Section 7. DELICTS

A. THE LEX AQUILIA AND ITS INTERPRETATION

Digest 9.2 (On the *lex Aquilia*)

James B. Thayer trans., *Lex Aquilia*; *On Gifts Between Husband and Wife*
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ON THE AQUILIAN LAW

1. ULPIAN, *On the edict*, Book 18: The *Lex Aquilia* partially repealed all preceding laws of every kind, including the Twelve Tables, which related to wrongful damage to property. These need not now be mentioned. **1.** The *Lex Aquilia* is a plehiscite, as Aquilius, their tribune, proposed it to the *plebs*.

2. GAIUS, *On the provincial edict*, Book 7: The first chapter of the *Lex Aquilia* reads: if anyone wrongfully kills another's slave of either sex, or his four-footed beast, let him be condemned to pay to the owner whatever was its greatest value in the past year. **1.** And later it is provided that the action shall be for double against a defendant who denies liability. **2.** So it appears that to our slaves are assimilated the four-footed beasts which are classed as "cattle" because they are kept in herds, like sheep, goats, cows, horses, mules, or asses. And as to the question whether pigs are counted as cattle, Labeo rightly answers that they are. But the term does not include dogs, nor *a fortiori* wild animals, like bears, lions, and panthers. However, elephants and camels are so to speak "mixed" and, though their nature is wild, as they do the work of draft-animals they should be included in the first chapter.

3. ULPIAN, *On the edict*, Book18: If a slave of either sex is wrongfully killed, the *Lex Aquilia* applies. It is rightly added that the killing shall be wrongful; killing does not suffice unless it is done unlawfully.

4. GAIUS, *On the provincial edict*, Book 7: Hence if I kill your slave, while he is lying in wait intending to rob me, I shall not be liable, for natural reason permits self-defense against danger. **1.** The Twelve Tables allow the killing of a nocturnal thief if he is caught in the act, provided that warning is first given by a shout; but if the thief is caught in the daytime he may be killed only if he defends himself with a weapon, warning also being given by a shout.

5. ULPIAN, *On the edict*, Book 18: So if one kills another who is attempting to attack him with a sword, the killing is not held wrongful; and if in mortal fear one kills a thief, there is certainly no Aquilian liability. On the other hand, if one prefers to kill, when it is possible to arrest the thief, by the better view it is a wrongful killing; hence there is also liability under the *Lex Cornelia*. **1.** We must understand *injuria* not as an insult of some kind, as in the *actio injuriarum*, but as that which is done unlawfully, that is, contrary to law, as when the killing is culpable; hence both actions, that of the *Lex Aquilia* and that for insult, will sometimes concur, and there will be double assessment of damages, one for damage and one for insult. Thus we interpret *injuria* as damage caused culpably even by one who did not intend the injury. **2.** Hence the question whether there will be an Aquilian action for damage done by a lunatic; Pegasus denies it: "What fault can there be in one who is not in his senses?" which is quite true. So the Aquilian action fails, as it would if an animal had done the damage, or a tile had fallen. And the same must be said if a child does the damage; but if he were over seven Labeo says that as he is held for theft he must be liable for the Aquilian action, to which I agree, if he were capable of distinguishing between right and wrong. **3.** If a teacher in the course of instruction wounds or kills a slave, is he held under the *Lex Aquilia*, on the ground that he committed wrongful damage? Julian writes that one is liable for putting out a pupil's eye in the act of disciplining him, so that liability for killing follows *a fortiori*.

These are the facts of the case reported by him: he says that a cobbler, because a pupil, a freeborn *filius familias*, ineptly performed his appointed task, struck his head with a last, putting out his eye. Here Julian holds that there is no liability for insult because the blow was not given for that purpose but to correct and instruct, and he doubts whether the action on the contract will lie, because slight punishment is permitted to a teacher. I, however, have no doubt that the action of the *Lex Aquilia* can be brought,

6. PAUL, *On the edict*, book 22: for excessive brutality on the part of a teacher is considered to be culpable.

7. ULPIAN, *On the edict*, book 18: Julian maintains that in this action the father may recover for the loss of his son's services caused by the destruction of his eye, as well as the expenses incurred in caring for him. **1.** We should hold that there is a killing whether the attack be committed with a sword, a stick, or any other implement, or the hands, as in a case of strangulation, or with the foot, the head, or in any other manner. **2.** If one who is overloaded throws down his burden thereby killing a slave, the Aquilian action will lie, because it was in his power not to load himself in that way. For even if one slips and crushes another with his burden, Pegasus says that he will be liable under the *Lex Aquilia*, provided that he loaded himself unduly or carelessly walked through a slippery place. **3.** Similarly, if one has done damage by being pushed by another, Proculus writes that neither the one who pushed can be held because he did not kill, nor the one who was pushed because he did not do wrongful damage; in which case an action *in factum* should be given against the one who pushed. **4.** If one kills another in wrestling or in the pancratium, or in a sparring match, or in any public exhibition, there is no Aquilian liability, since the damage seems to be committed in the cause of honor and valor, not wrongfully. But this does not hold in the case of a slave, since only freemen are accustomed so to contest; it does hold if a *filius familias* is wounded. Obviously the Aquilian action will lie if the plaintiff is wounded after he has given in, or if a slave not a party to the contest has been killed, but there is no action if his master has entered the slave in a private match. **5.** If one gives a slight blow to a sick slave thereby killing him, Labeo rightly says that he will be liable to an Aquilian action, because what will not kill one man may well kill another. **6.** However, Celsus says that it is very important whether the defendant killed or furnished the cause of death; in the latter case he is held not in an Aquilian action but in an action *in factum*. Thus he mentions one who gives poison under the guise of medicine and says that he furnished the cause of death, like him who gives a sword to a lunatic, the latter being liable not to an Aquilian action but to one *in factum*. **7.** If one throws another off a bridge, whether he dies from the impact, or is immediately drowned, or dies from exhaustion overcome by the power of the current, Celsus says that the *Lex Aquilia* applies, just as if one hurls a child against a rock. **8.** Proculus says that if a doctor unskillfully operates on a slave, either the action on the contract or that on the *Lex Aquilia* will lie.

8. GAIUS, *On the provincial edict*, book 7: The law is the same if the wrong use is made of a drug; likewise a defendant who operates properly but omits further treatment will not escape but will be held guilty of negligence. **1.** So, too, if a mule-driver through inexperience is unable to hold in his mules so that they run over another's slave, he is usually held on the ground of negligence. This is true even if he could not prevent the advance of the mules on account of weakness; and it is not inequitable that weakness should be counted a fault since one ought not to embark on an enterprise in which one knows or ought to know that his weakness will be dangerous to others. The law is the same for one who from inexperience or weakness cannot hold in the horse on which he is riding.

9. ULPIAN, *On the edict*, book 18: Likewise if a midwife gives a drug from which the patient dies, Labeo draws this distinction: if she did it with her own hands, she is held to have killed; but if she offered it so that the patient took it herself, the action is *in factum*; and this is correct, for in the latter case the defendant furnished the cause of death, rather than killed. **1.** If, by force or suasion, one administers a drug to another, orally or by injection, or if one massages him with a poisonous preparation, one is liable, like the midwife, to an Aquilian action. **2.** If one kills a slave by starvation, Neratius holds him liable *in factum*. **3.** If my slave is riding a horse and by frightening the horse you cause him to be thrown into a river so that he perishes, Ofilius writes that the action is *in factum*, as where my slave is lured into an ambush by the defendant and there killed by a third person. **4.** If a slave is killed by those who are throwing javelins for sport, the *Lex Aquilia* applies, but if men are throwing javelins in a field and the

slave crosses it, there is no action, because he ought not unseasonably to make his way over the playing field. Nevertheless, one who hit the slave on purpose would be liable under this statute,

10. PAUL, *On the edict*, book 22: because even a game, if dangerous, is culpable.

11. ULPIAN, *On the edict*, book 18: Mela gives another case: if a ball game was going on and a player hitting the ball knocked it against the hand of a barber so that the throat of the slave being shaved by the barber was cut by the razor, whoever of them was negligent will be held under the *Lex Aquilia*. Proculus holds that the barber was at fault; and truly, if he was doing business near a place usually devoted to sport or where there was heavy traffic, he is partly responsible; but there is much to be said for the view that he who engages as a barber one who has set up his stool in a dangerous place has only himself to blame. **1.** If one holds a slave and another kills him, the former is liable *in factum* for having furnished the cause of death. **2.** But if several strike a slave, let us consider whether all are held for killing. If it can be shown who gave the mortal wound, he will be liable for killing; if not, Julian says that all are liable for killing; and if one has been sued, the others are not released, for what one pays under the *Lex Aquilia* does not relieve another, as a penalty is involved. **3.** Celsus writes that if one gives a slave a mortal wound and another later kills him, the former will not be held for killing but for wounding, since the slave died from another wound; the latter will be held for killing; Marcellus agrees and it is the better view. **4.** For the same reason if several let fall a beam and crush a slave, the ancients held that they were all liable under the Aquilian statute. **5.** Proculus also gave an opinion that the Aquilian action lies against one who, even though he was not holding his dog, angered it, causing it to bite another; but Julian says that he would be liable under this statute only if he was holding the dog when he caused it to bite another, otherwise, that is, if he was not holding it, an action *in factum* lies. **6.** The right to bring the Aquilian action belongs to the *erus*, that is, the owner. **7.** If wrongful damage is done to the slave which I am about to "redhibit" to you, Julian says that I acquire the Aquilian action, but I must cede it to you when I attempt to "redhibit" the slave. **8.** If a slave is in the power of a *bona fide* possessor, will the latter be able to exercise the Aquilian action? He ought rather to be granted an action *in factum*. **9.** Julian says that one to whom clothes have been lent cannot bring the Aquilian action if they are torn, but the owner may do so. **10.** Julian deals with the problem whether the usufructuary or the usuary may bring the action; I consider that an *actio utilis* had better be granted in these circumstances.

12. PAUL, *On Sabinus*, book 10: If the owner of the property wounds or kills a slave in whom I have the usufruct, I should be given an action against him on the analogy of the *Lex Aquilia* for the proportion of my usufruct, so that the part of the year even before the creation of my usufruct will be reckoned in assessing the damage.

13. ULPIAN, *On the edict*, book 18: A freeman has a "*utilis*" Aquilian action on his own account, he has not the direct action because no one can be held to be owner of his own limbs. The owner has an action on account of a fugitive slave. **1.** Julian writes that if a freeman in good faith acts as my slave, he is liable to me under the *Lex Aquilia*. **2.** If the slave of an unclaimed inheritance is killed, it is a question who may bring the Aquilian action since the slave has no owner. Celsus says that the statute intended to indemnify the owner, therefore the inheritance will be considered the owner; hence the heir may sue after entry upon the inheritance. **3.** If a slave left as a legacy is killed after the inheritance has been entered upon, the legatee may bring the Aquilian action, if he did not accept the legacy after the slave's death; but if he refused it, Julian holds that the result will be that the action belongs to the heir.

14. PAUL, *On the edict*, book 22: Moreover, if the heir himself kills the slave, it must be held that the legatee has an action.

15. ULPIAN, *On the edict*, book 18: From Julian's view it would follow that if the bequeathed slave is killed before entry is made upon the inheritance the Aquilian action acquired by the inheritance remains with the heir, but if the slave is wounded under these circumstances, the action remains with the inheritance, but the heir should cede it to the legatee. **1.** If a slave is mortally wounded, but his death is accelerated by the fall of a house, a shipwreck, or another blow, an action cannot be brought for killing, but for wounding; but if he dies from the wound after he has been manumitted or alienated Julian says that an action may be brought for killing. The difference follows from the fact that you killed him at the time when you gave him the wound, although this was not proved till he died; but in the former case the

accident did not allow it to be proven whether you killed him. If you order a mortally wounded slave to be free and heir and he dies after you, his heir cannot bring the Aquilian action,

16. MARCIANUS, *Of rules*, book 4: because in that case the affair has reached a point where an action could not have arisen.

17. ULPIAN, *On the edict*, book 18: If the owner kills his slave, he will be liable in an action *in factum* to a *bona fide* possessor or pledgee.

18. PAUL, *On Sabinus*, book 10: If the pledgee kills or wounds the slave, he can be sued in the Aquilian action and that upon pledge, but the plaintiff must be content with either action.

19. ULPIAN, *On the edict*, book 18: If one kills a slave owned in common, Celsus says that he is liable under this statute, which is equally true if he wounds him,

20. ULPIAN, *On Sabinus*, book 22: that is, for the value of the share which belongs to the plaintiff.

21. ULPIAN, *On the edict*, book 18: The statute says: "Whatever was the highest value of the slave during that year," which clause gives the rule for the valuation of the damage committed. I. The year is reckoned backwards from the time of killing, but if he was mortally wounded and died only after a long interval, according to Julian we shall compute the year from the date of the wound, although Celsus is of the contrary opinion. **2.** But do we merely assess the value of the slave as it was when he was killed, or rather consider the interest of the plaintiff in his not being killed? And our practice is to estimate the plaintiff's interest.

22. PAUL, *On the edict*, book 22: Thus if you have killed a slave whom I have promised to deliver under a penalty, my interest therein will be considered in the judgment. **1.** Elements of value inherent in the object are considered, as where one kills a member, male or female, of a band of actors or singers, of twins, a chariot team, or a pair of mules; for the valuation should be made not only of the object destroyed, but account must also be taken of the amount by which the value of the other members is depreciated.

23. ULPIAN, *On the edict*, book 18: On this subject Neratius writes that if a slave, instituted as heir, is killed, the value of the inheritance will come into account. **1.** Julian says if a slave is killed who was ordered to be free and heir, neither the substituted nor the legitimate heir in the Aquilian action may recover the value of the inheritance, which would not have been permitted to the slave; which opinion is correct; and therefore he says that only the market value of the slave will be computed, because the substitute seems to have no other interest; but I do not think that even the market value will be estimated, because if the slave had been heir he would also have been free. **2.** Julian also writes that if I am instituted heir on condition that I manumit Stichus, and Stichus is killed after the death of the testator, I may even recover as damages the value of the inheritance, for by the killing fulfillment of the condition became impossible; but if the slave was killed in the lifetime of the testator, the value of the inheritance will not be allowed, because the highest value is judged retrospectively. **3.** Continuing, Julian writes that the value of the slave who was killed is decided as of the time in the past year when it was the highest; hence if the thumb of a very valuable painter is cut off and within a year from that time he is killed, when the Aquilian action is brought his value will be judged as of the date before he lost his thumb and his skill. **4.** But if my slave is killed who had committed great frauds in connection with my property, and whom I was about to put to torture in order to discover his accomplices, Labeo well says that my damages will include the interest that I had in discovering the frauds that he had committed, and not merely the value of harm that he had done. **5.** If a thoroughly worthy slave whose habits have changed within the year is killed, his value will be judged as it was before the change of character. **6.** In short, all the advantages which may have increased the value of the slave within a year from the time he is killed must be held to be added to the damages. **7.** If a child under a year old is killed; the better view is that this action will suffice to permit the value to be judged with reference to the part of the year when he lived. **8.** It is settled that the action belongs to the heir and other successors in title, but the action is not allowed against the heir or successors, as it is penal, unless it happens that the heir is enriched by the damage. **9.** If a slave is killed maliciously, it is obvious that the owner may also prosecute under the *Lex Cornelia*, and if he has brought the Aquilian action, the decision should be postponed until after that in the criminal cause. **10.** Our action is for ordinary damages against one who confesses, for double if one deny. **11.** If

one falsely confesses to killing a living slave and later attempts to prove that he is alive, Julian writes that the Aquilian action fails, although he confessed to the killing; for the action upon a confession relieves the plaintiff only of the burden of proving that the defendant killed the slave, nevertheless the slave must have been killed by someone.

24. PAUL, *On the edict*, book 22: This is clearer in an action for wounding a slave, for if one confess that he did the wounding and the slave is not wounded, for what kind of a wound shall we compute the damages, or to what date shall we reckon back?

25. ULPIAN, *On the edict*, book 18: Thus if the slave was not killed yet is dead, the better opinion is that one is not liable for the dead slave even though one may have confessed. **1.** If an agent, a tutor, a curator, or anybody else confesses that the absent defendant did the wounding, an *actio utilis* should be permitted against those who confessed. **2.** It should be noted that in this action against the confessor, the judge is appointed not to decide the liability but to assess the damages, none of the elements of a law suit are present when one confesses.

26. PAUL, *On the edict*, book 22: For suppose that the defendant confesses to the killing and is ready to pay the damages, but his adversary claims an excessive amount.

27. ULPIAN, *On the edict*, book 18: If a slave carries away and kills another slave, Julian and Celsus write that the actions for theft and wrongful damage are available. **1.** If a common slave, that is, of you and me, kills my slave, I have an Aquilian action against you if he did it with your consent; which Urseius declares to have been the view of Proculus. He adds that if it was without your consent there is no noxal action lest it should be in the power of the slave to serve you alone; to which I agree. **2.** Again if a slave owned by you and me in common is killed by a slave of Titius, Celsus writes that if either owner sues he ought to obtain the value of his share or else noxal surrender of the whole, because the latter expedient is not divisible. **3.** The owner is held if a slave kills, but not the *bona fide* possessor. It is a question whether the owner is liable to the Aquilian action on account of a fugitive slave. Julian holds that he is, which is perfectly true, since even Marcellus agrees. **4.** The second chapter of this statute has become obsolete. **5.** In the third chapter the *Lex Aquilia* reads: Regarding all other things except slaves or cattle killed, if anyone does damage to another, by wrongfully burning, breaking, or injuring, whatever was the value thereof within the last thirty days, so much let him be condemned to pay to the owner. **6.** If, therefore, one has not killed but has burnt, broken, or injured a slave or a quadruped, it is certain that an action may be brought under these terms of the statute. So if you throw a torch at my slave and scorch him, you will be liable to me. 7; Thus if you set fire to my woods or my country house, I shall have the Aquilian action. **8.** If one intended to burn my tenement and the fire spreads to that of a neighbor, the latter will also have the Aquilian action, as well as the tenants on account of any of their movables that have been destroyed. **9.** If the tenant's slave is detailed to look after a furnace but goes to sleep and the house burns down, Neratius writes that the tenant is liable for damages under the contract, providing he was negligent in choosing his laborers; however, if one lights a fire in a furnace, and another negligently watches it, will the former be held? for he who watched it did nothing, and he who correctly lit the fire was not at fault. What is the conclusion? I should say that there is an *actio utilis* both against him who went to sleep at the furnace and him who carelessly watched the fire; nor can anyone claim as to the former that he underwent a natural experience common to all mankind, because his duty was either to extinguish the fire or prevent it from escaping. **10.** If you have an oven against a wall held in common with your neighbor, will you be liable for wrongful damage? And Proculus says there can be no action, as there would be none against one who had a fireplace; yet I consider it more equitable to allow an action *in factum* that is, if the wail is burnt down; but if you have not yet injured me. but use your fire in a manner which makes me apprehensive of damage, I think the security against threatened damage will suffice. **11.** Proculus says that if the slaves of a tenant have burnt down the house the tenant is held either on the contract or under the *Lex Aquilia*, with the privilege of noxal surrender, and if one action has become *res judicata*, the other may no longer be brought. This is upon the assumption that the tenant was not at fault; if he employed obviously irresponsible slaves, he ought to be held for so doing in a direct

action for wrongful damage.[1] He observes that the same is true for persons working for the tenant of an apartment, which opinion is sound. **12.** If you burn my bees which have flown over to join yours, Celsus says that the Aquilian action lies. **13.** The statute says "*ruperit*." Almost all the ancients take this to mean "*corruperit*" (spoils). **14.** So Celsus decides that, if you scatter weeds or wild oats into another's cornfield, so that the crop is spoiled, the owner may bring not only the interdict *quod vi aut clam*, and the tenant, if the field is rented but also the action *in factum*; and if the tenant brings the proceeding, he must give security against a repetition of the suit, that is, lest the owner also recover; for it is one kind of damage to spoil or alter the object so that the *Lex Aquilia* will apply, but another where there is no alteration, but something is inserted which makes separation difficult. **15.** Celsus says that the Aquilian action clearly lies against one who contaminates wine, or pours it away, or turns it into vinegar or spoils in any other way, because pouring off or turning sour are included in the term "*corrumpere*" (spoil). **16.** And he admits that burning and breaking are included in this term, but he adds that it is nothing new that a statute, after enumerating some special cases should append a general word including the cases already provided for, which opinion is correct. **17.** We shall all agree that "*rumpere*" includes wounding or striking a slave, with a switch, a whip, the fists, a weapon, or anything else, so as to break the skin or make a bruise, but this is providing that pecuniary damage follows the wrong, for if the slave has not depreciated either in value or usefulness, the *Lex Aquilia* does not apply, though there may be an action for insult; this statute dealing only with cases of spoiling which cause some loss. Therefore even if the value of the slave is not reduced but expenses are incurred in curing or caring for him, these seem to me a loss, hence the Aquilian action may be brought. **18.** If one tears or spots another's clothes, he is liable on the ground of "*ruptio*" (spoiling). **19.** If one throws my corn or millet into the river, the Aquilian action is available. **20.** So if one mixes sand or anything else with grain so that it is hard to separate them, an action will lie, as it were, for spoiling. **21.** If one knocks coins out of my hands, Sabinus thinks that the direct action lies if they are lost so that nobody else has obtained them as where they fall into a river, the sea, or a sewer, but if another has obtained them, an action lies for aiding and abetting a theft, as the ancients held. He adds that the action *in factum* may be brought. **22.** If a slave woman or a mare has had a miscarriage caused by your blow, Brutus says you will be liable to an Aquilian action for "*rumpere*." **23.** If one overloads a mule and breaks one of its limbs, this statute applies. **24.** One who scuttles a trading vessel is liable to an Aquilian action for "*rumpere*," as Vivianus writes. **25.** If one picks unripe olives, or cuts corn or grapes prematurely, he is liable under this law; but if they are ripe, the Aquilian action does not lie, for there is no injury, since he has presented you with the expenses which are involved in gathering such a crop; if he removes them after they are gathered, he is liable for theft. As for the grapes, Octavenus adds the proviso that they must not be thrown upon the ground so that they burst. **26.** Vivianus says the same about a thicket; if the twigs are not ready for cutting the Aquilian action lies, but if they are taken when ripe the actions for theft and secretly cutting down trees are applicable. **27.** If you cut pollard willows without injuring the trunk, there is no Aquilian action. **28.** If one castrates a slave boy, thus increasing his value Vivianus holds that this statute does not apply, but one should bring the action for insult, or that on the edict of the aediles, or the one for quadruple the value. **29.** If you give a cup to a jeweler to be filigreed and he breaks it through lack of skill, he is liable for wrongful damage; but if he breaks it not from lack of skill but because it was badly cracked, he may have a defense. Hence most artisans who receive things of this kind stipulate that they will not do the task at their risk, which prevents either an action on the contract or under this statute **30.** If a husband gives his wife unset pearls to use and she, without the knowledge or consent of her husband, perforates them in order to string them and wear them, she is liable under the *Lex Aquilia*, whether divorced or not when the action is brought. **31.** If one breaks or shatters the doors of my house or destroys the house itself he is held by this statute. **32.** If one tears up my aqueduct, although the materials are mine, nevertheless, since I do not own the land through which I bring the water, it is more correct to grant an *actio utilis*. **33.** If a stone falls off a cart and bursts or breaks anything, the carter should be liable to an Aquilian action if the stones fell because he had piled them badly. **34.** If one who has hired a slave to drive a mule entrusts him with the mule, and the slave ties the mule to his thumb by its halter, and the mule breaks away, tearing off the slave's thumb, and

[1] Professor Frier (*Landlords and Tenants in Imperial Rome*, p. 233) translates this passage as "he is liable for the wrongful loss as to why he had such people" and queries "wrongful loss." He also makes clear that the "He" in next sentece refers to Proculus.

dashes itself over a cliff; here Mela says, if an unskillful slave was let out as an experienced driver, an action on the contract lies for the mule which was destroyed or injured against the owner of the slave; but if the mule was disturbed, by a blow or by terror, then his, that is the mule's, owner, as well as the owner of the slave, may bring the Aquilian action against the man who disturbed the mule. In the case where the action on the contract was permitted I should say that the Aquilian action also applied. **35.** Likewise if you hire a plasterer to repair a cistern full of wine and he makes a hole in it so that the wine escapes Labeo says that an action *in factum* must be allowed.

28. PAUL, *On Sabinus*, book 10: Those who make pits to catch bears or deer are liable to an Aquilian action if they dig them on pathways and anything falls in and is injured; but if they make them in other places, where this is customary, they are not held. **1.** Nevertheless this action will be allowed only for cause shown, as where there was no warning and the plaintiff ignored and could not foresee the danger; for there are many examples of such cases to be found where the plaintiff is refused relief if he could have avoided the danger,

29. ULPIAN, *On the edict*, book 18: as where you put traps in a place where you had no right to do so and a neighbor's cattle are thereby caught. **1.** If you cut off part of my roof which extends without right over your land, Proculus writes that I can bring the Aquilian action against you; for you ought to have litigated with me the question of the right of projection; and it is inequitable that I should have to endure your cutting off my beams. A rescript of the Emperor Severus gives a different decision: in a case where a water pipe was laid over another's land without a servitude, he responded that it could be rightfully interrupted; which is correct, the difference being that the former plaintiff built on his own land, the latter on another's. **2.** If your ship collides with my rowboat and causes me damage, it is a question what action I have. Proculus says that if it was in the power of the sailors to avoid the collision which occurred through their negligence, the Aquilian action may be brought against the sailors, for it makes little difference whether you do the damage by intentionally directing your ship at the boat, or by negligent manipulation of the rudder, or with your own hands, since in all these cases I suffer damage directly caused by you; but if a rope broke, or the ship collided when it was under nobody's control, there is no action against the owner. **3.** Labeo likewise writes that if a ship is driven by the force of the wind against the anchor-ropes of another, and the sailors cut the ropes because they could disentangle themselves in no other manner than by so doing, no action will be allowed. Labeo and Proculus give the same opinion regarding fishermen's nets in which another's fishing vessel had become caught. Clearly the Aquilian action will lie if the sailors have done this culpably. But where the action is brought for wrongful damage to nets, there is no valuation of the fish which have not been caught in consequence of the injury, because it is uncertain whether they would have been caught, and the same should be said of hunters or fowlers. **4.** If one ship sinks another coming in the opposite direction, Alfenus says that there will be an action for wrongful damage either against the steersman or the captain, but if the ship was being impelled with such force that control was impossible, no action lies against the owner; if however, the event was due to the fault of the sailors, I should say that the Aquilian action was available. **5.** If one cuts the rope by which a ship is moored, an action *in factum* may be brought if the ship is destroyed. **6.** The action based on this chapter of the law may be brought for injury to all animals except "cattle," for instance a dog, but the same is true of boars, lions, or other wild birds and beasts **7.** Municipal magistrates may be held to an Aquilian action if they do wrongful damage. Also an action *in factum* will be allowed, where such a person levies upon cattle and kills them by starvation, refusing to let the owner feed them. Likewise when the official thinks that he is lawfully levying execution, but it is unlawful, and he returns the goods in a worn or spoiled condition, it is held that the Aquilian action is applicable; and the same must be said even if the execution is legal. But if a magistrate is guilty of a slight excess of violence towards one who resists, he will not be liable to an Aquilian action; for even when a slave who had been taken in execution hanged himself, no action was permitted. **8.** It is settled that the words "the value in the last thirty days," although they lack the word "highest," are to be understood as if they did not.

30. PAUL, *On the edict*, book 22: One who kills another's slave whom he catches in the act of adultery is not held under this statute. **1.** If a pledged slave is killed, the debtor has the action. But it is a question whether an *actio utilis* should be granted to the creditor, because he may have an interest, as where the debtor is insolvent or the action barred by lapse of time. But this is inequitable, if it means subjecting the wrongdoer to actions both by the owner and the creditor, unless one should consider that the debtor will

suffer no injury in the affair since he will be credited upon the debt for the amount recovered by the pledgee, and can sue the wrongdoer for the rest, or perhaps the debtor will be given an absolute right to sue for the amount by which the damage exceeds the debt; hence, in these cases where the creditor is allowed an action because of the insolvency of the debtor or prescription of the action, he will exercise the Aquilian action to the amount of the debt, crediting the recovery to the debtor; moreover, even the debtor has the Aquilian action for the remaining damages. **2.** If one consumes the wine or corn of another, he does not appear to have done wrongful damage, hence the *actio utilis* should be granted. **3.** In the action arising from this chapter like the first, only malice and negligence are punished; therefore if one sets fire to his straw or brambles in order to burn them up, and the fire escapes and spreads, injuring another's cornfield or vineyard. our question is whether it occurred through lack of skill or care. For if the defendant did it on a windy day, he is at fault, as one who furnishes its cause is held to have committed the damage, and he is open to the same charge who. did not watch the fire to keep it from spreading. But if he took all the necessary precautions, or a sudden gust of wind caused the fire to spread, he is not at fault. **4.** If a slave is wounded, but not mortally, and dies from neglect, the action will be for wounding, not for killing.

31. PAUL, *On Sabinus*, book 10: If a pruner throws a branch down from a tree, or a laborer throws something from a scaffolding, killing a passing slave, they are held if they threw the thing on to a public place without shouting so that the victim might avoid the accident. Mucius even holds that there may be an action for negligence if the same thing happens on private property, as it is negligent not to foresee what could have been foreseen by a careful person, or to give warning when it was too late to avoid the danger. On this view it makes little difference whether the victim was crossing public or private land, as there is often a public way over private property. But if there was no path, there will be liability only for malice, so that one may not aim at one whom he sees crossing; for no care should be required from one who could not foresee that anyone would pass his way.

32. GAIUS, *On the provincial edict*, book 7: It has been asked whether the practice should be applied to the action of wrongful damage which the proconsul observes in the case of theft by a number of one's slaves, i.e. that an action for the penalty is not allowed in regard to each slave but it is enough to pay what it would have cost if one freeman had committed the theft. And the better view is that the same rule should be observed, and justly so; for, respecting the action for theft, the reason of the rule is that an owner may not lose all his slaves for one delict, which reason equally applies to the action for wrongful damage; it follows that the same method of computing damage ought to be adopted, especially since the gist of our delict is often less serious, as when the damage is committed culpably but not intentionally. **1.** If the same person wounds a slave and later kills him, he will be held both for wounding and killing; for these are separate delicts. It is otherwise where in one attack a person kills another with several wounds; here there will be one action for killing.

33. PAUL, *On Plautius*, book 2: If you kill my slave, I am of the opinion that my sentiments are not to be taken into account (as for example if one kills your natural son for whom you would willingly pay a high price) but only the market value. Sextus Pedius agrees that the value of property is to be reckoned not by the sentiment or interest of individuals but by the average view; hence he who possesses his natural son is none the richer because he would buy him for a large price if another possessed him, nor does he who possesses another's son own as much as he could sell him for to his father. In short under the *Lex Aquilia* we recover our damages; and we are held to have lost what we could have gained or what we were forced to expend. **1.** For the damage which is not included in the *Lex Aquilia* an action *in factum* is allowed.

34. MARCELLUS, *Of digests*, book 21: A legacy of Stichus to Titius and Seius: Stichus is killed while Seius is deliberating but after Titius has vindicated the legacy; then Seius refuses it. Here Titius may sue the wrongdoer as if he were sole legatee,

35. ULPIAN, *On the edict*, book 18: because his ownership by accrual is held to relate back,

36. MARCELLUS, *Of digests*, book 21: for just as the heir has the action, as if there had been no legacy, where the legatee refused it, so Titius has the action as if he were sole legatee. **1.** If the owner orders a slave mortally wounded by Titius to be free and heir, and later Maevius succeeds the slave as heir,

Maevius will not have the Aquilian action against Titius, at least according to the view of Sabinus, who thought that an action would not be transferred to the heir which could not have been exercised by the deceased; and indeed it would be absurd if the heir could recover damages for the death of the person to whom he succeeded. But if the owner had ordered the slave to be free and part-heir, the latter's co-heir may bring the Aquilian action for his death.

37. JAVOLENUS, *From Cassius*, book 14: If a free man has committed direct injury by the order of another, an Aquilian action will lie against the one who gave the order if he had a right to command, if not, the action may be brought against the doer. **1.** If a quadruped for which an action *de pauperie* lies against the owner is killed by another, the latter is liable to an Aquilian action in which the damages should be computed not merely with respect to the animal's market-value but also to its accessory value, representing the liability in the action *de pauperie*; thus the defendant in the Aquilian action for killing should be condemned in the amount by which it would have benefited the owner to have made noxal surrender rather than pay the damages.

38. JAVOLENUS, *Of letters*, book 9: If my slave, bought by you in good faith and while in your service, is wounded by your slave, it has finally been settled that I have a good right of action against you under the *Lex Aquilia*.

39. POMPONIUS, *On Quintus Mucius*, book 17: Quintus Mucius writes: A mare was grazing in another's field, and being pregnant, miscarried while being driven off; it was asked if her owner could bring an Aquilian action against the man who drove her away for damage caused thereby. It was held that an action would lie if he struck her or intentionally drove her too violently. **1.** Pomponius: Although one surprise another's cattle on his land, he must drive them off as if they were his own that he had surprised, because if he has suffered any damage in the affair, he has the proper actions. Hence he who catches another's cattle on his land may not lawfully impound them, nor, as said above, should he drive them off otherwise than as if they belonged to him; he must either lead them away without harming them or notify their owner to come and get them.

40. Paul, *On the edict*, book 3: Under the *lex Aquilia*, if I claim that my chirograph has been destroyed which stated that money was owed me under a condition, and if at the time I can prove this by witnesses who may not be available when the condition is satisfied, and if after a brief exposition I can convince the judge of these facts, I ought to win; however, the execution of the judgment will be permitted when the condition of the debt is satisfied, so that if it fails the judgment will have no effect.

41. ULPIAN, *On Sabinus*, book 41: If one destroys a will, let us see whether there is an action for wrongful damage. And Marcellus in the fifth book of his Digest after hesitation refuses the action, asking upon what grounds the damage can be computed. In a note to the passage I remarked that this was true of the testator, because his interest could not be computed, otherwise, however, for the heir or legatee, for whom the will is almost like a chirograph; and in that very place Marcellus writes that the Aquilian action lies for destruction of a chirograph. And if a depositary of a will destroys it or reads it in the presence of others, it is more advisable to bring an action *in factum*, or for insult, if the secrets of one's last will have been published with the intention to insult him. **1.** Pomponius neatly remarks that it may often happen that the destroyer of a will is not held for theft but only for wrongful damage, as in the case where he destroyed without any intention of profiting but merely to injure, where he could not be held for theft, which requires not only the act but the intention of stealing.

42. Julian, *Of digests*, book 48: The depositary of a will or any other valuable document who so injures it as to render it illegible is liable in the action of deposit and that *ad exhibendum* for restoring or exhibiting an object so badly injured. For these facts an Aquilian action will also lie, for one is rightly held to have spoiled a will if he has erased part of it.

43. Pomponius, *On Sabinus*, book 9: You have an Aquilian action for damage done to the inheritance before your entry, although it occurred after the death of him to whom you are heir; for by "owner" the *Lex Aquilia* does not necessarily mean the owner at the time the damage was done; for if that were true the action could not even pass from the deceased to his heir, nor could you bring it after your return with *postliminium* for damage committed while you were a prisoner of the enemy, nor could a different rule be observed without great injustice to posthumous children who are taken to be heirs to their parents. The

same is to be said for trees secretly cut during this period, and I am of the opinion that the rule may be applied to the interdict "*quod vi aut clam*" if the act has been done after prohibition or it appears that the defendant ought to have known that it would have been prohibited by those who would succeed to the inheritance if they had found out in time.

44. ULPIAN, *On Sabinus*, book 42: The slightest negligence founds an Aquilian action. **1.** Whenever a slave wounds or kills with the knowledge of his owner, there is no doubt that the owner is liable to an Aquilian action.

45. PAUL, *On Sabinus*, book 10: We understand knowledge to include tolerance, so that one is held if he could have forbidden the act but did not. **1.** An action on the *Lex Aquilia* may be brought even after the wounded slave has been cured. **2.** If you kill my slave whom you believe to be a freeman, you will be liable to an Aquilian action. **3.** As two slaves were jumping over a heap of burning straw, they collided, both fell down, and one was burned to death; no action can be brought for him unless it can be proved which knocked over the other. **4.** They are innocent who do what would otherwise be wrongful damage when they can protect themselves in no other way; all statutes and systems of law allow force to repel force. But if in defending myself I throw a stone at my adversary, and hit not him but a passerby, I shall be liable under the *Lex Aquilia*, for it is permissible to strike only the aggressor, and even him where it is done solely in defense, not for revenge. **5.** One who removes a good wall is liable to its owner for wrongful damage.

46. ULPIAN, *On Sabinus*, book 50: If an Aquilian action has been brought for a wounded slave, this is no bar to another Aquilian action after he has died from the wound.

47. JULIAN, *Of digests*, book 86: But if damages were given in the former action and after the slave's death his owner brings an action for killing, by the *exceptio doli* his recovery in both actions will be limited to no more that he would have had if he had first brought the action for the death of the slave.

48. PAUL, *On the edict*, book 39: If a slave does damage to the inheritance before entry thereon, and after becoming free again damages the estate, he will be liable to both actions because the delicts result from two separate acts.

49. ULPIAN, *Of disputations*, book 9: If one by making a smudge drives away or even kills another's trees, he seems rather to have furnished the cause of death than to have killed, so that he will be liable to an action *in factum*. **1.** When it is said that the Aquilian action lies for wrongful damage, it must be understood that wrongful damage exists only when there is a wrong in addition to damage, the former element being absent when the act is done under the influence of *vis major*, as in the case reported by Celsus of a man who destroyed a neighboring house to prevent the spread of a fire; here he writes that there is no Aquilian action because the neighboring house was destroyed under the reasonable fear that the fire would spread to that of the defendant; he is also of the opinion that there is no Aquilian action whether the fire reached the defendant's house or was put out before doing so.

50. ULPIAN, *Of opinions*, book 6: If one demolishes another's house without his consent and builds baths there, in addition to the rule of natural law that fixtures belong to the owner of the land, he will also be liable to an action for wrongful damage.

51. JULIAN, *Of digests*, book 86: A slave was so wounded that it was certain that he would die of the blow; in the meantime, he was instituted heir and then died from another blow; my question is whether an Aquilian action for killing can be brought against both wrongdoers. The answer was that one is ordinarily said to have killed who furnishes the cause of death in any way, but under the *Lex Aquilia* the only one who is held to be liable is he who has furnished the cause of death by direct violence, so to speak by his own hand, because the interpretation of the word "kill" is made with reference to the words "slaying" or "slaughter." Moreover, not only those are held liable under the *Lex Aquilia* who have dealt such a wound that death follows immediately, but also those who have wounded a man so that he is certain to die. Hence if one has inflicted a mortal wound on a slave and another later gives the same slave a blow from which he dies before he would have died from the former wound, the better view holds both under the *Lex Aquilia*. **1.** And this is in accord with the authority of the ancients who, when a slave was wounded by several so that it did not appear which wound caused his death, decided that all are liable under the *Lex Aquilia*. **2.** The damages for the dead slave will not be the same for both wrongdoers, for he who first

wounded the slave will pay his highest value in the last year, reckoning back 365 days from the wound, but the second defendant will be liable for the highest value of the slave in the year preceding his death, which will include the value of the inheritance. Thus for killing the same slave one will pay more, the other less, which is not surprising since each has obviously killed the slave for a different reason and at a different time. And if anyone thinks that we have reached an absurd result, let him consider that it would be far more absurd that neither should be liable under the *Lex Aquilia*, or one rather than the other, since on the one hand misdeeds ought not to go unpunished yet on the other it cannot easily be decided which wrongdoer more clearly comes within the terms of the statute. Indeed it can be shown by countless examples that many rules have been adopted in the strict law contrary to academic logic on account of common convenience; I shall content myself here with but one: when, with intent to steal, several carry away another's beam which none by himself could have carried, all are held liable to the action for theft, although it might strictly be claimed that nobody should be liable because no one of them really carried it away.

52. ALFENUS, *Of digests*, book 2: If a slave dies from blows and this occurred neither by the ignorance of the doctor nor the negligence of the owner, an action may properly be brought for wrongfully killing him. **1.** An innkeeper had placed his lantern at night on a stone by the road, and a passerby had carried it off; the innkeeper followed him demanding the lantern and held him back when he attempted to escape; whereupon the other, to make him let go, began beating the innkeeper with a whip which he had in his hand in which there was a spike. A fierce fight ensued in which the innkeeper put out the eye of the man who had carried off the lantern; the former then consulted me as to whether he might not be held guiltless of wrongful damage because he had first been struck with the whip. I replied that unless he had intentionally put out the eye, he would not be held to have committed wrongful damage, for the fault seems to lie in him who first struck with the whip; if, however, the innkeeper had not first been beaten by the other, but the fight had resulted from his attempt to snatch away the lantern, the act seemed to be his fault. **2.** Mules were dragging two loaded carts up the Capitoline hill; the drivers of the front cart, which had got tilted back, were holding it up to make it easier for the mules; meanwhile the team began to move backward so that when the drivers, who were between the two carts, jumped out from their position, the rear cart was hit by the other and rolled down and ran over someone's slave boy. The boy's owner consulted me against whom to bring action. I answered that the rule of law depended upon the facts; assuming that the drivers who were holding up the front cart got out of the way of their own accord, thus rendering the mules unable to support the cart, which dragged them back by its own weight, then there would be no action against the owner of the mules, but an Aquilian action could be brought against those who were upholding the tilted cart, for one has none the less inflicted direct damage who voluntarily lets go something which he is supporting so that it strikes another, as where one does not hold in an ass which one is driving, just as one commits wrongful damage who allows a weapon or anything else to escape him. Assuming, however, that the mules shied at something and the drivers, fearing to be crushed, left the cart, there would be no action against the men, but one against the owner of the mules. But if neither the mules nor the men were responsible, but the mules could not sustain the weight or in straining slipped and fell, whereupon the cart began to go back, and because it was tilted the drivers could not sustain its weight, then there could be an action neither against the owner of the mules nor the men. At least it was certain, whatever the facts, that there could be no action against the owner of the other mules, who had gone backward involuntarily because they were hit. **3.** Oxen were sold on approval and later delivered for trial, during which a slave of the buyer was struck by the horn of one of them; the question was whether the seller ought to indemnify the buyer. I answered that if the buyer had bought the oxen, no recovery could be had: if not, then if it was by the slave's fault that he had been hit by the ox, there should be no recovery; otherwise, if by a vice in the ox. **4.** Several people were playing ball, one of whom pushed a youthful slave who was trying to get the ball; the slave fell and broke his leg. It was asked whether the owner of the child might bring an Aquilian action against the one whose push had caused the fall. I answered, No, since it seems to have occurred rather by accident than by negligence.

53. NERATIUS, *Of* "*parchments*," book 1: You drove another's oxen into a ravine with the result that they fell off a precipice; an action *in factum* will be granted against you upon the analogy of the *Lex Aquilia*.

54. PAPINIAN, *Of questions*, book 37: The debtor has the Aquilian action if the stipulator wounds the. promised animal before default in delivery, and it is the same if he kills it. But if the stipulator kills it after the promisor has defaulted, the debtor is discharged; but here there is no right to bring the Aquilian action, for the creditor seems to have wronged himself rather than anyone else.

55. PAUL, *Of questions*, book 22: I promised to Titius either Stichus or Pamphilus, at a time when Stichus was worth ten, Pamphilus twenty, thousand; the stipulator killed Stichus before default, the question was as to the action of the *Lex Aquilia*. I answered: since the cheaper slave is assumed to have been killed, the creditor in this matter differs in no way from a third person. What then will be the damages? Ten thousand, the value of the slave who was killed, or the value of the one whom I have to deliver, that is, the amount by which I am impoverished? And what shall we say if Pamphilus dies before default? Will the value of Stichus be diminished because the promisor is discharged? In fact it is enough if Stichus was more valuable when he was killed or within the year. For this reason, even if he is killed within a year after the death of Pamphilus, he will be held to be of the greater value.

56. PAUL, *Of sentences*, book 2: If a woman damages her husband's property, she will be liable under the provisions of the *Lex Aquilia*.

57. JAVOLENUS, *From the later works of Labeo*, book 6: I lent you a horse, and as you were riding it in the company of several others, one of them struck against your horse, throwing you off and at the same time breaking the horse's legs. Labeo refuses any action against you, but permits one against the rider if the accident was due to his fault; clearly there can be none against the owner of the horse. I agree.

NOTES

1. The great bulk of this title comes from the edictal mass and is regular: e.g., frags. 1-11, 13-15, 17, 19, 21-27, 29, 30, 32-39; frag. *40 is edictal but out of place; frags. *12, *16, *18, *20, *28, *31 are Sabinian interleaved with the edictal; frags. 41-53 are Sabinian and regular except for *47; frags. 54-56 are Papinianic and regular; frag *57 is Sabinian and out of place.

2. Authors excerpted:

Alfenus -- consul 39 B.C.
Javolenus Priscus -- consul in 90 A.D.
Neratius Priscus -- floruit temp. Trajan/Hadrian (A.D.98-138)
Julian -- consul 149 A.D.
Gaius -- Antonine jurist, died after A.D.178
Pomponius -- contemporary of Gaius
Marcellus -- Antonine jurist
Papinian -- killed A.D.212
Paul -- Severan jurist, floruit 181-235.
Ulpian -- Severan jurist, murdered A.D.224 or 228.
Marcianus -- younger contemporary of Paul and Ulpian

The *lex Aquilia* from an "Historicist" Viewpoint

What we make of the *Digest* title reproduced above is heavily dependent on how we put it together and with what other texts we put it. The following puts the texts together in a way that may reflect the development doctrine of the classical jurists, not only on the topic of the *lex Aquilia* but also of the law of delict generally.[1]

GI.3.182–223

(above pp. 177–180)

D.47.2.14.17

S. P. Scott trans., *The Civil Law*, 10:250–51

14. ULPIAN, *On Sabinus*, book 2: … **17.** If a letter which I have sent to you should be intercepted. who will have a right to bring the action for theft? And, in the first place, it must be ascertained to whom the letter belonged, whether to the person who sent it, or to him to whom it was dispatched. If I gave it to a

[1] [The sources of the first three inserted texts are unclear. The rest come from Sandro Schipani, *Responsibilità ex lege Aquilia*: *criteria di imputazione e problema della culpa*, Università di Torino, Memorie dell'Istituto Giuridico, ser. II, 131 (Torina: Istituto Giuridico, 1969), and these may too.]

slave of him to whom it was sent, it was immediately acquired by the latter. If I gave it to his agent, this is also the case, because, as possession can be acquired by means of a free person, the letter immediately became his property; and this is especially true if he was interested in having it. If, however, I sent a letter which was to be returned to me, it will remain mine, because I was unwilling to relinquish or transfer the ownership of it. Who then can bring the action for theft? He can do so who is interested in not having the letter stolen, that is to say, the individual who was benefited by what it contained. Therefore, it may be asked whether he, also, can bring the action for theft to whom the letter was given in order to be conveyed to its destination. He can do so if he was responsible for the safe-keeping of the letter, and if it was to his interest to deliver it he will be entitled to an action for theft. Suppose that the letter stated that something should be delivered to him, or done for him; he can then bring an action for theft, if he assumed responsibility for its delivery, or received a reward for carrying it. In this instance, he resembles an inn-keeper, or the master of a ship; for we grant them an action for theft, if they are solvent, as they are responsible for property.

D.9.3.1pr–4

id., vol. 4, at 3.

1. ULPIAN, *On the edict*, book 23: The praetor says with reference to those who throw down or pour out anything: Where anything is thrown down or poured out from anywhere upon a place where persons are in the habit of passing or standing, I will grant an action against the party who lives there for twofold the amount of damage occasioned or done. If it is alleged that a freeman has been killed by a blow from anything that fell, I will grant an action for fifty *aurei*. If the party is living, and it is said that he is injured, I will grant an action for an amount which would seem to be just to the judge that the party against whom suit is brought should be directed to pay. If it is alleged that a slave committed the act without the knowledge of his master, I will add to the petition in the case the words, "Or surrender the slave by way of reparation". **1.** No one will deny that this edict of the Praetor is of the greatest advantage, as it is for the public welfare that persons should come and go over the roads without fear or danger. **2.** It makes, however, very little difference whether the place is public or private, so long as persons ordinarily pass there; because the Praetor had in view persons who were going their way, and particular attention was not paid to highways; for those places through which people ordinarily pass should have the same security. If, however, there was a time when persons did not ordinarily pass that way, and anything is then thrown down or poured out while the place was enclosed, but only after that it began to be used for travel; the party will not be liable under this edict. **3.** Where something falls down while being hung up, the better opinion is that it should be held to have been thrown down; hence, where something is poured out of a vessel which is suspended, even without the agency of anyone, it must be said that the edict is applicable. **4.** This action *in factum* is granted against the party who lodged in the house at the time when something was thrown down or poured out, and not against the owner of the house, because the blame attaches to the former. […]

D.9.2.1–2

(above p. 401)

D.9.2.27.5

(above p. 405)

GI.3.210–219

(above p. 179–180)

D.9.2.39pr

(above p. 409)

D.9.2.31

(above p. 408)

D.43.24.7.4 (Concerning the interdict *quod vi et clam* [by force and secretly])

S.P. Scott trans., vol. 10, pp. 13–14

7. ULPIAN, *On the edict*, book 70: […] **4.** Gallus doubts whether still another exception may not be interposed; for example, where for the purpose of preventing a fire from spreading I demolish the house

of my neighbor, and proceedings are instituted against me either under the interdict *Quod vi aut clam*, or for the reparation of wrongful damage. Gallus is uncertain whether the exception, "if you have not done this to prevent the spread of the fire," ought to be employed. Servius says that if a magistrate directed this to be done, the exception ought to be granted, but a private individual should not be permitted to demolish the house. If, however, any act was committed by violence, or clandestinely, and the fire did not extend to that point, the amount of simple damages should be estimated, but if it did reach that point, the party in question should be released from liability. He states that the conclusion would be the same if the act had been committed for the prevention of future injury, as, both houses having been destroyed, it would appear that no injury or damage had been caused. But if you should do this when there was no fire, and fire should afterwards break out, the same rule will not apply; because, as Labeo says, the appraisement of damages should be made, not with reference to the former event, but according to the present condition of the property.

D.9.1.1.4 (Concerning the action for *pauperies* done by a four-footed animal) [edited]

[Scott?]

1. ULPIAN, *On the edict*, book 18: **4.** […] Servius says [that] this action lies where an animal does harm because its savage nature is excited; suppose for instance, a horse given to kicking actually kicks, or an ox which is in the habit of butting butts with its horns, or mules [do some mischief] owing to exceptional vice; but if an animal should upset a load on some passer by, owing to the roughness of the road or the negligence of the driver, or because it was too heavily laden, this action will not be allowed, but the proceedings will be for wrongful damage [under the *lex Aquilia*].

D.9.2.9.3

(above p. 402)

D.9.2.52pr

(above p. 411)

D.9.2.52.2

(above p. 411)

D.9.2.23.4

(above p. 404)

D.19.2.30.2

S.P. Scott trans., vol. 5, p. 91

30. PAUL, *Epitomes of Alfenus*' *digests*, book 3: […] **2.** Inquiry was made as to the action to be brought where a man hired mules to be loaded with a certain weight, and he who hired them injured them with heavier loads. The answer was that the owner could legally proceed either under the *Lex Aquilia* or in an action on lease, but that, under the *Lex Aquilia*, he could only sue the party who had driven the mules at the time; but, by an action on lease, he could properly proceed against him who hired them, even if someone else had injured them.

D.9.2.27.8

(above p. 405)

D.19.2.57

Donahue trans.

57. Javolenus, *From the later works of Labeo*, book 6: I made a *commodatum* of a horse to you. When you were riding on him and a number of others were riding along with you, one of these smashed into the horse and threw you off and in this accident the horse's legs were broken. Labeo denies that there is any action with you, but there is with the horseman if it happened through the *culpa* of the horseman; clearly a lawsuit can not be brought against the owner of the horse. I think this is right.

D.9.2.7.5

(above p: 402)

D.43.24.7.4

(above p. 413)

D.47.9.3.7 (Concerning the penal action against those who take things during fire, destruction, shipwreck or attack on a boat or ship)

S.P. Scott trans., vol. 10, p. 302

3. ULPIAN, *On the edict*, book 56: […] **7.** What the Praetor says with reference to causing damage only applies where the damage has been committed maliciously, for if malice is absent, the edict will not be available. Hence, how must what Labeo stated be understood, namely: if, for the purpose of protecting myself from a fire, which has broken out, I demolish a building belonging to my neighbor, should an action be granted against me, and my slaves? For, as I did this for the purpose of protecting my own house, I certainly am free from malice. Therefore I think that what Labeo said is not true. But can an action be brought under the Aquilian Law? I do not think it can, for anyone who desires to protect himself does not act unjustly when he cannot do otherwise. Celsus, also, was of the same opinion.

D.9.2.29.3

(above p. 407)

D.9.2.57

(above p. 412)

D.47.10.15.46 (Concerning *iniuria*)

Donahue trans.

ULPIAN, *On the edict*, book 70: If anyone should bring [an *actio*] *iniuriarum* for a slave who has been beaten and afterwards brings [an *actio*] *damni iniuriae*, Labeo writes that it is not the same matter, because one action has to do with the harm given by *culpa*, the other with the contumely.

D.9.2.5.2

(above p. 401)

D.40.12.13pr

Donahue trans.?

13. GAIUS, *On the edict of the urban praetor*, *Title*: *Actions relating to freedom*: It is certain that in the action *in factum* under discussion, judgment should only be rendered for the amount of damages which were caused by fraud, and not for what was due to negligence. Therefore, even if the alleged slave should be released from liability in a case of this kind, still, suit can afterwards be brought against him under the Aquilian Law, as by this law he will also be liable for negligence.

D.9.2.32pr

(above p. 408)

GI.3.202

(above p. 178)

D.9.2.8pr–1

(above p. VI.A.402)

D.50.17.132

Donahue trans.?

132. GAIUS, *On the provincial edict*, book 7: Lack of skill (*imperitia*) is counted as *culpa*.

GI.3.211

(above p. 179)

B. PRETORIAN DELICTS

[Omitted from this year's mateials.]

C. SECONDARY MATERIAL

1. Damage to Property and Theft

[Omitted from this year's materials.]

2. Infamia

[Omitted from this years materials.]

3. Iniuria, Defamation, Criminal Law

J.A. Crook, *Law and Life of Rome* (London: Thames and Hudson, 1967), 250–55, 268–78[†]
[footnotes omitted]

This final chapter begins at a tangent, with an account of the civil wrong called by the Romans *iniuria*. The real reason is that, though important, it does not fit conveniently anywhere else; however, it does touch our main theme tangentially, and will in due time lead us to it. For the action of one man against another for *iniuria*, which began as a means of redress for personal physical assault and battery, widened in scope until it became available for every sort of offence against dignity or standing, including defamation, verbal assault. Now defamation, as everyone knows, though it may simply be an affair between private individuals, moves at one end of its spectrum into seditious or criminal defamation, the bringing into contempt of the state or its officers, and so disturbing the peace and order of the community at large; and when it reaches that point it is very relevant indeed to the relation of citizen and state, because it raises the issue of freedom of speech. There is no place here to go into the early history of the Roman law of *iniuria*, for its important extensions had already taken place by the beginning of our period. The Twelve Tables had laid down penalties in money for physical assault on free men and slaves,

and they contained the general clause, 'If he shall have done an *iniuria* let there be a penalty of twenty-five' (*i.e. asses*), a sum which went down in value until it became derisory—hence the famous anecdote copied from Labeo by Aulus Gellius:

> 'There was a certain L. Veratius, a terrible nuisance and fearfully irresponsible. He used to take delight in slapping the faces of free men with the palm of his hand, and he went around followed by a servant with a purse of *asses*, and when he had slapped a man he would order twenty-five asses to be paid out on the spot. Therefore, says Labeo, the praetors afterwards decided that this law should be abolished and abandoned, and laid down in their edict that they would give "recoverers" for estimating injury.'

It was indeed the praetors, exercising *ius honorarium*, who built a whole law of redress for personal affront out of these unpromising materials. They added clauses to their edict widening the scope of *iniuria*, including one 'that nothing be done for the purpose of defaming'; and ultimately any wilful damage to a man's dignity or standing, even indirectly through persons in his *potestas*, was capable of grounding an *actio iniuriarum*. Gaius in the *Institutes*, and the *Digest* in a well-known title, testify to the great, and open-ended scope of the action: assault (or pretended assault) on the moral reputation of a man's wife or daughter or son; doing things to imply that a man could not meet his debts; flogging his slave; preventing him from fishing or sitting in a public place; raising an outcry against him; defaming him. (One thing, however it did not cover: the killing, whether deliberate or negligent, of a free man. For that there was no civil action in damages for the man's wife and family; their only recourse was to the criminal law.) The *actio iniuriarum* had a number of important features. According to Gellius it went before *recuperatores*, though that was clearly not always the case. It was also technically 'estimatory'; the plaintiff named a figure for his damages, which the judge could reduce but not exceed. Thirdly, conviction resulted in 'infamy'; fourthly, the suit, being regarded as very personal to the injured party, was not available to his heirs and did not lie against the heirs of the assaulter; and fifthly, you must not delay or swallow your injury, but pursue it at once, otherwise you lost your right to sue.

The Twelve Tables treated as criminal not only the casting of spells on people by incantations but also *occentare* (which was to raise a hostile demonstration in the streets against someone), thus blocking the only way open to the *plebs* in early days of bringing to notice and branding with public shame a wickedness or unfairness of one of the great men. This also was taken over into the civil law of *iniuria* by the praetor's edict; it receives careful definition in the Digest. A court *de iniuriis* was amongst the standing jury courts established by Sulla; technically it was not a criminal court, according to Paulus:

> 'for an action for *iniuria* under the *lex Cornelia* a representative can be put in (*i.e*. as defendant), for although the court is there for the public utility it remains a private suit.'

Its scope is plainly stated in the *Digest*: assault and battery, and forcible entry upon private premises. A recent attempt to prove that it covered defamation as well is unconvincing; it was in line simply with much other legislation 'concerning armed violence' in those troubled decades. But at some uncertain date a *senatusconsultum* did add to it libel and slander, whether by name or not, and included under this head persons who sold and propagated defamatory writings. What was the date of this *senatusconsultum*? It is generally held that it was passed under the influence of the emperor Augustus, late in his principate, and is referred to by Suetonius:

> 'Even libels about him distributed in the senate-house failed to disturb him—though he took great trouble to refute them —and he did not even investigate their authorship. All he did was to propose that in future there should be prosecution of anyone who put out flysheets or lampoons to the defamation of people under pseudonyms.'

Though admittedly there are doubts and difficulties this is probably right; if so, then from Augustus onwards (but not in Cicero's day) defamation, like other *iniuriae*, could be proceeded against either for civil damages or before the jury courts. As for seditious libel, the perennial problem about which is that it may be just political satire regarded with hostile eyes, a famous and difficult passage of Tacitus implies that Augustus on one occasion at least treated it as falling within the score of the criminal law of treason, *maiestas*, which had hitherto, says Tacitus, been confined to deeds, nor words (it had in tact been concerned with the punishment of disobedience or incompetence on the part of officers of state). This too is probably right; words had been immune—immune, that is, from prosecution under the statues of

maiestas. Henceforward (but not in Cicero's day) there was always danger that outspoken criticism of the regime or its personnel might count as treason.

The mark left by all this on literature should be considered. Lucilius in the good old days had 'got away with murder'; apparently like many satirists he did not much care for his own medicine, for we hear of him as plaintiff in a suit against an actor for defaming him on the stage. He lost it. In the late Republic the angry young men like Catullus flung their insults about with deliberate defiance. But the famous satirists of the classical age did not attack contemporaries. 'No Roman writer, playwright or satirist either enjoyed or thought himself entitled to exercise the right of free speech. If he attacked or defamed people, he did so at his peril.' Horace made a joke out of the situation, bringing in good old Trebatius (once the butt of Cicero's avuncular legal quips, now the 'embodiment of the law') to keep him on the straight and narrow path:

> 'Just take heed of warnings, lest ignorance of tee inviolable laws should cause you trouble; if a man makes wicked verses against another the law and d the courts await him.'

'Think before you enter the fray', says Juvenal's imaginary interlocutor:

> 'It's too late to repent of the battle once you've got your helmet on.' 'Very well, I'll chance what I'm allowed to say—about the fellows already in their tombs along the *Via Flaminia* and the *Via Latina*.'

Nor did Tacitus, for all his contentment with the regime under which he wrote, when you could 'say what you thought,' openly defame any contemporary.

It is customary to say—in rather modern language—that 'truth was a complete defence' to a charge of *iniuria*. In so fir as this assertion is based, as it appears to be, on one text in the *Digest*, it goes too far and makes nonsense of the whole Roman principle of damage to dignity and standing. What Paulus says in thee text is:

> 'It is not equitable for a man who defames a harmful person (*nocentem*) to be convicted for so doing, for the crimes of the harmful ought to be published and it is in the public interest for them to be.'

This may be accepted as far as it goes, that truth was a good defence to the charge of publicly accusing someone of being a criminal; but there are many things that you can publish about a man with intent to injure his dignity that fall short of alleging him to be a 'harmful person'—you can say he is illegitimate, or in financial straits, or squints, or is henpecked, or that his daughter has run away with a sailor. Nothing suggests that the truth of remarks of this kind would have been a good defence.

The reader may be puzzled about what has so far been said about defamation. 'Surely', he will ask, 'we have in published political and forensic oratory of the Republic the most savage and unbridled defamation; and was not outrageous personal abuse a stock-in-trade of political controversy?' This is undeniable, and it may be added that while there is on the one hand no shred of evidence that political or forensic speeches were protected by any formal legal 'privilege', on the other hand no actual case is ever heard of in which anyone sued anyone else for defamation on the basis of what was said about him in the courts or the senate or *coram populo*. It seems to have been thought more proper for established barristers to defend than to prosecute, and Quintilian has a discussion about the desirability of reasonable politeness, in which he refers to Cicero's practice; but he never says or implies that there was any danger of prosecution for slander—and speeches for the defence might, of course, contain just as much incidental defamation as those for the prosecution. Nor does Cicero's usage bear out the contention sometimes advanced that the phrase 'whom I name for honourable reasons' was slipped in, when counsel had occasion to refer to people incidentally, in to dispel the dancer of a slander action. We must assume that there was in this matter a distinction of *genre* and distinction of class, and that politics and the law courts were accepted by the upper class in Republican times as a game with its own special rules, such that they thought it beneath their diginity to appeal to umpires outside the game about what was said of them by their peers in the course of it. What the humbler man could say with impunity no doubt depended on the strength of his friends and enemies.

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The most obvious sphere in which the state impinges upon the individual is the criminal law. The system of the Roman criminal courts was described in Chapter III, and it was there shown how during the Principate the standing jury courts were gradually supplanted by the 'extraordinary' jurisdiction of the emperor's delegates. The jury courts came to an end with a whimper rather than a bang; the jurist Paulus at the beginning of the third century said:

> 'The ordinary jurisdiction of the capital courts has ceased to be in use; [but the standard legal penalties survive although the crimes themselves are now investigated *extra ordinem*].'

They were probably never formally abolished by legislation. Books 47 and 48 of the *Digest* contain a mass of evidence about the offences that were tried under the criminal law, still mostly grouped under the headings of the old statutes that set up the standing jury courts; one might wonder why the great Severan jurists like Ulpian, writing when the jury courts were in practice obsolete, chose to group the criminal law in this way, but the answer is no doubt partly that it was traditional and partly that they were only defining offences—so that even Justinian could continue to employ the antique system of classification. The picture is in any case confusing; some offences seem to have been transferred from one court to another, the addition of new offences to the sphere of this or that court seems to have been done quite unsystematically, and some very similar looking crimes were apparently triable under more than one heading. One thing they had in common, besides the rules of procedure laid down for them by the *leges Iuliae iudiciariae*: conviction in all of them resulted in legal 'infamy':

> 'Infamy is not produced by conviction for all crimes, but for those of the *iudicia publica*. Infamy therefore does not follow condemnation for a crime not under the *iudicia publica*, unless it is one for which condemnation in a civil action would have resulted in infamy, such as theft, violent seizure of goods, or *iniuria*.'

Of treason, *maiestas*, nothing need be said except to remind the reader that seditious libel came to be attached to it. It was the political crime *par excellence*, and its history belongs to the sinister story of palace politics, intrigue and assassination told by Tacitus, Suetonius and Dio. *Repetundae*, extortion of money by provincial governors, remained a common offence in the first century AD (and perhaps later—it is the evidence that dies out). Pliny records numerous trials; in his day the offenders were tried by the senate, their peers, but upon conviction the case went to a board of *recuperatores* to determine the sum at issue. Judicial bribery also came under this head. The court for murder took parricide, poisoning and magic arts, but seems to have lost its old original 'walking with a weapon with intent to kill or steal' to the court for *vis publica*. On the other hand it picked up arson, wrecking, castration, and engineering of testimony, if a magistrate, to procure a death penalty. *Vis publica* deals with illegal possession of arms, false imprisonment, affray, rape, prevention of burial, tampering with the courts (presumably by intimidation) and breach of the citizen's right of *provocatio*; and it seems that violation of tombs might also come under it. The court *de adulteriis* dealt also with *stuprum* and with unnatural sexual practices, including incest. The court *de annona* was confined to punishing combinations to raise the price of grain. And as to the old offence of *ambitus*, election bribery, it was still being legislated against in the first century AD, but later, as Modestinus says:

> 'This law is obsolete in Rome today, because the of magistrates belongs to the care of the emperor, not the favour of the people.'

Theft and *plagium* we have already said enough about, and also the non-civil court for *iniuria* (not, it appears, technically a *iudicium publicum*), which concerned assault and battery and forcible entry. But some further particularity must be given to the interesting complex of offences that crystallized round the old *lex Cornelia testamentaria*. Its original scope was false dealing with wills suppressing them, forging them, even opening and resealing them. An edict of Claudius and a *senatusconsultum Libonianum* made it a particular offence to write yourself into a man's will, and the *Libonianum* seems to have been important enough to warrant a special treatise by Paulus. By another *senatusconsultum* of unknown date the *lex Cornelia* was extended to cover forgery of any kind of document. Then it picked up falsifying of edicts and constitutions (though if done by an official this was *peculatus*, and the praetor had always had a clause protecting his own edict from being tampered with). Also there came in here all the law about counterfeiting—adulteration, clipping, forging, uttering false money and refusing to accept good money (though again, if done by officials this might be *peculatus*). The use of false weights and measures was subsumed under the *lex Cornelia* by Trajan, which is natural enough; but a curious collection of other

falsifications gets put by the *Digest* at least under the same heading: bribery in the legal process appears here also; so does neglect of imperial constitutions by a judge; assuming a false name; foisting upon someone a suppositious child; falsely behaving as a member of the military and using faked *insignia* or passes. *Peculatus*, as we have seen, was very similar to *falsa*; in fact it was much the same offenses when done by persons holding public or sacred office—retention of public money, conversion of public and sacred funds and the like were covered by it.

There was a constant need during the Principate to define new criminal offences, for the criminal law of the Republic had remained elementary. Some, as was shown above, were subsumed under the old statutes, others were treated as *extraordinaria* from the start, going before the emperor's delegated tribunals: blackmail (*concussio*), cattle-rustling (*abigeatus*), harbouring of brigands (*receptatio*), burglary (*effractio*), and what seems to have been a special provision against snake-charmers. The most striking sounding of these new 'extraordinary' offences, though little is really known about it, was *stellionatus*, behaving like a lizard it was the criminal version of *dolus*, put alongside the civil *actio de dolo* just as theft and *iniuria* got their non-civil counterparts, and it carried the same peculiarity as the *actio de dolo*, that it was a residuary procedure, only to be resorted to if no other charge would fit. It must be remembered, in any case, that the magisterial *cognitio* did not depend on the allegation of a named and defined offence; any set of alleged criminous acts was good enough ground for *cognitio*. The definitions no doubt arose out of the frequency of certain sets of facts.

For completeness we must add that gambling and betting were the object of a long tale of legislation from early Republican times onwards, though they were not, in our period, criminal offences. A *senatusconsultum* said you could put money on athletic contests 'which are done for virtue', but not on other games. It was the praetor's edict which applied the sanctions; the praetor, it appears, refused actions to recover gambling debts, and refused them also to the proprietors of gambling premises for assault or for theft committed on the premises, and he gave an action to people forced into gambling against their will:

> 'for there are those who force people to gamble either initially or, when they themselves are losing, to keep their opponent at the table.'

This seems in the end to have been visited with criminal penalties.

Everyone is struck by the apparent contrast between the simplicity and lack of savagery of the penalties for crime in the Republican age of Rome and the diversity and increasing brutality of those under the Principate. Appearances, as to brutality, may be a bit misleading, and diversity testifies to a more sophisticated and flexible criminal system. Under the system of the *quaestiones perpetuae* the penalty was fixed by the statute which established the court; if the jury convicted, the *poena legis* followed invariably, though where it was pecuniary there might have to be a *litis aestimatio* or assessment of amount. Penalties were either pecuniary or they were capital—there was nothing else. The capital penalty (execution with the axe—later with the sword) was seldom inflicted, to judge from what we hear, because the defendant normally went into exile, which was not a penalty of the law but an accepted way of avoiding the penalty. He lost his citizenship and freedom, so far as Rome was concerned, and he lost whatever property he could not take away with him; and behind him the door was shut by the decree that, he being now 'in exile', he was as 'interdicted from fire and water'—none must harbour him, and if he returned anyone could put him to death with impunity. Judging from what we hear may, however, be misleading; we do not know how much chance the lower classes had to slip away into exile, and a good many people may in fact have suffered the death penalty to the letter.

Jurisdiction *extra ordinem* was a wholly different affair. It depended on no statutes, and the penalties were at the discretion of the magistrate; even if the defendant was up on a 'statutory' crime, if it was being judged *extra ordinem* and not by a standing jury court (as was increasingly the case under the Principate), the emperor or prefect of the city or provincial governor could please himself and inflict penalties greater or less or of a different kind. The results were not in the end as arbitrary as they sound for what happened was the growth, by the end of our period, of a fairly standard set of 'extraordinary' penalties, because judges tended to follow the precedent of imperial rescripts. There was, to begin with, exile—as a true penalty, not just an escape route—in two main forms: *relegatio*, a negative form, meaning expulsion from Rome or from a province, and *deportatio*, a positive and much more severe

form, involving loss of citizenship and banishment to some specific remote place (Tomi, Pandateria and so on); this latter was not within the competence of provincial governors. These forms might or might not involve loss of property (normal with deportation but not with relegation), and they might be permanent or temporary. Another creation of the Principate was condemnation to labor—public works or the mines or the gladiatorial troops. The first of these, the least severe, did not affect free status, and might be temporary; but *damnatio in metalla* was for always (the 'next thing to death'), and as a gladiator you were bound to be killed sooner or later—moreover in these two cases a man lost liberty as well as citizenship, becoming a 'penal 'slave'. Exile in its various forms was on the whole for the upper class, hard labour for the lower. Beyond this came the death penalty (which in the 'extraordinary' jurisdiction really meant death) by decapitation, and beyond even that came the *summa supplicia*, aggravated death by crucifixion, burning, or being thrown to the beasts in the circus.

Now the *summa supplicia* were emphatically not an invention of the Principate, for all that they are associated primarily in everybody's mind with the Christian martyrdom, including the first of them all. The first two, at least, are very old, going right back to the 'barbarism' of early Rome, when crucifixion was a penalty for incest and treason. Of course, everybody knows that all through the Republic revolted slaves were crucified. Verres put to death in this way a Roman citizen in Sicily; Cicero complained of the breach of *provocatio* and the shamefulness, but not of the illegality of the method of punishment as such, and probably he would not have turned a hair if the man had been a peregrine. Burning too was an ancient punishment for treachery and arson. (It should be added that the antique special punishments of the 'sack' for parricides and the walling up alive of criminous Vestal Virgins went on.) The earliest certain evidence for casting to the beasts is a reference by Strabo to the fate of a robber chieftain from Sicily in his own time. Naturally, like the others, it was not normally inflicted on high-ranking persons. This became, in fact, the sphere *par excellence* of the distinction between *honestiores* and *humiliores*. Where the latter were condemned to the *summa supplicia* the former were just executed; where the latter went to the mines the former were merely relegated, and so on. But whether a sharp distinction ought to be made between a 'liberal' Republic and a progressively more brutal Principate seems doubtful. It is vital to remember that we do not know much about what was done to humble criminals in Republican times. In the late Republic the only criminal courts were the *iudicia publica*, mostly for 'upper-class' offences, so that it is not surprising that the penalties were mild in practice; but the lower plebs, and peregrines, and slaves, were at the mercy of magisterial *coercitio*, which is unlikely to have been liberal-minded. With the criminal law of the Principate we are at least looking across the spectrum of the whole population. At any rate, returning to the great distinction between *honestiores* and *humiliores* as it was formally set out from the second century AD onwards: Hadrian ruled that decurions (the bottom of the *honestiores*, so that what applied to them applied *a fortiori* to those above) could not receive capital punishment at all except for parricide, but this did not last. Decurions could not be condemned to the mines or to crucifixion or burning. Flogging, too, a very common general punishment for minor offences, which it had originally been a Roman citizen's privilege to escape, was now escaped only by the *honestiores*; we are back, in fact, to what was said at the end of Chapter III, that the *humiliores* came to take the place once occupied by peregrines.

Imprisonment was not, in principle, a legal penalty in Rome, and was probably not much used in practice, though the principle could at times be disregarded:

> 'Governors often condemn people to be held in prison or kept in chains, but they are not supposed to do so, for such penalties are forbidden; prisons ought to be for detaining men [*i.e.* for trial], not for punishing them … '

and people may have had to languish in gaol awaiting the infrequent assizes, in the provinces particularly.

Nor, apart from the *summa supplicia*, was torture a legal penalty. To the Romans it was not a category of punishment but a method of interrogation of witnesses. In the case of slaves, their evidence was not admissible except under torture. Numerous rules were evolved about this, such as that of Augustus that 'you cannot begin with torture', *i.e.* that there must be a *prima facie* case of some kind before slaves could be interrogated, some prior evidence for them to refute or corroborate. Augustus, indeed, seems to have wanted to confine slave torture to evidence in 'capital and atrocious' crimes, and Antoninus Pius laid down that in pecuniary suits torture was only to be used if the truth could not be reached otherwise. We

have already noted that if a master was killed all the slaves of his *familia* had to be put to the torture. What of free persons? Torture was one of the things against which a *civis Romanus* could exercise appeal, and it seems that apart from flagrant sporadic illegalities free persons were not tortured for evidentiary purposes in the late Republic. In the age of the Principate, however, we hear often enough of free persons, even *cives*, being tortured in trials for treason. Marcus Aurelius ruled that the highest class of all and their families were to be exempt from torture, and by the end of our period this privilege had been extended to all *honestiores*; but conversely treason always remained an exception, and other grave crimes tended to be added to it.

As is well known, suicide was not regarded by the Romans with any horror or disapprobation, and many people of the upper class, feeling that for one reason or another life was not worth living any longer escaped from it; we do not know how common suicide was amongst the lower classes. Now the historians of the early Principate refer a good deal to suicide as a means of avoiding the terrors of a trial for treason:

> 'This kind of death was often put into people's minds by fear of the executioner, and also because, if convicted, a man's property was confiscated and his burial forbidden, whereas those who settled their own fates had their bodies buried and their wills respected—a bonus for getting it over quickly.'

The rule that death before conviction forestalled the conviction, so that the consequences of ignominy and confiscation did not fall upon your family, is borne out Cicero's day by an anecdote of Valerius Maximus: Licinius Macer, on trial for extortion, waited on a balcony till the votes began to be counted, and when he saw Cicero, who was president of the court, taking off his magisterial toga he sent a message to him saying 'I have died not condemned but still under trial, so my property cannot be sold up', and at once committed suicide; on receipt of this message Cicero pronounced no verdict. By the end of our period the rule was different: suicide before conviction did not save a man's will, according to Ulpian:

> 'except in the case of those who do it out of weariness of life or impatience with ill health, or for self-advertisement, like some philosophers.'

If you wanted to save your property you must be still more prompt, and commit suicide before any charge had been preferred, that is, before you were even on trial. It is uncertain when this change came about . It has recently been argued, on the basis of a new piece of evidence about what happened to the property of Macro, Caligula's praetorian prefect, after he had been driven to commit suicide, that it had already come about in the reign of Tiberius (which would suggest that the change was connected with the spate of treason trials); this may well be right, but the evidence adduced does not actually prove that the new rule rather than the old governed the case of Macro.

The principles of procedure for the standing criminal courts, as codified by Augustus in the *lex Iulia iudiciorum publicorum*, were 'accusatorial'; there had to be a named accuser and a proper statement of charge. The authorities had no power, of themselves, to charge and try people. Any citizen—with a few exceptions—could bring a criminal charge, and there were rewards for the accuser if the trial resulted in a conviction—which was liable to conjure into being the professional *delator*; but on the other hand the accuser was responsible for his charge and liable to penalties for calumnious accusation. To judge from the fact that Paulus is found in the *Digest* quoting the proper statutory form of 'charge-sheet' in connection with the crime of adultery, we may assume that the 'accusatorial' procedure continued to be proper for the statutory offences even when they came to be judged by tribunals other than the standing courts. (The *Digest* also contains list of people debarred from preferring charges: women and wards, soldiers, magistrates in office, 'infamous' persons, and freedmen as against their patrons; but to this rule in turn there were exceptions (thus, anyone at ail could bring a charge of treason), which headed the law in a new direction, towards a principle that anyone should be enticed to bring an accusation on behalf of his own interest or family—a sort of private prosecution for crime.) The magistrate judging *extra ordinem*, on the other hand, at any rate for non-statutory offences, could proceed 'inquisitorially'; there need be no formal named accuser and charge, and he could simply investigate on 'information received', hale into court on his own responsibility, and judge whomsoever he chose (subject to the rules of appeal). Pliny proceeded, in dealing with Christians, on the basis of an *index* or informer as well as on formal accusations, and Trajan's objection to the use of anonymous informations, 'they are a bad example and

not in tune with the age we live in', implies that there was nothing *ultra vires* about Pliny's use of them. No doubt it was the lower orders who got thus treated. It is instructive to compare the procedure of the proconsul of Africa before whom Apuleius pleaded his defence on a charge of magic arts; here there was a formal named accusation and charge-sheet, and the governor actually required it to be resubmitted on the ground that the real accuser was sheltering behind someone else's name. At the top of the tree of crime was the unquiet world of intrigue and bloodshed about the imperial court; in the political trials for treason and its appended charges the rule of law did not always run, and we must not expect them to be always explicable in terms of, or to illuminate neatly, the rules of criminal justice. Such details as proper charge-sheets and named accusers were hardly to be expected at such times, for example, as the aftermath of the Pisonian conspiracy:

> 'No charge, no accuser was available. Neo, unable to clothe himself in the appearance a judge, had to turn to naked force.'

Professional *delatores* flourished on the rewards to be gathered. The emperors knew well enough the dangers of unleashing the informer, but, not without justification, they feared treason more. As Tiberius insisted:

> 'better to subvert the law than to abolish its custodians.'

And Domitian, who is reported to have said 'If you do not chastise *delatores* you are giving them positive encouragement', is also reported to have said that the great difficulty for emperors was that nobody believed them when they complained of plots against them until they were actually assassinated. He was proved correct.