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, 1, 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 72.

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 consulta 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 of aut consulta 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 rumperetur 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 percutere expresses a particular blow directed at the mule, probably in anger 75, vehementius agere expresses

72 Cf. above, 33 f.
73 A different account of the development of the law is given by Barton, Daupe Noster, 15.
74 Filius, 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 Lücken, 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.
the continuous act of driving the mule off the land, an act which might involve some contact with the mule's body. The presence of contact shows that the force with which the mule was driven was deliberate applied. It is perfectly possible that in both sets of circumstances described by the clause Quintus Mucius allowed an actio legis Aquilinae.

Sometimes the suggestion is made that Quintus Mucius was concerned with a particular aspect of inuria, namely the extent to which a person might exercise an admitted right in such a way as to cause damage to another. A person has the right to drive another's cattle off his land, but may he exercise the right in any manner he pleases or is he liable if he 'exceeds' or 'abuses' it? There is, however, nothing in Mucius' presentation of the facts to warrant the inference that he attributed to the owner of the land a right to drive off strange cattle which he found on his land. Consequently one is not entitled to infer that Mucius examined the problem from the point of view of 'abuse' or 'excess' of right.

Another decision of Quintus Mucius turning upon the presence of fault is preserved by Paul:

D. 9, 2, 31 (Paul. 10 ad Sab.): Si putator ex arbore ramum cum defec- vel machinaris hominem praetereuntem occidit, ita tenetur, si is in publicum decedit nec ille proclamavit, ut casus evitari possit. sed Mucius etiam dixit si in privato idem accidisset, posse de culpa agi: culpam autem esse qui cum dilegente provideri potest, non esse prosum aut tum denuntiatum esset, cum periculum evitari non possit....

Paul puts a case in which a putator is engaged in lopping trees on public ground and holds that the putator is liable if a branch falls onto a passer by and no warning had been given. He then cites from Mucius a decision referable to a person lopping trees on his own land. The phrase sed Mucius etiam dixit permits the inference that Mucius had also treated the case of the putator on public ground. It may permit the further inference that he found it less easy to impose liability on the putator in the former case than in the latter. But there is nothing to show that he was examining the content of a right to lop trees on one's own land or the failure to shout to warn others of the failure to shout. He did lop on private land.

The form of Quintus Mucius to have stated generally a rule in respect of culpam in the same context as the failure to shout was likely because a person was not aware of the circumstances that he referred to when he lopped trees and to the necessity of taking a view that Quintus Mucius was careful to be expected.

Some decisions of Paul:

D. 9, 2, 29, 31, 27 (Paul. 10 ad Sab.): Si obriisset, aut si cui in injuriae Aelfernum cum nullum in domo est, si putator nullam in domo est, puto Aquilinae.

The facts and the relevant point was that in respect of the latter has occurred (captain) or due to an accident the action lies with the putator. If the collision was such that there is no direct evidence of fault has been no fault of the governor and governor and the putator. All one can say in the phrase of the governor and judge was considered the facts and the contrary of the decision and decide.

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76 Cf. Monro, Lex Aquilia, 61 n.; Thayer, Lex Aquilia, 106; Lawson, Negligence, 122 n.; Schipani, Responsabilità, 136 f. Watson, Obligations, 242 f suggests that Quintus allowed a direct action for an indirectly caused injury in circumstances where a later jurist would have allowed a decretal action in factum.

77 Cf. Pernice, Sachbeschädigungen, 43; Labbe, 2, 1, 2nd ed. (1895, reprinted 1963), 59 f.; Flinkaux, Mélanges Cornu, 1, 282; Watson, Obligations, 237 f.; Schipani, Responsabilità, 139 f.; von Lüftow, Untersuchungen, 168.

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78 On the text.

79 See Most, VISKU, Rida, 3, 120 (1965), 40 f.; Watson, Obligations, 237 f.; Daube Noster, 2, 2.
one's own land or the permissible limits of its exercise. Rather he was
affirming the point that circumstances disclosing fault (in particular
the failure to shout a warning) might be present even where the branch
was lopped on private ground.

The form of Quintus Mucius' reasoning is interesting. He appears
to have stated generally that a person was liable under the lex Aquilia
in respect of culpa. However he did not define culpa in this general
context as the failure to avoid behaviour which a reasonable man would
have foreseen is likely to cause damage. He took his general proposition
that a person was liable for culpa and asked, was culpa disclosed by
the circumstances of this particular case? In answering this question
he referred to what could have been foreseen by a reasonable man
and to the necessity of a warning. Thus the text is no evidence for the
view that Quintus Mucius defined culpa in terms of foreseeability or the
care to be expected of a bonus paterfamilias.

Some decisions of Alfenus appear to turn upon the scope of injuria.
One concerns liability arising from a collision between two ships:

D. 9, 2, 29, 4 (Ulp. 18 ad ed.): Si navis alteram contra se venientem
obbruisset, aut in gubernatorem aut in ducatorem actionem competere
damni
injuriae Alfenus ait: sed si tanta via navis facta sit quae temperari non potuit,
nullam in dominum dandum actionem: sin autem culpa nautarum id factum
sit, puto Aquiliiae sufficere.

The facts are expressed somewhat elliptically. Possibly Alfenus'
point was that if a ship runs into another coming towards it the owner
of the latter has an actio legis Aquiliae against either the gubernator
(captain) or ducator (helmsman) of the former. The implication is that
the action lies against whichever of these two persons was at fault.
If the collision happens through the force of a storm it is apparent
that there is no action against the gubernator or ducator since there
has been no fault. But why does Alfenus appear to forget about the
gubernator and ducator and say that no action lies against the dominus?
All one can suggest is that he assumed no Aquilian action lay against
the gubernator or ducator because there had been no fault, and then
considered the point whether any action lay against the dominus,
irrespective of fault. It is unlikely that the full terms of Alfenus'.decision and discussion have been preserved.

78 On the text see MACCORMACK, 'Aquilian Culp', in Daube Noster, 203.
79 See MOSCHETTI, SDHI, 30 (1964), 102 f and cf. MONBO, Lex Aquilia, 40 n.;
VISREY, RDA, 3 (1949), 445 f; DE SARLO, Alfenus Varo, 110 f; GUARINO, Labco, 11
(1965), 40 f; WATSON, Obligations, 239; SCHIPANI, Responsabilita, 186; MACCORMACK,
Daube Noster, 208.
A lengthy extract from Alfenus’ digesta preserved in D. 9, 2, 52 pr. contains several references to matters of fault.

D. 9, 2, 52 pr. (Alf. 2 dig.): Si ex plagis servus mortuos esse sed medici inscientia aut domini negligente accidisset, recte de iniuria esse eo agitur.

Where a slave dies from blows he has received Alfenus held an action lay under the first chapter on the ground that the slave has been killed. Injury, provided that death did not result from inscientia on the part of the doctor or negligence on the part of the owner. He does not state the legal consequences of medici inscientia or domini negligence. In the former case probably an action under chapter three lay against those who had struck the blows and an action under chapter one against the doctor. In the case of his own negligence the dominus was limited to the action for wounding. One may infer that Alfenus was prepared to treat inscientia in the exercise of a skill or negligence on the part of a person who ought to have done something as faults which in appropriate circumstances would ground Aquilian liability.

52.1: Tabernarius in semita noctu supra lapidem lucernam posuerat: quidam praeteriens eam sustulerat: tabernarius eum conscriberet lucem reposebat et fugientem retinebat: ille flagello, quod in manu habebat, in eum dolor inerat, verberare tabernarium coeperat, ut se mitteret: ex eo male rixa facta tabernarius e i, qui lucernam sustulerat, oculum effuderat: cum lebat, num damnum iniuria von videtur dedisse, quoniam prior flagello percussus esset. respondi, nisi data opera effodisset oculum, non videri damnum iniuria decisse, culpam enim penes eum qui prior flagello percussit, resident sed si ab eo non prior vapulasset, sed cum ei lucernam eripere vellet, rixam esset, tabernarii culpa factum videri.

In order to make sense of this case certain assumptions have to made. The taking of the lantern must have been a practical jest or ‘drunken prank’ or, at any rate, an act not regarded as constituting theft. Unless one makes this assumption one has the problem of the provision of the Twelve Tables on the fur nocturnus; nor is it all clear why a thief should ever have been allowed an Aquilian action in respect of an injury received in the course of a struggle with the victim. The phrase damnum iniuria, on which Alfenus was making an actio iniuriarum, is surely the person injured. It does not seem an Aquilian action to which he has south the action, but an actio utilitas in a way that the text does not indicate on the assumption.

The substance of the case of fault: could the act of a participant in the course of a quiet game, to which one had been at some time dolus apart, have been a quarrel or scuffle? Alfenus in the

52.4: Tabernarius perependere conscriberet: dominus se non videri respondi non poterat.

The facts that the participant in the game were players, perhaps indication that if one the liability attached to the a game may not have been clear while there was a non player. Alfenus, asks, and was treated as responsible.

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80 Cf. LAWSON, Negligence, 130 n.; VISKY, RIDA, 3 (1949), 450; WATSON Obligations, 245; SCHIAPANI, Responsabilita, 177 f.; VON LÜTROW, Untersuchungen, 64. A different interpretation is offered by PUGSLEY, Tift. 36 (1968), 382 f.

81 WATSON, Obligations, 239.
phrase damnnum injuria non videtur dedisse shows that the action upon which Alfenus was asked to advise was the actio legis Aquilae not the actio iniuriarum. Hence one has to make the further assumption that the person injured (quidam praeterniens) is a slave or a son in power. It does not seem conceivable that Alfenus could have allowed an Aquilian action to a free person sui iuris in respect of physical injuries which he has suffered. Nor is it likely that he was prepared to allow an actio utilis. The case may have been presented to Alfenus in such a way that the status of the passer by was unclear; he gave his opinion on the assumption that the "thief" was a slave or a son in power.

The substantial question considered by Alfenus was the incidence of fault: could it be said that where an injury was sustained in the course of a quarrel recovery of compensation was excluded because no one had been at fault? Alfenus did not take this view. He held that, dolus apart, the fault lay with the person who had struck the first blow. The decision is important because it seems to have settled the point that liability may be incurred for injuries inflicted in the course of a quarrel or scuffle. It may be compared with the decision given by Alfenus in the case of the ball game:

52.4: Cumpila complures luderent, quidam ex his servulum, cum pilam percipere conaretur, impulit, servus cecidit et crus fregit: quaerebatu, an dominus servuli lege Aquilia cum eo, cuinis impulsu ceciderat, agere potest. respondi non posse, cum casu magis quam culpa videretur factum.

The facts are not quite clear: was the servulus who was hurt a participant in the game or a spectator who had rushed among the players, perhaps to retrieve the ball? Certainly the decision has more point if one supposes the latter state of affairs. The rule that no liability attaches where one player injures another in the course of a game may have been settled prior to Alfenus. But it may not have been clear whether the position was the same where the person injured was a non player who had for some reason rushed among the players. Alfenus, asked to determine te matter, held that the injury was to be treated as received through casus rather than through culpa.

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52 Contra Huvelin, Mélanges Girard, 1 (1912), 565 f.; damnnum refers to economic loss.
53 Cf. Huvelin, id.
54 On the text see in general MacCormack, Daube Noster, 217.
55 Cf. MacCormack, Daube Noster, 215. Sometimes the decision is held to rest on the consent of the plaintiff or on an assumption of risk: Thayer, Lex Aquilia, 117; von Lüttow, Untersuchungen, 108 f and cf. Watson, Obligations, 245. The text does not suggest that Alfenus approached the problem from this point of view.
Mela is the earliest jurist cited in connection with what appears to have been a much discussed problem:

D. 9. 2. 11 pr (Ulp. 18 ad ed.): Item Mela scribit, si, cum pila quidam luderent, vehemensius quis pila percussa in tonsoris manus eam decerit et sic servi, quem tonsor habebat, guia sit praecisa adiecto cultello: in quocumque eorum culpa sit, eum lege Aquilia teneri. Proculus in tonsore esse culpam: et sane si ibi tondebat, ubi ex consuetudine ludebatur vel ubi transius frequens erat, est quod ei imputetur: quamvis nec illud male dicitur, si in loco periculoso sellam habenti tonsori se quis commiserit, ipsum de se quem debet.

A barber had set up his stand near the spot on which some people were playing at ball. One of the players hit the ball so hard that it struck the barber’s hand as he was shaving a slave and caused him to cut the slave’s throat. Who was liable?

Ulpian summarises Mela’s decision in the words: in quocumque eorum culpa sit, eum lege Aquilia teneri. Eorum refers to the person who hit the ball and the barber. These words seem to mean that either the ballplayer or the barber (but not both) might be liable. They suggest that Mela held the essential question to be one of culpa but was unable to determine whether culpa should be imputed to the ballplayer or to the barber. Nothing in Ulpian’s summary permits one to conclude that Mela was concerned primarily not with the question of fault but with the question of the form of action. He appears to have accepted that the circumstances fell within the scope of occidere, that is, that the connection between the act of the ballplayer or barber and the injury was not such as to exclude the actio legis Aquiliae.

The problem was re-examined by Proculus but very little of his decision has been preserved. Ulpian notes merely: Proculus in tonsore esse culpam. Brief though this reference to Proculus’ opinion is, one seems justified in inferring that Proculus resolved Mela’s dilemma by holding that the relevant fault lay with the barber. But there are two points of difficulty. It is not certain whether the reason advanced by Ulpian for the liability of the barber (et sane ... imputetur) was also the

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86 ROTONDI, Scritti giuridici, 2, 487 and ALBANESE, Annali Palermo, 21 (1950), 143 assume that Mela attributed fault and liability to one of the ball players. On the text in general cf. MACCORMACK, Daube Noster, 215.

87 SO LAWSON, Negligence, 89 n. 89 n; KUNKEL, ZSS, 49 (1929), 177 f.; BESELER, ZSS, 50 (1930), 30 f.; ALBANESE, Annali Palermo, 21 (1950), 153; VON LÜBTOW, Untersuchungen, 106 f.

88 Cf. WATSON, Obligations, 242 n. 4; SCHIPANI, Responsabilità, 331.
reason given by Proculus. Nor is it certain whether Proculus allowed
against the barber the actio legis Aquilieae or an actio in factum.
From the early Principate one has a series of decisions from Labeo
and Proculus on questions of fault. Labeo has two decisions on liability
arising out of collisions.

D. 9. 2. 29. 3 (Ulp. 18 ad ed.) : Item Labeo scribit, si cum vi ventorum navis
impulsa esset in funes anchorarum alterius et navis viis praecepsissent, si
nullo ali modo nisi praeceps funibus explicare se potuit, nullam actionem
dandum. Itemque Labeo et Proculus et circa retia piscatorum, in quae navis
piscatorum inciderat, aestimarent....

Where one ship is driven by the force of a storm into the anchor
rope of another and the crew cut the rope in order to free the ship no
action lies, provided the ship could not have been freed in any other
way. Labeo appears to be considering a slightly more complicated set
of facts than had been considered by Alfenus in D. 9, 2, 29, 4. The latter
was concerned with damage inflicted by one ship on another through
the collision. Labeo asks, is the issue of liability affected where the
damnum is caused by the deliberate act of one of the crews? He holds
that, as in the case of a simple collision brought about by a storm, there
is no liability if the act is a necessary consequence of the storm.

There has been some recent discussion of the text. Rodger\(^9\) argues
that the text is drawn from that section of Ulpian’s commentary on
the third chapter of the lex Aquilia in which the word inuria is
discussed and that he takes from Labeo an illustration of the defence
of necessity. He also argues that the words nullam actionem dandum
refer to the direct action under the lex and to the physical damage
caused to the cables, not to the loss caused by the floating away of the
ship. On the other hand Pugsley argues that Labeo was commenting not
on chapter three but on actiones in factum\(^9\). He appears to hold that
nullam actionem dandum refers to an actio in factum in respect of the
loss of the ship.

It seems to me probable that 29, 3 forms part of Ulpian’s com-
mentary on the word inuria in chapter three. Whether he was consi-
dering a defence of necessity is doubtful. Certainly Labeo may have been
doing no more than raising specific problems in connection with inuria;
there is no evidence that he grouped particular sets of circumstances
under the head of ‘necessity’. Ulpian may have given an abbreviated

\(^9\) LQR, 88 (1972), 402 ff.

\(^9\) SALJ, 89 (1972), 489.
report of Labeo’s decision. Labeo himself may have raised the possibility of bringing an actio legis Aquiliae or an actio in factum, and he may have distinguished between the damage to the anchor ropes and the loss of the ship. If Labeo did make these distinctions one cannot now recapture the details of his discussion. But one should not assume that he refused the actio legis Aquiliae in the case where the ship was lost.

D. 9, 2, 57 (Inv. 6 ex post. Lab.): Equum tibi commodavi: in eo tui cum equitarius et una complures equtarent, unus ex his irruit in equum teque dedit et eo caso crura equi fracta sunt. Labeo negat tene cum ullam actionem esse, sed si equitis culpa factum esset, cum equite: sane non cum equo domino agi posse, verum puto.

Here the collision is between two horse riders. One rider crashes into the other and breaks the legs of the latter’s horse. If the accident happened through the culpa of the person who crashed into the horse an action under the lex Aquilia lies against him. Labeo does not in this text explain what is to be understood by culpa. I have suggested elsewhere that in cases involving collisions he may have understood culpa as the failure to take such steps to avoid the collision as were in the power of the persons involved.

The same point of view underlies Proculus’ treatment of the collision of ships’ case.

D. 9, 2, 29, 2 (Ulp. 18 ad ed.): Si navis tua impacta in meam scapham damnum mihi dedit, quae sunt est, quae actio mihi competeret. et alius Proculus, si in potestate nautarum fuit, ne id accideret, et culpa eorum factum sit, lege Aquilia cum nautis agendum, quia parvi referunt navem immittendo aut serraclum ad navem ducendo av tua manu damnum dederis, quia omnibus his modis per te damno adflor: sed si fume rupto aut cum a nullo regeretur navis incurret, cum domino agendum non esse.

What determines the question of liability is the ability or power of the sailors to have avoided the collision. The existence of this ability coupled with the failure to exercise it constitutes culpa and imposes liability. The text is also interesting for another reason. There appears to have been some discussion of the type of action to be brought and of the person to be cast in the role of defendant.

One possible choice of action was between the actio legis Aquiliae and an actio in factum. A necessary condition for either of them was the fault on the part of the crew. But the concluding words of the text

91 Cf. also MacCormack, Daube Noster, 209.
(sed si ... agendum non esse) suggest that the possibility of an actio against the dominus, not based on fault, was also investigated. Proculus' decisions on these points appear to have been the same as the decisions of Alfenus. No action lies against the dominus where the collision has occurred without anyone's fault. Where there has been fault on the part of the crew the actio legis Aquiliae lies against them. Possibly Proculus specified (as Alfenus) the gubernator or ducator or used the general term nautae loosely, meaning to designate whichever of the crew should have been at fault. Proculus' reason for allowing the actio legis Aquiliae is given in the clause commencing quia parvi refert. Perhaps the argument had been put that the actio in factum was appropriate since the damage had been done by the ship not by the crew. Proculus rejected this approach and held that it made no difference whether the damnnum was brought about by the ship while under the control of the crew or by the hands of the crew.\(^\text{93}\)

Other, isolated examples of fault are to be found in decisions of Proculus.

D.9,2,27.11 (Ulp.18 ad ed.): Proculus ait, cum coloni servi villam exussissent, colonum vel ex locato vel lege Aquilia teneri, ita ut colonus possit servos noxne dedere, et si uno judicio res esset judicata, altero amplius non agendum. sed haec ita, si culpa colonus careret: ceterum si noxios servos habuit, damn eum in iuria teneri, cur tales habuit. idem servandum et circa inquilinorum insulae personas scribit: quae sententia habet rationem.

Ulpian ascribes to Proculus the rule that a dominus may be liable under the lex Aquilia on the ground of culpa where his slaves have burnt down a country house which their master has hired. The reason given for the presence of culpa is the possession of noxii servi. A dominus who has slaves of a consistently unreliable or untrustworthy disposition may be assumed to know their weakness. Hence there is personal fault on the part of the dominus if he continues to employ a noxius servus in circumstances where he is likely to cause damage.\(^\text{94}\)

D.9,2,29.1 (Ulp.18 ad ed.): Si protectum meum, quod supra domum tuam nullo iure habebam, reccidisess, posse me tecum damn iuria agere Proculus scribit: dehuisti enim mecum ius mihi non esse protectum habere agere: nec esse aequum damn um me pati reccissis a te meis tignis....

Where a person allowed his roof to project over his neighbour's house and the neighbour cut off the projection, Proculus held that an

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\(^{93}\) Cf. MacCormack, Daube Noster, 208.

\(^{94}\) See MacCormack, RIDA, 18 (1971), 536; Thomas, Labeo, 17 (1971), 18.
actio legis Aquiliae lay against the neighbour even though the plaintiff had no ius which permitted him to extend his roof. The proper course for the neighbour to pursue was to bring the actio negatoria to secure a declaration that no ius to have the projecting roof existed. Resort to self help in lieu of bringing the relevant action constituted fault.

It has been argued that at the time of the enactment of the lex Aquilia the requirement of injuria was understood to mean that a person was liable for damage attributable to his act unless he could show the existence of a ius permitting the infliction of damnun. Later the requirement was interpreted in a different fashion. A person was liable only if fault on his part could be shown. Is there any evidence for this supposed development to be gathered from the decisions which so far have been considered?

The two decisions of Quintus Mucius can be explained as resting upon the presence or absence of a ius. One might say that in the case of the mule Quintus examined the extent of a person's ius to drive off another's animal which had strayed onto his land, and that in the case of the putator he considered the extent of a person's ius to chop trees on his own land. Indeed both decisions might be treated as relating to a landholder's ius to perform activities on his own land. Although this is a possible way of looking at the texts one has to accept that it receives no explicit support from them. On the contrary what does appear from the wording of the decisions attributed to Quintus is a certain emphasis upon the notion of fault. The mule is driven off by blows or consulto vehementius; there is culpa on the part of the putator in that he failed to shout a warning before lopping the branch.

The facts considered in some of the decisions by Alfenus and Mela also suggest that the existence of a ius may have been held to be relevant. Alfenus examines liability for loss suffered in a collision of ships at sea, in a quarrel and in a ball game. In the first case he holds that there is liability unless the collision was brought about by a storm. Should one infer that if no storm had occurred Alfenus would have held the crew of one of the ships liable on the ground that they had no ius to collide with the other? It seems to me doubtful whether one should make this inference. One cannot infer from the fact that Alfenus mentions spec-

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95 Watson, Obligations, 236 implies that the change took place or was well under way in the late Republic. Cf. also Wesel, Statuslehre, 49; Schipani, Responsabilita, 83 f., 133, 152, 196; MacCormack, Daube Noster, 201, and, for a general discussion, Beinart, 'The Relationship of iniuria and culpa in the lex Aquilia', in St. Arangio Ruiz, 1 (1953), 279.
ically the occurrence of a storm that, in the absence of a storm, he would have held there to be liability even though no fault had been shown. The implication of his reasoning is that there is almost certainly fault where two ships collide unless the collision has been brought about by a storm.

Nor can one explain the decisions in the other cases as resting simply upon the presence or absence of a ius. Although it might have been argued that a person has a ius to hit another in self-defence, Alfenus has recourse to the notion of culpa and holds that the person who struck the first blow is the one at fault. In the case of the ball game it is difficult even to say that the individual players had a ius to inflict injuries on each other. Again Alfenus invokes the notion of culpa. Nor does Mela appear to have determined liability in the case of the ball players and the barber according to whether the players or the barber had a ius for the performance of their respective activities. The presentation of the facts includes a reference to an element of fault; the ball is struck vehementius.

I do not think that these Republican decisions evidence an interpretation of iniuria as non iure. Like the later decisions from Labeo and Proculus they assume that there is iniuria only if there is fault. A different conclusion may be drawn from a series of texts which discuss the liability of a person who, in order to prevent the spread of a fire, pulls down his neighbour's house. The opinion of two Republican jurists, Aquilius Gallus and Servius are preserved in:

D. 43, 24, 7, 4 (Ulp. 71 ad ed.): Est et alia exceptio, de qua Celsus (? Gallus) dubitat an sit obicenda: ut puta si incidendi arcendi causa vicini aedes interciderit et quod vi aut clam mecum agatur aut damni iniuria. Gallus enim dubitat, an excipi oportet: 'quod incidendi defendendi causa factum non sit? Servius autem ait, si id magistratus fecisset, dandam esse, privato non esse idem concedendum: si tamen quid vi aut clam factum sit neque ignis usque eo pervenisset, simpli litem aemendam: si pervenisset, absolvit eum oportere. idem ait esse, si damni iniuria actum fuerit, quoniam nullam iniuriam aut damnum dare videtur aequae peritus aedibus. quod si nullo incidio id feceris, deinde postea incidendum ortum fuerit, non idem erit dicendum, quia non ex post facto, sed ex praesenti statu, damnum factum sit necne aemulari oportere Labeo ait 56.

56 The suggestion in the Mommsen-Krüger edition of the Digest that Celsus is a scribal error for Gallus is probably correct; contra, however, LENEL, Palimpsestia iuris civilis, 1, 160 n. 1 and, it appears, SCHIPANI, Responsabilita, 155. On the text in general cf. VISKY, RIDA, 3 (1949), 478; WATSON, Obligations, 240 f.; The Law of Property in the Later Roman Republic (1968), 228; RÖHLE, SDHT, 81 (1965), 307 f., treating most of the text as a mixture of post-classical glosses; SCHIPANI, op. cit., 154 ff.
Gallus, considering possible defences to an actio under the edict, doubts whether the exceptio quod incendii defendendi quod vi aut clam would be available. It is not clear from the text whether Gallus was concerned only with defences to the edictal action or whether he intended his advice to apply equally to an Aquilian action. If he was concerned with the Aquilian action the implication of his decision is that the person who pulled down the house is liable under the lex even though there had been no fault on his part. The damnum is brought about inurius in the sense that no ius for its infliction can be shown.

Servius, a pupil of Gallus, perhaps differed from his master, or perhaps stated in the form of rules what had been regarded as doubtful by Gallus. In the first place he distinguished between an act of a magistrate and an act of a private individual. If the building was pulled down by a magistrate there was no liability under the edict or under the lex Aquilia. In the second place he distinguished between the case where the fire in fact reached the pulled down house and that in which it was extinguished before reaching the house. This distinction is relevant to the liability of the private individual. He is liable only if the fire does not reach the house. These rules are applicable to liability under the lex Aquilia as to liability under the edict.

An individual is not liable under the lex Aquilia where the fire reaches the pulled down house since, Servius states, there is no damnum and no inurit. The house would have been destroyed even if the individual had not pulled it down. The core of Servius’ reasoning seems to have been the absence of damnum in these particular circumstances. But where the house is not destroyed by the fire Servius, like Gallus, seems to have held that the defendant is liable since he is unable to rely upon a justifying ius. The significance of Servius’ distinction between the private individual and the magistrate is that the latter does act in virtue of a ius.

Labeo adds a proviso to Servius’ statement of the position. If the fire starts after the house been pulled down the individual will be liable under the lex Aquilia even though the fire reaches the house. The reason is that the existence of damnum depends upon the state of affairs obtaining at the time the house was pulled down. If at that time no fire was in existence, damnum must have occurred. Labeo’s opinion is unlikely to have been based upon the non-existence of a ius. If a person pulls down a house before the fire has started, fault is clearly to be attributed to him.

A distinguih

In the case of the person who destroyed the house, the damnum was described as ignis extinguis and as ignis extinguis in another place.

Ulpian, on the other hand, distinguished between the house of the person who pulled down and the house of the person who destroyed the house. Ulpian said that where the house was pulled down there was no damnum and no ius, whereas where the house was destroyed there was damnum and ius. Ulpian’s decision, however, is not inapplicable to the rule of Servius and his phrase has been used, at least possibly by Labeo.

The text does not state that it plain that Servius was aware who had pulled down his own house. The word “her” is a reference to his own house. The

310 ff.
A different approach to the problem was taken by Celsus:

D. 9, 2, 49, 1 (Ulp. 9 disp.): Quod dictur damnum iniuria datum Aquillia persequi, sic erit accipienda, ut videatur damnum iniuria datum quod cum damno iniuriam attulerit: nisi magna vi cogente fuerit factum, ut Celsus scribit circa eum, qui incendii arcendi gratia vicinas aedes intercidit: nam hic scribit cessare legis Aquilliae actionem: justo enim metu ducitur ne ad se ignis perveniret vicinas aedes intercidit: et sive pervenit ignis sive ante extinctus est, existimat legis Aquilliae actionem cessare.\(^7\)

Ulpian reports Celsus as holding that the person who pulls down the house is not liable, whether or not the fire reached it, where he had been actuated by a reasonable fear that the fire would reach his own premises. Not quite the same reasoning seems to be ascribed to Celsus in another text.

D. 47, 9, 3, 7 (Ulp. 56 ad ed.): Quod ait praetor de damno dato, ita demum locum habet si dolo damnum datum sit: nam si dolus malus absit, cessat edictum. quoadmodum ergo procedit, quod Labeo scribit, si defendendi mei causa vicini aedificium orto incendio dissipaverim, et meo nomine et familiae judicio in me dandum? cum enim defendendarum mearum aedium causa fecerim, utique dolo careo. puto igitur non esse verum quod Labeo scribit. an tamen lege Aquilia agi cum hoc possit? et non puto agendum: nec enim iniuria hoc fecit, qui se tueri voluit, cum alias non posset. et ita Celsus scribit.\(^8\)

Ulpian asks whether the person pulling down the house is liable under the lex Aquilia and suggests that there is no liability since there is no iniuria. He wished to protect his own property and no other course of action was open to him. This reasoning he attributes to Celsus. But it is possible that Ulpian cited Celsus as an authority for the decision that there was no liability and was not purporting to paraphrase his reasoning. The reason given may be Ulpian’s own which, quite possibly, he thought resembled or concurred with Celsus’ reason.

The more precise reason attributed to Celsus in D. 9, 2, 49, 1 makes it plain that he based his decision upon the absence of fault. A person who had reasonable grounds for thinking that a fire would reach his own house cannot be deemed to be at fault if he pulls down a neighbour’s house in order to check the spread of the fire. If Celsus excluded

liability where there was no fault, he probably held that the presence of fault was a necessary condition of liability.

One might conclude that the texts on the liability of a person who pulls down another's house in order to prevent the spread of a fire evidence a change in the interpretation of injuria. Gallus and Servius hold that there is liability unless there is a justifying ius, while Celsus treats the presence of fault as a condition of liability. If one accepts this conclusion one should be careful not to apply it in too general a fashion. The change in interpretation evidenced by these texts does not of itself prove that injuria at the time of the enactment of the lex was understood to mean that a person was liable for damnum unless he could rely upon a ius.

There is a further point that should be considered. In holding that the person who pulled down the neighbour's house was liable, Gallus and Servius may have treated the act of pulling down the house as itself constituting fault. They may not have based their decision upon the absence of a ius. What, on this view, changes in the later law is the content given to the notion of fault. Celsus would not have regarded the mere act of pulling down the house as a fault.

General assessment of the evidence provides little support for the view that injuria in the law of the early and middle republic was understood in the sense of non iure, and in the law of the late republic or early principate in the sense of dolus et culpa. It seems to me likely that from the time of the enactment of the lex injuria was understood by the jurists as expressing a requirement of fault. It is possible that in certain circumstances the jurists relied upon the presence of a ius as a reason for holding that liability was to be excluded. But it does not follow either that they paid no attention to the notion of fault or that they did not construe injuria generally as requiring the presence of fault. Whether or not the early interpreters of the lex used the language of dolus and culpa is another matter. The later jurists may have had a broader, more flexible notion of fault (expressed particularly in the word culpa) than the earlier.

CONCURRENCE OF ACTIONS

Two situations may be distinguished. A who has no contractual relationship with B damages an object belonging to B. The appropriate remedy is the actio legis Aquiliae. A holds an object belonging to B under a contract of locatio conductio. If A damages the object it is by no means obvious that B's remedy is the actio legis Aquiliae. A would not have had the opportunity to damage the object but for his possession of it and hence cannot be held liable for it. The question is whether the presence of B's concurrence is necessary for the applicability of the locatio conductio contract.

When a person is servants and to do an act that is a sin or rude, it is an appropriate to wish to be paid and to which is a form of concurrence. If the concurrence of the servant does not allow the servant to be held responsible for the action. The reverse is true if the compensation is due to bring the servant to the point of being under the obligation of acting for the servant might succeed in recovering if B claims that the servant might not have concurred.

The idea that Aquilai application of the concept of concurrence is the product of choice between the legal theories so far seem to be excluded from the early period. A summary of the available material is not necessary, and proposed the following equations:

A has the object B is holding.

If A damages the object A is responsible for the damages. If A damages the object and B's concurrence is necessary for the applicability of the locatio conductio contract then B is responsible for the damages.

If A damages the object and B's concurrence is necessary for the applicability of the locatio conductio contract but B's concurrence is not necessary then A is responsible for the damages.
of it and he derives his possession from the contract with B. It follows that the appropriate remedy is the action arising from the contract of locatio conductio.

Where the damage to the object hired fell within the urere, frangere or rumpere of the third chapter of the lex Aquilia, the locator might wish to bring the Aquilian action rather than the contractual. The former gave him a chance of recovering more than his actual loss. If the conductor unsuccessfully defended the action he was condemned to pay double. The jurists may, therefore, have been under pressure to allow the locator a choice between the contractual and the delictual action. If he brought the contractual action first and recovered compensation for the damage, he would not have been allowed subsequently to bring the Aquilian action even though he might have recovered more under this action. But if he had brought first the Aquilian action he might still have available the contractual, not so that he might again recover compensation for the damage to the object but so that he might raise other issues relevant to the contract.

The development of the rules on the concurrence of the actio legis Aquiliae and the actio locati was probably determined by these considerations. Even by the late Republic the rule that the locator had a choice between the actio legis Aquiliae and the actio locati does not seem to have been finally settled. Two decisions survive from this period. Both are reported by jurists of the late classical period in an abbreviated form which makes it difficult to be sure of the solutions proposed by the Republican jurists.

A decision of Alfenus is reported by Paul:

D. 19, 2, 30, 2 (Alf. 3 dig. a Paulo ep.): Qui mutas ad certum pondus oneris locaret, cum malore onere conductor eas rupisset, consulebat de actione respondit vel lege Aquilia vel ex locato recte eum agere, sed lege Aquilia tantum cum eo agi posse, qui tum mulas agitasset, ex locato, etiam si alius eas rupisset, cum conductore recte agi.

If one takes the text down to the phrase eum agere the import of Alfenus' decision seems clear. The locator may bring against the conductor either the actio legis Aquiliae or the actio ex locato. From the presence of the word recte one may infer that Alfenus was attempting to settle a point regarded as doubtful. However the final part of the text poses a difficulty. If it is taken as an explanation or amplification

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99 Cf. the remarks of THOMAS, Irish Jurist, 7 (1972), 151.
of the phrase vel lege Aquilia vel ex locato one has to conclude that Alfenus restricted the locator to the contractual action against the conductor and allowed him to bring the Aquilian action only against a person not a party to the contract.\textsuperscript{100}

If the second part of the text is construed independently of the first, Alfenus is shown to be contrasting two situations. In one the mules are overloaded by the conductor; here the locator has the choice between the contractual and the delictual action. In the other the mules are overloaded by their driver, a person who is not a party to the contract; here the contractual action may still be maintained against the conductor, but the delictual action alone lies against the driver. The mysterious alias of the text is often taken to be an employee of the conductor.\textsuperscript{101} But there does not seem to be any reason for imposing such a restriction upon alias. Alfenus may have been referring to anyone into whose hands the mules happened to fall. No doubt in most cases the person driving the mules would be an employee of the conductor.

I think that on the preferable construction the text examines first the situation where the mules are overloaded by the conductor and second the situation where they are overloaded by a person not a party to the contract. If the former situation occurs the locator might recover compensation for the damage under either the contractual or the delictual action but not under both. But if the latter situation occurs, could he recover once from the conductor under the actio ex locato and again from the driver under the actio legis Aquiliane\textsuperscript{2}? It seems that in this case the contractual and the delictual actions have different purposes. By the actio legis Aquiliane the locator may recover from the driver compensation for the damage to the object. By the actio ex locato he may recover from the conductor compensation for other loss, if any, arising from a breach of contract. The important point, probably, was that if the driver should prove to be a man with no assets, the locator could include compensation for the damage to the object in his claim against the conductor asserted by the actio ex locato.

\textsuperscript{100} So Pernice, Labeo, 2, 2, 1 (1960, reprinted 1963), 63 f.

\textsuperscript{101} Schulpz, Grünk. Z. 38 (1911), 39; Haymann, ZSS, 40 (1919) 251; Vazny, Annali Palermo, 12 (1929), 130; De Sarlo, Alfeno Varo, 103; Canna, Ricerche sulla responsabilità contrattuale nel diritto romano (1966), 79; Alzon, Problèmes relatifs à la location des entrepôts en droit romain (1965), n. 691; Von Lüttow, Untersuchungen, 72. Watson, Obligations, 237 is rightly more cautious. Suggestions that the text has been heavily interpolated do not convince me.
Ulpian reports a case from Mela in terms which suggest that Mela took a more conservative approach than Alfenus:

D. 9, 2, 27, 34 (Ulp. 18 ad cd.): Sì quis servum conductum ad mulum regendum commendaverit et mulum ille ad pollicem suum eum alligaverit de loro et mulus erupserit sì, ut et pollicem avelleret servo et se praeciptaret, Mela scribit, si pro perito imperitus locatus sit, ex conducto agendum cum domino ob mulum ruptum vel debilitatum, sed si letu aut terrore mulus turbatus sit, tum dominum elus, id est null, et servì cum eo qui turbavit habiturum legis Aquiliane actionem, nihil autem videtur et eo casu quo ex locato actio est competere etiam Aquiliae.

A hires from B a slave to drive a mule. The slave ties the mule to his thumb by means of the halter. Something causes the mule to bolt. In doing so it tears away the slave's thumb and throws itself over a height. Mela allows A the actio ex conducto to recover compensation for the injury to the mule (or for its loss) provided B had been in breach of contract in hiring out an unskilled person as a muledriver. Where the bolting of the mule is attributable not to the muledriver's lack of skill but to the act of a third person, Mela allows both A and B an actio legis Aquiliane against the latter. Ulpian's version of Mela's decision makes it plain that he understood Mela to have allowed only the contractual action where the injury to, or loss of, the mule was caused by the slave's lack of skill. Ulpian, indeed, may have misunderstood Mela's decision. Yet, so far as one can go by the text, it seems that Mela denied the concurrence of the contractual and the delictual actions.

Another text which puts a situation in which either a contractual or a delictual action might be appropriate and yet only one is mentioned is:

D. 9, 2, 27, 35 (Ulp. 12 ad cd.): Item si tectori locaveris laccion vino plenum curandum et ille eum pertuderit, ut vinum sit effusum, Labeo scribit in faetum agendum.

A plasterer, employed to repair a cistern full of wine, makes a hole in the cistern with the result that the wine escapes. Labeo does not consider the remedy for the damage to the cistern. Compensation could certainly be recovered under the actio locati; probably as an alternative Labeo would have allowed the actio legis Aquiliane. The more important question was the recovery of compensation for the loss of the wine.

102 Cf. PERNICE, Labeo, 2, 2, 1, 64.
103 Cf. von LUFTOW, Untersuchungen, 154 suggesting that Mela allowed the actio legis Aquiliane noctialis.
Here there may have been a difficulty. The plasterer was employed to repair the cistern. Could compensation for the wine be recovered under an action based upon breach of contract? Labeo may have doubted whether the actio locati embraced both the damage to the cistern and the loss of the wine. One ought not to infer from his failure to mention the actio locati that he denied in principle the concurrence of a contractual and a delictual action.

Other texts disclose situations in which the particular circumstances render inappropriate either the contractual or the delictual action. Ulpian in the Collatio reports the views of Sabinus and Proculus on a case in which the slaves of an inquilinus have burnt down the insula:

12.7.9: Sed si qui servi inquilini insulam exussierint, libro X Urseis refert Sabinum respondisse lege Aquilia servorum nomine dominum noxii iudicio conveniendum: ex locato autem dominum teneri negat. Proculus autem respondit, cum coloni servi villam exussierint, colonum vel ex locato vel lege Aquilia teneri, ita ut colonos servos possit noxae dedere, et si unum iudicio res esset iudicata, altero amplius non agendum.

Sabinus, as reported by Urseius Ferox, held that the actio legis Aquilae noxialis but not the actio ex locato might be maintained by the dominus against the inquilinus. The situation seems to have been one in which no personal fault could be imputed to the inquilinus; this is to be inferred from the fact that the noxal action is allowed. Proculus giving a responsum in a similar, though not identical, case held that the dominus might maintain either the actio ex locato or the actio legis Aquilae against a colonus whose slaves had burnt down the villa. He was prepared to assign a noxal effect to the contractual as to the delictual action.

The text does not permit a conclusion as to Sabinus' general treatment of the concurrence of the contractual and the delictual actions. On the particular facts of the case he held the contractual action to be inappropriate. His reasoning can only be conjectured. He may have considered that the act of the slaves in burning down the insula did not amount to a breach of contract on the part of the inquilinus. Or he may not have been prepared to attribute noxal effect to a contractual fault.

When the inquilinus possessed slaves these would, presumably, act for him. The opinion of Sabinus is not to infer from his failure to mention the actio locatil in his decision in this case.

With regard to the decision in the Collatio there is no need to consider the illegli of obedience, to obey praecipe or praetorium.

The basic position is that a fault of the inquilinus will compensate the dominus for any loss falling on him, and that no personal fault of the inquilinus will have allowed an actio ex locato? This is the case in form 2. Would the resulting actio legisAquilae be based upon the fault of the inquilinus or upon that of the colonus?

The actio legis Aquilae is exhibited in a different form as the forward-looking actio legis Aquilae considered in the Responsum of Proculus. Proculus operated in the same manner as Aquilae, but may have used the delictual action instead.

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104 Cf. on the text ALBANESE, Annali Palermo, 21 (1950), 68; von LÜBTOW, Untersuchungen, 114. LONGO, Ricerche romanistiche, 717 replaces in factum agendum with actionem locati dandum.


106 Cf. THOMAS, id. suggesting that the difference in the factual situations may account for the difference in the solutions proposed.
to a contractual action and refused the action on the ground that it was unfair to force the inquilinus to pay full monetary compensation. Where the colonus or inquilinus is personally at fault in that he possessed noxii servi, Proculus allowed the actio legis Aquiliae. He would, presumably, have allowed the actio ex locato as an alternative. The opinion of Sabinus on this point has not been preserved. One cannot infer from his disagreement with Proculus in the case where the inquilinus or colonus was not at fault that he would have expressed disagreement in the case where fault was present.

With the decisions of Sabinus and Proculus may be compared a decision of Neratius reported by Ulpian:

D. 9, 2, 27, 9 (Ulp. 18 ad ed.): Si fornacarius servus coloni ad fornacem obdormisset et villa fuerit exusta, Neratius scribit ex locato conventum praestare debere, si neglectus in eligendis ministeris fuit.

The actio ex locato allowed by Neratius is based upon the personal fault of the colonus and must be taken as lying purely for financial compensation. Possibly Neratius would have followed Proculus in allowing the noxal actio ex locato where the slaves were not noxii and no personal fault could be attributed to the colonus. Would Neratius have allowed the actio legis Aquiliae as an alternative to the actio ex locato? The fact that the slaves had not committed an act which resulted in the burning down of the house coupled with the availability of the contractual action may have led Neratius to deny the applicability not merely of an actio legis Aquiliae but also of an actio in factum.

The decisions from the early Principate so far examined have each exhibited some special feature which precluded a ruling on the straightforward issue whether the contractual and the delictual actions might lie concurrently. This issue does, however, seem to underlie a decision of Proculus on the liability of a doctor. He holds that a medicus who operates unskilfully upon a slave is liable either under the actio legis Aquiliae or under the actio ex locato. Unfortunately one cannot determine whether Proculus’ view was shared by his contemporaries,

108 His opinion is reported by Ulpian, D. 9, 2, 27, 11, set out above.
109 See MacCormack, RIDA, 18 (1971), 539 and the literature there cited at notes 37, 38. Of particular relevance are the remarks of Kunkel, ZSH, 45 (1925), 330 f, though his interpretation of the text differs from that presented here. Cf. also Schipani, Responsabilità, 452 f.
110 Reported by Ulpian, D. 9, 2, 7, 8 on which cf. Visky, Iura, 10 (1959), 39 f.
or whether some at least would have maintained that the appropriate remedy was the actio ex locato, not the actio legis Aquiliae. Consequently one is unable to be sure whether the opinion denying concurrence represented in the decision from Mela was still held in the first century A.D.

From Iulian is preserved an interesting discussion of the remedies available to the father of a free apprentice who receives an injury from his master inflicted in the course of instruction.

D. 9, 2, 5, 3 (Ulp. 18 ed.): Si magister in disciplina vulneraverit servum vel occiderit, an Aquilia teneatur, quasi damnum inuria dederit? et Iulianus scribit Aquilia teneri eum qui elusceraverat discipulum in disciplina: multo magis igitur in occiso idem erit dicendum. proponitur autem apud eum species tallis: sutor, inquit, puero discenti ingenio filio famillias, parum bene facienti quod demonstraverit, forma calcem cervicem percussit, ut oculus puero perfunderetur. dicit igitur Iulianus inuliarum quidem actionem non competere, quia non facienda inuliae causa percussit, sed monendi et docendi causa: an ex locato, dubitat, quia levis dumentaxat castigatio concessa est docenti: sed lege Aquilia posse agi non dubito.

In considering D. 9, 2, 5, 3 two problems arise: is the text an accurate version of what Ulpian wrote, even if somewhat cut down, and what can be gathered as to Iulian’s opinion on the availability of the actiones ex locato and legis Aquiliae? The investigation requires a comparison between D. 9, 2, 5, 3 and two other texts, D. 19, 2, 13, 4 and PSI 1449R.

D. 19, 2, 13, 4 (Ulp. 32 ed.): Item Iulianus libro octagesimo sexto digestorum scriptis, si sutor puero parum bene facienti forma calcei tam vehementer cervicem percussit, ut ei oculus effunderetur. ex locato esse actionem pati eius: quamvis enim magistris levis castigatio concessa sit, tamens nunc modum non tenuisse: sed et de Aquil an supra diximus. inuliarum autem actionem competere Iulianus negat, quia non inuliae facienda causa hoc fecerit, sed praecipiendi.

PSI 1449R: gi(.es actionem ex)
locato pa(tri eius Iulianus)
dicit, iniuriarum autem ne-
gat, quia no(n inuliae fa-
ciendae causa id (fecerit),
se praeci(piendi. Se-
d et de Aquil(an quid sen-)
tians allo (commentario tradi-
dimus.

Al three texts treat the same subject matter, that is, they all contain part of a passage from Digest 18 and 19, 32, 270 ff.

In 5.171; 172 Resp. the question of concurrence is raised.

270 ff. 1959.
contain a report by Ulpian of a case put by Iulian \(^{111}\). Yet \(9, 2, 5, 3\) forms part of Ulpian’s commentary on the lex Aquilia (Book 18 ad edictum) and \(19, 2, 13, 4\) and PSI 1449 part of his commentary on locatio conductio (Book 32 ad edictum). This fact is important and probably accounts for certain differences between \(9, 2, 5, 3\) and the other two texts.

A preliminary point is the significance, if any, of the difference between \(19, 2, 13, 4\) and PSI 1449, both from Ulpian’s commentary on locatio conductio. In PSI 1449 there is no mention of the reason for Iulian’s awarding of the actio ex locato, and the reference to the lex Aquilia follows rather than precedes the reference to the actio iniuriarum. Neither difference seems to me significant in the sense of warranting conclusions as to the genuineness of \(13, 4\). It is perfectly possible that the separate transmission of the passage or the transmission of the whole commentary led to some changes in the versions transmitted. Phrases or sections of the text may be rearranged; portions may be omitted or abbreviated. Changes of this type are more likely than the insertion of new material. Hence one need not be particularly surprised that the reference to the lex Aquilia precedes the reference to the actio iniuriarum in D. \(9, 2, 13, 4\) but follows it in PSI 144R. The version in PSI may have omitted Iulian’s reasoning in favour of the availability of the actio ex locato. A more plausible suggestion, perhaps, is that the reasoning was recorded in a portion of the text now missing \(^{112}\). If this suggestion is accepted one has another example of a difference in the order of the phrases which may occur when one passage is transmitted in two or more versions.

The differences between D. \(19, 2, 13, 4\) and D. \(9, 2, 5, 3\) are considerable. \(5, 3\) commences with the case of the slave apprentice and the master’s Aquilian liability; in \(13, 4\) only the case of the free apprentice is reported. Nor do the reports of this case coincide even in substance. In \(5, 3\) the presentation of the facts is followed by (i) Iulian’s denial of the actio iniuriarum on the ground that the injury was inflicted not faciendae iniuriae causa, but monendi et docendi causa, (ii) his doubt

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\(^{112}\) WOLFF, Iura, 10 (1959), 4.
whether the actio ex locato lies since levis castigatio is permitted to an instructor, and (iii) Ulpian's unhesitating affirmation that the actio legis Aquiliae lies. In 13, 4 the presentation of the facts is followed by (i) Iulian's awarding of the actio ex locato on the ground that the right of levis castigatio had been exceeded, (ii) Ulpian's statement that the lex Aquilia has been dealt with earlier, (iii) Iulian's denial of the actio iniuriae faciendae causa but praecipendi.

These differences are not, of course, to be explained as a consequence of the transmission of an original passage in several versions. They stem from the fact that Ulpian made separate summaries of the same passage in Book 86 of the Digesta of Iulian, one for use in his commentary on the lex Aquilia, the other for use in his commentary on locatio conductio. Since the summaries were intended for different purposes it is natural that their content should differ. Thus in his Aquilian commentary, Ulpian appropriately makes use of the case of the slave apprentice, in order to make the point that Aquilian liability may be attracted where a master injures his pupil in the course of correction. No doubt an action against the magister under the contract of locatio conductio would also have been possible. Perhaps the possibility was even mentioned by Iulian. However Ulpian was not interested in recording the contractual liability and hence says nothing of the slave case in his commentary on locatio conductio. On the other hand the question of liability under the contract of locatio conductio was more important where the apprentice was free since the existence of an Aquilian remedy was doubtful. Hence Ulpian uses this case both in his commentary on the lex Aquilia and on locatio conductio.

The difference in the accounts of the actio ex locato is less easy to explain. The account in 13, 4 is straightforward. Iulian is reported as allowing the action and his reason is given. But in 5, 3 not only is a doubt on the availability of the action attributed to Iulian but his reasoning is reported in an odd form. The phrase quia levis *dumtaxat* castigatio concessa est implies that in the case under consideration levis castigatio has been exceeded. It ought, therefore, to appear as a reason for allowing the actio ex locato rather than as a ground for doubt. Furthermore it appears odd that the more hesitant account of the actio ex locato should be introduced in the commentary on the lex Aquilia and not in that on locatio conductio.

A possible explanation may be advanced for the fact that Ulpian in his commentary on the lex Aquilia recorded Iulian's doubts on the availability of the actio ex locato but says nothing of them in his
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...commentary on locatio conductio. When dealing with the contract of locatio conductio Ulpian may have thought it sufficient to give the gist of Iulian's decision with a short statement of the reason. He may have thought Iulian's expression of doubt more relevant in the context of the lex Aquilia since he wished to contrast the doubtful position of the contractual action with the undoubted availability of the delictual. Dubitata an is balanced by non dubito.

There remains the problem of the reasoning employed in 5,3 to ground the doubt concerning the availability of the actio ex locato. The doubt appears to have consisted in the fact that some measure of castigatio was allowed under the contract. It was resolved by the decision that levis castigatio was permissible under the contract. The text as it stands has conflated the statement of the doubt and the finding of liability reached in the particular case, namely that liability attaches because only levis castigatio is permitted. The most obvious explanation is that the compilers have shortened the text, thereby presenting as the ground of the doubt the reason for the decision reached on the basis of the resolution of the doubt.

I do not think that any importance attaches to the fact that in 13,4 the reference to the actio injuriarum follows, and in 5,3 precedes, the reference to the actio legis Aquiliae. More interesting is the manner in which this latter action is introduced in the two texts. In 13,4 one simply has the words sed et de Aquilia supra diximus. Since the text is from Book 32 of Ulpian's commentary on the edict the words may naturally be taken as a reference to the discussion of the actio legis Aquiliae in 5,3 drawn from Book 18 of the commentary. As it stands 5,3 does not say very much about the lex Aquilia. There is no discussion, merely a statement that the actio legis Aquiliae lies. Again, as with the actio ex locato, one suspects that the compilers have abbreviated the discussion.

Comparison of the three texts permits one to conclude that Iulian discussed the availability of the actio ex locato, raised the question of the measure of castigatio permitted by the contract of locatio conductio and concluded that there was liability where levis castigatio had been exceeded. It also seems certain that Ulpian discussed the availability of the actio legis Aquiliae. What one cannot infer directly from the texts is whether Iulian discussed the Aquilian action. There are, however, two indirect indications which suggest an affirmative answer. The case of the free apprentice was taken by Ulpian from Book 86 of Iulian's digest. Since this was the book in which he treated of the lex Aquilia it seems likely that he said something about the possi-
bility of an Aquilian remedy. The other indication is less substantial but, perhaps, still helpful. Ulpian asserts that he does not doubt the availability of the actio legis Aquiliae. So bold a statement is odd without the accompaniment of a background describing the doubt which Ulpian repudiated. It seems likely that the compilers have removed the discussion leading up to the non dubito clause and left merely its conclusion. If one assumes the existence of such discussion in the original text there is at least the possibility that it contained observations of Julian as well as observations of Ulpian.

From these admittedly slight indications one may infer that Julian discussed the availability of the actio legis Aquiliae. There were three courses open to him. He might have affirmed that the Aquilian action itself was appropriate, or he might have favoured an actio utilis, or he might have rejected both remedies. Any of these courses may have been adopted without hesitation or may have been coupled with the expression of a doubt. One may perhaps conjecture that Julian suggested with some reservation the possibility of an actio legis Aquiliae. The conjecture receives tenuous support from Ulpian's decision; this may be conceived as a reply to a doubt raised by Julian. If Julian was prepared to concede that the actio legis Aquiliae might lie his reason may have been that a son in power could be approximated to a slave for the purpose of Aquilian liability. Of course the son could not be approximated to the slave in every respect. Damages for injury to the son required to be calculated in a different way from damages for injury to the slave. Ulpian dealt with the question of damages to be allowed for injury to the son (7, 2, 7 pr). Whether Julian said anything on the point cannot be determined. There is no indication that Julian refused the actio legis Aquiliae purely on the ground that the appropriate remedy was the actio ex locato.

Situations involving a possible concurrence of the actio legis Aquiliae and the actio ex locato seem to have caused the most difficulty. Probably they were the situations most likely to be encountered in practice. The only example of concurrence where the contractual action is not the actio ex locato is supplied by Julian:

D. 9, 2, 42 (Jul. 48 dig.): Qui tabulas testamenti depositas aut alii cuius reliet instrumentum in loco delevit ut legi non possit, depositi actione et ad exibendum tenetur,quia corruptam rem restituerit aut exhibuerit. legis quoque Aquiliae actio ex eadem causa competit: corrupisse enim tabulas recte dicitur et quis eas interleverit.

113 Cf. the discussions in the literature cited note 111.
114 Cf. Honsell, Quod interest in bonae-fidei-judicium (130).
In a case where the depositee of tabulae testamenti defaces them, Julian allows the depositor the actio depositi, the actio ad exhibendum and the actio legis Aquiliae. Under the actio depositi the value of the defaced tabulae may be recovered or, perhaps, the cost of preparing fresh tabulae. The actio depositi was probably the remedy normally contemplated by the depositor. But Julian considered the actio ad exhibendum might also be appropriate. The point seems to have been that the production of the illegible tabulae could not be deemed to be the production of the original tabulae deposited. The amount recoverable under the actio ad exhibendum may have been the value of the defaced tabulae rather than the cost of their replacement. Despite a possible difference in the compensation recoverable under the actiones depositi and ad exhibendum it does not seem likely that the depositee would have been permitted to recover under both 115.

Almost as an afterthought Julian adds that the actio legis Aquiliae is also competent. If recovery has already been made under the actio depositi or actio ad exhibendum one has to assume that further damages were not recoverable under the delictual action. The manner in which Julian refers to the actio legis Aquiliae suggests that the question of its availability had only recently been settled, perhaps by Julian himself 116.

The impression one obtains from the texts as a whole is that the Aquilian action was gradually made available in cases where the normal or primary remedy was an action for breach of contract. Probably the Aquilian action was first allowed as an alternative to the actio locati and subsequently allowed to lie concurrently with other contractual actions.

**DAMAGES**

Discussion of the assessment of compensation under chapters one and three has been conducted in terms of 'objective value' and 'subjective interest'. Sometimes it is maintained that the classical law knew a purely objective system of assessment under which compensation

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116 Cf. also Ulp. D. 10, 2, 16, 5 reporting a decision of Julian on the concurrence of the actio legis Aquiliae and the actio familiae creiscundae.
was restricted to the market value of the object damaged or destroyed. On the other hand it may be maintained that even in classical law compensation was assessed on the basis of the 'subjective interest' of the dominus. He was entitled to receive what he had actually lost by the defendant's act. Compromise views state that items of interest might be added to the market value but that such items were calculated in an objective not a subjective manner. It was not the 'interest' of the particular dominus that was taken into account, but the 'interest' which any dominus in the like circumstances would have had.

I think it is better to avoid both the terminology of 'objective' and 'subjective' and generalisations concerning the relationship of 'market value' and 'interest'. In considering the calculation of damages under chapter one the jurists were required to apply and interpret the words quanti id in eo anno plurimi fuit. Id refers to the slave or beast described in the previous section of the chapter. These words on their face do not state a standard by which the highest value of the object may be measured. The assumption commonly made that in the early law compensation is restricted to the highest price which the slave or animal considered merely as a commodity fetched in the market, receives no support from the words of the chapter. One cannot assume that the jurists even at the time of the enactment of the lex Aquilia applied inflexibly some particular standard for the assessment of compensation.

It is misleading to picture the development of the law as a progression from 'market value' to 'interest' whether one locates the final stage of the development in the classical or the post classical period. One well known difficulty with any theory which presents a sharply drawn contrast between 'market value' and 'interest' is the fact that certain types of loss may readily be classified as falling under either head. A slave is instituted heir but is killed before he has accepted the inheritance. The loss incurred by the dominus may be treated as the loss of a slave with a particularly high market value or as a loss compounded of the value of the slave and the value of the inheritance. The latter may be treated as a part of the dominus' 'interest' in the slave, an element separate from, and additional to, his value as a commodity.

Another difficulty, less well known, but nevertheless compelling is that there is nothing in the formulation of chapter one to have precluded the jurists from allowing items of loss not strictly related to the market value to be included in the compensation. Sometimes it is argued that the provision by the lex of a period of time within which the highest
value of the object is to be calculated is incompatible with any method of assessment except market value. How, it is asked, can one speak of the ‘highest interest’ to the owner within the previous year? This argument is founded upon the acceptance of ‘market value’ and ‘interest’ as expressing clearly defined, mutually opposed methods of assessment. If a progression from ‘market value’ to ‘interest’ is not accepted as dogma there seems no substance in the argument that a jurist in determining the highest value of an object within the previous year might not take into account factors other than the price which it would have fetched in the market.

No specific decision on the assessment of compensation survives from a jurist earlier than Labeo. Ulpian attributes to Labeo a decision usually regarded as astonishing in the degree to which it recognises the ‘interest’ of the dominus 117.


D. 9.2.23.4 (Ulp. 18 ad ed.): Sed et si servus, qui magnas fraudes in meis rationibus commiserat, fuerit occisus, de quo quaestionem habere destinaveram, ut fraudium participes eruerentur, rectissime Labeo scribit tanti aestimandum, quanti mea intererat fraudes servi per eum commissas detegi, non quanti noxa eius servi valeat.

The basic facts are clear. A slave who has dealt fraudulently with his master’s property is killed before the names of his accomplices have been elicited by torture. But Ulpian or the compilers have rendered Labeo’s decision and his reasoning in such a fashion that the content of neither is clear. In particular the phrases fraudes servi per eum commissas detegi and quanti noxa eius servi valeat are obscure. Ought the former to be amended to read ‘frauds of the slave’ or ‘frauds committed through the slave’? Does the latter refer to the known loss incurred through the activities of the slave or to his market value as a noxius servus?

Whether one supposes that Labeo wrote ‘frauds of the slave’ or ‘frauds committed through the slave’ is probably not of much significance. The point is that the slave’s fraudulent transactions were carried out in conjunction with other people and the dominus could not maintain actions against these until he had obtained evidence from the slave. Labeo seems to have allowed the dominus to include as a head of damages in his Aquilian action the amount lost through the fraud

117 Cf. Jolowicz, LQR, 38 (1922), 225 and n. 7; Gerke, SDHI, 23 (1956), 94f.; Below, Lucrum cessans, 36 f.
of the slave \textsuperscript{118}. If this is correct the phrase quanti noxa eius servi valeat must refer to the price which the noxius servus would have fetched in the market. No distinction can have been drawn by Labeo between the loss incurred by the acts of the slave himself (the known loss) and the loss incurred through the acts of the slave’s accomplices (the unknown loss).

Labeo’s decision may not have been shared by all jurists of his time. But there seems nothing inconceivable in the fact that he should have allowed the dominus to recover in the Aquilian action the sum of which he had been defrauded. Nor should one take the decision as reflecting any significant change in the method by which compensation under chapter one was assessed. Labeo, no less than the earlier jurists, may have taken as his starting point the notion of the ‘highest value of the slave within the preceding year’. In calculating the value he included the amount of which the dominus had been deprived by the slave’s fraud. Other jurists may not have included this amount. But there is unlikely to be anything novel in Labeo’s taking into account items of loss other than the market value of the slave \textsuperscript{119}.

A case put by several jurists is that in which a slave instituted heir has been killed. Ulpian reports a decision of Neratius that in these circumstances the value of the inheritance may be included in the damages (9, 2, 23 pr). Iulian held the same (9, 2, 5, 2, 1), specifying that the dominus might recover the highest price for which the slave could have been sold in the previous year, and that included in this price was the pretium hereditatis. However a contrary view was maintained by Sextus Pedius, a contemporary of Iulian:

\textit{D. 35, 2, 63 pr (Paul. 2 \textit{ad legem Iuliam et Papiam}): ... sed nec post mortem testatoris heredem institutum servum tanto pluris esse, quo pluris venire potest; Pedius scribit: est enim absurdum ipsum me heredem institutum non esse locupletiorem, ante quam adeam, si autem servus heres institutus sit, statim me locupletiorem effectum, cum multis causis accidere possit, ne insu nostro adeat.....}

Pedius refused to allow the pretium hereditatis to be included in the calculation of the highest price for which the slave in the previous year could be sold, as this would be conservative, since the value of the slave might decline from ‘infirmitas’. In the case of damages arising to claims due to damage to the slave is the compensation the slave was worth at the time of death of the dominus. If a money price is assessed throughout the year, the slave’s highest value before the death of the dominus.

From the property law (Paul. 2 \textit{ad legem Iuliam et Papiam}) to the lex funghi. And the property laws have expected the dominus to exclude all losses, such as damage to the slave, particular against the contrary.

Two hundred years later...
year could have been sold. His reason is not that he was following a conservative method of assessment based upon ‘market value’ as distinct from ‘interest’. Pedius was not adopting a standard for the assessment of damages different from that adopted by Iulian. He merely considered on the facts of the case that it was unjust to allow the dominus to include the value of the inheritance in the compensation, since, even if the slave had not been killed, he may not have gained the inheritance.

Pedius discusses a case in which the servus heres institutus is killed after the death of the testator but before he has entered upon the inheritance. Even in these circumstances he refuses to allow the dominus to claim the value of the inheritance. What is the position where the slave is instituted heir and is killed before the death of the testator? Pedius obviously would not countenance a claim by the dominus for the value of the inheritance. Neither Neratius nor Iulian states whether the slave was killed before or after the death of the testator. Possibly they both had in mind primarily the case in which the slave is killed after the death of the testator. But it seems conceivable that they would have put a monetary value upon the dominus’ chance of acquiring the inheritance through a slave who had been instituted heir and yet had been killed before the death of the testator and allowed him to include that in the highest price which the slave would have fetched within the preceding year.

From another version of the same passage in Pedius’ writings (Paul. 2 ad Pl. D. 9, 2, 33 pr) it appears that Pedius stated generally that pretia rerum non ex affectione nec utilitate singulorum, sed communiter fungi. At any rate Paul attributes the statement to him. Pedius may have expressed himself in some such way; yet it is difficult to know the content he gave to utilitas singulorum. He obviously intended to exclude from inclusion in the calculation of the highest price matters such as the value of the hereditas which other jurists were prepared to include. But one is not justified in concluding (and nor does it make particular sense to say) that Pedius adhered to a ‘market value’ in contrast to an ‘interest’ standard of assessment.

Two intricate cases are discussed by Iulian:

D. 9, 2, 23, 1 (Ulp. 18 ad ed.): Iulianus ait, si servus liber et heres esse insus occisus fuerit, neque substitutum neque legitimum actio legis Aquiliae hereditatis aestionem consecuturum, quae servo competere non potuit: quae sententia vera est. pretii legitimorum solummodo fieri aestionemem,

120 Cf. also the opening words of D. 35, 2, 63 pr.
quia hoc interesse solum substituti videretur: ego autem posto nec pretii famiae aetationem, quia, si heres esset, et liber esset.

2. Idem Julianus scribit, si institutus fuero sub condicione 'si Stichus manumiserit' et Stichus sit occidus post mortem testatoris, in aetationem etiam hereditatis pretium me conseceturum: propter occasiorem enim defect condicio: quod si vivo testatore occidus sit, hereditatis aetationem cessare, quia retorsum quanti plurimi fuit inspicitur.

In the case put in 23,1 the slave is killed in the lifetime of the testator. Julian held that neither the heres substitutus nor the heres legitimus may recover the value of the inheritance. His reason is given in the clause quae servo competere non potuit, and in the succeeding words: pretii igitur solummodo fieri aetationem, quia hoc interesse solum substituti videretur. Two related points are involved. The slave does not acquire the inheritance and hence its value cannot be included in the compensation. If this were the single reason advanced by Julian it would not be possible to see how he distinguished this case from the case in which a slave was instituted heir and killed after the death of the testator. But his reference to the ‘interest’ of the heres substitutus suggests that he amplified his initial reason with a further point. Not only did the slave not acquire the inheritance but it was in virtue of the slave’s death that the heres substitutus (or legitimus) acquired. The latter could not therefore be allowed to claim as compensation both the value of the slave and the value of the inheritance.

The clause quia hoc interesse solum substituti videretur does not justify the conclusion that Julian was applying a general standard of assessment based upon ‘interest’ rather than ‘market value’. His point was that the heres substitutus might not recover the value of the inheritance through the death of the slave. He expressed the point by stating that the ‘interest’ of the heres substitutus was limited to the pretium servi.

Ulpian affirms Julian’s decision that the value of the inheritance may be recovered but rejects his decision allowing recovery of the pretium servi. His reason for rejecting Julian’s decision is given in the clause quia si heres esset, et liber esset. Just as the institution of the slave as heir precludes the recovery of the value of the inheritance (because the heres substitutus or legitimus would not have acquired the inheritance but for the death of the slave), so the provision that he

should be present at the time of the testator’s death is not sufficient.

Neither does the notion of assessment based upon ‘interest’ of the testamentary heir offer Julian as a criterion for the decision.

In 23,2 the slave is killed after the testator’s death. The problem is one of assessment of the value of the slave on the basis of the notion of the slave’s ability to survive. Julian’s decision was what he considered to be in the best interest of the slave.

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121 If he had been killed after the testator the problem would not have arisen. The slave as heres necessarius acquires his freedom and the inheritance immediately upon the testator’s death.
should be free precludes recovery even of his price (because there is no action for the death of a free person under the lex Aquilia). 

Neither Iulian nor Ulpian can be shown to have applied a standard of assessment based upon the 'interest' of the dominus. Interpretations of the text which attribute to Iulian or Ulpian a decision based upon the notion of 'interest', and particularly those which use this notion as a criterion for interpolation appear to me to be misconceived.

In 23,2 Iulian puts a case in which a person is instituted heir subject to the condition that he manumit a particular slave. Where the slave is killed after the death of the testator but before the condition has been fulfilled the heir may recover the value of the inheritance. The words of the text are: in aetosationem etiam hereditatis pretium me consequeturum. A number of writers have seen a difficulty in the appearance of the word etiam. Since the slave was to be freed (if he had survived) it cannot be said that the dominus has lost his value. Hence what he should recover is the value of the inheritance less the value of the slave. Etiam therefore seems unnecessary and misleading.

The difficulty, I think, may be removed if one compares the decision in 23,2 with that in 23,1. Where a servus liber et heres esse iussus was killed Iulian allowed the heres substitutus to recover the price of the slave even though he would have been free if he had lived. In 23,2 the slave who was killed would have been free if he had lived and had been manumitted by the dominus. Despite the fact that the slave would be free only if manumitted the case is essentially the same as that considered in 23,1. The dominus would not be in a position to claim the inheritance unless he had manumitted the slave. Iulian is asked to decide whether the dominus is entitled to the value of the inheritance. On the facts put to him the slave would as certainly have become free if he had lived as in the case where he was ordered to be free and heir. Iulian must therefore have held that the dominus might claim the value of the slave. But he went further and held that in this case (where the

122 Cf. von Tühr, Zur Schätzung des Schadens in der Lex Aquilia (1892), 12 n. 7. Different explanations are given by Beseler, ZSS, 50 (1930), 27 and Rodger, 'Damages for the Loss of an Inheritance', in Daube Noster, 289 f.

123 Cf. Kaser, Quanti ea res est (1935), 180 f; Gerke, SDHI, 23 (1956), 66 f; Below, Lucrum cessans, 25 f; Rodger, Daube Noster, 289 f.

124 Beseler, Beiträge, 4 (1913), 124 f; Kaser, Quanti, 172; Schindler, ZSS, 74 (1957), 230. Cf. also Buckland, Yale Law Journal, 33 (1924), 363; Thayer, Lex Aquilia, 80; Medicus, Id quod interest, 240 n. 33; Below, Lucrum cessans, 20; von Lößow, Untersuchungen, 123.
dominus had not benefited through the slave’s death) he might also (etiam) claim the inheritance.

Iulian contrasts the case in which the slave is killed after the death of the testator with the case in which he is killed during the testator’s lifetime. In this event the dominus may not recover the value of the inheritance. The reason given in the text is that he recovers the highest value of the slave within the previous year. At no time within the year could the value of the inheritance be treated as an element in the value of the slave. I have argued elsewhere that the death of the slave during the testator’s lifetime rendered the condition impossible and allowed the person instituted heir to take the inheritance unconditionally. He could not therefore be said to have lost the inheritance through the slave’s death.

The view generally held is that Iulian refused to allow the dominus to acquire the inheritance on the ground that the condition had failed. He also refused to allow the value of the inheritance to be included as a head of damages in the Aquilian action because the ‘interest’ of the dominus in the inheritance had not vested at the time of the slave’s death.

On both views the words quia retrorsum quanti plurimi fuit inspicitur present a problem. They do not state, or at best state in a highly obscure manner, the reason for Iulian’s decision. However one is not compelled to assume that the words have been interpolated. They may be construed sensibly as a statement that the damages were restricted to the highest price which the slave would have fetched within the previous year, the implication being that any other factor was excluded.

23, 2 has been seen by the protagonists of the ‘market value’ or the ‘interest’ principles of assessment as a critical text. Those who favour the view that the ‘market value’ principle predominated in classical law have to explain away the apparent relevance accorded by Iulian to the ‘interest’ of the dominus. Those who think that the principle of ‘interest’ was introduced in the classical period naturally emphasise the significance of the text, but differ on the question whether the ‘interest’ of the slave is to be considered a critical factor in the determination of the damages or not.

125 See also Rodger, Daube Noster, 294.
126 Cf. MacCormack, RIDA, 21 (1974); also Rodger, Daube Noster, 295 f.
127 Beseler, Beiträge, 4, 125; Kaseb, Quanti, 173; Below, Lucrum cessionis, 20 f.
128 Cf. the writers cited in the previous note.
129 Cf. Jolowicz, LQR, 32 (1922), 228 f; Gerke, SDHI, 23 (1956), 92; Lübro, Untersuchungen, 124.
of the dominus is evaluated according to ‘subjective’ or ‘objective’ criteria. I do not think that such discussions are helpful. In the case where the slave was killed after the death of the testator Iulian was prepared to hold that the value of the inheritance might be treated as an element in the highest value of the slave within the previous year. Where he is killed before the death of the testator his highest value within the previous year could not be held to include the value of the inheritance. The reason for the difference is that in the latter case the dominus in fact obtains the inheritance. It is not permissible to extract from the text generalisations concerning the role of a supposed ‘market value’ or ‘interest’ principle.

Ulpian takes from Iulian one further decision on the calculation of compensation under the first chapter:

D. 9, 2, 23, 3 (Ulp. 18 ad ed.): Idem Iulianus scribit aestimationem hominis occisi ad id tempus referri, quo plurimi in eo anno fuit: et ideo et si pretioso pictori pollex fuerit praecibus et intra annum, quo praecideretur, fuerit occisis, posse eum Aquila agere pretioque eo aestimandum, quanti fuit priscum artem cum pollice amisisset.

The statement of the law found at the beginning of the text is odd. Its form suggests that Iulian was stating the result of the juristic interpretation of the lex; yet the first chapter itself provided that the dominus might recover the highest value of the slave or animal within the previous year. Possibly by the time of Iulian the chapters of the lex were no longer cited and their content stated in the form of rules of law without a specification of their origin. Possibly again there was some doubt whether the period of time prescribed by the lex was still to be applied in the calculation of compensation. Iulian affirmed that it was. Or possibly Iulian may simply have wished to make a prefatory statement to make more intelligible the case which he proceeds to consider in the second part of the text.

This case is that of a slave artist who loses his thumb in an accident and within the space of a year is killed. Iulian decides that the dominus may recover the highest value possessed by the slave in the period before he lost his thumb. An interesting question is suggested by this decision. Can one infer that prior to Iulian the jurists interpreted the first chapter to mean that the dominus was entitled to the highest price.

130 Kasar, Quanti, 170; 175-6; Below, Lucrum cessans, 22 f; Wesel, Statuslehre, 53.
which a slave possessing the mental and physical qualities of the deceased slave at the time of his death would have fetched within the previous year? If one assumes that Iulian was establishing a new point of law one would be justified in making this inference. But one cannot necessarily assume that Iulian was establishing a point for the first time. Earlier jurists may have taken into account qualities possessed by the slave within the year preceding his death which he lacked at the time of death. Hence Iulian may have been stating the accepted rule rather than introducing a new one.

It is very difficult to assess the manner in which the jurists treated questions of compensation under chapter three. No decision specifically upon a point of compensation survives from a period before Labo; in addition there is much uncertainty as to the type of damage contemplated by the chapter. On the most plausible view, I think, the chapter dealt with serious damage to chattels or severe wounds inflicted on beasts or slaves. Its compensation clause provided that the dominus should recover the value of the res within the previous thirty days. The clause does not contain the word plurimi. But it seems almost certain that ‘the value of the res’ was understood to be ‘the highest value’.

The earliest reference to the clause is contained in an opinion of Sabinus recorded by Gaius in the Institutes:

3, 218: Hoc tamen capite non quanti in eo anno, sed quanti in diebus XXX proximis ea res fuerit, damnatur is qui damnum dederit, ac ne PLURIMI quidem verbum adicetur. et ideo quidam putaverunt liberum esse idem vel ad id tempus ex diebus XXX aestimationem redigere quo plurimi res fuit, vel ad id quo minoris fuerit. sed Sabino placuit prinde habendum ac si etiam hac parte PLURIMI verbum adicuit; nam legis latorem contentum fuisse quod prima parte eo verbo usus esset.

From this passage one may deduce that at the time of Sabinus the period of thirty days still played a part in the calculation of the compensation. But the part it played was disputed. Was the judge entitled to award as compensation any of the varying values which the res may have had within the previous thirty days; or was he required to award its highest value within this period? Sabinus settled that the latter view was correct. Why, one might ask, did the controversy arise in the first place? A conceivable explanation is that the initial acceptance that the value within the previous thirty days was the highest value came, perhaps in the late Republic, to be questioned by some literal minded jurists. They took advantage of the absence of the word plurimi in the third chapter to argue that the method of assess-

ment was not to be by a simple average.
ment could not have been the same as that provided under chapter one. It thus became necessary for an authoritative ruling that plurimi was to be implied in the formulation of the compensation clause.

If one assumes that at the time of Sabinus actions under chapter three entailed a calculation of compensation based upon the highest value of the res within the previous thirty days, one has to ask how the rule operated in cases where the damage or wound was relatively minor. There seems to be a choice of three explanations. One may say that even as late as Sabinus damage to an object of a minor nature or a trifling wound was not the subject of an Aquilian action. Or one may say that actions in respect of such injuries were competent but that the jurists did not apply the time rule to them and allowed the dominus to recover simply the amount he had lost through the injury. Or finally one may say that the jurists allowed the dominus to recover what he had lost on the assumption that the res was valued at its highest within the previous thirty days.

On general grounds there is little to choose between these explanations. It does not seem at all impossible that minor damage should not have been brought within the scope of chapter three until after the time of Sabinus. On the other hand the controversy concerning the absence of the word plurimi may have arisen in conjunction with attempts to broaden the scope of the third chapter. A jurist wishing to include a case of minor damage under chapter three may have advanced as a reason the absence of a requirement that the highest value of the res within the previous thirty days was recoverable. Such an approach would force a decision on the question of plurimi. But once it had been settled that the word was to be understood as part of the third chapter, the problem posed by the case of minor damage had to be faced. Whether the notion of highest value was applied only in the case of total destruction or serious damage, or whether it was applied to all cases (giving the dominus compensation for what he had lost based upon the highest value) cannot be determined.

Little information on the operation of the compensation clause is provided by the only decision from the period under discussion which raises a question of compensation:

D. 9, 2, 29, 3 (Ulp. 18 ad ed.): Item Labo scribit, si, cum vi ventorum navis impulsa esset in funes anchorarum alterius et nautae funes praecidissent, si nullo alio modo nisi praecisis funibus explicare se potuit, nullam actionem demand. idemque Labo et Proculeus et circa retia piscatorum in quae navis piscatorum inciderat aestimarunt. plane si culpa nautarum id factum esset, lege Aquilia agendum. sed ubi damni inuria agitur ob retia, non piscium,
qui idaeo capti non sunt, fieri aestimationem, cum incertum fuerit, an caperentur. idemque et in venatoribus et in aucupibus probandum.

The main point Labeo and Proculus wish to make is that the owner of the nets may not recover compensation for such fish as might have been caught but for the damage to the nets. They appear to have been thinking not of fish which were actually in the net at the time it was broken, but of the haul of fish reasonably to be expected. Since Labeo and Proculus were not concerned with the damage to the nets, one may not infer from their silence on the period of thirty days that the period was disregarded in the assessment of compensation. It is probable that the dominus was entitled to recover the highest value which the nets had born within the previous thirty days.

\[\text{\textsuperscript{131} Cf. the words } \textit{cum incertum fuerit, an caperentur}. \text{ For a thorough analysis of the text see } \textit{Rodex}, \textit{LQR}, 88 (1972), 402. \text{ His interpretation differs radically from that accepted in this paper.}\]