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## Compulsion in Roman Law

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## 1. INTRODUCTION<sup>1</sup>

Ancient Roman law was formal in the sense that it seldom looked behind the external manifestations of a legal act in order to determine its validity.<sup>2</sup> The significance of this approach for compelled acts was later encapsulated in a famous phrase by Paulus:

*"Si metu coactus adii hereditatem, puto me heredem effici, quia quamvis si liberum esset noluissem, tamen coactus volui"* ("If I have entered upon an inheritance whilst compelled by fear, I believe that I become heir, because, although I would have declined if I had a free choice, when compelled I still had the will to do it").<sup>3</sup>

Thus, the mere fact that an heir was "compelled by fear" did not imply that he could dispute the validity of his formal decision to accept the inheritance. He exercised his will in making a choice and was bound by it. As Paulus would say, *"voluntas coacta tamen voluntas est"*. It was only in the case of agreements such as *emptio venditio* and *locatio conductio*, which were enforced by *bonae fidei* actions, that the judge had authority to provide relief. He could take anything which relates to good faith into account when he made his judgement, and here the presence of *metus* or duress was obviously relevant. A person attempting to enforce an agreement concluded under compulsion could be defeated by an *exceptio metus*, which was inherent in

<sup>1</sup> Cf., generally, Von Lübtow, *Der Ediktstitel "Quod metus causa gestum erit"*; Hartkamp, *Der Zwang im römischen Privatrecht*; Schulz, "Die Lehre vom erzwungenen Rechtsgeschäft im antiken römischen Recht", 1922 (43) *ZSS (RA)*, 171; Schulz, *Classical Roman Law*, pp. 600 sqq.; Levy, "Zur nachklassischen in integrum restitutio", 1951 (68) *ZSS (RA)* 398; Kupisch, *In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht*, pp. 123 *passim*; Kaser, "Zur in integrum restitutio, besonders wegen metus und dolus", (1977) 94 *ZSS (RA)*, 123, Kaser, *Das römische Privatrecht I*, pp. 227, 242. For an introductory overview see Zimmermann, *The Law of Obligations*, pp. 651 sqq.

<sup>2</sup> Cf. Kaser, *Das römische Privatrecht I*, pp. 227, 242; Buckland, *A Text-book of Roman Law from Augustus to Justinian*, p. 416. A notable exception was *error*. If induced by *dolus*, the *dolus* could indirectly affect the validity of the agreement (cf. Thomas, *Textbook of Roman Law*, p. 228).

<sup>3</sup> Paul. D. 4.2.21.5. For a detailed analysis of this text, which deals with the possibility that it could have been interpolated, cf. Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 84 sqq.

*bonae fidei iudicia*.<sup>4</sup> Agreements such as the *stipulatio*, on the other hand, were not enforced by *bonae fidei* actions, but by actions which came to be termed *stricti iuris*. Here the judge's hands were tied: he was only able to take into account that which was provided for in the *formula*, and if nothing could be said about *metus*, he was powerless to provide relief.<sup>5</sup> Reform was needed, and the ideal vehicle for such reform was the praetor. In this chapter the focus will primarily be on the way in which the praetor reformed the civil law by providing the *actio quod metus causa* and *in integrum restitutio (propter metum)* to the victim of compulsion. Attention will also be paid to certain other forms of relief to which the victim was entitled, namely remedies of property law and a particular *stricti iuris* action of the law of obligations called the *condictio*.

## 2. COMPULSION AND THE REMEDIES BASED ON *METUS*

### 2.1 The formula Octaviana

The first reform aimed at remedying the inability of the *ius civile* to provide adequate relief on grounds of *metus* was the inclusion of the *formula Octaviana* in the praetor's edict at about 71 B.C.<sup>6</sup> Unfortunately, not much is known about this *formula*. Two texts of Cicero indicate that it dealt with *aufferre per vim aut metum* or *aufferre per vim et metum*,<sup>7</sup> but these records are

<sup>4</sup> Cf. Kaser, *Das römische Privatrecht I*, pp. 244, 488; Nicholas, *An Introduction to Roman law*, p. 176. If the defendant proved fraud or duress he could also reduce the damages awarded to the plaintiff without wholly absolving the defendant (cf. Pap. D. 19.1.41; Thomas, *Textbook of Roman Law*, p. 228).

<sup>5</sup> Cf. Kaser, *Das römische Privatrecht I*, p. 245, n. 31; Thomas, *Textbook of Roman Law*, p. 228; Nicholas, *An Introduction to Roman Law*, pp. 163, 176; Buckland, *A Text-book of Roman Law from Augustus to Justinian*, pp. 416 sq., 679 sqq.

<sup>6</sup> Cf. Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 191 sq., 245 sqq.; Von Lübtow, *Der Ediktstitel "Quod metus causa gestum erit"*, pp. 126 sqq. On the social conditions at the time which may have prompted this measure, cf. Zimmermann, *The Law of Obligations*, pp. 651 sqq. According to Kelly, moral philosophical considerations reflected in Aristotelian and Stoic teaching on will and intention underlay the introduction of this measure (*A Short History of Western Legal Theory* (Oxford, 1992), p. 53).

<sup>7</sup> The two texts are *In Verr. II 3.65.152* ("Adventu L. Metelli praetoris ... aditum est ad Metellum; eductus est Apronius; eduxit vir primarius, C. Gallus senator, postulavit ab L. Metello, ut ex edicto suo iudicium daret in Apronium 'Quod per vim aut metum abstulisset', quam formulam Octavianam et Romae Metellus habuerat et habebat in provincia") and *ad.*

somewhat cryptic and inconsistent. A major problem with the Ciceronian texts is the absence of a clear indication of the factual basis of relief. By this the methods used by the wrongdoer and the effect thereof on the victim are meant. It is therefore not surprising that a diversity of interpretations exists as to what these texts are supposed to mean. According to Carlo Alberto Maschi a distinction should be drawn between *vis* and *metus* as two separate grounds for relief: he uses a distinction which was developed in mediaeval law, namely between *vis absoluta* and *vis compulsiva*.<sup>8</sup> Maschi then defines the word "*vis*" in the formula as *vis absoluta*, i.e. physical bodily force which completely excludes any exercise of will by the victim. Robbery is supposed to involve such violence. *Metus*, on the other hand, is defined as fear caused by *vis compulsiva*, i.e. through the "bending" of the will of the victim.<sup>9</sup> Threats are a source of such fear. According to Maschi, it is only when specific measures were taken against robbery, namely the *actio vi bonorum raptorum*<sup>10</sup> (contained in an Edict of Lucellus dating from 76 B.C.), that the formula Octaviana no longer needed to be applied in cases of *vis absoluta* and was

*Quint. frat.* 1.1.7.21. ("*Cogebantur Sullani homines quae per vim et metum abstulerant reddere*"). The latter text indicates that the formula was aimed at assisting the recovery of illicit takings from Sulla's supporters (cf. Von Lübtow, *Der Ediktstitel "Quod metus causa gestum erit"*, pp. 127). The generality of this statement makes it arguable that even in early Roman law collective persecution was covered by the *metus* remedies.

<sup>8</sup> On this distinction see Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 3 sqq., who refers to Azo, *Summa in C. 2,19 (20) de his quae vi metusve causa gesta sunt*, § in primis (Papiae, 1506; Torino, 1966), 38; *Glossa ordinaria*, gl. vi atroci ad D. 4.2.1, gl. non videor and per vim ad D. 4.2.9 pr.; Baldus de Ubaldis, *Commentarius super Decretalibus*, in c. quae causa, X, de his quae vi metusve causa fiunt, n. 6-7 (Lugduni 1551), f.171rb.

<sup>9</sup> See Carlo Alberto Maschi, *Il diritto romano I. la prospettiva storica della giurisprudenza classica* (2nd. ed., Milan, 1966), pp. 641 sq., 647 sqq., 651 sqq. (references obtained from Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 4 sqq.; Ebert, "*Vi metusve causa*", (1969) 86 ZSS (RA) 403, 404 and Kupisch, *In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht*, pp. 193 sqq.). This view was initially followed by Schulz, "*Die Lehre vom erzwungenen Rechtsgeschäft im antiken römischen Recht*", 1922 (43) ZSS (RA), 171, but subsequently rejected in his *Classical Roman Law*, p. 601.

<sup>10</sup> Other important measures were the *leges repetundarum*, which were specifically aimed against magistrates who enriched themselves by extorting bribes. Cf. Von Lübtow, *Der Ediktstitel "Quod metus causa gestum erit"*, pp. 81 sq., 129 sqq.; Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 251 sqq.; Berger, *Encyclopedic Dictionary of Roman Law*, s.v. *Repetundae*.

restricted to the "active" part of *vis compulsiva*, with *metus* forming the "passive" part. In other words, the concepts *vis* and *metus* now formed a sort of hendiadys: when combined they expressed the notion of compulsion through threats, with *vis* being the ("active") act of threatening, and *metus* the ("passive") effect on the victim.<sup>11</sup> This view that *vis* and *metus* formed a hendiadys, has also been proposed by many other authors, most notably Schulz,<sup>12</sup> but with a crucial difference: they are not in agreement with Maschi's view that the word *vis* in the *formula Octaviana* initially only applied to *vis absoluta*. According to them the hendiadys of *vis* and *metus* did not develop after the action against robbery was recognised. It was already present in the *formula Octaviana*. Thus, the formula never applied to *vis absoluta*, but only to *vis compulsiva*; or, as Schulz puts it, "fear caused by threat".<sup>13</sup> Ebert also supports the view that the *formula Octaviana* did not apply to *vis absoluta*, but bases this view on entirely different reasons.<sup>14</sup> He rejects the view that the words *vis* and *metus* form a hendiadys: according to him, these words rather deal with two ways of "bending" the will of a victim, namely through *vis*,<sup>15</sup> which is defined as physical violence causing fear, and through *metus*, which relates to threats of future harm. However, this view has been subjected to criticism,<sup>16</sup> and at present, it seems doubtful whether a clear

<sup>11</sup> See Maschi, *Il diritto romano I. la prospettiva storica della giurisprudenza classica* (2nd. ed., Milan, 1966), pp. 641 sqq. (references obtained from Ebert, "*Vi metusve causa*", (1969) 86 ZSS (RA) 403, 404 and Kupisch, *In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht*, pp. 193 sqq.).

<sup>12</sup> Schulz, *Classical Roman Law*, pp. 601 sq.; Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 5 sqq., 16. Cf. Kupisch, *In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht*, p. 194, n. 312.

<sup>13</sup> Schulz, *Classical Roman Law*, p. 601.

<sup>14</sup> Ebert, "*Vi metusve causa*", (1969) 86 ZSS (RA) 403 at 407.

<sup>15</sup> *Vis compulsiva* is then supposed to be restricted to *vis* so defined (Ebert, "*Vi metusve causa*", (1969) 86 ZSS (RA) 403, 405 sqq., 408, 414). As Hartkamp points out, such usage of the term *vis compulsiva* is at variance with existing usage, which defines it as psychological compulsion irrespective of the method employed (*Der Zwang im römischen Privatrecht*, p. 13, n. 5).

<sup>16</sup> Cf. Kupisch, *In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht*, pp. 193 sqq.; on the distinction cf. also Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 4 sq.

answer can be found. The Ciceronian texts alone give very little guidance: the word "*auferre*" could mean "to rob" or "to take by force", as well as "acquire as the fruits of some act".<sup>17</sup> It could therefore be used in the context of *vis absoluta* (inasmuch as it encompasses robbery) as well as *vis compulsiva*. Use of both the expressions *vis et metus* and *vis aut metus* is further confusing: if only *vis et metus* were used there would be much more force in the argument that they should be interpreted as a hendiadys. The words could then be read together, and an interpretation of *vis* as a reference to *vis absoluta* would be untenable since it would render the reference to *metus* superfluous.<sup>18</sup> After all, in cases of *vis absoluta* it is utterly irrelevant whether or not the victim experienced fear. Use of the expression *vis aut metus* again indicates that two different concepts could have been intended, and that a hendiadys does not exist. This again provides support for the views of Maschi and Ebert, albeit that they differ as to the exact meaning of *vis*.

It is not only the field of application of the *formula Octaviana* which is heavily disputed: the exact nature of the relief it gave rise to is also unclear. From the words "*reddere cogebantur*" contained in one of Cicero's texts,<sup>19</sup> it can be deduced that the *formula* was aimed at obtaining some form of restitution, but this is about as far as one can take it. Apparently a penal remedy, aimed at obtaining damages in fourfold, was available to pressurize the recipient into providing restitution,<sup>20</sup> but whether one could only proceed against the wrongdoer, or also against a third party recipient, is unclear.<sup>21</sup>

<sup>17</sup> Von Lübtow, Der Ediktstitel "Quod metus causa gestum erit", pp. 127 sq.; Hartkamp, Der Zwang im römischen Privatrecht, p. 249.

<sup>18</sup> Cf. Hartkamp, Der Zwang im römischen Privatrecht, p. 249.

<sup>19</sup> Ad. Quint. frat. 1.1.7.21.

<sup>20</sup> Von Lübtow, Der Ediktstitel "Quod metus causa gestum erit", p. 128; Hartkamp, Der Zwang im römischen Privatrecht, p. 249; Schulz, "Die Lehre vom erzwungenen Rechtsgeschäft im antiken römischen Recht, 1922 (43) ZSS (RA), 171, 218; also see Kupisch, In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht, pp. 158 sqq.

<sup>21</sup> Cf. esp. Hartkamp, Der Zwang im römischen Privatrecht, pp. 253 sqq., who supports the idea of a claim against third parties, but also discusses the contrary opinion.

## 2.2 Hadrian's *Edictum perpetuum*

Two centuries after the adoption of the *formula Octaviana* an important provision on *metus*, which is recorded in Ulp. D.4.2.1, was included in the *Edictum perpetuum* of Hadrian.<sup>22</sup> It is the most important Roman legal text on *metus* and reads as follows:

"*Ait praetor: 'Quod metus causa gestum erit, ratum non habebo'*"  
 ("The praetor says: 'What is done through fear I will not uphold')."<sup>23</sup>

It is apparent that there has been a movement away from the expression "*vis et metus*", found in the *formula Octaviana*, to simply "*metus*". Ulpian provides the explanation that the reference to force ("*vis*") was later dropped because "anything which is done by unmitigated force may be held to be done through fear too".<sup>24</sup> This indicates that the Edict did not encompass *vis absoluta*, but only *vis compulsiva*. In fact, if it encompassed *vis absoluta*, the contraction to *metus* would have been highly unlikely.<sup>25</sup> It should be obvious, however, that it could never have been intended that the Edict applied whenever someone experienced any sort of fear.<sup>26</sup> Where the fear is not caused by wrongful means, but flows from threatened force of legal proceedings,<sup>27</sup> or is "rightfully applied by a magistrate in pursuance of an established law",<sup>28</sup> no relief would

<sup>22</sup> Cf. Schulz, *Classical Roman Law*, p. 601 sq.; Hartkamp, *Der Zwang im römischen Privatrecht*, p. 193.

<sup>23</sup> Lenel reconstructed the formula as follows: "Si paret metus causa A<sup>m</sup>A<sup>m</sup> fundum q.d.a. N<sup>o</sup>N<sup>o</sup> mancipio dedisse q.d.r.a. neque plus quam annus est cum experiundi potestas fuit neque ea res arbitrio iudicis restituatur, q.e.r. erit, tantae pecuniae quadruplum iudex N<sup>m</sup>N<sup>m</sup> A<sup>o</sup>A<sup>o</sup> c.s.n.p.a" (*Das Edictum perpetuum* (2nd. ed., Leipzig, 1927), p. 112).

<sup>24</sup> Ulp. D. 4.2.1 ("... quodcumque vi atroci fit, id metu quoque fieri videtur").

<sup>25</sup> Cf. Hartkamp, *Der Zwang im römischen Privatrecht*, p. 7. According to him, Maschi regards the expression "... quodcumque vi atroci fit, id metu quoque fieri videtur" as interpolated "weil sie nicht in seine Theorie passen"(!).

<sup>26</sup> Maier, *Prätorische Bereicherungsklagen*, p. 95.

<sup>27</sup> Cf. C. 8.37.9.1 (Diocl. et Max.), C. 2.19.10 (Diocl. et Max.).

<sup>28</sup> Ulp. D. 4.2.3.1 ("Sed vim accipimus atrocem et eam, quae adversus bonos mores fiat, non eam quam magistratus recte intulit; scilicet, iure licito et iure honoris quem sustinet"). Cf. Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 21 sqq.

be provided. Neither would there be relief if a person brought force to bear on a debtor in order to obtain payment.<sup>29</sup> Fear was also not understood simply to mean any apprehension whatever, but rather "fear of some evil of exceptional severity" (*maioris malitatis*).<sup>30</sup> It should further not have been the fear felt by a weak-minded man, but rather that fear which might reasonably have an effect upon a man of the most resolute character ("*homo constantissimus*").<sup>31</sup> It did not cover *metus reverentialis*, which is the fear or profound reverence which a son, for example, could feel for his father, and which would induce the son to act in a certain way.<sup>32</sup> Many examples are mentioned of the application of this edict: these deal with fear of personal harm, such as death,<sup>33</sup> harm to physical integrity and loss of freedom,<sup>34</sup> and possibly also fear of harm of an economic nature.<sup>35</sup> Threats of harm to family are also covered.<sup>36</sup>

<sup>29</sup> This did not exclude relief by other means. In certain cases of self-help the *lex Julia de vi privata* could impose criminal liability (cf. Mod. D. 48.7.8; Kaser, *Das römische Privatrecht I*, p. 222; Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 43 sq. 158 sqq.). Furthermore, through the *decretum divi Marci* a creditor who engaged in self-help could also be punished by the loss of his claim (Call. D. 4.2.13; cf. Kaser, *Das römische Privatrecht I*, p. 222, and on the post-classical law, *Das römische Privatrecht II*, p. 41).

<sup>30</sup> Ulp. D. 4.2.5; also see Ulp. D. 4.2.23.3.

<sup>31</sup> Gai. D. 4.2.6 ("Metum autem non vani hominis, sed qui merito et in homine constantissimo cadat"). Cf. Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 27 sqq.; Zimmermann, *The Law of Obligations*, pp. 653 sq.

<sup>32</sup> Cf. Cels. D. 23.2.22; Hartkamp, *Der Zwang im römischen Privatrecht*, p. 18, n. 1; Von Savigny, *System des heutigen römischen Rechts*, vol. 3, p. 102 note c).

<sup>33</sup> Cf. Ulp. D. 4.2.3.1; Ulp. D. 4.2.7; Paul. D. 4.2.8; Ulp. D. 4.6.3.

<sup>34</sup> Cf. e.g. Paul. D. 4.2.2 (fear of an attack which cannot be repelled); Paul. D. 4.2.8.2 (fear of sexual assault); Paul. D. 4.2.4 and Paul. 4.2.8.1 (fear of slavery); Ulp. D. 4.2.7; Paul. D. 4.2.22 (fear of imprisonment); Ulp. D. 4.2.7.1; Ulp. D. 4.2.23.1 (fear of being brought in chains); Ulp. D. 4.2.23.2 (an athlete's fear of being confined, thus preventing him from entering into contests).

<sup>35</sup> Cf. Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 40 sq. But cf. also C.4.13; Dawson, "Economic Duress and the Fair Exchange in French and German law", 1937 (3) *Tulane Law Review* 35, 347.

<sup>36</sup> Cf. Paul. D. 4.2.8.3; Hartkamp, *Der Zwang im römischen Privatrecht*, p. 42.



Thus far the focus was on the relationship between *vis* and *metus*, and the meaning of *metus*. The question now arises as to what exactly was meant by the expression "*quod metus causa gestum erit*". Various possibilities exist.<sup>37</sup> Georg H. Maier argues that it means "what has been done with the purpose of causing fear". The conduct instilling fear would therefore be the object of the edict.<sup>38</sup> This interpretation draws its strength from the view that *metus* is a delict: the focus is on the wrongfulness of the conduct, and not on the emotional state of the victim. However, as Kunkel indicates, this interpretation does not fit in well with the words "*ratum non habebo*", which could surely only pertain to the act of the victim and not to the act of the wrongdoer.<sup>39</sup> The conventional approach is then that the Edict applies to the act which the victim concluded out of fear ("*metus causa*").<sup>40</sup> However, this approach only really explains why the victim has a claim against the wrongdoer; it fails to explain why third party recipients could also be liable under the edict. Kupisch's alternative approach overcomes this problem by interpreting "*metus causa*" as "as a consequence of fear", rather than the conventional "out of fear".<sup>41</sup> Thus, if a third party who had nothing to do with the extortion receives something as a consequence thereof, he could still fall under the Edict.<sup>42</sup> In this way, the focus of the Edict is constantly on the restitution of what has been obtained, and has to be returned, rather than on the punishment of wrongs.<sup>43</sup>

<sup>37</sup> For a general overview, see Zimmermann, *The Law of Obligations*, p. 654.

<sup>38</sup> Maier, *Prätorische Bereicherungsklagen*, pp. 96 sqq.

<sup>39</sup> Kunkel, *Römisches Privatrecht*, p. 261, n. 5; Hartkamp, *Der Zwang im römischen Privatrecht*, p. 55, n. 16; Kaser, "Zur in integrum restitutio, besonders wegen metus und dolus", (1977) 94 ZSS (RA), 123.

<sup>40</sup> Cf. Hartkamp, *Der Zwang im römischen Privatrecht*, p. 55; Zimmermann, *The Law of Obligations*, p. 654.

<sup>41</sup> Kupisch, *In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht*, pp. 146 sq.

<sup>42</sup> Cf. Kaser, "Zur in integrum restitutio, besonders wegen metus und dolus", (1977) 94 ZSS (RA), 123 ("Der Prätor will jeglichen im Gefolge einer Furchterregung gemachten Erwerb entkräften oder wieder rückgängig machen"); Zimmermann, *The Law of Obligations*, p. 654.

<sup>43</sup> Cf. Kupisch, *In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht*, p. 148.

It is against this background that the remedies the Edict gave rise to - the consequences of "*ratum non habeo*" - can be examined. Again, academic opinion is divided.<sup>44</sup> Conventional thought,<sup>45</sup> based on the work of Schulz,<sup>46</sup> maintains that classical Roman law provided three separate remedies in cases of *metus*, namely the *exceptio metus*, *in integrum restitutio (propter metum)*, and the *actio quod metus causa*. These remedies will now be dealt with in turn.

*i. The exceptio metus*

It has already been shown that the *exceptio metus* was inherent in *bonae fidei iudicia*. The judge could therefore simply refuse to enforce such agreements if they were concluded under *metus*. For plaintiffs not fortunate enough to obtain the relief on this basis, the praetor also provided an *exceptio metus*.<sup>47</sup> The remedy was generally available against the wrongdoer as well as third parties.<sup>48</sup> Incidentally, it will be indicated below how a *condictio* could possibly be provided if a transfer was made by a victim who was not aware that he had this *exceptio* at his disposal.<sup>49</sup>

<sup>44</sup> On the difficulties surrounding the interpretation of the text in general, cf. Ankum, "Eine neue Interpretation von Ulpian Dig. 4.2.9.5-6 über die Abhilfen gegen metus", in: Festschrift für Heinz Hübner, p. 3.

<sup>45</sup> Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 189 sqq.; Jolowicz, *Historical Introduction to the Study of Roman Law*, p. 292; Lee, *The Elements of Roman Law with a Translation of the Institutes of Justinian*, p. 352; Thomas, *Textbook of Roman Law*, pp. 373 sqq.; Buckland, *A Text-book of Roman Law from Augustus to Justinian*, pp. 593 sqq.; Honsell (et al.), *Römisches Recht*, pp. 126, n. 72, 375, n. 12; Kaser, *Das römische Privatrecht I*, pp. 244 sqq.

<sup>46</sup> See his *Classical Roman Law*, p. 600 sqq. and "Die Lehre vom erzwungenen Rechtsgeschäft im antiken römischen Recht", (1922) 43 ZSS (RA) 171 sqq.

<sup>47</sup> Cf. Ulp. D. 44.4.4.33. Its exact relationship with the *actio quod metus causa* is not clear (see Zimmermann, *The Law of Obligations*, p. 658).

<sup>48</sup> Ulp. D. 44.4.4.33. Cf. Schulz, *Classical Roman Law*, p. 603.

<sup>49</sup> Cf. text to notes 99 and 100.

*ii. In integrum restitutio*

It has been indicated above that the civil law at times was unable to provide satisfactory relief in cases of *metus*. To overcome this problem, the Edict empowered the praetor to provide *in integrum restitutio (propter metum)*.<sup>50</sup> The remedy entailed that the praetor ensured a return to the former legal state by way of the annulment of an existing legal state. The victim was therefore entitled to be placed in the position he would have been in if there was no compulsion.<sup>51</sup> The exact scope of the relief varied in accordance with the facts of each case, e.g. whether a right of action was lost, an obligation was undertaken, or an object was transferred.<sup>52</sup>

*iii The actio quod metus causa*

According to conventional thought, in addition to *in integrum restitutio*, the Edict also provided the separate remedy of the *actio quod metus causa*.<sup>53</sup> If instituted within one year after something was obtained through *metus*, the *actio quod metus causa* could be used to claim four times the damages<sup>54</sup> suffered as a result of the *metus*. If instituted after one year, only simple damages could be claimed. However, since it was an *actio arbitraria*, the defender was allowed to escape this fourfold liability by returning that which

<sup>50</sup> Cf. the general wording of Ulp. D. 4.2.1; Schulz, *Classical Roman Law*, p. 603; Kaser, *Das römische Privatrecht I*, p. 244, n. 20; *Das römische Zivilprozessrecht*, pp. 330 sqq.; Zimmermann, *The Law of Obligations*, p. 656. The remedy has been described as "the most striking exercise of his imperium by the praetor" (Thomas, *Textbook of Roman Law*, p. 113).

<sup>51</sup> Kaser, *Das römische Privatrecht I*, p. 244; Kupisch, *In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht*, pp. 3 sqq.; Kunkel, *Römisches Privatrecht*, p. 381.

<sup>52</sup> Thomas, *Textbook of Roman Law*, p. 113.

<sup>53</sup> Cf. generally Zimmermann, *The Law of Obligations*, p. 656, and especially n. 43 and authorities quoted there.

<sup>54</sup> Cf. Ulp. D. 4.2.14.1; Kaser, *Das römische Privatrecht I*, p. 244. The claim for damages did not only include the value of that which was obtained, but also its fruits (cf. Ulp. D. 4.2.12; Ulp. D. 4.2.14.7, Paul. D. 4.2.21.2), lost profits (cf. Thomas, *Textbook of Roman Law*, p. 374; Ulp. D. 4.2.12) and accidental loss (Ulp. D. 4.2.12, Ulp. D. 4.2.14.11; C. 2.19.1; Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 221, 227).

was obtained through *metus*.<sup>55</sup> If the pursuer himself obtained something under the transaction, he could not retain it as a windfall, but had to give it back too.<sup>56</sup>

Because the *actio quod metus causa* awarded damages *in quadruplum*, many regard it as mainly a penal action for damages. However, the action was also *in rem scripta*, i.e. not only available against the wrongdoer, but against anyone (also *bona fide* third parties) who acquired something as the consequence of *metus*.<sup>57</sup> It is rather unusual for a penal action to allow a defender to escape liability for damages by returning that which was obtained through *metus*. This characteristic is treated as important by those who reject the conventional approach, and believe that in classical law the *actio quod metus causa* was not a remedy separate from *in integrum restitutio*, but an instrument aimed at achieving *in integrum restitutio*.<sup>58</sup> The argument is that the purpose of fourfold damages was to provide an incentive for the person who had the goods to return them. Only if he persisted in refusing to give the

<sup>55</sup> Cf. Ulp. D. 4.2.14.1; Kaser, *Das römische Zivilprozessrecht*, p. 257, n. 9.

<sup>56</sup> Cf. Kaser, "Zur in integrum restitutio, besonders wegen metus und dolus", (1977) 94 ZSS (RA), 135 sqq.; cf. also Kaser, *Das römische Zivilprozessrecht*, p. 330; Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 232 sqq.

<sup>57</sup> Cf. Maier, *Prätorische Bereicherungsklagen*, pp. 110 sqq.; Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 201 sqq. (esp. p. 203 nn. 13, 14); Kaser, *Das römische Privatrecht II*, p. 90, n. 46, *Das römische Privatrecht I*, p. 244, n. 25; *contra* Beseler, *Beiträge zur Kritik der römischen Rechtsquellen*, vol. I, p. 74; Von Lübtow, *Der Ediktstitel "Quod metus causa gestum erit"*, pp. 183 sqq.; Schulz, *Classical Roman Law*, p. 601. A *mala fide* third party was equated with the wrongdoer (Hartkamp, *Der Zwang im römischen Privatrecht*, p. 201, n. 1). A *bona fide* third party was sometimes treated differently (cf. Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 190 sq., 219 sqq.). He was only liable for loss after *litis contestatio* which could be ascribed to *dolus* on his side (cf. Ulp. D.4.2.14.5, Maier, *Prätorische Bereicherungsklagen*, pp. 134 sqq.; Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 222 sqq., 242). Hartkamp discusses the possibility that sometimes *cautiones* had to be given that the third party would return the goods if he found it again (cf. Ulp. D. 4.2.14.11). It is not clear whether a *bona fide* third party who purchased something which was obtained as a consequence of fear could refuse restitution unless his purchase price was repaid (cf. Maier, *Prätorische Bereicherungsklagen*, pp. 145 sqq.; Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 231 sqq., 243).

<sup>58</sup> Cf. generally Kupisch, *In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht*, pp. 123 passim; Kaser, "Zur in integrum restitutio, besonders wegen metus und dolus", (1977) 94 ZSS (RA), 101, 108 passim.

goods back, should he be punished.<sup>59</sup> Such an analysis certainly fits in well with the nature of the *actio quod metus causa* as an *actio arbitraria*. The rule that the judge could only condemn for a sum of money did not function properly when the victim wanted what he was entitled to as a matter of right and not (merely) a sum of money. The *actio arbitraria* then provided the judge a way around this problem by allowing him to determine that a monetary amount would be payable if the defendant did not act in a certain way. In the context of *metus*, the *actio quod metus causa* could then be used to effect restitution. This approach also draws much of its persuasive power from the argument that if the *actio quod metus causa* was purely a penal remedy, it is highly questionable why a third party who merely received the goods obtained through *metus*, and not the wrongdoer, would be exposed to the *actio*. It further solves the problem which the conventional approach has in explaining the odd overlapping relationship between the *actio quod metus causa* and *in integrum restitutio*.<sup>60</sup>

In post-classical law the distinction between the *ius civile* and *ius honorarium* was removed, and because the roles of the judge, who granted civilian relief, and the praetor, who granted relief according to the *ius honorarium*, were merged, a single remedy could be granted for all cases of *metus*. Whether it was due to a Justinianic integration ("*Verschmelzung*"),<sup>61</sup> or purely a continuation of the classical position does not matter: post-classical

<sup>59</sup> Cf. Zimmermann, "The Law of Obligations, pp. 656 sq.; Visser, "Rethinking Unjustified Enrichment: A Perspective of the Competition between Contractual and Enrichment Remedies", 1992 *Acta Juridica* 203, 220.

<sup>60</sup> Cf. Kaser, "Zur *in integrum restitutio*, besonders wegen *metus* und *dolus*", (1977) 94 *ZSS (RA)*, 104 sqq., 109 sqq. (esp. 116); Zimmermann, *The Law of Obligations*, pp. 656 sq.; but cf. Ankum, "Eine neue Interpretation von Ulpian Dig. 4.2.9.5-6 über die Abhilfen gegen *metus*", in: *Festschrift für Heinz Hübner*, p. 4, n. 5 and Gunter Wesener's review of Kupisch's *In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht* in (1976) 44 *Tijdschrift voor Rechtsgeschiedenis* 169.

<sup>61</sup> Cf. Schulz, "Die Lehre vom erzwungenen Rechtsgeschäft im antiken römischen Recht, 1922 (43) *ZSS (RA)*, 171, 229 sqq.; Von Lübtow, *Der Ediktstitel "Quod metus causa gestum erit"*, p. 218; Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 201 sq. It is not clear where exactly in Ulp. D.4.2.9 the discussion of *in integrum restitutio* is supposed to stop, and that of the *actio quod metus causa* is supposed to start. Traditionally it has been placed between Ulp. D.4.2.9.6 and 7 (cf. Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 190 sqq.), but according to Ankum it should be placed between Ulp. D.4.2.9.4 and 5 ("Eine neue Interpretation von Ulpian Dig. 4.2.9.5-6 über die Abhilfen gegen *metus*", in: *Festschrift für Heinz Hübner*, p. 3).

law did not treat the *actio quod metus causa* and *in integrum restitutio* as distinct remedies.<sup>62</sup> A person who was compelled to enter into a transaction could claim back that which the recipient obtained,<sup>63</sup> as well as threefold damages if restitution did not take place.<sup>64</sup> The actio was *in rem scripta*,<sup>65</sup> and, as in classical law, the *exceptio metus* was available to ward off claims based on transactions where *metus* was present.<sup>66</sup>

*iv. Excursus: Voidness or voidability?*

At this stage is appropriate to pause and briefly consider the effect of the praetorian law on the validity of transactions concluded under compulsion. At least two options present themselves, namely voidness or voidability (i.e. validity until such time as the victim obtained relief). The question as to which of these alternatives is preferable, is difficult to answer, for Roman law did not draw an explicit distinction between voidness and voidability.<sup>67</sup> In these times

<sup>62</sup> Cf. Kaser, *Das römische Privatrecht II*, p. 90, n. 47; Levy, "Zur nachklassischen in integrum restitutio", 1951 (68) *ZSS (RA)* 398 sqq. (esp. 405); Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 173 sqq. *In integrum restitutio*, in its *propter metum* form, actually seems to have disappeared during the time of Constantine. On the process of amalgamation which characterised the post-classical law in general, see Schulz, *Classical Roman law*, pp. 457 sq. Another feature was the grouping together of certain delicts, such as *furtum*, *rapina*, *damnum iniuria datum* and *iniuria*. However, *metus*, like *dolus*, was not included in the list, although it subsequently came to be termed a "praetorian delict" (see Nicholas, *An Introduction to Roman law*, pp. 210 sq.; Thomas, *Textbook of Roman law*, pp. 373 sq.).

<sup>63</sup> He could also rely on the agreement: cf. Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 50 sq., referring to C. 2.19.4 (Gord. 239) and C. 2.19.2 (Alex. 226).

<sup>64</sup> Kaser, *Das römische Privatrecht II*, p. 90; *Das römische Zivilprozessrecht*, p. 471. Cf. Ulp. D. 4.2.14.10. Also cf. Ulp. D. 4.2.9.6; Ulp. D. 4.2.14.1; Ulp. D. 4.2.14.3; Ulp. D. 4.2.14.7. On *restitutio*, cf. in general Ulp. D. 4.2.3; Paul. D. 4.2.8; Ulp. D. 4.2.9.7; and Ulp. D. 4.2.12 (regarding the measure of restitution).

<sup>65</sup> Schulz, *Classical Roman Law*, pp. 604 sq.; cf. Ulp. D. 4.2.9.3 and Ulp. 4.2.9.8.

<sup>66</sup> Kaser, *Das römische Privatrecht II*, p. 90; cf. Ulp. D. 4.2.9.3.

<sup>67</sup> Cf. Kaser, *Das römische Privatrecht I*, pp. 246 sqq.; Kaser, *Das römische Privatrecht II*, p. 90, n. 48 and Zimmermann, *The Law of Obligations*, p. 678 sqq., but cf. Schulz, *Classical Roman Law*, p. 602. Paulus regarded compelled transactions are valid in principle (D. 4.2.21.5) whereas Ulpian stated that "nothing is so contrary to consent ... as force or fear" (D. 50.17.116: "*Nihil consensui tam contrarium est, qui ac bonae fidei iudicia sustinet, quam vis atque metus: quem comprobare contra bonos mores est*"). This again indicates that

it was practically unimportant whether one regarded such agreements as void or voidable. The distinction (like that between *vis absoluta* and *vis compulsiva*) is of post-Roman origin. It seems unwise to attempt to force such structuring concepts onto Roman law.<sup>68</sup> The important point is that the victim of compulsion could attack the transaction and claim restitution.<sup>69</sup>

### 3. COMPULSION AND THE *CONDICTIONES*

Thus far the focus has been almost exclusively on the praetorian remedies of the *actio quod metus causa*, *in integrum restitutio* and the *exceptio metus*. However, it was not only the law relating to *metus* which could provide relief to victims of compulsion: mention has already been made of legislative reform through the *leges repetundarum*,<sup>70</sup> the *lex Julia de vi privata*, the *decretum divi Marci*<sup>71</sup> and the Edict of Lucellus against robbery (the *actio vi bonorum raptorum*),<sup>72</sup> as well as the relief the *ius civile* provided where *negotia bonae fidei* were concerned.<sup>73</sup> The attention will now turn to the *condictio*<sup>74</sup> - a

compelled transactions were void. In the age between classical and Justinianic law compelled transactions were generally regarded as void (Levy, "Zur nachklassischen in integrum restitutio", 1951 (68) *ZSS (RA)*, 360, 398 sqq., esp. 404 sqq.). Cf. Paul. Sent. 1.7.10; CT 15.14.8, according to which one of the exceptions to a list of valid transactions concluded between *tyranni* are those *dolo metuve caruerunt*, but again there is support for the contrary position (cf. Hartkamp, *Der Zwang im römischen Privatrecht*, p. 173, n. 3, Levy, "Zur nachklassischen in integrum restitutio", 1951 (68) *ZSS (RA)*, 408 n. 195).

<sup>68</sup> Von Lübtow, *Der Ediktstitel "Quod metus causa gestum erit"*, p. 73; Kaser, "Zur in integrum restitutio, besonders wegen metus und dolus", (1977) 94 *ZSS (RA)*, 107 sq.

<sup>69</sup> Cf. Levy, "Zur nachklassischen in integrum restitutio", 1951 (68) *ZSS (RA)*, 360, 408.

<sup>70</sup> Cf. n. 10 *supra*.

<sup>71</sup> Cf. n. 29 *supra*.

<sup>72</sup> Cf. text to n. 10 *supra*.

<sup>73</sup> Cf. text to n. 4 *supra*.

<sup>74</sup> On the *condictiones*, see Kaser, *Das römische Privatrecht I*, pp. 592 sqq.; Kaser, *Das römische Privatrecht II*, pp. 421 sqq.; Zimmermann, *The Law of Obligations*, pp. 834 sqq.; Liebs, "The History of the Roman *Condictio* up to Justinian" in: *Essays for Tony Honoré*, p. 163, esp. nn. 1, 2 and authorities quoted there; J. von Koschimbahr-Lyskowski, *Die Condictio als Bereicherungsklage im klassischen römischen Recht I* (Weimar, 1903), II

remarkable *stricti iuris* action which, like the praetorian remedies, could be used to obtain restitution in cases of compulsion.

### 3.1 Classical law

In early classical procedure a *legis actio per conditionem* could be used to recover a specific object (*certa res*) or sum of money (*certa pecunia*): in essence, this process entailed that the victim could give notice (*condicere*) before a magistrate that a matter would be referred for trial before a judge.<sup>75</sup> The defendant could avert this process by settlement or by submitting to the claim. The appeal of this procedure throughout its various stages of development lay in its abstract nature: without stating the basis for recovery or *causa debendi*, the pursuer could use the *condictio* to obtain recovery of a *certum* in a variety of circumstances.<sup>76</sup> It is therefore not surprising that the *condictio* came to be applied in certain non-contractual cases of what nowadays would be termed unjustified enrichment.<sup>77</sup> In classical law the basis of relief by way of the *condictio* in such cases was the absence of a *causa retinendi*, i.e. the fact that a person held something of another without being entitled thereto.<sup>78</sup> It is then said that in such cases two requirements had to be

(Weimar, 1907); Robert von Mayr, *Die Condictio des römischen Privatrechtes* (Leipzig, 1900); Von Lübtow, *Beiträge zur Lehre von der Condictio nach römischem und geltendem Recht*; Schwarz, *Die Grundlage der Condictio im klassischen römischen Recht*; Schulz, *Classical Roman Law*, 610 sqq.; Honoré, "Condictio and payment", 1958 *Acta Juridica* 135; Peiris, *Some Aspects of the Law of Unjust Enrichment in South Africa and Ceylon*, pp. 70 sqq., 130 sqq.; Visser, *Die rol van dwaling by die condictio indebiti*, pp. 1 sqq.; De Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg*.

<sup>75</sup> Cf. G.4.18; Liebs, "The History of the Roman *Condictio* up to Justinian" in: *Essays for Tony Honoré*, p. 164; Zimmermann, *The Law of Obligations*, p. 835.

<sup>76</sup> G.4.176. However, as Liebs points out, since *sponsio* or *stipulatio* were in any event the only ground for making the claim (in early law), "that peculiarity seems not to have been very remarkable originally" ("The History of the Roman *Condictio* up to Justinian", in: *Essays for Tony Honoré*, p. 165 n. 9).

<sup>77</sup> See Zimmermann, *The Law of Obligations*, pp. 836 sqq.

<sup>78</sup> Cf. Schwarz, *Die Grundlage der Condictio im klassischen römischen Recht*, pp. 212 sqq.; Kaser, *Das römische Privatrecht I*, p. 595; Visser, *Die rol van dwaling by die condictio indebiti*, p. 3, n. 9.



met for a successful claim with the *condictio*.<sup>79</sup> Firstly, with a few notable exceptions,<sup>80</sup> there had to be some act of conferment - a transfer or *datio* whereby ownership was acquired.<sup>81</sup> In this regard it has been argued that the *datio* had to be supported by its own *causa dandi*,<sup>82</sup> which in this context indicates with what purpose the *datio* was made, e.g. to pay a debt.<sup>83</sup> Secondly,

<sup>79</sup> Kaser, *Das römische Privatrecht I*, pp. 592 sqq.

<sup>80</sup> For a discussion of the exceptions, most notably theft (the *condictio furtiva*) and similar situations which involved taking, such as driving an owner off his land (a *condictio 'ex iniusta causa'*), see Liebs, "The History of the Roman *Condictio* up to Justinian", in: *Essays for Tony Honoré*, pp. 169 sqq.

<sup>81</sup> Kaser, *Das römische Privatrecht I*, pp. 594; Von Lübtow, *Beiträge zur Lehre von der Condictio nach römischem und geltendem Recht*, p. 146; Evans-Jones, "From 'undue transfer' to 'retention without a legal basis'", in: Evans-Jones ed., *The Civil Law Tradition in Scotland*, p. 219; Honoré, "Condictio and payment", 1958 *Acta Juridica*, 135. It is not clear whether a valid *datio* required a *negotium* between the parties. In Jul. D. 12.6.33 it is stated that "If I build on your site and you possess the house, there is no room for a *condictio* because there has been no dealing (*nullum negotium*) between us. For one who pays what is not owed does go through a kind of transaction (*aliquid negotii*) by the act of paying. But when an owner takes possession on his own of a building, placed there by another, he enters no transaction." According to Kaser this indicates that the *datio* required a *negotium contractum gestum*, i.e. an acceptable form of cooperation between the parties aimed at reaching a particular legal outcome (cf. *Das römische Privatrecht I*, pp. 594). According to Schwarz the *negotium* requirement would not be met where there was a delict (*Die Grundlage der Condictio im klassischen römischen Recht*, pp. 11 sq.) For criticism of the *negotium* requirement, see Liebs, "The History of the Roman *Condictio* up to Justinian", in: *Essays for Tony Honoré*, p. 172, esp. n. 63, where it is indicated that a *condictio* could arise from consumption, *accessio*, *commixtio* or *confusio* (also cf. Zimmermann, *The Law of Obligations*, p. 854). On the demise of the *negotium* requirement in Roman Dutch law cf. De Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg*, pp. 75 sqq. This was only in regard to the *condictio sine causa specialis* (i.e. not in regard to the *condictiones indebiti*, *ob turpem vel iniustam causam* and *causa data causa non secuta*, which are dealt with below).

<sup>82</sup> Cf. Schwarz, *Die Grundlage der Condictio im klassischen römischen Recht*, pp. 191 sqq., 219 sqq.; Visser, *Die rol van dwaling by die condictio indebiti*, pp. 6 sq., 11 sq. On the requirement of a *iusta causa traditionis* in the specific case of a *datio* in the form of *traditio*, see text to n. 132 *infra*.

<sup>83</sup> Schwarz, *Die Grundlage der Condictio im klassischen römischen Recht*, pp. 229 sq.; cf. Visser, *Die rol van dwaling by die condictio indebiti*, p. 11; Visser, "Die Grondslag van die condictio indebiti", 1988 (51) *THRHR* 491, 495.

the purpose for which the *datio* was made had to fail.<sup>84</sup> This failure of the purpose meant that what had been received was retained *sine causa*, and that the *condictio* was available to recover it. The following are examples of such a failure of purpose:

(a) Where a person erroneously<sup>85</sup> made a *datio* with the purpose of paying a debt (*solvendi causa*), while the debt was in fact not due (*indebitum*).<sup>86</sup> It seems as if classical law the *error* requirement essentially entailed that the claimant should prove that he made an undue transfer, which would then give rise to a presumption that it was made in error. The defendant could rebut this presumption by proving that the transfer was made in the knowledge that it was not due.<sup>87</sup>

(b) Due to the fragmented and restricted nature of the Roman law of contracts,<sup>88</sup> a *datio* could also be made in the absence of a valid

<sup>84</sup> Schwarz, *Die Grundlage der Condictio im klassischen römischen Recht*, pp. 212 sqq. Cf. also Kaser, *Das römische Privatrecht I*, pp. 595 sq. He seems to differ from Schwarz by referring to the purpose of the transferor, rather than the agreed upon purpose of the parties. For a more careful approach, cf. Visser, *Die rol van dwaling by die condictio indebiti*, pp. 16 sq. According to him it seems "possible to conclude" that the basis of the *condictio* in classical law was retention of a performance without legal ground. He also states that there is the "strong possibility" that the law regarded cases where the agreed purpose of the performance failed, as cases of unjustified retention.

<sup>85</sup> On the error requirement in classical law cf., generally, Kaser, *Das römische Privatrecht I*, p. 596, n. 36 and authorities quoted there; Zimmermann, *The Law of Obligations*, pp. 849 sqq.; Visser, *Die rol van dwaling by die condictio indebiti*, pp. 22 sqq.

<sup>86</sup> Kaser, *Das römische Privatrecht I*, p. 596.

<sup>87</sup> Cf. Schwarz, *Die Grundlage der Condictio im klassischen römischen Recht*, pp. 96 sqq., pp. 294 sqq.; Zimmermann, *The Law of Obligations*, p. 850. The extreme views of Beseler and Solazzi, i.e. that the state of mind of the transferor did not matter at all, and that he could claim with a *condictio* even if he knew no debt was due, seem totally at variance with the texts (cf. G.3.91, Ulp. D. 12.6.1.1, Paul. D. 50.17.53; cf. Kaser, *Das römische Privatrecht I*, p. 596, n. 36; Zimmermann, *The Law of Obligations*, p. 849, n. 102; Visser, *Die rol van dwaling by die condictio indebiti*, pp. 26 sq.). As to the implication of knowledge on the side of the recipient that the transfer is not due, see Visser, *Die rol van dwaling by die condictio indebiti*, p. 22; Schwarz, *Die Grundlage der Condictio im klassischen römischen Recht* p. 297. The possibility cannot be discounted that the wrongdoer could be exposed to a *condictio furtiva*, since receipt of a transfer in the knowledge that it is not due can amount to *furtum*.

<sup>88</sup> Cf. Zimmermann, *The Law of Obligations*, p. 843.

contract, but in the expectation that the recipient would do something (a *datio ob rem*). If the expected outcome did not ensue, the purpose likewise failed. An exception to the latter case is where the expected outcome did ensue, but the acceptance of the *datio* was morally offensive (a *datio ob turpem rem* or *ob turpem causam*),<sup>89</sup> or illegal (a *datio ob injustam causam*).<sup>90</sup> Recovery was then possible, unless the transferor was also tainted by turpitude.<sup>91</sup>

The meaning of the transfer *ob turpem rem* or *ob turpem causam* needs to be examined more closely. In essence, it involved cases where the recipient could be condemned with *infamia*,<sup>92</sup> where he acted contrary to certain imperial legislation protecting the *boni mores*, and where he violated rules of practice regarding the integrity of family life.<sup>93</sup> One of the examples of compulsion which lead to *infamia* is where a person who holds goods in deposit for another demands money for its return. This was quite contrary to his duty of trust.<sup>94</sup>

<sup>89</sup> Kaser, *Das römische Privatrecht I*, pp. 597 sq.; cf. Schwarz, *Die Grundlage der Condictio im klassischen römischen Recht*, pp. 169 sqq.

<sup>90</sup> The few texts which deal with the *condictio* where it fulfills this function are Gai. D. 24.1.6 (transfers contrary to the prohibition of donations between spouses), Ulp. D. 12.7.1.3 and Ulp. D. 12.5.6 (broader but vague, with controversial roots in the *condictio furtiva*). Cf. Schwarz, *Die Grundlage der Condictio im klassischen römischen Recht*, pp. 274 sqq.; Kaser, *Das römische Privatrecht I*, p. 598, n. 49.

<sup>91</sup> Cf. text to nn. 119 – 121 *infra*.

<sup>92</sup> Cf. Schwarz, *Die Grundlage der Condictio im klassischen römischen Recht* p. 169 sqq., 172 sqq.; Kaser, "Rechtswidrigkeit und Sittenwidrigkeit im klassischen römischen Recht", 60 (1940) *ZSS (RA)*, 95, 112 sqq.).

<sup>93</sup> On the meaning of *dare ob rem turpem*, cf. Kaser, "Rechtswidrigkeit und Sittenwidrigkeit im klassischen römischen Recht", 60 (1940) *ZSS (RA)* 95; Schwarz, *Die Grundlage der Condictio im klassischen römischen Recht* p. 169 sqq.

<sup>94</sup> Cf. Paul. D. 12.5.2.1; Kaser, "Rechtswidrigkeit und Sittenwidrigkeit im klassischen römischen Recht", 60 (1940) *ZSS (RA)*, 95, 116. Other examples are *sacrilegium facere* (Ulp. D. 12.5.2pr), *furtum* (Ulp. D. 12.5.2pr, Ulp. D. 12.5.4.1), *homicidium* (Ulp. D. 12.5.2pr), *iudicem corrumpere* (Ulp. D. 12.5.2.2), *iniuria* (Ulp. D. 12.5.4.2), *calumnia* (Paul. D. 12.6.65, Ulp. D. 3.6.5.1), *stuprum* (Ulp. D. 12.5.4pr), *concussio* (C. 4.7.3), *meretricium* (Ulp. D. 12.5.4.3) and *incestum* (Pap. D. 12.7.5pr). Cf. Schwarz, *Die Grundlage der Condictio im klassischen römischen Recht*, p. 169 sqq., 172 sqq.; Kaser, "Rechtswidrigkeit und Sittenwidrigkeit im klassischen römischen Recht", 60 (1940) *ZSS (RA)*, 95, 112 sqq.).

### 3.2 Post-Classical law

In post-classical law, the "single" *condictio* disappeared, and was replaced by specific *condictiones*, each with their own field of application. However, in contrast to the classical *condictio*, these *condictiones* did have a unity of purpose, in that they were more clearly linked to the notion of natural justice, equity or good faith that no person should enrich himself at the expense of another.<sup>95</sup> In fact, there are indications that all the *condictiones* could be grouped together under a "general" *condictio sine causa*.<sup>96</sup> Again, as in classical law, the measure of recovery was determined by what had been obtained without legal ground, and not merely by the amount of enrichment remaining at the commencement of legal proceedings.<sup>97</sup> Two of these specific *condictiones*, namely the *condictio ob turpem vel iniustam causam* and the *condictio indebiti* are of some relevance to cases of compulsion and need to be examined more closely.

#### *i. The condictio indebiti*

It will be recalled that in classical times the *condictio* could be used to recover a *datio* which was made with the purpose of paying a debt (*solvendi causa*), which was in fact not due (an *indebitum*). Some uncertainty exists as to whether the *condictio*, when fulfilling this function, could be used in classical law to recover a transfer made on the grounds of an extorted stipulation. There are a number of considerations which indicate that that this may not have been the case. Firstly, the victim would have to prove that the transfer was undue,

<sup>95</sup> Cf. Pomp. D. 12.6.14: "For it is by nature fair (*natura aequum est*) that nobody should enrich himself at the expense of another". Also cf. Pomp. D. 50.17.206; Von Lübtow, *Beiträge zur Lehre von der Condictio nach römischem und geltendem Recht*, p. 21; Kaser, *Das römische Privatrecht II*, pp. 421 sq.

<sup>96</sup> On the *condictio sine causa generalis*, see Zimmermann, *The Law of Obligations*, pp. 856 sq. According to Schwarz, " ... die causa sei für die Byzantiner dasjenige, was die Leistung oder das Versprechen objektiv, innerlich rechtfertigt, sein Fehlen ruft die condictio auf den Plan; und zwar meinten sie: Entweder ist es gar nicht da, von Anfang an, oder es fällt später fort, oder man erwartet es, aber es trifft nicht ein. Das ergibt sich als byzantinische Lehre aus D. 12,7,1,2 und eod. 4. Klarer kann man den Gedanken nicht wiedergeben; denn er ist nicht klar gedacht" (*Die Grundlage der Condictio im klassischen römischen Recht*, pp. 209 sqq.). On the relationship between this notion and the concept of *retinere sine causa* in classical law, cf. Visser, *Die rol van dwaling by die condictio indebiti*, pp. 17 sqq.

<sup>97</sup> Kaser, *Das römische Privatrecht II*, p. 425.

but according to civil law he had a problem: what was willed under compulsion was nonetheless willed (*voluntas coacta tamen voluntas est*). As Schwarz states: "he who performs *ex stipulatione*, performs something which is due under civil law".<sup>98</sup> It is only under praetorian law, which recognised the remedies on grounds of *metus*, that one could talk of an *indebitum*. Secondly, it would have to be assumed that the victim made the transfer with the purpose of paying a debt (*solvendi causa*). This assumption does not hold if the purpose is viewed subjectively: the victim's intention is rather that the compulsion should come to an end. It is only by using a broad, objective interpretation that one could argue that the purpose of the transfer is to discharge a debt. And thirdly, on the assumption that the debt could be regarded as undue under praetorian law, it would still have to be proved that payment was not made in the knowledge (*scientia*) that it was undue (*indebitum*).<sup>99</sup> The *prima facie* conclusion is therefore that recovery with the *condictio* would not be possible. However, the position might not have been that simple. It has been suggested that the victim might have found a way to circumvent this problem.<sup>100</sup> The possibility exists that the victim could have been ignorant of the fact that he could defend himself with the praetorian remedy of an *exceptio metus causa*. If the victim did not know the defence was available, it cannot be said that he knowingly transferred an *indebitum*. Consequently, the victim of an extorted stipulation might have been able to claim with the *condictio* in classical law.<sup>101</sup>

In the more fragmented post-classical law the recovery of an *indebitum* became the domain of a specific *condictio*, namely the *condictio indebiti*. However, it is clear that in post-classical law this *condictio* was not used to provide relief where a transfer was made on grounds of an extorted agreement. It was not only the fact that Justinian made error<sup>102</sup> a "positive" requirement

<sup>98</sup> Schwarz, *Die Grundlage der Condictio im klassischen römischen Recht*, p. 297.

<sup>99</sup> Schwarz, *Die Grundlage der Condictio im klassischen römischen Recht*, pp. 294 sqq.

<sup>100</sup> Schwarz, *Die Grundlage der Condictio im klassischen römischen Recht*, pp. 294 sqq.

<sup>101</sup> Cf. Schwarz, *Die Grundlage der Condictio im klassischen römischen Recht*, pp. 297 sq.

<sup>102</sup> Error should not be construed too narrowly, since payments made in doubt whether a debt was due could still be recovered. Cf. Liebs, "The History of the Roman *Condictio* up to Justinian", in: *Essays for Tony Honoré*, p. 178.

for claiming with the *condictio indebiti* which militated against such a development.<sup>103</sup> To Justinian the receipt of such transfers were tainted with turpitude. It will now be indicated how he made his new *condictio ob turpem vel iniustam causam* available for the recovery of such transfers.

*ii The condictio ob turpem vel iniustam causam*

Whereas classical law provided the *condictio* if, amongst others, a transfer was made *ob turpem* or *iniustam causam*, the Digest accommodates these cases in a single title dealing with the *condictio ob turpem vel iniustam causam*.<sup>104</sup> Transfers *ob turpem rem* (or *causam*) have been discussed above and what has been said there need not be repeated here. Transfers *ob iniustam causam* are dealt with briefly in D. 12.5.6,<sup>105</sup> which states that:

*"Perpetuo Sabinus probavit veterum opinionem existimantium id, quod ex iniusta causa apud aliquem sit, posse condici: in qua sententia etiam Celsus est"* ("Sabinus always said that the early jurists were right in holding that the *condictio* would go for anything in someone's hands on an unlawful basis. Celsus shares that view").

Apparently, the *condictio ob iniustam causam* was included in the title due to Theodosian reform, whereby the (mere) infringement of a statutory prohibition gave rise to invalidity. This stands in contrast to classical law, which only regarded serious breaches of statutory prohibition as tainted by turpitude, and, hence, granted the *condictio ob turpem causam*.<sup>106</sup>

<sup>103</sup> Cf. Zimmermann, *The Law of Obligations*, pp. 850 sq.; Evans-Jones, "From 'undue transfer' to 'retention without a legal basis'", in: Evans-Jones, ed., *The Civil Law Tradition in Scotland*, pp. 220 sqq. Justinian further qualified the type of error which would be acceptable for claiming with this *condictio*. In general errors of law excluded recovery, and errors of fact did not. Cf. Zimmermann, *The Law of Obligations*, pp. 850 sq. On the classical roots, see Visser, *Die rol van dwaling by die condictio indebiti*, pp. 31 sqq.

<sup>104</sup> D 12.5. Where the transfer was made for an honest purpose (*ob honestam causam*), no recovery was possible (cf. Paul. D. 12.5.1.1, Ulp. D. 12.5.4). Whether it in fact comprised two separate *condictiones* or one is not clear. Cf. generally Glück, *Pandecten*, vol. 12 ad D. 12.5, pp. 50 sqq.; De Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg*, pp. 20 sqq.

<sup>105</sup> But also cf. Ulp. D. 12.7.1.3.

<sup>106</sup> Zimmermann, *The Law of Obligations*, p. 846, n. 77; Liebs, "The History of the Roman *Condictio* up to Justinian", in: *Essays for Tony Honoré*, pp. 175 sq.

Digest title 12.5 lists various examples where the *condictio ob turpem vel iniustam causam* applied. A number of these deal with compulsion. Firstly, as has been alluded to above, this *condictio* applied in the case of the (by now degenerate)<sup>107</sup> *stipulatio* extorted by *vis*.<sup>108</sup> Pomp. D.12.5.7 reads as follows:

"*Ex ea stipulatione, quae per vim extorta esset, si exacta esset pecunia, repetitionem esse constat*" ("It is agreed that money exacted under a stipulation itself extorted by force is recoverable").

Although this text seems acceptable if one purely focuses on the turpitudinous conduct of the wrongdoer in accepting the payment, it is in fact problematical. After all, the *condictio ob turpem vel iniustam causam* was a subcategory or modality of the *condictio causa data causa non secuta*. It was used to recover a transfer aimed at obtaining a counterperformance (a *datio ob rem*) where the acceptance of the performance was tainted with turpitude.<sup>109</sup> It did not apply to a transfer aimed at fulfilling a debt (a *datio solvendi causa*). Insofar as the victim's payment on ground of the compelled stipulation is aimed at fulfilling a debt, it is not a *datio ob rem*, but a *datio solvendi causa*. The implication is then that the *condictio indebiti* would be a more appropriate remedy. However, as indicated above, the *condictio indebiti* was now subject to the error requirement, which excludes this possibility.

The second category of examples contained in D. 12.5 deal with the situation where someone receives a transfer to do what he is obliged to do in any event. These cases are not expressly link to the notion of *vis* (or *metus*) like D.12.5.7, but still clearly deal with compulsion: each case involves an implicit wrongful threat. The texts are the following. Paul D.12.5.2.1 deals with the situation

"*Si tibi dedero, ut rem mihi reddas depositam apud te vel ut instrumentum redderes*" ("if I pay you so that you give me back something deposited with you, a document for instance").

<sup>107</sup> Cf. Nicholas, *An Introduction to Roman Law*, p. 194; Kaser, *Das römische Privatrecht II*, p. 377; Schulz, *Classical Roman Law*, p. 476.

<sup>108</sup> But cf. Evans-Jones, "From 'undue transfer' to 'retention without a legal basis' (the *condictio indebiti* and the *condictio ob turpem vel iniustam causam*)", in: Evans-Jones, ed., *The Civil Law Tradition in Scotland*, p. 220.

<sup>109</sup> Zimmermann, *The Law of Obligations*, pp. 841 sqq.

The implication is clear: unless I pay you, you will not return the document. As indicated above, this was already regarded as a transfer *ob turpem causam* in classical law, since *infamia* attached to the party who asked for the payment to return the object.<sup>110</sup> According to D.12.5.9pr, this *condictio* is also available

"*Si vestimenta utenda tibi commodavero, deinde pretium, ut reciperem, dedissem*") ("If I lend you clothes for use and then pay you a price to get them back").

Initially this case did not involve *infamia* and was not regarded as a *datio ob rem turpem*. The compilers, however, seem to have viewed it differently.<sup>111</sup> The last of these examples is D.12.5.9.1, which deals with the situation where a payment was made to receive something which was in any event owed under a will or *stipulation*.<sup>112</sup>

The final category of cases of compulsion dealt with in D. 12.5 concerns the situation where a transfer is made so that someone does not commit a crime. In a certain sense this is the converse of the former category: it is not a question of a person being obliged to do something, but rather being obliged *not* do something, such as not to commit murder, theft or sacrilege.<sup>113</sup> The above cases of compulsion should be distinguished from cases rather amounting to bribery. Here the claim is normally excluded in any event: after all, both the parties are tainted by the turpitude. Notable examples are where a judge is paid to pronounce in someone's favour,<sup>114</sup> where an adulterer buys his way out,<sup>115</sup> and where a runaway slave pays to prevent disclosure of his

<sup>110</sup> Cf. Kaser, "Rechtswidrigkeit und Sittenwidrigkeit im klassischen römischen Recht", 60 (1940) ZSS (RA) 95, 116.

<sup>111</sup> Schwarz, Die Grundlage der Condictio im klassischen römischen Recht, p. 174.

<sup>112</sup> It should be noted though that this *condictio* was "residual" in nature. If a payment was made, but this payment was undue because there had to be release in terms of the law of hire, sale or mandate, then actions from those areas of the law were available. Cf. Paul. D. 12.5.9.1.

<sup>113</sup> Ulp. D. 12.5.2.1 ("ut puta dedi tibi ne sacrilegium facias, ne furtum, ne hominem occidas").

<sup>114</sup> Ulp. D. 12.5.2.2.

<sup>115</sup> Ulp. D. 12.5.4.



whereabouts or his crimes.<sup>116</sup> As far as the measure of recovery is concerned, the recipient was exposed to a claim aimed at recovery of the object (or its value), and its fruits or accessions,<sup>117</sup> but not interest.<sup>118</sup> Recovery was excluded in cases of *turpitudō solius dantis*, i.e. where only the pursuer was tainted with turpitude,<sup>119</sup> and in cases where the "*in pari delicto*" or "*in pari turpitudine*" rules applied, i.e. where both the claimant and the recipient were tainted with turpitude.<sup>120</sup> Recovery was obviously allowed in cases of *turpitudō solius accipientis*, i.e. where the turpitude was only on the side of the recipient.<sup>121</sup>

### 3.3 The relationship between the *condictiones* and the *metus* remedies

This overview of the treatment of the *condictiones* can be concluded by some brief remarks on their relationship with the *metus* remedies. Classical lawyers were notorious for not creating new remedies if it was at all possible to use existing ones.<sup>122</sup> There are indications in D.12.5.7 that a *condictio* could be

<sup>116</sup> Ulp. D. 12.5.4; 12.5.5 (on which see Daube, "Turpitude in Digest 12.5.5", in: *Studies in Roman Law in Memory of A. Arthur Schiller*, pp. 33 sqq., especially in regard to the question whether the text concerns a *condictio furtiva*). The situation referred to above should be distinguished from the situation where A gives B something in order that B should supply information as to A's runaway slave or as to a thief of A's goods (Ulp. D. 12.5.4.4). As Daube puts it "To want a remuneration for helping the master of a fugitive or one who has suffered a theft is not by itself dishonourable, at least not to a legally relevant degree. Detectives and slave-catchers live on it" (Turpitude in Digest 12.5.5", in: *Studies in Roman Law in Memory of A. Arthur Schiller*, p. 33).

<sup>117</sup> Glück, *Pandecten*, vol. 12 ad D. 12.5, p. 64; De Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg*, p. 22; Paul D. 12.6.15 pr; Paul. D. 12.6.65.5; Paul. D. 12.4.7.1 and Paul D. 12.4.12 are applied analogously.

<sup>118</sup> Glück, *Pandecten*, vol. 12 ad D. 12.5, p. 64, De Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg*, p. 22, n. 16, relying on C.4.7.4.

<sup>119</sup> For example, payments to a prostitute (Paul. D. 12.5.3; cf. the discussion in Zimmermann, *The Law of Obligations*, pp. 847 sq., esp. n. 91).

<sup>120</sup> Cf. Ulp. D. 12.5.2.2; Ulp. D. 12.5.4; Paul. D. 12.5.3; Paul. D. 12.5.8; Ulp. D. 50.17.154; C. 4.7.2. For discussion, see Zimmermann, *The Law of Obligations*, pp. 846 sqq.

<sup>121</sup> Paul. D. 12.5.1.2; Ulp. D. 12.5.4.2; Glück, *Pandecten*, vol. 12 ad D. 12.5, p. 61.

<sup>122</sup> Cf. Von Lübtow, *Der Ediktstitel "Quod metus causa gestum erit"*, p. 304.

used to recover extorted transfers (albeit to a limited extent). So why were the praetorian *metus* remedies created, and the *condictio* not developed further?<sup>123</sup> A number of reasons present themselves. Firstly, the *condictio* initially applied to a very limited category of transactions.<sup>124</sup> Secondly, the *condictio* was in any event excluded where there was *scientia* or knowledge that a transfer is not due. It is only after the *metus* remedies were introduced that the victim could possibly avail himself of the rather artificial argument that he was ignorant of the *exceptio metus*.<sup>125</sup> Thirdly, the *condictio* could in any event not provide relief against third parties, particularly where a claim was made against the heir of a person who obtained goods on grounds of compulsion. The *condictio* was not aimed at restoring to a previous position (*restituere oportere*), but at *dare facere oportere*, which was not something one would expect a judge to grant in the light of the general protection afforded to heirs.<sup>126</sup> However, probably the most important explanation is the limited scope of the *metus* remedies - the strict standards of fortitude created room for a remedy which could be applied in less serious cases of compulsion. Through an analysis based on turpitude, the *condictio* could be made available.<sup>127</sup> But from a post-classical perspective, the fact that there may have been an overlap in fields of application is not really significant: the recognition of D.12.5.7 in addition to the praetorian action contained in D.4.2 was fully in line with the Byzantine practice to duplicate remedies.<sup>128</sup>

<sup>123</sup> Cf. J. von Koschembahr-Lyskowski, *Die Condictio als Bereicherungsklage im klassischen römischen Recht*, vol. II (Weimar, 1907), p. 6. Von Lübtow does not believe that Pomp. D. 12.5.7 is of classical origin (*Der Ediktstitel "Quod metus causa gestum erit"*, p. 314).

<sup>124</sup> Pomp. D. 12.5.7 only applies to the *stipulatio*.

<sup>125</sup> Cf. text to n. 100 *supra*.

<sup>126</sup> Levy, *Privatstrafe und Schadensersatz im klassischen römischen Recht*, p. 92 sq.; Von Lübtow, *Der Ediktstitel "Quod metus causa gestum erit"*, p. 304 sq.

<sup>127</sup> Josef Kohler, *Lehrbuch des Bürgerlichen Rechts* (Berlin, 1906), vol. 1, pp. 518 sqq.; Von Savigny, *System des heutigen römischen Rechts*, vol. 3, p. 107 n. (r). Cf. Dawson, "Economic Duress and the Fair Exchange in French and German Law", 1937 (11) *Tulane Law Review* 345, 347 sq.

<sup>128</sup> Von Lübtow, *Der Ediktstitel "Quod metus causa gestum erit"*, pp. 315 sq. ("Die Byzantiner liebten es, nach dem Grundsatz: "doppelt hält besser" dem Kläger Rechtsmittel in Hülle und Fülle zur Verfügung zu stellen").

#### 4. COMPULSION AND REMEDIES OF PROPERTY LAW

Implicit in a lot of what has been discussed above is the assumption that the person who acquired something as a consequence of *metus*, or some other form of compulsion, became owner thereof. The question was then whether this position could be reversed by granting a praetorian remedy based on *metus*<sup>129</sup>, or a *condictio*. To complete the overview of the Roman law of compulsion, the effect of compulsion on the transfer of ownership needs to be examined more closely.

In classical Roman law certain modes of derivative acquisition of ownership<sup>130</sup> such as the more ancient and formal *mancipatio* and *in iure cessio* were abstract. In other words, it was not required that acquisition should be supported by a *causa*, such as payment in terms of a valid agreement.<sup>131</sup> However, this was apparently not the case with *traditio*, which was a more informal mode of acquisition. Here the dominant view is that in classical law the transfer of ownership had to be supported by a *iusta causa traditionis*, such as a valid agreement of sale.<sup>132</sup> Apparently payment or *solutio* was regarded as a valid *causa* in itself: a transfer made with a view towards payment of a debt was therefore regarded as validly supported by a *causa*, even if the debt turned

<sup>129</sup> On the distinction between obtaining an order that the wrongdoer should restore, and obtaining automatic restitution of ownership, cf. Kupisch, *In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht*, pp. 1 sqq.

<sup>130</sup> On the different modes of acquisition and the distinction between quiritary and bonitary ownership in Roman law, see Kaser, *Das römische Privatrecht I*, pp. 400 sqq.; Schulz, *Classical Roman law*, pp. 338 sq.; Nicholas, *An Introduction to Roman Law*, pp. 66 sqq., 116 sqq.; Thomas, *Textbook of Roman law*, pp. 136 sqq.; Honsell (et al.), *Römisches Recht*, pp. 156 sqq.; Ankum and Pool, "*Rem in bonis meis esse* and *rem in bonis meam esse* - Traces of the Development of Roman Double Ownership", in: *Essays for Barry Nicholas*, pp. 5 sqq.

<sup>131</sup> Cf. Kaser, *Das römische Privatrecht I*, pp. 416 sqq.; Zimmermann, *The Law of Obligations*, pp. 271 sq., 841 sq.

<sup>132</sup> Cf. Kaser, *Das römische Privatrecht I*, pp. 416 sqq.; Kaser, "Zur in integrum restitutio, besonders wegen metus und dolus", (1977) 94 *ZSS (RA)*, 123, 138 sqq.; Zimmermann, *The Law of Obligations*, pp. 271 sq., 841 sq. For critical assessment see D. F. Pugsley, "Was *iusta causa* necessary for *traditio* in Roman law?", 1974 (37) *THRHR*, 13; Gordon, "The Importance of the *iusta causa* of *traditio*", in: *Essays for Barry Nicholas*, pp. 123 sqq.; Evans-Jones and MacCormack, "*Iusta causa traditionis*", in: *Essays for Barry Nicholas*, pp. 99 sqq.

out to be undue.<sup>133</sup> How did all of this fit in the law relating to compulsion? As far as *metus* is concerned, there are indications that where ownership was transferred under compulsion, the praetor provided a rescissory action in the form of an *actio in rem* on the model of the *rei vindicatio*.<sup>134</sup> This remedy apparently was available as an alternative to the *actio quod metus causa*.<sup>135</sup> The wrongdoer's acquisition of rights of (quiritary)<sup>136</sup> ownership could then be thwarted by the *actio in rem*. In the case of the compelled *mancipatio*, the victim apparently had a choice between the rescissory *rei vindicatio* and the *actio quod metus causa*.<sup>137</sup> In the case of the compelled *traditio*, the position is more complicated. If the *traditio* was compelled, but the underlying *causa* such as an agreement of sale was valid, the relief did not lie with the *actiones in rem* or *quod metus causa*, but rather with the *lex Julia de vi privata*.<sup>138</sup>

<sup>133</sup> Cf. Kaser, *Das römische Privatrecht I*, pp. 416 sqq.; Kaser, "Zur in integrum restitutio, besonders wegen metus und dolus", (1977) ZSS 138 sqq.

<sup>134</sup> Kupisch, *In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht*, pp. 134 sqq.; Kaser, "Zur in integrum restitutio, besonders wegen metus und dolus", (1977) 94 ZSS 138 sqq.; Zimmermann, *The Law of Obligations*, p. 656, n. 46.

<sup>135</sup> In Ulp. D 4.2.9.6 it is stated that "... although we think that an action *in rem* is to be granted because the property belongs to the person ("*quia res in bonis eius est*") on whom force has been brought to bear, it is still said, not without reason, that if anyone should bring an action for fourfold, the action *in rem* ceases; and the reverse is also true". But cf. Von Lübtow, *Der Ediktstitel "Quod metus causa gestum erit"*, pp. 120 sqq., 255 sq. He states that it is the Edict's consequence of "*ratum non habeo*" which provides the victim with a "fictional *rei vindicatio*" and so restores his ownership. The action seems to be regarded as *part* of the relief provided by the *actio quod metus causa*, rather than a separate remedy.

<sup>136</sup> Although the wrongdoer obtained quiritary ownership, it is possible that the victim may still have retained bonitary ownership. On the possibility that the victim may still have retained rights of bonitary ownership, see Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 127 sqq.; Kupisch, *In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht*, pp. 222 sqq.

<sup>137</sup> Cf. Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 127 sqq. on the validity of the compelled *mancipatio*.

<sup>138</sup> Cf. Ulp. D. 4.2.12.2; Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 166 sq. On the position if the underlying agreement of sale was extorted, but not the *traditio*, see C. 2.19.4. Hartkamp argues that this is indicative of a confirmation of the transfer, and an abandonment of the praetorian remedies (*Der Zwang im römischen Privatrecht*, pp. 50 sq.).

However, if the underlying agreement was extorted as well, the validity of the *causa* and the validity of the transfer became questionable. In classical law, this may very well have meant that ownership did not pass.<sup>139</sup> In post-classical law, where *traditio* became the dominant mode of derivative acquisition, the position could have been similar, but this is by no means clear.<sup>140</sup> When one briefly moves on to the effect of compulsion on the validity of transfers in the context of the *condictio*, the picture is more simple. It has been indicated above that in post-classical law the *condictio ob turpem vel iniustam causam* could be used to recover certain transfers made under compulsion, most notably where a person used actual threats (*vis*), or implied threats (e.g. by stating that he will not do something he is supposed to do, unless the victim does something in turn). The question as to whether this compulsion was sufficiently serious to affect the transfer of ownership is not hard to answer. In these cases there was clearly no concurrence between the *condictio* and remedies of property law such as the *rei vindicatio*. Even though a transfer made under an extorted stipulation could be regarded as having been tainted with turpitude, the turpitude did not prevent the passage of ownership.<sup>141</sup>

## 5. CONCLUSIONS

1. Early Roman private law was not well adapted to provide relief to victims of compulsion: the general rule was that compelled acts were valid. It was only in certain cases that a judge could provide relief by relying on considerations of good faith. Given the tumultuous social and political conditions in Republican Rome, it was up to the praetor to remedy this deficiency. The first reform was contained in a *formula Octaviana*, of which the exact contents is unclear. Apparently, it was aimed at enabling recovery of what had been taken, or what was given under force and (or) fear ("*per vim et (aut) metum*"). At the time, the

<sup>139</sup> Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 178 sq.

<sup>140</sup> Ulp. D. 4.2.9.6 indicates that ownership does not pass, but see Hartkamp, *Der Zwang im römischen Privatrecht*, pp. 178 sq.; Von Lübtow, *Der Ediktstitel "Quod metus causa gestum erit"*, p. 13; and generally Kaser, *Das römische Privatrecht II*, pp. 282 sqq.

<sup>141</sup> Cf. Liebs, "The History of the Roman *Condictio* up to Justinian", in: *Essays for Tony Honoré*, p. 174; Zimmermann, *Law of Obligations*, p. 845, n. 74. Ownership also passed with the transfer of money (Kaser, "Das Geld im römischen Sachenrecht", (1961) 29 *Tijdschrift voor Rechtsgeschiedenis* 220).

*actio vi bonorum raptorum* was also introduced, which was a specific action against robbery. Further legislative relief was provided in the form of a *lex Julia de vi privata*, which imposed criminal punishment in cases of self-help, and the *leges repetundarum*, which were specifically aimed against magistrates who enriched themselves by extorting bribes. *The decretum divi Marci* punished a creditor with the loss of his claim if he engaged in self-help, regardless of whether a debt was due.

2. From a modern perspective the most important Roman remedy against compulsion is to be found in the *Edictum perpetuum* of Hadrian. According to the Edict the praetor would not uphold what is done as a consequence of fear ("*quod metus causa gestum erit, ratum non habebo*"). The Edict did not encompass physical bodily force which completely excludes any decision of will of the victim (in mediaeval terms, *vis absoluta*), but rather compulsion through "bending" the will of the victim ("mental" fear or *vis compulsiva*). It was also required that the fear had to be caused by wrongful means, and had to be serious enough to move a *homo constantissimus*. The meaning of the words "*ratum non habebo*" in the Edict is unclear, but it seems as if the following relief was provided. If the victim was faced with a claim of enforcement he could ward it off with the *exceptio metus*. If he had already made a compelled transfer and wanted restitution, he could institute the *actio quod metus causa*. It is disputed whether this remedy, which exposed the wrongdoer to a penalty of fourfold damages if he did not provide restitution, was aimed at obtaining *in integrum restitutio (propter metum)*, or whether *in integrum restitutio* was a separate remedy.

3. Under certain circumstances compulsion could also give rise to a *condictio* - a remedy aimed at recovery of a specific amount or object. In classical law the *condictio* could apparently be used to recover a transfer made in fulfillment of a compelled stipulation. In Justinianic law, which was characterised by a fragmentation of the *condictio*, it was the *condictio ob turpem vel iniustam causam* which was singled out for the fulfillment of this function. This *condictio* was aimed at the recovery of transfer which were made for a future purpose which succeeded, but where the retention of the transfer was unacceptable because it was tainted by turpitude. Examples of cases of compulsion where the *condictio ob turpem vel iniustam causam* was used towards

this end are where a transfer was made to a person so that he would do what he was supposed to do in any event, such as to return goods which were deposited with him or loaned to him, or to refrain from committing a crime. In this limited context, through recourse to notions of turpitude, the *condictio ob turpem vel iniustam causam* could be applied in cases of compulsion not covered by the praetorian *metus* remedies. The *condictio indebiti* was particularly suited for the recovery of transfers made in order to pay a debt (*solvendi causa*), but which failed, because no debt was due. It was apparently not used in cases where undue transfers were obtained by compulsion. This can be ascribed to the prominence of the error requirement in post-classical law.

4. Compulsion could further give rise to remedies of property law, most notably a rescissory action in the form of an *actio in rem*.