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Table des matières

Éditorial

Jean-François Gerkens

Dans l'éditorial de la *RIDA* 64, nous déplorions la disparition de Joseph Mélèze-Modrzejewski, membre de notre comité de rédaction. Avec le décès de Hans Ankum, c'est un nouveau membre de notre comité de rédaction qui est venu à manquer. Il y était entré pour le numéro 36 (1989), il y a donc environ 30 ans, en même temps que Giovanni Pugliese.

Hans Ankum a fait l'objet d'une commémoration lors de l'assemblée générale de la SIHDA d'Édimbourg, ainsi que lors d'une rencontre du « Forum romanum », société savante qu'il avait fondée au sein de son Université d'Amsterdam. Lors de cette réunion du 18 octobre 2019, Eric Pool a évoqué « le maître et ami Hans Ankum », Laurens Winkel « le romaniste », Edgar du Perron le « professeur de l'Université d'Amsterdam » et l'auteur de ces mots, « Hans Ankum et la SIHDA ». La *RIDA* commémorera Hans Ankum dans son prochain numéro.

Au demeurant, le présent numéro commémore, comme annoncé, Joseph Mélèze-Modrzejewski sous la plume de Jakub Urbanik. Il rend également hommage à Berthold Kupisch à l'initiative de Jeroen Chorus.

Enfin, le premier article du présent numéro constitue l'élaboration du texte de la conférence introductive à la session internationale de la SIHDA de Bologne. Pascal Pichonnaz l'avait prononcée le 12 septembre 2017,en ouverture de la session internationale dont la chronique est parue dans le numéro précédent de la *RIDA*. Le présent numéro contient quant à lui, la chronique de la SIHDA de Cracovie de 2018.

Au titre des nouveautés éditoriales, la rédaction de la *RIDA* a décidé de publier — dans le futur et en plus de la revue — des monographies sous forme de « Hors-série la *RIDA* ». Nous espérons que l'initiative trouvera également son lectorat.

Excellente lecture à toutes et tous !

Chaudfontaine, le 11 novembre 2019.
Jean-François Gerkens

Hommage à Berthold Kupisch

In Integrum Restitutio under Classical Roman Law, Particularly on the Ground of *Metus*, and Berthold Kupisch

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1. Introduction

Berthold Kupisch taught Roman Law and Private Law at the University of Münster, 1970–1998, and died 30th Dec 2015, a few days before reaching the age of 84. This is time nor place for an obituary[1]. What I want to do, is recalling Kupisch' contribution to our understanding of how the *praetor* and *iudex* did their work when *in integrum restitutio* (henceforth mostly shortened as *restitutio*) was ordered. Kupisch first developed these ideas in his Heidelberg Habilitationsthesis of 1969, published in 1974[2]. In some 120 pages, almost half of that book, *restitutio* on the ground of *metus* was investigated. About 30 years later, in 2007, Kupisch gave a synopsis of the same subject, in some 20 pages[3]. Shortage of time suggests that we confine ourselves to *restitutio* on the ground of *metus*.

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1. See for an obituary W. Krüger, *ZSS (RA)* 134 (2017), p. 670–685.

2. B. Kupisch, In integrum restitutio *und* vindicatio utilis *bei Eigentumsübertragungen im klassischen römischen Recht* (*Münsterische Beiträge zur Rechts- und Staatswissenschaft* 18), Berlin *etc.*, 1974.

3. Kupisch, "Überlegungen zum Metusrecht: Die *actio quod metus causa* des klassischen römischen Rechts", in *Festschrift Huwiler*, Bern, 2007, p. 415–438. Further contributions by Kupisch on the same theme: "Cicero, *pro Flacco* 21,49 f. und die *in integrum restitutio* gegen Urteile", *ZSS (RA)* 91 (1974), p. 126–145; "Quod metus causa gestum erit, ratum non habebo", in *Mélanges Schmidlin*, Basel *etc.*, 1998, p. 463–479.

The *praetor* introduced part of *ius honorarium* in order to correct *ius civile*, *corrigendi iuris civilis gratia*[4]. Perhaps the most striking example of *ius honorarium*, created *corrigendi iuris civilis gratia*, is the *in integrum restitutio*, whereby the consequences which *ius civile* attached to certain juristic or factual acts or events, were thwarted; more specifically, by way of the various remedies available for that purpose in the formulary procedure: *actio utilis* or *in factum*, *denegatio*, *exceptio*, *replicatio*, *actio arbitraria* and *iussum de restituendo*[5].

There had to be a *iusta causa*, a good ground for *restitutio*. Many such grounds were recognised[6]; one of the principal ones was *metus*, fear caused by *vis*, *i.e.* violence, actual or threatening violence. The *praetor* would restore the *status quo ante* for the victim of such fear. Some of the specific *restitutio* remedies had to be sought within an *annus utilis*, running from the moment something had happened because of fear.

Restitutio could be granted if the applicant had suffered an injury to his proprietary interests as a result of his fear. Any injury sufficed, an actual loss of property or a commitment incurred; hence a variety of reliefs. *E.g.*, if an obligation had been undertaken because of fear and fulfilled by money payment, the injured party might be given an *actio* for recovering the money lost, indeed, recovering even fourfold that money if the defendant did not restore the *status quo ante*. If ownership had been transferred because of fear, the transferor might obtain an *actio* containing the fiction that the transfer had not at all occurred (*actio rescissoria*); *etc*.

As Kupisch has established, two types of *restitutio* should be distinguished.

On the one hand there was the 'judicial' *restitutio*, brought about by the *iudex*. It would occur when *in iure* the applicant alleged a good ground for *restitutio* and was given an *actio arbitraria*. That *actio* contains a *clausula arbitraria* '*neque ea res arbitrio iudicis restituetur*', unless that matter, according to the discretion of the *iudex*, will be restored. Consequently, the *iudex*, before condemning the defendant in his final judgment, would first give a *iussum de restituendo*. He thereby authorized the defendant to bring about restoration under the direction of the *iudex* (*e.g.*

4. Pap. D. 1.1.7.1.

5. The standard text on *in integrum restitutio* remains M. Kaser & K. Hackl, *Das römische Zivilprozessrecht*, 2nd ed., München, 1996, § 64. *In integrum restitutiones*, p. 421–426.

6. The principal ones were four in number: *metus*, *dolus*, minor age, absence. The *praetor* would restore the *status quo ante* for the victim of *metus* or *dolus*. The minor could seek *restitutio* in respect of disadvantage incurred when *captus* through his lack of experience. Absence was a ground for *restitutio* when property had been lost or an *actio* been undefended by reason of a person's absence on state business, being a prisoner of war, or for reasonable fear for the other party. Among the other recognised grounds for *restitutio* figure *alienatio iudicii mutandi causa*, *intercessio* by a woman in violation of the *Senatusconsultum Vellaeanum*, *fraus creditorum*, *capitis deminutio* of a contract partner and a number of cases where *restitutio litis* was available. Finally, any ground qualified which, to the *praetor*, would seem *iusta*. See Kaser – Hackl, 1996, p. 424–426.

retransfer ownership and/or pay an amount of money). If the defendant complied, he was to be absolved by the final judgment. If, however, he refused to comply, the claimant could assess the value of what was at issue, by *iusiurandum in litem* (and probably exaggerate that value), and in the final judgment the *condemnatio* would come to the value thus assessed. Such an *actio arbitraria* in the Digest is sometimes called *actio quod metus causa*, sometimes *actio arbitraria in factum*. *Actiones in rem* are generally *actiones arbitrariae*, but there are also some *actiones in personam arbitrariae*, such as the *actio quod metus causa*.

On the other hand there was the 'praetorian' *restitutio*, brought about by the *praetor*. It would occur when *in iure* the applicant, likewise, alleged a good ground for *restitutio*, but was given, at that stage already, an *actio* thwarting the consequences which the act or other event complained of had produced. Such an *actio* was called *iudicium rescissorium*, for it rescinded, 'tore up', the consequences of the act or other event. It would mostly include a fiction, *e.g.* a *reivindicatio* would contain the fiction that the transfer of ownership complained of had not occurred. It would, however, also include a *clausula arbitraria*, which might lead to judicial *restitutio*, just as discussed before. Exceptionally, the *praetor*, on giving one of these actions, might leave it to the *iudex* to examine whether the alleged ground for *restitutio* did apply.

2. Traditional doctrine of *in integrum restitutio*; Kupisch' new theory

Traditional doctrine, since an influential book of Burchardi (1831)[7], and adopted by Savigny[8], Bethmann-Hollweg[9], Fritz Schulz[10] and many others, held that *in integrum restitutio* exclusively referred to praetorian *restitutio* and that it was achieved in two steps, both taken *in iure*, at distinct points in time. The first step began with a request of the injured party and terminated by the *praetor*'s *decretum*. That decree would either rescind the consequences of the act or other event, if disapproved of by the *praetor*, or refuse to do so. The second step, only possible if a rescinding *decretum* had been given, was a request for and the granting of an *actio rescissoria*, in order to execute the rescinding *decretum*. Such was the

7. G.C. Burchardi, *Die Lehre von der Wiedereinsetzung in den vorigen Stand*, Göttingen, 1831.

8. F.C. von Savigny, *System des heutigen Römischen Rechts*, 7, Berlin, 1848, p. 90 f.

9. M.A. von Bethmann-Hollweg, *Der Civilprozeß des gemeinen Rechts*, 2, Bonn, 1865, p. 740–757.

10. F. Schulz, "Die Lehre vom erzwungenen Rechtsgeschäft im antiken römischen Recht", *ZSS(RA)* 43 (1922), p. 171–261; see also his *Classical Roman Law*, Oxford, 1951, p. 68–69 and 600–609.

view of *e.g.* Luigi Raggi[11], Manlio Sargenti[12], Andreas Wacke[13], Arthur Hartkamp[14] and Massimo Brutti[15]. Also Max Kaser, initially, subscribed to that doctrine[16]. There was a variant of this doctrine, developed by Otto Karlowa (1901)[17], further elaborated by Mario Lauria (1930)[18] and applauded by Giuliano Cervenca since 1965[19]. It sustained that often no separate rescinding *decretum* was required and moreover that, in most cases, there was but one phase wherein the *praetor* granted or refused to give the *actio rescissoria*, the *exceptio* or the *replicatio*, as the case might be.

According to both the traditional doctrine and its variant, *in integrum restitutio* was a clear-cut technical concept, and it could only apply to the procedural phase before the *praetor*, and ending in the rescinding *decretum* or the giving of an *actio rescissoria*. According to these views, the procedural phase *apud iudicem* could not be called *in integrum restitutio*.

Kupisch, however, advanced two propositions. They were qualified by Kaser as '*weithin neue und revolutionierende Thesen*' and '*eine umstürzende Neuerung*[20]'.

According to Kupisch' first proposition, *in integrum restitutio*, if it is to be executed by way of an *actio rescissoria*, is nothing else but that *actio*. There is no such thing as a rescinding *decretum*, preceding and distinct from the granting of the *actio rescissoria*. The *actio rescissoria* is identical to *in integrum restitutio*. Moreover, a remedy like the *actio quod metus causa* likewise is identical to *in integrum restitutio*[21]. And all this was already the case, according to Kupisch, in the *formula* procedure during the classical period[22].

Secondly, *in integrum restitutio*, as used in the sources, is not a *terminus technicus* exclusively for the praetorian *restitutio*, during the procedural phase

11. L. Raggi, *La* restitutio in integrum *nella* cognitio extra ordinem, Milano, 1965.
12. M. Sargenti, "Studi sulla 'restitutio in integrum' ", *BIDR* 69 (1966), p. 193–298.
13. A. Wacke, "Kannte das Edikt eine in integrum restitutio propter dolum?", *ZSS (RA)* 88 (1971), p. 105–135.
14. A.S. Hartkamp, *Der Zwang im römischen Privatrecht*, Amsterdam, 1971, p. 189–292.
15. M. Brutti, *La problematica del dolo processuale nell'esperienza romana* 2, Milano, 1973, p. 327–624.
16. M. Kaser, *Das römische Zivilprozessrecht*, 1st ed., München, 1966, p. 331–332.
17. O. Karlowa, *Römische Rechtsgeschichte* 2, Leipzig, 1901, p. 1090 f.
18. M. Lauria, "*Iurisdictio*", in *Studi Bonfante* 2, Milano, 1930, p. 477–538.
19. G. Cervenca, *Studi vari sulla "restitutio in integrum"*, Milano, 1965, p. 25 f.
20. M. Kaser, "Zur *in integrum restitutio*, besonders wegen *metus* und *dolus*", *ZSS (RA)* 94 (1977), p. 101–183, at p. 110 and 116.
21. Kupisch, 1974, p. 95–107; 123–140.
22. Part of the doctrine held that the *actio rescissoria* was identical to *in integrum restitutio* only in the *cognitio extra ordinem* of the later classical period; other scholars held that this identity did not arise until during the post-classical period. Kupisch 1974 (*e.g.* p. 105–107) refuted both views.

in iure; it comprises equally the judicial *restitutio*, during the procedural phase *apud iudicem*. Praetorian restitution is the means by which the *praetor*, on the level of *ius honorarium*, rescinds the consequences given by *ius civile* to an act or other event. Judicial restitution is brought about by the *iussum de restituendo*, the means by which the *iudex*, empowered on the basis of the *clausula arbitraria* in the *formula* of the *actiones arbitrariae*, authorizes the defendant, if desirous to avoid condemnation, to reinstate the claimant in his original position[23].

Kupisch developed his theory for *restitutio* on all grounds, but it is with regard to *metus* that his new propositions moved away farthermost from the traditional doctrine[24].

3. Digest 4.2: many interpolations?

Title 4.2 of the Digest bears as its rubric *Quod metus causa gestum erit*, "What will have been performed because of fear[25]". This title is devoted to *metus*, in the context of *in integrum restitutiones* generally. It is beyond doubt that the *praetor*'s edict, title 10 in Lenel's reconstruction, likewise dealt with *in integrum restitutiones*, first generally and then with the various grounds for such *restitutio*, *metus* in the first place. Ulp. D. 4.2.1 quotes the words of the edict:

> D. 4.2.1 (Ulpian, 11 *Ad edictum*)
>
> *Ait praetor: 'Quod metus causa gestum erit, ratum non habebo'.*
>
> "The *praetor* says: 'What will have been performed because of fear[26], shall I not regard as valid (/shall I not approve of)'."

Thus, the *praetor*'s edict held: "*Quod metus causa gestum erit, ratum non habebo*" ("[the juristic act] which will have been performed because of fear, shall I not regard as valid, shall I not approve of"). Kupisch pointed out that *gestum* does not refer to some act of the person injured because of his fear. It refers to the act performed by the person who acquired a thing or other advantage to the detriment of the person injured because of the latter's fear[27]. In practice, that came down to the following. A person pretended *in iure* (a) he had been injured because of his fear for violence, and (b) the person he wanted to sue (or against whom he wanted to defend himself) had performed a juristic act whereby the latter had made a gain because of that fear. The person he wanted to sue (or against whom he wanted

23. Kupisch, 1974, p. 4–13; 58–60.

24. Kaser, 1977, p. 108.

25. A translation into German is perhaps closer to the original: '*Was aufgrund von Furcht vorgenommen worden sein wird*'. Seemingly, '*vorgenommen*' fits better than 'performed' to '*gestum*', implying, as it should do, that a juristic act, not a mere factual act or event, has occurred.

26. See the previous footnote.

27. Kupisch, 1974, p. 140–175; 184–188; Kupisch, 2007, p. 434–435.

to defend himself) could be, but needed not to be, the person by whom that fear had been caused. The *praetor* would then provide the person said to have been so injured, with a remedy against the other person, to thwart the legal consequences of that juristic act. That could be either an offensive remedy, such as the actio *quod metus causa*, the *actio rescissoria* and the *replicatio metus*, or a defensive remedy, such as the *exceptio metus* and *denegatio* of an *actio* or *exceptio*.

The traditional doctrine of *restitutio* was unable to regard the *actio quod metus causa* as a *species* of *restitutio*, because, if brought within a year from what had happened because of fear, it runs into a *poena* of fourfold the loss and therefore seems to be an *actio poenalis*. Thus, the teaching of Schulz and other scholars was that the *praetor*, certainly, in the first place procured *in integrum restitutio* by *actiones rescissoriae*, in order to reinstate the legal situation as it was before the act had occurred because of fear; but that the *praetor* in the second place aimed, with the *actio quod metus causa*, at punishing a delict of causing fear. In this view both remedies (*actio rescissoria* and *actio quod metus causa*) were utterly distinct.

This picture, however, does not conform to the sources. In Digest title 4.2 we are clearly faced with a continuous amalgamation of *restitutio* and *actio quod metus causa*. The traditional doctrine attributed this amalgamation to Justinian. The compilers of the Digest had ruthlessly shortened and interpolated the texts of the classical jurists because these texts conflicted with that traditional doctrine. But as Kupisch showed, the difficulties which Digest 4.2 presented to these scholars, find their origin in their strenuous attempts to bring the sources into harmony with preconceived ideas. Ideas which are not inherent in the sources. In this way, during the 20th century, the method of interpolations-criticism, by way of deletions from, additions to and a rearrangement of texts, was applied to *metus*, and with regard to hardly any other part of Roman jurisprudence so fiercely as here. To Kaser, that seemed to be a frenetic attitude, which threatened to discredit the very method of text-criticism[28].

4. Digest 4.2: hardly any interpolations

Kupisch overcomes the difficulties of Digest 4.2 by identifying the *actio quod metus causa* as merely a *species* of *in integrum restitutio*. His open-minded and careful analysis of sources results herein, that the *metus* texts in the Digest fit in a harmonious overall picture, when they are being looked at, both on their own and in the context of *palingenesia*. There is no need to assume that they had undergone, after the classical period, material corrections, but for a few renovations brought about by the compilers, known long before the 20th Century. Both the *actio quod metus causa* and the *actiones rescissoriae* are manifestations of *in integrum restitutio*. The *actio quod metus causa* made up the normal remedy. It was supplemented

28. Kaser, 1977, p. 109.

by the *actiones rescissoriae*, which contained the *fictio* that the fact which had occurred because of the claimant's fear, had never occurred[29].

5. Terminology: *metus causa*; *metus causa gestum/factum* by whom?

Kupisch also made a clean sweep of some important terminological obscurities. When we look at how the words *metus causa* used to be (and, indeed, still are) translated, we observe an alarming variety which is utterly at variance with linguistic requirements. *Metus* is fear, *i.e*. a mental position which a person is subject to. It is, however, often translated as threat, menace, compulsion, coercion or duress, in German '*Zwang*' or '*Drohung*'; but all these expressions are quite misleading, in pointing to the person who caused fear in another person; not to either that other person who feared, or to the person who acquired something to the detriment of the person who feared.

There is an even more dangerous dispute concerning the meaning of *metus causa*. Traditionally, it was taught that the *praetor* disapproved of acts that had been caused by fear. What was performed *metus causa* was given a causal interpretation: the act which had been performed because of fear; moreover, it was believed that the *praetor* aimed at the act of the fearing person.

In 1932, Georg Maier[30] objected to the traditional opinion that the *actio quod metus causa* had derived its name from the mental position of the victim, not from the act of the causer of fear. Maier remarked that the *praetor* did not disapprove of fear but of causing fear. He therefore thought *metus causa factum* referred to the violent person's act and he saw in it a *sensus finalis*, namely: what had been done in order to cause fear. *Metus causa* was not to be translated as 'for', 'because of', 'moved by' fear, but as 'in order to cause', 'with a view to bring about', 'with the purpose of causing' fear (in itself, linguistically *causa* may have such a final sense).

Some scholars adhered to Maier's opinion. But that opinion does not at all fit to the *ratum non habebo* of the edict. What had been done in order to cause fear, is actual or threatened violence. To say: 'I shall not regard it as valid' has no good sense if said with regard to threat or actual violence. It can only refer to a juristic act performed as a consequence of fear[31].

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29. Thus, the transition to the *cognitio* procedure, where the functions of *praetor* and *iudex* were combined in one hand, did not lead to a structural change of *in integrum restitutio*.

30. G.H. Maier, *Prätorische Bereicherungsklagen* (*Romanistische Beiträge zur Rechtsgeschichte* 5), Berlin *etc*., 1932. A staunch opponent of the national-socialists, Maier was refused *venia legendi* because of his anti-nazi attitude, though his Habilitationsthesis 1933 had been accepted by Berlin University (*Juris vinculum inter personas, Studien zum Römischen und modernen Obligationenbegriff*, published posthumously as [1st part] *Irrtümliche Zahlung fremder Schulden*, *Archiv civ. Praxis* 152 [1952/53], and [2nd part] *Zur Geschichte der Zession* in *Festschrift Rabel* 2, Tübingen 1954).

31. Kupisch, 1974, p. 141–146; Kupisch, 2007, p. 422.

Kupisch rejects the *sensus finalis*. He opts for a causal interpretation, but brilliantly avoids the objection against focussing on the position of the victim. It is neither the victim nor the causer of fear the *praetor* was focussing on: *metus causa* must be understood from the point of view of the person who had acquired some profit. If that profit derived from what the victim had lost due to fear, it was acquired *metus causa*. The acquisition itself is neutral. It may be the causer of fear himself who took a profit from that fear. It may be a third party who was exploiting the intimidated person's position. It may even be an innocent third party who acquired in good faith[32].

This interpretation ties in best with Ulp. D. 4.2.9.1:

D. 4.2.9.1 (Ulpian, 11 *Ad edictum*)

Animadvertendum autem, quod praetor hoc edicto generaliter et in rem loquitur nec adicit a quo gestum (…)

"Mark that the *praetor* in this edict speaks generally and with regard to the matter (*in rem*) and does not add by whom [an act] has been performed (…)"

Likewise Ulp. D. 4.2.9.8:

D. 4.2.9.8 (Ulpian, 11 *Ad edictum*)

Cum autem haec actio in rem sit scripta nec personam vim facientis coercerat, sed adversus omnes restitui velit quod metus causa factum est: non immerito Iulianus a Marcello notatus est scribens, si fideiussor vim intulit, ut accepto liberetur, in reum non esse restituendam actionem, sed fideiussorem, nisi adversus reum quoque actionem restituat, debere in quadruplum condemnari. Sed est verius, quod Marcellus notat: etiam adversus reum competere hanc actionem, cum in rem sit scripta.

"Moreover, since this action is framed with regard to the matter (*in rem*) and does not coerce the individual exercising force, but intends against all that there should be *restitutio* of what has been done because of fear, Julian was not undeservedly denounced by Marcellus for writing that if a guarantor brought force to bear with the result that his obligation was formally released, the action against the principal debtor is not to be restored, but the guarantor ought to be condemned to pay fourfold unless he also restores the action against the principal debtor. But what Marcellus remarks is more correct, that this action also lies against the principal debtor, since it is framed with regard to the matter (*in rem*)."

The *actio quod metus causa* does not punish the person of the user of force, but it requires from all people that what has happened because of fear be restored. Even the acquisition of a third party in good faith of a thing the fearing person had lost, has a sufficient causal link with the fear by which the fearing person lost what the third party could acquire.

In the same vein Ulp. D. 4.2.14.3:

32. Kupisch, 1974, p. 146 f.

D. 4.2.14.3 (Ulpian, 11 *Ad edictum*)

In hac actione non quaeritur, utrum is qui convenitur an alius metum fecit. Sufficit enim hoc docere metum sibi illatum vel vim, et ex hac re eum qui convenitur, etsi crimine caret, lucrum tamen sensisse … nec cuiquam iniquum vide[a]tur ex alieno facto alium in quadruplum condemnari, quia non statim quadrupli est actio, sed si res non restituatur.

"In this action, no inquiry is made as to whether fear was caused by the person sued or by another person. For it suffices that [the claimant] explains that fear or violence was brought to bear on him and that the person sued, albeit he lacks crime, yet, as a consequence thereof, has experienced profit … Nor should it appear unjust to anyone that one person is condemned to fourfold as a consequence of another person's deed, because the action is not for fourfold at once, but [only] if the matter is not restored."

It is enough that the claimant states that fear has been inflicted upon him and that the person sued has made some gain as a consequence of this fear.

6. What does the *actio quod metus causa* want to punish?

There remains a weighty objection against the view of the *actio quod metus causa* as a remedy for *restitutio*. The problem is that this *actio* is directed to condemn the defendant to a *poena quadrupli*, a fine of fourfold the loss. That is much more than *restitutio* and thus the *actio* looks like an *actio poenalis*. Kupisch enervates that objection by pointing to texts like D. 4.2.14.3, last phrase (quoted in the previous section): 'Nor should it appear unjust to anyone that one person is condemned to fourfold as a consequence of another person's deed, because the action is not for fourfold at once, but [only] if the matter is not restored'.

The penalty is reconcilable with the *restitutio* function. The *actio quod metus causa* is an *actio arbitraria* (indeed, it is the only *actio in quadruplum* that is *arbitraria*). Condemnation could therefore be avoided by complying with the *iussum de restituendo* and bringing about restoration. Furthermore, condemnation under the *actio quod metus causa*, unlike condemnation under most *actiones poenales* (*e.g.* the *actio de dolo* or the *actio furti*) does not involve infamy. Thirdly, this *actio* may not only be directed against the causer of fear but also against an innocent third party who had not committed any delict by acquiring something from the claimant's property, lost by the claimant because of fear. What the *actio* wants to punish, then, is not some delict of causing fear. It punishes nothing but *contumacia*, the refusal of complying with the *iussum de restituendo* given by the *iudex*[33]. The *actio quod metus causa* looks like another type of *actio mixta*, both *rem* and *poenam*

33. Kupisch, 1974, p. 235–238; Kupisch, 2007, p. 430, with reference to Inst 4.6.27. Note that scholars like O. Gradenwitz, *Die Ungültigkeit obligatorischer Rechtsgeschäfte*, Berlin, 1887, p. 38–40, already taught that the fine of fourfold was not meant to punish the causer of fear but the defendant who did not act upon the *iussum de restituendo*.

persequens, next to the type of actions where *lis infitiando crescit in duplum*, like the *actio ex testamento* and the *actio legis Aquiliae*.

7. Kaser's evaluation of Kupisch' views

Kaser summed up what should be accepted in Kupisch' new views on *in integrum restitutio*, as it operated during the classical period, generally, and on the ground of *metus*, particularly[34].

The main advancement of our understanding of the classical *in integrum restitutio* generally, accomplished by Kupisch, appears to concern judicial *restitutio*. We are now aware of its role under the *actiones arbitrariae* and its position within the, now much widened, field of *in integrum restitutio*.

More particularly, as to *metus*, Kupisch has irreversibly opened our eyes for two important issues. First, the pure *restitutio* function of the *actio quod metus causa*, as a means of urging a defendant to restore what he had acquired but the claimant had lost because of *metus*. Secondly, the fact that the *poena quadrupli* of the *actio quod metus causa* is no punishment for the causer of fear.

In doing so, Kupisch has liberated us from the jumble of numerous unjustified assertions of interpolations. At the same time, he dressed an overall convincing explanation of the 'Drittwirkung', the fact that the *actio quod metus causa* could be brought against third parties, even third parties in good faith, who had acquired (part of) the thing the claimant had lost. That explanation also suits the gradual expansion of 'Drittwirkung' in the course of the classical period. Besides the *actio quod metus causa*, the *actiones rescissoriae* must now retreat somewhat. They were probably meant for instances where the issue of the presence of a ground for *restitutio* could be decided on already *in iure*, by the *praetor*. They favoured the defendant in so far that he needed not be afraid of the threat of *poena quadrupli*.

In conclusion, Kaser declares himself decidedly convinced that Kupisch' ideas with respect to the essence and the development of *in integrum restitutio*, particularly *metus causa*, deserve the confidence of Roman Law scholarship, because these ideas, when compared to the opinions voiced in the literature before Kupisch, are closer to the sources in the first place and more rational in the second place[35].

8. Reception of Kupisch' views

In how far have Kupisch' ideas, after 1974, been received by Roman Law scholarship and adopted in the textbooks? It is impossible to mention the entire,

34. Kaser, 1977, p. 178–179, where he also lists Kupisch' merits concerning *restitutio* on the grounds of *dolus*, minor age, *alienatio iudicii mutandi causa*, infringement of the *Senatusconsultum Vellaeanum*, *capitis deminutio* of one of the parties to a contract, and a number of instances of *restitutio litis*.

35. Kaser, 1977, p. 183.

very profuse literature written after 1974 which touches on *restitutio*. I will only recall a few works, at random, which discuss Kupisch' ideas on *restitutio*. I must abstain from mentioning the numerous authors who did not pay attention to these, when they should have done so[36].

The reviewers of Kupisch' book were divided. Hans-Peter Benöhr, if doubting certain aspects, agreed to the main new views. Benöhr remained a supporter of Kupisch' doctrine, as he demonstrated in a series of essays on *in integrum restitutio* for persons above the age of 25 years[37]. Gunter Wesener[38] could not accept the central new thesis of Kupisch of the identity of *restitutio* and *actio rescissoria* and preferred to stick to the traditional doctrine. Giuliano Cervenca[39] essentially was of the same opinion.

After a somewhat cautious approach in the new edition of his grand treatise on Roman Private Law, Second Part[40], Kaser accepted Kupisch' views to a large extent, as we saw, in the *Savigny Zeitschrift* of 1977. Kaser and Karl Hackl, in the second edition of *Das römische Zivilprozessrecht*, § 64, 1996, rewrote the treatment of *in integrum restitutio* much in the sense of Kupisch. In the *Kurzlehrbuch* the same was already done as from the editions, prepared by Kaser after 1975, and this was retained in the editions as from 2003, prepared by Rolf Knütel.

Alvaro d'Ors, in a series of copious, very careful essays[41], made it clear that he disagreed with both Kupisch' and Kaser's main views.

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36. Thus *e.g.* the important study of E. Calore, Actio quod metus causa. *Tutela della vittima e azione* in rem scripta (*Univ. Roma Tor Vergata. Pubbl. Fac. di Giur.* 8), Milano, 2011. The learned authoress adheres to the traditional view of *in integrum restitutio* as an exclusively praetorian remedy, but does not discuss Kupisch' and Kaser's views. She is rightly censured for this unfortunate defect by H. Ankum, *IVRA* 63 (2015), p. 193–200, at p. 195. M.F. Cursi, "'Actio quod metus causa' e le azioni 'miste'", *Index* 43 (2015), p. 393–401, neglected signalling that defect.

37. H.-P. Benöhr, [review of Kupisch 1974], *Archiv civ. Praxis* 176 (1976), p. 247–255; "'*Sachproblem*' – '*Rechtsregeln*' – '*rechtspolitische Perspektive*'", in *Festschrift Hausmaninger*, Wien, 2006, p. 41–57; "Zur Berechnung der Restitutionsfristen für einen *maior viginti quinque annis*", in *Studi Labruna* 1, Napoli, 2007, p. 387–408; "Rechtstechnik und Rechtsprinzipien", in *Festschrift Huwiler*, Bern, 2007, p. 39–67; "Zum Verfahren der in integrum restitutio für Volljährige", in *Festschrift Knütel*, Heidelberg, 2009, p. 103–117.

38. G. Wesener, [review of Kupisch 1974], *TR* 44 (1976), p. 169–172.

39. G. Cervenca, "Restitutio in integrum", *Labeo* 24 (1978), p. 213–221.

40. M. Kaser, *Das römische Privatrecht, Zweiter Abschnitt*, 2nd ed., München 1975, in the 'Nachträge zum Ersten Band', § 59–60, p. 580–582.

41. A. d'Ors, "Acerca de las acciones 'ex sc. Vellaeiano'", in *Estudios Alvarez Suárez*, Madrid, 1978, p. 337–351; "La acción del menor restituido", *AHDE* 49 (1979), p. 297–326; "Una acción de dolo dada al menor contra su esclavo manumitido", *SDHI* 46 (1980), p. 31–43; "El comentario de Ulpiano a los edictos del "metus", *AHDE* 51 (1981), p. 223–290; "Las acciones frustradas del caso Heraclides", in *Studi Biscardi* 1, Milano, 1982, p. 289–308.

Hans Ankum agreed with Kupisch only on a limited number of issues. Thus, he accepted[42] that in a number of cases where the *praetor*'s edict proposed *in integrum restitutio*, the injured person, apart from other remedies for *restitutio*, disposed of an *actio arbitraria in personam* which enabled the *iudex* to make a *iussum de restituendo*. Those cases were especially cases of *metus* or *dolus*; another case was that of the *minor circumscriptus* by the adverse party. But Ankum abandoned[43] Kupisch where the latter defended that the concept of *in integrum restitutio* in itself includes such *actiones arbitrariae* with judicial *restitutio*; in his view, Kupisch did not find the required support for that point in the texts.

In the new edition of Kunkel's *Römisches Recht*, Theo Mayer-Maly, reviser of the passage on *metus*, appears to follow D'Ors' preference for the traditional doctrine; Walter Selb, who revised the passage on *restitutio in integrum*, shows himself equally as not convinced by Kupisch, just as he had already, a year before, made clear in an essay in that year's Festschrift for Kaser[44].

It would seem that the *Droit privé romain, tome II* by Bruno Schmidlin and Carlo Augusto Cannata[45], while mentioning Kupisch' book, does not adhere to his views on *restitutio*.

Reinhard Zimmermann adopted on the whole Kupisch' theory, in his influential *The Law of Obligations*[46].

Carlo Venturini, in an essay on *metus* in the 1994 *Festschrift for Murga*[47], applauded certain aspects of Kupisch' ideas.

In her Mainz doctoral thesis of 2001 on insolvency in classical Roman Law, Inge Kroppenberg[48] highlighted Kupisch' discovery of the identity of the *actio de dolo* and *in integrum restitutio* in all but exceptional cases as '*mittlerweile gesicherter Forschungsstand*'.

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42. H. Ankum, "Le *minor captus* et le *minor circumscriptus* en droit romain classique", in *Études Jaubert*, Bordeaux, 1992 (now also in Id., *Extravagantes* [*Antiqua* 93], Napoli 2007), p. 35–50, at p. 39–40.

43. Ankum, "L'*actio de auctoritate* et la *restitutio in integrum* dans le droit romain classique", in *Maior viginti quinque annis*, Assen, 1979, p. 1–21, at 19 ; "Eine neue Interpretation von Ulpian Dig. 4.2.9.5–6 über die Abhilfen gegen *metus*", in *Festschrift H. Hübner*, Berlin *etc*., 1984, p. 3–19.

44. H. Honsell, Th. Mayer-Maly [and] W. Selb, *Römisches Recht*, 4th ed., Berlin *etc*. 1987, § 53.4 resp. Anhang § 24; W. Selb, "Das prätorische Edikt: Vom rechtspolitischen Programm zur Norm", in *Festgabe Kaser … 80*, Wien *etc*., 1986, p. 259–272.

45. Lausanne 1987, at p. 127.

46. Cape Town, 1990 and Oxford, 1996, at p. 656 f.

47. C. Venturini, "Metus", in *Homenaje Murga Gener*, Madrid, 1994, p. 921–944.

48. I. Kroppenberg, *Die Insolvenz im klassischen römischen Recht. Tatbestände und Wirkungen außerhalb des Konkursverfahrens* (*Forsch. röm. Recht* 48), Köln, 2001, at p. 445.

Götz Grevesmühl, author of a Göttingen doctoral thesis of 2003 on *fraus creditorum*, *in integrum restitutio* and the *actio Pauliana*[49], touched briefly on Kupisch' theory that, in that field, the *in integrum restitutio* and the *actio in factum* are identical. However, he confined himself to stating that refuting this theory would exceed the limits of his research. A statement which surprises, for it is clear that if Kupisch' theory is correct, Grevesmühl's thesis would lack any basis[50].

The *Historisch-kritischer Kommentar zum BGB* on § 123–124 of the German civil code, written by Martin Schermaier, is presenting the *actio quod metus causa*, like Kupisch did, as *in integrum restitutio*, noting that the question is disputed[51].

The *Istituzioni di diritto romano* of Giovanni Pugliese, Francesco Sitzia and Letizia Vacca, in their edition of 2012, clearly agreed with the doctrine of Kupisch in so far as accepted by Kaser[52].

The *Cambridge Companion to Roman Law*, 2015, mentioned Kupisch' 1974 book in its bibliography, but no trace of his views pops up in Ernest Metzger's few words on *in integrum restitutio*[53].

In *The Oxford Handbook of Roman Law and Society*, 2016, only Christian Baldus' chapter 41 touched lightly on the *clausula arbitraria* of the *reivindicatio*, but did not deem it needful to mention either Kupisch, or judicial and praetorian *restitutio*.

9. Conclusion

From the point of view of methodology, Kupisch applied in an exemplary manner the modern methods of approaching and understanding the Roman sources. In this he was one of Max Kaser's most brilliant pupils.

A first keyword is here the '*Glaubwürdigkeit*', the credibility, of the fragments taken from the writings of the classical jurists and handed down to us by Justinian. Kaser established the opinion that Justinian's compilers, when including these fragments in the Digest, changed them to a lesser extent than had often been thought before. He therefore attacked a radical and exaggerated criticism of the texts. But a sharp criticism of the Roman sources was one of the tools of the great German and Italian scholars who analysed *in integrum restitutio* in the first half of the 20th Century and whose results were now revised by Kupisch. While abandoning

49. G. Grevesmühl, *Die Gläubigeranfechtung nach klassischem römischen Recht (Quellen u. Forsch. z. R. u. s. Geschichte* 10*)*, Göttingen, 2003, at p. 27 footnote 104.

50. Review by J.D. Harke, *TR* 72 (2004), p. 383–386, who speaks of '*eine gravierende Lücke*'.

51. M. Schermaier, in M. Schmoeckel (red.), *Historisch-kritischer Kommentar zum BGB*. 1, *Allgemeiner Teil, § 1–240*, Tübingen, 2003, p. 485–486.

52. However, the assertion stated there (at p. 172) that the *actio quod metus causa* '*si dirigeva solo contro l'autore della violenza o della minaccia*', is unhappy. It could be misread as referring to the *actio quod metus causa* known from D. 4.2; but it would be correct if applied to the *formula Octaviana* which preceded it.

53. P. 277.

almost entirely the assumption of corruptions of the texts, Kupisch tried to gain new opinions from the sources handed down to us, and he has been successful.

Under the banner of another of Kaser's postulates, Kupisch assumed that, in the classical period, a technical legal language had not developed to such extent as it had generally been seen as self-evident before. That is particularly true for the terminology of nullities, including *in integrum restitutio*.

Finally, we will have to allow more room for a variety of procedural design with respect to *in integrum restitutio* than it had been assumed before. It is no longer acceptable that *in integrum restitutio* is kept apart from *actio* as a matter of course, both as concepts and as to terminology.

While doubting some of Kupisch' separate conclusions, we cannot but applaud, with Benöhr[54], his main theses. The essential merit of Kupisch' work may well be seen in his having put question marks at what was thought to be self-evident, and having found new answers with new methods.

54. Benöhr, 1976, p. 255.

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Sommaire

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