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Actio de in rem verso. *An Unwanted Continuity. The Doctrine of* versio in rem *in the Austrian Civil Code and Interwar Legal Discussion in Czechoslovakia*[*]

Abstract

This paper concerns of the doctrine of *versio in rem* (or *actio de in rem verso*) in the legal discussion in interwar Czechoslovakia. The paper presents a brief overview of the origin and field of application of *actio de in rem verso* in classical Roman law and the transformation of the doctrine of versio in rem in the frame of *Corpus Iuris Civilis*. The scope of the changes made by the compilers is still uncertain and was a subject of extensive discussion among the legal scholars of the 19th century. The paper describes the nature of *versio in rem* in the Austrian Civil Code (provision of § 1041) and presents legal statements of the prominent exponents of the various legal schools of interwar Czechoslovakia, the legal traditionalists and the supporters of the School of Pure Law Theory. The doctrine of *versio in rem* is still in the centre of attention of the modern legal scholars in the Czech Republic. The doctrine of *versio in rem* was adopted in the new Czech Civil Code, but without reflecting the results of the interwar discussion.

Keywords: *versio in rem, actio de in rem verso*, unjust enrichment, Austrian Civil Code, civil law in Czechoslovakia

The *actio de in rem verso* in Roman Law

This paper is dedicated to a discussion about the doctrine of *versio in rem* in the legal science of interwar Czechoslovakia.[1] Czech civil law and legal science in this pe-

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[1] For more details see Dostalík, *Spor meziválečné právní*, 90–102.

riod depended heavily upon the Austrian model (partly because of the acceptance of the Austrian Civil Code by the newly formed Czechoslovakia). This discussion about the doctrine of *versio in rem* can serve as an excellent example of the process of emancipation of national laws in the Central Europe after gaining the independence.

Versio in rem has a long tradition in private law,[2] with its origins rooted in classical Roman law.[3] Reinhard Zimmermann ranked *actio de in rem verso* amongst "Roman institutions that stimulated the advance towards a broadly based enrichment liability,"[4] in other words for Zimmermann, *versio in rem* was one of the examples of the "liability outside the *condictiones*," together with *actio negotiorum gestio contraria*. What the *versio in rem* has in common with the *condictiones* of the Roman law is the principle that "no one can be enriched at the expense of another" and the main difference is in the absence of *datio* (transfer of the property). Max Kaser showed as a typical example of the use of the *actio de in rem verso* when the slave used the money borrowed from a third person for buying food or clothes for his master.[5] This idea that the *actio de in rem verso* served mainly for the clothes and nutrition would remain in the tradition of civil law for a very long time. *Versio in rem* relates to contracts that were entered into by a slave or by a son under the control of the father of the family (*pater familias*).[6] In this case, the contract was valid, but the *pater familias* had only limited liability for the obligations of the contract.

The *pater familias* was liable in two instances. The first is if the *pater familias* formed a *peculium*, meaning he allowed part of his property to be separately and independently managed by the slave.[7] In this case, the slave was entitled to secure contracts on the base of natural obligation, his master instead could be sued under the contract with the praetorian *actio*. His liability was limited to the value of the *peculium*. The lawsuit was named *actio de peculio* in the praetorian edict.[8] The second instance was a direct order of the *pater familias* to the slave. In this case, the *pater familias* could be sued under the principle of *actio quod iussu.* In the case of absence of *peculium*, (alternatively its liquidation) or any direct order from the *pater familias* there probably was a gap in the liability of the *pater familias*. Although the *pater familias* could benefit from the actions of his slave, the second party to a contract had no legal recourse to recover any unjust enrichment back from him.

This gap was filled with the *versio in rem*, originally introduced under the name *actio de in rem verso* in the praetorian edict as the part of *actio de peculio formulae*.[9] With the help of this *actio* the party contracting with the slave could directly sue the *pater fami-*

[2] Wellspacher, *Versio in rem*, 129. Kupisch, *Die Versionsklage*, *passim*. Coing, *Europäischen Privatrecht 1500–1800*, 498–502.

[3] Tuhr, *Actio in rem verso*, 169–73. Niederländer, *Die Bereicherungshaftung*, 37–56.

[4] Zimmermann, *The Law of Obligations*, 878.

[5] Kaser, *Das römische Privatsrecht. Erster Abschnitt*, 607.

[6] D. 15, 3. See also Salkowski, *Zur Lehre von Sklavenerwerb*, 289ff; Lenel, *Das Edikt.*

[7] See Tuhr, *Actio in rem verso*, 238–59.

[8] For the relationship between actio de peculio and actio de in rem verso see Chiusi, *Die actio de in rem verso*, 66–85.

[9] G. 4, 72a. For the position of the *actio de in rem verso* in the praetorian edict see *ibid.*, 15–31; also, see Dajczak, Giaro, Longchamps de Bérier, *Prawo rzymskie*, 143.

lias. The limit of the liability of the *pater familias* was the value of the augmentation[10] of his property.[11] In some cases, there was a possibility to use either *actio de in rem verso* or *actio quod iussu* or *actio de peculio*. Aldona Jurewicz[12] refers to fragment of the Digest (D. 15, 3, 5, 2), where a slave purchased something for his master. If the master of the slave ordered the purchase, it could be possible to sue with the help of *actio quod iussu*. If there was no explicit order from the master, but the item purchased was useful to the master, then the *actio de in rem verso* could be used. And if none of these two requirements were met, there was still a possibility to use *actio de peculio*.

In the great compilation of laws (527–533) made by the emperor Justinian, the *versio in rem* could still serve as a remedy for recovering enrichment of the property of *pater familias* achieved by the actions of the slave (or any person in his *potestate*). The use of freedmen as the brokers, however, caused raising the question: whether this doctrine could be used for recovering any enrichment made by a man who was not *in potestate* (*persona libera*) and made *impensae* on property of *pater familias*, using money of another man. This particular use of *versio in rem* was unacceptable in classical Roman law because of the principle that one cannot be obligated by activity of third party,[13] and therefore obtain for example ownership directly from the acting of the free person. In the greatest collection of work on Roman legal science (jurisprudence), the Digest, there is no trace of this use of *actio de in rem verso*. However, an instrument that could solve the problem of enrichment by third party was *actio negotiorum gestio* (directly or through analogy).

Nevertheless, in the collection of imperial decrees in the Justinian's Code (C. 4, 26, 7) we find a constitution, the text of which suggest that it could be used, when the broker took a loan and spent it on behalf of his principal. This imperial decree dates back to the reign of emperor Diocletian. In general opinion it seems to be heavily interpolated in the 6th century CE. According to this view, in Diocletian's original version of the text there was no deflection from previous Roman doctrine. The Justinian's compilers, however, added a word *libero* and a small passage in the end of the text (C. 4, 26, 7, 3). It changed the meaning of the text through expanding the scope of application of *versio in rem*. In consequence, it opened the door to a legal interpretation, that *versio in rem* could be used for recovering of enrichment which was made to the property of *pater familias* with the money of third party by a contracting free person (not a slave or a *filius familias*):

C. 4, 26, 7, 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. DIOCL. ET MAXIM. AA. ET CC. CRESCENTI. *<A 293 D. NON. APRIL. BYZANTII AA. CONSS.>

[10] For the review of the term *versio* in the sources of Roman law see Chiusi, *Die actio de in rem verso*, 119–33.

[11] Dajczak, Giaro, Longchamps de Bérier, *Prawo rzymskie*, 545.

[12] Jurewicz, *Pater familias dominusve iussit*, 54.

[13] See e.g. G.3,103: *Praeterea inutilis est stipulatio, si ei dari stipulemur, cuius iuri subiecti non sumus*.

Ernst Rabel and Otto Lenel[14] claim that the word *libero* (free person) and the sentence *nisi vel in rem eius pecunia processit* had been added by the Justinian's compilers. This amendment allowed much wider use of the *actio de in rem verso* than in classical times. Such a broader concept made it possible to understand *versio in rem* as a special case of *negotiorum gestio* and to use this action even where the *actio* of *negotiorum gestio contraria* belongs[15] and at the same time using *actio de in rem verso* as a case of an enriched third party. Every action of every free person which resulted in unjust enrichment of their property could lead to the use of *actio de in rem verso* for the recovery of such enrichment. This major change has been connected with significant changes in the law of unjust enrichment. Emperor Justinian aimed to create a general clause of unjust enrichment. For some scholars (Rabel,[16] Lenel), this *actio de in rem verso* represents a legal action (*actio*) that can be used as a general means for various situations where unjust enrichment can be recovered. There is no space left to describe the "second life" of this provision of the Justinian's Code in the French law.[17]

The view of those scholars was not generally accepted, and differing opinions can be found. This opinion rejects the general character of the *versio in rem* even in Roman law. According to Kaser, the scope of the *actio de in rem verso* in post-classical law was extended through individual cases of a classical law. In the post-classical law, there is a general responsibility of the holder of power for the actions of a person not subject to his power. Herein lie the origins of the *Verwendungsklage*, which serves to compensate if a foreign thing is turned in favour of another.[18] It can be seen that Kaser on the one side admitted "extension" of the scope of application of the *actio de in rem verso*, but only towards the free person (*Gewaltfreier*), not towards the general character of the *actio de in rem verso* in the sense of *condictio sine causa generalis*. In the Czech literature already in the end of 19th century Josef Stupecký[19] and Antonín Pavlíček[20] were convinced that the discussed change cannot be interpreted as the general clause of unjustified enrichment.

The *versio in rem* did not disappear from the legal sphere when the Roman law began its new life in 11th century, even if slavery and power of the *pater familias* over his son did not play any significant role in the life of medieval society. The reason (or the catalyst, according to Zimmermann)[21] was the single text of Justinian's Code cited above (C. 4, 26, 7, 3). The remedy mentioned in this text was known by the writers of *ius commune* as *actio de in rem verso utilis*.[22] In detail we can distinguish two main streams of understanding of *actio de in rem verso*. The first group understood *actio de in rem verso* as enrichment of the third party, based on the contract between two other persons,[23] thereby labelling *actio de in rem verso* as a contract. The other group focused on the

[14] Lenel, *Das Ediktum*, 297.
[15] Zimmermann, *The Law of Obligations*, 880.
[16] Rabel, *Ein Ruhmesblatt Papinians*, 5–25.
[17] For more details see Zimmermann, *The Law of Obligations*, 884.
[18] Kaser, *Das römische Privatsrecht. Zweiter Abschnitt*, 107.
[19] Stupecký, *Versio in rem*, *passim*.
[20] Pavlíček, *Žaloby z obohacení*, 95–8.
[21] Zimmermann, *The Law of Obligations*, 879.
[22] Coing, *Europäischen Privatrecht 1500–1800*, 498–502.
[23] Struve, Georg Adam. *Syntagma Iuris Civilis*, Exerc. XXI. Lib. XV, Tit III, LXXII. After: Zimmermann, *Law of Obligations*, 879.

relation between only two persons, and the foundation of the *actio de in rem verso* for them was a quasi-contract.[24] This perception brought *actio de in rem verso* to the vicinity of *negotiorum gestio*.[25]

The legal jurisprudential scholars of the period of *ius commune* were interested in the possibility of this widespread application of the *actio de in rem verso* and tried to find more locations in the Digest of Justinian, which could support this general character. The search was relatively successful and they uncovered several examples where the doctrine was used. For instance:

D. 17, 2, 82

Iure societatis per socium aere alieno socius non obligatur, nisi in communem arcam pecuniae versae sunt.

Lawyers of the *ius commune* were convinced that *actio de in rem verso* is the embodiment of the principle that no-one can enrich himself on the expense of another[26] and that lawsuit can be used in the role of *condictio sine causa generalis*.[27] *Ius commune* understood *versio in rem* first as a contract between the plaintiff and the intermediary. The starting point for the obligation to compensate was the *versio* itself, i.e. the use of the thing for the benefit of another. The *ius commune* lawyers classified *actiones adiecticiae qualitatis* into two groups. In the first group were *actio quod iussu*, *actio institoria*, *actio tributoria*, where the third party is bound based on his will (*voluntas*). The second group consists of the *actio de in rem verso*, where this basis is *utilitas*, i.e. the benefit the defendant has.[28] The second option (based on D. 15, 3, 32) was to understand the *versio in rem* as a special case of agency (mandate) or *negotiorum gestio*.[29]

During the 18th century, more attention was paid to the *versio in rem* as a two-party relation. The main question was: Is it possible to use *actio de in rem verso* even in the case where is no middle person, just because someone has enriched himself at the expense of another? The famous fragment from the Digest was used to answer this question in the affirmative (D. 26, 8, 1, pr). The limitation of the lawyer Ulpian to the case of pupil obliged towards tutor only has been removed and this opinion started its advance to a generally held rule.[30] And this idea of general use of *actio de in rem verso* in the cases of unjust enrichment deeply penetrated the newly created civil codes of the end of the 18th and beginning of the 19th century.[31] The Prussian code (ALR) embedded this

[24] Stryk, Samuel. *Usus modernus pandectarum*, Lib. XV, Tit. III, § 2. After: Kupisch, *Die Versionsklage*, 24.

[25] See further arguments at Zimmermann, *The Law of Obligations*, 880.

[26] *Ibid*., 879.

[27] Dajczak, Giaro, Longchamps de Bérier, *Prawo rzymskie*, 550.

[28] Kupisch, *Die Versionsklage*, 24.

[29] *Ibid.*, 33–4.

[30] To the discussion about the extent of the field of application of this rule see Zimmermann, *The Law of Obligations*, 882. For the value of this rule for the further development in the Czech legal science see Dostalík, *Condictiones*, 130.

[31] Zimmermann, *The Law of Obligations*, 883.

general rule in section § 262 I 13.[32] Prussian law also tended to understand *versio in rem* as a mandate case.[33]

And the second instance of the application of this general principle is § 1041 of the Austrian Civil Code (ABGB). Zimmermann states that in Austria, over time, *sedes materiae* became the accepted norm for all enrichment claims arising not from the transfer.[34] This can be true for Austrian legal science[35] at the end of 20th century but not for Austrian civil law of the 19th century or interwar Czechoslovakia and not for the recent Czech civil law,[36] as will be presented below.

The *actio de in rem verso* in the Austrian Civil Code

The problem of *versio in rem* led to extensive discussions and debates amongst lawyers of civil law in Czechoslovakia, beginning at the end of 19th and the start of the 20th century.

The problem was the provision of § 1041 of the Austrian Civil Code. This provision – in its original version – states:

> § 1041 Verwendung einer Sache zum Nutzen des Anders
>
> Wenn ohne Geschäftsführung eine Sache zum Nutzen eines Andern verwendet worden ist; so kann der Eigentümer sie in Natur, oder wenn dies nichtmehr geschehen kann, den Wert verlangen, den sie zur Zeit der Verwendung gehabt hat, obgleich der Nutzen in der Folge vereitelt worden ist.[37]

Before a presentation of the discussion of Czech legal science, it would be worth examining the position and purpose of this provision in the system of Austrian civil law. It would also be helpful to remind ourselves of the influence of Roman law upon the Austrian Civil Code itself. Let us enter upon the second issue. According to Emanuel Tilsch (1866–1912) there are many institutes and principles taken from Roman law (*usus modernus pandectarum*). For example, he referred to *tutela*, testamentary heir, real obligations, the principle of universal succession, amongst others. On the other hand, he remarked that the Civil Code arose when Roman law was unfavourable and there were direct issues to the creators not to rely on the provisions of Roman law.[38] The spirit of the Civil Code was quite different, influenced by Canon law, the law of Nature and other influences.[39] There is no indication that the Austrian lawmakers originally intended

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[32] Fort the relation between the *versio in rem* and *condictiones* see also Lübtow, *Beiträge zur Lehre*, 11ff.

[33] Kupisch, *Die Versionsklage*, 57.

[34] Zimmermann, *The Law of Obligations*, 883.

[35] The problem of the unjust enrichment was overly complicated in the Austrian Civil Code. See Pavlíček, *Žaloby z obohacení*, 79–80.

[36] For the problem of liability outside *condictiones* in the recent Czech law see Dostalík, *Nakládání s cizí věcí*, *passim*.

[37] This German text was taken over from Rouček, Sedláček, *et al.*, *Komentář k československému obecnému zákoníku*, 665.

[38] Tilsch, *Občanské právo*, 21–2.

[39] See Horák, "Ratio skripta?", 61–9.

§ 1041 ABGB as a *condictio sine causa generalis*. If we look at Franz von Zeiller's contemporary commentary,[40] we find that he still adheres to the concept of classical Roman law. The *actio de in sem verso* is still to serve, especially in cases where a minor (pupil) obtains clothes or food for his needs. The only change from classical Roman law is that a person who uses another person's property to his advantage does not have to be subject to paternal power (*Gewaltfreier*). The use of the other person's property must be beneficial, so there must be enrichment. A situation where beautification occurs is not considered a beneficial use of a foreign thing. Entitlement to compensation arises even if the intended benefit does not come, which is shown by von Zeiller in a well-known example when a stranger hands over money to a minor to get clothes and the minor loses that money.[41] We see that the provision of § 1041 ABGB remains entirely in the intentions of Roman law and *ius commune*.

Finally, Berthold Kupisch points out a link between the Austrian ABGB and the *ius commune*. The legal qualification of *versio in rem* is, in essence, in line with the views of *ius commune* and Prussian law. Systematically, *versio in rem* is understood as a case of mandate, or in some more specific cases, a case of *negotiorum gestio*.[42] Kupisch also points out that von Zeiller also refers in his commentary to the legal regulation of the mandate (§§ 1036–1040).[43] The main focus of the Czech legal scholars was if the provision of § 1041 ABGB could be used either as the special case of a *negotiorum gestio* or can be adopted as a base for *condictio sine causa generalis*.[44]

In the first half of the 20th century, there was no visible connection of *versio in rem* with institute of unjust enrichment, even in the situation where single *condictiones* were scattered in the Austrian Code and there was an urgent need to re-define and further systemize the doctrine of unjust enrichment.[45] It can be summed up that the *versio in rem* was only one of several norms regulating the issue of unjust enrichment and potentially duplicating existing norms regulating this issue. So, the starting point of the discussion in the interwar Czechoslovakia was the place and purpose of the provision of § 1041 ABGB.

There was a commonly held opinion in Czech legal science that this provision introduced the doctrine of *versio in rem* into Austrian private law. But the broadly worded text of this provision led to two opposing legal opinions on the nature of this provision. The first group was represented by Stupecký and his pupil Jan Krčmář.[46] These scholars (devoted to civil law) were traditionalists and tried to interpret this provision with the help of the conventional methods of historical legal interpretation. Stupecký, in his work

[40] Zeiller, *Commentar über das allgemeine bürgerliche Gesetzbuch*, 316–34.

[41] For a short overview of the commentary of Zeiller see Kupisch, *Die Versionsklage*, 92–3.

[42] *Ibid.*, 96.

[43] *Ibid*.

[44] This proposition can be traced back to Baldus de Ubaldis, see Zimmermann, *The Law of Obligations*, 881.

[45] The discussion of the nature and purpose of the *versio in rem* was held also among the German-speaking lawyers of Austria. For example Ehrenzweig had an opinion that the true aim of the Austrian lawgiver in the case of provision § 1041 was to introduce *condictio sine causa generalis*. See Kupisch, *Die Versionsklage*, 97, f.n. 23.

[46] Krčmář, *Právo občanské*, 209.

devoted to the historical development of *versio in rem* and published in 1888,[47] concludes that the principle that one cannot be unjustly enriched at the expense of others is not only exhausted in *actio de in rem verso*, but also other institutes such as *commixtio*, *specificatio*. The main objection of Stupecký against the use of the *actio de in rem verso* as a *condictio sine causa generalis was* that even in Roman law, this doctrine was not used for the recovery of unjust enrichment. The main aim of this doctrine was to improve the situation of a creditor who had entered into a contract with the slave or *filius familias*. Cases in which *actio de in rem verso* had been invoked in Roman law could be resolved in Austrian law through an agency without order or by unjust enrichment. So, Stupecký concluded that *versio in rem* has no place in the system of the Austrian civil law and that it was a mistake or unnecessary to take over this doctrine from *ius commune*.

On the opposing side of this argument was Ernst Swoboda, one of the representatives of the German-speaking Czech legal scholars. In his writings, printed in 1919,[48] Swoboda denied utterly the connection between provision § 1041 of the Austrian Civil Code with the tradition of Roman law. He argued that this provision represented a violation of a principle that no one can intervene in the matters of another, a provision that is based on the laws of nature, and not Roman law.

The second group consisted mainly of the Czech members of the philosophical school of Normative Theory of Law (*normative Rechtstheorie*): Jan Sedláček[49] and Vladimír Kubeš.[50] In this discussion, there is no trace of the leading figure of the Czech division of the Pure Theory of Law, František Weyr. But his attitude to the use of Roman law and historical comparison is seen in his academic writings – he denied the necessity of the historical development in the process of interpretation of a legal institute. The only source of information for Weyr and his pupil Sedláček was the text of the legal norm. Sedláček rejected using the *ius commune* tradition to interpret § 1041 ABGB.[51]

However, he sought some possibilities and limits of the application of the institute *versio in rem* and he found some instances in the Supreme Court of Czechoslovakia. The first instance was the case of a tenant who was obliged to make restitution to the estate according to the contract of lease. The tenant retained the services of a plumber. The plumber completed the work, but the tenant failed to pay him. In this case, on a *versio in rem* basis, the plumber was able to directly sue the property owners, arguing that his work had increased the value of the property. But if the owners had decreased the amount of the rent paid by the tenant, they would not have been enriched, and therefore it was impossible to sue them directly.

There were more instances of the application of the institutes *versio in rem* by the Czech courts (jurisprudence). Another case concerned a construction firm. When a co-owner of a building built some bricks into the building and another co-owner refused to pay his share of the costs of the bricks, it was possible to sue him based on the *versio in rem*. A pastor ordered bricks for the construction of a new church, and he did not pay for

[47] Stupecký, *Versio in rem*.
[48] Swoboda, *Bereicherung Geschaftsführung*, *passim*.
[49] Sedláček, *Nepravé jednatelství a versio in rem*, 38.
[50] Kubeš, *Příspěvek k nauce o žalobách*, 49–54.
[51] Rouček, Sedláček *et al.*, *Komentář k československému obecnému zákoníku*, 665–75.

them. In this case, the pastor could be sued up to the agreed purchase price and the parish could be sued to the value of enrichment.

Other cases of the application relate to the alimentation. A fiancée provided nutrition for the couple in anticipation of their marriage. The marriage was not concluded, and the Court ruled that the fiancée had the right to demand the value of the provided nutrition back. We must admit that in the given circumstances, this is not a case of *versio in rem* of the Roman law. By providing the nutrition, the fiancée seeks her own benefit, which favours her spouse. So, by the classification of the Roman lawyers, this case would be classified under the doctrine of *negotiorum gestio*. And indeed, we can find other nutrition cases in the title of the Digest concerning *actio negotiorum gestio*.

Kubeš, a disciple of Sedláček held a different opinion. He stated that the style and formulation of the § 1041 ABGB got a little out of the hand of the creators of ABGB and the lawgiver said more than he already wanted. Like a faithful member of the Pure Theory of Law School Kubeš depended heavily on the text of the legal norm. He delivered a profound analysis of the text of § 1041 ABGB and believed that this could be used as a general norm of unjust enrichment, *condictio sine causa generalis*. Kubeš pointed out that the Austrian civil law has adopted only a few of the *condictiones* of the Justinian's Civil Code (*Corpus Iuris Civilis*) and there is not one single condition among them with a subsidiary character that could be used in all cases where unjust-enrichment occurs. Without *condicto sine causa generalis* there was a substantial gap in the Austrian Civil Code.

In conclusion, we can say that there was much disagreement and controversy among Czech scholars in the interwar period concerning the tiny § 1041 of the Austrian Civil Code. Stupecký and Krčmář argued for a historical, Roman-law tradition, based on the sources and opinions of the *ius commune*. After the laborious analysis of the institute from the point of legal history, they considered the *versio of rem* as an obsolete doctrine with no use in modern (Czechoslovak) civil law. On the other hand, Sedláček and Kubeš were rooted in the tradition of Pure Theory of Law School and their primary tool of research was the textual analysis of the norm.

The doctrine of *versio in rem* has been adopted to the Draft of the Czech Civil Code from 1937.[52] We can find it under the provision of § 886 under the name of using another person's property without consent. The text of § 886 corresponds with § 1041 the Austrian Civil Code.

> § 886 of the Draft:
>
> Upotřebí-li se bez úmyslu obstarati cizí záležitost věci k prospěchu druhého, může vlastník pohledávati tuto věc nebo, není-li to dobře možno, hodnotu, kterou měla v době, kdy se jí upotřebilo, a to i tehdy, když prospěch potom byl zmařen.[53]
>
> [If a foreign thing is used without intent to obtain the item for the benefit of another, the owner may seek the thing or, if this is not possible, the value it had at the time it was used, even if the benefit was then wasted.][54]

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[52] See also Salák *et al.*, *Historie osnovy občanského zákoníku*.

[53] The original Czech version was taken over from the newest edition of Jan Kober. See Kober, *Osnova československého občanského zákoníku*, 324.

[54] Translation by author.

The official commentary says that no item in the exceedingly lengthy list of publications convinced the lawgiver to change this part of the civil law. However, the lawgiver dared not remove the doctrine of *versio in rem* from the Draft of the Civil Code. The official attitude of the lawgiver, as is seen from the documents, is that without the doctrine of *versio in rem*, there will be a huge gap in the structure of Civil Code. That is the reason we can speak about an unwanted continuity with the connection with the doctrine of *versio in rem*. As it was stated before, there has been meaningful discourse among legal scholars about the purpose and interpretation of this doctrine. The opinions of the scholars were wide-ranging: from the complete rejection of this doctrine, through the questioning of the Roman roots of *versio in rem*, to the wide application of this doctrine in the branch of unjust enrichment. However, the lawgiver did not reflect this discussion in the Draft of the Czechoslovak Civil Code from 1937. He took over the text of § 1041 of the Austrian Civil Code without any substantial changes.[55]

The doctrine of *versio in rem* was omitted in the Civil Code of Czechoslovakia from 1950. The main reason for this omission was to simplify the Code so that common people could understand this legal norm. The second reason was to introduce an entirely new conception of the doctrine of unjust enrichment. A general clause of the unjust enrichment was introduced, not as an applicable rule, but as a legal principle, and narrowly defined specific *condictiones* were added, which matched the *condictiones* of the emperor Justinian. So, the demands of the interwar legal science in Czechoslovakia for clarification and better systematisation of the doctrine of the *ius commune* were fulfilled not long after the Second World War. This post-war conception of the doctrine of unjust enrichment was in force for a considerable period and was accepted by jurisprudence. However, between 1950 and 2014, the *versio in rem* slowly disappeared utterly from the Czech (or Czechoslovak) civil law and that in this period, the doctrine of unjust enrichment had nothing in common with the *versio in rem*. The two institutes were separated entirely.

With the introduction of the new Czech Civil Code (in force from 2014) the doctrine of *versio in rem* has reappeared in Czech civil law.[56] We can find this doctrine under the provision of § 3012 and it is obvious that the main source of inspiration for this provision was the Draft of Civil Code from 1937.[57] And today, Czech legal scholars are facing the same problems of interpretation and analysis of the doctrine of *versio in rem* as did their predecessors in the interwar period. But the long absence of the *versio in rem* has meant that this is now viewed as a stranger to Czech Civil law because the examples of using this doctrine from the past (even from the Roman law) can be served better with the elp of the unjust enrichment. The common opinion says that there is no field of application of the *versio in rem* in the legal practice.[58]

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[55] Dostalík, *Nakládání s cizí věcí*, 88.

[56] The doctrine did not disappear completely. *Versio in rem* can be traced in the provision of Zákon mezinárodního obchodu (International Trade Act from 1961) – provisions of §§ 716–718.

[57] Melzer, Tégl, *Občanský zákoník*, 1623.

[58] *Ibid*.

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