

Sanction for the non-confessing debtor. Litiscredence in Roman law

Michael Binder*

Contents

I. Introduction	2
II. Actions with litiscredence	3
A. Actio iudicati	6
B. Actio depensi	6
C. Actio ex testamento.....	6
D. Actio legis Aquiliae	7
E. Actio de modo agri	7
III. Liability of the vindex. First case of litiscredence?	8
IV. Similarities between actions with litiscredence?	10
V. Liability in duplum: Legal consequence of a delict or increase of lis?	13
VI. More actions with litiscredence?	15
A. Actio auctoritatis	16
B. Actio ex confesso	16
C. Action based on the Lex Furia de sponsu	17
D. Depositum.....	18
E. Actio in factum/Actio utilis.....	19
VII. Conclusion.....	20
VIII. Bibliography.....	21
IX. Lists of abbreviations	28

*Dr. Michael Binder is currently working at the department of Roman Law and Antique Legal History of the University of Vienna.



I. Introduction

Although penalties for frivolous litigation (*poenae temere litigantium*) were rare in Roman law and mostly connected with certain actions, such penalties are mentioned in both the Institutes of Justinian and the Institutes of Gaius.¹ The category *poenae temere litigantium* comprises 1) penalties for not satisfying a creditor's claim² and 2) penalties for denying liability³ (*poenae infitiationis*).⁴ Roman jurists sometimes referred to the phrase "*infitiando lis crescit in duplum*"⁵ in order to describe certain actions⁶ where the denial of liability by the defendant led to the doubling of damages.⁷ Modern legal scholars often use the word litiscrescence⁸ as a synonym for "*infitiando lis crescit in duplum*". A *debitor* could avoid such a sanction if he confessed in front of the *praetor* (*confessio in iure*). Actions with litiscrescence led to a difficult situation for the *debitor*:⁹ On the one hand, he could try his chances of winning the lawsuit and deny liability. This option was a risky choice, because if he lost, he had to pay the *duplum*. On the other hand, the safe option of confessing (*confessio in iure*) meant that the *debitor* could no longer successfully dispute his liability.

¹ The following article is a summary of my dissertation 'Sanktion für den nicht geständigen Schuldner. Litiscredenz im römischen Recht und in griechischen Rechtssystemen' (University of Vienna, 2021). I want to thank the supervisor of my doctoral thesis, Prof. Dr. Philipp Scheibelreiter, for his revision of and feedback on this summary. *De poena temere litigantium* (Inst. 4.16 pr.); *De temere litigandi coercionibus et de poenis* (Gai. 4.171-187); Leopold Wenger, 'Institutes of the Roman Law of Civil Procedure. Translated by Otis Harrison Fisk', 2nd edn. (New York: The Liberal Arts Press, 1955) pp. 183 seq. and p. 331; Max Kaser/Karl Hackl, 'Das Römische Zivilprozeßrecht', 2nd edn. (München: C. H. Beck, 1996) p. 283.

² For instance: Gai. (2 ad ed. *aedilium curulium*) D. 21.1.45.

³ For instance: Ulp. (22 ad ed.) D. 11.1.11.3.

⁴ Lothar v. Seuffert, 'Poenae temere litigantium' (1884) 67 Archiv für die civilistische Praxis 323-365, pp. 323 seq.

⁵ Inst. 3.27.7: Text and translation see chapter 'V. Liability in duplum: Legal consequence of a delict or increase of lis?'

⁶ The cases described by *infitiando lis crescit in duplum* belong to category *poenae infitiationis*.

⁷ Wenger, 'Civil Procedure', p. 331.

⁸ See Reinhard Zimmermann, 'The Law of Obligations: Roman Foundations of the Civilian Tradition' (Oxford: University Press, 1990: reprint 1996) 308. In German: Litiscredenz (before the 20th century: Litiscredenz); in Italian: litiscrescenza; in French: litiscroissance.

⁹ See David Pugsley, 'On the Lex Aquilia and Culpa' (1982) 50 TRG 1-17, p. 7; Jan Dirk Harke, 'Die Rechtspositionen am Sklaven. Ansprüche aus Delikten am Sklaven', in: Tiziana J. Chiusi/Johanna Filip-Froschl/Johannes M. Rainer (eds.), Corpus der römischen Rechtsquellen zur antiken Sklaverei (CRRS) III/2 (Stuttgart: Franz Steiner Verlag, 2013) p. 75.

II. Actions with litisrescense

The Institutes of Gaius is a textbook for law students, most likely published around 161 A.D.¹⁰ A transcription from the 5th or 6th century was discovered by Niebuhr in 1819.¹¹ Gaius mentioned actions with litisrescense twice in his Institutes. First, in book 4 section 9, he discussed actions claiming restoration and a penalty:¹²

Gai. 4.9

Rem vero et poenam persequimur velut ex his causis, ex quibus adversus infitiantem in duplum agimus; quod accidit per actionem iudicati, depensi, damni iniuriae legis Aquiliae, aut legatorum nomine, quae per damnationem certa relicta sunt.

We seek both property and penalty, on the other hand, in those cases where, for instance, we raise an action for double damages against someone who denies a claim, as happens with an action on judgment debt, on expenditure, for wrongful loss under the Aquilian Act, or for definite thing left by obligatory legacy.¹³

The second mention is in book 4 section 171, which deals with “punishment and penalties for frivolous litigation”:¹⁴

Gai. 4.171

... adversus infitiantes ex quibusdam causis dupli actio constituitur, velut si iudicati aut depensi aut damni iniuriae aut legatorum per damnationem relictorum nomine agitur. ...

... in some actions the claim is doubled if the defender denies liability, for instance, if an action is brought on a judgment debt, or on expenditure, or for wrongful loss, or for obligatory legacies. ...¹⁵

In both sources, Gaius refers to the *actio iudicati*, *actio depensi*, *actio legis Aquiliae*, and *actio ex testamento*. However, it is questionable whether Gaius knew of more/suspected more actions with litisrescense or not. To answer this question, one must further examine the word “*velut*”, which was chosen by Gaius in 4.9 as well as in 4.171. If *velut* is placed at the beginning of a list, it

¹⁰ Fritz Schulz, ‘History of Roman Legal Science’ (Oxford: Clarendon Press, 1946: reprint 1967) p. 197 suspects the publishing date early after the death of Antoninus Pius because of the phrase *divus Antoninus Pius* in Gai. 2.195; Rafael Domingo, ‘Roman law: An introduction’ (London: Routledge, 2018) p. 71.

¹¹ Francis de Zulueta, ‘The Institutes of Gaius II. Commentary’ (Oxford: Clarendon, 1953) p. 5; Hein L. W. Nelson, ‘Überlieferung, Aufbau und Stil von Gai Institutiones’ (Leiden: Brill, 1981) p. 1.

¹² William M. Gordon/Olivia F. Robinson, ‘The Institutes of Gaius’, 2nd edn. (London: Duckworth, 2001) p. 573.

¹³ Translation: Gordon/Robinson, ‘Gaius’, pp. 405 seq.

¹⁴ Gordon/Robinson, ‘Gaius’, p. 579.

¹⁵ Translation: Gordon/Robinson, ‘Gaius’, pp. 523 seq.

can refer to a conclusive or a non-exhaustive enumeration.¹⁶ A detailed study of Gaius' usage of the word *velut(i)* was conducted by Winkler in 1958. Winkler concluded that Gaius chose *velut(i)* most of the time to specify an abstract claim with one or more examples (non-exhaustive enumeration). Nevertheless, sometimes after describing a generic term, Gaius continued in the next sentence with a conclusive enumeration.¹⁷ However, Winkler did not refer to the sources Gai 4.9 and Gai 4.171 in her analysis.

For Gai 4.171, Winkler's remarks suggest a strong likelihood that *velut* indicated a non-exhaustive enumeration. This position is also confirmed by the translations of Manthe ("zum Beispiel"), Gordon/Robinson ("for instance"), and de Zulueta ("examples are").¹⁸

In Gai. 4.9, the situation is less clear. According to Gaius, actions with litiscredence must also be actions that claim restoration and a penalty. However, this statement cannot be correct, because there was only a penalty if the defendant denied liability.¹⁹ Finkenauer states that Gaius should have explained in 4.9 why the *actio legis Aquiliae* belongs to those actions claiming restoration and a penalty.²⁰ Actions with litiscredence do not necessarily have to qualify as penal actions.²¹

Another list of actions with litiscredence can be found in PS 1.19.1. *Iulii Pauli sententiarum receptarum ad filium libri V* is the name of a source that today is often referred to as *Pauli Sententiae*.²² It was published around 300 A.D. and was one of the most successful legal books in

¹⁶ See Barry Nicholas, 'Verbal forms in Roman Law' (1992) 66 *Tulane Law Review* 1605-1614, p. 1610; Thomas Finkenauer, 'Wie formal war die römische Stipulation?', in: Isabella Piro (ed.), *Scritti per Alessandro Corbino III* (Tricase: Libellula Edizioni, 2016) 87-108, p. 91.

¹⁷ Annemarie Winkler, 'Gaius III, 92' (1958) 5 *RIDA* 603-636, p. 609.

¹⁸ Ulrich Manthe, 'Gaius Institutiones. Die Institutionen des Gaius', 2nd edn. (Darmstadt: Wissenschaftliche Buchgesellschaft, 2010) p. 411; Gordon/Robinson, 'Gaius' p. 523; Francis de Zulueta, 'The Institutes of Gaius I. Text with critical notes and translation' (Oxford: Clarendon, 1946; reprint 1958) p. 301.

¹⁹ See Moritz A. v. Bethmann-Hollweg, 'Der Civilprozeß des gemeinen Rechts in geschichtlicher Entwicklung II: Formulae' (Bonn: Marcus, 1865; reprint 1959) p. 294; Max Kaser, 'Das Römische Privatrecht I: Das altrömische, das vorklassische und klassische Recht', 2nd edn. (München: C. H. Beck, 1971) p. 502; Hans Ankum, 'Actions by which we claim a thing (res) and a penalty (poena) in Classical Roman Law' (1982) 85 *BIDR* 15-39, p. 19; Zimmermann, 'Obligations' p. 974; Thomas Finkenauer, 'Pönale Elemente der lex Aquilia', in: Richard Gamauf (ed.), *Ausgleich oder Buße als Grundproblem des Schadenersatzrechts von der lex Aquilia bis zur Gegenwart*. Symposium zum 80. Geburtstag von Herbert Hausmaninger (Wien: Manz, 2017) 35-71, p. 38.

²⁰ Finkenauer, 'Lex Aquilia', p. 37.

²¹ de Zulueta, 'Gaius', p. 230; Ulrich v. Lübtow, 'Untersuchungen zur lex Aquilia de damno iniuria dato' (Berlin: Duncker & Humblot, 1971) pp. 38 seq.; Zimmermann, 'Obligations', p. 974.

²² Detlef Liebs, 'Römische Jurisprudenz in Africa mit Studien zu den pseudopaulinischen Sentenzen', 2nd edn. (Berlin: Duncker & Humblot, 2005) p. 41; Domingo, 'Roman law', p. 73; Philipp Scheibelreiter, 'Der „ungetreue Verwahrer“. Eine Studie zur Haftungsbegründung im griechischen und frühen römischen Depositenrecht' (München: C. H. Beck, 2020) p. 116.

antiquity.²³ It is strongly debated whether the content was taken exclusively from the writings of the classical jurist Iulius Paulus.²⁴

PS 1.19.1²⁵

Quaedam actiones si a reo infitentur, duplantur, velut iudicati, depensi, legati per damnationem relictī, damni iniuriarum legis Aquiliae, item de modo agri, cum a venditore emptor deceptus est.

Some actions double if they are denied by the defendant, for instance (the action based upon) a judgment debt, a payment by a sponsor, obligatory legacies, an act of wrong-doing according to the Aquilian Act, also (the action for) the size of acre-land if the buyer was deceived by the seller.

This source deviates from the Institutes of Gaius. In the *Pauli Sententiae*, a different wording is used. Certain actions double (*actiones duplantur*) if they are denied by the defendant (*si a reo infitentur*). Here, the word *actio* should be translated as a plaintiff's claim.²⁶ The list of actions with litiscredence in the *Pauli Sententiae* does not exactly match the lists given by Gaius. In PS 1.19.1, an additional action, the *actio de modo agri*,²⁷ is mentioned.

Furthermore, in PS 1.19.1, the list is prefaced by the word “*velut*”. However, an analysis of the word “*velut*” in the *Pauli Sententiae* would be very difficult, as it is possible that the text was drawn from more than one author.²⁸ It is only possible to conclude that “*velut*” should mostly be translated as “for instance”.²⁹ In the context of PS 1.19.1, it seems more likely that the word *velut* introduces a non-exhaustive enumeration.³⁰

In the following chapters I want to analyse whether the origin of litiscredence can be found in the liability of the *vindex* and was adopted in some formulary actions. Therefore, first the actions

²³ Liebs, ‘Römische Jurisprudenz’, pp. 42, 46; Scheibelreiter, ‘Der „ungetreue Verwahrer“’, p. 116.

²⁴ See Ernst Levy, ‘Vulgarization of Roman Law in the Early Middle Ages’ (1943) 1 *Medievalia et Humanistica* 14-40, p. 26; Ernst Levy, ‘A Palingenesia of the Opening Titles as a Specimen of Research in West Roman Vulgar Law’ (Ithaca: Cornell Univ. Press, 1945; reprint 1969) p. viii; Iolanda Ruggiero, ‘Ricerche sulle Pauli Sententiae’ (Milano: Dott. A. Giuffrè Editore, 2017) pp. 34 seq.; Liebs, ‘Römische Jurisprudenz’, p. 42.

²⁵ See Philipp Scheibelreiter, ‘Zwischen furtum und Litiscredence: Überlegungen zur poena dupli der actio ex causa depositi’ (2009) 56 *RIDA* 131-154, pp. 143 seq.

²⁶ Kaser/Hackl, ‘Zivilprozeßrecht’, p. 284; for the different meanings of the word *actio* see Hermann G. Heumann/Emil Seckel, ‘Handlexikon zu den Quellen des römischen Rechts’, 11th edn. (Graz: Akademische Druck- und Verlagsanstalt, 1971) pp. 9 seq.

²⁷ This action is sometimes referred to as an *actio in duplum*, see chapter ‘II.E Actio de modo agri’.

²⁸ See Levy, ‘Vulgarization’, p. 26; Levy, ‘Palingenesia’, p. viii; Fritz Schulz, ‘Die Lehre vom Concursus Causarum im klassischen und justinianischen Recht’ (1917) 38 *SZ* 114-209, p. 118.

²⁹ Winkler, ‘Gaius’, p. 609; Heumann/Seckel, ‘Handlexikon’, p. 616.

³⁰ Wiesław Litewski, ‘Studien zum sogenannten depositum necessarium’ (1977) 43 *SDHI* 188-202, p. 200; Scheibelreiter, ‘Der „ungetreue Verwahrer“’, p. 218.

listed in Gai 4.9, Gai 4.171, and PS 1.19.1 need to be examined (chapter II).³¹ Then the procedural peculiarity of those actions needs to be compared with the liability of a *vindex* (chapters III., IV., and V.). In the last monograph written by Paoli, which tackles the topic of litisrescenscence in Roman law, a connection between formulary actions with litisrescenscence and the liability of the *vindex* was disputed.³²

A. Actio iudicati

The first action given by Gaius as well as the author/authors of the *Pauli Sententiae* is the *actio iudicati*.³³ A judgement debt that was not fulfilled by the defendant within 30 days could be executed with the *actio iudicati*.³⁴ If sued, the *debitor* could confess and pay the judgement debt (*simplum*) or deny the rightfulness of the judgement.³⁵ In case of denial, the *debitor* could either win the lawsuit, after which the judgement debt was cleared, or lose the lawsuit and face a condemnation *in duplum*.

B. Actio depensi

An obligation resulting from a *stipulatio* (verbal contract) could be secured by *sponsio*.³⁶ With the *actio depensi*, a *sponsor* was able to demand reimbursement after paying the principal debtor's obligation.³⁷ The principal debtor had two options: 1) confess and reimburse the *sponsor* or 2) deny liability under the *actio depensi*. An unsuccessful denial led to a double condemnation.

C. Actio ex testamento

With the *actio ex testamento*, the legatee could claim a *legatum per damnationem* (left to him by the *testator*) from the heir.³⁸ If the heir did not confess (*confessio in iure*), litisrescenscence took place and the heir was liable for the *duplum* (in case he lost the lawsuit against the legatee). Due to the different wording in Gai. 4.9 ("*damnationem certa relicta*") and Gai. 4.171 ("*legatorum per*

³¹ In this summary of my dissertation, a detailed analysis of those actions is not possible.

³² Jules Paoli, 'Lis infitiando crescit in duplum' (Paris: Éd. Domat-Montchrestien, 1933) pp. 46 seq.

³³ There are not many sources dealing with the *actio iudicati*, perhaps because in the law of Justinian an *actio iudicati* was no longer necessary to execute a verdict, see Wenger, 'Civil Procedure', p. 311; Kaser/Hackl, 'Zivilprozeßrecht', p. 511; Heinrich Honsell/Theo Mayer-Maly/Walter Selb, 'Römisches Recht', 4th edn. (Berlin: Springer, 1987) p. 550 suspect that the *actio iudicati* was not based on a specific act, but instead introduced by the *praetor*.

³⁴ Fritz Schulz, 'Classical Roman Law' (Oxford: Clarendon Press, 1951; reprint 1992) p. 26.

³⁵ Gai. 4.9, Gai. 4.171, and PS 1.19.1; Max Kaser/Rolf Knütel/Sebastian Lohsse, 'Römisches Privatrecht. Ein Studienbuch', 22nd edn. (München: C. H. Beck, 2021) p. 80.

³⁶ Nikolaus Benke/Franz-Stefan Meissel, 'Übungsbuch Römisches Schuldrecht' 9th edn. (Wien: Manz, 2019) p. 279; Nikolaus Benke/Franz-Stefan Meissel, 'Roman Law of Obligations. Origins and Basic Concepts of Civil Law II. Translated by Caterina Maria Grasl' (Wien: Manz, 2021) p. 274.

³⁷ Zimmermann, 'Obligations', p. 132.

³⁸ Schulz, 'Classical', pp. 324 seq.

damnationem relictorum”), it remains unclear whether only the *actio certi ex testamento* or also the *actio incerti ex testamento* entailed litisrescenscence.³⁹

D. Actio legis Aquiliae

The last action that is part of all three lists is the *actio legis Aquiliae*. In the first and third chapter of the *lex Aquilia* (3rd century B.C.),⁴⁰ certain cases of harm and destruction/damage of property are enumerated.⁴¹ Litisrescenscence was implemented in all three chapters.⁴² A perpetrator who did not admit his liability and lost the lawsuit had to pay the *duplum*.⁴³

E. Actio de modo agri

In PS 1.19.1, the *actio de modo agri* is also part of the actions listed. During a transaction of land via *mancipatio*,⁴⁴ the vendor could make a formal declaration (*nuncupatio*) and guarantee the buyer that the land was a particular size.⁴⁵ If it turned out to be smaller than promised, the buyer could claim from the vendor with the *actio de modo agri* the proportionate amount of the price for the missing land.⁴⁶ Since the *actio de modo agri* is referred to as an *actio in duplum* in PS 2.17.4 and does not appear in Gai. 4.9 and Gai. 4.171, it is questionable whether it entailed litisrescenscence.⁴⁷

³⁹ Only the *actio certi ex testamento*: Otto Lenel, ‘Das Edictum perpetuum. Ein Versuch zu seiner Wiederherstellung’, 3rd edn. (Leipzig: Tauchnitz, 1927) p. 368; Kaser, ‘Privatrecht I’, p. 743; Lisa Isola, ‘Überlegungen zur Litisrescenscence bei der *actio ex testamento*’ (2020) 137 SZ 70-135, p. 123; Kaser/Knützel/Lohsse, ‘Privatrecht’, p. 485; also the *actio incerti ex testamento*: Gerhard v. Beseler, ‘Romanistische Studien’ (1927) 47 SZ 53-74, p. 66; Gregor Albers, ‘Perpetuatio obligationis: Leistungspflicht trotz Unmöglichkeit im klassischen Recht’ (Wien – Köln – Weimar: Böhlau, 2019) p. 159.

⁴⁰ See chapter ‘IV. Similarities between actions with litisrescenscence?’.

⁴¹ Benke/Meissel, ‘Schuldrecht’, p. 330; Benke/Meissel, ‘Obligations’, p. 326; an *adstipulator* who unlawfully released the *debtor* was sanctioned by the 2nd chapter, see Zimmermann, ‘Obligations’, p. 957; this chapter lost its relevance in the 2nd century B.C., see Herbert Hausmaninger, ‘Das Schadenersatzrecht der *lex Aquilia*’, 5th edn. (Wien: Manz, 1996) p. 8.

⁴² Hausmaninger, ‘Schadenersatzrecht’, p. 8.

⁴³ For the amount of the claim see Benke/Meissel, ‘Schuldrecht’, p. 365; Benke/Meissel, ‘Obligations’, p. 360.

⁴⁴ See Schulz, ‘Classical’, pp. 344 seq.; Nikolaus Benke/Franz-Stefan Meissel, ‘Übungsbuch Römisches Sachenrecht’ 11th edn. (Wien: Manz, 2018) pp. 83 seq.; Nikolaus Benke/Franz-Stefan Meissel, ‘Roman Law of Property. Origins and Basic Concepts of Civil Law I. Translated by Caterina Maria Grasl’ (Wien: Manz, 2019) pp. 82 seq.

⁴⁵ Zimmermann, ‘Obligations’, p. 308.

⁴⁶ Zimmermann, ‘Obligations’, p. 308.

⁴⁷ Litisrescenscence: Zimmermann, ‘Obligations’, p. 308; Rudolf Düll, ‘Zum vielfachen Wertersatz im antiken Recht’, in: Scritti in onore di Contardo Ferrini III (Milano: Vita e Pensiero, 1948) 211-230, p. 219; no litisrescenscence: Adolf A. F. Rudorff, ‘Ueber die Litisrescenscence’ (1848) 14 Zeitschrift für geschichtliche Rechtswissenschaft 287-478, p. 428 seq.; Max Conrat, *Der westgothische Paulus* (Amsterdam: Müller, 1907; reprint 1967) pp. 8 seq.; Lenel, ‘Edictum perpetuum 3rd edn.’, p. 194; Martin Pennitz, ‘Das periculum rei venditae. Ein Beitrag zum „aktionenrechtlichen Denken“ im römischen Privatrecht’ (Wien – Köln – Weimar: Böhlau, 2000) p. 174.

III. Liability of the *vindex*. First case of litiscredence?

The actions listed in Gai 4.9, Gai. 4.171, and PS 1.19.1 were based upon the formulary system. However, in archaic Rome, a different legal institution, described as *legis actiones*, existed.⁴⁸ Execution (upon a judgment) was possible with the *legis actio per manus iniunctionem (pro iudicato)*. In 4.21-25, Gaius explained this ritual, which starts with the plaintiff's laying his hand on the defendant.⁴⁹ After this act, the defendant was no longer permitted to make any objections.⁵⁰ He could not "throw off the hand" (*manum depellere*). The defendant had to either pay or name a *vindex* for his defence.⁵¹ After the *vindex* exercised the right to throw off the plaintiff's hand, the defendant was free.⁵²

The sanction for a *vindex* who threw off the plaintiff's hand and defended the defendant unsuccessfully was detailed in *Lex Ursonensis* chapter 61. The *Lex Ursonensis* (1st century B.C.)⁵³ was the municipal law of the Roman *colonia* Urso.⁵⁴

Lex Ursonensis chapter 61

[LXI][--- cui quis ita ma-] (Tablet a, Col. I)

num inicere iussus erit, iudicati iure manus iniectio esto itque ei s(ine) f(fraude) s(ua) facere liceto. uindex arbitrato Iiuri qui{q}ue i(iure) d(icundo) p(raerit) locuples esto. ni uindicem dabit iudicatum {q} ue faciet, secum ducito. iure ciuili uinctum habeto. si quis in eo uim faciet, ast eius uincitur, dupli damnas esto colonisq(ue) eius colon(iae) (sestertium) (uiginti milia) d(are) d(annas) esto, eiusque pecuniae cui uolet petitio, Iuir(o) qui{q}ue i(iure) d(icundo) p(raerit) exactio iudicatioque esto.

⁴⁸ See Arthur A. Schiller, 'Roman Law. Mechanisms of Development' (The Hague - New York: Mouton, 1978: reprint 2010) pp. 188 seq.

⁴⁹ Schiller, 'Roman Law', p. 204; Okko Behrends, 'Der Zwölfafelprozeß. Zur Geschichte des römischen Obligationenrechts' (Göttingen: Schwartz, 1974) p. 39; see also Gell. 20.1.45-48.

⁵⁰ An exception was assumed by Okko Behrends, 'Die römische Geschworenenverfassung. Ein Rekonstruktionsversuch' (Göttingen: Schwartz, 1970) p. 7 who argued that after the payment of the debt in the form of a *solutio per aes et libram* (see chapter 'IV. Similarities between actions with litiscredence?'), the defendant could refer to this public act.

⁵¹ Schiller, 'Roman Law', p. 205.

⁵² Max Kaser, 'Typisierter dolus im altrömischen Recht' (1962) 65 *BIDR* 79-104, p. 100.; Kaser/Hackl, 'Zivilprozeßrecht', p. 139; Rudolf Düll, 'Vom vindex zum iudex' (1934) 54 *SZ* 98-136, p. 126; Gunter Wesener, 'Vindex', in: Paulys Realencyclopädie der classischen Altertumswissenschaft Suppl. XIV (München: Druckenmüller, 1974) 886-895, p. 891; Feodor Kleineidam, 'Die Personalexekution der Zwölfafeln' (Breslau: Marcus, 1904) p. 186 mentioned *ne bis de eadem re sit actio*; see Kaser/Knütel/Lohsse, 'Privatrecht', p. 69; different: Max Kaser, 'Das altrömische Ius. Studien zur Rechtsvorstellung und Rechtsgeschichte der Römer' (Göttingen: Vandenhoeck & Ruprecht 1949) p. 197; see also Leopold Wenger, 'Zur Lehre von der actio iudicati. Eine rechtshistorische Studie' (Graz: Leuschner & Lubensky, 1901) p. 102.

⁵³ Wolfgang Waldstein/Johannes M. Rainer, 'Römische Rechtsgeschichte, 11th edn.' (München: C. H. Beck, 2014) p. 120.

⁵⁴ See Niklas Rafetseder, 'Lex coloniae - lex municipii: Die römische Stadtgesetzgebung in Republik und Kaiserzeit' (Dissertation: University of Vienna, 2020) pp. 87 seq.

[LXI — Against whomsoever anyone in this way] shall have been commanded to lay on a hand, there is lawfully to be laying on of a hand for what has been judged and it is to be lawful for him to do it without personal liability. The guarantor is to be a man of substance, according to the decision of the *IIvir* or whoever shall be in charge of jurisdiction. Unless he (the defendant) shall appoint a guarantor or shall perform what has been judged, he (the plaintiff) is to take him with him into custody. He is to keep him in chains according to the civil law. If anyone shall use force in that case, and if he is convicted of it, he is to be condemned for double the amount and he is to be condemned to pay to the colonists of that colony 20,000 sesterces, and there is to be suit for that sum by whoever shall wish and exaction and right of judgment by the *IIvir*⁵⁵ or whoever shall be in charge of jurisdiction.⁵⁶

A *vindex* who lost against the plaintiff had to pay the *duplum* (to the plaintiff) and 20,000 *sesterces* (to the *colonia*). It is possible that the penalty of 20,000 sesterces was a *poena temere litigantis*.⁵⁷ Outside the scope of application of the *Lex Ursonensis*, there is no direct evidence that a *vindex* was liable for the *duplum* if he lost.⁵⁸ Nevertheless, as the payment of the *duplum* after a condemnation for a judgment debt is well documented under the formulary system⁵⁹, the same is assumed for the liability of a *vindex*.⁶⁰ The liability *in duplum* of a *vindex* described in the text is very similar to that described in Gai 4.9, Gai. 4.171, and PS 1.19.1. A *vindex* could either pay the debt of the defendant or deny the defendant's liability and risk condemnation *in duplum*. The *vindex* was never liable for the *simplum*, because before *manum depellere*, the defendant owed the *simplum*, and after it the *vindex* was (if convicted) liable for the *duplum*.⁶¹

Nevertheless, the existence of litiscredence should not be denied on the basis of the fact that liability *in simplum* and liability *in duplum* affected different legal actors. “Lis crescit” is in this constellation still true, because after the act of “*manum depellere*”, the sum necessary to free the defendant doubled.⁶²

⁵⁵ See Marietta Horster, ‘Substitutes for emperors and members of the imperial families as local magistrates’, in: Luuk de Lig/Emily Hemelrijk/H.W. Singor (eds.), *Roman Rule and Civic Life: Local and Regional Perspectives* (Amsterdam: J. C. Gieben, 2004) 331-351, pp. 335 seq.

⁵⁶ Text and translation: Michael H. Crawford, ‘Roman Statutes I’ (London: Institute of Classical Studies. Univ. of London, 1996) pp. 400, 421 seq.

⁵⁷ To this penalty, see Adolf Exner, ‘Zur Stelle über die Manus Injunctio in der Lex Coloniae Juliae Genetivae’ (1878) 13 *Zeitschrift für Rechtsgeschichte* 392-398, pp. 396 seq.

⁵⁸ Wenger, ‘Actio iudicati’, p. 102.

⁵⁹ See Gai. 4.9, Gai. 4.171, and PS 1.19.1.

⁶⁰ See Kleineidam, ‘Personalexekution’, p. 198; Max Kaser, ‘Unmittelbare Vollstreckbarkeit und Bürgenregreß’ (1983) 100 *SZ* 80-135, pp. 92 seq.

⁶¹ Paoli, ‘Lis infitiando’ pp. 46 seq.; critical: Kaser, ‘Das altrömische Ius’, p. 122.

⁶² Kaser, ‘Das altrömische Ius’, p. 122.

IV. Similarities between actions with litiscredence?

No source contains any direct answer to the question why the non-confessing *debitor* was sanctioned with an increased *lis* in certain cases. Bethmann-Hollweg, however, offers a plausible explanation: A principal debtor who did not reimburse the *sponsor* was perceived as ungrateful, and an heir not obeying the testament was considered impious.⁶³ The principle was that the condemned *debitor* should not be able to renew the legal dispute unpunished, and a perpetrator increased his wrongdoing by denying his liability under the *actio legis Aquiliae*.⁶⁴

Huschke suspected that in archaic Roman law, actions with litiscredence were a result of (direct) execution. The *legis actio per manus iniunctionem* for a judgement debt was already mentioned.⁶⁵ In addition to this ordinary form of execution, Huschke also described direct execution, for which no verdict was necessary. If the obligation originated from a *negotium per aes et libram*, no verdict by a *iudex* was required, as the plaintiff's claim could be verified by the witnesses of the *negotium per aes et libram*.⁶⁶ A *negotium per aes et libram* is assumed to be connected to the *actio depensi*,⁶⁷ *actio ex testamento*,⁶⁸ and *actio de modo agri*.⁶⁹

Kaser followed Huschke's theory. He emphasised that in archaic Roman law an obligation that incurred with a high degree of publicity (in front of witnesses) enabled the *praetor* to skip the appointment of the *iudex*.⁷⁰ The *praetor* could simply question the witnesses of the *negotium per aes et libram* and decide the case based on their testimony.⁷¹ After 30 days, the *praetor*'s decision was executable.⁷² Evidence for execution without the verdict of a *iudex* (direct execution) can be found in Gai. 4.21-22. Gaius described (in 4.21) the execution of a verdict with the *legis actio per*

⁶³ Bethmann-Hollweg, 'Civilprozeß II', p. 538.

⁶⁴ Bethmann-Hollweg, 'Civilprozeß II', p. 538.

⁶⁵ See chapter 'III. Liability of the vindex. First case of litiscredence?'.
⁶⁶ See Philipp E. Huschke, 'Kritische Bemerkungen zum vierten Buch der Institutionen des Gaius' (1846) 13 Zeitschrift für geschichtliche Rechtswissenschaft 248-338, p. 263 seq.; Philipp E. Huschke, 'Ueber das Recht des nexum und das alte römische Schuldrecht. Eine rechtshistorische Untersuchung' (Leipzig: Gebauersche Buchhandlung, 1846; reprint: 1980) pp. 79 seq.; critical: Ludwig Mitteis, Ueber das Nexum (1901) 22 SZ 96-125, pp. 111 seq.

⁶⁷ *Solutio per aes et libram*: Payment from the *sponsor* to the *creditor* in front of witnesses, see Ludwig Mitteis, 'Römisches Privatrecht bis auf die Zeit Diokletians I' (Leipzig: Duncker & Humblot, 1908) p. 275; Gunter Wesener, 'Die Durchsetzung von Regressansprüchen im römischen Recht' (1965) 11 Labeo 341-361, pp. 341 seq.; Kaser, 'Privatrecht I', p. 172; Kaser, 'Unmittelbare Vollstreckbarkeit', p. 100; Alexander Neumann, 'Der Bürgenregress im Rahmen des römischen Auftragsrechts. Studien zur formula in factum concepta' (Baden-Baden: Nomos, 2011) p. 45.

⁶⁸ *Testamentum per aes et libram*: Declaration of the last will from the *testator* in front of witnesses, see Isola, 'Litiscredence', pp. 78 seq.

⁶⁹ *Mancipatio*: see chapter 'II.E Actio de modo agri'.

⁷⁰ See Kaser, 'Unmittelbare Vollstreckbarkeit', p. 82, 111.

⁷¹ Kaser, 'Unmittelbare Vollstreckbarkeit', pp. 92 seq.

⁷² Kaser, 'Unmittelbare Vollstreckbarkeit', p. 92.

manus iniectioem. In 4.22 Gaius then referred to another form of execution with the *legis actio per manus iniectioem pro iudicato* on the basis of specific laws. The *Lex Publilia* (most likely 4th century B.C.)⁷³ and the *Lex Furia de sponsu* (2nd century B.C.)⁷⁴ are as such laws. The words *pro iudicato* indicate that there was no verdict, but something that was considered equal.⁷⁵ Kaser argues that this must have been the decision of the *praetor*.⁷⁶

The *legis actio per manus iniectioem* as well as the *legis actio per manus iniectioem pro iudicato* could only be disputed by a *vindex* who (if he lost) was liable for the *duplum*. With the disappearance of the *legis actiones*, litiscescencia in the trial between *creditor* and the *vindex* also vanished.⁷⁷ However, Manthe suspects that most cases of litiscescencia were preserved in the formulary system.⁷⁸ Direct evidence for this theory exists in the case of the *actio iudicati* and *actio depensi*. The *actio iudicati* is effectively equivalent to the *legis actio per manus iniectioem*, because in both cases the plaintiff executed a judgement debt and both actions could effectuate an increase of the *lis*. In the *Lex Publilia*, it is stated that a *sponsor* who did not get reimbursed within six months by the principal debtor after his payment to the *creditor* obtains the right to bring a *legis actio per manus iniectioem pro iudicato* against the principal debtor.⁷⁹ Later, under the formulary system, the *sponsor* received an *actio depensi*, which (according to Gai. 3.127⁸⁰) was also based on the *Lex Publilia*.

These two cases demonstrate that certain claims (execution of a judgement, recourse of a *sponsor*) could lead to litiscescencia under the *legis actiones* as well as under the formulary system. However, it is difficult to prove such a transition in general, because in some cases only the *legis actio* or formulary action is known.

⁷³ Wilhelm Hoffmann, 'Publilium (11)', in: Paulys Realencyclopädie der classischen Altertumswissenschaft XXIII (Stuttgart: Metzler, 1959) 1912-1916, p. 1916; Giovanni Rotondi, 'Leges publicae populi Romani' (Milano: Soc. Editrice Libraria, 1912; reprint 1966) p. 473; Hein L. W. Nelson/Ulrich Manthe, 'Gai Institutiones III, 88-181. Die Kontraktobligationen. Text und Kommentar' (Berlin: Duncker & Humblot, 1999) p. 195.

⁷⁴ Max Kaser, 'Über Verbotsgesetze und verbotswidrige Geschäfte im römischen Recht' (Wien: Österreichische Akademie der Wissenschaften, 1977) p. 44.

⁷⁵ Kaser, 'Unmittelbare Vollstreckbarkeit', pp. 83 seq.; Loredana Cappelletti, 'Gli statuti di Banzi e Taranto nella Magna Graecia del I secolo a. C.' (Frankfurt am Main - Wien: Lang, 2011) p. 77.

⁷⁶ Kaser, 'Unmittelbare Vollstreckbarkeit', p. 93.

⁷⁷ Manthe assumed that direct execution was only possible until the 3rd/2nd century B.C., see Ulrich Manthe, 'Geschichte des römischen Rechts', 6th edn. (München: C. H. Beck, 2019) p. 75.

⁷⁸ Manthe, 'Geschichte', pp. 74 seq.

⁷⁹ See Gai 4.22.

⁸⁰ Gai. 3.127: *In eo quoque par omnium causa est, quod si quid pro reo solverint, eius recipiendi causa habent cum eo mandati iudicium; et hoc amplius sponsores ex lege Publilia propriam habent actionem in duplum, quae appellatur depensi.*

Translation: Gordon/Robinson, 'Gaius', pp. 337 seq.: They are all in the same case in this respect also, that if they pay anything on behalf of the principal they can recoup themselves by bringing an action on mandate against him; beyond this, personal sureties have an action of their own for double under the Publilian Act, called the action on expenditure.

Within the scope of the *Lex Furia de sponsu*, a *creditor* could only demand a portion of the whole sum from each co-*sponsor*.⁸¹ If the *creditor* took more than this portion, the *sponsor* could recover the excess amount with the *legis actio per manus iniectioem pro iudicato*. There is no source that mentions the action by which the co-*sponsor* could recover the excess amount from the *creditor* under the formulary system.⁸²

For the legatee's action against the heir, the formulary action (*actio ex testamento*) emerges in many sources.⁸³ The equivalent *legis actio* and the legal basis for this action remain unknown. Due to the high publicity of a *testamentum per aes et libram*⁸⁴ the laying on of a hand (*manus iniectio*) was probably granted without a trial. A *legis actio per manus iniectioem* or a *legis actio per manus iniectioem pro iudicato* could be taken into consideration.⁸⁵

Moreover, limited information exists about the vendor's action for the missing acre-land. In PS 1.19.1, the formulary action (*actio de modo agri*) is part of the list already described. The high publicity of the promise made in the *nuncupatio*⁸⁶ indicates that the laying on of a hand (*manus iniectio*) was immediately allowed by the *praetor*. Therefore an earlier *legis actio per manus iniectioem* or *legis actio per manus iniectioem pro iudicato* seems possible.⁸⁷

Concerning the *Lex Aquilia*, the situation appears to be uncertain. As the *Lex Aquilia* is usually dated to the 3rd century B.C.,⁸⁸ it is not clear whether such a *legis actio* existed or not.⁸⁹

⁸¹ Benke/Meissel, 'Schuldrecht', pp. 286 seq.; Benke/Meissel, 'Obligations', p. 281.

⁸² Otto Lenel, 'Das Edictum perpetuum. Ein Versuch zu seiner Wiederherstellung', 1st edn. (Leipzig: Tauchnitz, 1883) p. 171 suspected an *actio legis Furiæ* (with litisrescenscence). However, there is no proof for such an action with litisrescenscence, see chapter 'VI.C Action based on the Lex Furia de sponsu'.

⁸³ See for example Gai. 4.9, Gai. 4.171, and PS 1.19.1.

⁸⁴ See chapter 'IV. Similarities between actions with litisrescenscence?'.

⁸⁵ See Max Kaser, 'Das legatum sinendi modo in der Geschichte des römischen Vermächtnisrechts' (1950) 67 SZ 320-359, p. 339; Kaser, 'Das altrömische Ius', pp. 123 seq.

⁸⁶ The vendor promised the buyer in front of witnesses that the land comprises a particular size, see chapter 'II.E Actio de modo agri'.

⁸⁷ See Otto Karlowa, 'Römische Rechtsgeschichte. In zwei Bänden: Band 2: Privatrecht und Civilprozess, Strafrecht und Strafprozess, Teil 1: Privatrecht' (Leipzig: Veit, 1901) p. 577; Okko Behrends, 'Das nexum im Manzipationsrecht oder die Ungeschichtlichkeit des Libraldarlehens' (1974) 21 RIDA 137-184, pp. 172 seq.

⁸⁸ See v. Lübtow, 'Untersuchungen zur lex Aquilia', p. 15; David Ibbetson, 'The Dating of the lex Aquilia', in: Andrew Burrows/David Johnston/Reinhard Zimmermann (eds.), Judge and Jurist. Essays in Memory of Lord Rodger of Earlsferry (Oxford: University Press, 2013) 167-177, p. 167; in prior publications, the *Lex Aquilia* was (often) dated in the 6th-5th century B.C., see Bernhard Kübler, 'Geschichte des römischen Rechts. Ein Lehrbuch' (Leipzig: Deichertsche Verlagsbuchhandlung, 1925) p. 127; Paoli, 'Lis infitiando', pp. 125 seq.; Alexander Beck, 'J. Paoli, Lis infitiando crescit in duplum' (1937) 57 SZ 505-511, p. 507.

⁸⁹ Dieter Nörr, 'Causa mortis. Auf den Spuren einer Redewendung' (München: C. H. Beck, 1986) p. 147; possible *legis actiones* would be: the *legis actio sacramento in personam*, the *legis actio per iudicis arbitrive postulationem*, and the *legis actio per manus iniectioem*; see Frederick H. Lawson, 'Negligence in the civil law' (Oxford: Clarendon Press, 1950) p. 12; Dieter Nörr, 'Zur Formel der *actio legis Aquiliae*', in: Holger Altmeppen (ed.), Festschrift für Rolf Knütel zum 70. Geburtstag (Heidelberg: Müller, 2009) 833-848, pp. 840 seq.

V. Liability in duplum: Legal consequence of a delict or increase of lis?

The phenomenon by which the *lis* doubles if liability under a specific *actio* is denied is usually described with the word *litisrescenscence*. However, this term may not be precise. The *duplum* did not necessarily have to be the product of an increased *lis*; it could also result from a delict.

Such a delict is what Cicero might be referring to in *De officiis* 3.16.65:⁹⁰

Ac de iure quidem praediorum sanctum apud nos est iure civili, ut in iis vendendis vitia dicerentur, quae nota essent venditori. Nam, cum ex duodecimo tabulis satis esset ea praestari, quae essent lingua nuncupata, quae qui infitatus esset, dupli poenam subiret, a iuris consultis etiam reticentiae poena est constituta; quicquid enim esset in praedio vitii, id statuerunt, si venditor sciret, nisi nominatim dictum esset, praestari oportere.

In the laws pertaining to the sale of real property it is stipulated in our civil code that when a transfer of any real estate is made, all its defects shall be declared as far as they are known to the vendor. According to the laws of the Twelve Tables it used to be sufficient that such faults as had been expressly declared should be made good and that for any flaws which the vendor expressly denied, when questioned, he should be assessed double damages. A like penalty for failure to make such declaration also has now been secured by our jurisconsults: they have decided that any defect in a piece of real estate, if known to the vendor but not expressly stated, must be made good by him.⁹¹

Cicero described the sale of land by which the seller makes a promise to the buyer in the form of *nuncupatio*.⁹² He explained that the denial of *lingua nuncupata* led to a *poena dupli*. The denial took place in front of the *praetor (in iure)*.⁹³ A debtor who unsuccessfully disputed such a promise made in the *nuncupatio*⁹⁴ could have committed a delict. This delict could have sanctioned the denial of a public fact.⁹⁵

⁹⁰ See Andrew R. Dyck, 'A commentary on Cicero, *De officiis*' (Ann Arbor, Mich.: The Univ. of Michigan Press, 1996) pp. 576 seq.

⁹¹ Translation: Walter Miller, '*De officiis*' (Cambridge, MA: Harvard University Press, 2014) p. 335.

⁹² See chapter 'II.E Actio de modo agri'.

⁹³ Gerhard v. Beseler, 'De iure civili Tullio duce ad naturam revocando' (1931) 39 *BIDR* 295-348, p. 328; similar: Manfred Fuhrmann, 'Poena', *Paulys Realencyclopädie der classischen Altertumswissenschaft Suppl. IX*, (Stuttgart: Druckenmüller, 1962) 843-861, p. 853 and Isola, 'Litisrescenscence', pp. 77 seq; different: Karlowa, 'Römische Rechtsgeschichte II', p. 575 and Detlef Liebs, 'Dammum, damnas, damnare. Zur Bedeutungsgeschichte einiger lateinischer Rechtswörter' (1968) 85 *SZ* 173-252, pp. 244 seq. who think that an incorrect *nuncupatio* was qualified as an *infinitio* and no separate denial in front of the *praetor* was necessary.

⁹⁴ See John M. Kelly, 'Roman litigation' (Oxford: Clarendon Press, 1966) p. 153.

⁹⁵ Huschke, 'Kritische Bemerkungen', p. 269; Huschke, 'Nexum', p. 96; Kaser/Hackl, 'Zivilprozeßrecht', p. 284.

Another possibility for a delict in the context of denying litigation could be the deprivation of an adjudicated *debitor*.⁹⁶ If a *vindex* freed a condemned *debitor* by the act of *manum depellere* and subsequently lost the lawsuit, the *creditor* could no longer take action against the *debitor*.⁹⁷

These two approaches certainly offer an explanation for the condemnation *in duplum*. Nevertheless, new questions emerge. For most delicts, the perpetrator must act with malicious intent or negligence. According to Kaser, malicious intent was automatically assumed if the *vindex* lost against the *creditor*.⁹⁸ It has been pointed out that subjective criteria for the liability of the defendant play a more significant role in more advanced legal systems.⁹⁹ Free consideration of evidence did not exist in early Roman law.¹⁰⁰ Instead, formal rules for the consideration of evidence, such as those described by Kaser, might have been in effect.¹⁰¹

On the other side, the *duplum* may not have resulted from a delict. It would be possible to assume that it was the result of the increase of the *lis*. The phrase “*infitiando lis crescit in duplum*” was known to the *veteres*:

Inst. 3.27.7

Ex quibusdam tamen causis repeti non potest, quod per errorem non debitum solutum sit. sic namque definiverunt veteres: ex quibus causis infitiando lis crescit, ex his causis non debitum solutum repeti non posse, veluti ex lege Aquilia, item ex legato. quod veteres quidem in his legatis locum habere voluerunt, quae certa constituta per damnationem cuicumque fuerant legata ...

On some facts it is impossible to recover a mistaken payment which was not due. This point was summed up by the classical jurists thus: if the cause of action is one in which liability enlarges on denial, the law denies recovery of a payment not due. This happens under the Aquilian Act and in respect of legacies. Here the classical jurists chose to confine the rule to those legacies which were both obligatory and fixed ...¹⁰²

⁹⁶ Kaser, ‘Typisierter dolus’ (1962) p. 100; see also Wesener, ‘Vindex’, pp. 891 seq.

⁹⁷ Kleineidam, ‘Personalexekution’, p. 186.

⁹⁸ Kaser, ‘Typisierter dolus’ (1962) pp. 98 seq.

⁹⁹ Honsell/Mayer-Maly/Selb, ‘Römisches Recht’, p. 229; Geoffrey MacCormack, ‘Fault and Causation in Early Roman Law: An Anthropological Perspective’ (1981) 28 RIDA 97-126, pp. 98 seq.

¹⁰⁰ See Scheibelreiter, ‘Der „ungetreue Verwahrer“’, p. 226; Helmut Blank, ‘Zur unmittelbaren Vollstreckbarkeit’ (1986) 103 SZ 449-456, p. 456; Kaser/Hackl, ‘Zivilprozeßrecht’, p. 117; Kaser/Knützel/Lohsse, ‘Privatrecht’, p. 76.

¹⁰¹ Max Kaser, ‘Zum Ursprung des geteilten römischen Zivilprozeßverfahrens’, in: Festschrift für Leopold Wenger. Zu seinem 70. Geburtstag dargebracht von Freunden, Fachgenossen und Schülern I, (München: C. H. Beck, 1944) 106-128, p. 113; Franz Wieacker, ‘Endoplorare. Diebstahlsverfolgung und Gerüft im altrömischen Recht’, in: Festschrift für Leopold Wenger. Zu seinem 70. Geburtstag dargebracht von Freunden, Fachgenossen und Schülern I (München: C. H. Beck, 1944) 129-179, pp. 156 seq.

¹⁰² Translation: Peter Birks/Grant McLeod, ‘Justinian’s Institutes translated with an introduction by Peter Birks & Grant McLeod with the Latin text of Paul Krueger’ (New York: Cornell University Press, 1987) p. 119 seq.

A payment of an *indebitum* cannot be reclaimed with the *condictio indebiti*¹⁰³ if the payer intended to fulfil a debt for which the denial would have led to the increase of the *lis*.¹⁰⁴ Since this rule is attributed to the *veteres*, the *veteres* must have been familiar with the phrase “*infitiando lis crescit in duplum*”.¹⁰⁵ By *veteres*, Justinian most likely referred to classical jurists.¹⁰⁶ Iulius Paulus knew the phrase “*infitiando lis crescit in duplum*”.¹⁰⁷ It is unclear whether this phrase was also used before the classical period. The absence of sources that mention the phrase “*infitiando lis crescit in duplum*” before the classical period¹⁰⁸ indicates that delict is the origin¹⁰⁹ of liability *in duplum* for denying liability in court.

VI. More actions with litiscredence?

In the chapter “II. Actions with litiscredence”, the enumerations discussed above (Gai. 4.9, Gai. 4.171, and PS 1.19.1) were qualified as likely to be non-exhaustive. Some of the following actions were also potentially among the actions with litiscredence.

¹⁰³ See Zimmermann, ‘Obligations’, p. 849; Peter Birks/Eric Descheemaeker, ‘The Roman law of Obligations’ (Oxford: University Press, 2014) p. 255.

¹⁰⁴ Fridolin Eisele, ‘Exegetica’ (1914) 35 SZ 1-38, pp. 36 seq.; Laurens C. Winkel, ‘Error iuris nocet: Rechtsirrtum als Problem der Rechtsordnung’ (Amsterdam: Gieben, 1985) p. 106; Kaser/Hackl, ‘Zivilprozessrecht’, p. 378.

¹⁰⁵ See Manthe, ‘Geschichte’, p. 74.

¹⁰⁶ Heumann/Seckel, ‘Handlexikon’, p. 621; see also the translation above.

¹⁰⁷ Paul. (18 ad ed.) D. 12.2.30 pr.: *Eum, qui iuravit ex ea actione quae infitiando crescit aliquid sibi deberi, simpli, non dupli persecutionem sibi acquirere Pedius ait: abunde enim sufficere exonerare petitorum probandi necessitate, cum ommissa hac parte edicti dupli actio integra maneat: et potest dici hoc iudicio non principalem causam exerceri, sed iusiurandum actoris conservari.*

Translation: Peter Birks in Alan Watson, ‘The Digest of Justinian I’, 2nd edn. (Philadelphia: University of Pennsylvania Press, 1998) p. 370: Pedius holds that if one swears that something is owed to him under an action which doubles on denial, it is the single claim not the double, which he acquires. It is quite enough that the plaintiff is relieved of the necessity of making his proof, given that the claim for double survives intact if this part of the edict is passed over. Also, it can be said that the business if this action is not the principal subject matter but the protection of the plaintiff’s oath.

¹⁰⁸ Typical might have been phrases that did not refer to the *lis* like *dupli damnas esto* (Lex Ursonensis chapter 61), see chapter ‘III. Liability of the vindex. First case of litiscredence?’.

¹⁰⁹ A delict of the *vindex* was often disputed, see Josef Partsch, ‘Aus nachgelassenen und kleineren verstreuten Schriften’ (Berlin: Duncker & Humblot, 1931) p. 317 and Isola, ‘Litiscredenz’, p. 93; in favour of a delict: Kaser, ‘Typisierter dolus’ (1962) p. 100 and Wesener, ‘Vindex’, pp. 890 seq.

A. Actio auctoritatis

With the *actio auctoritatis*, the buyer can claim from the seller the *duplum*¹¹⁰ of the price for the purchase if he was evicted from the sold and mancipated *res*¹¹¹ by a third party.¹¹² Most of the time, the *actio auctoritatis* is qualified as an *actio in duplum* and the liability explained as arising from a delict.¹¹³

Huschke, in contrast, argues that the *actio auctoritatis* is an action with litiscredence.¹¹⁴ This would be possible if the seller had promised in the *nuncupatio* that no defect of title would occur and later denied such a promise. Did Cicero have the *actio auctoritatis* in mind when he stated “... *quae essent lingua nuncupata, quae qui infitatus esset, dupli poenam subiret ...*”?¹¹⁵ This possibility cannot be excluded, but since there is no evidence, the *actio auctoritatis* should not be qualified as an action with litiscredence.¹¹⁶ In addition, the fact that the *actio auctoritatis* is called an *actio in duplum* (PS 2.17.3) speaks against Huschke’s theory. An *actio in duplum* is not the same as an *actio* with litiscredence. Against an *actio in duplum*, a *confessio in iure* could not improve the position of the defendant. Here the defendant who confessed had to pay the *duplum*.

B. Actio ex confesso

Under the formulary system, a verdict was enforced with the *actio iudicati*,¹¹⁷ a confession (*confessio in iure*) with the *actio ex confesso*.¹¹⁸ Because of the general rule *confessus pro iudicato*

¹¹⁰ PS 2.17.3: *Res empta mancipatione et traditione perfecta si evincatur, auctoritatis venditor duplo tenus obligatur.*

The seller of an object, which is sold and mancipated, is due to *auctoritas* obligated for the double amount (of the price). See Schulz, ‘Classical’, p. 533; Rafael Brägger, ‘Actio auctoritatis’ (Berlin: Duncker & Humblot, 2012) p. 168 seq.

¹¹¹ It does not matter whether the seller refused assistance or the assistance from the seller (for the buyer) against the third party turned out to be unsuccessful, see Zimmermann, ‘Obligations’, p. 294.

¹¹² Schulz, ‘Classical’, p. 533; Zimmermann, ‘Obligations’, pp. 294 seq.; Benke/Meissel, ‘Schuldrecht’, p. 158; Benke/Meissel, ‘Obligations’, p. 152.

¹¹³ Rudorff, ‘Litiscredenz’, pp. 444 seq.; Lenel, ‘Edictum perpetuum 3rd edn.’, p. 546; Kaser, ‘Unmittelbare Vollstreckbarkeit’, p. 85; Brägger, ‘Actio auctoritatis’, p. 170; Zimmermann, ‘Obligations’, p. 294 seq.

¹¹⁴ Huschke, ‘Nexum’, pp. 188 seq.; Ernst I. Bekker, ‘Die Aktionen des römischen Privatrechts I’ (Berlin: Vahlen, 1871) p. 37.

¹¹⁵ *De officiis* (3.16.65): see chapter ‘V. Liability in duplum: Legal consequence of a delict or increase of lis?’; Franz Haymann, ‘Die Haftung des Verkäufers für die Beschaffenheit der Kaufsache’ (Berlin: Vahlen, 1912) pp. 46 seq. shared the opinion of Huschke.

¹¹⁶ Rudorff, ‘Litiscredenz’, pp. 444 seq.; Kaser, ‘Unmittelbare Vollstreckbarkeit’, p. 85; Brägger, ‘Actio auctoritatis’, p. 170.

¹¹⁷ See chapter ‘II.A Actio iudicati’.

¹¹⁸ See Wenger, ‘Civil Procedure’, pp. 116 seq.; Dieter Medicus, ‘F. La Rosa, L. „actio iudicati“ nel diritto romano classico’ (1964) 81 SZ 465-476, p. 467; Kaser/Hackl, ‘Zivilprozeßrecht’, p. 271: There are not many sources dealing with the *actio ex confesso* (= *actio confessoria* or *actio ex confessione*): Ulpian refers to this action in (18 ad ed.) D. 9.2.23.11: *Si quis hominem vivum falso confiteatur occidisse et postea paratus sit ostendere hominem vivum esse, Iulianus scribit cessare Aquiliam, quamvis confessus sit se occidisse: hoc enim solum remittere actori confessoriam actionem, ne necesse habeat docere eum occidisse: ceterum occisum esse hominem a quocumque oportet.*

est,¹¹⁹ it would seem possible that in the enforcement proceedings, the *iudicatus* and the *confessus* had to face the same sanction (litiscredence) if they denied their liability. In addition, under the *legis actiones*, both (the *iudicatus* and the *confessus*) were sued with the same action (*legis actio per manus iniunctionem*), which entailed litiscredence. However, scholars consider direct sources (Gai. 4.9, Gai. 4.171, and PS 1.19.1) more important than these systematic considerations. Therefore, the *actio ex confesso* is not seen as an action with litiscredence.¹²⁰

C. Action based on the Lex Furia de sponsu

Gaius mentioned in 4.22 a *legis actio per manus iniunctionem pro iudicato* in connection with the *Lex Furia de sponsu*:

Gai. 4.22

Postea quaedam leges ex aliis quibusdam causis pro iudicato manus iniunctionem in quosdam dederunt, sicut lex Publilia in eum, pro quo sponsor dependisset, si in sex mensibus proximis, quam pro eo depensum esset, non solvisset sponsori pecuniam; item lex Furia de sponsu adversus eum, qui a sponsore plus quam virilem partem exegisset, et denique conplures aliae leges in multis causis talem actionem dederunt.

Subsequently certain statutes dealing with various other cases appointed the action by the laying on of a hand against others, as if they were judgment debtors. For example, by the Publilian Act against a person on whose behalf a personal surety had expended money, if he had not repaid the money to the personal surety in the six months following the time at which expenditure was made; again, by the Furian Act on personal suretyship against one who exacted more than his share from a personal surety; and finally a large number of other statutes appointed an action of this kind in many cases.¹²¹

In addition to the *Lex Publilia*,¹²² the *Lex Furia de sponsu*¹²³ is also listed as an example of a *legis actio per manus iniunctionem pro iudicato*. The *Lex Furia de sponsu* protected co-guarantors because it stated that the *creditor* could no longer successfully sue a co-guarantor for the whole

Translation: Colin Kolbert in Watson, ‘The Digest of Justinian I’, p. 282: If someone falsely confesses to killing a slave who is still alive and afterward is ready to show that the slave is still alive, Julian writes that the Aquilian action no longer lies, even though he had confessed to killing; for an action on a confession only relieves the plaintiff from necessarily having to bring proof that the defendant killed the slave; it is still necessary that the slave must actually have been killed by someone or other.

¹¹⁹ Paul. (56 ad ed.) D. 42.2.1: *Confessus pro iudicato est, qui quodammodo sua sententia damnatur.*

Translation: Joseph A. C. Thomas in Alan Watson, ‘The Digest of Justinian IV’, 2nd edn. (Philadelphia: University of Pennsylvania Press, 1998) p. 58: One who admits liability is in the position of one against whom judgement is pronounced; for, in a way, he is condemned by his own decision.

¹²⁰ Wlassak (1934) 73; Medicus, ‘L’ „actio iudicati“’, p. 467; Winkel, ‘Rechtsirrtum’, p. 147.

¹²¹ Translation: Gordon/Robinson, ‘Gaius’, p. 421.

¹²² See chapter ‘IV. Similarities between actions with litiscredence?’

¹²³ See chapter ‘IV. Similarities between actions with litiscredence?’

sum. Instead, the debt was divided among the co-guarantors.¹²⁴ A *creditor* who took¹²⁵ more than the sum for which a co-guarantor was liable could be sued by this co-guarantor with the *legis actio per manus iniunctionem pro iudicato*. With this action, the co-guarantor could claim back the amount that exceeded his part of the obligation.¹²⁶

Due to the fact that a *legis actio per manus iniunctionem pro iudicato* entailed litiscredence, it would also seem plausible that there existed an action with litiscredence under the formulary system. For the *Lex Publilia*, the transition from a *legis actio per manus iniunctionem pro iudicato* to an action with litiscredence (*actio depens)* was described in the chapter “IV. Similarities between actions with litiscredence?” However, a formulary action based on the *Lex Furia de sponsu* is not known. Lenel and Kaser suspect the existence of an *actio legis Furiae*.¹²⁷ There is no indication that such an action would be missing in Gai. 4.9, Gai. 4.171, and PS 1.19.1.¹²⁸

D. Depositum

In the Institutes of Justinian, a list of the actions with litiscredence appears in 4.6.26:

Inst. 4.6.26

Sed furti quidem nec manifesti actio et servi corrupti a ceteris, de quibus simul locuti sumus, eo differunt, quod hae actiones omnimodo dupli sunt: at illae, id est damni iniuriae ex lege Aquilia et interdum depositi, infitiatione duplicantur, in confitentem autem in simplum dantur: sed illa, quae de his competit, quae relicta venerabilibus locis sunt, non solum infitiatione duplicatur, sed et si distulerit relictis solutionem, usque quo iussu magistratuum nostrorum conveniatur, in confitentem vero et antequam iussu magistratuum conveniatur solventem simpli redditur.

The actions for non-manifest theft and for corruption of a slave differ from the others mentioned with them in being invariably for double. The others, i.e. the Aquilian actions for wrongful loss and some for deposit, are doubled only on denial of liability. Someone who

¹²⁴ Benke/Meissel, ‘Schuldrecht’, p. 286; Benke/Meissel, ‘Obligations’, p. 281; Zimmermann, ‘Obligations’, p. 119.

¹²⁵ The meaning of the word *exegisset* is not entirely clear in this context. It is controversial whether an extrajudicial request which was followed by payment already enabled a *legis actio per manus iniunctionem pro iudicato*. See Huschke, ‘Nexum’, p. 123; Otto Karlowa, ‘Der römische Civilprozess zur Zeit der Legisactionen’ (Berlin: Weidmannsche Buchhandlung, 1872) pp. 193 seq.; Walter Selb, ‘Vom geschichtlichen Wandel der Aufgabe des iudex in der legis actio’, in: Dieter Simon/Dieter Nörr (eds.), Gedächtnisschrift für Wolfgang Kunkel (Frankfurt am Main: Klostermann, 1984) 391-448, p. 439; Otto Lenel, ‘Der Prätor in der legis actio’ (1909) 30 SZ 329-354, pp. 336 seq.; Kaser, ‘Unmittelbare Vollstreckbarkeit’, p. 119.

¹²⁶ Kaser, ‘Privatrecht I’, p. 662; Kaser, ‘Verbotsgesetze’, p. 44 seq.; Honsell/Mayer-Maly/Selb, ‘Römisches Recht’, pp. 520 seq.; Kaser/Hackl, ‘Zivilprozeßrecht’, p. 140; Marianne Elster, ‘Die Gesetze der mittleren römischen Republik’ (Darmstadt: Wissenschaftliche Buchgesellschaft, 2003) p. 468.

¹²⁷ Lenel, ‘Edictum perpetuum 3rd edn’, p. 217; Kaser, ‘Unmittelbare Vollstreckbarkeit’, p. 121; Philipp E. Huschke, ‘Gaius: Beiträge zur Kritik und zum Verständniß seiner Institutionen’ (Leipzig: Hirzel, 1855) p. 88 in contrast assumed a *condictio ex lege Furia*.

¹²⁸ Kaser, ‘Unmittelbare Vollstreckbarkeit’, p. 121.

admits liability is only liable for single damages. The action for legacies to sacred institutions is doubled not only on denial but also when delay in paying lasts until the order of one of our magistrates brings the defaulter to court. Someone who admits liability and pays before being summoned, need only pay single damages.¹²⁹

The cases with litiscescencia under the law of Justinian (6th century A.D.) are different from the classical ones listed in Gai. 4.9, Gai. 4.171, and PS 1.19.1.¹³⁰ In Inst. 4.6.26, only the *actio legis Aquiliae* is preserved in its original form.¹³¹

According to Inst. 4.6.26, the *actio depositi* was also an action with litiscescencia. It is unclear whether the compilers decided to explicitly add the *actio depositi* in Inst. 4.6.26 or if this was a mistake.¹³²

It is likely that the *actio depositi* was believed to be an action with litiscescencia because of an incorrect reading of the word “*depensi*” in PS 1.19.1.¹³³ With the discovery of the Institutes of Gaius in 1819 (and the lists in Gai. 4.9 and Gai. 4.171 that contain the *actio depensi*), it became clear that in PS 1.19.1 the *actio depensi* must have been in this list as well.¹³⁴

E. Actio in factum/Actio utilis

In certain situations, the *praetor* could grant the plaintiff a decretal action as a remedy.¹³⁵ Such analogous actions, most often called *actiones in factum* or *actiones utiles*,¹³⁶ are known in the context of the *Lex Aquilia*.¹³⁷

¹²⁹ Birks/McLeod, ‘Justinian’s Institutes’, pp. 131 seq.

¹³⁰ To the dating of the Institutes of Gaius and *Pauli Sententiae* see chapter ‘II. Actions with litiscescencia’.

¹³¹ Max Kaser, ‘Das Römische Privatrecht II: Die nachklassischen Entwicklungen’ (München: C. H. Beck, 1975) p. 345; the *actio ex testamento* contained only litiscescencia if the legatee was a sacred institution.

¹³² See Litewski, ‘Studien’, p. 201; Tom Walter, ‘Die Funktionen der *actio depositi*’ (Berlin: Duncker & Humblot, 2012) p. 223 seq.

¹³³ Rudorff, ‘Litiscescencia’, p. 457; Scheibelreiter, ‘Der „ungetreue Verwahrer“’, p. 217.

¹³⁴ Rudorff, ‘Litiscescencia’, p. 457.

¹³⁵ Zimmermann, ‘Obligations’, p. 981.

¹³⁶ For the difference in classical law see Walter Selb, ‘Actiones in factum und Formeltechnik’, in: Gerhard Frotz/Werner Ogris (eds.), Festschrift für Heinrich Demelius zum 80. Geburtstag. Erlebtes Recht in Geschichte und Gegenwart (Wien: Manz, 1973) 223-235, p. 223 seq.; Hylkje de Jong, ‘Die *actio in duplum* (ἡ τοῦ διπλοῦ ἀπαίτησις) bei Sachbeschädigung – Ein Mysterium im byzantinischen Recht’ (2015) 132 SZ 324-361, p. 329; Richard Gamauf, ‘*Vindicatio nummorum*. Eine Untersuchung zur Reichweite und praktischen Durchführung des Eigentumsschutzes an Geld im klassischen römischen Recht’ (Habilitationsschrift: University of Vienna, 2001) pp. 272 seq.

¹³⁷ Benke/Meissel, ‘Schuldrecht’, p. 334 seq.; Benke/Meissel, ‘Obligations’, pp. 330 seq.; these actions were probably introduced by the *praetor* in the late 2nd century B.C., see Max Kaser, ‘„Ius honorarium“ und „ius civile“’ (1984) 101 SZ 1-114, pp. 65 seq.; Nörr, ‘Causa mortis’, p. 149.

Since the *actio legis Aquiliae* was an action with litiscescence, analogous actions might also have contained the same sanction. A similar *formula* of an analogous action would indicate that litiscescence was incorporated.¹³⁸ The *formulae* of such analogous actions are not available.¹³⁹

Modern legal scholars are unsure whether analogous actions could lead to an increase of the *lis*. According to MacCormack, analogous actions sometimes included litiscescence. Litiscescence could only happen if the *formula* was designed similar to the *formula* of the *actio legis Aquiliae*. He suspected that the appearance of the words “*ad exemplum*”¹⁴⁰ in legal sources was an indication of a similar *formula*.¹⁴¹

According to Kaser, the *formula* of an *actio utilis* generally remained closer to the *formula* of the *actio legis Aquiliae* than the *formula* of an *actio in factum*.¹⁴² In classical Roman law, the *actio utilis* was most likely used to extend the right to sue from the owner to another party.¹⁴³ Thus, only a small modification of the *formula* was necessary.

However, MacCormack’s approach was also criticised.¹⁴⁴ Since the terms “*in factum*” and “*utilis*” in the *Corpus Iuris Civilis* do not differ in meaning anymore,¹⁴⁵ it is difficult to draw conclusions about the *formulae* of these actions.

VII. Conclusion

In archaic Roman law as well as in classical Roman law, litiscescence was in certain cases the legal consequence of a denial of liability in front of the *praetor*.¹⁴⁶ An analysis of the wording used in Gai. 4.9, Gai. 4.171, and PS 1.19.1 demonstrates that these lists are most likely non-

¹³⁸ Peter Stein, ‘School Attitudes in the Law of Delicts’, in: Studi in onore di Arnaldo Biscardi II (Milano: Istituto Ed. Cisalpino - La Goliardica, 1982) 281-293, p. 289.

¹³⁹ Georg Thielmann, ‘„Actio utilis“ und „actio in factum“. Zu den Klagen im Umfeld der lex Aquilia’, in: Studi in onore di Arnaldo Biscardi II (Milano: Istituto Ed. Cisalpino - La Goliardica, 1982) 295-318, pp. 304 seq.; Bruce W. Frier, ‘A Casebook on the Roman Law of Delict’ (Atlanta: Scholars Pr.: Oxford, 1989) p. 24.

¹⁴⁰ These words are used, for instance, in Nerat. (1 *membranarum*) D. 9.2.53: *Boves alienos in angustum locum coegisti eoque effectum est, ut deicerentur: datur in te ad exemplum legis Aquiliae in factum actio.*

Translation: Colin Kolbert in Watson, ‘The Digest of Justinian I’, p. 293: You have driven someone else’s oxen into a narrow place, and the result was that they fell over a precipice. An *actio in factum* based on the lex Aquilia will be given against you.

¹⁴¹ Geoffrey MacCormack, ‘Aquilian Studies’ (1975) 41 SDHI 1-78, pp. 40 seq.

¹⁴² Kaser, ‘Privatrecht I’, p. 621.

¹⁴³ Alfred Pernice, ‘Zur Lehre von den Sachbeschädigungen nach römischem Rechte’ (Weimar: Böhlau, 1867) pp. 144 seq.; Gunter Wesener, ‘Actiones ad exemplum’ (1958) 75 SZ 220-250, pp. 221 seq.; Selb, ‘Actiones in factum’, pp. 228 seq.; Gamauf, ‘Vindicatio nummorum’, p. 270.

¹⁴⁴ Thielmann, ‘„Actio utilis“ und „actio in factum“’, p. 304.

¹⁴⁵ See de Jong, ‘Die actio in duplum’, pp. 328 seq.; to the difference of *actiones utiles* and *actiones in factum* in classical times see Gamauf, ‘Vindicatio nummorum’, pp. 270 seq.

¹⁴⁶ In the law of Justinian, litiscescence was not abolished. However, the procedural situation was not the same. Here the denial took place in front of a judge.

exhaustive.¹⁴⁷ Due to a lack of further legal sources, it is not possible to determine how many such actions existed. Actions which could have been omitted from the lists were presented in the chapter ‘VI. More actions with litisrescenscence?’

The earliest case of litisrescenscence was most likely the liability *in duplum* of a *vindex* who unsuccessfully denied a creditor’s claim.¹⁴⁸ Some actions that occur in Gai. 4.9, Gai. 4.171, and PS 1.19.1 exhibit a connection with a previous *legis actio per manus iniunctionem (pro iudicato)*. Such a connection was demonstrated for the *actio iudicati* as well as the *actio depensi* and appears to be possible for the *actio ex testamento* and *actio de modo agri*.¹⁴⁹

Roman jurists discussed (possible cases of) litisrescenscence for different times¹⁵⁰ and under different procedural systems.¹⁵¹ Although the cases deviated and some may have been randomly added,¹⁵² in general the Romans made efforts to establish continuity between archaic and classical Roman law.¹⁵³

VIII. Bibliography

A. Literature

Gregor Albers, ‘Perpetuatio obligationis. Leistungspflicht trotz Unmöglichkeit im klassischen Recht’ (Wien – Köln – Weimar: Böhlau, 2019)

Hans Ankum, ‘Actions by which we claim a thing (res) and a penalty (poena) in Classical Roman Law’ (1982) 85 *BIDR* 15-39

Alexander Beck, ‘J. Paoli, Lis infitiando crescit in duplum’ (1937) 57 *SZ* 505-511

Okko Behrends, ‘Die römische Geschworenenverfassung. Ein Rekonstruktionsversuch’ (Göttingen: Schwartz, 1970)

Okko Behrends, ‘Das nexum im Manzipationsrecht oder die Ungeschichtlichkeit des Libraldarlehens’ (1974) 21 *RIDA* 137-184

Okko Behrends, ‘Der Zwölfafelprozeß. Zur Geschichte des römischen Obligationenrechts’ (Göttingen: Schwartz, 1974)

¹⁴⁷ See chapter ‘II. Actions with litisrescenscence’.

¹⁴⁸ See chapter ‘III. Liability of the vindex. First case of litisrescenscence?’.

¹⁴⁹ See chapter ‘IV. Similarities between actions with litisrescenscence?’ However, there is no proof that direct execution was allowed under the Aquilian Act.

¹⁵⁰ Archaic Roman law: see *Lex Ursonensis* chapter 61; *De officiis* (3.16.65); classical Roman law: see Gai. 4.9, Gai. 4.171, and PS 1.19.1; the law of Justinian: Inst. 4.6.19; Inst. 4.6.26.

¹⁵¹ *Legis actiones*, formulary system and *cognitio extra ordinem*.

¹⁵² See chapter ‘VI. More actions with litisrescenscence?’.

¹⁵³ Different: Paoli, ‘Lis infitiando’ pp. 46 seq.

- Ernst I. Bekker, 'Die Aktionen des römischen Privatrechts I' (Berlin: Vahlen, 1871)
- Nikolaus Benke/Franz-Stefan Meissel, 'Übungsbuch Römisches Sachenrecht' 11th edn. (Wien: Manz, 2018)
- Nikolaus Benke/Franz-Stefan Meissel, 'Übungsbuch Römisches Schuldrecht' 9th edn. (Wien: Manz, 2019)
- Nikolaus Benke/Franz-Stefan Meissel, 'Roman Law of Property. Origins and Basic Concepts of Civil Law I. Translated by Caterina Maria Grasl' (Wien: Manz, 2019)
- Nikolaus Benke/Franz-Stefan Meissel, 'Roman Law of Obligations. Origins and Basic Concepts of Civil Law II. Translated by Caterina Maria Grasl' (Wien: Manz, 2021)
- Gerhard v. Beseler, 'Romanistische Studien' (1927) 47 SZ 53-74
- Gerhard v. Beseler, 'De iure civili Tullio duce ad naturam revocando' (1931) 39 BIDR 295-348
- Moritz A. v. Bethmann-Hollweg, 'Der Civilprozeß des gemeinen Rechts in geschichtlicher Entwicklung II: Formulae' (Bonn: Marcus, 1865: reprint 1959)
- Michael Binder, 'Sanktion für den nicht geständigen Schuldner. Litiscescencia im römischen Recht und in griechischen Rechtssystemen' (Dissertation: University of Vienna, 2021)
- Peter Birks/Grant McLeod, 'Justinian's Institutes translated with an introduction by Peter Birks & Grant McLeod with the Latin text of Paul Krueger' (New York: Cornell University Press, 1987)
- Peter Birks/Eric Descheemaeker, 'The Roman law of Obligations' (Oxford: University Press, 2014)
- Helmut Blank, 'Zur unmittelbaren Vollstreckbarkeit' (1986) 103 SZ 449-456
- Rafael Brägger, 'Actio auctoritatis' (Berlin: Duncker & Humblot, 2012)
- Loredana Cappelletti, 'Gli statuti di Banzi e Taranto nella Magna Graecia del I secolo a. C.' (Frankfurt am Main - Wien: Lang, 2011)
- Max Conrat, 'Der westgothische Paulus' (Amsterdam: Müller, 1907: reprint 1967)
- Michael H. Crawford, 'Roman Statutes I' (London: Institute of Classical Studies. Univ. of London, 1996)
- Rafael Domingo, 'Roman law: An introduction' (London: Routledge, 2018)
- Rudolf Düll, 'Vom vindex zum iudex' (1934) 54 SZ 98-136
- Rudolf Düll, 'Zum vielfachen Wertersatz im antiken Recht', in: Scritti in onore di Contardo Ferrini III (Milano: Vita e Pensiero, 1948) 211-230
- Andrew R. Dyck, 'A commentary on Cicero, De officiis' (Ann Arbor, Mich.: The Univ. of Michigan Press, 1996)
- Fridolin Eisele, 'Exegetica' (1914) 35 SZ 1-38

Marianne Elster, 'Die Gesetze der mittleren römischen Republik' (Darmstadt: Wissenschaftliche Buchgesellschaft, 2003)

Adolf Exner, 'Zur Stelle über die Manus Injunctio in der Lex Coloniae Juliae Genetivae' (1878) 13 *Zeitschrift für Rechtsgeschichte* 392-398

Thomas Finkenauer, 'Wie formal war die römische Stipulation?', in: Isabella Piro (ed.), *Scritti per Alessandro Corbino III* (Tricase: Libellula Edizioni, 2016) 87-108

Thomas Finkenauer, 'Pönale Elemente der lex Aquilia', in: Richard Gamauf (ed.), *Ausgleich oder Buße als Grundproblem des Schadenersatzrechts von der lex Aquilia bis zur Gegenwart. Symposium zum 80. Geburtstag von Herbert Hausmaninger* (Wien: Manz, 2017) 35-71

Bruce W. Frier, 'A Casebook on the Roman Law of Delict' (Atlanta: Scholars Press, 1989)

Manfred Fuhrmann, 'Poena', *Paulys Realencyclopädie der classischen Altertumswissenschaft Suppl. IX*, (Stuttgart: Druckenmüller, 1962) 843-861

Richard Gamauf, 'Vindicatio nummorum. Eine Untersuchung zur Reichweite und praktischen Durchführung des Eigentumsschutzes an Geld im klassischen römischen Recht' (Habilitationsschrift: University of Vienna, 2001)

William M. Gordon/Olivia F. Robinson, 'The Institutes of Gaius', 2nd edn. (London: Duckworth, 2001)

Jan Dirk Harke, 'Die Rechtspositionen am Sklaven. Ansprüche aus Delikten am Sklaven', in: Tiziana J. Chiusi/Johanna Filip-Froschl/Johannes M. Rainer (eds.), *Corpus der römischen Rechtsquellen zur antiken Sklaverei (CRRS) III/2* (Stuttgart: Franz Steiner Verlag, 2013)

Herbert Hausmaninger, 'Das Schadenersatzrecht der lex Aquilia', 5th edn. (Wien: Manz, 1996)

Franz Haymann, 'Die Haftung des Verkäufers für die Beschaffenheit der Kaufsache' (Berlin: Vahlen, 1912)

Hermann G. Heumann/Emil Seckel, 'Handlexikon zu den Quellen des römischen Rechts', 11th edn. (Graz: Akademische Druck- und Verlagsanstalt, 1971)

Wilhelm Hoffmann, 'Publius (11)', in: *Paulys Realencyclopädie der classischen Altertumswissenschaft XXIII* (Stuttgart: Metzler, 1959) 1912-1916

Heinrich Honsell/Theo Mayer-Maly/Walter Selb, 'Römisches Recht', 4th edn. (Berlin: Springer, 1987)

Marietta Horster, 'Substitutes for emperors and members of the imperial families as local magistrates', in: Luuk de Lig/Emily Hemelrijk/H.W. Singor (eds.), *Roman Rule and Civic Life: Local and Regional Perspectives* (Amsterdam: J. C. Gieben, 2004) 331-351

Philipp E. Huschke, 'Kritische Bemerkungen zum vierten Buch der Institutionen des Gaius' (1846) 13 *Zeitschrift für geschichtliche Rechtswissenschaft* 248-338

Philipp E. Huschke, 'Gaius: Beiträge zur Kritik und zum Verständniß seiner Institutionen' (Leipzig: Hirzel, 1855)

Philipp E. Huschke, 'Ueber das Recht des nexum und das alte römische Schuldrecht. Eine rechtshistorische Untersuchung' (Leipzig: Gebauersche Buchhandlung, 1846; reprint: 1980)

David Ibbetson, The Dating of the lex Aquilia, in: Andrew Burrows/David Johnston/Reinhard Zimmermann (eds.), Judge and Jurist. Essays in Memory of Lord Rodger of Earlsferry (Oxford: University Press, 2013) 167-177

Lisa Isola, 'Überlegungen zur Litisrescenscence bei der actio ex testamento' (2020) 137 SZ 70-135

Hylkje de Jong, 'Die actio in duplum (ἡ τοῦ διπλοῦ ἀπαίτησις) bei Sachbeschädigung - Ein Mysterium im byzantinischen Recht' (2015) 132 SZ 324-361

Otto Karlowa, 'Der roemische Civilprozess zur Zeit der Legisactionen' (Berlin: Weidmannsche Buchhandlung, 1872)

Otto Karlowa, 'Römische Rechtsgeschichte. In zwei Bänden; Band 2: Privatrecht und Civilprozess, Strafrecht und Strafprozess, Teil 1: Privatrecht' (Leipzig: Veit, 1901)

Max Kaser, 'Zum Ursprung des geteilten römischen Zivilprozeßverfahrens', in: Festschrift für Leopold Wenger. Zu seinem 70. Geburtstag dargebracht von Freunden, Fachgenossen und Schülern I, (München: C. H. Beck, 1944) 106-128

Max Kaser, 'Das altrömische Ius. Studien zur Rechtsvorstellung und Rechtsgeschichte der Römer' (Göttingen: Vandenhoeck & Ruprecht 1949)

Max Kaser, 'Das legatum sinendi modo in der Geschichte des römischen Vermächtnisrechts' (1950) 67 SZ 320-359

Max Kaser, 'Typisierter dolus im altrömischen Recht' (1962) 65 BIDR 79-104

Max Kaser, 'Das Römische Privatrecht I: Das altrömische, das vorklassische und klassische Recht', 2nd edn. (München: C. H. Beck, 1971)

Max Kaser, 'Das Römische Privatrecht II: Die nachklassischen Entwicklungen' (München: C. H. Beck, 1975)

Max Kaser, 'Über Verbotsgesetze und verbotswidrige Geschäfte im römischen Recht' (Wien: Österreichische Akademie der Wissenschaften, 1977)

Max Kaser, 'Unmittelbare Vollstreckbarkeit und Bürgenregreß' (1983) 100 SZ 80-135

Max Kaser, '„Ius honorarium“ und „ius civile“' (1984) 101 SZ 1-114

Max Kaser/Karl Hackl, 'Das Römische Zivilprozeßrecht', 2nd edn. (München: C. H. Beck, 1996)

Max Kaser/Rolf Knütel/Sebastian Lohsse, 'Römisches Privatrecht. Ein Studienbuch', 22nd edn. (München: C. H. Beck, 2021)

- John M. Kelly, 'Roman litigation' (Oxford: Clarendon Press, 1966)
- Feodor Kleineidam, 'Die Personalexekution der Zwölf Tafeln' (Breslau: Marcus, 1904)
- Bernhard Kübler, 'Geschichte des römischen Rechts. Ein Lehrbuch' (Leipzig: Deichertsche Verlagsbuchhandlung, 1925)
- Frederick H. Lawson, 'Negligence in the civil law' (Oxford: Clarendon Press, 1950)
- Otto Lenel, 'Das Edictum perpetuum. Ein Versuch zu seiner Wiederherstellung', 1st edn. (Leipzig: Tauchnitz, 1883)
- Otto Lenel, 'Der Prätor in der legis actio' (1909) 30 SZ 329-354
- Otto Lenel, 'Das Edictum perpetuum. Ein Versuch zu seiner Wiederherstellung', 3rd edn. (Leipzig: Tauchnitz, 1927)
- Ernst Levy, 'Vulgarization of Roman Law in the Early Middle Ages' (1943) 1 *Medievalia et Humanistica* 14-40 = Wolfgang Kunkel/Max Kaser (eds.), Ernst Levy. *Gesammelte Schriften I*, 220-247
- Ernst Levy, 'A Palingenesia of the Opening Titles as a Specimen of Research in West Roman Vulgar Law' (Ithaca: Cornell Univ. Press, 1945: reprint 1969)
- Detlef Liebs, 'Dammum, damnas, damnare. Zur Bedeutungsgeschichte einiger lateinischer Rechtswörter' (1968) 85 SZ 173-252
- Detlef Liebs, 'Römische Jurisprudenz in Africa mit Studien zu den pseudopaulinischen Sentenzen', 2nd edn. (Berlin: Duncker & Humblot, 2005)
- Wiesław Litewski, 'Studien zum sogenannten depositum necessarium' (1977) 43 SDHI 188-202
- Ulrich v. Lübtow, 'Untersuchungen zur lex Aquilia de damno iniuria dato' (Berlin: Duncker & Humblot, 1971)
- Geoffrey MacCormack, 'Aquilian Studies' (1975) 41 SDHI 1-78
- Geoffrey MacCormack, 'Fault and Causation in Early Roman Law: An Anthropological Perspective' (1981) 28 RIDA 97-126
- Ulrich Manthe, 'Gaius Institutiones. Die Institutionen des Gaius', 2nd edn. (Darmstadt: Wissenschaftliche Buchgesellschaft, 2010)
- Ulrich Manthe, 'Geschichte des römischen Rechts', 6th edn. (München: C. H. Beck, 2019)
- Dieter Medicus, 'F. La Rosa, L' „actio iudicati“ nel diritto romano classico' (1964) 81 SZ 465-476
- Walter Miller, 'De officiis' (Cambridge, MA: Harvard University Press, 2014)
- Ludwig Mitteis, Ueber das Nexum (1901) 22 SZ 96-125
- Ludwig Mitteis, 'Römisches Privatrecht bis auf die Zeit Diokletians I' (Leipzig: Duncker & Humblot, 1908)

Hein L. W. Nelson, 'Überlieferung, Aufbau und Stil von Gai Institutiones' (Leiden: Brill, 1981)

Hein L. W. Nelson/Ulrich Manthe, 'Gai Institutiones III, 88-181. Die Kontraktobligationen. Text und Kommentar' (Berlin: Duncker & Humblot, 1999)

Alexander Neumann, 'Der Bürgenregress im Rahmen des römischen Auftragsrechts. Studien zur formula in factum concepta' (Baden-Baden: Nomos, 2011)

Barry Nicholas, 'Verbal forms in Roman Law' (1992) 66 *Tulane Law Review* 1605-1614

Dieter Nörr, 'Causa mortis. Auf den Spuren einer Redewendung' (München: C. H. Beck, 1986)

Dieter Nörr, 'Zur Formel der actio legis Aquiliae', in: Holger Altmeyden (ed.), *Festschrift für Rolf Knütel zum 70. Geburtstag* (Heidelberg: Müller, 2009) 833-848

Jules Paoli, 'Lis infitiando crescit in duplum' (Paris: Éd. Domat-Montchrestien, 1933)

Josef Partsch, 'Aus nachgelassenen und kleineren verstreuten Schriften' (Berlin: Duncker & Humblot, 1931)

Martin Pennitz, 'Das periculum rei venditae. Ein Beitrag zum „aktionenrechtlichen Denken“ im römischen Privatrecht' (Wien - Köln - Weimar: Böhlau, 2000)

Alfred Pernice, 'Zur Lehre von den Sachbeschädigungen nach römischem Rechte' (Weimar: Böhlau, 1867)

David Pugsley, 'On the Lex Aquilia and Culpa' (1982) 50 *TRG* 1-17

Niklas Rafetseder, 'Lex coloniae - lex municipii: Die römische Stadtgesetzgebung in Republik und Kaiserzeit' (Dissertation: University of Vienna, 2020)

Giovanni Rotondi, 'Leges publicae populi Romani' (Milano: Soc. Editrice Libreria, 1912: reprint 1966)

Adolf A. F. Rudorff, 'Ueber die Litiscredenz' (1848) 14 *Zeitschrift für geschichtliche Rechtswissenschaft* 287-478

Iolanda Ruggiero, 'Ricerche sulle Pauli Sententiae' (Milano: Dott. A. Giuffrè Editore, 2017)

Philipp Scheibelreiter, 'Zwischen furtum und Litiscredenz: Überlegungen zur poena dupli der actio ex causa depositi' (2009) 56 *RIDA* 131-154

Philipp Scheibelreiter, 'Der „ungetreue Verwahrer“. Eine Studie zur Haftungs begründung im griechischen und frühen römischen Depositenrecht' (München: C. H. Beck, 2020)

Arthur A. Schiller, 'Roman Law. Mechanisms of Development' (The Hague - New York: Mouton, 1978: reprint 2010)

Fritz Schulz, 'Die Lehre vom Concursus Causarum im klassischen und justinianischen Recht' (1917) 38 *SZ* 114-209

Fritz Schulz, 'History of Roman Legal Science' (Oxford: Clarendon Press, 1946: reprint 1967)

Fritz Schulz, 'Classical Roman Law' (Oxford: Clarendon Press, 1951: reprint: 1992)

Walter Selb, 'Actiones in factum und Formeltechnik', in: Gerhard Frotz/Werner Ogris (eds.), Festschrift für Heinrich Demelius zum 80. Geburtstag. Erlebtes Recht in Geschichte und Gegenwart (Wien: Manz, 1973) 223-235

Walter Selb, 'Vom geschichtlichen Wandel der Aufgabe des iudex in der legis actio', in: Dieter Simon/Dieter Nörr (eds.), Gedächtnisschrift für Wolfgang Kunkel (Frankfurt am Main: Klostermann, 1984) 391-448

Lothar v. Seuffert, 'Poenae temere litigantium' (1884) 67 Archiv für die civilistische Praxis 323-365

Peter Stein, 'School Attitudes in the Law of Delicts', in: Studi in onore di Arnaldo Biscardi II (Milano: Istituto Ed. Cisalpino - La Goliardica, 1982) 281-293

Georg Thielmann, '„Actio utilis“ und „actio in factum“. Zu den Klagen im Umfeld der lex Aquilia', in: Studi in onore di Arnaldo Biscardi II (Milano: Istituto Ed. Cisalpino - La Goliardica, 1982) 295-318

Wolfgang Waldstein/Johannes M. Rainer, 'Römische Rechtsgeschichte', 11th edn. (München: C. H. Beck, 2014)

Tom Walter, 'Die Funktionen der actio depositi' (Berlin: Duncker & Humblot, 2012)

Alan Watson, 'The Digest of Justinian I', 2nd edn. (Philadelphia: University of Pennsylvania Press, 1998)

Alan Watson, 'The Digest of Justinian IV', 2nd edn. (Philadelphia: University of Pennsylvania Press, 1998)

Leopold Wenger, 'Zur Lehre von der actio iudicati. Eine rechtshistorische Studie' (Graz: Leuschner & Lubensky, 1901)

Leopold Wenger, 'Institutes of the Roman Law of Civil Procedure. Translated by Otis Harrison Fisk', 2nd edn. (New York: The Liberal Arts Press, 1955)

Gunter Wesener, 'Actiones ad exemplum' (1958) 75 SZ 220-250

Gunter Wesener, 'Die Durchsetzung von Regressansprüchen im römischen Recht' (1965) 11 Labeo 341-361

Gunter Wesener, 'Vindex', in: Paulys Realencyclopädie der classischen Altertumswissenschaft Suppl. XIV (München: Druckenmüller, 1974) 886-895

Franz Wieacker, 'Endoplorare. Diebstahlsverfolgung und Gerüft im altrömischen Recht', in: Festschrift für Leopold Wenger. Zu seinem 70. Geburtstag dargebracht von Freunden, Fachgenossen und Schülern I (München: C. H. Beck, 1944) 129-179

Laurens C. Winkel, 'Error iuris nocet: Rechtsirrtum als Problem der Rechtsordnung' (Amsterdam: Gieben, 1985)

Annemarie Winkler, 'Gaius III, 92' (1958) 5 RIDA 603-636

Moriz Wlassak, 'Konfessio in Iure und Defensionsweigerung nach der Lex Rubria de Gallia Cisalpina' (München: C. H. Beck, 1934)

Reinhard Zimmermann, 'The Law of Obligations: Roman Foundations of the Civilian Tradition' (Oxford: University Press, 1990: reprint 1996)

Francis de Zulueta, 'The Institutes of Gaius I. Text with critical notes and translation' (Oxford: Clarendon, 1946: reprint 1958)

Francis de Zulueta, 'The Institutes of Gaius II. Commentary' (Oxford: Clarendon, 1953)

B. Ancient legal sources

D. 9.2.23.11

D. 21.1.45

D. 11.1.11.3

D. 42.2.1

Gai. 3.127

Gai. 4.9

Gai. 4.21-25

Gai. 4.171

Inst 3.27.7

Inst. 4.6.19

Inst. 4.6.26

Inst. 4.16 pr.

PS 1.19.1

PS 2.17.3

PS 2.17.4

C. Ancient non-legal sources

De officiis (3.16.65)

Gell. 20.1.45-48

IX. Lists of abbreviations

12 Tab.: Twelve Tables

BIDR: Bullettino dell'Istituto di Diritto Romano

D.: Digesta

Binder, Sanction for the non-confessing debtor. Litiscescencia in Roman law

De officiis: Marcus Tullius Cicero, De officiis

Gai.: Gaii Institutiones

Gell.: Aulus Gellius, Noctes Atticae

Inst.: Iustiniani Institutiones

Labeo: Labeo: rassegna di diritto romano

PS: Pauli Sententiae

RIDA: Revue Internationale des Droits de l'Antiquité

SDHI: Studia et Documenta Historiae et Iuris

SZ: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung

TRG: Tijdschrift voor Rechtsgeschiedenis

