THE ORIGINAL SCOPE OF THE LEX AQUILIA AND THE QUESTION OF DAMAGES.

The text of the third chapter of the lex Aquilia is given by Ulpian in D. 9.2.27.5 as follows:

'Ceterarum rerum praeter hominem et pecudem occisos si quis alteri damnum faxit, quod usserit fregerit ruperit iniuria, quanti ea res erit in diebus triginta proximis, tantum aes domino dare damnas esto.'

It was pointed out by Pernice that the words 'praeter . . . occisos' do not fit well into the text. They are, he says, out of keeping with the laconic style of the statute and probably an explanatory insertion of Ulpian's own. Karlowa agrees with Pernice on the stylistic argument and adds that the clause in question spoils the sequence of the sentence, as it indeed obviously does. He thinks, however, that perhaps only the word 'occisos' has been inserted. Grammatically, it is true, the sentence will run well enough if we merely cut out 'occisos,' but it is more probable that Pernice is right in excluding the whole clause, for the statute which spoke in the first chapter not of 'homo' and 'pecus' but of 'seruus seruaue' and 'quadrupes pecus,' can scarcely have used different, non-technical expressions in the third. But if we cut out the words in question difficulties arise at once. They are by no means mere surplusage, as Pernice seems to think and as Willems actually says. Without them there is no means of bringing in under the statute any injury to slaves and pecudes short of killing them, for killing only is dealt with in the first chapter and the words 'ceterarum rerum,' if read without the qualification 'praeter hominem et pecudem occisos' necessarily mean 'as regards all things other than slaves and pecudes,' and exclude this class of property from the

2 R.R.G. ii. 795.
3 The text of the first chapter is given by Gaius, D.h.t. 2, as follows: 'Ut qui [? si quia] seruum seruamue alienum alienamue quadrupedem nel [? ne] pecudem iniuria occiderit, quanti id in eo anno plurimi fuit tantum aes dare domino damnas esto.'
4 Homo here, and e.g. in Gai. iii. 210 is a loose expression, taken, no doubt, from the pattern formula. For seruus serua in strict legislative language, cf. the edict de seruo corrupto, D. 11.3.1. pr.
5 La loi Aquilienne, p. 15.
purview of the third chapter absolutely. Hence Grueber⁶ would retain the words as part of the text of the law. Karlowa says the word ‘occisos’ was put in by somebody who realized that without it mere wounding of slaves or pecudes could not be brought in under the third chapter at all. Even with the words in it is not easy. ‘Burning’ and ‘breaking’ are not natural words to use with reference to slaves or cattle. We do, it is true, find ‘rumpere’ interpreted to cover the case of causing a mare to slip her foal, and a somewhat far-fetched instance of burning is given by Ulpian, who supposes that someone throws a lighted torch at a slave.⁵ But even so, the word used is ‘adurere,’ not ‘urere,’ and anyhow these would scarcely be the cases which a legislator would contemplate in the first instance.

But if there was this oversight in the statute how came it there? Why did the draftsmen not realize the omission themselves? They provided in the first chapter for the destruction of a particularly valuable form of property; in the third, according to the ordinary view, they provided for the destruction of or injury to other forms of property. One would have thought that the omission of mere injury to the more valuable sort of property was obvious.

In my opinion, there was no oversight in the matter at all, because, as far as the original scope of the law is concerned, the ordinary view of the meaning of the third chapter is wrong. Mere injury to slaves and pecudes was left out because the statute originally did not contemplate any injury less than destruction at all, even in the case of property coming under the third chapter. If one reads the text as given by Ulpian without the words ‘praetere . . . occisos’ and manages to get rid of the meaning which centuries of interpretation have given to it, there is not really any reference whatever to partial injury. The words are ‘usserit ruperit fregerit,’ none of which necessarily connotes anything but complete destruction. ‘Frangere,’ indeed, is a particularly strong word, meaning ‘to break in pieces.’ ‘Urere’ is used in early Latin where the classical language prefers a compound, for ‘to burn up’—e.g. XII. Tables, 10.1, ‘Hominem mortuum in urbe ne sepelito, neve urito,’ and even occurs in the Digest in this sense.⁹

‘Rumpere’ is a neutral word, but it certainly means to break completely at least as often as it refers to partial breakage.¹ But

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⁶ Lex Aquilia, p. 199.
⁷ H.t. 27.23.
¹ ‘Si membrum rupsit’ in the XII. Tables means something serious.
really there is no need for elaborate investigation into the original meaning of the words. The number of cases in which literal breaking of an ordinary chattel short of destruction comes to be adjudicated upon by courts of law is comparatively small. Nearly all cases of partial destruction mentioned in the sources are concerned with the wounding of slaves or with the sort of damage which could only be brought under the statute by extending ‗rumpere‘ to mean ‗corrumpere‘. It is consequently not at all surprising that the draftsmen of the lex Aquilia should not have contemplated breaking, etc., short of destruction in the case of things coming under the third chapter. Read in the way suggested, the statute appears, not a botched and clumsy piece of work which forgets to mention a more important injury where it mentions a less important one, but a perfectly logical enactment dealing with the destruction of property, property of one sort in the first chapter, of all other sorts in the third.

It may be urged that the word ‗damnum‘ is against this view of the original scope of the third chapter, that it suggests immediately any damage done to a thing, and that, if only complete destruction had been meant, the third chapter could have said simply ‗ceterarum rerum si quis quam usserit, etc.,‘ just as the first chapter said ‗si quis seruum . . . occiderit‘. I do not think any great weight should be attached to this objection. ‗Damnum‘ is the loss occasioned to the owner of the article in question, not the physical injury done to the article itself, and the particular loss meant is explained by the words ‗quod usserit, etc.‘ If these words can have meant what I think they meant, then the word ‗damnum‘ does not alter their meaning. The parallelism with the first chapter is, of course, not complete. Very possibly the change in the construction is due to the interposition of the second chapter. The relevancy of the second chapter is, as Gaius points out (III. 216), that it too deals with the occasioning of loss, and it may well have been this idea that caused the draftsmen to express in the third chapter what was only implied in the preceding two.

It would seem, however, that as early as the second century B.C. the law was no longer interpreted as its makers intended it should be. There is, of course, no doubt that it was taken to include all damage to property in classical times; but even Brutus seems to have understood the third chapter as referring to partial damage to slaves and pecudes, for in the passage already quoted he interprets ‗rumpere‘ with respect to slave-women and mares. As this word has no application to them, according to the original text of the law, it seems necessary to
conclude that the interpretation of ‘ceterarum rerum’ to mean ‘all cases other than those of killing a slave or pecus’ (instead of ‘all things other than slaves and pecudes’) is much older than Ulpian, and that the words ‘praeter . . . occisos,’ if an insertion of his at all, are an insertion based upon a very old piece of interpretatio. Perhaps it was customary to explain the chapter by putting in these words, just as it became customary on the authority of Sabinus to explain ‘quantae ea res erit . . .’ by putting in ‘plurimi.’ Only the explanation implied by ‘praeter . . . occisos’ is, as we have seen, older than Sabinus, and its author may have been forgotten. Some such insertion or explanation is also implied by Gaius, III. 217, although Pernice says there is no indication of the clause in that passage. For what Gaius says is ‘Capite tertio de omni cetero damno cautetur,’ and without the clause in question the third chapter certainly does not deal with all other forms of damage. It is noticeable that Gaius, though he gives (III. 210) an almost literal quotation from the first chapter, gives only a paraphrase of the provisions of the third. Is it fanciful to imagine that he may have had difficulty in making his pupils see exactly how ‘all other damage’ did come in under its literal meaning—a difficulty which has certainly been felt by other teachers since his day? Of course, if we consider ourselves at liberty to reconstruct the lex Aquilia as Kriepl does, in the form in which it ought to have been enacted had all the future interpretations been foreseen, all difficulties vanish. Kniep’s version follows more or less the text of Gaius, III. 217; but the elegant, rather expansive style is hardly in keeping with what we know of early Roman legislation, and it is inconceivable that Ulpian should have given us the crabbed phrasing he produces D.h.t. 27.5 had the statute itself been anything like Kniep’s reconstruction.

The main importance of realizing that the lex Aquilia was not intended by its framers to deal with anything less than the destruction of property, and indeed the main argument for this view, lies in the light which is thus thrown on the question of damages, and it is with the question of damages that the remainder of this paper is concerned.

2 Gai, book iii. §§ 88–295, p. 563: ‘Qui serum seruamue alienum alienamque quadrupedemue alienam, quae pecudum numerod est, uulnerauerit; sine eam quadrupedem, quae pecudum numerod non est, nelufi canem aut forum bestiam vel uirum, leonem uulnerauerit vel occiderit; in ceteris quoque animalibus, qui alienum uulnerauerit vel occiderit; item in omnibus rebus, qua anima carent, qui alteri damnum faxit, quod usserit, frugerit, ruperit iniuria; quanti itid in diebus triginta proximis fuit, tantum ero dare damnas esto.’
It has always been a stumbling-block to commentators that, according to the literal interpretation of the text, even where an object is only injured, not destroyed, the highest value it bore during the preceding thirty days must be paid by way of compensation to the owner. This result is so obviously unfair that one cannot believe any legislator intended it. Various expedients have been tried to get rid of the difficulty.

Monro, for instance, would interpret the words of the law as meaning 'the amount which the incident would have cost you if it had occurred at the moment in the month at which it would have cost you most.' This is something like the construction which the classical lawyers used; but it is far too complicated to have been intended by draftsmen who adopted the archaic rule given in Chapter I, and Monro has to admit that the statute was very badly drawn if this was what was meant.

Muirhead says the owner was entitled, 'as we may assume,' to the difference between the value at its highest point and its value after the damage. But what right have we to assume any such thing? Pernice's conjecture is the most ingenious. He thinks that what happened before interpretatio substituted the interesse for the real value of the object injured as the measure of damages was that the owner was obliged to hand over the damaged object to the delinquent. But there is no trace of this procedure in the sources, and, above all, it is difficult to see how such a rule can have been enforced, under the system of the legis actiones, whose leading characteristic is the unity of the question submitted to the index. It would only be possible under the formulary system either by officium iudicis or by the insertion of an exceptio doli. Von Tuhr seems to agree with Pernice, and quotes examples of a similar expedient in other cases, where a thing was so badly damaged that it is no longer of any appreciable value to its owner. Two of these examples, D. 11.3.14.8,9 and 21.1.43.6, deals with ius honorarium and expressly mention the officium iudicis, and

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3 Lex Aquilia, p. 36.
4 (1886) L. Q. B. p. 388.
5 By interesse is meant the amount of damages arrived at by taking, not the market value of the thing destroyed, but the whole loss suffered by the plaintiff. The Romans themselves said 'id quod (actori) interest'—the difference which the delict made to the plaintiff. For the ascription of the change from the one system to the other to interpretatio, see J. 4.3.10: 'Iud. non ex urbis legis sed ex interpretatione pluvit non solm permpti corporis aestimationem habendam esse ... sed so amplius quidquid praeltera permpto eo corpore damnii nobis adiutum fuerit.'
6 Zur Schätzung des Schadens in der lex Aquilia, p. 11, n. 5.
the third, 13.1.14.2, uses the exceptio doli to obtain the desired result.

What is much more likely is that the need for the interesse was first felt when interpretation brought in cases of partial damage, and that from these cases the new method of calculating damages spread to others, where the injustice of going by the mere market value was not so obvious.

It is impossible to prove this conjecture, because the whole development must have taken place by the time of Augustus. Labeo7 is already fully acquainted with the principle of interesse, but that it must have needed some very flagrant case of injustice to get round the unmistakable words of the law is clear. It is true that the words ‘quanti ea res fuit’ (which are frequently recurring technical words of Roman law) are in themselves ambiguous. They may mean either ‘the value of that thing’ or ‘the cost of that circumstance.’ The Romans recognized this ambiguity, and they sometimes put the one interpretation on them, sometimes the other. Thus Ulpian, in D. 50.16.193, where he is speaking of theft, says the words ‘quanti eam rem paret esse’ refer not to ‘id quod interest,’ but to the real value of the thing; whereas in D. 39.2.4.7, where he is speaking of damnnum infectum, he says ‘quanti ea res est’ refers not to the value, but to ‘id quod interest.’ But in the case of the lex Aquilia there is no ambiguity, because of the addition of the words ‘in the preceding year’ or ‘thirty days.’ You can take the highest market value in the preceding year or thirty days, but there is no such thing as the highest interesse within any past period. To give a man his interesse means to put him in the same position, as far as money can do it, as if the delict had never been committed, i.e. you have to compare his actual pecuniary position after the delict with a hypothetical one, and give him the difference. But a man cannot receive what he would have now, but for certain circumstances, at the highest value at which ‘it’ stood during the past year. The two principles, therefore, of highest value within a preceding period and interesse are logically inconsistent, and to introduce the interesse principle was to do violence to the words of the statute. The only possible way of combining the two principles would be to say ‘the principle of interesse shall apply, but where in estimating the interesse you have to take into account the value of a thing which has been destroyed, that value shall be taken at the moment when

7 D.b.t. 23.4.

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it stood at its highest during the preceding year.' But there is nothing to show that the Romans did use this construction, which it would be difficult to read into the words of the statute, and which is inapplicable to the case of partial injury.

Once introduced, the interesse principle did not, however, as it logically should have done, supplant the older principle. This is clear from the quite considerable number of texts which discuss the application of the time rules. Of course, in a great majority of cases, there would be no practical difference in the result, whether you applied one principle or the other. Most things do not, or, at any rate, did not at Rome, fluctuate widely in value from month to month or year to year; and generally, when you destroy a piece of property, you do not inflict any greater damage on the owner than the market value of that piece of property. But the interesting problem is to know what the Romans did when the practical results of the two principles differed.

It is urged by Von Tuhr* that the recognition of the interesse principle did not prevent the primary application of the principle of the market value. According to his view, the additional damage which the owner suffers over and above the market value is only regarded as an accessory to that value. The new principle never ousts the old one, for we find no cases where less than the real value is given on the ground that the plaintiff's interest does not amount to so much. The weakest part of his argument is that in which he rules out of the cases to be considered that of partial injury. Here, he says, the plaintiff gets less than the full value of the thing, not because his interesse is less than the full value, but because the value of the thing has been only partially, not wholly, destroyed. Even where the owner of a slave who is wounded is said to be able to bring an action for medical expenses and nothing else, there is, according to Von Tuhr, no departure from the principle of value, because the cost of curing the slave can be regarded as impensae necessariae, which are a burden on the value of the right of ownership. This is really no explanation at all. The law says the (highest) value that the thing bore within the past thirty days is to be taken; it says nothing about the delinquent's making up the difference between that value and the decreased value after the delict, or discharging burdens which have been placed on the value by reason of the delict.

Further, the sources do not consistently treat the value and the interesse as separate things, for we find cases in which the

* Loc. cit. p. 11 seqq.
rules as to time are applied to what is really the interesse. Thus, in Paulus D.h.t. 55, A is under an obligation to deliver to B Stichus or Pamphilus, the former valued at 10, the latter at 20. B kills Stichus, thereby depriving A of his option of delivering the cheaper slave. The measure of damages is 20. Of this, says Von Tuhr, 10 is the value of Stichus and 10 is the interesse, i.e. the difference between the value of Stichus and Pamphilus. But that this is not the way Paulus looks at the matter is really clear from what follows; for even if Pamphilus is already dead when Stichus is killed, so long as he died within the year preceding the killing of Stichus 20 can be recovered as damages—pluris uidebitur fuisse. The extra 10, the amount of the interesse, is regarded as part of the value of Stichus for the purpose of applying the time rules.

My own view is that the Romans never worked out a consistent theory of damages, because they were hampered by the archaic time rules, and because they never clearly distinguished between market value and value to the owner. Market value is a perfectly clear conception, but value to the owner really does not mean anything more than interesse. Once you allow anything besides the actual price which could be obtained in the market to be included in the amount of the damages, there is no point at which you can stop short of the difference between the plaintiff's actual pecuniary position and the hypothetical position which would have existed had the delict not taken place. But there are cases in which some particular item in the calculation of this difference is so closely connected with the identity of the thing damaged that it can be regarded as part of its value sufficiently for the time rules to be applied with apparent logic, as in I.55 cit. The same item may appear sometimes as an element of value, sometimes merely as interesse. Thus, in h.t. 23, pr. Ulpian treats the value of an inheritance left to a slave who has been killed as part of the interesse, having explained the principle in 21.2, whereas in h.t. 51.2 such an inheritance is taken by Julian to be merely an element which enhances his market value. Julian's view certainly seems the more correct, as a slave who was instituted would actually fetch more on that account if put up for sale; it is not a mere case of value to the owner.

One can, I think, distinguish three classes of case in the sources:—

(i) Those in which there is no question of interesse, and where the market value simply is taken and the words of the statute as to the time at which this is to be calculated applied if
there is any occasion for them, e.g. h.t. 23.3,5,7, and 51.2. These would, of course, in practice be the commonest where the destruction was complete.

It appears that full value was also given, as Von Tuhr has shown, where, owing to the fact that the owner is under a legal liability to transfer his ownership to someone else, his interesse is less than the full value, e.g. where he has sold, but not yet delivered, the thing destroyed; also probably in some cases where the ownership is encumbered by a real right belonging to a third party, or where the right of action is given to a person who has a real right less than ownership (the owner who has pledged his property and the pledge creditor). This need not surprise us. English law, too, has the interesse principle in cases of tort, and yet a mere bailee may recover from a wrongdoer the full value of the article bailed. 9

(ii) Cases where the point of view is strictly that of interesse, e.g. h.t. 22. pr, 37.1, 23.4, and all the cases of destruction of documents of title, h.t. 40-42. The very few cases from which we can infer anything as to the measure of damages where the injury is partial must also come under this head, e.g. h.t. 29.3, where fishing-nets are torn, and apparently the only reason why damages do not have to be paid for the fish which would otherwise be caught is the uncertainty of the catch; and 27.17, which allows medical expenses to be claimed where a slave has been wounded and has recovered. At any rate, in none of the partial injury cases is there any attempt to apply the time rules.

(iii) Cases where the two principles clash, and where an attempt to reconcile them is made by treating items really only allowable on the interesse principle as part of the value for the purpose of applying the time rules. One instance, h.t. 55, has already been discussed. Another is 23.2. I am instituted on condition that I manumit Stichus. If Stichus is killed after the death of the testator, I can include the value of the inheritance in my damages, but not if he is killed during the testator's lifetime, 'quia retronsum quanti plurimi fuit inspictur.'

Really the value of the inheritance can only be brought in as interesse. The slave cannot be sold at a higher price, because of the condition which attaches to his person; this only increases

9 Special damage may be recovered in trover if laid: Bodley v. Reynolds (1846) 8 Q. B. 779. As to trespass, see The Mediana [1900] A. C. 113. For the bailee's right to recover full value, whether in trover, trespass, or case, see the authorities quoted by Collins M.R. The Winkfield [1902] P. 42, at pp. 54 sub fin. and 59 sub fin.
his value to his master. Now, strictly on interesse principles, the moment of the testator's death is not decisive as to whether the inheritance should be included in the damages or not. The owner of the slave might be able to show that, in fact, the testator died very shortly after the slave was killed without altering his will, so that had the slave not been killed he would have certainly benefited to the amount of the inheritance. The question would merely be whether the damage was too remote or not. But here Ulpian refuses to include the value of the inheritance in the damages, not on any plea of remoteness, but simply because he takes the inheritance to be an element in the value of the slave which did not attach to him before the testator died. After the testator's death the owner can at any moment make aditio and get the inheritance. This valuable right is then clearly bound up with the person of the slave, so it can be treated as part of his value, though, as a matter of fact, it would not make him worth a penny more to anyone else. Before the testator's death the master has no power of making aditio. His chance of getting the inheritance depends on other things besides the slave's life; and so, as in reckoning the period over which one may look for the highest value one has to go back, not forward, from the moment of killing, the value of the inheritance cannot be claimed if the slave is killed before the testator's death.

The two inconsistent principles are harmonized by regarding the interesse as part of the value of the slave, i.e. substituting 'value to owner' for 'market value'; but this is only made possible by the sacrifice of some of the logical consequences of interesse.

The Romans, like other lawyers, could not satisfy all the theories all the time, and it is no disparagement to point out that one cannot get a complete logical principle by combining their various decisions. On the contrary, the technical skill which reconciles an archaic statute with advanced principles in leges 23.2 and 55 cit. deserves all the more admiration if we fully appreciate the difficulty.

I would sum up my propositions as follows:—

(a) There was no need for any principle of interesse when the lex Aquilia was passed, because it dealt only with destruction.

(b) The interesse principle was brought in of necessity when the statute was interpreted to include partial damage.

(c) In classical times the two principles generally work independently. In most cases either the value or the interesse will assert itself as the element which must be considered. But
sometimes the two are combined; that is, where some item of 
*interesse* is so closely bound up with the identity of the article 
damaged that it can be regarded as part of its value, although 
value here has to mean value to owner, whereas it was originally 
intended to mean, and is ordinarily taken by the classical 
authors themselves to mean, market value.

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