

***Condemnatio Pecuniaria* and Enforcement of Specific Performance in Roman Civil Procedure**

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I. Introduction

Classical Roman procedural law is largely shaped by the principle of *condemnatio pecuniaria*, the mandatory money-condemnation. The formulary procedure,¹ the ordinary proceedings of the classical period, adheres to this principle. The rule applies: “*Omnis condemnatio pecuniaria est*: every condemnation is monetary.”² The judge can impose judgment only for a certain monetary amount. Thus, the plaintiff is always only granted money by the judgment, regardless of the substantive object of his *actio*. The principle of monetary condemnation consistently applies in enforcement proceedings.

The *condemnatio pecuniaria* is not problematic in cases involving claims for the payment of money (for example, a claim for the purchase price or a claim for the repayment of a monetary loan). However, when the matter concerns non-monetary rights or claims, the question arises whether and how the entitled party can enforce them. For instance, the owner using the *rei vindicatio* typically wishes to recover the disputed thing itself, not merely an equivalent sum of money. Yet the outcome of the

¹ The formulary procedure is based on *formulae* in which, for different claims, the respective procedural framework is determined by the specific words of each *formula*. The procedure is divided into two stages: a phase *in iure* before the judicial magistrate (*praetor*), in which the *formula* – and thus the content of the action – is established, and a phase *apud iudicem* before a lay judge (*iudex*), in which the judge renders a substantive decision based on the *formula*. Cf., for the formulary procedure, e.g. Kaser, Knütel and Lohsse, *Römisches Privatrecht. Ein Studienbuch*, 22nd edn. (München, 2021) 62 ff.

² See, with regard to the *condemnatio pecuniaria*, for example: Burdese, ‘Sulla condanna pecuniaria nel processo civile romano’ (1990) *SemCompl* 175 (175 ff); Pennitz, *Der „Enteignungsfall“ im römischen Recht der Republik und des Prinzipats* (Wien/Köln/Weimar, 1991) 249 ff; Kaser and Hackl, *Das Römische Zivilprozeßrecht*, 2nd edn. (München, 1996) 372 f; Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford, 1996) 771 f and 825 f; Winkel, ‘Specific Performance in Roman law’, in Hallebeek and Dondorp (eds.), *The Right to Specific Performance. The Historical Development* (Antwerpen/Oxford/Portland, 2010) 9 (9 ff); Kindler, *Affectionis aestimatio. Vom Ursprung des Affektionsinteresses im römischen Recht und seiner Rezeption* (Berlin, 2012) 24 ff and 46 footnote 174; Klingenberg, ‘§ 13 – Formularprozess: Verhandlung *apud iudicem*’, in Babusiaux, Baldus, Ernst, Meissel, Platschek and Rübner (eds.), *Handbuch des Römischen Privatrechts. Band I* (Tübingen, 2023) 413 (452 ff) with further references in footnote 490.

trial is formally limited to a monetary judgment. In this respect, classical Roman procedural law may appear peculiar.³

Nevertheless, the path to specific (non-monetary) enforcement is not completely blocked. The formulary procedure contains mechanisms that exert indirect pressure on the defendant to “voluntarily” render the specific performance demanded. In this way, the formal principle of monetary condemnation is, in effect, circumvented.

In the *cognitio* procedure⁴ – which had already developed during classical times alongside the formulary procedure as extraordinary proceedings for certain claims – the principle of *condemnatio pecuniaria* does not apply. As a result, specific enforcement through a judgment *in rem* and corresponding execution is possible. This continues in post-classical and Justinianic law, in which the *cognitio* procedure ultimately becomes the ordinary form of legal proceedings.⁵

This paper examines the principle of *condemnatio pecuniaria*, its implications, and its relationship to the specific enforcement of non-monetary claims in classical Roman law. Its purpose is to present, in concise form, the essential results of the author’s doctoral thesis⁶ on this subject. At first, the concept of *condemnatio pecuniaria* in Roman procedural law will be portrayed (Part II), followed by the examination of the consequences of monetary judgments in disputes concerning the recovery of property belonging to the plaintiff (Part III). A central aspect is the analysis of the mechanisms, which, despite the rule of monetary condemnation, indirectly secure specific enforcement (*actiones arbitrarie*, *iusiurandum in litem*, infamy; Part IV). Finally, two texts (D. 6.1.68 and C. 3.35.2) are examined which,

³ Cf., for instance, Levy, ‘Die Enteignung des Klägers im Formularprozess’ (1921) *ZRG-RA* 476 (476); see also Wenger, ‘Zu drei Fragen aus dem römischen Zivilprozeßrechte’ (1939) *ZRG-RA* 315 (316).

⁴ In contrast to the formulary procedure, the *cognitio* procedure is characterized by a lower degree of procedural formality – cf. Kaser, Knütel and Lohsse, *Römisches Privatrecht* 56. For example, there is no division into two stages of proceedings before the *praetor* and the lay judge; instead, the entire process takes place before a state judge. Without the binding force of the *formulae*, there is no adherence to *condemnatio*-clauses, the *formula*-clauses that limit condemnation exclusively to an award of money. For further details on the *cognitio* procedure, see below section II.C.

⁵ On the development of the *cognitio* procedure, for example: Rüdiger, ‘Imperial *Cognitio* Process’, in du Plessis, Ando and Tuori (eds.), *The Oxford Handbook of Roman Law and Society* (Oxford, 2016) 257 (257 f and 262); Kaser, Knütel and Lohsse, *Römisches Privatrecht* 56 f; Willems, ‘§ 15 – Kognitionsprozess’, in Babusiaux, Baldus, Ernst, Meissel, Platschek and Rüdiger (eds.), *Handbuch des Römischen Privatrechts. Band I* (Tübingen, 2023) 492 (493 f).

⁶ Schmatzberger, ‘*Iudex non ipsam rem condemnat*’. *Untersuchungen zum Geldverurteilungsprinzip und zur Durchsetzbarkeit von Naturalleistungen im klassischen römischen Zivilprozess* (dissertation, University of Vienna, 2025).

contrary to the *condemnatio pecuniaria*, appear to attest to direct specific enforcement in the formulary procedure (Part V).

II. The Rule of *Condemnatio Pecuniaria* in Classical Roman Law

The starting point for examining the *condemnatio pecuniaria* is the formulary procedure, the ordinary proceedings in the classical period of Roman law. In addition, the other forms of litigation – the *legis actiones* and the *cognitio* – must also be taken into consideration.

A. Formulary Procedure

The central textual evidence for the applicability of the *condemnatio pecuniaria* in the formulary procedure is the following passage from the *Institutiones* of Gaius:

Gai. 4.48

*Omnium autem formularum, quae condemnationem habent, ad pecuniariam aestimationem condemnatio concepta est. Itaque et, si corpus aliquod petamus, velut fundum, hominem, vestem, aurum argentum, iudex non ipsam rem condemnat eum, cum quo actum est, sicut olim fieri solebat, <sed> aestimata re pecuniam eum condemnat.*⁷

The *condemnatio*, in all *formulae* containing one, is framed in terms of valuation in money. Accordingly, even where the suit is for a corporeal thing, such as land, a slave, a garment, gold, or silver, the *iudex* condemns the defendant not in the actual thing, as was the practice in early days, but in the amount of money at which he values it.⁸

Gaius notes in the opening sentence that all *formulae* containing a condemnation clause (*condemnatio*) are directed toward a monetary assessment of the object in dispute. Thus, in all actions for performance under the formulary procedure, only money is ultimately awarded. The classical jurist illustrates this rule by reference to the claim for the surrender of a (corporeal) thing, which is particularly relevant in the context of real actions. However, the *condemnatio pecuniaria* is also well attested in the sources with respect to other types of obligations, for example in Cels. (6 dig.)

⁷ Reconstruction of the text according to Manthe, *Gaius Institutiones. Die Institutionen des Gaius*, 2nd edn. (Darmstadt, 2010) 346, who follows Krüger and Studemund (eds.), *Gai institutiones ad Codicis Veronensis apographum studemundianum novis curis auctum*, 7th edn. (Berlin, 1923) 168.

⁸ Translation: de Zulueta, *The Institutes of Gaius. Part I, Text with critical notes and translation*, 2nd reprint (Oxford, 1958) 253.

D. 42.1.13.1⁹ regarding *obligationes faciendi* (obligations to perform an act or service) in general.¹⁰

The principle of mandatory monetary condemnation applies to all actions for performance in the formulary procedure. In consequence, every obligation that does not consist of money from the outset has to be assessed in monetary terms. The judgment is then rendered for the assessed value (*litis aestimatio*)¹¹ of the specific object in dispute.¹²

The principle of *condemnatio pecuniaria* is maintained at the stage of execution. There is no execution in kind in the formulary procedure; the plaintiff can only obtain the monetary amount awarded in the judgment. In the case of personal execution, the debtor has to work off his debt within the framework of debt bondage.¹³ In the case of execution against assets, the debtor's entire estate is liquidated for the proportional satisfaction of the creditors by being auctioned off to the highest bidder – the purchaser of the estate (*bonorum emptor*)¹⁴ – in a *venditio bonorum*.¹⁵

⁹ *Si quis promiserit prohibere se, ut aliquid damnum stipulator patiat, et faciat ne quod ex ea re damnum ita habeatur, facit quod promisit: si minus, quia non facit quod promisit, in pecuniam numeratam condemnatur, sicut evenit in omnibus faciendi obligationibus.*

Translation essentially based on Watson (ed.), *The Digest of Justinian. Volume 4*, 2nd edn. (Philadelphia, 1998) 51: If someone should promise that he will prevent the stipulator from suffering any harm and he so acts that no harm does arise out of the matter, he performs his promise; if not, since he has not done what he said he would, he is to be condemned in money damages just as would be the case in all obligations to do something (Watson translates the last half-sentence more freely: just as would be the case in any other action on a stipulation to do something).

¹⁰ See e.g., concerning sales law, also Ulp. (28 ad ed.) D. 19.1.1 pr. and Ulp. (32 ad ed.) D. 19.1.11.9.

¹¹ The term refers to the monetary valuation of the subject matter of the dispute, but also to the estimated sum itself or the condemnation to that amount – Kaser and Hackl, *Zivilprozeßrecht* 372 footnote 21 with further references.

¹² Kaser and Hackl, *Zivilprozeßrecht* 372; Klingenberg, 'Verhandlung apud iudicem', 413 (452 f); the only exception to exclusive monetary condemnation are the *actiones noxales*, in which the *condemnatio* is framed alternatively as payment of a sum of money or the surrender of the perpetrator (*noxae deditio*) – see, for instance, Ulp. (66 ad ed.) D. 42.1.6.1; Kaser, Knütel and Lohsse, *Römisches Privatrecht* 361 f.

¹³ Unless the debtor or those around him pay the judgment sum in any event in order to avoid debt bondage; on the personal execution cf. Kaser and Hackl, *Zivilprozeßrecht* 387 f with references in footnote 32; Willems, '§ 14 – Formularprozess: Vollstreckung', in Babusiaux, Baldus, Ernst, Meissel, Platschek and Rüfner (eds.), *Handbuch des Römischen Privatrechts. Band I* (Tübingen, 2023) 476 (480 f).

¹⁴ The *bonorum emptor* acquires the debtor's estate as universal successor.

¹⁵ For the execution against assets see, for instance: Kaser and Hackl, *Zivilprozeßrecht* 388 ff; Kaser, Knütel and Lohsse, *Römisches Privatrecht* 80 f; Willems, 'Vollstreckung', 476 (481 ff).

B. Excursus: *Ipsam Rem Condemnare* in Gai. 4.48

Gai. 4.48 provides unequivocal evidence for the principle of *condemnatio pecuniaria* in the formulary procedure. For further clarification, Gaius draws a legal-historical comparison to earlier times in the second sentence: *sicut olim fieri solebat*. This remark allows conclusions to be drawn regarding the pre-classical *legis actio* procedure.¹⁶

The reconstruction and interpretation of the text are subjects of considerable debate in legal scholarship.¹⁷ The segment beginning with “*iudex non ipsam rem condemnat*” is particularly problematic. Its interpretation is decisive for determining whether there is a difference (in earlier times *condemnatio in rem*, now *condemnatio pecuniaria*) or a continuity (both in earlier times and now *condemnatio pecuniaria*) between the *legis actio* procedure and the formulary procedure with respect to the content of the judgment. The substantive meaning depends on where one places a conceptual pause in the text.

The traditional view reconstructs the text by inserting a *sed* between *sicut olim fieri solebat* and *aestimata re* (as in the version reproduced here above, footnote 7),¹⁸ or alternatively by placing punctuation at precisely that point.¹⁹ This results in a contrast between the *condemnatio pecuniaria* of the formulary procedure and the *ipsam rem condemnare* of earlier times.²⁰

¹⁶ In the *Institutiones* of Gaius, *olim* regularly refers to the *legis actiones* – e.g. Gai. 4.32, Gai. 4.82 or Gai. 4.108; on this, for example: Burdese, (1990) *SemCompl* 175 (199); Pennitz, *Enteignungsfall* 255 f; Gagliardi, *Decemviri e Centumviri. Origine e competenze* (Milano, 2002) 140; Falcon, “‘Ipsam rem condemnare’ in Gai. 4.48”, in Garofalo (ed.), *Il giudice privato nel processo civile romano. Omaggio ad Alberto Burdese, Volume III* (Padova, 2015) 521 (524 f); Albers, *Perpetuatio obligationis. Leistungspflicht trotz Unmöglichkeit im klassischen Recht* (Wien/Köln/Weimar, 2019) 128.

¹⁷ See for example: Nicolau and Collinet, ‘Gaius, Institutes IV, § 48; La condamnation pécuniaire sous les Actions de la Loi’ (1936) *RHD* 751 (751 ff); Wenger, (1939) *ZRG-RA* 315 (316 ff); Lübtow, ‘Ursprung und Entwicklung der *condemnatio pecuniaria*’ (1951) *ZRG-RA* 320 (358 f); Kelly, *Roman Litigation* (Oxford, 1966) 69 ff; Quadrato, *Tignum iunctum ne solvito (Dalle XII Tavole a Giustiniano)* (Bari, 1967) 14 ff; Burdese, (1990) *SemCompl* 175 (199 ff); Pennitz, *Enteignungsfall* 254 ff; Gagliardi, *Decemviri e Centumviri* 137 ff; Falcon, ‘Ipsam rem condemnare’, 521 (521 ff); Albers, *Perpetuatio obligationis* 128; further references in Kaser and Hackl, *Zivilprozeßrecht* 127 footnote 50 and 373 footnote 24a.

¹⁸ Krüger and Studemund (eds.), *Gai institutiones* 168; Manthe, *Gaius Institutiones* 346; furthermore cf. de Zulueta, *Institutes of Gaius* 252.

¹⁹ Gagliardi, *Decemviri e Centumviri* 146 f.

²⁰ Cf. for the traditional view, e.g.: Wenger, (1939) *ZRG-RA* 315 (319 and 328 f); Kelly, *Roman Litigation* 70 f; Quadrato, *Tignum iunctum* 15 ff; Gagliardi, *Decemviri e Centumviri* 148 f and 152 ff; Winkel, ‘Specific Performance’, 9 (10); Klingenberg, ‘Verhandlung apud iudicem’, 413 (452) footnote

According to the divergent view, however, the *sed*²¹ or corresponding punctuation²² should be inserted before *sicut olim fieri solebat*. In that case, the passage would attest to the continuity of the principle of monetary condemnation in both the *legis actio* procedure and the formulary procedure.²³

Since Gaius almost always highlights contrasts when he draws a comparison between these two types of procedure in his *Institutiones*,²⁴ the traditional reading remains preferable. However, all *legis actiones* ultimately lead only to monetary compensation, because execution in the *legis actio* procedure always presupposes a settlement amount, through the payment of which the debtor may free himself from liability (which is quantified in money).²⁵ The *ipsam rem condemnare* in Gai. 4.48 is therefore not to be understood as a genuine judgment for specific performance, but only in a non-technical sense: since the matter likely concerns a dispute over ownership, the legal-historical reference must pertain to the *legis actio sacramento in rem*.²⁶ In the *legis actio sacramento in rem*, the determination of the disputed right of dominion is made only indirectly through the pronouncement on the lawfulness of the *sacramenta*.²⁷ The *ipsam rem condemnare* refers to this implicit declaration regarding the underlying entitlement to the disputed object.²⁸

490; further references in Falcon, ‘*Ipsam rem condemnare*’, 521 (527 f) footnote 15; see also the above-mentioned translation by de Zulueta, *Institutes of Gaius* 253.

²¹ Cf. in particular Nicolau and Collinet, (1936) *RHD* 751 (757 ff); in agreement for example Lübtow, (1951) *ZRG-RA* 320 (358 f); on this, see also Falcon, ‘*Ipsam rem condemnare*’, 521 (525 f) with further references.

²² Brini, *Della condanna nelle legis actiones* (Bologna, 1878) passim (semicolon); Burdese, (1990) *SemCompl* 175 (199 ff) (colon).

²³ See for the dissenting view, for instance: Nicolau and Collinet, (1936) *RHD* 751 (751 ff); Lübtow, (1951) *ZRG-RA* 320 (320 ff).

²⁴ In approximately 30 comparisons, except for a single case, the focus is always on the differences – for a list of the respective passages cf. Quadrato, *Tignum iunctum* 18 footnote 54.

²⁵ Lübtow, (1951) *ZRG-RA* 320 (352 ff); Kaser and Hackl, *Zivilprozeßrecht* 135 with further references; Albers, *Perpetuatio obligationis* 126 f; Kaser, Knützel and Lohsse, *Römisches Privatrecht* 61 f; Varvaro, ‘§ 9 – Die Legisaktionen’, in Babusiaux, Baldus, Ernst, Meissel, Platschek and Rühner (eds.), *Handbuch des Römischen Privatrechts. Band I* (Tübingen, 2023) 321 (337 f).

²⁶ Kelly, *Roman Litigation* 71; Quadrato, *Tignum iunctum* 19; Pennitz, *Enteignungsfall* 254 ff; Kaser and Hackl, *Zivilprozeßrecht* 104 f and 127.

²⁷ Kaser and Hackl, *Zivilprozeßrecht* 122 f; Kaser, Knützel and Lohsse, *Römisches Privatrecht* 59 f; Varvaro, ‘Legisaktionen’, 321 (331).

²⁸ Pennitz, *Enteignungsfall* 255 f; Kaser and Hackl, *Zivilprozeßrecht* 104 f and 126 f; Gagliardi, *Decemviri e Centumviri* 140 ff and 157 ff; Albers, *Perpetuatio obligationis* 128.

C. Departure from Mandatory *Condemnatio Pecuniaria* in the *Cognitio*

In contrast to the formulary procedure, the *cognitio extra ordinem* or *cognitio extraordinaria* is not subject to the restriction to monetary condemnation.²⁹ The principle of *condemnatio pecuniaria* does not apply to the *cognitio* procedure, since there is no binding force of the *formulae* and, consequently, no constraint imposed by condemnation-clauses directed toward monetary compensation.³⁰ The judge may render a *condemnatio in ipsam rem*, which can then be directly enforced in execution.³¹

Already for the classical and early post-classical period, evidence can be adduced demonstrating the direct enforceability of specific performance in the *cognitio extraordinaria*.³²

For example, the rescript C. 3.34.5 (Philippus Arabs 246)³³ concerns the actual enforcement in kind of a servitude in a provincial setting.³⁴ Owing to construction carried out on a neighbouring property in violation of a real servitude – possibly a *servitus altius non tollendi* – the claimant may obtain an order from the provincial governor, acting as the competent judge, that ensures restoration of the former

²⁹ Johnston, *The Roman Law of Trusts* (Oxford, 1988) 226 and 254 f; Burdese, (1990) *SemCompl* 175 (180 f); Kaser and Hackl, *Zivilprozeßrecht* 495 and 609 ff; Rüfner, ‘Cognitio’, 257 (265); Babusiaux, ‘Zum Rechtsschutz von Fideikommissen im Prinzipat’ (2019) *ZRG-RA* 140 (144) footnote 17; Willems, ‘Kognitionsprozess’, 492 (505 f).

³⁰ Johnston, *Trusts* 224; Willems, ‘Kognitionsprozess’, 492 (494).

³¹ See, for example, CTh. 11.36.25 (Valens/Gratian/Valentinian 378) = C. 7.65.5.1.

³² Digest of sources by Johnston, *Trusts* 226 footnote 19; cf. also Kaser and Hackl, *Zivilprozeßrecht* 495 f footnote 12.

³³ *Si quid pars diversa contra servitutem aedibus tuis debitam iniuriöse extruxit, praeses provinciae revocare ad pristinam formam, damni etiam ratione habita, pro sua gravitate curabit.*

Translation by Frier (ed.), *The Codex of Justinian. Volume 1* (Cambridge, 2016) 743: If your adversary has constructed anything which is detrimental to the servitude enjoyed by your houses, the governor will, in accordance with his power, take care that the former condition is restored and that the cost of the damage is reckoned.

³⁴ Cf. on the already high importance of the *cognitio* procedure in the provinces from the very outset: Kaser and Hackl, *Zivilprozeßrecht* 439 ff; Rüfner, ‘Cognitio’, 257 (261 f); Willems, ‘Kognitionsprozess’, 492 (496 ff).

condition (*praeses provinciae revocare ad pristinam formam [...], curabit*),³⁵ for instance by condemning the neighbour to dismantle the construction.³⁶

A further piece of evidence for the direct enforcement of specific performance in the *cognitio* procedure is provided by Ulp. (68 ad ed.) D. 43.4.3 pr.,³⁷ where the late classical jurist Ulpian addresses compulsory access to the object in question in the context of trust law.³⁸ There are two available options when enforcing a *missio in possessionem* in favour of a beneficiary appointed by *fideicommissum* who has been sent to take possession: the beneficiary may proceed under the formulary procedure by means of the applicable interdict, which – through its subsequent proceedings – ultimately results in the condemnation of the opposing party to pay a sum of money.³⁹ Otherwise, the magistrate enforces the *missio* he has ordered directly in extraordinary *cognitio* by virtue of his official authority, if necessary even by the use of coercive force (*per manum militarem*). The second alternative therefore leads to execution in kind.

In Justinianic law, the possibility of condemnation to specific performance is likewise clearly attested. Thus, I. 4.6.32 states in general terms that the judge must condemn either to a certain sum of money or – by way of a judgment for specific performance –

³⁵ Cf. on this rescript also Liebs, ‘Kommilitonen erhalten Bescheid. Die Reskripte der Soldatenkaiser an Soldaten’, in Babusiaux and Kolb (eds.), *Das Recht der „Soldatenkaiser“. Rechtliche Stabilität in Zeiten politischen Umbruchs?* (Berlin/München/Boston, 2015) 89 (101).

³⁶ Thus, in the comparable case in C. 3.34.9 (Diocletian/Maximian 293); the confirmation of C. 3.34.5 by C. 3.34.9 is also emphasized by Liebs, ‘Reskripte’, 89 (101).

³⁷ *Si quis missus fuerit in possessionem fideicommissi servandi causa et non admittatur, potestate eius inducendus est in possessionem, qui eum misit, aut si quis volet uti interdicto, consequens erit dicere interdictum locum habere. sed melius erit dicere extra ordinem ipsos iure suae potestatis exsequi oportere decretum suum, nonnumquam etiam per manum militarem.*

Translation by Watson (ed.), *Digest of Justinian 485*: If someone has been sent to take possession for the purpose of safeguarding a *fideicommissum* and is not admitted, he is to be brought into possession by the power of the person who sent him; or if he wishes to employ the interdict, it will follow that the interdict must be said to lie. But it will be better to say that the authorities themselves should carry out their decree *extra ordinem* by right of their power, sometimes even by military force.

³⁸ Cf. regarding this text in particular Babusiaux, (2019) *ZRG-RA* 140 (156 ff); see also Isola, ‘Überlegungen zur Litiskreszenz bei der actio ex testamento’ (2020) *ZRG-RA* 70 (105 ff).

³⁹ See Ulp. (72 ad ed.) D. 43.4.1 pr. and 5; Babusiaux, (2019) *ZRG-RA* 140 (156); cf. also Isola, (2020) *ZRG-RA* 70 (108); regarding the subsequent proceedings following interdicts see, for instance, Kaser and Hackl, *Zivilprozeßrecht* 416 ff.

to the surrender of an object.⁴⁰ Further sources express a preference for specific enforcement.⁴¹

However, these texts do not yet permit the inference of a general priority of condemnation and enforcement in kind.⁴² After all, the Justinianic compilation likewise contains numerous texts attesting to the *condemnatio pecuniaria* even in cases involving obligations of specific performance.⁴³ The sources therefore point to a differentiated legal regime:⁴⁴ in particular, where claims seek the recovery of objects, direct enforcement in kind is appropriate. For other obligations of specific performance (for example, a claim for delivery of the goods under a contract of sale), however, condemnation to the monetary value appears to have remained the norm.

III. Acquisition of Property because of a Monetary Judgment: The “Expropriatory Effect” of the *Condemnatio Pecuniaria*

In disputes concerning the recovery of property belonging to the plaintiff, the principle of *condemnatio pecuniaria* leads to what is known as “Enteignung im Formularprozess”⁴⁵ – expropriation in the formulary procedure. If the defendant does not restore the disputed thing (*res litigiosa*) during the pending lawsuit, the plaintiff can ultimately obtain only a money condemnation and is compensated with

⁴⁰ *Curare autem debet iudex, ut omnimodo, quantum possibile ei sit, certae pecuniae vel rei sententiam ferat, etiam si de incerta quantitate apud eum actum est.*

Translation by Sandars, *The Institutes of Justinian*, 15th edn. (London, 1922) 452: A judge ought, as much as possible, to take care that his sentence awards a thing or sum certain, even though the claim submitted to him may have been for an uncertain quantity.

⁴¹ See especially C. 7.4.17 (Justinian 530) in the context of the legacy of a slave, which is to be manumitted, as well as the (interpolated) forcible taking of the object *manu militari* in D. 6.1.68 (on this below, Section V.A); see also C. 6.2.22.3-3a (Justinian 530); for further sources cf. Kaser and Hackl, *Zivilprozeßrecht* 609 f footnote 28; cf. also Winkel, ‘Specific Performance’, 9 (13 ff).

⁴² However, this view is shared by Kaser, *Das Römische Privatrecht. Zweiter Abschnitt. Die nachklassischen Entwicklungen*, 2nd edn. (München, 1975) 343 f; less certain however Kaser and Hackl, *Zivilprozeßrecht* 609 f; Wenger, (1939) *ZRG-RA* 315 (355) identifies a „Prinzip der Sachkondemnation und Sachexekution“ in Justinianic law.

⁴³ For instance the above mentioned texts (D. 19.1.1 pr., D. 19.1.11.9 and D. 42.1.13.1 – footnotes 9 and 10); cf. also C. 4.49.4 (Diocletian/Maximian 290) as well as C. 4.49.10 (Diocletian/Maximian 293).

⁴⁴ Zimmermann, *Law of Obligations* 772 f calls it a „patchy picture“; Winkel, ‘Specific Performance’, 9 (17) emphasises „the ambiguity of the texts in Justinian’s legislation“; see also Albers, *Perpetuatio obligationis* 118 f with footnote 3.

⁴⁵ This designation goes back to the study by Levy, (1921) *ZRG-RA* 476 (476 ff); cf. furthermore Pennitz, *Enteignungsfall* 252 f and 321.

the amount awarded in the judgment, while the thing claimed remains in the hands of the condemned party.

This result – allocation of the disputed thing to the condemned party, who in return is obliged to pay its value – resembles a purchase of the object in dispute. Accordingly, Roman jurists draw an analogy to the contract of sale (*emptio venditio*). Ulpian, for example, expresses this succinctly:⁴⁶

Ulp. (75 ad ed.) D. 41.4.3

Litis aestimatio similis est emptioni.

A judicial award of the value is akin to a purchase.⁴⁷

The *litis aestimatio* thus enables the condemned party to acquire the *res litigiosa* and functions as a title of acquisition (*iusta causa*).⁴⁸ Different consequences arise depending on whether the defendant still has the object at the time of his condemnation (Section A), or whether he lost possession beforehand (Section B). A special problem is presented by the case in which the monetary judgment arising from an action for restitution is rendered in favour of a person who is not the owner of the disputed thing (Section C).

A. Monetary Judgment Against the Possessor

The condemned possessor acquires the *res litigiosa* because of the analogous treatment of the monetary condemnation as a purchase. In this respect, the initial question is what legal protection regarding the object accrues to the condemned party. A further issue concerns the associated proprietary position.

Regarding legal protection, Iul. (19 dig.) D. 25.2.22 pr.⁴⁹ attests that – because a monetary condemnation is to be qualified as a purchase of the disputed thing (*qui*

⁴⁶ Further evidence: Ulp. (16 ad ed.) D. 6.2.7.1: *Si lis fuerit aestimata, similis est venditioni*; Ulp. (29 ad Sab.) D. 21.2.21.2: *ex secunda emptione, id est ex litis aestimatione*; Iul. (19 dig.) D. 25.2.22 pr.: *qui litis aestimationem suffert, emptoris loco habendus est*; Gai. (6 ad ed. prov.) D. 41.4.1: *Possessor, qui litis aestimationem optulit, pro emptore incipit possidere*; Ulp. (6 fideicomm.) D. 42.4.15: *emptori similis est: item is, qui rem in solutum accepit vel qui lite aestimata retinuit*.

⁴⁷ Translation: Watson (ed.), *Digest of Justinian* 442.

⁴⁸ Due to the lack of the *litis aestimatio* as title of acquisition, the reverse case of an (unjustified) acquittal of the possessor does not result in acquisition of the *res litigiosa* – cf. Pap. (20 quaest.) D. 20.1.3.1 (regarding an acquittal because of *iniuria iudicis* in a lawsuit concerning an *actio in rem*).

⁴⁹ *Si propter res amotas egero cum muliere et lis aestimata sit, an actio ei danda sit, si amiserit possessionem? movet me, quia dolo adquisiit possessionem. respondi: qui litis aestimationem suffert, emptoris loco habendus est. ideo si mulier, cum qua rerum amotarum actum est, aestimationem litis*

*litis aestimationem suffert, emptoris loco habendus est*⁵⁰ – an *actio in rem* is available as an active remedy and an *exceptio* as a defensive one. According to Julian, a (former) wife who has been condemned in favour of her (former) husband by the *actio rerum amotarum*⁵¹ is to be protected by an *actio in rem* if she subsequently loses possession. In the variant in which she does not lose possession and is later sued again by the husband (or his heir) with the *rei vindicatio*, she is to be granted an *exceptio*.⁵²

The mentioned *actio in rem* has to be the *actio Publiciana*.⁵³ The *rei vindicatio* does not come into consideration, since, in the variant of D. 25.2.22 pr., the woman requires an *exceptio* in order to defend her possession against the second action brought by the *maritus*. Consequently, the former husband must still be entitled to bring the *rei vindicatio* and must therefore still be the owner under *ius civile*. The acquisition by the possessor condemned to pay a sum of money also fits neatly into

praestiterit, adversus vindicantem maritum vel heredem mariti exceptionem habet et, si amiserit possessionem, in rem actio ei danda est.

Translation by Watson (ed.), *The Digest of Justinian. Volume 2*, 2nd edn. (Philadelphia, 1998) 277: If a man sues his wife for unlawful removal of property and a valuation is made in court, would she have an action to recover this property if she lost possession? This question interests me, because she obtained possession by fraud. I replied that where anyone pays the amount the property was valued at in court, he should be thought of as a buyer. So if the woman sued for property unlawfully removed pays its valuation in court, she will have a defense against the husband or his heir if either of them claims it as his own. If she loses possession, she should be granted a real action.

⁵⁰ With regard to the determining factor for the “expropriatory effect” of the *condemnatio pecuniaria*, the sources employ inconsistent terminology – e.g.: “*litis aestimationem optulit*” in Ulp. (16 ad ed.) D. 6.2.7.1 and Gai. (6 ad ed. prov.) D. 41.4.1; “*oblatam litis aestimationem suscepit*” in Ulp. (28 ad ed.) D. 13.6.5.1; “*litis aestimatione damnatus sit*” in Nerat. (1 resp.) D. 16.3.30; “*litis aestimationem suffert/praestiterit*” in Iul. (19 dig.) D. 25.2.22 pr.; for further references, see Levy, (1921) *ZRG-RA* 476 (511 ff). It would seem plausible that the judgment itself is decisive, rather than the mere offer or the actual payment of the *litis aestimatio* – cf. Klingenberg, ‘Verhandlung apud iudicem’, 413 (456).

⁵¹ The *actio rerum amotarum* concerns a special case of theft: it is available to a spouse after the divorce has taken place and is aimed at the return of property that the other spouse unlawfully removed on the occasion of divorce (*divortii causa*). Regarding this action, cf. e.g.: Kaser, *Das Römische Privatrecht. Erster Abschnitt. Das altrömische, das vorklassische, und klassische Recht*, 2nd edn. (München, 1971) 618 f; Schmatzberger, ‘Der prozessuale Erwerb scheidungs halber entwendeter Sachen in D. 25.2.22 pr.’ (2023) *JEHL* 214 (215 ff) with further references in footnote 8.

⁵² Cf. on this text, for instance: Pennitz, *Enteignungsfall* 307 f; Wacke, *Actiones suas praestare debet. Die Last zur Klagenabtretung an den Ersatzpflichtigen und dessen Eigentumserwerb – Römischrechtliche Grundlagen des Zessionsregresses nach § 255 (I. Fall) BGB* (Berlin, 2010) 276 f; Schmatzberger, (2023) *JEHL* 214 (214 ff); Schmatzberger, ‘„Pyrrhussieg“ *apud iudicem*? Sachverlust trotz erfolgreicher Klage’ (2023) *RIDA* 241 (246 ff).

⁵³ Explicitly attested in Ulp. (16 ad ed.) D. 6.2.7.1 (*si optulit reus aestimationem litis, Publicianam competere*).

the formula of the *actio Publiciana*,⁵⁴ which presupposes that the object in question has been sold and delivered to the acquirer (*emit <et> is ei traditus est*).⁵⁵ The requisite *emptio venditio* is provided by the analogous treatment of the *litis aestimatio* as purchase. Since the object is in fact already in the possession of the condemned party, the delivery is presumably to be understood as a *traditio brevi manu*.⁵⁶

The *exceptio* intended to protect the condemned possessor in a passive manner is most likely the *exceptio rei venditae et traditae*.⁵⁷ This is supported not only by the fact that this *exceptio* is the counterpart to the *actio Publiciana*. Another substantial argument is provided by Pomp. (6 ad Sab.) D. 47.2.9.1 (second case):⁵⁸ the owner

⁵⁴ *Caius Aquilius iudex esto. Si quem hominem Aulus Agerius (bona fide) emit et is ei traditus est, anno possedisset, tum si eum hominem, de quo agitur, eius ex iure Quiritium esse oporteret, qua de re agitur, si ea res (arbitrio iudicis) Aulo Agerio non restitueretur, quanti ea res erit, tantam pecuniam iudex Numerium Negidium Aulo Agerio condemnato, si non paret absolvo.*

Reconstruction of the formula according to Lenel, *Das edictum perpetuum. Ein Versuch zu seiner Wiederherstellung*, 3rd edn. (Leipzig, 1927) 169 ff; concurrent reconstruction by Mantovani, *Le formule del processo private romano. Per la didattica delle Istituzioni di diritto romano*, 2nd edn. (Padova, 1999) 46 (number 14); regarding the problems of reconstruction, see, for instance, Platschek, '§ 63 – Herausgabeklage des redlichen Erwerbers (*actio Publiciana*)', in Babusiaux, Baldus, Ernst, Meissel, Platschek and Rübner (eds.), *Handbuch des Römischen Privatrechts. Band II* (Tübingen, 2023) 1729 (1740 ff).

⁵⁵ Attested in Gai. 4.36; *et* is added by Lenel, *Edictum perpetuum* 171 with footnote 5; Platschek, 'Actio Publiciana', 1729 (1742), however, pleads for the addition of *postquam*.

⁵⁶ For the subsumption of the monetary condemnation of the possessor under the formula of the *actio Publiciana*, cf. for example: Penitz, *Enteignungsfall* 309 f footnote 267; Wacke, *Actiones suas praestare debet* 278 f and 284 ff; Schmatzberger, (2023) *JEHL* 214 (219 f); Schmatzberger, (2023) *RIDA* 241 (248 ff). Levy, (1921) *ZRG-RA* 476 (484 f and 498 ff) does not classify this as genuine *traditio* and therefore advocates for an analogous *actio quasi Publiciana*, with reference to Pomp. (29 ad Sab.) D. 6.1.70 (*Nec quasi Publicianam quidem ei dandam placuit*).

⁵⁷ An *exceptio quasi rei venditae et traditae* is accordingly assumed by Levy, (1921) *ZRG-RA* 476 (498 f), see footnote 56 above; an overview of the other possibilities discussed in the literature can be found in Schmatzberger, (2023) *RIDA* 241 (247) footnote 23.

⁵⁸ *Sed si eam a fure vindicasset, conditio mihi manebit. sed potest dici officio iudicis, qui de proprietate cognoscit, contineri, ut non aliter iubeat restitui, quam si conditionem petitor remitteret: quod si ex conditione ante damnatus reus litis aestimationem sustulerit, ut aut omnimodo absolvat reum aut (quod magis placet), si paratus esset petitor aestimationem restituere nec restitueretur ei homo, quanti in litem iurasset, damnaretur ei possessor.*

Translation by Watson (ed.), *Digest of Justinian* 4252: But if I have brought my *vindicatio* against the thief, I will still have the *condictio*; it can, though, be said that it is within the sphere of the judge who decides the issue of ownership to order restitution of the thing to the owner only if the latter surrender his *condictio*; but if the defendant has already been subjected to an assessment of value in the *condictio*, having been found liable, it will be for the judge in the *vindicatio* either to absolve the defendant or [preferably], if the plaintiff be prepared to refund the assessment but the slave be not restored to him, to condemn the slave's possessor to the plaintiff for the amount that the plaintiff has sworn in the proceedings.

brings the *rei vindicatio* against a thief who has already been condemned because of a *condictio ex causa furtiva* and has paid the condemnation sum. In the second lawsuit, the judge may either acquit or – if the plaintiff is prepared to refund the *litis aestimatio* of the first trial – permit the successful assertion of the *rei vindicatio*, thereby ultimately allowing a condemnation for a sum of money determined by an oath as to value on the part of the plaintiff (*iusiurandum in litem*). No *exceptio* is mentioned.

Thus, in both the scenario of D. 25.2.22 pr. (variant) and that of D. 47.2.9.1 (second case), the owner first proceeds successfully against the possessor by means of a delictual action for the recovery of the disputed object and subsequently by means of the *rei vindicatio*; yet an *exceptio* is granted only in D. 25.2.22 pr. If the *exceptio* were based on *res iudicata* or on the plaintiff's *dolus*, it would also have had to be addressed in D. 47.2.9.1 (second case). The essential difference lies in the fact that the *condictio furtiva* – unlike the *actio rerum amotarum*⁵⁹ – did not involve the *iusiurandum in litem*.⁶⁰ Therefore, the first action in D. 47.2.9.1 (second case) does not yet exert the same intensified pressure toward restitution as does the subsequent *rei vindicatio*. The *condictio* for theft therefore does not appear to lead to an “expropriation” of the plaintiff.⁶¹ The *exceptio* in D. 25.2.22 pr. is thus explained – in contrast to D. 47.2.9.1 (second case) – by the acquisition of bonitary ownership through money condemnation (on this, see immediately below) as an *exceptio rei venditae et traditae*.⁶²

Furthermore, the question arises as to what proprietary status is brought about by the “expropriatory effect” of monetary condemnation.⁶³ On the one hand, the classical

⁵⁹ Pomp. (16 ad Sab.) D. 25.2.8.1.

⁶⁰ Viaro, *L' 'arbitratus de restituendo' nelle formule del processo privato romano* (Napoli, 2012) 171 f; Schmatzberger, (2023) *RIDA* 241 (263) with further references in footnotes 107 and 108; in the case of *condictiones*, there is normally no *iusiurandum in litem*: Paul. (26 ad ed.) D. 12.3.6 and Marcian. (4 reg.) D. 12.3.5.4; see more detailed below at footnote 127.

⁶¹ Levy, (1921) *ZRG-RA* 476 (488 ff); Wacke, *Actiones suas praestare debet* 281 ff; Viaro, *Arbitratus* 173.

⁶² Cf. Schmatzberger, (2023) *JEHL* 214 (220 ff); see also Wacke, *Actiones suas praestare debet* 277 and 282.

⁶³ This has been the subject of extensive discussion in the Roman legal scholarship – for an overview of the different views cf. Wacke, *Actiones suas praestare debet* 270 ff and Schmatzberger, (2023) *RIDA* 241 (252 f).

texts speak of *usucapio* (*pro emptore*).⁶⁴ On the other hand, the sources use terminology of ownership.⁶⁵ Ownership under the *ius civile*, however, must in any event be excluded: otherwise, in the variant of D. 25.2.22 pr., the woman would not require the *exceptio* to defend herself against the *rei vindicatio* brought by her former husband, and the sources would not refer to acquisition by usucapion (*pro emptore*) or to the *actio Publiciana* so frequently. Accordingly, where the texts employ terminology of ownership, what is meant must be bonitary (also called praetorian) ownership.

The parameters according to which the party condemned to pay a sum of money acquires praetorian ownership are less clearly discernible in the sources. In Paul. (10 ad Sab.) D. 6.1.46,⁶⁶ reference is made to the immediate transfer of ownership of the disputed thing, as valued on oath, to the possessor. A condition for the acquisition of praetorian ownership could therefore be that the plaintiff determines the value of the dispute by means of the *iusiurandum in litem*,⁶⁷ or at least has the possibility of doing so.⁶⁸ An indication of this is the fact that the *condictio ex causa furtiva* – the only action for recovery available to the owner that does not involve the *iusiurandum in litem* – does not appear to lead to an “expropriation” (see above in the main text at footnote 61). Doubt is raised, however, by the circumstance that an acquisition of the object in question can nonetheless take place (albeit at a later point in time) because of a money judgment. This can occur in the case of condemnation of a non-possessor

⁶⁴ See e.g. Gai. (6 ad ed. prov.) D. 41.4.1 (*Possessor, qui litis aestimationem optulit, pro emptore incipit possidere*); e contrario also Ulp. (31 ad Sab.) D. 41.3.27 (*idem et in litis aestimatione placet, ut, nisi vere quis litis aestimationem subierit, usucapere non possit*).

⁶⁵ Ulp. (28 ad ed.) D. 13.6.5.1 (*rem offerentis facit*); Nerat. (1 resp.) D. 16.3.30 (*rem tuam fieri*); especially Paul. (10 ad Sab.) D. 6.1.46 (*dominium*) – the term *dominium* can also refer to bonitary ownership, as the mention of *duplex dominium* in Gai. 1.54 shows; Levy, (1921) *ZRG-RA* 476 (484) footnote 1; Pennitz, *Enteignungsfall* 314 footnote 285.

⁶⁶ *Eius rei, quae per in rem actionem petita tanti aestimata est, quanti in litem actor iuraverit, dominium statim ad possessorem pertinet: transegisse enim cum eo et decidisse videor eo pretio, quod ipse constituit.*

Translation by Watson (ed.), *The Digest of Justinian. Volume I*, 2nd edn. (Philadelphia, 1998) 208: Where a thing, which has been [successfully] sued for by action *in rem*, is valued [instead of being handed over] at the sum which the plaintiff swore for the purposes of the action, the ownership at once passes to the possessor. For the latter is deemed to have negotiated and settled the matter with the plaintiff at his own valuation.

⁶⁷ In this sense e.g.: Pennitz, *Enteignungsfall* 314 ff; Babusiaux, ‘Die Durchsetzung ökonomischer Interessen im klassischen römischen Zivilprozess’, in Lo Cascio and Mantovani (eds.), *Diritto romano e economia. Due modi di pensare e organizzare il mondo (nei primi tre secoli dell’Impero)* (Pavia, 2018) 707 (717 ff).

⁶⁸ Schmatzberger, (2023) *RIDA* 241 (261 ff); cf. already Levy, (1921) *ZRG-RA* 476 (493 ff).

even after negligent loss of the *res litigiosa*, where the *iusiurandum in litem* is generally inapplicable and thus irrelevant. Accordingly, D. 6.1.46 could also quite plausibly be explained by its connection with Paul. (17 ad Plaut.) D. 6.1.47.⁶⁹ D. 6.1.46 may merely contrast the immediate transfer of *dominium* to the possessor on the one hand with the case of the condemned non-possessor, who does not (yet) acquire the *res litigiosa* due to the lack of *possessio* on the other hand (on this, see immediately below, Section B).⁷⁰

For the acquisition of bonitary ownership to be considered at all, the plaintiff must – according to the principle “*nemo plus iuris transferre potest quam ipse habet*” – himself be vested with a corresponding proprietary right. This can be shown by way of example in the case of the monetary condemnation of a third-party possessor because of the *vindicatio pignoris* (see below, Section C). Accordingly, mere possession capable of leading to usucapion is in any event the result where the plaintiff is not at least a praetorian owner.⁷¹

B. Monetary Condemnation of the Non-Possessor

In the case of monetary condemnation of the possessor, the “expropriation” occurs immediately (see Section A above). In contrast, when a defendant who no longer has the *res litigiosa* is condemned on the basis of an action for recovery brought by the owner, acquisition by way of *condemnatio pecuniaria* can take place only at a later point in time. For the condemned party to acquire the *res litigiosa* (and the associated legal protection), possession must first be recovered, as follows from the texts just cited, D. 6.1.46 and D. 6.1.47:⁷² unlike in the case of possession of the disputed thing (*res praesens*), where possession is lacking (*res absens*), the condemned party must first regain possession of the object in question in order to acquire ownership. The reason lies indeed in the fact that the *litis aestimatio* as *iusta causa* for the acquisition of ownership (grounded in the analogy to a purchase) and the *traditio* (*brevi manu*)

⁶⁹ *Haec si res praesens sit: si absens, tunc cum possessionem eius possessor nactus sit ex voluntate actoris: et ideo non est alienum non aliter litem aestimari a iudice, quam si caverit actor, quod per se non fiat possessionem eius rei non traditum iri.*

Translation by Watson (ed.), *Digest of Justinian I* 208: That is, if the thing is present. If it is somewhere else, then [ownership passes] only when the possessor obtains possession of it with the plaintiff's consent. It follows, therefore, that the judge's valuation should be made only if the plaintiff has given a *cautio* that he will do nothing to prevent possession being delivered.

⁷⁰ Cf. Schmatzberger, (2023) *RIDA* 241 (255 ff) for a comprehensive analysis of this topic.

⁷¹ Kaser, *Privatrecht I* 437; Wacke, *Actiones suas praestare debet* 270.

⁷² See footnote 66 (D. 6.1.46) and footnote 69 (D. 6.1.47).

must be present cumulatively for the requirements of the *actio Publiciana* to be satisfied.⁷³ The non-possessor, however, initially lacks the physical control over the *res litigiosa* required for the assumption of a *traditio*. The *causa* of the *litis aestimatio* alone is not yet sufficient for acquisition.⁷⁴

The non-possessor therefore does not (yet) have an *actio Publiciana* because of the monetary condemnation. However, he is not entirely without protection. In the absence of an action of his own, other means are available to the non-possessor to complete the procedural acquisition by (re-)obtaining the object in question: on the one hand, he may demand the cession of the actions to which the plaintiff is entitled by virtue of his ownership.⁷⁵ On the other hand, a duty on the part of the plaintiff to provide security also operates in his favour. By means of the assigned actions, he can pursue the recovery of the respective object against third parties. The security is intended to protect him in the internal relationship to the (former) plaintiff.

The plaintiff's duty to cede his actions to the condemned non-possessor is addressed repeatedly in the sources. In the context of the *rei vindicatio*, for example, Paul. (21

⁷³ Cf. Ulp. (16 ad ed.) D. 6.2.7.16; see also Ulp. (16 ad ed.) D. 6.2.9.1 and 2.

⁷⁴ See above Section III.A at footnotes 54-56.

⁷⁵ For cession, the *rei vindicatio* is of particular relevance, but also the *actio ad exhibendum*, the *actio legis Aquiliae*, and the *actio servi corrupti*, and perhaps actions arising from theft – Klingenberg, 'Die Ersitzung während des Eigentumsprozesses', in Klingenberg, Rainer and Stiegler (eds.), *Vestigia Iuris Romani. Festschrift für Gunter Wesener zum 60. Geburtstag am 3. Juni 1992* (Graz, 1992) 237 (251); Wimmer, *Besitz und Haftung des Vindikationsbeklagten* (Köln/Weimar/Wien, 1995) 117 footnote 514; Wacke, *Actiones suas praestare debet* 81 f.

ad Sab.) D. 6.1.21⁷⁶ discusses – inter alia⁷⁷ – the *cessio actionum* in the case of a condemnation due to the escape of a slave who ought to have been kept in custody.⁷⁸ However, a defendant may demand assignment (or provision of security for a future transfer of actions) only if he caused the loss of a disputed thing merely through negligence (*culpa*). If he gave up possession deliberately (with *dolus*), he is excluded from the *cessio actionum*.⁷⁹

The cession of actions to the condemned non-possessor is also attested for contractual actions.⁸⁰ Unlike in the case of the *rei vindicatio*, however, the assignment to a defendant sued by an *actio ex contractu* does not appear to be precluded when he is reproached with *dolus* in relation to the loss of the *res litigiosa*. This is attested

⁷⁶ *Si a bonae fidei possessore fugerit servus, requiremus, an talis fuerit, ut et custodiri debuerit. nam si integrae opinionis videbatur, ut non debuerit custodiri, absolvendus est possessor, ut tamen, si interea eum usuceperat, actionibus suis cedat petitori et fructus eius temporis quo possedit praestet. quod si nondum eum usucepit, absolvendum eum sine cautionibus, ut nihil caveat petitori de persequenda ea re: quo minus enim petitor eam rem persequi potest, quamvis interim, dum in fuga sit, usucapiat? nec iniquum id esse Pomponius libro trigensimo nono ad edictum scribit. si vero custodiendus fuit, etiam ipsius nomine damnum debet, ut tamen, si usu eum non cepit, actor ei actionibus suis cedat. Iulianus autem in his casibus, ubi propter fugam servi possessor absolvitur, etsi non cogitur cavere de persequenda re, tamen cavere debere possessorem, si rem nactus fuerit, ut eam restituat, idque Pomponius libro trigensimo quarto variarum lectionum probat: quod verius est.*

Translation by Watson (ed.), *Digest of Justinian I* 204: If a slave has run away from a possessor in good faith, we should ask whether the slave was such that he ought to have been kept in custody. For if he appeared to be of unblemished reputation, so that he did not need to be kept in custody, the possessor should as a rule be acquitted. If, however, he has usucaptured the slave in the meantime, he must transfer his rights of action to the plaintiff and be liable for the profits accruing during the time that he possessed the slave. If he has not yet usucaptured, he should be acquitted without giving any *cautiones*, so that he need give no *cautio* to the plaintiff about tracing the slave. For cannot the plaintiff trace it just as well himself, even though in the meantime, while the slave is on the run, the defendant has usucaptured? Pomponius writes in the thirty-ninth book of *Edict* that this is not unjust. If, on the other hand, the slave ought to have been kept in custody, the defendant should be condemned in the value of the slave itself, provided that the plaintiff assigns his rights of action to him, if the defendant has not yet usucaptured. Julian holds, however, that in those cases, where the possessor is acquitted because a slave is in flight, although he is not compelled to give a *cautio* about tracing the slave, yet he should give a *cautio* that if he gets hold of it, he will still restore it. Pomponius, in the thirty-fourth book of his *Readings*, approves, and it is the better view.

⁷⁷ Paulus addresses, via differentiated case-variants, the issues of liability and allocation of the object in dispute in an ownership lawsuit against a possessor by usucapion when the claimed slave has fled.

⁷⁸ Cf. on this complex text, for instance, Klingenberg, ‘Ersitzung’, 237 (248 ff); Wimmer, *Besitz und Haftung* 50 ff; Wacke, *Actiones suas praestare debet* 73 ff.

⁷⁹ Paul. (13 ad Sab.) D. 6.1.69; Pap. (12 quaest.) D. 6.1.63 (first sentence).

⁸⁰ Regarding the *locatio conductio operis*, see e.g. Gai. (10 ad ed. prov.) D. 19.2.25.8 and Lab. (5 post. a Iav. epit.) D. 19.2.60.2.

by Marcell. (4 dig.) D. 42.1.12⁸¹ – at least – for the actions arising from the contracts of loan for use and deposit.⁸²

Apart from the cession of his actions, the plaintiff may also be required to provide security (*cautio*) in order to safeguard the (future) acquisition of the disputed object by the non-possessor. In D. 6.1.47,⁸³ the plaintiff must provide security that he will not prevent the defendant from (re-)acquiring possession. If the plaintiff subsequently regains the *res litigiosa*, the duty to carry out restitution arises from the *cautio de restituendo*.⁸⁴

Protection by means of *cautiones* is particularly relevant where the former plaintiff regains the *res litigiosa* before the defendant, since the assigned *rei vindicatio* cannot be brought against the owner himself.⁸⁵ However, in the sphere of contractual liability (at least in the case of a loan contract), the defendant is not necessarily without legal protection, even when no *cautio* was provided: in the context of *commodatum*, the sources attest that the borrower may proceed with the contrary action against the lender (and former plaintiff).⁸⁶ By means of the *actio commodati contraria*, he can

⁸¹ *In depositi vel commodati iudicio, quamquam dolo adversarii res absit, condemnato succurri solet, ut ei actionibus suis dominus cedat.*

Translation by Watson (ed.), *Digest of Justinian* 450: Where the action on a deposit or a loan for use be brought, then, even though the thing be missing through the fraud of the defendant, on condemnation, he should receive the relief that the owner make over to him his own actions.

⁸² The explanation for this differentiation lies presumably in the fact that, in contractual relationships (specifically *depositum* and *commodatum*), the owner can choose to whom he entrusts his property. Where, in the absence of a contract, the owner is confined to the *rei vindicatio*, he does not have this free choice of the party obliged to make restitution. Because he voluntarily entrusts his property to another, the contractual creditor can more readily be said to bear responsibility for the dishonest conduct of his counterparty than the owner, who typically stands in no special (contractual) relationship to the defendant in a *rei vindicatio*.

⁸³ See on this already in the main text above at footnote 69.

⁸⁴ For the plaintiff's *cautio de restituendo*, see for example Pomp. (11 ad Sab.) D. 13.6.13 pr.; cf. also D. 6.1.21 concerning such a security provided by the defendant (above, footnote 76).

⁸⁵ This would contradict the concept of cession under Roman law – Pennitz, *Enteignungsfall* 319; Wacke, *Actiones suas praestare debet* 309.

⁸⁶ Paul. (29 ad ed.) D. 13.6.17.5 and Afr. (8 quaest.) D. 13.6.21 pr.; cf. on this issue in particular Scheibelreiter, 'Konträrklage oder *condictio*? Marginalia zu D. 13.6.21 pr. (Afr. 8 *quaest.*)', in Piro (ed.), *Scritti per Alessandro Corbino. Volume 6* (Tricase, 2016) 621 (621 ff).

obtain either restitution of the respective thing itself, or a reimbursement of the money paid as compensation.⁸⁷

A special case is addressed in the complex second part of Pap. (12 quaest.) D. 6.1.63,⁸⁸ which at first glance seems to contradict the other observations on the legal situation regarding the condemnation of the non-possessor. In the first sentence, Papinian initially deals with the assignment of the *rei vindicatio*. In the second sentence, he then addresses the opposite case, in which the cession (or provision of security) does not take place. The condemned non-possessor is nevertheless fully protected in terms of recovery of the *res litigiosa*, both against third parties and against the former plaintiff himself. This points to a real action available to the *condemnatus*, by which he can assert his rights against anyone, even though the monetary condemnation – due to the lack of possession – could not yet have led to acquisition of the disputed object and the corresponding legal protection through the *actio Publiciana*.

The passage can, however, be plausibly explained by assuming an exceptional case:⁸⁹ the condemned non-possessor might be entitled to the *actio Publiciana* for another reason than the money judgment, namely on the basis of an independent *usucapio*. This, in connection with the *iusta causa* provided by the *litis aestimatio*, could – as a special exception – allow enforcement even against the owner under *ius civile*.⁹⁰ The latter could not escape his duty to deliver the disputed thing even by offering

⁸⁷ By contrast, a *condictio*, attested for the analogous constellation in the *locatio conductio operis*, is directed exclusively at reimbursement of the paid compensation (Ulp. [32 ad ed.] D. 12.7.2) – on this, for example, Scheibelreiter, ‘Konträrklage’, 621 (638 ff).

⁸⁸ *Si culpa, non fraude quis possessionem amiserit, quoniam pati debet aestimationem, audiendus erit a iudice, si desideret, ut adversarius actione sua cedat: cum tamen praetor auxilium quandoque laturus sit quolibet alio possidente, nulla captione adficietur. ipso quoque, qui litis aestimationem perceperit, possidente debet adiuvari: nec facile audiendus erit ille, si velit postea pecuniam, quam ex sententia iudicis periculo iudicati recepit, restituere.*

Translation by Watson (ed.), *Digest of Justinian* 1 210: If someone has lost possession through his own fault, but without fraud, since he must submit to paying the assessed value, his application ought to be granted by the judge, if he asks that his opponent transfer his own action to him. As the praetor will give him aid at any time, whoever is in possession, he will suffer no disadvantage. Indeed, he must be aided even when the party in possession is the one who received the assessed value; and the latter should not readily get a hearing if, having once received the assessed value as a result of the judge's order, at the risk of the defendant against whom judgment was given, he should afterward seek to give back the money [in exchange for the thing].

⁸⁹ See Wacke, *Actiones suas praestare debet* 310 ff.

⁹⁰ In this “enhancement” of the *actio Publiciana* based on a mere usucapion claim lies the *auxilium* of the *praetor* mentioned by Papinian.

repayment of the judgment sum from the prior lawsuit. The *res litigiosa* is therefore to be considered allocated to the condemned non-possessor definitively.

C. Judgment in Favour of a Non-Owner by Example of the *Vindicatio Pignoris*

The “expropriation” resulting from the *condemnatio pecuniaria* only takes effect when the plaintiff is the owner of the disputed object. This is illustrated, for example, in the context of the pledge vindication. If the pledgee brings a *vindicatio pignoris* for restitution against a third-party possessor, the defendant is not confronted with the person fully entitled to the disputed object *in rem*. The pledge is not owned by the plaintiff, but belongs to the pledgor, who is not a party to this lawsuit. The monetary judgment in favour of the pledgee does not (yet) lead to the transfer of (praetorian) ownership to the *condemnatus*. Procedural acquisition of the disputed object only becomes possible in the case of a subsequent *rei vindicatio* by the pledgor.

This special case – the *rei vindicatio* brought by the pledgor against a third-party possessor who has already been condemned in a prior lawsuit because of a *vindicatio pignoris* – is well attested in the sources.⁹¹ It is addressed repeatedly in the Digest, by several different classical jurists.⁹² Mayer-Maly even speaks of a leading case (“Leitfall”) of classical and post-classical legal scholarship.⁹³

If the third-party possessor is condemned to the assessed value of the pledged thing in favour of the pledgee because he does not provide restitution with regard to the pledge vindication, the *rei vindicatio* of the owner in a subsequent lawsuit is initially met by an *exceptio doli* of the defendant.⁹⁴ However, the *dominus* may overcome this *exceptio* and succeed with his action if he offers the defendant financial compensation.⁹⁵ The protection of the third-party possessor by means of the *exceptio*

⁹¹ Cf. for instance: Mayer-Maly, ‘Ein Leitfall der Digesten zur Vindikation eines Pfandes in der Hand eines Dritten’ (1955) *ZRG-RA* 347 (347 ff); Wubbe, ‘Der Streitwert bei der actio Serviana’, in Medicus and Seiler (eds.), *Festschrift für Max Kaser zum 70. Geburtstag* (München, 1976) 179 (191 ff); Bürge, *Retentio im römischen Sachen- und Obligationenrecht* (Zürich, 1979) 137 ff.

⁹² The case is addressed directly by Iul. (11 dig.) D. 13.7.28 pr. and Gai. (9 ad ed. prov.) D. 20.6.2, similarly by Pap. (2 resp.) D. 6.1.65 pr. and by analogy or reference it appears in Paul. (23 ad ed.) D. 10.2.29 as well as in Ulp. (20 ad ed.) D. 10.3.7.12.

⁹³ Mayer-Maly, (1955) *ZRG-RA* 347 (348).

⁹⁴ D. 13.7.28 pr.; D. 10.2.29; that the *exceptio* in question is the *exceptio doli* follows from its explicit mention in D. 6.1.65 pr. In D. 20.6.2, no *exceptio* is explicitly mentioned, so a dismissal of the action by the *praetor* himself (*denegatio actionis*) may be addressed, or the *exceptio* may be implicitly assumed – cf. also Bürge, *Retentio* 139.

⁹⁵ Regarding the amount of compensation to be paid, the sources, at first glance, appear potentially contradictory – see for example Mayer-Maly, (1955) *ZRG-RA* 347 (351). According to D. 20.6.2, the

in the second lawsuit is therefore not based on acquisition of (bonitary) ownership of the pledged thing as a consequence of the money judgment in the former lawsuit.⁹⁶ Rather, it is grounded on a right of retention by which compensation can be obtained for payments made in connection with the earlier *vindicatio pignoris*.⁹⁷ The acquisition of the disputed object can only take place under the rule “*litis aestimatio similis est emptio*” as a result of the owner’s action in the second lawsuit if the defendant again fails to make restitution in kind and is condemned to a monetary payment.⁹⁸

IV. Mechanisms for Indirect Realization of Specific Performance in the Formulary Procedure

Despite the mandatory *condemnatio pecuniaria* in the classical formulary procedure, the aim is nevertheless that claims for specific performance be satisfied according to their actual content. This goal can be achieved by exerting pressure on the obligated party to render the performance in kind voluntarily before being condemned to pay its monetary value or even more. The mechanisms of indirect “coercion” serving this purpose are primarily the *actiones arbitrariae* and the plaintiff’s oath as to value (*iusiurandum in litem*). In addition, the threatened loss of honour in consequence of the defamatory actions (*actiones famosae*) may also provide an incentive to perform *in natura*.

third-party possessor is to be reimbursed the amount of the secured debt (*debitum*), whereas D. 13.7.28 pr. refers to the *litis aestimatio* of the first lawsuit. In terms of the monetary amount, *litis aestimatio* and *debitum* may differ, but they do not necessarily have to; they can also coincide. Therefore, a contradiction between the sources cannot be assumed as a matter of course.

⁹⁶ In that sense, however, e.g. Levy, (1921) *ZRG-RA* 476 (500).

⁹⁷ Accordingly, Bürge, *Retentio* 137 ff carries out the examination of the texts from the perspective of *retentio*.

⁹⁸ Cf. also Wubbe, ‘Streitwert’, 179 (192).

A. Restitution in Kind Due to Arbitrary Actions (*Actiones Arbitrariae*)

The realization of specific performance is served in particular by the so-called *actiones arbitrariae*.⁹⁹ By means of an arbitrary clause (*clausula arbitraria*)¹⁰⁰ directed at the restitution (*restituere*) or production of an object (*exhibere*), the condemnation of the defendant is made conditional upon the failure to restore or produce the object before judgment is given. By virtue of the arbitrary clause, the defendant (who would otherwise lose the case) has the opportunity to obtain an acquittal by carrying out restitution in kind; if, however, he does not carry out restitution, he is to be condemned in accordance with the formula. The prospect of avoiding the financial loss of a monetary condemnation is likely to make specific performance appear quite attractive to the defendant.

The category of *actiones arbitrariae* comprises all those actions whose formula contains a corresponding *clausula arbitraria*. A closer examination of the sources shows that this category encompasses a broad spectrum of quite diverse actions. The starting point for the analysis is the non-exhaustive catalogue in Justinian's *Institutes*:

I. 4.6.31

Praeterea quasdam actiones arbitrarias, id est ex arbitrio iudicis pendentes, appellamus, in quibus nisi arbitrio iudicis is cum quo agitur actori satisfaciat, veluti rem restituat vel exhibeat vel solvat vel ex noxali causa servum dedat, condemnari debeat. sed istae actiones tam in rem quam in personam inveniuntur. in rem veluti Publiciana, Serviana de rebus coloni, quasi Serviana, quae etiam hypothecaria vocatur: in personam veluti quibus de eo agitur, quod aut metus causa aut dolo malo factum est, item qua id, quod certo loco promissum est, petitur. ad exhibendum quoque actio ex arbitrio iudicis pendet. in his enim actionibus et

⁹⁹ Regarding the arbitrary actions, cf. for example: Kaser and Hackl, *Zivilprozeßrecht* 335 ff with extensive references in footnote 4; see also Schmatzberger, 'Nomen (non) est omen? Zur arbiträren Natur der sog. actio arbitraria' (2024) *JEHL* 201 (204 f); in particular on the *rei vindicatio* see e.g. Baldus, '§ 59 – Herausgabeklage des Eigentümers (*rei vindicatio*)', in Babusiaux, Baldus, Ernst, Meissel, Platschek and Rüdner (eds.), *Handbuch des Römischen Privatrechts. Band II* (Tübingen, 2023) 1537 (1581 f); in the context of the action arising from *metus* cf. furthermore Gaulhofer, *Metus. Der prätorische Rechtsschutz bei Furcht, Zwang und Gewalt* (Wien/Köln/Weimar, 2019) 173 ff as well as Forgó-Feldner, '§ 109 – Einrede und Klage wegen widerrechtlicher Zwangsausübung (*exceptio metus* und *actio quod metus causa*)', in Babusiaux, Baldus, Ernst, Meissel, Platschek and Rüdner (eds.), *Handbuch des Römischen Privatrechts. Band II* (Tübingen, 2023) 2930 (2955 ff).

¹⁰⁰ Its wording is approximately: *neque ea res (arbitrio iudicis) restituetur/exhibebitur* – cf. Kaser and Hackl, *Zivilprozeßrecht* 336 with further references; see also Ulp. (11 ad ed.) D. 4.2.14.11 (*et hoc fit his verbis edicti „neque ea res arbitrio iudicis restituetur“*).

ceteris similibus permittitur iudici ex bono et aequo secundum cuiusque rei de qua actum est naturam aestimare, quemadmodum actori satisfieri oporteat.

Some actions, again, are called arbitrary, as depending upon the *arbitrium* of the judge. In these, if the defendant does not, on the order of the judge, give the satisfaction awarded by the judge, and either restore, exhibit, or pay the thing, or give up a slave that has committed an injury, he ought to be condemned. Of these arbitrary actions some are real and some personal: real, as the actions *Publiciana*, *Serviana* as to the property of a farmer, and *quasi-Serviana*, also called *hypothecaria*; personal, as those by which a suit is commenced on account of something done through fear or fraud, and that by which something is sought which was promised to be paid at a particular place. The action *ad exhibendum* also depends on the *arbitrium* of the judge. In these actions, and others of a like nature, the judge may determine, according to the principles of equity and the circumstances of the particular case, the satisfaction which the plaintiff ought to receive.¹⁰¹

Apart from that, the sources contain more or less clear indications of an arbitrary clause and a corresponding arbitrary procedure for numerous other *actiones*. A detailed presentation of all the actions examined would exceed the scope of this paper. In summary, however, the *actiones arbitrarie* include: all *actiones in rem*,¹⁰² the vindication into slavery (*vindicatio ex libertate in servitutem*),¹⁰³ actions in the subsequent proceedings following interdicts,¹⁰⁴ the action for production (*actio ad*

¹⁰¹ Translation: Sandars, *Institutes of Justinian* 450.

¹⁰² The action for recovery of property (*rei vindicatio*) and its variations proposed in the edict; the action for inheritance (*hereditatis petitio*) and its special forms; the actions concerning usufruct (*vindicatio ususfructus* and *actio negatoria ususfructus*); the actions concerning servitudes (*vindicatio servitutis* and *actio negatoria servitutis*); the action for recovery of an object by a bona fide acquirer (*actio Publiciana*); the pledge vindication (*vindicatio pignoris*). See the reconstructions of the *formulae* by Lenel, *Edictum perpetuum* passim or Mantovani, *Formule* 37 ff.

¹⁰³ Since this action concerns the claim to a disputed person as a slave (and thus as property), its conception as an *actio in rem* corresponding to the formula of the *rei vindicatio* is natural – see also: Lenel, *Edictum perpetuum* 382 ff; Mantovani, *Formule* 39 (number 3).

For its counterpart, the vindication into freedom (*vindicatio ex servitute in libertatem*), the arbitrary character is, however, doubtful, since the slave is regarded as free during the proceedings anyway – see, for example, Paul. (51 ad ed.) D. 40.12.24 pr. and 3, or Gai. (8 ad ed. praet. urb.) D. 40.12.25.2 – and it therefore appears questionable what a *restitutio* according to the *clausula arbitraria* would consist of.

¹⁰⁴ The *formula arbitraria* and – in the procedure *per sponsionem* – the *iudicium secutorium* (or *iudicium Cascellianum*); see the description in Gai. 4.163 and Gai. 4.165–169.

exhibendum),¹⁰⁵ actions arising in the context of execution and the protection of creditors,¹⁰⁶ as well as various other *actiones in personam* aimed at the restoration of a lawful state of affairs.¹⁰⁷ For some of the actions examined, this classification must remain doubtful;¹⁰⁸ for others, inclusion among the arbitrary actions can be ruled out.¹⁰⁹

In the special procedure of the *actiones arbitrarie*, the judge is to work toward bringing about specific performance.¹¹⁰ If the *iudex* intends to decide in the plaintiff's favour, he does not issue an immediate final judgment but instead first renders a declaratory interlocutory decision (*pronuntiatio*) about the legitimacy of the plaintiff's claim.¹¹¹ He then orders the defendant – by means of a restitution order (*iussum de restituendo*) – to restore or produce the object *in natura*.¹¹²

¹⁰⁵ In case of the *actio ad exhibendum*, the arbitrary clause is not directed at restitution, but at production – cf. for instance Lenel, *Edictum perpetuum* 223.

¹⁰⁶ The actions of the purchaser of assets in execution proceedings (*actio Rutiliana* and *actio "Serviana"*); the action based on fraud against creditors (*actio Pauliana*); the actions of the patron to secure his compulsory share in the inheritance of his freedman (*actio Fabiana* and *actio Calvisiana*).

¹⁰⁷ The action on the ground of intimidation (*actio quod metus causa*) and the action based on fraud (*actio de dolo*); the action to ward off rainwater (*actio aquae pluviae arcendae*); the action for rescission (*actio redhibitoria*); the *noxal* action in cases of *iniuria* (*actio iniuriarum noxalis*).

¹⁰⁸ Such is the case with the *stipulatio* action arising from the *cautio pro praede litis et vindictiarum*, with the vindication into freedom (see above, footnote 103); with the action arising from the *receptum*-liability of *nautae*, *caupones* and *stabularii* (*actio de recepto*); and with the *actio certi ex testamento* for individually determined legacy items.

Despite the mention of *noxae deditio* in I. 4.6.31, it is generally doubtful whether the *noxal* actions – apart from the special case of the *actio iniuriarum noxalis* (see above, footnote 107) – should be classified as arbitrary actions per se. In the formula, *noxae deditio* comes into play as an alternative *condemnatio* – see e.g. Ulp. (66 ad ed.) D. 42.1.6.1: *Decem aut noxae dedere condemnatus*. Unlike in the case of a *clausula arbitraria*, this does not mean averting condemnation.

¹⁰⁹ In particular, for the *actio de eo quod certo loco*, which is even called "*actio arbitraria*" in the sources and is mistakenly listed in the demonstrative catalogue of I. 4.6.31. It does not serve to enforce specific performance, but to account for any differences in value when determining the judgment sum in the case of proceedings held at a location other than the arranged place of performance. On this cf. Schmatzberger, (2024) *JEHL* 201 (201 ff) with further references regarding this action in footnote 1.

¹¹⁰ Cf. on the procedure of the *actiones arbitrarie* e.g.: Kaser and Hackl, *Zivilprozeßrecht* 337 ff; Babusiaux, 'Durchsetzung', 707 (712 ff); Kaser, Knütel and Lohsse, *Römisches Privatrecht* 212 f; regarding the details of restitution in the *rei vindicatio*, see furthermore, Pennitz, *Enteignungsfall* 298 ff as well as Baldus, 'Rei vindicatio', 1537 (1581 f).

¹¹¹ In the *rei vindicatio*, for example, the pronouncement is that the thing claimed is the property of the plaintiff (Ulp. [9 ad ed.] D. 3.3.40.2: *rem meam esse pronuntietur*).

¹¹² The judicial *iussum* is widely attested in the sources, see e.g.: Ulp. (51 ad ed.) D. 6.1.68 (*Qui restituere iussum iudici non paret [...]*); Pomp. (6 ad Sab.) D. 47.2.9.1 (*[...] ut non aliter iubeat restitui*,

For restitution to be deemed adequate, the defendant must in principle take all measures (surrender of the *res litigiosa* and any additional acts) necessary to (re-)establish the state of affairs to which the plaintiff is entitled on the basis of the right asserted. The details of restitution therefore vary depending on the plaintiff's particular claim.¹¹³ Thus, in an ownership suit, for example, not only the disputed object itself but also any fruits and revenue must be surrendered.¹¹⁴ The implementation of restitution lies within the discretion of the judge, who determines the specific modalities.¹¹⁵

If the defendant duly renders restitution in kind, he is acquitted. If, however, he fails to do so, he is condemned to pay the *litis aestimatio*. In cases of wilful refusal to render restitution (*contumacia*)¹¹⁶ or of impossibility brought about with intent (*dolus*), the defendant faces an assessment of the value based on the plaintiff's oath as to value (*iusiurandum in litem*).¹¹⁷ Where neither *contumacia* nor *dolus* is present, the valuation is carried out objectively by the judge.¹¹⁸

quam si conditionem petitor remitteret: [...]; I. 4.17.2 (*[...] iubere eum debet, ut rem ipsam restituat cum fructibus [...]*); on this cf. Kaser and Hackl, *Zivilprozeßrecht* 338; Viaro, *Arbitratus* 190 ff; Baldus, 'Rei vindicatio', 1537 (1581).

¹¹³ Cf., in particular, on restitution in kind in context of the *actio quod metus causa* Gaulhofer, *Metus* 181 ff and Forgó-Feldner, 'Einrede und Klage wegen widerrechtlicher Zwangsausübung', 2930 (2958 f).

¹¹⁴ For details, see Baldus, 'Rei vindicatio', 1537 (1596 ff) with further references.

¹¹⁵ On the determination of the modalities of restitution *in natura* by the judge cf. Kaser and Hackl, *Zivilprozeßrecht* 338 (with numerous references to literature and sources).

¹¹⁶ The term *contumacia* denotes the defendant's disobedience to the judicial *iussum de restituendo* – Wubbe, 'Streitwert', 179 (180 ff); Kaser and Hackl, *Zivilprozeßrecht* 339; Babusiaux, 'Durchsetzung', 707 (713); Gaulhofer, *Metus* 214; Forgó-Feldner, 'Einrede und Klage wegen widerrechtlicher Zwangsausübung', 2930 (2956 f) footnote 157.

¹¹⁷ See in particular Paul. (13 ad Sab.) D. 12.3.2 (*[...] cum vero dolus aut contumacia non restituentis vel non exhibentis, quanti in litem iuraverit actor*); cf. for example: Wubbe, 'Streitwert', 179 (182); Kaser and Hackl, *Zivilprozeßrecht* 339; Grzimek, *Studien zur Taxatio* (München, 2001) 144 f; Harke, *Der Eid im klassischen römischen Privat- und Zivilprozessrecht* (Berlin, 2013) 166 ff; Klingenberg, 'Verhandlung apud iudicem', 413 (448); Baldus, 'Rei vindicatio', 1537 (1583); on the *iusiurandum in litem*, see below Section IV.B.

¹¹⁸ For the case of negligence see Ulp. (36 ad ed.) D. 12.3.4.4 (*Ex culpa autem non esse iusiurandum deferendum constat, sed aestimationem a iudice faciendam*) and Marcian. (4 reg.) D. 12.3.5.3 (*Sed in his omnibus ob dolum solum in litem iuratur, non etiam ob culpam: haec enim iudex aestimat*); on this, for instance: Harke, *Eid* 167 f; also Grzimek, *Taxatio* 145.

The same will also apply where the defendant bears no fault at all for the impossibility of restitution, provided that in such a case there is any liability that entails a monetary condemnation (as, for example, in the action arising from *metus*).

B. Oath as to Value by the Plaintiff (*Iusiurandum in Litem*)

By means of the *iusiurandum in litem*,¹¹⁹ the plaintiff can influence the determination of the judgment sum during the proceedings. He takes an oath regarding the value of the matter in dispute. This entails the risk for the defendant of being condemned to an excessive monetary sum, since the plaintiff's estimation of the value obviously invites overvaluation.¹²⁰ Ulpian, for example, in Ulp. (51 ad Sab.) D. 12.3.1, speaks of an assessment exceeding the actual value or price of the disputed thing.¹²¹ In this way, the financial detriment of a money judgment is further increased. This intensified pressure is intended to induce the defendant to render performance in kind.¹²²

In addition, the valuation oath likely also embodies a “punitive” purpose intended to sanction the defendant's *contumacia* or *dolus*.¹²³ The punitive character is primary particularly in cases of *dolus*, since natural restitution is impossible in this case anyway and therefore cannot be forced; however, it will probably also exert a certain preventive effect by inducing the holder of the object not to eliminate the possibility of restitution intentionally in the first place.

That the main concern is the enforcement of specific performance in the context of the *iusiurandum in litem* is shown by its scope of application. It is applicable especially to the *actiones arbitraiae* (see above).¹²⁴ The oath is also attested in the sources for *reddere*-actions and *bonae fidei iudicia* that are directed at the surrender

¹¹⁹ See D. 12.3 and C. 5.53; Watson, ‘Iusiurandum in litem in the bonae fidei iudicia’ (1966) *TR* 175 (175 ff); Pennitz, *Enteignungsfall* 301 ff; Kaser and Hackl, *Zivilprozeßrecht* 339 f; Grzimek, *Taxatio* 142 ff; Kindler, *Affectionis aestimatio* 160 ff; Harke, *Eid* 152 ff; Klingenberg, ‘Verhandlung apud iudicem’, 413 (448 f); cf. for further references also Isola, (2020) *ZRG-RA* 70 (110 f) footnote 137.

¹²⁰ Cf. in detail Harke, *Eid* 160 ff; see also Watson, (1966) *TR* 175 (175 f); Pennitz, *Enteignungsfall* 302; Grzimek, *Taxatio* 149 ff; Kindler, *Affectionis aestimatio* 177; Babusiaux, ‘Durchsetzung’, 707 (714 f).

¹²¹ (...) *creocere condemnatio potest ex contumacia non restituentis per iusiurandum in litem (...) ex contumacia aestimatur ultra rei pretium*.

¹²² Wubbe, ‘Streitwert’, 179 (179 f); Kaser and Hackl, *Zivilprozeßrecht* 339; Winkel, ‘Specific Performance’, 9 (11); Klingenberg, ‘Verhandlung apud iudicem’, 413 (448 f).

¹²³ Thus, the designation as “penalty” in the sources – see e.g. Marcell. (8 dig.) D. 12.3.8; on the question of its punitive character, see, inter alia, Kindler, *Affectionis aestimatio* 163 ff; further: Watson, (1966) *TR* 175 (176); Grzimek, *Taxatio* 143 ff; Gaulhofer, *Metus* 216 ff; cf. also Harke, *Eid* 164.

¹²⁴ Overview of the sources in Klingenberg, ‘Verhandlung apud iudicem’, 413 (448) footnotes 432 and 433.

or return of objects.¹²⁵ In all of these actions, the issue is restitution in kind, not an obligation to make payment or to transfer ownership of an object.¹²⁶

Accordingly, the *iusiurandum in litem* is likely to occur only exceptionally, if at all, in *actiones stricti iuris* that do not contain a clause referring to *restituere* or *reddere*.¹²⁷ In principle, the scope of application of the oath consists exclusively of actions which, by virtue of their formula or at least in substance, have a restitutory character.¹²⁸

The general applicability of the *iusiurandum in litem*, however, does not necessarily mean that it will also be administered in an individual case. As already explained, a prerequisite for the oath is, at first, that the defendant has refused the (possible) natural restitution out of *contumacia* or has rendered it impossible with *dolus*. Even then, the claimant may take the oath only if the *iudex*, in the exercise of his discretion,¹²⁹ permits it: Ulp. (36 ad ed.) D. 12.3.4.1.¹³⁰

Even if the oath is permitted, however, the claimant is not obliged to take the *iusiurandum in litem*; he cannot be compelled to do so by the judge.¹³¹ Rather, he

¹²⁵ Ulp. (28 ad ed.) D. 13.6.3.2 (*actio commodati*); Ulp. (30 ad ed.) D. 16.3.1.26 and 40 (*actio depositi*); Marcell. (8 dig.) D. 19.2.48.1 (*actio locati* of the lessor of an object); Paul. (36 ad ed.) D. 24.3.25.1 (*actio rei uxoriae*); there is abundant evidence for the *iusiurandum in litem* in the context of the *actio tutelae*, e.g. Ulp. (36 ad ed.) D. 12.3.4 pr.; on the oath as to value in the *actio rerum amotarum*, which is directed at *reddere*, see already above, footnote 59 – cf. also Schmatzberger, (2023) *JEHL* 214 (218) with further references in footnotes 51-53.

¹²⁶ Therefore, the general statement in Marcian. (4 reg.) D. 12.3.5 pr. (*[...] et in bonae fidei iudiciis in litem iuretur*) must be restrictively applied only to those *bonae fidei* actions that are directed at the return of an object; cf. convincingly Harke, *Eid* 171 ff; further Grzimek, *Taxatio* 146 f; Kindler, *Affectionis aestimatio* 176; Albers, *Perpetuatio obligationis* 148.

¹²⁷ Paul. (26 ad ed.) D. 12.3.6; Marcian. (4 reg.) D. 12.3.5.4; Harke, *Eid* 169 ff; Albers, *Perpetuatio obligationis* 147 ff; Klingenberg, ‘Verhandlung apud iudicem’, 413 (448).

¹²⁸ Accordingly, the oath sworn in the context of the *actio furti* in Iav. (15 ex Cass.) D. 12.3.9 must relate to the *damni decisio* and is not a case of *iusiurandum in litem* – Lenel, *Edictum perpetuum* 329; Kaser and Hackl, *Zivilprozeßrecht* 340; Harke, *Eid* 169.

¹²⁹ Ulp. (36 ad ed.) D. 12.3.4.2; Marcian. (4 reg.) D. 12.3.5.1; Harke, *Eid* 152; Klingenberg, ‘Verhandlung apud iudicem’, 413 (449).

¹³⁰ *Deferre autem iusiurandum iudicem oportet: ceterum si alius detulerit iusiurandum vel non delato iuratum sit, nulla erit religio nec ullum iusiurandum: et ita constitutionibus expressum est imperatoris nostri et divi patris eius.*

Translation by Watson (ed.), *Digest of Justinian* I 373: The oath must be tendered by the judge; if not and the oath is sworn on someone else’s tender or on no tender at all, conscience is not bound, and the oath is void. This has been laid down in the *constitutiones* of our emperor and his deified father.

¹³¹ Paul. (13 ad Sab.) D. 6.1.71; C. 5.53.2 pr. (Antoninus 212).

may insist on an assessment by the *iudex*. One possible motive for this is a desire to avoid exposing himself to the risk of perjury.¹³²

In order to prevent excessive overestimation by the claimant, the oath as to value is, however, subject to various corrective limits. These are ultimately intended to ensure the adequacy of the sworn amount. Already the moral and religious constraints of an oath to the gods,¹³³ as well as the risk of being held responsible for perjury (*periurium*),¹³⁴ appear capable of preventing a manifest abuse of the *iusiurandum in litem*.

Within the proceedings themselves, the judge has the means to regulate the claimant's valuation by oath. When the *iudex* admits the *iusiurandum in litem*, he may, by means of a (judicial) *taxatio*, set an upper limit in advance (*ex ante*) which the claimant may not exceed.¹³⁵ Even subsequently (*ex post*), the judge may still – especially where the oath has been taken without a prior *taxatio* – condemn the defendant to a lower sum or, under certain circumstances, even render an acquittal.¹³⁶

C. Infamy in Consequence of the *Actiones Famosae*

A monetary judgment entails a financial detriment for the condemned party. In lawsuits concerning specific performance, arbitrary proceedings and the *iusiurandum in litem* can therefore motivate the defendant to avert the *condemnatio* by rendering the performance *in natura*. However, this financial incentive is not the only factor that makes avoidance of a judgment appear attractive.

In certain actions, the threat of infamy (*infamia* or *ignominia*)¹³⁷ arising from an impending condemnation can exert an indirect “compulsion” of non-monetary kind

¹³² Schmatzberger, (2023) *RIDA* 241 (262); for further considerations of possible reasons see Grzimek, *Taxatio* 144 f footnote 8, or Harke, *Eid* 153.

¹³³ Cf. for instance Grzimek, *Taxatio* 152.

¹³⁴ On the danger of perjury, see Ulp. (36 ad ed.) D. 12.3.4 pr.; Paul. (3 resp.) D. 12.3.11.

¹³⁵ Ulp. (36 ad ed.) D. 12.3.4.2 and Marcian. (4 reg.) D. 12.3.5.1; see also Paul. (11 ad ed.) D. 4.3.18 pr.; cf. on the judicial *taxatio* in the oath as to value, for instance Grzimek, *Taxatio* 152 ff; Harke, *Eid* 156 ff.

¹³⁶ Ulp. (36 ad ed.) D. 12.3.4.3 and Marcian. (4 reg.) D. 12.3.5.2.

¹³⁷ On (legal) infamy cf., for example: Kaser, ‘Infamia und ignominia in den römischen Rechtsquellen’ (1956) *ZRG-RA* 220 (220 ff); Kaser, *Privatrecht* I 274 f; McGinn, *Prostitution, Sexuality, and the Law in Ancient Rome* (New York/Oxford, 1998) 44 ff; Wolf, ‘Das Stigma ignominia’ (2009) *ZRG-RA* 55 (55 ff); Scheibelreiter, ‘s. v. Schande’, in Schöllgen, Brakmann, de Blaauw, Fuhrer, Leppin, Löhr, Nesselrath, Niehoff and Tanaseanu-Döbler (eds.), *Reallexikon für Antike und Christentum. Sachwörterbuch zur Auseinandersetzung des Christentums mit der antiken Welt* (Stuttgart, 2019) 699

on the defendant to perform *in natura*. The terms *infamia* or *ignominia*¹³⁸ primarily denote – beyond the loss of honour in a social and moral sense¹³⁹ – restrictions on the individual's (private) legal status.

There is no uniform concept of *infamia*. The phenomenon of legal infamy encompasses a wide range of cases, which are regulated in various legal sources. The most prominent lists of infamy-cases are found in the praetorian edict on *postulatio*¹⁴⁰ and in the *lex Iulia municipalis*¹⁴¹ preserved on the *Tabula Heracleensis*.¹⁴² In addition, there are other catalogues of cases of infamy.¹⁴³

The specific legal consequences of the respective cases of infamy also vary.¹⁴⁴ They can restrict the private legal status of the *infames*, but also their participation in public life. Notably, the praetorian edict regulates limitations on procedural capacity: the

(704 ff); Willems, '§ 28 – Verlust der Ehrenstellung (*infamia*)', in Babusiaux, Baldus, Ernst, Meissel, Platschek and Rüfner (eds.), *Handbuch des Römischen Privatrechts. Band I* (Tübingen, 2023) 731 (731 ff); see for further references Schmatzberger, 'Der ungetreue Mandant. Infamie infolge Verurteilung aus der Auftragsgegenklage?', in Horn and Verrico (eds.), *Acta Maceratensia. Perspektiven vom XVI. Jahrestreffen der Jungen Romanistinnen und Romanisten (11. bis 13. Mai 2022)* (Macerata, 2024) 115 (116) footnote 3.

¹³⁸ In the sources, there does not appear to be a clear differentiation between these terms – Scheibelreiter, 'Schande', 699 (706); Schmatzberger, 'Der ungetreue Mandant', 115 (116); on the terminology, see further: Wolf, (2009) *ZRG-RA* 55 (56 ff); Chiusi, 'Fama' and 'infamia' in the Roman Legal System: The Cases of Afrania and Lucretia', in Burrows, Johnston and Zimmermann (eds.), *Judge and Jurist. Essays in Memory of Lord Rodger of Earlsferry* (Oxford, 2013) 143 (144 ff); Willems, 'Infamia', 731 (732 ff).

¹³⁹ Dishonourable behaviour can initially lead to purely social demeaning but may also result in intervention by the censors within the framework of their moral jurisdiction (*regimen morum*) – cf. for example Kaser, (1956) *ZRG-RA* 220 (224 ff); Chiusi, 'Fama', 143 (144 ff); Schmatzberger, 'Der ungetreue Mandant', 115 (116) with further references in footnote 1 and 2.

¹⁴⁰ Iul. (1 ad ed.) D. 3.2.1; for the reconstruction of the edict "*De postulando*" cf. Lenel, *Edictum perpetuum* 75 ff; see also Wolf, (2009) *ZRG-RA* 55 (66 ff) and Scheibelreiter, '„Im Auftrag des Ehrlosen“. Zur Infamie des Mandanten', in Höbenreich and Peinhopf (eds.), *Zur Erinnerung an Gunter Wesener. Schriften zu seinem 90. Geburtstag anlässlich des Symposiums am 3. Juni 2022 in Graz* (Lecce, 2023) 93 (99 ff).

¹⁴¹ Tab. Heracl. 108-125 and 135-137.

¹⁴² CIL I², 593 = ILS, 6085 = FIRA I, 13; for a detailed examination of the *Tabula Heracleensis*, see, for example, Crawford (ed.), *Roman Statutes. Volume I* (London, 1996) 355 ff.

¹⁴³ See in particular also the catalogue in the *lex Irnitana* (Lex Irnit. 84 IXB 9-16 – CIL II 4, 1201). Cf. on the various lists of infamy, for instance, Scheibelreiter, 'Schande', 699 (707 ff) and Willems, 'Infamia', 731 (734 ff) with further references; on other laws prescribing infamy, see Kaser, (1956) *ZRG-RA* 220 (254 ff) or Wolf, (2009) *ZRG-RA* 55 (72 ff).

¹⁴⁴ Overview of the various legal consequences in Willems, 'Infamia', 731 (738 ff); cf. also Chiusi, 'Fama', 143 (147 ff); Scheibelreiter, 'Schande', 699 (713 ff).

postulatio pro alio is restricted to close relatives, and both active and passive representation in lawsuits is prohibited.¹⁴⁵ In addition, infamy can also constitute an obstacle to holding public office. For example, the *lex Iulia municipalis* excludes the *infames* from exercising municipal offices.¹⁴⁶

Regarding the enforcement of claims for specific performance in Roman civil procedure, the loss of honour because of the defamatory actions (*actiones famosae*) is particularly relevant.¹⁴⁷ Such actions are included in several catalogues of infamy-cases.¹⁴⁸ Lists of *actiones famosae* are also handed down particularly in the *Institutes* of Gaius and in Justinian's *Institutes*:

Gai. 4.182 (first sentence)

Quibusdam iudiciis damnati ignominiosi fiunt, velut furti, vi bonorum raptorum, iniuriarum, item pro socio, fiduciae, tutelae, mandati, depositi. (...).

In some actions, such as those on theft, robbery with violence, outrage, and again those on partnership, *fiducia*, tutorship, mandate, and deposit, a defendant who is condemned becomes infamous. (...).¹⁴⁹

I. 4.16.2 (first sentence)

Ex quibusdam iudiciis damnati ignominiosi fiunt, veluti furti, vi bonorum raptorum, iniuriarum, de dolo, item tutelae, mandati, depositi, directis non contrariis actionibus, item pro socio, quae ab utraque parte directa est et ob id quilibet ex sociis eo iudicio damnatus ignominia notatur. (...).

In certain actions the person condemned becomes infamous, as in the actions *furti, vi bonorum raptorum, iniuriarum, de dolo*; as also in the actions *tutelae, mandati, depositi*, if direct, but not if contrary; and also in the action *pro socio*, which is direct, by whichever of the contracting parties may be condemned. (...).¹⁵⁰

¹⁴⁵ Gai. 4.182; on the restrictions in procedural capacity in civil proceedings, see, for example, Wolf, (2009) *ZRG-RA* 55 (96 ff).

¹⁴⁶ Tab. Heracl. 108-109 and 135-137; specifically on the exclusion from municipal offices, cf. McGinn, *Prostitution* 32 ff.

¹⁴⁷ Cf. on the defamatory actions e.g.: Scheibelreiter, 'Schande', 699 (708 f and 711); Klingenberg, 'Verhandlung apud iudicem', 413 (456); Willems, 'Infamia', 731 (735 f).

¹⁴⁸ See, for example, the aforementioned infamy-catalogues in the praetorian edict (D. 3.2.1) and in the *lex Iulia municipalis* (Tab. Heracl. 110-112).

¹⁴⁹ Translation: de Zulueta, *Institutes of Gaius* 303.

¹⁵⁰ Translation: Sandars, *Institutes of Justinian* 499.

The lists are almost identical.¹⁵¹ The core of *actiones famosae* includes certain delictual actions (*actio furti*, *actio vi bonorum raptorum*, *actio iniuriarum*, and *actio de dolo*) as well as some actions arising from certain contractual relationships, which are characterized by a bond of loyalty and trust (*fides*) between the parties (*actio pro socio*, *actio fiduciae*, *actio tutelae*, *actio mandati*, *actio depositi*).¹⁵² In Justinian's *Institutes*, it is additionally emphasized that the *actiones contrariae* arising from those *fides*-contracts in which a distinction is made between the direct and the contrary action (usually)¹⁵³ do not lead to the *infamia* of the condemned party.¹⁵⁴

¹⁵¹ The *actio de dolo* is omitted by Gaius but is mentioned in Justinian's *Institutes*. The *actio fiduciae*, in turn, is cited only by Gaius and also appears in the infamy-list of the *lex Iulia municipalis* (Tab. Heracl. 111), but is omitted in the Justinianic sources, as *fiducia* had already been abolished in Justinianic times – cf. Kaser, *Privatrecht II* 313.

¹⁵² Despite some parallels with the action for deposit, the *actio commodati* does not belong to the defamatory actions, as Mod. (2 diff.) Coll. 10.2.4 explicitly confirms. The reason for this may be that a distinct action for loan (*commodatum*) was only created at a later time (toward the end of the Roman Republic – cf. Zimmermann, *Law of Obligations* 189), by which point the phenomenon of infamy was already established. The already existing circle of *actiones famosae* may have been considered closed and therefore was not subsequently expanded to include the newly introduced *actio commodati*.

¹⁵³ In this regard there is an (apparent) contradiction within Ulpian's commentary on the praetorian edict (Ulp. [6 ad ed.] D. 3.2.6.5 and 7): In D. 3.2.6.5, it initially appears that condemnation under the *actio mandati contraria* could lead to infamy (for example, in the guarantor's recourse against the debtor). However, according to D. 3.2.6.7, infamy is excluded in all *actiones contrariae*, since these actions are brought not on the ground of breach of trust (*perfidia*), but merely for settlement (*calculus*) between the contracting parties.

Perhaps, the resolution of this antinomy lies in a rule-exception relationship: Generally, condemnation because of a contrary action does not lead to infamy. However, if the contrary action is based on particularly dishonest conduct (*perfidia*) by the defendant, such as the debtor's refusal to pay the guarantor in recourse, the condemnation can, at least in the context of the *mandatum*, result in infamy. Cf. Schmatzberger, 'Der ungetreue Mandant', 115 (115 ff); for a detailed discussion of the issue, see also Scheibelreiter, 'Infamie des Mandanten', 93 (93 ff).

¹⁵⁴ See, in addition to I. 4.16.2 and D. 3.2.6.7, for example, D. 3.2.1 (*non contrario iudicio*). In the *Institutiones* of Gaius and other pre-Justinianic sources, the *actiones contrariae* are not explicitly addressed. Cf. on the evidence in the sources Schmatzberger, 'Der ungetreue Mandant', 115 (118 ff).

Infamy because of *actiones famosae* does not arise automatically upon their commencement. Only the *condemnatio*¹⁵⁵ results in the disgrace of the condemned party.¹⁵⁶ This is a case of so-called “indirect” infamy.¹⁵⁷

A party being sued will be motivated to avoid a judgment because of an *actio famosa* in order to avoid the disgrace and the associated reduction of their legal status. Where a claim for specific performance is at issue, “indirect” infamy can thereby create an incentive for the defendant to perform *in natura*, since in this way the defamatory *condemnatio* can ultimately be averted. Especially the respective contractual relationships typically concern claims for performance in kind, such as the return of a deposited object or the delivery of an item procured for the principal under a mandate.¹⁵⁸ In this respect, the *actiones famosae* also constitute a mechanism for (indirect) enforcement of specific performance in the sense of a side effect, as the primary purpose of infamy is in any case the sanctioning of disgraceful behaviour.

V. Direct Specific Enforcement in the Formulary Procedure?

Whereas in the classical formulary procedure the rule of *condemnatio pecuniaria* applies, condemnation to, and enforcement of, specific performance is in principle encountered only in the context of the *cognitio extraordinaria* (see above, Part II). Two source texts, however, appear (*prima facie*) to attest direct enforcement in kind in the procedure *per formulas*: the Digest fragment D. 6.1.68 and the imperial

¹⁵⁵ In the context of delictual *actiones famosae*, a settlement (*pactio*) leads to infamy as well – Gai. 4.182 second sentence; D. 3.2.1; Ulp. (6 ad ed.) D. 3.2.4.5; Paul. (5 ad ed.) D. 3.2.7; cf. Meissel, *Societas. Struktur und Typenvielfalt des römischen Gesellschaftsvertrags* (Frankfurt am Main, 2004) 49.

¹⁵⁶ Infamy occurs only if the defendant is condemned in his own name (D. 3.2.1: *suo nomine damnatus*). Through legal representation, infamy can be avoided for both the representative and the represented party – see Ulp. (6 ad ed.) D. 3.2.6.2; Meissel, *Societas* 50; Scheibelreiter, ‘Infamie des Mandanten’, 93 (101).

Because of the *dolus*-clause contained in the infamy catalogue of the *lex Irnitana* (Lex Irnit. 84 IXB 9–10: *neque pro socio aut fiduciae aut mandati quod dolo malo factum esse dicatur, aut depositi, aut tutelae*), some scholars hold that certain *actiones famosae* arising from contractual relationships lead to infamy only if the condemnation is for a fraudulent breach of duty – see on this discussion, for instance: McGinn, *Prostitution* 46 footnote 218; Kaser, Knütel and Lohsse, *Römisches Privatrecht* 332 f and 336; Scheibelreiter, ‘Infamie des Mandanten’, 93 (93 footnote 1); Willems, ‘Infamia’, 731 (736 footnote 38 and 39).

¹⁵⁷ By contrast, in other cases of *infamia*, infamy arises immediately, not depending on a condemnation but resulting directly from dishonourable behaviour – cf. Scheibelreiter, ‘Infamie des Mandanten’, 93 (119) with further references.

¹⁵⁸ However, the *actio de dolo*, which belongs to the delictual *actiones famosae*, also aims at restitution in kind through its arbitrary clause (see above Section IV.A).

constitution C. 3.35.2. Upon closer examination, however, these texts are unlikely to cast doubt on the comprehensive applicability of the *condemnatio pecuniaria* in the formulary procedure.

A. D. 6.1.68

In this notorious text,¹⁵⁹ there is mention of the direct enforcement of a claim for the surrender of a disputed thing by means of compulsory transfer of possession (*manu militari*).

Ulp. (51 ad ed./ad Sab.)¹⁶⁰ D. 6.1.68

Qui restituere iussus iudici non paret contendens non posse restituere, si quidem habeat rem, manu militari officio iudicis ab eo possessio transfertur et fructuum dumtaxat omnisque causae nomine condemnatio fit. si vero non potest restituere, si quidem dolo fecit quo minus possit, is, quantum adversarius in litem sine ulla taxatione in infinitum iuraverit, damnandus est. si vero nec potest restituere nec dolo fecit quo minus possit, non pluris quam quanti res est, id est quanti adversarii interfuit, condemnandus est. haec sententia generalis est et ad omnia, sive interdicta, sive actiones in rem sive in personam sunt, ex quibus arbitrato iudicis quid restituitur, locum habet.

A party is ordered by the judge to hand something over, does not obey, and claims that he is unable to do so. If, indeed, he has the thing, then he is dispossessed by armed force at the judge's direction, and the judgment against him is restricted to profits and matters arising out of the action. If he is unable to deliver and has fraudulently arranged it, judgment should be given against him for whatever amount his opponent swears as the value without limitation. If he is unable to deliver but did not fraudulently arrange it, judgment should be given against him for no more than the thing is worth, that is, the amount of his opponent's interest. These are general rules, applicable whenever a judge orders something to be

¹⁵⁹ From the extensive literature on this source text, see, for example: Grzimek, *Taxatio* 156 ff; Winkel, 'Specific Performance', 9 (11 ff and 16 ff); Viaro, *Arbitratus* 59 ff; Harke, *Eid* 156 ff; Albers, *Perpetuatio obligationis* 119 f; Gaulhofer, *Metus* 213 f; Isola, (2020) *ZRG-RA* 70 (104 ff); Baldus, 'Rei vindictio', 1537 (1582).

¹⁶⁰ The paligenetic origin of the text is questionable: According to the *inscriptio* preserved in the *Littera Florentina*, the fragment stems from the 51st book of Ulpian's commentary on the edict ("*De legatis*"), that is, from the context of the law of legacies. Lenel, by contrast, assigns it to the 51st book of Ulpian's commentary on Sabinus ("*De iudiciis*"), and thus to a purely procedural context. Cf. Lenel, *Paligenesia Iuris Civilis. Volumen II* (Leipzig, 1889) 1197 (Ulpian – fragment 2987); see also Winkel, 'Specific Performance', 9 (12 ff).

handed over, whether in an interdict or in an action *in rem* or in an action *in personam*.¹⁶¹

The parties are in dispute over the surrender of an object. The claimant evidently prevails with his claim, since the judge orders the defendant, by means of a restitution order (*iussum de restituendo*), to surrender the object. The most plausible setting of this dispute is therefore a lawsuit based on the *rei vindicatio*.¹⁶²

Doubts about the authenticity of this text are raised above all by the forcible transfer of possession *manu militari* described in the first sentence in the event that the defendant refuses the (possible) restitution. According to the prevailing view this is to be classified as a post-classical or a Justinianic interpolation.¹⁶³ After all, a direct enforcement of restitution in kind is incompatible with the principle of *condemnatio pecuniaria* in the formulary procedure and would instead correspond better to the procedural law of the *cognitio*.

Consequently, a connection to the *cognitio* procedure would have to be considered.¹⁶⁴ Although this is not likely from a paligenetic view,¹⁶⁵ it does not appear entirely implausible. After all, the only other Digest text concerning specific enforcement *manu militari* occurs in the context of the *cognitio extra ordinem*, namely in Ulpian's commentary on the edict (D. 43.4.3 pr.; see above at footnote 37).¹⁶⁶

The recently proposed, novel interpretation of D. 6.1.68 is based on this consideration:¹⁶⁷ the text does not deal with the *rei vindicatio* at all, but rather with the

¹⁶¹ Translation: Watson (ed.), *Digest of Justinian I* 210 f.

¹⁶² Apart from the indications of an arbitrary procedure (*iussum de restituendo*, plaintiff's oath as to value, mention of the *arbitrium iudicis* in the last sentence), this is already suggested by the placement of the text in D. 6.1 ("De rei vindicatio") – cf. also Pennitz, *Enteignungsfall* 301; Viaro, *Arbitratus* 59; Baldus, 'Rei vindicatio', 1537 (1582).

¹⁶³ Regarded as a Justinianic interpolation, for example, by: Lenel, *Paligenesia II* 1197 footnote 3; Kaser, *Privatrecht II* 337 with footnote 11; Johnston, *Trusts* 226 footnote 19; Kaser and Hackl, *Zivilprozessrecht* 610 f and 626 footnote 25; Zimmermann, *Law of Obligations* 773; doubts as to authenticity are also expressed by Baldus, 'Rei vindicatio', 1537 (1582); the generalization in the final sentence is likewise considered interpolated (see footnote 170).

Arguments for a corruption of the text already in post-classical times have been made, for example, by Winkel, 'Specific Performance', 9 (12 and 16); in agreement Rüfner, 'Cognitio', 257 (265).

¹⁶⁴ Albers, *Perpetuatio obligationis* 119 f; Baldus, 'Rei vindicatio', 1537 (1582).

¹⁶⁵ Cf. Winkel, 'Specific Performance', 9 (12); Albers, *Perpetuatio obligationis* 119.

¹⁶⁶ Reference to this connection, for example, by Isola, (2020) *ZRG-RA* 70 (105 f); see also: Albers, *Perpetuatio obligationis* 119; Babusiaux, (2019) *ZRG-RA* 140 (157) footnote 72.

¹⁶⁷ Isola, (2020) *ZRG-RA* 70 (104 ff).

law of legacies, which would correspond with the transmitted *inscriptio*. The passage concerning the transfer of the object *manu militari* refers to the same *interdict* as D. 43.4.3 pr., which provides protection not only for the fideicommissary but also for the legatee. The compulsory enforcement of surrender of the *res litigiosa* would be explained as a post-classical transfer of procedural mechanisms of the law of *fideicommissum* in the *cognitio extra ordinem* to the law of legacies in the formulary procedure. The remainder of Ulpian's elaborations refer to the assertion of the legacy in a regular lawsuit, without recourse to this *interdict*, by means of the *actio (certa) ex testamento*.

However, there are also concerns regarding this interpretation. The comparison with D. 43.4.3 pr. is not entirely appropriate, since there the specific enforcement *per manum militarem* is described precisely as an alternative to the *interdictal* procedure aimed at money condemnation, and not as its result. Moreover, the contents of the texts (arbitrary proceedings and *iusiurandum in litem*) cast doubt on any connection to the *actio (certa) ex testamento*.¹⁶⁸

Therefore, the traditional view remains more plausible: D. 6.1.68 deals with the *rei vindicatio*. The forcible handover of the demanded object *manu militari* is unclassical, which is why the applicability of the principle of *condemnatio pecuniaria* in the formulary procedure remains unshaken.

The remainder of D. 6.1.68 is compatible with the classical proceedings of the *actiones arbitrae* (see Section IV.A for details). The impossibility of restitution in kind leads to monetary condemnation of the defendant; in cases of *dolus*, the judgment sum is determined by means of the claimant's *iusiurandum in litem* (second sentence), otherwise the condemnation is based on the (judge-assessed) objective value (third sentence).¹⁶⁹ Even the conclusion of the Digest fragment (fourth sentence), which establishes general applicability for all arbitrary actions (*haec*

¹⁶⁸ See also above, footnote 108.

¹⁶⁹ Ulpian's statement on the unlimited oath (*quantum adversarius in litem sine ulla taxatione in infinitum iuraverit*) need not be universally applicable, and therefore there is not necessarily a contradiction with the attested limitations of the oath, particularly regarding the *taxatio*.

sententia generalis est), need not necessarily be rejected as unclassical,¹⁷⁰ if it is understood exclusively in reference to the immediately preceding third sentence.¹⁷¹

B. C. 3.35.2

The imperial constitution C. 3.35.2¹⁷² could possibly provide evidence for restitution in kind in the tort law under the *lex Aquilia*.

C. 3.35.2 (Gordian 239)

Legis Aquiliae actione expertus adversus eum, quem domum tuam deposuisse vel incendio concremasset damnoque te adflixisse proponis, ut id damnum sarciatur, competentis iudicis auctoritate consequeris. quin etiam, si aqua per iniuriam alio derivata est, ut in priorem statum restituitur, eiusdem iudicis cura impetrabis.

If you bring an action under the *lex Aquilia* against the person who, as you allege, tore or burned down your house and thereby inflicted damage on you, you will obtain relief by the authority of an appropriate judge in order to compensate for this loss. Moreover, by the care of the same judge, you will obtain a judgment that in a case where water is conducted to another place, causing injury to you, it be restored to its former condition.¹⁷³

The rescript is set in the context of the Aquilian tort law (C. 3.35: “*De lege Aquilia*”)¹⁷⁴ and addresses two cases: the first case concerns the destruction of a house (by

¹⁷⁰ Numerous assumptions of textual corruption, for example: Lenel, *Paligenesia II* 1197 footnote 4; Wenger, (1939) *ZRG-RA* 315 (369); Kaser, *Privatrecht II* 337 with footnote 11; Winkel, ‘Specific Performance’, 9 (12 and 16); Gaulhofer, *Metus* 213 footnote 548; Baldus, ‘Rei vindicatio’, 1537 (1582).

¹⁷¹ Harke, *Eid* 157; cf. also Isola, (2020) *ZRG-RA* 70 (115).

¹⁷² The constitution receives only little attention in scholarship. See, for instance: Pernice, *Zur Lehre von den Sachbeschädigungen nach römischem Rechte* (Weimar, 1867) 245 ff; Lange, *Schadenersatz und Privatstrafe in der mittelalterlichen Rechtstheorie* (Münster/Köln, 1955) 69; Desanti, *La legge Aquilia. Tra verba legis e interpretazione giurisprudenziale* (Torino, 2015) 145 ff; Harke, *Iuris prudentia Diocletiana. Kaiserliche Rechtsprechung am Ende des dritten Jahrhunderts* (Berlin, 2019) 20 f; paligenetic study of the corresponding scholia to the *Basilica* by Miglietta, ‘Per uno studio paligenetico di B. 60.3: il contributo dei commentari bizantini ad C. 3.35’ (2015) *AUPA* 261 (266 f).

¹⁷³ Translation: Frier (ed.), *The Codex of Justinian I* 749.

¹⁷⁴ Cf. generally on the *lex Aquilia*, for example: Pernice, *Sachbeschädigungen*; Kaser, *Privatrecht I* 161 f and 619 ff; Hausmaninger, *Das Schadenersatzrecht der lex Aquilia*, 5th edn. (Wien, 1996); Zimmermann, *Law of Obligations* 953 ff; Desanti, *La legge Aquilia*; Kaser, Knützel and Lohsse, *Römisches Privatrecht* 366 ff; Winiger, ‘§ 92 – Klage wegen Sachbeschädigung (*actio legis Aquiliae*)’, in Babusiaux, Baldus, Ernst, Meissel, Platschek and Rüfner (eds.), *Handbuch des Römischen Privatrechts. Band II* (Tübingen, 2023) 2572 (2572 ff).

demolition or fire), by which the owner suffers unlawful damage (*damnum iniuria datum*). The applicability of the *actio legis Aquiliae* appears unproblematic in this case.

However, regarding the second case, concerning an unlawfully diverted watercourse, the imperial decision appears noteworthy, as it calls for the restoration of the previous state (*in priorem statum restituitur*). Such restitution in kind would be contrary to the classical tort law under the *lex Aquilia*.¹⁷⁵ The *lex* provides only for monetary compensation,¹⁷⁶ and the formula of the *actio legis Aquiliae* therefore contains no arbitrary clause directed at specific performance.¹⁷⁷ Thus, (indirect) enforceability of restitution in kind in an arbitrary procedure is not envisaged; the result of a lawsuit ought to be an award of damages in money.

The restoration of the watercourse *in natura* might be interpreted as resulting from the increasing influence of the *cognitio* procedure, particularly in an imperial constitution dated to the year 239, a transitional phase between late-classical and post-classical law.¹⁷⁸ In the *cognitio*, enforcement of restitution *in natura* is possible, since there is no binding requirement of *condemnatio pecuniaria* (see Section II.C). The rescript could therefore be seen as a development of the principles of classical tort law under the *lex Aquilia*, allowing for restitution in kind.

Another plausible explanation, however, is the possibility that the passage concerning the diverted watercourse does not refer to the *lex Aquilia* at all, but to an entirely different claim. It potentially concerns a matter of servitude law.¹⁷⁹ In this context, the

¹⁷⁵ As already noted by Pernice, *Sachbeschädigungen* 246; Harke, *Iuris prudentia Diocletiana* 20 f, however, does not seem to take issue with this; Desanti, *La legge Aquilia* 145 ff, does not address the imperial statement on the restoration of the watercourse at all; an approximation, at least, to restitution in kind in a modern sense is noted by Lange, *Schadenersatz und Privatstrafe* 69.

¹⁷⁶ On the wording of the *lex*, cf. e.g.: Hausmaninger, *Schadenersatzrecht* 7 f; Kaser, Knütel and Lohsse, *Römisches Privatrecht* 366; Winiger, 'Actio legis Aquiliae', 2572 (2573 f).

¹⁷⁷ Lenel, *Edictum perpetuum* 201 ff; Mantovani, *Formule* 64 ff; see also Winiger, 'Actio legis Aquiliae', 2572 (2575).

¹⁷⁸ See on this phase of transition Kaser, *Privatrecht II* 3; Kaser, Knütel and Lohsse, *Römisches Privatrecht* 7.

¹⁷⁹ This connection is also drawn by Thalelaos in Scholion 1 ad B. 60.3.58, a scholion to the Basilica text relating to C. 3.35.2 – on this scholion see Miglietta, (2015) *AUPA* 261 (266 f); cf. also Pernice, *Sachbeschädigungen* 246 f.

A connection to the *actio aquae pluviae arcendae* – which is an *actio arbitraria*, see footnote 107 – is to be excluded. There is no mention of rainwater (*aqua pluvia*), but only of *aqua* as such. It is also unclear whether there is a modification of land on the neighbor's ground. Moreover, the impairment consists of the fact that the water has been diverted (*aqua derivata est*). The mere diversion of water, however, does not fulfil the requirements of this action. Cf. for further details on the *actio aquae*

actual restoration of the watercourse to its previous state could simply be the result of the indirect pressure for specific performance arising from the restitution clause of a relevant *actio arbitraria*¹⁸⁰ and thus reflect classical procedural law. In that case, C. 3.35.2 would be consistent with the formulary procedure.

VI. Final Remarks

In conclusion, it should be noted that classical Roman law recognizes the need for the enforceability of performance *in natura* and takes it into account, at least in part. Although in the formulary procedure, only monetary condemnation can be imposed due to the principle of *condemnatio pecuniaria*, there are nevertheless mechanisms at hand to bring about performance in kind indirectly and at a preliminary stage; this is especially true in cases of increased interest in specific performance, such as the arbitrary procedure, which is applicable particularly in the context of *actiones in rem*.

How realistic specific enforcement in the formulary procedure has been, cannot, of course, be determined for court practice. In any case, the sources deal with this issue extensively, so it is certainly not an entirely insignificant matter. From a financial perspective, the monetary condemnation and the threat of execution – especially in the case of the typical overvaluation of the disputed amount because of the plaintiff's *iusiurandum in litem* – create an indirect pressure to render performance in kind. The negative consequences of a judgment for the civil honour within the framework of infamy also have a certain deterrent effect. Due to the (indirect) coercive effects of an impending condemnation, the effective enforcement of claims for specific performance does not seem unlikely.

However, a money judgment in the absence of (possible) performance in kind is regularly the result of a legal dispute. This is exemplified by the sources concerning the “expropriation of the plaintiff” and the “acquisition of a disputed object by the condemned party because of monetary condemnation” in lawsuits for recovery of corporeal things. The discussion regarding the legal status of the party condemned to pay money in relation to the object not surrendered illustrates the need for regulation in cases where the indirect pressure to effect performance *in natura* does not operate successfully.

pluviae arcendae and its prerequisites, for instance: Kaser, *Privatrecht I* 126 and 407; Kaser, Knütel and Lohsse, *Römisches Privatrecht* 185.

¹⁸⁰ Consideration may be given to the arbitrary actions concerning servitudes (*vindicatio servitutis* and *actio negatoria servitutis*; see footnote 102) or to an arbitrary action in the subsequent proceedings of an interdict (on their arbitrary nature, see footnote 104).

Ultimately, it will depend on the individual case whether the claimant actually obtains performance in kind or can only secure monetary compensation. In particular, the financial and social situation of the defendant will be decisive in determining whether he submits to the indirect pressure to render specific performance or accepts the monetary judgment with all its consequences.

The relationship between the enforceability of claims for specific performance and the principle of *condemnatio pecuniaria* in the formulary procedure appears to be – over all – appropriately resolved. A judgment can formally only award money. Nevertheless, the claimant receives monetary compensation, which usually enables him to procure equivalent alternatives. Through the exercise of indirect pressure on the defendant, there is still a probability in certain cases that performance *in natura* will actually be realized.

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