Some remarks on *Ne quis in suggrunda protectove id positum habeat, cuius casus nocere possit* praetor's edict.

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Certain cases of damage caused to another person's things had already been regulated in the Law of the XII Tables[1]. Such transgressions (*damnum iniuria datum)* only received more complex treatment under *lex Aquilia*[2], which, as Ulpian wrote, annulled all previous regulations dealing with unlawful damage to property contained in the Law of the XII Tables and other laws[3]. This act in its first section treated of killing a slave and the quadrupeds belonging to a herd (*pecus*)[4]. The third section of this act, however, referred to liability of a person who, as a result of an unlawful and

[1] In particular, the unlawful cutting down of other people's trees was prosecuted by means of *actio de arboribus succisis* (Gaius refers to this case in his *Institutiones* when discussing the *legis actio* procedure – G. 4,11) and *os fractum* of another person's slave entailed the obligation of paying the owner 150 sesterces (XII Tables 8, 3).

[2] *Lex Aquilia* was published probably in 286 B.C. (see A. BISCARDI, *Sulla data della "lex Aquilia", Scritti in memoria di A. Giuffré*, I, Milano 1967, 81). Whereas when the edicts *ne quis in suggrunda* is considered, we can assume, taking into consideration the comments devoted to this edicts, that it was introduced, like the majority of other ones, by the praetors of the period of the late republic. It was already known to Servius Sulpicius Rufus (D. 9,3,5,12). (See A. WATSON, *The law of Obligations in the Later Roman Republic*, Oxford 1965, 267ff; A. WATSON, *Law Making in the Later Roman Republic*, Oxford 1974, 31ff; W. KUNKEL, *Herkunft und Soziale Stellung der römischen Juristen*, Weimar 1952, 25).

[3] D. 9,2,1pr.

[4] D. 9,2,2pr.; G. 3,210; I. 4,3pr.

direct action, injured other person's slave or animal belonging to *pecus*, killed or injured an animal not belonging to *pecudum numero, e.g.* a dog, damaged or injured other objects as a result of burning, breaking or tearing them (*urere, frangere, rumpere*)[5]. The main premise for liability was therefore, according to the original wording of *lex Aquilia*, the damage, which moreover had to be caused unlawfully and directly to the thing. It is clearly evident from the above that the application of *lex Aquilia* regime to the cases of liability later defined as *positum aut suspensum* (placing an object in a dangerous manner over a site where usually traffic takes place) was impossible, most of all because the element of damage was lacking in them.

Liability for *positum aut suspensum* had been regulated for the first time in the edict *ne quis in suggrunda*[6]. As one may presume, the introduction of heavier liability in this case was justified by the necessity of protecting pedestrians[7]. The Roman law of that time,

[5] D. 9,2,27,5; I. 4,3,13. In the later period a process of conceptual broadening of those terms took place. In particular *rumpere* was interpreted as *corrumpere* (G. 3,217; I. 4,3,13; D. 9,2,27,19; D. 9,2,27,20; D. 9,2,27,25; D. 9,2,27,26; G. 3,219).

[6] D. 9,3,5,6 (*Ulpianus libro vicensimo tertio ad edictum*): *Praetor ait: 'Ne quis in suggrunda protectove supra eum locum, quo vulgo iter fiet inve quo consistetur, id positum habeat, cuius casus nocere cui possit. Qui adversus ea fecerit, in eum <solidorum> decem in factum iudicium dabo. Si servus insciente domino fecisse dicetur aut noxae dedi iubebo'*. It is worth noticing that in the above-quoted passage of the edict as well as in its comments the terms *positum* (D. 9,3,5,7; D. 9,3,5,9-12) and *expositum* (D. 9,3,5,8) are used, whereas the expression *positum aut suspensum* is characteristic of Gaius's text handed down in D. 44,7,5,5 and then repeated in I. 4,5,1 (*… Cui similis est is, qui ea parte, qua vulgo iter fieri solet, id positum aut suspensum habet, quod potest, si ceciderit, alicui nocere…*). It possibly was influenced by the *amphora ex reticulo suspensa* mentioned in D. 9,3,5,12. In my opinion separating *suspensum* as a distinct case towards *positum* does not seem fully proper, for *positum* in its broader sense means as much as situated. Thus *positum* comprises in its concept *suspensum* (see. J. SONDEL, *Słownik łacińsko - polski dla prawników i historyków*, Kraków 1997, 763, 927).

[7] See G. A. PALAZZO, *Obbligazioni quasi ex delicto*, Parma 1919, 104; D. STOJČEVIČ, *Sur le caractère des quasi-delits en droit romain*, *IURA* VIII, 1 (1957), 66.; W. WOŁODKIEWICZ, *Deiectum vel effusum oraz positum aut suspensum w prawie rzymskim*, *CPH* XX (1968), 41. Another reason for the introduction of that specific regulation could be an intention to facilitate claiming one's rights by a victim, but it only makes some sense if we assume that *actio de positis* will be applied also when a dangerously hung object will fall down, thus causing some damage to a pedestrian.

however, did not know the notion of a delict consisting in creating the potential danger only. The need for a legal regulation of this type of liability was the main reason why it was included in the praetor's edict on entering the stage of high architecture by the Roman city-planning dating back to the 3rd century B.C. Thus, Titus Livius, recounting the miraculous events which during the Winter of 217-218 B.C. heralded Hanibal's offensive against Rome mentioned a startled bull climbing onto the third floor of a building near the *Forum Boarium* before leaping down amidst the cries of its terrified inhabitants[8]. Likewise, Cicero said that Rome was a city suspended in the air by the floors of its dwellings[9]. During this period, according to Vitruvius, one way of coping with the overcongestion of the city was "to seek some solution in taller buildings"[10]. Those buildings were getting taller during this period is also evident in the proscriptions of the emperors on building construction who saw tall buildings as posing a danger to the safety of citizens. Augustus was the first to ban private individuals from constructing buildings higher than 70 feet (20 metres) in height[11]. During the reign of Trajan this figure was reduced to 60 feet (18 metres)[12]. Such buildings came under the category of *insula* architecture, which catered to the needs of both the rich and poor[13]. Be-

[8] Tit. Liv. 21,62,3: *…et in foro boario bovem in tertiam contignationem sua sponte ascendisse atque tumultu habitatorum territum sese deiecisse…*

[9] Cic., *de leg. agr.* 2,96: *Roman in montibus positam et convallibus, cenaculis sublatam atque suspensam, non optimis viis, angustissimis semitis prae sua Capua planissimo in loco explicata ac praeclarissime sita inridebunt atque contemnet.*

[10] Vitruv., *de arch.* 2,8,17: *In ea autem maiestate urbis et civium infinita frequentia innumerabiles habitationes opus est explicare. Ergo cum recipere non possit area planata tantam multitudinem ad habitandum in urbe, ad auxilium altitudinis aedificiorum res ipsa coegit devenire.*

[11] About restrictions introduced by August see Strabo 5,3,7, 16,2,23; Tac., *ann.* 2,71; Martial., *ep.* 1,117,7.

[12] See D. 39,1,1,17; C. 8,10,1. The statutory regulations of this issue indicate a large number of buildings, which were over 20 metres high. This prohibition was often evaded by building more and more low storeys (about 5 feet high) what caused the fact that those tenement houses with lousy and untidy construction (the ceilings were often built of branches *e.g.* poplars, willows, elms and clay or "Roman cement" made of volcanic mud mixed with sand and lime) were not infrequently higher than 4 floors.

[13] As for the common existing of such kind of building see *e.g.* M.E. BLAKE, *Ancient Roman Construction in Italy from the Prehistoric Period to Augustus*, Wash-

sides the problems caused by the appearance of tall buildings and an increasing population the relative narrowness of Rome's streets (4-6 metres)[14] meant that movement along the city's thoroughfares was inevitably a hazardous affair. Thus, for example, Juvenalis wrote that one should always have a will ready at hand so as not to be seen as an idler unprepared for sudden accidents[15]. In order to prove his point Juvenalis mentioned the death of an eleven-year-old child who had been hit on the head by a falling brick (*tegula prolapsa peremit*)[16].

Literary sources show that over a fairly long period of time (beginning with the rapid and chaotic development of the city after the War with the Celts in 388 B.C. and ending with the fire during the reign of Nero) relatively minor changes took place in Roman architecture[17]. This led to the need to issue an edict designed to protect the safety of pedestrians, as the officials appointed for this purpose (*IVviri viarum curandarum, curatores viarum*) were failing to perform their duties effectively[18].

According to the wording of the edict, the praetor granted a complaint against a person who suspended an object on roof's eaves over a place where usually passers-by walk, provided that any

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ington 1947, 130; J. CARCOPINO, *Życie codzienne w Rzymie*[2], Warszawa 1966, 34–36.

[14] The statement of Martialis, who said that there was a possibility of touching neighbour's outstretched hand, could be the illustration of this problem (Martial., *ep*. I,86,1-2: *Vicinius meus manuque tangi de nostris Novius potest fenestris*). This indicates occurrence of narrower streets.

[15] Iuv., *Sat.* 3,268: *respice nunc alia ac diversa pericula noctis: quot spatium tectis sublimibus unde cerebrum testa ferit, quotiens rimosa et curta fenestris vasa cadant, quanto percussum pondere signent, et laedant silicem. possis ignarus haberi et subiti casus improvidus, ad cenam si intestatus eas adeo tot fata, quot illa nocte patent vigiles te praetereunte fenestrae.*

[16] CIL. III,2083(= CLE. 1060) *Papiria Rhome v(iva) f(ecit) sibi et / Papiriae Cladillae ann. XIX / et P. Papirio Proculo ann. XI filis / condidit hic miseri mater duo funera pa(rtus) / ossaque nos iustis intulit exequiis / tegula nam Romae Proculum prolapsa peremit / pressit Sipunti pressa. Cladilla rogum / vota parens nocuere tibi qui numina saeva / ut plura eriperent plurta dedere bona / et P. Papirio Clado viro et P. Papirio / Celerioni et Papiriae Hispanillae li(bertis)./*

[17] As for the description of Rome's streets in those times and the chaos appearing also in the rebuilding parts of the town see Tit. Liv. 5,55,3 and Tac., *ann.* 15,43,5.

[18] See T. GIMÈNEZ-CANDELA, *Los Llamados Cuasidelitos*, Madrid 1990, 71, 74 and the literature cited there.

damage could have been caused as a result of it. Liability was thus in this case not only independent of the perpetrator's guilt but also of the effect, because its fundamental premise was mere danger of the damage. This results from the preventive character of the edict[19]. It is also connected with the general ban provided by the edict, contrary to three different hypotheses and sanctions bound with them, which were provided by the edict *de his qui deiecerint vel effuderint*[20]. Such structure of the edict *ne quis in suggrunda* could support the argument of its earlier origin compared with the edict *de his qui deiecerint vel effuderint*[21]. New threats and various damages resulting from them coerced issuing the latter one. Of such sequence could indicate a passage of D. 9,3,5,12, imparting the standpoint of Servius, according to whom an action framed on the analogy of *actio de positis* should be granted in case when a suspended object fell down, for as he claims both there was a lack of *actio legitima* (*actio legis Aquiliae* could not have been applied in this period for the requirement of damage *corpore corpori* arising[22] as well as *actio honoraria* (the edict *de his qui deiecerint vel effuderint* had not come into existence yet[23]). Assuming such sequence of both edicts contained in D. 9,3 does not contradict

[19] A. WATSON, *Liability in the "actio de positis ac suspensis", Mélanges Meylan* I, Lausanne 1963, 379; R. HOCHSTEIN, *Obligationes quasi ex delicto*, Stuttgart-Berlin-Köln-Mainz 1971, 17; T. GIMÈNEZ-CANDELA, (Fn.18), 123.

[20] D. 9,3,1pr. (*Ulpianus libro vicensimo tertio ad edictum*): *Praetor ait de his, qui deiecerint vel effuderint: 'unde in eum locum, quo vulgo iter fiet vel in quo consistetur, deiectum vel effusum quid erit, quantum ex ea re damnum datum factumve erit, in eum, qui ibi habitaverit, in duplum iudicium dabo. Si eo ictu homo liber perisse dicetur, sestercium quinquaginta <aureorum> iudicium dabo…' Si vivet nocitumque ei esse dicetur, quantum ob eam rem aequum iudici videbitur eum cum quo agetur condemnari, tanti iudicium dabo.* Thus, in the case of damage or destruction of an object, compensations were set at *duplum* of the damage inflicted. If, however, the expulsion of a liquid or solid object resulted in the death of a free person, the penalty was set at 50 *aurei*. If a person was only injured by the object the amount of compensation depended on the discretion of the judge.

[21] Contrary to D. DAUBE, *Forms of Roman Legislation*, Oxford 1956, 26.

[22] According to the wording of the act, the damage of an object was to take place by direct, physical influence on its substances – *damnum corpore corpori datum* (G. 3,219). An explanation of this kind was a result of quite primitive understanding of the cause-effect relation considering only this reason which caused directly the particular effect.

[23] D. 9,3,5,12 (*Ulpianus libro vicensimo tertio ad edictum*): … *Idem servandum respondit et si amphora ex reticulo suspensa decidisset et damni dedisset, quia et legitima et honoraria actio deficit.* See below p. 10-11.

Ulpian's claim contained in D. 9,3,5,7: *hoc edicto superioris portio est*, which proves only that the edict *ne quis in suggrunda* is a part of the edict introduced earlier[24], which in fact results from the structuring of D. 9,3 and which does not have to mean the chronological priority of the edict *de his qui deiecerint vel effuderint*[25].

The edict states that the liability will be assumed when objects are placed in a dangerous manner[26], which is further commented by Ulpian and supplemented with the explanations also taken from the edict, that it denotes the placement *in suggrunda protectove supra eum locum, quo vulgo iter fiet inve quo consistetur*[27]. *Protectum* denotes a projection from a façade in the form of a protruding mould, which could also serve as a protection from rain[28]. *Suggrunda*, however, is a technical term of some architectural character having some obscure origin[29]. This term denotes a kind of a little roof which is an element of both a cottage[30] and an urban

[24] See *Corpus Iuris Civilis, Text und übersetzung*, II, Heidelberg 1995, 774, where *superior* translates as vorhergehenden - former, preceding. To express temporal precedence a term *anterior* is used (J. SONDEL, (Fn.6), 65).

[25] Presenting liability for *deiectum vel effusum* and for *positum aut suspensum* in one title of the Digests (D. 9,3) enabled some authors to put forward a claim that the edict *ne quis in suggrunda* was a section of the edict *de his qui deiecerint vel effuderint* (the D. 9,3 bears the same name, what *per analogiam* could be the proof of the above hypothesis's validity). Compare O. LENEL, *Das Edictum Perpetuum*[3], Leipzig 1927, 174; A. WATSON, (Fn.19), 380; R. HOCHSTEIN, (Fn.19), 17.

[26] D. 9,3,5,11 (*Ulpianus libro vicensimo tertio ad edictum*): *Praetor ait 'cuius casus nocere posset'. Ex his verbis manifestatur non omne quidquid positum est, sed quiquid sic positum est, ut nocere possit, hoc solum prospicere praetorem, ne possit nocere: nec spectamus ut noceat, sed omnino si nocere possit, edicto locus sit…*

[27] See Fn.6.

[28] A. BERGER, *Encyclopedic Dictionary of Roman Law*, Philadelphia 1953, 659; *Oxford Latin Dictionary*, Oxford 1985, 1503.

[29] A. ERNOUT - A. MEILLET, *Dictionnaire étymologique de la langue latine*, Paris 1939, 436. Regarding the origins of the word itself see A. ERNOUT, *Les éléments étrusques du vocabulaire latin*, *Philologica* I, Paris 1946, 38.

[30] Varro, *de re rust.* 3,3,5: *earum rerum cultura instituta prima ea quae in villa habet; non enim solum augures Romani ad auspicia primum pararunt pullos, sed etiam patres familiae rure. Secunda, quae macerie ad villam venationis causa cluduntur et propter alvaria; apes enim subter sugrundas ad initio villatico usae tecto. Tertiae piscinas dulces fieri coeptae et e fluminibus captos recepere ad se pisces.*

insulae[31]. The jurist emphasizes at the same time, that he means an object placed above the street or a road. The literal interpretation of the text in the edict must have caused some difficulty, which was attempted to be eliminated by accepting a complaint in the form of *actionis de positis*[32] in cases where *positum* did not occur in *suggrunda protectove*. An opinion expressed by Servius and quoted by Ulpian gives evidence that in the time of the Republic *actiones in factum* were created according to the existing model of a praetor's complaint[33]. That *actio utilis* was out of the question here[34] results from the fact that in the formulary trial *actiones utiles* carried *formulae ficticiae*, and not *in factum*[35].

It must be added that the edict *ne quis in suggrunda* describing placing of an object uses the same term as the edict *de his qui effuderint vel deiecerint – quo vulgo iter fiet inve (vel in) quo consistetur*[36] thus allowing to use relevant opinions of jurists commenting the latter of the aforementioned edicts. So, according to Labeo, the edict *de his qui deiecerint vel effuderint* could be applied only during the day[37]. Some reservations as to the accuracy of this opinion were expressed by Paulus who stated that in some places streets were also busy at night[38]. The thesis that some regula-

[31] Vitruv. *de arch.* 2,9,16: *Cuius materies si esset facultas adsportationibus ad urbem, maximae haberentur in aedificiis utilitates, et si non in omne, certe tabulae in subgrundiis circum insulas si essent ex ea conlocate, ab traiectionibus incendiorum aedificia periculo liberarentur, quod ea neque flammam nec carbonem possunt recipere nec facere per se.*

[32] D. 9,3,5,12 (*Ulpianus libro vicensimo tertio ad edictum*): *…Nam et cum pictor in pergula clipeum vel tabulam expositam habuisset eaque excidisset et transeunti damni quid dedisset, Servius respondit ad exemplum huius actionis dari oportere actionem: hanc enim non competere palam esse, quia neque in suggrunda neque in protecto tabula fuerat posita…*

[33] F. HORAK, *Rationes decidendi*, Aalem 1969, I, 86, 91; V. ARANGIO-RUIZ, *Studi Formularii*, *BIDR* XXV (1912), 178, fn. 1; G. WESENER, *Actiones ad exemplum*, *ZSS* LXXV (1958), 229.

[34] So for example O. LENEL, (Fn. 25), 174; W. M. GORDON, *The 'Actio de posito' Reconsidered, Studies in Justinian`s Institutes in memory of J.A.C. Thomas*, London 1983, 46.

[35] E. VALIÑO, *Actiones utiles*, Pamplona 1974, 22.

[36] See D. 9,3,1 pr. cited in Fn. 20.

[37] D. 9,3,6,1 (*Paulus libro nono decimo ad edictum*): *Labeo ait locum habere hoc edictum, si interdiu deiectum sit, non nocte…*

[38] D. 9,3,6,1 (*Paulus libro nono decimo ad edictum*): *… sed quibusdam locis et nocte iter fit.* See also U. E. PAOLI, *Urbs. Aspetti di vita romana antica*, Firenze

tions of the edict should be applied also to the cases happening at night is supported by another opinion of his, in which he did not mention that the liability should be only limited to the daytime, explaining that he meant a dangerously placed object on a site where there is usually some (human) traffic, both within and beyond city borders[39].

As it results from the above-quoted D. 9,3,5,6[40], a conduct counter to regulations contained in the edict effected in the obligation of paying a penalty of 10 solidi. However, according to O. Lenel, the original text of the edict provided in this case for a penalty of 10.000 sesterces[41]. This opinion seems valid, considering the fact that since the middle of the 3rd century B.C. the Romans estimated the value of their properties in sesterces[42]. The problem of exact estimation of the extent of penalty for not observing the edict *ne quis in suggrunda*, especially with reference to penalties provided for in the edict *de his qui deiecerint vel effuderint*, poses a subject of contention in the doctrine of Roman jurists. Some authors[43] assume in this case even an amount of 100.000 sesterces. This assumption appears however incorrect for two causes. Firstly, it is obvious that the edict of preventive character[44] cannot provide for a heavier penalty than the one which penalises for the caused damage. Thus, it would not have been logical to penalise someone for a mere fact of placing an object in a dangerous way with a penalty double as high as the one provided for by the edict *de his qui deiecerint vel effuderint* in case when a free person had perished. Secondly, it is evident after comparison of the text of both edicts in the wording handed down by the Digests that the amount of 10

1942, 63, according to which at night streets started to be busy with the traffic of carts, which was forbidden during the day. Comp. Iuv., *Sat*. 3, 234-238.

[39] D. 9,3,6 pr. (*Paulus libro nono decimo ad edictum*): *Hoc edictum non tantum ad civitates et vicos, sed et ad vias, per quas vulgo iter fit, pertinet.*

[40] See Fn.6.

[41] O. LENEL, (Fn.25), 173.

[42] See O. JUREWICZ, L. WINNICZUK, *Starożytni Grecy i Rzymianie w życiu prywatnym i państwowym*, Warszawa 1968, 478.

[43] Comp. G. A. PALAZZO, (Fn.7), 99. Recently T. GIMÈNEZ - CANDELA, (Fn.18), 123.

[44] What is interesting this character of the edict is assumed also by T. GIMÈNEZ - CANDELA, (Fn.18), 123.

solidi is five times smaller than the amount of 50 aurei[45] (according to O. Lenel[46] 50.000 sesterces). Therefore, in order to retain the above proportion, a penalty for not observing the rules of the edict *ne quis in suggrunda* measured in sesterces has to total 10.000.

The issue of liability becomes complicated nevertheless in cases where injury was caused by a suspended object which fell on an injured party. According to the text of the edict *ne quis in suggrunda*, no *actio de positis* can be made in such cases. On the other hand, however, the edict *de his qui deiecerint vel effuderint* did not provide for cases where the injury was caused by a suspended object which fell on a person[47]. Thus, a certain kind of legal lacuna existed that Roman jurists tried to fill when discussing regulations contained in the above-mentioned edicts. For it is obvious that injuries caused in such a fashion were usually no less serious than injuries caused by the expulsion of a liquid or solid object onto the street.

This problem requires deeper reflection. In theory, the regulations of the first of the above-mentioned edicts could have been extended to cover injuries caused by falling objects which had previously been suspended. This does not seem fair, however, when one considers the penalty for such transgressions set in the edict (10 solidi *i.e*. 10.000 sesterces), especially when one considers the extent of the possible injury, including death. For if a similar injury was caused by the expulsion of an object from a dwelling the edict provided for a penalty of 50 aurei, *i.e*., 50.000 sesterces. Another important factor to bear in mind is that the last of the above-mentioned edicts dealt with three different categories of liability and different levels of compensation, depending on the kind of injury involved[48].

Ulpian, commenting upon the edict, was thus justified in accepting that an *actio de deiectis vel effusis* could be pursued in

[45] This refers to golden coins that circulated after Diocletian's reforms in 294 A.D., which aimed at stabilisation of, among others, golden currency of *aureus* and after putting into circulation a new golden coin of solid by Constantine the Great probably in 311 A.D. (see E. WIPSZYCKA (ed.), *Vademecum historyka starożytnej Grecji i Rzymu*, Warszawa 1979, 281).
[46] O. LENEL, (Fn.25), 174.
[47] See D. 9,3,1 pr. cit. above in Fn.20.
[48] See above Fn.20.

cases of injuries caused by falling objects which had previously been suspended[49]. Certain authors have detected a certain inconsistency in Ulpian's own views on this subject[50], citing as an argument against the thesis expressed in D. 9,3,1,3, his commentary to the edict *ne quis in suggrunda* contained in D. 9,3,5,11, to the effect that, which would imply that this could also be applied in the case in question. In my opinion, however, the final sentence of D. 9,3,5,11 which sounds *coercetur autem, qui positum habuit sive nocuit id quod positum erat sive non nocuit* does not prove in any way that Ulpian accepted the application of *actio de positis* instead *actio de deiectis vel effusis* but seems only to confirm the existence of liability independent of the result. For the praetor was not concerned whether something actually would fall and thus pose a danger, but whether it could fall as a dangerously placed object.

The above problems involved in establishing an appropriate claim thus resulted from the wording of D. 9,3,5,12 where Ulpian described the hypothetical case of a painter whose bust or a painting is placed on a balcony falls and injures a passer-by. According to Servius, whom he cited in this case, a claim should be established based on such a model[51]. The same claim should be also possible, when, *e.g.*: an amphora suspended on a net fell and caused injury, for - as Servius argues - both *actio legitima* and *actio honoraria* are lacking in this case[52]. The above arguments come from Servius, and thus Ulpian does not directly contradict what he said in D. 9,3,1,3 and which also results from D. 9,3,5,11. He only cited a view which was already out of date, which may indicate that the edict *ne*

[49] D. 9,3,1,3 (*Ulpianus libro vicensimo tertio ad edictum*): *Quod cum suspenderetur, decidit, magis deiectum videri, sed et quod suspensum decidit, pro deiecto haberi magis est. Proinde et si quid pendens effusum sit, quamvis nemo hoc effuderit, edictum tamen locum habere dicendum est.* See also R. ZIMMERMANN, *Effusum vel deiectum*, *Festschrift für Hermann Lange*, Stuttgart-Berlin-Köln 1992, 304.

[50] Comp. W. WOŁODKIEWICZ, (Fn.7), 35, 36.

[51] D. 9,3,5,12 (*Ulpianus libro vicensimo tertio ad edictum*): *…Nam et cum pictor in pergula clipeum vel tabulam expositam habuisset eaque excidisset et transeunti damni quid dedisset, Servius respondit ad exemplum huius actionis dari oportere actionem: hanc enim non competere palam esse, quia neque in suggrunda neque in protecto tabula fuerat posita.*

[52] D. 9,3,5,12 (*Ulpianus libro vicensimo tertio ad edictum*): *… Idem servandum respondit et si amphora ex reticulo suspensa decidisset et damni dedisset, quia et legitima et honoraria actio deficit.*

quis in suggrunda was issued earlier than the edict *de his qui deiecerint vel effuderint*. For Servius, not having the choice of *actio de deiectis vel effusis* resorted to *actio de positis.* This hypothesis is based on the assumption that if things had been otherwise Servius would have chosen the first one, from the above-mentioned views, and did not claim that there is a lack of any other beyond the claim which would have better suited for application in the described case.

We must still explain the contradiction between the initial fragment of D. 9,3,5,12 and D. 9,3,1,3. If we accept the text served by the Digest as genuine then this contradiction may be explained by the fact that Ulpian was influenced by the example given by Servius which he cited. A more likely explanation of this contradiction seems however to be the argument forwarded by Th. Mommsen[53] who, referring to Cuiacius, believed that the beginning was interpolated and should read: . . . *in eum competit actio* (*sc. actio de deiectis vel effusis* - my note) *qui habitaverit non in eum qui posuit: itaque utilis danda erit eum qui posuit, quasi haec actio* (*sc. actio de positis* - my note) *non sufficiat, quia positum habuisse non utique videtur qui posuit, nisi vel dominus fuit aedium vel inhabitator*. Thus, in a case where somebody else suspended the object in question and the *habitator*, for whom *actio de positis* did not apply, did not take down that object, he would be liable for any damage or injury (for *actio de deiectis vel effusis*) at the time when the object in question fell. For the prospect of liability for injury caused by a falling object was intended to force the *habitator* to take any such object down, when the person who suspended or placed it did not do it and against whom *actio de positis* is or could have been directed.

Regarding the person, who could be charged on the grounds of *actio de positis*[54], the issue could be explained on the basis of the text of the edict quoted in D. 9,3,5,6., according to which *ne quis* –

[53] In Mommsen's Digest edition *ad* D. 9,3,5,12 (*ed. stereotypa*, Berolino 1922).

[54] In literature, the responsibility is connected with the person of a tenant or the owner of the building (*e.g.* P. STEIN, *The Nature of quasi-delictal Obligations in Roman Law, RIDA* V (1958), 563; A. WATSON, (Fn.19), 380) or only with the person hanging the object, (*e.g.* G. LONGO, *I quasi delicta. Actio de effusis et deiectis. Actio de positis ac suspensis*, *St. Sanfilippo*, IV, Milano 1983, 462; W. WOŁODKIEWICZ, [Fn. 7], 38).

id positum habeat. Also the commentary of Ulpian in this case, indicates the responsibility of a person who placed the object regardless of the fact whether the person was the owner of the building, its tenant or a stranger[55]. The liability of the person placing the object and not the owner or a tenant is also not denied in the D. 9,3,5,12 in Mommsen's version, since the complaint in question (*Si id quod positum erat deciderit nocuerit, in eum competit action qui habitaverit non in eum qui posuit*…) is meant as an *actio de deiectis vel effusis* and not as an *actio de positis*[56]. Anyway, the second part of the quoted passage telling about a painter who hanged his works in the gallery (*pergula*) over a street confirms the liability of the one who is hanging out works, because the painter exhibiting his works did not have to be the inhabitant of the house (neither its owner). The thesis on the liability of the person placing the object in a dangerous manner is, in my opinion, not in contradiction with the contents of the D. 9,3,5,10 which mentions the liability of the house owner or the inhabitant[57]. The liability of the house owner or the person inhabiting the house described in the D. 9,3,5,10 must be recognized as only ancillary one. Those people could avoid the liability by not agreeing to hanging out or even by disturbing the one who made this[58]. Such interpretation of the liability (exclusively the ancillary one) of the house owner or the tenant of the house in case when someone else hanged out the object, could be supported by the view according to which the D. 9,3,5,10 is commenting solely on a *positum habere* in connection with *noxalis actio*[59]. It is evident from considerations included therein that the noxal complaint could arise only when the slave owner did not know about the hanging of the object in a dangerous manner by

[55] D. 9,3,5,8 (*Ulpianus libro vicensimo tertio ad edictum*): *Ait praetor: 'ne quis in suggrunda' protectove. Haec verba 'ne quis' ad omnes pertinent vel inquilinos vel dominos aedium, sive inhabitent sive non, habent tamen aliquid expositum his locis.*

[56] See above p.10 why the word *actio* in the expression *competit actio* is interpreted as *actio de effusis*.

[57] D. 9,3,5,10 (*Ulpianus libro vicensimo tertio ad edictum*): *Positum habere etiam is recte videtur, qui ipse quidem non posuit, verum ab alio positum patitur*…

[58] Comp. W. WOŁODKIEWICZ, (Fn. 7), 36, 37, Fn.68; A. WATSON, (Fn.19), 379.

[59] See W. A. GORDON, *The Roman Class of quasi - delicts, Estudios de derecho Romano, Homenaje al Profesor Don Carlos Sánchez del Rio y Peguero,* Zaragoza 1967, 307.

the slave[60]. If, on the other hand, the slave owner knew about it and agreed to it, then *actio noxalis* could not be applied. In such case an *actio de positis* was led directly against the owner who faced charges himself[61]. The regime of liability provided for in the two cases described above proves the ancillary character of the owner's or the tenant's liability towards the one who hanged the object. Naturally, in case when the owner or the inhabitant had no knowledge of the conduct of a free person, we cannot speak of the noxal liability, which took place only when a thing was hanged out by the slave and the owner did not know about it.

When we consider the character of an *actio de positis* it was the *actio poenalis et popularis.* The penal character of the complaint accounted for a ban on applying it against the perpetrator's heirs[62]. According to Ulpian commenting on the text of the edict the complaint could be granted to heirs of the aggrieved[63]. The passage of the D. 9,3,5,13 treating of this issue arouses doubts amongst the Roman jurists[64]. The bone of contention has for long been the issue of succession *actiones populares*[65]. In my opinion, the view on the succession of those complaints is not to sustain, because it results from their character that any person is able to bring them. Additional complications appear on the level of *actio de positis*. I still support the view that such complaint could be vested only in case when the object dangerously placed or hanged still did not fall down. It is therefore difficult to appoint the aggrieved here (in the

[60] D. 9,3,5,6 (*Ulpianus libro vicensimo tertio ad edictum*): *… si servus insciente domino fecisse dicetur, aut noxae dedi iubebo.*

[61] D. 9,3,5,10 (*Ulpianus libro vicensimo tertio ad edictum*): *… quare si servus posuerit, dominus autem positum patiatur, non noxali iudicio dominus, sed suo nomine tenebitur*. See also W. WOŁODKIEWICZ, (Fn.7), 36, 37, Fn. 68.

[62] D. 9,3,5,13 (*Ulpianus libro vicensimo tertio ad edictum*): *Ista … actio … in heredes autem non competit, quia poenalis est*. See also W. OSUCHOWSKI, *Zarys rzymskiego prawa prywatnego*[2], Warszawa 1966, 203.

[63] D. 9,3,5,13 (*Ulpianus libro vicensimo tertio ad edictum*): *Ista autem actio popularis est et heredi<similibusque> competit…*

[64] See C. FADDA, *L'azione popolare, Studio di diritto romano ed attuale, I parte storica - Diritto Romano*, Torino 1894, 175, Fn. 2, 176; F. CASAVOLA, *Studi sulle azioni popolari romane. Le "actiones populares"*, Napoli 1958, 166, Fn. 40.

[65] Their *iure hereditario* application was excluded by: A. CODACI-PISANELLI, *Le azioni popolari*, Napoli 1887, 30; C. FADDA, (Fn. 64), 154. Whereas for admitting the succession *actiones populares* declare: H. PAALZOW, *Zur Lehre von den römischen Popularklagen*, Berlin 1889, 43ff; F. CASAVOLA, (Fn. 64), 161ff.

appropriate meaning of this word), and the more, to appoint his heir who could benefit from bringing the suit. Despite the fact that liability under *positum aut suspensum* originates independently of damage, we can talk in this case of bigger or lesser extent of interest of people legitimate to bringing the complaint[66]. Thus, the expression *"heredi <similibusque>"* used in the D.9,3,5,13 should probably be translated – forgetting any assumptions about the interpolations of this passage – not as a circle of people who bring the *iure hereditario* complaint but as a group of people most interested in bringing the above-mentioned suit[67].

[66] For instance, a person over whose property or over a place taken by this person usually in the street, an object which could cause damage was hanged out, would take the precedence in bringing the suit of the accidental pedestrians. (W. WOŁODKIEWICZ, (Fn.7), 40, Fn. 88).

[67] Compare T. GIMÈNEZ - CANDELA, (Fn.18), 121, 122. The author supports the view that *actio de positis* was applied also in case when the object which was put fell down.