Sanction for the non-confessing debitor. Litiscrescence in Roman law

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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 claim[2] and 2) penalties for denying liability[3] (*poenae infitiationis*).[4] Roman jurists sometimes referred to the phrase "*infitiando lis crescit in duplum*"[5] in order to describe certain actions[6] where the denial of liability by the defendant led to the doubling of damages.[7] Modern legal scholars often use the word litiscrescence[8] 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

[1] The following article is a summary of my dissertation 'Sanktion für den nicht geständigen Schuldner. Litiskreszenz 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 coercitionibus 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: Litiskreszenz (before the 20th century: Litiscrescenz); 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

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.

II. Actions with litiscrescence

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 litiscrescence 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

Filip-Froschl/Johannes M. Rainer (eds.), Corpus der römischen Rechtsquellen zur antiken Sklaverei (CRRS) III/2 (Stuttgart: Franz Steiner Verlag, 2013) p. 75.

[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.

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> *... 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 litiscrescence 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 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 litiscrescence 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]

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[15] Translation: Gordon/Robinson, 'Gaius', pp. 523 seq.

[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 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 litiscrescence do not necessarily have to qualify as penal actions.[21]

Another list of actions with litiscrescence 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 antiquity.[23] It is strongly debated whether the content was taken exclusively from the writings of the classical jurist Iulius Paulus.[24]

PS 1.19.1[25]

Quaedam actiones si a reo infitientur, duplantur, velut iudicati, depensi, legati per damnationem relicti, 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 infitientur*). Here, the word *actio* should be translated as a

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.

[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 Litiskreszenz: Überlegungen zur poena dupli der actio ex causa depositi' (2009) 56 RIDA 131-154, pp. 143 seq.

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plaintiff's claim.[26] The list of actions with litiscrescence 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 litiscrescence can be found in the liability of the *vindex* and was adopted in some formulary actions. Therefore, first the actions 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 litiscrescence in Roman law, a connection between formulary actions with litiscrescence 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

[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.

[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*.

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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*), litiscrescence 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 damnationem relictorum*"), it remains unclear whether only the *actio certi ex testamento* or also the *actio incerti ex testamento* entailed litiscrescence.[39]

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[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.

[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 Litiskreszenz bei der actio ex testamento' (2020) 137 SZ 70-135, p. 123; Kaser/Knütel/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.

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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] Litiscrescence 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 litiscrescence.[47]

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[40] See chapter 'IV. Similarities between actions with litiscrescence?'.

[41] Benke/Meissel, 'Schuldrecht', p. 330; Benke/Meissel, 'Obligations', p. 326; an *adstipulator* who unlawfully released the *debitor* 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] Litiscrescence: 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 litiscrescence: Adolf A. F. Rudorff, 'Ueber die Litiscrescenz' (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.

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III. Liability of the vindex. First case of litiscrescence?

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 iniectionem* (*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(raude) s(ua) facere liceto. uindex arbitratu IIuiri qui{q}ue i(ure) d(icundo) p(raerit)

[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 Zwölftafelprozeß. 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 litiscrescence?'), 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 Zwölftafeln' (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.

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> *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(amnas) esto, eiusque pecuniae cui uolet petitio, IIuir(o) qui{q}ue i(ure) d(icundo) p(raerit) exactio iudicatioque esto.*
>
> [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 system[59], 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

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[55] See Marietta Horster, 'Substitutes for emperors and members of the imperial families as local magistrates', in: Luuk de Ligt/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 Injectio 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.

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 litiscrescence 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]

IV. Similarities between actions with litiscrescence?

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 litiscrescence were a result of (direct) execution. The *legis actio per manus iniectionem* 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*

[61] Paoli, 'Lis infitiando' pp. 46 seq.; critical: Kaser, 'Das altrömische Ius', p. 122.

[62] Kaser, 'Das altrömische Ius', p. 122.

[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 litiscrescene?'.

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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 manus iniectionem*. In 4.22 Gaius then referred to another form of execution with the *legis actio per manus iniectionem 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,

[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, 'Litiskreszenz', 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.

[73] Wilhelm Hoffmann, 'Publilius (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 Kontraktsobligationen. 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.

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 iniectionem* as well as the *legis actio per manus iniectionem 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*, litiscrescence in the trial between *creditor* and the *vindex* also vanished.[77] However, Manthe suspects that most cases of litiscrescence 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 iniectionem*, 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 iniectionem pro iudicato* against the principal debtor.[79] Later, under the formulary system, the *sponsor* received an *actio depensi*, which (according to Gai. 3.127[80]) 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 litiscrescence 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.

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*

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[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 reciperandi 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.

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

iniectionem 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 iniectionem* or a *legis actio per manus iniectionem 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 iniectionem* or *legis actio per manus iniectionem pro iudicato* seems possible.[87]

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[82] Otto Lenel, 'Das Edictum perpetuum. Ein Versuch zu seiner Wiederherstellung', 1st edn. (Leipzig: Tauchnitz, 1883) p. 171 suspected an *actio legis Furiae* (with litiscrescence). However, there is no proof for such an action with litiscrescence, 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 litiscrescence?'.

[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.

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]

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 litiscrescence. 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 infitiatus 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

[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 Aquila* 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 iniectionem*; 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.

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

> 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 *debitor* 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]

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

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[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, 'Litiskreszenz', pp. 77 seq; different: Karlowa, 'Römische Rechtsgeschichte II', p. 575 and Detlef Liebs, 'Damnum, 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 *infitiatio* 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.

[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.

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]

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

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[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/Knütel/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.

[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.

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 period[108] indicates that delict is the origin[109] of liability *in duplum* for denying liability in court.

VI. More actions with litiscrescence?

In the chapter "II. Actions with litiscrescence", 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 litiscrescence.

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

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[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 adquirere Pedius ait: abunde enim sufficere exonerare petitorem probandi necessitate, cum omissa 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 litiscrescence?'.

[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, 'Litiskreszenz', p. 93; in favour of a delict: Kaser, 'Typisierter dolus' (1962) p. 100 and Wesener, 'Vindex', pp. 890 seq.

[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 assistence from the seller (for the buyer) against the third party turned out to be unsuccessful, see Zimmermann, 'Obligations', p. 294.

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 litiscrescence.[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 infitiatus 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 litiscrescence.[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 litiscrescence. 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

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[112] Schulz, 'Classical', p. 533; Zimmermann, 'Obligations', pp. 294 seq.; Benke/Meissel, 'Schuldrecht', p. 158; Benke/Meissel, 'Obligations', p. 152.

[113] Rudorff, 'Litiscrescenz', 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, 'Litiscrescenz', 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.*

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

confessus pro iudicato est,[119] it would seem possible that in the enforcement proceedings, the *iudicatus* and the *confessus* had to face the same sanction (litiscrescence) 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 iniectionem*), which entailed litiscrescence. 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 litiscrescence.[120]

C. Action based on the Lex Furia de sponsu

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

> Gai. 4.22
>
> *Postea quaedam leges ex aliis quibusdam causis pro iudicato manus iniectionem 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]

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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.

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 iniectionem 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 sum. Instead, the debt was divided among the co-guarantors.[124] A *creditor* who took[125] more than the sum for which a co-guarantor was liable could be sued by this co-guarantor with the *legis actio per manus iniectionem 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 iniectionem pro iudicato* entailed litiscrescence, it would also seem plausible that there existed an action with litiscrescence under the formulary system. For the *Lex Publilia*, the transition from a *legis actio per manus iniectionem pro iudicato* to an action with litiscrescence (*actio depensi*) was described in the chapter "IV. Similarities between actions with litiscrescence?" 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]

[122] See chapter 'IV. Similarities between actions with litiscrescence?'

[123] See chapter 'IV. Similarities between actions with litiscrescence?'

[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 iniectionem pro iudicato*. See Huschke, 'Nexum', p. 123; Otto Karlowa, 'Der roemische 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.

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D. Depositum

In the Institutes of Justinian, a list of the actions with litiscrescence 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 relicti 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 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 litiscrescence 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 litiscrescence. 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 litiscrescence because of an incorrect reading of the word "*depensi*" in PS 1.19.1.[133] With the

[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 litiscrescence'.

[131] Max Kaser, 'Das Römische Privatrecht II: Die nachklassischen Entwicklungen' (München: C. H. Beck, 1975) p. 345; the *actio ex testamento* contained only litiscrescence 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, 'Litiscrescenz', p. 457; Scheibelreiter, 'Der „ungetreue Verwahrer"', p. 217.

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]

Since the *actio legis Aquiliae* was an action with litiscrescence, analogous actions might also have contained the same sanction. A similar *formula* of an analogous action would indicate that litiscrescence 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 litiscrescence. Litiscrescence could only happen if the *formula* was designed similar

[134] Rudorff, 'Litiscrescenz', p. 457.

[135] Zimmermann, 'Obligations', p. 981.

[136] For the diffenernce 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 (ἡτοῦ 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' (Habilitiationsschrift: 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.

[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.

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 no 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, litiscrescence 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-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 litiscrescence?'

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[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, litiscrescence was not abolished. However, the procedural situation was not the same. Here the denial took place in front of a judge.

[147] See chapter 'II. Actions with litiscrescence'.

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The earliest case of litiscrescence 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 iniectionem* (*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) litiscrescence for different times[150] 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]

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[148] See chapter 'III. Liability of the vindex. First case of litiscrescence?'.

[149] See chapter 'IV. Similarities between actions with litiscrescence?' 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 litiscrescence?'.

[153] Different: Paoli, 'Lis infitiando' pp. 46 seq.

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IX. Lists of abbreviations

12 Tab.: Twelve Tables

BIDR: Bullettino dell'Istituto di Diritto Romano

D.: Digesta

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

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