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Quod ex pretio habes – some remarks on the scope of unjustified enrichment liability in Roman law

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In many cases where someone gains a financial benefit at the expense of another person he or she is not aware that this gain is without legal ground and for that reason the benefit should be handed over on the basis of unjustified enrichment law. The fate of the benefit in the hands of the enriched party can be different; in particular it can be transferred to a third party, used up, discarded or lost in another way. It often turns out that when the impoverished party seeks the return of the benefit it is impossible because of the loss of the enrichment. Contemporary law has special provisions on that situation. Under Polish law anyone who without legal grounds has gained a financial benefit at the expense of another person is obliged to hand over the benefit in kind, and if it is not possible, to return its value (art. 405 of the civil code). In the case of transfer, loss or damage, this obligation refers to what was obtained in exchange for the benefit or as remedy of damage (art. 406 c.c.) and only when the enriched person has used the benefit up or discarded it in good faith does he cease to be obliged to return it (art. 409 c.c.)¹.

¹ See: E. Łętowska, *Bezpodstawne wzbogacenie [Unjustified enrichment]*,

In this paper I analyse how that problem was solved in Roman law in cases where someone has transferred to a third person a thing of another which he has previously received without legal ground². I do not deal with all cases where the person ceases to be enriched (loss of the enrichment), but only with that particular problem.

Crucial and at the same time the most difficult to interpret is a source of Roman law concerning the sale of another's slave for a low price: D.12.6.26.12 (Ulp. 26 ad ed.) "et interdum licet aliud praestemus, inquit, aliud condicimus: ut puta fundum indebitum dedi et fructus condico: vel hominem indebitum, et hunc sine fraude modico distraxisti, nempe hoc solum refundere debes, quod ex pretio habes [...]".

It is an excerpt from a very long passage of Ulpian's commentary to an edict which refers to the problem of restitution of a benefit in several different cases, especially where a freedman does works for his patron (*operae officiales* or *operae fabriles*)³, in the belief that he owes them. In all these cases Ulpian asks what the subject of the restitution should be and presents his and other jurists' views in this regard. Of particular importance is the quotation of Celsus' remark that *interdum licet aliud praestemus, aliud condicimus*, so it

Warszawa 2000, pp. 126 ff.; P. Księżak, *Bezpodstawne wzbogacenie. Art. 405–414 KC [Unjustified enrichment]. Art. 405–414 of the Polish civil code*, Warszawa 2007, pp. 143–165 with further literature mentioned there.

² I do not tackle here the problem if the phrase "without legal ground" is the proper way of describing the Roman concept of *condictiones*. On the discussion of *causa condictionis* see recently: S. Hähnchen, *Die causa condictionis. Ein Beitrag zum klassischen römischen kondiktionenrecht*, Berlin 2003, passim; N. Jansen, *Die Korrektur grundloser Vermögensverchiebungen als Restitution? Zur Lehre von der ungerechtfertigten Bereicherung bei Savigny*, ZSS 120, 2003, pp. 106–182; M. Sobczyk, *The problem of causa condictionis in the settlements of Roman jurists and in modern Polish unjustified enrichment law*, "Studia Prawnoustrojowe" 9, 2009, pp. 29–42.

³ On this topic see: I. von Koschembahr-Lyskowski, *Die Condictio als Bereicherungsklage im römischen Recht*, vol. 1, Weimar 1903, pp. 43 ff.; idem, *Die Condictio als Bereicherungsklage im römischen Recht*, vol. 2, Weimar 1907, pp. 251 ff.; W. Waldstein, *Zur Frage der condictio bei irrtümlicher Leistung nichtgeschuldeter operae*, in: *Iuris Professio. Festgabe für Max Kaser zum 80. Geburtstag*, Wien–Köln–Graz 1986, pp. 319–330.

does happen on occasion that we can bring a *condictio* for something different from what we handed over. As a rule the plaintiff claims back that benefit which he has handed over, but this rule is neither strict nor applicable in every situation. It often happens that the defendant is unable to restore the benefit in kind, because he does not possess it yet. The jurist illustrates such a case with two examples: I give land not owed and bring a *condictio* for its fruits or I give a slave not owed, and you sell him honestly (*sine fraude*) for a small sum. In the case of land the possibility of demanding its fruits is obvious; however, this text should be understood in the way that not only the land itself must be given back but also its fruits and not in the way that the fruits are to be handed over instead of the land⁴. This rule is confirmed in other sources⁵.

Much more complex is the second example mentioned by Ulpian – sale of a slave not owed *sine fraude* for a low price. The most difficult part of the passage relates to the words *quod ex pretio habes*, which describe the extent of the obligation of restitution. Two aspects make it difficult: first, Latin *pretium* can mean both “value” and “price”, second *quod ex pretio habes* can mean both “what you still have left from the price” or “what you have received as price”. As far as the first question is concerned the term “price” fits more to the context of the fragment, because it refers to the contract of sale. The words *modico distraxisti* also refer more to the price than to the value of the slave. The second question is much more difficult. In the English translation of the Digest edited by Alan Watson this phrase is translated by Peter Birks as “you certainly need only give me back what you have left from the price”⁶, in Charles Henry. Monro’s “all that you need return is so much of the purchase money as you still have got”⁷. In old German

⁴ U. v. Lübtow, *Beiträge zur Lehre von der condictio nach römischem und geltendem Recht. Studien zum römischem und geltendem Recht*, Berlin 1952, pp. 53 ff.

⁵ D.12.6.15pr. (Paul. 10 ad Sab.), D.12.6.65.5 (Paul. 17 ad Plaut.).

⁶ P. Birks, in: *The Digest of Justinian. Translation*, ed. A. Watson, vol. 1, Philadelphia 1985.

⁷ *The Digest of Justinian*, transl. Ch.H. Monro, vol. II, Cambridge 1909, p. 315.

translation it is: “du brauchst blos das wiederzugeben, was du vom Preise hast”⁸ and in the recent one: “was du vom Kaupreis noch hast”⁹. The Polish translation follows the same pattern: “czyż nie powinienes zwrócić jedynie tego, co pozostało ci z ceny”¹⁰. All these translations take into consideration only one possibility: that the *condictio*-debtor has to return only what he has left from the price, so only remaining (still existing) enrichment at the time of *litis contestatio*. It is surprising that the alternative interpretation is not mentioned at all, even in references. In fact, this problem is not as simple as it seems to be after the reading of the Digest’s translation.

Many different views were presented in the Romanist literature on this issue. They can be classified in two groups, both corresponding to the above-mentioned different ways of interpretation of the Latin *quod ex pretio habes*. The opinion that this phrase means “what you have left from the price” is strongly supported by Ulrich. v. Lübtow in reference to Justinian law and with sharp contradiction to classical law. According to him this part of the passage is strongly reduced and interpolated. In its current wording when someone in good faith sells a slave who was not owed for a low price, the owner of the slave can demand only the proceeds achieved as long as they still exist. It is compatible with the Byzantine theory of enrichment, but classical law was completely different¹¹. Lübtow argues that as a rule under classical law where someone obtained financial benefit without legal ground he was obliged to return the benefit in kind or its value without any reduction, so the enrichment received, and he could not claim that his enrichment had shrunk or was lost before he was called to give it

⁸ *Das Corpus Iuris Civilis in's Deutsche übersetzt von einem Vereine Rechtsgelehrter und herausgegeben*, von C. E. Otto, B. Schilling und C. F. F. Sintenis. Dritter Theil der Pandecten. Zwölftes und dreizehntes Buch. Übersetzt von M. R. Schneider unter der Redaction des C.E. Otto, Leipzig 1830, p. 64.

⁹ *Corpus Iuris Civilis. Digesten 11–20, Text und Übersetzung*, ed. O. Behrends, R. Knütel, B. Kupisch, H. H. Seiler, Heidelberg 1999.

¹⁰ *Digesta Iustiniani. Digesta Justyniańskie. Tekst i przekład [Digest of Justinian. Text and translation]*, vol. III, books 12–19, ed. T. Palmirski, Kraków 2014, p. 81.

¹¹ U. Lübtow, *op.cit.*, p. 54.

back¹². However, this obligation was limited to the price received by the seller acting in good faith where the price was lower than the objective value of the slave¹³. In Justinian law this obligation was further limited only to what the *bonae fidei* seller has left from the price, because by this amount he remained enriched at the time of *litis contestatio*. Such a solution was regarded as just and corresponded to the general Justinian unjustified enrichment concept¹⁴. The interpretation presented by Lübtow is based on the assumption of extensive interpolation of the source by Justinian compilers; the author even proposed a reconstruction of the original wording¹⁵. This view complies with the dominant opinion in the literature at the time of Lübtow’s work that in Justinian law the recipient of undue performance was obliged to hand over only the enrichment remaining at the time of the commencement of an action¹⁶. However, it should be stressed that the dominant view was based first of all on the quoted source.

A radical change in interpretation was proposed by Werner Flume, who gives several arguments that *quod ex pretio habes* can mean only “was du als Kaupreiserlös hast” (what you have as purchase price”), not “was du von dem Kaufpreis noch hast” (what you still have from the purchase price). First of all, Flume points out that this text has nothing to do with the reduction of *condictio* only to the remaining enrichment¹⁷, but it refers to a situation where the object of undue performance and the object of its restitution are different. Therefore *ex pretio* signifies the origin – “as price” not “from the price”. The same meaning of *ex pretio* is proved in other

¹² Ibidem, pp. 20 ff.

¹³ Ibidem.

¹⁴ Ibidem, p. 84.

¹⁵ Ibidem, pp. 52 ff.

¹⁶ See: H. Siber, *Retentio propter res donatas*, in: *Studi in onore di Salvatore Riccobono nel XL anno del suo insegnamento*, t. 3, Palermo 1936, pp. 241 ff.; C. Sanfilippo, *Condictio indebiti I. Il fondamento dell’obbligazione da indebito*, Milano 1943, p. 57; F. Schwarz, *Die Grundlage der condictio im klassischen römischen Recht*, Münster-Köln 1952, p. 307.

¹⁷ This remark was made earlier by F. Schulz, *Die actiones in id quod pervenit u. in quantum locupletior factus est*, Breslau 1905, p. 32.

sources¹⁸. If compilers had wanted to say “what you have left from the price” they would have used *in quantum locupletior factus est* (as he became richer)¹⁹. Moreover, the *condictio* as a processual remedy aims at effecting the return of a given object *in concreto*, so if it is for a *certa res*, the obligation is to return that thing itself. If the *certa res* has been sold, the price must be given back, since the price merely took its place. Flume argues that this position did not change in Justinian law. In his opinion, there was no contradiction, in fact, between classical and Justinian law in this matter. By the time of Justinian, the orientation of the *condictio* remained that of an action aimed at recovery of the object of the enrichment itself, that means it retained a concrete, rather than abstract, orientation towards recovery of the net enrichment remaining in the defendant’s estate²⁰.

The interpretation of Flume is supported by Daniel P. Visser, though not without hesitation or reservations. In his opinion although both above-mentioned translations are grammatically possible, “what you have left from the price” seems to be the most natural one. Notwithstanding after analysing Flume’s arguments he reaches the conclusion that “Flume is probably right”²¹. In Roman law the orientation of the *condictiones* was towards the recovery of that which had been given and not towards restoring the balance of enrichment remaining with the enrichment-debtor²².

David A. Juentgen adheres to the interpretation of Flume too. He points out that the enrichment-debtor’s primary obligation is to return a given object *in concreto*. Consequently, where the enrichment-debtor has obtained specific goods he or she is under an obligation to return these goods themselves. If they have

¹⁸ See D.6.1.29 (Pomp. 21 ad Q. Muc.).

¹⁹ W. Flume, *Der Wegfall der Bereicherung in der Entwicklung vom römischem zum geltenden Recht*, in: *Festschrift für Hans Niedermeyer zum 70. Geburtstag*, Göttingen 1953, pp. 105 ff., cf. H. Niederländer, *Die Bereicherungshaftung im klassischen römischen Recht*, Weimar 1953, p. 6.

²⁰ W. Flume, *op.cit.*, pp. 103–133.

²¹ D. P. Visser, *Responsability to Return Lost Enrichment*, “Acta Iuridica” 175, 1992, p. 180.

²² *Ibidem*, p. 185.

been sold, the price must be given back since the price merely took their place. If specific goods have been lost or destroyed, the enrichment-debtor is freed, for *restitutio in concreto* is no longer possible (*impossibilium nulla est obligatio*)²³.

Reinhard Zimmermann comes to the conclusion that *quod ex pretio habes* does not mean “what you have left from the price” but “what you have received as price” and Ulp. D.12.6.26.12 can therefore not be taken to have determined the content of enrichment *condictiones*, on a gliding scale, according to the enrichment still extant at the time of *litis contestatio*. In his opinion in such a case the purchase price merely replaced the original object of the plaintiff’s *condictio* in the defendant’s property, which is based on the idea of surrogation. The *condictio* was an action *stricti iuris* and its formula did not, therefore, allow for any flexibility. The defendant was condemned in either the sum or the value of the object that he had received. This solution of classical law remained in force at the time of Justinian²⁴.

Although both above-mentioned translations of *quod ex pretio habes* are grammatically possible, modern translations of the Digest still adhere to the long-adopted wording that the phrase means “what you have left from the price”, while the view in the Romanist literature prevailing after the fundamental work of Flume understands it as “what you have received as price”. It is essential therefore to find out if other sources of Roman law can support one of the competing views. Every scholar of Roman law must first make an important assumption which is crucial for the result of his research, namely that as a rule the Roman sources should be treated as genuine (not interpolated), unless there are strong grounds to presume otherwise²⁵.

²³ D.A. Juentgen, *Unjustified enrichment in New Zealand and in German Law*, “*Canterbury Law Review*”, vol. 8, issue 3 (2002), pp. 526 ff.

²⁴ R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Cape Town–Wetton–Johannesburg 1990, pp. 897–900.

²⁵ This attitude is stressed in modern research, see W. Bojarski, *Remarks on Textual Reconstruction in Roman Law*, in: *Le droit et le monde contemporain. Mélanges à la mémoire de Henryk Kupiszewski*, ed. W. Wołodkiewicz and M. Zabłocka, Warsaw 1996, pp. 83–89.

The general rule of restitution is proclaimed by Pomponius: D.12.6.7 (Pomp. 9 ad Sab.) “Quod indebitum per errorem solvitur, aut ipsum aut tantundem repetitur”.

This text was placed by the Justinian compilers in the Digest's title *De condictione indebiti*, so the most important of Roman *condictiones*²⁶, but I think that it was applicable generally for *condictio* as the unjustified enrichment action, not only in the case of *condictio indebiti*. Pomponius says that when debt not due is discharged in error, recovery is either of what is actually given or its value in money. In the case of money received as a purchase price it means that the recipient should restore exactly the same coins²⁷ or if he has consumed them or lost them in any way, their value in other coins. Nothing in this text suggests that this obligation is reduced in any way. No circumstances that can occur after the undue performance and change the recipient's position are taken into account²⁸. Therefore, the source can be understood in two ways. First, it should be taken as a neutral one, it could be said merely to state the basic principle that the enrichment-debtor has to give that which he or she received or its value, and not what should happen when the enrichment-debtor has neither the object itself nor its value in his or her patrimony²⁹. Second, the text suggests that if the recipient for any reason has a lesser quantity of the fungible things than he originally received he is still obliged to give the original amount of goods (*tantundem*) back, not only that which he has left from the goods. So, in the case of money its

²⁶ In fact, there should be no doubts that exactly this *condictio* was the most important, cf. D. Liebs, *The History of Roman Condictio up to Justinian*, in: *The Legal Mind. Essays for Tony Honoré*, ed. N. MacCormick and P. Birks, Oxford 1986, pp. 163 ff.

²⁷ In ancient times people attached importance to coins, so the giver first sought to reclaim exactly the same coins he had given and if it was impossible because of consumption he could demand their value. See M. Kaser, *Das Geld im römischen Sachenrecht*, TR 29, 1961, p. 171; J. G. Fuchs, *Consumptio nummorum (disceptatio nondum consumpta)*, in: *Mélanges Philippe Meylan*, vol. I: *Droit romain*, Lausanne 1963, p. 126; A. Wacke, *Die Zahlung mit fremden Geld. Zum Begriff des „pecuniam consumere“*, BIDR 79, 1976, p. 54.

²⁸ D.P. Visser, *op.cit.*, p. 176.

²⁹ *Ibidem*, p. 177.

consumption does not have any impact on the recipient's duty. To my view although both interpretations are admissible, the second seems slightly more correct. One can assume that if Pomponius wanted to limit the obligation of restitution he would do it expressly.

Further guidance can be drawn from the sources regarding donation in contemplation of death (*donatio mortis causa*). This donation could take various forms³⁰; however, they all have one thing in common – in certain circumstances the giver could claim the object of donation back, especially where his life was not in danger any more, e.g. he had recovered from a serious disease, or he outlived the receiver³¹. For that purpose he could take advantage of *condictio ob rem* (later known as *condictio causa data causa non secuta*)³². From the very nature of this donation it appears that the problem of scope of the recipient's duty of restitution was of particular importance. This issue was tackled by Iulian: D.39.6.37.1 (Ulp. 15 ad l. Iul. et Pap.) “Iulianus ait: si quis servum mortis causa sibi donatum vendiderit et hoc vivo donatore fecerit, pretii conductionem donator habebit, si convaluisset et hoc donator elegerit. alioquin et ipsum servum restituere compellitur”.

³⁰ There is neither place here nor any point in presenting those forms, for details see: M. Amelotti, *La „donatio mortis causa” in diritto romano*, Milano 1953, passim; P. Simonius, *Die Donatio mortis causa im klassischen römischen Recht*, Basel 1958, passim; G.G. Archi, *La donazione. Corso di diritto romano*, Milano 1960, passim; S. Di Paola, *Donatio mortis causa. Corso di diritto romano*, Napoli 1969, passim; C. Tort-Martorell LLabrés, *La revocación de la donatio mortis causa en el derecho romano clásico*, Madrid 2003, passim; P. Jung, *Das Rückforderungsrecht des Schenkers mortis causa Zugleich eine Abhandlung zu D 39,6,39 und D 39,6,35,2–3*, in: Pichonnaz, *Spuren des römischen Rechts – Festschrift für Bruno Huwiler zum 65. Geburtstag*, Bern 2007; M. Sobczyk, *Darowizna na wypadek śmierci w projekcie zmiany kodeksu cywilnego a rzymska donatio mortis causa [Donation in contemplation of death in the draft of the amendment to the Polish civil code and Roman donatio mortis causa]*, in: *Interes prywatny, a interes publiczny w prawie rzymskim*, ed. B. Sitek, K. Naumowicz, K. Zaworska, Olsztyn 2012, pp. 231–243.

³¹ See D.39.5.1pr. (Iul. 17 dig.), D.39.6.27 (Marc. 5 regur.), D.39.6.35.2–3 (Paul. 6 ad l. Iul. et Pap.), I.2.7.2; C.4.6.6.

³² On this particular field of application of *condictio ob rem* see M. Sobczyk, *Świadczenie w zamierzonym celu, który nie został osiągnięty. Studium z prawa*

Iulian says: if someone sells a slave given to him *mortis causa* and does so while the donor is still alive, the donor will be able to bring a *condictio* for the price³³ of the slave if he gets better and if he chooses to do so. Otherwise, the donee is compelled to return the slave himself³⁴. In fact, the situation referred to by Iulian is very similar to the initial one described above. Someone sells a slave received by means of *donatio mortis causa* whom he is obliged to restore in a possible case when the giver recovers and decides to claim the donation back. One important difference is that this time the source tells nothing about the amount of the price received, so one can assume that it was the market price. However, the essential thing is that here it is not written *quod ex pretio habes* but the *condictio* is for *pretium* without any sign of its reduction, so the problem of loss of the price is not taken into consideration. Naturally, it does not necessarily mean that this problem is completely irrelevant, but the more convincing interpretation is that the recipient has to pay the price received, not only that what he has left from the price. It seems that if the obligation of restitution was restricted to remaining enrichment Iulian's response would indicate this solution expressly.

The same conclusion stems from another of Iulian's solutions: D.39.6.19 (Iul. 80 dig.): "Si filio familias res mortis causa data fuerit et convaluisset, donator actionem de peculio cum patre habet: at si pater familias, cum mortis causa donationem accepisset, in adoptionem se dederit, res ipsa a donatore repetitur. nec huic similis est is, qui rem, quam mortis causa acceperat, alii porro dederit: nam donator huic non rem, sed pretium eius condiceret".

Iulian deals here with three cases all concerning *donatio mortis causa*. If property has been given to a son-in-power and the donor gets better, he can bring an action on *peculium* against the father.

rzymskiego [Performance made for a specific purpose that was not achieved. Study in Roman law], Toruń 2012, pp. 168–177.

³³ In the above-mentioned translation edited by A. Watson "value" is used instead of "price".

³⁴ J. D. Harke is right to remark that this solution is in favour of the *condictio*-creditor not the debtor, see J.D. Harke, *Das klassische römische Kondiktionensystem*, IURA 2003, p. 80.

If the head of the household receives a gift *mortis causa* and then allows himself to be adopted, the property itself can be reclaimed by the donor. So, in both cases the object of the action is the given property itself³⁵. The case of someone who receives a gift *mortis causa* and then gives it to somebody else is not similar, since the donor would in that case bring a *condictio* against the latter not for the property, but for its value. In the third case the donee is unable to give the property itself back because he has already given it to someone else; that is why the *condictio* is not for the property but for its value. It should be stressed, however, that even the third case differs considerably from the initial one, because this time the object that should be given back is not sold, so no price is received in exchange, but is merely given to another person. Due to the fact that the donee always has to take into consideration that the donor can demand the given property, he is not released from the obligation of restitution, but the object of this obligation is different from the object of donation: instead of the property itself its value must be given back. It is obvious that in such a situation there is no room for the problem of loss of the money received as price, since there is no price.

Another similar case is tackled by Paulus: D.39.6.39 (Paul. 17 ad Plaut.): “*Si is, cui mortis causa servus donatus est, eum manumisit, tenetur condicione in pretium servi, quoniam scit posse sibi condici, si convaluerit donator*”.

If someone who has been given a slave *mortis causa* manumits that slave, he is liable to a *condictio* for the value of the slave, since he knows that a *condictio* can be brought against him in the event of the donor’s getting better. This case is similar both to the initial one and to the last one mentioned by Iulian, but this time the slave given *mortis causa* was neither sold nor given but manumitted. As a result, the restitution of the given property itself is impossible as in the cases of sale or further donation; that is why only the value of the slave can be claimed. The words *pretium servi* must be understood here as the value of the slave, not the price for him, be-

³⁵ In fact the two cases are also different in some aspects that are not interesting here, about the differences, see P. Simonius, *op.cit.*, pp. 177 ff.

cause the slave was manumitted not sold³⁶. This solution confirms the general rule *aliud praestemus, aliud condicimus* but it does not deal with the particular problem of loss of the enrichment. It is notable that Paulus justifies his view writing that this obligation is imposed on the donee because he knows that a *condictio* can be brought against him in the event of the donor's getting better.

A similar solution was proposed by Paulus in the case of *servus indebitus*: D.12.6.65.8 (Paul. 17 Plaut.) "Si servum indebitum tibi dedi eumque manumisisti, si sciens hoc fecisti, teneberis ad pretium eius, si nesciens, non teneberis, sed propter operas eius liberti et ut hereditatem eius restituas".

If somebody gives a slave not due and the recipient manumits him, Paul says that the recipient will be liable for his value if he acted knowingly; if unknowingly, he will not be liable, though he must make restitution in respect of his day works as a freedman and rights of succession to him. The recipient's knowledge is the essential precondition of his liability: if he is aware that the slave was not owed to him he does not have any liability, except the day works (*operae liberti*) and rights of succession. If he knows that fact, he is liable for the slave's value³⁷ without any reduction. This time the recipient does not receive anything for the manumission of the slave, so there is no purchase price that can take the place of the thing, therefore the principle of surrogation is inapplicable here. In consequence, there is neither room nor need to discuss the problem of the partial or total loss of the purchase price. The recipient is either liable for the value of the slave or not liable at all; partial liability does not come into account. Since the manumission of the slave, so a *res in specie*, amounts to the total loss of the enrichment, the recipient's liability depends on his knowledge about the relevant fact of the undue character of performance that he previously received.

There is also another of Iulian's solutions regarding a similar problem, mentioned by his pupil Africanus: D.12.1.23 (Afric. 2

³⁶ P. Simonius, *op.cit.*, pp. 176 ff.; J.D. Harke, *op.cit.*, p. 80.

³⁷ In my opinion since the slave is manumitted not sold the term *pretium* should be translated as value, not price.

quaest.) “Si eum servum, qui tibi legatus sit, quasi mihi legatum possederim et vendiderim, mortuo eo posse te mihi pretium condicere iulianus ait, quasi ex re tua locupletior factus sim”.

This text does not deal with the object of undue performance but the object of *legatum*, i.e. a slave, who was in the possession of a person who *bona fide* regarded himself as *legatarius*. If the slave is sold the true *legatarius* can claim the price, because the possessor becomes richer. This obligation exists even if the slave then dies³⁸. Nothing in this text is said about the amount of the price or its consumption. Iulian does not suggest any reduction of the amount of money that should be restored. In fact, it can still be said that the price is given back instead of the thing, but if the restitution could be lower than the price received Iulian would take it into account.

None of these sources deals exactly with the same problem which is tackled by Celsus and Ulpian in D.12.6.26.12; however, they relate to similar, or even very similar, issues. This observation does not exclude the prudent conclusion that in the case of the sale of a slave not owed for a low price the recipient acting in good faith was obliged to hand over what he had received as the purchase price not only the existing enrichment. Apart from that problem, in the case of D.12.6.26.12 it is difficult to find any important reasons why the original classical wording had to be interpolated by the Justinian compilers, *nota bene* exactly in the opposite direction. Other sources at least do not support the suspicion of interpolation and in consequence do not support the view of there being a radical difference between classical and Justinian law. In my opinion the Justinian concept of unjust enrichment was not radically different from the classical one and I am not convinced by the view that the compilers relied so strongly on the doctrine of equity that the only admissible solution was an obligation to restore only the remaining enrichment.

The two grammatically possible translations of *quod ex pretio habes* illustrate the two views taken in the literature. It is interest-

³⁸ In fact the existence of the obligation is independent from the existence of the slave, cf. J.D. Harke, *op.cit.*, p. 82.

ing that the translations of D.12.6.26.12 cited above are different from the currently prevailing view, that the phrase means 'what you have received as price'. This prevailing view complies with the general opinion today that both in classical law and in Justinian law the enrichment liability as a rule was not restricted to the enrichment existing at the time of *litis contestatio*³⁹. Proponents of the view argue that the enrichment-debtor's primary obligation was to return a given object *in concreto*. Consequently, where the enrichment-debtor had obtained specific goods (*res in specie*) he or she was under an obligation to return those goods themselves. If they had been sold, the full price had to be given back since the price merely took their place. If specific goods had been lost or destroyed without the enrichment-debtor's fault or delay, he was freed, because the restitution of the object *in concreto* was no longer possible (*impossibillum nulla est*). If the debtor acted in bad faith he remained obliged to pay the value of the thing lost⁴⁰. If, however, money or other fungibles had been lost the enrichment-debtor would not be freed, for fungibles cannot perish: these things can always be substituted⁴¹. So, when corn given when not due was consumed, its value was recoverable⁴². The receipt of something not due was likened to *mutuum* (the contract of loan) by Gaius, who stated that when things such as money, wine, oil, corn, bronze, silver and gold were lent, not the actual things that were lent, but their equivalent had to be returned⁴³.

Roman law knew only a few exceptions to these rules. In the case of *pupillus* who had concluded a contract without the authority of his tutor and for this reason, on the basis of the rescript of Antoninus Pius, was liable only *in quantum locupletior factus est* at

³⁹ H. Niederländer, *op.cit.*, p. 1; W. Flume, *op.cit.*, p. 109; B. Kupisch, *Um-gerechtfertigte Bereicherung. Geschichtliche Entwicklungen*, Heidelberg 1987, pp. 1 ff.; R. Zimmermann, *op.cit.*, p. 897; M. Kaser, R. Knütel, *Römisches Recht*, München 2003, p. 306; S. Hähnchen, *op.cit.*, pp. 22 ff.

⁴⁰ H. Niederländer, *op.cit.*, p. 2; R. Zimmermann, *op.cit.*, p. 898.

⁴¹ D.19.5.25 (Marc. 3 reg.).

⁴² D.12.6.65.6 (Paul. 17 ad Plaut.).

⁴³ G.3.91, cf. I.3.14.1.

the time of *litis contestatio*⁴⁴. In the case of a prohibited donation between husband and wife when the donor claimed it back the donee’s liability was limited only to the remaining enrichment⁴⁵. Likewise, when the possessor of an inheritance in good faith was sued by means of *hereditatis petitio* and afterwards had to restore the property to the heirs, he restored it in the present condition, not in the original condition when he had received it⁴⁶.

Even the above-mentioned rule governing the loss of *res in specie* cannot be seen as a proof of the limited unjustified enrichment liability. The fact that the receiver was released from his duty to restore the thing when it was lost without his fault does not mean that only the enrichment existing at the time of *litis contestatio* was taken into account. This rule is an emanation of the fundamental assumption that the fate of the object received in the patrimony of the enriched person determined the obligation of restitution. When the obligation became impossible without the person’s fault it extinguished. Contrary to the contemporary law the enrichment was not related to the whole patrimony of the enriched person, but only to the particular asset⁴⁷.

After this short research I have come to the conclusion that the modern translation of D.12.6.26.12 should take into account the currently prevailing view on the interpretation of *quod ex pretio habes*, because this view is based in other sources.

⁴⁴ D.26.8.1pr. (Ulp. 1 ad Sab.), D.26.8.5pr. (Ulp. 40 ad Sab.). H. Niederländer, op.cit., pp. 11 ff.; W. Flume, op.cit., p. 124; E.H. Kaden, *Das Schriftum der Jahre 1950–1953 zur römischen Bereicherungslehre*, ZSS no 71, 1954, pp. 580–583; B. Kupisch, op.cit., pp. 1 ff.; R. Zimmermann, op.cit., pp. 896 ff.

⁴⁵ W. Flume, op.cit., p. 116 ff.; H. Niederländer, op.cit., pp. 35 ff.; K. Misera, *Der Bereicherungsgedanke bei der Schenkung unter Ehegatten*, Köln–Wien 1974, passim.

⁴⁶ D.5.3.20.6c (Ulp. 15 ad ed.); H. Niederländer, op.cit., pp. 154 ff.; M. Müller-Ehlen, *Hereditatis petitio. Studien zur Leistung auf fremde Schuld und zur Bereicherungshaftung in der römischen Erbschaftsklage*, Köln–Weimar–Wien 1998, passim.

⁴⁷ Cf. W. Flume, p. 121.

STRESZCZENIE

Quod ex pretio habes – kilka uwag na temat zakresu odpowiedzialności z tytułu bezpodstawnego wzbogacenia w prawie rzymskim

W artykule zajmuję się wybranymi aspektami ustania wzbogacenia w prawie rzymskim. Analizuję szczególnie problem sprzedaży w dobrej wierze osobie trzeciej korzyści majątkowej uzyskanej cudzym kosztem bez podstawy prawnej. Problem ten został poruszony przez Ulpiana w D.12.6.26.12 (Ulp. 26 ad ed.), gdzie jurysta ten użył sformułowania *quod ex pretio habes*, które może być dwojako interpretowane: „to, co pozostało ci z ceny”, lub „to, co otrzymałeś jako cenę”. W przekładach Digestów stosowana jest pierwsza interpretacja, podczas gdy w literaturze romanistycznej przeważa druga. Przedstawiam poglądy wyrażone w literaturze i analizuję relewantne źródła prawa rzymskiego w poszukiwaniu wskazówek, która z tych interpretacji jest właściwa. Ostatecznie dochodzę do wniosku, że współczesne przekłady wzmiankowanego fragmentu powinny uwzględnić pogląd dominujący w nauce, albowiem znajduje on potwierdzenie w innych źródłach.

Słowa kluczowe: prawo rzymskie; bezpodstawne wzbogacenie; utrata wzbogacenia; *quod ex pretio habes*

SUMMARY

Quod ex pretio habes – some remarks on the scope of unjustified enrichment liability in Roman law

In this paper I deal with selected aspects of the concept of loss of enrichment in Roman law. I analyse a particular problem where someone acting in good faith has transferred to a third person a thing of another which he has previously received without legal ground. It was tackled by Ulpian in D.12.6.26.12 (Ulp. 26 ad ed.), where the jurist used the crucial phrase *quod ex pretio habes*, which can be interpreted in two ways: “what you still have left from the price” or “what you have received as price”. In modern translations of Digest the former interpretation is used, while in the Romanist literature the latter prevails. I present the views expressed in literature and analyse relevant sources of Roman law in search for

clues which of those interpretations is the proper one. Finally, I come to the conclusion that the modern translation of D.12.6.26.12 should take into account the currently prevailing view on the interpretation of *quod ex pretio habes*, because this view is based in other sources.

Keywords: Roman law; unjustified enrichment; loss of enrichment; *quod ex pretio habes*

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