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Festschrift für Johannes Michael Rainer



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From the rule of *ambitus* to the *paries communis*

LEX (XII Tab. 7.1) and IVS (in D. 39.2.35–37)¹

To honour our dear friend J. Michael Rainer, I thought to address him a short piece on the *paries communis*, a theme he has been writing very important pages about.² The contrast between the rule of *ambitus*, drawn from the Law of the Twelve Tables, and the fact that party-walls were a very common feature in Rome is known to all. Party-walls have existed already under the roman Republic,³ in obvious contradiction to the *ambitus* rule. It is difficult not to realise that this rule might have suited small villages, but not a huge city of over one million citizens, like ancient Rome. In this article, I will confront the rule of the XII Tables with a discussed problem about the refecton of a party-wall.

I. As for the Lex, the Law of the Twelve Tables

The so-called “ambitus-rule” has been reconstructed as follows: “AMBITVS PA-RIETIS SESTERTIVS PES <esto>”. Traditionally,⁴ neighbouring problems are located in table 7 of the Twelve Tables and the ambitus-rule would be 7.1. This sentence can be translated by: “Let the reserved space along a wall be two and a half feet!”

This reconstruction of the rule is not disputed and accepted as such, even though it causes quite some difficulties.

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¹ This contribution is substantially the paper I gave at the SIHDA conference in Osaka, on 25 September 2024.

² See in particular: Rainer, “Der Paries communis im klassischen römischen Recht”, ZRG RA 105 (1988), 488–513.

³ Rules on party-walls were already discussed by republican jurists. See e.g. Alfenus Varus (2 Dig.) D. 39, 2, 43, 1.

⁴ According to Michel Humbert (*Humbert, La loi des XII Tables*, Paris 2018, p.318), this tradition starts with Dirksen.

This “*ambitus parietis*” rule has been transmitted to us mainly by Varro (*De lingua Latina* 5.22.):

22. *Via quidem iter, quod ea vehendo teritur, iter item actus, quod agendo teritur; etiam ambitus <iter>, quod circumeundo teritur: nam ambitus circuitus; ab eoque Duodecim Tabularum interpretes ‘ambitus parietis’ circuitum esse describunt. Igitur tera terra et ab eo poetae appellarunt summa terrae quae sola teri possunt, ‘sola terrae’.*

Translation (by Roland G. Kent, Loeb 1938):

22. A ‘road’ (*via*) is indeed a ‘way’ (*iter*), because it ‘is worn down’ (*teritur*) by ‘carrying in wagons’ (*vehendo*); a ‘driving-passage’ (*actus*) is likewise an *iter*, because it is worn down by ‘driving of cattle’ (*agendo*). Moreover an ‘edge-road’ (*ambitus*) is a ‘way’ (*iter*), because it ‘is worn’ (*teritur*) by the going around: for an edge-road is a circuit; from this the interpreters of the Twelve Tables define the *ambitus* of the wall as its circuit. Therefore *tera*, *terra*; and from this the poets have called the surface of the earth, which *sola* ‘alone’ can be trod, the *sola* ‘soil’ of the earth.

The rule according to which one cannot build within 2 and a half feet of the boundary of one’s land would therefore be the consequence of a need to let a person through and it is this repeated passage that creates the path, as well as the name of the rule. As such, this rule seems to imply that party-walls didn’t exist in the times of the *Decemviri*. Or at least that they were not allowed. But it is unclear whether party-walls have indeed been prohibited. There is no archaeological evidence for this and Michel Humbert hypothesises that it might be that the rule was only applicable when someone did not want to build until the land limit. So, it could have been a facultative rule, applicable only if the neighbours wanted to leave some free space beyond their building. But this raises of course the question of the agreement between neighbours, and if you have an agreement between neighbours, it could include an agreement to build a party-wall. That would eventually mean that either you agree on building a party-wall, either you don’t and then you must respect the *ambitus parietis sestertius* rule.

But it could also very well be, that we misunderstand the meaning of *ambitus*, because Publius Mucius Scaevola (in Cic. *Topica* 24) seems to have another definition of what *ambitus* means:

Cic. *Top.* 4, 24: ...*Quoniam P. Scaevola id solum esse ambitus aedium dixerit, quod parietis communis tegendi causa tectum proiceretur, ex quo tecto in eius aedis qui protexisset aqua deflueret, id ambitus videri.*

▷

From architects like Vitruvius,⁷ we know that Roman architects too needed to know the law. For the population of a city of the size of Rome, party-walls were inevitable because of the lack of space! And to build *insulae* of 6 or 7 floors, these (party-)walls needed to be thick enough, to be capable to carry these floors, but still, Vitruvius writes that these party-walls had to be made of no more than 2 or 3 bricks. This means that it was rather thin: maximum 1,5 feet wide (i.e. a bit less than half a meter).⁸ The solidity of party-walls was thus an important issue, also addressed in the following fragments of the Digest:

Ulp., 42 ad Sabinum (D. 39.2.35): *In parietis communis demolitione ea quaeri oportet, satis aptus fuerit oneribus ferendis an non fuerit aptus.*

Paul., 10 ad Sabinum (D. 39.2.36): *Sed ita idoneum esse plerique dixerunt, ut utrarumque aedium onera, quae modo iure imponantur, communis paries sustinere possit.*

Ulp., 42 ad Sabinum (D. 39.2.37): *Nam si non fuit, utique demolire eum oportuit nec debet, si quid damni ex hac causa attigit,⁹ is qui demolitus est*

7 Vitruvius (2.8.17): *Leges publicae non patiuntur maiores crassitudines quam sesquipedales constitui loco communi; ceteri autem parietes, ne spatia angustiora fiant, eadem crassitudine conlocantur. Latericii vero, nisi diplinthii aut triplinthii fuerint sesquipedali crassitudine non possunt plus quam unam sustinere contignationem. In ea autem maiestate urbis et civium infinita frequentia innumerabiles habitationes opus est explicare. Ergo quum recipere non possent area plana tantam multitudinem ad habitandum in urbe, ad auxilium altitudinis aedificiorum res ipsa coegit devenire. Itaque pilis lapideis, structuris testaceis, parietibus caementiciis altitudines exstructae et contignationibus crebris coaxatae, cenaculorum ad summas utilitates perficiunt dispartitiones. Ergo moenibus et contignationibus variis alto spatio multiplicatis, populus Romanus egregias habet sine impeditione habitationes.* English translation by Joseph Gwilt [<<https://lexundria.com/vitr/2.8.17/gw>> (1 September 2025)]: 17. The public laws forbid a greater thickness than one foot and a half to be given to walls that abut on a public way, and the other walls, to prevent loss of room, are not built thicker. Now brick walls, unless of the thickness of two or three bricks, at all events of at least one foot and a half, are not fit to carry more than one floor, so that from the great population of the city innumerable houses would be required. Since, therefore, the area it occupies would not in such case contain the number to be accommodated, it became absolutely necessary to gain in height that which could not be obtained on the plan. Thus, by means of stone piers or walls of burnt bricks or unsquared stones, which were tied together by the timbers of the several floors, they obtained in the upper story excellent dining rooms. The Roman people by thus multiplying the number of stories in their houses are commodiously lodged.

8 Rainer, (fn. 2), 493–494.

9 The use of “*attingere*” is surprising, as it is very unusual. Our text is the only one, in the Roman legal sources we have, where *damnum* is subject to *attingere*. In this context, “*accidere*” or “*contingere*” are much more common. In his *editio maior*, Mommsen suggests to replace “*attigit*” by “*accidit*”. But actually, Ulpian seems to use the verb “*contingere*” very often in the context of a *damnum infectum*. (In Title 39, 2 of the Digest, “*damnum contingere*” is used by Ulpian in 7 texts. There are also 3 other texts of Ulpian using the expression outside of this Title. “*Contigerit*” would therefore also be plausible.)

teneri, nisi sumptuose aut parum bonus novus paries sit restitutus. quod si fuerit idoneus paries, qui demolitus est, in actionem¹⁰ damni infecti venit id, quanti interfuit actoris eum parietem stare: merito, nam si non debuit demoliri, restituere eum debet proprio sumptu. sed et si qui reditus ob demolitionem amissus est, consequenter restitui eum Sabinus voluit. si forte habitatores migraverunt aut non tam commode habitare possunt, imputari id aedificatori potest.

English translation by Christopher J. Tuplin, in Alan Watson's edition, 1998:

D. 39.3.35 (Ulpian, Sabinus, book 42): In the case of the demolition of a party-wall, the question whether or not the wall was fit to support the weight put on it must be investigated.

D. 39.2.36 (Paul, Sabinus, book 10): Most authorities hold that the proper situation is for the party-wall to be capable of bearing the weight legally put on it by the two houses.

D. 39.2.37 (Ulpian, Sabinus, book 42): For if the wall is not suitable it is necessary to demolish it and if some injury¹¹ occurs as a result, the person who did the demolition should not be held liable unless he spends too much or does a bad job in building a new wall. If, however, the wall that has been demolished was suitable, the matter comes within the scope of an action against anticipated injury¹² for the amount of the plaintiff's interest in the wall remaining standing. This is as it should be since, if the wall ought not to have been demolished, the person who demolished it should restore it at his own expense. In addition, if there has been any loss of income as a result of the demolition, Sabinus wished that to be restored accordingly; and if the residents moved out or were unable to live as comfortably as before, this can be charged to the responsibility of the builder.

In the first fragment, Ulpian addresses the question of the demolition of a party-wall. And about this, he writes that a distinction must be made according to whether or not the wall was capable of supporting constructions. In order to clarify the terms of the distinction, the Compilers chose to insert a text by Paul, which specifies when a wall can be considered *idoneus*, or suitable: it is suit-

¹⁰ This is maybe an interpolation, because in the times of Ulpian, the *actio* has long been replaced by the *cautio damni infecti*. The return of the "*actio damni infecti*" is due to the disappearance of the formulas. But we will return to this question later in this article.

¹¹ The translation of *damnum* by injury is of course surprising to say the least.

¹² Again, it is not acceptable to my eyes, to translate *actio damni infecti* by action against anticipated injury.

able if it is able to bear the construction of the co-owners. The palingenetic context of this text written by Paul is interesting, as Lenel puts it immediately after D. 9.2.45.5 (*qui idoneum parietem sustulit, damni iniuria domino eius tenetur*). He who removes an *idoneus* wall is liable to its owner for wrongful damage.). So, Book 10 of Paul's comment on Sabinus seems to elaborate both on the *lex Aquilia* and the *damnus infectus*, the future damage.

Ulpian's text goes on saying that if the party-wall is not *idoneus*, it must be demolished anyway. Whoever demolished it should not be held responsible for the damage that this demolition could have caused, unless the new wall was badly done, or at too great a cost.

On the other hand, if the party-wall – which has been demolished – was *idoneus*, the applicant may apply for the *id quod interest* on the basis of the *actio damni infecti*. Ulpian justifies this position by the fact that it is normal for anyone who destroys a wall that should not have been destroyed to have to rebuild it at his own expense.

At the end of the fragment, the jurist adds that since Sabinus, the *id quod interest* includes the *lucrum cessans* and gives an example for this: if tenants have had to be moved, or have been hindered in their enjoyment, the defendant must compensate them.

The use of the terminology *actio damni infecti*, has sometimes been considered to be an interpolation, as in classical law, you expect to read *cautio damni infecti*. On this specific point, the interpolation seems obvious to the most recent doctrine, because, as Masi¹³ writes, with the disappearance of the formulas, the Romans no longer spoke of *cautio damni infecti*, but of *actio damni infecti*. Ulpian is therefore dealing with the *cautio*. This seems to be confirmed by another text of Ulpian:

D. 39.2.33 (42 Sab.): *Inquilino non datur damni infecti actio, quia possit ex conducto agere, si dominus eum migrare prohiberet.*

But on the other hand, in several other fragments, the Compilers left the “*cautio damni infecti*” (see e.g. D. 9.2.27.10; D. 39.2.13.2; D. 39.2.20pr.; D. 39.2.39pr.; D. 39.3.3.3; D. 43.23.1.14).

The question is now: is it an interpolation, a mistaken or incomplete interpolation or is it just the evolution of Roman jurisprudence towards the end of the Classical era?

The latter is not totally impossible in my view. As an argument, I propose to read rapidly a text written by Paul:

13 Masi A., *Denuncia di nuova opera (storia)*, ED 12, Milano 1964, 165.

Paul (49 ed.) D. 39.3.11.3: ...*Magisque existimat id servandum in aquae pluviae arcendae actione, quod in actione damni infecti, quia utrobique non de praeterito, sed de futuro damno damno agitur.*

Translation by Tuplin: ...And Julian thinks that this should be observed even more in the *actio aquae pluviae arcendae* than in the *actio damni infecti*, because in both cases it is not a question of a past damage, but of future damage.

This time, I cannot imagine that the text has been interpolated, because Paul really makes a comparison between the *actio aquae pluviae arcendae* and the *actio damni infecti*. And to me, this text makes sense almost only if it is comparing two actions.¹⁴

Let's turn to the general content of Ulpian's text now. In practice, the situation portrayed by Ulpian is as follows. Primus and Secundus are co-owners of a party-wall. Primus would like to support a construction on this wall, but it is not strong enough for this purpose. Now, as it is said in Paul's fragment [lib. 10 *ad Sabinum* (D. 39.2.36)] and by Cicero,¹⁵ this is a right arising from the co-ownership of a party-wall. If Secundus¹⁶ opposes the restoration or reconstruction of the wall, Primus will be able to assert its right in court.¹⁷ In return, Secundus will be able to protect himself against the damage he would incur by destroying the wall, by forcing Primus to promise a *cautio damni infecti*. This *cautio* will be

14 Sitzia, Ricerche in tema di "actio aquae pluviae arcendae" dalle XII tavole all'epoca classica. Giuffrè. Milano 1977, 193, considers that this comparison is strange, but I don't believe that this is sufficient grounds for considering it interpolated. In any case, there is a complete lack of explanation as to why the compilers would have interpolated this passage in such a manner. Imagining a purely gratuitous invention without any comprehensible rationale does not seem sufficient to call into question the comparison that Paul proposes between the two actions.

15 Cicero, *top.*, 4, 22: *Ab efficientibus causis, hoc modo: "Omnibus est ius parietem directum ad parietem communem adiungere vel solidum vel fornicatum. At si quis in pariete communi demoliendo damni infecti promiserit, non debet praestare quod fornix vitii fecerit". Non enim eius vitio qui demolitus est damnum factum est, sed eius operis vitio, quod ita aedificatum est ut suspendi non posset.*

16 As a co-owner of an undivided thing, Secundus has a *ius prohibendi* (See Gai. 7 ed. Prov. D. 8, 2, 8) even though it is not definitive, as it ends in the event of the necessity to repair the party-wall.

17 Another fragment of Ulpian says that it was allowed to use the *actio communi dividundo* or the *interdictum uti possidetis*; v.: Ulp., *lib. 71 ad edictum* (D. 10, 3, 12): *Si aedes communes sint aut paries communis et eum reficere vel demolire vel in eum immittere quid opus sit, communi dividundo iudicio erit agendum, aut interdicto uti possidetis experimur.* Rainer, (fn. 2, 500–503) convincingly argues that this passage is not interpolated and that it reflects the state of the jurisprudence in the Severian period, but that the interdict was probably the normal way to overcome the *ius prohibendi*.

conventional if Secundus has not opposed the works; otherwise, it will be imposed by the praetor.

In the event that the co-owners do not agree, the praetor will grant Primus the right to tear down the party-wall, provided of course that it is not *idoneus*. As Paul writes, this means that the wall is not capable of supporting the buildings which the co-owners intend to build on it. However, this verification seems to have been difficult to carry out practically. It appears that, usually¹⁸, the application – made by means of an *interdictum uti possidetis*¹⁹ – was examined only superficially, and that the authorisation to demolish was granted on the basis of appearance. In return, the defendant's situation was protected by means of a *cautio damni infecti*. Thus, verification of the quality of the wall was postponed until it was demolished. It was probably only by demolishing the wall that its solidity could really be checked.

If it comes out that the demolition of the wall was inevitable because it was not *idoneus*, nobody will be liable for an eventual damage deriving from the destruction. Both co-owners will thus have to pay half of the cost of the works.

On the other hand, other situations, with another outcome, are also possible. It could be that Secundus will suffer a damage he will be allowed to claim a compensation for.

For this purpose, Secundus will rely on the *cautio damni infecti*. By acting *ex cautione*, he might be able to obtain the amount of the interest he had in the wall not being demolished.

This is the case in three situations:

- ▷ when Secundus proves that the demolished wall was actually *idoneus*;
- ▷ when Primus rebuilt a low-quality wall;
- ▷ when this wall has been rebuilt at too great a cost.

If Secundus can prove that they are in one of these three cases, Primus will be liable to it for the *id quod interest*, and will have to bear the cost of reconstructing the wall alone. The amount of this *id quod interest* shall be understood – at least starting from the time of Sabinus – as including *lucrum cessans*. Thus, if Secundus leased the building adjacent to that of Primus and, as a result of the works, the enjoyment of the building by its tenants has been reduced or has become impossible, the loss in rents which would result from it is included in the *id quod interest*.

¹⁸ See in particular Rainer (fn. 2), 503–504.

¹⁹ See fn. 17.

What is of particular interest to me in this text is the justification given in the event that Primus is not liable for the damage suffered by Secundus. In writing that the wall should have been demolished anyway (*utique demolire eum oportuit*), Ulpian insists that the damage is not due to the demolition by Primus, but rather the consequence of the fact that the wall was not *idoneus*. The words ‘*ex haec causa*’ refer to the first words of l.37: “*Nam si non fuit ... (idoneus)*”.²⁰

According to Bonfante,²¹ “*ex haec causa*” here means “*vitium operis*”.

But before Bonfante, Cujas²² and already the Glossators²³ were also already talking about a flawed wall in our context:

Glossa “*In parietis communis demolitione*” ad D. 39.2.35: “*Si vero in culpa non fuisti: puta quia vitiosus erat, & minabatur ruinam, & aedium onera sustinere non poterat: non teneris mihi quia restituisti alium demoliendo veterem...*”.

My translation: But if you were not at fault: suppose that it was defective, and threatened to collapse, and the building could not bear the burdens: you are not liable to me because you restored another by demolishing the old.

But the *glossa* takes a broader picture than Bonfante and sees more than just the case of a flawed wall and considers the insufficiency of the party-wall: “*& aedium onera sustinere non poterat*”.

Vitium operis, referred to above, is obviously not the one which gives rise to liability *ex cautione damni infecti*.²⁴ The defect to which Primus responds is not that of the party-wall, but the *vitium operis quod fit*,²⁵ that is to say, the defect inherent in the act which he has been authorised to perform: the destruction and reconstruction of the party-wall. Primus’ *cautio damni infecti* therefore does not cover the vice of the wall. Bonfante²⁶ also defines the ‘*vitium operis*’ referred to here as an objective fact which excludes subjective fault. It is true that Ulpian

20 It is true that these dots ... refer to *idoneus* only in the Digest, as these words are taken from Paul (l. 36). Ulpian (l. 35) uses another terminology: “*si non fuerit aptus oneribus ferendis*”. But to my understanding, the meaning of both expressions is similar.

21 Bonfante, *Corso di diritto romano*, Roma 1926, T 2/1, 339 (Rist. 1966, 399).

22 Cuiacius, *Operum postumorum*, T. 7, Neapoli 1722, col. 415 (ad D. 8, 2, 13, 1).

23 In Gothofredus, *Digestum novum*, Lugduni 1603, Glossa “*In parietis communis demolitione*” (ad D. 39, 2, 35), col. 89–90.

24 See particularly Giaro [Giaro, *Il limite della responsabilità ex cautione damni infecti*, BIDR 78 (1975), p. 272–273], which contrasts the damage caused by a *vitium (aedium, loci, operis)*, for which the promisor is liable, with that caused by force majeure, which excludes any liability on his part.

25 On this notion, see: Masi (fn. 13), 163 and 165.

26 Bonfante (fn. 21), 339 (Rist. 1966, p. 399).

does not hold anyone responsible for the wall's defect: If it is not *idoneus*, the cost of reconstruction will have to be borne by the two co-owners.

This is a consequence of the fact that the adjoining wall is an undivided property, the conservation of which is in the interests of both.²⁷ It is undeniable, however, that if the *vitium operis* had been attributable to only one of the co-owners, he alone would have had to provide for the reconstruction of the wall. This is also what we can draw from our text, since Ulpian states that if someone builds a '*parum bonus*' party-wall, he must bear his reconstruction '*proprio sumptu*'. Rather, it seems that here we are faced with a case where a *paries communis* which was *idoneus* is no longer *idoneus*. This can be either because it has become too old or because Primus decides to support a new construction, requiring a more robust party-wall.

With regard to '*vitium operis*', it must be borne in mind that a wall which is not *idoneus* is a wall which threatens to ruin, as the gloss referred to above might suggest. Rather, it is a wall that threatens to collapse if the construction that Primus wants to support is built. It may indeed be considered that this is a defect of the party-wall, in so far as its function is to support the constructions which the co-owners intend to build on it.

The gloss referred to above also seems to say that Primus is not liable for the damage incurred by Secundus as a result of the demolition of the party-wall because he did not commit any fault. In my view, such an interpretation of the solution proposed by Sabinus and Ulpian cannot be accepted though. There can be no question of verifying whether Primus committed a fault in destroying the wall, since except in the case of a contractual *cautio damni infecti* it was the praetor who granted him the right to do it.

In the end, Primus is not bound because Secundus did not suffer any damage. The destruction of the wall had become necessary because it was not *idoneus*. This last explanation²⁸ seems to us more correct.

Indeed, Ulpian writes that the defect of the wall (the fact that it is not *idoneus*) has the consequence that the wall must be demolished in any event. This demolition may result in damage to Secundus. The Jurist insists, however, that it was the fact that the party-wall wasn't sufficient to carry a heavier weight that caused (*ex hac causa*) the damage. Consequently, the perpetrator of the demolition (Primus) cannot be held liable.

Vice versa, if Primus had been allowed by the praetor to destroy the wall, but that by tearing it down, it appears that the wall was *idoneus*, then Primus will

27 See also: Palma, *Iura vicinitatis*, Torino 1988, 214–216.

28 See already Burckhard, in Glück, *Ausführliche Erläuterungen der Pandecten*, 39–40, 2, Erlangen 1875, 118.

have to bear the costs alone, even though you still cannot claim that he committed a fault, as he had been authorised to do so by the praetor. So, there's still no problem of fault. But in the application of the *cautio damni infecti*, Primus will pay for the damage alone, because he promised to do it (or because he was forced to promise it by the praetor).

As a conclusion, we can see that the IVS about party-walls was rather sophisticated, notwithstanding the initial question, whether the LEX of the twelve tables allowed the very existence of party-walls.

□