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«SOLUTIO PER ERROREM».

THE SIGNIFICANCE OF THE SOLVENS' MISTAKE
IN THE CONTEXT OF THE CONDUCTIO INDEBITI**

ABSTRACT. One mark of a mature legal system is that it is conscious of its own traditions: to fully understand the notion of solutio indebiti in the contemporary legal systems we need to understand the historical and the institutional background from which the conductio indebiti came. In this respect, the action to which that name was applied in Roman law is based on principles which afford scope for interesting analysis.

In the Roman World, where one, by mistake, makes payment of what is not due, he may in certain circumstances recover it by an action. Whether money paid under an error in law can be recovered by a conductio indebiti is a question which has given rise to much controversy. The constitution of Diocletian and Maximian seems to deny restitution where the money has been paid under an error in law: in C. 1.18.10 it is explicitly stated that «cum quis ius ignorans indebitam pecuniam persolverit, cessat repetitio. Per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est». Referring to this constitution and other texts, many eminent jurists, such as Cujas, Donellus, and Voet, maintain that no action lies to recover money paid by mistake in point of law. Other authors, among whom we find Vinnius and D'Aguesseau, are of the opinion that restitution may be obtained in all cases of error, whether it be an error of fact or an error of law. They contend that in the whole title of the Digest which concerns the conductio indebiti, restitution is never confined solely to an error in fact, or denied to an error in law, but is constantly ascribed simply to error, whether the payment was made on account of what was never due, or of some claim which could not be enforced by reason of a perpetual exception.

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The aim of this paper is to investigate the Romanist roots of the solvens' mistake importance for the purposes of restitution remedy in case of undue payment. I will therefore analyze the Roman jurists' position and the interpretative tradition of the ius commune, which are the basis of all civil law systems.

The second part of my essay will instead be focused on a basic examination of the solutio per errorem in the Italian, English, German and French legal systems, so as to highlight the considerable similarities of the legal solutions adopted in those different systems.

CONTENT. 1. The *indebiti solutio* in the ancient Roman law – 2. *Solvere per errorem* – 3. Considerations about the *error* in the Medieval Roman law – 4. Beyond the Romanist tradition: comparative profiles

1. *The indebiti solutio in the ancient Roman law*

The institution of undue payment, as is known, has its origins in Roman law, and its legal foundation is to be found in the need – felt today as then – to decide on a legal validation that leads over asset transfers.¹

In the systematic order of the Gaius' *Institutiones*, the *solutio indebiti* follows the description of the constituent elements of the *mutui datio*, presented in Gai 3.90 as the sole source of the *obligatio re contracta*.² In fact, paragraph 91 states:³

Is quoque, qui non debitum accepit ab eo, qui per errorem solvit, re obligatur; nam proinde ei condici potest SI PARET EVM DARE OPORTERE, ac si mutuum accepisset. Unde quidam⁴ putant pupillum aut mulierem, cui sine tutoris auctoritate non debitum per errorem datum est, non teneri condictione, non magis quam mutui datione. Sed haec species obligationis non videtur ex contractu consistere, quia is, qui solvendi animo dat, magis distrahere vult negotium quam contrahere.⁵

1 For details, see M. KASER, *Das römische Privatrecht*, I², München, 1971, pp. 586, 592 *et seq.*, 596, 615; W. KUNKEL-H. HONSELL, *Römische Recht*, Berlin-Heidelberg-New York, 1987, p. 350 *et seq.*; B. KUPISCH, *Arricchimento nel diritto romano, medioevale e moderno*, in *Dig. disc. priv.*, I, Torino, 1987, p. 423; R. ZIMMERMANN, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford, 1996 (Cape Town-Wetton-Johannesburg, 1990), pp. 834-838, 848-851; C.A. CANNATA, «Cum alterius detrimento et iniuria fieri locupletioem». *L'arricchimento ingiustificato nel Diritto Romano*, in L. Vacca (ed.), *Arricchimento ingiustificato e ripetizione dell'indebitum*. VI Convegno Internazionale ARISTEC (Padova-Verona-Padova, 25-26-27 settembre 2003), Torino, 2005, pp. 13-52; J. DU PLESSIS, *The «condictio quasi indebiti»*, in *Fundamina*, 16, 2010, p. 52 *et seq.*

2 See ZIMMERMANN, *The Law of Obligations*, cit., pp. 153-165; C.A. CANNATA, *Corso di Istituzioni di diritto romano*, II, 2, Torino, 2017, pp. 79-95; V. MANNINO, *Introduzione alla storia del diritto privato dei Romani* 3, Torino, 2018, pp. 422-425.

3 To ensure that the texts cited in this essay are accessible also to those who do not have a working knowledge of Latin, I have added translations to all passages cited in the text and in the footnotes. For the passage from Gai 3.91 devoted to *solutio indebiti*, I have used the 1904 English translation of Edward Poste. For passages from the Digest and from the *Codex* of Justinian which mention the *indebitum*, I have used the 1932 English translation of Samuel P. Scott.

4 See J.C. VAN OVEN, *La «forêt sauvage» de la condictio classique*, in *TR*, 22, 1954, p. 271 *et seq.*

5 The receiver of what was not owed from a person who pays in error is also under a real obligation, for he may be sued by *condictio* with the formula: 'If it be proved that he ought to convey' just as if he had received the property in pursuance of a loan. And, accordingly, some have held that a ward or female, if their guardian has not authorized them to receive a payment, are not liable to be sued for money paid in error any more than they are for money received as a loan. This, however, is a mistake, as the obligation in this case seems to be of a kind not arising

As the name suggests, the *solutio indebiti* mainly represents a case of fulfilment of the contract (*solutio*), that is the compensation of a credit through the payment of the amount due.⁶ In Roman law, in fact, we can distinguish between the *solutio*, on one hand, and other ways of settling an obligation – which do not necessarily involve the satisfaction of the creditor – on the other. The verb *solvere*,⁷ after all, appears in the sources also in a broader sense,⁸ to indicate the dissolution of the obligatory bond in general, not the fulfilment (especially if carried out with payment) in particular.

The archaic Roman law recognized in fact mainly two ways to extinguish the obligation: the *nexi liberatio* and the *solutio per aes et libram*.⁹ In the subsequent evolution of the *ius civile*, however, we notice a progressive overcoming of this formalism based on the idea that it was possible to dissolve the obligatory bond with a formality-free fulfilment, unless they were imposed by the very structure of the obligation which they wanted to cancel. This also happened in the context of the credit, presumably due to the effect of the *l.a. per condictionem*, introduced by a third century BC *lex Silia* to prosecute claims relating to *certa pecunia*, and extended shortly afterwards by a *lex Calpurnia* to the credits of *aliae certae res*. The *condictio* then becomes the mean through

from contract, as a payment in order to discharge a debt is intended to extinguish an obligation, not to establish one.

6 Cf. W.W. BUCKLAND, *Main Institutions of Roman Private Law*, Cambridge, 1931, p. 306; E. DESCHEEMAER, *The Roman Division of Wrongs: A New Hypothesis*, in *Roman Legal Tradition*, 5, 2009, p. 10 et seq., 16; CANNATA, *Corso di Istituzioni*, II, 2, cit., p. 97 et seq.

7 *L&S* (= CHAR.T. LEWIS-CH. SHORT, *A Latin Dictionary*, Oxford, 1879), s.v. *solvo*: «I. To loose an object bound, to release, set free, disengage, dissolve, take apart (...). B. Trop. 1. To free, release, loose, emancipate, set free (...) c. From obligations and debts». See also ZIMMERMANN, *The Law of Obligations*, cit., p. 748 et seq., p. 754 et seq.; C.A. CANNATA, *Corso di Istituzioni di diritto romano*, II, 1, Torino, 2003, pp. 273-302.

8 See D. 20.6.6.1 (Ulp. 73 ad ed.): *Qui paratus est solvere, merito pignus videtur liberasse: qui vero non solvere, sed satisfacere paratus est, in diversa causa est. Ergo satisfecisse prodest, quia sibi imputare debet creditor, qui satisfactionem admisit vice solutionis: at qui non admittit satisfactionem, sed solutionem desiderat, culpandus non est*; D. 50.16.176 (Ulp. 45 ad Sab.): *'Solutionis' verbo satisfactionem quoque omnem accipiendam placet. 'Solvere' dicimus eum, qui fecit quod facere promisit*; D. 46.3.52 (Ulp. 14 ad ed.): *Satisfactio pro solutione est*; D. 46.3.54 (Paul. 56 ad ed.): *Solutionis verbum pertinet ad omnem liberationem quoquo modo factam magisque ad substantiam obligationis refertur, quam ad nummorum solutionem*. For a detailed overview, see A. SACCOCCIO, «*Aliud pro alio consentiente creditore in solutum dare*», Milano, 2008, pp. 3-9.

9 See M. KASER, *Das altrömische ius*, Göttingen, 1949, p. 240 et seq.; D. LIEBS, «*Contrarius actus*». *Zur Entstehung der römischen Erlaßverträge*, in *Sympotica F. Wieacker*, Göttingen, 1970, p. 128 et seq.; ZIMMERMANN, *The Law of Obligations*, cit., p. 755 et seq.

which the lender can act against the borrower who has not satisfied the obligation to repay the contract *tantundem eiusdem generis*.¹⁰

In the formulating system, the *condictio* maintains its abstract nature (i.e., the possibility of acting without indicating the source of the sought after credit)¹¹ and the jurisprudential interpretation specifies its field of application, establishing that it was based on two assumptions, one of positive and one of negative sign. The first consisted of the *datio*, meant as the transfer of the *res* property, that the claimant had made in favour of the defendant, not as a mere delivery. The second, on the other hand, assumed that there was no valid reason for the defendant to withhold the thing received.¹² The *condictio* could therefore be undertaken in any case of *solutio indebiti*, or rather of performing an undue service.

What happens if, as a matter of fact, the contract that one would like to fulfil does not exist, or if who pays (*solvens*) is not really indebted to the recipient of the payment (*accipiens*)?

2. *Solvere per errorem*

As Gaius suggests (3.91), like the one who *mutuum accepisset*, even those who receive a certain amount of money as payment of a non-existent debt are *obligari re*, since the mandatory situation is due to a sum that has been wrongly transferred (in such case the recipient is required to restore it).

The situation that lies ahead is the following:

1. transfers to A one hundred (*sestertii*), as a debt's payment.
2. acquires the hundred (*sestertii*) property because:
3. the *traditio*, in Roman law, is a causal transaction and
4. its cause is an acceptance *in lieu* [that the parts negotiated for the payment]

(*causa solvendi*).

10 See G. PUGLIESE, *Il processo civile romano*, I. *Le legis actiones*, Roma, 1962, p. 346 et seq.; ZIMMERMANN, *The Law of Obligations*, cit., p. 835 et seq.; CANNATA, «*Cum alterius detrimento et iniuria fieri locupletioem*», cit., p. 14.

11 ZIMMERMANN, *The Law of Obligations*, cit., pp. 835 and 852, but see S. ROMEO, *L'appartenenza e l'alienazione in diritto romano. Tra giurisprudenza e prassi*, Milano, 2010, p. 334 et seq., for arguments against.

12 See CANNATA, «*Cum alterius detrimento et iniuria fieri locupletioem*», cit., p. 15 et seq., 18 et seq.

5. The debt did not exist, and so B wasn't obliged to *dare oportere*.

At this point two potential alternatives can be expected:

6. The *solvens* was aware of the nonexistence of the debt, but he paid anyway.

7. The *solvens* was wrong, he just misguidedly thought there was a debt.¹³

Only in the second case, as it will be seen more clearly in the following section, whoever has performed the unjustified service may obtain the repayment of the unduly loaned amount, resorting to the *condictio indebiti*.

As can be learned from the reading of Gai 3.91, in order for the payment of the undue fee to function as the source of the obligation to repay, it must have taken place by mistake of the *solvens*, who must have made the payment convinced of being obliged. In truth, the *accipiens* knowledge has its relevance: if he had known there was no debt to be repaid and had taken advantage of the *solvens*' mistake, he would have committed a theft, and so he not only couldn't have acquired the amount of money transferred to him, but would also have been sued in an *actio poenalis in personam (actio furti)*.¹⁴ If the enriched person was aware that the payment was not due, therefore, when he accepted it, he could be held liable for the *condictio furtiva*. In the latter instance, ownership would not have passed and the enriched person would have been liable for damage caused to the impoverished person as a result of his loss. Furthermore, the enriched party was also liable for the value of fruits which he could have gathered but did not, which presumably also included interest on the money received. The enriched party was not allowed to take any expenses into account but in certain instances was allowed to detach improvements. If the performance was destroyed, the party was liable unless he could show that the thing would have suffered the same fate at the hands of the plaintiff.

The *mala fides* receiver was thus in a worse position than the receiver who only discovered the true state of affairs after receiving payment.¹⁵

13 See VAN OVEN, *La «forêt sauvage»*, cit., p. 275 et seq., nt. 21.

14 See KASER, *Das römische Privatrecht*, I², cit., p. 593; CANNATA, «*Cum alterius detrimento et iniuria fieri locupletioem*», cit., p. 19.

15 On this, see the analysis by CANNATA, *op. loc. ult. cit.*; M. MARRONE, *Problemi di responsabilità del debitore nel regime dell'indebito: dal diritto romano ai codici italiani*, in Vacca (ed.), *Arricchimento ingiustificato*, cit., pp. 234-236, and A. LOVATO-S. PULIATTI-L. SOLIDORO, *Diritto privato romano*, Torino, 2014, p. 585.

Given that the one who pays something persuaded to be in debt and the one who received the undue payment are both at fault, let us see the relevance of the *solvens*' mistake for the purpose of the reconveyance (*condictio indebiti*).

The debate around the prerequisite of the *solvens*' fault in order to be entitled for reimbursement has always been spirited since the *ius commune* period.¹⁶ As it is, this is the most discussed topic of the Romanist branch of knowledge.¹⁷ The most rigorous interpolationists just reject tout court that the *solvens* fault has relevance at all in the classical Roman law: this means that having made an undue payment would have been enough to justify the practice of the *condictio indebiti*.¹⁸

The sources, however, suggest for more moderate stances.

Gaius presents indeed the *indebiti solutio* with these words: *qui non debitum accepit ab eo, qui per errorem solvit, re obligatur*.

We can read in the Digest:

D. 12.6.1.1 (Ulp. 26 *ad ed.*): *Et quidem si quis indebitum ignorans solvit, per hanc actionem condicere potest: sed si sciens se non debere solvit, cessat repetitio*.¹⁹

And,

D. 12.6.50 (Pomp. 5 *ad Q. Muc.*): *Quod quis sciens indebitum dedit hac mente, ut postea repeteret, repeterere non potest*.²⁰

According to these excerpts, the payment could be repeated just in case of the

16 See ZIMMERMANN, *The Law of Obligations*, cit., pp. 849, 868 *et seq.*; H. SCOTT, *The Requirement of Excusable Mistake in the Context of the Condictio Indebiti: Scottish and South African Law Compared*, in *S. Afr. Law J.*, 124, 4, 2007, p. 830.

17 See ZIMMERMANN, *The Law of Obligations*, cit., p. 849, more specifically nt. 101.

18 See S. SOLAZZI, *L'errore nella «condictio indebiti»*, in ID., *Scritti di diritto romano*, IV, Napoli, 1963, p. 99 *et seq.*; ID., *Ancora dell'errore nella «condictio indebiti»*, in ID., *Scritti*, IV, cit., p. 405 *et seq.* On the error requirement in classical law see also KASER, *Das römische Privatrecht*, I2, cit., p. 596, nt. 36.

19 And, indeed, if anyone ignorantly pays what is not due, he can recover the same by means of this action; but if he paid it being aware that he did not owe it, an action for its recovery will not lie.

20 Where anyone knowingly pays what he does not owe with the intention of afterwards bringing suit to recover it, he has no right of action.

solvens' mistake, so that it would not be possible to give back what was intentionally paid. The reason is purely technical: the *traditio solutionis causa* has definitively attributed to the *accipiens* the ownership of the transferred amounts. The obligation to give back the undue payment arises, in turn, from a case that includes the *error solventis*. If there has been no mistake, the case at the source of the *re obligari* does not occur, and so there is no obligation whatsoever. Therefore, the quite common opinion among Romanists, according to which the cognizant *solvens* would have carried out a *traditio donationis causa*, losing the right to act with the *condictio* against the *accipiens*, is not correct.²¹

Let us now analyze the procedural profiles of the question in more details.

The obligation *ex debito soluto* was protected with a generic *condictio*. On the basis of the relative *formula*, the judge had to condemn the respondent, if it turned out that they were obliged to transfer (*dare oportere*) to someone who acted a *certa pecunia* or a *certa res*. But, as the *formula* did not state the source of the obligation, it was still the judge's task to verify what the claim of the plaintiff was to a *certum dare oportere*. In this framework worked the *prudentes*, who had to delineate the outlines of the duty of restitution, to decide on which cases it was possible to *condicere* and in which ones it was not admitted.²² In all likelihood, even in classical law (contrary to what was argued in the past) the error of the *solvens* plays a central role, a negative – and not a positive – requirement for the restitution action. In order to *condicere*, in fact, the plaintiff would have the burden of proving on the procedural level only the circumstance of the payment and the presence of a valid *causa condicendi*, while his *inscientia* would have been just presumed. The defendant, on the contrary, should have refuted the content of this

21 See, for example, TH. MACKENZIE, *Studies in Roman Law with Comparative Views of the Laws of France, England, and Scotland*⁵, Edinburgh, 1880, p. 255 and BUCKLAND, *Main Institutions*, cit., p. 310. Cf. D. 46.2.12 (Paul. 31 ad ed.): *Si quis delegaverit debitorem, qui doli mali exceptione tueri se posse sciebat, similis videbitur ei qui donat, quoniam remittere exceptionem videtur. Sed si per ignorantiam promiserit creditori, nulla quidem exceptione adversus creditorem uti poterit, quia ille suum recepit: sed si qui delegavit tenetur conditione vel incerti, si non pecunia soluta esset, vel certi, si soluta esset, et ideo, cum ipse praestiterit pecuniam, aget mandati iudicio*; D. 50.17.53 (Paul. 42 ad ed.): *Cuius per errorem dati repetitio est, eius consulto dati donatio est*. For a bibliographic review on this subject, see KASER, *Das römische Privatrecht*, I², cit., p. 596, nt. 36, and CANNATA, *Corso di Istituzioni*, II, 2, cit., p. 99 et seq., for arguments against.

22 See A. SACCOCCIO, «*Si certum petetur*». *Dalla condictio dei veteres alle conditiones giustinianee*, Milano, 2002, p. 549 et seq.

assumption, showing that the plaintiff was aware of the non-existence of the debt.²³

We may observe a change in the discipline with Justinian:

D. 22.3.25 pr. (Paul. 3 *quaest.*): *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.*²⁴

From the passage it is clear how the error has become a fundamental requirement of the applicant's claim; it is, in fact, the plaintiff who must prove that his performance took place *per dolum accipientis vel aliquam iustam ignorantiae causam*. It is equally clear that the recognition of the *condictio indebiti* to the *solvens* appears to be subordinated to the requirement of the reasonableness of the error.²⁵

The constitution of the emperors Diocletian and Maximian of 294 lays down a principle that will profoundly influence the medieval interpreters:

C. 1.18.10: *Imperatores Diocletianus, Maximianus. Cum quis ius ignorans indebitam pecuniam persolverit, cessat repetitio. Per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est.*²⁶

The dichotomy *error iuris/error facti* dominated, in Justinian law, as a norm to identify the cases in which the undue payment cannot be excused, therefore there is no return action. Exemplary in this regard, Paulus' statement in D. 22.6.9 pr. (Paul. *l. sing. iuris et fac. ignor.*), in which the disciplines' differences between error of law²⁷ and factual

23 See ZIMMERMANN, *The Law of Obligations*, cit., p. 850.

24 Therefore, he who alleges that he has paid money which was not due will be required to produce evidence that the said money was paid through the fraud of the party who received it, or on account of some just cause of ignorance, and unless he shows this he will have no right to recover it.

25 See P. VOCI, *L'errore nel diritto romano*, Milano, 1937, p. 129; U. ZILLETI, *La dottrina dell'errore nella storia del diritto romano*, Milano, 1960, p. 11 *et seq.*, p. 483 *et seq.*

26 Where anyone, who is ignorant of the law, pays money which is not due, he cannot recover it; for you are well aware that only ignorance of fact confers the right to recover money which has been paid when it was not due.

27 On the *ignorantia iuris* theme, cf. F. VASSALLI, «*Iuris et facti ignorantia*», in ID., *Studi giuridici*, III, 1. *Studi di*

error are highlighted: *regula est iuris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere*.

D. 22.6.9 pr. (Paul. *l. sing. juris et fac. ignor.*): *Regula est iuris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere. Videamus igitur, in quibus speciebus locum habere possit, ante praemisso quod minoribus viginti quinque annis ius ignorare permissum est. Quod et in feminis in quibusdam causis propter sexus infirmitatem dicitur: et ideo sicubi non est delictum, sed iuris ignorantia, non laeduntur. Hac ratione si minor viginti quinque annis filio familias crediderit, subvenitur ei, ut non videatur filio familias credidisse.*²⁸

Although, in all likelihood, the elaboration belongs to the classical jurists, only in the Low Empire the principle *ignorantia iuris nocet* – then accepted in the Justinian Compilation – had maximum application, as a suitable instrument to guarantee the stability of juridical relations and certainty of law.²⁹ It was nonetheless subjected to exceptions, essentially in consideration of the limited capacity attributed to certain subjects: people under twenty-five years old, women (*propter sexus infirmitatem*), militaries, countrymen.³⁰

diritto romano (1906-1921), Milano, 1960, p. 425 et seq.; M. SCARLATA FAZIO, v. *Ignoranza della legge (dir. rom.)*, in *Enc. dir.*, 20, Milano, 1970, p. 1 et seq.; H. KUPISZEWSKI, «*Ignorantia iuris nocet*», in «*Sodalitas. Studi in onore di A. Guarino*, III, Napoli, 1984, p. 1357 et seq.; P. CERAMI, «*Ignorantia iuris*», in *Sem. compl. der. rom.*, 4, 1993, p. 57 et seq.

28 The ordinary rule is that ignorance of law injures anyone, but ignorance of fact does not. Therefore, let us examine to what instances this rule is applicable, for it may be stated, in the first place, that minors under twenty-five years of age are permitted to be ignorant of the law; and this also is held with respect to women in certain cases, on account of the weakness of the sex; hence, so long as no crime has been committed, but only ignorance of the law is involved, their rights are not prejudiced. For the same principle, if a minor under the age of twenty-five lends money to a son under his father's control, relief is granted him, just as if he had not lent the money to a son subject to paternal authority.

29 D. 22.6.2 (Ner. 5 membr.): *In omni parte error in iure non eodem loco quo facti ignorantia haberi debet, cum ius finitum et possit esse et debeat, facti interpretatio plerumque etiam prudentissimos fallat*. Cf. VOCI, *L'errore*, cit., pp. 226 et seq.; V. SCARANO USSANI, *L'utilità e la certezza. Compiti e modelli del sapere giuridico in Salvio Giuliano*, Milano, 1987, p. 83 s. and nt. 108.

30 C.Th. 2.16.3; D. 2.5.2.1, D. 2.13.1.5, D. 25.4.1.15, D. 22.6.9 pr., D. 22.6.9.1; C. 1.18.1, C. 9.23.5, C. 6.9.8.

On the other hand, the assessment of the *error facti* was different. In the conception of classical jurists, the error of fact was the total or partial ignorance of a factual circumstance that had determined the conclusion of the bargain; as such, it therefore affected and characterized the desire to perform the act or the deal. In the specific case of *indebiti solutio*, the mistake of the *solvens* is what is defined as a significant error of the will (or presumed error). In fact, on the one hand, there was the agent's willingness to pay the due amount and, on the other, the unwillingness to perform an act of liberality. The classical jurists and the Justinian compilers assumed that, if the mistake that had led the *solvens* to pay had been an *error facti*, it could be allowed to reclaim the debts.³¹ The Byzantines positively considered the *error iuris* inexcusable and, therefore, the payment made was unrepeatable due to an error of law. The position taken by the classical jurisconsults, conversely, is doubtful in this regard, due to the manipulation of the texts by the Justinian's commissioners.³²

On the subject, I will briefly discuss only the thought of Labeo.

D. 22.6.9.2 (Paul. *l. sing. juris et fac. ignor.*): *Sed facti ignorantia ita demum cuique non nocet, si non ei summa negligentia obiciatur: quid enim si omnes in civitate sciant, quod ille solus ignorat? Et recte Labeo definit scientiam neque curiosissimi neque negligentissimi hominis accipiendam, verum eius, qui cum eam rem ut, diligenter inquirendo notam habere possit. 3. Sed iuris ignorantiam non prodesse Labeo ita accipiendum existimat, si iuris consulti copiam haberet vel sua prudentia instructus sit, ut, cui facile sit scire, ei detrimento sit iuris ignorantia: quod raro accipiendum est.*³³

31 See VOCI, *L'errore*, cit., p. 130 *et seq.*

32 See ZILLETTI, *La dottrina*, cit., p. 216 *et seq.*, p. 483 *et seq.*; ZIMMERMANN, *The Law of Obligations*, cit., p. 850 *et seq.*

33 Ignorance of the fact, however, does not injure anyone unless he should be guilty of gross negligence; for example, what if everyone in the town knew what he alone does not? Labeo very properly says that neither the knowledge of the most inquisitive, or the most negligent man, should be understood to be meant, but that of him who can obtain it by diligent inquiry. 3. Labeo, however, thinks that ignorance of the law ought not to be considered excusable unless the party should not have access to a magistrate, or is not intelligent enough to easily ascertain that ignorance of the law is a detriment to him, which is very rarely the case.

Two centuries before Paulus tempered the principle *ignorantia iuris nocet* with the exceptions mentioned above, the Augustan jurist seems to go even further, stating that the *ignorantia iuris* should only harm those who can avail themselves of legal assistance (or if they are law expert themselves). In other words, Labeo would recognize the operation of the rule only in those cases where the law's mistake could have been reasonably avoided. The position of the jurist is not without implications concerning also the evaluation of the incidence of the error of fact: if, in fact, it is fair that the *solvens* does not receive an injustice from his *ignorantia iuris*, if it could not be avoided even with a conscientious behavior, just as reasonable is that the *condictio* is denied in those cases in which the *error facti* is attributable to his serious negligence.³⁴

So, just to summarize, the payment had to have taken place *solvendi animo per errorem*, that is, under the impression that the performance was owing. Where the party's mistake was an *error iuris*, that is a mistake of law, the party could not, as a general rule, have reclaimed either. Thus, in principle, he could have recovered the performance only if he had performed as a result of an *error facti*, a factual mistake. Moreover, this was only the case if such *error facti* was a *iustus error*, that is a reasonable mistake. In certain cases of complicated legal questions and where the payer was a woman, soldier or ignorant rustic, an *error iuris* was no bar to the institution of the *condictio indebiti*; in short, an *error iuris* was accepted as a *iustus error* in specific cases.

The idea that the repeatability of what is paid can be conditioned by the *solvens'* behavior, in particular by the excusability of its mistake, will strongly influence the thinking of the seventeenth-century jurisprudence and still echoes today in the juridical administration of the *condictio indebiti* in South African law.³⁵

34 See ZILLETTI, *La dottrina*, cit., p. 254 et seq.; KASER, *Das römische Privatrecht*, I², cit., p. 242; ZIMMERMANN, *The Law of Obligations*, cit., p. 604 et seq.; L.C. WINKEL, *Mistake of law: English and Roman comparisons*, in W.J. Swadling (ed.), *The Limits of Restitutionary Claims. A Comparative Analysis*, London, 1997, p. 244 et seq. and nt. 3, p. 247; SCOTT, *The Requirement of Excusable Mistake*, cit., p. 829 and nt. 7.

35 See SCOTT, *The Requirement of Excusable Mistake*, cit., pp. 839-851; EAD., *Unjust Enrichment in South African Law. Rethinking Enrichment by Transfer*, Oxford-Portland, 2013, p. 4 et seq.

3. Considerations about the error in the Medieval Roman law

In the Middle Ages, Glossators and Commentators were above all interested in the *solutio* due to error of law. In the theoretical construction of Medieval authors, the *ignorantia iuris civilis* could be relied upon, if it prevented from suffering damage, while no emphasis was in *lucro captando*. In fact, as the assumption of the *condictio indebiti* was satisfied in the absence of a reason that legitimized the *accipiens* to withhold an enrichment unfairly achieved through an unwary *solvens*, it could not be judged *bonum et aequum* subordinating the remedy to the application of the principle *ignorantia iuris non excusat*.³⁶

The *interpretatio* relating to the payment by error of law is rooted in the *Glossa* of Accursio, where a classification of the hypotheses of undue is proposed that, abiding by the *bonum et aequum*, should have clarified the limits of interference of the principle *ignorantia iuris non excusat* in the applicative sphere of the *condictio*. It should also be noted that the mistake is an essential precondition for the reimbursement (the consciousness of the *solvens* of paying what is not due is, in fact, equated to a donation in order to make the credit stable) and the only effective way to assess whether or not to grant the *condictio indebiti* is identifying the justification, natural or civil, of the payment. The principle of non-excusability of the mistake of law is in fact negligible in itself, it is rather used for the sole purpose of highlighting the natural obligation's capability for the attribution's solidity.³⁷ To affirm that the *solvens*, believing a civil obligation to be only a natural one, does not deserve repetition because such *error iuris* cannot be excused, is equivalent to say that the natural obligation is in itself suitable to justify the attribution. In essence, considering *bonum et aequum* that the *solvens* can repeat patrimonial attributions received from the *accipiens* without reason, there is no doubt that the *ignorantia iuris* is in itself unfit to justify and stabilize this payment.³⁸

Such an approach, which strongly marks the so-called *mos italicus*, is however

36 See ZIMMERMANN, *The Law of Obligations*, cit., p. 608; A. D'ANGELO, *L'errore senza rimedio*, Milano, 2006, pp. 123-142.

37 See E. CORTESI, v. *Errore (dir. interm.)*, in *Enc. dir.*, 15, Milano, 1966, pp. 236-246; ZIMMERMANN, *The Law of Obligations*, cit., p. 868 et seq., p. 873; D'ANGELO, *L'errore*, cit., pp. 140-142.

38 See D'ANGELO, *op. loc. ult. cit.*

criticized by the *Culti*, which reiterate the idea, setting out from C. 1.18.10 and based on the rigid *error iuris/error facti* opposition, that the error of law is never excusable: considering that the *solvens* voluntarily gives away his own money not only when he pays a debt, but also when he makes an undue payment; assuming, therefore, that some stability must be recognized to a spontaneous patrimonial attribution, although not properly justified, the concession of the restoring remedy must be evaluated as a special favor of equity, therefore denied in the case of error of law (because it is an inexcusable behavior). The erroneous assumption of the existence of a debt rises, then, from a mere 'supposed cause' to reason of the stability of the attribution and preclusive element of the *condictio* itself.³⁹

The principle *ignorantia iuris non excusat* is reiterated with particular force by the Dutch jurist Johannes Voet, who embraces an even more extreme interpretation of D. 22.6. He states, in fact, that even in the case of *error facti*, the recognition of the *condictio* to the *solvens* must be subordinated to the excusability of his error. As for the *error iuris*, it would always be an inexcusable fault.⁴⁰

In the *usus modernus pandectarum*, in which both stances are present, some authors begin to replace the term *ignorantia* with *error* and, because of the resulting contrast between *ignorantia iuris* and *ignorantia facti*, they definitively open the way to a new direction. After about five hundred years of doctrinal dispute, Augustin Leyser, with the distinction between *ignorantia vincibilis* and *ignorantia invincibilis*, makes the principle of excusability of error the main condition for determining whether the *condictio indebiti* should be granted or not to *solvens*.⁴¹

Starting from the nineteenth century, it is the German Historical School that absorbed these influences: for example, Savigny believes that, although in principle the *condictio indebiti* must always be granted in case of error, it cannot assist the *solvens*

39 See MACKENZIE, *Studies in Roman Law*, cit., p. 256; ZIMMERMANN, *The Law of Obligations*, cit., p. 869; D'ANGELO, *L'errore*, cit., pp. 142-151, 162 et seq.; SCOTT, *The Requirement of Excusable Mistake*, cit., p. 830.

40 See MACKENZIE, *op. loc. ult. cit.*; ZIMMERMANN, *The Law of Obligations*, cit., p. 869 and nt. 210; D'ANGELO, *L'errore*, cit., pp. 154 et seq.; SCOTT, *The Requirement of Excusable Mistake*, cit., p. 830.

41 ZIMMERMANN, *The Law of Obligations*, cit., p. 870; SCOTT, *The Requirement of Excusable Mistake*, cit., p. 830 et seq., nt. 23.

in case of an inexcusable one (*verschuldeten*). The reasons for this orientation must be sought in an equitable principle: it is right to recover what was paid for by mistake (*Begünstigung aus Billigkeit*), but it would be unfair to allow it to those who made a mistake for their negligence. Years later Vangerow will formulate the theory in even more general terms, affirming that repeatability can be granted only in the case of an excusable error, but without any distinction between factual error and error of law.⁴²

Despite the general favor shown to this approach in the Germanic area, the *Bürgerliches Gesetzbuch* (BGB) compilers will however prefer a discipline closer to classical Roman law, abolishing the principle of excusability and the distinction between factual error and error of law.

4. Beyond the Romanist tradition: comparative profiles

Let's now see how this long interpretative procedure has affected the discipline of restorative remedies in some of the main contemporary law systems.

Traditionally the prerequisites for regaining an undue payment are identified in the characteristic, in its being unjustified and in the mistake of the *solvens*. In addition to these traits, French scholars also added an evaluation of the excusability of the error of those who proceeded to an unjustified fulfillment: it was believed, in fact, that every time the transfer of wealth was due to a serious negligence of the impoverished, it could not be considered without cause, and so the consequent impossibility of restorative remedies.⁴³

The 1865 Italian Civil Code (c.c.) found in the mistake of the *solvens* (Art. 1145) a necessary requirement for the recognition of the reclaim action. The doctrine and the jurisprudence both agreed in believing that the proof of the error was essential to obtain the restitution of what was unduly paid. In the current Italian law, the undue payment discipline is articulated differently depending on whether it is an objective or subjective undue. In the first case, despite what was configured in the 1865 Code, there are only two prerequisites for reacquiring what was unduly paid: the making of a

42 See MACKENZIE, *Studies in Roman Law*, cit., p. 256 s.; D'ANGELO, *L'errore*, cit., p. 159 *et seq.*; SCOTT, *The Requirement of Excusable Mistake*, cit., p. 831 *et seq.*

43 See P. GALLO, *Introduzione al diritto comparato*, II. *Istituti giuridici*³, Torino, 2018, p. 389.

payment and the lack of the corresponding obligation. The subjective condition of ignorance on the part of the *solvens* about the non-existence of the obligation has disappeared. Article 2033 c.c. in fact begins by simply stating that «those who made an undue payment have the right to get back what they unduly paid».⁴⁴

The irrelevance of the *solvens* error pursuant to Art. 2033 of the Civil Code constitutes a significant trend reversal to the dominant opinion under the Napoleonic Code and under the 1865 Civil Code, according to which a payment made by a *solvens* aware of the non-existence of the debt was the same as a donation. The 1942 Civil Code seems to have embraced the idea that it is arbitrary to deduce there is a state of willingness from a mere intellectual state. Therefore, the *scientia indebiti* does not allow us to presume the *animus donandi*, and can undoubtedly coexist with the decision to assume, albeit temporarily and with the implicit clause to repeat the *solutio*, the position of the fulfilling debtor. If anything, it will be up to the *accipiens* to provide the proof that the payment was made in a spirit of generosity or in fulfillment of a natural obligation or on the basis of a contractual obligation. Howbeit, the system does not allow the mere intellectual ability of the *solvens* to constitute a valid justification for not fulfilling the debt: to be able to recover what unduly paid, the author of the payment just needs to prove the nonexistence of the debt, because the objective illicit is based only on the lack of foundation of the patrimonial shift as such.⁴⁵

The psychological element, however, becomes relevant again in the subjective debts' topic pursuant to Article 2036 of the Civil Code, enforceable in the case that a person mistakenly pays someone else's debt.

In this case, in order for the *solvens* to be able to recover the amount paid, it is

44 See: M. PESCATORE, *Filosofia e dottrine giuridiche*, I, Torino, 1881, p. 253 *et seq.*; A. NAMIAS, *Contributo alla teoria della ripetizione dell'indebito*, in *Arch. giur.*, 45, 1890, p. 104 *et seq.*; G. PACCHIONI, *I quasi contratti e l'azione di arricchimento ingiustificato*, Padova, 1935, p. 225 *et seq.*; L. CALIENDO, *Dell'errore del «solvens» nella ripetizione dell'indebito*, in *Ann. Dir. Comp. St. Leg.*, 12, 2, 1935, p. 49; E. MOSCATI, v. *Indebito (pagamento e ripetizione dell')*, in *Enc. dir.*, 13, Milano, 1971, p. 86; U. BRECCIA, *La ripetizione dell'indebito*, Milano, 1974, p. 30 *et seq.*; P. GALLO, *Arricchimento senza causa e quasi contratti (i rimedi restitutori)*, in *Tratt. Sacco*, Torino, 1996, p. 121; P. CISIANO, *Questioni vecchie e nuove in tema di ripetizione di indebito oggettivo*, in *Giur. it.*, 2000, p. 54; F. ROCCHIO, *Errore e onere della prova nella ripetizione dell'indebito*, in *Riv. dir. civ.*, 6, 2010, p. 846 *et seq.*

45 See ROCCHIO, *Errore e onere della prova*, cit., pp. 848-852.

necessary that at the time the payment was made in an excusable error condition. It is clear why the law grants the action only if the payer is in error; the creditor, in fact, is really owed money, and thus has achieved what is due to him; only an excusable error (therefore not dependent on grave negligence) could justify the recovery of the amount paid; on the other hand, if the error is not excusable, it does not seem fair to penalize the creditor who, as things stand, had just received what is rightfully his; it is the false debtor, consequently, who will have to turn to the true debtor to be refunded.

In the outlined perspective, the responsibility of the *accipiens indebiti* creates the conditions suitable to exclude a recovery, as for example that the payment was made on the basis of a solid contractual obligation, in fulfillment of a natural obligation, or in a pure spirit of generosity. As we will see, the most recent developments show a clear tendency to lessen the error relevance in other legal systems too. From this point of view, therefore, it can be said that the discipline outlined by Art. 2033 of the Civil Code is at the forefront in Europe.⁴⁶

Traditionally, in common law countries the rule governing the recovery of undue payments is very clear: the inexistence of the debt is not sufficient, the proof of the error of the *solvens* is also required.⁴⁷ In particular, at first, only a fundamental or basic error could give rise to the restoring remedy, as Baron Bramwell's famous *dictum* in *Aiken v. Short* (1856)⁴⁸ reminds us:

«In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money».

A further limitation to the possibility of recovering consisted in the exclusion of the obligation to return if the error had been due to the negligence of the subject

46 See GALLO, *Introduzione al diritto comparato* II³, cit., p. 390.

47 See MACKENZIE, *Studies in Roman Law*, cit., p. 257; GALLO, *op. loc. ult. cit.*

48 See A. TETTENBORN, *Law of Restitution in England and Ireland*³, London-Sidney, 2002, p. 26 *et seq.*

who made the payment, as Baron Parke recalls, in the *Kelly v. Solari* (1841):⁴⁹

«[if the money] is paid under the impression of the truth or a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it».

However, starting from the jurisprudence of the 1970s we can notice a gradual reduction in the relevance of the *mistake*.⁵⁰

The case *Barclay's Bank Ltd. v. W. J. Sims & Sons* (1979)⁵¹ states the principle according to which

«if a person pays money to another under a mistake of fact which causes him to make a payment, he is prima facie entitled to recover as money paid under a mistake of fact».

A 1993 decision by the English House of Lords (*Woolwich Equitable Building Society v. Inland Revenue Commissioners*) then established that the recovery of unduly paid taxes should not be subject to proof of the error.⁵² In this perspective, if a company makes undue payments in order to avoid bad publicity, or to avoid the imposition of penalties connected with late payment, it is entitled to get back its money even if, at the time of payment, it was perfectly aware of the undue nature of the taxation. In this case, recovery cannot be excluded because it is easily understandable that whoever makes the undue payment of a tax is not in any case moved by a generous intent. In the end it is clear that the error requirement tends to blend in England too, while solutions comparable to those established in our 1942 Civil Code are set. Also the

49 See P. BIRKS, *The Foundations of Unjust Enrichment: Six Centennial Lectures*, Wellington, 2002, p. 7 *et seq.*

50 See D'ANGELO, *L'errore*, cit., p. 200 *et seq.*

51 See P. BIRKS, *An Introduction to the Law of Restitution*, Oxford, 1985, p. 150 *et seq.*

52 See A.S. BURROWS-E. MCKENDRICK-J. EDELMAN, *Cases and Materials on the Law of Restitution*, New York, 2005, p. 625 *et seq.*; GALLO, *Introduzione al diritto comparato II*³, cit., p. 391.

traditional rule of the *mistake of law* (*ignorance of the law is no excuse*) now appears limited to a small circle of cases, which surprisingly coincide with those excluded from the restitution remedy in the civil law countries too.⁵³

In Germany it is the legislation itself that asks for proof of the *solvens'* mistake in order for them to get back what was paid without cause (§ 814 BGB).⁵⁴ However, for a long time, the jurisprudence has attenuated the condition's relevance, essentially reversing the burden of giving proof: it is therefore not the plaintiff who has to prove he misguidedly paid, but it will be the defendant who will have to demonstrate how, at the time of payment, the *solvens* was aware of the absence of the obligation, thus he had voluntarily fulfilled, perhaps driven by a munificent intent or by any other factor suitable to justify the money withholding.⁵⁵

Useful indications in the sense of a gradual decrease in the relevance of the mistake also derive from the 1992 new Dutch Code, which, for the purpose of recovering the undue payment, no longer refers to the proof of error (Art. 6:203).

As anticipated, before the 2016 reform the relevance of the error in French law was still considerable. The Napoleon Code seemed to have a strictly objective conception of the undue payment by not requiring proof of the error for the purpose of restitution, just stating that any undue payment had to be reversed (Art. 1235). Proof of the error was required only in matters of subjective undue (Art. 1377).

Immediately after the Code issuing, the doctrine and jurisprudence had, however, brushed up the so-called '*condition d'erreur*', in compliance with the *ius commune* – and ultimately Roman – tradition, according to which the conscious payment of a non-existent debt would have been equatable with a donation. In this perspective, despite what affirmed in the Code's section, error's proof became again an essential requirement for the purposes of restoring the undue debt. As expected, all this has had consequences: subordinating the restoring of the undue payment to the evidence of the

53 GALLO, *Introduzione al diritto comparato* II³, cit., p. 391.

54 *Bürgerliches Gesetzbuch (BGB) § 814 (Kenntnis der Nichtschuld): Das zum Zwecke der Erfüllung einer Verbindlichkeit Geleistete kann nicht zurückgefordert werden, wenn der Leistende gewusst hat, dass er zur Leistung nicht verpflichtet war, oder wenn die Leistung einer sittlichen Pflicht oder einer auf den Anstand zu nehmenden Rücksicht entsprach.*

55 See D. GEROTA, *La théorie de l'enrichissement sans cause dans le Code civil allemand*, Paris, 1925, p. 175.

error means, in fact, that any attribution carried out with the awareness of its undue character can no longer be restored, regardless of the lack of cause or underlying justification.

Nevertheless, in spite of the dominant leaning, even in French law the role of the *solvens'* mistake ended up being deescalated: in case of nullity of the contract, for example, the contract is invalidated not because the act is not supported by the will of its author, but because it is objectively without reason. The action of invalidity is therefore completely detached from the proof of the error.⁵⁶

Accepting the solicitations of the most recent doctrine, the Legislator intervened on the discipline of the debts in 2016, with a legislative reform that conceives the debt in strictly objective terms.

The setting given to the subject is now the following: any payment presupposes a debt, so what was unduly received must be returned. The Legislator does not mention the error but excludes the restoration in the case of spontaneous execution of a natural obligation (Art. 1302).

«Tout paiement suppose une dette; ce qui a été reçu sans être dû est sujet à restitution. La restitution n'est pas admise à l'égard des obligations naturelles qui ont été volontairement acquittées».

It follows that anyone who has received an undue service by mistake, or even knowingly, is subject to restitution (Art. 1302-1):

«Celui qui reçoit par erreur ou sciemment ce qui ne lui est pas dû doit le restituer à celui de qui il l'a indûment reçu».

The phrasing of Art. 1302-3 is interesting, it seems to contain a reference to the duty of diligent behavior on the part of the *solvens*:

«La restitution ... peut être réduite si le paiement procède d'une faute».

56 See GALLO, *Introduzione al diritto comparato* II³, cit., p. 392 *et seq.*

Even though it appears that the generally objective view of the undue established in Europe has led many authors to believe the Roman heritage of the institute completely outdated, there is a fact I would like to linger over before I finish: the significance again granted to the *error solventis* as a negative requirement for restorative remedies. If it is indeed true that whoever pays the undue debt can appeal for restitution without having to prove the existence of his mistake, the defendant will be able to resist only by demonstrating the existence of a *scientia solventis*.

In the final analysis, to quote Zimmermann's keen observation, on the procedural plane we are very close «to the position that had once prevailed in classical Roman law».⁵⁷

57 ZIMMERMANN, *The Law of Obligations*, cit., p. 871.
