

## **The Legal Nature and Features of the Claim Established on Article 669 Paragraph 1<sup>st</sup> of the Chilean Civil Code**

### **La naturaleza jurídica y caracteres de la acción del artículo 669 inciso 1° del Código Civil chileno**

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#### **Abstract**

In the present work the legal nature of the claim established on article 669 paragraph 1<sup>st</sup> of the Chilean Civil Code is explored; even though it seems to be agreement as to what a restitutionary reimbursement is, this is not asserted enough, which generates difficulties at the judicial level. Indeed, concerning the reimbursement claim granted by article 669 paragraph 1<sup>st</sup>, no distinction has been drawn between the restitutionary and compensatory character of the norm. Having an unduly property allocation taken place, the principle of unjustified enrichment imposes the obligation of restituting, thus not being required a correlative impoverishment in order to demand the restitutionary reimbursement, since the claim is not aimed at compensating the impoverished, but to recover the unduly assigned enrichment. In this way, regarding the studied claim the stress must shift from the amount of the impoverishment to the effective amount of the enrichment, so as not to apply the compensatory logic to the restitutionary reimbursement.

**Key words:** *Ownership; immovable accession; enrichment by intrusion; right of option; reimbursement; restitution; compensation.*

#### **Resumen**

En el presente trabajo se explora la naturaleza jurídica de la acción del artículo 669 inciso 1° del Código Civil chileno; aunque parece haber acuerdo respecto que se trata de un reembolso restitutorio, no se afirma lo suficiente, lo que genera ciertas dificultades a nivel judicial. En efecto, en la acción de reembolso otorgada en el inciso 1° del artículo 669 no se ha

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distinguido en modo alguno el carácter restitutorio o indemnizatorio de la norma. Habiendo una atribución patrimonial indebida, el principio de enriquecimiento injustificado impone la obligación de restituir, por lo que no debe exigirse un empobrecimiento correlativo para reclamar el reembolso restitutorio, ya que no se busca indemnizar al empobrecido, sino recuperar el enriquecimiento atribuido indebidamente. De este modo, en la acción estudiada el acento debe trasladarse del monto del empobrecimiento al monto efectivo del enriquecimiento, a fin de no aplicar la lógica indemnizatoria al reembolso restitutorio.

**Palabras clave:** *Dominio; accesión inmueble; enriquecimiento por intromisión; derecho de opción; reembolso; restitución; indemnización.*

## INTRODUCTION

This work focusses on article 669 paragraph 1<sup>st</sup> of the Chilean Civil Code,<sup>1</sup> which regulates the hypothesis regarding the one who builds, plants, or sows in third-party ground, and endeavors to explore the features of the action that it grants, its difficulties, as well as a tentative answer as to the legal nature of this claim.

The thesis is that the action pursuant to which the builder can claim a reimbursement to the owner of the land possesses a restitutionary nature, since the concept of *compensations* employed by the provision seeks only to refer to the rules on reciprocal service obligations concerning the *actio rei vindicatio*.

Due to the location of the provision in the Civil Code, the paper considers two relevant focal points in its development; first, accession, mode of acquiring ownership according to the Chilean legislation, since they are elements that attach to the ground, in accordance with the principle *superficie solo cedit*, accede to the principal thing, thus comprising building, sowing, or planting, a whole alone with the land. Consequently, considering the option that the norm provides in favor of the owner of the land, this implies addressing the question of when the transference of ownership would operate, that is, whether it operates automatically according to the general rule of accession, or subject to the right of option and reimbursement of the materials to the defeated possessor.

Another relevant focal point is the right of restitution, particularly the prevention of unjustified enrichment, which is the basis of the studied norm according to the legal doctrine and judicial jurisprudence. That said, since this constitutes the imposition of an enrichment, the paragraph 1<sup>o</sup> of article 669 provides that the owner of the land is endowed with an alternative right of *making its own* of what was planted, sowed, or built, via the compensations prescribed in favor of good faith possessors, or for obligating the latter to pay the *just price* of the land plus the statutory interests for the time during which it was in her possession, option concerning to which is arguable whether it is an hypothesis of reversed accession or it constitutes only a forced sale.

<sup>1</sup> All the references are to be understood as references to the Chilean Civil Code, unless otherwise indicated.

It is pertinent to point out that in comparative law the norm has been studied and developed, specially by Spanish dogmatics, which is why several of the literary references included in this investigation have that provenance. At a national level there are few studies concerning this matter, being the nearest work that of Manuel González,<sup>2</sup> although the latter addresses the 2<sup>nd</sup> paragraph of article 699, thus remaining the need for examining in depth the nature of the action, the feasibility of a concurrence of actions, as well as solutions resolving the conflict of claims on the basis of a restitution understood in a broader sense.

This work, limited in its purpose, does not address the historical background nor it formulates a comparison between Chilean and Spanish law, but it seeks to explore the doctrinal development on unjustified enrichment and the special action granted to the one who builds, plants or sows in third-party ground; thus, methodologically, I address the dogmatic development of the involved institutions, as well as their development in the Chilean jurisprudence of latter years, specially the Supreme Court decision from December 17<sup>th</sup>, 2018 in *J.L.M.S. y otros con Serviu X Región*,<sup>3</sup> concerning the qualification of the legal nature of the action and determining what the restitution should include, and the Supreme Court decision from March 7<sup>th</sup>, 2017 in *W.J.L. con I. Municipalidad de Penco y otros*,<sup>4</sup> with respect to the features of the restitutionary claim.

In its structure, this work begins focusing on the 1<sup>o</sup> paragraph of article 669, in the context of accession and the normative referral to the heading 4 of the Title XII, Book II of the Chilean Civil Code (section 1). Thereafter, in order to clarify who is the owner of the improvements, the doctrinal problems aroused by the exceptional option established on the studied paragraph are reviewed: from when does the ownership transference of the improvements takes place (immediate or deferred accession), alongside the issue of the reversed accession contemplated in the second option granted to the owner of the land and, concerning the action of reimbursement, I inquire into the restitutionary character of the norm and into the problematic character of the concept of *compensations* in the paragraph 1<sup>o</sup> (sections 2 and 3). In what follows, I address some features of the action of unjust enrichment, specially the titularity of the action and its subsidiary nature, understanding that paragraph 1<sup>o</sup> of article 669 contemplates a special restitutionary claim (section 4). Lastly, I offer some conclusions.

## **I. PARAGRAPH 1<sup>st</sup> OF ARTICLE 669 IN THE CONTEXT OF ACCESSION AND THE NORMATIVE REFERRAL TO THE HEADING 4 OF THE TITLE XII, BOOK II OF THE CIVIL CODE**

The studied paragraph integrates a system comprised by articles 668 and 669, which concerns movable-to-immovable accession regulation included in Title V, Book II of the Chilean Civil Code;<sup>5</sup> these regulate two different hypothesis: whereas article 668 develops the

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<sup>2</sup> GONZÁLEZ GONZÁLEZ (2017).

<sup>3</sup> *J.L.M.S. y Otros con Serviu X Región* (2018).

<sup>4</sup> *W.J.L. con I. Municipalidad de Penco y Otros* (2017).

<sup>5</sup> Historically, accession does not possess in the Roman sources the technical meaning it has in the modern law, but it entails a series of hypotheses in which a thing is inseparably joined to another, thus arising the problem of

case of building on the own ground of the builder but with materials belonging to a third party, article 669 addresses the opposite hypothesis, namely the edification on a ground belonging to a third party but with materials owned by the constructor, article integrated by two paragraphs.

These articles set what is usually called industrial accession.<sup>6</sup> Here, unlike natural accession, the precedent of the union is a human act,<sup>7</sup> which is relevant for determining the intentionality and imputation of the involved parties. This case is also known as immovable accession, for what was built accedes the land, traditionally regarded as the principal thing, according to the principle of accessoriness;<sup>8</sup> likewise, since it is not possible to separate of the thing so that the defeated possessor recovers what she owns, pursuant to the principle *superficies solo cedit*,<sup>9</sup> the things attached to the ground shall be acquired by the owner of the latter;<sup>10</sup> however, the application of this principle, as well as the principle *accessorium sequitur principale*, can be problematic.

With regard to this, Díez Picazo argues that establishing the accessory or principal character of something usually implies considering the economic destination of the thing, its value or volume,<sup>11</sup> all of which are relative circumstances. Regarding the ground, its increased value is usually presumed, but this might not be the case, for instance, if the created value and what was built surpasses the valuation of the land. Cerdeira, on the contrary, refutes these arguments, pointing out that the principles *superficies solo cedit* and *accessorium sequitur principale* should not be justified exclusively on the basis of the economic significance of the land, but on the attracting power of the ground.<sup>12</sup>

Moreover, the factual hypothesis contained in paragraph 1<sup>st</sup> of article 669,<sup>13</sup> evidences the conflict that arises between two claims: the claim of the owner of the land who seeks to

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determining who is the owner of the whole; see GUZMÁN BRITO (1996), pp. 557-566. Regarding solutions in Roman Law adopted by nineteenth century codifications, see DÍEZ PICAZO (1966), pp. 832-835.

<sup>6</sup> Even though the hypothesis of plantation and sow can be regarded as mixed hypotheses, see PEÑAILILLO ARÉVALO (2019), p. 721.

<sup>7</sup> DÍEZ PICAZO (1966), p. 842; BECH SERRAT (2015), p. 186.

<sup>8</sup> PEÑAILILLO ARÉVALO (2019), p. 723.

<sup>9</sup> DÍEZ PICAZO (1966), p. 835; The rule intends to express that the owner of the ground is the owner of the surface and of what attaches to it; see GUZMÁN BRITO (1996), pp. 561-562. Therefore, the faculty that the possessor has, in order to exercise the *ius tollendi* established on paragraph 2<sup>nd</sup> of article 910 of the Civil Code, is rather problematic, since that would imply that the transference of titularity has not operated through accession.

<sup>10</sup> GUZMÁN BRITO (1996), p. 562; An application of this principle and the rules of immovable accession to the hypothesis of article 1996 of the Civil Code, in SAN MARTÍN NEIRA (2016) pp. 145-179.

<sup>11</sup> DÍEZ PICAZO (1966), pp. 847-848.

<sup>12</sup> CERDEIRA BRAVO DE MANSILLA (2011), pp. 3086-3094.

<sup>13</sup> With regard to the immediate sources of the norm, it is enough to point out the difficulty of referring for that purpose the history of the law, since the Review Commission of the Code of Bello from 1853 [*Comisión Revisora del Código de Bello de 1853*] deliberately did not register deliberations; see GUZMÁN BRITO (1982). It can be indicated, nevertheless, that the paragraph 1<sup>o</sup> of article 669 is rooted, via Spanish law, in Roman law. *Cfr.* SOZA (2019), pp. 370, 383. In fact, the Spanish Civil Law includes the typical Roman models of the *locupletior factus est*, and also the *regulae iuris* following Pomponius, Digest 50,17, according to which the enrichment at the expense of other is forbidden; see BARRIENTOS GRANDON (2017), pp. 104, 114-117; BECH SERRAT (2015), pp. 69-71,

recover her possession, that was disrupted by the acts of the part who built,<sup>14</sup> sowed<sup>15</sup> or planted on third-party ground, and the claim of the defeated possessor who, being in good faith, seeks the restitution of the value of her investment, who is also in material possession of the ground.

### 1.1 Criteria for Solving the Conflict: Equity and Good Faith

With regard to the criteria applied by law in order to balance the conflicted claims, these seem to be equity and good faith. Equity, since it is intended to avoid a property allocation without cause in favor of the owner of the land that could also lead to an impoverishment for the one who built, planted, or sowed.<sup>16</sup> Alone with this, considering that this is a hypothesis of enrichment by intrusion, the studied paragraph grants an exceptional option to the owner of the land so that she chooses the settlement of the conflict between two alternatives.<sup>17</sup>

The second criterium for solving of the conflict is good faith, which, in the opinion of Díez Picazo, is the relevant one for solving the tension between the respective claims of the owner of the land and the defeated possessor.<sup>18</sup> It is worth highlighting that good faith refers to an objective standard of conduct, that is, to a diligent behavior so that, even though we are dealing with an intromission in the right of a third party, being an excusable mistake, it could work as a cause of exemption from liability.<sup>19</sup> Concerning this matter, Basozábal argues that the restitutionary claim is subjectivized, making it dependent on the good faith of the involved parties.<sup>20</sup>

In fact, the norm takes into consideration for solving the conflict the good faith of both the owner of the ground and the one who builds, plants, or sows. Therefore, existing ignorance in the owner of the land and just cause of error in the other part,<sup>21</sup> a right of option is granted to the owner for *making its own* or forcing to pay *the just price* of the land, and to the one who built, planted, or sowed, the right to demand “the value of the materials and other expenses [...] as long as she remains in possession of the land”.<sup>22</sup> Moreover, the right of retention flows from the norm as long as improvements are not reimbursed, which, according

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194. Moreover, the Project of Spanish Civil Code from 1851 established, in its article 404, a text that was remarkably similar to the one contained in the Code of Bello, especially regarding the right of option accorded to the owner of the land, which is not to be found in Roman sources; SOZA RIED (2019), pp. 389-392. Then, the precursors are the Project of Spanish Civil Code from 1851 and the work of García Goyena, specifically its Edition from 1852, *Concordancias, motivos y comentarios*; see BARRIENTOS GRANDON (2017), p. 94.

<sup>14</sup> DÍEZ PICAZO (1966), p. 834; LEITAO ÁLVAREZ SALAMANCA (2007), pp. 62-65.

<sup>15</sup> *Friopack Servicios Limitada con Banco de Chile S.A.* (2017).

<sup>16</sup> PEÑAILILLO ARÉVALO (1996), pp. 17-20; *J.L.M.S. y otros con Serviu X Región* (2018).

<sup>17</sup> BECH SERRAT (2015), p. 193; BASOZÁBAL ARRUE (1998), p. 278.

<sup>18</sup> DÍEZ PICAZO (1966), pp. 845-948.

<sup>19</sup> CÉSPEDES MUÑOZ (2018), pp. 131-135.

<sup>20</sup> BASOZÁBAL ARRUE (1998), pp. 272, 275.

<sup>21</sup> DÍEZ PICAZO (1966), p. 846.

<sup>22</sup> GUZMÁN BRITO (1996), p. 561.

to the criterium established by the Supreme Court, must be invoked in the action brought by the owner claiming the restitution of the land;<sup>23</sup> the former, by referral to the civil norm relative to the defeated possessor established on heading 4 of the Title XII, Book II of the Chilean Civil Code, which distinguishes between possessors of good faith and those who were in bad faith, in order to determine to what rights the possessor is entitled in the reimbursement.<sup>24</sup>

Then, as for the case that concerns us, the good faith<sup>25</sup> of the defeated possessor entails having built, planted, or sowed with just cause of error regarding the ownership of the ground, or the fact that she had a right over it,<sup>26</sup> and therefore “is ignorant of the objectively unlawful character of her act”.<sup>27</sup> In the case regarding the good faith of the owner of the land, it consists in her lack of knowledge, which works as a criterion of applicability for the 1° paragraph of article 669, since the 2<sup>nd</sup> paragraph regulates the exactly opposite hypothesis, that is, that the owner of the ground knew about the intrusion and did not oppose it.<sup>28</sup> In case of knowing and not opposing, in order to recover her property, the owner of the land shall be obligated to reimburse the improvements, thus being treated more harshly than the defeated possessor in bad faith, who shall be able to take the improvements back as long as that does not cause detriment to the land.<sup>29</sup>

Regarding the scope and limits of this knowledge, the Supreme Court has pointed out the need to examine more deeply the criterion that allows to allocate the property consequences of constructing, planting, or sowing, since what distinguishes both paragraphs of article 669 is the knowledge or lack thereof of the land’s owner. The question to be answered is, then, what should be considered knowledge, or what does it mean that the activity has taken place with the knowledge and tolerance of the owner [*a ciencia y paciencia*]. If there was knowledge in accordance with the norm (that is, not a mere awareness, but at least an appearance, although not quite like the consent required to form a juridical act) it

<sup>23</sup> *W.J.L. con I. Municipalidad de Penco y otros* (2017).

<sup>24</sup> The rules on reciprocal service obligations are general in character, that being, for example, the case of the nullity of a contract according to articles 1687 and 1689 of the Chilean Civil Code, although the scope of said remission is discussed in the case of resolution; see MOMBERG URIBE & PIZARRO WILSON (2018), pp. 329-360. If the defeated possessor is in bad faith, said possessor is sanctioned and shall be liable for the deterioration suffered by the thing due to her deed of fault, which has an obvious compensatory character; PINOCHET OLAVE & CONCHA MACHUCA (2015), pp. 144-150. Furthermore, the defeated possessor shall not have the right to be paid for the useful improvements, following paragraph 1° of article 910, since that could propitiate a malicious act to that end; see OROZCO MUÑOZ (2015), p. 207; ALONSO (1995); BECH SERRAT (2015), p. 304; BASOZÁBAL ARRUE (1998), p. 322.

<sup>25</sup> Good faith moderates the liability of the defeated possessor regarding the caused damages and allows her to keep the fruits she obtained before responding to the claim, alongside acknowledging the right to obtain reimbursement of the useful improvements and that, consequently, they must subsist at the time of bringing the action; see OROZCO MUÑOZ (2015), p. 205; BECH SERRAT (2015), p. 447.

<sup>26</sup> ATRIA LEMAITRE (2004), p. 22.

<sup>27</sup> BECH SERRAT (2015), p. 191.

<sup>28</sup> BECH SERRAT (2015), pp. 198-199.

<sup>29</sup> ATRIA LEMAITRE (2004), pp. 22-24.

shall be necessary to subsume the facts of the case under paragraph 2<sup>nd</sup> of article 669. Otherwise, the first paragraph shall be applicable.<sup>30</sup>

Paragraph 1<sup>st</sup> of article 669 poses nevertheless a difficulty: its location in the Civil Code. In fact, it is in a sense problematic to consider it concerning accession. The reason for this is that the scope of operation of this mode of acquiring ownership is usually restricted nowadays.<sup>31</sup> Regarding the studied paragraph this is problematic for two reasons: firstly, because of the exceptional circumstance of granting the owner of the land the alternative right of *appropriating* or obligating to pay the *just price*; and, secondly, because the owner of the land when opting for demanding the just price of the land situates herself in an hypothesis in which is argued whether it is a reversed accession,<sup>32</sup> or only a form of alienation that operates through a forced sale. Concerning the one who sowed on third-party ground, the alternative right offered in the paragraph 1<sup>o</sup> of article 669 entails making available to the owner of the land the lease of it plus compensation of damages, which seems a more equitable solution for the parties.

## II. WHO IS THE OWNER OF THE THING

Since the factual hypothesis of paragraph 1 of article 669 rises the issue of concurrence of entitlements, namely the title of the owner of the land who has suffered a disturbance of her ownership,<sup>33</sup> and the title of the defeated possessor who built, planted, or sowed on third-party land, it is precise solving who acquires ownership of these improvements and how, since the norm requires a positive intention on part of the land's owner of recovering possession by exercising, for example, a restitutionary claim of possessory character, the *precario* action, or even by unlawful actions.<sup>34</sup>

With regard to the concurrence of entitlement in this normative conflict, as previously indicated, the studied paragraph is located among the norms pursuant accession.<sup>35</sup> Thus, even though in principle it would seem correct to assert that the attached thing is owned by the owner of the land,<sup>36</sup> this requires certain specification.<sup>37</sup>

It is usually argued that the paragraph 1<sup>st</sup> of article 669 represents an exception to article 643, which defines accession in general terms, for it establishes a double right of option in favor of the owner of the land. First, because the ground's owner, through exercising the

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<sup>30</sup> *Friopack Servicios Limitada con Banco de Chile S.A.* (2018), pars. 14<sup>th</sup> & 15<sup>th</sup>. See CORRAL TALCIANI (2018).

<sup>31</sup> DÍEZ PICAZO (1966), p. 833.

<sup>32</sup> PEÑAILILLO ARÉVALO (2019), pp. 725-731.

<sup>33</sup> PINO EMHART (2019a), p. 378.

<sup>34</sup> *M.Z.R. con P.A.M.* (2016). ATRIA LEMAITRE (2017).

<sup>35</sup> Concerning the contribution of Pothier and the modern understanding of accession as a mode of acquiring ownership, see DÍEZ PICAZO (1966), pp. 835-837. Regarding the historical background, the evolution for considering the accession as a mode of acquiring and the originality of Bello with regard to this institution, see LEITAO (2007), pp. 61-117.

<sup>36</sup> DÍEZ PICAZO (1966), pp. 841-842.

<sup>37</sup> *C.A.D. con J.H.C.* (2018), par. 7<sup>th</sup>.

option granted to her, “shall have the right to make its own the building, plantation or sowing” [“*tendrá el derecho de hacer suyo el edificio, plantación o sementera*”], expression which has unleashed a discussion regarding the automatic or deferred character of the accession; that said, in case of choosing the second option, namely the one of obligating the builder to pay the *just price* of the land plus the legal interests for all of the time she had it in her power, it is argued whether this is an hypothesis of reverse accession; and in the case of the one who sowed, to lease the land demanding alongside compensation for damages. And secondly, because the first part of the studied paragraph refers to the rules of Heading 4 of Title XII, Book II of the Chilean Civil Code, in which case, as indicated by paragraph 3<sup>rd</sup> of article 909, the owner of the land shall choose between the payment of the value at the moment of the restitution of the works that constitute the useful improvements (expenses), or alternatively, the payment of the increase of value experienced by the thing at the moment of restitution due to the improvements (improvement).<sup>38</sup>

Concerning the option of appropriating, the scholarly discussion regarding accession in paragraph 1<sup>st</sup> of article 669 is articulated around two positions: automatic or immediate accession and conditioned or deferred accession.

## 2.1 Automatic or Immediate Accession

Unlike the majority opinion which tends to recognize in the analyzed provision a form of conditioned accession, this due to the relevance given to the express wording of the provision contained in the legal text,<sup>39</sup> “shall have the right to make its own” [“*tendrá el derecho de hacer suyo*”], there are authors in both comparative and national law that problematize this and argue in favor of automatic accession. In the Spanish doctrine, for instance, Cerdeira asserts the thesis of an automatic accession, following the general rule of accession, so that the hypothesis of the builder constructing in third-party land would not constitute an exception. The arguments of this author for substantiating the thesis of automatic accession include dogmatic reasons, such as, on the basis of a systematic and historical interpretation, the studied norm should not be considered an exception, and therefore the accession takes place with the attachment of the materials and the reimbursement is merely a condition for handing over the land, not for acquiring ownership.<sup>40</sup> With respect to practical reasons, specially related to the consequences of keeping the separation of ownership, the author inquires about the state of affairs before the right of choice is exercised: “what happens (...) while the owner of the principal makes a decision and then, once the decision has been made, finally the acceded is paid?”<sup>41</sup>

<sup>38</sup> Related to the option accorded by paragraph 3<sup>o</sup> of article 909, it is necessary to distinguish between expenses and improvements; the relevancy of differentiating both concepts is that expenses, in order to be reimbursed, have to be considered useful for the owner of the land, or for whoever is in her position. BECH SERRAT (2015), pp. 194, 568-573; OROZCO MUÑOZ (2015), pp. 262-263; ABELIUK MANASEVICH (2014), p. 231. *R.G.S.G. con Corte de Apelaciones de Santiago* (2008).

<sup>39</sup> CERDEIRA BRAVO DE MANSILLA (2012), pp. 50-53.

<sup>40</sup> CERDEIRA BRAVO DE MANSILLA (2012), pp. 53-67.

<sup>41</sup> CERDEIRA BRAVO DE MANSILLA (2012), p. 68.

In fact, the deferred accession thesis generates uncertainty and problems with respect to the accession: this, by keeping existent both the titularities of the builder and the owner of the land,<sup>42</sup> so that not even the necessary requirements for the *rei vindicatio* of their respective ownerships are present. The former does not happen when it comes to the second option offered by the norm in favor of the ground's owner, that is, obligating to pay the *just price*, since here is the builder who must restitute the value of the principal thing,<sup>43</sup> or in the hypothesis of the sower, who shall pay the rent allowed by law together with compensating damages.

In the national doctrine, the automatic accession theory has been argued by Claro Solar<sup>44</sup> and more recently addressed by Atria and González. Atria asserts that the owner of the land owns the constructions since the moment in which “the building attaches permanently to the ground”,<sup>45</sup> for that reason, the exercise of the option granted by the norm makes possible for the owner of the land to recover the use and enjoyment of the latter.<sup>46</sup> On his part, Gonzalez argues that the acquisition of ownership operates automatically, since accession, more than a mode of acquiring ownership, represents a way of losing it; hence, the displacement of ownership takes place at the moment on which the materials get attached.<sup>47</sup>

Then, adhering to this thesis, it would seem appropriate to differentiate between ownership acquisition, which operates according to the general rule of accession, that is, at the time of the attachment of the materials by the one who constructs, plants or sows according to the principle *superfices solo cedit*, and the reimbursement owed in case the option pursuant to which the owner of the land decides to appropriate, since what takes place with this is that the owner of the ground comes into possession of the improvements, whereby said reimbursement operates according to the restitutionary logic of the reciprocal service obligations with regard to the defeated possessor that is in good faith.

As to the second option established on the norm in favor of the owner of the land, through the forced sale the ownership –of the land to which the improvement made by who built or planted acceded– is transferred and handed over. In this case, the value of the improvement should not be included in the sale price of the land, in order to avoid an unlawful enrichment. However, it remains the question relative to whether the builder can refuse to acquire the land. Since paragraph 1<sup>st</sup> of article 669 formulates the right of option in favor of the owner of the land, inasmuch as she chooses this alternative, the builder should not refuse, even being able to be represented by the judge, as indicated by article 532 of the Chilean Code of Civil Procedure pursuant to obligations of doing. Nevertheless, in case the builder abandons the improvements and does not reclaim her reimbursement, it may be understood that she renounces an action accorded in her favor;<sup>48</sup> yet, if the improvements

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<sup>42</sup> ALONSO PÉREZ (2001), pp. 5-6.

<sup>43</sup> BECH SERRAT (2015), pp. 196-197.

<sup>44</sup> CLARO SOLAR (1979), p. 232.

<sup>45</sup> ATRIA LEMAITRE (2004), p. 29.

<sup>46</sup> ATRIA LEMAITRE (2004), p. 28; PINO EMHART (2019a), p. 384.

<sup>47</sup> GONZÁLEZ GONZÁLEZ (2017), pp. 235-236.

<sup>48</sup> ALONSO PÉREZ (2001), p. 10.

are not useful, even though the builder renounces, she should remain subjected to compensation of damages caused by the act of intrusion, according to the general rules.

## 2.2 Conditioned of Deferred Accession

Conversely, there are those who assert that the accession would be deferred<sup>49</sup> until the corresponding reimbursement in favor of the defeated possessor takes place, this, given the terms used in the first part of the studied paragraph, “shall have the right to make its own”, which seem to indicate that accession does not operate in an automatic, but rather in a deferred, fashion. Linked to this, according to the Chilean doctrine the hypothesis of the one who builds, plants or sows in third-party land, as pointed out by Ramos Pazos, would constitute a special norm in relation to the general rule of article 643, the express wording of the law being decisive for this understanding. Thus, an important sector of the Chilean doctrine agrees with Ramos Pazos when he affirms that, for the very same reason, the acquisition of the materials and the transfer of ownership cannot be asserted by the sole fact of the attachment of materials to the owner’s land.<sup>50</sup> Therefore, they reaffirm that the accession operates under the condition that the owner of the land makes the payment,<sup>51</sup> this being the majority doctrinal position both in Chile and in comparative law, thesis which is also followed by the national judicial jurisprudence.<sup>52</sup>

Due to the foregoing, there are those that even argue that the mode in which the owner of the land acquires ownership of the materials in this case is *traditio* (delivery) rather than accession. Contrarywise, Ramos Pazos asserts that, in fact, although this doubtless is a hypothesis of accession, in this case this is subjected to the condition that the owner of the ground reimburses the improvements.<sup>53</sup>

Because of this, in relation with the moment in which the owner of the land becomes owner of the edification, plantation, or sow, this would take place at the moment in which the owner of the land exercises the right of option accorded in her favor,<sup>54</sup> in case she decides to appropriate what was built, whereas the builder hitherto remains as the owner of the materials.<sup>55</sup> Therefore, an *actio rei vindicatio* should not prosper as long as the expense or value of the improvement is not reimbursed,<sup>56</sup> since the builder retains the ownership of the edification and, also, because the owner could very well choose the second alternative, namely the one of alienating, thus forcing the defeated possessor to buy.

<sup>49</sup> It is said that accession is deferred if it generates a right of option, so that only the exercise of said option consolidates the accession; see DÍEZ PICAZO (1966), p. 843. *C.A.D. con J.H.C.* (2018).

<sup>50</sup> RAMOS PAZOS (1985), pp. 141-142.

<sup>51</sup> DÍEZ PICAZO (1966), pp. 851-852.

<sup>52</sup> *J.L.M.S. y otros con Serviu X Región* (2018), par. 10<sup>th</sup>.

<sup>53</sup> RAMOS PAZOS (1985), p. 145.

<sup>54</sup> BECH SERRAT (2015), p. 193.

<sup>55</sup> RAMOS PAZOS (1985), pp. 144-145.

<sup>56</sup> BECH SERRAT (2015), p. 194.

Regarding the hypothesis of making its own, if the deferred accession thesis is asserted, exercising the option means that the owner of the land manifests her will and thereby accepts the conveyance of the ownership of the edification, plantation, or sow,<sup>57</sup> thus consolidating the accession, with the obligation for the owner of the land to reimburse the improvements, in order to avoid an unjust enrichment. Even though a restitutionary obligation does not begin to exist as long as the owner of the land does not decide to appropriate the improvements, remains to be settled whether it is possible to bring action directly, that is, whether the builder could force this lack of determination and demand that the owner of the land exercises the right of option accorded in her favor,<sup>58</sup> although the decision of the Court of Appeals of Concepcion form October 26<sup>th</sup>, 1983 denied this possibility.<sup>59</sup>

Moreover, in case the owner of the land does not accept the imposed enrichment and opts for obligating the one who built or planted to pay the *just price*, that is, the forced sale, in the perspective of the deferred accession theory this would imply that, having rejected the enrichment imposed by the builder, as indicated by Peñailillo, the accession takes place in favor of the owner of the construction, conditioned by the greater value or importance of the construction.

Therefore, the defeated possessor may exercise the right of retention,<sup>60</sup> as long as the reimbursement of the expense or improvement does not take place.<sup>61</sup> Consequently, two property rights subsist, even though in practical terms this would not bear relevance for the national system of property registration, since in Chile the separation of ownership is not admitted when it comes to registration in the Real State Register [*Conservador de Bienes Raíces*]. Likewise, the right of retention becomes superfluous, since, subsisting the entitlement of the owner over the land and that of the builder over the edification, the latter retains what is hers, all of which weakens the case for the deferred accession theory.

### 2.3 Reversed Accession

As previously stated, the studied norm focusses on the owner of the land,<sup>62</sup> to whom a right of option is granted, pursuant to which the owner may choose either to *make its own* what was built, or force to pay the *just price* for the land; this second option is known as reversed accession, since it reverses the rule of the right of option and imposes the acquisition upon the invading builder, thus having to acquire the land.

In relation to the issue of whether this is an hypothesis of reverse accession, specially developed by the Spanish dogmatic for the case of extra-limited accession,<sup>63</sup> it is pertinent to ask where does the acquisition originates, either in the force of attraction of the principal

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<sup>57</sup> BECH (2015), p. 32.

<sup>58</sup> *C.A.D. con J.H.C.* (2018), par. 6<sup>th</sup>.

<sup>59</sup> Corte de Apelaciones de Concepción, Rol N° 616-83, quoted in RAMOS PAZOS (1985) p. 146.

<sup>60</sup> ALONSO PÉREZ (2001), p. 4.

<sup>61</sup> BECH SERRAT (2015), p. 175.

<sup>62</sup> BECH SERRAT (2015), p. 193; DÍEZ PICAZO (1966), p. 840.

<sup>63</sup> CERDEIRA BRAVO DE MANSILLA (2011), pp. 3064-3071.

thing automatically operating *ex lege*,<sup>64</sup> in this case the construction or plantation, or in the juridical act of the builder who is forced to buy the land.<sup>65</sup> The latter appears to be the reason why, in this case, the thesis of a reversed accession seems difficult to accept, since it emanates from the unilateral act of the owner of the land who can release herself from the accession by transferring the land, although without the value of the edification or plantation in order to avoid an unlawful enrichment.<sup>66</sup> So, according to Alonso Pérez there is no reversed accession, since it does not operate automatically through the *vis atractiva* of the principal thing, but rather by a juridical act: the forced purchase.<sup>67</sup> With regard to this, Bech indicates that “the system allows to liquidate as it were an hypothesis of enrichment by the owner of the accessory thing, making her restitute the value of the principal thing”.<sup>68</sup>

Even though in the case of construction the ground always constitutes the principal matter,<sup>69</sup> the principle *superficiis solo cedit* is an expression of the more generic principle *accessorium sequitur principale*, which is why, in order to establish an hypothesis of reversed accession it is important to distinguish what is accessory and what principal, determining that, in this case, the attraction is exerted by the edification over the land.<sup>70</sup> Because of this, Peñailillo argues that there is no reversed accession in the studied norm, since among the principles that regulate it the accessory principle has to be considered, thus remaining as an hypothesis of accession so long as the building is more important or valuable than the land.<sup>71</sup>

Thus, while sustaining a coherent approach in relation to the automatic character of the accession according to the general rules, it seems complex to assert the thesis of reversed accession under the condition of the greater value of the edification or the lesser value of the land, considering that the norm does not condition in this regard. Therefore, it seems that what takes place is only a forced sale of the land in which, in order to avoid an unlawful enrichment, the value of the edification or that of the plantation must be subtracted.

Furthermore, as previously stated, the first part of paragraph 1° of article 669 as well as granting the owner the option of making its own what was built, planted, or sowed, accords a right of reimbursement in favor of the defeated possessor who was in good faith. The adequate understanding of this right involves considering the juridical nature of the action granted to the defeated possessor, since the consequence of its legal qualification has effects over the prescription of the action as well as the titularity, among others. And even though there is agreement that this is a restitutionary reimbursement, this is not sufficiently asserted, what generates difficulties at the judiciary level.

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<sup>64</sup> ALONSO PÉREZ (2001), pp. 9-10.

<sup>65</sup> BECH SERRAT (2015), p. 193.

<sup>66</sup> ALONSO PÉREZ (2001), pp. 9-10.

<sup>67</sup> ALONSO PÉREZ (2001), pp. 4-5.

<sup>68</sup> BECH SERRAT (2015), pp. 196, 614-623.

<sup>69</sup> SAN MARTÍN NEIRA (2016), pp. 152-154.

<sup>70</sup> CERDEIRA BRAVO DE MANSILLA (2011), pp. 3064-3071.

<sup>71</sup> PEÑAILILLO ARÉVALO (2019), p. 728.

### III. THE PROBLEM OF THE LEGAL NATURE OF THE ACTION

The factual hypothesis regulated by the studied norm concerns the owner of the land that suffers an intrusion in his ownership right due to a disturbance of the use and enjoyment to which she is entitled as owner. Therefore, the reimbursement obligation originates in the transgression of a right in rem<sup>72</sup> and paradoxically falls on the one who has suffered said disturbance, which –as pointed out by Atria– is strangely anomalous.<sup>73</sup>

Thus, as long as she wants to appropriate what was built, planted, or sowed, she shall reimburse the defeated possessor through *compensations* contemplated in reference to heading 4 of Title XII, which regulates the *actio rei vindicatio* [“*De la Reivindicación*”]. This way, as long as this does not take place, the builder should keep the ownership of the materials,<sup>74</sup> and the owner of the land would not acquire them,<sup>75</sup> what collides with the concept of accession, as previously indicated.

That said, in relation to the concept of *compensations* used in the studied paragraph, it is pertinent to ask for its function: does it only involve a referral to the norms on reciprocal service obligations, or does it seek to imprint a compensatory character to the reimbursement by which the owner of the land may *make its own* these improvements, implying that these have been useful?<sup>76</sup> it is nevertheless hasty to conclude that said reimbursement is compensatory on the sole basis of the use of that concept. In effect, compensation would require objective or subjective imputation, so that the duty of compensation would be comprehensible.<sup>77</sup>

Then, deciphering whether the action established on paragraph 1<sup>st</sup> of article 669 has either a compensatory or restitutionary nature implies establishing whether we must consider the damage and its imputation, having then to return all the profits originated in the unlawful act, or, disregarding the latter, only the benefit obtained through the unduly property allocation is to be paid.<sup>78</sup>

In effect, it is relevant to establish the legal nature of the action since important practical effects regarding the configuration of both the obligation and the action follow from that determination. As Cerdeira indicates: “once the *natura iuris* is established, then it will be possible to establish the capacity and legitimation necessary for exercising that option, the term –if any– in which it may be exercised, and whether is only exercisable against the builder or also against possible third parties acquiring the building”.<sup>79</sup>

<sup>72</sup> CERDEIRA BRAVO DE MANSILLA (2012), p. 99.

<sup>73</sup> ATRIA LEMAITRE (2004), p. 24; CÉSPEDES MUÑOZ (2018), pp. 132-133.

<sup>74</sup> *D.D.R. con J.R.V.* (2016).

<sup>75</sup> RAMOS PAZOS (1985), p. 142; *A.L.S. con K.S.M. y otros* (2015).

<sup>76</sup> ALONSO PÉREZ (2001), p. 3.

<sup>77</sup> CÉSPEDES MUÑOZ (2018), pp. 134-135.

<sup>78</sup> PINO EMHART (2019a), pp. 379-380; *J.L.M.S. y otros con Serviu X Región* (2018).

<sup>79</sup> CERDEIRA BRAVO DE MANSILLA (2012), p. 49; OROZCO MUÑOZ (2015), pp. 350-351.

So, if it were a compensatory reimbursement, passive legitimation corresponds to whom caused the damages, and active legitimation, to whom suffered said damages. Conversely, if it is a restitutory reimbursement, passive legitimation corresponds to the owner that acquired the improvements, and active legitimation, to the author of the improvements, provided that the requirements of having built, planted, or sowed in third-party land; that the owner was unaware and that the improvements subsist at the moment of bringing the action, are met.

Concerning prescription, the compensatory action prescribes in the term of four years according to article 2332; in contrast, the restitutory action prescribes in accordance with the general rule in a term of five years as established on article 2515.

Determining the nature of the action is also relevant regarding the transmissibility of the action. That, because if it is compensatory in nature, the active party may cede the action, whereas the passive party may not, for the part liable to pay damages shall always be the one who caused them.<sup>80</sup> Moreover, in order to assert the restitutory character of the action accorded by paragraph 1° it seems relevant to address the following considerations.

### 3.1 The System Established on Articles 668-669

First, articles 668 and 669 form a system with two opposite hypotheses. In the case of the owner of the land that constructs with materials belonging to a third-party, according to article 668, once the accession by attachment of the materials has been verified, she remains nevertheless obliged to pay the just price of the materials or to deliver others of the same nature, quality, and aptitude, thus compensating the loss suffered by the owner of the materials. Therefore, said reimbursements are of a clearly restitutory character.

On the other hand, paragraph 2<sup>nd</sup> of article 668 distinguishes compensatory effects, in case there was not just cause of error on part of the owner of the land, by indicating that she shall be obliged to compensate damages caused by the unlawful act.<sup>81</sup> The norm adds that, if she acted knowingly, she shall be subjected to the respective criminal action for that intentional act.<sup>82</sup> Therefore, in this case, the legislator has clearly distinguish the restitutory action from the compensatory one, imputing the latter in accordance to the general rules, and even considers the feasibility of a concurrence of actions, providing it does not involve double payment, obviously.

Conversely, concerning the reimbursement action established on paragraph 1° of article 669 no distinction whatsoever has been drawn with regard to the restitutory or compensatory character of the norm.<sup>83</sup> Likewise, considering the grammatical and systematic

<sup>80</sup> CERDEIRA BRAVO DE MANSILLA (2012), p. 101.

<sup>81</sup> PINO EMHART (2019), p. 382.

<sup>82</sup> Regarding the difficulties presented by the historical development of the norm, Soza considers the penal nature of the *Actio de tigno iuncto*, while adhering to the opinion asserting that in the time of Justinian the action transformed itself in a compensation action. See SOZA RIED (2019), pp. 377-378.

<sup>83</sup> With reference to Papinian D.6,1,48, based on equity, the only form of reclaiming a reimbursement is through the *exceptio doli* in favor of the good faith possessor. See SOZA RIED (2019), pp. 382-383.

elements of the studied paragraph, it is not possible to deduce that it has a compensatory character on the sole basis of the expression compensations [“*indemnizaciones*”] that it employs, since it does not mention any damages that could be imputed to the owner of the land and because the circumstance of knowing and not having opposed to the intrusion by the one who built, planted, or sowed, would situate the owner of the land in the hypothesis of paragraph 2<sup>nd</sup> of article 669, pursuant to which her negligence is indeed sanctioned, since an intentional omission could have occurred, or at least tacit consent could be presumed.<sup>84</sup> The studied paragraph only formulates, in the case of the one who sowed in third-party ground, a compensatory obligation together with the rent for the use of the land, as part of the second option accorded to the owner of the land.

### 3.2 Feasibility of a Contractual or Extra-contractual Compensation

Secondly, in relation to the possibility of deducing the compensatory nature from the option by which the owner would like to make its own the improvements, it is relevant to consider the reason for it. Would it have the meaning of compensation for tort damages? If that is the case, it must be pointed out that the one who committed an unlawful act of intrusion into the right of a third-party is the constructor, which is why said understanding does not appear to be feasible, since the obligation to compensate in this case is to be fulfilled by the owner of the invaded land. In any case, could the action established on paragraph 1<sup>o</sup> of article 699 be subsumed under the liability systems contemplated in Chilean law? With regard to the contractual liability system, it does not proceed since there is no agreement whatsoever between the owner of the land and the builder. Said possibility, as previously stated, is discussed in the literature as well as in jurisprudence regarding paragraph 2<sup>o</sup> of article 669, provided that the constructor built with the knowledge and tolerance of the owner of the land, which could be interpreted as tacit consent or acquiescence of her upon the work of the builder.<sup>85</sup>

As for the appropriateness of applying to the studied paragraph the system of extra-contractual liability which, according to articles 2314 and 2329, imposes the obligation to compensate upon the one who committed tort thus causing damages to a third-party, it must be pointed out that the Chilean civil legislation contemplates, not exclusively but mainly, a system of fault-based liability. Therefore, the requisites considered necessary by the doctrine and the jurisprudence for establishing the appropriateness of the action for damages, must be met. Among them, damage and fault are to be emphasized. As argued by Barros: “the principle of fault-based liability is basis and limit of liability: as a general rule, *dolus* and negligence generate civil liability and, in contrast, there is liability only if the agent incurs in *dolus* or negligence.”<sup>86</sup>

In respect thereof, in order to give way to extra-contractual liability there should be an unlawful act on part of the owner of the land that would justify the obligation to

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<sup>84</sup> ATRIA LEMAITRE (2004), pp. 24-25.

<sup>85</sup> *Friopack Servicios Limitada con Banco de Chile S.A.* (2018).

<sup>86</sup> BARROS BOURIE (2020), p. 66.

compensate for the unjustly acquired earnings, which is not appropriate according to paragraph 1° of article 669. In a different sense, the restitution contemplated in the norm could qualify as a compensation by sacrifice [*“por sacrificio”*],<sup>87</sup> in order to resolve the conflict between liberty of action and the protection of certain legally protected interests,<sup>88</sup> such as property; this way, being the property of the owner of the land preponderant, the reimbursement compensates the sacrifice of the builder, who loses the ownership of the materials when the accession takes place. Nonetheless, such use of the concept of compensation differs from the one relative to civil liability in that the action for damages requires negligence or *dolus*,<sup>89</sup> since the reason underlying the compensatory action is to repair the damages caused provided no liability exemption causes concur.

On the other hand, the reimbursement obligation contemplated on paragraph 1° of article 669, although is imposed on the owner of the enriched land, is subjected to the manifestation of will on her part, even by unlawful actions,<sup>90</sup> aimed at recovering the land held by the builder and opts for the alternative of *making its own*, having to reimburse the improvements in accordance to the legal provisions, in which case the defeated possessor shall be able to claim the payment once the obligation becomes due, and as long as the action has not prescribed pursuant to the general rules.<sup>91</sup>

### 3.3 The Meaning of Reimbursement

Considering that the unlawful act is constituted by the intrusion of the one who builds, plants, or sows in third-party land<sup>92</sup> and the damages are suffered by the owner of the land, a different logic flows from the legal text: the purpose of the action is not to repair the caused damages, but to avoid an unlawful enrichment.<sup>93</sup> Thus, the reimbursement due to unjustified enrichment must focus on the one who got richer,<sup>94</sup> not on the impoverished one, which is not always clear at a jurisprudential level; unlike an action for damages in which the amount of the damages determines compensation, regarding unlawful enrichment, Peñailillo indicates: “we are in the presence of a property allocation and of advantages according to the legal system and of an unduly enjoyment of these (...); it is the obligation of restituting imposed upon whom has not reason to retain.”<sup>95</sup>

In this sense, Álvarez Caperochipi argues that is a mistake to understand impoverishment as the opposite of enrichment, reason why it must not be required a

<sup>87</sup> CÉSPEDES MUÑOZ (2019a), pp. 1043-1050.

<sup>88</sup> CÉSPEDES MUÑOZ (2018), p. 131.

<sup>89</sup> PEÑAILILLO ARÉVALO (1996), p. 29; CÉSPEDES MUÑOZ (2019a), p. 1045.

<sup>90</sup> *M.Z.R. con P.A.M.* (2016).

<sup>91</sup> *D.D.R. con J.R.V.* (2016).

<sup>92</sup> BARROS BOURIE (2009), pp. 22-26.

<sup>93</sup> CERDEIRA BRAVO DE MANSILLA (2012), p. 99; CÉSPEDES MUÑOZ (2019a) pp. 1051-1052; *J.L.M.S. y otros con Serviu X Región* (2018).

<sup>94</sup> PEÑAILILLO ARÉVALO (1996), p. 29.

<sup>95</sup> PEÑAILILLO ARÉVALO (1996), p. 15; *J.L.M.S. y otros con Serviu X Región* (2018).

correlative impoverishment in order to claim the restitutionary reimbursement, since the purpose is not to compensate the impoverished party, but to recover the unduly allocated enrichment;<sup>96</sup> and it should not be necessary to consider elements of imputation, namely negligence or *dolus*,<sup>97</sup> since it is not a reimbursement imputable to liability. Hence, even though the norm uses the concept of compensations [“*indemnizaciones*”] in reference to the rules on defeated possessors, it is to be interpreted in terms of restitution.<sup>98</sup>

That way, the norm seeks to balance the rights of the owner of the land and those of the one who constructs, plants, or sows.<sup>99</sup> Thus, the conflict of claims arisen from the intrusion in third-party property<sup>100</sup> is solved indirectly, that is, the ownership of the construction, plantation or sow shall be acquired as a result of the options accorded by the norm in favor or the owner of the land, provided that the enrichment is effective,<sup>101</sup> certain and current.<sup>102</sup> Consequently, the action accorded by paragraph 1<sup>st</sup> of article 669 is based on unjustified enrichment,<sup>103</sup> therefore being restitutory in nature.<sup>104</sup> In relation to this, Basozábal refers to a “restitutionary perspective<sup>105</sup> by which the party effectively affected by the property allocation is compensated,<sup>106</sup> whereby the impoverishment should not be relevant neither as a requirement for the action nor as a limit for the reimbursement,<sup>107</sup> since, having a property allocation taken place, the principle of unjustified enrichment imposes the obligation of restituting.<sup>108</sup>

Since the restitutionary character of the action established on paragraph 1<sup>st</sup> has not been emphasized enough, the aforementioned is sometimes complex in the judicial practice; in *J.L.M.S. y otros con Serviu X Región* this very problem is discussed, thus including the problem of the nature of the action and what it should entail.<sup>109</sup> In the judgement of the Supreme Court the action granted by the Decree-Law N° 2.186 from 1978 is inadequate as a means for the complaining part to claim her rights, so that the reimbursement action –subsidiarily–

<sup>96</sup> Cited in BECH SERRAT (2015), pp. 470-471; BARROS BOURIE (2009), pp. 26-30.

<sup>97</sup> PEÑAILILLO ARÉVALO (1996), p. 29.

<sup>98</sup> OROZCO MUÑOZ (2015), p. 254.

<sup>99</sup> BASOZÁBAL ARRUE (1998), pp. 267-268.

<sup>100</sup> DÍEZ PICAZO (1966), pp. 837-838.

<sup>101</sup> BECH SERRAT (2015), p. 447.

<sup>102</sup> BECH SERRAT (2015), p. 458.

<sup>103</sup> ALONSO PÉREZ (2001), p. 7.

<sup>104</sup> PINOCHET OLAVE & CONCHA MACHUCA, (2015) p. 148; BARROS (2020), p. 1038.

<sup>105</sup> BASOZÁBAL ARRUE (1998), p. 268; BECH SERRAT (2015), p. 190.

<sup>106</sup> BECH SERRAT (2015), p. 464.

<sup>107</sup> BASOZÁBAL ARRUE (1998), p. 334.

<sup>108</sup> PEÑAILILLO ARÉVALO (1996), pp. 13, 28; *J. L.M.S. y otros con Serviu X Región* (2018), par. 9<sup>th</sup>.

<sup>109</sup> *J. L.M.S. y otros con Serviu X Región* (2018), par. 8<sup>th</sup>. Both parties lodged a writ of cassation against the substitution sentence dictated by the Court of Appeals of Puerto Montt, which rejected the lawsuit for damages due to administrative fault and extra-contractual liability filed against the Serviu Región de los Lagos, and that accepted the action of unjustified enrichment, ordering only the restitution of the obtained advantages, therefore, without adjustment or interests. Regarding the legal technique used in that decision for accepting the *in rem verso* action and its problematic character see CÉSPEDES MUÑOZ (2019b) pp. 4-5.

was to be accepted; the decision adds that the reimbursement was to include in this case both adjustment and interests.<sup>110</sup>

In light of this decision, that the restitution should be integral is not always evident or easy to determine. Thus, when considering the need to estimate the value of the obligation arising for the owner of land who wants to appropriate what was built, planted, or sowed, the emphasis should switch from the amount of the impoverishment to the effective amount of the enrichment, in order not to apply a compensatory logic to the restitutory reimbursement. Moreover, with regard to adjustments and interests it is appropriate to apply general rules, so the adjustment is due from the moment in which the obligation acquires absolute certainty, whereas the interests once the obligor is put on default.

### 3.4 The Normative Referral

What is then the reason for the use of the concept of compensations? The concept requires to be interpreted only in terms of restitution for unjustified enrichment,<sup>111</sup> since it only aims at correcting a property allocation devoid of cause and not to compensate damages. Moreover, according to Cerdeira, “the expression is broad, or rather improper, because it does not refer to the compensation of a damage, but to the compensation or the reinstatement of the value of the accessory good acquired by accession that its former owner loses”.<sup>112</sup>

In virtue of the foregoing, the use of the concept of *compensation* in paragraph 1<sup>st</sup> of article 669 cannot give way to characterize the action it establishes as compensatory, being the use of the concept justified rather as the use of a legal technique on part of Bello, namely the referral,<sup>113</sup> in virtue of which unnecessary duplication of legal norms in the Civil Code is avoided, which “doubtlessly obeys the analogy that exists between, on one hand, the situation created when the owner of the ground decides to acquire the work, sow or plantation and, on the other hand, the one of liquidating a possessory situation”.<sup>114</sup> Even more significant, because the underlying reason of the norm is to prevent an unduly property allocation by reimbursing the improvement carried out by the defeated possessor.

<sup>110</sup> *J.L.M.S. y otros con Serviu X Región* (2018), par. 21<sup>st</sup>. In a divided decision, some ministers of the Court indicate that the accepted action and in whose virtue the defendant is sentenced, being restitutionary in nature, cannot include other elements, which shows a limited understanding that is focused on the effective impoverishment, thus following the logic of a compensatory reimbursement, whose limit is determined by the damage.

<sup>111</sup> BECH SERRAT (2015), p. 190.

<sup>112</sup> CERDEIRA BRAVO DE MANSILLA (2012), p. 96.

<sup>113</sup> BARRIENTOS GRANDON (2017), pp. 83-84.

<sup>114</sup> BECH SERRAT (2015), p. 195.

#### IV. UNJUSTIFIED ENRICHMENT

As previously stated, the action of reimbursement contemplated by paragraph 1° of article 669 is predicated on the equity principle<sup>115</sup> and unjustified enrichment,<sup>116</sup> currently considered a general principle of law which,<sup>117</sup> even though is not regulated in the Chilean Civil Code,<sup>118</sup> inspires some of its institutions,<sup>119</sup> for instance, reciprocal service obligations; for that reason, the action seeks to avoid the enrichment at the expense of others when there is no legal cause for it,<sup>120</sup> in this case aiming at the restoration of the altered property situation.<sup>121</sup>

As shown by *J.L.M.S. y otros con Serviu X Región*, is relevant to ask what the restitution should include. As a general rule, if it is a transferable improvement, a restitution *in natura* can be claimed,<sup>122</sup> in which case valuation problems do not arise.<sup>123</sup> The former is possible provided that the improvement is not yet attached to the ground,<sup>124</sup> as indicates, for instance, the last paragraph of article 668. But when an accession by attachment of the elements to the ground has operated, the construction becomes non-transferable,<sup>125</sup> in which case is appropriate to value it applying objective and subjective criteria, in order to reconstitute its monetary value.<sup>126</sup> As indicated by Orozco, an objective valuation can be established on the basis of the market value that corresponds to the use, good, or service obtained,<sup>127</sup> of course, at the time in which the enrichment took place,<sup>128</sup> whereas a subjective valuation can consist in establishing whether the improvement generates profit or benefit for the enriched party.<sup>129</sup> Barros, in line with this, indicates that the restitution should entail “above all, the expenses

<sup>115</sup> PEÑAILILLO ARÉVALO (1996), p. 12.

<sup>116</sup> The notion can be traced to the expression *becoming richer*, which in its Latin form can usually be found in the Roman sources such as *locupletior sit* and *locupletior esse* or *locupletior factus est*. So, for example, in the Digest or in the Codex. Nevertheless, its reception and later evolution developed within the framework that permeated the *Ius Commune*, elaborated by European jurists, in which it is necessary to distinguish among typical hypotheses, the *regula iuris* and the *condictiones*. Cfr. BARRIENTOS GRANDON (2017), pp. 51-53; PINO EMHART (2019b), pp. 470-474.

<sup>117</sup> PEÑAILILLO ARÉVALO (1996), pp. 9, 34; ABELIUK MANASEVICH (2014), p. 224.

<sup>118</sup> ABELIUK MANASEVICH (2014), p. 226; PEÑAILILLO ARÉVALO (1996), pp. 32-34.

<sup>119</sup> LETELIER CIBIÉ (2018), p. 650.

<sup>120</sup> *J.L.M.S. y otros con Serviu X Región* (2018).

<sup>121</sup> OROZCO MUÑOZ (2015), p. 252.

<sup>122</sup> MOMBERG URIBE & PIZARRO WILSON (2018), pp. 340-343.

<sup>123</sup> OROZCO MUÑOZ (2015), p. 272.

<sup>124</sup> OROZCO MUÑOZ (2015), pp. 278-281.

<sup>125</sup> BECH SERRAT (2015), pp. 188-189.

<sup>126</sup> BECH SERRAT (2015), pp. 558, 561-563.

<sup>127</sup> OROZCO MUÑOZ (2015), p. 272.

<sup>128</sup> CERDEIRA BRAVO DE MANSILLA (2012), pp. 97-98; BECH SERRAT (2015), p. 453.

<sup>129</sup> OROZCO MUÑOZ (2015), pp. 275-278; BECH SERRAT (2015), pp. 539, 593-599.

that the defendant has saved by unduly using the goods of the complainant; after that, the net profit generated by its use".<sup>130</sup>

Even though the studied norm seeks to balance the claims of both parties, the obligation of reimbursement imposed upon the owner of the land pursuant to the first option granted to her, may constitute an excessive burden if, for example, the owner of the land did not contemplate carrying out such improvements, or if reimbursing entails a levy, making said reimbursement even impossible. Therefore, and because this is a hypothesis of imposed enrichment,<sup>131</sup> the second part of paragraph 1<sup>st</sup> of article exceptionally accords another option to the owner of the land, namely, to force the builder to pay the *just price* of the land plus legal interest for the time it remained in her power. That said, the solution is not perfect, as previously indicated, since it could be the case that a sale is neither possible nor wanted.

Considering these inconveniences, the Spanish doctrine has started to argue in favor of a restitution in a broader sense, what should also stimulate the national doctrinal discussion, thus being possible solutions "the lease or ownership transference of the thing to the subject who carries out the improvement",<sup>132</sup> as well as forming a community between the builder and the owner of the land, in proportion of the value of their contributions.

Among other traits of the action, the reimbursement obligation accorded to the defendant stands out. It is an obligation of giving that usually consists in giving an amount of money.<sup>133</sup> The action is personal,<sup>134</sup> that is, the builder can bring it against the owner or her heirs, and patrimonial. Therefore, it is possible to renounce the action, as well as transmit it or cede it.<sup>135</sup> With regard to prescription, the normal term is of five years from the moment in which it is possible to claim compensation, which means that the fact that the improvements have been carried out perhaps a long time ago is not an obstacle to the action.<sup>136</sup>

For visualizing other features of this restitutionary action,<sup>137</sup> the Supreme Court decision in *W.J.L. con I. Municipalidad de Penco y otros* is illustrative.<sup>138</sup> In the decision, among other things, the discussion regarding the titularity of the action and its subsidiary character is raised.

<sup>130</sup> BARROS BOURIE (2020), p. 1040.

<sup>131</sup> BASOZÁBAL ARRUE (1998), p. 300.

<sup>132</sup> BECH SERRAT (2015), pp. 541, 606, 626-628.

<sup>133</sup> PEÑAILILLO ARÉVALO (1996), pp. 28-29, 35.

<sup>134</sup> CERDEIRA BRAVO DE MANSILLA (2012), p. 100; OROZCO MUÑOZ (2015), p. 329.

<sup>135</sup> PEÑAILILLO ARÉVALO (1996), p. 37.

<sup>136</sup> *D.D.R. con J.R.V.* (2016).

<sup>137</sup> OROZCO MUÑOZ (2015), p. 261.

<sup>138</sup> The claimant lodged a writ of cassation against the Court of Appeals sentence that confirmed the first instance decision which rejected the action of undue payment and unjustified enrichment, so the Council against which the lawsuit was directed received on part of the State undue funds due to an expropriation act. *W.J.L. con I. Municipalidad de Penco y otros* (2017).

#### 4.1 Titularity of the Action

Regarding the titularity of the action of unjustified enrichment, the aforementioned decision indicates that it corresponds to the one who experienced an impoverishment,<sup>139</sup> but said titularity and rights must have been previously proven, or on trial, so it never was *decisorio litis*, which is why the Court could not take a position on this issue.<sup>140</sup>

Although the unjustified enrichment action may be lodged through a claim or counterclaim, without evidentiary limitation in relation to articles 1708 and 1709,<sup>141</sup> the special action established on paragraph 1<sup>st</sup> of article 669, supposes that the owner of the land exercises the right of option and decides to appropriate the edification, plantation, or sow.<sup>142</sup> This circumstance poses the already indicated problem of whether who built, planted, or sowed, can force the option of the owner of the land through a lawsuit. As pointed out, the answer given to this matter by the Concepcion Court of Appeals was negative, although for reasons of equity and legal certainty we consider that the builder should be able to force said option.<sup>143</sup>

Concerning passive legitimation, the reimbursement obligation corresponds to the owner of the land,<sup>144</sup> provided it has not been released from levies and burdens by executory expropriation decree.<sup>145</sup> Meanwhile, active legitimation,<sup>146</sup> following the traditional doctrine, corresponds to whom has been unjustly impoverished,<sup>147</sup> whereas from a modern perspective of the theory of unjustified enrichment, corresponds to whom has lost the property allocation or benefit to which she was entitled, thus having enriched a third party<sup>148</sup> without legal cause for it.<sup>149</sup>

#### 4.2 Subsidiary Character of the Action

With respect to the subsidiary character of the action of enrichment, the quoted sentence indicates that, if another action exists, it is not appropriate to accept the former; adding that, as a matter of fact, the procedural opportunity prescribed when the

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<sup>139</sup> ABELIUK MANASEVICH (2014), pp. 228-229.

<sup>140</sup> *W. J. L. con I. Municipalidad de Penco y otros* (2017).

<sup>141</sup> *C.A.D. con J.H.C.* (2018), 8<sup>th</sup> Paragraph.

<sup>142</sup> BASOZÁBAL ARRUE (1998), p. 333.

<sup>143</sup> ATRIA LEMAITRE (2004), p. 31.

<sup>144</sup> *D.D.R. con J.R.V.* (2016), par. 11<sup>th</sup>.

<sup>145</sup> With regard to this, it is worth remembering that expropriation, due to its liberating effect, is regarded as an originary mode of acquiring that operates in virtue of the law. Hence the expropriation procedure establishes in articles 20 and 23 of DL 2.186 that third parties may assert their rights provided these are grounded on an executory judicial sentence previous to the expropriation act. *O.C.L. con E.L.S.* (2011).

<sup>146</sup> *W. J. L. con I. Municipalidad de Penco y otros* (2017).

<sup>147</sup> ABELIUK MANASEVICH (2014), p. 228; PEÑAILILLO ARÉVALO (1996), pp. 20-24.

<sup>148</sup> OROZCO MUÑOZ (2015), p. 260.

<sup>149</sup> *W. J. L. con I. Municipalidad de Penco y otros* (2017).

expropriation decree becomes executory.<sup>150</sup> In fact, the action of unjustified enrichment is subsidiary in character,<sup>151</sup> that is, applicable in case there is no special rule,<sup>152</sup> and residual.<sup>153</sup> Therefore, in case the applicability requirements of the action established on paragraph 1<sup>st</sup> of article 669 fail, the unjustified enrichment action should not be accepted. Considering the accessory and special character of this action, it is discussed whether the circumstance of not exercising it in conjunction with the principal matter leads to the preclusion of this right. It has been understood in this manner by sectors of the doctrine<sup>154</sup> and jurisprudence.<sup>155</sup>

In the Spanish doctrinal field, the subsidiarity of the action is also affirmed, that is to say, that it is not appropriate if there is another action, arguing that such character derives from a general principle of law forbidding enrichment at the expense of others without a legal ground for it, and from the principle of specialty, so that it would not be appropriate, for example, if it is appropriate to apply the special rules of accession or possession.<sup>156</sup>

The former is problematic, since a concurrence with other actions is feasible, in which case an integrative approach regarding the actions should be sought, so that the right of restitution, without being discarded, could at least be used as support for the claimed action.<sup>157</sup> Moreover, because of the limitation implied by the former, the assertion of the non-subsidiary character of the unjustified enrichment action and the possibility of concurrence of actions becomes open for debate.<sup>158</sup>

In the Chilean doctrine Alberto Pino Emhart has argued that, since the national civil legislation does not expressly contemplate “the subsidiarity of restitutionary actions, unlike in the French or Italian law [...] the debate for determining whether the subsidiary character of such actions is justified or not, remains open”.<sup>159</sup> He propounds following the distinction between subsidiarity in a strong sense and subsidiarity in a weak sense, understanding that, in the first case, a typical norm regulated by the legislator being applicable, as it is the case regarding the studied norm, the restitutionary claim is not to be accepted, whereas in its weak sense it would only seek to “avoid the concurrence of actions,<sup>160</sup> the restitution action remaining thus available if the requirements of the special action are not met. Concerning the concurrence of a restitution action and an extra-contractual liability action, he argues

<sup>150</sup> *W.J.L. con I. Municipalidad de Penco y otros* (2017).

<sup>151</sup> ABELIUK MANASEVICH (2014), p. 230; PEÑAILILLO ARÉVALO (1996), pp. 24-27; CÉSPEDES MUÑOZ (2019b), pp. 4-5.

<sup>152</sup> *W.J.L. con I. Municipalidad de Penco y otros* (2017).

<sup>153</sup> OROZCO MUÑOZ (2015) p. 342; *J.L.M.S. y otros con Serviu X Región* (2018).

<sup>154</sup> BASOZÁBAL ARRUE (1998), p. 336.

<sup>155</sup> *A.L.S. con K.S.M. y otros* (2015).

<sup>156</sup> OROZCO MUÑOZ (2015), pp. 340-344; For deepen aspects of causation and action, see *A.F.A. con M.D.G.* (2001).

<sup>157</sup> BECH SERRAT (2015), p. 164.

<sup>158</sup> BECH SERRAT (2015), pp. 519-537.

<sup>159</sup> PINO EMHART (2019b), p. 466.

<sup>160</sup> PINO EMHART (2019b), p. 475.

that: “here the general rule should be a subsidiarity in a weak sense, in order to avoid the accumulation of actions that would involve a double payment for the complainant.”<sup>161</sup>

Finally, it is necessary to stress that the reimbursement action established on paragraph 1<sup>o</sup> of article 669 is a special restitutionary action, whose aim is to prevent an enrichment devoid of cause, therefore, it is important to refocus from impoverishment and damage, characteristics of a compensation-focused argumentation, to a view centered on the property allocation without cause; moreover, to develop the task of exploring ways to solve this issue that imply restitution in a broader sense. In what follows, some conclusions of the present work are offered.

## V. CONCLUSIONS

By way of conclusion, the following considerations are offered:

First, the use of the term *compensations* on paragraph 1<sup>o</sup> of article 669 does not imply that the reimbursement action it accords has a compensatory character, since its function is to normatively refer to the rules on reciprocal service obligations. Besides, the action itself cannot be based on damage or fault on part of the owner of the land, in which case the application of the system of tort liability could be justified, this is so because the owner of the land is who suffers the intrusion in her right through the action of the one who builds, plants, or sows.

On the other hand, as paragraph 1<sup>st</sup> of article 669 stands, the problem arises as to when the acquisition of ownership by the owner of the land takes place, that is, whether the accession operates immediately or it is deferred until the owner of the ground exercises the option. We agree with the more recent doctrine that argues in favor of immediate accession, and that is not appropriate to consider this norm as an exception to the general rule, since what the option and reimbursement allow is to obtain possession of the improvements, which already acceded from the time in which its attachment took place, this in light of the systematic understanding of the norm in relation to article 668 of the Civil Code and the restitutionary logic underlying the studied norm.

It is necessary to point out that the solution instituted by paragraph 1<sup>st</sup> of article 669 is not perfect. Although it establishes an option as a right in favor of the owner of the land, this can be explained due to the imposition of an obligation or right without the will of the owner. That said, it may not be the best solution; thus, for example, if the reimbursement for appropriating becomes a levy or burden for the owner of the land, or if the second option accorded in her favor is not feasible, namely that of obliging to pay the just price of the land, for example, due to the existence of a levy or prohibition of sale.

Regarding the reimbursement, historically this could have had some compensatory background related to the bad faith of the owner, but said hypothesis is regulated by paragraph 2<sup>nd</sup> of article 669. Therefore, paragraph 1<sup>st</sup> is restitutionary in nature, since not being possible to remove the improvements and having these acceded to the ground by

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<sup>161</sup> PINO EMHART (2019b), pp. 479-480; OROZCO MUÑOZ (2015), pp. 335-338.

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application of the principles of accessory and *superficies solo cedit*, it imposes the duty to restitute to anyone who, not having a cause for it, unduly appropriates the improvements. Because of this, is important to underscore the property allocation devoid of cause and not the impoverishment and damage, which are characteristic of a compensation of damages.

Then, the obligation to restitute corresponds to the owner of the land (or to the one who holds the land in her place) to whom the alternative of *making its ownor* obliging to pay the *just price* is exceptionally granted. Just the bad faith possessor loses the right of reimbursement and shall compensate the damages that might have caused, what is put into question since it neglects a criterion strictly based on restitution. In case of obliging to pay the *just price*, we understand that it is a forced sale, which is consistent with asserting that paragraph 1° of article 669 is no exception to the general rule according to which accession operates in an immediate fashion, so that the constructor would not be obligated to pay for the land only in case of renouncing the reimbursement and abandoning the edification. In the opposite case she could even be forced by the court. Regarding the reversed accession, as indicated by Peñailillo, it is possible provided that the improvement is of higher value than the land, according to the principle of accessory.

Lastly, the amount of the reimbursement is determined from the moment in which the obligation is due, it must be integral, so rather than concentrating on the impoverishment it should be focused on the amount of the enrichment. Adjustments and interests until the effective payment takes place are to be included according to the general rules.

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