WHO COULD SUE ON THE LEX AQUILIA?

The concept of law as a seamless web of inter-related rules may seem anachronistic in these days of the specialist lawyer. In the study of Roman law, however, a new theory in one branch of the subject, can still illumine or throw into question our views about other areas of the law: conversely, evidence from areas of the law which might, at first, not seem relevant, may be important in assessing the value of the original theory. It is the purpose of this article to illustrate this process and to demonstrate how useful it can be.

Without doubt, one of the most interesting and controversial theories of recent years is Kaser's 1 concept of ownership in early Roman law. He argues that the concept of absolute dominium was only a product of the sophisticated system of the last years of the Republic and the early classical era. In early Roman law, however, the concept of ownership was not yet institutionalised. While, from an early date, the power certain persons enjoyed over things was protected by an actio in rem, this legal control over property was a mere reflection of the protection granted by vindication and was not conceived of as a specific legal type or contrasted with other types of legal power. Kaser's arguments are based on:

(a) The absence of the term dominium from early law. Dominium did not establish itself as a technical term till the last century B.C. Instead, early law used vague words like meum esse. Kaser suggests, therefore, "that in ownership the question of who had this power was more important than the question of whether the owner's power was comprehensive or restricted."

(b) The suggestion that the uniformity of early Roman power over things went so far that only one right, i.e. ownership, was recognised. Thus, all rights later conceived of as restricted real rights in another's property were absorbed in the idea of ownership. For example, a servitude was itself a qualified and restricted ownership of the same nature as the right of ownership in the rest of the land. And so Kaser speaks of the person who enjoyed the servitude as "the limited owner" of the land who shared the enjoyment of it with "the other owner," i.e. the land owner. Cf. the later view

1 See Kaser "The Concept of Roman Ownership" Tydskrif vir Hedendaagse Romeins-Hollandse Reg (1964). p. 8 et seq.

207
that a servitude was a right sui generis imposing a restriction on the right of ownership to the entire piece of land.

(c) Kaser's view that all the "relative" owners had the legis actio sacramento in rem. He argues that early Roman ownership was a relative right, i.e. a mere reflection of the protection afforded by vindicatio. Kaser asserts that in the ancient process of vindication—the legis actio sacramento in rem—both parties asserted "meum esse ait." Consequently, since both parties assert ownership, the judge could only decide which of them had a better right to the thing; moreover, as he could not decide that neither had a right to the property, he had to allot it to one of them, leaving open the possibility of a third party to claim the thing from the successful litigant in later proceedings.

Kaser's theory has, however, not gone without its critics. Watson, for example, attacks Kaser's view that both parties were placed on level terms in the legis actio sacramento in rem and, instead, argues that it was the plaintiff alone who had to prove his claim to be owner. Diosdi, on the other hand, argues inter alia that only the right of the defendant was examined and consequently the defendant bore the burden of proof. It would seem therefore, that criticism of Kaser's theory based on the reconstruction of the legis actio sacramento in rem is of limited value because the nature of the legis actio sacramento in rem is itself highly controversial. Instead, some light can be thrown on Kaser's theory, by examining its implications in another field altogether—the law of delicts. If Kaser is correct, the early concept of ownership covered a wider range of circumstances than in late Republican and classical law. For example, it would cover the usufructuary, the pledge creditor and "the deserving possessor," i.e. a person who in later years would be able to rely on the actio Publiciana. Consequently, the "dominus" (or "erus") in the lex Aquilia would have had a wider meaning than we have hitherto thought and persons who would later be regarded as "non owners" could sue on the lex Aquilia prior to the classical period.

At first sight such a conclusion might seem unacceptable. The commonly held view is that the concept of absolute dominium was

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3 Property, p. 91 et seq.

4 Watson, "Towards a new hypothesis of the legis actio sacramento in rem," RICA XIV (1967) 455; Roman Private Law around 200 B.C., Edinburgh, 1971, p. 69 et seq. But this hypothesis entails the novel idea that the defendant was first to speak in the action.

applicable to the interpretation of the lex from its inception in 287 B.C., i.e., originally, only the owner in stricto sensu could sue directly on the lex: later, however, the class of plaintiff was extended to include persons who were not strictly owners, by means of the praetorian decretal actions. But a careful examination of the relevant texts shows that they are, at the very least, not inconsistent with the thesis inherent in Kaiser's theory.

The relevant text in relation to the usufructuary is D. 9.2.11.10. (Ulpian). An fructarius vel usuarius legis Aquiliae actionem haberet Julianus tractat: et ego puto melius utile judicium ex hac causa dandum. (Italics added)

It is clear that Julian was not discussing the question whether the usufructuary should be given relief on the lex or not. Instead, Ulpian's remark surely suggests that Julian was discussing the much more technical (and less fundamental) issue of whether the usufructuary had a direct or indirect action. Only thus can we give full force to the "melius." On analogy with D. 47.2.46.1, it would seem that both the dominus and the usufructuary enjoyed an action on the lex but owing to the existence of the usufruct, the interesse of the dominus would be diminished accordingly.

It is, moreover, likely that usufructs were in existence from at least the second century B.C. In Cicero de finibus 1.4.12, Scaevola, Manlius and Brutus dispute concerning the fructus partes ancillae, thus establishing beyond doubt, that a usufruct of movables existed by 150 B.C. If, however, Casina 886 ff does refer to usufructus, then the institution included slaves at the time of Plautus. While admitting the limitations of any argument deduced from consideration of the social desirability for the existence of a legal institution, it does, however, seem that from about 200 B.C. the usufructuary would greatly benefit from an action to recover the loss caused by injury to and destruction of the property over which he enjoyed his usufruct, especially as the proprietatis dominus was under no obligation to provide a replacement. Furthermore, while any truly satisfactory analysis of the juristic notion of usufruct remains doubtful owing to the lack of evidence, it is nevertheless, open to argument that originally ususfructus was considered as pars dominii. All these factors, then, are consistent with the view that the usufructuary may have enjoyed the right to sue on the lex Aquilia from an early date but later could only sue on an actio utilis owing to

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7 See Watson, Property, p. 203 et seq.

Both the stricter interpretation of the lex in classical law and the rationalisation of the concept of ususfructus itself have passed D. 9.2.27.32 (Ulpian) is concerned with a servitude.

Si quis aequae ductum meum diruerit, licet cementa mea sunt quae diruta sunt, tamen quia terra mea non sit qua aquam duco, melius est dicere actionem utilem dandam.

While the aqueduct exists, the ownership accedes to the landowner. The owner of the building materials has merely a right of servitude and consequently only an actio utilis. Although it is generally agreed that in early law a servitude was regarded as a species of ownership, it is doubtful if in this case there was ever a direct action. For originally the lex was limited to injuries to slaves and pecudes and it is not until Laboe that we have the first evidence of its application in respect of inanimate objects, D. 9.2.29.3: damage to immovables not being evidenced till Ulpian D. 9.2.27.7.8. But notice also the indirect way in which the point is made and the use of "melius," again suggesting that a direct action was once given.

Ulpian apparently gave a pledge creditor an actio in factum.

D. 9.2.17 (Ulpian) Si dominus servum suum occiderit, bona fidei possessori vel ei qui pignori acceptit in factum actione tenebitur.

The extent of this right is much disputed and the relevant text D. 9.2.30.1 has been held to be heavily interpolated. Considered in the light of the thesis presented in this paper, however, many of the difficulties can be removed.

D. 9.2.30.1 (Paul) Pignori datus servus si occissus sit, debitori actio competit. sed an et creditori danda sit utilis, quia potest interesse eius quod debitor solvendo non sit aut quod litem tempore amisit, quaeritur. sed hic iniquum est et domino et creditori eum teneori. nisi quis putaverit nullam in ea re debitorem inuriarum passuram, cum prosi et ad debiti quantitatem, et quod sit amplius consecutur sit ab eo, vel ab initio in id quod amplius sit quam in debito debitori dandam actionem: et ideo in his casibus in quibus creditor danda est actio propter inopiam debitoris vel quod litem amisit, creditor quidem usque ad modum debiti habebit Aquiliae

9. This is further borne out by the fact that the ususfructuary's action—the vindicatio usufructaria—while very similar to the vindicatio is not evidenced till the Empire. Perhaps it was unnecessary because the ususfructuary could use a vindicatio in the Republic.

10. Watson has slight doubts: Property, p. 92 et seq.


12. But this question of the application of the lex to immovables remains controversial.
actionem, ut prosit hoc debitori, ipsi autem debitori in id quod debitum excedit competit Aquilae actio. (Italics added.)

It is not clear whether the "eo" in "consecuturus sit ab eo" refers to the wrongdoer or the creditor. But it is better Latin that the "eo" refer to the creditor rather than someone not mentioned in the sentence. If so, the creditor can sue for the full value of the slave and not merely for his interesse. This would, however, contradict the last sentence. The style is regarded as so unlike Paul's that the latter part of the text is held to be interpolated. Lawson therefore regards the classical law as irrecoverable. 13

But in D. 9.2.17 the pledgee, along with the bona fide possessor, has an action against the owner if he kills the pledged slave. Though the reference to pledgee is often regarded as interpolated, it need not be so. If the reference to bona fide possessor originally referred to the bonitary owner (see infra), then the damages would be for the full value of the slave. Would this also be the case in respect of the pledgee? If so, it follows that D. 9.2.30.1 may have given an action for the full value. But the texts are ambiguous and no conclusion can be anything but tentative. For, on the other hand, if reference is merely to bona fide possessor, then the pledgee could only sue for his interesse.

I would approach the problem in another way. We know that pledge had very early origins: there is not inconsiderable evidence in Cato's de agric cultura 146.2, 149.2, and 150.2 that a form of pledge then existed and that the pledge could be recovered in an action similar to the Actio Serviana. 14 The book was written around 160 B.C., though Daube dates it earlier—200 B.C. But the texts are capable of more than one construction: Kaser, following out his theory of relative ownership argues that the action here evidenced is the vindicatio. 15 Moreover, the relationship of fiducia and the early form of pledge may have been very intimate so that the pledgee enjoyed some rights of dominus, including perhaps, the lex Aquilia. Accordingly, the later confusion in D. 9.2.30.1 is not surprising, and the subsequent praetorian action was given for similar reasons as in the case of usufruct. But these suggestions remain conjectural, and few will argue that the early nature of pledge is beyond dispute.

It is quite clear that a bona fide possessor had an actio in factum not only against third parties but also against the owner.

13 See Lawson, op. cit., p. 115 et seq.
14 See Watson, Obligations, p. 179 et seq.
15 Though Watson argues that the fact that the actio Serviana is formulated so totally in a praetorian fashion tells against any suggestion of a civil law forerunner.
D. 9.2.11.8 (Ulpian) Sed si servus bona fide aliiui serviat, an ei competit Aquilae actio? et magis in factum action erit danda. 
(Italics added.)

Again Ulpian's "et magis in factum action erit danda" indicates that the question was not whether the bona fide possessor had an action at all, but simply whether it was direct or indirect. If the bona fide possessor believed that he was owner at the time he sued, surely he could bring a direct action on the lex. There are two occasions, however, when the actio in factum would be useful—if the defendant challenged his title or if there had been mala fides superveniens, when a cautious plaintiff would bring the indirect action. It has been suggested, therefore, that the actio in factum was either brought only when there was mala fides superveniens or that everyone, even true owners, ex majore cautela, used it. But there is no evidence of the latter. 16

Since on eviction, a bona fide possessor had to hand over to the owner any profits he derived on the lex, it seems even more surprising that he could have the action against him. D. 9.2.17. cf. D. 5.8.55. But the bona fide possessor could have a right of retention to recover expenses, e.g. if the property was a slave and he had defended a noxal action on his behalf or he had incurred medical expenses on the slave's account. It is submitted that it was for his loss in these respects that the bona fide possessor could sue the owner.

Some writers attempt to resolve these difficulties by maintaining that the passages originally referred only to the bonitary owner. 17 For the bonitary owner knew he was not dominus and so would not bring a direct action on the lex. On Justinian's abolition of the distinction between res mancipi and res nec mancipi (C. 7.31.15), the distinction between bona fide possessor and bonitary owner disappeared and these passages were interpolated accordingly. One must assume that the compilers failed to realise that there were still some situations where the differences between the bonitary owner and bona fide possessor had been important and that direct substitution of terms would cause difficulties. (Though these would only be theoretical owing to the looseness of the reformed pleading.) D. 9.2.11.8 and D. 9.2.17 would fall into this category. This solution is not without its difficulties. If the texts only referred to the bonitary owner in classical law, it would follow that they did not cover the bona fide possessor. Moreover, the questions raised (supra) would still be relevant for Justinian's law. It is submitted that in classical law, the bona fide possessor as well as the bonitary

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16 Compare the use of possessory actions.
17 See Lawson, op. cit., p. 65 et seq.
owner did have an action and the problems were solved along the lines I have suggested.

Although it is generally regarded as Republican, there is no direct evidence of the existence of the Actio Publiciana till the time of Neratius, in the closing years of the first century A.D. D. 6.2.9.4. The mere fact that most of the edictum perpetuum was created during the later Republic does not entitle us to assume that Actio Publiciana existed then. While expressing no positive belief that it arose in the Empire, Watson is suspicious 18 that such an important action should not be evidenced till the first century, if it was introduced as early as 67 B.C. Why then so late? Watson argues that as so many remedies were available to the deserving possessor prior to the Publiciana, the need for that action has been exaggerated and it may simply not have been felt necessary till the Empire. On the other hand, its late introduction might indicate that the absolute concept of ownership was a later development than Kaser suggests. 19 Further, we do know that "the deserving possessor" was being protected from an early date since the first possessory interdicts are evidenced in Plautus and Terence. 20 But when we bear in mind that these were certainly used by parties prior to a vindication, this in no way casts doubt on Kaser's arguments. If these are sound, the deserving possessor may well have been plaintiff in the Aquilian Action from an early date.

It can be seen then that a study of the relevant texts shows that they are quite consistent with the view that non-owners or limited owners in Kaser's sense could sue on the lex prior to the classical period. Indeed, this theory provides interesting solutions to the problems inherent in the texts.

However, it might be argued that the late Republican and classical jurists are not likely to have restricted the early scope of the action by insisting that only true owners should be plaintiffs in the direct action. But, on the contrary, this pattern of development is consistent with other evidence we have of a more restrictive interpretation of the lex in the late Republic and Empire.

For example, consider the right of an heir to sue on the lex. The general rule is given in D. 9.2.28.8:

Hanc actionem et heredi ceterisque successoribus dari constat:

sed in heredem vel ceteros haece actio non dabitur, cum sit poenalis, nisi forte ex damno locupletior heres factus sit.

18 See Watson, Property, p. 104 et seq.
19 He regards it as having developed in the Republic.
20 See Watson, Property, p. 81 et seq.
It is simply the general rule in delict: the action is actively but not passively transmissible unless the heir has profited from the delict, e.g. if the original defendant killed a slave who had been instituted heir and to whom he was himself substituted and then, before the action, dying and leaving the inheritance as part of his own.\textsuperscript{21}

The situation was complicated by the possibility, always present in Roman law, of the hereditas becoming iacens. Unlike other kinds of heir (though later the practor allowed them the ius abstinendi), the sui heres had no power to refuse the inheritance; nor, of course, had the heres necessari. The heres extraneus, on the other hand, had always the right to refuse the hereditas. Time might well elapse before he decided to enter. During this period the hereditas was held to be iacens and the estate belonged to no one. Could the property be damaged with impunity?

This question seems to have troubled the classical jurists.

D. 9.2.18.2 (Ulpian) Si servus hereditarius occidatur, quaeritur quis Aquilia agat, cum dominus nullus sit huius servi. et ait Celsus legem domino damna salva esse voluisse: dominus ergo hereditas habebitur, quare adita hereditate heres poterit experiri.

Lawson argues\textsuperscript{22} that the reasoning is so lame and contradictory that “dominus ergo hereditas habebitur” is almost universally regarded as an interpolation. He finds Celsus’ reasoning difficult and thinks that a long discussion has been omitted.

Pomponius in D. 9.2.48 treats the matter differently.

Ob id quod ante quam hereditatem adires damnum admissum in res hereditarias est legis Aquiliae actionem habes, quod post mortem eius cui heres sis acciderit: dominum enim lex Aquilia appellat non utique cum qui tunc fuerit cum damnum daretur; nam isto modo ne ab eo quidem cui heres quis erit transire ad eum ea actio poterit.

He then lists other examples of the principle, e.g. suing for what had been done while a person had been in the power of the enemy. Lawson concludes\textsuperscript{23} that the jurists felt they had to extend the original meaning of \textit{damnum} to cover this case and so made use of the fiction: but he finds the reasoning so tortuous that he doubts whether Pomponius is the author.

I take a different view. I suggest that granting the heir an action on the lex for damage done to res hereditariae was not a classical innovation: it is far more likely that from at least the late

\textsuperscript{21} In most other cases the \textit{condictio furtiva} would suffice.

\textsuperscript{22} \textit{Op. cit.}, p. 93.

Republic onwards the action had been automatically granted in such circumstances.

First, the texts, especially D. 9.2.48, seem much more like attempts to rationalise existing rules rather than bring about important innovations. Secondly, if the question had not been resolved prior to the Empire, why did the praetor not simply give the heir a decreetal action? There is no need to resort to tortuous reasoning in order to extend the scope of damnum. Thirdly, although its early history is controversial, there is little doubt that freedom of testation was well established by the later Republic. Fourthly, there is some evidence for supposing that the problem of the hereditas iacens troubled Republican jurists. Consider, for example, Cicero ad.fam. 7.22.

Inuseras heri inter scyphos, quod dixeram controversiam esse, possetne heres, quod furtum antea factum esset, furti recte agere. Itaque etiam domum bene potus seroque redieram, tamen id caput, ubi haec controversia est, notavi et descriptum tibi misi, ut scires id, quod tu neminem sensisse dicebas, Sex. Aelium, M'. Maniliam, M. Brutum sensisse. Ego tamen Scaevolae et Testae aduentur.

Although the text in Cicero ad.fam. 7.22 is ambiguous since furtum ante factum can mean either a theft committed in the lifetime of the accused or a theft committed after his death, but before entry, nevertheless Huvelin has taken the latter view and Watson has shown that this is not unacceptable. He himself thinks that it is likely that res hereditariae could not be stolen in that period. (I have little doubt that the actio furti was refused the heir, not so much because he was not owner at the time of the theft, but because of the continued existence of usucapio pro herede.) But, in spite of its economic importance it seems that the question whether the heir could sue for damage due to res hereditariae was not discussed. I suggest that the problem never arose since it was settled practice to give the heir an action on the lex in such circumstances. The rule was subsequently questioned in the Empire when, it is submitted, the lex became more strictly construed and, consequently, we find the rationalisations in D. 9.2.48.

Moreover, Professor Watson has convincingly demonstrated that the jurists of the later Republic gave an actio legis Aquiliae where the injury was inflicted less directly than was required in

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24 Watson, Obligations, pp. 228–229.
26 Watson, Obligations, p. 241 et seq.
classical law. He compares, for example, D. 9.2.52. 2 (Alfenus 2 dig) with D. 9.2.7.3. (Ulpian 18 ad. ed).

Alfenus is discussing the situation where two carts were going up the Capitoline hill, one behind the other. The first cart rolls back, hits the second, which runs over a slave boy. Although the killing is very indirect, an actio legis Aquiliae lies against the men who were holding the first cart, if they had got out of the way of their own accord. Ulpian, on the other hand, held that where one man does damage as a result of being pushed by another, the one who pushed cannot be sued on an actio legis Aquiliae but only on an actio in factum. In other words, it is only with the development of praetorian decretal actions that the statute begins to be interpreted in a more technical and restrictive way: earlier, the lex was given a wider, non-technical interpretation so that it could cover as wide a range of circumstances as possible.

Accordingly, certain tentative conclusions can be drawn. When, at first, one considers Kaser's theory of relative ownership in the context of the lex Aquilia, it seems not to conform to the accepted pattern of development of the lex, i.e. the view that it was only in the classical period that relief was extended to non-owners. However, closer analysis of the relevant texts demonstrates that they are, on the contrary, perfectly consistent with Kaser's theory and, indeed, many of the textual difficulties are removed when discussed in the light of relative ownership. Moreover, there are strong social and economic reasons why persons not strictly dominus should have been able to obtain relief from the lex at an early date. All the relevant cases of non-owners are evidenced from an early date: with the exception of servitudes, in each case slaves and pecudes would be very important, e.g. in Cato de agrí cultura 150.2, a shepherd is pledged. Furthermore, the damage or destruction of these things had far-reaching results, e.g. the usufruct would come to an end: the security fell: the "deserving possessor" lost the property that would be his by usucapio. Indeed, in many instances, the loss would be greater to these persons than to the actual owner. Consequently, it would not be surprising to find that they had an action on the lex. Finally, accepting that in early law, owing to a broad concept of ownership, the Aquilian action was available to non-owners, the pattern of the evolution of the lex which we have gleaned from other sources is not disturbed, i.e. the granting of the direct action to persons who are not strictly owners is consistent with the broad interpretation of the lex we find in Republican law, while the subsequent restriction to praetorian
actions is paralleled in the more restrictive interpretation of the lex
we find in the Empire.

No doubt the debate surrounding Kaser's theory of relative
ownership will continue: it has, however, been the purpose of this
article simply to demonstrate that if we consider Kaser's theory in
the context of the lex Aquilia, we find that there is, at the very
least, nothing in the texts contradictory to the theory but, rather,
that they tend to support Kaser's thesis.27

J. M. Thomson.*

* I would like to thank Professor B. Beinart and Professor P. Stein for reading
this article in manuscript and commenting thereon. The immense debt I owe
to Professor W. A. J. Watson will be clear from the text.
Lecturer in Law, King's College, University of London.