THE MEASURE OF DAMAGES IN THE ACTIO DEPOSITI IN FACTUM

by

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In this paper I intend to identify the measure of damages in the actio depositi in factum in classical Roman law; in particular whether it comprised the objective value of the property (vera aestimatio rei) or whether account was taken of losses suffered over and above the value of the deposit (interesse). We shall see that the action in factum was available to the depositor in two factual situations: (a) where the deposit had not been returned on demand\(^1\), and (b) where it had been returned but in a damaged state\(^2\). According to the majority view amongst modern scholars, throughout classical law only the vera aestimatio rei could be recovered as damages. During this period the actio depositi in factum is also generally thought to have been a penal remedy; the fact that damages comprised the vera aestimatio rei is presented as a confirmation of its penal nature. But this conclusion creates a difficulty as regards the position where the deposit was returned but in an impaired condition. Were damages in this case also the full aestimatio rei or based only on the pursuer’s actual loss (interesse) i.e. the value of the damage? If the latter, which is most likely given that the deposit in this case had at least been returned, we would have to conclude that damages in the action in factum comprised the vera aestimatio rei or interesse depending on the nature of the claim. The fact that interesse was the measure of damages in one category of claim would also suggest the possibility that even if in origin it was only the vera aestimatio rei which was recovered where the deposit had not been returned, as jurisprudence developed some account may have come to have been taken of losses above the simple value of the property. Evidence that this was the case is provided by D. 12,3,3 (Ulp. 30 ed.). However, it is generally argued by modern scholars that, even where the deposit had been returned but in an impaired condition, damages in classical law were the full aestimatio rei. This surprising conclusion that the pursuer could recover more than his actual loss is explained on the grounds of the penal nature of the action. But, if this were so, we must at least admit an inconsistency in the function of damages in the two sorts of deposit claim. Where the property was not returned we are informed by the edict preserved in D. 16,3,1,1 that the action lay in simplum\(^3\); it reflected the pursuer’s loss. Yet, if the claim was in respect of impaired property the pursuer could recover more than his loss with the result that the damages were given a clearer penal function in what appears to be the less blameworthy case; namely that where the deposit had in fact been returned.

1. Gaius, Inst., 4,47; see below p. 268.
2. D. 16,3,1,16 (Ulp. 30 ed.); see below p. 278.
3. See below p. 269.
The formula of the actio depositi in factum is preserved by Gaius.

Gaius, Inst., 4,47:

... Iudex esto. Si paret Aulum Agerium apud Numerium Negidium mensam argenteam deposuisse eamque dolo malo Numerii Negidii Aulo Agerio redditam non esse, quanti ea res erit, tantam pecuniam iudex Numerium Negidium Aulo Agerio condemnati. Si non paret absoluito.

From the formula we can determine that condemnation in the action followed upon satisfaction of two basic conditions: (a) the fact that a deposit had been made (si paret ... mensam argenteam deposuisse) and (b) the failure to return dolo malo the same deposit (eamque dolo malo ... redditam non esse). The intentio makes a direct reference to the property deposited (mensam argenteam) and the judge is directed in the condemnatio, of the type quanti ea res est, to assess the value of the res at the moment of pronouncing sentence (erit).

The structure of the formula taken in conjunction with the fact that when first introduced the action sanctioned only a failure to return the deposit (eamque dolo malo ... redditam non esse) – that is, the claim is that an object has not been returned, therefore the piece of property in question is the immediately identifiable loss to the pursuer – strongly supports the idea that in origin damages in the action in factum comprised only the objective value of the property (vera aestimatio rei).

The problem whether damages comprised the vera aestimatio rei or interesse is one which arises, not just in the context of depositum, but generally in relation to condemnaciones of the type q.e.r.e.. Levy believes that q.e.r.e. always gave the pursuer his interesse, H. Siber that it always gave him only the vera aestimatio rei, Kaser and P. Voci that it might give him 'value' or interesse depending upon the particular nature of the action.

Irrespective of the individual merits of the theories of these scholars, a common feature of their arguments is the belief that the formal structure of an action determines the basis for assessing damages, not only when the action was first introduced but throughout its classical law history. Thus, in the case of the actio depositi in factum, with the exception of Levy, they all believe that only vera aestimatio rei could be recovered up until the time of Justinian. They do not

5. Gandolfi, op. cit., p. 75. See also H.F. Jolowicz and Barry Nicholas, Historical Introduction to the Study of Roman Law (Cambridge 1972), p. 204 n. 7. This means a valuation, not just of the nuda res, but also its fruits, accessories, and, in the case of deposits of slaves, their offspring; M. Kaser, R.P.R. I (Munich 1971), p. 493.
7. Privatstrafe und Schadensersatz (Berlin 1915).
9. Q.e.r.e.
11. His approach is equally 'formal' in so far as he believes that q.e.r.e. always gave interesse.