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A NEW POSSIBLE INTERPRETATION OF DIGEST OF JUSTINIAN D.9.2.27.14: A CONTRIBUTION TO THE STUDY OF PRECURSORS OF ENVIRONMENTAL LAW IN ROMAN LAW

Abstract: *The paper addresses the meaning of the Digest of Justinian 9.2.27.14, which deals with the case of damage caused by contamination of the soil by weeds. The author of this paper concludes that neither Celsus nor Ulpian had any doubt that in the case of the contamination of soil an interdictum quod vi aut clam could be brought, but only within a period of one year following the damage. This interdict is granted to either the owner, and, if the land was subject of the contract of lease, to the tenant (lessee), but only to one of them. Furthermore, an Aquilian action could also be brought, but only one of these two legal instruments could be used. The lawsuit could be brought both by the owner or by the tenant. The actio is granted to both the the owner and the lessee, not as an actio directa, but as an actio in factum ex lege Aquilia. The reason for this cannot be established with certainty.*

Key words: *lex Aquilia, damnum iniuria datum, damage, extracontractual liability, interdictum quod vi aut clam, contamination, law of obligations, environmental law, Roman law.*

1. INTRODUCTION

D.9.2.27.14 ULPIANUS libro octavo decimo ad edictum. *Et ideo Celsus quaerit, si lolium aut avenam in segetem alienam inieceris, quo eam tu inquinare, non solum quod vi aut clam dominum posse agere vel, si locatus fundus sit, colonum, sed et in factum agendum, et si colonus eam exercuit, cavere eum debere amplius non agi, scilicet ne dominus amplius inquietet: nam alia quaedam species damni est ipsum quid corrumpere et mutare, ut lex Aquilia locum habeat, alia nulla ipsius mutatione applicare aliud, cuius molesta separatio sit.*

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This interesting text has long attracted the attention of the experts,¹ but its meaning has not yet been established with certainty. Without the ambition to offer a conclusive solution, it is our intention to offer in this paper a short overview of the existing theories, and to offer one more possible reading of the D.9.2.27.14 text.

2. AN OVERVIEW OF EXISTING THEORIES

There is a consensus in the modern literature about the following conclusions.

The text of D.9.2.27.14 examines the case in which a person contaminated a portion of soil belonging to other by sowing seeds of weeds.

The legal question, not expressly stated but implicitly clearly visible from the answer, is: could some procedural remedy be used against the person who contaminated the soil, and if so, which type of procedural remedy should be brought, and by whom?

From the answer we can also conclude that the owner can bring an interdiction *quod vi aut clam*, as can the lessee, if the land is leased. The owner can also use a lawsuit *in factum*. Also not clearly stated, but apparent from the context in which the text is found in the Digest, is that under the term *actio in factum* the ancient legislator implied *actio in factum ex lege Aquilia*, also called *actio damni iniuriae in factum*. If a lessee used this lawsuit, he would offer a guarantee that the land owner would not have additional later² requests for compensation of damages. It is also stated that one type of loss (*damnum*) is to corrupt a thing (*corrumpere*), in which case an Aquilian action could be brought, and another was when the thing itself had not been corrupted, but mixed with others, so that the separation of mixed things would be difficult (*molesta separatio*).

But in essence everything else regarding this text is doubtful. Different interpretations of the text have been offered in modern literature. We will provide an overview of them. They can mainly be grouped in four groups:

- 1 Including the author of this paper, see for example Aličić, S., 2016, *Imovinska šteta u rimskom klasičnom pravu – Osnove koncepta štete u savremenom pravu*, Sarajevo, University Press, pp. 162–163; Aličić, S., 2011, Ulpijan, Celz i zagađenje zemljišta korovom (D.9.2.27.4), *Zbornik radova Pravnog fakulteta u Novom Sadu*, 45/3, pp. 613–633.
- 2 The term *amplius*, which has multiple meanings, here means *afterwards*. See Guizzi, F., 1961, In tema di origini della “cautio de rato”, *Labeo*, 7, pp. 340–341.

2.1. THE FRAGMENT IS INTERPOLATED, AND THE AQUILIAN ACTION IS NOT GRANTED TO THE TENANT IN CLASSICAL LAW. IN THE ORIGINAL TEXT, AQUILIAN ACTION, AND MAYBE EVEN INTERDICT, HAS BEEN DENIED TO THE LESSEE

There are numerous sources that testify that classical Roman law denied not only direct Aquilian action to the *detentor*, but also *actio in factum ex lege Aquilia*. A direct lawsuit can be granted only by a person who has a real right over the damaged thing.³ Because of this, in older literature D.9.2.27.14 has often been marked as interpolated.⁴ Although some authors defended its authenticity,⁵ it remained under suspicion long after the interpolationist critique had been mainly abandoned, predominantly on the basis of the linguistic incoherency of the text.⁶ Some of the authors who in recent times indicated possible interpolations are the following ones.

On the basis of earlier opinions of Pampaloni and Bessler, Albanese believes that the text is heavily interpolated in the part from *non solum* to *inquietet*. Convinced that classical Roman law would not allow Aquilian action *in factum* in this case, he proposes the following reconstruction of the text: *an legi Aquiliae actione tenearis? et ait in factum agendum*. Moreover, he suggests that the text was interpolated twice: the part regarding the lessee has been interpolated in the postclassical period, while the interdict *quod vim aut clam* was added by Justinian's compilers.⁷

Lübtow believes that the reason why in the original text a lawsuit *in factum*, instead a direct lawsuit, has been granted was not because of the lack of physical damage (*rumpere*), but because of directly inflicted damage (*corpore*).⁸

3 D.9.2.11.9; 9.2.27.34; 9.2.57.

4 See, for example, Thayer, J. B., 1929, *Lex Aquilia (Digest IX, 2, Ad Legem Aquilianam): Text, Translation and Commentary*, Cambridge, Harvard University Press, pp. 91–92.

5 *Ibid.*

6 Even those who defend the originality of the text acknowledge that it has some strange characteristics: it looks incomplete (MacCormack, G., 1973, *Celsus quaerit: D.9.2.27.14, RIDA*, 20, p. 341; Tellegen-Couperus, O. E., 1995, *The Tenant, the Borrower and the lex Aquilia, RIDA*, 42, p. 417); the language is somewhat strange (MacCormack, G., 1973, p. 341); the form of the verb *agere* in the words *non solum ... posse agere* does not correspond to that in *sed et in factum agendum* (Tellegen-Couperus, O. E., 1995, p. 417).

7 Albanese, B., 1950, *Studi sulla legge Aquilia, Annali del Seminario giuridico della Università di Palermo*, 21, pp. 332–333.

8 Lübtow, U. von, 1971, *Untersuchungen zur lex Aquilia de damno iniuria dato*, Berlin, Duncker & Humboldt, pp. 165 ff.

Valino does not exclude a possibility of an alteration of the text even in Antiquity. Using the positions previously taken by Ferrini as a starting point, he says that it is impossible the an *actio damni iniuriae* could have been granted to a tenant in classical Roman law, because the damage was not inflicted *corpore*, and because he was not the owner of the thing.⁹

The interpolationist critique of the D.9.2.27.14 text is today completely abandoned and its arguments refuted.¹⁰ The linguistic issues and lack of internal consistency of the text are currently mostly attributed to the abbreviation and summation of the text rather than interpolation, either by members of Tribonian's commission, by postclassical jurists, or by Ulpian.¹¹ In regard to the latter, it is sometimes stated that the second part of the text possibly does not derive from Celsus, but represent a comment by Ulpian.¹²

2.2. THE OWNER AND THE LESSEE CAN SEEK COMPENSATION OF DAMAGES INDEPENDENTLY. THE LAWSUIT *IN FACTUM* IS GRANTED ONLY BY THE LESSEE AS THE PROCEDURAL REPRESENTATIVE OF THE OWNER, FOR THE DAMAGE BOTH TO THE SOIL AND TO THE FRUITS. THIS IS WHY A PROCEDURAL GUARANTEE IS REQUIRED IN THIS CASE, WHILE IT IS NOT NECESSARY IF AN INTERDICT IS BROUGHT. DIRECT AQUILIAN ACTION IS NOT GRANTED, BECAUSE THE LESSEE IS NOT OWNER OF THE LAND.

In the first scientific paper explicitly dedicated to the analysis of the D.9.2.27.14 source,¹³ MacCormack concludes, on the basis of comparison with other texts, that lessee could bring an interdict (D.43.24.11.12; 43.24.11.13) for loss of fruits (D.43.24.12; 43.24.19), while the owner could

9 Valino, E., 1973, *Acciones pretorias complementarias de la accion civil de la ley Aquilia*, Pamplona, Universidad de Navarra, pp. 81–84.

10 Porto, A. di, 1988, La tutela della “salubritas” fra editto e giurisprudenza, Il ruolo di Labeone. I – Acque., *BIDR*, 91; Tellegen-Couperus, O. E., 1995, p. 417.

11 MacCormack believes that the text might be abbreviated by Justinian's compilers (MacCormack, G., 1973, p. 342), while Tellegen-Couperus believes that it might have happened even earlier, in the postclassical period (Tellegen-Couperus, O. E., 1995, p. 417). Capogrossi Colognesi also speaks in favor of abbreviation rather than interpolation (Capogrossi Colognesi, L., 1993, *L'interdetto “quod vi aut clam” e il suo ambito di applicazione*, Index, 21, pp. 277–278).

12 Guizzi, F., 1961, pp. 331–332; Cerami, P., 1985, La concezione celsina del “ius”. Presupposti culturali e implicazioni metodologiche, Palermo, Palumbo, pp. 125 ff; Porto, A. di, 1988; against: Guarino, A., 1986, La concezione celsina del “ius”. (Lettura); Labeo, 32, p. 76; Winiger, B., 1997, *La responsabilité aquilienne romaine: damnum iniuria datum*, Bâle et Francfort-sur-le-Main, p. 39.

13 MacCormack, G., 1973, pp. 341–348.

bring one for the value of the land (D.43.24.12).¹⁴ He remarks that one of the conditions for use of the interdict *quod vi aut clam* is the existence of some physical or material change on land (*opus in solo*),¹⁵ in which he sees also the element of *corrumpere* in the sense of *lex Aquilia*. Celsus discussed whether an interdict could be brought in this case, and for some reason he concluded that it could not, with the reason having disappeared in the process of abbreviation of the text.¹⁶

Celsus concluded that the owner could bring either an interdict or Aquilian action, i.e., only one of this two procedural remedies (D.43.24.15.12).¹⁷ Aquilian action was *in factum* because the soil had not changed in its nature (*corruptum*). This lawsuit could also be granted to the lessee.

As of the question why the procedural guarantee was needed when a lessee brought an *actio in factum*, but not when he brought an interdict¹⁸ (although not excluding the possibility that the reference to the interdict was lost in the process of abbreviation of the text), the author concludes that, based on the contract of lease, the lessee had the right to act as a representative (*procurator*) of the owner of the land. Therefore, he brought the lawsuit *in factum* not only for the damage to fruits, but also for the damage to the land itself. Because of that, he was required to provide a guarantee that the owner would not bring the same lawsuit.¹⁹

This interesting and original theory by MacCormack had was accepted by some authors.²⁰ However, it has two flaws: first, contrary to what the author states, the analogy with interdict suggests that Aquilian action should have been granted to both the lessee and the owner, and second, it did not provide a plausible answer to the question which must be put if we accept this theory – if in this case Aquilian protection is actually granted to the *detentor*, why did this not happen in any other known case?

14 *Ibid.*, p. 346.

15 It could be cutting down trees (D.43.24.7.5), dumping manure or garbage (D.43.24.7.6), dumping polluting substances in a well (D.43.24.11pr), moving stones (D.43.24.15.1), but also gathering fruits (D.43.24.7.5), burning hay (D.43.24.9.3), or transporting manure across land belonging to another (D.43.24.22.3) (MacCormack, G., 1973, p. 344).

16 *Ibid.*, p. 345.

17 *Ibid.*, pp. 345–346.

18 Regarding this question (interesting in itself but irrelevant for our research), what kind of *cautio* exactly, see Thayer, J. B., 1929, pp. 92–93, and Guizzi, F., 1961, pp. 331–341.

19 MacCormack, G., 1973, pp. 347–348. See also Thayer, J. B., 1929, pp. 91–92.

20 See Llanos Pitarch, J. M., 1995, *La restitución en la posesión: El interdicto quod vi aut clam*, Castellón 1995, pp. 152, 154–163, 166–167; Ziliotto, P., 2000, *L'imputazione del danno aquiliano: tra iniuria e damnum corpore datum*, pp. 182–183.

2.3. BOTH THROUGH AQUILIAN ACTION AND INTERDICT,
THE OWNER OF THE LAND SEEKS COMPENSATION
FOR CONTAMINATION OF THE SOIL, AND THE LESSEE FOR
THE FRUITS, AS THEIR OWNER. DIRECT AQUILIAN ACTION
IS NOT GRANTED BECAUSE THE CONTAMINATION
OF THE SOIL CANNOT BE INTERPRETED AS *CORRUMPERE*
IN THE SENSE OF *LEX AQUILIA*.

An explanation appeared quiet early, as a response to the interpolationist critique, stating that the lawsuit is granted to the tenant not because his quality of a party to a contract of lease, but as the owner of the fruits.²¹ The only reason why in this case the direct lawsuit was not granted, was that the damage was not inflicted *corpore*.²² Of course, the owner of the land had an independent lawsuit for the degradation of the soil.

In the second paper (after MacCormack's) explicitly dedicated to the analysis of the D.9.2.27.14 text, Tellegen-Couperus reinforced this theory with new arguments.²³

She dismissed MacCormack conclusion that physical change of the soil was a condition for bringing an interdict, and believes that Celsus had no doubt whether the interdict should be given.²⁴ She also remarks, that *cautio amplius non peti* applied in situations other than when someone acted as the *procurator*.²⁵

According to Tellegen-Couperus, the lessee could claim the value of the fruits both by Aquilian action and interdict. The owner did not claim the value of the land, because the soil was not permanently destroyed but only temporarily made useless. He instead claimed the value of the lost harvests for the period after the contract of lease expired. The reason why a procedural guarantee was not needed if interdict was being brought was that it could be brought only for a period of one year after the damage was inflicted, i.e., only for one harvest. Therefore, if the land is leased, only the lessee could bring the interdict, while the Aquilian action could be brought also by owner, because further bad harvests could follow after the contract of lease had expired. The interdict was applied if physical change (*corruptio*) of soil occurred, and if it had not, an Aquilian action was granted. The lawsuit in this case was *in factum*, because the existence

21 Thayer, J. B., 1929, p. 91; Natali, N., 1896, *La legge Aquilia ossia il damnum iniuria datum: Studio sul lib. IX, tit. II del Digesto*, Roma, Tipografia dell'Unione cooperativa editrice, pp. 120–122.

22 Natali, N., 1896, p. 78.

23 Tellegen-Couperus, O. E., 1995, pp. 415–436.

24 *Ibid.*, pp. 422–423.

25 *Ibid.*

of physical damage was also a condition for the application of direct Aquilian action.²⁶ Furthermore, the author adds that no person could bring an Aquilian lawsuit solely on the basis of being the *detentor*, and the lessee brought a lawsuit not as a tenant of the land, but as the owner of the fruits.²⁷ It is true that prior to the harvest the tenant was not the owner of the fruits; but in this case he probably could not notice the contamination nor bring a lawsuit prior to the harvest.²⁸

The conclusions of Tellegen-Couperus conclusions can be summarized as follows:

If the soil is damaged, the owner can bring *quod vi aut clam*, while the *detentor* can bring an interdict as the owner of the fruits. If the soil is not permanently damaged, the owner can bring Aquilian action, but only *in factum*, because such damage is not considered *corrumpere*, while the lessee can bring, again, a lawsuit as the owner of the fruits.²⁹

This theory seems to have the best argumentation of all. On the plus side, it does not contradict any known sources, and offers a plausible explanation to why the Aquilian action is granted to the lessee, although in other cases it is generally not granted to the *detentor*. However, even this theory has some weak points. The text of paragraph D.9.2.27.14 contains no hint of an indication that the interdict is not granted to the owner of the land. Furthermore, the explanation that the tenant is regarded as the owner of the fruits because he would not notice the contamination before the harvest does not seem plausible, and there is no definitive proof that the lawsuit is *in factum* because of the lack of physical damage. It could also be for some other reason.

2.4. IN THE CASE OF CONTAMINATION OF SOIL, BOTH INTERDICT AND LAWSUIT BELONGS TO THE OWNER, AND IN THE CASE OF THE CONTAMINATION OF HARVEST, CELSUS WOULD GRANT EITHER INTERDICT OR LAWSUIT TO THE TENANT, BUT ULPAN WOULD NOT.

Del Porto proposed a new and original reading of D.9.2.27.14. He believes that the second part, in which an explanation is given (from *nam* to the end), derives from Ulpian, who had in mind two different situations. The first one is the mixing of grain seed with weeds, the other is contamination of the soil. Ulpian would allow interdict only in the latter case,

26 *Ibid.*, pp. 423–427.

27 *Ibid.*, pp. 427–436.

28 *Ibid.*, p. 418.

29 *Ibid.*, pp. 423–427.

and as a proof, Del Porto mentions that in the case of the mixing of the grain with sand or other material Ulpian does not mention interdict but only Aquilian action (D.9.2.27.20).³⁰ Celsus had a more liberal position on the matter of application of the interdict. Ulpian, on the other hand, strictly respects the principle that *opus* must be *in solo*, while for Celsus, it is acceptable even if it is done to the plants (for example by cutting young trees, D.43.24.18pr), and in a similar case of damage to the plants Ulpian would consider that there is no *opus in solo*, and hence no interdict could take place (D.43.24.7.5).³¹

According to Del Porto, we are confronted with two situations, and interdict or Aquilian action can belong either to the lessee, or to the owner, i.e., only to one of them.

This bold and innovative theory has had some influence on other authors,³² but can also be attacked from many directions. There is no proof that Ulpian's opinion is different from Celsus's, although it is plausible that Ulpian used the text of Celsus out of the original context. Further, both classical jurists talk about the seeding of weeds, not about the mixing of the seeds of weeds with the grain,³³ so the parallel with the Ulpian's D.9.2.27.20 text, which deals with mixing sand and wheat, is out of place. Ulpian's silence on interdict in D.9.2.27.20 can be explained simply by the fact that the text specifically discusses Aquilian liability. It is true that in D.43.24.7.5 Ulpian does not allow bringing interdict in the case of removing the fruits, but at the end of the same text he says explicitly that an *opus in solo* exists if someone does something to the trees, but not if he does something to the fruits (*in solo fieri accipimus et si quid circa arbores fiat, non si quid circa fructum arborum*). So, his opinion does not differ substantially from the one expressed by Celsus in D.43.24.18pr. Finally, whole the discussion about *corrumpere* in D.9.2.27.14 has nothing to do with the interdict. It is clear that it refers to the application of the *lex Aquilia* (*ut lex Aquilia locum habeat*).

3. A CRITICAL SURVEY OF THE EXISTING THEORIES AND A POSSIBLE NEW READING OF THE D.9.2.27.14 TEXT

The theories based on the interpolationist critique are today mostly abandoned, while all the others have to be seriously taken into consideration. Del Porto's theory is very bold and interesting, but thus the easiest

30 Porto, A. di, 1988, pp. 495–496.

31 *Ibid.*, pp. 494–497.

32 For example, Corbino, A., 2008, *Il danno qualificato e la lex Aquilia: Corso di diritto romano*, Padova, Cedam, p. 162.

33 Capogrossi Colognesi, L., 1993, p. 278.

to criticize. MacCormack's theory has good argumentation and is convincing, but not entirely. Tellegen-Couper's interpretation seems to have the best argumentation and is the only one that does not contradict other sources, so in this paper, we will accept this latter interpretation, trying to add some more arguments in its favor, but also to propose a revision of this theory in some aspects.

Our goal is to prove the following: that the Aquilian action is granted to the lessee on the basis of his ownership of the fruits, and not on the basis of him being a tenant, while to the owner of the land it is granted based on his ownership of the land; that the lawsuit is granted because the owner could not bring the interdict for the losses that he suffered within one year from the moment when the damage was caused, while Aquilian action can also be used later; that Ulpian and Celsus had no doubt that interdict could be applied, and that they did not even consider that to be in question; that the lessee could bring the lawsuit from the moment of contamination, as a future owner of fruits, and not only after becoming an owner by the separation of the fruits during the harvest; that the reason why the Aquilian action was not granted as a direct one was not necessarily the consequence of the absence of physical damage (*corrumpere*), and that the wrong impression in that regard could be derived from the fact that Ulpian used the text of Celsus out of the original context.

Of course, everything presented here is an assumption. Some of them may be convincing, but must be taken with caution, because, as we will see, a definitive and certain interpretation of this text is apparently impossible.

3.1. THE ISSUE OF ACTIVE LEGITIMATION AND CONCURRENCE OF DIFFERENT LEGAL REMEDIES

Celsus says that if someone threw the seeds of weeds on the land seeded with wheat belonging to someone else, the owner could use an interdict against him, as could the lessee (*quod vi aut clam dominum posse agere vel, si locatus fundus sit, colonum*). Let us see first whether Celsus could have doubts about the possibility of application of interdict in this case at all. The conditions are that a deed (*opus*) has been committed on the land, or connected to the land, that it provoked material loss, and that it was committed by force or in secret.³⁴

34 Llanos Pitarch, J. M., 1995, pp. 73–108; Capogrossi Colognesi, L., 1993, p. 232. See also Longo, G., 1962, Voce: Interdictum quod vi aut clam, *Novissimo digesto italiano*, VIII, pp. 808–809.

Does *opus* on land exist?³⁵ As it appears, it does. It exists even in the case of mere ploughing of the land.³⁶ However, especially interesting in that regard is the next text:

D.43.24.11pr. ULPIANUS libro septuagensimo primo ad edictum. *Is qui in puteum vicini aliquid effuderit, ut hoc facto aquam corrumperet, ait Labeo interdicto quod vi aut clam eum teneri: portio enim agri videtur aqua viva, quemadmodum si quid operis in aqua fecisset.*

The contamination of a water source, i.e., of a well that is part of the landed property, is without any doubt an *opus*, and interdict can be brought in this case, why would the spoiling of the land itself not be considered *opus in solo*? As it appears, neither Ulpian nor Celsus had reason to have any doubt about it.

Was it committed *vi aut clam*? Probably yes, first because there is no mention of a possible contractual liability of a person who, for example, sold the contamination seeds.³⁷ If the idea that someone would make the effort to gather seeds of weeds only to cause damage to a neighbor seems strange, it is enough to recall the famous passage, often cited together with D.9.2.27.14, from the Gospel of Matthew:

Vulgata, Mt 13:24. *Aliam parabolam proposuit illis, dicens: Simile factum est regnum caelorum homini, qui seminavit bonum semen in agro suo. 25. cum autem dormirent homines, venit inimicus eius, et superseminavit zizania in medio tritici, et abiit. 26. Cum autem crevisset herba, et fructum fecisset, tunc apparuerunt et zizania. 27. Accedentes autem servi paterfamilias, dixerunt ei: Domine, nonne bonum semen seminasti in agro tuo? Unde ergo habet zizania? 28. Et ait illis: Inimicus homo hoc fecit.*

In his stories (parables), Jesus generally used examples from everyday life that everyone could understand.³⁸ So, seeding weeds was probably a common way at this time to cause damage to another, out of pure malice.

The financial loss clearly exists. There is no consensus in science on whether the interdict could be brought by a *possessor*, or only by a person having some right.³⁹ However, it is certain that this does not necessarily

35 In other texts, Ulpian underlines that interdict *quod vi aut clam* can be applied only if *opus in solo* was committed by force or in secret (*ad ea sola opera quaecumque in solo vi aut clam fiunt* – D.43.24.1.4).

36 Capogrossi Colognesi, L., 1993, p. 278.

37 For example, a merchant who sells an infected animal, which infects other animals in a heard, could be liable for the damage because of improper execution of the contract of sale (D.19.1.13pr).

38 E.g. that of the lost sheep, (Mt 18.12–14; Lk 15.3–7), lost coin (Lk 15.8–10), and prodigal son (Lk 15.11–32).

39 Llanos Pitarch, J. M., 1995, p. 111.

have to be a real right. It can be also right based on a contract,⁴⁰ as testified in this source:

D.43.24.12 *VENULEIUS* libro secundo interdictorum *Quamquam autem colonus et fructuarius fructuum nomine in hoc interdictum admittantur, tamen et domino id competet, si quid praeterea eius intersit.*

So, the interdict can generally be granted to the lessee, for damage of fruits. It also includes damage caused by weeds, because that type of damage is otherwise considered a *vis maior* and losses caused by it are on the lessee.

D.19.2.15.2 *ULPIANUS* libro trigesimo secundo ad edictum *Si vis tempestatis calamitosae contigerit, an locator conductori aliquid praestare debeat, videamus. Servius omnem vim, cui resisti non potest, dominum colono praestare debere ait, ut puta fluminum graculorum sturnorum et si quid simile acciderit, aut si incursus hostium fiat: si qua tamen vitia ex ipsa re orientur, haec damno coloni esse, veluti si vinum coacuerit, si raucis aut herbis segetes corruptae sint.*

Therefore, D.9.2.27.14 contains all the conditions for the application of interdict *quod vi aut clam*. The idea that Celsus grants Aquilian action only when there is no possibility to bring an interdict because there is no *opus in solo*⁴¹ makes no sense. A lawsuit *in factum* is granted to both the owner and the lessee (*non solum quod vi aut clam ... sed et in factum agendum*), in addition to the interdict. They can choose one of the two procedural remedies for compensation of damages.⁴²

The reason why the Aquilian action *in factum* is granted should be found, as already stated in the literature,⁴³ in the fact that the interdict can be brought only for a period of one year after the damage was inflicted. There is no such a limitation for Aquilian action, which can be used multiple times in the case of multiple successive bad harvests. This is also the reason why no procedural guarantee is required if interdict is used: it can be used only once.⁴⁴

As for the damages, the lessee could claim *lucrum cessans* because of the bad harvests before the expiration of contract of lease, and the owner for the losses suffered subsequently. It is clear that the owner cannot claim

40 Llanos Pitarch, J. M., 1995, pp. 119–120. See also Fargnoli, I., 1998, *Studi sulla legittimazione attiva all'interdetto quod vi aut clam*, Milano, Giuffrè.

41 Tellegen-Couperus, O. E., 1995, pp. 423–427.

42 A person against whom an interdict *quod vi aut clam* has been passed must return the thing to pristine condition, or, if that is not possible, must pay the estimated value of the damages. Llanos Pitarch, J. M., 1995, pp. 108–110.

43 Tellegen-Couperus, O. E., 1995, pp. 423–427.

44 *Ibid.*

the worth of the entire landed property as a compensation for damages. Ryegrass (*lolium*) is a type of weed physically similar to grain and difficult to separate, and it is also toxic. Wild oat (*avena*) is a harmless but resistant weed and it takes up to six years to remove it from the soil.⁴⁵ None of the mentioned weeds would make the soil permanently less fertile.

Therefore, in the case of contamination of soil, the interdict depended on the owner. If the land had been leased, only the lessee could bring an interdict (*quod vi aut clam dominum posse agere vel, si locatus fundus sit, colonum*), because such a contract could not last less than a year, therefore the owner had no interest in bringing it. However, the owner could also bring a lawsuit *in factum* (*sed et in factum agendum*), and if the land had been leased, this was the only procedural remedy that he could use. It could also be used by lessee, but in that case he would have to offer a guarantee that the owner would not seek compensation of the same damage (*et si colonus eam exercuit, cavere eum debere amplius non agi, scilicet ne dominus amplius inquietet*).

3.2. THE NATURE OF AQUILIAN ACTION *IN FACTUM*

What is the basis for the use of Aquilian action by a lessee, and why is it *in factum*⁴⁶ and not direct?

A *detentor* could bring an Aquilian lawsuit only as the owner of the fruits, however, according to the *superficies solo cedit* principle, they are the property of the land owner until the harvest. As previously stated, Tellegen-Couperus tried to solve the problem by sustaining that the tenant would not notice the contamination prior to the harvest, and then he would notice that the harvested was in vain, because it is impossible to separate the weeds from the grain. But must it actually be so? Let us remind of the ending of the biblical parable:

Vulgata, Mt 13:28. *Servi autem dixerunt ei, Vis, imus, et colligimus ea?* 29. *Et ait: Non: ne forte colligentes zizania, eradicetis simul cum eis et triticum.* 30. *Sinite utraque crescere usque ad messem, et in tempore messis dicam messoribus: Colligite primum zizania, et alligate ea in fasciculos ad comburendum, triticum autem congregate in horreum meum.*

In the biblical story, the slaves noted the weeds before the harvest. They did not pluck them out, so as not to damage the grain. After the harvest, they would separate the grain from the weeds. It is important to note that D.9.2.27.14 does not state that *separatio* would be *impossibilis*,

45 *Ibid.*, p. 418.

46 On the nature of the Aquilian *actio in factum*, see, for example, Ziliotto, P., 2000, p. 60.

only difficult, *molesta*. So, two things come in mind. First, that the loss suffered is not necessarily the value of the wheat, but the costs of its separation from the weeds after harvest. Second, if the existence of the damage is noted before the harvest, could the tenant bring the lawsuit before the harvest? On the basis of the analogy with stealing (*furtum*) of the fruits, we have no reason to doubt that he could, because the lessee could bring an *actio furti* even for the fruits that he had not yet gathered.

D.47.2.26.1 PAULUS libro nono ad Sabinum *Item constat colonum, qui nummis colat, cum eo, qui fructus stantes subriperit, acturum furti, quia, ut primum decerptus esset, eius esse coepisset.*

Why is the lawsuit not direct but *in factum*? Most Romanists believe that the reason is the absence of the physical damage (*corrumpere*). Had there been physical damage to either the fruits or the land, a direct Aquilian action would be granted. Even the authors whose interpretation of the D.9.2.27.14 text completely differs in other respects agree on this matter.⁴⁷

This theory is well supported by sources. Our text is part of Ulpian's long fragment from Book 18 On the Edict, included in the chapter of the Digest D.9.2 – *Ad legem Aquiliam*. It is a part of the discussion on the meaning of the word *rumpere* in the third chapter of the *lex Aquilia*, as one of the conditions for application of this law, which means that the damage is inflicted by burning, breaking or otherwise damaging or destroying an object (D.9.2.27.5). After several cases of damage made by fire (27.6–12), Ulpian says:

D.9.2.27.13 *Inquit lex "ruperit". rupisse verbum fere omnes veteres sic intellexerunt "corruperit".*

This is followed by the D.9.2.27.14 text, as an illustration⁴⁸ of what was said above: almost every corruption of a thing can be considered *rumpere* in the sense of the *lex Aquilia*. After that, another example of damage without physical change of a thing follows:

D.9.2.27.15 *Cum eo plane, qui vinum spurcavit vel effudit vel acetum fecit vel alio modo vitiavit, agi posse Aquilia Celsus ait, quia etiam effusum et acetum factum corrupti appellatione continentur.*

Then, several other examples follow. So, our passage is part of Ulpian's discussion about the significance of the term *rumpere*.

However, it is by no means certain that the Celsus's opinion that Ulpian cites was originally in a similar context. It was likely taken either

47 MacCormack, G., 1973, pp. 343–344.; Ziliotto, P., 2000, pp. 183–184; Tellegen-Couperus, O. E., 1995, pp. 417–418.

48 Ziliotto, P., 2000, p. 182.

from his book *questionum* or from *digestorum*,⁴⁹ works of a scientific and didactical character. Celsus probably discussed the case, real or fictitious, from various perspectives, while Ulpian used it only to illustrate one aspect: the interpretation of the term *corrumpere*.

It is possible that in the original text by Celsus some other reason was given for why the Aquilian action was not granted as direct. Some authors believe that it could be because the damage was not inflicted *corpore*,⁵⁰ a matter that Celsus believed to be of great importance (*multum interesse dicit*):

D.9.2.7.6 ULPIANUS libro octavo decimo ad edictum *Celsus autem multum interesse dicit, occiderit an mortis causam praestiterit, ut qui mortis causam praestitit, non Aquilia, sed in factum actione teneatur. unde adfert eum qui venenum pro medicamento dedit et ait causam mortis praestitisse, quemadmodum eum qui furenti gladium porrexit: nam nec hunc lege Aquilia teneri, sed in factum.*

It is worth emphasizing the fact that Celsus seems to be the only known jurist not to be convinced that a direct action should be brought in the case when the damage is inflicted by the spread of uncontrolled fire:

CO.12.7.5 ULP. 18 ED. *sed plerisque aquilia lex locum habere non videtur, et ita celsus libro XXXVII digestorum scribit. ait enim "si stipulam incendit ignis effugit, aquilia lege eum non teneri, sed in factum agendum, quia non principaliter hic exussit, sed dum aliud egit, sic ignis processit".*

In similar situations, Ulpian (D.9.2.27.8) and Paul (D.9.2.30.3) do not even mention the question whether the lawsuit is *in factum* or not, nor do they mention the question whether the damage is inflicted by direct human action or not, but only discuss the issue of fault.

49 In his books *Ad Sabinum* and *Ad edictum* there are several quotes by Celsus (D.12.1.1.1; 28.5.9.2; 34.2.19.3; 7.1.2.7; 12.6.26.13; 34.2.19.3; 47.2.43.10; 47.12.2; CO.12.7.5), usually with indication, from which Celsus's work the quote was taken: *ut libro primo quaestionum Celsus ait* – D.12.1.1.1; *Celsus libro duodecimo quaestionum, digestorum undecimo posse defendi ait* – D.28.5.9.2; *Idem Celsus libro nono decimo quaestionum quaerit* – D.34.2.19.3; *scribit Celsus libro octavo decimo digestorum* – D.7.1.2.7; *ut Celsus libro sexto et Marcellus libro vicensimo digestorum scripsit* – D.12.6.26.13; *Idem Celsus libro nono decimo quaestionum quaerit* – D.34.2.19.3; *Celsus libro duodecimo digestorum quaerit* – D.47.2.43.10; *Celsus libro XXXVII digestorum scribit* – CO.12.7.5. Beside paragraphs 9.2.27.14–15, there is only one other case, D.47.12.2, where Celsus's quote by Ulpian is without an indication of Celsus's book from which the quote was taken.

50 Llanos Pitarch, J. M., 1995, p. 152; Valino, E., 1973, p. 84; Winiger, B., 1997, pp. 159–164; Lübtow, U. von, 1971, pp. 165 ff.

The last sentence of the D.9.2.27.14 text, *alia quaedam species damni est ipsum quid corrumpere et mutare, ut lex Aquilia locum habeat, alia nulla ipsius mutatione applicare aliud, cuius molesta separatio sit*, from stylistic point of view does not fit the text. It introduces the following paragraph, about adulterated wine, and it is not certain that it is Celsus's: it could be entirely Ulpian's comment, at least in the part *ut lex Aquilia locum habeat*, which sounds as a later addition. So, if the damage has not been inflicted *corpore*, for Celsus this would be absolutely sufficient reason to grant an *actio in factum*, instead of an *actio directa*, and the whole discussion about *corrumpere* could have nothing to do with the character of the lawsuit.

4. CONCLUSION

It is most likely that neither Celsus nor Ulpian had doubts that in the D.9.2.27.14 text, in the case of weed contamination of soil, an interdict *quod vi aut clam* could be brought, because all the conditions for its application are fulfilled. An interdict can be claimed only for the loss suffered up to one year after the damage had been inflicted. For this reason, this procedural remedy depends either on the owner or, if the land is leased, on the lessee of the land – but only on one of them. Because losses can be suffered even after one year, an Aquilian action is granted. It depends both on the owner and on the lessee: on the lessee for the losses suffered before, on the owner for the losses suffered after the termination of the contract of lease. This is the reason why the lessee had to offer a procedural guarantee in the form of stipulation that the owner would not seek reimbursement of the same damages in the future, while this was not necessary in the case when an interdict was being brought. The lawsuit is granted to the tenant as the future owner of the fruits, and not on the basis of being the *detentor* of the land. The lawsuit was granted to both owner and tenant not as an *actio directa*, but an *actio in factum ex lege Aquilia*. It is not possible to establish the reason with certainty. It could be the lack of physical change of a thing (*corrumpere*), or some other reason, such as the fact that the damage was not made directly (*corpore*) or that the tenant had not yet become the owner of the fruits. Both the owner and the tenant could use either an interdict or an Aquilian action, but only one of two procedural remedies could be applied.

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NOVO MOGUĆE TUMAČENJE PARAGRAFA
JUSTINIJANOVIH DIGESTA D.9.2.27.14:
PRILOG IZUČAVANJU ZAČETAKA PRAVA ZAŠTITE
ŽIVOTNE SREDINE U RIMSKOM PRAVU

Samir Aličić

APSTRAKT

Predmet rada je analiza značenja pasusa Justinijanovih Digesta D.9.2.27.14. Autor na osnovu uporedne analize izvora izvodi sledeće zaključke. Izvesno je da ni Celz ni Ulpijan u tekstu D.9.2.27.14 nisu sumnjali da se u slučaju zagađenja zemljišta korovom može dati interdikt *quod vi aut clam*, jer su ispunjeni svi uslovi za njegovu primenu. Interdiktom može da se zahteva samo šteta koja će nastati u roku od godinu dana. Iz tog razloga ovo procesno sredstvo pripada ili vlasniku zemlje ili, ako je zemljište dato u zakup, zakupcu. Iz istog razloga daje se pored interdikta i akvilijanska tužba, s tim što se može upotrebiti samo jedno od ta dva procesna sredstva. Ona pripada kako vlasniku zemlje, tako i zakupcu. Zakupcu se daje za onu štetu koja nastane pre isteka zakupa, a vlasniku za onu koja nastane kasnije. Tužba se i vlasniku i zakupcu ne daje kao direktna, nego kao *actio in factum ex lege Aquilia*. Razlog za to ne može se sa sigurnošću utvrditi.

Ključne reči: *lex Aquilia*, *damnum iniuria datum*, šteta, vanugovorna odgovornost, *interdictum quod vi aut clam*, zagađenje, obli-gacije, pravo zaštite životne sredine, rimsko pravo.

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