

Si ita dedi, ut intra certum tempus manumittas. The Case of Ulp. 26 ed. D. 12,4,3,3¹

HORVÁTH, KATA ZSUZSANNA*

ABSTRACT *This paper deals with the problem of unjust enrichment in Roman law in particular with the *condictio causa data causa non secuta*. This action was used for the recovery of a performance rendered for an intended purpose that has not been achieved. The study focuses on the exegesis of fragment D. 12,4,3,3. This source concerns a person who gives money to another person for him to manumit his own slave, however, this does not happen. The legal question is whether there is a possibility of initiating a *condictio*. The research method used is the exegetical method.*

KEYWORDS *unjust enrichment, *condictio causa data causa non secuta*, exegesis, D. 12,4,3,3, manumissio.*

1. Introduction

The subject of this study is unjust enrichment. The legal concept of unjust enrichment was already known in Roman law, where it was applied in various typical situations.² These cases were known by classical jurists, but no strictly defined, separate types were established.³ Later, during the Justinian codification, several types of *condictio* were developed for specific types of situations. As a

¹ A KULTURÁLIS ÉS INNOVÁCIÓS MINISZTERIUM EGYETEMI KUTATÓI ÖSZTÖNDÍJ PROGRAMJÁNAK A NEMZETI KUTATÁSI, FEJLESZTÉSI ÉS INNOVÁCIÓS ALAPBÓL FINANSZÍROZOTT SZAKMAI TÁMOGATÁSÁVAL KÉSZÜLT.



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* PhD student, University of Szeged, Doctoral School of Law and Political Sciences; teaching assistant, University of Szeged, Faculty of Law and Political Sciences, Roman Law Department.

² Ferenc Benedek, "Jogalap nélküli gazdagodás jogellenes és erkölcstelen magatartásból a római jogban," *Dolgozatok az állam-és jogtudományok köréből*, 15 (1984): 8. says, that with regard to the interpretation of unjust enrichment, the most significant difference between Roman law and current law is the following: Roman law applied the rules of unjust enrichment to specific types of situations, while in current law the situations of unjust enrichment are considered "innominate".

³ Reinhard Zimmermann, *The Law of Obligations* (Oxford University Press, 1996), 838–839.

result, the Digest regulates the individual types of unjust enrichment under separate titles. Thus: the *condictio causa data causa non secuta* is regulated in D. 12,4, the *condictio ob turpem vel iniustam causam* is regulated in D. 12,5, *condictio indebiti* is regulated in title D. 12,6, *condictio sine causa* is regulated in title D. 12,7, and *condictio furtiva* is regulated in title D. 13,1. This paper deals with the case of *condictio causa data causa non secuta*.

In terms of the structure of the paper, following the introduction, I will first briefly present the *condictio causa data causa non secuta* as a case of unjust enrichment. Following this theoretical introduction, I will move on to the exegesis of the fragment D. 12,4,3,3, which can be found in the title of the Digest on *condictio causa data causa non secuta*. In doing so, after examining the *inscriptio*, I will analyse the various factual situations. I will also outline the legal issues and problems that arise, then present the solution to the case and its legal justification.

2. The *condictio causa data causa non secuta*

The concept of unjust enrichment can be defined as follows: the wealth of one person (the “enriched”) increases at the expense of another person (the “enricher”),⁴ usually on the basis of a legal transaction between the two, but sometimes due to other circumstances, without there being sufficient reason for the permanent retention of this increase in wealth.⁵ The starting point is that every performance has a purpose, and if that purpose is not achieved, the law allows the performing party to reclaim it.⁶ On the other hand, the person accepting the performance lacks the legal basis to retain or withhold the performance received.⁷ The Roman law textbooks in Hungary highlight two conceptual elements of unjust enrichment. On the one hand, the realization of the so-called *datio* is essential for unjust enrichment.⁸ This *datio* basically means a transfer of ownership under civil law.⁹ It should be emphasized that the essence of this condition is that the wealth of the enriched increases at the expense of the other

⁴ It is important to note that this advantage must actually be incorporated into the wealth. Compare Ferenc Benedek and Attila Pókecz Kovács, *Római magánjog* (Dialóg Campus, 2018), 339.

⁵ Benedek and Pókecz Kovács, *Római magánjog*, 339.

⁶ András Bessenýő, *Római magánjog. A római gondolkodás az európai jogi gondolkodás történetében* (Dialóg Campus, 2003), 481.

⁷ Bessenýő, *Római magánjog*, 481.

⁸ Benedek and Pókecz Kovács, *Római magánjog*, 311.; Imre Molnár and Éva Jakab, *Római jog* (Leges Diligens, 2021), 325–326.; András Földi and Gábor Hamza, *A római jog története és intézményei* (Novissima Kiadó, 2023), 552–553.; Róbert Brósz and Elemér Pólay, *Római jog* (Tankönyvkiadó, 1989), 453.; Iván Siklósi, *Római magánjog II. kötet* (ELTE Eötvös Kiadó, 2021), 1586.

⁹ Ferenc Benedek, *Jogalap nélküli gazdagodás a római jogban* (Candidate dissertation, University of Pécs, 1968), 77.

party's wealth.¹⁰ The second element is the so-called *sine causa* requirement.¹¹ That is, the enriched must not have a valid legal title to retain the enrichment (*sine causa retinendi*).¹²

This paper focuses on *condictio causa data causa non secuta* which refers to the reclamation of a performance that has lost its purpose. In other words, it occurs when someone provided a performance in the hope of receiving a certain counter-performance, but the hoped-for goal did not materialize.¹³ It was particularly significant because not all agreements were enforceable in Roman law (*nuda pactio obligationem non parit*).¹⁴ Thus, a person who provided a performance on the basis of a *pactum* in the hope of receiving a certain counter-performance could reclaim the performance they had provided on the basis of unjust enrichment if the other party failed to perform.

Based on Benedek's further classification, the fragment examined in this paper belongs to the category of *datio ob rem* within the scope of *condictio causa data causa non secuta*.¹⁵ *Datio ob rem* is a type of transfer of ownership that: "was made for a specific purpose and the transferor has a financial or other interest in its realization".¹⁶ It follows that if something was transferred to another party for the specific purpose of the acquiring party fulfilling some kind of counter-performance on their part, the "*res data*" can be reclaimed if the expected result did not occur.¹⁷

Within this category of *datio ob rem*, the analyzed fragment can be classified as belonging to the "*do ut facias*" group. In this case, the purpose of the *datio* expected from the acquiring party may be any conduct other than *datio* itself.¹⁸ If this intended conduct did not subsequently materialize, the first performing party had the option of reclaiming the transferred property. However, if the purpose was achieved, the possibility to initiate a *condictio* was lost.

¹⁰ Benedek and Pókecz Kovács, *Római magánjog*, 311. considers the increase in wealth and the increase in wealth occurring at the expense of the other party's wealth as separate elements.

¹¹ Benedek and Pókecz Kovács, *Római magánjog*, 311.; Molnár and Jakab, *Római jog*, 325-326.; Földi and Hamza, *A római jog története és intézményei*, 552-553.; Brósz and Pólay, *Római jog*, 453.; Siklósi, *Római magánjog II. kötet*, 1589.

¹² Benedek and Pókecz Kovács, *Római magánjog*, 311.; Földi and Hamza, *A római jog története és intézményei*, 553.; Siklósi, *Római magánjog II. kötet*, 1589.

¹³ Molnár and Jakab, *Római jog*, 326.; Brósz and Pólay, *Római jog*, 453-454.; Földi and Hamza, *A római jog története és intézményei*, 553.; Benedek and Pókecz Kovács, *Római magánjog*, 314.

¹⁴ D. 2,14,7,4.

¹⁵ Benedek, *Jogalap nélküli gazdagodás a római jogban*, 210-211.

¹⁶ Benedek, *Jogalap nélküli gazdagodás a római jogban*, 204.

¹⁷ Benedek, *Jogalap nélküli gazdagodás a római jogban*, 204.

¹⁸ Benedek, *Jogalap nélküli gazdagodás a római jogban*, 215.

3. The exegesis of D. 12,4,3,3

Following this theoretical introduction, I will move on to the exegesis of the case. The Latin text of the fragment analysed in this study is as follows:

D. 12,4,3,3 Ulpianus libro 26 ad edictum

Quid si ita dedi, ut intra certum tempus manumittas? Si nondum tempus praeteriit, inhibenda erit repetitio, nisi paeniteat: quod si praeteriit, condici poterit. Sed si Stichus decesserit, an repeti quod datum est possit? Proculus ait, si post id temporis decesserit, quo manumitti potuit, repetitionem esse, si minus, cessare.

What if I pay you to manumit him within a fixed time? While the period runs recovery is to be refused, unless I change my mind. When the period has passed, the *condictio* lies. Suppose that Stichus dies. Can the payment then be recovered? Proculus holds that if he dies after the time fixed for manumission, recovery is to be allowed; if not, not.¹⁹

Upon examining the inscription, we can conclude that the source comes from the 26th book of Ulpianus' commentary on the praetor's edict. This book deals with cases of "*de rebus creditis*", and within that, the present source appears under the subheading "*de condictione*" in Lenel's *Palingenesia*.²⁰

3. 1 Analysis of the facts, the legal issue, and the solution

This chapter intends to review the text, which contains several variations of the facts. First, I will outline the initial factual situation, then I will describe the different variations. The starting point in all cases is as follows: there are two people, one of whom we will call person "A" and the other person "B". Based on the facts, person "A" gave something (presumably money) to person "B" with the agreement that person "B" would manumit a slave in his possession. The parties also set a specific time limit for this.

According to the first factual variation, person "A" wishes to initiate *condictio* against person "B", within the specified time limit, in order to recover the money he has given. He wants to do so on the legal basis that person "B" has not yet freed the slave.

In the second factual variation, person "A" wishes to initiate a *condictio* against person "B" to reclaim the transferred money, also within the time period available for manumission, on the grounds that person "A" withdrew from the release, regretted it.

The third version of the facts describes the case where person "A" wishes to initiate a *condictio* against person "B" after the *terminus* has expired in order to reclaim the amount transferred. He wants to do so because person "B" did not manumit the slave in time.

¹⁹ Alan Watson, ed., *The Digest of Justinian. Volume 1*. (University of Pennsylvania Press, 1998), 374.

²⁰ Otto Lenel, *Palingenesia Iuris Civilis* (Ex Officina Bernhardi Tauchnitz, 1889), 567–569.

The fourth and fifth versions of the facts are based on the death of the slave to be manumitted. According to the fourth version of the facts, the slave dies after the time limit set for manumission has passed, while according to the fifth version, the slave dies within the fixed time period.

As we can see, in the first three factual variations the slave to be manumitted, Stichus, is alive. These cases can be further divided according to whether the *condictio* is initiated before or after the time limit: in the first and second factual versions, we are before the expiry of the *terminus*, while in the third case, we are after it. However, a difference can be noticed in the legal grounds for the *condictio*. In the first and third factual variations, the legal ground for recovery is person “B”’s failure to free Stichus, while in the second factual variation, it is reconsideration and regret. Even in the situation where Stichus dies, two versions can be found, depending on whether the death occurs before or after the fixed time for manumission. In the fourth version of the facts, the slave dies after the period has passed, while in the fifth version, he dies before it.

After discussing the facts of the case, let us turn to the legal issue. In all variations of the facts, the question that arises is whether, based on the rules of unjust enrichment, person “A” has the possibility to recover the amount transferred (*dare*) from person “B” by way of *condictio*.

The solution is also provided by the source, according to which *condictio* is not available in the first variation of the facts, but is available in the second and third cases. In the fourth version of the facts, the jurist also considers *condictio* to be available, while in the fifth and final case he does not.

I would like to illustrate, using a diagram, the aforementioned different factual variations and the legal solution provided by the jurist to the legal question of whether *condictio* can be granted or not.

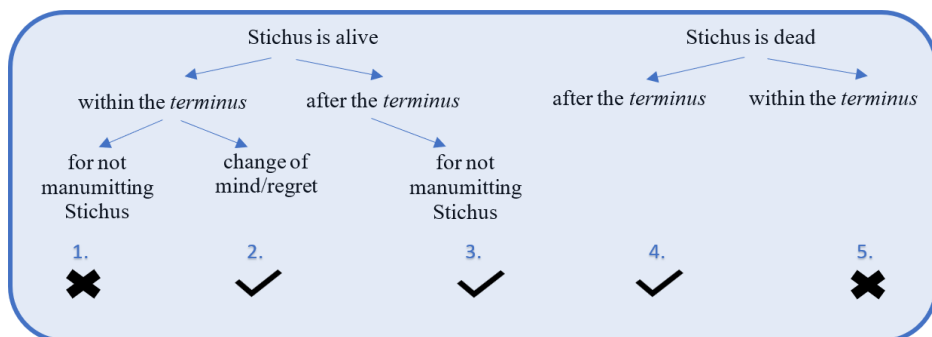


Illustration 1: Presentation of factual variations and the legal solutions (own illustration).

3. 2 Legal justification

In the following, I would like to present the legal reasoning in line with the different factual variations. According to the starting point of the case, person “A” and “B” agreed that person “A” would transfer something to person “B” in exchange for person “B” manumitting a slave in his possession (Stichus). The

parties agreed in a *pactum*, there is no indication that a *stipulatio* was concluded between them. Consequently, since Roman law did not recognize such agreement as a nominate contract, any claim arising from it could not have been enforced.²¹ Roman law had a closed contractus system, so it only recognized certain types of contracts, and any contract that did not fall within this scope could not be litigated (*numerus clausus* system of contracts). This is also related to the concept of the action-based approach in Roman law, which meant that legal proceedings could only be initiated in cases where an appropriate *actio* was available.

At this point, it is also necessary to mention innominate real contracts. The essence of these contracts is that if one party has performed, this party has the opportunity to demand counter-performance from the other party. In the case of innominate contracts, from classical times onwards, if one party had already performed, the praetor gave an *in factum actio* or *actio praescriptis verbis* to that party. In this way the first performing party could enforce the counter-performance.²² This legal development led to the system of innominate real contracts developed by Justinian. By that time, a new set of contracts had emerged, divided into four types: *du ut des*, *do ut facias*, *facio ut des*, and *facias ut facias*.²³

Subsequently, let us turn to the analysis of each factual variation. Firstly, in the first factual case, we can see that person “A” wishes to initiate *condictio* against person “B” within the time limit available for manumission as person “B” has not yet fulfilled their agreement, i.e., he has not manumitted the slave. As we have already established, no named contract was concluded between the parties, which means that this agreement was not originally enforceable under Roman law. However, person “A” is not left without a mean of redress, as the rules on unjust enrichment become relevant (in this case, in an auxiliary, subsidiary capacity). The option available to person “A” is to initiate *condictio* to reclaim the amount he has paid. At a later stage in the development of the law, based on the information discussed above, the praetor granted *actio in factum* and *actio praescriptis verbis* in order to enable the party that had already performed to not only reclaim performance, but also to enforce the other party to perform. However, at the time this case arose, it was not yet possible, so in the present situation, person “A” wishes to reclaim his own performance by means of *condictio* due to the other party’s failure to perform.

The legal situation that arises between the parties can be classified as *condictio causa data causa non secuta*. In this case, one thing is transferred to another with the express purpose that the acquiring party also provides counter-performance on his part. It follows from that that the *res data* can be reclaimed if the expected result did not occur and the desired goal was not achieved.²⁴ However, it is very

²¹ It is worth noting that under Roman law, no action could be brought from a *pactum* on the basis of the principle of *nuda pactio obligationem non parit*, but an objection (exception) could be raised.

²² Zimmermann, *The Law of Obligations*, 534., 844.

²³ Zimmermann, *The Law of Obligations*, 534.

²⁴ Benedek, *Jogalap nélküli gazdagodás a római jogban*, 204.

important to note that this action is only admissible if the goal is definitively lost. If a certain time limit is set, it is not certain until the expiry of the fixed time that the other party will not actually provide the counter-performance, in this case the manumission of the slave. During this period of uncertainty (pending legal situation) *condictio* cannot be initiated.²⁵

Based on this, it is completely clear why it is not possible to initiate *condictio* in this first variation of the facts. The *terminus* has not yet expired, so it is not certain at all that person “B” will not manumit the slave in time. It is conceivable that person “B” will still fulfil the obligation within the time period, as this is still an open question at this point. Therefore, it cannot be stated with certainty that the goal will not be achieved, thus the *condictio* cannot be granted.

Now, let us move on to the second variation of the facts. This case is similar to the first one in that we are still before the expiry of the agreed *terminus*. However, it differs in terms of the ground on which person “A” bases the right to recover the money given. Unlike in the previous case, it is not the failure of the purpose of the agreement, but rather “regret”, meaning withdrawal from the agreement, or change of mind (*paeniteat*).

The question arises as to what the so-called *ius paenitentia* (Reurecht) actually means. According to the Oxford Latin Dictionary, the word *paenitentia* means regret for one’s actions or a change of mind or attitude.²⁶ The verb *paeniteo* also has similar meanings, such as: to cause dissatisfaction, give reason to complain or regret; to feel regret, or think better.²⁷ The Encyclopedic Dictionary of Roman Law also provides similar guidance. According to this, *paenitentia* (which derives from the verb *paenitere*) means that someone changes their mind about a transaction they have already concluded or about failing to perform a legal act within a specified time limit.²⁸ The dictionary also mentions that although *paenitentia* has no legal effect as a general rule, there have been cases where a person was able to unilaterally withdraw from a transaction merely as a result of a simple change of mind.²⁹ Berger explains that, for example, if someone gives money to a slave owner to manumit the slave, they then have the option to revoke the agreement (he uses the word “donation” for the monetary contribution made).³⁰ The Finály Latin-Hungarian dictionary also contains meanings consistent with the above, as follows: *poenitentia* means repentance, *poenitet* means to regret something, to be dissatisfied with something.³¹

From these meaning and the opinions in the literature, we can conclude that the essence of *ius paenitentia* is that the party who performed first, in this case person

²⁵ Benedek, *Jogalap nélküli gazdagodás a római jogban*, 220.

²⁶ Peter Geoffrey William Glare, ed., *Oxford Latin Dictionary* (Clarendon Press, 1992), 1282.

²⁷ Glare, *Oxford Latin Dictionary*, 1282.

²⁸ Adolf Berger, *Encyclopedic Dictionary of Roman Law* (The American Philosophical Society, 1953), 616.

²⁹ Berger, *Encyclopedic Dictionary of Roman Law*, 616.

³⁰ Berger, *Encyclopedic Dictionary of Roman Law*, 616.

³¹ Finály Henrik, *A latin nyelv szótára* (Akadémiai Kiadó, 2002), 1517.

“A”, had the right to change their mind.³² They could unilaterally decide to reclaim the performance they had performed. If the party who had already performed initiated *condictio* for this reason, we can actually speak of a subcategory of *condictio causa data causa non secuta*, namely *condictio ex paenitentia*.³³ It should be noted that the assessment of this *condictio* is controversial in the literature in the context of *datio ob rem*.³⁴ The starting point is D. 12,4,5 pr.,³⁵ and in the title of *condictio causa data causa non secuta condictio ex paenitentia* also appears in D. 12,4,5,1, D. 12,4,3,2, and D. 12,4,3,3 which is examined in this study. In connection with the aforementioned *condictio*, the Kaser-Knütel textbook emphasizes that it most often appeared in the context of someone giving money to the owner for the purpose of manumitting his slave or buying a slave with that money, whom he would then manumit.³⁶ This is when the so-called Reurecht, or right of revocation, appears, usually without the parties agreeing on it separately.³⁷ The *ius paenitentia* was essentially equivalent to a right of withdrawal after the conclusion of innominate real contracts.³⁸ Dogmatically, this issue can be interpreted as meaning that the person who performed first and had not yet received counter-performance could not be sued – with the then known *actio praescriptis verbis*– because it was only possible to bring proceedings against the other person who had not yet performed.³⁹ Liebs’ explanation of the problem is as follows: in the case of unjust enrichment, the critical period is when one party has performed and the other has not yet performed. If the transaction partner of the party that has already performed changes their mind and does not counter-perform, the original performance is returned on the basis of *condictio*. Liebs concludes that this logically means that the party who performed first is not bound by the agreement either. Therefore, they did not have to wait to see whether the other party would perform in accordance with the agreement, but could initiate *condictio* to reclaim their performance.⁴⁰ It is also important to note that, under *ius paenitentia*, it was only possible to initiate *condictio* as long as the other party had not yet counter-

³² Zimmermann, *The Law of Obligations*, 844.

³³ Zimmermann, *The Law of Obligations*, 844.; Lisa Isola, *Venire contra factum proprium. Herkunft und Grundlagen eines sprichwörtlichen Rechtsprinzips* (Peter Lang Edition, 2017), 331.

³⁴ Wolfgang Ernst, “Die datio ob rem als Austauschgeschäft – Ein Beitrag zu einseitig geregelten Geschäftsvorgängen im Verkehrsrecht”, in *Usus Antiquus Juris Romani*, ed. Wolfgang Ernst and Éva Jakab (Springer, 2005), 45.

³⁵ Ernst, “Die datio ob rem als Austauschgeschäft,” 45.

³⁶ Max Kaser and Rolf Knütel, *Römisches Privatrecht. Ein Studienbuch* (Verlag C. H. Beck, 2014), 288.

³⁷ Kaser and Knütel, *Römisches Privatrecht. Ein Studienbuch*, 288.

³⁸ Zimmermann, *The Law of Obligations*, 844., 858.

³⁹ Zimmermann, *The Law of Obligations*, 844.

⁴⁰ Detlef Liebs, “The History of the Roman *Condictio* up to Justinian,” in *The Legal Mind. Essays for Tony Honoré*, ed. Neil MacCormick and Peter Birks (Oxford University Press, 1986), 172–173.

performed.⁴¹ Prior to this, however, the first performing party could exercise this right even if the other party was willing to perform or had already begun preparations for performance.⁴²

Some questions arise regarding the evidential rules. It is certainly necessary to prove that the person who wishes to withdraw from the agreement notified the other party of this intention. The necessity of such notification is indicated in fragment D. 12,4,5,1. This source describes a case in which someone transfers a slave to another person on the condition that the slave be freed within a specified period of time but then he changes his mind. The person notifies the other party of this change, but the other party frees the slave anyway. The significance of this fragment in the present case lies in the fact that it concerns the obligation of the withdrawing party to notify the other party. It would be anomalous if individuals could refer to this right without restriction, so in my opinion it is absolutely necessary for the other party to be notified in advance.

Therefore, in the present case, person “A” had the right to withdraw from the agreement with the help of the rules of unjust enrichment, more precisely *condictio causa data causa non secuta*, more specifically, the *condictio ex paenitentia*. He may unilaterally change his mind and demand the return of the performance he has given. This is not precluded by the rule that *ius paenitentia* may only be exercised prior to the other party’s performance, as person “B” has not yet fulfilled his obligation under the agreement. Thus, on this legal basis, it is possible to initiate *condictio* against person “B” even before the *terminus* expires. However, based on the above, a prerequisite for this, according to the logic of procedural law, would be that the plaintiff must prove that the other party was notified of the withdrawal beforehand.

The next issue to consider is the third scenario, in which person “A” wishes to reclaim the transferred amount after the fixed time set for manumission, on the grounds that person “B” did not manumit the slave. In this case, *condictio* (*causa data causa non secuta*) can be granted without any problems on the basis of the rules of unjust enrichment, since, as discussed above, a definitive failure of purpose was necessary for the claim to be made. In the present case, it has become clear that the purpose has not been achieved, since the original purpose for which person “A” transferred the money was for person “B” to manumit his slave within the specified time limit. With the expiry of the *terminus*, it has become certain that this will not and cannot happen. The *condictio* therefore clearly is available to person “A”.

Moving on to the fourth and fifth factual variations, we see that the jurist introduces another factual element into the source, namely the death of the slave to be manumitted. In the following, I will examine these two factual versions. In the fourth case, where the slave dies after the time limit for manumission, the amount can be reclaimed, and we can apply the general principle of unjust enrichment. This can be supported by the reasoning related to the previous factual

⁴¹ Liebs, “The History of the Roman *Condictio* up to Justinian”, 173.; Zimmermann, *The Law of Obligations*, 858.

⁴² Zimmermann, *The Law of Obligations*, 858.

variation. If the slave dies after the fixed time set for his manumission, it is clear that the goal has permanently failed. Person “B” undertook to manumit Stichus within a certain period of time, but this did not happen. Stichus died as a slave after the *terminus* had expired. In fact, at this point, the slave’s death can be considered irrelevant, because even if he was alive, the amount would be recoverable due to the certain failure of the goal. The question arises as to why the jurist highlights this case.

This question can be answered by examining the fifth factual variation. In this case, contrary to the logic of unjust enrichment, the *conditio* is not available in the event of the slave’s death within the fixed time. This cannot be explained by the logic of unjust enrichment, since in this case too, the goal has permanently failed. The death of the slave necessarily means that his manumission will certainly not take place. Thus, applying the rules of unjust enrichment, one would have to conclude that since the goal for which person “A” provided the sum has certainly failed, the *condictio causa data causa non secuta* is admissible. It is therefore an interesting question why Ulpianus, taking up Proculus’s idea, says that in this case, recovery is not possible.

If we look at the fifth variation, we encounter a rule of transfer of risk. The source states that the “risk” of the slave’s death is ultimately borne by person “A,” who is the one providing the money (if the slave dies within the specified period of time set for the manumission). In this case, the possibility of recovery, *condictio*, is excluded. This risk of transfer clause is similar to the risk of transfer rules known from the sale of goods (*Preisgefahr*). According to this, the buyer bears the risk of damage or destruction of the item due to *vis maior* occurred between the conclusion of the contract and the transfer of the item, provided that the sale was perfect. The sale is perfect if the goods and the purchase price are specifically determined and the transaction is not subject to any suspensive conditions.

Applying this rule to the present situation, it can be seen that the risk of the slave dying as a result of an accidental event within the time available for manumission lies on person “A”. The transaction can be considered perfect based on the logic of the sale, as the goods were specified, the amount was transferred, and there were no suspensive conditions. The time limit set for manumission does not affect the perfection of the transaction. Thus, we can say that the „risk” has been transferred to person “A”, who is the one providing the money.

The question arises as to why this transfer of risk clause of a sale is applied in a case of unjust enrichment. The explanation for this, in my opinion, can be that the present agreement is a “mixed contract”, a so-called “gemischte” Vertrag.⁴³ In other words, it is a contract that combines elements of several types of contracts (“z. B. die Elemente von Kauf und Pacht oder von Pacht und Werkvertrag miteinander vereinigten”).⁴⁴ In this case, elements of both sale and mandate can be found. Sale, because person “A” actually “buys” the slave in order to free him, but the transfer does not take place, only the transfer of the amount. It is a mandate, because person “B” undertakes to perform a task namely

⁴³ Kaser and Knütel, *Römisches Privatrecht. Ein Studienbuch*, 277.

⁴⁴ Kaser and Knütel, *Römisches Privatrecht. Ein Studienbuch*, 277.

to manumit the slave (Stichus) whom person “A” wishes to manumit. It is also clear that this is a confidential agreement, which also reinforces the contract of agency nature of the transaction. However, unlike a *mandatum*, this transaction is not free of charge.

Proculus, recognizing the significance of this mixed nature, considered it important to properly regulate the relationship between the parties. Since there was no other option available at this point in the development, he gave the *condictio* but based on the rules of transfer of risk in sale agreements. We can see that Roman jurists were fundamentally practical in their thinking, seeking to provide solutions to the practical problems that arose. In the present situation, they believed that this agreement contained elements of both *emptio venditio* and *mandatum*, therefore considered this analogy of transfer of risk to be applicable for the purpose of a fair and appropriate assessment of the legal problem.

It is also interesting to note that Ulpianus adopts the opinion of Proculus, who lived about 200 years before him. From this we can see that this transactional mechanism already played a role in Proculus’s time, as well as in Ulpianus’s time, since he adopted it without change, and it was also significant during the Justinian codification. In other words, a situation that has existed for 600 years is unfolding before our eyes.

Furthermore, it is worth asking why person “A” did not choose the option of buying the slave himself and then manumitting him on his own terms. Or why they did not conclude their agreement in a *stipulatio*. These solutions would have resolved the problems that arose. First, if they had actually entered into a sales contract with each other, person “A” as the owner of the slave, could have manumitted him at any time. Furthermore, concluding the agreement in a *stipulatio* would have meant that if person “B” failed to fulfil his obligations, meaning that he did not manumit Stichus by the fixed time, then person “A” would have had the right to sue him on the basis of the stipulation.

These questions can be explained by the fact that this may have been an agreement between absent parties. In this case, given the time-consuming, costly, and dangerous nature of travel, it is understandable why they did not want to meet in person to complete the transaction or to conclude the *stipulatio* which required personal presence. In addition, there was presumably a relationship of trust between them, which is characteristic of a mandate. Thus, they were able to easily speed up the process by agreeing in this way.

4. Conclusion

In this study, following a brief theoretical introduction, I conducted an exegesis of D. 12,4,3,3. This fragment can be found in the Digest under the title dealing with the issue of *condictio causa data causa non secuta*. This *condictio* was aimed at reclaiming performance that had lost its purpose.

After analysing several factual variations in the source, we saw that one party (person “A”) gave money to the other (person “B”) to manumit his slave (Stichus) within a specified period of time, but this did not happen. If the *terminus* has not yet expired, person “A” cannot, as a general rule, initiate *condictio* against person

“B”, as the goal cannot yet be considered definitively lost. However, person “A” may invoke the so-called *ius paenitentiae*, i.e. they may withdraw from the agreement, in which case a *condictio* may be initiated within the time limit set for manumission, until the manumission takes place. After the fixed time, *condictio* can be granted without any problem due to the certain failure of the purpose. *Condictio* is also possible in the event of the slave’s death after the time limit, as the purpose has not been achieved. If the slave dies within the fixed time, then, given the mixed nature of the agreement (a combination of sale and mandate), *condictio* cannot be granted on the basis of the transfer of risk analogy, contrary to the logic of unjust enrichment. As for the question of why no sale contract or contract of agency was concluded and why no *stipulatio* was agreed upon, the answer can be that this is presumably an agreement between absent parties.