CANEM VEL SERVUM TENUIT?

D. 9,2,11,5 and the applicability of the *actio legis Aquiliae* in cases involving inanimate objects used for killing

by

SEBASTIAN LOHSE (BONN)

D. 9,2,11,5 (Ulpianus *libro octavo decimo ad edictum*):

Item cum eo, qui canem irritaverat et effecerat, ut aliquem morderet, quamvis eum non tenuit, Proculus respondit Aquiliae actionem esse: sed Julianus eum demum Aquilia teneri ait, qui tenuit et effecit ut aliquem morderet: ceterum si non tenuit, in factum agendum.

Again, Proculus gave an opinion that an action on the Lex Aquilia lay against a person who had incited a dog and caused it to bite someone, even though he was not holding it (/him); but Julian says that only a person who holds it (/him) and causes it to bite someone is liable to the Aquilian action: but if he did not hold it (/him), the action must be in factum

I. – Introduction

D. 9,2,11,5 is generally being cited amongst those cases, which discuss, whether a direct *actio legis Aquiliae* or an *actio in factum* (or utilis\(^2\)) is applicable. The problem is one of causation or, to speak in the Roman jurists’ language, one of the scope of *occidere*. Wherever this text is discussed in a little more depth, the examination concentrates on explaining why Proculus gave the direct action and why Julian partly disagreed with him. The explanation usually given is, that Proculus regarded the dog as an instrument or a weapon used for killing the slave\(^3\), whereas Julian must have visualised the dog as being


2. In the following text only the expression *actio in factum* will be used. For possible differences between *actiones utiles* and *actiones in factum* see e.g. W. Selb, *Formulare Analogien in ‘actiones utiles’ and ‘actiones in factum’ am Beispiel Julians*, in: Studia in onore di Arnaldo Biscardi III, Milano 1982, p. 315–350.

3. That *aliquid* is a slave (or a son in power) rather than a free person *sui iuris* follows from the fact, that the choice of action is between the *actio legis Aquiliae* and an *actio in factum*. In the case of an injury of a free person *sui iuris* the *actio iniuriarum* would have been applicable, see R. Wittmann, *Die Körpervorleistung an Freien im klassischen römischen Recht*, München 1972, p. 1; G. MacCormack, *Aquilian Studies*, in: *Studia et documenta historiae et iuris* 41 (1975), p. 1 (47); J.E. Spruit, *Nocturne: eine Auslegung von Affenuis D. 9,2,52.1 aus soziologischer Sicht*, Tijdschrift voor Rechtsgezindheid 65 (1995), p. 247 (248, 254, 255 with n. 3).
an animal and therefore having its own will.

Sometimes a few other points have been raised besides this. Schulz has looked at the arrangement of the fragments 7, 9 and 11 of the Digest title on the lex Aquilia and therefore discusses the connection of D. 9, 2, 11, 5 with its surrounding texts, whereas Grueber and MacCormack have suggested that the passage does merely deal with wounding, not with killing.

But whereas as to all these problems several arguments stand against each other, there is one question the answer to which has not been examined in great depth so far. This question is, whether — for a direct actio legis Aquilae to be applicable in Julian’s opinion — the person, who irritated the dog, had to hold the slave or the dog. Zimmermann at least remarks that the text does not make clear, whether the dog or the slave had to be held. The only real arguments however are given by von Lübbow, Nörö, Pugsley and Valiño. von Lübbow suggests that the dog had to be set on the slave, so that it would not make sense


5. F. Schulz, Principles of Roman Law, Oxford 1936, p. 64.

6. Schulz, Principles (supra, n. 5), p. 64 remarks, that fr. 11.5 should rather be placed in fr. 7 or 9, since it does not actually discuss the common action of several persons like the other texts in fr. 11 do.


to hold the dog\textsuperscript{11}. Pugsley, although characterising the dispute between Julian and Proculus as "childish and unedifying"\textsuperscript{12}, also thinks that in Julian's opinion the slave had to be held in order for the civil law action to be applicable; he points out that \textit{eum} could refer to \textit{aliquam} only\textsuperscript{13}. Valiño and Nörr on the contrary argue that \textit{qui tenuit et effectit ut \textit{aliquam} morderet} would exclude the possibility of the slave being held\textsuperscript{14}. Most scholars commenting on this text however simply go for one alternative without giving any reason. The main purpose of this essay therefore is to examine, whether or not it is possible to decide, whether the dog or the slave had to be held in Julian's opinion. Two approaches will be made: First of all it is necessary to look at the text itself in more detail. Secondly other decisions on the scope of \textit{occidere} may be of help as well, because they may explain why Julian did not agree with Proculus. One additional question is closely connected with the problems dealt with in this part: Frequently an interpolation of D. 9,2,11,5 has been assumed: Some scholars have suggested, that the text originally did not make a distinction between holding and not holding the slave or the dog\textsuperscript{15}. Albanese on the contrary is of the opinion that Proculus already shared Julian's opinion\textsuperscript{16}. Even if Albanese was right however, one still would not know, whether both Julian and Proculus thought of the dog or the slave as being held. But since the development of the interpretation of \textit{occidere} may suggest a solution to the question of interpolation, this question will be dealt with in the second part, too.

II. – The wording of D. 9,2,11,5

As mentioned above, Zimmermann says, that the text itself does not make clear, whether the dog or the slave had to be held\textsuperscript{17}. One can, however, infer more from the text than this statement suggests.

Obviously instead of \textit{servum} or \textit{canem} the text only refers to '\textit{eum} non \textit{tenuit}', which could be the dog as well as the slave. Usually \textit{eum} could be taken to refer to whichever of both possible words stands closest to it, that would be the slave (\textit{aliquam}) in this case\textsuperscript{18}. The difficulty with this is, that \textit{ut \textit{aliquam} morderet} is subordinate to the preceding words, which contain the other possibility, \textit{canem}. If it is possible to construct an argument out of this structure, the argument could therefore be that \textit{eum} must be taken to refer to \textit{canem}, since \textit{aliquam},

\textsuperscript{11} von Lübrow, \textit{Untersuchungen} (\textit{supra}, n. 4), p. 152 fn. 98.

\textsuperscript{12} Pugsley, \textit{On the Lex Aquilia and Culpa} (\textit{supra}, n. 9), p. 1 (9). See also Barton, \textit{Lex Aquilia and Decretal Actions} (\textit{supra}, n. 9), p. 15 (23).

\textsuperscript{13} Pugsley, \textit{On the Lex Aquilia and Culpa} (\textit{supra}, n. 9), p. 1 (9).

\textsuperscript{14} Valiño, \textit{Acciones} (\textit{supra}, n. 9), p. 54; Nörr, \textit{Causa mortis} (\textit{supra}, n. 9), p. 144 n. 20.

\textsuperscript{15} Kerr Wylie, \textit{Actio de pauperie} (\textit{supra}, n. 3), p. 459 (470 fn. 6); see also Pugsley, \textit{On the Lex Aquilia} (\textit{supra}, n. 9), p. 1 (10).


\textsuperscript{17} Zimmermann, \textit{Obligations} (\textit{supra}, n. 4), p. 980 fn. 190.

although standing closer to *eum*, is part of a subordinate phrase. The other possibility however does not seem to be far-fetched either.

Although *eum* as referring to the dog or the slave does not appear in the part of the text describing Julian’s opinion, this part nevertheless gives a hint, too: Either the slave or the dog is the inherent object of *qui tenuit*. If it was the slave, who was injured subsequently, would he not rather be referred to as *eum* than *aliquem* four words later\(^\text{19}\)? But this argument in favour of the dog is not too strong either. One possible explanation for the use of *aliquem* is, that *eum* has already been used in the same sentence for the person irritating the dog, so that *aliquem* is needed as a contrast to this *eum*.

Von Lübtow\(^\text{20}\) does not make clear what it is, that in his opinion suggests that the person had to let the dog go and set it on the slave instead of holding the dog while irritating it. He must be thinking of the whole situation of the case. But neither *irritaverat* nor *effecerat ut aliquem morderet* appear to carry any special meaning, which would exclude the possibility that the dog had to be held. It may be easier to visualise somebody causing a dog to bite someone, if he does not hold the dog, but von Lübtow’s argument does not seem to be very strong, if this is its only support.

Finally MacCormack’s and Grueber’s argument, that the text does rather deal with wounding than with killing, is closely connected with the text. They claim that a dog’s bite does not normally result in death\(^\text{21}\). But as Stein points out\(^\text{22}\), Ulpian discusses the case under the subject of *occidere*, so that one can assume from this that the dog killed the slave.

If it is possible to construct any argument out of the wording of D. 9,2,11,5, it would therefore be one in favour of the dog being held. Both suggested arguments however are not strong enough to exclude the other possibility.

III. – The development of the interpretation of *occidere*

Two texts from Julian and Ulpian may serve as an illustration of what must have been the narrowest possible meaning of *occidere*:

D. 9,2,51pr. (Iulianus libro octagensimo sexto digestorum):
*occidisse dicitur vulgo quidem, qui mortis causam quolibet modo praebuit: sed lege Aquilia is demum teneri visus est, qui adhibita vi et quasi manu causam mortis praebuisset, tracta videlicet interpretatione vocis a caedendo et a caede.*

D. 9,2,7,1 (Ulpianus libro octavo decimo ad edictum):
*occisum autem accipere debemus, sive gladio sive etiam fuste vel alio telo vel manibus (si forte strangulavit eum) vel calce petiti vel capite vel qualitier qualiter.*

Although Julian’s statement about the etymological origin of *occidere* is ir-

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relevant for the case he discusses (A has wounded a slave so that he will die; subsequently the slave is killed by B), it can nevertheless be taken to be original23. Caedere, meaning to make fall or to knock down, leads to what is the narrowest meaning of occidere one can imagine: quasi manu occidere24.

The second text cited above then already contains an extension: To kick and to butt (calce petiti vel capite) are still means of killing the body, but killing somebody with a sword or other weapon involves an instrument, so that the victim does not have to be touched any more. The direct *actio legis Aquilae* thus is applicable as long as there is a physical contact between the assailant and the victim, whether this contact is a direct one or a contact by means of any instrument connecting the parties at the time of the killing. An example for what might have been the next step in the interpretation of occidere is given in

D. 9,2,7,2 (Ulpianus *libro octavo decimo ad edictum*):

sed si quis plus iusto oneratus deecerit onus et servum occiderit, Aquilia locum habet: fuit enim in ipsius arbitrio ita se non onerare. nam et si lapsus aliquid servum alienum onere presserit, Pegasus ait lege Aquilia eum teneri ita demum, si vel plus iusto se oneravit vel neglegentius per lubricum transierit.

In the first part of this text Ulpian decides that occidere also applies to a case, where somebody throws down his burden and thereby kills a slave. So here the instrument used for is not in connection with the killing person’s body at the time of the killing any more. Another example for this extension is the case, which immediately precedes the dog’s case: Ulp. D. 9,2,11,4. Here several people throw down a beam which kills a slave. According to Ulpian the *vetere* already held that all those persons are liable under the *lex Aquilia*.

We have not so far elaborated at which time it was first recognised that occidere also covered cases, in which the instrument used for killing had left the person’s hands or body before the killing. The answer to this question, however, is crucial for the interpretation of the dog’s case. If this extension was made for the first time after Proculus, then Proculus must have thought that the dog – being the instrument used for killing – had to be held, if the *lex Aquilia* was to be applicable. Consequently Albanese would be right in suggesting an interpolation of D. 9,2,11,5. The reference to the *vetere* in D. 9,2,11,4 suggests that this step was taken quite early. Two other texts support this as well:

D. 9,2,27,23 (Ulpianus *libro octavo decimo ad edictum*):

et si mulum plus iusto oneraverit et aliquid membris ruperit, Aquilae locum fore.

Here Brutus decides that the *lex Aquilia* is applicable, where a mule has been overburdened. It should not matter that the case is one of *rumpere*, since Alfenus seems to go even further in D. 9,2,52,25: Two loaded carts were dragged up the Capitoline hill by mules. The mule-drivers were assisting by pushing at the rear

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24. Whether or not the etymological origin of occidere is the reason for the jurists’ narrow interpretation of it, is irrelevant for this examination.
25. For literature see MacCormack, *Aquilian Studies (supra, n. 3)*, p. 1 (14 fn. 21); Nörr, *Causa mortis (supra, n. 9)*, p. 142 fn. 14.
of the first cart but then stepped aside, so that the mules could not hold the carts any more. The carts subsequently ran over a slave and killed him. Alfenus gave a direct action against the mule-drivers, if they had stopped assisting the mules of their own accord. As MacCormack and Nörr point out, Alfenus comes to his decision by comparing the situation with that of an escaping ass, which causes damage, on the one hand and that of a missile thrown at another person on the other hand. According to Alfenus in all these situations there is direct liability under the lex Aquilia.

Having looked at these cases, one should think that by Proculus' time it was quite clear, that occidere also covered cases, where the instrument used for killing was moved in direction of the victim without having a direct corporeal connection with the killing person. A decision of Proculus himself, however, creates difficulties:

D. 9,2,7,3 (Ulpianus libro octavo decimo ad edictum):
proinde si quis altenius impulsu damnum dederit, Proculus scribit neque eum qui impulsit teneri, quia non occidit, neque eum qui impulsus est, quia damnum in iuria non dedit: secundum quod in factum actio erit danda in eum qui impulit.

On the face of it this decision seems to contradict Alfenus' decision (including the two analogy-examples) as well as Brutus' decision. The person being pushed should be regarded as an instrument just like the missile being thrown, the carts, which get out of control, or the burden, which is put on the mule. If Proculus really did not agree with Alfenus and Brutus, then he must have also thought that the dog had to be held in the dog's case. MacCormack however suggests three ways to reconcile Proculus' decision in D. 9,2,7,3 with the one in the dog's case as it stands:

First of all he says – assuming that the dog's case is one of rumpere – it may be possible that Proculus was more strict in determining the meaning of occidere than in determining that of rumpere. As MacCormack himself points out, it is not easy to see why this should have been the case. Additionally one has to remark that Proculus would then have agreed with Brutus' decision but disagreed with Alfenus' decisions, since the latter ones concern occidere.

The second possibility suggested by MacCormack is the difference in the nature of the object which is used as the instrument for killing. Following this explanation Proculus would have given a direct action only, if the object did not act like an inanimate one. This means he would have disagreed with Brutus' and Alfenus' decisions, since in both these cases the instrument does act like an inanimate one. Furthermore one could hardly understand, why Proculus should have decided in this way, instead of giving a direct action where the killing was more direct, that is where the object acted like an inanimate one.

Thirdly MacCormack suggests that the element of fault may have been absent in D. 9,2,7,3, so that the push occurred more or less accidentally – as opposed to the dog's case, where the dog seems to have been irritated intention-

27. See below p. 272.
ally. This suggestion he supports with Pegasus' decision in D. 9,2,7,2\(^{29}\). Since Pegasus specifically points out the element of fault (if somebody slips and crushes a slave with his burden, he is only liable under the _lex Aquilia_ provided he loaded himself unduly or walked carelessly), MacCormack argues, he may have had Proculus' decision in mind with which he agreed, unless fault could be found. This explanation seems to be the most plausible one, since it reconciles all four decisions: On the one hand Proculus' decision in the dog's case as it stands would not contradict his decision in the case, where the person has been pushed, and on the other hand Proculus would have agreed with Brutus' and Alfenus' decisions.

So far it has been shown that by Proculus' time it was well established that _occidere_ covered cases, in which the instrument used for killing had no direct corporeal connection with the killing person at the moment of the killing any more. Therefore there was no reason for Proculus to think that the dog had to be held just because there might have been the necessity of some corporeal connection between the killing person and the victim at the time of the killing. Consequently so far there is no reason to assume an interpolation as Albanese\(^{30}\) does.

There is, however, another characteristic element in the dog's case. The instrument used for killing is not an inanimate object like a sword, a missile or a cart (although pulled by mules, the cart itself is inanimate), but there is a psychological element involved on the part of the instrument. This psychological element is what most scholars explain the difference between Julian's and Proculus' opinion with: Usually it is said, that Proculus regarded the dog as a kind of weapon like a sword or a beam\(^{31}\). Julian's opinion then is explained by reference to the own will of the dog. An animal could not be regarded as a simple tool, so that an additional corporeal act by the person to be held liable is necessary\(^{32}\).

One therefore has to examine, whether or not Proculus may have decided that the dog or the slave had to be held because of the necessity of an additional corporeal act, if a direct action was to be applicable. The earliest decision, which may be of help here, is from Ofilius:

D. 9,2,9,3 (Ulpius _libro octavo decimo ad edictum_):

si servum meum equitatem concitato equo efficeris in flumen praecipitari atque ideo homo perierit, in factum esse dandum actionem Ofilius scribit: quemandmodum si servus meus ab alio in insidias deductus, ab alio esset occisus.

Ofilius gives an _actio in factum_, where a horse has been frightened, so that the slave riding on it is thrown into a river and dies. Ofilius justifies his decision by reference to another case. A comparison of these two cases helps under-

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29. See above p. 269.
30. See above n. 16.
standing the decision. In both cases the instrument used for killing is not a merely technical weapon, but there is involved a psychological element on the part of the instrument: The horse acts, because it has been frightened, and the man, who finally kills the slave, shows his own intention to an even greater extent. On the one hand Ofilius appears to have recognised this. On the other hand a comparison of the temporarily second parts of each case leads to a remarkable result. One can assume, that Ofilius would have given a direct action against the man, who actually killed the slave (with his own hands), since this is the narrowest possible meaning of occidere. If one takes the analogy made by Ofilius seriously, one can therefore infer from it, that Ofilius would have given a direct action as well in the case Celsus deals with in D. 9,2,7,7 (a slave is thrown into a river)\textsuperscript{33}. What this shows is, that for Ofilius the reason to grant an actio in factum rather than a direct action can neither have been that the slave was thrown into the river, nor that there was no direct corporeal contact between the person frightening the horse and the slave\textsuperscript{34}, but that Ofilius’ reason must have been the psychological element involved in the horse’s reaction.

The contrary opinion as to the question, which action has to be given, can be seen in two other jurists’ decisions: Firstly there is the example Alfenus refers to in his decision on the carts, which were dragged up the Capitoline hill (D. 9,2,52,2): Although an ass is no inanimate object, Alfenus would have given a direct action against somebody, who failed to hold an ass he was driving, so that the ass caused damage\textsuperscript{35}. Secondly there is a decision of Fabius Mela:

D. 9,2,27,34 (Ulpianus libro octavo decimo ad edictum):

si quis servum conductum ad mulum regendum commendaverit ei mulum ille ad pollicem suum eum alligaverit de loro et mulus erupterit sic, ut et pollicem avelleret servo et se praecipitaret, Mela scribit, si pro perito imperitus locatus sit, ex conducto agendum cum domino ob mulum ruptum vel debilitatum, sed si icu aut terrore mulus turbatus sit, tum dominum eius, id est muli, et servi cum eo qui turbavit habiturum legis Aquiliae actionem ...

If someone frightened a mule, so that it injured the slave, who was holding it, and then dashed over a height, Mela gives a direct action both to the mule’s and the slave’s owner. So in these two cases a direct action is given, although the instrument used for killing is no inanimate object and (at least partly) acts of its own accord\textsuperscript{36}. That means that before Proculus gave his decision in the dog’s

\textsuperscript{33} Celsus’ decision in D. 9,2,7,7 is therefore not as original as von Lübtow, Untersuchungen (supra, n. 4), p. 145 claims.

\textsuperscript{34} Since it was already established that direct physical contact was not necessary for occidere, see above.

\textsuperscript{35} MacCormack, Aquilian Studies (supra, n. 3), p. 1 (13–14) and Nörr, Causa mortis (supra, n. 9), p. 143 maintain the view, that Alfenus put forward this example in order to lessen the remoteness between the case of the carts getting out of control and that of the missile thrown at another person. Yet it is the case of the carts getting out of control rather than that of the escaping ass, which one could designate as the mediatory case: the missile thrown at another person is inanimate, whereas the escaping ass acts of its own accord – the mules on the contrary combine elements of both cases in so far as they are not inanimate, but – being pulled back by the carts – cannot act of their own accord either.

\textsuperscript{36} Nörr, Causa mortis (supra, n. 9), p. 144 is of the opinion, that there is a specific corporeal connection in this situation and therefore suggests the comparability of this case
case there had already been controversy amongst the jurists, whether to give a
direct action or an *actio in factum* in cases like these. Proculus may have fol-
lowed one or the other opinion.

Therefore neither the fact that there was no corporeal connection between the
killing person and the slave, nor the fact that a dog does not act like an inani-
mate object must have necessarily been a reason for Proculus, not to give his
opinion in that way in which it appears from the dog’s case. Although his opinion
appears to be very liberal\(^{37}\), it is therefore not necessary to assume any
interpolation. The text as it stands may well represent Proculus’ opinion.

The following question now remains to be examined: Those jurists, who
shared Ofilius’ opinion, seem to be prepared to give an *actio in factum* rather
than a direct action, if there is some psychological element involved on the part
of the instrument used for killing. Which additional element do these jurists
require for a direct action to be applicable in these cases? As discussed above
one of the first steps in the extension of *occidere* was to recognise those cases as
constituting *occidere*, where the instrument used for killing is moving towards
the victim after it has left the killing person’s body. A very similar extension,
but this time the other way round, can be seen in

D. 9.2,7,7 (Ulpianus *libro octavo decimo ad edictum*):

*sed si quis de ponte aliquem praecipitavit, Celsus ait, sive ipso icu perierit aut
continuo submersus est aut lassatus vi fluminis victus perierit, lege Aquilia teneri,
quemadmodum si quis puerum saxo inlisisset.*

Ignoring the even greater extension being made in the middle part of this text
(sive ... aut ... aut ...), one has to notice that it is not the instrument, which is
moved towards the victim here, but the victim, who is moved towards the ob-
ject, which will kill him (the slave is thrown into the river, the boy is dashed
against the stone). Probably Ofilius would already have decided in this way\(^{38}\).

In early classical times there seems to appear another extension:

D. 9.2,9pr.,1 (Ulpianus *libro octavo decimo ad edictum*):

*item si obstetrix medicamentum dederit et inde mulier perierit, Labeo distinguit, ut,
si quidem suis manibus suppossit, videatur occidisse: sin vero dedit, ut sibi mulier
offert, in factum actionem dandam, quae sententia vera est: magis enim causam
mortis praestitit quam occidit.*

*si quis per vim vel suam medicamentum alciui infundit vel ore vel clystere vel si
eum unxit malo veneno, lege Aquilia eum teneri, quemadmodum obstetrix supponens
tenetur.*

with that of the dog (or the slave) being held in D. 9,2,11,5. On the one hand, however,
there always necessarily is a corporeal contact between the animal and the injured person
at the time of the injury, so that one cannot draw a conclusion from the fact that the slave
had tied the mule to his thumb by means of the halter. On the other hand according to Mela
there does not have to be any physical contact between the person held to be liable and the
mule either: a mere frightening of the mule is sufficient (*icu aut terrore*).

\(^{37}\) See Albanese, *Studi sulla legge Aquilia* (*supra*, n. 16), p. 1 (125–126); Mac

\(^{38}\) See above.
Labeo gives the direct action, if a midwife has administered a woman a drug with her own hands. The direct action however is refused on the ground that there is no occidere, if the woman has taken the drug herself. Fr. 9,1 shows, what exactly was required for administering in this sense: No force is necessary, so that it is still occidere, if the person, who is killed, agreed with being given the drug. The distinction drawn by Labeo has been criticised by von Lübtow, who remarks that distinctions are often suspicious. He further refers to Celsus’ later decision, where the actio directa is not given in the case of poisoning:

D. 9,2,7,6 (Ulpianus libro octavo decimo ad edictum):
Celsus autem multum interesse dicit, occiderit an moris causam praestiterit, ut qui mortis causam praestiterit, non Aquilia, sed in factum actione teneatur. unde adfert eum qui venenum pro medicamento dedit et ait causam mortis praestitisse, quemadmodum eum qui furenti gladium porrexit: nam nec hunc lege Aquilia teneri, sed in factum.

Celsus’ decision however only contradicts the distinction drawn by Labeo, if the case in fr. 7,6 is understood to mean, that the person was administered the poison and did not take it himself. But there is no reason to assume this. Labeo uses dare for the case, where the woman has taken the drug herself. Celsus also uses dare and gives no hint whatsoever that the poison has been administered. Furthermore, as Nörr and MacCormack point out, the analogy used by Celsus shows, that he must have thought of the person taking the poison himself. Whomsoever the slave in the analogy-example is murdering, he has only been given the sword, the last act of killing he is doing himself. Against von Lübtow one can therefore take Labeo’s distinction to be original.

It thus becomes crucial to determine, what exactly distinguishes the cases, in which the direct action is given, from the cases in the category, which the dog’s case belongs to. Usually reference is made to the fact that in the latter cases the object acts of its own accord. One can, however, find another criterion which distinguishes both categories. In all cases, where the lex Aquilia is held to be applicable, there is a corporeal act involved on the part of the liable person. This corporeal act physically connects the person to be held liable with the victim either at the time of the killing itself (like kicking, cutting, or administering a drug) or as part of a movement used for killing (throwing something at the victim or throwing the victim towards something). Such a corporeal element is not present in the dog’s case. If neither the dog nor the slave have been

39. As Lawson, Negligence (supra, n. 1), p. 88 note on s. 1 points out, suasum must be taken to mean persuading the patient to allow the drug to be administered directly, not persuading the person to take the drug himself. Lawson must be right, since suasum would otherwise contradict the decision given in Ulp. D. 9,2,9pr.
40. von Lübtow, Untersuchungen (supra, n. 4), p. 147.
42. MacCormack, Aquilian Studies (supra, n. 3), p. 22.
43. Either himself or another slave.
44. See above n. 28, 29.
touched\textsuperscript{46}, there is no physical connection between the killing person and the victim.

Both explanations, the acting of ones own accord and the physical connection, however, have difficulties, if one looks at two cases, where only an \textit{actio in factum} is given:

In the first case (Ulp.-Mela D. 9,2,27,34\textsuperscript{47}) the explanation, which suggests that the missing corporeal act is the distinguishing element, fails\textsuperscript{48}. Here Mela decided that the direct action lies against someone, who has excited a mule by frightening or striking (!) it, so that the mule injured the slave holding it and died itself. Mela obviously seems to share Proculus’ (D 9,2,11,5) and Alfenus’ (D. 9,2,52,2) opinion and is prepared to give the direct action even in those cases, which fall into the dog’s case’s category. But Ulpian’s opinion in fr. 27,34 must have been interpolated; he originally gave an \textit{actio in factum} against the man who excited the mule\textsuperscript{49}. If he also did this in the case, where the mule was hit, then absence of a corporeal act on the part of the killing person cannot have been the only reason for him not to give a direct action.

The second case is the one considered by Ulpian and Proculus in D. 9,2,7,3\textsuperscript{50}. As discussed above Proculus probably thought that there was no intention or other fault involved. Ulpian however gave an \textit{actio in factum}. MacCormack\textsuperscript{51} explains this by suggesting that Ulpian assumed the presence of fault, since he connected this decision with the preceding one, where Pegasus points to the necessity of fault, by using the words \textit{proinde si}. But then after what has been said so far, one would expect Ulpian to give a direct action: Since the person, who is pushed, acts like an inanimate object, no psychological element is involved. Furthermore there is a corporeal act of the pushing person involved, so that the case is perfectly comparable to that where javelins are thrown at another person (Ulp. D. 9,2,9,4) or where a slave is dashed against a stone (Ulp.-Cels. D. 9,2,7,7). So in this case both explanations suggested above fail.

But at the same time this case suggests a third explanation: Possibly it is not crucial, whether or not the object used for killing acts of its own accord or whether or not there is a psychological element involved. The reason why some jurists draw a distinction between the two categories of cases could rather be, that in the category, which the dog’s case belongs to, it is possible that the instrument may act of its own accord. Or in other words: Wherever the instrument used is an inanimate one, regardless of whether it acted of its own accord

\textsuperscript{46} In the sense of moving them towards each other or at least holding them where they are; a corporeal element which somehow assists the killing is necessary. Simple touching of the object used for killing is obviously not sufficient as Labeo’s distinction shows: Where the poison has only been given to the victim so that he can take it himself, the requirement is not fulfilled.

\textsuperscript{47} See above, p. 272.

\textsuperscript{48} Against Nör, \textit{Causa mortis} (supra, n. 9), p. 144 see above n. 36.


\textsuperscript{50} See above, p. 270.

\textsuperscript{51} MacCormack, \textit{Aquillian Studies} (supra, n. 3), p. 1 (17).
or not, some jurists only give an *actio in factum*. This explanation would not have difficulties with any of the cases. The person, who is being pushed, acts like an inanimate object although not being one and therefore theoretically being capable of acting of his own accord. A further argument for this explanation is, that when having a closer look at those cases, which involve animals, one can discover that they do not really act of their own accord: A frightened horse or mule instinctively starts running, not because it decides to do so.

Two more advantages can be found in this explanation: First of all, if it is the theoretical possibility to act of ones own accord, which distinguishes the two categories, rather than an actual acting of ones own accord, one can understand more easily why some jurists like Proculus, Alfenus and Mela regarded the animal as pure instrument. This is, what it actually represents in the cases. So the cases are even more borderline than thought so far, and this is why there was juristic controversy about them.

Secondly this explanation shows, what must have been required for a direct action to be applicable by those jurists, who were prepared to give an *actio in factum* only. The cases fall back into the scope of *occidere*, if one can exclude the theoretical possibility of the instrument acting of its own accord. In the dog’s case this cannot be done by holding the slave, but only by holding the dog.

That it is not enough for a direct action to be applicable, if the victim was held, can further be shown by a comparison of two cases, in which the instrument used for killing is capable of acting of its own accord: The first case is the example given by Ofilius in D. 9,2,9,3: A slave is led into an ambush, where he is killed by another person. Ofilius allows an *actio in factum* only. With nearly the same case Ulpian deals in

D. 9,2,11,1 (Ulpianus libro octavo decimo ad edictum):
si alius tenuit, alius interemit, is qui tenuit, quasi causam mortis praebuit, in factum actione tenetur.

Here the person to be held liable actually held the victim. Ulpian still only allows an *actio in factum*.

All this points to the solution, that in Julian’s opinion probably the dog had to be held.

IV. – Conclusion

As MacCormack\textsuperscript{52} has pointed out, ‘questions involving what a modern writer would describe as a causal point arose for a Roman jurist in the context of the operative words of the first and third chapters of the *lex*’. In order to find out about the Roman jurists’ reasons for giving a particular decision in our context one therefore has to concentrate on their notion of what constitutes *occidere* rather than on modern categories of causation. In this way it has on the one hand been shown, that it is possible to reconcile quite a few of the Roman jurists’

decisions on the scope of *occidere* without assuming a great extent of interpolation:

Obviously *occidere* covers all those cases, in which the killing is done *quasi manu* (Julian D. 9,2,51 pr.). In extension to this a direct action is granted as well, where something is thrown at the victim or vice versa, so that no direct corporeal connection is necessary. That a direct action is applicable, where the victim has been moved towards something, which then killed him, may not have been decided by Celsus for the first time as frequently assumed so far\(^\text{53}\), but may have already been Ofilius’ opinion\(^\text{46}\). The scope of *occidere* was then even further extended by Labeo to cases where no force had been used (D. 9,2,9,1). All these extensions seem to have been accepted by later jurists\(^\text{55}\). What they have in common is the requirement of some physical connection (killing *corpore*) between the killing person and the victim, either at the time of the killing (see Labeo’s distinction in the drug’s case) or in that way that the killing person threw an instrument at the victim (or the victim towards an instrument). But this corporeal element is not the reason for the controversy about the dog’s case and related cases, since a direct action is even then not given, if there has been physical violence against the animal, which killed the victim\(^\text{56}\). The reason for the dispute rather is, whether or not the fact that the object used for killing is not an inanimate one is relevant. If one takes this as distinguishing element rather than the fact that the animal actually acted of its own accord, no problems with Ulpian’s decision in D. 9,2,7,3 arise.

Alfenus, Mela and Proculus regarded these cases as falling under the scope of *occidere*, whereas Ofilius, Julian and Ulpian were prepared to give an *actio in factum* only\(^\text{57}\). D. 9,2,11,5 is a perfect example of this controversy and should therefore not be assumed to be interpolated.

Secondly it has been shown, that in Julian’s opinion probably the dog had to be held for an *actio legis Aquilae* to be applicable. Both Ulpian’s decision in D. 9,2,11,1 and the text itself suggest this solution. Only holding the object, which is used for killing, can compensate the theoretical possibility of the object acting of its own accord.

As further support one can finally cite the Basilica:


\(^{54}\) See D. 9,2,9,3 and above.

\(^{55}\) Except for Celsus’ decision in D. 9,2,7,7, which Gaius 3,219 might have disagreed with. His opinion depends on whether one reads *item si* or *sed si*; see Hausmaninger, Schadensersatzrecht (supra, n. 9), p. 15 fn. 6. Inst. Inst. 4,3,16, however, follows Celsus.

\(^{56}\) See Ulp.-Mela D. 9,2,27,34 and above n. 41.

\(^{57}\) It seems difficult, after this, to agree with A. Watson, The Law of Obligations in the later Roman Republic, Oxford 1965, p. 243, who states that the jurists of the later Republic gave a direct action where the injury was inflicted less directly than was required in classical law. The described development as well as the fact that Ulpian agrees with most older decisions in his commentary on *occidere* do not support this suggestion. Especially Watson’s example that Ulpian because of D. 9,2,7,3 would have given an *actio in factum* in Alf. D. 9,2,52,2 where the two carts got out of control is inaccurate in my opinion. The two cases have to be distinguished, since the two carts are inanimate whereas the pushed person is not. One could only apply Watson’s theory to the described controversy by saying that later classical jurists tended to give an *actio in factum* in the controversial cases only.
If somebody holding a dog caused it to bite someone, he is liable under the *lex Aquilia*. But if he irritated the dog not holding it, he is liable because an action for the double amount can be brought against him.