

Casebook on the Roman Law of Contracts

Chapter VIII: Quasi-Contract

In discussing what he calls the law of personal obligations, the jurist Gaius, writing about 160 CE, draws a fundamental divide between contracts where the obligation arises through agreement between two parties, and delicts (*delicta*) where one person inflicts some form of wrongful loss or injury on another (*Inst.* 3.88). He is referencing a long established distinction, going back to fourth-century Greek philosophers.

However, in a passage from what appears to be a later, somewhat expanded version of the *Institutes* (it is called the *Res Cottidianae* or *Aurea*, “Everyday Matters” or “Golden Rules”), Gaius, D. 44.7.5 pr.-3, adds in other sources of personal liability that are not easily incorporated within the contracts/delicts dichotomy, although they may bear some resemblance to one category or the other. Of these sources, two have special historical standing: the action on administration of another’s affairs, when someone manages the business of another without that person’s prior or subsequent agreement (*actio negotiorum gestorum*); and the *condictio* when it is used to recover a payment or performance made to another by mistake. These two sources ostensibly have little to do with one another, but almost four centuries later Justinian, *Inst.* 3.27, combined them and others in a new category of obligations arising *quasi ex contractu*, “as if from a contract, from quasi-contract.” (See Case 216 below.)

Although the Roman jurists never developed these liabilities with any high degree of precision or analytical abstraction, they did consistently work to expand them beyond their original perimeters, and what they said has proven to be, quite often, not only brilliantly perceptive, but also rich in provocative insights awaiting further development by later scholars, lawyers, and judges particularly in Civil Law jurisdictions. The one false start, to be sure, was the very name “quasi-contract,” particularly were it falsely taken (as it once frequently was) to imply some sort of actual contract “implied by law” between claimant and recipient. Today the widely preferred name for liabilities of this type is rather unjustified enrichment (or, in Common Law jurisdictions, unjust enrichment).

Common Law countries were slow to recognize unjustified enrichment as an independent source of liability, but over the last half-century it has become firmly established in most of them: in the United States, now above all owing to the *Third Restatement on Restitution and Unjust Enrichment* (2011). The guiding principle of the Restatement, one often repeated with slight variation in many other national codes or legal decisions, is § 1: “A person who is unjustly enriched at the expense of another is subject to liability in restitution.” This principle is but a more careful version of the jurist Pomponius’ famous maxim: *Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletior* (“For it is by Nature fair that no one become richer through another’s loss”: D. 12.6.14, 50.17.206). But the real legal work began, and begins, precisely here, in cutting this lofty but overbroad moral principle down to more manageable size.

Part A: Unauthorized Administration of Another's Affairs (*Negotiorum Gestio*)

The Praetor's Edict, quoted by Ulpian (D. 3.5.3 pr.), established this liability in the following words: "If someone administers the affairs of another, or what were his affairs at the time of his death, I will give a trial on this account." (*Si quis negotia alterius, sive quis negotia, quae cuiusque cum is moritur fuerint, gesserit: iudicium eo nomine dabo.*)

It is thought likely that the Edictal provision began as a means of handling procedural problems when a lawsuit was brought against an absent defendant whose affairs might be endangered if he went undefended. The defendant could learn of the situation and ask a third party to intervene, through a mandate (*mandatum*; see Chapter V.C); or, on the other hand, a third party might step in voluntarily, without a mandate, as a friendly act. These two situations were thought of as parallel, and accordingly each led to reciprocal actions *ex fide bona*. In the case of the voluntary intervener, the defendant had an action for failure to exercise due care in administration, while the intervener could sue for expenses.

However, the Praetor had phrased his provision broadly, and already by the end of the Roman Republic it was being applied more generally to other situations in which one person had acted to "administer" the non-judicial business of another without that person's knowledge, much less consent. Ostensibly, according a remedy to the intervener in such circumstances, even where the remedy involves only recovery of expenses, seems a direct contradiction of the venerable Common Law dread of the "officious intermeddler," the volunteer who assists or benefits another without contractual authorization or legal duty to do so, but nonetheless wants compensation for these actions. The dread arises from the sense that each person's affairs should be a matter for him or her alone, except under very compelling circumstances. By and large, therefore, benefits nonetheless conferred in this fashion are (somewhat sluggishly) often not considered part of our law of unjustified enrichment.

Roman society generally, and Roman law in particular, are certainly not hostile to individualism. But neither was it the paramount value of, in particular, a Roman citizen, especially an upper-class Roman. As Reinhard Zimmermann (*Obligations* 436) observes, "he felt obliged to help his friends by lending them money, standing surety, or simply giving advice. All this was part of the *officium amici* [a friend's duty], and it could matter little whether such help had been specifically solicited or not. ... [T]heir lawyers, practical and matter-of-fact, did what was necessary to provide favourable conditions for a behaviour along the accepted ethical lines and to protect the position of both parties."

As we shall see, this creative process involved careful restrictions when a conferred "benefit" was not wanted or needed by the recipient, or when it was actually a burden and no benefit at all.

Case 216: The Invention of Quasi-Contract

D. 44.7.5 pr., 3 (Gaius libro tertio Aureorum)

pr. Si quis absentis negotia gesserit, si quidem ex mandato, palam est ex contractu nasci inter eos actiones mandati, quibus invicem experiri possunt de eo, quod alterum alteri ex bona fide praestare oportet: si vero sine mandato, placuit quidem sane eos invicem obligari eoque nomine proditae sunt actiones, quas appellamus negotiorum gestorum, quibus aequae invicem experiri possunt de eo, quod ex bona fide alterum alteri praestare oportet. Sed neque ex contractu neque ex maleficio actiones nascuntur: neque enim is qui gessit cum absente creditur ante contraxisse, neque ullum maleficio est sine mandato suscipere negotiorum administrationem: longe [magis] <minus> is, cuius negotia gesta sunt, ignorans aut contraxisse aut deliquisse intellegi potest: sed utilitatis causa receptum est invicem eos obligari. ...

3. Is quoque, qui non debitum accipit per errorem solventis, obligatur quidem quasi ex mutui datione et eadem actione tenetur, qua debitores creditoribus: sed non potest intellegi is, qui ex ea causa tenetur, ex contractu obligatus esse: qui enim solvit per errorem, magis distrahendae obligationis animo quam contrahendae dare videtur.

Iustinianus, *Institutiones* 3.27 pr.

Post genera contractuum enumerata dispiciamus etiam de his obligationibus, quae non proprie quidem ex contractu nasci intelleguntur, sed tamen, quia non ex maleficio substantiam capiunt, quasi ex contractu nasci videntur.

Gaius in the third book of his *Golden Rules*:

pr. If someone administers the affairs of an absent person, when (he does so) on the basis of a mandate, there clearly arise between them, from the contract (*ex contractu*), the actions on mandate whereby they can sue in turn about what each ought to present to the other in accord with good faith (*ex fide bona*).

But if (he does so) without a mandate, the view has prevailed that they are clearly obligated reciprocally, and on this account there were devised the actions we call “for administered affairs” (*negotiorum gestorum*), whereby they can equally sue in turn for what each ought to present to the other in accord with good faith (*ex fide bona*).

But these actions arise neither from a contract nor from a misdeed (*neque ex contractu neque ex maleficio*), since the administrator is not considered to have previously contracted with the absent person, nor is it any misdeed to take up the administration of affairs without a mandate; (and) far less can the person, whose affairs were administered while he was unaware, be understood either to have contracted or to have done a wrong. But for the sake of practicality (*utilitatis causa*) it was established that they are reciprocally obligated. ...

3. Likewise a person who receives (payment of) a debt because of the payer’s mistake (*error*) is obligated by the same action as debtors to creditors (i.e., the *condictio*). But the person who is held liable for this reason cannot be understood to have been obligated on a contract, since someone who pays by mistake is held to give (the payment) more with the intent of discharging an obligation than of contracting one.

Justinian in the third book of his *Institutes*:

After having listed the various kinds of contracts, let us now also examine obligations that, properly speaking, are not understood to arise from contract (*ex contractu*), but, because they do not come into existence through a misdeed (*ex maleficio*), are held to arise “as if from a contract” (*quasi ex contractu*).

Discussion:

1. A New Cause of Action. There is much to look at in these two sources, but for now concentrate on the thread of logic that binds together the Gaius passage, and how the two liabilities are then merged into Justinian’s *quasi ex contractu*. Unauthorized administration of affairs may seem at first to have little to do with payments made by mistake, and the remedies in the two situations not only arose wholly independently but also are quite differently structured. Nonetheless, there may be a common idea. See if you can find it. Don’t worry if the idea is hard to locate, or seems untenably vague; the Roman jurists themselves never arrived at anything resembling a generalized theory of “quasi-contract” or unjustified enrichment.

Illustrating this confusion, both Gaius and Justinian list two other alleged forms of quasi-contract: the reciprocal liabilities of a guardian and ward for the guardian’s conduct during tutelage; and the liability of an heir to a legatee (D. 48.7.5.2; Justinian, *Inst.* 3.27.2-5, which adds liabilities arising from common property). These liabilities are better explained elsewhere, through the law of status, property, and succession; they do not involve the core ideas in this chapter.

2. Unauthorized Administration of Affairs. It is not known when the Praetor introduced this remedy into his Edict. Formally, the Praetor promises to give an action based on his own authority (*iudicium dabo*, “I will give a trial”); this indicates that the original form of the action was probably based on individual alleged facts (*in factum*), a form that survives in some later texts even as the original form of action was largely superseded by the later one based on *bona fides*—this latter a formulation unlikely to antedate the second century BCE. The good faith actions were, in any case, well established by the late Republic.

Roman legal sources refer to a wide variety of situations in which the actions might be used: not only for emergencies where intervention is urgent (propping up a building that is about to collapse or providing medical care to a sick slave), but also for everyday business like discharging or standing surety for a principal’s debt, collecting a debt due to the principal, purchasing farms, selling slaves or livestock, and so on. In each case, the administrator’s intervention occurs without the other party’s prior or subsequent consent, and almost always without even that party’s knowledge. As Gaius says, in Roman law such a unilateral intervention can establish rights and duties on both sides, in accord with good faith (*ex fide bona*).

In modern law, it remains controversial whether a Good Samaritan should be able to claim compensation for expenses, and, if so, whether this claim should be regarded as an instance of unjustified enrichment. Speaking very broadly, Civil Law systems (ultimately based to a considerable extent on Roman law) answer yes to both questions, while Common Law generally discourages liability. See Daniel Visser, “Unjustified Enrichment in Comparative Perspective,” in *The Oxford Handbook of Comparative Law* (ed. Mathias Reimann and Reinhard Zimmermann, 2006) 969-1002, at 983-984 (“Is Obtruding a Benefit on Another about Unjustified Enrichment?”). As Visser observes, “The real challenge ... is to find the appropriate balance between encouraging altruism and protecting personal liability.”

Case 217: The Reason for the Actions on Unauthorized Administration

D. 3.5.1 (Ulpianus libro decimo ad Edictum)

Hoc edictum necessarium est, quoniam magna utilitas absentium versatur, ne indefensi rerum possessionem aut venditionem patiantur vel pignoris distractionem vel poenae committendae actionem, vel iniuria rem suam amittant.

D. 3.5.2 (Gaius libro tertio ad Edictum Provinciale)

Si quis absentis negotia gesserit licet ignorantis, tamen quidquid utiliter in rem eius impenderit vel etiam ipse se in rem absentis alicui obligaverit, habet eo nomine actionem: itaque eo casu ultro citroque nascitur actio, quae appellatur negotiorum gestorum. Et sane sicut aequum est ipsum actus sui rationem reddere et eo nomine condemnari, quidquid vel non ut oportuit gessit vel ex his negotiis retinet: ita ex diverso iustum est, si utiliter gessit, praestari ei, quidquid eo nomine vel abest ei vel afuturum est.

Ulpian in the tenth book on the Edict:

This edict is essential because of its great usefulness to absentees, to prevent their suffering, through lack of (judicial) defense, their property being possessed or sold, or a pledge being sold, or the action on forfeiting a penalty, or losing their property wrongfully.

Gaius in the third book on the Provincial Edict:

If someone administers the affairs of an absent person, even one who is unaware (of this), nevertheless he has an action on account of whatever he usefully expends on this person's property, or even if he obligates himself to a third party for the absent person's property. And so in this case an action arises on either side, called (the action) on administered affairs. And indeed, just as it is fair that he provide an accounting of his action and on this basis be condemned for whatever either he did not administer as he ought to or (for what) he retains from these affairs, so too conversely it is just, if his administration was useful, that he receive whatever he either lost or will lose on this account.

The Problem:

Your house stands on several acres of lawn. While you were away on a month-long vacation, it rained heavily and the grass became very unsightly. I hire a landscaping company to come in and cut your grass. Can I recover for my expenditure?

Discussion:

1. Origins. As Ulpian indicates, the Praetor may have devised these actions primarily to benefit defendants who came under judicial assault during their absence (Roman sources frequently mention this situation); while Gaius frames the edict's purposes much more broadly, in accord with later legal thinking. The Praetor's pronouncement was, in fact, located in the portion of the Edict that dealt with representation in court (Lenel, *EP*³ 101-105). On Lenel's reconstruction, if the person whose business was administered later sued, the model formula in classical law was:

Whereas the defendant administered the plaintiff's affairs, this being the matter in question, whatever on this account it is proper that the defendant ought, in accord with good faith, to give to or do for the plaintiff, let the *iudex* of this matter condemn the defendant to the plaintiff; if it does not appear, let him absolve. (Ibid. 105.)

If the administrator sued, the same wording was used, except that, in the "whereas" clause, "defendant" and "plaintiff" were interchanged. The wording was deliberately left quite general, which opened the way for much later juristic development.

2. An Imperfect Bilateral Arrangement. As Gaius says, the administrator is only entitled to expenses for the intervention, while being subjected to liability for lack of due care. Does this balance (or imbalance) seem to encourage the proper level of intervention by third parties in the affairs of others, particularly when the intervention is initiated unilaterally and without the beneficiary's knowledge? The Romans were not unaware of the dangers in promoting such interference; see, for instance, another maxim of Pomponius, D. 50.17.36: "It is fault to involve yourself in a matter not pertaining to you" (*Culpa est immiscere se rei ad se non pertinenti*). But, in an era of slow and erratic communication, the Praetor and the jurists may have been swayed by the weak position of an absent person, not only in litigation but in other vital matters. As you read on, try to determine how well they did in striking the balance.

3. Absence? Many sources insist, as these two fragments do, that the beneficiary must be "absent" (*absens*) if the administrator is to receive compensation for expenses. Presumably, physical absence is meant; the beneficiary physically cannot tend to his or her own affairs, and would presumably have done so were he or she present. But several sources indicate that just lack of awareness (*ignorantia*) was enough; e.g., Paul, D. 3.5.40: "A person who defends my slave in a noxal action when I am unaware (*ignorans*) or absent has the action on administration of affairs with me for the whole amount ..." This is important because some interventions might be occasioned by the mental incapacity of the beneficiary: too young or insane, for instance. Clearly, *negotiorum gestio* was available in the case of underage wards (e.g., Paul, D. 3.5.14) and the insane (e.g., Ulpian, D. 3.5.3.5). It seems hard to avoid this extension, doesn't it?

4. The Good Samaritan. A renowned doctor stops to administer medical aid to a victim who has been badly injured in an automobile accident and is unconscious. Assuming that the doctor exercised a high level of skill, does it seem right to you that she receive only her expenses for this intervention, rather than compensation at her regular, very steep fee rates, or at least at going market rates for her profession? In the case of a skilled professional, is the Roman award too low to encourage intervention that is both urgent and socially desirable? Should it matter whether the patient died despite the intervention?

Case 218: Benefit to the Recipient

D. 3.5.9.1 (Ulpianus libro decimo ad Edictum)

Is autem qui negotiorum gestorum agit non solum si effectum habuit negotium quod gessit, actione ista utetur, sed sufficit, si utiliter gessit, etsi effectum non habuit negotium. Et ideo si insulam fulsit vel servum aegrum curavit, etiamsi insula exusta est vel servus obit, aget negotiorum gestorum: idque et Labeo probat. Sed ut Celsus refert, Proculus apud eum notat non semper debere dari. Quid enim si eam insulam fulsit, quam dominus quasi inpar sumptui deliquerit vel quam sibi necessariam non putavit? Oneravit, inquit, dominum secundum Labeonis sententiam, cum unicuique liceat et damni infecti nomine rem derelinquere. Sed istam sententiam Celsus eleganter deridet: is enim negotiorum gestorum, inquit, habet actionem, qui utiliter negotia gessit: non autem utiliter negotia gerit, qui rem non necessariam vel quae oneratura est patrem familias adgreditur. Iuxta hoc est et, quod Iulianus scribit, eum qui insulam fulsit vel servum aegrotum curavit, habere negotiorum gestorum actionem, si utiliter hoc faceret, licet eventus non sit secutus. Ego quaero: quid si putavit se utiliter facere, sed patri familias non expediebat? Dico hunc non habiturum negotiorum gestorum actionem: ut enim eventum non spectamus, debet utiliter esse coeptum.

D. 17.1.50 pr. (Celsus libro trigesimo octavo *Digestorum*)

Si is qui negotia fideiussoris gerebat ita solvit stipulatori, ut reum fideiussoremque liberaret, idque utiliter fecit, negotiorum gestorum actione fideiussorem habet obligatum, nec refert, ratum habuit nec ne fideiussor. ...

Ulpian in the tenth book on the Edict:

A person who sues on administration of affairs will not just use this action if he (successfully) accomplishes the matter he administered; it is enough if he acted usefully, even if he did not accomplish the matter. And so if he propped up an apartment building or took care of a sick slave, he will sue on administration of affairs (even) if the building burned down or the slave died; and Labeo also approves this rule.

But, as Celsus reports, Proculus annotated him (Labeo, as follows): this (the action) ought not always to be given (by the Praetor). For what if he propped up an apartment building that the owner abandoned from not being up to the expense, or that he thought he did not need? In Labeo's view, says Celsus, he burdened the owner, since anyone is allowed to abandon property even because of threatened damage (*damni infecti*; to a neighbor). But Celsus elegantly mocks this view; for, he says, a person who administered affairs usefully has an action on administration of affairs, but someone who undertakes something unnecessary, or that will burden a *paterfamilias*, does not administer affairs usefully.

Related to this is what Julian writes, that a person who propped up an apartment house or cared for a sick slave has an action on administration of affairs if he does this usefully, even if the outcome was unsuccessful. I ask: What if he thought he acted usefully, but it was not benefitting the *paterfamilias*? I hold that this man will not have the action on administration of affairs; for when we do not look to the outcome, it ought (at least) to be started usefully.

Celsus in the thirty-eighth book of the Digests:

If a person who was administering a surety's affairs paid a stipulator (creditor) so as to free (both) the principal and the surety (from the debt), and he did this usefully, he has obligated the surety in an action on administration of affairs, nor does it matter whether the surety ratified this or not.

Discussion:

1. Usefulness. There is general agreement that the administrator's action must be "useful" (*utilis*); see also Alexander Severus, C. 2.18.10 (222 CE): "If you cared for another person's sick slave who was (still) of some use to his master, and you administered the affair usefully (to the master), you can recover your expenses by the appropriate action." However, as this fragment shows, that requirement may be rather difficult to isolate. Ulpian begins by suggesting that the action must be reasonable even if it is not successful; the building may fall down anyway, or the slave may die. So the standard looks to be an objective one: was intervention reasonable?

But then come the remarks of Proculus, Celsus, and Julian, who veer off in quite a different direction: What if the owner didn't want this building, or couldn't afford to keep it up? (Proculus argues that in such an event the Praetor should not award an action to the administrator in the first place, while Celsus and Julian seem to prefer that the action be awarded but that the administrator be defeated by the absence of benefit. The same destination, different routes.) Here the emphasis seems to be on the putative beneficiary, who, despite the good intentions of the administrator (Julian), may not have actually benefitted from the act. This is a much more subjective, case-oriented standard of *utilitas*. Can the two positions be reconciled?

2. An Equitable Remedy. One way to reconcile them is to assume that, although in general the administrator is compensated for acting reasonably in light of the impending harm to another's interests, the particular circumstances of a defendant owner may also be taken into consideration, through a process that, in Common Law, would be regarded as essentially equitable, case-oriented and attentive to potential hardship on all sides. Look again at the rescript of Alexander Severus quoted in the previous note. Why does the emperor insist on the sick slave still being "of some use to his master"? This certainly looks extremely hard-hearted; but it is possible that a deeper legal point underlies the requirement. Can you spot it?

3. Celsus's Problem. In the second passage, a creditor C is owed money by a debtor D, and surety S has guaranteed payment of D's debt. (On suretyship, see Chapter II.F above.) Administrator A, intervening in the affairs of S, pays the debt to C, and thereby frees both D and S from further liability to C. S is liable to A for A's expenditures, provided that A acted *utiliter*, usefully. Using the concepts in the Ulpian passage, try to describe circumstances in which A's payment could be regarded as not useful. Note that, according to Celsus, the outcome is not affected by whether or not S has "ratified" (subsequently approved) A's payment. Why not?

4. Not Useful. Little survives as to the line between useful and not useful, but Modestinus, D. 3.5.26 pr., describes a case in which two brothers jointly owned a rural property and one built "splendid buildings" (*ampla aedificia*) on it. When the brothers came to divide their property, the builder received no compensation from his brother for buildings constructed "for his enjoyment," *voluptatis causa*, even though the property's market value may have risen as a result.

Case 219: Benefit the Recipient Does Not Want

C. 2.18.24 (Imp. Iustinianus A. Iuliano pp.)

pr. Si quis nolente et specialiter prohibente domino rerum administrationi earum sese immiscuit, apud magnos auctores dubitabatur, si pro expensis, quae circa res factae sunt, talis negotiorum gestor habeat aliquam adversus dominum actionem. **1.** Quam quibusdam pollicentibus directam vel utilem, aliis negantibus, in quibus et Salvius Iulianus fuit, haec decedentes sancimus, si contradixerit dominus et eum res suas administrare prohibuerit, secundum Iuliani sententiam nullam esse adversus eum contrariam actionem, scilicet post denuntiationem, quam ei dominus transmiserit nec concedens ei res eius attingere, licet res bene ab eo gestae sint. **2.** Quid enim, si dominus adspexerit ab administratore multas expensas utiliter factas et tunc dolosa adsimulatione habita eum prohibuerit, ut neque anteriores expensas praestet? quod nullo patimur modo: sed ex quo die attestatio ad eum facta est vel in scriptis vel sine scriptis, sub testificatione tamen aliarum personarum, ex eo die pro faciendis meliorationibus nullam ei actionem competere, super anterioribus autem, si utiliter factae sunt, habere eum actionem contra dominum concedimus sua natura currentem.

The Emperor Justinian to Julian, Praetorian Prefect (530 CE):

pr. If anyone intermeddled by administering property when its unwilling owner specifically forbade this, there was doubt among important (juristic) authorities whether such an administrator of affairs would have any action against the owner for expenditures on the property. **1.** Some (jurists) promise him a direct or analogous action, while some deny one (altogether), among whom was Salvius Julianus. To decide these questions, we ordain that if the owner objects and prohibits him from administering his property, then in accord with Julian's opinion no counteraction lies against him—that is to say, after the owner transmits a notice to him and does not permit him to lay hands on his property even if he administers the matter well.

2. But what if the owner has watched the administrator making much useful expenditure, and then with deceitful pretense forbids him in order to avoid owing the previous expenditures? In no respect do We allow this. But from the day on which notice (of prohibition) was given to him—either in writing or without writing but with other persons as witnesses—from that day on, no action shall lie for making improvements. But as for prior ones, if they were useful, We allow him to have an action against the owner, (but) one that is by its nature limited in time.

Discussion:

1. A Classical Debate, Suppressed. When Justinian's compilers set to work excerpting the writings of the Roman jurists, they were sometimes faced with earlier conflicts of opinion that could only be resolved by calling on the emperor. When Justinian obliged them, the losing juristic views were then often cut out of the excerpted Digest text, but the emperor's decision survives to attest them indirectly. In this Case, Justinian suggests that some jurists—among them, the acclaimed Julian—declined to allow the administrator to sue for expenses when the owner had “specifically” (*specialiter*) forbidden the administration, while others allowed a lawsuit nonetheless. (On the other hand, the administrator could still be sued if he failed in his duty of care.) Ulpian, D. 3.5.7.3, citing Julian, concurs with him as to a particular case: in a two-person partnership, one

partner forbids a third party from administering the partnership's affairs, while the other partner does not; the latter can be sued by the intervener, but a resulting verdict must not harm the former. Paul, D. 17.1.40, adopts a more general rule barring the action, but acknowledges that some jurists favored at least an analogous action (*actio utilis*) in particular cases. What can be said in favor of each of the three positions? In any case, it appears that the beneficiary's prohibition had to be clear, individualized, and, at least in Justinian's law, relatively formal (a simple oral prohibition would not work); so a broad posted ban ("No Trespassing! No Improvements!") would therefore be insufficient.

2. An Attempted Fraud. Section 2 shows the emperor alert to the possibility that his rule might lead a cunning beneficiary to avoid liability by delaying a prohibition. Justinian allows the administrator to seek compensation up to the point of the prohibition, but not thereafter. Notice the presumption here is that the owner is present and aware of the administrator's acts. Is this consistent with Case 217 above?

Case 220: Mistake as to the Beneficiary

D. 3.5.44.2 (Ulpianus libro quarto Opinionum)

Titius pecuniam creditoribus hereditariis solvit existimans sororem suam defuncto heredem testamento extitisse. Quamvis animo gerendi sororis negotia id fecisset, veritate tamen filiorum defuncti, qui sui heredes patri sublato testamento erant, gessisset: quia aequum est in damno eum non versari, actione negotiorum gestorum id eum petere placuit.

Ulpian in the fourth book of his Opinions:

Titius paid money to the creditors of an inheritance in the belief that his sister had become the testate heir to the deceased. Although he did this with the intent to administer the affairs of his sister, nevertheless in actuality he administered (the affairs) of the decedent's sons, who were the intestate heirs of their father after the will was invalidated. Because it is fair (*aequum*) that he not suffer loss, the view prevailed that he seek this (expenditure) by an action on administration of affairs.

Discussion:

1. Inadvertent Administration of Affairs. In a will, Titius' sister was named heir to the decedent's estate, which was burdened with debts that Titius paid off. His act may well have been a simple matter of intra-familial generosity, as in Case 222 below; in which event, Titius perhaps could not seek compensation from his sister for administering her affairs. But the will was broken, and the true beneficiaries of Titius' payments turned out to be the decedent's sons as heirs upon intestacy, who took an estate no longer burdened with debts. Can Titius sue the sons even though he had no intent to benefit them, and indeed even though he may not originally have wanted compensation at all? Why might the jurists have had doubts on this issue, and why did their position favoring liability ultimately prevail? Note Ulpian's emphasis on "fairness," *aequitas*.

2. A Thieving Slave. Africanus, D. 3.5.48, puts a hypothetical case: I sell a slave who takes with him to the buyer an object that the slave had stolen from me; and the slave's buyer, unaware of the theft, then sells the object. I have an action on administration of affairs against the slave's buyer for the price of the stolen object, even though this buyer, in selling the object, evidently had no intention of benefitting me or indeed anyone but himself. As this text suggests, the jurists seem to place their emphasis on the "utility," *utilitas*, of the benefit conferred, while downplaying "the intent to administer another's affairs," *animus negotia aliena gerendi*. Parallel, but still more surprising, is their handling of a free man who falsely believes himself to be a slave and who is serving a master when he acts (*liber homo bona fide serviens*); after his correct status is vindicated, he may sue or be sued in an action on administration of his putative master's affairs: Labeo/Paul, D. 3.5.18.2; Ulpian, D. 3.5.5.7; Paul, D. 3.5.35. From this position, it clearly follows that a person who administers affairs which he believes are Titius', when they are actually Sempronius', is liable to Sempronius alone: Ulpian, D. 3.5.5.1.

3. No Mandate. For some reason I thought I had a mandate from you to administer your affairs, but in fact I did not. So of course I cannot sue you on mandate, but I am allowed to bring an action for administration of your affairs: Ulpian, D. 3.5.5 pr. Does it matter what your reason might have been for not giving me a mandate? Should it matter?

Case 221: Benefit to Oneself

D. 3.5.5.5 (Ulpianus libro decimo ad Edictum)

Sed et si quis negotia mea gessit non mei contemplatione, sed sui lucri causa, Labeo scripsit suum eum potius quam meum negotium gessisse (qui enim depraedandi causa accedit, suo lucro, non meo commodo studet): sed nihilo minus, immo magis et is tenebitur negotiorum gestorum actione. Ipse tamen si circa res meas aliquid impenderit, non in id quod ei abest, quia improbe ad negotia mea accessit, sed in quod ego locupletior factus sum habet contra me actionem.

Ulpian in the tenth book on the Edict:

But also if someone administered my affairs with a view not to my profit but to his own, Labeo wrote that he administered his own affair rather than mine—for a person who comes to plunder looks to his own gain, not to my convenience.

But nonetheless, indeed even more so, he will be liable (to me) in an action on administration of affairs. Still, if he spent something on my property, he has a (counter)action against me, not for what he lost, since he undertook my affairs improperly, but for the extent of my enrichment.

Discussion:

1. The Administrator's Benefit. There reappears here the legal concern about whether the intervenor's acts are oriented to someone else's benefit: a person who administers my affairs with an eye only to his own gain is compared to a looter. Ulpian allows me to sue the administrator for misconduct, but restricts the countersuit for compensation: it must be for the extent of the principal's enrichment, which could, of course, substantially exceed the administrator's costs. Is this decision guided mainly by equity? How easy is it to draw a sharp line between what benefits me and what benefits the administrator? It may help to think up some hypothetical examples: for instance, the Thieving Slave described in the previous Case Discussion.

2. Altruism. Zimmermann (*Obligations* 442) observes that: "[N]either the voluntariness of the action on the part of the *gestor* [administrator] nor purely altruistic motive or *amicitia* nor absence of the principal was an essential or a fundamental condition for the *actiones negotiorum gestorum* to arise. ... We have seen that the recognition of the institution of *negotiorum gestio* was one of the anti-individualistic traits of Roman law; it entailed a certain curtailment of the principal's autonomy. The *utilitas* requirement was the main safeguard to limit the extent of such curtailment." Thinking back on the Cases to this point, do you think this safeguard is entirely sufficient? Do the jurists agree on how strongly the *utilitas* requirement should be enforced?

3. Common Interests. Paul, D. 3.5.20 pr., recounts a fascinating case that arose during the Roman Republic. Three Romans were captured and held for ransom by the Lusitani, a Celtiberian tribe who lived in modern Portugal and were often at war with Rome. One Roman was released on condition that he bring back money for the ransom of all three; but if he did not return, the other two were to come up with the money for him as well. After his release the first man refused to return, but the other two managed to pay the ransom for all three. Can they then sue the first man for compensation? Paul says yes; on what theory? See also Paul, D. 17.1.22.10.

Case 222: The Intent to Seek Compensation for Expenses

C. 2.18.11 (Imp. Alexander A. Herreniae)

Alimenta quidem, quae filiis tuis praestitisti, reddi tibi non iusta ratione postulas, cum id exigente materna pietate feceris. Si quid autem in rebus eorum utiliter et probabili more impendisti, si non et hoc materna liberalitate, sed recipiendi animo fecisse ostenderis, id negotiorum gestorum actione consequi potes.

The Emperor Alexander Severus to Herrenia (227 CE):

You have no legal basis to demand compensation for support payments (*alimenta*) to your sons, since you were required to do this by motherly devotion to them (*materna pietas*). But if you paid out anything on their affairs usefully and in an acceptable matter, and you show you did this not out of maternal generosity but with the intent to be compensated, you can obtain this (expenditure) by suing on administration of affairs.

Discussion:

1. Familial Devotion. The jurists normally presuppose that administrators will want to be paid for their expenses; there is none of the hairsplitting about “volunteers” that characterizes modern law in this area. But the jurists make an exception when one family member administers the affairs of another, for here the intervention is often said to stem from *pietas*, a strong norm of commitment to one’s family members even when they are no longer legally joined (as with emancipated children or those given in adoption). Paul, D. 3.5.33, describes a complicated case in which a grandmother administered the affairs of her grandson; after the death of both, the grandmother’s heirs sued the grandson’s heirs on administration of affairs, in order to receive compensation for expenditures that the grandmother had apparently made on him. Although the grandmother might have been legally compelled to support her grandson if he was indigent (Ulpian, D. 25.3.5 pr.-4), no such order had been issued. As in the imperial rescript above, this case came to center on the balance between the duty of *pietas* as against whether the grandmother had at the time expressed a clear desire for compensation. Paul holds that this decision is a question of fact, but that doubts should be called in favor of the grandmother’s heirs. Similar issues seem to have arisen frequently among family members; see, e.g., Alexander, C. 2.18.12, 13 (both 230); Gordian, C. 2.18.15 (239); etc.

2. Friendship. A person who, out of friendship (*amicitia*) for their deceased father, administers the affairs of his orphaned sons, has no action against them for his expenses: Ulpian, D. 3.5.43. Why? See also Scaevola, D. 17.1.60.1.

Case 223: Standards of Care in Administering Another's Affairs

D. 3.5.10 (Pomponius libro vicensimo primo ad Quintum Mucium)

Si negotia absentis et ignorantis geras, et culpam et dolum praestare debes. Sed Proculus interdum etiam casum praestare debere, veluti si novum negotium, quod non sit solitus absens facere, tu nomine eius geras: veluti venales novicios coemendo vel aliquam negotiationem inundo. Nam si quid damnum ex ea re secutum fuerit, te sequetur, lucrum vero absentem: quod si in quibusdam lucrum factum fuerit, in quibusdam damnum, absens pensare lucrum cum damno debet.

Pomponius in the twenty-first book on Quintus Mucius:

If you administer the affairs of someone who is absent and unaware, you should be liable for both fault (*culpa*) and deceit (*dolus*).

But Proculus (says) that sometimes (you) should also be liable for accident (*casus*) as well, e.g., if you administer in his name a new affair that the absent person was not accustomed to do; for instance, by buying newly enslaved persons or by initiating some (new) business. For if any loss results from this thing, it falls on you, but profit (goes to) the absent person. But if profit was made in some matters and loss in others, the absent person should offset the profit with the loss.

Discussion:

1. The Administrator's Standard of Care. The standard is set relatively high, obviously so as to deter off-the-cuff intervention. The administrator is expected to carry out the intervention fully (Papinian, D. 3.5.30.2), and also to surrender to the principal any profits he receives (Gaius, D. 3.5.2 (Case 217): "whatever ... he retains from these affairs"). In administering, he is obliged to act with conscientiousness (so, at least, a postclassical source, *Pauli Sent.* 1.4.1: "One who administers another's affairs must exhibit both good faith and scrupulous care (*exacta diligentia*) for the affairs of the person for whom he intervenes."). See also Paul, D. 3.5.20.3 (liability for injudiciousness, *imprudencia*, in picking someone to run a third party's affairs), 47.2.54.3 (liability if the principal's property is stolen because of the administrator's fault). The administrator's liability for malfeasance remains even if he intervenes under emergency conditions: Ulpian, D. 3.5.3.10.

However, the standard can be raised or lowered in appropriate circumstances. Pomponius, citing the earlier jurist Proculus, indicates that when the intervention seems especially officious, the administrator is liable also for *casus*, meaning that if loss results to the principal, the administrator escapes only if it can be shown to have occurred through a "higher force." On the other hand (and somewhat surprisingly), Ulpian (D. 3.5.3.9), citing Labeo, lets the administrator off with a very low standard of *dolus* (liability only for deliberate loss) if he intervenes because he was "compelled by affection" (*affectione coactus*), such as might occur if one spouse administers the property of the other, see Celsus, D. 24.1.47 ("It is a question of fact, not of law, whether a husband who spends money on his wife's property is managing her affairs or fulfilling a husband's duty; inference as to this is not hard based on the extent and type of the expenditure"; really?). See also Case 222.

Case 224: Administering the Affairs of a Deceased Debtor

D. 3.5.12 (Paulus libro nono ad Edictum)

Debitor meus, qui mihi quinquaginta debebat, decessit: huius hereditatis curationem suscepi et impendi decem: deinde redacta ex venditione rei hereditariae centum in arca reposui: haec sine culpa mea perierunt. Quaesitum est, an ab herede, qui quandoque extitisset, vel creditam pecuniam quinquaginta petere possim vel decem quae impendi. Iulianus scribit in eo verti quaestionem, ut animadvertamus, an iustam causam habuerim seponendorum centum: nam si debuerim et mihi et ceteris hereditariis creditoribus solvere, periculum non solum sexaginta, sed et reliquorum quadraginta me praestaturum, decem tamen quae impenderim retenturum, id est sola nonaginta restituenda. Si vero iusta causa fuerit, propter quam integra centum custodirentur, veluti si periculum erat, ne praedia in publicum committerentur, ne poena traiecticiae pecuniae auferretur aut ex compromisso committeretur: non solum decem, quae in hereditaria negotia impenderim, sed etiam quinquaginta quae mihi debita sunt ab herede me consequi posse.

Paul in the ninth book on the Edict:

My debtor, who owed me fifty (thousand sesterces), died. I undertook to oversee his estate and spent ten (on it); then I placed in my strongbox one hundred received from the sale of inheritance property, and this (money) was lost through no fault of mine. The question arose whether, from the heir who eventually emerged, I can claim either the fifty in money owed or the ten that I spent.

Julian writes that the question turns on our determining whether I had a legitimate reason for separating out the hundred. For if I am obliged to pay both myself and the other inheritance creditors, I will bear the risk not only of the sixty but of the remaining forty; but I will retain what I spent, i.e., only ninety must be restored.

But if there was a legitimate reason for keeping the one hundred apart, e.g., if there was a risk that the property be forfeit to the State, (or) that a penalty on a bottomry loan be increased or that it fall due because of an arbitration agreement (*compromissum*), then I can obtain from the heir not only the ten I spent on the estate's affairs, but also the fifty that were owed to me.

Discussion:

1. Creditors of Estates. Because of the vagaries of Roman inheritance law, it was not unusual for a considerable time to elapse before a heir took over an estate, and during this time the estate “lay open” (*hereditas iacens*), to the obvious consternation of the estate's creditors. Therefore the Praetor's Edict on the *actio negotiorum gestorum* (quoted in the introduction to this section) expressly allowed a creditor to administer the estate in the meantime. Here the creditor, to whom the decedent owed 50,000 sesterces, took control of the estate and sold it at auction for 100,000 after spending 10,000 on it. His claims therefore amount to a total of 60,000. For a reason that is uncertain, he deposited the 100,000 in his personal strongbox, where it “was lost” (stolen?) through no fault on his part.

Had the money not been lost, he and the other creditors of the estate would have shared it *pro rata*, with any excess, if all of them were satisfied, going to the heir. Work out how Julian and

Chapter VIII: Quasi-Contract, page 16

Paul determine the extent of the administrator's liability depending on the reasonability of his decision to place the 100,000 in his strongbox.

Part B. Unjustified Enrichment (The *Condictio*)

It seems extraordinary that the versatile *condictio*, commonly termed a “strict law action” (*actio stricti iuris*), should have come to be the central legal remedy for unjustified enrichment. However, if a *Digest* fragment is to be trusted (though many scholars have doubted this), Roman jurists had already concluded, by the late Roman Republic, that “a *condictio* can be brought for anything held by someone for an unjust cause” (Ulpian, D. 12.5.6: *id, quod ex iniusta causa apud aliquem sit, posse condici*).

Although this fragment may originally have concerned only stolen property that a thief obviously must return to its owner, it already contains the germ of what will be the central insight of Roman law in this area: that the legal claim for restitution of unjustified enrichment is primarily, first, that a benefit has been conferred on its recipient; second, that this conferral occurred at the expense of the claimant; and, third, that the recipient must surrender the benefit to the claimant unless there is a legally acceptable reason for it being retained. The jurists came to stress this last point above all, through an analysis of what they call “cause,” *causa*. Of course, we have already encountered the concept of *causa*, for instance in relation to stipulation and half-executed exchange agreements; in fact, you should be able to observe similarities to the use of defenses in stipulation (Chapter II.E). But with unjustified enrichment the concept gradually became central to the law’s development.

Causa served the jurists complexly, above all by directing attention to whether the recipient’s retention of the benefit can be justified. For this reason, they were less concerned than we tend to be about whether the benefit was conferred “voluntarily” by the claimant (Cases 216, 225); but the jurists seldom inquire about the reasonability, or not, of the “mistake” (*error*).

More remarkably still, despite the “strict law” nature of the *condictio*, the jurists quickly realized that restitution had to be grounded in principles of fairness, *aequitas* or the *aequum et bonum*, broadly similar to what we term Equity. This was because according the claimant too much power to reclaim benefit from the recipient might often be unfair to the latter, a situation particularly poignant when the recipient was entirely faultless in receiving the benefit. Although the jurists never quite reached the point of limiting the claimant’s restitution by not leaving the recipient worse off than before the conferral, still their decisions are often imbued with this underlying intuition.

Despite Roman achievements, their law in this area is not nearly so sophisticated and broad in its reach as the modern law of unjustified enrichment in most developed nations.

Case 225: Payment by Mistake

Gaius, *Institutiones* 3.91

Is quoque, qui non debitum accepit ab eo, qui per errorem soluit, re obligatur; nam proinde ei condici potest “si paret eum dare oportere,” ac si mutuum accepisset. unde quidam putant pupillum aut mulierem, cui sine tutore auctoritate non debitum per errorem datum est, non teneri conditione, non magis quam mutui datione. sed haec species obligationis non uidetur ex contractu consistere, quia is, qui soluendi animo dat, magis distrahere uult negotium quam contrahere.

Gaius in the third book of his *Institutes*:

Likewise, a person who received what was not owed (*non debitum*) from someone who paid by mistake (*per errorem*) is obligated by the (transfer of) property (*re*). For the *condictio* can be brought against him “if it appears that he ought to convey,” just as if he had accepted a loan for use (*mutuum*).

Therefore some (jurists) think that a juvenile ward or a woman, to whom what was not owed was given by mistake without their guardian’s authorization, is not liable under a *condictio*, any more than through the giving of a loan for use. But this type of obligation is not held to arise from a contract, since a person who gives with the intent to pay wants not to contract but to discharge a matter.

The Problem:

Apronius, a banker, inadvertently deposited 25,000 sesterces into the account of Caelius, when in fact the money was intended for C. Aelius. Can Apronius recover the deposit? Does it matter that Apronius was negligent in making the deposit? That Caelius, who failed to recognize the mistake, has since spent all of the money on redecorating his house?

Discussion:

1. The Basic Elements. Gaius gives a surprisingly thorough summary of what was typically required in order to bring a *condictio* for unjustified enrichment: 1) the transfer of property to a recipient, which 2) occurs because of a putative transaction such as a payment of a debt, and 3) is based on a mistake (*error*) by the transferor as to the transaction. The transferor can then reclaim the transferred property, or its value, through a *condictio*; Gaius regards this as roughly similar to reclaiming a loan (where no mistake is involved). The original core idea, therefore, is recovery of a benefit that, because of the claimant’s mistake, the recipient is not entitled to retain.

As the law developed, these typical requirements were often relaxed or even ignored. Just as an example, Pomponius, D. 12.6.22.1, allows a *condictio (incerti)* when a landowner conveys a farm but by mistake does not retain a right of way over the farm; the action obliges the transferee to surrender the right of way, which had been implicitly withheld in the farm’s conveyance.

2. Loans to Wards and Women. Orphans under the age of puberty (by convention, 14 for boys, 12 for girls) usually require authorization from their guardian (*tutor*) before they can validly receive a loan, since they would thereby incur a contractual obligation (Gaius, *Inst.* 3.107 (Case 1)). Adult women, if not under a *paterfamilias*, had once been in a similar position (see

Cicero, *Caec.* 72), and, although their legal independence steadily increased during the early Empire, may still have been (Gaius, *Inst.* 3.108); their guardian's authorization was, however, just a formality (*ibid.* 1.190 (Case 5)). An unauthorized loan to a juvenile ward or a woman was irrecoverable by the lender. However, as Gaius observes, the balance swings toward the transferor when a mistaken payment is involved; see also Case 227 below.

3. Examples. In which of the following cases would a plaintiff have a *condictio* based on a mistaken payment:

- I promised payment to you, but mistakenly believed that my promise had been to pay either you or Titius; I pay Titius; can I recover the payment from Titius? (Pomponius, D. 12.6.22 pr.; Diocletian and Maximian, C. 4.5.8 (294).)
- I promised to give you the slave Stichus, but I mistakenly believe I promised either Stichus or Pamphilus; I give you Pamphilus (who is more valuable than Stichus); can I reclaim Pamphilus and give you Stichus instead? (Pomponius, D. 12.6.19.3.)
- I owe you 100, but mistakenly believe I owe you 200; in payment, I make over to you a farm worth 200; can I recover the excess 100? (Ulpian, D. 12.6.26.4-6.)
- I made a binding promise to give you 10 or Stichus; by mistake I gave you 5. If I am now willing to give you Stichus instead, can I use the *condictio* to recover the 5? (Ulpian, D. 12.6.26.13. Warning: this one is hard.)
- I think I have promised to pay you a specified sum, and by mistake I pay you with coins belonging to a third party; can I recover the coins if they are not yet mixed with your other money? Does it matter whether my debt was a real one? (Pomponius, D. 12.6.19.2, and Paul, D. 12.6.15.1, disagreeing on the answer.)
- Under a will, I as the heir owe you an annuity; I agree with you on a settlement of this debt, and I make the payment. Our settlement is, however, void as the result of a statute. Can I recover my payment? (Ulpian, D. 12.6.23.2.)
- I promised to give you either the slave Stichus or a sum of money, and by mistake I pay you both; can I sue to recover one or the other, and, if so, who gets to make the choice? (Justinian, C. 4.5.10, settling a juristic controversy.)

4. What Justifies Recovery for Unjustified Enrichment? If you have ever played Monopoly, you will remember the card reading: "Bank Error in Your Favor—Collect \$200." But in fact, if a banker inadvertently pays money to you or into your account, our law, like Roman law, requires you to refund it, even if the bank's error was owing to its own negligence. In modern law, safeguards are in place to protect you from unfair treatment, but the principle remains the same. As you read this and subsequent cases, you should think about why banks (like other payers) are afforded such leniency to "call back" their mistakes, and also about what legal protections ought to be afforded to recipients.

Case 226: Requirements: Mistake

D. 12.6.1.1 (Ulpianus libro vicensimo sexto ad Edictum)

Et quidem si quis indebitum ignorans solvit, per hanc actionem condicere potest: sed si sciens se non debere solvit, cessat repetitio.

D. 22.3.25 pr.-1 (Paulus libro tertio quaestionum)

pr. Cum de indebitum quaeritur, quis probare debet non fuisse debitum? ... Et ideo eum, qui dicit indebitas solvisse, compelli ad probationes, quod per dolum accipientis vel aliquam iustam ignorantiae causam indebitum ab eo solutum, et nisi hoc ostenderit, nullam eum repetitionem habere. **1.** Sin autem is qui indebitum queritur vel pupillus vel minor sit vel mulier vel forte vir quidem perfectae aetatis, sed miles vel agri cultor et forensium rerum expers vel alias simplicitate gaudens et desidia deditus: tunc eum qui accepit pecunias ostendere bene eas accepisse et debitas ei fuisse soltuas et, si non ostenderit, eas redhibere.

Ulpian in the twenty-sixth book on the Edict:

And indeed if someone through lack of awareness paid an unowed debt, by this action he recovers it. But if he paid while knowing he did not owe it, restitution fails.

Paul in the third book of his Questions:

pr. When question arises about what is not owed, who should prove that it was not owed? ... And so (the answer is that) he who says he paid unowed (money) is forced to show proof that an unowed debt was paid by him through the recipient's deceit (*dolus*) or some legitimate reason for his lack of knowledge, and, unless he shows this, he will not get restitution. **1.** But if the person complaining about an unowed debt is either a juvenile ward or a young person (under 25) or a woman or, perhaps, an adult male (but) either a soldier or farmer and (thus) inexperienced in legal matters, or otherwise enjoying naïveté and given over to idleness, then the money's recipient shows that he received it properly and that what was owed was paid him; and, if he does not show this, he returns it.

Discussion:

1. What Is Meant by Mistake? Any lawyer will likely be uneasy with a general rule like Ulpian's. What exactly is meant by "lack of awareness" (*ignorantia*) or "mistake" (*error*)? Does it matter how the mistake came about, and in particular if the giver was careless? Are all mistakes equal, or are some more serious than others? Are only mistakes of fact relevant, or do mistakes of law also count? But the classical jurists appear to have left these questions unanswered, so that a *iudex* determined for himself what mistakes invalidated a payment. What can be said in favor of, or against, this strongly case-oriented approach?

2. Justinian Intervenes. From its wording and its style, it is clear that the second passage, although attributed to the jurist Paul, was entirely written by the compilers of the Digest, who imposed on claimants a duty to show that they had paid an unowed debt, while reversing this burden of proof for claimants who, owing to their inexperience, were especially likely to face difficulty in court. At the same time, later law allowed claimants only to allege ignorance of fact, not of law; e.g., Diocletian and Maximian, C. 1.18.10 (294 CE), which was also interpolated by the compilers from a rule once more narrowly applied (Gordian, C. 6.50.9 (238)). However, Justinian

Chapter VIII: Quasi-Contract, page 21

allows claimants to show that, despite the appearance of a settlement, they paid because of uncertainty about their legal position: C. 4.5.11 (530). Did the emperor get it right?

Case 227: Requirements: A Transaction and the Transfer of Property

D. 12.6.33 (Iulianus libro trigensimo nono Digestorum)

Si in area tua aedificassem et tu aedes possideres, *condictio* locum non habebit, quia nullum negotium inter nos contraheretur: nam is, qui non debitam pecuniam solverit, hoc ipso aliquid negotii gerit: cum autem aedificium in area sua ab alio positum dominus occupat, nullum negotium contrahit. Sed et si is, qui in aliena area aedificasset, ipse possessionem tradidisset, *condictionem* non habebit, quia nihil accipientis faceret, sed suam rem dominus habere incipiat. Et ideo constat, si quis, cum existimaret se heredem esse, insulam hereditariam fulsisset, nullo alio modo quam per retentionem impensas servare posse.

Julian in the thirty-ninth book of his *Digests*:

If I constructed a building on your site and you possess it, the *condictio* will not lie (against you) because no transaction (*negotium*) was contracted between us. For a person who pays money that is not owed manages a kind of transaction by this very act. But when the owner (of the land) occupies a building placed on his site by a third party, he does not contract a transaction.

But also if he had constructed on another's site and had himself handed over possession, he will not have a *condictio* because he conveys nothing to the recipient; rather, the owner begins to hold his own property. And so it is settled that if someone, thinking he is an heir, propped up an apartment building in the inheritance, he can recover his expenses in no other way than by retention (of the building).

Discussion:

1. Construction by a Good Faith Possessor. Assume that I, as the builder, mistakenly construct a building on land that you own. By law, the building accedes to the land (the venerable maxim is *superficies solo cedit*), with the result that you can claim ownership of the building; but this may leave the builder uncompensated. In Julian's view, even if I am entirely blameless (e.g., I was misled by a surveyor), I recover nothing if you have already taken possession of the building, even if I bowed to reality and invited you to do so. My only chance for recovery is if I still retain possession and force you into court, where you will ordinarily be obliged to pay my expenses before you can evict me. The jurists try to mitigate this rule; see, e.g., Celsus, D. 6.1.38, and Gaius, D. 41.1.7.10. But it still seems very harsh, doesn't it? Our law is considerably more evenhanded.

2. A Transaction. Julian argues for his rule by asserting that there is no genuine "transaction" (*negotium*) between the builder and the landowner, so that even a polite handover actually "conveys nothing" but what the landowner already owns, rather like returning lost property to its rightful owner. How convincing is this? Note Gaius' logic in Case 225 above: when an unowed payment is made to a juvenile ward without a guardian's authorization, some jurists (Julian quite possibly among them, see Julian, D. 26.8.13) thought the giver could not reclaim the payment, presumably because the "transaction" was void and non-existent. Gaius rejects this reasoning, but Pomponius, D. 46.3.66, appears to accept it. Which view is correct?

Case 228: Requirements: Absence of a Basis for Retention of Benefit

D. 12.6.66 (Papinianus libro octavo Quaestionum)

Haec conditio ex bono et aequo introducta, quod alterius apud alterum sine causa deprehenditur, revocare consuevit.

D. 12.7.1 (Ulpianus libro quadragesimo tertio ad Sabinum)

pr. Est et haec species conditionis, si quis sine causa promiserit vel si solverit quis indebitum. Qui autem promisit sine causa, condicere quantitatem non potest quam non dedit, sed ipsam obligationem. **1.** Sed et si ob causam promisit, causa tamen secuta non est, dicendum est conditionem locum habere. **2.** Sive ab initio sine causa promissum est, sive fuit causa promittendi quae finita est vel secuta non est, dicendum est conditioni locum fore. **3.** Constat id demum posse condici alicui, quod vel non ex iusta causa ad eum pervenit vel redit ad non iustam causam.

Papinian in the eighth book of his *Questions*:

This *condictio*, created on the basis of what is right and fair (*ex bono et aequo*), has become the way to reclaim what belongs to one person and is held by another without cause (*sine causa*).

Ulpian in the forty-third book on Sabinus:

pr. There is also this type of *condictio* if someone promises without cause (*sine causa*) or if someone pays what is not owed. **1.** But also if he promised for a reason (*ob causam*) but the cause did not come to pass, it must be held that the *condictio* lies. **2.** Whether the promise was from the start without cause, or there was a cause for the promise which has ended or not come to pass, it must be held that the *condictio* will lie. **3.** It is settled that the *condictio* can be brought against someone for that which either did not come to him for a legitimate reason (*ex iusta causa*) or which reverts to an illegitimate reason (*ad non iustam causam*).

Discussion:

1. Causa. Papinian's terse formulation stresses the equitable character of the *condictio* (see also Celsus, D. 12.1.32; Ulpian, D. 12.4.3.7 (citing Celsus: *naturalis aequitas*); Paul, D. 12.6.65.4), which justifies restitution when one person holds another's property *sine causa*. The word *causa* is extremely vague in juristic sources, but here it refers to the legal foundation for the recipient's continuing to hold the claimant's property. This foundation can usually be located by examining how the recipient came to hold the property and whether that basis still subsists; so, for instance, if the property were a gift, the object of a sale, a bequest from a deceased person, and so on. If there are no such grounds, then the property is being held *sine causa*. This potent idea is not yet highly developed by the jurists, but becomes ever more salient in subsequent legal writing.

2. Types of Lack of Cause. In a dense fragment, Ulpian makes out three basic ways in which a recipient may be holding a claimant's property *sine causa*:

1. The claimant may have conveyed it to the recipient (or even formally promised to pay it, by stipulation) without having a real reason for doing so, as when conveyance is the result of a mistaken belief in a debt (*indebitum*);

2. The claimant may have conveyed it in the justified expectation that some event would occur as a consequence, as when a dowry is given in the anticipation of an ensuing wedding; if that event does not occur, a conveyance that originally had a *causa* turns out not to have one (*datio ob causam; causa data, causa non secuta*) and restitution becomes available. (You have already encountered this idea in Chapter VI.B.);
3. The claimant may have conveyed it on a basis that was entirely valid and unconditional at the time, but which subsequently became invalid (*ob causam finitam*), a category discussed in the following Case.

In all these ways, a *condictio* may lie against the recipient. As will be obvious, the theory of *causa* helped the jurists move beyond the initial situation of payments made by mistake. The movement forward may have begun ca. 100 CE, as is suggested by Javolenus, D. 12.4.10: A woman who was about to marry gave her husband-to-be a dowry in the form of a receipt for payment of money that he owed her, but the marriage did not come off. Here, no money passed from her to him, but, says Javolenus, she can still bring a *condictio* “because it makes no difference whether the money came to him by being paid out *sine causa*, or through a receipt.”

In later law, as also in the Digest and Codex of Justinian, these various forms of *causa* tend to be presented separately, but in the law of the jurists they were not, it seems. The underlying *condictio*, in any case, is always the same.

3. Reclaiming a Promise. Ulpian permits a claimant to recover for a mistake not only when he made a payment, but also when he made a binding promise. Such a promise (usually made through a stipulation) can have value to the promisee in future litigation or just as an asset that can even be sold. The claimant’s suit is for release from the promise, or at least for relaxation of it to the extent of the mistake; see Julian, D. 12.7.3, and Alexander, C. 4.30.4.

Case 229: Subsequent Failure of Cause

D. 12.7.2 (Ulpianus libro trigensimo secundo ad Edictum)

Si fullo vestimenta lavanda conduxerit, deinde amissis eis domino pretium ex locato conventus praestiterit posteaque dominus invenerit vestimenta, qua actione debeat consequi pretium quod dedit? Et ait Cassius eum non solum ex conducto agere, verum condicere domino posse: ego puto ex conducto omnimodo eum habere actionem: an autem et condicere possit, quaesitum est, quia non indebitum dedit: nisi forte quasi sine causa datum sic putamus condici posse: etenim vestimentis inventis quasi sine causa datum videtur.

D. 19.1.11.6 (Ulpianus libro trigensimo secundo ad Edictum)

Is qui vina emit arrae nomine certam summam dedit: postea convenerat, ut emptio irrita fieret. Iulianus ex empto agi posse ait, ut arra restituatur, utilemque esse actionem ex empto etiam ad distrahendam, inquit, emptionem. Ego illud quaero: si anulus datus sit arrae nomine et secuta emptione pretioque numerato et tradita re anulus non reddatur, qua actione agendum est, utrum condicatur, quasi ob causam datus sit et causa finita sit, an vero ex empto agendum sit. Et Iulianus diceret ex empto agi posse: certe etiam condici poterit, quia iam sine causa apud venditorem est anulus.

Ulpian in the thirty-second book on the Edict:

If a fuller undertakes to clean clothes, and then, when the clothes are lost, is sued on the contract (*ex locato*) and pays their price to the owner (of the clothes), and the owner later finds the clothes, by what action should he (the fuller) pursue the price he paid? Cassius says not only can he sue on the contract, but he can also bring a *condictio* against the owner (of the clothes). I think that he has the action on the contract in any case; but the question was whether he can also bring a *condictio* because he gave what was not owed. Unless, perhaps, we think he can bring a *condictio* for what was given without cause (*sine causa*), for once the clothes were found the payment is held to be as though without cause (*quasi sine causa*).

Ulpian in the thirty-second book on the Edict:

The buyer of wine gave a specified sum (of money) as an earnest (*arra*). Later they had agreed that the sale became void. Julian says action can be on the purchase (*ex empto*) for restitution of the earnest, and, he says, there is an analogous action on the purchase also to discharge the purchase.

I ask this: if a ring was given as an earnest and, after the sale followed and the price was paid and the object of sale transferred, the ring is not returned, by what action should suit be brought: whether a *condictio* on the theory that it was given for a reason (*ob causam*) and the cause has ended, or rather an action on purchase? And Julian would say that action can be brought on the purchase; (but) a *condictio* could also be brought because the ring is now in the seller's hands without cause (*sine causa*).

Discussion:

1. The Fuller and the Wine Buyer. On fullers, see Case 164. This fuller lost his client's clothing and then paid compensation when sued on the contract for a job (*ex locato*). The problem arose when the client later recovered his clothing. It clearly seems unfair, doesn't it, that the client can keep both the compensation and the clothing; but how should suit be brought? The jurists allow the fuller to sue on the contract (*ex conducto*) despite the earlier verdict, but also provide him a *condictio*. As to the latter, they differ a little on the theory. Cassius, writing ca. 50 CE, regards the fuller's compensation as "unowed" (*indebitum*) even though, at the time of the first lawsuit, it plainly was owed. Ulpian, with a bit of hesitation, prefers to believe rather that the *causa* for the payment lapsed after the clothing was recovered; this view was made possible by the more advanced *causa* theories of the later jurists.

2. The Wine Buyer. He is not quite in the same situation as the fuller. An earnest payment (*arra* or *arrha*), similar to a modern deposit, was commonly thought to secure a sale even though only the parties' informal agreement was actually required (see Ulpian, D. 14.3.5.15 (Case 205), and Case 78); but a ring might also be used as a token of agreement. If the sale went through, the earnest would be offset against the price, while the ring would normally be returned. The text sets two problems: 1) if the sale agreement becomes void, how can the buyer get the earnest back (Julian gives an action on sale, compare the Cases in Chapter IV.A.3; but would a *condictio* also be appropriate?); 2) if the sale goes through but the seller declines to return the ring, what action? In the second case, note that the jurists seem to assume the seller became (temporary) owner of the ring, so they do not consider a property claim. What justifies the *condictio*?

3. Double Payment. Ulpian, D. 17.1.29.3, puts the following problem: A surety for a debt (*fideiussor*; see Chapter II.F) paid the creditor without informing the debtor, who subsequently also paid the creditor for the same debt. Clearly the surety's payment was legitimate when it was made, and he was also negligent not to have informed the debtor of this payment. But can the surety recover what he paid either from the creditor or from the debtor? Ulpian writes: "I believe that if, when he did not inform him when he could have done so, the surety's suit on mandate (against the debtor) should be rebuffed, since it is close to deceit (*dolus*) if he did not inform the debtor after his payment. But by an action on unowed payment (*actio indebiti*) the defendant (debtor) should cede (his action against the creditor) to the surety so that the creditor not receive double payment." The surety's failure to notify the debtor violated his duty as a mandatary and so he loses that suit; but he still can sue the debtor on unjustified enrichment, since he could have sought reimbursement from the creditor but apparently chose not to. If the opinion's final sentence gives good law, this action results not in the debtor having to pay the surety, but rather in his being forced to surrender his claim against the creditor—a rather extraordinary example of equitable relief.

Case 230: Misunderstanding about the Basis of a Transaction

D. 12.1.18 (Ulpianus libro septimo Disputationum)

pr. Si ego pecuniam tibi quasi donaturus dederō, 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 conditione teneatur, tamen doli exceptione uti poterit, quia secundum voluntatem dantis nummi sunt consumpti. **1.** Si ego quasi deponens tibi dederō, tu quasi mutuam accipias, nec depositum nec mutuum est: idem est et si tu quasi mutuam pecuniam dederis, ego quasi commodatam ostendendi gratia accepi: sed in utroque casu consumptis nummis conditioni sine doli exceptione locus erit.

Ulpian in the seventh book of his Disputations:

pr. If I give money to you as a gift and you receive it as a loan for consumption (*mutuum*), Julian writes that there is no gift. But let us see whether there is a loan. And I think that there is also no loan and further that the coins do not become the recipient's, since he receives them with a different understanding. So if he spends them, although he is liable in a *condictio*, nonetheless he will be able to use the defense of fraud (*exceptio doli*) because the coins were spent in accord with the giver's intent.

1. If I give (money) to you as a depositor and you receive (it) as a loan for consumption (*mutuum*), there is neither a deposit nor a loan. The same is true also if you give money as a loan for consumption (*mutuum*) and I received it as a loan for use (*commodatum*) in order to display it. But in either case, if the coins are spent, the *condictio* will lie without the defense of fraud.

Discussion:

1. Agreement (*Consensus*). If the result in the *principium* seems to you absurd, you are exactly right. I intend you to have a gift, and you mistakenly think I am making you a loan. There is no gift; whyever not? But there is also no loan, and the coins, until they are dispersed into commerce, remain mine, so I can bring a property claim; but thereafter I can bring a *condictio* for their value, which you can only defend by interjecting the defense of fraud. Why do the jurists seem to get this situation so wrong? A good starting point is Paul, D. 44.7.3.1, which holds: "But, for an obligation to arise, it is not enough that the coins are the giver's and become the recipient's; (they must) also be given and received with the intent (*animus*) that an obligation be formed. And so if someone gives me his money as a donation, although it both was the giver's and becomes mine, still I am not obligated to him because this was not transacted between us." But is a gift an obligation? What if the situation was reversed: I meant to lend, you thought I made a gift?

Ulpian's holding is not easily reconciled with Julian, D. 41.1.36: "... For also if I count out and hand over to you money as a gift, and you take it as a loan, there is agreement (among jurists) that ownership passes to you, nor is it an obstacle that we disagree about the reason (*causa*) for giving and receiving."

2. *Mutuum, Depositum, and Commodatum.* The situations in fragment 1 are a good deal likelier to occur. You leave a sum of money with me for safekeeping, and for some reason I assume you are allowing me to make use of it, so long as I return the same amount. Or I intended

a loan and you thought of it as exhibition material. There is no contract, but, after the identity of the coins is lost, a *condictio* can be brought. Why no defense of fraud?

3. Celsus' Problem. You ask both me and Titius for a loan of money. I order my debtor to promise you the money, and he does so; but you think it is Titius' debtor who made the promise. Are you obligated to me? Celsus, D. 12.1.32, sees the difficulty: "My position is unchanged if you have contracted no business (*negotium*) with me. But it is better that I think you are obligated, not because I lent money to you—for this cannot occur except between people who agree—but because my money came to you, and it is right and fair (*bonum et aequum*) that you return this to me." The debtor's payment, on my order, extinguishes his debt to me, and I thereby sustain a loss; but Julian's requirement of a transaction (Case 227) stands in the way, right? Celsus uses equity to steer a path around this requirement and allow for a *condictio*. Is he successful, particularly in evading the issue of intent, *animus*? Why does Celsus refer to the money paid by my debtor as "my money"?

4. Settling Disputed Claims. We agree on a payment to settle our dispute. Can the amount that was given be reclaimed if the dispute was in fact unfounded? Paul, D. 12.6.65.1, says no, unless the dispute involved an obviously false claim (*evidens calumnia*). Right solution?

Case 231: Frustration of Purpose

D. 12.4.16 (Celsus libro tertio Digestorum)

Dedi tibi pecuniam, ut mihi Stichum dares: utrum id contractus genus pro portione emptio et venditionis est, an nulla hic alia obligatio est quam ob rem dati re non secuta? In quod proclivior sum: et ideo, si mortuus est Stichus, repetere possum quod ideo tibi dedi, ut mihi Stichum dares. Finge alienum esse Stichum, sed te tamen eum tradidisse: repetere a te pecuniam potero, quia hominem accipientis non feceris: et rursus, si tuus est Stichus et pro evictione eius promittere non vis, non liberaberis, quo minus a te pecuniam repetere possim.

Celsus in the third book of his Digests:

I gave you money in order that you give me (the slave) Stichus. Is this type of contract to some extent a purchase and sale (*emptio venditio*), or is there no obligation here other than for a thing given for a purpose that was not realized (*ob rem dati re non secuta*)? I incline more to the latter view. And so, if Stichus died (before delivery to me), I can reclaim what I gave to you in order that you give me Stichus.

Suppose that Stichus belonged to a third party, but you nevertheless handed him over (without title). I will be able to reclaim the money from you because you did not make the slave the recipient's property. And again, if Stichus is yours and you refuse to give a guarantee against eviction, you will not be freed from my being able to reclaim the money from you.

Discussion:

1. "To Some Extent a Purchase." Money for a slave: at first glance, this certainly does look like a sale. If it were, the death of Stichus, or the seller's failure to deliver title or to guarantee against eviction by a true owner, would be treated according to the ordinary rules of sale discussed in Chapter IV above (especially Section B.1 and 4); that is, the buyer would sue on the purchase, *ex empto*, to recover damages, if and to the extent that the law allowed this. Instead, Celsus turns to the rules for half-executed exchange agreements (see especially Case 190) and allows the putative buyer the option of seeking restitution of the price he paid. Does the jurist's move here present a problem? Observe that, especially in the case when Stichus died of natural causes before delivery, usually the buyer bore that risk (Cases 110-111, 113), meaning that the seller was still entitled to the price unless he was somehow at fault for the slave's death. Was Celsus doing an end run around this rule? (In truth, though, this fragment has been the subject of extensive scholarly debate; it remains quite unclear what Celsus was up to.)

Case 232: Dowry for an Incestuous Marriage

D. 12.7.5 (Papinianus libro undecimo Quaestionum)

pr. Avunculo nuptura pecuniam in dotem dedit neque nupsit: an eandem repetere possit, quaesitum est. Dixi, cum ob turpem causam dantis et accipientis pecunia numeretur, cessare con-dictionem et in delicto pari potioem esse possessorem: quam rationem fortassis aliquem secu-tum respondere non habituram mulierem con-dictionem: sed recte defendi non turpem causam in proposito quam nullam fuisse, cum pecunia quae daretur in dotem converti nequiret: non enim stupri, sed matrimonii gratia datam esse. **1.** Noverca privigno, nurus socero pecuniam dotis nom-ine dedit neque nupsit. Cessare con-dictio prima facie videtur, quoniam iure gentium incestum committitur: atquin vel magis in ea specie nulla causa dotis dandae fuit, con-dictio igitur competit.

Papinian in the eleventh book of his Questions:

pr. A woman who was about to marry her maternal uncle gave (him) money for a dowry, but (in the end) did not marry him. It was asked whether she can reclaim it.

I held that, when money was paid because of an immoral cause (*ob turpem causam*) both of giver and recipient, the *condictio* fails and the (current) possessor pre- vails when the wrong is the same on both sides. Now someone who accepts this reasoning might perhaps respond that the woman will (therefore) not have a *condictio*. But the cor- rect reply is that in the hypothetical case the cause (*causa*; for the payment) was not im- moral, but nonexistent, since the money that was given cannot be turned into a dowry; it was given not for an improper sexual relation but for a marriage.

1. A stepmother gave money as a dowry to a stepson, or a daughter-in-law to a father-in-law, and (each of them) did not then marry. The *condictio* seems on its face to fail since, by the Law of Nations (*ius gentium*), incest is committed. However, the better view in this case is that there was no basis (*causa*) for giving a dowry; therefore the *con- dictio* lies.

Discussion:

1. Immorality and Restitution. The proposed marriage clearly violated Roman rules on incestuous marriages (*Tituli Ulp.* 5.6-7; Justinian, *Inst.* 3.6), and would therefore have been void. The problem was the woman's dowry payment; is she entitled to reclaim it through a *con- dictio*? Papinian's initial response suggests that since both the woman and her uncle were partic- ipating in the illegality, the payment stays with the recipient. They are, as the Romans say, *in pari turpitudine*, equally reprehensible, and so a court will not intervene—a potentially harsh legal rule also enforced in Common Law. (Paul, D. 12.5.8, gives the explanation.) Clear examples are a liti- gant paying a judge for a verdict (Ulpian, D. 12.5.2.2; Paul, D. 12.5.3) or a thief paying hush-money to a witness (Ulpian, D. 12.5.4.1). Payments for sexual offenses produce the same result: Ulpian, D. 12.5.4 pr. (*stuprum* or adultery).

But it may seem unfair (particularly if the social context is considered) to leave the matter there. Clearly the case was contentious, but Papinian reasons that since marriage could not result, her payment lacks *causa* and therefore she can reclaim it. Is this reasoning correct? (Or is he just being solicitous of the woman?) With regard to the dowry payment, how would the legal situation change if the couple had attempted to carry out the marriage?

What is interesting in this fragment is how the jurists manipulate the concept of *causa* in the interests of equity.

2. Immorality of the Giver. In determining whether a payment for an immoral cause can be reclaimed, it is really only the giver's innocence that is crucial. Thus, a *condictio* lies for money extorted from me by force (Pomponius, D. 12.5.7) or threat (Ulpian, D. 12.5.2 pr.-1, 4.2); but not if the immorality is mine alone (Paul, D. 12.5.1 pr.) or shared by both parties. This leads to a famous, highly sophisticated opinion by the jurists: "What is given (as payment by a customer) to a prostitute cannot be reclaimed, as Labeo and Marcellus write, but with novel reasoning: because what is involved is not the baseness of both parties, but only that of the giver, since she acts basely because she is a prostitute, but does not take money basely because she is a prostitute." Ulpian, D. 12.5.4.3.

Case 233: Extent of Recovery and Change of Position

D. 12.6.65.5-8 (Paulus libro septimo decimo ad Plautium)

5. Ei, qui indebitum repetit, et fructus et partus restitui debet deducta impensa. 6. In frumento indebito soluto et bonitas est et, si consumpsit frumentum, pretium repetet. 7. Sic habitatione data pecuniam condicam, non quidem quanti locari potuit, sed quanti tu conducturus fuisses. 8. Si servum indebitum tibi dedi eumque manumisisti, si sciens hoc fecisti, teneberis ad pretium eius, si nesciens, non teneberis, sed propter operas eius liberti et ut hereditatem eius restituas.

Paul in the seventeenth book on Plautius:

5. After deducting expenses, both fruits (*fructus*) and offspring should be restored to a person reclaiming an unowed payment. 6. In the case of unowed grain that was paid, he will also reclaim its price if he (the recipient) consumed the grain.

7. So, when the right to dwell (*habitatio*) is given, my *condictio* is for the money: not, indeed, for as much as it could have been leased for, but for as much as you would have rented it for.

8. If I gave an unowed slave to you and you manumitted him, if you did this knowingly, you will be liable for his price; if unknowingly, you will not be liable, except for the services (*operae*) of this freedman and for restoring the (right of) inheritance from him.

Discussion:

1. Problems with Restitution. Restitution is an easy enough idea to understand, but often difficult to implement, in our law no less than in Roman. The original ambit of the *condictio* was for a specific amount of money (or of other fungibles, such as grain) or of a specific object (*certa res*); and the aim of restitution was just to put claimants back into their position before the conferral. So, assuming that the conferral itself could not be returned (the money may have been spent, or the object lost), a judgment was in most cases simply for the amount or for an object's price, with adjustments for the claimant's lost profit and the recipient's expenses in the meantime.

But as a more equitable understanding of *condictio* emerged, the original measures began to seem unfair particularly to a recipient who may have changed position. In section 8, I mistakenly give you a slave whom you free without knowing of my mistake; is it fair to ask you to return the slave's price, or indeed anything beyond the legal claims you as an ex-master have against the freed slave? (Paul's holding here seems inconsistent with that in section 6, doesn't it, unless we assume that the recipient consumed the grain while knowing of the claimant's mistake.) In other words, the jurists began to move, with agonizing slowness, towards a fairer solution.

The most intricate situation is in section 7, where, apparently owing to a mistake (doubtless as the consequence of estate settlement), the recipient gets the right to dwell for free in a building (*habitatio*) and does so. The claimant (no doubt the heir) now wants rent money, but this claim is limited: not the market value of a lease, but an amount that takes into account the recipient's circumstances. Here the aim starts to be to remove the benefit from an innocent recipient but without leaving him or her in a worse position, even if this results in some loss to the claimant: a new and very powerful idea. Do you see why? But this development is highly uneven in our sources.

2. Pomponius' Problem. A juvenile ward (*pupillus*) cannot become obligated without a guardian's authorization. Pomponius, D. 46.3.66, puts the case of a ward who owes money to a creditor and who, without his guardian's authorization, orders a third party, whom he wrongly takes to be his debtor, to pay the money to the creditor. After the payment, what is the mistaken debtor's position? Technically, the debtor cannot bring a *condictio* against the ward, since the latter is not obligated owing to the missing authorization from the guardian; nor can he seek restitution from the ward's creditor since he acted on the basis of the ward's order and thereby freed the ward from liability to the creditor. So what is to be done? Pomponius: "But the ward will be liable in an analogous action (*actio utilis*) to the extent he became wealthier because he was freed from the debt." This invention of a *condictio* based on the factual situation is a purely *ad hoc* solution to the legal dilemma, arising out of equity, but the outcome is nonetheless important for incorporating into law the idea of surrendering unjustified enrichment.

Case 234: Unowed Services by a Freedman

D. 12.6.26.12 (Ulpianus libro vicensimo sexto ad Edictum)

Libertus cum se putaret operas patrono debere, solvit: condicere eum non posse, quamvis putans se obligatum solvit, Iulianus libro decimo digestorum scripsit: natura enim operas patrono libertus debet. Sed et si non operae patrono sunt solutae, sed, cum officium ab eo desideraretur, cum patrono decedit pecunia et solvit, repetere non potest. Sed si operas patrono exhibuit non officiales, sed fabriles, veluti pictorias vel alias, dum putat se debere, videndum an possit condicere. Et Celsus libro sexto digestorum putat eam esse causam operarum, ut non sint eadem neque eiusdem hominis neque eidem exhibentur: nam plerumque robor hominis, aetas temporis opportunitasque naturalis mutat causam operarum, et ideo nec volens quis reddere potest. Sed hae, inquit, operae recipiunt aestimationem: et interdum licet aliud praestemus, inquit, aliud condicimus: ut puta fundum indebitum dedi et fructus condico: vel hominem indebitum, et hunc sine fraude modico distraxisti, nempe hoc solum refundere debes, quod ex pretio habes: vel meis sumptibus pretiosorem hominem feci, nonne aestimari haec debent? Sic et in proposito, ait, posse condici, quanti operas essem conducturus. Sed si delegatus sit a patrono<, an teneatur alii exhibere> officiales operas, apud Marcellum libro vicensimo digestorum quaeritur. Et dicit Marcellus non teneri eum, nisi forte in artificio sint (hae enim iubente patrono et alii edendae sunt): sed si solverit officiales delegatus, non potest condicere neque ei cui solvit creditori, cui alterius contemplatione solutum est quique suum recipit, neque patrono, quia natura ei debentur.

Ulpian in the twenty-sixth book on the Edict:

In the (false) belief that he owed them, a freedman rendered services (*operae*) to his patron. In the tenth book of his *Digests*, Julian wrote that he cannot bring a *condictio* even though he paid under the belief he was obligated, since by Nature a freedman owes services to his patron. But also if the services were not rendered to the patron, and instead, when his duty (*officium*) was requested, he arranged for and paid a monetary equivalent to his patron, restitution is also impossible.

But if, in the (false) belief he owes them, he renders to his patron services that are not duteous but craftsmanly (*non officiales, sed fabriles*), such as painting or the like, consider whether he can bring a *condictio*. Celsus, in the sixth book of his *Digests*, thinks it is the nature of services that they differ in kind and with respect to the giver and to the recipient. For often a person's strength, age, and the natural circumstances change the nature of services, and so he cannot render them even willingly. Still, he says, (the value of) these services can be estimated.

And sometimes, he says, although we proffer one thing, we bring a *condictio* for another. For instance, I gave you an unowed farm and I bring a *condictio* for the fruits. Or (I gave you) an unowed slave, and you, without fraud, sold him for a low price; surely you need only refund what you (still) have from the price. Or I made the slave more valuable by my expenditures; shouldn't they (the expenditures) be estimated? So also, in the hypothetical case (above), he says a *condictio* can be brought for the amount I (the patron) would have rented these services for.

But question is raised by Marcellus, in the twentieth book of his *Digests*, whether he (a freedman) who was delegated by his patron is liable to render duteous services (*officiales operae*) to a third party. Marcellus says that he is not liable except if, perchance, they consist in a skill (*artificium*), since those can also be rendered to a third party on a patron's order. But if after being delegated he renders duteous ones, he can bring a *condictio* neither against the creditor to whom he rendered them, since they were rendered to him with a view to (satisfying) another person and he (the creditor) receives (only) what is his; nor against his patron, because they were owed to him by Nature.

Discussion:

1. Services. In freeing their slaves, masters often imposed on them certain duties, called *operae*, conceived as “work days.” By law, they were not to be excessive and, as Celsus indicates, had to be suitable to the age, status, and training of the freedperson: Ulpian, D. 38.1.2; Paul, D. 38.1.16.1. The slave promised to provide them just before being freed; and this promise was later, somewhat anomalously, made legally enforceable. Because they usually stem from the ex-slave's “duty” (*officium*), they are called *officiales*, and they are owed only to the ex-master patron and his or her descendants, so they are non-transferable to third parties.

These highly personal services are distinguished from “craftsmanly services” (*operae fabriles*), which are essentially those that can be purchased on the open market and hence have a monetary value. These the patron can order the freedperson to perform for third parties: Ulpian, D. 38.1.6, 9.1.

Trace out how Celsus, Julian, Marcellus, and Ulpian go about handling these two types of services when a freedperson performs them under the mistaken belief that he must do so. On delegation, see Case 211.

2. Damages. In the third paragraph of the translation, Celsus is cited (more than a little off-point) as amplifying the general principles for calculating damages that are given in the previous Case. Note, in particular, the slave who is delivered by mistake to an innocent recipient who then sells the slave for a price lower than market value; only the proceeds of the sale can be reclaimed.

Case 235: Tracing the Benefit

C. 4.26.7 pr.-1, 3 (Impp. Diocletianus et Maximianus AA. et CC. Crescenti)

pr. Ei, qui servo alieno dat mutuum pecuniam, quamdiu superest servus, item post mortem eius intra annum de peculio contra dominum competere actionem vel, si in rem domini haec versa sit quantitas, post annum etiam esse honorariam non est ambigui iuris. **1.** Quapropter si quidem in rem domini versa pecunia est, heredes eius convenire potes de ea summa, quae in rem ipsius processit. ...

3. Alioquin si cum libero rem agente eius, cuius precibus meministi, contractum habuisti et eius personam elegisti, pervides contra dominum nullam te habuisse actionem, nisi vel in rem eius pecunia processit vel hunc contractum ratum habuit.

The Emperors Diocletian and Maximian to Crescens (293 CE):

pr. It is not doubtful law that a person who lends money to someone else's slave has available an action on the (slave's) *peculium* against his owner, for as long as the slave survives and also within one year after his death; or, if the amount has been turned to the owner's benefit (*in rem domini versa*), that he also has a Praetorian (*honoraria*) action after the year. **1.** Therefore if indeed the money has been turned to the owner's benefit, you can sue his heirs for the amount that passed into his property. ...

3. For the rest, if you had a contract with a free person who was conducting the business of the person you mentioned in your petition, and you chose (to do business with) his person (*eius persona*), you realize that you had no action against the principal (*dominus*) unless either the money passed into his property or he ratified this contract.

Discussion:

1. "Turned to the Owner's Benefit." The Introduction to Chapter VII.A notes that, when a dependent son or slave makes a contract, the liability of the *paterfamilias* is normally limited by the value of the dependent's *peculium*, a fund held more or less independently of the assets of the father or master. But this limit can be breached in two ways: 1) if the father or master gave an order (*iussum*) allowing the contract, or 2) if the proceeds of the contract were turned to his material benefit (*in rem versa*). Suppose, for example, that I buy a horse from your son and pay for it, but he does not then deliver the horse; if my payment ends up in your hands, then you may be held liable, above and beyond your son's *peculium*. This form of enrichment is quite different from the *condictio*, but it is worth pausing on it because of what follows in section 3, which has a later historical importance all out of all proportion to its length.

2. A Contract with a Free Person. Several third-century sources suggest that the jurists were experimenting with extensions of the action *de in rem verso* beyond the situation of dependent sons and slaves. For instance, Papinian, D. 17.2.82, discusses partnership (*societas*), in which one partner is not liable for another partner's debts; but the jurist makes an exception if the proceeds from a partner's contract come into the common fund. See also Ulpian, D. 12.1.27 (a city); Emperors Severus and Antoninus, C. 8.15.1 (194; the principal of a *procurator*). However, section 3 of this Case is much the boldest of these sources, even though the circumstances of Crescens' petition are uncertain. Apparently without authorization he free person (*liber*, neither subject to another's power nor a *procurator*) was managing the affairs of a third party and made the

Chapter VIII: Quasi-Contract, page 37

contract with the would-be plaintiff; this person may have disappeared or become insolvent. Being able to sue the person's principal could therefore be very important, right? What theories do the emperors use to justify a possible lawsuit?