AQUILIAN STUDIES

SUMMARIA. — Opiniones jurisprudentium ab aetate Q. Mucli ad Celsi Iulianique aetatem cognoscuntur de his quaestionibus: de interpretatione verborum 'rumpere' et 'corrumpere'; quem ad modum verba 'occidere' et 'mortis causam occidere' intellegi debeat; de actionibus in factum et de actionibus ad exemplum legis Aquiliae; de significacione verborum 'inuria' et 'culpa'; de actionibus concurrentibus, præsertim de actione ex locato et de actione legis Aquiliae; de litis aequitacione (hic quaeritur etiam num vera sint principia, quae dicuntur 'market value' et 'interesse').

INTRODUCTION

The following sections are an attempt to study the development of the Aquilian rules which the jurists themselves seem to have regarded as the most important. For the purpose of the study I have selected as the end point of the development the writings of Celsus and Iulian. What I have tried to do is to isolate the main topics discussed by the jurists from the late Republic until the time of Celsus and Iulian, and, within each topic, to look at the way particular rules have been developed. The result, to some extent, may be to impose upon the jurists a system of classification or even a manner of looking at problems which they did not adopt. As far as possible I have resisted the temptation to impute to the jurists patterns of analysis which cannot be justified on the texts.

Assessment of the evidence poses one difficulty of a general nature. It is often not clear whether a decision of a jurist forms part of a systematic development of a theme or not. There is no firm evidence of systematic commentaries on the lex Aquilia until the Digesta of Celsus and Iulian. For the Republic one in general has collections of responsa, for example, those of Brutus, Servius and Alfenu. These may have been arranged in accordance with the subject matter treated and hence may have contained a section on the lex Aquilia. But the exposition does not seem to have been by way of a systematic commentary. Most survives of the collection made by Alfenu. Several responsa given by
Alfenus on problems of injuria are grouped together. It is not impossible that he should have annotated the words of the lex with the relevant decisions which he had given. But one cannot be sure of the range covered by Alfenus' responda; nor can one be sure of the extent to which the arrangement of his material may have been altered by Paul or by other jurists who utilised the Digesta.

The only systematic treatise (not basically a collection of responda) known to have been written in the Republic is Quintus Mucius' de iure civili libros XVIII. But too little of this survives for one to make any inference as to the manner in which Quintus treated the lex Aquilia. A similar lack of information prevents one drawing inferences from the writings of the jurists of the early principate. One does not know how Sabinus treated the lex Aquilia in his libri ad edictum or his iuris civilis libri, or Labeo in his libri ad edictum praetoris. All one can say is that possibly these jurists adopted the method of systematic exposition.

More helpful are the fragments preserved from the Digesta of Celsus and Ulpian. Both jurists included in the part of their discussion devoted to leges and senatus consulta a section on the lex Aquilia. Their commentaries on the lex may have taken the form of an analysis of the operative words of the first and third chapters. Celsus appears to have commented on the words urere and rumpere of the third chapter, and possibly the word occidere of the first chapter. Ulpian wrote extensively on the assessment of damages under chapter one, and on the range of persons entitled to an action under the lex. The latter discussion may have taken the form of a comment on the word ero in the first and third chapters. But otherwise it does not appear that Ulpian commented on the words of the lex.

The topics discussed most frequently by the jurists of the period under consideration are the scope of the operative words of the first and third chapters of the lex, in particular rumpere, occidere and injuria, actiones in factum, the assessment of damages and the concurrence of actions. I have devoted a section to each of these topics. Problems considered by the jurists in connection with the interpretation of occidere are often discussed by modern writers in connection with causation. Hence I have placed the material relating principally to occidere in a section labelled causation.

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2 Cf. Lenel, Palingenesia, 1, 165 f.
Jurists from the time of Brutus to that of Celsus and Justinian were interested in the interpretation of the word rumpere occurring in the third chapter of the lex. Several decisions from Celsus survive and it seems that he wrote a commentary on the word. From other jurists only one or two decisions are recorded. Yet these may have been drawn from comprehensive discussions of rumpere. One does not know the extent to which a commentary written by one jurist was drawn upon by a later jurist whose commentary superseded the earlier. The main commentary drawn upon by Ulpian is that written by Celsus; but Celsus may have utilised previous commentaries which were forgotten once his own was accepted as the standard treatment.

From the Republic are recorded two decisions from Brutus and one from Quintus Mucius. Ulpian cites from Brutus the following cases:

D. 9, 2, 27, 22 (Ulp. 18 ad ed.): Si mulier pugno vel equa ictu a te percassa elecertit, Brutus ait Aquilia tenet quasi rupto. 23. Et si mulier plus justo oneraverit et aliquid membri ruoperit, Aquiliae locum fore.

The case put in 27, 23 may have been treated by Brutus in the context of a discussion of rumpere. But it raises a question not so much of the meaning of rumpere as of the relationship between the act of the person made liable and the injury suffered: Hence it may more appropriately be examined in the section on causation.

The decision of Quintus Mucius is reported by Pomponius:

D. 9, 2, 39 pr. (Pomp. 17 ad Quintum Mucianum): Quintus Mucius scribit: equa cum in alieno pacseretur, in cogendo quod praegnas erat elecit: quaerat dominus eius possetne cum eo qui coegisset lege Aquilia agere, quia equam in iocio ruperat, si percussisset aut consulto vehementius egisset, visum est agere posse.

Quintus appears to have been concerned primarily with the issue of inuria. But the words with which he expresses the injury suffered by the mule provide an interesting contrast with the words used by Brutus, and suggest that some development may have taken place in the interpretation of rumpere.

In the case put by Brutus the question of liability depended upon the interpretation given to rumpere. The person who struck the blow was liable only if the resulting injury could be held to fall within the scope of rumpere. Where a person struck a slavewoman or a mare and caused a miscarriage, the actual object struck remained whole
and—yet—damnum was caused through the premature birth of the child or foal. Brutus may have considered that the child or foal should be deemed an extension of the mother's body. He was prepared to hold that the injury fell within the scope of rumpere; but because the object struck itself remained whole he described the injury as a quasi-rumpere.

Quintus Mucius deals with the same type of injury as Brutus, but his analysis appears to have been different. In the simple case where A strikes B's mare and causes a miscarriage Quintus takes for granted A's liability to B. Not only does he accept that the injury falls within the scope of rumpere but he even dispenses with Brutus' qualification that the injury counts as a quasi-rumpere (quia equam in icioendo ruperat). Thus it seems that Quintus was prepared to conceive the procuring of a miscarriage by the infliction of a blow as a straightforward case of rumpere. One should not, perhaps, press too far the difference in the approach of Brutus and Quintus. Pomponius may not be reporting Quintus' exact words and it is possible that the authentic version of the decision was expressed in terms of a quasi-rumpere.

No other specific decision on rumpere survives from the Republican period. However Ulpian states that almost all the veteres understood ruperit as corruperit. It is difficult to know what inferences may be drawn from this statement. There is no record of any Republican jurist framing a decision in terms of corrupere. Indeed the earliest jurists cited for decisions on corrupere are Celsus and Iulian. If Ulpian's statement is taken literally one may infer that the Republic saw two developments in the interpretation of rumpere. Some jurists (the majority) went so far as to hold that rumpere included corrupere; others restricted the extension of rumpere to situations that might be classed as quasi rumpere.

However I am not sure that Ulpian's statement should be taken literally. The absence of evidence from the Republic or early Principate

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4 For the literature on the text, mainly concerned with questions of directness and abuse of rights, see notes 74, 78, 77.

5 D. 9, 2, 27, 12.
suggests that Ulpian may have termed corrupere what the earlier jurists termed quasi rumpere. Or it is possible that the early jurists held that certain states of affairs constituted rumpere and did not differentiate them in terms of quasi rumpere or corrupere. These states of affairs my have been ones which a later jurist would have included under corrupere.

The only other jurist prior to Celsus from whom Ulpian takes a case turning on the interpretation of rumpere is Vivianus:

D. 9, 2, 27, 24 (Ulp. 18 ad ed.): Si navem venaliciarum mercium perforasset, Aquiliae actionem esse, quasi ruperit, Vivianus scribit.

To scuttle a ship is treated by Vivianus as a quasi rumpere. This is a rather strict approach. Conceivably the boring of holes in a ship in order to sink it could be described as rumpere. Yet because the ship was not actually broken up or taken apart, Vivianus held that the case did not fall under rumpere. The fact that holes were bored precluded the treatment of the case as an example of corrupere.

Having stated that almost all the veteres understood rumpere as corrupere, Ulpian illustrates the point with some examples taken from Celsus:

D. 9, 2, 27, 14 (Ulp. 18 ad ed.): Et ideo Celsus quaeae, si lollum aut avenami in segetem alienam inieceris, quo eam tu inquisares, non solum quod vi aut clam dominum posse agere vel, si locatus fundus sit, colonum, sed et in factum agendum, et si colonus eam exercuit, cavere eum debere amplius non agi, scilicet ne dominus amplius inquietet: nam alia quaedam species damni est ipsum quid corrupere et mutare, ut lex Aquilia locum habeat, alia nulla ipsius mutatione applicare salut, cuius molesta separatio sit.

15. Cum eo plane, qui vinum spurcavit vel effudit vel acetum fecit vel alio modo vitavit, agi posse Aquilia Celsus ait, quia etiam effusum et acetum factum corrupti appellacione continentur.

16. Et non negat fractum et uustum contineri corrupti appellazione, sed non esse novum ut lex specialiter quibusdam enumeratis generale subiectum vel verbum quo specialia complexatur: quae sententia vera est.

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6 LAWSON, Negligence, 23 and WESSEL, Rhetorische Statuslehre, 467 accept a double development in the Republic, one along the lines of corrupere, the other along the lines of rumpere or quasi-rumpere. FRANKEL, ZSR, 67 (1920), 612 and HAUSMANNINGER, Studi Grosso, 5, 265 indicate the prominence of quasi rumpere in the early development and emphasise that Ulpian’s statement in D. 9, 2, 27, 13 is to be treated with caution.

7 Cf. ALBANESE, Annali Palermo, 21 (1950), 69 n. 1, 201; his reconstruction of the text seems to me unacceptable.

8 Cf. HAUSMANNINGER, Studi Grosso, 5, 266.
In 14. Celsus holds that the sowing of loliunum or avena into another's crop grounds an actio in factum. The reason given in the text is that the actio legis Aquilae may be brought only where the circumstances disclose a corrumpere et mutare. Where one thing is added to another in such a way that the latter is physically unchanged the appropriate action for any damnum is an actio in factum. This reason probably, though not certainly, goes back to Celsus. Its significance lies in the correlation of corrumpere and mutare. There is no corrumpere unless the object has been changed in some way.9

In 15, Celsus cites as examples of corrumpere the spoiling or pouring out of wine or the making of wine into vinagre. Wine which is spoilt or is made into vinagre may certainly be said to be changed and hence to fall within the criterion established in 14. Wine which is poured out cannot by the mere fact of the pouring out be said to be changed, but it almost certainly becomes changed through absorption or mixture with some other substance10. What is particularly interesting about the example is the type of object. Wine is not something to which the words of the third chapter, urere, frangere, rumpere could be meaningfully applied. If loss such as that described by Celsus in the text was to be brought within the third chapter at all, it was necessary to invoke the notion of corrumpere. The question which arises is: did Celsus apply the notion of corrumpere already developed in other contexts to what may have been regarded as an extreme case, or was the notion developed in the first place to cater for the spoiling or pouring out of wine or similar substances11?

Paragraph 16 looks as though it is a very much abbreviated version of what Celsus said. There is no account of the arguments of those who challenged his use of corrumpere. Some jurists apparently thought that Celsus went too far in holding that cases of corrumpere could be brought under rumpere. Whether these jurists objected to Celsus' specific rulings that cases of corrumpere were actionable under the lex is uncertain. But they saw a danger in the assertion that rum-

10 Cf. however the following note.
11 ALBANESE, Annuali Palermo, 21 (1950), 66f, holding that classical jurists allowed only an actio in factum in the effusio vini case, rejects 'spuravit vel effudit vel', 'vel alto modo vitavit', and 'efusa et' on the ground that spoiling or pouring out cannot amount to the mutare contemplated in 27, 14. Against FRAENKEL'S suggestion that Celsus wrote 'rupti not corrupti, ZSS, 67 (1950), 612, followed by Von LÜTOW, Untersuchungen, 113 see. HAUSSMANN, Studi Grossi, 5, 267.
pere in general could be understood as corrumpere. As an argument against this assertion they advanced the wording of the third chapter. If the legislators had intended rumpere to be understood as corrumpere there would have been no need for them to have mentioned ure and frangere as well as rumpere. The range of cases covered by the two former words could have been brought within the scope of the third. In order to preserve the sense of the wording of the chapter it was necessary at least to interpret rumpere in a sense falling short of corrumpere. Possibly the jurists who advanced this argument were prepared to accept that some cases of corrumpere might be subsumed under rumpere. Celsus' reply was simply to affirm that there was nothing unusual in a lex using terms referring to specific situations together with a more general term capable of including within its scope the situations covered by the specific terms.

The controversy of which one receives a hint in 26, 16 confirms the importance of the rôle played by Celsus in the development of the notion of corrumpere. It is not impossible that Celsus was the first jurist to make extensive use of corrumpere and it seems likely that he was the first to hold that rumpere might in general be understood as corrumpere.\(^\text{12}\)

Iulian supplies examples of corrumpere rather different from those supplied by Celsus:

\[\text{D. 9, 2, 42 (Iul. 48 dig.) : Qui tabulas testamenti depositas aut aliquus rei instrumentum ita delerit, ut legi non posset, depositi actione et ad exhibendum tenetur, quia corruptam rem restituerit aut exhibuerit. legis quoque Aquiliae actio ex eadem causa competit: corrupisse enim tabulas recte dicitur et qui eas interleverit.}\]

\[\text{D. 10, 2, 16, 5 (Ulp. 19 ad ed.) : Denique ait (Iulianus), si minus ex heredibus rationes hereditarias delaverit vel interleverit, teneri quidem lege Aquilla, quasi corruperit; non minus autem etiam familiae erciscundae indicio.}\]

The situation put in 9, 2, 42 seems to be straightforward. A testator deposits the tablets of his will with a person who smears out and renders illegible the writing on the wax. The testator has the actio legis Aquiliae against the depositee to recover the expenses incurred in the making of a new will. It does not seem that Iulian is considering a possible action by the heir or a legatee to recover the value of

\(^{12}\text{Fraenkel, ZSS, 67 (1950), 612, followed by von Lübrow, Untersuchungen, 114, replaces corruptit with rupti. See, however, Hausmann, Studi Grosso, 5, 267; Wesel, Rhetorische Statuslehre, 47f.}\]
what they were given under the will. The tablets are changed physically by their defacement but the change is not such as to be describable as a rumpere. The destruction or breaking up of the tablets might constitute rumpere but the word seems too strong for the cases where the tablets as such are physically intact and might be used again. This perhaps was the view of Iulian. His language (recte dicitur) implies that there may have been some doubt whether the smearing of the tablets should be actionable as a rumpere. Iulian held the correct decision to be that smearing constituted a corrumpere.

The other case raises more problems. Iulian holds that if one heir destroys or renders indecipherable the accounts relating to the estate he is liable to his coheirs under the lex Aquilia on the ground of a quasi corrumpere. Probably Iulian’s own words have not been fully preserved. The destruction of the accounts could be brought squarely under rumpere; corrumpere is appropriate only to the case of interlinere. However the real problem concerns the force to be attributed to quasi corruperit. Why does Iulian introduce quasi in this context and not in that of the spoilt will? Was his terminology merely loose or unsettled or can a specific reason be found for the difference between the two cases? There is, I think, one point that may be considered. In 9, 2, 42 the testator seeks compensation for the physical damage to the tablets which renders them useless as a will. But in 10, 2, 16, 5 the heirs are concerned not merely with the cost of drawing up fresh accounts to replace the ones rendered useless. They wish to recover debts shown by the accounts to be owed by the heir who had ‘spoilt’ them. Since the loss is not here confined to the physical corrumpere Iulian may have thought it appropriate to preface corruperit with quasi.

12 Most of the attacks on the text are directed to the first part qui... exhibuerit. The whole or parts of corrupisse... interierit have at times been rejected: FRAENKEL, ZSS, 67 (1950), 614; MARONE, Annali Palermo, 26 (1957), 406 n. 374; VON LÜBTOW, Untersuchungen, 115 n. 151. The doubts expressed seem unjustified. Cf. HAUSMANNINGER, St. Grosso, 5, 269 and n. 75.
14 Delere may be used to express the destruction of the accounts through the smearing of the wax.
15 Cf. Hausmanninger, St. Grosso, 5, 269.
16 FRAENKEL, ZSS, 67 (1950), 614, followed by VON LÜBTOW, Untersuchungen, 115 n. 151 corrects corruperit to ruperit, and ALBANESI, Annali Palermo (1950), 42 n. 1 attributes quidem lege Aquilia quasi corruperit: non minus etiam to a post classical hand. But see Hausmanninger, St. Grosso, 5, 269 and n. 76.
Despite Ulpian's statement in 9, 2, 27, 13 (which may be taken from Celsus) the evidence supplied by reports of actual decisions suggests that the earlier jurists extended the scope of rumpere largely by means of quasi rumpere. This notion appears to have been invoked when an object had received some physical damage but not enough to constitute 'breaking' or 'smashing'. The first jurist to make extensive use of corrumpere appears to have been Celsus. He applies it to a case where the nature of the object precluded classification of the damage as either rumpere or quasi rumpere. Iulian applies the notion of corrumpere to a different type of case (the rendering illegible of wax tablets or accounts), where again it was difficult to speak of rumpere or quasi rumpere. Whereas Celsus appears to have applied mutare as a test of corrumpere, there is no evidence that Iulian applied the same test.

CAUSATION

The heading of this section is, perhaps, misleading. It has been selected because of the prominence given in modern discussions of the lex Aquilia to questions of causation. The texts used by modern writers as illustrations of a particular theory of causation are generally decisions as to whether a specific state of affairs constitutes occidere or not. No explicit reference to causal relationships or causal notions is made by the jurists. They appear rather to have been determining the scope of the operative words of the first and third chapters. However the modern discussions can only be understood and assessed if some preliminary remarks on causal relationships are made.

Modern critics frequently analyse two types of case in terms of causation. A standard example of the first type is the killing of A by B where B does not himself strike A but — to take instances discussed in the texts — pushes another person against A or places poison in A's food. The second type is that in which the 'chain of causation' between B's act and A's death is broken by the occurrence of an event not within the control of B. The issues raised are not the same. In the first type

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This treatment of the problem seems to stem from the pronounced modern concern with questions of causation. There is no evidence in the texts that Iulian or Celsus thought of the relation between the wounds and the death in terms of chains of causation.

ACTIONES IN FACTUM

In a variety of situations involving damnum an actio in factum rather than an actio legis Aquiliae is granted. One class of case concerns damnum resulting from physical damage where there has been no physical contact between the property damaged and the person made liable. The relevant texts have been considered in the previous section. The other principal class of case, to be considered in this section, is that in which damnum is incurred although there has been no physical damage to items of property. Also to be discussed are a case of particular obscurity (that of the partes communis to which an oven is attached), and the meaning to be assigned to the phrase ad exemplum legis Aquiliae used in the context of actiones in factum.

Two texts which appear to be dealing with much the same situation are:

D. 19, 5, 23 (Alf. 3 disp. a Paolo ep.): Duo secundum Tiberium cum ambularent, alter eorum et qui secum ambulabat rogatus anulum ostendit, ut resperceret: ills excidit anulus et in Tiberim devolutus est. respondit posse agi cum eo in factum actione.

D. 9, 2, 27, 21 (Ulp. 18 ad ed.): Si quis de manu mihi nummos excusserit, Sabinus existimavit damni injuriae esse actionem, si ita perierint ne ad aliquem pervenerint, puta si in flumen vel in mare vel in cleacam eclicerunt: quod si ad aliquem pervenerunt, ope consilio furtum factum agendum, quod et antiquis placuit, idem etiam in factum dari posse actionem at.

The facts in the case decided by Alfenus appear clear. One person handed to another a ring to be admired and the ring slipped from the latter’s hand into the river. No Aquilian action lay as the loss of the ring could not strictly be brought under the usure, frangere or rumpere of the third chapter. But Alfenus was prepared to allow an actio in factum. It is perhaps conceivable that he refused the Aquilian action on the ground that there was no fault, but was prepared to allow an actio in factum. However it seems more probable that the person from whose hand the ring slipped would have been deemed to be at fault. Hence the reason for the refusal of the Aquilian action is the
difficulty of bringing the damnun within the scope of urere, frangere
or rumpere.\footnote{50}

The situation considered by Sabinus is more difficult to reconstruct.
It appears that the person who knocked the coins out of the plaintiff's
hands was not acting carelessly but intended to cause this loss. If the
coins were obtained by a third person, Sabinus holds that the actio
furti (ope consilio) lies. But if the coins fall into a river, the sea or a
sewer and are lost the actio legis Aquiliae lies.\footnote{51}

This is all that can be gathered from the text as it stands. But it
is possible that the text is not in its original form. Sabinus may have
distinguished more clearly between the case where the coins were
deliberately knocked out of the plaintiff's hands so that another might
obtain them and the case in which they were either carelessly or as a
prank knocked out of his hands. In the latter case no actio furti would
lie and Sabinus would have to consider the possibility of an actio legis
Aquiliae or an actio in factum.

Whichever was the precise set of facts considered by Sabinus, it
does seem that he allowed the actio legis Aquiliae where the coins had
fallen into the river. But the actio is allowed only on condition that
the coins have perished. « Perish » in this context appears to have been
taken as the equivalent of « destroy ». Normally coins are not damaged
or destroyed in a physical sense. What corresponds to the physical
destruction of a more perishable object is the loss of the coins in some
irretrievable manner. Hence Sabinus, emphasising the physically
indestructible nature of coins, may have held that the loss of the coins
in the river or sea or sewer constituted their destruction and fell
within the scope of the rumpere of the third chapter.\footnote{52}

\footnote{50} Sometimes it is emphasised that the \textit{actio in factum} is not related in any
way to the \textit{lex Aquilia} and properly belongs to the sphere of inominate contracts:
De Francesco, \textit{Storia e dottrina dei cosidetti contratti innominati}, 1 (1913), 301;
Rotondi, \textit{Scritti giuridici}, 2, 453; De Sareo, Alfonso Varo, 35; Biondi, \textit{Contratto e
stipulato} (1953), 111 f.; Longo, \textit{Ricerche romanistiche}, holding respondit... actione
interpolated. Cf. also von Lübrow, \textit{Untersuchungen}, 183; Barton, \textit{Dode Noster},
18. On the other hand some writers suggest that the \textit{actio in factum} was
modelled on the \textit{lex Aquilia}: Albanese, Annali Palermo, 21 (1950), 81 f.; holding
that Paul not Alfenus granted the action; Watson, \textit{Jura}, 17 (1956), 174; Thomas,

\footnote{51} Sabinus' citation of the \textit{antiqui} appears to refer only to the point
concerning the \textit{actio furti}.

\footnote{52} Cf. Rotondi, \textit{Scritti giuridici}, 2, 454. Contra Albanese, Annali Palermo, 21
(1950), 50 ff.
The last clause of the text has caused much trouble. It is generally thought impossible that Sabinus should have allowed both the actio legi Aquiliae and an actio in factum. Various reconstructions are attempted. Some writers hold that Ulpian contrasted Sabinus’ view with the view of another jurist, and that the name of this jurist came, through a mistake, to be replaced with idem. Others accept that Sabinus denied an Aquilian action or suspect the reference to the actio in factum.

The assumption upon which these views have been founded is questionable. It is not altogether impossible that Sabinus should have suggested that an actio legi Aquiliae might be brought but that, in any event, an actio in factum would be allowed. This interpretation has the merit of according best with the wording of the text. If the text is taken in its present form the result is that Sabinus allowed either the actio legi Aquiliae or an actio in factum in a case in which the coins were deliberately knocked out of the plaintiff’s hands, probably as a prank, and lost. If one assumes that Sabinus had distinguished further states of affairs, for example, the careless knocking of the coins out of the plaintiff’s hands one has to consider whether he assigned a different remedy to each state of affairs. Did he allow the actio legi Aquiliae in the case of the prank, the actio in factum in the case of the careless act? Unfortunately one cannot do more than raise the question.

Labeo, like Sabinus, considers circumstances in which either the actio furti or the actio in factum is appropriate:

D. 47, 2, 50, 4 (Ulp. 87 ad ed.): Cum eo qui pannum rubrum ostendit fugavitque pecus, ut in fures incideret, si quidem dolo malo fecit, furti actio est: sed et si non furti faciendi causa hoc fecit, non debit impunitus esse lusus tam perniciosus: idcirco Labeo scribit in factum dandum actionem.

53 De Francisci, Contratti innominati, 1, 337; Rotondi, Scritti giuridici, 2, 454 and cf. 451 n. 1; Gerke, SDHI, 23 (1957), 110 f.; Watson, ZSS, 78 (1961), 396.
54 Albanese, Annali Palermo, 21 (1950), 50 ff.; Longo, Ricerche romanistiche, 714 f., also suggesting that the reference to the actio in factum is interpolated; von Lütkow, Untersuchungen, 131.
56 There may be some significance in the verb with which Sabinus is reported as expressing his opinion: existimavit is more hesitant than ait. See Dias, Acta Juridica (1958), 213 ff.; Barton, Daube Noster, 19. Pugsley, Property, 95 f., 113 construes the phrase action damnii iniuriae as a reference to the actio in factum ad exemplum legi Aquiliae.
The distinction between the states of affairs remedied by the actio furti or the actio in factum is drawn more clearly than in D. 9, 2, 27, 21. What determines the remedy is the quality of the fault. If the cattle are deliberately stampeded with the result that they fall into the hands of thieves the actio furti lies. The implication of the phrase dolo malo fecit is that the person stampeding the cattle intended that they should be taken by the thieves. But if the waving of the red flag is merely a reckless practical joke the actio in factum lies.

Labo appears to be considering a situation in which the cattle, stampeded through the lusus tam perniciosus, fall into the hands of thieves. He refused the actio legis Aquiliae because the relevant facts (the waving of the flag and the acquisition of the cattle by the thieves) could not be brought within the scope of the rumpere of the third chapter. Possibly the decisive factor was the fate of the cattle. They were lost to the owner but not killed or physically injured in any way. But if the cattle instead of being taken by thieves had fallen over a precipice and been killed or injured, Labo would probably still have allowed the actio in factum not the actio legis Aquiliae, on the ground of the absence of physical contact between the cattle and the waver of the flag.

With Labo’s decision in D. 47, 2, 50, 4 may be compared his decision in D. 4, 3, 7, 7:

D. 4, 3, 7, 7 (Ulp. 11 ad ed.): Idem Labo quaeit, si compeditum servum meum ut fugeret solveres, an de dolo actio danda sit? et ait Quintus apud cum notans: si non misericordia ductus fecisti, furti teneris: si misericordia, in factum actionem dari debere.

No doubt there has been some abbreviation of the text. Labo may have considered the possibility of actions other than the actio doli, and, in any event, is likely to have decided that the actio doli is the appropriate action to be brought. He may have held that the actio doli was more appropriate than either the actio furti or an actio in factum. The intention to deprive the owner of the slave distinguished the case from the prank considered in D. 47, 2, 50, 4. On the other hand the intention was not such as to constitute an animus furandi.

Labo may not have explicitly distinguished the possible motives for the release of the slave. Quintus who appears to have been a later

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57 See above 18 f.

58 Cf. THOMAS, Iura, 19 (1968), 5 f.
jurist commenting on a decision of Labeo makes a more detailed analysis. If the motive for the release of the slave is misericordia, an actio in factum is appropriate; if the motive is not misericordia, an actio furti should be brought. One may have evidenced in Quintus’ decision a readiness on the part of the jurist to allow an actio in factum in cases where a person is deliberately deprived of his property under circumstances which preclude either the actio legis Aquilae or the actio furti.

Proclus also appears to have allowed an actio in factum in certain cases where one person deliberately deprived another of his property:

D. 41, 1, 35 (Proc. 2 ep.): ... sin autem aprum meum factum in suam naturalem laxitatem dimissas et eo facto meus esse desisset, actionem mihi in factum dari oportere, veluti responsum est, cum quidam polum alterius ex nave eiecisset.

Proclus proceeds by arguing from the settled case of the cup to the uncertain case of the boar. The verb eiecisset suggest that the cup was deliberately thrown overboard; one might infer an intention to deprive the owner of his property. The analogy loses some of its force unless the throwing overboard of the cup, like the release of the boar, is a deliberate act. If one assumes that in both cases the object is lost through a deliberate act, the similarity between the two sets of facts is considerable but not complete. The cup appears to have been thrown overboard by the person made liable. But the boar escapes through the release of the trap, that is, through an act which does not have so strong a physical connection with the loss as the act of the person who throws overboard the cup. Nevertheless Proclus appears to have held

59 Albanese, Annali Palermo, 23 (1953), 96 ff has argued that apud eum notans may refer to a note by Quintus preserved in a work by Labeo. Contra Watson, SDHI, 28 (1962), 340 f. While it is perhaps conceivable that the phrase could have the meaning assigned to it by Albanese, it seems much more likely that it has the obvious meaning of ‘Quintus annotating a work of Labeo’. The present participle notans certainly appears rather odd if it refers to a note recorded in the writings of Labeo.

60 On the text cf. Rotondi, Scritti giuridici, 2, 419; Albanese, Annali Palermo, 21 (1950), 83 ff; 23 (1953), 96 ff; Watson, SDHI, 28 (1962), 340; Thomas, Jura, 19 (1963), 5: von Lüttwitz, Untersuchungen, 190 ff. Albanese, against the usual view, argues that the actio in factum is one ad exemplum legis Aquilae and suggests that it was allowed first by Ulpian, Annali Palermo, 23, 111 f.
the difference to be immaterial and allowed an actio in factum in the
case of the boar as in the case of the cup.\footnote{A lb a n e s e , A n n a l i P a l e r m o , 2 1 ( 1 9 5 0 ) , S 3 f ; 2 3 ( 1 9 5 3 ) , 1 8 4 f holds the actio
in factum to be ad exemplum legis Aquilinae. Other writers emphasise that the
actio in factum is independent of the lex Aquilia: R o r o n o r , S c r i t t i j u r i d i c i , 2 ,
455; L o n g o , R i c e r c h e r o m a n i s t i c h e , 7 2 0 , rejecting the clause relating to the cup
as a gloss; v o n L ü t t o w , U n t e r s u c h u n g e n , 1 8 3 ; K r a m p e , P r o c u l i e s p i s t u l a e ( 1 9 7 0 ) ,
6 5 f ; a n d c f . B a r t o n , D a u b e N o s t e r , 1 8 .}

Two issues are raised by these texts: (i) how far were the jurists
prepared to go in treating the loss of an object as equivalent to its
destruction? (ii) to what extent did the jurists in considering the
availability of the actio in factum distinguish between various types
of fault? On the first issue the evidence suggests that Sabinus was
prepared to hold that the irretrievable loss of an object was to be
treated in law as its physical destruction and, therefore, that the actio
legis Aquilias in appropriate circumstances might be allowed. It does
not appear that this view was shared by any other jurist.

The second issue is more complex. The earliest jurist known to
have granted an actio in factum in a case of irretrievable loss is Alfenus.
He was concerned with loss caused not deliberately but through an
act of carelessness. If the person admiring the ring had deliberately
flung it into the river Alfenus may like Labeo in D. 4, 3, 7, 7 have allowed
an actio doli or he may like Proculus in D. 14, 1, 55 have allowed an
actio in factum.

Sabinus may have been considering the same type of case, that is,
one in which the coins were dropped into the river through carelessness.
But the wording of D. 9, 2, 27, 21 suggests rather a case of loss delibera-
tely caused. If this is taken as an accurate record of the case decided
by Sabinus one must accept that he was prepared to allow an actio in
factum even though the person made liable had acted with the
intention of causing loss to the plaintiff. Even here there is some
element of doubt. Most likely Sabinus was considering a case in which
the defendant had acted with the intention of causing loss to the
plaintiff. But he may conceivably have been considering the sort of case
put by Labeo in D. 47, 2, 50, 4, that is, one in which the defendant had
acted recklessly (not just carelessly) without the specific intention to
cause loss.

The decision of Labeo in D. 4, 3, 7, 7 shows that not all jurists were
willing to allow an actio in factum where the person made liable had
intended to deprive the plaintiff of his property. Labeo preferred to
allow an actio doli, perhaps with some hesitation. However Labeo's
opinion was not followed even by members of his own school. Procclus
allowed an actio in factum in a case similar in all relevant particulars
to that decided by Labeo, and the unknown Quintus, commenting on
Labeo's decision, held that he should have allowed an actio in factum,
at least where the motive was misericordia.

Actiones in factum were granted both in cases where the act
causing loss was careless and in cases where it was intentional. Where
the act was intentional the availability of the actio in factum depended
upon the type of intention. In cases where the intention might be
construed as an animus furandi the appropriate remedy was the actio
furti. Where the intention was merely to play a joke and did not
involve also an intention to deprive the plaintiff of his property the
appropriate remedy was the actio in factum. But where an intention
to deprive the plaintiff of his property was present the jurists expe-
rienced some difficulty in determining the remedy. Labeo appears to
have allowed the actio doli, Sabinus and Procclus the actio in factum.
The position of Quintus is interesting. Certainly where the intention
stemmed from misericordia he preferred the actio in factum. But if
the defendant had acted out of spite Quintus may have imputed to him
an animus furandi and allowed the actio furti or he may have agreed
with Labeo and allowed the actio doli.

The case of the paries communis to which is attached an oven is
reported by Ulpian in two parallel texts, one from the Collatio and
one from the Digest.

Coll. 12, 7, 8 (Ulp. 18 ad ed.): Item libro VI ex Viviano relatum est: si
furnum secundum parietem communem haberet, an damni inuiri tenebris?
Et ait (Procclus) agi non posse Aquilia lege, quia nec cum eo qui focum
haberet: et ideo sequius putat in factum actionem dandam. Sed non pro-
ponent exustum parietem. Sane enim quaeri potest, si nondum mihi damnum
deresis et etsa ignem habeas ut metuam ne mihi des, an aequum sit me
interim actionem, id est in factum, impetrare? Fortassum enim de hoc
senserit Procclus. Nisi quis dixerit damni non facti sufficer e cautioenem.

D. 9, 2, 27, 10 (Ulp. 18 ad ed.): Si furnum secundum parietem communem
haberet, an damni inuiri tenearis? et ait Procclus agi non posse, quia nec
cum eo qui focum haberet: et ideo sequius puto in factum actionem dandam,
scilicet si paries exustus sit: sin autem nondum mihi damnum deresis, sed
etsa ignem habeas ut metuam ne mihi damnum des, damni inuerti puto
sufficer e cautioenem.

The correct approach to these difficult passages was, I think, indi-
cated by Kretschmar; the clue to their interpretation lies in the rules
concerning the use of the paries communis and in relating these texts.
to other texts of Proculus which record decisions on the paries communis. In D. 8, 2, 13 pr Proculus considers a case in which a bathroom is built against a common wall and serviced by pipes conducting hot water (or steam?) placed against the wall. He holds that the placing of the pipes against the wall is unlawful (non licet autem tubulos-habere ad parietem communem) and to reinforce his decision remarks that the wall may be scorched or dried out through the heat of the pipes (de tubulis eo amplius hoc iuris est, quod per eos damma torretur paries). It is clear that the placing of the pipes is unlawful in itself whether or not the wall is actually scorched or dried out. In fact Proculus also held that ordinary water pipes might not lawfully be attached to a party wall.

Although Proculus was not prepared to allow the attachment of pipes carrying hot or cold water to the paries communis, he was prepared to allow the building of a bathroom against the common wall. The placing of the bathroom against the wall was lawful, he thought, even if the wall became damp. The question which arises is whether Proculus would have held the case of the fireplace or oven to be analogous to that of the pipes or of the bathroom?

It seems that a fireplace and an oven, considered simply as objects, are more appropriately classed with pipes than with bathrooms. Moreover the reason which Proculus gives to reinforce his decision in the case of the heating pipes applies with even greater force to the case of an oven or fireplace. There seems to be a clear danger that the operations conducted in the fireplace or oven might result in the scorching of the wall. On this reasoning one has to conclude that Proculus held the construction of a fireplace or oven against the paries communis to be unlawful.

The question of remedies is complicated. Where one co-owner wished to alter the common property in a manner not approved by the others, the latter had the right to prevent him from carrying out the alteration

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62 Kretschmar, ZSS, 59 (1939), 150 ff. His discussion, usually ignored, was examined and criticised by Wolff, 'Ulpian XVIII ad edictum in Collatio and Digest and the Problem of Postclassical Editions of Classical Works', in Scrilli Ferrini, 4 (1942), 34.

63 Fistulam tunc iam parieti commun...non ture haber Proculus sit. Paul D. 8, 2, 19 pr; for other texts on the use of the paries communis see D. 8, 2, 13, 1, D. 8, 2, 13, 2.

64 D. 8, 2, 19 pr and cf. the opinion of Neratius cited by Paul in the same fragment.

65 Contra Watson, Tijd. 30 (1962), 211 ff.
(ius prohibits). This remedy cannot have been appropriate in the case of the paries communis considered by Proculus. Here the addition or alteration had occurred before the objecting co-owner had a chance to do anything about it. He could require the person who constructed the oven or fireplace to give the cautio damnii infecti. This would cover the case where damage was subsequently caused to the wall. But the co-owner might wish for immediate compensation on the ground of the unlawful construction of the oven or fireplace. Could he bring an action requesting a declaration that no right for the construction of the oven or fireplace existed and seeking appropriate compensation? The relevant texts suggest that the jurists raised the question of the possibility of such an action but that the rule eventually settled restricted the co-owner to the actio communi dividundo.

Where the wall had been weakened or damaged in some way through the construction and use of the oven or fireplace, compensation might be recoverable under the actio communi dividundo. But Proculus appears to have raised the question whether an actio legis Aquiliae or an actio in factum would lie. The probability is that these actions were conceived as alternatives to the actio communi dividundo.

The decision attributed by Ulpian in the Collatio to Proculus does not state whether the paries communis had suffered any damage through the fireplace or oven. However it does not seem likely that the availability of an actio legis Aquiliae or an actio in factum would have been canvassed unless some damage had occurred. Probably in the case examined by Proculus the wall had been scorched or weakened through the heat. He held that an actio legis Aquiliae was not competent but that an actio in factum might be brought. Why should he have denied the competence of the Aquilian action? The possible reasons appear to be that one co-owner might not bring an action under the lex against another co-owner for damage to the object owned in common, or that the damage could not be brought under the urere, frangere or rumpere of the third chapter, or that the damage was not 'caused' by the defendant's physical act.

The plausibility of the first reason depends upon the view taken of the legal relationship between co-owners. Some writers have thought that in principle the only legal action competent between co-owners is the actio communi dividundo. On this view it is not competent for

one co-owner to bring against the others the actio legis Aquiliae. However there is much disagreement on the question of the rights and duties of co-owners inter se, and it seems unsafe to assume that the reason for Proculus’ decision lies in the legal relationship between co-owners.

Either of the other two reasons seems possible. Proculus may not have been prepared to hold that the damage resulting to the wall from the fireplace or oven fell under the operative terms of the third chapter. In particular such scorching as the wall received Proculus may not have been prepared to bring within the scope of urere. Further the damage may have been conceived as ‘caused’ by the fireplace or oven, not by the co-owner’s act in placing it against the wall.

It thus becomes clear that Proculus is dealing not with a case where the wall was burnt down but with a case where it was left intact, even though it had deteriorated in some particular. He refuses the actio legis Aquiliae but allows an actio in factum. Ulpian, recording this decision, adds the words ‘sed non proponit exustum parietem’. Are these to be taken as an indication of Ulpian’s inability to comprehend Proculus’ reasoning or can a more straightforward explanation be found? Possibly Ulpian regarded Proculus’ decision as perfectly sound on the assumption that the wall had been burnt down but was puzzled by the fact that Proculus did not seem to be dealing with such a case. Hence Ulpian constructs an argument which might explain the awarding of the actio in factum in a case where the wall had not been burnt down.

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68 The following views may be distinguished in the literature: (a) that Proculni allowed the actio in factum on the ground of the indirectness of the act causing the damage: PEINICE, Sachbeschädigungen, 153; SCHULZ, Einführung in das Studium der Digesten (1918), 22 f; WIEACKER, Teststufen klassischer Juristen (1960), 242 ff; von LÜHOR, Untersuchungen, 162 ff; (b) that the actio legis Aquiliae was not available between assis and hence recourse to an actio in factum was necessary: RICCIONI, ‘Dalla comunne del diritto quiritaro alla comproprietà moderna’, in VINOGRADOFF, Essays in Legal History (1913), 50 n. 2; WIEACKER, ZSS, 67 (1950), 370 ff; ALBANESE, Annali Palermo, 21 (1950), 29 ff; (c) that the actio in factum was granted because the damage to the wall was not of sufficient gravity to fall within the scope of chapter three: KRETSCHMAR, ZSS, 59 (1939), 150 f; LAWSON, Negligence, 104 n.; (d) that the actio legis Aquiliae was excluded because the defendant had a ‘us’ to attach the oven to the wall: THATER, Lex Aquilia, 88; WOLFF, Scritti Ferrini, 4, 73 f; LAWSON, id.; WATSON, Tijd., 30 (1962), 208 ff.
This is one explanation of Ulpian's treatment of Proculus' decision. But there is, I think, a preferable explanation. Ulpian's statement that Proculus does not propose the case in which the wall has been burnt down may be taken as an acceptance of the point that the actio in factum is appropriate where the wall is merely scorched. But it implies that the situation is not the same where the wall has been burnt down. The implication of Ulpian's statement is that in this situation not the actio in factum but the actio legis Aquiliae is the appropriate remedy.

With the words sane enim quaeri potest Ulpian seems to be introducing a further point. He is no longer referring to the case in which the wall has been scorched or has deteriorated in some way but to the case in which it has suffered no damage from the placing of the oven. Ulpian raises the question whether the actio in factum would lie in this case and suggests that Proculus may have intended to give the actio so wide a scope.

A different version of the decisions of Proculus and Ulpian appears in the Digest. One has to attribute this to a summary made by the compilers which glossed over the distinctions more clearly evident in the Collatio version.

A puzzling feature of the terminology in which actiones in factum are described is the occasional use of the phrase ad exemplum legis Aquiliae of a phrase with a similar force. Do such phrases state anything significant about the actio in factum which they qualify, and, conversely, do actiones in factum not described as ad exemplum legis Aquiliae lack characteristics possessed by actiones which are so described?

Use of the word exemplum or its equivalent makes it plain that the lex Aquilia provides the model for the granting of an actio in factum. The difficulty is to determine the way in which the model functioned. In speaking of the lex Aquilia as a model the jurists may have meant no more than that an actio in factum might be allowed in a particular case of damnum, just as in other cases (the majority) a remedy was supplied by the lex. On the other hand they may have gone further and modelled the actio in factum upon the actio legis Aquiliae in the sense that they applied to the former action the special characteristics of the latter (the methods for the calculation of damages prescribed by chapters one and three, and the rule that damages were doubled if the defendant was convicted after denial of liability). 69

I am inclined to think that use of the word exemplum and equiva-

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69 Cf. the remarks of Barton, Daube Noster, 20 f.
lents implies a closer correlation between the model and the particular instance than the characteristic which they have in common of providing a remedy for damnum. Where an actio in factum is described as ad exemplum legis Aquiliae what seems to me to be implied is that the formula of the actio was constructed upon the same lines as the formula of the actio legis Aquiliae. The implication, therefore, is that it provided for the assessment of the damages in accordance with the manner prescribed in chapters one and three of the lex and for the doubling of the damages if the defendant denied liability and was condemned.

The phrase ad exemplum legis Aquiliae (or a similar expression) does not occur with any frequency. The earliest example of its occurrence is in the text from Neratius quoted in the preceding section (D. 9, 2, 53). Gains dealing with a similar case to that of Neratius (cattle driven over a cliff) allows a utilis actio damni iniuriae quasi ex lege Aquiliae (D. 47, 2, 51). Pomponius states:

D. 19, 5, 11 (59 ad Quint. Mar.): ... sed et eas actiones, quae legibus proditae sunt, si lex lucta ac necessaria sit, supplet praetor in eo quod legi deest: quod factum in lege Aquilia reddendo actiones in factum accomodatas legi Aquiliae, idque utilitas eius legis exiget.

The remaining examples are all late classical. The Collatio preserves a section from Book 18 of Ulpian’s commentary of the edict which contains two references to an action in factum ad exemplum legis Aquiliae. After recording a decision from Celsus in which an actio in factum, not an actio legis Aquiliae is allowed in a case of damage through escape of fire, Ulpian quotes a rescript of Severus on a similar case in which a noxale indicium ad exemplum legis Aquiliae is allowed (12, 7, 6). Ulpian himself is prepared to allow an actio ad exemplum Aquiliae against a person who fell asleep while watching a furnace or who looked after it carelessly; a like action is allowed against a doctor who has been careless in his treatment (12, 7, 7). Paul allows to the usufructuary an actio ad exemplum legis Aquiliae (D. 9, 2, 12) and Ulpian an utilis actio exemplo Aquiliae (D. 7, 1, 17, 3).

On the whole it seems to be taken for granted by writers on the topic that no particular significance is to be attached to the distribution of the term ad exemplum legis Aquiliae or related terms. The assumption is made that in many instances the actio in factum allowed

70 See especially WESNER, ZSB, 75 (1953), 222 ff.; BARTON, Daube Noster, 25 n. 21.
by a jurist without the addition of the qualification ad exemplum legis Aquiliae is to be understood as an action modelled upon, and extending the provisions of, the lex. One has perhaps to allow for the fact that the compilers may on occasion have deleted the phrase ad exemplum legis Aquiliae. Yet one is not justified in assuming that the phrase has been deleted in all or even most of the instances in which a text records merely an actio in factum. Thus one has the position in which a jurist sometimes allows an actio in factum, sometimes an actio in factum ad exemplum legis Aquiliae. The distribution of the terminology suggests that the later jurists were more prepared than the earlier to allow actiones in factum ad exemplum legis Aquiliae.71

A premise, I think, that has to be accepted is that the addition of the phrase ad exemplum legis Aquiliae to the phrase actio in factum is not purely fortuitous. Where a jurist allows an actio in factum and does not qualify it as ad exemplum legis Aquiliae the presumption is that the action does not have the peculiar characteristics of an actio legis Aquiliae. The Aquilian rules for the assessment of damages are not applied; nor are the damages doubled if the defendant denies liability and is condemned. Little that is certain can be said of the circumstances in which a jurist was prepared to grant an actio in factum ad exemplum legis Aquiliae as distinct from a mere actio in factum.

From the texts in which the phrase ad exemplum legis Aquiliae or a similar phrase occur one may conclude that an actio in factum ad exemplum legis Aquiliae was allowed in cases where there was no physical contact between the property damaged and the person made liable and in cases where a person other than the dominus was allowed an action. But even within these spheres it is probable that there was development throughout the classical period.

Neratius allowed an actio in factum ad exemplum legis Aquiliae against a person who brought it about that cattle were driven over a cliff (D. 9, 2, 53). He appears to have been considering a case in which an intention to drive the cattle over the cliff was present. In such a case there would be no difficulty in presuming an intention to deprive the owner of his property. It is possible that Gaius in D. 47, 2, 51 was dealing with a similar case though the clause in which the facts are stated (nam et si praecipitata sint pecora) is too brief for one to be

71 Pomponius' general statement (D. 19, 5, 11) suggests that there were more actiones in factum ad exemplum legis Aquiliae granted in the earlier law than might be inferred from the two references by Neratius and Gaius.
certain. On the other hand the decisions recorded by Ulpian in the Collatio (12, 7, 6/7) allow the actio ad exemplum for careless acts. If, therefore, jurists in the early classical period allowed the actio ad exemplum only where an intention to deprive the owner of his property could be presumed, jurists of the late classical period no longer imposed this restriction.

Furthermore even in circumstances where an intention to deprive the owner of his property was presumable, not all the jurists of the early classical period would have allowed an actio ad exemplum. Labeo preferred an actio doli (D. 4, 3, 7, 7), Proculus an actio in factum (D. 41, I, 55) 72. In general it seems probable that the jurists of the later classical period were prepared to grant actiones in factum ad exemplum legis Aquiliae more readily than jurists of the earlier period 73.

INJURIA

Several decisions of the Republican jurists are concerned, at least in part, with questions of injuria. Quintus Mucius in considering the case of the man who drove another's mule from his land causing it to have a miscarriage held that there was liability under the lex si percussisset aut consulto vehementius egisset (D. 9, 2, 39 pr, set out in the first section). These words have been the subject of much discussion both from the point of view of the manner in which the miscarriage is effected and from the point of view of injuria.

One line of argument has been to urge the rejection of the whole phrase or of aut consulto vehementius egisset on the ground that an injury inflicted without physical contact afforded merely an actio utilis not an actio legis Aquiliae. A comparison is made with Gaius Inst. 3, 119 where an example of damnum non corpore datum affording an actio utilis is given as: si quis...iumentum tam vehementer egerit ut rumpe-retur 74. This argument does not seem tenable. Consulto vehementius agere does not necessarily express a lack of physical contact between the driver and the mule. Whereas percute expresses a particular blow directed at the mule, probably in anger 75, vehementius agere expresses

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72 Cf. above, 33 f.
73 A different account of the development of the law is given by Barton, Daube Noster, 15.
74 FLEINIAU, Mélanges Cornil, 1, 261 f.; SCHULZ, History of Roman Legal Science (1946), 51 n. 1; ALBANESE, Annali Palermo, 21 (1950), 194 and n. 1 and cf. von Lützow, Untersuchungen, 168.
75 It does not seem as though the blow was intended to produce the miscarriage. Some writers talk of acts done by intention, design, malice or dolus but it is not clear what exactly they intend to express with these terms.