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Donation in contemplation of death as an example of *datio ob rem* in Roman law

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In this paper I deal with two legal institutions of Roman law – *donatio mortis causa* and *datio ob rem* – that on the surface seemed to be independent of each other completely, but in fact were related so closely that the former was one of the most important examples of the latter's application. Both these concepts have their equivalents in contemporary law; however, as far as Polish law is concerned, the idea of the introduction of donation in contemplation of death as special type of donation in the civil code was rejected finally[1]. The *datio ob rem* constituted an essential element[2] of *condictio causa*

[1] Two legislative initiatives of the Polish Senate (in 2009 and 2011) were abandoned finally. About them see M. Sobczyk, *Darowizna na wypadek śmierci w projekcie zmiany kodeksu cywilnego a rzymska donatio mortis causa*, in: *Interes prywatny a interes publiczny w prawie rzymskim*, eds. B. Sitek, K. Naumowicz, K. Zaworska, Olsztyn 2012, pp. 231–243.

[2] There is a dispute as to whether this element was indispensable or if *condictio* without the prior transfer of property was also admissible. For details see S. Heine, *Condictio sine datione*. „Zur Haftung aus ungerechtfertigter Bereicherung im klassischen römischen Recht und zur Entstehung des

data causa non secuta which was one of the basic Roman unjustified enrichment claims and therefore it is the Roman root of the modern concept of *performance rendered for an intended purpose that has not been achieved* within the meaning of art. 410 § 2 of the Polish civil code of 1964[3].

In Roman law *condictio ob rem*[4], later known as *condictio causa data causa non secuta*[5] or *condictio ob causam datorum*[6], was applied where someone rendered a performance that as a rule consisted in a transfer of property (*datio*), for an intended purpose which related to a specific future event, effect or state of affairs that was expected to occur (*ut aliquid sequatur*[7], *ut aliquid fieret*[8]) and if the purpose was not achieved the giver became entitled to claim restitution of his own performance[9]. There were many different cases of *datio ob rem*, but only a few are usually mentioned in the textbooks on Roman law[10], and thus a student can get the wrong impression that this *condictio* was confined only to innominate contracts and dowries given on account of a future marriage. Among

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Bereicherungsrechts im BGB", Berlin 2005, *passim* with further literature mentioned there.

[3] This condictio is regulated also in § 812 I sentence 2, 2nd alternative of the German civil code (BGB) and in the art. 62 of Swiss code of obligations, in Austrian law it is derived from § 1435 of the civil code (ABGB). It was present also in the art. 129 of the Polish code of obligations of 1933.

[4] The names *condictio ob rem* or *condictio ob rem dati* were used in classical law; however, it is should be stressed that the classical Roman jurists made no difference in nomenclature between various cases of *condictio* (so called figures of *condictio*). The types of *condictio* known from Digest of Justinian were created at the earliest in postclassical law or by the compilers.

[5] This name was given by the compilers to title of Digest of Justinian devoted to this type of *condictio* (D.12.4).

[6] This name was given by the compilers to the title of Codex of Justinian devoted to this type of *condictio* (C.4.6). Both names are still used in the modern doctrine of civil law.

[7] D.12.6.52 (Pomp. 27 ad Q. Muc.).

[8] D.12.1.19pr. (Iul. 10 dig.).

[9] See M. Sobczyk, *Świadczenie w zamierzonym celu, który nie został osiągnięty. Studium z prawa rzymskiego* Toruń 2012, with literature mentioned there.

[10] See e.g. J.A.C. Thomas, *Textbook on Roman law*, Oxford 1976, p. 327.

the cases of *condictio's* application[11] the gifts *mortis causa* deserve special attention, first of all because those gifts were popular with the Romans. The importance of this form of donation is due to the fact that it is a basic proof that the Roman *datio ob rem* was a very wide concept, which could not be reduced to the informal agreement where one of the parties fulfilled his part of the agreement in expectation of a counter-performance from the other party and the counter-performance was not delivered.

There is no room or need here to describe the transaction of donation itself, however a brief outline seems to be useful.

In Roman classical law the *donatio* was not treated as a separate, independent contract, but formed only a legal basis (*causa*) of the transfer of property[12]. In other words, it constituted a *causa* for such legal transactions as *mancipatio, in iure cessio* and *traditio*, which led to the transfer of ownership, in this case of a gratuitous nature[13]. An agreement on the *causa donandi* was required for

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[11] The other cases of *datio ob rem* in which the restitution took place *re non secuta* were: performance made in the expectation that the recipient would behave in a particular way, which could be compared to unenforceable counter-performance, e.g. he would emancipate a son in power or manumit a slave; performance made to satisfy a condition reserved in a legal act, e.g. last will, under which the giver was entitled to receive financial benefit; donation in which the donor imposed a duty on the recipient (*donatio sub modo*); performance given by a man erroneously regarded as a slave in order to obtain freedom; performance made on the account of the settlement in order to avoid or end a civil trial (*datio propter transactionem*); performance delivered to a person who was a *falsus procurator* in the expectation that the creditor would approve it, where such an approval did not take place.

[12] M. Amelotti, *La "donatio mortis causa" in diritto romano*, Milano 1953, pp. 4 ff.; P. Simonius, *Die Donatio mortis causa im klassischen römischen Recht*, Basel 1958, pp. 5 ff., 198 ff.; C. Tort-Martorell Llabrès, *La revocación de la donatio mortis causa en el derecho romano clásico*, Madrid 2003, pp. 33 ff.; M. Kaser, R. Knütel, *Römisches Recht*, München 2003, p. 298; P. Jung, *Das Rückforderungsrecht des Schenkers mortis causa Zugleich eine Abhandlung* zu D 39,6,39 und D 39,6,35,2-3, in: *Pichonnaz. Spuren des römischen Rechts, Festschrift für Bruno Huwiler zum 65. Geburtstag*, Bern 2007, pp. 332.

[13] Apart from that it could constitute a causa for *stipulation*, *acceptilatio* (formal release of a debtor from his debt) and *pactum de non petendo*, see: D.39.6.28 (Marcell. lib. sing. resp.); D.38.6.18.2 (Iul. 60 dig.).

any donation, but there was no requirement of any special form. *Donatio* became a separate legal transaction after the reform of Emperor Constantine in 316 A.D., but it referred only to a bilateral formal act that was immediately executed and that led to the instant transfer of ownership from the donor to the donee[14]. *Donatio* as a consensual contract (*pactum letigitum*) was recognized very late, only in 530[15].

Roman *donatio mortis causa* was a special type of donation, not a separate legal transaction. Moreover, it was not a single uniform transaction, but could take various forms[16]: D.39.6.2. (Ulp. 32 ad Sab.): "Iulianus libro septimo decimo digestorum tres esse species mortis causa donationum ait, unam, cum quis nullo praesentis periculi metu conterritus, sed sola cogitatione mortalitatis donat. aliam esse speciem mortis causa donationum ait, cum quis imminente periculo commotus ita donat, ut statim fiat accipientis. tertium genus esse donationis ait, si quis periculo motus non sic det, ut statim faciat accipientis, sed tunc demum, cum mors fuerit insecuta". ("Julian, in the seventeenth book of his Digest, says that there are three types of gift mortis causa. The first, is when one makes a gift because of apprehension aroused, not by some imminent danger, but simply by reflection on mortality. Another type of gift mortis causa, he says, is when, disturbed by imminent danger of some sort, one makes a gift in such a way that it becomes the recipient's property immediately. A third type of gift mortis causa, he says, is when disturbed by imminent danger of some sort, one

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[14] FV. 249; CTh.8.12.1; C.8.53.25, see: M. Amelotti, pp. 5 ff.; G.G. Archi, *Donazione*, ED, vol. 13, Milano 1964, p. 947; C. Tort-Martorell Llabrès, *La revocación*, p. 44; M. Kaser, R. Knütel, *Römisches Recht*, p. 298; R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Cape Town-Wetton-Johannesburg 1990, p. 492.

[15] C.8.56.4. For more about the development of donation see: M. Amelotti, *La donatio*, pp. 4 ff.; P. Simonius, *Die Donatio*, pp. 5 ff., 198 ff.; G.G. Archi, *Donazione*, *passim*; Tort-Martorell Llabrès, *La revocación*, pp. 33 ff.; M. Kaser, R. Knütel, *Römisches Recht*, p. 298; P. Jung, *Das Rückforderungsrecht*, p. 332; R. Zimmermann, *The Law*, p. 494 ff.

[16] Those forms are briefly described by Julian cited by Ulpian in D.39.6.2 (Ulp. 12 ad sab.) and by Paul in D.39.6.4 (Paul 6 ad leg. Iul. et pap).

makes a gift in such a way that it becomes the recipient's property not immediately, but in the event of one's death")[17].

Ulpian, citing Julian, mentioned three types of gift in contemplation of death. The most important of them was an immediate transfer of ownership to the recipient (*datio*) made by the donor in apprehension of an imminent and substantial danger to his life[18] (*periculo imminente*), e.g. a serious illness[19], weak health[20], battle[21], attack by enemies or robbers[22], cruelty or harted of a powerful man[23], an imminent sea voyage, or journey through dangerous places[24]. It is not certain whether the danger had to be objective[25] or whether even a subjective one sufficed[26]. Alongside the ownership of the thing, the recipient obtained its possession, so he could use it and take its fruits. The position of the recipient as an owner and possessor of the property was very strong, but with one very important limitation – he had to bear in mind that the contract was not definite until the death of the donor. When the giver survived

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[17] Translation: *The Digest of Justinian*, transl. ed. by A. Watson, Philadelphia 1998, D.39.6.2.

[18] This was the basic form of donation *mortis causa*, see M. Amelotti, *La donatio*, p. 12; P. Simonius, *Die Donatio*, p. 9; H. Ankum, *Donations in contemplation of death between husband and wife in classical Roman law*, "Index" 1994, no 22, p. 636; C. Tort-Martorell Llabrès, *La revocación*, p. 29; A. Riechelmann, *Paenitentia. Reue und Bindung nach römischen Rechtsquellen*, Frankfurt am Main, p. 77; P. Jung, *Das Rückforderungsrecht*, p. 328. In S. Di Paola's opinion this was the only one form known in classical law (Donatio, pp. 1 ff.).

[19] D.12.1.19 (Iul. 10 dig.); D.12.4.12 (Paul. 6 ad l. Iul. et Pap.); D.22.1.38.3 (Paul. 6 ad Plaut.); D.23.3.76 (Tryph. 9 disp.); D.24.1.4 (Iul. 17 dig.); D.24.1.20 (Iav. 11 epist.); D.24.1.56 (Scaev. 3 quaest.); D.39.6.8 P. Simonius, *Die Donatio*, p. 114; P. Jung, *Das Rückforderungsrecht*, p. 341, S. Di Paola, *Donatio*, pp. 50 ff.

[20] D.39.6.3 (Paul. 7 ad Sab.).

[21] D.39.6.29 (Ulp. 17 ad ed.).

[22] D.39.6.3 (Paul. 7 ad Sab.).

[23] D.39.6.3 (Paul. 7 ad Sab.).

[24] D.39.6.3 (Paul. 7 ad Sab.); D.39.6.4 (Gai. 1 res. cott.); D.39.6.29 (Ulp. 17 ad ed.).

[25] C. Tort-Martorell Llabrès writes in this context about "peligros ciertos y determinados" (*La revocación*, p. 84).

[26] This interpretation was supported by Neratius in D.39.6.43 (Ner. 1. resp.), see P. Simonius, *Die Donatio*, pp. 99 ff.; S. Di Paola, *Donatio*, pp. 136 ff.; P. Jung, *Das Rückforderungsrecht*, p. 341.

the danger, e.g. recovered from the illness[27], or outlived the recipient[28], he could demand the restitution of the gift, so the donation took full effect only upon the death of the donor[29]. The fact itself that the danger to the donor's life ceased to exist did not frustrate the legal effects of donation and did not automatically cause the retransfer of ownership of the given property to the donor[30]. It was up to the donor whether to reclaim the property or not. This form was also the oldest one[31].

The second form of *donatio mortis causa* was similar to the first one, but with a crucial difference, the transaction made in imminent danger to the donor's life could be under suspensive condition in such a way that the thing did not become the recipient's property immediately, but only upon the death of the donor[32]. The donor was still the owner of the property, so even when he handed it over to

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[27] Recovery from an illness is a basic circumstance in which the donor could claim restitution, see: D.12.1.19 (Iul. 10 dig.); D.12.4.12 (Paul. 6 ad l. Iul. et Pap.); D.22.1.38.3 (Paul. 6 ad Plaut.); D.23.3.76 (Tryph. 9 disp.); D.24.1.4 (Iul. 17 dig.); D.24.1.20 (Iav. 11 epist.); D.24.1.56 (Scaev. 3 quaest.); D.39.6.8.1 (Ulp. 7 ad Sab.); D.39.6.13pr. (Iul. 17 dig.); D.39.6.13.1 (Iul. 17 dig.); D.39.6.16 (Iul. 29 dig.); D.39.6.18pr. (Iul. 60 dig.); D.39.6.18.1 (Iul. 60 dig.); D.39.6.19 (Iul. 80 dig.); D.39.6.24 (Afric. 9 quaest.); D.39.6.29 (Ulp. 17 ad ed.); D.39.6.35.6 (Paul. 6 ad l. Iul. et Pap.).

[28] D.12.1.19 (Iul. 10 dig.); D.24.1.4 (Iul. 17 dig.); D.24.1.52.1 (Pap. 10 quaest.); D.39.6.13.1 (Iul. 17 dig.); D.39.6.23 (Afric. 2 quaest.); D.39.6.29 (Ulp. 17 ad ed.); D.39.6.35.4 (Paul. 6 ad 1 Iul. et Pap.); D.39.6.44 (Paul. 1 manual.).

[29] It was an essential feature of this donation, see: M. Amelotti, *La donatio*, pp. 40 ff.; P. Simonius, *Die Donatio*, p. 101; S. Di Paola, *Donatio*, p. 57; G. G. Archi, *Donazione*, p. 947; C. Tort-Martorell Llabrès, *La revocación*, p. 26, pp. 78 ff.; P. Jung, *Das Rückforderungsrecht*, pp. 342 ff.

[30] P. Simonius, *Die Donatio*, p. 114; P. Jung, *Das Rückforderungsrecht*, p. 341. S. Di Paola, *Donatio*, pp. 50 ff.

[31] M. Amelotti, *La donatio*, pp. 62 ff.; P. Simonius, *Die Donatio*, p. 90; S. Di Paola, *Donatio*, p. 30; H. Ankum, *Donations*, p. 636; C. Tort-Martorell Llabrès, *La revocación*, pp. 34 ff.; P. Jung, *Das Rückforderungsrecht*, p. 327.

[32] D.24.1.11pr. (Ulp. 32 ad Sab.); D.39.5.1 (Iul. 17 dig.); D.39.6.2 (Ulp. 32 ad Sab.). On the conditional form of *donatio mortis causa* see: M. Amelotti, *La donatio*, pp. 12 ff.; P. Simonius, *Die Donatio*, pp. 114 ff.; H. Ankum, *Donations*, p. 636; C. Tort-Martorell Llabrès, *La revocación*, p. 14; A. Riechelmann, *Paenitentia*, p. 77. According to S. Di Paola (*Donatio*, pp. 1 ff.) this form was created in postclassical law.

the donee and granted him its possession[33], he could regain it by means of *rei vindicatio*[34]. The donor's right was still effective *erga omnes*, so his position was much stronger and respectively the position of the donee was much weaker than in the unconditional gift. In this case there was no *datio* and no need to have recourse to *condictio* when the donor decided to regain his property after he survived the danger to his life. For those reasons this type of gift *mortis causa* cannot be regarded as *datio ob rem* in a technical sense. In this form the conditional transfer of ownership was available only in case of *traditio*, because *mancipatio* and in *iure cessio* were *actus legimiti*, in which the reservation of a condition was not admissible.

The last form, which in the cited source is mentioned in the first place, was the gift made not in apprehension of imminent danger, but simply by reflection on mortality (*sola cogitatione mortalitatis*)[35]. In this form the grounds for the donor's decision were different: he was motivated not by the threat of death, but by the simple thought that as a mortal being he would die one day. Apart from that difference, the legal construction remained the same, and the transfer of property could be immediate or subject to the suspensive condition described above. Where the transfer of property took place immediately the donor could revoke it any time he changed his mind (so called *ius poenitendi*) without any further requirements, especially without any special justification[36]. It is controversial if *donatio sola cogitatione mortalitatis* was actually recognized in classical law[37], in spite of the fact that according to the cited source

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[33] As a rule the thing was handed over to the donee to let him use it and take its fruits, see: C. Tort-Martorell Llabrès, *La revocación*, pp. 69 ff.

[34] *Rei vindicatio* is confirmed in D.39.6.14 (Iul. 18 dig) and D.39.6.29 (Ulp. 17 ad ed.), see. P. Jung, *Das Rückforderungsrecht*, pp. 342 ff.

[35] This type of donation is mentioned also in D.39.6.2 (Ulp. 32 ad Sab.); D.39.6.31.2 (Gai. 8 ad ed. prov.); D.39.6.35.4 (Paul. 6 ad ad l. Iul. et Pap.); C.8.56.4.

[36] On *ius poenitendi* see: A. Riechelmann, *Paenitentia*, *passim* with further literature mentioned there.

[37] This kind of donation is mentioned in: D.39.6.2 (Ulp. 32 ad Sab.); D.39.6.31.2 (Gai. 8 ad ed. prov.); D.39.6.35.4 (Paul. 6 ad ad l. Iul. et Pap.);

it was mentioned by Julian and Ulpian. However, it was known in postclassical times. The recognition of a gift made simply on reflection on mortality and the right to change one's mind made that kind of donation very convenient for the donor. The position of the giver was very strong, especially in the case of the conditional gift, and the recipient had to reckon with the necessity of returning of the thing any time if the donor changed his mind. Owing to the fact that the donor did not have to justify his decision in any way, the two abovementioned traditional circumstances of revocation of donation lost their importance. The donor did not have to prove that his life was no more in danger and did not have to wait in hope that the donee would die before him.

The nature of donation in contemplation of death was explained by Paulus: "Paulus libro sexto ad legem Iuliam et Papiam (D.39.6.35.2–3) 2. Sed mortis causa donatio longe differt ab illa vera et absoluta donatione, quae ita proficiscitur, ut nullo casu revocetur. et ibi qui donat illum potius quam se habere mavult: at si, qui mortis causa donat, se cogitat atque amore vitae recepisse potius quam dedisse mavult: et hoc est, quare vulgo dicatur: 'se potius habere vult, quam eum cui donat, illum deinde potius quam heredem suum' 3. Ergo qui mortis causa donat, qua parte se cogitat, negotium gerit, scilicet ut, cum convaluerit, reddatur sibi: nec dubitaverunt Cassiani, quin condictione repeti possit quasi re non secuta propter hanc rationem, quod ea quae dantur aut ita dantur, ut aliquid facias, aut ut ego aliquid faciam, aut ut Lucius Titius, aut ut aliquid optingat, et in istis condictio sequitur". ("2. But a gift mortis causa differs considerably from the true and absolute sort of gift, which proceeds in such a way that it can in no circumstances be revoked. In that sort of case, of course, the donor wishes the recipient rather than himself to have the property. But the person who makes a gift mortis causa is thinking of himself and, loving

C.8.56.4. For its classical origin: M. Amelotti, *La donatio*, p. 11; H. Ankum, *Donations*, p. 636, for postclassical: F. Schwarz, *Die Grundlage der condictio im klassischen römischen Recht*, Münster-Köln, p. 268; P. Simonius, *Die Donatio*, pp. 80 ff.; C. Tort-Martorell Llabrès, *La revocación*, pp. 39 ff.; P. Jung, *Das Rückforderungsrecht*, pp. 333 ff.

life, prefers to receive rather than to give. This is why it is commonly said: 'He wishes himself rather than the recipient to have the property, but, that said, wishes the recipient rather than the heir to have it'. 3. Consequently, insofar as he is thinking of himself, the person who makes a gift mortis causa is making a business transaction, with the purpose, that is, of receiving the property back in the event of his getting better; and the followers of Cassius did not doubt that such property can be reclaimed by a condictio on nonreciprocation, the agreement being that that condictio applies to gifts that are made on condition that you do something or that I do something or that Lucius Titius does something or that some event occurs and the condition is fulfilled")[38].

First of all Paulus emphasized the most important difference between a gift *mortis causa* and the usual basic form of donation (true and absolute sort of gift, *vera et absoluta donatio*), namely the donation in its basic form (*donatio inter vivos*) as a rule could not be revoked, while there were circumstances where the donor could claim back the property given *mortis causa*. This essential feature of donation in contemplation of death is mentioned in other sources[39]. The fact that all aforementioned forms of *donatio mortis causa* were used in contemplation of death (either imminent danger or general reflection on death) and the potential recoverability were its the most important features which distinguished it from other legal institutions, especially *donatio inter vivos*. Due to those characteristics the gift *mortis causa* should be regarded as a peculiar form of donation[40]. In the modern definition of Roman *donatio mortis causa* it is stressed that in this type of donation its

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[38] Translation: *The Digest of Justinian*, transl. ed. by A. Watson, Philadelphia 1998, D.39.6.35.2-3.

[39] As Ulpian wrote: *non videtur perfecta donatio mortis causa causa facta antequam mors insequatur* (D.39.6.32, Ulp. 76 ad ed.), see also D.39.5.1pr. (Iul. 17 dig.); D.39.6.27 (Marc. 5 regur.); I.2.7.2; C.4.6.6.

[40] It should be noticed that *donatio mortis causa* was a subtype of *donatio*, not a separate legal institution. Julian mentioned it among the types of donations (D.39.5.1pr. Iul. 17 dig.), while Ulpian made an express distinction between *donatio* and *donatio mortis causa* (D.50.16.67.1 Ulp. 76 ad ed.), see also I.2.7pr.

final effect was dependent on the fact that the donee outlived the donor[41]. That means that the classical donation in contemplation of death was a gift affected by an agreement between donor and donee, which took full effect when the donor died and the donee was still alive at that time[42]. In fact, this short description does not reflect the complexity of this legal institution and various forms in which it was applied in Roman law.

This essential feature of Roman donation in contemplation of death referred to all three forms described above, particularly to the immediate transfer of the given property and it is even more visible in the case of the conditional transfer, where the real effect of the transaction took place only upon the donor's death. However, this feature is the most natural for the third form – donation motivated by the mere general awareness of one's mortality (*sola cogitatio mortalitatis*), because it could be claimed back any time the giver changed his mind (*ius poenitendi*)[43], without any further requirements for its recoverability. In this form of donation *mortis causa* its free recoverability was manifested in the in some sense temporal position of the donee and the decisive character of the moment of the donor's death.

In the third paragraph of the cited excerpt, Paulus, following the Sabinian school, expressly classified donation in contemplation of death as *datio ob rem*. Although the jurist referred to the unconditional donation made *periculo imminente*, this classification seems to be common for those forms of donation in contemplation of death which consisted in the immediate transfer of a property

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[41] M. Amelotti, *La donatio*, p. 3; B. Biondi, *Successione testamentaria e donazioni*, Milano 1955, p. 707; W. Litewski, *Słownik encyklopedyczny prawa rzymskiego*, Kraków 1998, s. v. *donatio mortis causa*; C. Tort-Martorell Llabrès, *La revocación*, p. 95, F. Longchamps de Bérier, in: W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa 2009, p. 312.

[42] Cf. F. Schulz, *Classical Roman Law*, Oxford 1951, p. 351.

[43] For classical origin of *ius poenitendi* see: M. Amelotti, *La donatio*, p. 4, p. 42; P. Simonius, *Die Donatio*, p. 11, pp. 130 ff.; G.G. Archi, *Donazione*, p. 946; S. Di Paola, *Donatio*, pp. 40 ff.; H. Ankum, *Donations*, p. 636; C. Tort-Martorell Llabrès, *La revocación*, p. 51. For its classical origin: A. Riechelmann, *Paenitentia*, p. 80.

(*datio*). Only the transfer of ownership subjected to the suspensive condition could not be seen as a *datio*, at least in its technical meaning. Paulus did not mention the opinion of the Proculians, so nothing sure can be said about their classification, however, it is possible that the Proculians did not share the view that that kind of donation rested within the range of *datio ob rem*. Nevertheless, the classification of *donatio mortis causa* as a case of *datio ob rem* seems to have been the prevailing view in the third century.

The classification of donation in contemplation of death as a *datio mortis causa* was of crucial importance, because where the circumstances occurred that enabled the donor to reclaim the property, he did not have to look for any different or further ground for restitution. In particular, the parties did not have to expressly agree the conditions of recoverability of the gift[44], it was enough when they manifested their intention that the donation was not a definite one, but in contemplation of death. In other words, the parties could conclude an express agreement, in which the donee incurred an obligation to return the property is some circumstances, but it was not necessary.

The question arises as to what, in this case, was the particular purpose of *datio ob rem*, described in the sources as giving for a purpose[45]. The next question is why this form of donation existed as well as the donation *inter vivos* and such institutions of Roman inheritance law as last will (*testamentum*), legacy (*legatum*) and *fideicommissum*. Both questions are intrinsically connected with the nature of this type of donation. The excerpt from Paulus's commentary on *lex Iulia et Papia* contains some clues in all those aspects.

In the majority of cases of *datio ob rem* the giver's aim was to receive a counter-performance from the recipient on the basis of an informal agreement concluded outside the field of contract law[46]. In

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[44] Such agreements were sometimes made, see D.39.6.42pr. (Pap. 13 resp.), but in fact the agreement was enforceable provided that the contract of stipulation was concluded, see M. Amelotti, *La donatio*, p. 103; P. Simonius, *Die Donatio*, p. 172.

[45] See: D.12.6.52 (Pomp. 27 ad Q. Muc.), D.12.6.65pr. (Paul. 17 ad Plaut.).

[46] This was a typical aim in innominate contracts and in similar agreements such as *datio ob manumissionem*. About discussion on the purpose of perfor-

case of *donatio mortis causa* the purpose was undoubtedly different. It is obvious that the donor did not expect any counter-performance from the recipient, because such an expectation would be contrary to the gratuitous nature of donation. The giver's aim was to make a donation, but not a definite one, owing to the fact that in certain circumstances its subject had to be restored. In my opinion the purpose of performance could be different in different situations. As a rule the donor wanted to regulate the fate of an item of his property after his death by giving it to a chosen person when he was still alive. However, as Paul says "he [the donor] wished himself rather than the recipient to have the property, but, that said, the recipient rather than the heir to have it"[47], so in this way the donor preferred himself to the donee and the donee to his heirs[48], therefore he still wanted to recover the property in certain circumstances and in postclassical law any time he changed his mind. Similar descriptions of the nature of the donation were offered by Marcianus[49] and the Institutes of Justinian[50].

Owing to the fact that the donee received the ownership and possession of the given property at the time the gift was made, his legal position was much stronger than the position of a legatee or even a heir, because they received their rights only after the death of the deceased. Although the gift *mortis causa* was not held to have

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mance in *datio ob rem* see: F. Schwarz, Die Grundlage, *passim*; F. Chaudet, *Condictio causa data causa non secuta. Critique historique de l'action en enrichissement illégitime de l'art.* 62 al 2 CO, Lausanne 1973, passim; A. Söllner, *Der Bereicherungsanspruch wegen Nichteintritts des mit einer Leistung bezweckten Erfolges* (§ 812 Abs. 1 S. 2, 2 Halbsatz BGB), AcP, 1963, no 163, p. 25; B. Kupisch, *Ungerechtfertigte Bereicherung. Geschichtliche Entwicklungen*, Heidelberg 1987, p. 12; L. Pellecchi, *L'azione in ripetizione e le qualificazioni del dare in Paul. 17 ad Plaut. D.12.6.65 contributo allo studio della condictio*, SDHI 1998, no 4, p. 70; J.D. Harke, *Das klassische römische Konditionensystem*, "IURA" 2003, p. 60, M. Sobczyk, *Świadczenie*, pp. 121 ff.

[47] *Se potius habere vult, quam eum cui donat, illum deinde potius quam heredem suum* D.39.6.35.2 (Paul. ad leg. iul. et pap.), comp. D.39.6.1pr. (Marcian. 9 inst.), I.2.7.1.

[48] D.39.6.1pr., D.39.6.35.2, I.2.7.1.

[49] D.39.6.1pr. (Marcian. 9 inst.).

[50] I.2.7.1.

been fully completed until death ensued[51], the donee was already the owner and possessor of the property in question. He could use the property and take its fruits from the time the thing was handed to him. This was a very important advantage of the gift (in comparison with the acts of inheritance law) that put the donee in a much better position than the position of an heir or *legatarius*. Even when the transfer of ownership was made subject to the suspensive condition the property was usually handed over to the donee, hence, being already a possessor, he did not have to claim it from the donor's heirs after the donation became fully effective. For that reasons donation in contemplation of death existed as well as the traditional instruments of inheritance law, especially legacies.

Apart from this basic purpose in the construction of *datio ob rem* the donor could pursue a different aim. In some situations the donation was an easier way of disposal of assets than drafting of a last will, because of the formalities of Roman *testamentum* in classical law in comparison with the informal *donatio* executed by means of a simple delivery of a thing (*traditio*). In a state of imminent danger to the life an informal donation was a very convenient tool. In other cases the donor wanted to circumvent the restrictions or prohibitions of Roman inheritance law, in particular restrictions imposed on unmarried or childless persons[52]. Where a particular person could not be instituted as a heir or receive a legacy and thus there was no point in drafting a last will, the best, or even the only, way of disposal of property in contemplation of death was by donation in favour of that person. It is true therefore that to some extent donation of this kind was the product of attempts to avoid

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[51] D.39.6.32 (Ulp. 76 ad ed.).

[52] Those restrictions were imposed in the *lex Iulia de maritandis ordibus* from 18 B.C. and *lex Papia Poppaea* from 9 A.D. Unmarried persons could not receive anything on the basis of last will, childless persons could receive only half of the testator's disposition. On those *leges* see: M. Zabłocka, *Przemiany prawa osobowego i rodzinnego w ustawodawstwie dynastii julijsko-klaudyjskiej*, Warszawa 1987, pp. 34 ff.; idem, *Zmiany w ustawach małżeńskich Augusta za panowania dynastii julijsko-klaudyjskiej* PK 30/1987, no 1–2, pp. 151–178; F. Longchamps de Bérier, *O elastyczności prawa spadkowego*, Warszawa 2006, pp. 120 ff.

the technical or formal elements of succession law. Moreover, the donor could intend to incline the donee to a particular behaviour, for example he expected that the donee would support him or care for him in his old age[53]. This case resembles an innominate contract in the form *do ut facias* (I give in order that you do something for me) to some extent, but in fact it cannot be treated as such a contract.

Those examples show that the grounds for the donor's decision could be of various natures that only at a very general level had some features in common. That is why, in my opinion, there was not a single uniform purpose (*res*) of the *datio ob rem* in case of donation in contemplation of death. Hence, the purpose of donation *mortis causa* cannot be reduced to any simple scheme. However, what is the most important, the purpose did not refer to the counter-performance, so therefore this example of *datio ob rem* differed considerably from the typical ones.

In comparing donation in contemplation of death with other *dationes in rem*, it is important to note that in the case of donation there was a dissonance between the purpose of the performance and the circumstance which enabled the giver to claim restitution of his performance. If the donor survived the danger for the sake of which he decided to make the donation he was entitled to reclaim his property regardless of the particular purpose he was motivated by at the time of transfer of the property to the donee. The fact itself that the donor survived the danger did not frustrate the purpose of the donation, but it could give rise to a decision to claim its restitution.

Being fully effective only on the donor's death, donations in contemplation of death were not subject to the restrictions which affected gifts *inter vivos*, which refers first of all to the restrictions imposed in *lex Cincia de donis et muneribus*[54] and the prohibitions of donation between husband and wife.

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[53] T. Parkin, in: *Roman family law: Status, sentiment, space*, eds. B. Rawson, P. Weaver, Oxford 1999, p. 130.

[54] *Lex Cincia de donis and muneribus* from 204 B.C. prohibited gifts exceeding a certain value (unknown today) with some exceptions related to *personae exceptae* (mostly near relatives), see A. Berger, *Encyclopedic dictionary*, p. 549.

In the course of the development of the law this kind of donation became gradually more and more similar to the institutions of Roman inheritance law[55]. It was increasingly brought under the provisions which applied to legacies. Already by the end of the classical period the *leges Furia*[56], *Voconia*[57], *Falcidia*[58] and *Iulia et Papia* had been extended to this donation and the requirements of capacity to make and take gifts were the same as those for legacies. As a result, one of the basic and the most frequent purposes of the donor, namely the circumventions of the restrictions of inheritance law, decreased considerably. In particular, the capacity to take a donation of this kind was much narrower after the provisions of *lex Iulia at Papia* regarding unmarried and childless persons became applied to those gifts[59]. In my opinion the general recognition of the donation *sola cogitatione mortalitatis* and *ius poenitendi* was a further very important step in the assimilation of the *donatio mortis causa* with the institutions of inheritance law.

Because of the evolution described above, the legal character of the donation in contemplation of death was not obvious in Roman law. It was controversial among the classical jurists whether this

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[55] This process is described in detail in: M. Amelotti, *La donatio*, pp. 78 ff.; S. Di Paola, *Donatio*, pp. 133 ff.; P. Simonius, *Die Donatio*, pp. 31 ff.; C. Tort-Martorell Llabrès, *La revocación*, p. 37; A. Riechelmann, *Paenitentia*, pp. 79 ff.; P. Jung, *Das Rückforderungsrecht*, pp. 339 ff.

[56] *Lex Furia testamentaria* passed between 204 and 169 B.C. fixed the maximum amount of a legacy at one thousand asses except for legacies bequeathed to one's nearest relatives, spouse, or bride, see A. Berger, *Encyclopedic Dictionary*, p. 552.

[57] *Lex Voconia* of 169 B.C. provided that no woman could be heir to an estate having a value greater than a fixed amount, see A. Beger, *Encyclopedic Dictionary*, p. 560.

[58] *Lex Falcidia* of 40 B.C. provided that legacies should not exceed three quarters of the testator's estate, so the remaining fourth part was reserved to the heir pointed in testament. The provisions of *lex Falcidia* were extended to donations in contemplation of death in Emperor Alexander Severus's constitution from 223 A.D. (C.6.50.5), see also: D.39.6.27 (Marc. 5 reg.); D.39.6.42.1 (Pap. 13 resp.).

[59] Paulus wrote in D.39.6.35pr. (Paul. 6 ad l. Iul. et Pap.) about a *senatus consultum* which extended the limitation to donations, see S. Di Paola, *Donatio*, pp. 134 ff.; F. Longchamps de Bérier, *O elastyczności*, pp. 125 ff.

transaction belonged to the group of legal acts *mortis causa* or *inter vivos*[60]. Due to its anomalous character, some of them deemed that a gift in contemplation of death was comparable with a last will, while some others thought that it was assimilable to contracts. The controversy was resolved by the Emperor Justinian's constitution in which it was recognized as a transaction *mortis causa* and was assimilated to legacies[61]. In consequence the rules as to the capacity to give and to take such a gift were for the most part the same as those which governed legacies[62]. However, the assimilation was not complete, because of the certain differences that still remained[63], which caused the donation in contemplation of death to keep some degree of its autonomy.

STRESZCZENIE

Darowizna na wypadek śmierci jako przykład *datio ob rem* w prawie rzymskim

Darowizna na wypadek śmierci stanowi jeden z podstawowych przykładów *datio ob rem*, która była koniecznym elementem rzymskiej skargi *condictio causa data causa non secuta*, będącej z kolei poprzedniczką współczesnej koncepcji świadczenia w zamierzonym celu, który nie został osiągnięty w rozumieniu art. 410 § 2 polskiego kodeksu cywilnego. W pracy tej opisana została istota tej darowizny i różne formy jej zastosowania. Szczególną uwagę poświęcono problematyce celu świadczenia darczyńcy w odniesieniu do ogólnej idei świadczenia w zamierzonym celu (*datio ob rem*) w prawie rzymskim. Ponadto została ukazana ewolucja *donatio mortis causa* w kierunku jej asymilacji z instytucjami prawa spadkowego, zwłaszcza legatami.

Słowa kluczowe: darowizna na wypadek śmierci; *datio ob rem*; *condictio causa data causa non secuta*

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[60] This view is based on the C.8.56.4, I.2.7.1; however, according to M. Amelotti (*La donatio*, pp. 31 ff.), P. Simonius (*Die Donatio*, pp. 3 ff.) and P. Jung, (*Das Rückforderungsrecht*, p. 337) the information in those sources may be false.

[61] C.8.56.4; I.2.7.1.

[62] D.39.6.37 pr.

[63] M. Amelotti, *La donatio*, pp. 34 ff.; P. Simonius, *Die Donatio*, p. 74.

SUMMARY

Donation in contemplation of death as an example of *datio ob rem* in Roman law

Donation in contemplation of death was one of the basic examples of *datio ob rem* which is an essential element of *condictio causa data causa non secuta*, which is the Roman root of the contemporary concept of *performance rendered for an intended purpose that has not been achieved* within the meaning of art. 410 § 2 of the Polish civil code of 1964. In this article the legal nature of this donation and various forms of its application are described. Particular attention is paid to the purpose of the donor's performance in relation to the general idea of "giving on purpose" (*datio ob rem*) in Roman law. Moreover, the evolution of *donatio mortis causa* towards its assimilation with the institution of Roman inheritance law, especially legacies, is shown.

Keywords: donation in contemplation of death; *datio ob rem*; *condictio causa data causa non secuta*

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