

## DATIO AS AN ASSUMPTION OF CONDICTION APPLICATION IN ROMAN LAW<sup>a</sup>

Valentina Cvetković-Dorđević

University of Belgrade, Faculty of Law, Belgrade, Serbia

*valentina\_cvetkovic@ius.bg.ac.rs*

### Abstract

Condictio represents an action that was created in Roman law and was used for the restitution of a thing which the defendant had acquired without legal grounds at the plaintiff's expense. The formula of condictio contained a plaintiff's claim that the defendant was obliged to give (*dare oportere*), suggesting that the plaintiff had previously transferred the ownership of a thing to the defendant (*datio*). This paper analyzes the fragments from Digesta in which condictio applies even without *datio*, i.e. transfer of ownership to the defendant. The conclusion we arrived at stipulates that Roman jurists, in order to sanction as many cases as possible of acquisition without legal grounds at the expense of another, expanded the scope of condictio application. Such expansion was accomplished in several ways. Roman jurists granted condictio in certain cases where the transfer of ownership was not valid (the so-called *condictio de bene dependis*). In addition, they applied condictio when the plaintiff executed some other act other than the transfer of ownership at the benefit of the defendant. In that way they extended the concept of *datio*. Finally, Roman jurists granted condictio even in the cases when the defendant's acquisition was not caused by the performance of the plaintiff (the so-called *condictio sine datione*). Imposing sanctions on acquisition without legal grounds at the expense of another, which occurred not only by the act of the plaintiff but also by the act of the defendant, the third person, or a natural cause, speaks in favor of understanding condictio as a predecessor of the modern institution of unjust enrichment, whose purpose is exactly the prohibition of acquisition of an economic benefit without legal grounds at the detriment of another.

**Key words:** *datio, condictio de bene dependis, condictio sine datione, condictio ex causa furtiva, Roman law*

---

<sup>a</sup> This paper is a result of research within the Project of the Faculty of Law, University of Belgrade "Identity Transformation of Serbia" supported by the Ministry of Education, Science and Technological Development of the Republic of Serbia.

## **DATIO KAO PRETPOSTAVKA PRIMENE KONDIKCIJE U RIMSKOM PRAVU**

### **Апстракт**

Кондикција представља тужбу која је настала у римском праву која је служила за повраћај ствари коју је тужени неосновано стекао на терет тужиоца. Формула кондикције садржала је тужиочево тврђење да је тужени дужан да да (*dare oportere*) која претпоставља да је тужени претходно стекао ствар тако што му је тужилац пренео у својину (*datio*). У раду се анализирају фрагменти из Дигеста у којима се формуларна кондикција примењује иако не постоји *datio* то јест предаја ствари тужиоца у својину туженом. Закључак до кога се долази јесте да су римски правници у циљу санкционисања што већег броја случајева неоснованог стицања на туђ рачун проширивали поље примене кондикције. То проширење остварено је на неколико начина. Јуриспруденти су додељивали кондикцију у одређеним случајевима у којима пренос својине није био пуноважан (*condictio de bene dependis*). Поред тога они су примењивали кондикцију и када је тужилац неосновано извршио неку другу чинидбу у корист туженог која није била усмерена на пренос својине и тако проширивали појам *datio*. Најпосле, римски правници су додељивали кондикцију и у одређеним случајевима у којима неосновано стицање туженог није проузроковано чинидбом тужиоца (*condictio sine datione*). Санкционисање неоснованог стицања туженог до кога је дошло не само чинидбом тужиоца већ и радњом туженог, трећег лица или природним догађајем говори у прилог схватања кондикције као претече савременог института неоснованог обogaћења чија сврха је управо санкционисање имовинске користи неосновано стечене на било који начин.

**Кључне речи:** *datio*, *condictio de bene dependis*, *condictio sine datione*, *condictio ex causa furtiva*, римско право

### *INTRODUCTION*

Condictio originates from Roman law, where it represented an action that was used for the restitution of a precisely specified sum of money or a precisely specified thing which was in the defendant's ownership without legal grounds (*sine causa*). Although this remedy was introduced by the Silian and Calpurnian Laws (Gaius, Institutiones IV, 19), its development was fostered through the interpretations by Roman jurists. In the beginning, condictio represented a new form of the oldest type of civil procedure (*legis actio per conductionem*). The plaintiff's claim that the defendant was obliged to give a precisely specified sum of money or a precisely specified thing was sufficient for its initiation. *Legis actio per conductionem* was characterized by abstractness, since the plaintiff did not state the legal grounds of his claim upon the initiation of the procedure. Thus, the sanctioning of legally unprotected relationships based on good faith was primarily provided. In addition, in new *legis actio* the relationships that had been protected in the former *legis actiones* (*sacramento and per iudicis postulationem*) could also be discussed.

The only limitation of the *legis actio per condictionem* pertained to the subject of a dispute, which was reflected in a precisely specified sum of money (*certa pecunia*) or a precisely specified thing (*certa res*). Therefore, the scope of condiction application back then was quite broad and it included both voluntary relationships established between the plaintiff and the defendant (such as *mutuum*, *depositum*, and *commodatum*) and the relationships established without the will of the plaintiff (when the defendant stole the plaintiff's thing and the like). At the time the *legis actio per condictionem* was introduced, there was no difference between the ownership as an absolute right with the broadest powers regarding a certain thing and the possession as a factual power over a thing that a person, who is not the owner, can have. Therefore, it could not be required, as an assumption of the application of the *legis actio per condictionem*, that the defendant become the owner of the thing claimed by the plaintiff.

After Augustus had abolished the *legis actio* procedure, the formulary procedure remained applicable as the sole regular civil procedure. The formula of condiction contained the intention (*intentio*) according to which the defendant was obliged to give (*dare oportere*), without stating the legal grounds of the plaintiff's claim (Lenel, 1927, p. 237, 240). The procedural framework of the condiction application gave room to a substantial development of the institution, which was performed through the activity of Roman jurists. Applying condiction in the settlement of specific cases, Roman jurists outlined the assumptions of its application and thus laid the foundations of its substantial determination, which was provided in the Code of Justinian.

#### *DATIO AS AN ASSUMPTION OF THE APPLICATION OF CONDITION STRICTO SENSU*

A notable narrowing of the scope of the condiction application dates back to the time of Proculus, according to whose opinion the formula of condiction, which contained the expression *dare oportere*, could be applied in a specific case only if the plaintiff had previously transferred to the defendant the ownership over a thing whose restitution he required:

*Cum servus tuus in suspicionem furti Attio venisset, dedisti eum in quaestionem sub ea causa, ut, si id repertum in eo non esset, redderetur tibi: is eum tradidit praefecto vigilum quasi in facinore deprehensum: praefectus vigilum eum summo supplicio adfecit. Ages cum Attio dare eum tibi oportere, quia et ante mortem dare tibi eum oportuerit. Labeo ait posse etiam ad exhibendum agi, quoniam fecerit quo minus exhiberet. Sed Proculus dari oportere ita ait, si fecisses eius hominem, quo casu ad exhibendum agere te non posse: sed si tuus mansisset, etiam furti te acturum cum eo, quia re aliena ita sit usus, ut sciret se invito domino uti aut dominum si sciret prohibitorium esse. — “Attius suspected your slave of theft.*

You gave him up for questioning on the basis that if nothing was found against him, he would be given back to you. Attius handed him over to the prefect of the watch as one caught red-handed. The prefect of the watch exacted the ultimate punishment. You will sue Attius maintaining that he ought at civil law to give the slave to you; for his obligation to do so antedated the death. Labeo says you can also bring the action for his production, since the impossibility of production has been brought about by his conduct. However, Proculus says there can only be an obligation to give if you initially transferred the property in the slave to Attius in which case you cannot have the action for production. Yet, if the property in the slave remained in you, you could sue Attius for theft too; for he has used property belonging to another knowing he was doing so without the owner's consent or that the owner, if he knew, would forbid it" (D.12.4.15 *Pomponius libro 22 ad Sabinum*).

Based on this fragment, the expression *dare oportere* was given the meaning *to give, to transfer into the ownership*, so a new condition of the condiction application consisted in the fact that the plaintiff performed *datio*, i.e. he transferred the ownership over a thing to the defendant. Accordingly, Gaius's statement in *Institutiones* (III, 91; IV, 18), according to which the formula of condiction contained a plaintiff's claim that the defendant ought to give, should be interpreted so that the defendant was obliged to transfer the ownership over a specified sum of money or a specified thing to the plaintiff. Since no one can transfer to another more rights than one has oneself, it is assumed that the defendant previously became the owner of a thing.

*Datio*, as a condition of the condiction application, could be required once when the Quiritarian ownership became a self-explanatory legal category (Milošević, 1989, p. 108). The acquisition of the Quiritarian ownership required undertaking strict formal acts (*mancipatio, in iure cessio*). Having performed them, the acquirer became a Quiritarian owner even when there were no legal grounds for the acquisition or the legal grounds were invalid. In the beginning, performing the required form resulted in the final acquisition of the ownership regardless of the existence of valid legal grounds. However, with the development of legal awareness it was realized that the acquisition for which there were no adequate legal grounds could not be final. It was in order to cancel the acquisition without legal grounds that condiction was applied. Since the moment the groundless acquisition could be attacked by condiction, it can be said that two elements were required for the final transfer of ownership in Roman law: legal grounds (*iustus titulus*) and the mode of acquisition (*modus acquirendi*). Applying the appropriate mode of acquisition resulted in the acquisition of ownership. However, if the acquisition had no legal grounds, it could be attacked by condiction, which aimed at the recovery of the groundlessly acquired thing (Sanfilippo, 1943, p. 78-79; Schwarz, 1952, p. 221).

By setting the condition that the defendant had become the owner of a thing through the plaintiff's act, it would be logical that the cases of depriving the plaintiff of his possession of a thing against his will were excluded from the scope of the condictio application. A notable exception was a theft in which the person who suffered the theft could institute condictio against the thief (in the Code of Justinian, it was called *condictio ex causa furtiva*). A significant condition consisted in the fact that condictio against the thief could be brought only by the owner of a stolen thing (D.13.1.1; D.47.2.14.16). The allowing of the application of condictio against the thief should be sought in the fact that the owner was no longer able to bring an ownership action (*rei vindicatio*) in the case of failure of an individually specified stolen thing. As long as the thing existed, the owner might choose whether to bring a *rei vindicatio* or condictio. In the case of failure of an individually specified thing, the owner was not left unprotected, but there was condictio at his disposal under which he received a monetary value of a stolen thing from the thief. Applying the principle *fur semper in mora est*, the thief's obligation became permanent (*perpetuatio obligationis*), on the grounds of which he was obliged to pay for the value of the stolen thing (D.13.1.8.1).

According to Julianus' interpretation, condictio could be brought only if there was a *negotium* between the plaintiff and the defendant:

*Si in area tua aedificassem et tu aedes possideres, condictio locum non habebit, quia nullum negotium inter nos contraheretur.* – "If I build on your site and you possess the house, there is no room for a condictio because there has been no dealing between us" (D.12.6.33 Julianus libro 39 digestorum).

However, this *negotium* should not be seen as a legal transaction in today's terms (with all the conditions required for its validity) but as a relationship between two subjects (the plaintiff and the defendant) which arose from the plaintiff's act accepted by the defendant and which, as a rule, resulted in transferring the ownership over a thing from the plaintiff to the defendant (Saccoccio, 2002, p. 282-292). According to Julianus, *negotium* did not imply the parties' consent of wills to oblige themselves thereby, so it might also represent the payment of what was not owed belonging to quasi contracts. Julianus did not differentiate between contracts and quasi contracts as the sources of obligation, so he required the same conditions for both the loan for consumption (*mutuum*) and the payment of what was not owed (*solutio indebiti*). Thus, in the case of the payment of what was not owed to a minor, Julianus pointed out that the payer might sue him and demand the recovery of the paid amount provided that the receiving of the payment was approved by the minor's tutor (D.26.8.13). Gaius was the first to notice the difference between the loan for consumption and the payment of what was not owed and thus he laid the foundation of the distinction between contracts and quasi contracts as the sources of

obligation (Institutiones III, 91). The criterion for distinction was a subjective element that, in the case of loan for consumption, was reflected in the will of the parties to conclude a contract and that was absent in the case of the payment of what was not owed. Pursuant to the fact that women and minors did not possess legally relevant will, they could not independently enter into an agreement but instead needed a tutor's approval. On the other hand, in the case of the payment of what was not owed, the parties participating in it did not possess the will for conclusion of a contract, but only the will of the payer was required to extinguish the existing obligation. Therefore, if the recipient of the payment was a minor or a woman, there was no reason to deny the payer the recovery in the absence of a tutor's approval.

#### *CONDICTIO DE BENE DEPENSIS*

The jurists granted condictio in certain cases where *datio* was not valid. Condictio applied in the case where *datio* was not valid and where the receiving party had spent the received thing after the enactment of Digesta is called *condictio de bene depensis*. It is assumed that Stephanus, a professor of Law in Beirut in mid-sixth century, first used this name to denote the condictio from D.12.1.11.2 (de Jong, 2010, p. 22). The application of this type of condictio assumed the invalid *mutuum* either because the transfer of the ownership had not been performed (there was no valid *datio*) or because there was not the consent of wills (*consensus*) about the essential elements of the loan for consumption (*mutuum*). In order to apply the condictio *de bene depensis* the fulfillment of two conditions was required: that the receiving party acted in good faith, i.e. that he believed that the valid loan for consumption had been concluded, and that he had spent the thing (de Jong, 2010, p. 35).

In the fragment D.12.1.11.2 Ulpianus pointed out that in the situation when a slave lent the money against the will of the master *datio* was not valid and therefore the loan for consumption was not concluded. The slave's master remained the owner of the money. As long as the money was in the borrower's possession, the master could bring a *rei vindicatio* for the recovery of the money. In the case that the borrower had spent the money, he would be responsible on the basis of condictio only if he had acted in good faith, i.e. if he believed that the slave lent the money to him with the consent of his master:

*Si fugitivus servus nummos tibi crediderit, an condicere tibi dominus possit, quaeritur. Et quidem si servus meus, cui concessa est peculii administratio, crediderit tibi, erit mutua: fugitivus autem vel alius servus contra voluntatem domini credendo non facit accipientis. Quid ergo? Vindicari nummi possunt, si extant "exstant", aut, si dolo malo desinant possideri, ad*

*exhibendum agi: quod si sine dolo malo consumpsisti, condicere tibi potero.* – “If a fugitive slave advances money to you, can his owner bring a condictio against you? Certainly, a slave of mine with license to administer his *peculium* will make a valid loan for consumption by lending to you; but in the case of a loan made by a fugitive or by another slave acting against his master’s will, the property in the coins will not pass to the recipient. What is the result? The coins can be vindicated if they still survive, or an action for production can be brought if they have ceased to be possessed through fraud; if without fraud you have used them up, I can bring a *condictio* against you” (D.12.1.11.2 *Ulpianus libro 26 ad edictum*).

Regardless of whether the recipient acted in good faith, it was considered that he was enriched by spending the thing, so that justice and fairness required that he be responsible on the basis of condictio (de Jong, 2010, p. 29).

The condictio *de bene dependis* was applied in the cases where a person *sui iuris*, who did not possess full business capacity, alienated a thing without the approval of a tutor or a curator.

Women and minors *sui iuris* could not validly alienate *res Mancipi* without the approval of a tutor (Gaius, Institutiones II, 80). On the other hand, women, but not minors, could validly alienate *res nec Mancipi*. Thus, if a minor without the approval of a tutor lent the money to any person, *datio* was not valid so the owner of the money would still be the minor who had a *rei vindicatio* at his disposal (Gaius, Institutiones II, 82). However, in the situation where the recipient had spent the received money, the possibility of applying a *rei vindicatio* was excluded, but this was not the case with condictio. Therefore, a minor who without the approval of a tutor lent the money or paid with the aim of extinction of the obligation without the approval of a tutor, was entitled to the condictio against the recipient if he had spent the received money (D.12.1.19.1). Although *datio* was not valid, spending the money by the recipient had the same effect as if *datio* had been valid, i.e. as if the recipient had acquired ownership by transferring a thing. Medieval jurists came to the conclusion that *consumptio nummorum bona fide* in a certain way convalidated an invalid loan for consumption at the beginning. This theory is called *reconciliatio mutui* (Saccoccio, 2002, p. 301-302; Stanojević, 1966, p. 104). By the consumption of the received money in the assets of the acquirer the effects were realized equivalent to those which would arise in the case of a valid transfer of ownership (Saccoccio, 2002, p. 305).

The condictio *de bene dependis* was also applied in the cases where the loan for consumption was given by a mentally incapable person *sui iuris* without the approval of a curator. The valid loan for consumption was not concluded, due to which a mentally incapable person was still the owner of a thing who might bring a *rei vindicatio* for the recovery of the money given. However, if the borrower was not aware of the lender’s

business incapacity and therefore spent the thing received for consumption, he would be responsible pursuant to the *condictio*:

*Si a furioso, cum eum compotem mentis esse putares, pecuniam quasi mutuam acceperis eaque in rem tuam versa fuerit, condictioem furioso adquiri Iulianus ait: nam ex quibus causis ignorantibus nobis actiones adquiruntur, ex isdem etiam furioso adquiri. Item si is qui servo crediderat furere coeperit, deinde servus in rem domini id verterit, condici furiosi nomine posse. Et si alienam pecuniam credendi causa quis dederit, deinde furere coeperit et consumpta sit ea pecunia, condictioem furioso adquiri. – “You received money on loan for consumption from a lunatic whom you thought to be sane and applied it to your own benefit. Julian holds that the lunatic can bring the *condictio*, since all causes which can give rise to actions in our favor without our knowledge also operate in favor of lunatics. Again, where one who has given credit to a slave goes mad, and then the slave applies the money to his master's benefit, the *condictio* can be brought in the name of the lunatic. Suppose again that someone gives a loan of money which belongs to another. He then goes mad, and the money is used up. Even in his lunacy the *condictio* is his” (D.12.1.12 Pomponius libro sexto ex Plautio).*

*Datio* was not valid, due to which the application of the *condictio de bene dependis* was also taken into account in the situation when a thief appeared in the role of a lender. Given that the borrower did not acquire the ownership over the money, a person who suffered the theft remained its owner and, as long as the money was not spent, he could bring a *rei vindicatio*. However, if the borrower spent the money, its owner might bring the *condictio de bene dependis* against him:

*Nam et si fur nummos tibi credendi animo dedit, accipientis non facit, sed consumptis eis nascitur condictio. – “For even in the case of a thief who pays over coins to you with the intention of making a loan, though no property in the coins passes, yet once they have been used up, the *condictio* lies” (D.12.1.13 Ulpianus libro 26 ad edictum).*

This type of *condictio* was also applied when *datio* was not valid, since both parties shared an erroneous belief regarding the kind of a business transaction (*error in negotio*). Namely, if one party gave the money in order to make a gift (*donatio*) and the other party thought it had received it as a loan for consumption (*mutuum*), there was neither a gift nor a loan for consumption since there was no consent of wills between the parties on the type of a contract:

*Si ego pecuniam tibi quasi donaturus dedero, tu quasi mutuam accipias, Iulianus scribit donationem non esse: sed an mutua sit, videndum. Et puto nec mutuam esse magisque nummos accipientis non fieri, cum alia opinione acceperit. Quare si eos consumpserit, licet condictioe teneatur, tamen doli exceptione uti poterit, quia*



*secundum voluntatem dantis nummi sunt consumpti.* – “If I give you money as a gift but you receive it as a loan for consumption, Julian writes that there is no gift. But is it a loan for consumption? In my view, it is not. Furthermore, the property in the coins does not pass to the recipient, albeit his belief at the time of the receipt was the contrary. If he uses up the money, the *condictio* lies against him, but he will be able to meet it with the defense of fraud on the ground that it was in accordance with the will of the giver that the coins were used” (D.12.1.18 *Ulpianus libro septimo disputationum*).

The giver remained the owner of the money who could bring a *rei vindicatio* with the aim of its recovery. If the recipient had spent the money, he may permanently refuse the giver’s conduction by raising an *exceptio doli*. The giver paid out the money in order to permanently alienate it free of charge, due to which claiming its recovery was considered a fraudulent conduct.

A contract was also not created when the giver wanted to conclude a deposit (*depositum*) and the recipient believed that a loan for consumption (*mutuum*) was concluded. A contract was also not created when giving was performed with the intention of concluding a loan for consumption and receiving on behalf of a loan for the purpose of ostentation. In both cases, however, the recipient who had spent the money was responsible pursuant to the condition *de bene depensis*:

*Si ego quasi deponens tibi dedero, tu quasi mutuum accipias, nec depositum nec mutuum est: idem est et si tu quasi mutuum pecuniam dederis, ego quasi commodatam ostendendi gratia accepi: sed in utroque casu consumptis nummis conductioni sine doli exceptione locus erit.* – “If I give a deposit and you receive as loan for consumption, there is neither deposit nor loan for consumption. It is the same if you lend for consumption, but I receive for use, as, for instance, for display. However, in both these cases, there is room for a *condictio* without the defense of fraud” (D.12.1.18.1 *Ulpianus libro septimo disputationum*).

### THE EXTENSION OF THE CONCEPT OF DATIO

Classical jurists continuously extended the scope of the conduction application with their broad interpretation of the concept of *datio* (Donatuti, 1977, p. 748-749). The occurrence of the need for sanctioning the groundless acquisition of other rights, even the possession of a thing, resulted in the extension of the concept of *datio*.

According to Paulus, the term *datio* could have the meaning of giving a thing to usufruct:

*Si fundi mei usum fructum tibi dedero falso existimans me eum tibi debere et antequam repetam decesserim, condictio eius ad heredem quoque meum transibit.* – “I grant a usufruct of my land to you

mistakenly thinking I am bound to do so. Then, before I claim it back, I die. My *condictio* also goes to my heir” (D.12.6.12 *Paulus libro septimo ad Sabinum*).

The giver (owner) gave the land on behalf of usufruct mistakenly believing that he was obliged to. It is not clear, from the fragment, whether the owner, through one of the modes of acquisition of servitude, really established usufruct in favor of the recipient, or whether he just gave him the thing to usufruct mistakenly believing that the personal servitude already existed. In any case, the plaintiff was still the owner, due to which there was a *rei vindicatio* for the recovery of a thing at his disposal. In the fragment, however, it is pointed out that the owner was authorized to bring the *condictio*. In terms of the land, the *condictio* was focused on the recovery of a factual power. Nevertheless, if the land yielded fruits, a *bona fide* recipient acquired the ownership over the fruits and therefore pursuant to the *condictio* he was obliged to return them (D.12.6.15). Although Roman jurists did not create the concept of assets, they guessed that acquiring usufruct or groundless factual exercise of this right represented a monetary value and because of that they allowed the application of *condictio* in such cases.

The concept of *datio* was understood by Paulus as giving a flat for someone else to live in on the basis of personal servitude (*habitatio*):

*Sic habitatione data pecuniam condictam, non quidem quanti locari potuit, sed quanti tu conducturus fuisses.* – “Thus, if it is habitation that has been given, my *condictio* lies for money, not indeed for the amount it might have been hired out for, but the amount you would have paid to hire it” (D.12.6.65.7 *Paulus libro 17 ad Plautium*).

Although the thing given on behalf of personal servitude was a flat, by the *condictio* the sum of money was claimed equal to the amount the defendant would pay on behalf of the rent if he had rented the flat. The benefit of using the flat free of charge was therefore reflected in the saved expenses. The *condictio* here was not used for the recovery of the given thing (the flat), for which purpose the giver might bring a *rei vindicatio*, but for providing the benefit that the defendant groundlessly achieved at the expense of the plaintiff.

Marcianus granted *condictio* due to the payment of what was not owed performed by a freedman to his patron:

*Si pactus fuerit patronus cum liberto, ne operae ab eo petantur, quidquid postea solutum fuerit a liberto, repeti potest.* – “If a pact is made between a freedman and his patron to the effect that day works will not be demanded, the freedman can recover in respect of any performance subsequently made by him” (D.12.6.40.2 *Marcianus libro tertio regularum*).

A freedman had a natural obligation to perform manual work for his patron (*operae officiales*). However, the two of them entered into a pact that the patron would not require the performance of such work from the freedman, in which case it was about a *pactum de non petendo*. If the patron, upon entering the pact, required from the freedman the performance of such work, the freedman might raise an *exceptio doli*; but if the freedman performed the work, it was considered that he had performed what was not owed, because of which he was entitled to bring the *condictio* against his patron. In such a case, the *condictio* was not focused on the recovery of the given thing, since the nature of the performed manual work was contrary to the recovery. Therefore, the patron was obliged to pay for the performed work to the freedman. Here, *Datio* had the meaning of the performance of the manual work due to which it approached the meaning of the term *facere*. In the absence of a pact, the freedman who performed the manual work (*operae officiales*) for his patron because he was misguided that he might be forced to perform it by an action, would not be entitled to the *condictio*. This is because the fulfillment of a natural obligation was not considered the payment of what was not owed since the obligation existed and only the creditor might not demand its fulfillment before the court. Unlike the manual work (*operae officiales*), the work that required special knowledge and expertise of a freedman [such as the work of a painter, a doctor, etc. (*operae fabriles*)] was subject to a general regime of contracting. If a freedman performed this kind of work mistakenly believing that the obligation of its performance existed, according to Celsus, he was entitled to claim, by the *condictio*, a monetary payment from his patron in the amount which the patron would have paid if he had contracted the performance of the specific work (D.12.6.26.12).

The concept of *dare* approaching the concept of *facere* in the law of *condictio* is particularly evident in the cases of groundless debt relief (*acceptilatio*). The creditor, in anticipation of the occurrence of certain grounds, deliberately released the debtor from the debt. If the said grounds did not occur, the performed debt relief was not valid, due to which the creditor was entitled to claim, by the *condictio*, the surrender of the owed thing. Thus, a woman who, in anticipation of the conclusion of a marriage, gave a dowry to a husband, thus making him free from the financial debt to her, and there was subsequently no marriage, the woman might bring the *condictio* against him and thus claim the recovery of the money (D.12.4.10). In this case *datio* was reflected in the fact that the plaintiff released the defendant from the existing debt.

In the abovementioned cases, the plaintiff performed a certain act in favor of the defendant, which did not represent the transfer of the ownership over a thing (*datio* in its strict sense). Bearing in mind that these cases also involved groundless acquisition, classical jurists also included the performance of these acts in the concept of *datio* and thus enabled the application of *condictio*.

### *CONDICTIO SINE DATIONE*

Unlike the cases where the plaintiff performed the act which resulted in the acquisition of the defendant, in Digesta, there are fragments where the condictio was granted due to groundless acquisition that was not caused by a plaintiff's act.

Systematizing different types of condictions, Justinian's compilers did not single out *condictiones sine datione* in a separate title. Instead, a separate title was dedicated to only one form of the application of the condictio *sine datione*. It is about a condictio for the recovery of a stolen thing (D.13.1 *De condictione furtiva*). Other forms of the application of the condictio *sine datione* were classified not only in separate titles but also in separate books, which represent an integral part of Digesta.

In the fragment D.12.1.31.1, one person bought a slave without knowing that he had been stolen. The purchased slave, from his *peculium* given by his owner, then bought another slave who was handed over to a *bona fide* purchaser. Sabinus and Cassius thought that the owner might bring the condictio against the *bona fide* purchaser and require the transfer of another slave who was bought by the money which belonged to the owner. Julianus (D.19.1.24.1) agreed with this opinion. In this case, there was no *datio* between the plaintiff (the owner) and the defendant (the *bona fide* purchaser of the slave). Namely, the *bona fide* purchaser acquired the ownership over the other slave via mancipation, which was made by the vendor of the slave on the basis of the contract of sale (Heine, 2006, p. 59). The purchase price was, however, paid by the money that was a part of the *peculium* of the stolen slave and that, therefore, belonged to the owner of the slave. Despite the fact that there was no *datio* between the plaintiff and the defendant, justice and fairness (*bonum et aequum*) required the application of the condictio whose purpose was the correction of the defendant's acquisition at the expense of the plaintiff (Heine, 2006, p. 78).

In the fragment D.12.1.4.1, Ulpianus granted a lessor the condictio for the recovery of the fruits which were picked *ex iniusta causa* by a tenant after the contract of lease (*locatio conductio rei*) had ceased. Regardless of the fact that the contract of lease ceased, the recovery of the fruits was denied if they were picked with the consent of the lessor. At the same time, it was assumed that there was a consent if a tacit relocation (*relocatio tacita*) existed (D.19.2.13.11; Bujuklić, 2012), which happened if, after the expiry of the term of the contract of lease, both parties continued to behave as if the contract had still been effective. The explicit legal norm under which enjoying the fruits was prohibited after the termination of a contract of lease did not exist, so here the expression *iniusta causa* did not denote unlawful grounds of acquisition. The prohibition to enjoy the fruits after the termination of a contract of lease directly stemmed from the fact that *ius fruendi* was returned to the owner (the lessor) due to the elasticity of the right of ownership (*ius recadentiae*). Therefore, after a

termination of a contract of lease, the tenant's consumption of the fruits may be considered a breach of the lessor's right of ownership nowadays. The condiction was granted because the tenant, after the termination of the contract of lease, had no legal grounds to consume the fruits. Therefore, the expression *ex iniusta causa* should be interpreted as consuming the fruits based on an invalid ground rather than on unlawful grounds. Since after the termination of the contract the lessor did not give the fruits to the tenant, but picked them on his own, the condiction that was granted was not based on the act of the plaintiff (the lessor).

The condiction for giving the civil fruits (*fructus civiles*) was granted by Papinianus in D.12.6.55. The fragment contains three different situations where the issue of giving the civil fruits caused by the conclusion of legal transaction was settled. In the first situation, a *mala fide* possessor leased without authorization the land owned by another person. The lessor was not obliged to return the received rent (*merces locationis*) to a tenant but he was obliged to give it to the owner of the land. The fact that the lessor leased without authorization a thing owned by another person did not affect his relationship with the tenant. The tenant paid the money on the basis of fulfillment of his obligation under the contract of lease, which remained effective despite the fact that the lessor leased without authorization the thing owned by another person. The lessor therefore acquired the ownership over the received rent and he was not obliged to return it to the tenant. However, the lessor leased the thing owned by another person without authorization, because of which the fruits it yielded belonged to the owner of the thing and not to the lessor. Although there was no *datio* between the owner of the land and the lessor *sui iuris*, the owner of the land could have brought the condiction against the lessor for surrendering the received rent (Heine, 2006, p. 81). In the second situation from the same fragment, a slave owned by another person performed work in favor of a certain person and there was no agreement on the lease of a slave. The slave gave the monetary compensation received on the basis of the performed work to a third party (non-owner) and not to his master. The ownership over the money, however, was not acquired by a third party. At the time the money was paid to the slave, the ownership over it was acquired by the slave's master (Kaser, 1971, p. 286). The fact that the slave handed over the money to a third party, instead of his master, did not affect the issue of the owner of the money, who remained the slave's master. Papinianus did not consider the possibilities of further development of the situation but only highlighted the fact that a third party could not keep the money. These were reduced to three basic possibilities. According to the first possibility, the given money can be individualized, for which the owner might bring a *rei vindicatio*. According to the second possibility the money was spent, for which the application of a *rei vindicatio* was rejected. The owner might bring only the condiction against the third party (Heine, 2006, p. 82). According to

the third possibility, the third party did not act in good faith since he deliberately received the money from the slave knowing that the owner of the money was the slave's master. In this case, it was considered that the third party committed a theft due to which he was responsible on the basis of the *condictio* for the recovery of a stolen thing – *condictio ex causa furtiva* (Heine, 2006, p. 82). In the third situation the contract of lease was concluded by the owner of a thing. The tenant, without an order of the lessor, paid the rent to a third party with whom he was not in a contractual relationship. The payment made to a wrong person did not release him from the obligation towards the lessor. Such payment was not owed, for which the payer might recover the paid amount most likely by the application of the *condictio indebiti*. If the recipient of the payment knew that he received what was not owed he would be responsible for the theft on the basis of the *condictio ex causa furtiva* (Heine, 2006, p. 83). Since the tenant paid the rent to the person who was not in good faith, that person did not acquire the ownership over it. As long as the paid money can be individualized the tenant had a *rei vindicatio* for its recovery at his disposal. If a third party spent the money or mixed it with his own money, the tenant could not apply a *rei vindicatio* but only the *condictio*.

*Condictio sine datione* was also granted in the case where one spouse appropriated the other spouse's thing. The appropriation of the things between the spouses was not considered a theft. However, one spouse might have sued another with the approval of the magistrate, but not with criminal charges or those that caused *infamia* (D.25.2.2). Since the *condictio* had no penalty nature nor did it lead to *infamia*, a spouse whose thing was appropriated by another spouse might have brought the *condictio* during the marriage, whereas after the dissolution of the marriage he or she might have brought only *actio rerum amotarum* (D.23.3.9.3; D.25.2.11; D.25.2.6.2; C.5.21.2).

In the fragment D.25.2.25, Marcianus granted the *condictio ob iniustam causam* to a husband for the recovery of the things appropriated by a wife in anticipation of a divorce, which eventually did not take place. He explained his decision referring to *ius gentium*, which allowed the recovery of the things from the persons who possessed *non ex iusta causa*. Since the wife alone (without the husband's act) appropriated the thing, she did not become the owner. The *condictio* here served for the recovery of the possession, whereas the expression *non ex iusta causa* should be interpreted as the absence of valid grounds for possession.

In the fragment D.25.2.6.5, Aristo granted the *condictio* to a husband's heir for the recovery of the thing which was in the widow's possession *ex iniusta causa*. It is obvious that the wife was not the husband's heir, due to which she had no grounds to keep the things that belonged to him. Inheritance had the effect of entering into inheritable rights of a *de cuius*, which means that an heir became the owner of the

things that were in the ownership of the *de cuius*. It is undisputed that the heir might bring against the wife a *hereditatis petitio* which is similar to a *rei vindicatio*, but Aristo also granted him a condiction. Given that the widow did not become the owner of the thing, the condiction which the heir brought against her could serve only for the recovery of the possession (*condictio possessionis*). The heir had ownership over the thing that was claimed by the condiction and kept by the wife without legal grounds, and there was no explicit legal norm that prohibited such an act of the widow. The obligation of transferring the thing to the heir arose from the fact that he, via the universal succession, became the owner who should be enabled to exercise all his proprietary rights (assuming that the widow had no personal servitude over the things which authorized her to factual power). Even in that case, it was about the condiction *sine datione*, since the wife did not acquire the thing due to the plaintiff's act, but she appropriated it herself.

Finally, in Digesta, the condiction was also awarded when a groundless acquisition of the defendant arose from a natural cause. Thus, the condiction might be brought for the recovery of what the river took away and left on the land of another person (D.12.1.4.2).

### CONCLUSION

Condictio represents an action that originated in Roman law in the form of *legis actio per condictioem*, which was introduced by the Silian and Calpurnian Laws (250 and 200 BC). Unlike the modern law where one person may bring an action whenever he considers that his right has been violated, in Roman law there was no general action but a number of specific actions, whose purpose was the protection of precisely determined factual situations. If a specific factual situation could not be classified into any of the formulas of the existing actions, the affected party remained without legal protection. The condiction by its scope of application approached a modern general action so far as the statement of the legal grounds of the plaintiff's claim (*demonstratio*) was not required for the condiction to be brought. The plaintiff only claimed that the defendant was obliged to give a precisely specified sum of money or a precisely specified thing. Since the statement of the legal grounds of the plaintiff's claim was not required, it allowed, above all, sanctioning of the relationships that had been unprotected such as *mutuum*. In addition, the relationships that had been protected before the introduction of the condiction may be claimed by it as well. In the beginning, the only limitation of the condiction application was provided by the Silian and Calpurnian Laws and it referred to the subject of a dispute that could be a precisely specified sum of money (*certa pecunia*) or any precisely specified thing (*omnis certa res*). The scope of its application, then, was very wide, since no additional conditions were required. By settlement of

specific cases Roman jurists made certain assumptions of the condiction application, which, on the one hand, narrowed the scope of its application and, on the other hand, widened it. A notable narrowing of the scope of the condiction application was caused by Proculus' attitude, by which the plaintiff had to previously transfer the ownership over the thing to the defendant (D.12.4.15). Therefore, *datio* in the meaning of transferring a thing in the ownership became an important assumption of the application of the condiction.

In order to apply the condiction in as many cases of groundless acquisition as possible, Roman jurists also granted condiction in certain situations where the transfer of ownership over a thing was not valid. The condiction that was applied in the case where *datio* was not valid in the sixth century after the enactment of Justinian's Code is called *condictio de bene depensis* and it referred to the cases where the transfer of ownership over a thing was not valid, since it was performed by a person who had no full business capacity.

The extension of the condiction application was also achieved by Roman jurists through the extension of the concept of *datio*. According to Paulus, the term *datio* can have the meaning of giving a thing to usufruct (D.12.6.12), giving a flat on the basis of personal servitude *habitatio* (D.12.6.65.7). According to the interpretation of Marcianus, the concept of *datio* approaches the term *facere*, since it has the meaning of performing manual work (*operae officiales*) performed by a freedman for his patron (D.12.6.40.2).

In addition to the extension of the concept of *datio*, which assumes the plaintiff's act performed in favor of the defendant, Roman jurists also granted condiction when groundless acquisition of the defendant was not caused by the plaintiff's act (*condictio sine datione*). It was applied in various cases, such as groundless acquisition of: a *bona fide* purchaser who acquired a thing by the money from *peculium* belonging to another person (D.12.1.31.1; D.19.1.24.1); a tenant who consumed the fruits after the expiry of the contract of lease (D.12.1.4.1); a *mala fide* person who leased without authorization another person's thing (D.12.6.55); a person who received a sum of money paid for the slave's work instead of the slave's master (D.12.6.55); a wife who alone appropriated the husband's thing (D.25.2.25) or the wife who, after the death of the husband, kept the thing inherited by another person (D.25.2.6.5); or a person to whose land the flow of water inflicted a thing owned by another person (D.12.1.4.2). The application of the condiction in various cases where groundless acquisition at the expense of the plaintiff was caused in any way (by the act of the plaintiff, the defendant, a third party, or a natural cause) laid the foundations on which the modern institute of unjust enrichment was created in the consequent historical cycle.



## REFERENCES

- Bujuklić, Ž. (2012). Locatio conductio. In *Forum Romanum-Roman State, Law, Religion and Myths* (pp. 476-481). Belgrade: Faculty of Law University of Belgrade.
- de Jong, H. (2010). Stephanus on the *condictio de bene dependens*. *The Legal History Review*, 78, 15-35. DOI: 10.1163/157181910X487305
- Donatuti, G. (1977). „Le ‘*causae*’ delle ‘*condictiones*’“. *Studi di diritto romano II*. Milano: Dott. A. Giuffrè editore.
- Heine, S. (2006). *Condictio sine datione*. Berlin: Duncker&Humbolt.
- Kaser, M. (1971). *Das römische Privatrecht I - Das altrömische, das vorklassische und klassische Recht*. München: Verlag C.H.Beck.
- Lenel, O. (1927). *Das Edictum Perpetuum*. Leipzig: B. Tauchnitz.
- Milošević, M. (1989). Certain Observations on the Roman Concept of Ownership. *Archive for Legal and Social Sciences*, 1-2, 105-114.
- Saccoccio, A. (2002). *Si certum petetur dalla condictio dei veteres alle conictiones giustinianeae*. Milano: Dott. A. Giuffrè editore.
- Sanfilippo, C. (1943). *Condictio indebiti – Il fondamento dell’ obbligazione da indebito*. Milano: Dott. A. Giuffrè editore.
- Schwarz, F. (1952). *Die Grundlagen der Condictio im klassischen römischen Recht*. Münster-Köln: Böhlau-Verlag.
- Stanojević, O. (1966). *Loan for Consumption and Interest*. Belgrade: Institute for Legal History.

## SOURCES

- Iustiniani *Digesta*, <http://droitromain.upmf-grenoble.fr/Corpus/digest.htm>
- Stanojević, O. (1982). *Gaius, Institutiones*. Beograd: Nolit.
- Watson, A. (Ed.). (1998). *The Digest of Justinian (vol. I)*. Philadelphia: University of Pennsylvania Press.

## DATIO KAO PRETPOSTAVKA PRIMENE KONDIKCIJE U RIMSKOM PRAVU

**Valentina Цветковић-Ђорђевић**

Универзитет у Београду, Правни факултет, Београд, Србија

### Резиме

Појам *datio* у кондикционом праву има шире значење у односу уговорно право. У уговорном праву *datio* се доводи у везу са предметом облигације и представља дуговану чинидбу која се састоји у преносу својине или другог стварног права. У кондикционом праву *datio* представља начин на који је тужени стекао ствар чији повраћај тужилац захтева. У почетку *datio* је уско схватана и подразумевала је да је тужилац претходно пренео ствар у својину туженом. Како је извршени пренос без правног основа, стицалац је дужан да изврши повраћај. У сврху санкционисања што већег броја случајева неоснованог стицања римски правници у одређеним случајевима додељују кондикцију и када пренос ствари у својину није пуноважан (*condictio de bene dependens*). Поред тога, они

проширују појам *datio* те он представља и предају ствари на плодуживање (*ususfructus*), предају стана ради становања (*habitatio*) и извршење рада. Свим случајевима у којима постоји *datio* заједничко је то што је неосновано стицање проузроковано радњом тужиоца. Римски правници иду и корак даље, те кондикцију додељују у одређеним случајевима у којима неосновано стицање није проузроковано радњом тужиоца већ радњом туженог, радњом трећег лица или природним догађајем (*condictio sine datione*). Санкционисањем неоснованог стицања насталог на било који начин, основано је закључити да је римска кондикција претеча савременог института неоснованог обогаћења чија је сврха санкционисање имовинске користи која је неосновано стечена на било који начин.