Iurium itinera

Historische Rechtsvergleichung und
vergleichende Rechtsgeschichte

Historical Comparative Law and
Comparative Legal History

Reinhard Zimmermann zum 70. Geburtstag
am 10. Oktober 2022

Herausgegeben von

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in Verbindung mit

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ISBN 978-3-16-161486-6 / eISBN 978-3-16-161487-3
DOI 10.1628/978-3-16-161487-3

ISSN 0340-6709 / eISSN 2568-6577
(Beiträge zum ausländischen und internationalen Privatrecht)

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliographie; detaillierte bibliographische Daten sind im Internet über *http://dnb.dnb.de* abrufbar.

Das Buch wurde von Gulde Druck in Tübingen auf alterungsbeständiges Werkdruckpapier gedruckt und von der Buchbinderei Spinner in Ottersweier gebunden.

Printed in Germany.

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Some Diachronic Reflections on the Scope of Error in Unjustified Enrichment

Pascal Pichonnaz[*]

I. Introduction

Reinhard Zimmermann, to whom these lines are dedicated, has repeatedly addressed the subject of unjustified enrichment.[1] He has also motivated many of his former students to take an interest in this topic.[2] As far as I know, however, he did not specifically address the roots of unjustified enrichment in Swiss law in any of his publications, even though a specific analysis of Swiss law seems interesting in this context.[3] Given the narrow confines of this format, however,

[*] I am very grateful to my assistant, Aurélie Santarossa, Attorney-at-Law, for helping me with the preparation of this article and for revising my manuscript, as well as to my assistant, Camille de Salis-Soglio, University of Fribourg/Switzerland, and to Sonja Meier and Stefan Feltes, who kindly revised my English.

[1] In particular, *R. Zimmermann* (ed.), Grundstrukturen eines Europäischen Bereicherungsrechts, 2004; *D. Johnston/R. Zimmermann* (eds.), Unjustified Enrichment: Key Issues in Comparative Perspective, 2002; *S. Meier/R. Zimmermann*, Judicial Development of the Law, Error Iuris, and the Law of Unjustified Enrichment – A view from Germany, LQR 115 (1999), 556–565.

[2] I mention here only *S. Meier*, Irrtum und Zweckverfehlung: Die Rolle der unjust-Gründe bei rechtsgrundlosen Leistungen im englischen Recht, 1991, who has become a leading expert on unjustified enrichment in English law, see *ead.*, Unjust factors and legal grounds, in: Johnston/Zimmermann, Unjustified Enrichment (fn. 1), 37–75; and *N. Jansen*, Die Korrektur grundloser Vermögensverschiebungen als Restitution? Zur Lehre von der ungerechtfertigten Bereicherung bei Savigny, ZRG (rom.) 120 (2003), 106–162, who looked at Roman law and its reinterpretation by Savigny.

[3] For such an analysis, cf. *B. Huwiler*, Zur Anspruchsgrundlage der Obligation aus ungerechtfertigter Bereicherung im Schweizerischen OR, Der Allgemeine Teil und das Ganze, in:

I will have to limit myself to a few diachronic reflections on the origin, purpose and scope of the requirement of error in case of undue payment (*Zahlung einer Nichtschuld*) under Swiss law.

When a person renders performance to another without it being owed, it may be with the intention of making a gift, or it may just be a performance made in error. In the former case, it is possible to revoke the gift under certain limited conditions, specified in Swiss law in Art. 249 OR (*Obligationenrecht*; *Code des obligations*). The donor may do so in particular if the beneficiary has committed a serious criminal offence against the donor or one of his relatives, if he has grossly neglected to perform his duties under family law or if, without good cause, he fails to fulfil the provisos attached to the gift.

In the latter case of mistaken performance, the person rendering the performance had the intention of extinguishing a debt (performance made *solvendi causa*), but, since the debt does not exist, he is entitled to restitution of the enrichment if he can prove that the performance was made in error. If there is no mistake, this generally means that the voluntary payment was made with the intention of making a gift. One might therefore think that there is no third option (*tertium non datur*). However, the Swiss courts have held that if the payment was not made voluntarily (*unfreiwillig*), the person who rendered the performance does not have to prove the existence of an error on his part in order to obtain restitution of his performance; in other words, if he can show that he had no choice when making his performance, he can subsequently obtain restitution without proving that the payment was made by mistake.[4] This is the case, for example, if the person who performed was subjected to an unlawful threat (Art. 29 OR)[5] or was unfairly exploited (*Wucher*), resulting in him providing an exorbitant advantage to the other party because of his predicament (*Notlage*).[6] Moreover, there is no involuntary payment where a person applying for a permission to erect a building pays his neighbour a sum of money in return for the neighbour withdrawing

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Liber amicorum für Hermann Schulin, 2002, 41–82; and already *L. R. Kaufmann-Bütschli*, Grundlagenstudien zur ungerechtfertigten Bereicherung in ihrer Ausgestaltung durch das schweizerische Recht, 1983; and for some issues *F. L. Schäfer*, Das Bereicherungsrecht in Europa, Einheits- und Trennungslehren im gemeinen, deutschen und englischen Recht, 2001, 252–258.

[4] *H. Schulin/A. L. Vogt*, in: Basler Kommentar: Obligationenrecht I, 7th edn., 2020, Art. 63 OR para. 4.

[5] Handelsgericht Zürich, 3.7.1969, Blätter für zürcherische Rechtsprechung 1970, 248–251; *I. Schwenzer/C. Fountoulakis*, Schweizerisches Obligationenrecht Allgemeiner Teil, 8th edn., 2020, para. 56.07.

[6] BGer (*Bundesgericht*; *Federal Tribunal*), 28.5.2004, 5C.51/2004, reason 7.1 (*obiter dictum*); BGE 129 (2003) III 646–655, reason 3.2 (*obiter dictum*); BGE 123 (1997) III 101–109, reason 3.b (*obiter dictum*); also *A. Koller*, Schweizerisches Obligationenrecht Allgemeiner Teil, 4th edn., 2017, para. 31.31; *A. von Tuhr/H. Peter*, Allgemeiner Teil des Schweizerischen Obligationenrechts, vol. 1, 3rd edn., 1979, 485 (§ 52 IV).

his objection to the erection permission.[7] In Swiss case law, two typical situations must be distinguished: (1) voluntary payment made in error or (2) "involuntary" payment, in which case an error is irrelevant.

This leads us to the question of the scope of the error, its content and its ultimate function in the regime of restitution of undue payments (*condictio indebiti*) pursuant to Art. 63 (1) OR. An analysis of the historically decisive moments in the evolution of this concept should shed some light on the scope of this requirement. I will begin with a reminder of the situation under Roman law (I.), to draw some lessons from it; I will then examine a few attempts at generalisation in the Middle Ages (II.), before examining in greater detail the generalisation brought about by the German Pandectists of the 19th century and the authors of modern codifications (III.).

II. The Role of Error in the *Condictio Indebiti* in Roman Law

According to *Reinhard Zimmermann*,[8] the *condictio indebiti* regime may not have been the oldest action for unjustified enrichment in Roman law, but it was undoubtedly the most frequent. Recent studies have shown that already by the time of *Gaius* (2nd century AD), the *condictio indebiti* was, in a way, the typical action for unjustified enrichment.[9] Among all the hypotheses of *dationes*, *Papinian* (ca. 140–212 AD) would have distinguished between the contractual restitutive *condictio* and the other non-contractual restitutive *condictiones*,[10] of which the *condictio indebiti* was in a certain sense the archetype. Moreover, it is *Papinian* who seems to have used the expression *condictio indebiti* for the first time.[11]

It is now accepted that the use of the term *condictio indebiti* was already common in classical law, although the *formulae* of actions may not have been specifically distinguished.[12] The specific outlines of the various *condictiones* hypotheses related to unjustified enrichment were then fixed by *Ulpian* (2nd half of

[7] BGE 123 (1997) III 101–109, reason 3.b; more recent BGer, 1.6.2021, 4A_73/2021, reason 4.3.2; BGer, 12.6.2008, 4A_37/2008, reason 3; also BGer, 8.2.2012, 4A_657/2011, Semaine Judiciaire 2012 I 433–437.

[8] *R. Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition, 1990, 848, who also refers to *D. Liebs*, The history of the Roman condictio up to Justinian, in: The legal mind: Essays for Tony Honoré, 1986, 163–183, 168 and 177.

[9] *A. Saccoccio*, Si certum petetur. Dalla condictio dei veteres alle condictiones giustinianee, 2002, 471–514; see also 526 ff.

[10] *Saccoccio*, Si certum petetur (fn. 9), 520–528.

[11] *Saccoccio*, Si certum petetur (fn. 9), 522 and 524; in particular *Papinian*, D. 13,5,9; D. 46,8,3 *pr.*; D. 47,2,81,5 and 7; D. 34,1,8.

[12] See however *I. Fargnoli*, "Alius solvit alius repetit": studi in tema di indebitum condicere, 2001, 6 f., who considers that the classical authors did not have a specific *condictio indebiti*, but only an *indebitum solutum* of which the protection had to be ensured by a *condictio* (p. 8); in the opinion of *Saccoccio* (Si certum petetur [fn. 9], 524–526), the *condictio indebiti*

the 2nd century AD–223 AD)[13]. The *condictio indebiti* had by that time become a model of the extra-contractual *condictio* according to *Ulpian*.[14]

Paul (2nd half of the 2nd century AD–222 AD) reminds us that the legal remedy ensuring restitution depends on the various causes which justify payment.[15]

Paul, D. 12,6,65 *pr.*

In summa, ut generaliter de repetitione tractemus, sciendum est dari aut ob transactionem aut ob causam aut propter condicionem aut ob rem aut indebitum: in quibus omnibus quaeritur de repetitione.

In short, if we are to consider the main lines of restitution, one must know that every giving is on account of a settlement, a cause, a condition, an obligation *re* or a debt that is not owed: in all these cases, one has to ask whether there is restitution.[16]

Title 12,6 of the Digest, *sedes materiae*, contains a number of hypotheses about the payment of money not owed (*indebitum solutum*), based on Justinian's desire to structure the whole of the *condictiones* into specific topics. However, hypotheses of *indebitum solutum* can also be found in other titles. Each case concerns situations in which the *solvens* pays when he does not have to or could have avoided doing so. The *praetor* would then grant a *condictio indebiti* in case of payment of an *indebitum solutum*, which is a specific case of *negotium contrahere/gerere*, a requirement for granting a *condictio*.[17] Several types of *indebitum* can be distinguished:[18]

(1) An *objective indebitum*, where the performance simply was not owed to the payee. This included cases where nothing was owed; *Paul* expresses this in the words "quod omnino non debetur".[19] However, the category also included

exists in any case under Ulpian as an archetypal action for unjustified enrichment; see also *Jansen*, Korrektur grundloser Vermögensverschiebungen (fn. 2), 116 f.

[13] *Saccoccio*, Si certum petetur (fn. 9), 525–528; and above all *Ulpian*, D. 12,1,18 *pr.*–1; D. 12,6,1,1; D. 12,6,66; D. 12,7,1–2; also *Paul*, D. 13,6,17; *Papinian*, D. 6,1,63; *Ulpian*, D. 19,2,19,6; see also *I. Fargnoli*, Condictio als Rückforderungsklage, in: U. Babusiaux/C. Baldus/W. Ernst/F.-S. Meissel/J. Platschek/T. Rüfner (eds.), Handbuch des Römischen Privatrechts, 2022, 1994.

[14] *Ulpian*, D. 12,7,1 *pr.*–3; for a detailed analysis, see *Saccoccio*, Si certum petetur (fn. 9), 526 ff.

[15] *Paul*, D. 12,5,1 contains a similar list.

[16] Translation slightly adapted from *A. Watson* (ed.), The Digest of Justinian, vol. 1, 1985, *ad* D. 12,6,65.

[17] *Saccocio*, Si certum petetur (fn. 9), 278 ff., particularly the analysis of *Julian*, D. 12,6,33, where the *solutio indebiti* is treated as an example of *negotium contrahere/gerere*, only to be distinguished by Gaius, who goes beyond the unitary model (*Saccoccio*, Si certum petetur [fn. 9], 502 ff.).

[18] Cf. *Paul*, D. 12,6,65,9 ("Indebitum est non tantum, quod omnino non debetur, sed et quod alii debetur, si alii solvatur, aut si id quod alius debebat alius quasi ipse debeat solvat"); and for this classification, see *Fargnoli*, Condictio (fn. 13), 1994; already *ead.*, Alius solvit alius repetit (fn. 12), 9–22, 253–256.

[19] *Paul*, D. 12,6,51,9: "Indebitum est non tantum, quod omnino non debetur, sed et quod alii debetur, si alii solvatur, aut si id quod alius debebat alius quasi ipse debeat solvat".

payments to the wrong person ("quod alii debetur, si alii solvatur") as well as cases where something other than the thing given was owed. The latter hypothesis is mentioned by *Reinhard Zimmermann* in his "Law of Obligations";[20] according to *Pomponius*, there was payment of a *quasi indebitum* when the *solvens* handed over the slave Pamphilus because he mistakenly thought that he was under an obligation to deliver Pamphilus or Stichus when in fact only Stichus was owed.[21] Similarly, an *indebitum* was paid when the *solvens* handed over the slave Stichus, unaware that he was under an alternative obligation to only pay 10.[22]

(2) A *subjective indebitum*. There was also an *indebitum* when the *solvens* believed that he owed something, but, in fact, owed nothing, and nevertheless paid a true creditor (*ex latere dantis*)[23] or when he was indeed a debtor but paid this debt to a non-creditor (*ex latere accipientis*).[24]

(3) A *debitum civile*, with an *exceptio perpetua iure praetorio*. If, under civil law, the debtor had a perpetual exception which would have allowed him to object to the payment he had made *iure civili*, the *praetor* would grant him the *condictio indebiti* so that he could claim back the amount paid; this is what emerges for the first time from a text by *Celsus* (D. 12,6,47), which deals with a *fideiussor* who paid in his own name, whereas he was supposed to pay in the name of the debtor, who had mandated him to do so. *Celsus* tells us that the payment made by the *fideiussor* was an *indebitum*, and that he had to be granted the action against the payee, since he could have resisted payment by way of an exception (namely, that he could have invoked the mandate which he had received from the debtor, and not pay as *fideiussor*).[25] Several excerpts from *Ulpian* in particular express the same view.[26] *Ulpian*, D. 12,6,26,3 indicates, however, that there is no payment of an *indebitum* (money not owed) if the payor (the *solvens*) paid in full knowledge of the existence of the exception (*nisi sciens se tutum exceptione sol-*

[20] *Zimmermann*, Obligations (fn. 8), 848.

[21] This is the hypothesis of *Pomponius*, D. 12,6,19,3, which indicates however a case of "quasi indebitum solutum"; *Zimmermann*, Obligations (fn. 8), 848.

[22] *Julian*, D. 12,6,32,3: "Qui hominem generaliter promisit, similis est ei, qui hominem aut decem debet: et ideo si, cum existimaret se Stichum promisisse, eum dederit, condicet, alium autem quemlibet dando liberari poterit".

[23] *Pomponius*, D. 12,6,19,1; *Fargnoli*, Alius solvit alius repetit (fn. 12), 9.

[24] *Pomponius*, D. 12,6,22; *Fargnoli*, Alius solvit alius repetit (fn. 12), 9.

[25] Cf. about the authenticity of the final passage which mentions "si modo per ignorantiam petentem exceptione non summoverit" *Fargnoli*, Alius solvit alius repetit (fn. 12), 203–204 and the references.

[26] For further hypotheses, see *Ulpian*, D. 16,1,8,3 (discussed by *Fargnoli*, Alius solvit alius repetit [fn. 12], 51–55), where a woman pledges herself in favour of another and delegates to a third party to pay her pledge (which is void according to *SC Velleianum*); she benefits from the *condictio indebiti* for not having objected the *exceptio SC Velleiani*; *Ulpian*, D. 44,5,1,11 (discussed by *Fargnoli*, *ibid.*, 56–58), where a freedman delegates a debtor to his patron, whereas he could have opposed the *exceptio si non onerandae libertatis causa promissum est* (*Fargnoli*, *ibid.*, 251); *Julian*, D. 12,6,32,1 (discussed by *Fargnoli*, *ibid.*, 213–216), where the *fideiussor* pays when he could have invoked the *exceptio pacti conventi*.

vit).[27] However, what was due *naturaliter*, or in other words, what was paid pursuant to a natural obligation, was due and did not constitute payment of an amount not owed (*indebitum solutum*).[28] Thus, if the *paterfamilias* paid his *alieni iuris* son's debt, there was no *indebitum*, even if he had not given the son an order (*iussum*) to enter into such debt or if he was not enriched. Things were similar if the *alieni iuris* son paid,[29] but likely different for the son who had become *sui iuris*, since in that case he could avail himself of an *exceptio SC Macedoniani*, a perpetual exception, vis-à-vis his creditor. Hence, if the son, having become *sui iuris*, paid a debt incurred while still being *alieni iuris*, he could obtain restitution by way of a *condictio indebiti*, given that he did not make use of his perpetual exception.[30]

One can also point to the situation of set-off in bankruptcy (*agere cum compensatione*). There are two texts that deal with the *condictio indebiti* in this context.[31] *Ulpian*, D. 16,2,10,1 essentially deals with the situation where the debtor of a bankrupt pays the *bonorum emptor* his debt without deducting the claim he has against the bankrupt. *Ulpian* then proceeds to grant the debtor a *condictio* by stating that the payment was made "quasi indebito soluto" (almost as if the amount were not owed), to emphasise that the sum was indeed owed, but that the debtor could have paid less by requiring the *bonorum emptor* to deduct the whole of his claim. This *condictio indebiti* was based on equity, since, in the absence of any set-off, the debtor and creditor of the bankrupt would have paid his debt in full, but would have obtained only a reduced share (the dividend promised by the *bonorum emptor*) of his claim.[32] The second text (*Ulpian*, D. 12,6,30), by contrast, does not deal with the situation of the *bonorum emptor*, but rather with the set-off against a banker (*argentarius*). Here, there is no difference in the amounts due according to whether one acts with or without set-off, especially since set-off is imposed on the banker in all cases by the formula of action (*agere cum compensatione*).[33]

As *Reinhard Zimmermann* rightly states, the second requirement for the granting of a *condictio indebiti* by the *praetor* was more delicate: the payment had to

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[27] About the exception *iure praetorio*, and a kind of *indebitum praetorium*, see *Fargnoli*, Alius solvit alius repetit (fn. 12), 252; for *Jansen*, Korrektur grundloser Vermögensverschiebungen (fn. 2), 117 the decisions about perpetual exceptions were only casuistic, with no underlying principle.

[28] *African*, D. 12,6,38,1; *Neratius*, D. 12,6,41; *Tryphoninus*, D. 12,6,64.

[29] *Ulpian*, D. 14,6,9,4–5.

[30] See at least *Pomponius*, D. 14,6,20, who gives an *actio in factum* if the *sui iuris* son makes a new promise (*novatio*) to pay that amount.

[31] For an analysis of *Ulpian*, D. 16,2,10,1 (who admits such a *condictio indebiti*) and *Ulpian*, D. 12,6,30, which seems to reject it, see *P. Pichonnaz*, La compensation: Analyse historique et comparative des modes de compenser non conventionnels, 2001, paras. 398–417 and 418–423, as well as paras. 424–429 for the summary.

[32] *Pichonnaz*, La compensation (fn. 31), paras. 09 ff.

[33] *Pichonnaz*, La compensation (fn. 31), paras. 19 ff.

have been made in error (*solutio per errorem*).[34] Interpolationists such as *Solazzi* have denied the very existence of the requirement of a mistake to grant a *condictio indebiti*.[35] However, the more restrained approach to interpolations that has prevailed since the 1960s has shown that the granting of the *condictio indebiti* did require the existence of payment in error (*solutio per errorem*).[36]

First, an excerpt taken from the Institutes of *Gaius* (Gai. 3,91), on which the compilers had no influence, emphasises the requirement of error. *Gaius* states that "he who accepts what is not owed from the one who has paid in error is obliged *re*" ("Is quoque qui non debitum accepit ab eo qui per errorem solvit, re obligatur").

The Digest contains a similar excerpt from *Ulpian*, indicating that if someone has paid a non-debt in the belief that it was owed, he can obtain restitution by this action: but if, knowing the amount was not owed, he paid nevertheless what he did not owe, there is no repetition (*Ulpian*, D. 12,6,1,1: "Et quidem si quis indebitum ignorans solvit, per hanc actionem condicere potest: sed si sciens se non debere solvit, cessat repetitio").

In *Ulpian's* text, the emphasis is on the ignorance of the fact that the debt was not owed as a central element in granting or denying the *condictio* ("ignorans solvit"/"sed si sciens"). Similarly, *Ulpian* states this in another passage of the Digest (D. 12,6,26,3), stressing the importance of the criterion of ignorance, since knowledge denies the right to the *condictio* ("nisi sciens se tutum exceptione solvit").

In both *Ulpian's* texts, knowledge thus appeared as a means of excluding the *condictio* ("sed si sciens", "nisi sciens"). This raises the question whether the error had to be proved by the *solvens* to obtain the *condictio* or whether it was rather up to the *accipiens* to prove the knowledge (*sciens*) of the *indebitum* by the *solvens* at the time of payment, as *Schulz* has argued.[37] The indication "nisi sciens" could imply that there was a presumption of ignorance. The answer de-

[34] *Zimmermann*, Obligations (fn. 8), 849.

[35] *S. Solazzi*, L'errore nella 'condictio indebiti', in: *id.*, Scritti di diritto romano, vol. 4, 1963, 99–164; *id.*, Ancora dell'errore nella 'condictio indebiti', in: *loc. cit.*, 405–447; *id.*, Le 'condictiones' e l'errore, in: *loc. cit.*, vol. 5, 1972, 1–42.

[36] Cf. above all the fundamental research by *H. Koch*, Bereicherung und Irrtum: Rechtsvergleichende Untersuchungen zum anglo-amerikanischen, französischen, schweizerischen, römischen und deutschen Leistungsbereicherungsrecht, 1973; *L. C. Winkel*, Error iuris nocet: Rechtsdwaling als rechtsorde-probleem, 1982, 189 ff.; *D. P. Visser*, Die Rol van Dwaling by die condictio indebiti (unpublished doctoral thesis, Univ. Leiden, 1985, cited by *Zimmermann*, Obligations [fn. 8], 849 fn. 100); *D. P. Visser*, Die grondslag van die condictio indebiti, THRHR 51 (1988), 492–507, as well as *H. Gaspart-Jones*, La condictio indebiti. Et l'erreur dans le droit de Justinien, in: Hommage à René Dekkers, 1982, 93–115; *A. Simonius*, Zur Frage einer einheitlichen causa condictionis, 1953, 161.

[37] *F. Schulz*, Classical Roman law, 1951, 616; *F. Schwarz*, Die Grundlage der condictio im klassischen römischen Recht, 1952, 47–64, in particular 96 ff.; see also *Zimmermann*, Obligations (fn. 8), 850.

pends partly on the weight given to the passage by *Paul* (D. 22,3,25 *pr. in fine*), which deals with these questions of proof and states, in particular, the following:

> […]. Et ideo eum, qui dicit indebitas solvisse, compelli ad probationes, *quod per dolum accipientis vel aliquam iustam ignorantiae causam indebitum ab eo solutum*, et nisi hoc ostenderit, nullam eum repetitionem habere.
>
> […]. Hence, the person who claims to have paid money not owing must prove that he did so through the fraud of the recipient or to some just cause of ignorance. Unless he does this, he fails to recover.[38]

However, this passage has been considered to be interpolated by *Schwarz* in particular.[39] A number of authors follow this approach and consider that error was a negative requirement of the *condictio indebiti* in classical law; therefore, it was up to the recipient to prove that the payor had done so in full knowledge.[40]

In relationships involving three parties, it is possible that the ignorance considered was that of the party bringing the action, rather than that of the party who had paid.[41]

At the very least, it seems clear that in the 6th century AD it was up to the claimant to show that he was unaware that there was no just cause for the payment. Once ignorance is no longer presumed, it becomes more important to determine whether the "excuse" for ignorance was "legitimate" or reasonable.[42] Indeed, as long as ignorance was presumed, the payee had to prove that the payor knew of the *indebitum*; therefore, ignorance did not have to be qualified as much. The situation was different from the moment when ignorance had to be positively established by the payor. It was not enough to assert it; the payor also had to be able to prove that this state of ignorance was legitimate.

Thus, in *Paul's* passage (D. 22,3,25 *pr.*), which appears under the title devoted to proofs and presumptions, it is stated that there must be "some just cause of ignorance of the non-debt" ("aliquam iustam ignorantiae causam indebitum"). Therefore, an assessment in each case is required as to whether the cause of ignorance was "legitimate" (*iusta*). Several texts underline this character of legitimate ignorance. They deal mainly with the payment by an heir of a *fideicommissum*.[43] The heir pays the *fideicommissum* in full, when in fact he could have

[38] Translation slightly adapted from *Watson*, Digest I (fn. 16), *ad* D. 22,3,25.

[39] *Schwarz*, Grundlage der condictio (fn. 37), 96 ff. and 107 ff.

[40] In this sense in particular, *A. D'Ors*, Review of Schwarz, Grundlage der condictio (fn. 37), Revue Internationale des droits de l'Antiquité 1 (1954), 533–539; *A. Guarino*, Review of A. Sanfilippo, Condictio indebiti, vol. 1: Il fondamento dell'obbligazione da indebito, 1943, Studi et Documenta Historiae et Iuris 1945, 319–336; *M. Kaser*, Römisches Privatrecht, vol. 1, 2nd edn, 1971, 596 Fn. 36; *Zimmermann*, Obligations (fn. 8), 850; *Fargnoli*, Alius solvit alius repetit (fn. 12), 257–259.

[41] For this view, and a detailed analysis, see *Fargnoli*, Alius solvit alius repetit (fn. 12), 258–259.

[42] In this sense, *Zimmermann*, Obligations (fn. 8), 850.

[43] C. 4,5,7 (*Diocletian/Maximinian*, 293 AD); C. 6,50,9 (*Gordian*, AD 238); *Paul*, D. 22,6,9,5; e. g. *Zimmermann*, Obligations (fn. 8), 850 fn. 111.

deducted the Pegasian quarter.[44] The requirement of legitimacy is reinforced in this context by the fact that the *fideicommissum* as such is already based on an aspect of fidelity and ethics.[45] The fact that the error had to be legitimate may thus have been initially confined to this area of law, given its special character.

It could then have been extended through the contrast between error of fact and error of law, according to the principle found in a text by *Paul*: "Regula est iuris quidem ignorantia cuique nocere, facti vero ignorantiam non nocere".[46] The error of fact was thus legitimate, while the error of law was not. This distinction was not as clear cut as *Paul's* explanation in the same passage shows.

The opposition between error of fact and law was, however, sufficiently important for *Justinian* to include a specific title in the Code (C. 1,18) devoted to the distinction between the two types of errors ("De iuris et facti ignorantia"). This distinction also played a role with respect to the *condictio indebiti*, as can be seen in the passage under the title concerning ignorance of fact and law:

C. 1,18,10 (*Diocletian/Maximinian*, 294 AD):

Cum quis ius ignorans indebitam pecuniam persolverit, cessat repetitio. Per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est.

Whenever someone ignorant of the law pays money not owing, restitution cannot be claimed. For you are aware that only on account of ignorance of fact may restitution be claimed of money paid but not owed.[47]

Such an assertion is in line with *Paul's* passage (D. 22,6,9,5) which states that a constitution (*epistula*) by Marcus Aurelius does not entitle the payor to restitution if, ignorant of the law, he did not invoke the *lex Falcidia* to retain a quarter of the inheritance ("Si quis ius ignorans lege Falcidia usus non sit, nocere ei dicit epistula divi Pii"). According to the same fragment, Septimius Severus and Caracalla decided in a similar way in a rescript dealing with the delivery of a *fideicommissum* for the construction of a canal where the heirs had failed to deduct the Falcidian quarter. The emperors indicated that there could be no repetition, for the heirs had to know that ignorance of a fact is relevant, but not ignorance of law, for help is not given to those who are stupid ("stultus"), but to those who are ignorant ("Quod si ideo repetitionem eius pecuniae habere credunt, quod imperitia lapsi legis Falcidiae beneficio usi non sunt, sciant ignorantiam facti, non iuris prodesse nec stultis solere succurri, sed errantibus").[48]

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[44] On the Pegasian quarter, see *U. Babusiaux*, Wege zur Rechtsgeschichte: Römisches Erbrecht, 2nd edn., 2021, 289–296; *P. Pichonnaz*, Les fondements romains du droit privé, 2nd edn., 2020, paras. 24 ff.

[45] *Pichonnaz*, Les fondements (fn. 44), para. 824.

[46] *Paul*, D. 22,6,9 *pr.*

[47] Translation pursuant to *B. W. Frier*, The Code of Justinian: A New Annotated Translation with Parallel Latin and Greek Text, vol. 1, 2016.

[48] *Paul*, D. 22,6,9,5 *in fine*.

These texts have sometimes led to the view that only errors of fact were legitimate, but that errors of law were never legitimate ("error iuris nocet").[49] However, various texts show that an error of law could allow for restitution, often based on a *quasi indebitum*. Examples include the woman who had interceded for another person not being aware that she could oppose the *exceptio SC Velleiani* (*Ulpian*, D. 16,1,8,3) or when a freedman failed to oppose the *exceptio si non onerandae libertatis causa promissum est* (*Ulpian*, D. 44,5,1,11). These are two cases where Roman law protected the ignorance of the existence of an exception.

The same applied to the creditor of a bankrupt who was also his debtor; if this person, on the application of the *bonorum emptor*, paid his debt to the bankrupt instead of setting off his claim against the latter, he was entitled to restitution on the basis of a *condictio indebiti*, because he paid a *quasi indebitum* for part of the sum.[50] Indeed, the creditor of the bankrupt could set off his entire claim against the debtor to extinguish his debt, whereas if he paid his debt, he could only receive a percentage of his claim (dividend) in the bankruptcy of his debtor.[51] Ignorance of the law was also protected in this case and opened the way for a *condictio indebiti*.

With others, it is possible to see a reason for this acceptance of an error of law as a legitimate error for the *condictio indebiti* in a famous text by *Papinian*:

Papinian, D. 22,6,7

Iuris ignorantia non prodest adquirere volentibus, suum vero petentibus non nocet.

The error of law does not benefit those who wish to acquire, but it does not prejudice those who sue for their own.[52]

Papinian goes on to say in another passage that deals with the same idea:

Papinian, D. 22,6,8

Error facti nec maribus quidem in damnis vel compendiis obest, iuris autem error nec feminis in compendiis prodest: ceterum omnibus iuris error in damnis amittendae rei suae non nocet.

An error of fact does not prejudice even males in regard to loss of profit, but an error of law does not benefit even females in the case of profit. But, no one suffers from an error of law when the issue is one of loss of his own property.[53]

Therefore, according to *Papinian*, claiming what is one's own and what one has lost by an error of law was possible. Following *Winkel*, these two texts probably also deal with the *condictio indebiti*, and not only with a *reivindicatio*.[54] The idea

[49] On this subject, see *Fargnoli*, Alius solvit alius repetit (fn. 12), 256; however, she cites Windscheid in particular, to which I will return below.

[50] *Ulpian*, D. 16,2,10,1; *Pichonnaz*, La compensation (fn. 31), paras. 98 ff.

[51] On the whole, see *Pichonnaz*, La compensation (fn. 31), para. 04–429.

[52] Translation slightly adapted from *Watson*, Digest I (fn. 16), *ad* D. 22,6,7.

[53] Translation slightly adapted from *Watson*, Digest I (fn. 16), *ad* D. 22,6,8.

[54] In this sense, *L. Winkel*, Mistake of Law: English and Roman Comparisons, in: W. Swadling (ed.), The Limits of Restitutionary Claims: A comparative analysis, 1997, 244–256, 248.

of demanding restitution of what is one's own, "suum" in D. 22,6,7, must have referred not only to a thing that was mistakenly handed over, but also to a sum of money (*indebitum*), even if this entailed the loss of property.

The compilers preserved texts in the Digest in which the error of law would benefit the party invoking it, while at the same time incorporating the constitution by Diocletian/Maximian into the Code, which states that an error of law would not be beneficial. Despite the discrepancy between those two fragments, one has to admit that an error of law must have been legitimate in some cases.[55] Thus, the error of law was particularly legitimate in many, if not all, cases of restitution of a payment that was not owed, as seen above.

III. The Difficulties for the Medieval Authors

I will not describe all the positions taken by the medieval authors on the notion of error of law (*error iuris*), since others have done so in detail,[56] nor will I describe the law of unjustified enrichment in detail. Instead, my aim is to discuss how these authors dealt with the discrepancies between the various texts of the Digest and the Code, presenting both – in general terms – the fact that *ignorantia iuris* or *error iuris* could not be invoked, and – in more specific terms – the fact that ignorance of certain exceptions was not an obstacle to invoking error in order to obtain restitution. Moreover, many texts of the Digest do not distinguish between error of fact and error of law in relation to the *solutio indebiti*.

In the Ordinary Gloss,[57] *Accursius* (1182–1260) makes several distinctions in an attempt to reconcile the various texts:[58]

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[55] In this sense, e.g., *F. Vassalli*, Iuris et facti ignorantia, in: *id.*, Studi giuridici, vol. III.1: Studi di diritto romano (1906–1921), 1960, 425 ff.; *P. Voci*, L'errore nel diritto romano, 1937, 130.

[56] See in particular *L. Winkel*, Vorbemerkungen zum Thema Rechtsirrtum in der mitteralterlichen Jurisprudenz, zugleich ein Thema aus der Geschichte der Rechtsideologie, Ius Commune 13 (1985), 69–82; also *O. Lottin*, Le problème de l'ignorantia iuris de Gratien à Saint Thomas d'Aquin, Recherches de théologie ancienne et médiévale 5 (1933), 345–368; but more specifically in relation to the doctrine of restitution see *R. Zimmermann/P. Hellwege*, "Error iuris non excusat" und das "law of restitution" – Zur Karriere einer gemeinrechtlichen Maxime in der Welt des common law, in: Festschrift für Bernhard Großfeld zum 65. Geburtstag, 1999, 1367–1401.

[57] About the understanding of unlawful enrichment by the Glossators, see *H. Coing*, Zur Lehre von der ungerechtfertigten Bereicherung bei Accursius, ZRG (rom.) 80 (1963), 396–399 (and further references).

[58] *Accursius*, Glossa ordinaria (Corpus iuris civilis Iustinianei, Lyon, 1627), *gl.* "Regula est" *ad* D. 22,6,9 *pr.* (col. 2088–2089); and see also *gl.* "Nunc videndum" *ad* D. 12,6,1 (col. 1292–1293).

Dic quod ignorantia alia facti, alia iuris et facti, alia probabilis, alia non probabilis. Item iuris, alia naturalis, alia quasi naturalis, alia civilis iuris […] et in hoc tertio membro subdistingue, quia aut certat de damno vitando et tunc non nocet. […]

I say that ignorance is either of fact or of law, ignorance of fact being either probable or improbable. Similarly, an error of law is either ignorance of natural law, quasi-natural law, or civil law … and regarding this third element, one must make a further distinction, since when someone claims something to avoid a loss, then it is not detrimental. […]

Hoc tamen fallit in indebito: ubi per ignorantiam iuris civilis solutum, dummodo naturaliter debeatur, non repetitur. […]

However, this does not apply to a payment that is not owed: if a sum solely owed by virtue of natural law is paid in ignorance of civil law, there is no restitution. […]

Thus, it was only when the payment was made by an error of law in relation to a *debitum naturale* (a debt due by virtue of natural law) that restitution was not possible; in most other cases, the error of law did not prevent restitution.[59] As we have seen, this statement is based on several texts of the Digest which excluded the *condictio indebiti* in the case of a debt due *naturaliter*.[60] The understanding of those texts had evolved. In Roman law, the aim was to ensure that there was no restitution when a *paterfamilias* paid the debt of a slave or of an *alieni iuris* son; in such a case, the debt was only due *naturaliter*, i. e., it did not give rise to a civil law action, but the *paterfamilias* remained obliged to pay and could not invoke a *solutio indebiti*. For *Accursius*, the debt due *naturaliter* becomes a debt due by virtue of natural law. The notion of natural law is not yet understood in the same sense as it will be by *Grotius*, but the meaning of the text diverged from the one understood in Roman law.

For *Bartolus* (1313/1314–1357), the error had to be presumed and it was for the other party to prove the absence of error, as underlined in his comment on C. 1,18,4 of the Justinian Code of 534 AD.[61] He refers there to a distinction between a falsified will ("testamentum quod erat falsum") and a will which has not been concluded in the appropriate form ("non solenne"). When a will had been falsified or had not respected the solemn form, which also made it false, the traditional view was that the payment of a bequest could be recovered. However, *Bartolus* considers[62] that a falsified will must be distinguished from a will which is void for a different reason. For him, a will which did not respect the solemn form should be considered "falsified" when the aim is to sanction the notary, but not when it relates to another person ("Nam testamentum non solenne habetur pro falso, quantum ad puniendum notarium, non quantum ad alia"). Therefore, in his view, a will which did not meet the solemn requirements gave rise to a natural obligation. Hence, the person who paid out of ignorance of the lack of

[59] In this sense, e. g., *Winkel*, Mistake of Law (fn. 54), 251.

[60] *African*, D. 12,6,38,1; *Neratius*, D. 12,6,41; *Tryphoninus*, D. 12,6,64.

[61] *Bartolus (de Saxoferrato)*, In duodecim libros codicis Commentaria (Opera omnia, Bd. 4), Basle, 1562, *ad* C. 1,18,4, *n.* 2 ("error praesumitur").

[62] *Bartolus*, Commentaria (fn. 61), *ad* C. 1,18,4, *n.* 3.

form could not obtain restitution of the amount. For co-heirs, however, *Bartolus* had a nuanced solution.

Commenting on C. 1,18,13, *Bartolus* writes that it was a subtle and difficult text. According to him, the text says, in short, that women cannot avail themselves of an error of law to a greater extent than men, except where the law so provides. He goes on to give various examples and concludes by saying that, as far as the presumption of an error of law is concerned, it is easier to allow it in the case of women than men.[63] In fact, the law comes to the woman's aid because she is a woman, not because she made a mistake. This, therefore, allows him to limit the possibility of restitution in case of error of law.

Finally, *Bartolus* points out in his commentary on C. 1,18,10, which emphasises that restitution for undue payment is not granted in the case of an error of law, but only in the case of an error of fact, that natural obligations do not allow for restitution. He then makes several distinctions according to the obligations which are not due under civil law or natural law, and analyses the various hypotheses of opposable exceptions.[64]

When dealing with the same issue of the falsified will a couple of decades later, *Baldus* (1319/1327–1400)[65] emphasises that the will is presumed to be true; the burden of proof of a falsified will falls on the party who asserts that it is contrary to the truth. Consequently, an error must be presumed of what is admitted to be contrary to the truth. This means that a mistake about the validity of the will is indeed a source of relevant error. *Baldus* indicates that this is true when one relies on another's error of fact, but not when one invokes an error caused by one's own act, because it is then a serious negligence which cannot be presumed. He goes on to say that a will is not presumed to have respected the solemn form, which means that it has to be proven; a distinction must, therefore, be made between obvious flaws and others. Finally, he notes that before the decision to divide the property is made, the error is an error of fact and not of law; it is the decision to divide the property which creates the error of law and which then prevents restitution: "Solutio. Ibi fuit facta divisio precedente sententia definitive". In other words, the passage of the Code which allows for restitution can be explained on the basis that it is not yet an error of law, but only an error of fact.

Similarly, in relation to an erroneous payment of a promise, *Baldus* emphasises that only an error of fact can be relevant; he adds that the promise can be revoked for the part which is not owed as long as there is an error that does not relate to the settlement itself ("nisi ex causa transactionis interponatur").[66] However, *Baldus'* contribution lies mainly in making it clear that negligent ignorance

[63] *Bartolus*, Commentaria (fn. 61), *ad* C. 1,18,4, *n.* 1 and 2.

[64] *Bartolus*, Commentaria (fn. 61), *ad* C. 1,18,4, *n.* 2, 17.

[65] *Baldus de Ubaldis*, In Primum, Secundum et Tertium Cod. Lib. Commentaria, Venice, 1599, *ad* C. 1,18,4, *n.* 2.

[66] *Baldus*, Commentaria (fn. 65), *ad* C. 1,18,6, *n.* 2.

is not to be taken into account ("Solutio aut error cadit in latam culpam et tunc non potest revocari, ut ibi, aut non cadit in latam culpam et potest revocari"). The reason for this difference is that the person who alleges the consequences of a serious negligence, in this case an error, alleges his own turpitude. He should therefore not be heard on this issue.[67]

In the analysis of the following text, *Baldus* returns to the question of whether an error of law can be relied on and introduces a distinction between cases where the purpose of the error is to avoid offences, more precisely whether a conviction should take place for the commission of an offence ("ad delicti exclusionem") and cases where the invocation of the error is intended to retain the thing which is currently in the hands of a third party ("ad rei suae retentionem, interdum ad alicuius rei acquisitionem").[68] For offences, there must be intention, and since error excludes intention, an error of law is relevant. On the other hand, when ignorance of civil law is invoked to preserve one's property, the error is not harmful because it is a matter of avoiding damage. However, when it is a question of invoking ignorance of the civil law to acquire the thing of another (as in *usucapio*), this ignorance cannot be invoked, unless it does not cause damage to a third party.[69] This allows *Baldus* to emphasise that an error of law cannot be beneficial in obtaining restitution of a natural obligation; this, in turn, enables him to analyse the various situations of failure to invoke an exception.[70]

These few examples make it possible to discern *three essential features* of the requirement of error: Firstly, the main criterion for distinguishing the hypotheses in which the error is beneficial continued to be driven by the distinction between error of fact and error of law. However, a second component appeared, namely that an error based on serious negligence could not be invoked, by virtue of the principle *nemo allegans sua turpitudine*. Finally, an error of law relating to the existence of an exception was only relevant if there was no natural obligation that remained, which often made it possible to avoid restitution by invoking the existence of a natural obligation.

Faced with the same difficulties between the texts of the Digest, which retain hypotheses of restitution for an error of law, and the Code, which highlights certain texts to exclude taking into account an error of law (above all C. 1,18,10), the two French humanists *Jacques Cujas* (1522–1590) and *Hugues Doneau* (1527–1591) base their analysis on a new criterion. They read *Papinian*, D. 22,6,8 in a literal manner; they distinguish between damage which is about to occur ("in damnis *amittendae* rei suae") and damage which has already occurred ("in damnis rei suae *amissae*") and admit restitution based on an error of law only in the former case.[71]

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[67] *Baldus*, Commentaria (fn. 65), *ad* C. 1,18,7, *n.* 3.
[68] *Baldus*, Commentaria (fn. 65), *ad* C. 1,18,7, *n.* 7.
[69] *Baldus*, Commentaria (fn. 65), *ad* C. 1,18,7, *n.* 7.
[70] *Baldus*, Commentaria (fn. 65), *ad* C. 1,18,10, *n.* 1.
[71] See for such an analysis *Winkel*, Mistake of Law (fn. 54), 252.

In his "Inleiding(e)" (an introduction to Dutch law written in 1620, but first published in 1631), *Hugo Grotius* (1583–1645) dedicates a specific title to the obligation deriving from an (illegitimate) profit, but above all recognises a proper basis for unjustified enrichment (an inequality benefiting others),[72] influenced by authors of the Spanish Scholasticism.[73] In fact, he also does this in his "De iure belli ac pacis".[74] In title XXX of the "Inleiding", he first stresses that the obligation to return a thing received without cause is closely allied to natural law.[75] He then deals in turn with three *condictiones*, which he mentions in Latin in the margin, including the *condictio indebiti*,[76] and adds a fourth dedicated to a kind of *condictio sine causa (specialis)*[77] with an example referring to *Celsus*, D. 12,1,32.

With respect to error, he also allows an error of law as a justification for restitution unless there is a legally recognised reason for the payment,[78] which probably refers to the payment of a *naturalis obligatio*.[79] *Grotius* thus seems to deliberately leave aside the distinction between error of fact and error of law, excluding restitution for error of law only in the case of a *naturalis obligatio*.[80] *Grotius'* opinion was then followed by *Arnold Vinnius* (1588–1657), although he did not really take up the idea of an autonomous source for unjustified enrich-

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[72] *H. Grotius*, Inleiding tot de Hollandsche Rechts-geleertheid, The Hague, 1631, *boeck* III, *deel, n.* 14 = *id.*, The Jurisprudence of Holland, transl. and ed. by R.W. Lee, vol. 1, 1953, 297 para. 14; see the analysis in *R. Feenstra*, L'influence de la scolastique espagnole sur Grotius en droit privé: Quelques expériences dans des questions de fond et de forme, concernant notamment les doctrines de l'erreur et de l'enrichissement sans cause, in: *id.*, Fata iuris romani: Etudes d'histoire du droit, 1974, 338–363, in particular 350; *id.*, Grotius' Doctrine of Unjust Enrichment as a Source of Obligation, in: E. J. H. Schrage (ed.), Unjust Enrichment: The Comparative Legal History of the Law of Restitution, 1995, 197–236, in particular 204.

[73] On their understanding, cf. *J. Hallebeek*, The Concept of Unjust Enrichment in Late Scholasticism, 1996; also *G. Nufer*, Über die Restitutionslehre der spanischen Spätscholastiker und ihre Ausstrahlung auf die Folgezeit, 1969; *Jansen*, Korrektur grundloser Vermögensverschiebungen (fn. 2), 132–137.

[74] *H. Grotius*, De iure belli ac pacis, 2nd edn., Amsterdam, 1631, *lib.* II, *cap.* X, § 2. On this aspect, cf. also *Feenstra*, L'influence de la scolastique (fn. 72), 355; *id.*, Grotius' Doctrine (fn. 72), 210 ff.; *Jansen*, Korrektur grundloser Vermögensverschiebungen (fn. 2), 137–143.

[75] *Grotius*, Inleiding (fn. 72), *boeck* III, *deel* XXX, *n.* 3 = *id.*, Jurisprudence of Holland I (fn. 72), 449 para. 3.

[76] *Grotius*, Inleiding (fn. 72), *boeck* III, *deel* XXX, *nn.* 4–11 = *id.*, Jurisprudence of Holland I (fn. 72), 451/453 paras. 4–11.

[77] *Grotius*, Inleiding (fn. 72), *boeck* III, *deel* XXX, *n.* 18 = *id.*, Jurisprudence of Holland I (fn. 72), 455 para. 18; cf. *Feenstra*, Grotius' Doctrine (fn. 72), 205 f.

[78] *Grotius*, Inleiding (fn. 72), *boeck* III, *deel* XXX, *n.* 6 = *id.*, Jurisprudence of Holland I (fn. 72), 451 para. 6.

[79] *R. W. Lee*, in: Grotius, Jurisprudence of Holland (fn. 72), vol. 2: Commentary, 1953, 329 *ad verba* "alwaer 't oock".

[80] See for such an analysis *Winkel*, Mistake of Law (fn. 54), 252; *D. P. Visser*, Ungerechtfertigte Bereicherung, in: R. Feenstra/R. Zimmermann (eds.), Das römisch-holländische Recht: Fortschritte des Zivilrechts im 17. und 18. Jahrhundert, 1992, 369–428, 396.

ment.[81] *Johannes Voet* (1647–1713) later followed the stricter view of humanists such as *Doneau*.[82]

IV. The Decisive Influence of *Savigny* and *Windscheid* on Swiss Law

After summarising in broad terms the conceptions of the German historical school of the 19th century (1.), I will return to the question of how the Pandectists' ideas were made concrete in Swiss law (2.).[83]

1. The views of the German historical school

In his 1840 work "System des heutigen römischen Rechts", *Friedrich Carl von Savigny* (1779–1861) mentions that the specific actions called *condictiones*[84] ("Kondiktionen") were indeed very diverse ("höchst mannichfaltig"), but that it was nevertheless possible to trace them all back to a very simple principle ("[man kann sie] auf ein sehr einfaches Princip zurückführen").[85] This was the starting point for a general principle of unjustified enrichment which would influence the drafting of the Swiss Federal Code of Obligations of 1881 and the Swiss Code of Obligations of 1911. *Savigny's* thinking was later clarified and refined by *Bernhard Windscheid*, particularly in his work on the *Voraussetzungslehre*.[86]

a) The view of Friedrich Carl von Savigny

For *Friedrich Carl von Savigny*,[87] the loan for consumption (*mutuum*) is the foundation of the Roman *condictiones*. With this view, he follows the Institutes of *Gaius*.[88] Indeed, in a *mutuum*, the lender performs a *dare*; he transfers the ownership of the fungible things lent, so that he cannot later use the *reivindicatio* (the

[81] *A. Vinnius*, Commentarius in quatuor libros Institutionum, in: *id.*, Institutionenkommentar Schuldrecht: Text und Übersetzung von K. Wille, 2005, *ad* Inst. 3,14,2, *n.* 3, 19 and 21.

[82] *Visser*, Ungerechtfertigte Bereicherung (fn. 80), 393 ff.

[83] The following considerations are largely based on my reflections published in French in *P. Pichonnaz*, Clause générale et condictio indebiti: La relation délicate entre les articles 62 et 63 code des obligations suisse, Quelques éléments de réflexions, Revue Tribonien 2019, 116–137.

[84] See *Pichonnaz*, Les fondements (fn. 44), paras. 149 ff.

[85] *F. C. von Savigny*, System des heutigen römischen Rechts, vol. 5, Berlin, 1841, 511.

[86] *B. Windscheid*, Die Lehre von der Voraussetzung, Berlin, 1850. For a detailled presentation in German, see above all *Huwiler*, Obligation (fn. 3), 41 f.

[87] For a detailed analysis, see *Jansen*, Korrektur grundloser Vermögensverschiebungen (fn. 2), 149–162; *Schäfer*, Bereicherungsrecht in Europa (fn. 3), 169 ff.

[88] Gai. 3,91: "Is quoque, qui non debitum accepit ab eo, qui per errorem soluit, re obligatur; nam proinde ei condici potest SI PARET EVM DARE OPORTERE, ac si mutuum accepisset" (He who receives undue payment from someone who pays in error is also bound *re* [by the remittance of the thing]: in fact, he may have the *condictio Si paret eum dare oportere* imposed on him, as if he had received by way of a loan).

action to claim property) to obtain restitution of the sum of money paid when the loan contract terminates.[89]

For *Savigny*, however, the transfer of ownership is based on the common intention of the parties ("durch den übereinstimmenden Willen beider handelnden Personen, ohne diesen Willen aber nicht");[90] this is the origin of the idea of the transfer of ownership being abstract. Indeed, for *Savigny*, the title of transfer (the *iusta causa*) exists primarily to indicate the various purposes of the transfer of ownership. Therefore, the absence or disappearance of such a *iusta causa* does not make the transfer of ownership void as such; it remains valid. The disappearance of the *iusta causa* does, however, make it possible to *remove the effects* of the transfer of ownership by invoking the *condictiones* ("die Übertragung, an sich gültig und wirksam […] kann hinterher angefochten und entkräftet werden durch eine Reihe sorgfältig ausgebildeter Condictionen").[91] It is in this sense that, for *Savigny*, the *condictiones* (actions of a personal nature) are a substitute for the *reivindicatio* (action of a real nature). In a way, they allow the transferor to be *compensated* for the *loss of his property*, by enabling him to obtain the value of the property of which he has been deprived.

In 1929, the Swiss Federal Tribunal (the Supreme Court), when deciding whether the transfer of movable property under Swiss law was causal or abstract, also had to consider the relationship between the *condictio indebiti* and the abstract transfer of ownership.[92] The drafters of the Swiss Civil Code had left the question undecided in Art. 714 (1) of the Swiss Civil Code,[93] which provides that "[t]ransfer of chattel ownership requires the delivery of possession to the transferee".[94] Ruling in favour of a causal transfer, as in the case of real estate where the legislator expressly mentions it (Art. 974 Swiss Civil Code), the Federal Tribunal emphasised that there are nevertheless situations in which Art. 63 OR concerning a non-existent obligation should apply.[95]

There is another possible explanation for the loan contract being the origin of the *condictiones*. By lending money, the lender trusts the borrower (*credere*) that he will return the sum received. Therefore, if the loan had become due but was

[89] *v. Savigny*, System V (fn. 85), 515.

[90] *F. C. von Savigny*, Das Obligationenrecht als Theil des heutigen Römischen Rechts, vol. 2, Berlin, 1853, 257.

[91] *v. Savigny*, Obligationenrecht II (fn. 90), 261.

[92] BGE 55 (1929) II 302–310, reason 2.

[93] Swiss Civil Code of 10 December 1907 (CCS or, in German, "ZGB"), which entered into force on 1 January 1912 (Systematic Collection, No. 210), which can be downloaded in an unofficial English translation from the official website: online: <https://www.fedlex.admin.ch/eli/cc/24/233_245_233/en> (last accessed on 2 September 2021).

[94] BGE 55 (1929) II 302–310, reason 2, which indicates this, and which points out that the Federal Tribunal had previously recognised the abstract nature of the transfer of movable property, BGer 3.7.1903, Blätter für zürcherische Rechtsprechung 2/1903, 321–322 and BGE 34 (1908) II 809–815, 812.

[95] BGE 55 (1929) II 302–310, reason 2.

not repaid, an action called *condictio* was granted in Rome instead of the *reivindicatio*, the *condictio certae creditae pecuniae*, to protect the lender's trust (*creditum*) and to avoid his assets being permanently reduced.[96] Building on this idea, *Savigny* considers that other hypotheses present a similar need for protection. This is the case whenever the assets of one person are reduced for the benefit of another without legal justification ("das Vermögen zum Vortheil eines Anderen ohne Rechtsgrund vermindert seyn würde").[97] He believes that a *condictio* should be granted in this situation, in the form of a *condictio indebiti* (action for recovery of payment not owed), a *condictio sine causa* (action for restitution for lack of cause) or a *condictio causa furtiva* (action for restitution on the grounds of theft).[98]

Thus, in *Savigny's* conception, the ground for the various *condictiones* arises from the need to replace the *reivindicatio*, which cannot be granted in these hypotheses, by an action that allows to obtain something similar. This need to replace the *reivindicatio* by another action is justified by the broken trust (*creditum*) of the transferor, but also by the fact that the intention to transfer a sum of money or an object was not a (valid) intention to transfer ownership, given that it was based on an error from the beginning, or even later on.[99] As he states elsewhere, *the error is thus the real reason for the condictio* ("[e]rror [ist] die wahre Bedingung der Condiction").[100]

Therefore, according to *Savigny*, the various types of *condictiones* are all based on the concept of error in performance. These are the *condictio indebiti* (the action for recovery of payment not owed), the *condictio ob causam datorum* (the action for restitution of what was given to obtain something), the *condictio sine causa* (the action for restitution of what was given without cause) or the *condictio ob iniustam causam* (the action for restitution of what was given by virtue of an unjust cause).[101] In a way, with respect to the payment of an amount not owed, the error replaces the trust (*credere*) which was the basis of the loan contract. Thus, *Savigny* considers that, in every case of payment in error, there is no justification for the recipient to keep the money received or the performance rendered. Because of the error, the intention to transfer the sums is vitiated and therefore there is no *causa donandi*. This leads to the absence of a *causa retinendi*, a justification for withholding the sums received, which is the basis of the obligation to return.[102] These are features of a unitarian conception of unjustified enrichment. Despite the unitarian conception, *Savigny* maintains the specific requirements for each *condictio*; this is the reason why opinions are divided about

[96] *v. Savigny*, System V (fn. 85), 109 and 514 ff.
[97] *v. Savigny*, System V (fn. 85), 110.
[98] *v. Savigny*, System V (fn. 85), 110.
[99] *v. Savigny*, System V (fn. 85), 521; see also *Jansen*, Korrektur grundloser Vermögensverschiebungen (fn. 2), 157.
[100] *v. Savigny*, System V (fn. 85), 452.
[101] *v. Savigny*, System V (fn. 85), 452.
[102] In this sense *Huwiler*, Obligation (fn. 3), 55.

whether *Savigny* really had a unitarian conception of unjustified enrichment[103] or whether he was still influenced by the separate categories of Roman law[104]. The common features, however, bring *Savigny's* thinking closer to the natural law, as expressed by *Grotius* in his "De iure belli ac pacis", but also to some extent in the writings of the Spanish Scholastics already.[105]

b) The additions made by Bernhard Windscheid

Bernhard Windscheid (1817–1892) added a dogmatic precision to *Savigny's* thinking,[106] especially in his work about the *Voraussetzungslehre*. He was probably also the first to use the concept of *ungerechtfertigte Bereicherung* (unjustified enrichment) as a generic technical term, as the title given to § 421 of his "Lehrbuch des Pandektenrechts" demonstrates.[107]

Windscheid also took up the idea that the various *condictiones* are all based on *the existence of an error*. He notes, however, that the person who erroneously renders a performance does so under the influence of an *error in motives*. This is a genuine error, but one which should not be considered in the system based on the theory of declaration of intent, since the declaration expressed was what the person rendering the performance actually wanted. Indeed, for *Savigny*, only an error in expression was relevant for the granting of a *condictio*, not an error in motives. *Windscheid* therefore added the fact that an error in motives is a sufficient justification for granting a *condictio*. This is because, in his view, the error in motives does not relate to a "fact" but to a "legal fact", namely to the *causa* of the transfer (*Zuwendung*).[108] Thus, for example, if I perform in the belief that I am obliged to do so, when I am not, this is an *error as to the motives of my payment*, namely the mistaken belief that there is a *causa* for the transfer.

Windscheid's Voraussetzungslehre thus defines the *Voraussetzung* as the circumstance, apparent to the other party, without which one would not have wanted to do a certain act ("ohne welchen man nicht gewollt haben würde").[109] Thus, when the *Voraussetzung* ceases to exist, there is no error in expression, because the person has expressed his *real* intention ("wirklicher Wille"). However, he has

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[103] In this sense particularly *J. Wilhelm*, Rechtsverletzung und Vermögensentscheidung als Grundlagen und Grenzen des Anspruchs aus ungerechtfertigter Bereicherung, 1973, 21 ff.; see also *Koch*, Bereicherung und Irrtum (fn. 36), 120 f.; *Jansen*, Korrektur grundloser Vermögensverschiebungen (fn. 2), 152.

[104] In this sense particularly *J. Rückert*, Dogmengeschichtliches und Dogmengeschichte im Umkreis Savignys, bes. in seiner Kondiktionslehre, ZRG (rom.) 104 (1987), 666–678, 670 ff.; *Schäfer*, Bereicherungsrecht in Europa (fn. 3), 111 ff., 454 ff.

[105] In this sense also *Jansen*, Korrektur grundloser Vermögensverschiebungen (fn. 2), 159 f.

[106] Cf. in this sense particularly *W. Schubert*, Windscheid und das Bereicherungsrecht des 1. Entwurfs des BGB, ZRG (rom.) 92 (1975), 186–233, 191 ff.

[107] *B. Windscheid*, Lehrbuch des Pandektenrechts, vol. II.2, Düsseldorf, 1866, § 421 (p. 180).

[108] *Windscheid*, Voraussetzung (fn. 86), 5 ff.

[109] *Windscheid*, Voraussetzung (fn. 86), 7.

not expressed his *true* intention ("eigentlicher Wille").[110] For *Windscheid*, if this true intention is apparent to the other party, the cause of attribution disappears, which allows for restitution based on the *condictio indebiti*. The *Voraussetzung* is, in a way, the purpose of the legal act, and thus its *causa*.[111] Therefore, when the *Voraussetzung* falls away, the *causa* itself does so, too.

Furthermore, for *Windscheid*, a *condictio* must be granted whenever there is an enrichment in the form of an increase or non-decrease of assets irrespective of whether a direct transfer has taken place between the persons involved.[112] *Windscheid* thus also applies the rules of unjustified enrichment when the enrichment takes place at the expense ("auf Kosten") of someone else; this not only includes cases of performance, but also cases where the enriched person uses the thing of a third party or hands it over to another person ("Gebrauch, Verbrauch, Hingabe fremden Vermögens"). As there is no need for an act of the claimant in unjustified enrichment, *Eingriffskondiktion* (enrichment by act of the enriched person) and *Zufallskondiktion* (enrichment by chance) are therefore also possible.

Thus, *Windscheid's* work has largely consisted in generalising the requirements and the basis of all the *condictiones*, namely the actions granted in case of unjustified enrichment.

2. The concretisation of the Pandectists' views in Swiss law

Even though *Windscheid's Voraussetzunglehre* was ultimately rejected in Germany, it found some resonance in the former *Obligationenrecht* of 1881.[113] On the one hand, elements of this doctrine can be found in the extensive scope of the error as to substance (Art. 19 (3) OR 1881), which became a genuine essential error in motive in the 1911 Code of Obligations (Art. 24 (1) No. 4 OR). On the other hand, the regime of unjustified enrichment, as submitted to the drafting committee of the Federal Code of Obligations by *Paul Friedrich von Wyss* (1844–1888), a law professor from Basel, was strongly influenced by this approach.

Indeed, *Paul Friedrich von Wyss* played an important role in the revival of the rules on unjustified enrichment, since he had been a member of the drafting committee for the Federal Code of Obligations of 1881 since 1876 and was responsible for developing the draft on the basis of the third draft of 1876, published in 1877.[114]

Von Wyss' draft was submitted in 1877. With respect to unjustified enrichment, he emphasised the influence of *Windscheid* ("Windscheids klassische Ausführungen über das Fundament der römischen Bereicherungsklagen [Pand. § 421–429],

[110] *Windscheid*, Voraussetzung (fn. 86), 5 ff.

[111] *Windscheid*, Voraussetzung (fn. 86), 50 ff.

[112] *Windscheid*, Lehrbuch II.2 (fn. 107), 4th edn., Düsseldorf, 1875, § 421 para. 1 (p. 578 f.; this edition was the one used by P.F. von Wyss).

[113] *Huwiler*, Obligation (fn. 3), 59 and 72 f.

[114] *R. Eugster*, Die Entstehung des schweizerischen Obligationenrechtes vom Jahre 1883, 1926, 75 f.; also *Huwiler*, Obligation (fn. 3), 61.

haben für dieses Verfahren den Weg gezeichnet").[115] It is true that *Münzinger's* and *Fick's* earlier drafts were also based on Justinian's foundations, but they still followed a structure that placed the *condictio indebiti* at the beginning of the title, and then they had added the various "other" *condictiones*.[116]

Von Wyss, by contrast, placed a single rule (Art. a) at the beginning of the part about unjustified enrichment. This was a general rule which was then completed and clarified by supplementary rules, in particular Art. b (about the various absences of cause) and Art. c (about the recovery of payments which are not owed).[117] The text of the general rule is as follows:[118]

Art. a. – Wer ohne rechtsmässigen Grund auf Kosten *) eines Andern bereichert ist, hat dem Benachtheiligten seinen Gewinn herauszugeben.

*) Oder: 'aus dem Vermögen' – Dieser Ausdruck ist vielleicht etwas zu enge, der andere etwas zu weit.

He who is enriched without a legal cause at the expense *) of another, must return his enrichment to the impoverished.

*) Or: 'of the assets' – This expression is perhaps a little too narrow, the other a little too broad.[119]

As *von Wyss* expressly states in his explanations, this introductory article lays down the general principle of unjustified enrichment ("Mit diesem Eingangssatze wäre das allgemeine Princip ausgesprochen, ohne dass, wie wir glauben, die Schranken zu weit geöffnet sind").[120] Art. c about the *condictio indebiti* is presented as an important case ("ein wichtiger Fall")[121] that needs to be expressly mentioned. This is why *von Wyss'* draft proposes a special provision not only for the various hypotheses of *causae* which cease to exist or which do not exist (Art. b), but also an Art. c which deals with the *condictio indebiti*:

Art. c. – Wurde freiwillig eine vermeintliche Schuld bezahlt oder anerkannt, so ist die Rücknahme dann statthaft, wenn der Benachtheiligte sich in nachweisbarem Irrthum befand.

If a supposed debt was paid or acknowledged voluntarily, restitution is only possible if the person disadvantaged by the transaction can prove that he was in error.[122]

The structure of the law of unjustified enrichment proposed by *von Wyss* was thus parallel to the part of the code devoted to the contract as a source of obli-

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[115] *P.F. von Wyss*, Motive zu der auf Grund der Commissionsbeschlüsse vom September 1877 bearbeiteten neuen Redaktion des allgemeinen Theiles des Entwurfes zu einem schweizerischen Obligationenrechte, Bern, 1877, 10.

[116] Cf. on this point, convincing *Huwiler*, Obligation (fn. 3), 61; compare with Art. 103 Draft 3 of 1876, followed by Art. 104–110 Draft 3 of 1876.

[117] *P.F. von Wyss*, Redaktions-Vorschläge, abgedruckt in: *ders.*, Motive (fn. 115), 1.

[118] *v. Wyss*, Motive (fn. 115), 10.

[119] Unofficial translation by myself.

[120] *v. Wyss*, Motive (fn. 115), 10.

[121] *v. Wyss*, Motive (fn. 115), 11.

[122] Unofficial translation by myself.

gations, which contained a general rule (the present Art. 1 OR), followed by clarifications. It also corresponded to the structure of the law of delict, which also contained such a general rule, and still does to this day in Art. 41 OR. According to this structure, Art. c clarifies the scope of Art. a, which is the general rule. It should be emphasised that the general rule about unjustified enrichment establishes a genuine source of the obligation of restitution, as a proper and specific ground.

Von Wyss was also inspired by a cantonal code which already contained such a general rule about unjustified enrichment: the 1861 Civil Code of Graubünden (*Bündnerisches Civilgesetzbuch*),[123] written by *Peter Conradin von Planta* (1815–1902). In his explanations ("Erläuterungen"), *von Planta* expressly states that he followed the theories of *Savigny* and *Puchta*.[124]

Thus, § 467 of the Civil Code of Graubünden provided as follows:

> [Forderungen aus ungehöriger Bereicherung] Die ungehörige Bereicherung einer Person tritt dadurch ein, dass dieselbe ohne Rechtsgrund auf Kosten einer andern sich bereichert, d. h. durch direkten Abbruch an dem Vermögen eines andern einen Zuwachs zu ihrem eigenen erhält.
>
> [Claim for improper enrichment] Improper enrichment of a person occurs because he is enriched without legal basis at the expense of another, i. e. by direction of the assets of another, he obtains an increase in his own assets.[125]

This structure suggested by *von Wyss* of a general rule followed by a specific case in the form of payment of money not owed, was kept in place in the final text of the Federal Code of Obligations of 1881 ("OR 1881"), which provides as follows:[126]

> Art. 70. A person who, without legitimate cause, has enriched himself at the expense of another, shall be liable for restitution.
>
> Art. 71. In particular, one is obliged to return what one has received without cause, by virtue of a cause which has not been fulfilled, or by virtue of a cause which has ceased to exist.
>
> Art. 72. A person who has paid voluntarily what he did not owe can only obtain restitution on condition that he proves that he paid because he mistakenly believed himself to be a debtor.
>
> One cannot obtain restitution of what one has paid to extinguish a prescribed debt or to fulfil a moral duty.

Compared to the Federal Code of Obligations of 1881, the Code of Obligations of 1911 was amended only to the extent necessary to adapt it to the introduction of the Civil Code of 1907. The text of the provisions about unjustified enrichment

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[123] *v. Wyss*, Motive (fn. 115), 9.

[124] *P. C. von Planta*, Bündnerisches Civilgesetzbuch mit Erläuterungen des Gesetzesredaktors, Hitz, 1862, 397, which refers to *G. F. Puchta*, Lehrbuch der Pandekten, Leipzig, 1845, § 307 and *v. Savigny*, System V (fn. 85), 523 (corrected quotation because Planta is mistaken and refers to the wrong passage, see for this correction *Huwiler*, Obligation [fn. 3], 63 fn. 136).

[125] Unofficial translation by myself.

[126] FF (Feuille Fédérale) 1881 III 73, available online: <https://www.fedlex.admin.ch/fr/fga/index/1881/6> (French); BBl. (Bundesblatt) 1881 III 109, available online: <https://www.fedlex.admin.ch/de/fga/index/1881/6> (German) (last accessed on 24 November 2021).

was thus only slightly modified in terms of form, but not in terms of substance. Art. 70 and 71 OR 1881 were combined into a single article with two paragraphs, with a slight adaptation of the wording of the new Art. 62 (2) OR; Art. 72 OR 1881 was slightly modified in its wording of paragraph (1); finally, a new paragraph (3), which refers to the provisions about debt collection and bankruptcy, was added to Art. 63 OR.

It should therefore be noted that the analysis of the historical foundations of Art. 62 OR (general rule) and 63 OR (specific case of payment of money not owed) also applies to the current state of the text. The idea of a general rule as the basis for all actions for unjustified enrichment therefore remains; however, this rule is subject to a specific limitation in the case of "payment of money not owed" within the meaning of Art. 63 (1) OR. This historical observation obviously does not exclude the fact that the understanding, interpretation and ultimately the interaction between these two provisions have evolved over time.

In the modern provision of unjustified enrichment, error is one of the requirements for Art. 63 OR to apply, but it is not required for the application of the general rule in Art. 62 OR. In the case of a voluntary payment, which is the basis of a *Leistungskondiktion*, it must be demonstrated that the payment was made in error. The latter concept is not precisely defined by the legislator, and it is therefore necessary to rely on case law and academic developments to determine its meaning and scope. It should also be pointed out that there is no requirement of error if the performance was not made voluntarily, e. g. under pressure of debt collection proceedings (cf. Art. 86 Debt Collection and Bankruptcy Act).

According to the case law of the Federal Tribunal, an error about the non-existence of an obligation can be caused by inattention or ignorance.[127] The Roman distinctions, especially the medieval ones, have all been abandoned. Even the idea that one cannot invoke an error resulting from negligence, because this would be tantamount to invoking one's own turpitude, is not accepted by the Federal Tribunal. In fact, for the Federal Tribunal, any type of error can be relied on, whether it is of fact or of law, whether it is excusable or inexcusable.[128] Indeed, according to the Federal Tribunal, the basis of a claim for unjustified enrichment is not the error, but the fact of having rendered performance without *causa*. However, when the performance is made voluntarily, in order to distinguish it from a gift, it is necessary to establish the existence of an error. That error then indicates the absence of a *causa* of performance, which may be due to an error of fact or law.[129]

The Federal Tribunal's position can be clarified by looking at two decisions.

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[127] BGE 123 (1997) III 101–109, reason 3.a; *B. Chappuis*, in: Commentaire Romand, Code des obligations I, 3rd edn., 2021, Art. 63 OR para. 8.

[128] BGE 129 (2003) III 646–655, reason 3.2; CoRo/*Chappuis* (fn. 127), Art. 63 OR para. 8.

[129] BGE 64 (1938) II 121–132, reason 5.f; CoRo/*Chappuis* (fn. 127), Art. 63 OR para. 8; *Meier*, Irrtum und Zweckverfehlung (fn. 2), 123.

(1) *An error about the right to be paid during maternity leave.* The decision of the Federal Tribunal BGE 118 (1992) II 58–63 examined the question whether a pregnant employee, who had agreed with her employer to terminate her employment contract for a term taking effect before the birth, could avoid this agreement on the basis of her ignorance of the right to paid maternity leave. This was not, as such, an action for payment of money not owed, but rather a question about whether the contract was void because of an error of law. The Federal Tribunal states that not knowing the law does not preclude the voidness of an agreement within the meaning of Art. 24 (1) No. 4 OR when the mistake does not relate to general provisions known by everyone.[130] In the case of an error in motives, it must relate to a subjectively essential fact, which is objectively considered as an essential element of the contract in accordance with the rules of good faith in commercial relations. In this case, however, the error was qualified as a simple one (i.e. not an essential one), as it concerned only the legal effects of the contract. However, the judgment was strongly criticised by *Paul Piotet*, who pointed out that the legal effects of the contract may well constitute an essential element in accordance with commercial loyalty.[131] If this is the case, i.e. if ignorance of the law can invalidate a contract as long as it is in accordance with good faith, then the situation corresponds to the idea of *Windscheid's Voraussetzungslehre*, in this case an error about the reasons for payment.

Furthermore, if it is accepted that a party may claim that an agreement is void on the ground of error, it follows that it must necessarily be possible to obtain restitution of sums paid under such agreement (Art. 63 OR). However, it must be emphasised that to obtain restitution for the payment of money not owed, the error does not have to be essential within the meaning of Art. 23 ff. OR, since the aim is not to remove the *causa* of the payment, but "merely" to invoke the error as to whether the payment was owed,[132] without it having to be excusable.[133]

(2) *A legitimate error.* In its decision BGE 129 (2003) III 646–655, the Federal Tribunal notes that when the legal parent-child relationship with a father registered in the civil status as the legal father is terminated by an action for disavowal, and at the same time the legal parent-child relationship is established with the biological father who recognised the child, the obligation for maintenance of the former ceases, with retroactive effect to the moment when it came into being, and the obligation for maintenance of the latter comes into being with retroactive effect to the day of the birth. In general, according to the Federal Tri-

[130] *B. Schmidlin/A. Campi*, in: Commentaire Romand (fn. 127), Art. 23 and 24 OR para. 85; esp. BGE 79 (1953) II 272–276.

[131] *P. Piotet*, L'annulation pour erreur de droit, Journal des Tribunaux 1993 I, 538–543, in particular 540 f.; similar view in CoRo/*Schmidlin/Campi* (fn. 130), Art. 23 and 24 OR paras. 88 ff.

[132] In this sense also *P. Gauch/W. Schluep/J. Schmid*, Schweizerisches Obligationenrecht, Allgemeiner Teil, vol 1, 11th edn., 2020, para. 1534; *v. Tuhr/Peter*, Allgemeiner Teil I (fn. 6), 483 (§ 52 IV); also BGer, 28.5.2004, 5C.51/2004, reason 7.1.

[133] BGer, Semaine Judiciaire 1994, 269–274, reason 4.a.bb; BGer, 28.5.2004, 5C.51/2004, reason 7.1.

bunal, the consequence is that the father registered in the register on civil status has a claim for unjustified enrichment against the biological father for the contributions that he paid to the child, subject to the rules on limitation of actions.

In this decision, the Federal Tribunal ruled that the father legally registered in the register on civil status had no reason to doubt his paternity at the time of the recognition of the child and the establishment of the maintenance agreement. Therefore, he was under an error (of fact), for the occurrence of which he was not negligent.

It is debatable whether this decision should have considered the issue of error. At the time of payment, the sums were due, but when the father's status was retroactively terminated, it was no longer due. In subsequent decisions, the Federal Tribunal waived the requirement of error.[134] One of these cases concerned a contract which provided for advance payments. Due to the delay in payments, the other party terminated the contract and, pursuant to contractual provisions, could keep the advance payments as a contractual penalty. However, as the Federal Tribunal found that the contractual penalty was excessive within the meaning of Art. 163 (3) OR, it imposed restitution of part of the advance payments pursuant to Art. 63 OR. Nevertheless, it did not require the existence or proof of an error, since, at the time of the performance, the payment was owed. The same applied to the payment of an initial rent, the cause of which was later declared void *ab initio*.[135]

It is clear that error is no longer the central element of actions for restitution of unjustified enrichment according to the Federal Tribunal. An error is only required if the payment is voluntary and if, at the time it is made, there is already no *causa* that could legitimise it. Initially central in Swiss law, the relevance of error has been limited to the *Leistungkondiktion*, in cases of voluntary payment of a debt which, at the time of payment, does not already exist, i. e. payment *sine causa*.

One may then ask what the situation is when a person renders a performance while in *doubt as to whether the obligation exists or not*, when the *causa* of the performance does not actually exist. The commentators are divided. The majority accepts that there is no error in case of doubt,[136] while some authors consider that an error must be admitted if it can be established that no performance would have been rendered if the person had had (actual) knowledge of the non-existence of the obligation.[137] The Federal Tribunal seems to follow this approach, admitting an error when the person providing the performance "ought to have known"

[134] BGE 133 (2007) III 43–55, reason 3.5.1; BGE 133 (2007) III 201–212, reason 3.

[135] BGE 140 (2014) III 583–591, reason 3.2.2.

[136] BSK OR I/*Schulin/Vogt* (fn. 4), Art. 63 OR para. 4; *Gauch/Schluep/Schmid*, Allgemeiner Teil I (fn. 132), para. 1533; *v. Tuhr/Peter*, Allgemeiner Teil I (fn. 6), 484 (§ 52 IV).

[137] *E. Bucher*, Obligationenrecht: Allgemeiner Teil, 2nd edn., 1988, 672 f.; CoRo/*Chappuis* (fn. 127), Art. 63 OR para. 9.

but did not necessarily know that there was no valid cause for performance. Thus, only *actual* knowledge is an obstacle to restitution under Art. 63 OR.[138]

This is a far cry from the restrictive approach of the medieval authors and the impossibility of invoking an error of law as well as an error based on a lack of diligence. This is largely due to the fact that the error primarily relates to the reason for the performance in the sense of *Windscheid's Voraussetzungslehre*. Therefore, the generalisation of the unjustified enrichment rules is based primarily on the lack of *causa* at the time of payment, with the idea that in the case of a *Leistungkondiktion*, there is a right to restitution in the event of an error about the reason for payment (error on motives); it does not matter whether this was based on a misunderstanding of the law or of the facts. However, such an error may be rejected if it is not in accordance with the rules of good faith, as expressly provided for in Art. 24 (1) No. 4 OR. In a way, therefore, the essential error in motives is at the heart of the error required by Art. 63 (1) OR, as it was already apparent in the work leading up to the drafting of the Federal Code of Obligations of 1881.

I hope that these modest iterative reflections about the scope of error in matters of unjustified enrichment will demonstrate to the dedicatee of these lines that Swiss law has sometimes allowed itself to be inspired by the ideas of the Pandectist authors in quite an original way, even beyond what the Germans themselves may have taken up. In this field, it is not the influence of French law which has led to the recognition of a general rule about unjustified enrichment and a specific exception for the recovery of undue payments, but rather the decisive influence of *Windscheid's* ideas, in the light of Roman law texts, on *von Wyss* and the drafters of the Federal Code of Obligations of 1881.

[138] BGer, 3.6.2015, 4D_13/2015, reason 4.1; BGer, 22.2.2018, 4A_451/2017, reason 5.3; CoRo/*Chappuis* (fn. 127), Art. 63 OR para. 9a.