

Book III.  
Title XXXV.

Concerning the Aquilian law.  
(De lege Aquilia.)

Bas. 60.3.58; D. 9.2; Inst. 4.3.

Headnote.

The Aquilian law was passed about 287 B.C. and took the place of most other laws on the same subject. It provided, as finally construed and extended, a remedy, generally speaking, for unlawful damages caused by a free man to private property, real or personal, either maliciously or negligently. What appears to be an exception is that a father could sue for damages to a son in his power. D. 9.2.7 pr. The damages here contemplated, and the damages caused by *injuria*—damages to person, dignity, or reputation (C. 9.35), covered the larger portion of damages by tort and the actions relating thereto, together with the actions in case of theft (C. 6.2), robbery (C. 9.33), and kindred acts—were the main civil actions for tort, and roughly speaking, were the actions of trespass, case, and trover of our common law. These wrongs were, under the Roman law, classed as private delicts.

The Aquilian law covered damages caused by the killing of slaves or domestic animals, and cutting, burning, breaking, bruising, tearing, smashing, pouring out, and in fact by any sort of spoiling and destruction of property. The original law required the injury to be caused by direct physical force. But an action was soon given where the damage [was] caused indirectly and where the facts were within the spirit of the law. In such event, the action given was the so-called action in *factum*—on the acts done, or, as we might say, an action on the case; for a similar distinction exists between the actions of trespass and on the case at our common law. Sometimes an “analogous” (*utilis*) action was given, where the case was not directly covered by the law, but was analogous to those contemplated therein. The distinction between those in *factum* and *utiles* was not great. On account of the fact that forms of action were nearly obsolete in Justinian’s time, it is not necessary to consider this subject in detail, but an example may be given of a direct and indirect damage: A midwife gave her patient poison by pouring it down her throat. This was a direct injury under the statute. D. 9.2.9. But if she merely gave it to the patient who drank it herself, the injury was indirect and the action was one on the special facts—in *factum*. D. 9.2.7.6.

A few instances of liability under this law may be mentioned: If a man gave a poisonous drug as medicine; if a physician operated properly, but negligently omitted further treatment; if a man starved a slave to death; if one threw another off a bridge whereby the latter was drowned or killed by the shock; if an inexperienced man drove a pair of mules which he could not hold; if a man frightened a horse, whereby the rider was thrown off and killed or injured; if a man threw a torch at another and scorched him; if a man set fire to a plantation; if a man employed to look after a furnace went to sleep and the house was burned down; if a man sowed tares and wild oats in his neighbor’s corn field; if a party contaminated wine or spilled it or made it turn sour; if a man tore or befouled some one’s clothe; if a man mixed sand with another’s corn; if a man hit a female slave who was pregnant and produced premature birth; if a man scuttled a merchant ship. Numerous other illustrations are given in D. 9.2.

The damages caused were required to be the proximate result of the injury which could have been anticipated. Mommsen, Strafrecht 830; D. 9.2.31. An illustration is given in D. 9.2.11 pr., which is similar to our famous Squib case. If, it is said, several persons are playing at ball, one of whom gives the ball rather a hard stroke, and so drives it against the hand of a barber, and thereby a slave whom the barber has in his hands has his throat cut, in consequence of the razor being knocked against it, whichever party is guilty of negligence is responsible for the damage. So, too, the doctrine of contributory negligence is recognized, for it is said in D. 50.17.203 that if a man suffers damage through his own fault, he does not appear to suffer any at all. See also D. 9.2.52.1; D. 9.2.45 pr.; Mommsen *supra*, 831. The principle of an intervening agency breaking the causal connection is illustrated by the following case: If a man wounded another, but not mortally, and the wounded person died in consequence of being neglected, the wrongdoer was liable for the wounding but not for the death. D. 9.2.30.3; D. 9.2.30.4. We also hear of the doctrine of concurring negligence: If a number of persons struck a man, who was thereby killed, and it was known who struck the fatal blow, that one was liable for the death; but if that fact was not known, then all were liable for having slain, and an action against, and payment by one, did not release the others. D. 9.2.11.2; D. 9.2.51.1. Each was liable for the whole. D. 47.10.24. A wrongdoer was liable for the smallest negligence. D. 9.2.44. But active negligence was generally required;<sup>1</sup> mere neglect of duty did not give rise to the action here contemplated; that was true e.g. in case of neglect in plow land, prune vines or clear water courses. True only for direct action—not for in factum injuries. C. 12.7.7.<sup>2</sup> D. 7.1.13.2; Buckland 581; Roby, Roman Private Law 189. Condemnation did not involve infamy as in most other delicts, although a denial of liability resulted in a two-fold penalty.

In case of the unlawful killing of a slave or beast, the measure of damages was the highest value of the slave or property within the previous year; in other cases the measure of damages was the value of the slave or property within thirty days before the injury. D. 9.2.2; D. 27.5; Inst. 4.3. and 13. A usufructuary had a right to this action, so far as his interest extended. A possessor in good faith had an action for full value, though he, in turn, might be responsible to the owner. So a pledgee might bring the action if the debtor was insolvent, or if he had from any cause lost his personal claim against the debtor. In these cases it lay even against the owner himself. D. 9.2.11.10; D. 11.8.17; D. 9.2.30.1. The action being considered penal in its nature, it did not lie against the heirs or successors of the person committing the tort, although it lay in favor of the heirs and successors of the party damaged. D. 9.2.23.8. Payment of damages by, or suit against, successful or not, against one did not release the other.<sup>3</sup>

The Aquilian law related only to torts committed by free persons. The subject of torts committed by slaves is sufficiently illustrated at C. 3.41 and need not be mentioned here. But it may be well to say a few words concerning the subject of injuries inflicted by animals (pauperies), though not within the terms of the Aquilian law. Tamed animals were treated about the same in this respect as slaves, and if the owner of such animal, which through its viciousness caused damage, was ready to surrender it as compensation,

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<sup>1</sup> A question mark has been placed after this clause, and above the line two mostly illegible comments have been penciled in, the second of which reads: "Reasonable care?"

<sup>2</sup> This was penciled in and is difficult to decipher. It is followed by an illegible treatise citation.

<sup>3</sup> This sentence was penciled in, as was the accompanying citation, which is illegible.

then just as in the case of surrender of a slave, the owner was released from all liability. Inst. 4.9 pr. If the viciousness was caused by the act of the party injured, no action lay at all. Paul Sent. 1.15.3; D. 9.1.1.4.

But the rule was different as to wild animals. If it ran away, and did damage, the owner was not liable. It was, however, forbidden to keep dogs, boars, bears, or lions near a public road, and if a person violated this law, he was responsible for the injury caused by such animal, injury to a free man being compensated by such sum as was deemed just by the judge, and in all other cases of injury the penalty was fixed at double damages. Inst. 4. 9 pr and 1.

In many cases the action for unlawful damage to property was concurrent with other actions, as that on a pledge, or hire, loan, malicious wrong to person etc. If damages, however, were fully recovered in one action, the other or others were barred. D. 9.2.18; D. 9.2.27.11 and 34; D. 9.2.42 But that was true only as to the damages; if a penalty was fixed for the same act, such penalty might be recovered in addition. Thus if a man stole and killed or wounded a slave, he would be liable for the penalty for theft as well as in an action for the unlawful damages to property. D. 47.1.2. If a slave was killed, a criminal action might also be brought. D. 9.2.23.9. Arson, i.e. setting property on fire willfully, was also punished criminally, even by death, if committed in a city. Mommsen supra, 841. On the subject of cumulation of actions, see Buckland 709-711. As to liability of ship owners, stable keepers and innkeepers for damage done by their employees, see headnote to C. 6.2.

### 3.35.1. Emperor Alexander to Glyconides.

If it can be proven that unlawful damage was inflicted by setting fire to your forest or felling trees, you have a right of action under the Aquilian law. Promulgated November 7 (222).

### 3.35.2. Emperor Gordian to Mucianus.

If you bring an action under the Aquilian law against a person who, as you allege, tore or burned down your house and thereby inflicted damage on you, you will obtain relief by the authority of a competent judge that this damage is compensated; and by the care of the same judge, you will obtain judgment, in a case where water is unlawful conducted to another place, that it be restored to its former condition. Promulgated November 6 (239).

### 3.35.3. The same Emperor to Dolens.

There is no doubt that for the death of the female slave, who, as you complained, was murdered, an action under the Aquilian law to satisfy the damage, as well as criminal action, lies against the guilty person. Promulgated March 28 (241).

### 3.35.4. Emperors Diocletian and Maximian and the Caesars to Zoilus.

If unlawful damage is proven in an action under the Aquilian law, and the defendant enters a denial, double compensation will be assessed. Given at Heraclia April 17 (293).

Note.

This rule that a denial in an action under the Aquilian law would entail double damages, is also stated in D. 9.2.2.1 and D. 9.2.23.10. Donellus maintains (10, 11) that this rule did not apply to an action on the special facts (in factum), and if so construed, the rule is not so unreasonable as it otherwise would seem to be, as applied to many cases. See next law and note.

3.35.5. The same Emperors and the Caesars to Claudius.

If your cattle were unlawfully shut in and the starved to death or were otherwise killed, you may bring an action for double damage under the Quilian law. Given October 18 (293).

Note.

This rescript on its face, states that an action for double damages was given in the case indicated. But this is clearly wrong, and entirely inconsistent with other provisions relating to the Aquilian law. Inst. 4.3.9.14.15. Double damages were given—in some cases at least—where there was a denial of the act, and doubtless this rescript meant to refer to a case of that kind. Bas. 60.3.63 makes such double liability dependent on denial. Inst. 4.3.16. states that an action for shutting in cattle and starving them to death is a utilis (analogous) action, and not an actin in factum—on the special facts. Hence, double liability in case of denial under such circumstances is not inconsistent with the holding of Donellus mentioned in note to the previous law that double liability did not exist in an action in factum.

3.35.6. The same Emperors and Caesars to Plinius.

You are not at all forbidden, under the Aquilian law, to bring an action for unlawful depasturing. Promulgated October 18 (294).