

MATER FAMILIAS

SCRITTI ROMANISTICI PER MARIA ZABŁOCKA

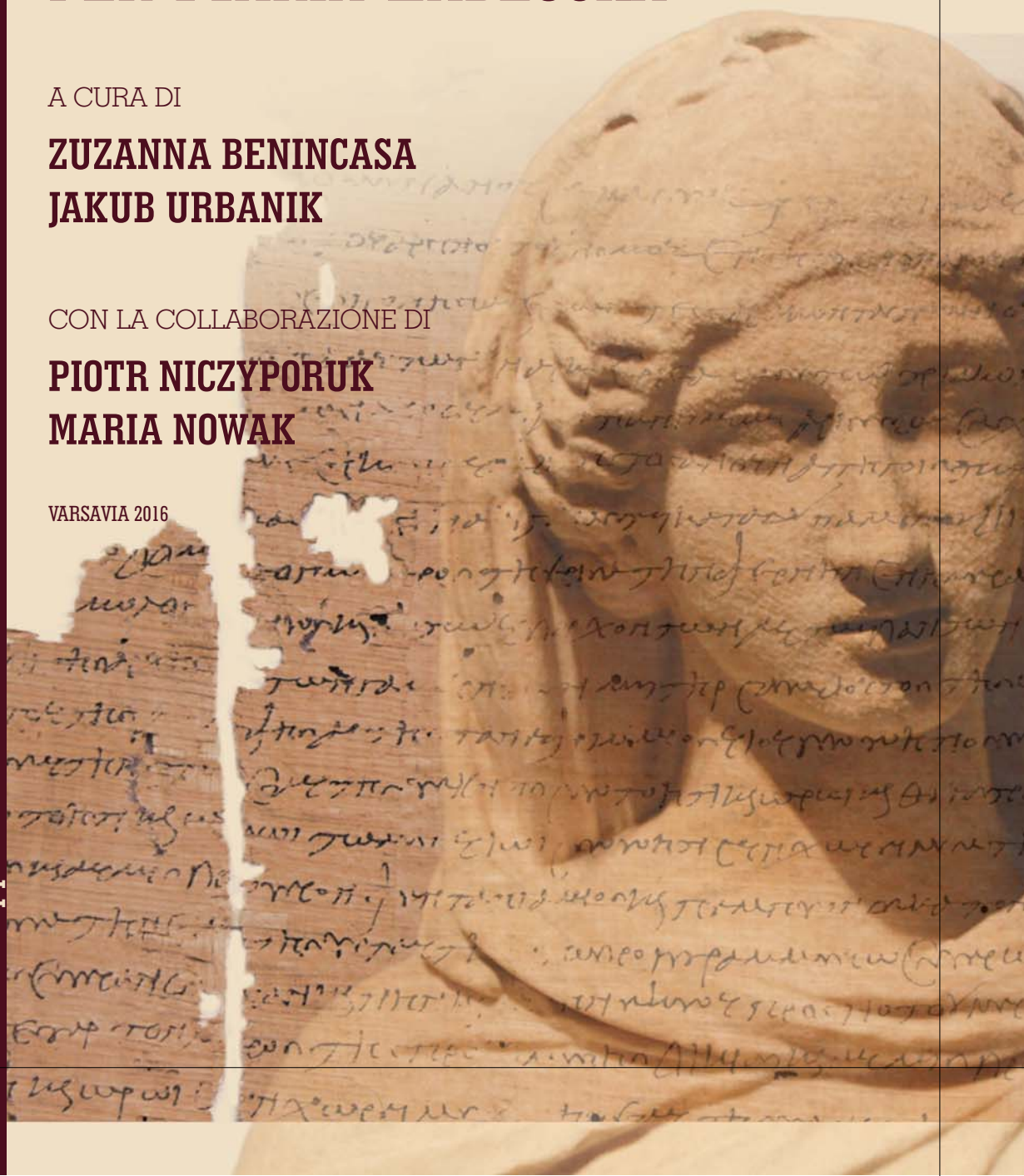
A CURA DI

**ZUZANNA BENINCASA
JAKUB URBANIK**

CON LA COLLABORAZIONE DI

**PIOTR NICZYPORUK
MARIA NOWAK**

VARSAVIA 2016



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Mater Familias
Scritti per Maria Zabłocka

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**RECOVERY OF PERFORMANCE
RENDERED DOTIS NOMINE ON ACCOUNT
OF A FUTURE MARRIAGE THAT DID NOT TAKE PLACE**

I. INTRODUCTION

DOWRY (*dos*) IS ONE of the most interesting and important institutions of Roman family law. This institution does not have regulation in the contemporary Polish civil law. In European states it belongs to the history of law. However, research into Roman dowry seems to be useful not only for historians of law, but also for contemporary civil law, because of certain similarities to institutions that are applied today. I should mention also that in some countries dowries are still given (e.g. India, Pakistan). Roman *dos* is a complex issue with many particular problems, but I deal with only one of them – recovery of property given as a dowry on account of a future marriage in the case where, contrary to expectation, the marriage was not concluded. This problem did not usually arise because the planned marriage in fact took place; therefore Roman jurists were more concerned about the recovery of dowry after termination of the marriage. However, in the sources of Roman law one can find some solutions in maybe rarer but still practically important cases of performance made *dotis nomine* before marriage where the marriage did not take place at all.

The main topic of this paper involves many particular questions, especially legal qualification of that kind of performance, purpose of the performance, ways in which the dotal property could be claimed back, the responsibility of the parties for the fact that the marriage did not follow and capacity to claim restitution before the court. Other problems associated with that issue, *e.g.* creation of a dowry, are dealt with only to a very limited extent. My research is confined to Roman classical law.

Performance rendered as a dowry given on account of a future marriage was an example of *datio ob rem*, which is why I compare rules governing this type of performance with general rules of *datio ob rem* in search of differences and similarities.



II. ASSIGNMENT OF DOWRY

In classical Roman law there were several ways in which a dowry could be assigned. As it is written in the sources «dos aut datur, aut dicitur, aut promittitur» (*TUlp.* 6.1). In the context of my topic the most important of them was *dotis datio* where the performance was rendered to the woman's fiancé before the marriage. In this case the fiancé or his *pater familias* acquired immediately the ownership of the assets conveyed,¹ so the property became his full legal property already before marriage.²

¹ *D.* 23.3.7.3 (*Ulp.* 31 *Sab.*); *D.* 23.3.8 (*Call.* 2 *quaest.*); *D.* 23.3.9 *pr.* (*Ulp.* 31 *Sab.*), *cf.* H. KUPISZEWSKI, 'Stosunki majątkowe między narzeczonymi w prawie rzymskim klasycznym (*dos i donatio*)', [Patrimonial relationships between bride and fiancé in Roman classical law (*dos* and *donatio*)], *Prawo Kanoniczne* 3-4 (1977), pp. 265-271; Jane F. GARDNER, *Women in Roman law and society*, Bloomington-Indianapolis 1986, p. 100; Agnieszka STĘPKOWSKA, 'Ustanowienie a ukonstytuowanie się posagu w rzymskim prawie klasycznym' [On the distinction between assignment of the dowry and its constitution in classical Roman law], *Zeszyty Prawnicze* 6.1 (2006), p. 202.

² In fact, the husband's rights to the dotal property were not unlimited, especially after *lex Iulia de fundo dotali* he was not allowed to alienate dotal immovables (Italic lands) without the consent of the wife. For details see: K. CZYCHLARZ, *Das römische Dotalrecht*, Giessen 1870, pp. 143-144; F. SCHULZ, *Classical Roman Law*, Oxford 1951, p. 124; Jane F. GARDNER, 'The recovery of Dowry in Roman law', *Classical Quarterly* 2 (1985), pp. 449-

However, the property became *dos* only by the conclusion of marriage. Apart from immediate transfer of ownership it was permitted to reserve a suspensory condition that the ownership would pass to the husband or his *pater familias* upon marriage.³ The transfer of ownership was executed by means of *mancipatio*, *in iure cessio* or *traditio* and only *traditio* could be conditional.⁴ Polybius reported that according to the Roman custom the dowry in the form of money or other fungibles was usually paid in three annual instalments,⁵ if the parties did not arrange otherwise. There is a dispute whether this form was the widest in application,⁶ but undoubtedly it was popular. Conveyance of the specified property was not the only possible subject of performance. Some sources confirm that besides the transfer of ownership the dowry could take the form of cre-

450; P. DU PLESSIS, *Borkowski's Textbook on Roman law*, Oxford 2010, p. 129; Suzanne DIXON, *The Roman Family*, Baltimore – London 1992, pp. 51–53; B. W. FRIER, «Roman dowry: Some economic questions», published: <[http://www.law.umich.edu/centersandprograms/lawandeconomics/workshops/Documents/Paper 12](http://www.law.umich.edu/centersandprograms/lawandeconomics/workshops/Documents/Paper%2012)> (2013), pp. 7–9; STĘPKOWSKA, 'Ustanowienie' (cit. n. 1), p. 196; EADEM, 'Ochrona majątku posagowego w kontekście *manumissio servi dotalis*' [Protection of the dotal property in the context of *manumissio servi dotalis*], *Zeszyty Prawnicze* 8.2 (2008), pp. 55–56; EADEM, 'Zakaz alienacji gruntów posagowych w rzymskim prawie klasycznym' [Prohibition of alienation of dotal lands in Roman classical law], *Czasopismo Prawno-Historyczne* 2 (2007), pp. 21–43.

³ D. 23.3.7.3 (Ulp. 31 *Sab.*); D. 23.3.9 *pr.*–1 (Ulp. 31 *Sab.*); CZYCHLARZ, *Das römische Dotalrecht* (cit. n. 2), pp. 141–142; 150–151; H. H. KÖNIG, 'Die vor der Ehe bestellte dos nach klassischem römischem Recht', *SDHI* 34 (1963), pp. 154–171; KUPISZEWSKI, 'Stosunki' (cit. n. 1), pp. 265–271; IDEM, 'Osservazioni sui rapporti patrimoniali fra i fidanzati nel diritto romano classico: *dos* e *donatio*', *Iura* 29 (1978), pp. 115–122; K. AYITER, 'Appunti sulla *dotis datio ante nuptias*', [in:] *Studi C. Sanfillippo IV*, Milano 1983, p. 49; STĘPKOWSKA, 'Ustanowienie' (cit. n. 1), pp. 208–209.

⁴ Cf. CZYCHLARZ, *Das römische Dotalrecht* (cit. n. 2), p. 144; KÖNIG, 'Die vor der Ehe' (cit. n. 3), p. 157; KUPISZEWSKI, 'Stosunki' (cit. n. 1), pp. 265–266; IDEM, 'Osservazioni' (cit. n. 3), p. 115; AYITER, 'Appunti' (cit. n. 3), pp. 55–57.

⁵ Polyb. xxxii 13; cf. GARDNER, *Women* (cit. n. 1), pp. 100–101.

⁶ KÖNIG, 'Die vor der Ehe' (cit. n. 3), p. 164; KUPISZEWSKI, 'Stosunki' (cit. n. 1), p. 273; AYITER, 'Appunti' (cit. n. 3), p. 50; STĘPKOWSKA, 'Zakaz alienacji' (cit. n. 2), p. 26. GARDNER, *Women* (cit. n. 1), p. 100. In STĘPKOWSKA's opinion under classical Roman law the fiancé seldom became the owner of dotal property before the marriage, cf. her 'Zakaz alienacji' (cit. n. 2), p. 26.

ation of limited rights in property (e.g. *ususfructus*),⁷ cancellation of the fiancé's debts (*acceptilatio*) or suspension of their payment (*pactum de non petendo*).⁸

Other means of assignment of a dowry were *dotis dictio*, where the performance was not made before the marriage but only promised (in fact declared) unilaterally,⁹ and *dotis promissio* realized by *stipulatio* that obliged the *promissor* to render performance after conclusion of the marriage.¹⁰ The problem of the recovery of performance arose in situations where the performance was made – the transfer of ownership occurred – before it turned out that the expected marriage would not take place. This was typical for *dotis datio*. In the case of *dotis dictio* and *dotis promissio*, which were only promises to give the dowry, as a rule the performance was rendered upon marriage or after its conclusion, so the problem did not arise, unless the debtor decided to fulfil this promise before the marriage.



⁷ D. 23.3.7.2 (Ulp. 31 *Sab.*); D. 23.3.66 (Pomp. 8 *Q. Muc.*); D. 23.3.78 (Tryph. 11 *disp.*).

⁸ D. 12.4.10 (Iav. 1 *ex Plaut.*); D. 23.3.43 *pr.* (Ulp. 3 *disp.*); D. 23.3.41.2 (Paul. 35 *ad. ed.*). Cf. CZYCHLARZ, *Das römische Dotalrecht* (cit. n. 2), pp. 125–134; F. SCHWARZ, *Die Grundlage der condictio im klassischen römischen Recht*, Münster – Köln 1952, p. 150; KÖNIG, *Die vor der Ehe* (cit. n. 3), pp. 185–189; J. G. WOLF, *Causa stipulationis*, Köln – Wien 1970, pp. 102–108; KUPISZEWSKI, 'Stosunki' (cit. n. 1), pp. 267–274; IDEM, 'Osservazioni' (cit. n. 3), pp. 118–126; FRIER, *Roman dowry* (cit. n. 2), p. 6; STĘPKOWSKA, 'Ustanowienie' (cit. n. 1), p. 200.

⁹ Cf. CZYCHLARZ, *Das römische Dotalrecht* (cit. n. 2), pp. 113–123; A. BERGER, *Dotis dictio w prawie rzymskiem* [Dotis dictio in Roman law], Kraków 1910, *passim*; SCHULZ *Classical Roman Law* (cit. n. 2), p. 122; H. KUPISZEWSKI, 'Das Verlöbniß im altrömischen Recht', *ZRG RA* 77 (1960), pp. 142–146; IDEM, 'Stosunki' (cit. n. 1), p. 274; KÖNIG, *Die vor der Ehe* (cit. n. 3), pp. 213–214; GARDNER, *Women* (cit. n. 1), p. 99; A. WATSON, *Roman Law and Comparative Law*, University of Georgia Press 1991, p. 32; STĘPKOWSKA, 'Ustanowienie' (cit. n. 1), pp. 200–202.

¹⁰ CZYCHLARZ, *Das römische Dotalrecht* (cit. n. 2), pp. 98–113; WOLF, *Causa stipulationis* (cit. n. 8), pp. 91–128; GARDNER, *Women* (cit. n. 1), p. 99–100; STĘPKOWSKA, 'Ustanowienie' (cit. n. 1), pp. 201–202.

III. PURPOSE OF THE PERFORMANCE

The person who made performance aimed at establishing a dowry, but in fact, the nature of the purpose of *datio* is much more complex:

D. 12.4.9 pr. (Paul. 17 *Plaut.*) Si donaturus mulieri iussu eius sponso numeravi nec nuptiae secutae sunt, mulier condicet. sed si ego contraxi cum sponso et pecuniam in hoc dedi, ut, si nuptiae secutae essent, mulieri dos acquireretur, si non essent secutae, mihi redderetur, quasi ob rem datur et re non secuta ego a sponso condicam.

Paul qualified this type of performance as *datio ob rem*, which is why if *res* was not materialized the giver became entitled to claim restitution of the property given as a dowry. Here we approach the very difficult question as to what is understood as *res*. Many diverging opinions have been expressed about the meaning of the term *datio ob rem* in Roman classical law. Some scholars identify *res* with the counter-performance which was expected from the recipient.¹¹ That means that the giver transferred property in the expectation that the recipient would give him something (*dare*) or would do something in the giver's interest (*facere*).¹² If the recipient failed to provide counter-performance the giver could exercise his right to claim his original performance back. Other scholars consider this

¹¹ SCHWARZ, *Die Grundlage* (cit. n. 8), pp. 117–190. This point of view was shared: by A. SÖLLNER, 'Der Bereicherungsanspruch wegen Nichteintritts des mit einer Leistung bezweckten Erfolges (§ 812 Abs. 1 S. 2, 2 Halbsatz BGB)', *Archiv für civilistische Praxis*, 163 (1963), p. 25; G. JAHR, 'Zur *iusta causa traditionis*', *ZRG RA* 80 (1963), pp. 171–172; WOLF, *Causa stipulationis* (cit. n. 8), p. 31; F. CHAUDET, *Condictio causa data causa non secuta. Critique historique de l'action en enrichissement illégitime de l'art. 62 al 2 CO*, Lausanne 1973, p. 104 (however, his interpretation of *datio ob causam* is different from the SCHWARZ's one); H. HONSELL, *Die Rückabwicklung sittenwidriger oder verbotener Geschäfte*, München 1974, p. 82; O. BEHREND, 'Die *condictio causa data causa non secuta*. Ihr familienrechtlicher Tatbestand im klassischen Bereicherungssystem und ihre Erweiterung zur Kondiktion wegen Zweckverfehlung unter vorklassischem Einfluß', [in:] G. KNOTHE & J. KOHLER (eds.), *Status familiae. Festschrift für Andreas Wacke zum 65. Geburtstag*, München 2001, pp. 39–40; Carmen TORT-MARTORELL LLABRÈS, *La revocación de la donatio mortis causa en el derecho romano clásico*, Madrid 2003, pp. 147–148.

¹² Followers of this interpretation declared all sources in which *res* did not refer to counter-performance as interpolated. Cf. SCHWARZ, *Die Grundlage* (cit. n. 8), pp. 123–132.

interpretation of *res* as too narrow.¹³ According to this point of view *datio ob rem* was applied not only where the giver expected counter-performance but also when he tried to achieve other goals, including that not associated with the recipient's behaviour at all.¹⁴ In fact the concept of *datio ob rem* and its relation to *datio ob causam* is still disputable in literature, where many divergent views have been expressed, including those that differ from each other only in subtleties.¹⁵

That diversity of views refers also to the issue of dowry given before the expected marriage. Fritz Schwarz applies his theory about the meaning of *res* and sees here the example of performance rendered in expectation of counter-performance.¹⁶ His interpretation that the behaviour expected from the fiancé consisted in *matrimonium ducere*¹⁷ does not find justification in the contents of the cited text nor in other sources of Roman law. In my opinion this very narrow understanding of *res* is improper and in consequence the purpose of dowry cannot be identified with counter-performance or other behaviour expected from the recipient. Moreover, the conclusion of marriage cannot be regarded as the counter-performance.¹⁸ Conclusion of marriage cannot be seen as a per-

¹³ P. SIMONIUS, *Die Donatio mortis causa im klassischen römischen Recht*, Basel 1958, pp. 226–234; L. PELLECCHI, 'L'azione in ripetizione e le qualificazioni del dare in Paul. 17 Plaut. D. 12.6.65. Contributo allo studio della conditio', *SDHI* 64 (1998), p. 70; J. D. HARKE, 'Das klassische römische Konditionensystem', *Iura* 54 (2003), p. 60.

¹⁴ SIMONIUS, *Die Donatio* (cit. n. 13), p. 226; KUPISCH, *Ungerechtfertigte Bereicherung. Geschichtliche Entwicklungen*, Heidelberg 1987, p. 12, n. 14; HARKE, 'Das klassische römische Konditionensystem' (cit. n. 13), p. 60.

¹⁵ There is neither need nor room here to present the discussion in literature in detail, therefore apart from the literature mentioned above I point to: A. D'ORS, *Creditum, PWRE Suppl.* x (1965), col. 1160; D. LIEBS, «Bereicherungsanspruch wegen Misserfolgs und Wegfall der Geschäftsgrundlage», *Juristenzeitung* 1978, p. 698; A. SACCOCIO, *Si certum petetur. Dalla conditio dei veteres alle conditiones giustinianee*, Milano 2002, pp. 224–231; M. SOBCZYK, *Świadczenie w zamierzonym celu, który nie został osiągnięty. Studium z prawa rzymskiego* [Performance made for intended purpose that has not been achieved. Study in Roman law], Toruń 2012, pp. 121–129 with further literature.

¹⁶ SCHWARZ, *Die Grundlage* (cit. n. 8), pp. 117–119; 149–151.

¹⁷ SCHWARZ, *Die Grundlage* (cit. n. 8), p. 149.

¹⁸ Cf. HARKE, 'Das klassische römische Konditionensystem' (cit. n. 13), p. 59.

formance at all and the fiancé who received property *dotis nomine* cannot be regarded as a debtor obliged to conclude the planned marriage and responsible for non-fulfilment of that duty. It is necessary to take into consideration the nature of Roman marriage in classical law, which was based on the indispensable and essential element called *affectio maritalis* – the common will of both spouses to enter into and to remain in marriage. At least as a rule the marriage was concluded because of *affectio maritalis* and not because the fiancé had previously received a dowry.

In principle, a man did not decide to marry a woman because he received something from her or her *pater familias*. Under classical Roman law there was no legal obligation to marry a particular woman. Even betrothal (*sponsalia*) did not give rise to an obligation to get married.¹⁹ At that time *sponsalia* became mostly a social act, with certain limited legal effects (e.g. *quasiadfnitas*),²⁰ and were not necessary in that sense that matrimony did not have to be preceded by betrothal.²¹

Owing to the particular nature of Roman marriage it must be emphasized that the person who gave a property *dotis nomine* did not act with the purpose of concluding marriage, so the marriage itself cannot be regarded as the proper purpose of his performance.²² This proper purpose was to give a dowry and to achieve all those effects that were associated with the dowry as a legal institution. One of the most important tasks of this

¹⁹ In archaic and preclassical Roman law *sponsalia* gave rise to *legis actio per iudicis arbitrive postulationem* and then *actio ex stipulatu*. However, the disappointed party could demand only payment of a specific amount of money and later *id quod interest*. Already in the first century before Christ *sponsalia* were not protected by law. Cf. KUPISZEWSKI, 'Stosunki' (cit. n. 1), pp. 262–265; IDEM, 'Das Verlöbniß' (cit. n. 9), pp. 146–154. Similarly: A. GUARINO, *Adfnitas*, Milano 1939, p. 14; M. MARRONE, *Istituzioni di diritto romano. Fatti e negozi giuridici persone e famiglia*, Palumbo 1986, p. 292; R. ASTOLFI, *Il fidanzamento nel diritto romano*, Milano 1992, pp. 9–15; BEHREND, 'Die *condictio*' (cit. n. 11), pp. 25–26.

²⁰ *Quasiadfnitas* is not an original Roman term, cf. recently L. LABRUNA, 'La quasiadfnitas di Henryk Kupiszewski', [in:] P. NICZYPORUK & Anna TARWACKA (eds.), *Noctes Iurisprudentialae. Scritti in onore di Jan Zabłocki*, Warszawa 2015, pp. 150–151.

²¹ More about legal effects of engagement see: KUPISZEWSKI, 'Stosunki' (cit. n. 1), pp. 264–265; P. CSILLAG, *The Augustan Laws on Family Relations*, Budapest 1976, pp. 106–113; ASTOLFI, *Il fidanzamento* (cit. n. 19), pp. 102–132; BEHREND, 'Die *condictio*' (cit. n. 11), p. 26.

²² CHAUDET, *Condictio* (cit. n. 11), p. 124–131; PELLECCI, 'L'azione' (cit. n. 13), p. 111, n. 137.

institution was to help the husband to sustain the burden of marriage (*onera matrimonii*). In this way the dowry was the woman's contribution to the maintenance of the household.²³ Naturally, a dowry increased a woman's prospects of getting married and made her more attractive on the 'matrimonial market'. Other important functions of *dos* were to ensure sustainability of marriage, to secure the maintenance of the woman and increase her prospects of remarriage after dissolution of a previous marriage.²⁴

Dowry was not an indispensable element of Roman marriage, especially a precondition of its conclusion or validity.²⁵ Under classical law giving a dowry was a custom,²⁶ social duty²⁷ or practice²⁸ but not a legal obligation; however, it was very important and usually expected by the future

²³ Cf. *D.* 23.3.1 (Paul. 14 *Sab.*); *D.* 23.3.56.1 (Paul. 6 *Plaut.*); *D.* 23.3.76 (Tryph. 9 *disp.*); *D.* 49.17.16 (Pap. 19 *resp.*). More about this function of dowry see: GARDNER, *Women* (cit. n. 1), p. 102; DU PLESSIS, *Borkowski's Textbook* (cit. n. 2), p. 128.

²⁴ *D.* 23.3.2 (Paul. 40 *ed.*). About those functions of dowry cf. CSILLAG, *The Augustan Laws* (cit. n. 21), pp. 94–96, p. 139; GARDNER, *Women* (cit. n. 1), p. 97; Agnieszka STĘPKOWSKA, 'Dos recepticia i dos aestimata w świetle *lex Iulia de fundo dotali*? [Dos recepticia and dos aestimata in the light of *lex Iulia de fundo dotali*]', *Studia Prawnoustrojowe* 7 (2007), p. 207; F. M. MAZ-ZANTE, *Dos aestimata dos vendita? Die geschätzte Mitgift im römischen Recht*, Frankfurt am Main 2008, p. 3; FRIER, *Roman dowry* (cit. n. 2), pp. 9–10; STĘPKOWSKA, 'Ustanowienie' (cit. n. 1), p. 197.

²⁵ M. LAURIA, *La dote romana*, Napoli 1938, p. 54; C. SANFILIPPO, *Corso di diritto romano. La dote*, Catania 1959, p. 45; Susan TREGGIARI, *Roman Marriage. Iusti Coniuges from the Time of Cicero to the Time of Ulpian*, Oxford 1991, p. 323.

²⁶ SCHULZ, *Classical Roman Law* (cit. n. 2) p. 120; GARDNER, *Women* (cit. n. 1), p. 97; EADEM, 'Recovery' (cit. n. 2), p. 452; A. JACOBS, 'Carvilius Ruga v Uxor: A famous Roman divorce', *Fundamina* 2009, p. 102.

²⁷ «Un dovere sociale », cf. M. TALAMANCA & L. CAPOGROSSI COLOGNESI, *Elementi di diritto privato romano*, Milano 2013, p. 76. F. SCHULZ described it as a moral duty, cf. F. SCHULZ, *Principles of Roman law*, Oxford 1936, p. 201. M. KASER as 'starke sittliche Bindung, aber nicht als eine rechtliche' (M. KASER, *Das römische Privatrecht. Erster Abschnitt. Das altrömische, das vorklassische und klassische Recht*, München 1971, p. 335). However, from *D.* 23.2.19 it appears that in the thirty fifth section of the *lex Iulia* persons who refused to endow their children *in potestate* under a constitution of Septimius Severus and Caracalla were compelled by the proconsuls or governors of provinces to do so. In Justinian law there was formal obligation to provide the dowry.

²⁸ DU PLESSIS, *Borkowski's Textbook* (cit. n. 2), p. 128.

husband.²⁹ Marriage could be concluded without a dowry. Therefore dowry was not given in return for the fiancé's consent to get married to a particular woman. Nevertheless, dowry was strictly connected with marriage to the extent that it could not exist without marriage. As Ulpian wrote 'neque enim dos sine matrimonio esse potest'.³⁰ This observation leads to the conclusion that in spite of the fact that the marriage did not constitute the purpose of performance it was still a decisive factor for *datio*.³¹ The giver decided to give a dowry because of his expectation that the marriage would take place.³² The proper purpose of the performance was determined by the future expected event – conclusion of marriage. This future event was a decisive factor for the achievement of the purpose of performance, but not the purpose itself.

Instead of *res* later classical jurists, especially Ulpian, used the term *causa*. However, at that time *causa* had the same meaning as previously *res* and could describe any purpose of performance, not only counter-performance.³³ That is why in late classical and postclassical law *causa* indi-

²⁹ DIXON, *The Roman Family* (cit. n. 2), pp. 50–53; JACOBS, 'Carvilius Ruga' (cit. n. 26), p. 102; STĘPKOWSKA, 'Ustanowienie' (cit. n. 1), pp. 197–198; CSILLAG, *The Augustan Law* (cit. n. 21), pp. 92–96.

³⁰ D. 23.3.3 (Ulp. 63 ed.), cf. CZYCHLARZ, *Das römische Dotalrecht* (cit. n. 2), pp. 77–84, 148–150; LAURIA, *La dote* (cit. n. 25), p. 19; KÖNIG, 'Die vor der Ehe' (cit. n. 3), pp. 152–154; SANFILIPPO, *La dote* (cit. n. 25), p. 15; BEHREND, 'Die *condictio*' (cit. n. 11), p. 16; STĘPKOWSKA, 'Ustanowienie' (cit. n. 1), p. 208; EADEM, 'Ochrona' (cit. n. 2), p. 55.

³¹ HARKE, 'Das klassische römische Kondiktionensystem' (cit. n. 13), p. 58.

³² KUPISZEWSKI, 'Stosunki' (cit. n. 1), p. 265; IDEM, 'Osservazioni' (cit. n. 3), p. 114.

³³ F. BORÈ, *Die Voraussetzungen der condictio causa data causa non secuta des Gemeinen Recht und diejenigen der ihr entsprechenden Klage des Bürgerlichen Rechts: der Bereicherungsklage wegen Nicht-Eintritts des Erfolges*, Berlin 1904, p. 2; HONSELL, *Die Rückabwicklung* (cit. n. 11), p. 81; S. E. WUNNER, 'Der Begriff causa und der Tatbestand der *condictio indebiti*', *Romanitas* 9 (1970), p. 470; D. LIEBS, (cit. n. 15), p. 698; R. ZIMMERMANN, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Cape Town – Wetton – Johannesburg 1990, pp. 842–843; C. A. CANNATA, 'Cum alterius detrimento et iniuria fieri locupletiorum. L'arricchimento ingiustificato nel diritto romano', [in:] Letizia VACCA (ed.), *Arricchimento ingiustificato e ripetizione dell'indebito. VI Convegno Internazionale ARISTEC Padova– Verona– Padova 25–26–27 settembre 2003*, Torino 2004, p. 35; W. ERNST, 'Die *datio ob rem* als Austauschgeschäft– Ein Beitrag zu einseitig geregelten Geschäftsvorgängen im Verkehrsrecht', [in:] W. ERNST & Eva JAKAB (eds.), *Usus Antiquus Iuris Romani. Antikes Recht in lebenspraktischer Anwendung*, Berlin – Heidelberg 2005, p. 36.

cated the purpose of the person who gave a dowry (cf. *D.* 23.3.7.3, Ulp. 31 *Sab.*).

Roman classical law knew one basic remedy to recover the property transferred to the fiancé before marriage in the event the marriage did not take place. This remedy was *condictio*, which was later termed as *condictio ob rem* or *condictio ob causam* and by Justinian's compilers as *condictio causa data causa non secuta*³⁴ or *condictio ob causam datorum*.³⁵ Recovery of dowry was one of the most important fields of application of this *condictio*.³⁶ However, if the suspensory condition 'cum nuptiae fuerint secutae' was reserved, the ownership did not yet pass to the fiancé, and *rei vindicatio* was applied instead of *condictio*.³⁷ A restitution claim could be invoked only after it turned out that the planned marriage would not follow.³⁸ Property given before marriage was entered as being given as a potential dowry, so as long as the potential remained, there was no recovery (cf. *D.* 12.4.8, Ner. 2 *membr.*).



IV. RESPONSIBILITY FOR NON-ACHIEVEMENT OF THE PURPOSE OF THE PERFORMANCE

The next very important issue associated with the application of *condictio ob rem* referred to the reasons for non-achievement of the purpose of the performance. The crux of that issue was the problem of responsibility of the parties for failure to achieve the purpose of the performance. Sources

³⁴ Cf. the *Digest* title *De condictione causa data causa non secuta* in (*D.* 12.4).

³⁵ Cf. the title in *Codex De condictione ob causam datorum* (*Cf.* 4.6).

³⁶ Cf. *D.* 12.4.7.1 (*Iul.* 16 *dig.*); *D.* 12.4.6 (Ulp. 3 *disp.*); *D.* 12.7.5 *pr.* (*Pap.* 11 *quaest.*); *D.* 23.3.7.3 (Ulp. 31 *Sab.*); *D.* 23.3.9 *pr.* (Ulp. 31 *Sab.*); *D.* 42.5.17.1 (Ulp. 63 *ed.*).

³⁷ Cf. *D.* 23.3.7.3 (Ulp. 31 *Sab.*); *D.* 23.3.9 *pr.* (Ulp. 31 *Sab.*); KÖNIG, 'Die vor der Ehe' (cit. n. 3), pp. 160–171; KUPISZEWSKI, 'Stosunki' (cit. n. 1), p. 271; IDEM, 'Osservazioni' (cit. n. 3), p. 122; AYITER, 'Appunti' (cit. n. 3), p. 52.

³⁸ Cf. CZYCHLARZ, *Das römische Dotalrecht*, (cit. n. 2), pp. 143–144; KÖNIG, 'Die vor der Ehe' (cit. n. 3), p. 171.

of Roman law are very unclear in that respect. Some sources suggest that the reasons were completely irrelevant and only the objective fact – failure to achieve the purpose itself – mattered.³⁹ So regardless of the reasons for non-achievement of the purpose, the recipient had to return the performance.⁴⁰ Other sources attached importance to the reasons, especially the problem of fault (*culpa*). According to them the recipient became obliged to give the performance back only when he was at fault. When the failure to achieve the purpose was not caused by him or an event attributable to him, he was entitled to keep the benefit received.

In my study on *condictio ob rem* I came to the conclusion that the problem of responsibility depended on the particular purpose of the performance and its characteristics.⁴¹ There was no universal rule that had to be applied in every case. Generally, a division should be made between the purpose which referred to the behaviour of the recipient (especially counter-performance expected from him on the basis of an innominate contract) and the purpose that pertained to an event or state of affairs completely independent from the parties. Under classical law the recipient had to make restitution regardless of his fault,⁴² while under the law of Justinian this obligation became dependent on his fault in situations where the purpose referred to his behaviour. Some relevant sources of classical⁴³ and postclassical⁴⁴ law were interpolated by Justinian's commission through insertion of the notion of fault.⁴⁵ The recipient was

³⁹ *D.* 12.4.1.1 (*Ulp.* 26 *ed.*); *D.* 12.4.2 (*Herm.* 2 *iur. epit.*).

⁴⁰ For example when *filius emancipatus* had made *collatio bonorum*, but after did not ask for *bonorum possessio* he could claim his performance back, cf. *D.* 12.4.13 (*Marc.* 3 *reg.*).

⁴¹ Cf. SOBCZYK, *Świadczenie* (cit. n. 15), pp. 275–299.

⁴² Cf. *D.* 12.4.16 (*Cels.* 3 *dig.*); *D.* 12.4.5.3 (*Ulp.* 2 *disp.*); *D.* 12.4.5.4 (*Ulp.* 2 *disp.*).

⁴³ Cf. interpolated sources: *D.* 12.4.5 *pr.* (*Ulp.* 2 *disp.*); *D.* 12.4.5.2 (*Ulp.* 2 *disp.*); *D.* 19.5.5.1 (*Paul.* 5 *quaest.*).

⁴⁴ Cf. *Cf.* 4.6.10; *Cf.* 4.6.11.

⁴⁵ Cf. A. PERNICE, *Marcus Antistius Labeo. Römisches Privatrecht im ersten Jahrhunderte der Kaiserzeit* III 1, Halle 1892, pp. 302–307; B. LEHFELDT, *Die Schenkung unter einer Auflage nach römischem Recht*, Berlin 1911, p. 90; SCHWARZ, *Die Grundlage* (cit. n. 8), p. 306; E. BETTI, 'Zum Problem der Gefahrtragung bei zweiseitigen verpflichtenden Verträgen', *ZRG RA* 62 (1965), p. 22; CHAUDET, *Condictio* (cit. n. 11), p. 73; F. M. DE ROBERTIS, *La responsabilità*

obliged to restitution regardless of his fault when he did not manage to undertake the expected behaviour (*e.g.* manumission of his slave) within the period of time agreed by the parties.⁴⁶ Apart from that the giver could claim his performance back after he took advantage of *ius paenitendi*, which means when he resigned from achieving the intended purpose of the performance.⁴⁷ However, there were many exceptions to this general division that took into consideration peculiarities of the given purpose of performance, *e.g.* *datio propter condicionem* and *donatio mortis causa*.⁴⁸ As a result, the rules of restitution were very complex.

In the case of performance made *dotis nomine* the problem of responsibility concerned the reasons why the planned marriage did not take place. Owing to the special characteristics of that purpose of the performance its achievement depended on both parties. Each of them could end the betrothal and frustrate the purpose of performance. The question is whether and to what extent it affected the rule that the property already given had to be returned.

This issue was tackled by Paul:

D. 22.1.38.pr.-1 (Paul. 16 Plaut.): Videamus generali, quando in actione quae est in personam etiam fructus veniant. 1. Et quidem si fundus ob rem datus sit, veluti dotis causa, et renuntiata adfinitas, fructus quoque restituendi sunt, utique hi qui percepti sunt eo tempore quo sperabatur adfinitas, sed et posteriores, si in re mora fuit, ut ab illo, qui reddere debeat, omnimodo restituendi sunt. Sed et si per mulierem stetit, quo minus nuptiae contrahantur, magis est, ut debeat fructus recipere: ratio autem haec est, quod, si sponsus non conveniebatur restituere fructus, licuerat ei neglegere fundum.

contrattuale nel diritto romano (dalle origini a tutta l'eta postclassica), Bari 1994, pp. 295–322; SOBCZYK, *Świadczenie* (cit. n. 15), pp. 278–299.

⁴⁶ *D. 12.4.3.3 (Ulp. 26 ed.); D. 12.4.5.4 (Ulp. 2 disp.).*

⁴⁷ *D. 12.4.5 pr. (Ulp. 2 disp.); D. 12.4.5.2 (Ulp. 2 disp.).* On *ius paenitendi* see O. WENDT, *Die Reuverträge*, Erlangen 1879, *passim*; A. RIECHELMANN, *Paenitentia. Reue und Bindung nach römischen Rechtsquellen*, Frankfurt am Main 2005, *passim*.

⁴⁸ Cf. my *Świadczenie* (cit. n. 15), pp. 275–278; 293–294.

Paul dealt here with the question of restitution of fruits in *actio in personam*. He illustrated that problem with reference to a plot of land given as a dowry.

The fruits had to be given back even if the woman was responsible for the fact that the parties did not get married. Naturally, if the fruits had to be restored, the land itself had to be given back too. The fault of the woman was irrelevant and did not deprive her of the right to claim restitution of the land and fruits. In fact, this solution leads to the conclusion that the property given as a dowry had to be restored regardless of the reasons for failure to achieve the purpose of the performance, even in the most critical situation where the woman herself (or her *pater familias*) frustrated the purpose. On the other hand, restitution of the dowry was independent of the fiancé's attitude and his good or bad faith, in the sense that he was obliged to give the dowry back even if the frustration of the purpose was not attributable to him. In the case of fruits this solution was not obvious since Paul gave an explanation for it: if the fiancé was not liable for restitution of the fruits, he could neglect the land. Such an explanation was not motivated by the assessment of the bride's or the fiancé's attitude and their potential responsibility for ending the betrothal but it relied on the particular characteristics of the subject of the performance.

A similar conclusion derives from Ulpian's solution:

D. 23.3.7.3 (Ulp. 31 Sab.): Si res in dote dentur, puto in bonis mariti fieri accessionemque temporis marito ex persona mulieris concedendam. fiunt autem res mariti, si constante matrimonio in dotem dentur. quid ergo, si ante matrimonium? si quidem sic dedit mulier, ut statim eius fiant, efficiuntur: enimvero si hac condicione dedit, ut tunc efficiantur, cum nupserit, sine dubio dicemus tunc eius fieri, cum nuptiae fuerint secutae. proinde si forte nuptiae non sequantur nuntio remisso, si quidem sic dedit mulier, ut statim viri res fiant, condicere eas debebit misso nuntio: enimvero si sic dedit, ut secutis nuptiis incipiant esse, nuntio remisso statim eas vindicabit. sed ante nuntium remissum si vindicabit, exceptio poterit nocere vindicanti aut doli aut in factum: doti enim destinata non debebunt vindicari.

In this passage Ulpian deals with several problems, one of which referred to a dotal property transferred by a woman to her fiancé before marriage. If the marriage did not take place because of repudiation and the woman had given the property on the understanding that it would belong to the husband straight away, she would have to bring a *condictio* for it when the notice of repudiation was given. Only one event was required to claim dotal property back by *condictio* – notice of repudiation. Claim for restitution without prior notice of repudiation could be debarred by *exceptio doli* or *in factum*. The same rule pertained to *rei vindicatio*, which could be used only where the ownership did not yet pass to the fiancé. In classical law the reasons for repudiation were unimportant, so fault of the parties was not taken into consideration.

Recovery of the assets conveyed *dotis nomine* was admissible when none of the parties was responsible for the fact that they did not get married, especially when it was impossible *propter matrimonii interdictionem*.⁴⁹ *Condictio ex paenitentia* when betrothal still existed was not applicable to dowry.⁵⁰

The fact that the restitution was justified regardless of the reasons for non-achievement of the purpose of performance, and even when the woman refused to get married to the man who received the dowry, proves that peculiarities of this purpose of the performance were taken into account. In my opinion this solution derived from the general rule of Roman family law that nobody could be forced to get married. In classical law the woman could not bear negative consequences of her decision not to marry the fiancé; the opposite solution would infringe the principle of freedom of marriage.



⁴⁹ *D.* 22.3.9 *pr.* (Ulp. 31 *Sab.*); *D.* 23.3.59.2 (Marc. 7 *dig.*); *Cf.* 4.6.1.

⁵⁰ KÖNIG, 'Die vor der Ehe' (cit. n. 3), p. 171.

V. PERSON ENTITLED TO CLAIM RESTITUTION OF THE PERFORMANCE MADE DOTIS CAUSA

As a rule the person who made performance *ob rem* or *ob causam* had an active right of action to claim it back by means of *condictio ob rem*,⁵¹ however, in the case of dowry this issue was more complex. General rules are presented by Ulpian:

D. 23.1.10 (Ulp, 3 disp.): In potestate manente filia pater sponso nuntium remittere potest et sponsalia dissolvere. enimvero si emancipata est, non potest neque nuntium remittere neque quae dotis causa data sunt condicere: ipsa enim filia nubendo efficiet esse conductionemque extinguet, quae causa non secuta nasci poterit, nisi forte quis proponat ita dotem patrem pro emancipata filia dedisse, ut, si nuptiis non consentiret, vel contractis vel non contractis repeteret quae dederat: tunc enim habebit repetitionem.

The answer to the question who was entitled to end the betrothal and claim restitution of the property given *dotis causa* depended on whether the bride was under the parental power of her father or not. If she was *in potestate* only her *pater familias* could send *nuntius* to dissolve the betrothal and claim the property back. If she was emancipated those rights belonged only to her. However, there was an important exception to those rules – if the father gave the dowry on behalf of his emancipated daughter on condition that if he did not consent to the marriage, whether it had been contracted or not, he could get back what he gave, and then he would have an action for its recovery.

This problem looked different if the performance was made by a third person:

D. 12.4.6 (Ulp. 3 disp.): Si extraneus pro muliere dotem dedisset et pactus esset, ut, quoquo modo finitum esset matrimonium, dos ei redderetur, nec fuerint nuptiae secutae, quia de his casibus solummodo fuit conventum qui matrimonium sequuntur, nuptiae autem secutae non sint, quaerendum erit, utrum mulieri condictio an ei qui dotem dedit competat. Et verisimile est in hunc quoque casum eum qui dat sibi prospicere: nam quasi causa

⁵¹ Cf. SOBCZYK, *Świadczenie* (cit. n. 15), p. 305.

non secuta habere potest conductionem, qui ob matrimonium dedit, matrimonio non copulato, nisi forte evidentissimis probationibus mulier ostenderit hoc eum ideo fecisse, ut ipsi magis mulieri quam sibi prospiceret. sed et si pater pro filia det et ita convenit, nisi evidenter aliud actum sit, conductionem patri competere Marcellus ait.

Someone outside the family (*extraneus*) gave a dowry for a woman and it was agreed that, however the marriage ended, the dowry would return to him. The marriage has never taken place. Because only events subsequent to the marriage were contemplated by the agreement, the question arose who could claim the dotal property back – the woman or the donor of the dowry. The answer is that both solutions were possible depending on the peculiarities of the case, in particular in whose interest the dowry was given. Ulpian held that it was likely that the donor tried to safeguard his own interest, because one who gave on account of a marriage, could, if no marriage took place, use the *condictio* for non-materialization of an expected state of affairs (*causa non secuta*). However, the woman was sometimes able to prove clearly that the donor acted with a view to providing for her, not his own interest. Marcellus held that if a father gave a dowry on account of his daughter and made the same agreement, the father had the *condictio*, unless it was clearly intended otherwise. Ulpian stated here a general rule that the giver himself was entitled to restitution, unless the woman managed to prove that he acted more in her interest than in his own. That general rule was modified to a considerable extent when the dowry was given by a person who acted on the authority of the woman or her *pater familias*:

D. 12.4.7 (Iul. 16 dig.): Qui se debere pecuniam mulieri putabat, iussu eius dotis nomine promisit sponso et solvit: nuptiae deinde non intercesserunt: quaesitum est, utrum ipse potest repetere eam pecuniam qui dedisset, an mulier. Nerva, Atilicinus responderunt, quoniam putasset quidem debere pecuniam, sed exceptione doli mali tueri se potuisset, ipsum repetiturum. sed si, cum sciret se nihil mulieri debere, promississet, mulieris esse actionem, quoniam pecunia ad eam pertineret. si autem vere debitor fuisset et ante nuptias solvisset et nuptiae secutae non fuissent, ipse possit condicere, causa debiti integra mulieri ad hoc solum manente, ut ad nihil aliud debitor compellatur, nisi ut cedat ei condicticia actione.

In this passage the woman giving a dowry authorized, by means of *delegatio dotis nomine*,⁵² another person to promise (*delegatio promittendi*) money as a dowry to her fiancé.⁵³ The performance promised and then rendered on the woman's authority was intended to exert the effect of two *dationes* – first of the woman for her fiancé⁵⁴ and second of the giver for the woman.⁵⁵ The giver promised by stipulation and then gave money before marriage. Iulian analysed here three different situations where something went wrong.

In the first situation the giver was erroneously convinced that he was the woman's debtor and no marriage followed, so both relationships between the giver and the woman and between the woman and her fiancé were defective. According to Nerva and Atilicinus the giver himself could claim restitution directly from the recipient. So in the case of the two mentioned defects the giver was entitled to sue the recipient directly. This seems to be an unusual solution because as a rule where the relationship between delegator (*delegans*) and delegatee (*delegatus*) was defective, the delegatee could claim the performance only from the delegator,⁵⁶ and if the relationship between delegator and obligee (*delegatarius*) was defective the delegator (not delegatee) could claim restitution from the

⁵² *Delegatio* was often used to give a dowry, cf. *D. 12.4.9 pr.* (Paul. 17 *Plaut.*); *D. 23.3.78.5* (Tryph. 11 *disp.*). Cf. M. KASER, review of W. ENDEMANN, *Der Begriff der delegatio im klassischen römischen Recht*, ZRG RA 77 (1960), pp. 466–467; M. KASER & R. KNÜTEL, *Römisches Privatrecht*, München 2005, p. 338.

⁵³ Iulian used the verb *iubere* that indicated *delegatio*, cf. J. BARON, *Abhandlungen über römischen Civilprocess*, I. *Die Conditionen*, Berlin 1881, p. 247; W. ENDEMANN, *Der Begriff der delegatio im klassischen römischen Recht*, Marburg 1959, p. 15; KASER, rev. W. ENDEMANN, *Der Begriff* (cit. n. 52), p. 465.

⁵⁴ According to the rule *solvit enim et qui reum delegat* (*D. 16.1.8.3*, Ulp. 29 *ed.*).

⁵⁵ According to the rule *quod iussu alterius solvitur, pro eo est, quasi ipsi solutum esset* (*D. 50.17.180*, Paul. 17 *Plaut.*). About the concept of two *dationes* cf. KASER, review of ENDEMANN, *Der Begriff* (cit. n. 52), p. 464–465; Maria ZABŁOCKA, 'Realny charakter *mutuum* w rzymskim prawie klasycznym' [Real character of *mutuum* in classical Roman law], *Czasopismo Prawno-Historyczne* 31.2 (1979), pp. 11, 15, 25; ZIMMERMANN, *The Law* (cit. n. 33), pp. 159–160; J. L. ALONSO, *Estudios sobre la delegación 1. La doble atribución patrimonial*, Santiago de Compostella 2001, pp. 119–128; Iole FARGNOLI, *Alius solvit alius repetit. Studi in tema indebitum condicere*, Milano 2001, pp. 23–24.

⁵⁶ *D. 46.3.66* (Pomp. 6 *ex Plaut.*); *D. 46.2.13* (Ulp. 38 *ed.*).

obligee.⁵⁷ It is difficult to explain why the two basic rules of *delegatio* were not applicable here. In this point I share the explanation given by Hans-Herbert König⁵⁸ and Henryk Kupiszewski⁵⁹ that the giver's stipulation was subject to the suspensory condition – the conclusion of the planned marriage.⁶⁰ Therefore the giver should have waited for the marriage and was not allowed to pay the money before this condition was fulfilled. If he decided to do it earlier he acted only at his own risk and outside the scope of authorization given by the woman. In consequence, his *datio* could not be regarded as *datio* given by the woman to her fiancé, but only as his own *datio*. However, in this case another explanation is possible too, namely where both relationships (delegator – delegatee and delegator – obligee) were flawed the delegatee could claim restitution directly from the obligee, because it was the simplest and the most economical solution.⁶¹ That seems to be the third rule of *delegatio*, which should not be forgotten.

In the second situation the giver promised knowing he owed nothing to the woman, so the relationship between him and the woman was not defective. In this case the giver was treated as a person who gave a donation and for that reason the money belonged to the woman, so only she could take advantage of *condictio*.⁶²

In the last situation the giver was really the woman's debtor and paid the money in anticipation of a marriage which never followed. Here only the relationship between the woman and her fiancé was defective. However, the proposed solution is surprising – not the woman but her debtor was entitled

⁵⁷ D. 12.6.53 (Proc. 7 *epist.*); D. 16.1.8.3 (Ulp. 29 *ed.*); D. 44.5.1.11 (Ulp. 76 *ed.*).

⁵⁸ KÖNIG, 'Die vor der Ehe' (cit. n. 3), p. 196–199.

⁵⁹ KUPISZEWSKI, 'Stosunki' (cit. n. 1), pp. 275–277; IDEM, 'Osservazioni' (cit. n. 3), pp. 127–129.

⁶⁰ Both *dotis promissio* and *dotis dictio* were subject to this suspensory condition *si nuptiae sequuntur*, cf. D. 23.3.21 (Ulp. 35 *Sab.*), KUPISZEWSKI, 'Stosunki' (cit. n. 1), pp. 274–275; IDEM, 'Osservazioni' (cit. n. 3), pp. 126–127; STĘPKOWSKA, 'Ustanowienie' (cit. n. 1), pp. 208–209.

⁶¹ D. 39.5.2.4 (Iul. 60 *dig.*); D. 44.4.7.1 (Ulp. 76 *ed.*), cf. ALONSO, 'Estudios' (cit. n. 55), pp. 428–436; FARGNOLI, *Alius solvit* (cit. n. 55), pp. 58–65 with further literature mentioned there, cf. Ludovica PIRO, 'Solutio indebiti e legittimazione alla *condictio*. [A proposito di Iole Fargnoli, *Alius solvit alius repetit*. Studi in tema di *indebitum condicere*], *Index* 33 (2005), p. 665.

⁶² D. 46.2.12 (Paul. 31 *ed.*); D. 50.17.53 (Paul. 42 *ed.*); D. 19.2.19.6 (Ulp. 32 *ed.*); D. 41.4.7.2 (Iul. 44 *dig.*).

claim restitution from the recipient. This was another exception to the rules of *delegatio*, because normally in the case of defect in the relationship between delegator and obligee, the delegator (not the delegatee) could claim restitution. This exception can be explained in one way – the giver promised and paid money outside the scope of *delegatio*, because he should not have paid money before the marriage.⁶³ When he did that on the one hand he did not become released from his obligation towards the woman, so his debt still existed, and on the other hand only he could claim his performance back from the recipient directly, bearing the risk of the recipient's insolvency.

Similar problems are tackled by Paul in a fragment from the 17th book of his commentary on Plautius cited above (*D. 12.4.9 pr.*). Paul referred to a situation where someone had the intention to make a gift to a woman and at her request he paid her fiancé. If no marriage followed the answer to the question who was entitled to *condictio* was simple – only the woman could claim restitution because the giver acted with *animus donandi* for her benefit.⁶⁴ In this point the solution corresponded to Iulian's opinion cited above.

Apart from that Paul took into consideration another possibility – the giver made a contract with the fiancé and gave him money on the understanding that if the marriage followed the woman would have it as her dowry. If no marriage happened, it had to be given back to the giver and he had *condictio* against the fiancé as for something given for a purpose which never materialized. In this case the person entitled to *condictio* is indicated in *pactum*.⁶⁵ This passage proves that it was permitted to agree who would have the right to claim the dotal property back.⁶⁶

In the next passage of his commentary on Plautius Paul considered the situation of a giver who mistakenly thought he owed money to a woman and on her authority promised her fiancé money.

⁶³ KÖNIG, 'Die vor der Ehe' (cit. n. 3), pp. 200–201; KUPISZEWSKI, 'Stosunki' (cit. n. 1), pp. 277–278; IDEM, 'Osservazioni' (cit. n. 3), pp. 131–132.

⁶⁴ As ALONSO remarks '*ego* no opera come constituyente de dote, sino pura y simplemente como un donante delegado por la mujer, de modo que la *condictio* corresponderá a ésta come delegante' (*Estudios* [cit. n. 55], p. 165).

⁶⁵ Indication of the person was the proper purpose of that *pactum*, cf. KÖNIG, 'Die vor der Ehe' (cit. n. 3), p. 182.

⁶⁶ KÖNIG, 'Die vor der Ehe' (cit. n. 3), p. 182.

D. 12.4.9.1 (Paul. 17 Plaut.): Si quis indebitam pecuniam per errorem iussu mulieris sponso eius promississet et nuptiae secutae fuissent, exceptione doli mali uti non potest: maritus enim suum negotium gerit et nihil dolo facit nec decipiendus est: quod fit, si cogatur indotatam uxorem habere. itaque adversus mulierem condictio ei competit, ut aut repetat ab ea quod marito dedit aut ut liberetur, si nondum solverit. sed si soluto matrimonio maritus peteret, in eo dumtaxat exceptionem obstare debere, quod mulier receptura esset.

In fact marriage followed, so contrary to the previous cases the purpose of the performance, at least from the woman's perspective, was achieved. The question arose how to protect the interest of the giver, especially whether he could refuse to pay money and from whom he could recover money already paid to the fiancé. The answer to the first question was that he had to give the money, because the husband's interest deserved better protection. The answer to the second question was that *condictio* went against the woman, not against her fiancé.

Paul took into consideration the interest and legal position of the husband, who looked to his own interest, did not perpetrate any fraud and should not have been let down, which he would be if forced to take an undowered wife. However, apart from those arguments that solution complied with the general rules of *delegatio*. If the relationship between *delegans* and *delegatus* was defective, *delegatus* could demand restitution from *delegans* not from *delegatarius*.⁶⁷

In that case if the money was paid to the fiancé before the marriage took place, the giver's performance could be qualified as *datio ob rem*; however, the restitution was justified not because of the non-materialization of the intended purpose of the performance (in fact, this purpose was achieved), but because the money was not owed to the woman (*solutio indebiti* for her benefit). This was another reason why the money could be claimed only from the woman.⁶⁸ In consequence, *condictio indebiti*, not *condictio ob rem*, was applicable here.



⁶⁷ *D. 46.2.12 (Paul. 31 ed.); D. 46.2.13 (Ulp. 38 ed.); cf. H. H. JAKOBS, 'Fiducia und Delegation', ZRG RA 110 (1993), p. 373.*

⁶⁸ *Cf. G. DONATUTI, 'Le causae delle condictiones', Studi Parmensi 1 (1950), p. 92.*

VI. CONCLUSIONS

Performance given on account of a dowry before the planned marriage was a basic example of *datio ob rem*. This kind of performance had distinctive features with certain exceptions to the general rules of *datio ob rem*. The purpose of the performance was to give a dowry and to achieve those goals which were associated with the dowry. This purpose could not be reduced to the conclusion of marriage and the consent of the fiancé to get married to a particular woman could not be regarded as counter-performance. Yet, the dowry could not exist without marriage and the marriage remained the decisive factor for the achievement of that purpose of the performance. If the marriage did not take place the performance could be claimed back by *condictio*. Restitution was independent from the reason for non-achievement of the purpose, so it was justified even when the woman ended the betrothal. As a rule if the woman was a daughter in-power her *pater familias* could end the betrothal and claim dotal property back. If she was *sui iuris* she could do it herself. If the dowry was given by a third person on the woman's authority (*delegatio dotis nomine*) she was entitled to claim restitution. However, if in that case the giver was erroneously convinced of being the woman's debtor, he could sue the recipient directly. If the giver acted outside the scope of the woman's authority, he did it at his own risk and could reclaim his payment only from the recipient.

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