-requirement of a condictio based on interference. The former type of condictio requires the lack of a legal/contractual basis; the latter requires an infringement of the "Zuweisungsgehalt" of a right. It is this distinction which led Martinek to conclude that the idea of a general enrichment rule appears to be a useless play of thoughts (Martinek: p.329).

84) De Vos: in Juridical Review, 1960, p.254.

85) De Vos: loc.cit., p.253.

86) Under German law even a delictual possessor is entitled to claim compensation for necessary expenses pursuant to the provisions of negotiorum gestio: §§994 par.2, 683, 684 BGB.

87) Under German law they are not. Here De Vos refers to the Placaats: see chapter IV 2.

88) Under German law they are not: see chapter V 7.

89) Under German law the person is not denied the condictio indebiti: see chapter I 2 a.

90) 1968 (3) S.A. 563 (T).

91) Scholtens: "Enrichment at Whose expense?: in (1968) 85 S.A.L.J., pp.371 ff.

92) Scholtens: loc.cit., p.376; De Vos again criticized Scholtens' view in "Enrichment at Whose expense? A Reply", in 1969 S.A.L.J. 227.

93) Martinek: pp.330 ff.

94) In this respect Martinek speaks of an "accelerated convergence" of the Anglo-American law of restitution, and the German system, (loc.cit., on p.335).

95) Lotz: No.76.

96) Chapter V 5.

97) The disposition of property can be conceived as a form of consumption.

98) 1952 (4) S.A. 405 (S.W.A.)

99) loc.cit., on p.408 H.