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The Definition and Characteristics of Obligations under Unjust Enrichment

Abstract

The purpose of the article is to discuss unjust enrichment as a source of obligations, already known in Roman law, which dealt with the most important problems related to the matter in question and ways to solve those problems in practice.

The author, aware of the complexity of the issues related to unjust enrichment and the problems that may arise from the application of this institution, will focus on the presentation of the definition and the characteristics of unjust enrichment as a source of obligations. These characteristics are covered only in Article 405 of the Civil Code, but the apparently obvious regulation includes some unnamed elements that need to be taken into account when deciding whether unjust enrichment has actually taken place.

The author intends to show that the special nature of unjust enrichment is determined first and foremost by the fulfilment of the conditions for its occurrence. These conditions include: an individual's gain, benefiting at the expense of another person, the relationship between enrichment and impoverishment and the lack of legal grounds for enrichment; it should be added, however, that the Civil Code does not speak of the last of the listed conditions. The knowledge or the will of the enriched person will not be considered such conditions, though. The liability of the enriched person in such circumstances will occur regardless of the cause of the person's gain.

Keywords: unjust enrichment, obligation, financial gain, impoverishment

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Foreword

The Polish legislator has featured the provisions regulating the institution of unjust enrichment, i.e. Articles 405–414 of the Civil Code, in Title V of Book Three – Obligations. This implies that unjust enrichment – next to other institutions covered in Book Three of the Civil Code – is a source of obligations. Before proceeding with the analysis of the subject matter of the article, the explanation of what an obligation is within the meaning of the Polish civil law system is necessary.

The definition is provided in Article 353 § 1 of the Civil Code. It states that an obligation shall consist in that the creditor may demand performance from the debtor and the debtor shall render the performance. We thus always have a "creditor" and the "claims" they are entitled to on the one hand, and a "debtor" and the "debt" they need to settle on the other.[2] Looking closer into the provision, it is possible to conclude that an obligation is a legal relationship in which one person (creditor) may demand to be provided with a certain service, while the other person (debtor) is expected to provide this very service. The creditor's entitlement is referred to as receivables or claims, and the debtor's duty is called debt.[3] The author believes that the simplest and the most precise definition of obligation has been offered by Krzysztof Pietrzykowski, who has suggested that "the content of every obligation relationship is composed of a creditor's receivable and a debtor's duty correlated with the said entitlement. There may be then no receivables without a corresponding debt, nor there may be any debt without corresponding receivables."[4]

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2 A. Ohanowicz, [in:] W. Czachórski (ed.), *System prawa cywilnego*, Vol. III, part 1, *Prawo zobowiązań – część ogólna*, Wrocław 1981, p. 40; ibidem, p. 54: "The content of every civil-law relationship, and so also of every obligation relationship, is a set of defined rights and responsibilities of the parties to the relationship. It is therefore about the creditor's rights defined as subjective rights and the debtor's responsibilities. The debtor's behaviour related to the responsibility imposed upon them, meaning the rendering of the expected service, is outside the content of the obligation, though. The essential elements of an obligation relationship include the very responsibility to render a service, not the service itself, being a manifested form of the responsibility in question."

3 T. Wiśniewski, [in:] *Komentarz do Kodeksu cywilnego. Księga Trzecia. Zobowiązania*, t. I, Warszawa 2011, p. 15.

4 K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz do artykułów 1–449[11]*, t. I, Warszawa 2005, p. 823; ibidem, pp. 823–824: "An obligation relationship is a source of the so-called conditional rights, which unlike unconditional rights – effective *erga omnes* – are basically effective only towards the other party to such a legal relationship (*inter partes* effect). This means that in the case of obligation relationships it is a rule that the party exercising a conditional right (creditor) may demand to

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The author of this article intends to prove, among others, that unjust enrichment is a source of obligations since the institution is characterised by all the features named in the definition of an obligation under Article 353, § 1 of the Civil Code.

The concept

The concept of unjust enrichment has been defined in Article 405 of the Civil Code, which states that "anyone who without legal grounds has gained a financial benefit at the expense of another person is obliged to hand over the benefit in kind, and if this is not possible, to return its value."

Unjust enrichment is therefore a source of obligation with the parties thereto including the enriched (debtor) and the entity at the expense of which the enriched has enriched oneself (creditor). There is a general consensus on the above in the doctrine, an example including an opinion of e.g. Piotr Mostowik, who argues that "unjust enrichment, like a legal act and delict, is a source of obligations",[5] or an argument by Krzysztof Pietrzykowski, claiming that "benefiting financially at the expense of another person without legal grounds thereto is an autonomous source of obligation defined as an obligation under unjust enrichment."[6]

Characteristics of an obligation

Examining Article 405 of the Civil Code leads to the conclusion that unjust enrichment as an obligation involves:

1) an individual gaining a financial benefit (enriching oneself);
2) gaining such a benefit at the expense of another person (a part of the doctrine also uses the notion of impoverishment in this context);[7]
3) a lack of legal grounds for gaining such a financial benefit.

Source literature tends sometimes to mention a fourth element to supplement the definition, which is the relationship between enrichment and impoverishment. To quote Alfred Ohanowicz – "only when all these conditions are fulfilled can we

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have their right respected by the other party, with whom they are tied by an obligation, and not by third parties, with whom they have not established obligation relationships."

5 P. Mostowik, *Bezpodstawne wzbogacenie*, „Studia Prawa Prywatnego" 2007, 2, p. 43.

6 K. Pietrzykowski (ed.), op. cit., p. 1058.

7 This has been covered in more detail in sub-item 5.

speak of occurrence of a claim to hand over the assets appropriated as part of unjust enrichment. The extent of obligation to hand over any such assets does not determine the nature of the claim. There are cases when the act means an obligation to hand over the assets appropriated as part of enrichment, and the basis for such an obligation is completely different."[8]

Gaining a financial benefit (enrichment)

Enrichment, i.e. gaining a financial benefit, is the first condition that needs to be met for a claim under unjust enrichment to occur. The present regulation under Article 405 of the Civil Code, which includes the exact notion of "financial benefit", makes it clear that the benefit in question has to be of a financial nature.[9]

Thus, it is not a decrease in or a loss of the creditor's wealth, but an increase in the debtor's wealth that matters for the occurrence of an obligation and claim. "It is then not about redressing damage – there may actually be no damage at all (even lucrum cessans), but about returning benefits (...). In the event of no enrichment, there is no claim under Article 405 of the Civil Code."[10] A benefit gained by the debtor (the enriched) must therefore have its pecuniary equivalent. "A benefit that is not estimable and that has no such equivalent may not be considered an instance of enrichment."[11] Thus, non-financial, spiritual or moral benefits are not subject to an obligation of return.[12]

A non-financial benefit is one that may not be expressed in pecuniary terms and has no – even indirect – impact on one's wealth.[13]

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8 A. Ohanowicz, [in:] W. Czachórski (ed.), op.cit., p. 478; ibidem: "One can claim, for instance, to be additionally paid a sum of money required to supplement a legitimate portion (Article 1000 of the Civil Code) only within the limits of enrichment resulting from obtaining a donation, but the claim will be based on the right to a legitimate portion, not on unjust enrichment."

9 P. Mostowik, [in:] A. Olejniczak (ed.), *System Prawa Prywatnego*, t. 6, *Prawo zobowiązań – część ogólna*, Warszawa 2009, p. 243: "This is substantiated by the very wording of Article 405 of the Civil Code, which mentions 'financial benefit', and the objective of the obligations under consideration, which are to restore material balance."

10 P. Księżak, *Bezpodstawne wzbogacenie. Komentarz*, Warszawa 2007, p. 61.

11 A. Ohanowicz, *Niesłuszne wzbogacenie*, Warszawa 1956, pp. 92–93.

12 Ibidem.

13 P. Księżak, op. cit., p. 61; ibidem: "An example may be a benefit gained by an individual as a result of having a park arranged next to their home, or benefits gained by passive neighbours as a result of their more active neighbours taking care of the surroundings of their residential building: by cleaning the surroundings, by taking care of the local vegetation, and so on"; A. Ohanowicz, *Niesłuszne wzbogacenie*..., p. 71: "Social considerations also speak against extending the notion of enrichment to include non-financial gains. Financial enrichment alone puts the enriched in a difficult situation, when they have gained a benefit, often without an intention to do so, which required them to pay

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A financial benefit may take the form of an increase in the enriched person's assets or a decrease in their liabilities, which means avoiding a loss or saving on expenses they would need to incur.

It is important to add here that a financial benefit will also be an instance of saving on an expense essential to gaining a non-financial benefit. But "in order to consider saving on an expense (financial benefit) a contribution to gaining a spiritual benefit, any of the two following conditions must be proven:

1) the enriched would have incurred such an expense anyway or
2) the enriched has assumed someone else's right alone."[14]

Alfred Ohanowicz argues that saving on expenses may be considered enrichment only when it would be necessary to incur such expenses and when the interested party would have to incur these expenses using their own assets, without any prospect of having these assets returned. Enrichment also occurs when the "enriched" made no profit eventually, or even suffered a loss if – thanks to just enrichment – their loss was smaller than it would have been without this unjust enrichment.[15]

As for the fact that a benefit involves not only a specific donation received, but also saving on expenses, there is a general agreement in the doctrine. Such a view was also expressed by the Supreme Court, who found in its judgement of 11 January 1973 that a financial benefit within the meaning of Article 405 of the Civil Code was not only a direct transfer of material assets from the wealth of the impoverished party to the wealth of the enriched party but also the fact that the impoverished paid debt which should have been paid by the enriched.[16]

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a pecuniary equivalent of this benefit if they are unable to return them in kind. The latter would always accompany non-financial enrichment situations since such cases exclude returns in kind."

14 P. Księżak, op. cit., p. 62.

15 A. Ohanowicz, *Niesłuszne wzbogacenie*..., pp. 91–92; ibidem: "For instance, someone used someone else's patent for manufacturing purposes in good faith. This resulted in a loss that would have been even greater without the use of the patent in question."

16 Supreme Court's judgement of 11.01.1973, II CR 648/72 (OSNC 1973, no. 11, item 200): "A circumstance where a third party covers an obligation of one of joint and several debtors stands in no contradiction to accept that the latter of the debtors has enriched themselves as being released from debt by way of having one of the debtor's satisfy the creditor's claims (Article 366, § 1 of the Civil Code) means that the other debtors have gained a benefit within the meaning of Article 405 of the Civil Code. A financial benefit within the meaning of Article 405 of the Civil Code is not only a direct transfer of material assets from the wealth of the impoverished party to the wealth of the enriched party but also the fact that the impoverished pays debt which should have been paid by the enriched. The possibility to claim a return of the benefits gained or their equivalent based on the regulations on unjust enrichment does not depend on the creditor's ability to prove that they have rendered a service by carrying out someone's instruction. The only condition necessary to acknowledge that an instance of enrichment has occurred is to prove that a financial benefit has been gained at the expense of another person – without legal grounds for this to occur";

Gaining financial benefits may take many different forms. For the purpose of this article, the author has decided to cover only some of them, those which she believes illustrate the essence of the issue best. Hence, enrichment may involve acquiring – in particular – an ownership right but also of other property rights. This can happen in the event such rights are combined, mixed, transformed or purchased from a non-entitled entity.[17] It may eventually result from benefiting from undue service, which is a special case of unjust enrichment.[18]

Improving or mending another person's property, be it chattel or fixed property, is also an instance of enrichment. "This will involve all types of outlay whose return is usually regulated by special provisions."[19]

Taking advantage of another person's service, object or goods may also be considered an instance of enrichment.[20]

"Enrichment involves not only acquisition but also enhancement of receivables or rights. This includes cases when the creditor gets a better mortgage entry, when there is a pledge or surety established on the property."[21]

An instance of enrichment will also be the acquisition of ownership since "regardless of whether we consider ownership a type of subjective right or only

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an interesting example of gaining a financial benefit leading to liability on the grounds of unjust enrichment may be also found in a case examined by the Supreme Court, bearing the reference V CSK 255/07, where a transmission system failure led to one of the parties' bank account being mistakenly credited two times (see: Supreme Court's judgement of 04.10.2007, V CSK 255/07, LEX number 435625).

17 A. Ohanowicz, *Niesłuszne wzbogacenie*..., p. 81: "It is especially important to mention the purchase of a objects subject to wear and tear and money due to the fact that this will basically exclude recovery, and the claim for a return of assets gained through unjust enrichment will become the only remedy to protect one's right when it is breached."

18 The discussion on undue service as a special case of unjust enrichment would go beyond the subject matter of this article, which is why the issue will not be analysed herein.

19 A. Ohanowicz, *Niesłuszne wzbogacenie*..., p. 82.

20 Idem, [in:] W. Czachórski (ed.), op. cit., p. 481: "It is essential that enrichment occurs in this case at the expense of another person and that it is possible to classify it as unjust. It is therefore important that it appears as undue service or that at least there has been no intention to return the service selflessly."

21 Ibidem, p. 480; idem, *Niesłuszne wzbogacenie*..., pp. 82–83: "While the first case raises no questions because the real value of a mortgage is determined by its ranking, the remaining two tend to be challenged. An argument has been raised that we cannot speak of a creditor's enrichment because they gain nothing new through the establishment of a pledge or surety on an existing receivable. Their receivable exists to the same extent as before and there is no increase in the assets making up their wealth. But this is not the case. The amount at which the receivables are estimated alone does not determine their real material value. Nominal receivables of the same amount come at different, 'exchange rates', which means they are valued differently, depending on the possibility to settle them. 'A receivable is merely a hope, and a payment is the reality'. The likelihood of this hope becoming reality determines the value of the receivables."

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legally protected factual circumstances, ownership is characterised by features that make it valuable in material/financial terms."[22]

Enrichment involving avoidance of loss will include cases of unjustified release from debt, payment of debt by a third party not obliged to do so, or incurring other expenses that should have been incurred by the enriched if these expenses were necessary and the interested party would have had to incur them using their own assets, without any prospect of having these assets returned.[23]

Instances of enrichment will, however, not include a sole chance or opportunity to gain a benefit.[24] Enrichment will only involve situations in which a certain opportunity or chance is taken advantage of and becomes 'materialised'. Enrichment will neither include an improvement of one's procedural situation by facilitating the examination of evidence, or a refusal to return a document that proves an obligation or issuance of receipt. These matters have been regulated sufficiently in special provisions. Moreover, a creditor who has failed to fulfil their obligation to issue a receipt or a document does not gain any financial benefit in such circumstances.[25]

It needs to be added that a characteristic feature of an obligation under unjust enrichment is also that it is irrelevant if the enriched party gained a financial benefit voluntarily or knowingly. A view that neither knowledge nor will of the

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22 Ibidem, s. 73; ibidem, pp. 73–74: "Leaving the matter of possessory protection aside, the very fact of ownership brings about a range of presumptions of significance to the possessor, especially one that the possessor may exercise the right they have been granted. A possessor in good faith – and every possessor is presumed to act in good faith – is not obliged to provide remuneration for the property they own and use; they are not liable for the wear and tear, damage or loss of such property either. Such a possessor acquires ownership of natural profits detached from the property during the period of its possession in good faith, and retains the civil profits gained – if they have become mature within that time. Such a possessor may also request to have the necessary expenditures reimbursed, and demand reimbursement of other expenditures insofar as they increase the property's value at the moment of its return. Ownership may eventually lead to the acquisition of the owned right through usucaption. All these are real financial benefits, and not just possibilities to gain them. And this makes them fully satisfy the requirement of enrichment as a condition for a return/reimbursement claim to occur."

23 Idem, [in:] W. Czachórski (ed.), op. cit., p. 481.

24 E. Łętowska, *Bezpodstawne wzbogacenie*, Warszawa 2000, p. 69: "Acquiring a chance for enrichment does not substantiate actionable obligations since potential enrichment is simply not enrichment"; also A. Ohanowicz, *Niesłuszne wzbogacenie*..., p. 86: "A sole opportunity to take advantage of a situation is not financial benefit since it is still unknown if the interested party is able and wants to take advantage of it."

25 A. Ohanowicz, [in:] W. Czachórski (ed.), op. cit., p. 480.

enriched party are relevant to acknowledge that an instance of unjust enrichment occurred was expressed by the Supreme Court in its judgement of 9 January 2002.[26]

The last issue the author would like to raise when discussing the matter of enrichment is whether enrichment should be assessed from a subjective point of view, meaning the enriched party's interest, or from an objective point of view, which is the market value of enrichment. Since the knowledge or will of the enriched party is irrelevant to the occurrence of unjust enrichment, it may happen that the fact of enrichment becomes a burden or nuisance for the enriched party – even though the objective market value of this party's wealth increases.[27] To decide on this matter, "we need to bear in mind that the grounds to claim the return of assets gained through unjust enrichment are not only the enrichment of one party but the impoverishment of the other party in equal measure. Hence the assessment of the extent of benefit may not be based on its value from the perspective of one party, but for both; and the measure in such cases will usually be the common – or market – value of the assets in question."[28] The author agrees with this standpoint, which is supported by, for example, the definition of obligation quoted in the foreword to the article. Since in order to determine if there is an obligation *per se* there is an assessment aiming to find whether the established relationship involves some receivables, meaning an entitlement granted to one of the parties to the relationship, reflected in a duty to be fulfilled by the other party, which is referred to as debt, the situation of enrichment making a certain impact on the wealth of the enriched party may not be examined only from the perspective of the latter's interest.

To summarise the discussion on gaining benefits being a feature of obligation under unjust enrichment, it needs to be made clear that any such benefit has to be of a financial nature. Non-financial benefits do not translate into an obligation of return. Enrichment may involve either an increase in the enriched party's amount of assets, meaning a specific donation, or a decrease in the amount of their liabilities, meaning saving on expenses, avoidance of loss, and even suffering a loss that is smaller than it would have been if not for the enrichment. A chance or an oppor-

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26 Supreme Court's judgement of 09.01.2002, V CKN 641/00 (not published): "The preconditions of unjust enrichment arise from Article 405 of the Civil Code and include gaining a benefit at the expense of another person. There are no other conditions to claim that an instance of unjust enrichment has occurred. The knowledge or will of the enriched party do not belong to this. It is quite the contrary, in fact. Unjust enrichment may occur even against the will of the enriched party."

27 A. Ohanowicz, *Niesłuszne wzbogacenie*..., p. 93: "For instance, someone erects a building [on someone else's land – author's note] in good faith, and the landowner not only does not need the building but also finds it marring their entire property, but still has to return at least half of the amount by which the value of their (i.e. the landowner's) fixed property has increased to the former party."

28 Idem, [in:] W. Czachórski (ed.), op. cit., p. 481.

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tunity to gain benefits is not an instance of enrichment, though. Also, the knowledge or will of the enriched party is irrelevant to assess an instance of enrichment, and the assessment is made on the basis of an objective – market – value of the assets involved, and not on the basis of a subjective impression of the enriched party.

Benefiting at the expense of another person

Another distinguishing feature of an obligation under unjust enrichment is enrichment "at the expense of another person."

It has been raised in the foreword that a part of the doctrine tends to argue that the phrase "at the expense of another person" contained in Article 405 of the Civil Code is equivalent to the notion of "impoverishment".[29] The argument to support the claim is that the creditor does not have to suffer a specific loss or damage. The condition for a claim to arise is met even when there is no transfer of certain value from one set of assets to another.[30] Alfred Ohanowicz argues that "impoverishment shall be therefore considered not only when there is a direct transfer of material assets and the benefit gained depletes the wealth of the impoverished but also when the original amount of wealth of the impoverished has not increased because of the benefit gained. Unlike in the case of *lucrum cessans* and the obligation to redress damage, it does matter what happens with the profit made, meaning the profit not made by the impoverished; and it does matter if the impoverished would have made this profit at all. When there is a case of unjust enrichment, the profit made takes the form of enrichment, without which there are no grounds for a claim for return to arise."[31] He goes on to claim that "impoverishment, like enrichment, needs to be of a financial nature, and like the assessment of detriment, it should be based on objective considerations. Impoverishment may thus be considered whenever there is an instance of damage to property in the

29 E.g. ibidem, pp. 481–482; E. Łętowska, op. cit., p. 72; K. Pietrzykowski (ed.), op. cit., p. 1057.

30 E. Łętowska, op. cit., p. 63, offers an example of impoverishment involving the performance of work, providing labour, services, and manifested in using someone else's assets or property; ibidem, pp. 63–64: "There is no 'transfer' of property element in any of these situations; but there is no doubt that there has been an instance of enrichment 'at the expense' of another person. Nowadays we have a tendency to extend the turnover of different goods on commercial principles, which contributes to an extension of the potential scope of enrichment subject to return. First, we can see a progressing commercialisation of different non-material (non-property) goods, like information or other data sets, *know-how*, ideas of fructification of various goods, which is currently a subject of trade. The phenomenon has been dubbed as 'commercialisation of the utility value of objects'. This makes the range of the notion of 'financial benefit' extend."

31 A. Ohanowicz, [in:] W. Czachórski (ed.), op. cit., p. 482.

meaning adopted for situations of determination of the obligation to redress the damage."[32] The application of these rules to instances of impoverishment that are difficult to be associated with material loss makes it possible to determine, every time, that the profit made has been made to the detriment of another person, meaning at the expense of this person. Especially when it comes to using someone else's property or services, impoverishment occurs when the impoverished could hypothetically benefit from using the said property or services by making them available to other parties for a fee. It is not difficult also to apply these rules when there is a breach of intangible property rights. "A claim arises not only when it is possible to assume, according to particular circumstances, that the impoverished had an intention to let the enriched benefit free of charge."[33]

Paweł Księżak offers a different point of view, claiming that "linking the matter of unjust enrichment with the extent of impoverishment, and even damage, leads to wrong simplifications."[34] He argues that the extent of a claim under unjust enrichment is determined only by enrichment taking place at the expense of another person. "If someone has gained a benefit that does not arise from exploiting someone else's rights, there can be no claim in this respect. It is irrelevant whether impoverishment has or has not occurred."[35] The author believes that impoverishment is not a sign of unjust enrichment and that there is no need to determine whether it has or has not occurred. Article 405 of the Civil Code does not say any-

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32 Ibidem: "This is not to mean we should equate the institution of unjust enrichment with the institution of redressing damage because they include different requirements for claims to arise. But they do share one element, i.e. that of financial loss, and there are no contraindications to use the same notion in both cases."

33 Ibidem, p. 483: The author quotes a case of breaching someone else's patent as an example of a breach of intangible property. "If someone has breached someone else's patent unconsciously, it does not matter if the entitled party could and wanted to exploit their patent right. The fact is that it has been exploited by someone not entitled to do so, and the entitled party's loss is that the party has not gained the equivalent value they would demand in exchange for letting their patent be used."

34 P. Księżak, op. cit., p. 70.

35 Ibidem, pp. 69–70; "Since there is no requirement for impoverishment to occur, the proposition that its extent is equal (or similar) to the extent of property damage – with this being the grounds for liability for damages – may not be legitimate. (...) Even *lucrum cessans* is not always broad enough to associate the notion of damage with unjust enrichment. There is simply no damage where someone has used someone else's property, whose owner did not intend to rent or use alone, or where someone else's name has been used and the bearer of the name did not intend to commercialise it. Comparing the situation of the existing assets with a hypothetical state of assets that would exist if the event in question had not occurred leads to the conclusion that the person whose assets (rights) have been damaged has not lost anything. Nevertheless, an instance of enrichment has occurred at the expense of the party who had the exclusive right to take advantage of certain assets (rights)."

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thing about the assets of the impoverished, and it does not matter if the assets have been depleted. What matters is to determine that the act of enrichment has occurred and to find whose set of rights has been the source of enrichment.[36]

Ewa Łętowska offers a similar view to that of Alfred Ohanowicz. She emphasises that impoverishment comes "at the expense" of the impoverished party, which is a broader interpretation than that speaking of a loss of certain value being a part of the impoverished party's "property". Impoverishment may thus also involve a lack of benefits, without the original property being depleted. It is then about a benefit that passed the impoverished by and was gained by the enriched.[37] The objective will be to determine if a given benefit would have been taken advantage of by the impoverished if the enrichment-causing event had not occurred.

Piotr Mostowik claims directly that "impoverishment is considered to have occurred whenever property damage in compensatory terms has occurred, but in the case of *lucrum cessans* it is important that the benefit lost has been actually gained by the enriched party (without considering the situation only from the impoverished party's – who has lost the benefit – point of view)."[38]

Krzysztof Pietrzykowski, in turn, tends to use both notions interchangeably, like Krzysztof Kołakowski.[39]

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36 Ibidem, pp. 58–59: According to the author, equating the enrichment of one party with the impoverishment of another party can be legitimate only pursuant to the regulation on the institution of unjust enrichment in the form implemented by the formerly binding Code of Obligations in Article 123. "Article 123 of the Code of Obligations stated that a benefit had to be gained 'from the property of another person' (...). In the light of the solution in question, it was legitimate to acknowledge that enrichment is reflected in the impoverishment of another party, whose property is damaged or depleted. But in the Civil Code, the legislator resigned from that limitation and used a much broader formula adopted in the German law under § 812 BGB, which speaks of enrichment *auf Kosten* of someone else. The difference is not fundamental, but it is perceptible. In most cases, the notions of 'at the expense of' and 'from the property of' will be equal, and the indications of impoverishment will be obvious. But not always. There can be instances of enrichment which does not change the amount of property of a person, but which has occurred at the expense of that person. Therefore, enrichment may take place also in situations where there are no grounds to speak of damage within the meaning of compensatory regulations, which is to mean the difference between a hypothetical state of property that would exist if not for the damage-causing event and the actual state of property."

37 E. Łętowska, op. cit., p. 72; ibidem: "Hence, the difference between unjust enrichment and compensation including *lucrum cessans* is that the latter is subject to compensation regardless of whether there has been an instance of it and what its further course has been. An instance of impoverishment must be a real (and – in principle – still existing) financial benefit gained by the enriched party."

38 P. Mostowik, [in:] A. Olejniczak (ed.), op. cit., p. 246; idem, *Bezpodstawne wzbogacenie*..., p. 58.

39 K. Pietrzykowski (ed.), op. cit., p. 1058: "Enrichment of one person must come at the expense of another person. Impoverishment may then involve, contrary to enrichment, a depletion of assets or an increase in the amount of liabilities of the impoverished party"; see also: K. Kołakowski, [in:] *Komentarz do Kodeksu cywilnego. Księga Trzecia. Zobowiązania*, t. 1, Warszawa 2011, pp. 254–255.

To summarise the current discussion, based on a comparison of different standpoints offered by selected authorities speaking on behalf of the doctrine, it can be concluded that even though there is no consensus on equating the notion of "at the expense of another person" with the notion of "impoverishment", the environment generally agrees that in order to prove the existence of preconditions for enrichment "at the expense of another person", referred to typically as "impoverishment" by some, it is important to find if a given profit, being a transfer from the creditor's property or the creditor's failure to gain benefits, has gone towards in the enriched party's property in the form of a donation or savings made on expenses.

Although there is no agreement in the doctrine on treating the notion of "impoverishment" as an equivalent to the notion of "at the expense of another person", the author has decided to use these notions interchangeably. The author believes that the examples provided earlier make it safe to assume that despite the terminological changes in the Civil Code as compared to the content of the Code of Obligations, the notion of "impoverishment" expresses the essence of the subject matter at issue as well as the phrase of "at the expense of another person."[40]

It is important to stress that in practice situations may occur in which the value of impoverishment will not equal the value of enrichment. In such a situation – according to the Supreme Court's point of view – "if there is a case of inequality, the lower amount determines the value of unjust enrichment."[41] "Therefore, if the value of impoverishment does not correspond to the value of enrichment, what is claimed to be returned is the lower value of enrichment."[42]

To conclude the current discussion of impoverishment as one of the distinctive features of an obligation under unjust enrichment, the author would like to stress that it may take the form of a loss in the creditor's assets, or of lost benefits. Yet, it

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40 I do realise that it may raise objections among some readers, but I do believe that bearing in mind the purpose of this article, whose objective is to discuss the institution of unjust enrichment in a clear and legible manner, this solution will make it possible to avoid the editorial chaos related to constant references made to both standpoints, and will make the article more lucid.

41 Supreme Court's judgement of 19.03.2002, IV CKN 892/00 (not published): "1. The value of unjust enrichment is limited by two quantities: by the value of what is gone from the impoverished party's property without legal grounds, and by the value of what has contributed to the enriched party's property without legal grounds. These values do not have to be the same, and if there is a difference between them, the lower amount is the value of unjust enrichment."

42 P. Mostowik, [in:] A. Olejniczak (ed.), op. cit., p. 244; ibidem: "Taking the cases quoted in the doctrine into account, where it is difficult to prove the occurrence of impoverishment, the above principle shall be specified in more detail and 'unilaterally' state that if the value of enrichment is lower than that of impoverishment, we should take this lower value into consideration when assessing the value of the claim in question. A similar conclusion can be drawn through a strict interpretation of the wording of Article 405 of the Civil Code, which speaks of returning the benefit, and not of compensating the impoverishment."

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is not only and exclusively about actually lost benefits but also about benefits which the impoverished party could have theoretically gained by making their goods, rights or services available for a fee. It is important that impoverishment is actually materialised in the form of a specific benefit gained by the enriched party. This may result from a breach of someone else's tangible or intangible property, but it always has to be– as enrichment – of a financial nature, and should be assessed from an objective point of view, not from that of the impoverished party's interest. But there may be no instance of impoverishment considered an indication of unjust enrichment if someone's intention was to make their rights, goods or services available to others free of charge. It is also necessary to emphasise that the Civil Code uses the notion of "at the expense of another person", and that the doctrine offers no consensus on whether it can be equated with the notion of "impoverishment" or even "property damage" within the meaning accepted when determining an obligation to redress damage.

The relationship between enrichment and impoverishment

The Civil Code fails to cover the matter of the relationship between enrichment and impoverishment. The requirement for the existence of such a relationship is raised by some representatives of the doctrine.

Paweł Księżak disagrees. He makes the same reservations regarding the equation of the notions of "at the expense of another person" and "impoverishment" and the search for an indication of impoverishment when considering the precondition of the relationship between enrichment and impoverishment. He claims that it is usually possible to investigate the occurrence of this relationship whenever there is a case of a loss in assets. But in situations in which there is no impoverishment, such a connection is absent. Enrichment must always come at the expense of another person, which means that we can speak of a relationship – between enrichment and its source. But this is about the economic origin of enrichment, not about the causative imperative behind it. The grounds to raise a claim involve then finding that the source of enrichment lies in the rights of another person.[43]

The need for the precondition of the existence of the relationship in question to be met is raised by Alfred Ohanowicz, who argues that "the opinions on the essence of the relationship are different and divergent. One thing that is certain and unquestionable is that there has to be such a relationship if a claim for return is to arise."[44] He makes his point by referring to a transfer of assets that leads to the enrichment

[43] P. Księżak, op. cit., pp. 59–60.

[44] A. Ohanowicz, [in:] W. Czachórski (ed.), op. cit., p. 483.

of one party and to the impoverishment of another party since this transfer determines the grounds for a claim under unjust enrichment to arise (regardless of who the beneficiary of the enrichment is and how this enrichment happened). That is why a transfer of assets is the starting point for a discussion on the relationship in question. The sources of such transfers may be grouped as follows:

a) activity of the impoverished party,[45]
b) activity of the enriched party,[46]
c) activity of a third party,[47]
d) coincidence.[48]

Krzysztof Kołakowski suggests a similar division of the sources of the transfers of assets. Such transfers may result from the activity of the enriched party, of the impoverished party, of third parties, and even be caused by forces of nature.[49] The sources of transfers of assets were interpreted in the same way in the Supreme Court's judgement of 6 December 2005.[50]

The second reasoning in the Supreme Court's judgement of 30 January 2007 states that "unjust enrichment may arise out of different reasons, including the activity of the impoverished party, of the enriched party, or a third party. Enrichment may thus take the form of both the acquisition of goods or rights and taking advantage of someone else's services; it involves not only an increase in the amount of assets of the enriched party but also a decrease in the amount of their liabilities."[51]

On account of the above, enrichment and impoverishment need to be linked by the relationship in question in order to be able to determine that they are two opposites of the same transfer of assets.[52] They need to have therefore a common source, occur in the same circumstances, and may not be caused by different reasons. E. Łętowska argues that it is "a genetic relationship, so to speak – one and the same

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45 E.g. a service rendered by a person not obliged to do so, a transfer of ownership or of another right, constructing a building using own resources on someone else's land.

46 E.g. integrating someone else's chattel with one's own fixed property, constructing a building on one's own land using someone else's resources.

47 E.g. a court enforcement officer selling an object not owned by the debtor.

48 E.g. an accidental integration of objects, bursting a dam, causing the adjacent pond to become populated with fish.

49 K. Kołakowski, op. cit., p. 252; ibidem*:* "The author offers an academic illustration of a transfer of assets caused by forces of nature by using an example of migration of fish between ponds when the water level rises."

50 Supreme Court's judgement of 06.12.2005, V CK 220/05 (LEX no. 172188).

51 Supreme Court's judgement of 30.01.2007, IV CK 221/06 (LEX no. 369185).

52 A. Ohanowicz, [in:] W. Czachórski (ed.), op. cit., pp. 484–485.

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event is a reason sufficient to speak of both enrichment and impoverishment."[53] Krzysztof Pietrzykowski supports the claim by adding that there is a correlation between enrichment and impoverishment, and its essence is that both the benefit and the loss result from the same event.[54] The view was also shared by the Supreme Court in its judgement of 18 December 1968, where it was stated that "the precondition to raise a claim on the grounds of Article 405 of the Civil Code is the existence of a correlation between the enriched party's gain and the impoverished party's loss. The correlation is most of all about the fact that both the gain and the loss result from the same event. Therefore, enrichment caused by the expiry of the period of prescription and preclusion when the source of enrichment comes from separate and unrelated legal relationships and events is not subject to reimbursement."[55]

It is necessary to bear in mind that it is not a causal relationship, there is no causality between impoverishment and enrichment. Enrichment is neither the effect of impoverishment nor is impoverishment the effect of enrichment. They are simply two effects of different events, being manifestations of certain changes caused by a transfer of assets. The relationship is therefore aimed at a search for the event being the cause of both enrichment and impoverishment, and not at arriving at who the perpetrator is because the most important thing here is the fact of the transfer of a certain value from the impoverished party's assets to the enriched party's assets. The cause of the transfer does not matter; it only needs to be common to both events.[56]

The author concurs with the authors who argue that unjust enrichment also involves a relationship between enrichment and impoverishment. Since enrichment alone may occur against the will of the enriched party and must be reflected in

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53 E. Łętowska, op. cit., p. 73; the author offers an example of closing a sluice gate, which makes the river water level rise on one side and drop on the other. It is hard to argue that the water level rising on one side is the cause for the water level on the other side to drop. The relationship here is that a common source of both events is the sluice gate being closed. A. Ohanowicz offers another good example. He mentions a switch that can turn one lamp off and turn another one on at the same time. Both these events have the same cause and both are two effects of different events, but it is impossible to say that one lamp being turned on is the effect of another being turned off. – A. Ohanowicz, *Niesłuszne wzbogacenie*..., p 140.

54 K. Pietrzykowski (ed.), op. cit., p. 1059.

55 Supreme Court's judgement of 18.12.1968, I CR 448/68 (BSN 1969, no. 12, item 208).

56 E. Łętowska, op. cit., p. 73; also: A. Ohanowicz, [in:] W. Czachórski (ed.), op. cit., p. 485; ibidem, pp. 485–486: "The value does not have to be transferred in the same form in which it existed in the impoverished party's assets, but it needs to come from the same property. The crucial factor here is the origin of the gained benefit. Impoverishment and enrichment are only manifestations of the changes in question, meaning the transfers of value in the property of the parties involved. They just signal that there has been an actual transfer of assets and that there is a correlation between the events."

the sphere of the rights of another person, it seems logical that there must be a causal relationship between them, understood as an event that has led to enrichment on the one side with a corresponding impoverishment on the other side.

The doubt related to the issue in question may arise as to whether the relationship between enrichment and impoverishment is to be direct. This means situations where a benefit by which the impoverished party's property has been depleted has become a part of the enriched party's property not directly, but indirectly, through someone else's property. According to E. Łętowska, the formula offered in the Civil Code, according to which enrichment is to come not "from the property" of the impoverished party but "at the expense" of this party, gives a reason to claim that the condition requiring a relationship between enrichment and impoverishment does not have to be considered in the categories of strict "immediacy".[57]

Alfred Ohanowicz argues, in turn, that while there is no doubt as to situations where there is an "intermediary" in the form of a proxy or a statutory representative – with the represented party always being the enriched party, – in the case of situations in which there is a person acting on their own behalf but for someone else's account – without being authorised to do so, – the decisive factor will be the possibility to determine the identity of the benefit at issue. If it is possible to determine this identity despite the path of this benefit through the property of other parties, the fact of its direct or indirect transfer is irrelevant. But if the benefit is combined or mixed in a way that it is impossible to say if it is the same value that the impoverished party has lost, the transfer would have to then be analysed from the perspective between the impoverished party and the "intermediary" and between the "intermediary" and the enriched party. The legal relationships between the parties involved in the transfer of benefits between property will be crucial in this context.[58]

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57 E. Łętowska, op. cit., p. 74.

58 A. Ohanowicz, [in:] W. Czachórski (ed.), op. cit., pp. 485–486; E. Łętowska, op. cit., p. 75: "This means that the most important factor here will be to successfully prove and document the path of the benefit, but a contrary piece of evidence, suggesting a lack of immediacy of the transfer will not rule out the impoverished party's right to complain on the grounds of unjust enrichment"; cf. Supreme Court's judgement of 16.01.1973, II CR 652/72 (OSNC 1973, no. 12, item 216): "In a situation in which an owner of an establishment rents out the establishment and this establishment contains an object built by a third party, with this object becoming an element of the rented fixed property (establishment) (Article 47, § 2 of the Civil Code), it is only the owner of the establishment who benefits from unjust enrichment resulting from the addition of the said object, not the lessee"; Supreme Court's judgement of 22.11.1977, II CR 404/77 (not published): "II. A claim on the grounds of unjust enrichment occurs when there has been a transfer of assets from the property of one party to the property of another party, when there is a relationship between the impoverishment and the enrichment, and when this enrichment has occurred without legal grounds. A person lending money may not demand – based on the regulations on unjust enrich-

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To conclude on the matter of causal relationship, the author wishes to stress that the Civil Code does not speak of this relationship. It is mentioned in the doctrine, but without a consensus on the issue. Those who claim that establishing a relationship between enrichment and impoverishment is a precondition for a claim on the grounds of unjust enrichment to arise, argue that the relationship should prove that the enrichment and the impoverishment have a common source, which means that there has to be a single event resulting in the enrichment of one party and the impoverishment of another. This is not a cause and effect relationship because there is no need to establish the identity of the perpetrator or the manner of transfer of assets, but the very fact of the transfer. There is neither a need to prove the immediacy of the relationship as in situations in which the transfer of assets involves third parties in addition to the enriched and the impoverished party, it will be crucial to determine the identity of the value of loss. If it is possible, the number of assets through which the benefit in question has passed before it has reached the enriched party is irrelevant.

Lack of legal grounds

The last and at the same time the most important distinctive feature of an obligation under unjust enrichment is the lack of legal grounds for the transfer of assets that leads to enrichment. To quote Alfred Ohanowicz, "the legal basis is the cause that justifies the enrichment, meaning that it makes it compliant with the binding legal framework." But the case will be different when enrichment has occurred according to the impoverished party's will, especially as a result of their rendering of a service, and different yet when it has happened against their will.[59]

Krzysztof Pietrzykowski explains that a lack of legal grounds is a situation in which gaining a financial benefit is not justified in the provisions of an act, a valid legal act, an administrative act or a binding court decision.[60] Krzysztof Kołakowski also remarks that a lack of legal grounds to gain a benefit occurs when the benefit is not supported by any legal act, any statutory provision, any court decision or

ment – that a third party release a benefit gained as a result of the borrower's making investments in the third party's fixed property since the potential enrichment of the third party has not come at the expense of the lender but of the borrower."

59 A. Ohanowicz, [in:] W. Czachórski (ed.), op. cit., p. 486.

60 K. Pietrzykowski (ed.), op. cit., p. 1059.

any administrative decision.[61] This was also found in the Supreme Court's judgement of 17 November 1998.[62]

The basis that justifies a transfer of assets may therefore be:

a) a provision of the binding law,
b) an administrative act,
c) a court decision,
d) a legal act.

The examination of the absence of legal grounds shall thus involve finding whether a given instance of enrichment is justified by a provision of the binding law, a court decision, an administrative act or a legal act.

To conclude, the author would like to discuss the issue of the relationship between the notions of "unjustness" and "unfairness". The no longer binding Code of Obligations contained a notion of "unfair enrichment", which might imply that the institution used to be subject to value judgement. The present Civil Code says that enrichment is to be unjust. This unjustness – according to Paweł Księżak – can be construed in two ways: in a technical sense, meaning without any legal justification, or legal grounds (which has already been covered) or from the perspective of fairness. In such a view, what has been gained against the principles of fairness, even if it can be legally justified, will be unjust and groundless.[63]

According to the author, the notion of justness, with ethics being its measure, should not be only limited to cases where enrichment may not be justified on the grounds of the law. It should expand to include cases in which enrichment can actually be legally justified, but remains flagrantly inconsistent with the idea of fairness. But the current trend is rather to assume that fairness may not be a sufficient and only explanation for the institution of unjust enrichment because it is its basis in a sense of the ratio of contractual liability or liability in tort, and according to the norms which unjust enrichment regard, the goal of the regulations is to balance the transfers of assets occurring without legal grounds.[64]

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61 K. Kołakowski, op. cit., p. 254.

62 Supreme Court's judgement of 17.11.1998, III CKN 18/98 (LEX no. 479355): "The benefit referred to in Article 405 of the Civil Code has to be gained without legal grounds of any kind. This happens when the benefit is not supported by any legal act, any statutory provision, any court decision or any administrative decision."

63 P. Księżak, op. cit., p. 5; ibidem: "In many cases, the effect of a judgement made from both points of view will be the same, which certainly tones down the dispute. But it is the main problem of the very idea of unjust enrichment. The name of the institution may not be decisive in this case."

64 Ibidem, p. 6.

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The function of claims raised on the grounds of unjust enrichment is to protect property against unjust diminishment and to control property transfers. It is unacceptable to enrich oneself at the expense of others, and so whoever has taken advantage of an unjustified benefit shall return this benefit to the person who should have been granted this benefit. "In a technical sense, unjust enrichment has nothing to do with fairness: we can imagine a consistent but unfair legal system, in which standards concerning unjust enrichment are also necessary."[65]

Although Article 405 of the Civil Code does not refer whatsoever to the notion of "fairness", it is reasonable to quote the statement of reasons included in the Supreme Court's decision of 28 April 1999, where it was found that "although the Civil Code departs from the 'unfairness' of enrichment defined in the Code of Obligations (Article 123) and substitutes it with the notion of 'unjustness', it is necessary to acknowledge that when assessing the legitimacy of a claim raised under Article 405 of the Civil Code, moral considerations shall be taken into account as well."[66] This would provide grounds to claim that although the idea of "unfairness" of enrichment was formally abandoned and that the academic environment does not speak for fairness-related concepts, the principles of fairness shall not be disregarded completely when analysing instances of potential unjust enrichment.[67]

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65 Ibidem, pp. 5–7.

66 The Supreme Court's judgement of 28.04.1999, I CKN 1128/97 (not published): "Article 405 ignores the event which has led to the occurrence of unjust enrichment. This may be a result of the activity of the enriched party, impoverishment of a third party, and any other event (e.g. coincidence) resulting in a transfer of benefits from the property of one party to the property of another party. The fault of the enriched party or any other form of that party's default or negligence, or a causal relationship as defined under Article 361, § 1 of the Civil Code are irrelevant. Speaking differently, the application of Article 405 of the Civil Code is justified whenever there is some objective situation involving unjust enrichment of one party and impoverishment of another party, which makes it possible to claim that impoverishment is a function of enrichment and vice versa. Moreover, although the Civil Code departs from the 'unfairness' of enrichment defined in the Code of Obligations (Article 123) and substitutes it with the notion of 'unjustness', it is necessary to acknowledge that when assessing the legitimacy of a claim raised under Article 405 of the Civil Code, moral considerations shall be taken into account as well."

67 Cf. also: E. Łętowska, op. cit., p 76: "Although the Polish doctrine of today does not offer views defending Stammler's concept of 'unjustness' defined as inconsistency with 'just law' and although the case law does not provide decisions formulated in clear support of the concept in question, even in situations when there was a transfer justified on legal grounds but viewed as reprehensible in axiological terms, the concept at issue has not become completely absent from practice. The conclusion must come from what practice actually practices and not what it stands for officially."

Conclusion

To conclude the discussion on the notions and the distinctive features of obligations under unjust enrichment, the author would like to stress that the institution, given its nature and place in the Civil Code, may be a source of obligation.

An analysis of Article 405 of the Civil Code proves that the institution of unjust enrichment features all the qualities of an obligation, which have been covered in the foreword to the article. It contains receivables, which shall be understood as the right of the person at the expense of whom the enrichment has occurred to demand that the enriched party hand over the benefit in kind or to return the benefit's value if a return in kind is not possible (a demand of a service involving particular action). Such receivables are correlated with the debtor's (enriched party's) duty to act in a defined way, which will be to hand over the benefit in kind or to return its value. The parties to such an obligation relationship will be then the enriched party as the debtor and the party at the expense of whom the enrichment has occurred (the impoverished) as the creditor.

The characteristic features differentiating an obligation under unjust enrichment from other types of obligation are: an individual's gain (enrichment), benefiting at the expense of another person (due to the latter's impoverishment), the relationship between enrichment and impoverishment and the lack of legal grounds for enrichment. It should be made clear that the Civil Code does not speak of the said relationship, though. The knowledge, will, and even good or bad faith of the enriched party will not be relevant to the obligation.[68] The liability of the enriched party in such circumstances will occur regardless of the cause of the party's gain.

Finally, it needs to be said that the obligations subject to the provisions of Article 405 and following of the Civil Code shall not be equated with all solutions and regulations included in the provisions where the legislator uses the notion of "enrichment" or "return" or "reimbursement" because they shall be governed by other special provisions.[69]

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[68] This may be relevant only to other claims, which may coincide with a claim raised under unjust enrichment.

[69] P. Mostowik, *Bezpodstawne wzbogacenie*..., p. 45; ibidem: "For instance, in the light of Article 57 §, 1 of the Commercial Companies Code, a partner shall have the right to demand that the partnership be issued the benefit a partner made in breach of the prohibition of competition – within six months of the date when other partners learned of the breach of the prohibition, but no later than within three years. S. Sołtysiński argues the claim for the issuance of benefits is not subject to the provisions on unjust enrichment, which will make the duty to release profit on account of no enrichment remain valid (Article 409 of the Civil Code)."

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