Bona fides exuberans. A New Legal Concept of Twelfth Century Legal Scholarship*

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Abstract

It is said that the dualist interpretation of good faith (bona fides) clearly distinguishes subjective good faith (guter Glaube, goede trouw) from objective good faith (good faith and fair dealing, Treu und Glauben, redelijkheid en billijkheid). When has this new distinction emerged in the legal history? In this paper it is argued that objective good faith was named by the Glossators of the 12th century, who coined the new legal term of bona fides exuberans. This new legal concept has appeared in the 1150's, and it is probably attributable to Bulgarus.

Key words: *bona fides exuberans; ius commune; glossator; societas; Treu und Glauben.*

1. Preliminary remarks

The notion of bona fides has gained a wide interest among the contemporary legal historians. Important volumes[1] have been published on this legal issue, but the origins of this legal notion has still remained unknown.

Recently András Földi has published an article regarding the traces of the dualist interpretation of good faith in the ius commune until the end of the sixteenth century.[2] In his view the dualist interpretation of good faith (bona fides) clearly distinguishes subjective good faith (guter Glaube, goede trouw) from objective good faith (good faith and fair dealing, Treu und Glauben, redelijkheid en billijkheid). Even in the Middle Ages and in the early modern age the majority of jurists interpreted good faith in a monist manner. According to Földi, the dualist interpretation of good faith first appeared - in the form of a certain „protodualism" - in a work by Franciscus Aretinus in the second half of the fifteenth century. Modern dualism appeared in the first half of the sixteenth century in works of Medina and Rebuffus. More than three centuries passed before modern dualism gained wide currency after the publication of Wächter's monograph in 1871.[3]

If there is a dualist interpretation of good faith (bona fides) that clearly distinguished subjective good faith from objective good faith, it is to be asked: When has this new distinction emerged in the legal history?

In the course of his very limited research so far Földi has not found indications that the dualist interpretation of bona fides appeared before the fifteenth century. According to him, the dualist interpretation of bona fides first appeared, in the form of protodualism, in a work by Franciscus Aretinus (1418-1486) in the second half of the fifteenth century.

For everyone who has a thorough knowledge of medieval legal scholarship this statement sounds a bit unbelieveable. Franciscus Aretinus was not amongst the most original minds of the legal science, his works are often a simple collection of other's views. It is hard to believe that Franciscus Aretinus has created this new approach in the legal history or at least in the Middle Ages.

2. The new concept: the bona fides exuberans

In fact, if Földi had used all identifiable sources for the area, he would have realised that this distinction emerged many centuries earlier than he thought.

For example, *Wilhelmus de Cabriano* in his Casus Codicis, which is believed to be the description of the lectures held by Bulgarus during the academic year 1156-1157, points out that „there is a good faith which protects the substance of every plea and agreement, therefore all contracts. But there is also another faith called exuberant and abundant, which includes many performances based on equity about which the parties have not

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1 Gordley, James, *Good faith in contract law in the medieval ius commune*, in Zimmermann, Reinhard-Whittaker, (ed.), *Good Faith in European Contract Law*, Oxford 2000, 94.; Garofalo (ed.), *Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea*, I-III (2003) 229 ff.

2 Földi, András, *Traces of the dualist interpretation of good faith in the ius commune until the end of the sixteenth century*. Fundamina, vol.20, no.1, (2014) 312-321.

3 Wächter, *Die bona fides insbesondere bei der Ersitzung des Eigenthums*, Heidelberg 1871.

agreed, and this is required in the bonae fidei contracts. The first type, however, is required in every contract, because a contract that was not entered into with good faith, but was due to deceit is void or voidable."[4]

As the author of this magnificent edition of this early legal lecture points out, „these Casus Codicis are a kind of lecture notes, in which Wilhelmus de Cabriano summarised the teaching on Justinian's Code of his master, the Glossator Bulgarus de Bulgarinis, which took place during the academic year 1156-1157."[5] As Wallinga explains us, Wilhelmus de Cabriano did not make a verbatim report (a lectura) of his master's voice, but only wrote down – or, in any case, published – what he considered most important. Textual variants, for instance, are hardly ever mentioned, and he concentrates on the legal argumentation. Even so, the reader of the Casus Codicis practically finds himself in Bulgarus' lecturing hall: he can see which texts Bulgarus treated – some of them briefly, others very elaborately. The Casus Codicis, in other words, are a direct and especially a very detailed source of Bulgarus' opinions.

An other legal work, an early Lectura Institutionum from the 12th century confirms that this distintion between the aforementioned two types of bona fides has emerged around the middle of the 12th century, and the authorship thereof can be sought in the circle of the four pupils of Irnerius.

Indeed, the *Lectura Institutionum Vindobonensis* has a similar legal reasoning: „Every action is equitable, if bona fides means the opposite of mala fides, because in all pleas bona fides, and not mala fides should prevail. Indeed, every legislator intends that nothing else than justice and equity take place in law-suits. But sometimes we speak of bona fides in a special sense, which means that a party to a contract has to do for the other party not only was agreed, but whatever he has to do on the basis of equity. Therefore some actions are of bona fides, namely exuberans, where a party has to do more than it was agreed by the contract."[6]

The Summa Institutionum Vindobonensis is a medieval legal compilation, probably of the middle of the 12th century. It survives in four manuscripts conserved in Bologna, Grenoble, Vienna, and Klosterneuburg. The creation of the Summa appears to belong to a pattern of revived interest in Justinianic legal texts. It has two versions, the first is called Summa Institutionum Vindobonensis, the second version (survived only in the Vienna manuscript) is called *Lectura Institutionum Vindobonensis*, and it is thought to be a kind of lecture notes, but it was edited in 1913 in footnotes (as an apparatus of glosses).

Little is known about the author of this compilation. Legal historians expressed various views about the attribution of the summa and the lectura. It was argued that Bulgarus[7], or Martinus, or Placentinus[8] was the author of the Summa, whereas the author of the Lectura should be sought in the circle of Martinus' pupils,[9] but other historians did not agree with these attributions. Sometimes the lecture adheres to the opinion of Bulgarus, but the legal reasoning seems to be much more in accordance with the legal views of Martinus.

However, it is undoubted that this is a very early witness of the legal teaching of the middle of the 12th century, because various authors have favoured seeing this legal text as originating in a teaching context. As a nearly contemporary legal material with the Casus Codicis of Wilhelmus de Cabriano, the Lectura Vindobonensis seems to make it sufficiently clear that the dualist interpretation of bona fides has its roots in the 1150's.

3. The correlation of the societas with bona fides exuberans

Another early compilation of the medieval legal tradition, the Summa Codicis Trecensis did also cite the bona fides exuberans.

The author of the Summa Trecensis is unknown, although Fitting made an edition under the name of Irnerius. According to Gouron, this summa was written in Provence, in Arles by a pupil of Irnerius, namely Geraudus. Around 1135 he had compiled it using the glosses of his teacher, Irnerius, but later, in the 1140's he revised the summa using the glosses of Bulgarus and Martinus. The final edition was made probably in the 1150's.[10]

As the unknown author of this summa explains, the judicial power in this case is very large, because of the specific nature of the partnership contracts, since a contract of partnership is preeminently one of good faith.[11]

This is an echo of the Codex Iustinianus 4. 37. 3 where it is stated that since good faith should prevail in partnership contracts, it is demanded by the rules of equity that the profits should be equally divided between the partners; and if the Governor of the province should find that your father belonged

[4] Wallinga, Tammo, *The Casus Codicis of Wilhelmus de Cabriano*, Frankfurt am Main 2005, 248.: „Est autem fides bona, que tuetur substantiam omnium placitorum omniumque conventorum, ergo omnium contractuum. A genere in speciem: est et alia fides que dicitur exuberans et magis abundans, per quam prestatur etiam id de quo inter contrahentes actum non est, et hoc in contractibus bone fidei desideratur, ut infra Pro socio, Cum (C. 4. 37. 3). Prima vero in omni contractu spectatur, quoniam contractus qui non bona fide, sed dolo malo est initus aut ipso iure est irritus aut irritandus."

[5] Wallinga, Tammo, *The Casus Codicis of Wilhelmus de Cabriano and the Dissensiones Dominorum*, in *Revue internationale du droit de l'antiquité* (2009) 194.

[6] Palmerius, Johannes Baptista (ed.), *Wernerii Summa Institutionum cum glossis Martini, Bulgari, Alberici aliorumve*, in *Bibliotheca Iuridica Medii Aevi*, Bononiae 1914, Add., vol. I. 166.: „omnes itaque actiones sunt bone fidei, si bona fides intelligatur ad differentiam male fidei, quia in omnibus iudiciis non mala, sed bona fides debet verti. Est enim cordis legislatoribus in iudiciis nihil aliud, quam iustitiam et aequitatem locum habere. Accipimus autem quandoque bonam fidem speciali significatione, qua reus prestat non tantum quod convenit, quam etiam quod eum ex aequo et bono prestare oportet. Actionum ergo quedam sunt bone fidei, idest exuberantis, in quibus ampliora intelliguntur vel desiderantur quam in contractu comprehendatur."

[7] Kantorowicz, Hermann, *Studies in the Glossators of Roman Law*, Cambridge 1937, 59-77.

[8] Haenel, Gustav, *Dissensiones Dominorum, sive controversiae veterum iuris Romani interpretum, qui glossatores vocantur*, Lipsiae 1834, XL

[9] Meijers, E. M., *Sommes, lectures et commentaires (1100 à 1250)*, in *Atti del Congresso Internazionale di Diritto Romano* (Bologna e Roma), Pavia 1934, 464ff.

[10] Gouron, A., *L'auteur et la patrie de la Summa Trecensis*, in *Ius Commune* 12 (1984) 1—38.

[11] Summa Codicis Trecensis 4.37, ed. Fitting, *Die Summa Codicis des Irnerius*, Berlin 1894, 113.: „Iudicis offitium, cum in hoc iuditio exuberans fides desideretur, latissime porrigitur. Ideoque utrosque ad collationem compellet et ad lucra communicanda et ad dampna resartienda."

to a partnership organized for the working of salt-pits, and died before having received his share of the common profits, he will order that portion of them to which you are actually entitled to be paid to you.[12]

This passage of the Codex refers only to fides, without the usual adjective „good" (*„bona"*), therefore it is not clear that the ancient Romans had intended this sentence as the Glossators did. However, the decisive step was made by the medieval Glossators of Roman Law when the anonymous Glossator interpreted fides as bona fides.[13] But not only he has added an adjective to the word „fides", but he has identified the recently created legal term, the *bona fides exuberans* with equity (*aequitas*).[14]

This was a very important step in the legal history of contract law in Europe, because it was the first time when bona fides was meant as an objective requirement of fair dealing and honesty, not only the subjective absence of dolus.

As to the author of these glosses, obviously it is not easy to say who wrote these glosses. Older witnesses than Accursius confirms that these glosses were written in the 12th century. The printed edition of Azo's lectura on the Codex Iustinianus refers to this gloss, too.[15]

Older manuscripts have these glosses, too. However, these glosses are anonymous, and we have to content ourselves with a general statement that this interpretation has emerged in the 1150's, and it is attributable probably to Bulgarus, or to anyone of the four pupils of Irnerius. As to any further conjecture regarding a supposed authorship of Irnerius, we must be careful. The glosses of Irnerius were generally not signed, or at least, the legal historians in the 20th century disputed about their authenticity, therefore it seems to be wise to avoid conjectures.

4. The *pactum appositum incontinenti* or *ex intervallo*

In Roman law, pacts were agreements not made in the form recognized by law, and therefore, were not enforceable by action. However, agreements collateral to equitable contracts, called *pacta adiecta* by the Glossators in the Middle Ages, such as sale, lease, a seller and purchaser might agree that the former had the right to repurchase the property sold, or that he should give a bond against eviction, or should put the property in good condition. If any such collateral agreements were made as part of the main contracts, they were, in time, made actionable; if not so made, they were unenforceable.

As Codex Iustinianus 2. 3. 13 stated, in the case of equitable (bonae fidei) contracts an action arises on a pact made in connection therewith only if the pact is made as part of the same transation; for whatever is agreed on thereafter, gives rise not to a claim, but to a defense only.[16]

Although the emperor had mentioned only the bonae fidei contracts in this fragment, the glossators thought that the same rule is to be applied to the stricti iuris contracts, too. According to Iacobus, also the pacts not following immediately upon the main bonae fidei contract (*pacta ex intervallo*) [17] were enforceable because of the bona fides exuberans.

Glossators asked why the emperor mentioned only the bonae fidei contracts, and why he omitted the stricti iuris contracts. According to the Lectura Codicis of the Bibliothčque Nationale of Paris, ms. Lat 4546, which Savigny attributed to Roffredus, but which Meijers showed to be due to his teacher, Karolus [18] de Toccus, a contemporary of Azo, the difference between bonae fidei and stricti iuris contracts is due to the bona fides exuberans, which is required in these contracts.[19] He refers to the „philosophical" reason of Wilhelmus de Cabriano who said that it is because of the fides exuberans that only the bonae fidei contracts were emphasized.

Indeed, this was the opinion of Wilhelmus de Cabriano, because the printed edition has a reference to this legal opinion.[20] This reasoning is cited also in a medieval manuscript conserved in Great-Britain and edited by Kantorowicz.[21] Dolezalek made

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[12] Codex Iustinianus 4. 37. 3.: Cum in societatis contractibus fides exuberet conveniatque aequitatis rationibus etiam compendia aequaliter inter socios dividi, praeses provinciae, si patrem tuum salinarum societatem participasse et non recepta communis compendii portione rebus humanis exemptum esse reppererit, commodum societatis, quod deberi iuxta fidem veri constiterit, restitui tibi praecipiet. (In this paper all translations of Roman law texts were made using the translation by P. Scott and the translation by Fred H. Blume, although with some changes.)

[13] Gl. *fides* ad C. 4. 37. 3., *pro socio*, l. *cum in societatis* (Parisiis 1569, coll. 816.): „Fides] scilicet bona, ut supra de acti. et oblig. l. bonam."

[14] Gl. *aequitatis* ad C. 4. 37. 3., *pro socio*, l. *cum in societatis* (Parisiis 1569, coll. 816.): „Aequitatis] idest bonae fidei."

[15] Azo, *Lectura* in C. 4. 37. 3., *pro socio*, l. *cum in societatis* (Parisiis, 1581, 335.)

[16] C.2. 3. 13.: In bonae fidei contractibus ita demum ex pacto actio competit, si ex continenti fiat: nam quod postea placuit, id non petitionem, sed exceptionem parit.

[17] Gl. *in bonae fidei contractibus* ad C.2. 3. 13., *de pactis*, l. *in bonae fidei contractibus* (Parisiis 1559, coll. 230.): „dicas idem in stricti iuris, ut infra eo. l. petens (C.2. 3. 27) et ff. si cer. petatur l. lecta § dicebam (D.12. 1. 40). Sed in his, scilicet bonae fidei, maxime videbatur valere etiam ex intervallo appositum propter exuberantem fidem, quae in his desideratur."

[18] Meijers, E. M., *Sommes, lectures et commentaires (1100 ŕ 1250)*, in *Atti del Congresso Internazionale di* Diritto Romano (Bologna e Roma), Pavia 1934, 464, 488-494.

[19] von Savigny, Friedrich Carl, *Geschichte des römischen Rechts im Mittelalter*, Heidelberg 1850, IV 534.: erroneously attributed by Savigny to Roffredus, Lectura in Codicem 2. 3. 13., (ms. Paris 4546): „W. philosophicam rationem ponit in casibus. Ideo dicit de his, quoniam propter exuberantem fidem quae in his desideratur puta etiam ex intervallo facta inesse videbantur eis."

[20] Wallinga, Tammo, *The Casus Codicis of Wilhelmus de Cabriano*, Frankfurt am Main 2005, 42-43.: „Que in continenti fiunt, sive sit contractus bone fidei sive stricti iuris, insunt et novam actionem pariunt… Set cum idem sit tam in stricti iuris contractibus, quam bonae fidei, quare de his dicit et de illis subtacet? Quod forte ideo fit propter exuberantem fidem que in his desideratur."

[21] Kantorowicz, Hermann, *Studies in the Glossators of Roman Law*, Cambridge 1937, 296. (ad C. 2. 3. 13): „Pactum de natura contractus est, cavere de evictione cum pignore vel fideiussore. Si in continenti factum est, veterem informat actionem et parit novam actionem, scilicet prescriptis verbis. Si vero ex intervallo, exceptionem tantum, ut huiusmodi: vendidi domum; ex intervallo convenit, ut liceat michi habitare; si sum in domo, habebo exceptionem; si autem extra, nullam actionem, quod non esset, si in continenti facta esset. Quare in contractibus bone fidei et non stricti iuris dixit? Quia in his non dubitatur, set stricti iuris, si in continenti, parit actionem novam, veterem informat; si ex intervallo, exceptionem. In bone fidei dubitatur propter exuberantem fidem, que celebratur. Semper separari debere propter uberiorem fidem."

clear that Kantorowicz had erroneously attributed this text to Wilhelmus de Cabriano, and he conjectured that the passage discovered and edited by Kantorowicz might be of Provencal origin.[22]

Glossators asked why the pacts annexed to the bonae fidei contracts differ from those annexed to the stricti iuris contracts. Some of them thought that those pacts differ because of the bona fides exuberans. But not all of them agreed, some of the Glossators had different opinions on that. Martinus and Albericus thought that subsidiary conventions annexed to an agreement remedied by bonae fidei action were enforceable.[23] Iacobus and Placentinus went further. They thought that not only those pacts are enforceable which are annexed to an agreement (contract) remedied by bonae fidei action, but also those annexed to stricti iuris contracts, if they were made at the same time that the main contract was made. In their views there is no difference between pacts annexed to bonae fidei and stricti iuris contracts, if the pact followed immediately upon the main contract (*pacta incontinenti*), but pacts not following immediately upon the main stricti iuris contract, were not enforceable (*pacta ex intervallo*).

The Dissensiones dominorum edited by Haenel has a slightly different version in the collection of Rogerius and the so-called Vetus collectio.[24] However, these differences are not significant. The text of the Vetus collectio is much more corrupted, therefore it is impossible to say whether Irnerius took a position in this dispute or not.

5. The restitution of deposited things to the thief

Alongside the afore-mentioned legal topics, we can cite another debated legal question in the 12th century in order to illustrate the application of this new legal concept in the practice.

D. 13. 6. 16 stated already that „even if a thief or a depredator lends property he will be entitled to an action on loan"[25], but the ancient Roman lawyers were not referring to the bona fides to support this legal rule.

D. 16. 3. 1.39 stated that „if a depredator or a thief makes a deposit, either of them will lawfully be entitled to an action on deposit; for it is to his interest to have it, because he may be held liable."[26] A reference to bona fides in order to support this statement is lacking here, either.

According to the Glossators, the rule that even a thief or a depredator makes a deposit is entitled to an action on deposit, has a strict correlation with the bona fides. They explained that this legal rule is strictly correlated with the bona fides, but they also stated that this rule is specifically connected to a special type of bona fides, the bona fides exuberans. This bona fides exuberans is an objective measure, and it is referring to the parties' obligations stemming from a contract on the basis of „natural equity", an objective requirement of fair dealing and honesty, and this *bona fides* is not only the absence of personal dishonesty or improbity.

This legal reasoning appeared probably in the second half of the 12th century. Placentinus explains that even a thief or a depredator who lends property or makes a deposit is entitled to an action on loan or deposit, yet not because of his dishonesty, but because deposit and loan (commodatum) are contracts plentiful of good faith.[27] And this is a clear reference to the bona fides exuberans.

A 12-13th century legal compilation, the Liber iuris Florentinus compiled between 1180 and 1234, most probably around 1200, has a similar legal reasoning. The anonymous author of this work points out that even if a thief who makes a deposit

[22] Dolezalek, Gero, *Die Casus Codicis des Wilhelmus de Cabriano*, in Studien zur europäischen Rechtsgeschichte, Frankfurt 1972, 25-52.

[23] Scialoja, Vittorio, *Di una nuova collezione delle dissensiones dominorum*, in *Studi e documenti di storia e diritto* 12 (1891) 272.: „[D]issentiunt, utrum sit idem pactum, si fiat in continenti, tam in bonae fidei iudiciis quam in stricti iuris, id est ut novam pariat actionem et veterem informet. Dicit Mar[tinus] et Al[bericus] in bonae fidei iudiciis pactum in continenti factum, sive sit de natura contractus sive non, novam parit actionem, scilicet praescriptis verbis, et veterem informat ex eo contractu, ut C. de pact. 1. in bonae fidei [C. 2, 3, 13] et D. de pact. Iuris §. Sed cum [D. 2, 14, 7, 4]. Ia[cobus] dicit et Plac[entinus] et U[go] idem esse in stricti iuris iudiciis, quod in bonae fldei, et e contrario, ut novam actionem pariat pactum appositum in continenti, scilicet praescriptis verbis, et veterem, quae fuerat, informet; et argumentum suum prň hac sententia ei proficiens est in C. de pact. 1. petens [C. 2, 3, 27] et D. si certum pe. lecta [D. 12, 1, 40]; illas quidem leges, quae loquuntur in bonae fidei iudiciis, sic determinat, quasi non videantur loqui ad differentiam stricti iuris iudic[iorum]; sed quia cum essent bonae fidei, videbatur quod pactum etiam ex intervallo factum debet parere novam actionem et veterem informare, quod removet… Dominus Ug[o] dicebat, quod pactum in stricti iuris iudiciis in continenti appositum novam parit actionem, sed veterem non informat, ar. D. de pact. iuris §. sed cum [D. 2. 14, 7, 4] et de condi. e. d. 1. ult. [D. 12, 4, 16]. Quod aliis non placet: et manifeste eius sententia reprobatur in D. si certum pe. lecta [D. 12, 1, 40].

[24] Haenel, Gustav, *Dissensiones Dominorum, sive controversiae veterum iuris Romani interpretum, qui glossatores vocantur*, Lipsiae 1834, 38.: „Dissentiunt in eo, utrum sit idem, si pactum fiat in continenti, tam in bonae fidei iudiciis, quam stricti iuris, ad hoc, ut novam pariat actionem et veterem informet; et dicit Martinus in bonae fidei iudiciis pactum in continenti factum, sive sit de natura contractus sive non, novam parere actionem, scilicet praescriptis verbis et veterem informare, scilicet ex eo contractu, ut C. de pactis, l. in bonae fidei (C.2. 3. 13) et D. de pactis, l. Iuris gentium, § Sed cum (D.2. 24. 7.4). I. do. dicit, in stricti iuris iudiciis, si pactum sit de natura contractus; si vero extra, dicit, tantum novam parere, scilicet praescriptis verbis, veterem non informare. Iacobus autem dicit, idem esse in stricti iuris, quod in bonae fidei iudiciis, ut et novam pariat actionem pactum factum in continenti in stricti iuris iudiciis, scilicet praescriptis verbis et veterem quae fuerat, informet, et argumentum suum pro hac sententia facere C. de pactis, l. petens (C.2. 3. 27) et D. si certum petatur, l. Lecta est (D.12. 1. 40). Illasque leges, quae loquuntur in bonae fidei iudiciis, sic determinat, quasi non videantur loqui ad differentiam stricti iuris, sed quia, quum esset bonae fidei, videbatur quod pactum etiam ex intervallo factum deberet novam parere actionem et veterem informare, quod removet." The dissensio of Rogerius at page 86.

[25] D. 13. 6. 16 Ita ut et si fur vel praedo commodaverit, habeat commodati actionem.

[26] D. 16. 3. 1.39 Si praedo vel fur deposuerint, et hos Marcellus libro sexto digestorum putat recte depositi acturos: nam interest eorum eo, quod teneantur.

[27] Pescatore, Gustav, *Placentini Summa de uarietatibus accionum*, Greifswald 1897, 43.: „Et sciendum est, quia etiam furi et predoni conpetit accio commodati set et depositi, ut D. eod. 1. Ita (13, 6, 16) et D. depositi 1. I. §. Si predo (16, 3, 1, 39). ex inprobitate tamen nec fur nec predo consequitur agendi potestatem, set ratione contractuum in quibus bona fides exuberat.

will be entitled to an action on deposit because of the exuberant faith that resides in this contract.[28]

There is another point where the anonymous author mentions the bona fides exuberans. In the chapter dedicated to loan (commodatum), the author helds that an utilis actio is entitled to a thief who lends others' property because of the exuberant faith that resides in this contract.[29]

6. Conclusion

It is clear that the afore-mentioned 12th century authors distinguished between bona fides exuberans and ordinary bona fides, they did not treat bona fides as a unified notion, as Földi stated. A new legal term has emerged, the bona fides exuberans. As to the meaning of this new legal term, it is an objective requirement of fair dealing and honesty. The ordinary bona fides means the absence of dolus of the contractant parties.

The distinction between the two types of bona fides is probably to be ascribed to Bulgarus. The afore-mentioned sources are evidences that this distinction can not be ascribed to Franciscus Aretinus (1418-1486), as Földi erroneously thought. The 12th century glossators of Roman Law have created a new legal term that survived along the centuries.

[28] Conrat, M., *Das Florentiner Rechtsbuch: Ein System römischen Privatrechts aus der Glossatorenzeit*, Berlin 1881, 114.: „Directa actio depositi conpetit ei qui rem suam deponit et eius heredi. Conpetit etiam furi propter exuberantem fidem."

[29] Conrat, M., *Das Florentiner Rechtsbuch: Ein System römischen Privatrechts aus der Glossatorenzeit*, Berlin 1881, 112.: actio „utilis datur ei qui commodat rem alienam, etiam propter exuberantem fidem que exigitur in commodato competit furi ad petendam rem commodatam furtivam."