ON THE THIRD CHAPTER OF THE LEX AULILIA.

The following pages are intended to show that, originally, the third chapter of the lex Aulilia was designed like the first for res se moventes; that whilst the first chapter concerned killing the third concerned wounding of a slave or an animal; that the thirty days of chapter 3 had nothing to do with the highest value of chapter 1, but referred to a problem peculiar to the case of wounding: the wrongdoer was responsible for all damage which appeared within thirty days of the commission of the act, but on the other hand for such damage only; that chapter 3 was extended to inanimate objects in the second half of the first century B.C.; that consequently it covered also complete destruction of inanimate objects which could not possibly fall under the occadere of the first chapter; that these changes led to a change in the conception of the thirty days which came to have the same significance as the year in chapter 1; and finally that the position of chapter 3 may result from the fact that the preceding chapters, though in an older form, were established at an earlier date. None of these propositions pretends to be definitive; perhaps some will seem acceptable.

According to Ulpian the lex Aulilia modified all the former laws which dealt with damnnum iniuria. Possibly this opinion is based on authentic tradition. We know, it is true, that for some time or even permanently certain rules of the Twelve Tables, although concerning damage, remained in force side by side with the Aquilian. Obviously these were not superseded, at least not at once. But not every kind of damage was always classed as a damnnum iniuria.

Thus the actio de arboribus succisis survived. The wrong was punished here not only because of the damage to property, but also because it was regarded as an impious act. The provision about frugem furtim nocte pavisse et secuisse shows clearly

that sacral elements played a great part in these cases.  Moreover, the delict of succidere arbores like that of pastus pecoris and that of arson is directed against immovable property. The notion of damnnum, however, was probably worked out where movable property was concerned.

It is easily understandable that damage done by animals did not come under damnnum inuria datum. In fact, the owner of the damaging animal was subject to liability already at the time of the Twelve Tables. But even much later it was still the animal itself which was considered as the actual wrongdoer.

Nor was arson yet included. It is not likely, however, that Gaius' account of the Twelve Tables is accurate here. The tentative description which they give of homicide by misadventure makes it highly improbable that, in the matter of arson, they distinguished so clearly between premeditated and accidental commission of a given act. We may therefore assume that Gaius states the law of the Twelve Tables as developed by interpretation. Yet the ancient rules are distinctly traceable. The Twelve Tables may well have taken the case of comburere aedes acerumve frumenti iuxta domum positum as typical of wilful arson. But, as in other primitive systems, anyone who had made a fire in the open field which spread to neighbouring land was regarded as innocent. So it becomes intelligible why arson did not count as damnnum inuria. If premeditated it was an offence against the community and the gods rather than against property. If unforeseen the element itself was held to be the real cause, just as was the animal in the case of pauperies and pastus pecoris.

Thus, of the provisions that we know there remain only those concerning personal injury which we might expect to be merged in the Aquilian. But again it was only in later times that wounding of a free man was looked upon as a damnnum. Not so, however, with slaves and cattle. Here the economical loss is the preponderant factor ever since an early period. On the contrary, the idea that occasionally even wounding of a slave might involve an insult to his owner is the product of systema-

---

1 On Germanic law, see K. v. Amira, Die germanischen Todesstrafen, Abhandlungen der Bayerischen Akademie 31, 1, pp. 76, 124, 153, 209 et seq. 213. Comp. also Deuteronomy xx, 19 et seq. It should be noted that, although there are some doubts (e.g. O. Lenz, Das Edictum Perpetuum, 3rd ed. p. 397), the Twelve Tables probably dealt with the delict of arbores succisae as performed furtim. It does not matter that they do not mention it expressly. The wrong was hardly ever committed openly.

2 D. 47, 9, 9 (Gaius libro quarto ad legem duodecim tabularum).

3 Qui . . . combusserit: si modo sciens prudensque id commiserit—si vero casu.

4 V. e.g. on Germanic law K. v. Amira, Nordgermanisches Obligationenrecht, 1, pp. 888 et seq. and 2, pp. 406 and 566.
tical legal thinking. At the time of the Aquilian this exceptional case was not yet taken into account. 7

Damage to slaves is dealt with by the Twelve Tables. It must occur in the lex Aquilia if Ulpian D. 9, 2, lpr. is correct. Indeed the third chapter of the lex speaks of urere frangere and rumpere. Os fractum and membrum ruptum are the wounds mentioned in the Twelve Tables. Whether or not there was also the question of wounding by burning we do not know. Comparative law shows that this kind of injury happened not less frequently than the others. 6 At any rate it is not probable that the lex Aquilia, while reforming the law of the Twelve Tables, would use the very terms of this code in a different sense. Moreover, it is to be noted that only with regard to living beings can the distinction between frangere and rumpere ever have been of any importance. It follows that urere frangere and rumpere mean three kinds of wounding. Whilst the first chapter of the lex concerns killing the third concerns wounding of a slave or an animal. We may add that the lex talionis in Exodus xxi, 23 et seq. gives almost the same enumeration: burning for burning, wounding by breaking for wounding by breaking, wounding by crushing for wounding by crushing. 9

The fact that the simple verbs urere frangere rumpere are employed instead of composed ones cannot be adduced as an objection. It is well known that the simplex is preferred in ancient style. In addition, there are numerous instances to be found throughout all periods of Latin literature of these words referring to wounds. Suffice it to cite some legal texts: Brutus D. 9, 2, 27, 22 (Ulpianus libro octavo decimo ad edictum), Q. Mucius D. 9, 2, 39pr. (Pomponius libro septimo decimo ad Quintum Mucium), Gaius 3, 219, I. 4, 3, 16, and above all a lex de vere sacro vovendo of the second Punic War. The lex, recorded by Livy, 10 contains a clause exonerating from blame the person who unintentionally damages or kills — rumpet occidetve insciens — a consecrated animal. We shall see below that this law which like the Aquilian relates to killing and wounding is noteworthy for the fact that rumpere comprises here all sorts of wounds.

7 On a similar subject Ciceron says (pro M. Tullio oratio 4, 9): apud maiores nostros ... quod enim in usu non veniebat, de eo, si quis legem aut inductum constitueret, non tam prohibere videreur quam admonere.

6 V. Exodus xxi, 25 and, on Germanic statutes, E. Wilda, Das Strafrecht der Germanen, p. 940.

9 The Hebrew text reads: kawiji' šâhâš kawiji' pēšâš šâhâš pēšâš ĥábbūra šâhâš ĥábbūra.

10 23, 10, 5. If the text given by Livy is not the authentic one it still shows how he supposed ancient laws to be.
It is only this way that the third chapter of the *lex Aquilia* can be explained. According to Ulpian D. 9, 2, 27, 5 the *lex* reads: *quantaeae res erit in diebus triginta proximis*. Several points which we have to discuss later confirm that the text as given here is authentic and, in fact, its authenticity has seldom been denied. Nevertheless, *erit* is generally taken as *fuit* or *fuerit* and *quantaeae* as *quantae plurimi*. But of course these alterations, consciously proposed by the Roman jurists, must obscure the original meaning of the law.

Up to the Aquilian reform there were probably fixed rates of compensation for the different kinds of damage to slaves: *membrum ruptum*, *os fractum* and perhaps *adustio*. From the Twelve Tables it appears that a *membrum ruptum* is more serious than an *os fractum* and we may conclude that the penalty was higher in this case. However, this system must frequently have led to unfair results. The value of money and goods fluctuated. The *membrum ruptum* of a bad slave might often have caused less damage to his owner than the *os fractum* of a good one. Last not least it was certainly not uncommon that a *membrum ruptum*, though in itself a more severe wound than an *os fractum*, eventually turned out better and *vice versa*. So the *lex Aquilia* provided that, no matter what sort of wound is inflicted, the actual damage of each particular case should be restored.

But here a difficult question arose. In the case of wounding all consequences are not manifest at once. The injured man may recover or may remain more or less disabled. The cost of the cure may be high or low. As we have said, it is exactly this point which among others rendered the fixed scale of penalties undesirable. When the *lex Aquilia* introduced individual estimation of each damage, it necessarily meant that not the very moment of wounding but the final outcome should be taken into account. How was this to be done? A certain time-limit was indispensable as the wrongdoer could not possibly be responsible for every indisposition which henceforth befell the injured person. Nor was it in the interest of the owner of the slave that compensation should be postponed too long. Therefore the *lex Aquilia* lays down that that damage is to be made good which comes out in the course of thirty days. That is to say: on the one hand, not only that damage which arises immediately is to be restored, but all damage appearing within thirty days. On the other hand, however, it is only this damage appearing within thirty days that the wrongdoer is liable for; no further results are imputed to him. Thus the text as handed down to
us becomes clear. Quanti ea res erit indiebus triginta proximis, tantum aes domino¹¹ dare damnas esto, i.e. the wrongdoer has to pay whatever this case will amount to in the next thirty days.

In almost the same way several ancient laws have tried to solve a problem which even nowadays is not very simple.¹² At Visby the wrongdoer was responsible for de vare des doteslages (the wound proving fatal) not longer than thirty days.¹³ He is earlier free if the injured man goes to the kitchen, to the market or to the baths. During the period thus appointed the injured man is not bound to accept any compensation, lest the matter be settled once for all. No invariable limit is given by Hebrew law. According to Exodus xxi, 18 et seq. liability comes to an end when the wounded person goes out of doors. But we may mention that it is still the rule in English law that an act which causes death is not homicide if the death occurs more than a year and a day after the commission of the act.¹⁴

If one takes the third chapter in the way suggested here, the phrase quanti ea res erit is used in a sense consistent with that to be found in the edict. In the edictal phrase quanti ea res est the words ea res always mean the case in question. Quanti ea res est may be translated: the sum this affair comes to. Similarly the Aquilian refers to the sum which the damage will amount to in thirty days. If on the contrary one prefers a revised text: quanti ea res fuit plurimi, ea res is the damaged thing. But considering the respect which Roman lawyers paid to tradition it is difficult to believe that later on the same formula has a different technical signification:

Gaius and Justinian, it is true, read ea res also in the first chapter which originally did not refer to the interest of the case, but to the real value of the killed slave. However, Ulpian D. 9, 2, 21pr. says with regard to this chapter that ait lex: quanti is homo in eo anno plurimi fuisse. So it is probable that the lex had something like quanti is homo¹⁵ idve quadrupes pecus. This was changed into quanti ea res or quanti id when, as Justinian tells us, I. 4, 3, 10, the jurists interpreted the first

¹¹ The lex had probably ero. V. A. Pernice, l. c. p. 14.
¹² One may think of how often assistance is claimed from an insurance company whilst it is doubtful if a long-ago accident is the ultimate cause of the sickness.
¹³ K. v. Amira, op. cit. 1, p. 714, and 2, pp. 851 et seq.
¹⁴ W. M. Geldart: Sir William Holdsworth, Elements of English Law, 2nd ed. p. 244.
¹⁵ Professor H. P. Jolowicz kindly suggests by letter that the lex had servus rather than homo, homo being praetorian. It may, however, be doubtful if, whilst the praetor often used homo (hunc ego hominem meum esse ait and the like), a lex must always have used servus. Possibly the first chapter of the Aquilian, beginning with exactly enumerating si servus servae, did not repeat this at the end but said shortly: quanti is homo.
chapter too on the interesse-principle. Quanti ea res or quanti id in eo anno plurimi fuit did now not only mean the highest value of the killed slave himself but included all circumstances of the case.\(^{14}\) Although ea res and id are synonymous, the fact that the former is employed in G. 3, 210, 214 and I. 4, 3pr. and the latter in D. 9, 2, 2pr. (Gaius libro septimo ad dictum provinciale) and I. 4, 3, 9 proves clearly that the jurists did not depend here on the authentic text and that Ulpian’s statement is more reliable. We may add that, whilst the change from quanti is homo to quanti ea res is easily understandable, the opposite development is not.

The Aquilian uses quanti ea res erit in a sense consistent with that to be found in the edict. It follows that this formula, as relating to the interesse in the case, is much older than the iudicia from which we know it. Indeed it is not unthinkable that the praetor adopted it from early laws and it even seems that he adopted it from the Aquilian itself. For if the formula is older than the iudicia, on the other hand the Aquilian may well have been the first lex to propose it. Whilst the third chapter contains it and thus is based on the interesse-principle, in the first chapter the principle of the real value is still predominant.

What is the reason of this divergence?\(^{17}\) In ancient times the two principles are not distinctly separated. It is not on systematical reflection that one of them is preferred, but according to the requirements of the individual situation. The first chapter of the lex Aquilia deals with killing of a slave or an animal. Here where complete destruction is concerned it is very natural to apply the principle of the real value. The dead slave has to be restored. Besides, the result will usually be the same as that which the interesse-principle would bring about. On the contrary, compensation for wounding a slave is likely to become compensation of the interesse. The damage consists in that for some time the slave is entirely unable to work, that later on also he is less efficient, that his owner has to pay for the cure. Possibly, there was once a period during which even here the principle of the real value played a greater part. If a slave was wounded the wrongdoer may have given another slave instead and taken the injured one. Anyway, as soon as damages are assessed in money the interesse-principle is appro-

\(^{14}\) For examples see I. 4, 3, 10.

\(^{17}\) Comp. H. F. Jolowicz, “The original scope of the lex Aquilia and the question of Damages”, The Law Quarterly Review, Vol. 33, pp. 223 et seq. Although the propositions set forth by H. F. Jolowicz are not accepted here, in many respects they make the basis from which one may proceed.
On the Third Chapter of the Lex Aquilia.

priate to the case of wounding. So the lex Aquilia is not exceptional in this respect. One may say that in all systems the interesse-principle is earlier developed in the case of wounding than in that of complete destruction or withdrawal. The Mishpatim of Exodus, whilst providing in xx, 33—xxii, 3 that a killed or stolen animal has to be replaced by one or several other animals, in xxii, 18 et seq. lay down that, if a free man is injured, the responsible person shall pay for the loss of his time and shall cause him to be thoroughly healed.

It is remarkable in this connexion that the notion of damnum is not to be found in the first chapter of the lex but only in the third. In the case of complete destruction such as killing there is a definite visible loss, i.e. the loss of the destroyed thing. At the time of the Aquilian there is no need to introduce here an abstract conception like damnum. It is different, however, if a slave is only wounded. No concrete thing is lost here. What is lost is the damnum, the difference between the former and the present value of the slave, the expenses for treatment and so on. Clearly, the fact that the third chapter in contrast with the first displays the idea of damnum stands in close relation to the interesse-principle applied here instead of the principle of the real value. 12

However, we have already mentioned that the two principles are not yet clearly distinguished. It seems that also the first chapter, by giving the highest value of the last year, takes into account an important component of the interesse. 13 Unquestionably there is a penal-element in this rule. But it is significant that the 'penalty' makes up for the fact that, prices being unsteady, the owner of the slave might not have sold him just at the time when the wrong was committed. Of course, there is no place for the highest value in the third chapter of the lex as long as its original scope is maintained. Here amends are to be made for the full amount of the interesse. This interesse, it is true, includes also the reduced possibility of selling a damaged slave at a favourable conjuncture. But it would be absurd to pay the highest value whilst the slave is still alive and perhaps is only slightly damaged.

We have now to consider how and when the original scope of the third chapter was widened. It should be observed that the

12 There may be a further reason of the fact that the third chapter alone has damnum. Possibly killing of a slave, dealt with by the first chapter, was for a long time regarded as violating not only the ius but also the fas. However, the lex Aquilia itself, a plebiscite, does not seem to care about the sacral aspect of the delict.

lex itself by its structure and formulation was very apt to suggest an extension. On the one side three different kinds of wounds are mentioned: urere frangere and rumpere. But on the other side the wounds are not so precisely defined as in the Twelve Tables. Frangere is said instead of as frangere, rumpere instead of membrum rumpere. Moreover the close and uniform enumeration of the acts: quod usserit fregerit ruperit, all of them covered by one and the same provision, indicates that the particular way in which the damage is done has become unimportant. In fact the lex seems to take up the three kinds of wounding merely in order to make it quite clear that there is now no essential difference between them. One may draw attention to the fact that the main delict, as presented by the third chapter, is not urere frangere or rumpere. Si quis alteri damnum faxit —thus the law comprehensively begins 20 and only in a subordinate clause it explains: quod usserit fregerit ruperit injuria. 21

There can be little doubt that from the beginning all sorts of wounds were brought under the third chapter. The word rumpere was very suitable for this purpose. In the above-cited lex de vere sacro vocendo, rumpere comprises any kind of damage to cattle. 22 So the responsa of Brutus D. 9, 2, 27, 22 et seq. (Ulpianus libro octavo decimo ad dictum) and Q. Mucius D. 9, 2, 39pr. (Pomponius libro septimo decimo ad Quintum Mucium), concerned with the causing of an abortion, show that a wrong which did not decidedly come under urere or frangere came under the wider conception of rumpere. 23

Yet damage to inanimate things, far less momentous, was included much later. The early references, Brutus D. 9, 2, 27, 22 et seq. Q. Mucius D. 9, 2, 39pr. and even Alfenus D. 9, 2, 52, 1 (libro secundo digestorum) are solely to damage to slaves and cattle. What is more important than this argumentum e

20 D. 9, 2, 27, 5. On the phrase ceterarum rerum praeter hominem et pecudem occisos, probably interpolated, v. below.

21 It is possible that originally the third chapter did not read injuria. G. 3, 217 and I. 4, 3, 13 do not mention it at the corresponding place. Moreover, in I. 4, 3, 13, the component of the delict seems to be secured for the third chapter less by reference to its own text than by analogy to the first. Indeed the defence that an act, otherwise criminal, had been committed urere arose in certain cases of homicide, though homicide of a free man. As the perpetrator had to fear the worst consequences it was here that the distinction between acts performed urere and injuria became first necessary. According to the Twelve Tables, if a thief is killed at night urere caesus esto. So the lex Aquilia may have made injuria a condition of liability in the first chapter only which deals with killing. Naturally enough, the jurists interpreted the third chapter accordingly.

22 Actually the lex means only that damage which makes the animal unfit for being sacrificed. It does not follow, however, that rumpere itself is necessarily restricted to this sort of damage.

23 Brutus speaks more carefully of a quasi rumpere.
silentio is the fact that, as we shall see, it is only Sabinus who gives the finishing touches to the doctrine which applies the third chapter to any damnum. However, as already Labo does not hesitate to give an action if inanimate objects are damaged, we may assume that the decisive change in the scope of the third chapter gradually took place in the second half of the first century B.C.

The third chapter was now considered as referring not only to wounding of slaves and animals, but also to damage to inanimate things such as ships, corn et cetera. Indeed, as to inanimate things it came to cover complete as well as partial destruction. For the first chapter, though concerning complete destruction of res se moventes, could not possibly be applied to inanimate things since it had occidere. On the contrary rumpere might signify any damaging act no matter whether directed against animate or inanimate objects. Henceforward, the lex Aquilia is the all-embracing law which we know from the classical texts. It is possible that in D. 9, 2, 27, 5 the phrase ceterarum rerum praeter hominem et pecudem occisus was introduced in order to emphasize the enlarged range of the third chapter. All cases of damnum except that of occidere dealt with by the first chapter should come under the third.

However, if an inanimate thing is damaged it is purposeless to wait thirty days. A wound may prove serious or harmless in the course of time. In the case of damage to inanimate things all consequences normally appear at once. Thus the thirty days of chapter 3 were interpreted analogously to the year in chapter 1. The wrongdoer was no longer responsible for quanti ea res erit in diebus triginta proximis, i.e. for the damage arising within thirty days, but for quanti ea res fuit, for the value which the damaged thing had in the last month. It is due to this interpretation that up to our time the third chapter has caused so many difficulties. As long as its original scope was maintained form and content were well matched. When it was altered, the text became obscure.

Some points, since not discussed by the Roman jurists themselves, have not much come into notice. They may

---

24 G. 3, 218.
25 E.g. D. 9, 2, 29, 3 (Ulpianus libro octavo decimo ad edictum).
26 That this phrase is an addition to the original text of the lex is convincingly shown by O. Lensel, review of H. F. Jolowicz loc. cit. Zeitsschrift der Savigny-Stiftung 48, pp. 575 et seq. It is, however, probable that the original text had another passage instead, giving servus serva and quadrupes pecus as objects of the wrong in question. Of course, if the words ceterarum ... occisus were inserted in connexion with the enlargement of the scope of the third chapter they are much older than Ulpian.
yet deserve attention. First of all the text reads erit instead of 
fruit and, strictly speaking, still refers to the time after 
the commission of the wrong. By the way, it may be remarked 
that this preservation of erit through all changes of inter-
pretation illustrates well the high standard of Roman legal 
tradition. Secondly it is in consequence of the new interpre-
tation that the formula quanti ea res erit has a different sense 
than in the edict. Whilst according to the original meaning of 
the law ea res is the owner’s interest in the case concerned it is 
now the damaged thing itself. However, we have already 
examined this. There is a third feature of the Aquilian which 
may be considered here. Originally, there existed good reasons 
for the first and the third chapter giving different terms. The 
first chapter, intending that he who kills a slave or an animal 
should not profit nor the owner suffer by a temporary fall of 
prices, laid down that the highest value of the last year should 
be taken as basis of assessment. The third chapter, concerning 
dindiction of wounds, made the wrongdoer responsible for the 
damage appearing within thirty days. Clearly both these terms 
are adequate to their respective purposes. However, when the 
thirty days of chapter 3 are held to have the same meaning as 
the year in chapter 1, the difference is no more justified.

The Roman jurists were apparently more anxious about 
another problem that resulted from extending the scope of the 
law. Before this reform, the third chapter charged the one who 
wounded a slave or an animal to pay quanti ea res erit in diebus 
triginta proximis, that is to say, whatever this affair will amount 
to in the course of thirty days. We have seen that, when this 
 provision was also applied to inanimate objects, its meaning had 
to be altered. The wrongdoer now had to restore quanti ea res 
fuit, the value of the damaged thing in the last thirty days. 
But so understood the rule was embarrassing indeed. For whilst 
the first chapter speaks of the highest value in the last year the 
third does not contain the word plurimi. Thus any moment of 
the last month might come into question—an absurd possibility. 
Gaius 3, 218 says that only Sabinus settled the matter by 
plausibly arguing that the third chapter too should be regarded 
as referring to the highest value.

The statement of Gaius is repeated by Justinian I. 4, 3, 15. In 
addition Ulpian says, D. 9, 2, 29, 8, that haec verba: quanti 
in triginta diebus proximis fuit, etsi non habent plurimi, sic 
tamen accipienda esse constat. There can be no doubt that the 
text of the third chapter as rendered by Ulpian D. 9, 2, 27, 5 is 
accurate at least in so far as the word plurimi is missing. It
may once more be observed that no history of the lex Aquilia
 overridden unless it accounts for this fact. Obviously the
interpretation of quanti as quanti plurimi does not give the
original meaning of the third chapter. There is no reason why,
if it meant the highest value, it should not have expressed it
just as the first chapter did.
In fact, Gaius’ statement proves not only that the third
chapter did not contain the word plurimi, it also supports the
view that the lex had quanti ea res erit and not fuit. If the
above account is correct the range of the third chapter was
extended in the second half of the first century B.C. It was
then that the dies triginta proximi came to be explained as the
last thirty days instead of as the next and that therefore the
difficulties arose about the missing plurimi. These difficulties
lasted till Sabinus, not a very long time. On the contrary the
assumption that from the beginning the third chapter referred
to the value in the last month would involve instability in the
mode of calculation for some hundreds of years.\textsuperscript{27} But this
seems most unlikely.
There is still one more discrepancy between text and content
brought about by the new interpretation. The third chapter,
asimilated to the first, provides that amends are to be made for
the highest value of the damaged thing. So, strictly speaking,
the third chapter like the first is only applicable to cases of
complete destruction. We know, however, that actually it was
applied to partial destruction too. Probably theory and practice
are here somewhat inconsistent. Before it was extended the
third chapter concerned wounding only and laid down that that
damage should be restored which exists thirty days after the
commission of the wrong. When inanimate things were in-
cluded the meaning of the thirty days had to be changed and
was equalized with that of the year in chapter I. But it is
almost certain that in cases of partial destruction such as wounding
the wrongdoer had to pay for the interest now as he had to
before. Indeed we have already mentioned that, naturally,
the interesse-principle kept on gaining influence and eventually
was recognized even for the first chapter of the lex.\textsuperscript{28}
How was it possible that the jurists of the late republic did
not maintain the ancient rule that, if a slave is wounded, one
has to wait thirty days for the estimation of damage? Pre-

\textsuperscript{27} It may be as well to quote here the description which G. 3, 218 gives of the
uncertain state existing before Sabinus: et ideo quidam putaverunt librum esse
judici ad id tempus ex diebus triginta asestimacionem redigere, quo plurimi res
fuit, vel ad id, qno minoris fuit.

\textsuperscript{28} Comp. O. Lenel, l. c. Zeitschrift 43, p. 577.
sumably it was long since this rule had been strictly followed. When the Aquilian was promulgated the appointment of the thirty days was a great improvement in the matter of assessment of damages. But gradually, even this provision must have proved insufficient. On the one hand it happens that the outcome is not sure at all after thirty days, on the other hand it may be evident before. We have seen that the law of Visby, though still giving the term of thirty days, provides that liability comes to an end earlier if the wounded man goes to the kitchen, the market or the baths. It is very likely that a similar progress took place in Roman law and that, by the time of the late republic, the rigid period prescribed by the lex was no longer observed. In fact this development may well have contributed to the change in the conception of the thirty days. As they had lost their original significance it was quite natural to interpret them analogously to the year in chapter 1. That the problem of compensation for wounds was still dealt with in classical times may be seen from Ulpian ad Sabinum (libro quinquagensimo) D. 9, 2, 46: Si vulnerato servo lege Aquilia actum sit, postea mortuo ex eo vulnere agi lege Aquilia nihil minus potest. 23

We pass now to some questions of principle. Professor H. F. Jolowicz in the course of some helpful advice stated that the propositions set forth here suppose that, at the time of Sabinus, the original meaning of the third chapter was utterly forgotten, although one would imagine that from the moment of its passing so important a statute must have been constantly before the courts. However, apart from the fact that claims of damages may have often been settled by agreement and that modern ideas thus initiated may have been adopted by the lawyers, one has to take into account the characteristics of antique interpretation. Undoubtedly, the lex Aquilia was constantly before the courts. But this does not exclude an incessant change nor even striking reforms of interpretation. An ancient jurist, when he interprets a statute differently from his predecessors, does not intend to

23 This decision probably made new law at the time of Sabinus. According to the original meaning of the third chapter that damage was to be made good which appears in the course of thirty days; for further consequences the wrongdoer was not responsible. Gradually this invariable limit was given up and in each case the most appropriate term was taken as basis of assessment. But it was still the rule that, once compensation having been made, the matter should be definitively settled. It is only Sabinus who lays down that, if subsequently fresh damage arises, the wrongdoer may be sued again. However, even Sabinus does not say that the same action under the third chapter may twice be brought; in other words, he does not give a second action if, though the wound turns worse, the slave remains alive. Amends under the third chapter having been made, he only gives another action if the wounded slave dies and thus the first chapter comes into question.
alter but on the contrary to arrive at its original meaning. So it comes that also the courts may give progressive decisions. This attitude, equally composed of rational and irrational elements, might be well worth further investigation. It seems to be a fundamental factor not only in the history of law, but also in the history of religion. Anyway, we may be safe in assuming that the lawyers of the late republic and the early empire had something like a system of legitimate interpretation. In other words, there existed rules of interpretation which were recognized as leading to the authentic meaning of a law. We cannot go here into the origin and development of this system. It may be remarked that it was applied throughout the civilized world. Two examples may be given as they are closely connected with the subject of this paper.

Hillel, the famous Rabbi of the second half of the first century B.C. established seven rules according to which the Bible should be interpreted. The third one, the rule of binjan 'āḇ, says that if of two or several provisions referring to similar cases one gives a specific regulation, this regulation may also cover the others. The traditional reason for this rule is that the torah is brief in expression and thus states details in one case only which, however, apply to many cases. Gaius 3, 218, discussing the third chapter of the lex Aquilia, states: sed Sabino placuit proinde habendum ac si etiam hac parte plurimi verbum adiectum esse; nam legis latorem contentum fuisse, quod prima parte eo verbo usus esset.

It may be noted that Mishna Baba qamma 1, 1 with the aid of this rule of binjan 'āḇ, solves a question very like that of the missing plurimi with which Sabinus deals. Exodus xxii, 6 provides that the person responsible for pastus pectoris has to pay compensation with the best part of his field. As to other cases of damage the law simply speaks of restitution. But the Mishna concludes that also here restitution has to be made with the best part.

More interesting than this rule of pure and plausible analogy is perhaps the one appearing in the case of rumpere. We have

---

20 As far as I can see, the mode in which English Courts apply the law is not so dissimilar.
21 Is it possible that Justinian I, 4, 3, 15 did no more understand the rule of interpretation applied here and therefore intended a scoffing remark on the plebs for its indolence? He reads: nam plebeem Romanam, quae Aquilia tribuno rogante hanc legem tult, contentam fusisse, quod prima parte eo verbo usus est.
22 Analogy based on material or formal elements of laws naturally played a great part in the matter of interpretation. The rule of binjan 'āḇ is not the only one to be mentioned in this connexion. However, there is no room here to examine this question in detail nor can we point out the differences between Jewish and Roman rules. The account set forth is indeed very summary.
seen that *rumpere* came to cover any damaging act. Indeed it
was identified with *corrumpere* and consequently the other words
presented by the *lex Aquilia, uere* and *frangere*, became super-
fuous. The fifth rule of Hillel’s, the rule of *kélél ṩ̄rā ṩ̄rā ūk̆l̆lāl*, says that, if a provision first gives a collective noun and
then an individual, it applies only to the individual. **If, however,
a provision begins with words of narrow signification and
then adds one of wider range, the latter prevails and includes the
former ones.** **This cannot better be translated into Latin than
by Celsus’ statement D. 9, 2, 27, 16 (Ulpianus libro octavo decimo
ad edictum): non esse novum ut lex specialiter quibusdam enu-
meratis genera subiciat verbum, quo specialia complectatur.**

Furthermore, Professor H. F. Jolowicz made the objection
that, if the third chapter said nothing of any objects except
slaves and *pecudes* the extension would have been by praetorian
actions rather than by very free interpretation, especially if the
extension took place as late as is suggested here. However, one
may hold that the development of law by praetorian actions never
made impossible its development by interpretation. It has not
yet been pointed out how far this, how far that, way was pre-
ferred not what was the mutual influence sure to have existed
between them. But it seems that, naturally enough, interpreta-
tion stood in the foreground where Statute Law was concerned.
Statutes on private law were not very frequent in the Roman
republic. It is probable that the text of a statute was read
again and again, discussed and explained. That the explanation
remained always the same is not to be expected. At any rate,
as to the changes of *quantī* into *quantī plurīmī* and of *rumpere*
into *corrumpere* we are explicitly told that they were established
by interpretation. We may add that in the second half of the
first century B.C. the main reform was indeed completed. But
we have seen that it was initiated long before. It is hardly an
exaggeration to say that it was initiated with the passing of
the *lex.*

In conclusion a few words may be said about the strange
position of chapter 3. We have discussed above Ulpian’s pro-
position D. 9, 2, 1pr. (libro octavo decimo ad edictum): Lex

**Leviticus i, 2 reads: ye shall bring your offering of the cattle, of oxen and
sheep. According to Hillel’s rule the words oxen and sheep have to be emphasized.
Not every kind of cattle may be offered (swine!).**

**The law defining the liability of the one who is hired to keep a thing and
especially animals begins at Exodus xxii, 10: If a man deliver unto his neighbour
an ass, or an ox, or a sheep, or any beast, to keep ... As here the collective
noun comes last the law applies to all kinds of cattle.**
Aquilia omnibus legibus, quae ante se de damno iniuria locutae sunt, derogavit, sive duodecim tabulis, sive alia quae fuit: quas leges nunc referre non est necessae. Apparently Ulpian knew not only about the Twelve Tables dealing with damnum, but also about other laws prior to the Aquilian. Apart from this text, it is true, we have no information about them. Nevertheless it is possible that they existed.

It should be remarked that probably the Twelve Tables did not contain special paragraphs about damage to slaves and animals. In this respect it may not have been necessary to amend the former law or to settle doubts. So the only case they introduced is that of os fractum. When dealing with the causing of an os fractum to a free man they incidentally mentioned the os fractum of a slave, as it was likewise punished by a fine. But they did not mention the membrum ruptum nor the killing of a slave. The delicts of membrum ruptum and of homicide had an entirely different aspect according as they were directed against free men or against slaves. As to membrum ruptum it is not to be assumed that retaliation was also allowed if a slave was damaged. Here a penalty may have been imposed on the wrong-doer. As to killing, the Twelve Tables provided that, in the case of accidental homicide of a free man, a ram should be sacrificed. Certainly, accidental homicide of a slave was more rationally dealt with. It is likely that it led to some sort of compensation. Of murder the Twelve Tables did not speak at all. If they had done, it would be inconceivable that no trace should be left of this rule. Moreover, similar codifications also, e.g. the code of Hammurabi and the Mishpatim of Exodus xx i, 1—xxiii, 19 are without provisions about this crime. It seems that, when the Twelve Tables were enacted, it was not yet possible, if desirable, to overcome private vengeance. If, however, a slave was the victim the law probably made little difference between accidental and intentional commission of the act.

Assuming that with regard to damage to res se moventes the only fine prescribed by the Twelve Tables was that for the os fractum of a slave, it may well be that even before the Aquilian came into existence a statute was made concerning the most important case, that is to say, of killing a slave or an animal. This statute, the lex alia quae fuit of Ulpian D. 9, 2, 1pr., may have established fixed rates of compensation, possibly according

** Already a lex regia, ascribed to Numa Pompilius, calls parricides only the one who murders a free man.
to kind and sex of the killed object. It may have been published as a *lex satura* together with a provision on *adstipulatio*. Later on the Aquilian was enacted, reforming the rules on killing and introducing a third chapter on wounding. But this new chapter was not interpolated between the first and second part of the former statute although from a systematical point of view it should come after the first. In other words, the structure of the former statute, the first chapter dealing with killing a slave or an animal and the second with *adstipulatio*, was not altered. The new rules on wounding were joined at the end.

It should be noted that of the method thus adopted numerous examples are to be found in primitive legislation. When new provisions are taken into an existing code they are seldom inserted in that place in which according to their subject and intention one would expect them to be. They are added to the code as a whole. There are manifold reasons for this. First of all it is well known that the respect for tradition, general among antique lawyers, was especially strong in the case of a *lex*. Secondly, it requires a much more developed technique to amalgamate new and old rules than only to add the new ones to the old. Thirdly, it may be of some influence that for a long time statutes were written on stone. Of course, making an appendix was here easier than fitting in an interpolation. Finally, ancient laws are either orally handed down or, if they are written, they nevertheless are commonly known and quoted by heart. So again, additions are less troublesome than interpolations.

DAVID DAUBE.

---

*Hence perhaps the minute enumeration of the first chapter of the Aquilian: *

*quass servum servamque alienum alienamque quadrupedemve (sic, according to A. Pernice, *l. c. pp. 12 et seq*) pecudem. . .

*It would lead too far to make this general statement more precise by examining particular instances. We may remark that the fact proposed here helps often to distinguish supplementary legislation from private glosses.

*I should like to thank Professor W. W. Buckland, Professor H. F. Jolowicz, Professor F. Pringsheim and my brother Benni Daube for valuable suggestions and criticism.*