The Fraudulent Claim of One's Own Fundus (D. 21.2.73)[1]

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Abstract

The title 50.17 of Justinian's Digest lists many juristic rules *(regulae iuris)*. One of these juristic rules, which can be found in D. 50.17.173.3, reads as follows: *dolo facit, qui petit quod redditurus est*. An application of this rule is described in D. 44.4.8.1, which deals with a problem in the context of the law of succession. Due to the rule's character as a general rule, there must have been more cases in which an *exceptio doli* was granted because of *dolo facit, qui petit quod redditurus est*. However, it is difficult to find other cases of *dolo facit, qui petit quod redditurus est,* as no further direct evidence was cited in the Digest of Justinian. In this paper, I examine whether or not the *exceptio doli* referred to in D. 21.2.73 is a consequence of *dolo facit, qui petit quod redditurus est*.

Keywords

regulae iuris; dolo facit; qui petit quod redditurus est; Liability for Eviction; *actio ex testamento*.

1 Introduction

The term *regulae iuris* has been the subject of many discussions in the academic literature.[2] The roman jurist Paulus characterised *regula iuris* as follows:

> D. 50.17.1 (Paulus libro 16 ad Plautium)
>
> *Regula est, quae rem quae est breviter enarrat. non ex regula ius sumatur, sed ex iure quod est regula fiat. per regulam igitur brevis rerum narratio traditur, et,*

1 I want to thank Prof. Dr. Philipp Scheibelreiter for his revision and feedback on this paper.

2 See, for example, the monographs from STEIN, P. *Regulae Iuris. From Juristic Rules to Legal Maxims*. Edinburgh: University Press, 1966 and LIEBS, D. *Lateinische Rechtsregeln und Rechtssprichwörter*. 7. ed. München: C. H. Beck, 2007.

> *ut ait Sabinus, quasi causae coniectio est, quae simul cum in aliquo vitiata est, perdit officium suum.*
>
> *A rule is something which briefly describes how a thing is. The law may not be derived from a rule, but a rule must arise from the law as it is. By means of a rule, therefore, a brief description of things is handed down and, as Sabinus says, is, as it were, the element of a case, which loses its force as soon as it becomes in any way defective.*[3]

According to this short explanation, the term *ius* is not synonymous with *regula*. A *regula* is only a short repetition of the *ius (regula est, quae rem quae est breviter enarrat; per regulam igitur brevis rerum narratio traditur)*; therefore, the law cannot be deducted from the *regula (non ex regula ius sumatur)*.[4]

However, it is very likely that *regulae iuris* still held significance and were used by roman jurists to solve practical cases.[5] One of these juristic rules is the subject of analysis in this paper.

2 Dolo facit, qui petit quod redditurus est

The juristic rule *dolo facit, qui petit quod redditurus est* derives from one of Paulus's writings. In the Digest of Justinian, this rule appears twice.

> D. 44.4.8 pr. (= D. 50.17.173.3)-1 (Paulus libro sexto ad Plautium)[6]
>
> *Dolo facit, qui petit quod redditurus est. 1. Sic, si heres damnatus sit non petere a debitore, potest uti exceptione doli mali debitor et agere ex testamento.*
>
> *A person who claims what he will have to return acts fraudulently. 1. Thus, if an heir has been condemned not to claim from a debtor, the debtor can employ the defense of fraud, as well as bring an action based on the will.*[7]

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3 Translation: CRAWFORD, M. In: WATSON, A. (ed.). *The Digest of Justinian IV.* Philadelphia: University of Pennsylvania Press, 1985, pp. 956–957.

4 On the distinction between *regula* und *ius,* see BÖHR, R. *Das Verbot der eigenmächtigen Besitzumwandlung im römischen Privatrecht. Ein Beitrag zur rechtshistorischen Spruchregelforschung.* München et al.: Saur, 2002, pp. 17–29.

5 See HAUSMANINGER, H. Nemo sibi ipse causam possessionis mutare potest – eine Regel der veteres in der Diskussion der Klassiker. In: SEIDL, E. (ed.). *Gedächtnisschrift für Rudolf Schmidt.* Berlin: Duncker & Humblot, 1966, p. 409.

6 *Ad Plautium libri* XVIII is a commentary written by Paulus, in which he discussed a popular work of Plautius; see LIEBS, D. Iulius Paulus. In: SALLMANN, K. (ed.). *Handbuch der Altertumswissenschaft VIII, 4.* München: C. H. Beck, 1997, 152.

7 Translation: BEINART, B. In: WATSON, A. (ed.). *The Digest of Justinian IV.* Philadelphia: University of Pennsylvania Press, 1985, p. 636.

In this text of the Digest of Justinian which was taken from Paulus (ad Plautium), *dolo facit, qui petit quod redditurus est* was mentioned in D. 44.4.8 pr. and later illustrated by an example in D. 44.4.8.1. Furthermore, *dolo facit, qui petit quod redditurus est* was also incorporated in the Digest of Justinian in the context of juristic rules (D. 50.17.173.3), but without any further explanation.

The meaning of *dolo facit, qui petit quod redditurus est* is clear. A creditor should not be able to *"claim* [from the debtor] *what he subsequently had to hand over again in any event."*[8] In the example from Paulus, the testator ordered in his will the discharge of his debtor from an obligation. However, such an order did not have a direct redemptive effect. The debtor (legatee) could have enforced his redemption by suing the heir with the *actio ex testamento*.

On the one hand, the heir was able to sue the debtor (legatee) because he inherited the obligation from the testator. On the other hand, the debtor (legatee) was allowed to sue the heir for the same sum he owed with the *actio ex testamento*.[9] In order to prevent excessive or unnecessary litigation,[10] Paulus concluded that the debtor (legatee) was not forced to pay; he could immediately refuse to pay and argue that a creditor who sues for something he has to give back acts with *dolus*. Therefore, the debtor (legatee) could have countered the action of the creditor with an *exceptio doli*.[11]

The case outlined by Paulus in D. 44.4.8.1 is, by my assessment, an effective example[12] of *dolo facit, qui petit quod redditurus est*. It is questionable whether more examples of *dolo facit, qui petit quod redditurus est* can be found in the Digest of Justinian.

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8 ZIMMERMANN, R. *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Oxford: Clarendon Press, 1996, p. 724.

9 See KRÜGER, H. Die liberatio legata in geschichtlicher Entwicklung. *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart*. 1894, Vol. 21, pp. 317–319.

10 See WACKE, A. Das Rechtssprichwort. Dolo facit, qui petit quod (statim) redditurus est. *Juristische Arbeitsblätter*, 1982, no. 10, p. 477.

11 In cases in which *dolo facit, qui petit quod redditurus est* was applicable, the defendant was most often granted an *exceptio doli*; however, in some cases, the *praetor* already denied the action *(denegatio actionis)* due to *dolo facit, qui petit quod redditurus est* or the judge (*index*) had to take *dolo facit, qui petit quod redditurus est* into consideration (*bonae fidei iudicium*); see MADER, P. Dolo facit qui petit quod redditurus est. In: SCHERMAIER, M. J., RAINER, J. M., WINKEL, L. C. (eds.). *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag*, Köln et al.: Böhlau, 2002, p. 419.

12 KRÜGER, 1894, op. cit., pp. 317–318; different: ARNDTS VON ARNESBERG, K. L. *Lehrbuch der Pandekten*, 6. ed. München: J. G. Cotta'sche Buchhandlung, 1868, p. 433.

3 D. 21.2.73: Another Case of *dolo facit, qui petit quod redditurus est*?

An analysis of how many cases of *dolo facit, qui petit quod redditurus est* are present in the Digest of Justinian would go beyond the scope of this paper. However, one possible further case from the writings of Paulus is subject to a detailed analysis below.

> D. 21.2.73 (Paulus libro septimo responsorum)
>
> *Seia fundos Maevianum et Seianum et ceteros doti dedit: eos fundos vir Titius viva Seia sine controversia possedit: post mortem deinde Seiae Sempronia heres Seiae quaestionem pro praedii proprietate facere instituit: quaero, cum Sempronia ipsa sit heres Seiae, an iure controversiam facere possit. Paulus respondit iure quidem proprio, non hereditario Semproniam, quae Seiae de qua quaeritur heres exstitit, controversiam fundorum facere posse, sed evictis praediis eandem Semproniam heredem Seiae conveniri posse: vel exceptione doli mali summoveri posse.*
>
> *Seia gave in dowry the Maevian, Seian, and other estates; her husband, Titius, possessed these lands without dispute during Seia's life; but after Seia's death, her heiress, Sempronia, instituted proceedings on the issue of the ownership of the property; my question is: Can Sempronia, being Seia's heiress, lawfully raise such an action? Paul's reply was this: Sempronia, suing in her own right and not as Seia's heiress, can raise an issue over title to the land, but in the event of eviction from that land, Sempronia, as heiress of Seia, can be sued or, at any rate, be resisted with the defense of fraud.*[13]

Seia provided her husband Titius with a dowry of a few estates. One of these estates belonged to Sempronia, who, after Seia died, became Seia's heiress. Sempronia wanted her estate back from Titius and therefore sued him. According to Paulus, Sempronia was not able to claim her estate due to her position as an heiress, but could claim it because of her own right *(iure quidem proprio, non hereditario)*.

After the death of a wife, the dowry usually belonged to the husband, not to the heir of the wife.[14] However, as Seia gave Sempronia's estate in dowry,

13 Translation: THOMAS, J. A. C. In: WATSON, A. (ed.). *The Digest of Justinian II*. Philadelphia: University of Pennsylvania Press, 1985, p. 632.

14 WACKE, A. Die letztwillige Befreiung vom Mitgiftrückgabeversprechen. Zur Entwicklung des Testierrechts über die dos. In: SLAPNICAR, K. (ed.). *Tradition und Fortentwicklung im Recht. Festschrift zum 90. Geburtstag von Ulrich von Lübtow am 21. August 1990*. Rheinfelden et al.: Schäuble, 1991, p. 64.

Seia could not transfer ownership of the estate to Titius, which means that Sempronia was still the owner of the estate and could therefore claim it back.[15]

Meanwhile, Titius also could have sued, because Seia was not able to procure Titius the peaceable possession of the estate.[16] Due to the fact that Seia was no longer alive, Titius could establish an *actio* against her heiress (Sempronia).

This constellation shares similarities with the one described in D. 44.4.8.1. Sempronia was able to sue Titius and Titius could have sued Sempronia. In order to prevent two lawsuits from occurring, Titius could have, if sued, defended himself with an *exceptio doli*.

Kupisch therefore referred in his translation of D. 21.2.73 to *dolo facit, qui petit quod redditurus est* by mentioning D. 50.17.173.3.[17] However, the situation in D. 21.2.73 is less clear, because the claims of Titius and Sempronia differ. Sempronia could have claimed her estate, and Titius – if his *dos* (Semponia's estate) was evicted – would not have been able to get the *dos* back.[18]

In my opinion, the situation described in D. 21.2.73 must be viewed from an economic perspective. Titius had to give Sempronia's estate to Sempronia and could then claim a payment from Sempronia. As, most likely, the payment which Titius could get from Sempronia equalled[19] the value of Sempronia's estate, it was not practical from an economic perspective to allow two (successful) lawsuits. Therefore, Titius had the right to defend himself with an *exceptio doli* against Sempronia's claim.

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15 On the problem of dealing with eviction as a defect in titel, see BENKE, N., MEISSEL, F.-S. *Roman Law of Obligations. Origins and Basic Concepts of Civil Law II. Translated by Caterina Maria Grasl.* Wien: Manz, 2021, p. 150; KASER, M., KNÜTEL, R., LOHSSE, S. *Römisches Privatrecht*, 22. ed. München: C. H. Beck, 2021, p. 306.

16 A man who received an estimated dowry was treated like an emptor; he could, in the case of an eviction, sue the seller with the *actio empti*, see BECHMANN, A. *Das römische Dotalrecht I.* Erlangen: Deichert, 1863, p. 223. Also an action resulting from a *stipulatio habere licere* was maybe possible.

17 KUPISCH, B. In: BEHRENDS, O., KNÜTEL, R., KUPISCH, B., SEILER, H. H. (eds.). *Corpus Iuris Civilis IV, Text und Übersetzung: Digesten 21–27.* Heidelberg: C.F. Müller, 2005, p. 81.

18 See WACKE, A. Die Konvaleszenz der Verfügung eines Nichtberechtigten. Zur Dogmatik und vergleichenden Geschichte des § 185 Abs. 2 BGB. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung.* 1997, Vol. 114, pp. 199–200.

19 Or maybe even (if a *stipulatio duplae* took place) exceed the value of Sempronia's estate.

4 Commonality between D. 44.4.8 pr.-1 and D. 21.2.73

The *exceptio doli* mentioned in D. 21.2.73 is optional. Paulus used the word *"vel"* in order to demonstrate that Titius had the right to defend himself with an *exceptio doli*. However, it was also possible for him to return the estate to Sempronia. This option would have only made sense if he would have been able to claim more after he had given back the estate. Such a situation is easy to imagine: if Seia would have promised to Titius to pay the *duplum* if eviction took place *(stipulatio duplae)*,[20] Titius would have been able to claim from Seia's heiress (Sempronia) the *duplum*. Of course, under such a condition *(stipulatio duplae)*, Sempronia should not have claimed the estate from Titius and therefore prevented the eviction and her liability for the *duplum*.

In a constellation similar to that described in D. 21.2.73, it is clear why a defendant might not have chosen to bring forward an *exceptio doli*. He had the opportunity to receive more, after eviction took place, with an action based on the *stipulatio duplae*.

It is questionable whether it could have been advantageous for the debtor (legatee) in a situation like that in D. 44.4.8.1[21] not to defend himself with the *exceptio doli*, but instead to pay his debt. If the debtor or legatee had paid his debt, he would have been able to sue the heir with the *actio ex testamento*.

With the *actio ex testamento,* the legatee could enforce the *legatum per damnationem*. Thus, if the redemption of an obligation was bequeathed, the legatee could force the heir to release him of his debt in the form of an *acceptilatio* or a *pactum de non petendo*.[22] After payment from the legatee to the heir, the debt does not exist anymore, and therefore the legatee can no longer enforce a formal release of the debt with the *actio ex testamento*. However, according to the will of the testator, the legatee should pay. This

20 See BENKE, MEISSEL, op. cit., p. 153; KASER, KNÜTEL, LOHSSE, op. cit., p. 313.
21 See '3. D. 21.2.73: Another case of dolo facit, qui petit quod redditurus est?'.
22 See MADER, op. cit., p. 417.

result can be achieved if the legatee can claim his money back; the legatee can claim the return of his money with the *actio ex testamento*.[23]

However, it remains questionable why a legatee would intentionally pay and later claim the money back from the heir. In my opinion, the legatee could have gotten a more favourable version of the *actio ex testamento*. Such a version was presented by Gaius.

> Gai. 4.9
>
> *Rem vero et poenam persequimur velut ex his causis, ex quibus adversus infitiantem in duplum agimus; quod accidit per actionem iudicati, depensi, damni iniuriae legis Aquiliae, aut legatorum nomine, quae per damnationem certa relicta sunt.*
>
> *We seek both property and penalty, on the other hand, in those cases where, for instance, we raise an action for double damages against someone who denies a claim, as happens with an action on judgment debt, on expenditure, for wrongful loss under the Aquilian Act, or for definite thing left by obligatory legacy.*[24]

One of the actions with litiscrescence mentioned in Gai. 4.9 is the *actio ex testamento*. Litiscrescence means that a defendant had to pay the *duplum* as a penalty if he denied the action in front of the *praetor (in iure)* and lost the trial.[25] According to Gai. 4.9, only the *actio certi ex testamento* included the procedural penalty of litiscrescence *(damnationem certa relicta sunt)*.

A debtor (legatee) who did not fulfil his obligation and sued the heir with the *actio ex testamento* demanded an act in the form of an *acceptilatio* or a *pactum de non petendo*. This was an *incertum*. If, however, the debtor (legatee) paid and demanded his money back, he demanded a *certum* and therefore the *actio ex testamento* in this case contained litiscrescence.

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23 KRÜGER, 1894, op. cit., p. 318; an example in which the payment could be claimed back with an *actio ex testamento* was provided by Ulpianus. D. 34.3.7.7 (Ulpianus libro 23 ad Sabinum): *Nam et si debitori liberatio sub condicione legata fuisset et vel lis fuisset contestata vel etiam exactum pendente condicione, ex testamento actio maneret liberatione relicta.*
Translation: JAMESON, S. In: WATSON, A. (ed.). *The Digest of Justinian III*. Philadelphia: University of Pennsylvania Press, 1985, p. 159. For, even if release had been left to the debtor conditionally and issue had been joined or [the debt] been collected while the condition was in suspense, an action on the will would subsist in respect of the release that had been left to him.

24 Translation: GORDON, W. M., ROBINSON, O. *The Institutes of Gaius*. 2. ed. London: Duckworth, 2001, pp. 405–407.

25 See BINDER, M. Procedural peculiarities of the lex Publilia de sponsu. In: *Journal on European History of Law*. 2022, Vol. 13, no. 1, p. 229.

5 Conclusion

In this paper, I sought to analyse the juristic rule *dolo facit, qui petit quod redditurus est*. According to this rule, a plaintiff acts fraudulently if he claims something from the defendant which he later has to return again. It was necessary in my analysis to start with D. 44.4.8 pr. (= D. 50.17.173.3)-1, where this juristic rule and an example of this rule can be found.

My goal was to explore, in addition to D. 44.4.8.1, another example of *dolo facit, qui petit quod redditurus est* and to compare the two cases. I identified an example in D. 21.2.73. It is clear in this case that Sempronia could claim her estate and Titius could claim, if forced to return the estate to Sempronia, a payment because of the eviction. Therefore, Semponia would not claim what she would later have to return to Titius. Nevertheless, the unnecessary exchange of the estate and the payment (which had the same or a higher value) could be prevented by Titius with an *exceptio doli* against Sempronia.

Interestingly, Titius in this case was in no way forced to bring forward an *exceptio doli*. Titius's option was expressed in the text with the Latin word *vel*. He could have returned the estate and then sued Sempronia. One can only speculate about the possible reasons for doing so. It is possible that Titus did not only have the option of the *actio empti*, but also a more favourable action from a *stipulatio*.

Analysing D. 21.2.73 can help to better understand D. 44.4.8.1. In D. 44.4.8.1, the defendant (debtor/legatee) must have had the same option. He could have either defended himself with an *exceptio doli* or made a payment to the heir and later claimed his money back with an *actio ex testamento*. The question arises why an individual would intentionally pay and later claim the same money back if he had the option to immediately deny the payment. In my opinion, the reason could have been a procedural penalty called litiscrescence. If a legatee claimed his money back from the heir with an *actio certi ex testamento* and the heir denied his liability and lost the lawsuit, then the legatee would be rewarded with double the amount *(duplum)* of what he had claimed.

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