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Roman Law [The Recovery of Benefits Conferred under Illegal or Immoral Transactions, Chapter One]

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A. THE *CONDICTIO OB TURPEM CAUSAM* IN CLASSICAL ROMAN LAW

I. The Function of the *Condictio* in Roman Law

The *condictio* is best viewed in the light of the *rei vindicatio*.¹ The *rei vindicatio* was a claim in the law of property. It enabled the owner of a certain thing (*certum*) to claim this *certum* from any possessor who did not have a right of retention over it. However, as soon as the owner transferred the ownership to the possessor (*dare, datio*), the *rei vindicatio* was no longer available: being a claim in the law of property, the *rei vindicatio* presupposed that the pursuer was the owner of the thing claimed. However, the fact that ownership passed does not necessarily mean that the transferee was entitled to the benefit. The law of property may thus trigger rigid results since, according to the law of property, ownership may pass, and the *rei vindicatio* cease, even though the transferee may not have a right to retain the benefits according to other rules of civil law. This rigidity of the law of property is mitigated to an extent by the law of obligations. The Roman jurists allowed recovery if the transferee, for certain reasons the jurists had developed, did not have a legal reason to retain the property (*causa*). In these cases, certain actions were granted to reverse the transfer; thereby, the results of the law of property which were seen to be unfair were corrected. So, for instance, recovery was permitted if the transferor's intention had been vitiated in some important manner when he transferred ownership, as, for example, where he had paid a sum of money under error as to legal liability towards the transferee. Thus, the law of property is closely interlaced with what we call today the law of unjustified enrichment, the latter operating to moderate legally unacceptable results of the former.

¹ Zimmermann, *The Law of Obligations*, pp. 841 sq.; Kaser, *RP I*, pp. 592 sq.; Reuter/Martinek, *Ungerechtfertigte Bereicherung* (1983), § 1 I 1 b (pp. 6 sq.).

The jurists granted the *condictio* as a means to allow recovery of benefits transferred under certain conditions.² Originally, *condicere* meant *denuntiare*, i.e. to announce a <6> judicial date³: in the early times of the formal *legis actiones*⁴ the action for recovery of a certain thing (*certum dare*) was introduced with a formal announcement of the pursuer before the *praetor*, saying that the defender had to appear *in foro* after thirty days for the appointment of a judge. When the *legis actiones* had fallen into disuse, the terms *condicere* and *condictio* continued to be used generally of a claim *certum dare*.⁵ According to Otto Lenel⁶, the remedy that was given by the *praetor* was the *actio certae creditae pecuniae* where it was a certain sum of money that was claimed, or the *actio certae rei* where a certain thing was claimed from the defender. The *formula* of the *actio certae creditae pecuniae* ran as follows⁷:

² D. Liebs, "The History of the Roman *Condictio* up to Justinian", in: N. MacCormick/P. Birks (eds.), *The Legal Mind – Essays for Tony Honoré* (1986), 163. The *condictio* was the oldest and most important but not the only action in this context. In cases where the *condictio* did not lie the *praetor* developed *actiones in id quod ad eum pervenit* or *quanto locupletior factus est* to allow recovery. See Levy, *Privatstrafe und Schadensersatz* (1915), pp. 88 sqq.; G. H. Maier, *Prätorische Bereicherungsklagen* (1932), pp. 1 sqq., and below notes 86, 91. <6>

³ Gai., Inst. 4.17a.

⁴ On the early procedure of *legis actiones* see in detail Kaser/Hackl, *ZP*, pp. 34 sqq.

⁵ I. 4.6.15. See Zimmermann, *The Law of Obligations*, p. 835; Kaser, *RP I*, p. 593, and Reuter/Martinek, *Ungerechtfertigte Bereicherung* (1983), § 1 I 1 b (p. 6). – The scope of the *condictio* was probably already in classical times expanded to certain narrow cases where an *incertum* was claimed: Kaser, *RP I*, pp. 598 sqq. with references.

⁶ Lenel, *Das Edictum Perpetuum* (3rd ed., 1927), pp. 237, 240; Lenel, *loc. cit.*, p. 234, states that in classical times the *actio* was not yet called *condictio certi*.

⁷ Lenel, *Das Edictum Perpetuum* (3rd ed., 1927), p. 237.

	<i>Titius iudex esto.</i>
<i>Intentio</i>	<i>Si paret Nm Nm Ao Ao sestertium decem milia dare oportere,</i>
<i>Condemnatio</i>	<i>iudex, Nm Nm Ao Ao sestertium decem milia condemnato.</i> <i>Si non paret absolvito.</i>
	Titius shall be judge.
<i>Intentio</i>	If it is proved that the defender Numerius Negidius has to give ten thousand <i>sestertii</i> to the pursuer Aulus Agerius,
<i>Condemnatio</i>	you, judge, shall condemn Numerius Negidius to give ten thousand <i>sestertii</i> to Aulus Agerius. If it is not proved you shall free him.

According to Lenel's reconstruction, the *formula* of the *actio certae rei* named the thing claimed instead of the sum of money but was, apart from that, identical.⁸ <7>

1. Overview of the Roman Civil Procedure

In order fully to understand the significance of the *actio certae creditae pecuniae* and the *actio certae rei*, a brief outline of the Roman civil procedure should be given. Classical Roman law was highly determined by procedural means.⁹ The procedure was divided between the *praetor* (*in foro*) and the *iudex* (*apud iudicem*). The key position was held by the *praetor*, a magistrate who had the power to grant procedural *formulae*. The *praetor* listened to the pursuer's demand as well as to the defender's objection. If he came to the

⁸ For instance: *Si paret Nm Nm Ao Ao tritici Africi optimi modios centum dare oportere, quanti ea res est, tantam pecuniam Nm Nm Ao Ao condemnato.* – If it is proved that the defender Numerius Negidius has to give one hundred measures of best African wheat to the pursuer Aulus Agerius, you, judge, shall <7> condemn Numerius Negidius to pay the value of this to Aulus Agerius. Lenel, *Das Edictum Perpetuum* (3rd ed., 1927), pp. 239 sq.

⁹ On the following see E. Metzger, "Actions", in: E. Metzger (ed.), *A Companion to Justinian's Institutes* (1998), 208 (pp. 212 sqq.); Kaser/Hackl, *ZP*, pp. 151 sqq.; Lenel, *Das Edictum Perpetuum* (3rd ed., 1927), pp. 14 sqq.; Sohm, *Institutes* (3rd ed., 1907), pp. 256, 257 sq.

conclusion that the pursuer's demand was actionable because there was an appropriate cause of action he granted a *formula*.

Such a *formula* had a certain structure.¹⁰ First, a judge was selected. He was in charge of evidence and of reaching the final judgment. Then followed the *demonstratio* where the facts of the case were described; this clause might be omitted when the facts were not complicated. The *intentio* expressed the aim of the claim; for instance to recover a certain thing (*certum dare oportere* or *sestertium milia decem dare oportere*). Thus, the *intentio* determined the nature of the action.¹¹

The important point about these *formulae* was that the existence of a *formula* determined the success of the pursuer's claim in the sense that if there was no *formula* that fitted the submitted facts, there was no action¹² and the pursuer could not enforce his demand. There were as many kinds of actions as there were different kinds of *intentiones*.¹³ This shows that the Romans thought not so much in terms of material rights but rather in terms of remedies. The *formulae* were published in the *praetor's edictum perpetuum*.¹⁴ <8>

2. Actio Certae Creditae Pecuniae and Actio Certae Rei

The *actio certae creditae pecuniae* and the *actio certae rei* did not mention the *causa*, that is the ground of the claim. Their *formulae* were abstract.¹⁵ To take the example of the *actio certae creditae pecuniae*, the *formula* did not say why the ten thousand *sestertii* were due. Therefore, this *formula* could be used for a wide range of cases where a *certum dare*, *i.e.* the transfer of a certain sum of money, or a certain thing in the case of the *actio certae rei*, was claimed.¹⁶ At first, the *formula* was used for actions *ex certa stipulatione* and *ex causa*

¹⁰ Kaser/Hackl, *ZP*, pp. 310 sqq.

¹¹ Sohm, *Institutes* (3rd ed., 1907), p. 258.

¹² In cases where not giving an action would have contradicted equity the *praetor* had the competence of creating new *formulae in factum* or *utiles*; he intervened *adiuvandi vel supplendi vel corrigendi gratia* (Pap. D. 1.1.7.1). See E. Metzger, "Actions", in: E. Metzger (ed.), *A Companion to Justinian's Institutes* (1998), 208 (pp. 220 sqq.); Kaser/Hackl, *ZP*, pp. 328 sqq., 238.

¹³ Sohm, *op. cit.*, note 11 above.

¹⁴ See Otto Lenel's reconstruction of the *edictum perpetuum* (Lenel, *Das Edictum Perpetuum* [3rd ed., 1927]). <8>

¹⁵ Zimmermann, *The Law of Obligations*, pp. 835 sq.; Lenel, *Das Edictum Perpetuum* (3rd ed., 1927), p. 237; Kaser, *RP I*, p. 593.

¹⁶ Siber, *Römisches Recht II* (1928), p. 15; Kaser, *RP I*, p. 593; Zimmermann, *The Law of Obligations*, p. 836.

furtiva. It was then expanded to cases where a loan was claimed back (*ex mutuo*) as well as to literal contracts. Finally, the Roman jurists identified certain cases of unjustified retention of a *certum* that were analogous to the established cases and granted the *condictio* on grounds of this analogy.¹⁷

However, it is important to note that despite the abstract *formula* of the *condictio* there was no general claim in classical Roman law to recover a thing that was retained without legal reason (*causa*) by a transferee.¹⁸ The Roman jurists rather identified a number of different cases based on narrow legal classifications to determine whether recovery was to be allowed or not.¹⁹ Thus several groups of cases were recognised in which the *condictio* was given, such as the *condictio indebiti*, the *condictio ob rem* and the *condictio ob turpem causam*.

The last mentioned cause of action applied to cases where benefits had been transferred under transactions involving turpitude. In order to explain the special function of the *condictio ob turpem causam* within the Roman system of the *condictio* and its relationship with the *condictio ob rem* and the *condictio indebiti*, it is necessary to understand the relationship of the *condictio* with the Roman law of contracts. <9>

II. The *Condictio* and the Roman Law of Contracts

1. The Roman Contractual System

In Roman law, there was a *numerus clausus* of contractual types.²⁰ That means that only certain types of contracts were recognised and legally enforceable. In Sohm's apt words²¹: "A contract in the Roman sense is not any declaration of consensus that is intended to create an obligation, but only a declaration of consensus that results in an obligation actionable by the civil law." Only if there was a *formula* by which the agreement could be enforced was there

¹⁷ Zimmermann, *The Law of Obligations*, pp. 836 sq.; Kaser, *RP I*, pp. 593, 525. Cf. Gai., *Inst.* 3.91.

¹⁸ Reuter/Martinek, *Ungerechtfertigte Bereicherung* (1983), § 1 I 1 b (p. 7) and c (pp. 8 sqq.); G. H. Maier, *Prätorische Bereicherungsklagen* (1932), p. 1; Honsell, *Rückabwicklung* (1974), p. 66; cf. Schulz, *Classical Roman Law* (1961), pp. 610 sqq., against Sanfilippo, *Condictio indebiti, Il fondamento dell' obbligazione da indebito* (1943), pp. 56 sqq.

¹⁹ Kaser, *RP I*, pp. 596 sqq. <9>

²⁰ Honsell, *Rückabwicklung* (1974), p. 70.

²¹ Sohm, *Institutes* (3rd ed., 1907), p. 372.

thought to be a contract. Thus, four different categories of contracts were recognised: consensual contracts, real contracts, verbal and literal contracts.²²

a) Consensual contracts were, as suggested by the name, concluded through consensus alone (*nudo consensu*) without the necessity of observing a certain form. Under this category came, for instance, sale (*emptio venditio*), rent and service contracts (*locatio conductio*), mandate (*mandatum*) and partnership (*societas*).²³

b) The *sine qua non* for a real contract was the agreed transfer of property to the transferee; the pure consensus of the parties to the transfer was not by itself sufficient to create an actionable obligation. Examples are loan (*mutuum*) and deposit (*depositum*).²⁴ So, if the parties only consented to a loan of money, the receiver of the promise had no remedy to enforce the agreement. The giver was not obliged to transfer the promised sum. As soon as the giver did transfer the money, however, an obligation was created: the recipient was obliged to pay the money back. This obligation was actionable with the *actio certae creditae pecuniae* - with the same *formula* as mentioned above.²⁵ The reason why this *formula* could be used also in this kind of case was that it only expressed the fact that there was an obligation to return a certain sum. This obligation was created by the objective act of handing over money. In this respect it did not differ from the payment of an *indebitum*. So in both cases the *actio certae creditae pecuniae* <10> lay.²⁶ This illustrates the abstract nature of this *formula* and the Roman way of thinking in procedural terms.

c) Verbal and literal contracts presupposed the observation of a certain form to create a valid obligation. To be obliged by a *stipulatio*, the contract had to be concluded in the form of oral question and answer, using the same verb. A literal contract derived from an entry in the expense book of the *paterfamilias*.²⁷

²² Gai., *Inst.* 3.89; Siber, *Römisches Recht II* (1928), p. 170; Kaser, *RP I*, pp. 524 sqq.; Sohm, *Institutes* (3rd ed., 1907), p. 372.

²³ Kaser, *RP I*, p. 526; Honsell, *Rückabwicklung* (1974), p. 70.

²⁴ Kaser, *RP I*, p. 525; Sohm, *Institutes* (3rd ed., 1907), p. 372; Honsell, *Rückabwicklung* (1974), pp. 70 sq.

²⁵ Kaser, *RP I*, p. 525. <10>

²⁶ Gai., *Inst.* 3.91; Zimmermann, *The Law of Obligations*, p. 837; Kaser, *RP I*, p. 525; Honsell/Mayer-Maly/Selb, *Römisches Recht* (4th ed., 1987), p. 253.

²⁷ See Kaser, *RP I*, pp. 525 and 168 sqq.; Honsell/Mayer-Maly/Selb, *Römisches Recht* (4th ed., 1987), pp. 295 sqq. and 251 sq.

2. *The Interplay of the Law of Contracts and the Condictio*

The Roman *condictio* worked in conjunction with the understanding of the law of contracts. In this context, the *condictio indebiti* and the *condictio ob rem* had clear functions to fulfil which complemented each other.

As described earlier, there was only a limited number of enforceable contracts. Within a contract, if a payment was made that was not due for some reason, say the contract was void *ab initio*, the *condictio indebiti* was available to recover what was not due.²⁸ So, when a payment was made to discharge an obligation that was thought to derive from a contract, the Roman jurists applied the *condictio indebiti*.²⁹

However, in cases where something was given that fell outwith the recognised types of contract, the *condictio indebiti* could not lie because the payment or transfer was not made to discharge an obligation. The transfer itself was not enforceable since there was no *formula* for this situation, and thus there was no legal obligation to be discharged by the transfer. Such a transfer outwith contract was called *datio ob rem*.³⁰ In this context one could understand *res* to denote what was given with the purpose of obtaining a counter-performance.³¹ So the giver paid (*datio*) in expectation of a certain behaviour or counter-performance by the recipient (*ob rem*). A contrast to the *datio ob rem* would be a gift (*donatio*), *i.e.* a transfer of value which does not envisage any counter-performance but is carried out *animo donandi*.³² On the other hand, if the donor <11> intended to evoke certain behaviour from the donee and therefore subjected the *donatio* to a corresponding condition the *condictio ob rem* was available to recover the donated benefits if the donee did not fulfill this condition.³³ In this context, the *datio* is made in expectance of the fulfilment of the condition (*ob rem*). A *datio ob rem* could generally be any act that was not made under the terms of a contract, say under a sale or lease.³⁴ Examples are a payment made for the purpose of freeing a slave of the

²⁸ Kaser, *RP I*, p. 596; see there note 36 on the controversial question of the *condictio indebiti* and its relation to error, with references.

²⁹ Justinian compiled these cases mainly in book twelve, title six of the Digest.

³⁰ Zimmermann, *The Law of Obligations*, pp. 842 sq.; Schwarz, *Condictio* (1952), pp. 117 sqq.; Honsell, *Rückabwicklung* (1974), pp. 73 sqq.; Kaser, *RP I*, p. 597.

³¹ Cf. to the wide-ranging use of *res* Heumann/Seckel, *Handlexikon* (1891), pp. 464 sqq.; on the use which applies here see p. 466 no. 5.

³² Ulp. D. 39.5.19.5 sq.; Kaser, *RP I*, p. 601. <11>

³³ Ulp. D. 23.3.9 *pr.*; C. 4.6.2.sq.; Kaser, *RP I*, p. 259.

³⁴ Honsell, *Rückabwicklung* (1974), pp. 73 sq.

recipient or to avoid a legal process³⁵, or the transfer of a dowry in expectation of a marriage.³⁶

If the purpose envisaged failed to materialize - the slave was not freed or the marriage cancelled - the *res* was *non secuta*. In this case, the Roman jurists allowed recovery by means of the *condictio*.³⁷ Paulus said:

Paul. D. 12.5.1.1 *Ob rem igitur honestam datum ita repeti potest, si res, propter quam datum est, secuta non est.*

What is given for a honourable purpose cannot be reclaimed unless the purpose envisaged fails to materialize.³⁸

The *condictio indebiti* and the *condictio ob rem* complemented each other. Performances that lay within recognised contracts could in principle be recovered with the *condictio indebiti*, and performances made by *datio ob rem* with the *condictio ob rem*, when the honourable purpose envisaged failed to materialize. Thus the giver, in a case outwith the range of consensual contracts, was protected by law, for even if he could not enforce counter-performance he could at least claim his own performance back.³⁹

To be more precise, however, it must be stressed that the Romans did not create distinct types of *condictiones*. They recognised only one *condictio* with the abstract *formula* of the *actio certae creditae pecuniae* (or *certae rei*).⁴⁰ The jurists identified different type cases which provided a ground for restitution by means of the *condictio*. Two of these cases were where a payment had been made that was not due (*indebitum <12> solutum*)⁴¹ and where a payment had been made for a purpose that was not achieved (*datio ob rem non secutam*). The texts only speak of *condictio* or *repeti posse* and name the facts of the case, like *indebitum solutum* or *re non secuta*. It was only Justinian who introduced different names for each type case in his Digest.⁴²

³⁵ Ulp. D. 12.4.1 *pr.*

³⁶ Paul. D. 22.1.38.1; Ulp. D. 23.1.10; Paul., Iav. D. 12.4.9 *pr.*

³⁷ Kaser, *RP I*, p. 597; Zimmermann, *The Law of Obligations*, pp. 843 sq.

³⁸ All translations of the fragments of the Digest are based on Mommsen/Krueger/Watson, *The Digest of Justinian* (1985), but changed where appropriate.

³⁹ Zimmermann, *The Law of Obligations*, pp. 842, 857 sq.

⁴⁰ Zimmermann, *The Law of Obligations*, pp. 838 sq. See also above A I. <12>

⁴¹ On the question of error see above note 29.

⁴² Zimmermann, *The Law of Obligations*, pp. 838 sq.; see also below D I.

III. *Condictio ob Rem* and *Condictio ob Turpem Causam*

1. *The Datio ob Rem as the Element Common to Both the Condictio ob Rem and the Condictio ob Turpem Causam*

When reading the very first fragment of the Digest title that is concerned with the *condictio ob turpem causam*, it becomes clear that there is a connection with the *condictio ob rem*. The fragment runs:

Paul. D. 12.5.1 *Omne quod datur aut ob rem datur aut ob causam, et ob rem aut turpem aut honestam: turpem autem, aut ut dantis sit turpitude, non accipientis, aut ut accipientis dumtaxat, non etiam dantis, aut utriusque. 1. Ob rem igitur honestam datum ita repeti potest, si res, propter quam datum est, secuta non est. 2. Quod si turpis causa accipientis fuerit, etiamsi res secuta sit, repeti potest.*

Everything given is given either *ob rem* or *ob causam*⁴³, and in respect of things given *ob rem* some are evil and some honourable. Then, in the case of evil purposes, the giver may be in the wrong and not the recipient, or the recipient and not the giver, or both may be. 1. What is given for an honourable purpose cannot be reclaimed unless the purpose envisaged fails to materialize. 2. However, in the case of an evil purpose, where the recipient is in the wrong, there can be recovery even if the purpose envisaged does materialize.

⁴³ There has been considerable discussion about the meaning of *causa* and *res* in Roman law. That is because in some fragments the two terms seem to be used as synonyms (as in Paul. D. 12.5.1.2), whereas in others they seem to be used as different terms. This finding led some to suppose a postclassical interpolation. Fritz Schwarz (*Condictio* [1952], p. 170 and, in full detail, from pp. 117 sqq. onwards; see also v. Beseler, [1937] 3 *SDHI* 376) suggests that in classical times the Romans only used *dare ob rem* or *turpis res*; at this time, according to Schwarz, *causa* only denoted a motive for performance that was, however, legally of no importance. As a result, Schwarz assumes that all fragments using the term *dare ob causam* or *turpis causa* were altered by postclassical glossators. Rightly, objections are raised against this wide-ranging assumption of postclassical interpolation. As Kaser (*RP I*, p. 597 note 42) points out, the ground (*causa*) and purpose (*res*) of a performance are often so closely related that a universal conceptual distinction could only be imposed on the Roman jurists. Peter Bufe ("§ 817 Satz 2 BGB" [1958/59] 157 *AcP* 215 [245 sq.]) rightly emphasizes that the fragment makes perfect sense as it stands so that nothing indicates an interpolation. Paul. D. 12.5.1.2 represents pure classical Roman law. <13>

Paulus subdivided the category of the *datio ob rem* according to whether the purpose envisaged is tainted by turpitude or not. He then proceeded to explain the case of a *datio ob rem inhonestam*. On an abstract level, there are three possible cases where <13> turpitude is involved: in the first only the giver is tainted, in the second only the recipient, and in the third both of the parties. Having made these classifications, Paulus named two general rules. According to the first rule, recovery is possible when something was given for an honourable purpose (*datio ob rem honestam*), but the purpose failed to be achieved (*res non secuta*). We already know this rule from the foregoing section; it is the case of the *condictio ob rem*. The second rule concerns the *datio ob rem inhonestam*. It is set up as a contrast to the first rule, and expresses the fact that even although the purpose envisaged has been achieved, recovery is possible if the recipient acted with turpitude. The unifying element of the *condictio ob rem* and *ob turpem causam* is that both groups of case presuppose a *datio ob rem*, i.e. a performance made in order to achieve a purpose outwith contract.⁴⁴

2. The *Condictio ob Turpem Causam* as a Subcategory of the *Condictio ob Rem*?

a) Founding on the text Paul. D. 12.5.1, it has been suggested⁴⁵ that the *condictio ob turpem causam* was in fact not a *condictio* (a separate claim), but only a subcategory of the *condictio ob rem*. The assumption is that the *condictio ob rem* followed different rules if a case imported turpitude. So, whenever there was a case of a *datio ob rem*, the *condictio ob rem* was applied.⁴⁶

Normally, the success of the pursuer advancing the *condictio ob rem* depended on the failure of the purpose envisaged, as was the case if the recipient did not counter-perform. If the purpose had materialized, however, the *condictio ob rem* ceased.⁴⁷ According to the view quoted above these rules of the *condictio ob rem* were modified when it came to immoral transactions. Then, recovery might be allowed even if the purpose had been achieved (*res secuta*). However, this exception was, so the reasoning goes, not needed in cases where the purpose was indeed immoral but did not materialize. Since here the *res* was *non secuta*, the normal rules of the *condictio ob rem* applied,

⁴⁴ On the *datio ob rem* see above A II 2, III.

⁴⁵ Honsell, *Rückabwicklung* (1974), p. 65 and pp. 80 sqq.

⁴⁶ Honsell, *Rückabwicklung* (1974), pp. 80 sqq.

⁴⁷ Ulp. D. 12.4.1 pr. <14>

and recovery was allowed. Thus the *condictio ob turpem causam* is believed only to have a small field of application; often the *condictio ob rem* would be a sufficient remedy. Later, according to this view, Justinian separated the *condictio ob <14> turpem causam* from the *condictio ob rem* and created a distinct category for the former claim.⁴⁸

This view has consequences for the application of the *in pari delicto* rule, a rule that will be discussed in detail below.⁴⁹ It bars recovery in cases where both of the parties are guilty of turpitude.⁵⁰ According to the view mentioned the rule was not needed in cases where the normal rules of the *condictio ob rem* led to non-recoverability of the performance.⁵¹ In a case where the tainted purpose materialized (*res secuta*), the *condictio ob rem* did not operate to allow recovery. The *in pari delicto* rule is therefore thought to have been restricted to cases where a tainted purpose did not materialize (*res non secuta*); for in this case the *condictio ob rem* would normally enable the pursuer to recover what he gave. But since public policy demanded irrecoverability when the pursuer was himself guilty of turpitude, here the *in pari delicto* rule was established to bar recovery.⁵²

b) However, there are difficulties with this view. It imposes a rather complicated conception, with exceptions and subcategories, on the classical law of the *condictio*. The Roman jurists did indeed classify different groups of case, according to the facts involved. But the question they asked was whether the *condictio* as a procedural *formula* should be granted in a particular case rather than if it was a case where an exception to the *condictio ob rem* should be made. The view mentioned above creates the impression that the *condictiones* were different claims. However, this was not the case in classical times. There was only one *condictio*: this was the abstract procedural *formula* of the *actio certae creditae pecuniae* or *certae rei*. The jurists formed groups of cases in which recovery should be granted by means of this *condictio*. In this respect, it was a much simpler system than suggested by the view described above. Furthermore, this is what Paulus said in D. 12.5.1: "*Omne quod datur aut ob rem datur aut ob causam, et ob rem aut turpem aut honestam.*" He divided the cases of *datio ob rem* according to whether the purpose was immoral or not; he used this device to delimit the different groups of case. He then applied separate rules to each of the different groups of case.

⁴⁸ Honsell, *Rückabwicklung* (1974), pp. 80 sq.

⁴⁹ See below section B.

⁵⁰ For instance, Paul. D. 12.5.3.

⁵¹ Honsell, *Rückabwicklung* (1974), pp. 85 sqq.

⁵² Honsell, *loc. cit.* <15>

The phrase "*Quod si turpis causa accipientis fuerit, etiamsi <15> res secuta sit, repeti potest*" at the end of the fragment D. 12.5.1 compares the cases of a *datio ob rem inhonestam* with those of a *datio ob rem honestam*. But the "*etiamsi*" only expresses the fact that in the former case of a *datio ob rem inhonestam* it did not matter whether the purpose had been achieved or not. The *condictio* should be granted *ob turpem causam*: because turpitude was involved.

This leads to the further conclusion that the application of the *in pari delicto* rule was not *a priori* confined to cases where the purpose had not materialized, as the view described suggests. In principle, this rule operated where both parties were at fault, the *res* being *secuta* or *non secuta*. The exact field of application of the *in pari delicto* rule must be determined from the fragments which have come down to us.⁵³

The *condictio ob rem* and the *condictio ob turpem causam* were thus two distinct groups of case, both referring to a *datio ob rem*. The *condictio ob turpem causam* was not an exception or a subcategory of the *condictio ob rem*. The fact that a case imported turpitude was taken as the decisive issue to apply the *condictio* and to allow recovery.

The following fragment found in the Digest title on the *condictio ob turpem vel iniustam causam* speaks in favour of this understanding:

Iul. D. 12.5.5 *Si a servo meo pecuniam quis accepisset, ne furtum ab eo factum indicaret, sive indicasset sive non, repetitionem fore eius pecuniae Proculus respondit.*

If someone is given money by my slave to stop him revealing a theft committed by the slave, a reply of Proculus holds that the money will be recoverable whether or not he reveals the theft.

The slave⁵⁴ pays over money in order to encourage tainted behaviour on the part of the recipient not to denounce a crime, *i.e.* to encourage him to act as an

⁵³ See below section B.

⁵⁴ The case raises the issue of capacity of the slave. In general, a slave was not capable of acquiring property in his own right; all he acquired, he acquired for his master because the master had the *dominica potestas*, the power over the body and will of the slave (Sohm, *Institutes* [3rd ed., 1907], p. 166; Kaser, *RP I*, pp. 285 sq.). Being a natural person, however, a slave was capable of concluding juristic acts, once his master left property to be managed by the slave (a so called *peculium*; Sohm, *Institutes* [3rd ed., 1907], p. 165; Kaser, *RP I*, pp. 286 and 287 sq.). Without a *peculium* or other authorization of his master a slave could not transfer

accessory after the fact. The decision of the case is unequivocal: recovery is possible whether the <16> purpose of the slave was achieved or not. In other words, it did not matter whether the *res* was *secuta* or not (*sive indicasset sive non*); since the purpose envisaged was tainted, the *condictio* was granted to enable the master to recover what he had lost.⁵⁵

In this context, the following text is also found:

Ulp. D. 12.4.1 *pr. Si ob rem non inhonestam data sit pecunia, ut filius emanciparetur vel servus manumitteretur vel a lite discedatur, causa secuta repetitio cessat.*

When money is given for a purpose which is not improper, as for the emancipation of a son, the manumission of a slave or the abandonment of a suit, recovery ceases once the purpose envisaged has materialized.

In the case of a *res non inhonestam* the question arises whether the *res* is *secuta* or not. If the purpose has materialized recovery ceases. In the case of a *res inhonesta* there may be recovery regardless of whether the purpose has materialized at all (as in Iul. D. 12.5.5 above). The two fragments show that only if no turpitude was involved (*ob rem non inhonestam*) did it matter for the application of the *condictio* whether the purpose was achieved. So the first question was whether the *res* was *honestam* or *inhonestam*, and only if the answer to this was that the *res* was *honestam* did the second question of the *res* being *secuta* or not arise. This corresponds with the presentation of the matter in Paul. D. 12.5.1 above.

The reason why recovery may be allowed on the grounds of a *res inhonesta* is that, where the transferee received the benefit on the grounds of his turpitudinous conduct, the benefit really belongs into the patrimony of the pursuer. A text from Ulpian provides examples:

the property of his master. In the above case, the slave had no authorization to give away the money for his own purpose. Normally, the result would be that the master was still the owner and the *rei vindicatio* lay against the recipient. However, in the special case of transfer of money the recipient acquires ownership by *commixtio*. Therefore, in this case, the master had to rely on the *condictio*. Note that the text speaks of the purpose being achieved or not (*sive indicasset sive non*). This issue (which refers to *res secuta/non secuta*) is only important for the question whether the *condictio* lay or not. The *rei vindicatio* lay as soon as the pursuer could prove his ownership. <16>

⁵⁵ Cf. also J. G. Wolf, *Causa Stipulationis* (1970), p. 38 note 14. <17>

Ulp. D. 12.5.2 *Ut puta dedi tibi ne sacrilegium facias, ne furtum, ne hominem occidas. In qua specie Iulianus scribit, si tibi dedero, ne hominem occidas, condici posse. 1. Item si tibi dedero, ut rem mihi reddas depositam apud te vel ut instrumentum mihi redderes.*

By way of example, take the case in which I pay you not to commit sacrilege, not to steal, or not to kill a man. In Julian's writings, it is held that in this kind of case, where I give to stop you killing someone, a *condictio* does lie. 1. Similarly, in the case where I pay to make you give me back something deposited with you, a document, for instance. <17>

These cases have in common the fact that the recipient is actually obliged to desist from, or to undertake a, certain action, like not killing somebody or returning a deposited thing. Nevertheless, he accepts money for something he ought to do anyway. The policy behind the rule that allows recovery is obvious. Everyone must obey his duties without demanding extra to do so. If the recipient demands extra he has no right of retention of the benefit. This applies regardless of whether the recipient has done what he was supposed to do or not, *i.e.* regardless of whether the *res* is *secuta* or not. The decisive point for granting recovery is the turpitude involved.

IV. The *Condictio ob Turpem Causam* and the Law of Contracts

A question arises whether the *condictio ob turpem causam* was also granted when the immoral act consisted in the performance of a contract. In Roman law, if a performance was made to discharge an obligation falling within the fixed number of contractual obligations the *condictio indebiti* operated to recover the benefits transferred.⁵⁶ The *condictio ob turpem causam*, by contrast, presupposed a situation in which a *datio ob rem* was given. A *datio ob rem* was a transfer which fell outwith the recognised types of contract. Therefore, in principle, the cases where the *condictio indebiti* was granted should easily be distinguished from those where the *condictio* would be given *ob turpem causam*.

However, there are some fragments which speak of turpitude in the context of performance of contracts. These fragments will therefore be looked at more closely. On an abstract level, there are two possibilities concerning how an

⁵⁶ See in detail above A II 2. <18>

agreement can be affected by turpitude: the agreement as such can be immoral because it is dealing with an immoral objective, or, although the agreement itself is not objectionable, certain acts concerning its execution are.

1. Immoral Agreement

First, the agreement as a whole can be immoral. This is the case when the object of the agreement itself is tainted. Examples are an agreement for the payment of a bribe or to commit a murder.

a) In classical Roman law, such an agreement could generally not create a contract. A contract existed when there was an action to enforce the promise, that is a *formula* <18> that fitted the circumstances of the case.⁵⁷ A *formula* was not given in respect of an agreement for a tainted purpose (but see below b and c).⁵⁸ Therefore, if something had been given in order to encourage immoral behaviour it was a *datio ob rem inhonestam* outwith contract. Thus, the *condictio ob turpem causam* operated to recover what was given. Since, as distinct from the position today, there was no contract, the transfer was not made *solvendi causa*; so it was not a case for the application of the *condictio indebiti*. The relationship of the *condictio ob turpem causam* with the *condictio indebiti* thus corresponds to the relationship of the *condictio ob rem* with the *condictio indebiti*, since both the *condictio ob turpem causam* and the *condictio ob rem* lay in cases of a *datio ob rem*, that is outwith contract.

b) However, one exception must be mentioned in which a contract came to exist, notwithstanding the immorality of the purpose. This was the case of an abstract stipulation. In an abstract stipulation, the cause of the stipulation was not mentioned. A contract was nevertheless created because a valid abstract stipulation only presupposed the observation of a certain form.⁵⁹ An abstract stipulation would, for instance, be created if A asks B to pay him 10.000, and B consents. By contrast, if the tainted cause was mentioned in the *stipulatio*, i.e. the stipulation was not abstract, the contract was void. Pomponius gives the example of the promise to kill someone or to commit a sacrilege⁶⁰ (for instance, A asks B to pay him 10.000 for killing C).

If the promise was made in the form of a stipulation, and the tainted cause was not mentioned (abstract stipulation), a contract was created because the

⁵⁷ See above A II 1.

⁵⁸ Honsell, *Rückabwicklung* (1974), p. 77.

⁵⁹ See above A II 1 c.

⁶⁰ Pomp. D. 45.1.27 *pr.* (cf. also Ulp. *eod.* 26). See also Pap. *eod.* 123: *Si flagitii faciendi vel facti causa concepta sit stipulatio, ab initio non valet.* – If a stipulation is made for the commission of a shameful act or in respect of one already committed, it is void from the start.

parties used the requisite form of question and answer. If the cause was immoral, however, the *praetor* prevented enforceability by denying a legal action or by giving a defence, the *exceptio doli*⁶¹:

Paul. D. 12.5.8 *Si ob turpem causam promiseris Titio, quamvis, si petat, exceptione doli mali vel in factum summovere eum possis, tamen si solveris, non posse te repetere, quoniam sublata proxima causa stipulationis, quae propter exceptionem inanis esset, pristina causa, id est turpitude, superesset: porro autem si et dantis et <19> accipientis turpis causa sit, possessorem potioem esse et ideo repetitionem cessare, tametsi ex stipulatione solutum est.*

If the basis of your promise to Titius is evil you can defeat his action by the defence of fraud or one adjusted to the circumstances. Yet, despite that, if you pay, you cannot recover. The reason is that although the immediate basis, the stipulation, is out of the way, being rendered empty by the availability of the defence, the antecedent *causa* still operates, namely the evil itself. Furthermore, if both parties, giver and recipient, are tainted, the possessor is the stronger, and no recovery is therefore possible even although the payment is made under a stipulation.

Paulus stated that, on the one hand, Titius cannot enforce the promise. If *tu*, on the other hand, has performed, he cannot recover what he transferred to Titius on the basis of the promise. According to Roman civil law, the stipulation was valid. However, its cause being evil, the *praetor* used a procedural device to prevent the operation of the stipulation.⁶² In Paulus' view, this rendered the stipulation useless in the sense that Titius cannot enforce it. *Tu* is, according to praetorian law, therefore not obliged to pay. However, if *tu* paid on the stipulation, he cannot recover. This is at first sight surprising, for seemingly he paid to discharge an obligation (*solvendi causa*). Therefore one would expect the *condictio indebiti* to operate. The crucial point, however, is seen to be the immoral cause that still exists behind the useless stipulation. Recovery is thus discussed because of the turpitude involved: *ob turpem causam*. Yet since both

⁶¹ Kaser, *RPI*, p. 251. <19>

⁶² On his *imperium* as regards the modification of the *ius civile* see above note 13. <20>

parties were tainted recovery is denied through the operation of the *in pari delicto* rule. The reasoning might have been this: the abstract stipulation is, in civil law, valid and as such provides a legal basis for retention of what was received. Therefore, strictly speaking, the payment was due; there was, in this sense, a *debitum*. The *condictio* could not apply on the grounds that *tu* paid on an *indebitum* (*condictio indebiti*). On the other hand, the stipulation was rendered ineffectual by praetorian law because its cause imported turpitude. Therefore, the result was that the abstract stipulation was treated on a similar basis as the stipulation naming the evil cause, which was void in civil law. One could perhaps say that the abstract nature of the stipulation was broken by praetorian law. The result was that the underlying evil cause determined the procedural validity of the stipulation as well as the question of recovery. Indeed, there seems to be no justification for treating both cases differently merely because the parties did not mention the evil purpose envisaged under the terms of their agreement. <20>

Although, apparently, the *condictio ob turpem causam* was applied to a contract here, it is an exception that is explicable because of the nature of the abstract *stipulatio*. The general conclusion is that the *condictio ob turpem causam* lay in cases of a *datio ob rem inhonestam* outwith contract, and that the *condictio indebiti* operated to recover payment of an *indebitum*.

c) Cases are also recorded in which the terms of an agreement were neutral but the remote purpose was evil. An example would be the purchase of a knife in order to kill someone. The sale was valid; the remote motive of the purchaser did not affect its validity.⁶³ Only if the purchased object could not be used other than in a tainted way, as was the case where poisonous medicine was sold, was the contract assumed to be invalid.⁶⁴ However, there is no text that answers the question whether the *condictio* lay to recover the price paid in the latter case, and, if so, for what reason: whether *ob turpem causam* or because it was an *indebitum*.

2. Tainted Acts in the Context of the Execution of a Contract

The turpitude may be restricted to certain acts concerning the execution of an otherwise untainted contract. Paulus wrote:

D. 12.5.9 *Si vestimenta utenda tibi commodavero, deinde pretium, ut reciperem, dedissem, condictio me recte*

⁶³ Honsell, *Rückabwicklung* (1974), p. 78.

⁶⁴ Gai. D. 18.1.35.2. <21>

acturum responsum est. quamvis enim propter rem datum sit et causa secuta sit, tamen turpiter datum est. 1. Si rem locatam tibi vel venditam a te vel mandatam ut redderes, pecuniam acceperis, habebo tecum ex locato vel vendito vel mandati actionem: quod si, ut id, quod ex testamento vel ex stipulatu debebas, redderes mihi, pecuniam tibi dederim, condictio dumtaxat pecuniae datae eo nomine erit. Idque et Pomponius scribit.

If I lend you clothes for use and then pay you a price to get them back, the reply has been given that I will be right to sue by *condictio*. Though the giving was for a purpose and the purpose has materialized, it was nevertheless wrongful. 1. If you are given money to release things hired to you, sold by you, or entrusted to you under a mandate, I shall have against you the actions of hire, sale, or mandate, but if I give you money to get from you something owed by you under a will or stipulation, only the *condictio* will lie to recover that payment. So Pomponius also writes.

Paulus considered different cases in which a contract, or in one case the will of a deceased, imposes an obligation on the recipient to return or hand over something to <21> the giver. Nevertheless the giver has to pay extra money to make the recipient return what he was bound to restore. Paulus decided that in some cases the *condictio* lies to recover the money, whereas in others there is an action on the contract. What at first sight looks like a confusing decision can again be explained by reference to the Roman procedure and their contractual system.⁶⁵

As has been noted, there was a limited number of fixed contractual types in classical Roman law. Generally speaking, a contract existed when there was an action to enforce a promise. This depended on the existence of a *formula* that fitted the circumstances of the case. The *formula* also determined the content of the actionable claim. The words laid down in a *formula* determined what could be claimed within a contractual relationship. For these reasons, we have to look at the *formulae* of loan, hire, sale, mandate, stipulation and testament.

The *formulae* of mandate, sale and hire resemble each other as they all belonged to the so-called *bonae fidei iudicia*. As such they all appeared under

⁶⁵ See above A I 1 and A II 1.

the same rubric of the *edictum perpetuum*.⁶⁶ One example is the *actio mandati*⁶⁷:

*Quod As As No No mandavit, ut ...,
quidquid ob eam rem Nm Nm Ao Ao dare facere oportet ex
fide bona,
eius, iudex, Nm Nm Ao Ao condemnato.
Si non paret absolvito.*

In case the pursuer Aulus Agerius has ordered the defender Numerius Negidius to do ...,
whatever the defender owes to the pursuer due to this with
respect to good faith
you, judge, shall condemn him to do.
If it does not prove true you shall free him.

The *formula* of the *bonae fidei iudicia* only differ with respect to the *demonstratio*, depending on the particular facts that are involved. The *intentio* of the *formulae* always runs the same: *quidquid ob eam rem dare facere oportet ex fide bona*. This provides a much wider latitude to the judge in making his decision than in the *formula* of the *condictio*.⁶⁸ The *condictio* only allowed the judge to decide whether the *certum* (for instance ten thousand *sestertii*) was due or not. No other issue was relevant. It was the <22> prototype of an *actio stricti iuris* in classical Roman law.⁶⁹ The *formula* of a *bonae fidei iudicium*, however, left open the issue of what exactly was due; the judge had to find out during the process.⁷⁰ His guideline was expressed by the term *ex fide bona*. This referred to equity and fairness within the relationship of the parties.⁷¹ Thus he had to consider all the circumstances arising in the case consistent with good faith. In the Institutes of Justinian the *bonae fidei iudicium* is described as such:

⁶⁶ Lenel, *Das Edictum Perpetuum* (3rd ed., 1927), p. XIX, tit. XIX de *bonae fidei iudiciis*.

⁶⁷ Lenel, *Das Edictum Perpetuum* (3rd ed., 1927), pp. 295 sq.

⁶⁸ Kaser, *RP I*, p. 485; cf. also Sohm, *Institutes* (3rd ed., 1907), p. 368. <22>

⁶⁹ Zimmermann, *The Law of Obligations*, p. 836. But see also note 5 above.

⁷⁰ Kaser, *RP I*, p. 485.

⁷¹ Heumann/Seckel, *Handlexikon* (1891), p. 205 "fides" no. 5 a.

I. 4.6.30 *in bonae fidei iudiciis libera potestas permitti videtur iudici ex bono et aequo aestimandi, quantum actori restitui debeat.*

In a *bonae fidei iudicium* we hold the judge to be allowed to estimate under equity how much is to be restored to the pursuer.

The *intentio* of the *formulae* of loan⁷², stipulation⁷³ and *testamentum*⁷⁴, however, runs *quidquid ob eam rem dare facere oportet* (i.e. whatever the defender owes to the pursuer due to the *res*). In these *formulae* the term *ex fide bona* is missing. The claim *quidquid ob eam rem dare facere oportet* was not restricted to a *certum* but also concerned the recovery of an *incertum*. This means that the object of the claim was not strictly determined but open to the judge's decision. However, as regards a strict obligation like stipulation or legacy *per damnationem*⁷⁵, the judge was only allowed to determine the *incertum* within the content of the obligation (*ob eam rem*)⁷⁶, for instance, where the pursuer claimed an estate which had been bequeathed to him by testament.⁷⁷ The *iudex* could adjudge everything which belonged to the estate (such as things and livestock) which were due under the terms of the legacy. However, he could not consider other circumstances outwith the obligation which arose from the testament; other circumstances apart from the content of the obligation could only be considered within a *bonae fidei iudicium*. So, if the possessor claimed additional money to hand over the estate he was not obliged to repay the money because of the testament since the content of the testament did not refer to this money. Therefore, the *iudex* <23> could not adjudge the money on the basis of the *formula* of the *actio ex testamento*. So the pursuer had to rely on the *condictio* to recover the extra money that had been paid.

Paulus said that the *condictio* also lay in the case of loan. Therefore it seems that the *formula* of the *actio commodati* did not have an *ex-fide-bona*-clause. According to the reasoning above, the recovery of the additional

⁷² Lenel, *Das Edictum Perpetuum* (3rd ed., 1927), p. 252.

⁷³ Lenel, *Das Edictum Perpetuum* (3rd ed., 1927), pp. 151 sqq.

⁷⁴ Lenel, *Das Edictum Perpetuum* (3rd ed., 1927), p. 367.

⁷⁵ A legacy *per damnationem* created the obligation of the heir to transfer the bequeathed goods to the legatee; the heir was liable under the *actio ex testamento*. Under a legacy *per vindicationem* the legatee became the owner directly and could claim the goods from the heir with the *rei vindicatio*. Kaser, *RP I*, p. 743.

⁷⁶ Kaser, *RP I*, pp. 493 sq.

⁷⁷ Cf. Kaser, *RP I*, pp. 749 sq. <23>

money could not be considered within the *actio commodati*; therefore the *condictio* was applied. However, the question whether the *actio commodati* had an *ex-fide-bona*-clause is controversial.⁷⁸ There are other fragments which allow the conclusion that the *actio commodati* did have the *ex-fide-bona*-clause, although it has been doubted whether those fragments represent pure classical Roman law.⁷⁹ However, this issue is not strictly relevant to the point in hand.

As a result, we see that only the *bonae fidei iudicia* provided the possibility to the judge of considering other circumstances beyond the content of the obligation. Thus other acts which were connected with the fulfilment of the contract could be considered. So, if the recipient only returned something to the pursuer after his having paid extra money, the judge could consider this under the clause *ex fide bona*. The return of the extra money to the pursuer was due *ex fide bona* because the recipient had no right to the extra money.

By contrast, the *formulae* of testament, stipulation, and, according to Paulus, also of loan, did not allow the possibility of considering extraneous facts arising from the execution of the obligation. They were restricted to the question what was due *ob eam rem*, i.e. what was due on the basis of the obligation. Therefore their *formulae* did not cover the demand of the pursuer to recover money paid over without any obligation to do so. Thus the *praetor* granted the *condictio* in such cases. Since the recipient was acting immorally in requesting and accepting extra money for fulfilling an obligation otherwise due by him, it was a case of *turpis causa* (cf., for instance, Ulp. D. 12.5.2.1).

In all of these cases the payment of the extra money is a *datio ob rem* since there was no obligation on the giver to pay over the money. It is not the case of a payment <24> made to discharge an obligation, so the *condictio* was not granted on the grounds that the payment was an *indebitum*. Since the payment was made to recover a *datio ob rem inhonestam* the *condictio* was granted *ob turpem causam*. Therefore, the fragment from Paulus conforms with the delimitation between the cases where the *condictio* operated to recover an

⁷⁸ Against a *bona-fide*-clause E. Levy, "Zur Lehre von den sog. *actiones arbitrarie*" (1915) 36 *SZ* 1; M. Kaser, "*Oportere* und *ius civile*" (1966) 83 *SZ* 30, and *RP I*, p. 534, each with further references; differently Lenel, *Das Edictum Perpetuum* (3rd ed., 1927), p. 253; in detail Pastori, *Il Commodato nel Diritto Romano* (1954), pp. 53 sqq.

⁷⁹ Lenel, *Das Edictum Perpetuum* (3rd ed., 1927), p. 253 assumes that the *actio commodati* had a *bona-fide*-clause but says himself that the *formula* as it appears in Ulpian's *commentarii* does not provide argument for this presumption and two fragments that would support this view were postclassical Justinian interpolations. <24>

indebitum and those where the *condictio* was given on the grounds of the turpitude involved.⁸⁰ <25>

B. THE BAR TO RECOVERY IN THE CASE OF MUTUAL TURPITUDE

I. Origin and Field of Application of the Bar to Recovery

After considering the case of the recipient alone being in turpitude which triggers liability to return the money, Paulus introduced the rule which applies to the case where both the giver and the recipient are in turpitude:

Paul. D. 12.5.3 *Ubi autem et dantis et accipientis turpitudine versatur, non posse repeti dicimus: veluti si pecunia detur, ut male iudicetur.*

When the evil taints both giver and recipient, we hold recovery to be excluded, as where money is paid to pervert a judgment.

In D. 12.5.8, the rule is repeated with the additional reasoning that the possessor is better off:⁸¹

Paul. D. 12.5.8 ... *Porro autem si et dantis et accipientis turpis causa sit, possessorem potioem esse et ideo repetitionem cessare ...*

If both parties, giver and recipient, are tainted, the possessor is better off, and no recovery is therefore possible.

Papinian spoke of the two parties being *in pari delicto*:

Pap. D. 12.7.5 *pr. ... cum ob turpem causam dantis et accipientis pecunia numeretur, cessare conductionem et in delicto pari potioem esse possessorem ...*

⁸⁰ Cf. also Honsell, *Rückabwicklung* (1974), pp. 83 sq. <25>

⁸¹ See also Ulp. D. 3.6.5.1 *Sed etiam praeter hanc actionem condictio competit, si sola turpitudine accipientis versetur: nam si et dantis, melior causa erit possidentis.* – But in addition to this action the *condictio* is also available if the turpitude is on the part of the recipient only. But if it is on the part of the giver as well, the position of the one in possession will be the stronger. <26>

When money is paid over on a basis the evil character of which taints both giver and recipient, the *condictio* will not lie, and where parties are equally in the wrong the possessor is better off.

Broadly speaking, this rule bars recovery in cases where both parties are involved in a turpitudinous transaction.

1. The Field of Application of the Rule in the Context of the Condictio ob Turpem Causam

The fragment following the rule expressed in Paul. D. 12.5.3 gives examples of cases where the rule bars recovery: <26>

Ulp. D. 12.5.4 *idem, si ob stuprum datum sit, vel si quis in adulterio deprehensus redemerit se; cessat enim repetitio, idque Sabinus et Pegasus responderunt. 1. Item si dederit fur, ne proderetur, quoniam utriusque turpitudine versatur, cessat repetitio. 2. Quoties autem solius accipientis turpitudine versatur, Celsus ait, repeti posse; veluti si tibi dedero, ne mihi iniuriam facias. 3. Sed quod meretrici datur, repeti non potest, ut Labeo et Marcellus scribunt; sed nova ratione non ea, quod utriusque turpitudine versatur, sed solius dantis; illam enim turpiter facere, quod sit meretrix, non turpiter accipere, cum sit meretrix.*

The same applies where something is given for *stuprum* or where one caught in adultery buys his way out; there is no recovery in such a case, so held in replies of Sabinus and Pegasus. 1. Again, if a thief pays over to avoid being given away, there is no recovery, for both parties are tainted. 2. Celsus says that wherever the turpitude is only on the side of the recipient recovery is possible, as, for instance, where I pay to prevent your committing *iniuria* against me. 3. What is given to a prostitute cannot be recovered; so Labeo and Marcellus write. But according to a new view both parties are not tainted but the payer alone is; for the prostitute does wrong to be one but, being one, does no wrong in taking money.

In the *principium*, Ulpian denied recovery to someone who has paid money in order to commit a *stuprum* (indecenty; for instance to have intercourse with an unmarried woman outwith a *concupinatus*, or a boy)⁸², and to someone who has paid money to silence the recipient who had caught him red-handed committing adultery. The *lex Iulia de adulteriis* criminalized both *stuprum* and *adulterium*.⁸³ Therefore, committing a *stuprum* or *adulterium* was both contrary to good morals and the law. However, there is no indication that the *lex Iulia de adulteriis* also forbade the handing over of money in order to commit or disguise the criminal act; so we cannot conclude that the payment itself was regarded as being illegal. The Roman jurists did not explore this question. They put weight on the turpitude of the transaction based upon the parties' envisaging a crime. Ulpian regarded both parties as being at fault and, therefore, barred the claim. The same applies to a thief who pays the recipient not to be denounced; Ulpian said that both the giver and the recipient are tainted, and there is no recovery. By contrast, the giver is not to blame if he pays the recipient to make him abstain from a wrong against the giver. In this case, the giver wants to avoid a wrong, not to encourage one. Also, the recipient is obliged not to commit the wrong in the first place; if he asks for <27> money to abstain from the wrong it amounts to an extortion against the giver. The giver only protects himself and therefore acts unobjectionably.

Ulpian then proceeded with the example of someone claiming back money he gave to a prostitute. This money cannot be recovered. According to an old view, both parties acted immorally, therefore the *in pari turpitudine* rule barred the claim. However, Ulpian reasoned differently and in a subtle way: only the payer is tainted, not the prostitute, for being a prostitute is immoral, but, once being one, it is not objectionable to take the money. This is, according to Ulpian, a case where recovery is denied because the giver alone acts in turpitude.⁸⁴

To illustrate a case where both parties are tainted, Paulus gave the example of bribery:

Paul. D. 12.5.3 *Ubi autem et dantis et accipientis turpitudine versatur, non posse repeti dicimus: veluti si pecunia detur, ut male iudicetur.*

⁸² Mommsen, *Römisches Strafrecht* (1899), pp. 694, 703.

⁸³ Mommsen, *Römisches Strafrecht* (1899), pp. 691 sqq.; M. Kaser, "Rechtswidrigkeit und Sittenwidrigkeit im klassischen römischen Recht" (1940) 60 *SZ* 95 (p. 118). <27>

⁸⁴ Cf. Paul. D. 12.5.1. <28>

When the evil taints both giver and recipient, we hold recovery to be excluded, as where money is paid to pervert a judgment.

Yet another example is given in:

Ulp. D. 3.6.5 *in heredem autem competit in id, quod ad eum pervenit. Nam est constitutum, turpia lucra heredibus quoque extorqueri, licet crimina extinguantur; utputa ob falsum, vel iudici ob gratiosam sententiam datum et heredi extorquebitur, et si quid aliud scelere quaesitum. 1. Sed etiam praeter hanc actionem condictio competit, si sola turpitudine accipientis versetur; nam si et dantis, melior causa erit possidentis. (...)*

But an action is available against the heir for what has come to him. For it has been laid down that dishonest gains are to be taken from heirs also, even though charges lapse. For example, a reward given for committing fraud or to a judge for a favourable verdict and anything else gained by criminal means will be taken from the heir as well. 1. But in addition to this action the *condictio* is also available if the only disgraceful behaviour is on the part of the recipient. But if it is on the part of the giver as well, the position of the one in possession will be the stronger.

If someone has made gains in a tainted way and then dies his heir will be liable to return the gains due to the application of a praetorian *actio in id quod ad eum <28> pervenit*.⁸⁵ The text refers to *calumnia* (D. 3.6), *i.e.* chicanery. In the context given here, there are two possible cases.⁸⁶ First, the deceased had extorted money from the giver not to take up an unfair trial against the giver himself. Second, the deceased had accepted money from the giver for taking

⁸⁵ The *actio in id quod ad eum pervenit* given here in context with *calumnia* (chicanery) was an *actio in factum* (Ulp. D. 3.6.1 *pr.*; Levy, *Privatstrafe und Schadensersatz* [1915], pp. 88 sqq.; G. H. Maier, *Prätorische Bereicherungsklagen* [1932], pp. 55 sqq.). The praetor granted *actiones in factum* in cases where, according to the *ius civile*, there was no claim but equity demanded one. They were granted on the facts of the single case (*in factum*); Kaser, *RP I*, pp. 580 sqq. See also note 91 below.

⁸⁶ G. H. Maier, *Prätorische Bereicherungsklagen* (1932), pp. 55 sq.; H.H. Seiler, "§ 817 S. 2 und das römische Recht", in: *Festschrift für Wilhelm Felgentraeger* (1969), 379 (pp. 384 sq.).

up an unfair trial against a third party. Ulpian said that *praeter actionem* (in addition to this action⁸⁷) the *condictio* lies. The *condictio* operates if only the recipient, that is the deceased, behaved in an objectionable way, whereas recovery is barred where the giver is also tainted. Thinking of the two cases of *calumnia* in Ulp. D. 3.6.5, we see that, in the first case, only the deceased is to blame since the giver protected himself against an unfair trial; here the *condictio* lies, as it always lies where the recipient demands extra without any right to do so (cf., for instance, Ulp. D. 12.5.4.2). In the second case where the giver made the deceased prosecute a third party both the giver and the recipient are tainted; in this case, therefore, recovery is barred.

The case illustrates that the *condictio ob turpem causam* also lay against the heir of someone who acted immorally, although the heir himself is untainted. In Roman law, the heir was in principle liable for the obligations of the deceased.⁸⁸ There were some exceptions made, especially as regards penal actions since the aim of these actions was the punishment and atonement of the guilty, not his innocent heir.⁸⁹ The *condictio*, however, was not a penal action even if it was granted because the deceased had committed a crime (which is a case of *ob turpem causam*). Its only aim was to enforce the restoration of gains to which the deceased was not entitled, and to which the heir was also therefore not entitled.⁹⁰ <29>

As a result, we conclude that the examples given in the Digest of the application of the *in pari delicto* rule concern transfers that were made in the context of severe moral offences and crimes. The texts mention acts like indecency, fraud, chicanery and bribery. In the case of criminal acts forbidden by law, the jurists focused upon the turpitude of the parties as a justification for applying the rule although the criminal acts which the parties envisaged infringed both good morals and legislation.⁹¹ As has been observed in the

⁸⁷ Levy assumes with good reason that the action Ulpian means in D. 3.6.5.1 (*praeter actionem*) is not the *actio in id quod ad eum pervenit* mentioned in the *principium* but the *actio vulgaris de calumniatoribus* which is the object of the title D. 3.6 (*Privatstrafe und Schadensersatz* [1915], pp. 102 sq.). Likewise H.H. Seiler, "§ 817 S. 2 und das römische Recht", in: *Festschrift für Wilhelm Felgentraeger* (1969), 379 (p. 384).

⁸⁸ Kaser, *RP I*, p. 733.

⁸⁹ Kaser, *RP I*, p. 612. See also Levy, *Privatstrafe und Schadensersatz* (1915), pp. 89 sqq.

⁹⁰ In cases where the *condictio* did not lie the *praetor* created *actiones in id quod ad eum pervenit* or *quanto locupletior factus est* because in law that the heir was not liable to penal actions: with these praetorian actions the pursuer could at least claim from the heir the gains which the deceased had made from the crime. Cf. Levy, *Privatstrafe und Schadensersatz* (1915), pp. 89 sqq.; Kaser, *RP I*, p. 600. <29>

⁹¹ The view once put forward by M. Kaser, "Rechtswidrigkeit und Sittenwidrigkeit im klassischen römischen Recht" (1940) 60 *SZ* 95 (p. 141), that legal solutions referring to

context of the *condictio ob turpem causam*, the decisive criterion was the turpitude involved.

2. The Policy of the Rule – An Excursion into the Law of Possession

It is striking that a rule with a similar wording and result to the *in pari delicto* rule can be found in other fragments of the Digest which, however, do not concern the *condictio ob turpem causam*, but are reported in the context of the law of possession. This could help us to understand the origin and the often questioned policy of the rule regarding the *condictio ob turpem causam*. In the context of the law of possession, it becomes clear what is meant by two parties being *in pari causa*.

Paulus said:

Paul. D. 50.17.128 *pr. In pari causa possessor potior haberi debet.*

Where two parties are in the same condition, the possessor must be regarded as being better off.

According to the palingenesia of this fragment⁹², Paulus reported the rule in the context of the *actio Publiciana*. This was a praetorian action by which a former possessor (the pursuer) who had begun the period of positive prescription (*usucapio*), but had then lost his possession, could claim the thing from the current possessor. The reason is that if the pursuer had not lost his possession he would have become the owner: the *usucapio* led to the transfer of ownership provided that a certain term of possession (one or two years) had elapsed and that other requirements (like possession *ex iusta causa* and good faith) were met. Therefore the *praetor* protected the pursuer as <30> if he had already become the owner; the *actio Publiciana* resembled the *rei vindicatio*.⁹³ The *actio Publiciana* – in accordance with the rules of *usucapio* – required

turpitude seem to be postclassical, whereas classical jurists would rather have reasoned with the legal prohibition in question is not reflected in the fragments examined here. Kaser himself admitted later that this view could only be sustained by the assumption of wide-ranging interpolations of the classical texts, which no longer conforms with modern text-critique; Kaser, *Verbotsgesetze* (1977), pp. 69 sq.

⁹² Lenel, *Palingenesia*, vol. I, 999; D. Daube, "Zur Palingenesie einiger Klassikerfragmente" (1959) 76 *SZ* 149 (p. 200). <30>

⁹³ Kaser, *RP I*, p. 439.

that (i) the pursuer had come into possession by way of a *traditio ex iusta causa*; and, in principle, that (ii) he believed that he had become the owner due to the *traditio ex iusta causa*. As such, the *traditio* is the mere transfer of possession. However, it effected the transfer of ownership of a *res nec Mancipi*⁹⁴ if it was carried out with the intention to transfer ownership and *ex iusta causa*, i.e. in fulfilment of an agreement that ownership should pass (as, for instance, sale or gift).⁹⁵

There are two main groups of case where the *actio Publiciana* applied. The first group comprised cases where the pursuer had the thing *in bonis*⁹⁶, meaning that the owner who intended to transfer ownership failed to do so only because he did not use the appropriate formal act. An example would be the transfer of a *res Mancipi*, i.e. things which require the form of a *mancipatio* to allow ownership to pass, such as land or slaves. If the owner of an estate did not use the *mancipatio* but merely a *traditio ex iusta causa* to transfer ownership the transferee would not become the owner according to the *ius Quiritium*, the strict civil law. The transferee could therefore not rely on the *rei vindicatio* should he have lost possession. However, since the transfer of ownership failed because of mere formal requirements the *praetor* regarded him as the owner and granted the *actio Publiciana* to enable him to get the estate back. The second group concerned cases where the transferor was not the owner and therefore could not transfer ownership. However, if the pursuer was in good faith as to the ownership of the transferor the *praetor* protected his possession, to a degree, by means of the *actio Publiciana*.⁹⁷

The fragment of Paul. D. 50.17.128 *pr.* has been deprived of its illustrative case. However, there is a text from Ulpian which provides a decision from Julian in this context: <31>

Ulp. D. 6.2.9.4 *Si duobus quis separatim vendiderit bona fide ementibus, videamus, quis magis Publiciana uti possit, utrum is cui priori res tradita est an is qui tantum emit. Et Iulianus libro septimo digestorum scripsit, ut, si quidem ab eodem non domino emerint, potior sit cui priori res tradita*

⁹⁴ *Res nec Mancipi* are things which do not require the form of the *mancipatio* in order to effect a transfer of ownership. The *mancipatio* was necessary to transfer ownership of *res Mancipi*, i.e. estates, slaves and livestock. See Kaser, *RP I*, pp. 123, 43 sqq.

⁹⁵ Kaser, *RP I*, pp. 416 sqq.; see also Kaser, *Eigentum und Besitz im älteren römischen Recht* (2nd ed., 1956), p. 197.

⁹⁶ Kaser, *RP I*, p. 403.

⁹⁷ On both groups of case see P. Apathy, "Die *actio Publiciana* beim Doppelkauf vom Nichteigentümer" (1982) 99 *SZ* 158; Kaser, *RP I*, p. 438. <31>

est, quod si a diversis non dominis, melior causa sit possidentis quam petentis. Quae sententia vera est.

If someone has separately sold the same thing to two parties, each of whom bought in good faith, which of them has the better right to the *actio Publiciana*, the one to whom the thing was first delivered or the one who merely bought it? Julian, in the seventh book of his Digest, writes that if the two buy from the same non-owner, the one to whom the thing is first delivered is better off. But if they buy from different non-owners, the possessor is in a better position than the pursuer. This view is correct.

The rule is not confined to cases of the *actio Publiciana*.⁹⁸ The example is chosen here in order to explain the reasoning behind the conception of a *par causa*. The fragment comprises two different cases. In the first, the same thing has been sold by the same non-owner to two different *bona fide* buyers. In the second, the same thing has been sold by two different non-owners to two different *bona fide* buyers. One of the buyers is in possession and the other one raises the *actio Publiciana* against him in order to get hold of the thing. In this latter case Julian held that the possessor is better off. Therefore, the *actio Publiciana* is not successful, and the possessor may keep the thing. Paulus' fragment names the *par causa* as a reason for the possessor being better off. This raises the question whether Julian was also of the view that the parties were *in pari causa* here.

Peter Apathy has shown that in the second case, apart from the fact that one of them is in possession, both buyers are in the same position as regards the actual right of possession and the ability successfully to raise the *actio Publiciana*.⁹⁹ This becomes <32> clear when a comparison is made with the

⁹⁸ For instance, the rule is also found in the context of pledge: Paulus says in D. 20.4.14 that if the same non-owner, at different times, has given the same thing as a pledge to two different creditors the first creditor is preferred, whereas if the pledge was given by two different non-owners *possessor melior sit*. See also Ulp. D. 50.17.154 *Cum par delictum est duorum, semper oneratur petitor, et melior habetur possessoris causa (...)* - When the delict of two is equal, the plaintiff is always worse off and the position of the possessor is regarded as stronger. The latter fragment stems from the law on *interdicta* by which the *praetor* protected the possessor against interference (Ulp. 70 ad ed. *Uti possidetis*, concerning the *exceptio vitiosae possessionis*); see D. Daube, "Zur Palingenesie einiger Klassikerfragmente" (1959) 76 SZ 149 (pp. 248 sqq.); Lenel, *Palingenesia*, vol. II, 822.

⁹⁹ P. Apathy, "Die *actio Publiciana* beim Doppelkauf vom Nichteigentümer" (1982) 99 SZ 158 (pp. 182 sqq.). P. Apathy also thoroughly discusses the antinomy between Ulp. D.

first case. In the first case where the same non-owner sold the same thing twice the first buyer is preferred because his procedural rights are stronger than those of the second buyer. Why is this? The case is decided in parallel with the case where the non-owner of an estate sells it to the first buyer; then he becomes the owner of the estate because he inherits it and sells it again to another buyer.¹⁰⁰ The first buyer bought from a non-owner; so, although he has the estate *in bonis*, he has not become the owner according to the *ius Quiritium*. If the heir and owner sells the estate again by using the *mancipatio* the second buyer becomes the owner according to the *ius Quiritium*. However, since the first buyer has the estate *in bonis* the *praetor* protects him against the real owner. If we assume that the original owner and heir (before the second sale) comes into possession again, the first buyer can successfully raise the *actio Publiciana* against him (see above). If the first buyer is in possession and the original owner raises the *rei vindicatio* against him on the grounds that he is still the owner according to the *ius Quiritium* the *praetor* gives the buyer the *exceptio doli* to bar the *rei vindicatio* since the owner had intended to transfer ownership to the first buyer. Therefore, after the first sale, the owner has merely got a *nudum ius*: his ownership is worthless in court and, after the first sale, it amounts only to a formal legal position. The crucial point is that if he now sells the estate again he can only transfer this *nudum ius* (according to the principle that nobody can transfer more rights than he has himself¹⁰¹). Hence, the first buyer is in a stronger position than the second buyer since the second buyer has only got the *nudum ius*. The first buyer can successfully raise the *actio Publiciana* against him *viz.* the second buyer will not be able to succeed with the *rei vindicatio* against the first buyer.

The difference with our case is that the non-owner does not later become the owner, and, consequently, neither does the second buyer. However, Julian decided the case on similar grounds: even if the seller became the owner and could transfer ownership to the second buyer, the second buyer would gain less than the first buyer since, in court, the first buyer's position is stronger and the second buyer only has a *nudum ius*. If the second buyer did not even

6.2.9.4 and Nerat. D. 19.1.31.2 (pp. 160 sqq.). According to Neratius, the buyer to whom the thing was first delivered must always be preferred; so Neratius does not refer to the rule *in pari causa possessor potior haberi debet*. However, this classical controversy does not question the fact that Ulpian, Julian and Paulus applied the rule <32> because they thought the two buyers were *in pari causa* if they had bought from two different non-owners. Therefore, the fragment from Ulpian may still be used for our purpose to show what was understood by two parties being *in pari causa*.

¹⁰⁰ Pomp., Iul. D. 21.3.2; Ulp., Iul. D. 44.4.4.32.

¹⁰¹ Ulp. D. 50.17.54 *nemo plus iuris ad alium transferre potest, quam ipse habet*. <33>

become the owner the position of the first buyer must, all the more, be the stronger. <33>

In the second case, however, two different non-owners sell the same thing to two different buyers. In this situation, the case cannot clearly be decided in parallel with the case where the non-owner after the first sale becomes the owner and sells again. If there are two non-owners both could possibly become the owner – so we cannot decide which buyer is in the stronger position than the other. It is possible that the first non-owner becomes the owner; in which case the first buyer would be in the stronger position. If, however, the second non-owner becomes the owner the second buyer is in a stronger position than the first buyer. Therefore, the case could only be decided if one non-owner really became the owner; then his buyer must be in the better position. In our case, however, none of the two non-owners later becomes the owner. The parallel would only work if there were only one non-owner who sold the same thing twice. If there are two non-owners and both could possibly become the real owner there is a legal stalemate between the two buyers.¹⁰² Therefore, both buyers must be regarded as being in the same position: they are *in pari causa*.

Julian decides that, in this situation, the one who is in possession is better off. This can be explained by reference to the procedural situation. If we assume that the second buyer is in possession and the first buyer raises the *actio Publiciana* against him, the *praetor* or *iudex* would find that, apart from the possession of the defender, both parties are *in pari causa*. The pursuer cannot advance a better right to possess the thing than the defender. So there is no reason to take the thing away from the defender whose position is equally strong as that of the pursuer. The action of the first buyer is not successful

¹⁰² Cf. also M. Kaser, "In bonis esse" (1961) 78 SZ 173 (pp. 188 sq.), who, however, deduces this result from the rules of *usucapio*: who first becomes owner by way of *usucapio* is uncertain as long as the term of *usucapio* has not elapsed; so, before this term has elapsed, Kaser reasons, both parties are legally in the same position. However, the loss of possession interrupts the *usucapio* (Kaser, *RP I*, p. 423). Therefore, in this respect, the pursuer should be in a worse condition: the defender is in possession, therefore his term of *usucapio* is still running, whereas the *usucapio* of the pursuer stopped. Furthermore, someone who regains possession but is not any more in good faith does not meet the requirements of *usucapio* and cannot become the owner (Paul. D. 41.3.15.2; P. Apathy, "Die *actio Publiciana* beim Doppelkauf vom Nichteigentümer" [1982] 99 SZ 158 [p. 185]). Of course, Kaser sees that the *usucapio* of the pursuer is interrupted, but he argues that also the defender might lose possession before his term elapses. Yet this fiction does not meet the facts of the case; the fact is that the defender is in possession, and therefore his *usucapio* is, at least at the moment, much better secured than that of the pursuer. Kaser's view cannot explain sufficiently why there should be a *par causa* between the parties. <34>

because his legal position is not stronger than that of the defender. Furthermore, if we assume that his action was successful the second buyer could in turn bring the *actio Publiciana* against the first buyer. The end result would be a never ending circle of claims. To avoid this absurdity the thing is left with the current <34> possessor. Regarding the right of possession, therefore, both parties are *in pari causa*. The *melior causa* of the possessor is the result of Julian's decision that the actual possessor may keep the thing. It therefore equals Paulus' *possessor potior haberi debet* but does not express that the parties are not *in pari causa* as regards the right of possession.

Turning back to the *condictio ob turpem causam*, we find that the Roman jurists put forward the same reasoning in respect of the possessor being better off where the two parties are in the same condition. The same condition here arises where both parties are equally at fault (*in pari delicto*). It seems that the Roman jurists have transferred the conclusion drawn from the law of possession to the situation where both parties are at fault as regards a tainted transfer: if the pursuer cannot advance a better right to claim the goods back than the defender the claim is barred.¹⁰³ Although the law applicable to the *condictio* is different from the law of possession in that it belongs to the law of obligations and not to the law of property the idea that the pursuer must present a stronger right in court than the defender in order to succeed is universal in application.¹⁰⁴

However, there is a difference between the rule as used in the law of possession and the *condictio*. The *actio Publiciana* is an *actio in rem*, *i.e.* the question is whether the pursuer has a right to the thing which is in the possession of the defender. The *condictio*, by contrast, is an *actio in personam*. The question here is whether the defender is liable as a person, *i.e.* whether the defender is, personally, under a duty towards the pursuer.¹⁰⁵ The defender's liability under the *condictio* does not directly refer to his possession: once he

¹⁰³ H.H. Seiler, "§ 817 S. 2 und das römische Recht", in: *Festschrift für Wilhelm Felgentraeger* (1969), 379 (p. 385); Honsell, *Rückabwicklung* (1974), pp. 88 sqq.; Zimmermann, *The Law of Obligations*, p. 846.

¹⁰⁴ Cf. the general way in which the rule is expressed in Ulp. D. 50.17.154 *Cum par delictum est duorum, semper oneratur petitor, et melior habetur possessoris causa (...)* – When the delict of two is equal, the pursuer is always worse off and the position of the possessor is regarded as stronger. According to its palingenesia, the fragment stems from the law on *interdicta* by which the *praetor* protected the possessor against interference (Ulp. 70 ad ed. *Uti possidetis*, concerning the *exceptio vitiosae possessionis*); see D. Daube, "Zur Palingenesie einiger Klassikerfragmente" (1959) 76 *SZ* 149 (pp. 248 sqq.); Lenel, *Palingenesia*, vol. II, 822.

¹⁰⁵ Zimmermann, *The Law of Obligations*, pp. 6 sq.

has received the goods transferred the *condictio* is in principle successful even if the defender has meanwhile lost possession.¹⁰⁶ Fritz <35> Schwarz¹⁰⁷ therefore doubts if the use of the term *melior causa possidentis* in the context of the *condictio ob turpem causam* is classical. However, the reference to *possessio* can be explained by an analogous transfer of the rule from the law of possession, meaning that the jurists used the same wording of the established rule but transferred the reasoning alone without intending a technical use of the term *possessio* in the new context.

As regards the policy of the rule, it is often discussed whether the rule aims to punish the pursuer because of his turpitude.¹⁰⁸ However, the reasoning of the Roman jurists does not refer to any idea of punishment of the parties; recovery is not barred in order to punish the pursuer but because he is in the same legal position regarding the goods transferred as the defender. The idea of punishment does not provide any solution since both parties are in the wrong; so it could not explain why one is to be punished whereas the other is allowed to keep the fruits of the wrong. Likewise, the idea that the parties come to court with unclean hands and therefore must not be heard is not supported by the fragments. According to this explanation, the rule aims to protect the dignity of the court in that it saves the court from investigating the immoral matters of the case.¹⁰⁹ But the question of the immoral conduct arises at an earlier stage of the inquiry, that is, where the court investigates whether the *condictio ob turpem causam* lies at all. The rule cannot possibly protect the court at this stage of the enquiry. It is likewise questionable if the rule is originally explained by the idea that legal help should be denied because neither of the parties deserves to be legally protected. The Roman jurists rather saw the issue to lie in the legal stalemate of the parties and for this reason left the transfer with the defender. It is a procedural rule, aimed at the practical need to decide on the pursuer's claim that can only be successful if he presents a stronger right than the defender has. <36>

¹⁰⁶ Pomp. D. 12.6.7; Zimmermann, *The Law of Obligations*, pp. 897 sq.; Kaser, *RP I*, p. 598; cf. also Schwarz, *Condictio* (1952), p. 188. <35>

¹⁰⁷ *Condictio* (1952), pp. 188 sq.

¹⁰⁸ Cf. J.K. Grodecki, "In pari delicto potior est conditio defendentis" (1955) 71 *LQR* 254 (pp. 265 sqq.); Honsell, *Rückabwicklung* (1974), p. 58. On the origin of the policy of punishment see Chapter Two II 2. On the discussion of the policy of the rule in modern law see the Chapters Three (German Law) II 1, Four (Italian law) II 1, Five (English law) II 2, each with references.

¹⁰⁹ Cf. J.K. Grodecki, "In pari delicto potior est conditio defendentis" (1955) 71 *LQR* 254 (pp. 265 sqq.); Rescigno, *In Pari Causa Turpitudinis*, p. 54. <36>

II. The *In Pari Delicto* Rule as a Strict Rule, or a Matter of Discretion?

A question worth considering is whether the Roman jurists regarded the *in pari delicto* rule as a strict rule¹¹⁰ in the sense that the rule operated as soon as both parties were at fault, or whether they applied the rule flexibly by weighing out the turpitude of each party in the individual case. In the latter case, the *in pari delicto* rule might not have been applied when the transferor was less at fault than the recipient. Seiler¹¹¹ assumes that the Roman jurists took an approach to the *in pari delicto* rule which was flexible in two respects: first, that they only applied the rule to cases of severe turpitude, and second, that they compared the degree of turpitude of the parties and did not bar recovery where the transferor was less to blame than the recipient.¹¹²

Seiler draws the first conclusion from the fact that the examples in the Digest deal with severe acts like indecency, adultery, and bribery.¹¹³ The examination above of the fragments applying the rule in the context of the *condictio ob turpem causam*¹¹⁴ supports Seiler's finding in this respect. There is no example where the rule would bar recovery in cases of minor infringements of good morals. In this context it seems possible to assume that the jurists applied the rule with a certain flexibility since the question when conduct must be regarded as a minor infringement of good morals is at least to some degree open to discretion. Notwithstanding the fact that the Roman jurists often referred to the *boni mores* of their ancestors, moral codes are never entirely fixed but change according to the prevailing views of a certain time.¹¹⁵

¹¹⁰ In modern literature, there is no agreement on the – different – question whether Roman *regulae* were non-binding descriptions of legal situations or if they were binding law. To this question Stein, *Regulae juris* (1966); Viehweg, *Topik und Jurisprudenz* (1965), pp. 26 sqq. The nature of the *in pari delicto* rule must be taken from the remaining fragments since they are the only evidence; see H.H. Seiler, "§ 817 S. 2 und das römische Recht", in: *Festschrift für Wilhelm Felgentraeger* (1969), 379 (p. 382).

¹¹¹ H.H. Seiler, "§ 817 S. 2 und das römische Recht", in: *Festschrift für Wilhelm Felgentraeger* (1969), 379; assenting Zimmermann, *The Law of Obligations*, p. 847.

¹¹² H.H. Seiler, "§ 817 S. 2 und das römische Recht", in: *Festschrift für Wilhelm Felgentraeger* (1969), 379 (pp. 382, 385 sqq., esp. 388). Similar J.K. Grodecki, "In pari delicto potior est conditio defendentis" (1955) 71 *LQR* 254 (p. 256), but without further consideration.

¹¹³ *Loc. cit.*, p. 385.

¹¹⁴ B I 1.

¹¹⁵ Cf. also M. Kaser, "Rechtswidrigkeit und Sittenwidrigkeit im klassischen römischen Recht" (1940) 60 *SZ* 95 (p. 139 sq.). <37>

However, apart from the fact that the texts in the Digest only deal with severe moral offences the fragments Seiler cites do not provide direct proof of a flexible approach to the rule. In particular, there are difficulties with Seiler's view that the jurists compared the degree of turpitude of the parties and allowed recovery where the transferor was at <37> fault but less so than the recipient. We do not find reasoning in the fragments saying that the rule should not be applied because the pursuer is less at fault, or because the case is one of minor turpitude. One fragment Seiler cites¹¹⁶ is:

Pap. D. 12.7.5 *pr. Avunculo nuptura pecuniam in dotem dedit neque nupsit: an eandem repetere possit, quaesitum est. dixi, cum ob turpem causam dantis et accipientis pecunia numeretur, cessare conditionem et in delicto pari potioem esse possessorem: quam rationem fortassis aliquem secutum respondere non habituram mulierem conditionem: sed recte defendi non turpem causam in proposito quam nullam fuisse, cum pecunia quae daretur in dotem converti nequiret: non enim stupri, sed matrimonii gratia datam esse.*

A woman gave a money dowry to her uncle whom she was going to marry, but she did not marry him. Can she recover it? I said that when money is paid over on a basis the evil character of which taints both giver and recipient, the *condictio* will not lie, and that where parties are equally in the wrong the possessor is the stronger. Following this reasoning one might hold that the woman could not have the *condictio*. But I further said that it was correct to object that in the case as given there was no basis at all and hence no evil basis, since the money which was given could not become a dowry, the point being that it was given not for improper sexual relations but for marriage.¹¹⁷

If a niece and the brother of her mother married it was considered to be *incestum* and thus indecency (*stuprum*) that was forbidden by law.¹¹⁸ Since

¹¹⁶ H.H. Seiler, "§ 817 S. 2 und das römische Recht", in: *Festschrift für Wilhelm Felgentraeger* (1969), 379 (pp. 385 sq.).

¹¹⁷ To far-reaching and inconvincing assumptions of interpolations see v. Beseler (1937) 3 *SDHI* 378; Schwarz, *Condictio* (1952), pp. 176 sqq.

¹¹⁸ Gai., *Inst.* 1.62; Paul. D. 23.2.39.1; H.H. Seiler, "§ 817 S. 2 und das römische Recht",

envisaging a *stuprum* resulted in the application of the *in pari delicto* rule¹¹⁹, Papinian considered applying the rule. However, he then stated that this is not a case of money given for an immoral cause. A dowry presupposes a marriage.¹²⁰ Even although the dowry goods can be transferred before the marriage is actually concluded (*dotis datio*), if the marriage fails to take place the goods do not constitute a dowry, and the giver can reclaim these goods by means of the *condictio*.¹²¹ Here, uncle and niece eventually did not get married, so the money could not constitute a dowry and the niece can claim it back. It is a case of a *res non secuta*. Since the marriage did not take place there is no basis for the transferred goods to become a dowry. The turpitude does not lie in the marriage itself <38> but in the indecency, the *stuprum*. The money, so Papinian reasoned, was not given for the *stuprum* but for the marriage and thus for an – in itself – unobjectionable purpose.

Seiler is of the opinion that Papinian weighed up the turpitude here and came to the conclusion that indecency in marriage is not as immoral as common indecency. Papinian would therefore have refused to apply the *in pari delicto* rule.¹²² However, Papinian expressed himself in a different way: he denied that there was any turpitude in this case (*non turpem causam in proposito*).¹²³ The *condictio* he granted is not one *ob turpem causam*. Since the purpose for the transfer of the money, *i.e.* to constitute a dowry, is not fulfilled, the claim is a *condictio ob rem*, *i.e.* the *condictio* is granted because the purpose envisaged did not materialize. This is in accordance with the other cases of a *dotis datio* without marriage.¹²⁴ Therefore, this fragment cannot be

in: *Festschrift für Wilhelm Felgentraeger* (1969), 379 (p. 386).

¹¹⁹ Ulp. D. 12.5.4 *pr.*, above B I 1.

¹²⁰ Ulp. D. 23.3.3.

¹²¹ Kaser, *RP I*, p. 336. <38>

¹²² H.H. Seiler, "§ 817 S. 2 und das römische Recht", in: *Festschrift für Wilhelm Felgentraeger* (1969), 379 (pp. 387 and 388).

¹²³ Also Schwarz, *Condictio* (1952), p. 178.

¹²⁴ Ulp. D. 23.3.7.3, Call. D. 23.3.8., Paul. D. 22.1.38.1; Ulp. D. 23.1.10; Paul., *Iav. D.* 12.4.9 *pr.* - Pap. D. 12.7.5 *pr.* speaks against the view of P. Bufe, "§ 817 Satz 2 BGB" (1958/59) 157 *AcP* 215 (pp. 240 sqq., esp. p. 247), who assumes that the *in pari delicto* rule was only applied to cases of a *res secuta*. Papinian would then not have considered the application of this rule to a case of obvious *res non secuta* without further discussion. Also, in no fragment of the title is it said that both performances have already been fulfilled, as Bufe himself admits (p. 247). Bufe assumes that this was not necessary because in Paul. D. 12.5.1.2 it was generally expressed that the cases of the title only consisted of cases of a *res secuta* (pp. 242 sqq., esp. p. 246). The text, however, implies that both cases of *res secuta* and *res non secuta* were meant. Honsell (*Rückabwicklung* [1974], pp. 85 sqq., 87 sq.), on the other hand, argues that the rule only applied to cases of a *res non secuta*. On these issues see above A III.

seen as an example in favour of the view that the Roman jurists applied the rule in a flexible manner. The *condictio* granted is not one *ob turpem causam*, and Papinian did not apply the rule because there is no turpitude involved.

Another fragment is:

Ulp. D. 12.5.2.2 *Sed si dedi, ut secundum me in bona causa iudex pronuntiaret, est quidem relatam conditioni locum esse: sed hic quoque crimen contrahit (iudicem enim corrumpere videtur) et non ita pridem imperator noster constituit litem eum perdere.*

It has been held that a *condictio* lies where, when I have a winning cause of action, I pay to make the judge pronounce in my favour. However, then the payer commits an offence (for he corrupts the judge), and not so long ago our emperor held that he loses his case.

A party bribes the judge even although his is a winning case. Ulpian referred to authority (*relatum est*) when deciding that the payer can recover the money he paid. However, we are then told that according to a recent constitution he loses his case <39> because the judge had been bribed, which was a crime. The decision seems odd since both giver and recipient act immorally in being involved in bribery, and so, according to the *in pari delicto* rule, recovery should be denied. The fragment must be seen in connection with:

Paul. D. 12.5.3 *Ubi autem et dantis et accipientis turpitudine versatur, non posse repeti dicimus: veluti si pecunia detur, ut male iudicetur.*

When the evil taints both giver and recipient, we hold recovery to be excluded, as where money is paid to pervert a judgment.

In this case, the judge was bribed in a non-winning cause of action. Paulus applied the *in pari delicto* rule with the result that the payer cannot recover what he gave. Seiler assumes that because in the first case the judge did not taint the judgment it was a case of minor turpitude on the side of the giver¹²⁵, who was on a winning cause of action in any case. He concludes that the

<39>

¹²⁵ *Loc.cit.*, p. 386.

jurists, in this case, regarded the parties as not being *in pari delicto* and thus did not apply the rule.¹²⁶ However, there are difficulties in reconciling the two fragments in this way. It is doubtful whether the jurists really regarded the giver on a winning cause of action as less to blame. Ulpian spoke of a crime having been committed by judge and briber in the first case. The fault of the giver should be equal in both cases, since he did not know during the procedure, that is at the time of the bribery, that his case would be successful in any case. Otherwise there would have been no point in bribing the judge. The question whether the judge acts less objectionably in not tainting the judgment in the first case is not decisive as regards the claim of the giver: for the judge is only the recipient and not the pursuer. Active and passive bribery was a crime according to the *lex Cornelia*.¹²⁷ So both the giver and the judge are involved in a crime and at fault. The two fragments from Ulpian and Paulus do contradict each other, and there is no obvious solution to this contradiction. But one thing may be said: the contradiction cannot plausibly be solved by assuming that the giver is less to blame where the *iudex* did not taint the judgment. <40>

We conclude that there is no indication that the Roman jurists compared different degrees of fault of the parties. The cases in the Digest where both parties are at fault are generally cases where they envisage a crime or indecent acts. Since both parties aim to achieve this act, both should equally be at fault. Even if the giver induces the receiver to commit the crime and does not commit it himself he is not less to blame.¹²⁸ <41>

C. THE *CONDICTIO OB INIUSTAM CAUSAM*

There is only one fragment in the title *De condictione ob turpem vel iniustam causam* of the Digest expressly concerning an *iniusta causa*. In D.

¹²⁶ *Loc.cit.*

¹²⁷ Mommsen, *Römisches Strafrecht* (1899), pp. 674 sq.; M. Kaser, "Rechtswidrigkeit und Sittenwidrigkeit im klassischen römischen Recht" (1940) 60 *SZ* 95 (p. 113). See Marcian. D. 48.10.1.2 sq. *Sed et si quis ob renuntiandum remittendumve testimonium dicendum vel non dicendum pecuniam acceperit, poena legis Corneliae adficitur. Et qui iudicem corruperit corrumpendumve curaverit. 3. Sed et si iudex constitutiones principum neglexerit, punitur.* – Also if anyone takes money for renouncing or withdrawing evidence or for giving or withholding [evidence], he is subject to the penalty of the *lex Cornelia*. So also is [the person] who corrupts, or provides for the corruption of a judge. 3. Also if a judge neglects the imperial constitutions, he is punished. See also Paul., *Sent.* 5.25.2. <40>

¹²⁸ In Roman law, the person who induced someone to commit a crime was treated just like the one who committed the crime; Mommsen, *Römisches Strafrecht* (1899), pp. 100 sq. <41>

12.5.6, Ulpian, citing Sabinus and Celsus, generally states that things given to someone *ex iniusta causa* may be recovered with the *condictio*:

Ulp. D. 12.5.6 *Perpetuo Sabinus probavit veterum opinionem existimantium id, quod ex iniusta causa apud aliquem sit, posse condicti: in qua sententia etiam Celsus est.*

Sabinus always said the early jurists were right in holding that the *condictio* would lie to recover anything that was received *ex iniusta causa*; Celsus shares this view.¹²⁹

However, no example is provided in the text to explain what is meant by *ex iniusta causa*.¹³⁰ In modern law, *iniustus* is often understood as meaning illegal in the sense of breach of legislation, as opposed to immorality or turpitude which is seen to be covered by the term *ob turpem causam*. The *condictio ob iniustam causam* is seen to operate in cases where there has been an illegal transfer and the transferor seeks recovery. Crucially, the *in pari delicto* rule is understood not only to bar the recovery of transfers *ob turpem* but also of transfers *ob iniustam causam*; hence recovery is in principle denied where both parties are involved in a transaction prohibited by the law.

In this chapter, it will be investigated whether classical Roman law proceeded on the same understanding and applied the *condictio ob iniustam causam* and the *in pari delicto* rule where the transaction was illegal.

In this context, it is useful to ask what was understood by illegal or statutorily prohibited transactions in classical Roman law. We will see that, depending on the nature of the legislation, the issue of recoverability did not always arise. <42>

¹²⁹ Cf. also in the title on the *condictio sine causa* Ulp. D. 12.7.1.3 *Constat id demum posse condicti alicui, quod vel non ex iusta causa ad eum pervenit vel redit ad non iustam causam*. It is agreed that the *condictio* can only go against someone for something which came to him *non ex iusta causa* or *ad non iustam causam*.

¹³⁰ In his *Palingenesia*, Lenel suggests as a title for Ulp. lib. XVIII *ad Sabinum* (which is the inscription of D. 12.5.6) *De legatis – De usus fructu et usu legato – De usu fructu earum rerum, quae usu consumuntur* (Legacy – Usufruct and legacy of usufruct and usus – Usufruct of those things which have been consumed by use); Lenel, *Palingenesia*, Vol. II, 1070, 1074. Lenel *loc. cit.* 1075 also connects the fragment with the rule that the *condictio* is in principle not granted to the owner except where the property is in the hands of a thief (*condictio ex causa furtiva*, Kaser, *RP I*, p. 618). From this, we may conclude that Ulp. D. 12.5.6 does not deal with an illegal transfer. <42>

I. Legal Prohibitions in Roman Law

Classical Roman law distinguished between the prohibition of juridical transactions, such as sales or donations, and the prohibition of non-judicial acts, as, for instance, criminal acts.¹³¹

1. Prohibition of Transactions

Three kinds of prohibition of transactions were recognised, depending on whether the law contained a sanction for its violation: (i) *leges perfectae*, which as a sanction rendered the transaction void, (ii) *leges minus quam perfectae*, which did not provide nullity but penalised the infringement, and (iii) *leges imperfectae*, which neither provided nullity nor penalties.¹³² Since the transaction was valid in the latter two cases, there could be no enrichment claim against the recipient.¹³³ In other words, if the transaction had already taken place, the giver could not claim back what he gave. In the case of a *lex minus quam perfecta* which penalised the illegal transaction but did not declare it void the penalty was intended to have a purely deterrent effect on the parties to the transaction¹³⁴ – the penalty was to make the parties abstain from the transaction. The sense of a *lex imperfecta* was to bar legal enforcement of the transaction in question. The *praetor* denied the *actio* or granted an *exceptio* if he perceived there to be an infringement of the law.¹³⁵ One example of a *lex imperfecta* is the *lex Cincia de donis et muneribus* (204 A.D.)¹³⁶. According to the *lex Cincia* it was in principle¹³⁷ forbidden to accept donations which exceeded a certain value. The *lex Cincia* did not provide a sanction regarding a donation which exceeded the value allowed; it did not declare this donation void. Therefore, if the forbidden donation had been fulfilled the transaction was valid; so there was no recovery. However, if the transaction was not yet fully carried out and the donee took the donor to court to enforce the

¹³¹ Kaser, *Verbotsgesetze* (1977), p. 7.

¹³² Following the long accepted view founding on Ulp. ep. (UE) 1, 1. Kaser, *Verbotsgesetze* (1977), pp. 9 sqq.; *idem*, *RP I*, pp. 249 sq.; Zimmermann, *The Law of Obligations*, pp. 697 sq.

¹³³ Zimmermann, *The Law of Obligations*, p. 699.

¹³⁴ Kaser, *Verbotsgesetze* (1977), pp. 39.

¹³⁵ Kaser, *Verbotsgesetze* (1977), pp. 27 sqq.; Kaser, *RP I*, p. 249; Zimmermann, *The Law of Obligations*, pp. 699.

¹³⁶ For literature on this *lex* see Kaser, *RP I*, p. 602 note 19.

¹³⁷ Certain exceptions were made for *personae exceptae* who were close to the donor, Kaser, *RP I*, p. 602; Kaser, *Verbotsgesetze* (1977), p. 21. <43>

transaction the <43> *praetor* would help the donor by granting an *exceptio*¹³⁸, or by denying an *actio* in the first place¹³⁹; so the donee could not enforce the promise.

In the case of a *lex perfecta*, by contrast, the transaction was void. This raises the issue of recoverability. However, the fragments which mention an *iniusta causa* (they will be discussed in detail below) are not concerned with the infringement of a *lex perfecta*. Furthermore, the following text which deals with the issue of recoverability of money paid *contra leges* allows recovery not on the grounds of an *iniusta causa* but on the grounds of *causa data causa non secuta*:

C. 4.6.5 Diocl. et Max. *Si militem ad negotium tuum procuratorem fecisti, cum hoc legibus interdictum sit, ac propter hoc pecuniam ei numerasti, quidquid ob causam datum est, causa non secuta restitui tibi competens iudex curae habebit.*

If you have employed a soldier as a procurator for your business, which is prohibited by the laws, and have paid him money on this basis, the learned judge will allow you to recover whatever has been given on this cause because it has been given for a cause that has not been achieved.

Tu makes a soldier his procurator, which is forbidden according to the laws. On account of the procuratorship, he pays over money to the soldier. Later, he claims the money back, and is allowed to recover. Regarding the question at issue, this text is notable for two reasons. First, it deals with a payment of money made on the basis of an illegal agreement (the appointment of the soldier as a procurator). Thus it is likely that the payment was considered to be illegal itself since it was made in execution of the illegal agreement. The payer seeks, and is allowed, recovery of the money paid to the soldier. The possibility of recovery is, however, not explained on the grounds of the soldier having the money *ob iniustam causam* but with reference to the cause underlying the transfer that has failed (*causa data causa non secuta*), meaning the invalid appointment. So the text shows that *iniusta causa* was not a term *a priori* assigned to illegal causes. Secondly, there is no mention of the *in pari*

¹³⁸ According to Lenel, *Das Edictum Perpetuum* (3rd ed., 1927), p. 513: an *exceptio legis Cinciae*; see Kaser, *RP I*, p. 603 note 34 on an *exceptio in factum*.

¹³⁹ Kaser, *Verbotsgesetze* (1977), pp. 27 sq. <44>

delicto rule here; recovery is allowed and not questioned albeit the transfer is actually illegal. There is no hint that the rule was applied to illegal transfers lacking turpitude. <44>

2. Prohibition of Non-Judicial Acts

Other laws prohibited non-judicial acts, such as criminal acts. If the parties came to an agreement that violated the law, for instance an agreement to commit a crime, the agreement itself was not valid in the sense of being enforceable, since it did not fall within any of the contractual types.¹⁴⁰ In procedural terms, there was no *formula* which fitted these circumstances and which could have led to a claim to enforce the promise. If one party had already paid the other party and now claimed the money back, the issue of recovery arose.

If the parties agreed to an act which infringed criminal law, inevitably turpitude must be involved as well since the criminal law is at the very core of the moral code. These were therefore cases of illegality which also imported turpitude. In this situation, the classical Roman jurists would judge the case upon the turpitude involved rather than on the fact that legislation was violated.¹⁴¹ This becomes clear from the fragments which, in these situations, denote the behaviour as *turpis*, and operate the rules applying to turpitude.¹⁴² One example is provided by Ulp. D. 12.5.4 *pr.* which discusses *stuprum* and adultery, acts which were contrary to good morals as well as forbidden by the *lex Iulia de adulteriis*. These are cases of a parallel infringement of morals and legislation. The legal prohibitions in such cases are an expression of good morals and generally aim to protect them; so morals are the underlying reason for the legal consequences provided. Hence, if one party had paid over money to evoke a crime, say to make the recipient kill someone, and then he sought to recover the money, the *condictio* would be operated *ob turpem causam*, and, depending on the circumstances, recovery would be barred because of the *in pari delicto* rule (cf. Ulp., Paul. D. 12.5.2 *sqq.*).¹⁴³ It is important to note that there is no hint that in these cases the Roman jurists spoke of an *iniusta causa*.

The classical Roman jurists did not treat an infringement of good morals and legislation on an equal basis but distinguished between them¹⁴⁴, as in:

¹⁴⁰ Honsell, *Rückabwicklung* (1974), pp. 77 *sq.*

¹⁴¹ Kaser, *Verbotsgesetze* (1977), pp. 71 *sqq.*

¹⁴² See above B I 1.

¹⁴³ Kaser, *Verbotsgesetze* (1977), p. 72.

¹⁴⁴ M. Kaser, "Rechtswidrigkeit und Sittenwidrigkeit im klassischen römischen Recht"

Marcian. D. 30.112.3 *Si quis scripserit testamento fieri, quod contra ius est, vel bonos mores, non valet, veluti si quis scripserit contra legem aliquid, vel contra edictum praetoris, vel etiam turpe aliquid.*

<45> If anyone wrote in his will that something should be done contrary to law or good morals, it is invalid, as if someone wrote something against legislation or against the edict of the *praetor*, or something immoral.

Contra ius is distinguished from *contra bonos mores*. Marcian defined as *contra ius* acts which infringe legislation or the *edictum praetoris*, whereas *contra bonos mores* is explained as an act which is *turpis*. The expression *iniustus*, however, is not used to denote an act against the law, neither here nor in other fragments referring to behaviour *contra leges*.¹⁴⁵

The meaning of *iniusta causa* in the context of the *condictio* must be deduced from the fragments which allow recovery on the grounds of an *iniusta causa*. These fragments will now be analysed.

II. Fragments Dealing with the *Condictio Ex Iniusta Causa*

Only a few fragments that tackle the issue of recovery *ex iniusta causa* or *ob iniustam causam* have come down to us. Moreover, some of them are reported outwith their original context, like Ulp. D. 12.5.6 and *idem* D. 12.7.1.3.¹⁴⁶ However, there are a few fragments which report cases where the *condictio* was granted because the fact situation was described as involving an *iniusta causa*.

1. The Case of the Lease of Land

Ulpian provided the example of fruits which have been reaped after the term of tenancy had elapsed:

Ulp. D. 12.1.4.1 (...) *Et fructus ex iniusta causa percepti condicendi sunt: nam et si colonus post lustrum completum fructus perceperit, condici eos constat ita demum, si non ex*

(1940) 60 SZ 95. <45>

¹⁴⁵ Cf., for instance, Marcian. D. 28.7.14; Paul. D. 45.1.35.1; Ulp. D. 2.14.7.7; Paul., *Sent.* 1.1.4 and 3.4b.2; C. 2.3.6.

¹⁴⁶ See above C at note 130. <46>

voluntate domini percepti sunt: nam si ex voluntate, procul dubio cessat condictio.

Fruits gathered *ex iniusta causa* can be claimed with the *condictio*: in the case of a tenant who gathers fruits after his term has ended, it is agreed that the *condictio* lies, at least where the gathering is done contrary to the will of the owner. If it is done in accordance with his will, then, no doubt, the *condictio* cannot be brought.

Ulpian stated that the *condictio* lies where fruits have been reaped *ex iniusta causa*. He then explained when the fruit can be recovered by the landowner: if the tenant has <46> reaped them after the *lustrum*, *i.e.* the term of the tenancy comprising five years¹⁴⁷, has elapsed, the *condictio* lies, but only if the tenant has done so without the consent of the landowner. On the other hand, if the landowner has permitted the fruit to be reaped after the term has elapsed the landowner cannot claim the fruit from the tenant. Within the term of the tenancy of an estate, the tenant is allowed to collect and keep the fruit which grows on the estate.¹⁴⁸ The contract (*locatio conductio*) imports the permission of the landowner to reap the fruit, and a corresponding right of the tenant to do so. However, with the end of its term the contract would normally lapse, and with it the permission and the right to reap the fruit. Therefore, if the *colonus* reaps the fruit after the contract has come to an end he does so without any right. The right to reap the fruit belongs to the landowner. In other words, one could say that the tenant infringes the right of the landowner if he takes the fruits without permission. According to this interpretation we might conclude that the term "*ex iniusta causa*" is used here to describe a situation where a right that is vested in the landowner is encroached upon by the tenant.

However, this would amount to an interpretation which concludes that classical Roman law, in certain fact situations, granted the *condictio* although the benefits had not been *transferred* by the pursuer but came to the defender in another way, for example, by encroachment. Yet the conventional view¹⁴⁹ assumes that the *condictio* in principle presupposed a *datio*, that is, a transfer between the parties. The only recognised exception would be the *condictio ex*

¹⁴⁷ Kaser, *RP I*, p. 568 note 47.

¹⁴⁸ Kaser, *RP I*, p. 565.

¹⁴⁹ Cf. Schwarz, *Condictio* (1952), pp. 1 sq., with further reference. But see also D. Liebs, "The History of the Roman *Condictio* up to Justinian", in: N. MacCormick/P. Birks (eds.), *The Legal Mind – Essays for Tony Honoré* (1986), 163 (pp. 170 sqq.).

furtiva, which was granted against the thief of money or goods – where the defender has stolen the goods there has obviously been no transfer.

This thesis cannot fully examine the complex question whether classical Roman law also granted the *condictio* in cases where the pursuer sought to recover benefits which came to the defender other than by transfer (*datio*).¹⁵⁰ However, stated with the proviso that the question cannot be fully answered here, the fact situations reported in the fragments that give the *condictio* on the grounds of an *iniusta causa* do seem to <47> resemble encroachment situations more than deliberate transfer cases. Taking the example of the lease of land again, there is in fact no contract and no permission to reap the fruits after the term of the lease has elapsed, and thus no basis for a deliberate transfer or *datio*. A transfer might possibly be construed if one recurs to the fiction that the lease, and with it the consent of the landowner, continues beyond the term. In Roman law, the contract of *locatio conductio* is assumed to be prolonged where the parties tacitly carry on with the contract after the *lustrum* has elapsed.¹⁵¹ This, however, is a fiction¹⁵²: the contract has in fact come to an end after five years, and the parties have not explicitly agreed to its renewal. A careful reading of the text of Ulpian rather speaks in favour of the view that there is no deliberate transfer here: he explicitly spoke of fruits which are taken not transferred, and the decisive factor for granting the *condictio* is the lack of authorization (*voluntas*) of the landowner. It seems to be the unauthorized taking of the fruit, and hence the act of encroachment by the tenant himself, which leads to his enrichment, and which triggers the *condictio*.

Yet, some difficulties remain. For example, why was the *condictio* not granted on the grounds of a *furtum*, a theft of the tenant? Was the fictitiously prolonged contract sufficient to exclude a *furtum*? And why is it not the *rei vindicatio* that is the appropriate remedy to recover the fruits? A parallel case in the Codex may explain.¹⁵³ In this case, a *mala fide* possessor is liable under the *rei vindicatio* to return the reaped fruits as long as they still exist. Only if the fruits have already been consumed does the *condictio* lie. A *mala fide* possessor hence does not acquire title by gathering the fruits. From this we may conclude that in our case the tenant was *bona fide*. Apparently he did not realize that the contract had ended and that he had no right to reap the fruits

¹⁵⁰ This examination will be provided by the forthcoming doctoral thesis of Sonja Heine, Freiburg, Germany. <47>

¹⁵¹ Ulp. D. 19.2.13.11; Kaser, *RP I*, p. 568.

¹⁵² Ulp. D. 19.2.13.11 (...) *reconduxisse videri (...) consensisse videntur (...)*.

¹⁵³ C. 4.9.3. <48>

anymore; so he acquired title *bona fide*. In that case, there is neither a *furtum* nor does the *rei vindicatio* lie. So, there neither seems to be an encroachment that amounts to a theft nor, where the fruits were taken without the will of the landowner, a deliberate transfer.

These questions cannot be pursued further here. For our purposes, at least, it suffices to note that the fragment speaks of an *iniusta causa* but is not concerned with any breach of legislation or illegal transfer. It seems to be a situation where the private right (ownership) of a person is infringed. The tenant benefits from the encroachment since <48> he has got the fruits. But since he has acquired them *ex iniusta causa*, without any authorization to reap them, he is liable under the *condictio* to return the fruits to the landowner.

2. The Actio Rerum Amotarum

Another fragment that grants the *condictio* on the grounds of an *iniusta causa* is:

Marcian. D. 25.2.25 *Rerum quidem amotarum iudicium sic habet locum, si divortii consilio res amotae fuerint et secutum divortium fuerit. sed si in matrimonio uxor marito res subtraxerit, licet cessat rerum amotarum actio, tamen ipsas res maritus condicere potest: nam iure gentium condici puto posse res ab his, qui non ex iusta causa possident.*

The *actio rerum amotarum* is available where things were removed so as to obtain a divorce, and the divorce actually took place. But if the wife takes away her husband's property during the marriage, although the *actio rerum amotarum* does not lie, the husband can bring a *condictio* to recover his property; for I hold that in accordance with the *ius gentium*, property can be recovered by a *condictio* from people who do not possess it *ex iusta causa*.

The *actio rerum amotarum* was a praetorian claim which was granted in cases where the wife, in expectation of a divorce, had removed goods from her husband's patrimony. After the divorce, the husband could claim what was his with the *actio rerum amotarum*. If the divorce did not take place, the *actio rerum amotarum* was not available since the prerequisites of the claim were not met. However, in this case Marcian gave the *condictio* because the wife possesses the goods *non ex iusta causa*. A similar fragment provides:

Aristo-Paul. D. 25.2.6.4 *Sed si morte mariti solutum sit matrimonium, heres mariti hereditatis petitione vel ad exhibendum actione eas consequi poterit. 1. Aristo et condici ei posse recte putat, quia ex iniusta causa apud eam essent.*

Where the marriage is dissolved by the death of the husband, his heir can recover the property by the *hereditatis petitio* or an *actio ad exhibendum*. 1. Aristo rightly thinks he can bring a *condictio* against the widow, because she holds the assets *ex iniusta causa*.

In the *principium*, Paulus stated that the heir of a deceased husband can claim the assets from the widow with the *hereditatis petitio* and with the *actio ad exhibendum*. The *hereditatis petitio* resembled the *rei vindicatio* and was brought by the heir who succeeded to the ownership of the deceased against someone who claimed to be, but was not, an heir. An *actio ad exhibendum* was granted by the *praetor* where the *rei* <49> *vindicatio* could not lie for procedural reasons (because the defender denied co-operation at the *litis contestatio*).¹⁵⁴ Then, citing Aristo, Paulus additionally gave the heir the *condictio*, reasoning that the assets are held by the widow *ex iniusta causa*. Since the *hereditatis petitio* lay against someone who is not an heir¹⁵⁵, the case presupposes that the widow has not become the heir of her husband. Therefore, she has no right to the assets she retains.

The question may again be raised whether in these two cases the terms *ex iniusta causa* or *non ex iusta causa* should be interpreted as describing a situation in which the possessor has infringed another's private right when acquiring the goods he retains. In these cases, it is clear that there has been no transfer of the benefits from husband to wife; instead, the wife has seized the goods. A further question which then immediately arises is why the *condictio* was not granted *ex furtiva*. However, the *condictio ex causa furtiva* did not lie between marriage partners; a theft (*furtum*) was seen to be excluded because of the close community of marriage partners.¹⁵⁶

"*Ex iniusta causa*" has been understood simply to denote a general expression for the fact that there is no just cause to retain the benefit.¹⁵⁷

¹⁵⁴ Kaser, *RP I*, pp. 104 sq.; 433 sq.

¹⁵⁵ Kaser, *RP I*, pp. 104 sq.

¹⁵⁶ Kaser, *RP I*, p. 618 f.; Wacke, *Actio Rerum Amotarum* (1963), p. 108.

¹⁵⁷ Wacke, *Actio Rerum Amotarum* (1963), p. 110. Cf. also Schwarz, *Condictio* (1952), pp. 275 sqq., who interprets *ex iniusta causa* as a general category which was created in order to embrace cases which did not fit under the special headings of *indebitum*, *ob rem*, etc.

However, *ex iniusta causa* seems to have been used in a more particular sense in classical Roman law. The term *ex iusta causa* can be found in the context of rules on acquisition of title. In classical Roman law, a possessor could acquire title by way of *usucapio* (positive prescription) after a certain prescription period had elapsed. However, this presupposed that the possession was qualified by a *iusta causa possessionis* (so-called *possessio civilis*). Only if the possessor possessed *ex iusta causa* could he acquire title.¹⁵⁸ An example would be a buyer (*emptor*) who has bought an estate from the owner without complying with the formal prerequisites of the *mancipatio*.¹⁵⁹ Since the form of the *mancipatio* was not used, the buyer did not acquire title. However, the rules of *usucapio* apply since he possesses *pro emptore*, and *ex iusta causa*: possession was transferred under a contract which was merely lacking a formal condition, and was not seized without authorization. By contrast, a *iusta causa* cannot come into being where <50> the goods are captured in an unauthorized manner.¹⁶⁰ The possessor then possesses *ex iniusta causa*. This has two consequences: title cannot be acquired by positive prescription, and the possessor is liable to return the seized goods.

In the case of the wife seizing goods of her husband's without his authorization, she possesses *ex iniusta causa*. So, she cannot acquire title by positive prescription, and she has to return the seized goods. Again, it seems to be a situation in which the possessor has infringed a private right of another without permission and has thereby come into possession. If the prerequisites of the special *actio rerum amotarum* were not met the Roman jurists granted the *condictio* to enable the husband to recover.

The most important fact, however, is again to note that these cases do not deal with any breach of legal prohibition. Neither are the goods illegally transferred from one party to the other; they come to the hands of the wife by her seizing them.

3. The Case of Marital Donations

The *condictio* is granted *ex iniusta causa* in yet another context: it is the case of a donation between marriage partners. This case is particularly interesting since such a donation was prohibited by law. Ulpian wrote:

¹⁵⁸ Kaser, *RP I*, p. 386.

¹⁵⁹ Cf. above, note 95. <50>

¹⁶⁰ Kaser, *loc. cit.* <51>

Ulp. D. 24.1.5.18 *In donationibus autem iure civile impeditis hactenus revocatur donum ab eo ab eave cui donatum est, ut, si quidem exstet res, vindicetur, si consumpta sit, condicatur hactenus, quatenus locupletior quis eorum factus est:*

As regards gifts which are prohibited by civil law, a gift can be revoked, and if the property involved still exists, it can be reclaimed from the man or woman to whom it was given. If it has been consumed, a *condictio* will lie to recover the amount by which either of them was enriched:

Gaius added in the following fragment:

Gai. D. 24.1.6 – *quia quod ex non concessa donatione retinetur, id aut sine causa, aut ex iniusta causa retineri intelligitur; ex quibus causis condictio nasci solet.*

– because something which is retained on the basis of a gift which is not permitted is held to be retained *sine causa* or *ex iniusta causa*; on these *causae* there is usually the *condictio*.

The prohibition was not expressed in the form of statutory legislation but by customary law which was founded on the Roman *mores*.¹⁶¹ It rendered the transfer <51> invalid, so normally the *rei vindicatio* operated to claim the gift back. If the gift had been consumed, however, the *condictio* lay to recover the enrichment.

At first sight, this case seems to differ from the others in two respects. First, there has clearly been a transfer of the gift between the marriage partners. Second, the transfer is forbidden by law, and thus illegal. Therefore, the question arises whether *ex iniusta causa* here denotes an illegal transfer where the *condictio* is given to recover benefits which have been illegally transferred. However, on closer investigation the case can again be interpreted as a situation where the donee infringes a private right of the donor. Ulpian tells us that the donation normally triggers the *rei vindicatio* since the transfer is rendered void. Only if the donee consumes the gift is the *condictio* granted. The consumption itself, however, is not a transfer but a deliberate act of the donee. Due to the consumption the *rei vindicatio* ceases since the owner loses

¹⁶¹ Ulp. D. 24.1.1; Kaser, *Verbotsgesetze* (1977), pp. 114 sq.

title to the consumed goods. The consumption, therefore, may be interpreted as an infringement of the owner's property rights.

Again, the Gaius-fragment that deals with the prohibition of marital donations had probably in mind the unauthorized consumption of the gift when speaking of *ex iniusta causa*, not the illegality of the transfer of the gift. However, this differentiation is quite subtle. It is therefore possible that this fragment in particular has induced the association of *iniusta causa* with illegal transfers. For Roman law, however, it is not true that the *condictio* was generally granted *ex iniusta causa* in cases of illegality. C. 4.6.5 provides the proof since, as will be recalled, money was illegally transferred and could be recovered on the grounds of *causa data causa non secuta*.¹⁶² The other fragments dealing with recovery *ex iniusta causa* might be explained on the grounds that the possessor came into possession by infringing a private right of the pursuer without the latter's authorization. At least it may be said that those fragments do not deal with transfers in breach of any legislation.

4. *Illegal Transfers and the In Pari Delicto Rule*

Another crucial point to observe is that none of the fragments which deal with a *condictio ex iniusta causa* mention the *in pari delicto* rule. In the fragments which do not concern illegal transfers this finding is not surprising since there is *prima facie* no reason to bar recovery. More interesting in this context is the case of marital donations. <52> As we have seen, this case is best explained on the grounds of encroachment upon ownership due to consumption; and according to this interpretation, there again is no illegal transfer as far as the *condictio* and not the *rei vindicatio* is concerned. However, even if we assume that the *condictio ex iniusta causa* is granted here on the grounds that the transfer of the donation is illegal, which must be doubted due to the reasons laid out above, still one thing may be said: the *in pari delicto* rule was not applied to this case. Not only is the rule not mentioned; it would not make any sense to apply it. The reason is that an application of the rule would achieve a result opposite to the aim of the law, namely to prohibit the transfer of property between the partners¹⁶³: the donee could have kept the benefits.

There is consequently no indication in the Digest that the *in pari delicto* rule was applied where the parties were involved in purely illegal transactions

¹⁶² See above C I 1. <52>

¹⁶³ Honsell/Mayer-Maly/Selb, *Römisches Recht* (4th ed., 1987), pp. 347 sq.; Kaser, *RP I*, pp. 331 sq.

which did not, at the same time, import turpitude. All examples of the *in pari delicto* rule given in the Digest deal with immoral, not merely illegal, transactions.¹⁶⁴ Neither is there any hint that the involvement in an illegal transaction alone was regarded as being *turpis* in classical Roman law.¹⁶⁵ The text in the Codex concerning an illegal payment of money (C. 4.6.5) gives the *condictio causa data causa non secuta* to enable the pursuer to recover; the question whether recovery should be barred by the *in pari delicto* rule is not raised. Transfers that were merely illegal were recoverable. Any extension of the *in pari delicto* rule to cases where the parties have infringed legislation without turpitude being involved must have occurred at a later date. <53>

D. POSTCLASSICAL DEVELOPMENT

I. The Development of the Distinct *Conditiones*

1. The Formation of Distinct Claims

In postclassical times, the formulary system was abolished and replaced by the postclassical civil procedure (*cognitio*). In this procedure, the action was no longer tied to the existence of a *formula* but was rather understood to be a substantive claim whose prerequisites were investigated by the judge.¹⁶⁶ As a consequence of the abolition of the *condictio* as a procedural *formula*, the jurists in the Eastern Roman Empire developed fixed and distinct claims of *condictiones* by taking up the classical division of cases in which the *actio certae creditae pecuniae* or *certae rei* had been granted. The Justinianic law commission then based the related titles in the Digest and the Codex on these claims which were named *condictio indebiti*, *condictio causa data causa non secuta* (the former *condictio ob rem*), *condictio furtiva*, and *condictio ob turpem vel iniustam causam*; moreover a claim called *condictio sine causa* was added which was a claim for recovery of something that was with the recipient without a legal basis, as well as a *condictio ex lege* for cases where an obligation was introduced by a *nova lex*. The difference from classical

¹⁶⁴ J.K. Grodecki, "In pari delicto potior est conditio defendentis" (1955) 71 *LQR* 254 (p. 256).

¹⁶⁵ Cf. H.H. Seiler, "§ 817 S. 2 und das römische Recht", in: *Festschrift für Wilhelm Felgentraeger* (1969), 379 (p. 389). <53>

¹⁶⁶ Cf. Kaser/Hackl, *ZP*, pp. 517 sqq.; E. Metzger, "Actions", in: E. Metzger (ed.), *A Companion to Justinian's Institutes* (1998), 208 (pp. 216 sq.).

Roman law was that now each *condictio* formed independent claims with distinct prerequisites.¹⁶⁷

2. The Change of the Contractual System

During the following legal development, the fate of the various *condictiones* took different directions. Broadly stated, the *condictio indebiti* took priority amongst them, while the other *condictiones* declined in importance. The reason for this development lay in the change of the contractual system. The classical system of fixed contractual types was, step by step, dissolved, and eventually displaced by the principle of contractual freedom.

a) In classical Roman times, the number of enforceable contracts was limited due to the formulary procedure.¹⁶⁸ Only if there was a *formula* that provided a remedy for the pursuer's demand for counter-performance was there a contract. If there was no *formula*, there was no claim for counter-performance. Where the pursuer had already <54> performed in order to obtain counter-performance (*datio ob rem*), all the pursuer could do was to claim back his own performance with the *condictio ob rem*.

b) However, sometimes there were cases in which it was not clear under which *formula* an agreement could be subsumed. One example is a transaction called *aestimatum*.¹⁶⁹ Goods of one party were left with the other, and their value was estimated. After a certain time, the recipient of the goods either had to pay the estimated sum to the owner or to return the goods. This transaction enabled the recipient to try to sell the goods. If he managed to do so, and obtained a price higher than the estimated sum, the surplus was his. If he failed to sell the property, the owner could vindicate from him. Thus the *aestimatum* contained elements of several contractual types, mainly *emptio venditio* and *locatio conductio*.¹⁷⁰ It was therefore uncertain which *formula* applied to this case. On the other hand, equity demanded enforceability since the elements of recognised contracts were implied. In order to save the pursuer from losing the case only because of these technical problems the *praetor* granted an *actio in factum*.¹⁷¹ It was an action "on the facts of the case", and closely related to an existing *formula*.¹⁷² So in the example of the *aestimatum*, after a description of

¹⁶⁷ Kaser, *RP II*, pp. 422 sqq.; Zimmermann, *The Law of Obligations*, p. 839.

¹⁶⁸ See above A II 1. <54>

¹⁶⁹ Cf. Ulp. D. 19.3.1 pr. Zimmermann, *The Law of Obligations*, pp. 535 sq.; Kaser, *RP I*, p. 581.

¹⁷⁰ Ulpian, *loc. cit.*, also discusses *mandatum* and *societas*.

¹⁷¹ Honsell/Mayer-Maly/Selb, *Römisches Recht* (4th ed., 1987), pp. 341 sq.

¹⁷² Zimmermann, *The Law of Obligations*, p. 533; Kaser, *RP I*, p. 582; Honsell/Mayer-

the facts of the case in the *demonstratio*, the *actio de aestimato* resembled the *formulae* of *emptio venditio* and *locatio conductio* in that its wording also ran *dare oportere ex fide bona*.

In introducing new *formulae* the *praetor* widened the range of enforceable agreements. The consequence was a considerable relaxation in the law of contracts.¹⁷³ It is certain that in classical times *actiones in factum* were granted in cases that involved elements from different typical contractual types. According to the ruling opinion, *actiones in factum* also were acknowledged in some cases of a *datio ob rem*, that is in cases of atypical agreements¹⁷⁴. Only later development, however, brought about the systematic recognition of enforceability in these cases.¹⁷⁵ <55>

c) In postclassical times, *actiones in factum* (*praescriptis verbis agere*) were generally recognised as remedies by which the pursuer could claim counter-performance in all cases of a (former) *datio ob rem*. Thus, by the time of Justinian, a new type of contract had in fact come to be recognised: the so-called innominate real contracts.¹⁷⁶ This category contained all agreements that did not fall within the classical types of contracts. Therefore, the pursuer now had the choice between claiming counter-performance with an *actio praescriptis verbis* or recovering what he himself had performed with the *condictio ob rem*.¹⁷⁷ However, such an agreement only became enforceable when the pursuer had already yielded performance. In that respect it resembled the classical real contract, and this is where its name derived from.¹⁷⁸ But the decisive difference from the latter was that the pursuer in classical times only had a claim to recover what he had given. He could not claim counter-performance.¹⁷⁹

The recognition of the innominate real contracts initiated the decline of the *condictio ob rem*. Since counter-performance was now enforceable, the *condictio ob rem* was not necessary any more to protect the pursuer who had

Maly/Selb, *Römisches Recht* (4th ed., 1987), p. 342.

¹⁷³ Zimmermann, *The Law of Obligations*, p. 534.

¹⁷⁴ Cf. Aristo/Iul./Ulp. D. 2.14.7.2.

¹⁷⁵ Honsell/Mayer-Maly/Selb, *Römisches Recht* (4th ed., 1987), p. 342; Zimmermann, *The Law of Obligations*, p. 534. <55>

¹⁷⁶ Zimmermann, *The Law of Obligations*, pp. 532 sqq.; Sohm, *Institutes* (3rd ed., 1907), pp. 378 sqq.; Kaser, *RP II*, pp. 419 sq.

¹⁷⁷ Zimmermann, *The Law of Obligations*, p. 858.

¹⁷⁸ Kaser, *RP II*, p. 421; Zimmermann, *The Law of Obligations*, p. 534.

¹⁷⁹ Sohm, *Institutes* (3rd ed., 1907), pp. 379 sq. note 5.

performed first. Although it still existed, the change in the contractual system deprived the *condictio ob rem* of its original importance.¹⁸⁰

d) Since the *condictio ob turpem causam* was also based on a *datio ob rem*, the question arises whether it also lost its function due to the development of the new contractual type. The innominate real contracts, however, were different from the cases of a *datio ob rem inhonestam*, in that they were enforceable. Enforceability, of course, was undesirable if the agreement imported turpitude. The decline of the *condictio ob turpem causam* probably began a considerable time later and was connected with the final recognition of contractual freedom. The final step assuming the existence of a contract as soon as there was a consent was seemingly taken by the French humanists, who abandoned the Roman principle "*nuda pactio obligationem non parit*" (mere consent does not produce an obligation). The principle was indeed reported until the seventeenth century, but from about the eighteenth century there was no longer any <56> dispute that pure consent created an obligation ("*ex nudo pacto oritur actio*").¹⁸¹ This was the moment when the *condictio indebiti* or *sine causa*¹⁸² began to supersede the *condictio ob turpem causam*. If the parties consented to an immoral transaction, they were now seen to conclude a contract; albeit one that was invalid. Their agreement was no longer conceived as lying outwith contract. So if a performance was made under such an agreement it was made *solvendi causa*, i.e. with the purpose to discharge the obligation under the contract. Therefore, the *condictio indebiti* (*sine causa*) could now operate to claim back what was given in performance of this contract that was void and that did not provide a legal basis.¹⁸³ Due to this development, the *condictio ob turpem causam* weakened in significance. However, the *condictio ob turpem causam* was received into the *ius commune* along with the other *condictiones* from the *Corpus Iuris Civilis*, and for long continued to be discussed and operated as a claim to recover what was given for a shameful cause.¹⁸⁴

¹⁸⁰ Zimmermann, *The Law of Obligations*, p. 858. <56>

¹⁸¹ Zimmermann, *The Law of Obligations*, p. 539, with further reference.

¹⁸² Depending on the scope and elaboration of these claims; see the following Chapters Three, Four and Six as to the development in the different countries discussed in this thesis.

¹⁸³ Zimmermann, *The Law of Obligations*, pp. 860 sq.

¹⁸⁴ Cf. Chapter Two.

II. The Link between the *Condictio ob Turpem Causam* and the *Condictio ob Iniustam Causam* in the Digest

Comparing the Digest with the Codex on the *condictio ob turpem vel iniustam causam*, a striking difference may be noticed: while in the Digest the *condictio ob turpem* and *ob iniustam causam* are brought together under the same title, and have been amalgamated into one term "*condictio ob turpem vel iniustam causam*", in the Codex the two types of case are treated separately. The title C. 4.7 deals with the *condictio ob turpem causam*; here we find cases *ob turpem causam* as well as the *in pari delicto* rule. After C. 4.8, where the *condictio furtiva* is discussed, in C. 4.9 the *condictio ob iniustam causam* appears. However, it only appears in the title, which runs *De condictione ex lege et sine causa vel iniusta causa*. The texts of the constitutions in this title do not mention these terms any more. C. 4.9.1 deals with a case in which the *condictio* is used to claim back a loan even before the term of loan has elapsed; the fragment does not deal with a case of unjustified enrichment (the loan is valid), and hence is not our concern.¹⁸⁵ The second fragment of this title states that a legal instrument which is invalid may be claimed from the creditor. In the third text, C. 4.9.3, <57> the *condictio* is granted for the recovery of fruits which were drawn and consumed by a *mala fide* possessor who knew he had no right to consume the fruits. This text, as we may conclude from parallel fragments in the Digest (see above C II 1), probably deals with a case *ob iniustam causam*. Finally, in C. 4.9.4, the pursuer is allowed to claim back a security given for a loan which was never paid out to the pursuer. Again, it is crucial to note that none of these texts deals with the violation of any legislation.

The Digest was compiled after the Codex had already been published;¹⁸⁶ therefore the combination of the cases *ob iniustam causam* with *ob turpem causam* must be later than their combination with *sine causa*. The reasons for this systematic change can only be guessed at¹⁸⁷, all the more since the one

¹⁸⁵ Cf. A II 1 b to the use of the *condictio* to claim back a loan. <57>

¹⁸⁶ Honsell/Mayer-Maly/Selb, *Römisches Recht* (4th ed., 1987), p. 46 with literature.

¹⁸⁷ Cf. also D. 12.7.5 *De condictione sine causa*, where a case is discussed which seems to concern a *turpis causa*, and which might therefore have been compiled in D. 12.5. However, according to the reasoning of Paulus it could be seen as a case of *sine causa* (although the classification *sine causa* was probably postclassical): *non turpem causam...: non enim stupri, sed matrimonii gratia datam esse*. The marriage, as a *causa*, never took place. One could reason that therefore the dowry money in question here was given *sine causa*. This might have been the reason for the law commission to file the text under this title. For a discussion of D. 12.7.5.1 see B II.

fragment actually appearing under the title *De condictione ob turpem vel iniustam causam* does not give a practical example but only makes the general statement that what is retained *ex iniusta causa* may be recovered with the *condictio*. A further finding is that, in the Digest, fragments in which an *iniusta* or *non iusta causa* is mentioned in the context of the *condictio* are mostly scattered between the different books of the Digest concerning the *condictio*, with one further mention in the book on marital donations. They are not systematically gathered under the title *De condictione ob turpem vel iniustam causam*.

It has been suggested¹⁸⁸ that the *condictio ob iniustam causam* might have increased in importance after Theodosius II had turned every statutory prohibition into a *lex perfecta* in his *lex non dubium* (439 A.D.).¹⁸⁹ Due to this provision, infringement of the law generally rendered a contract invalid.

However, nowhere does the *lex non dubium* mention the *condictio ob iniustam causam* or cases which could be related to it. The cases mentioned in Nov. Theod. 9 concern the provision that there is no action to enforce a contract if the contract is <58> illegal, but there is no case concerning the recovery of benefits already transferred. The suggestion¹⁹⁰ that Theodosius II made use of the *condictio ob iniustam causam* where a *lex perfecta* was violated fails to provide any proof. On the contrary, given that there is no clear hint in the later Digest or the Codex that the *condictio ob iniustam causam* was operated at all in cases of statutory violations it is difficult to imagine how the provision of Theodosius II could have affected the *condictio ob iniustam causam*. In the Codex, which was compiled long after the *lex non dubium* had been enacted, the *condictio causa data causa non secuta* is reported as a claim to recover illegally paid money (C. 4.6.5).¹⁹¹ Looking at the cases where the *condictio* is operated on the grounds of an *iniusta causa*, the *condictio ob iniustam causam* rather seems to denote cases of encroachment on the private rights of the pursuer. This might explain why Justinian's law commission associated the *condictio ob iniustam causam* with the *condictio ob turpem*

¹⁸⁸ D. Liebs, "The History of the Roman *Condictio* up to Justinian", in: N. MacCormick/P. Birks (eds.), *The Legal Mind – Essays for Tony Honoré* (1986), 163 (pp. 175 sq.); Zimmermann, *The Law of Obligations*, pp. 845 sq. note 77.

¹⁸⁹ Nov. Theod. 9 / C. 1.14.5.1 ...*hoc est ut ea quae lege fieri prohibentur, si fuerint facta, non solum inutilia, sed pro infectis etiam habeantur, licet legis lator fieri prohibuerit tantum nec specialiter dixerit inutile esse debere quod factum est.* <58>

¹⁹⁰ D. Liebs, "The History of the Roman *Condictio* up to Justinian", in: N. MacCormick/P. Birks (eds.), *The Legal Mind – Essays for Tony Honoré* (1986), 163 (pp. 175 sq.).

¹⁹¹ Above C I 1. <59>

causam in book 12.5 of the Digest. For to encroach on another person's right may, at least if it is done intentionally, be regarded as blameworthy behaviour.

Even if the reasoning of the law commission may only be guessed at, the association of the *condictio ob turpem causam* and *ob iniustam causam* under one title in the Digest was an important step. It provided the basis on which later jurists understood the law after the full text of the *Corpus Iuris Civilis* had been rediscovered in the Middle Ages. The starting point for their interpretation of *iniusta causa* was its association with *turpis causa*, and with the *in pari delicto* rule which was dealt with in the very same title. In the following chapter, an attempt will be made to explain why "*iniusta causa*" came to be understood as "illegal cause", and why the *in pari delicto* rule was expressly applied to it. <59>

E. CONCLUSIONS

The *condictio ob turpem causam* operated in cases where a transfer was made on a shameful cause outwith the fixed types of contracts. Examples given in the Digest refer to cases where the recipient demanded payment to prevent him from committing criminal or sacrilegious acts, or to cases where the transferor claimed back money which the recipient had extorted from him. The decisive criterion for granting recovery *ob turpem causam* was the turpitude involved on the side of the recipient; this being so, the *condictio* operated whether the immoral purpose had been achieved or not. Infringement of morals and of legal prohibitions could coincide especially where legislation protected morals. However, it was not the breach of legislation as such which was considered by the jurists concerning the question of recovery; they were silent on this issue. Decisive for the rules on the *condictio ob turpem causam* was the turpitude involved.

The *in pari delicto* rule barred recovery where both parties took part in the turpitude. Examples named in the Digest concern adultery, indecency, and criminal purposes. The bar to recovery was a procedural rule to solve the dilemma that a tainted pursuer comes to court and claims tainted gains from a tainted defender. This situation was conceived by the Roman jurists to be analogous to the situation where a pursuer claims possession of a thing to which the defender in possession has an equal right. Here, the rule was established that the pursuer had to present a stronger right of possession than the defender in order to succeed; where he could only present an equally strong right, the parties were *in pari causa*, and possession was accordingly left with the defender. Similarly, where both parties were equally to blame regarding the turpitudinous transfer of benefits, they were held to be *in pari*

causa: the pursuer, having transferred ownership of the benefits, could not present a stronger right to get them back than the defender to keep them. Where the turpitude was only on the side of the defender, the stronger right of the pursuer to have the benefits is based on the fact that he did not deliberately transfer ownership but was forced to do so by the tainted conduct of the defender. In that case, the benefits should clearly belong in the pursuer's patrimony; so recovery was granted *ob turpem causam*. Where the pursuer himself was to blame, however, the judge could not decide who, according to justice, should have the <60> benefits. Therefore, the judge did not alter the current state of possession but left the benefits with the current possessor.

The *condictio ob iniustam causam* was, in classical Roman law, not specially concerned with the recovery of illegal transactions. There is, furthermore, no indication that the *in pari delicto* rule was applied to cases *ob iniustam causam*. Rather, the *condictio ob iniustam causam* seems to have denoted cases where the defender has encroached upon another person's right and made gains therefrom. However, the link of the *condictio ob iniustam causam* with the *condictio ob turpem causam* and the *in pari delicto* rule in the Digest brought the two claims together and was one reason for the modern understanding of *iniusta causa* as denoting illegal transfers which are also barred by the *in pari delicto* rule. This theme will be developed in the next chapter.