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The politics of the *lex Aquilia*

Reparation disputes in the battle of the orders: the quest for fair trials

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Summary

Centuries of interpretation by sophisticated Roman jurists developed a comprehensive and nuanced law of damage to personal property, based on the republican *lex Aquilia*. This *lex* originated from a plebiscite and the plebeians must have pursued a comprehensible political purpose. That purpose is to be found in the 'access to justice' problem inherent in the *legis actio per sacramentum* procedure, which hindered cash-poor plebeians from engaging in adversarial trials. This grievance became pressing in the aftermath of the last *secessio plebis* (ca. 287 BCE) when vast amounts of property damage and destruction awaited judicial redress. For the most heinous deeds, the killing of slaves and cattle, a *manus iniectio* procedure was instituted that incentivised uncontested payment of reparations based on a *confessio in iure*. In the context of this reform, other elements of the *lex Aquilia* can be reconsidered, *inter alia* the reliance on a price from the preceding year and the mysterious Chapter II.

Keywords

lex Aquilia – *plebiscitum* – *manus iniectio* – *vindex* – litiscrescence – *secessio plebis* – *lex Hortensia*

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The most important *lex*
on the private law ever.

RICHARD BAUMANN

⁘

1 Back to Beinart

The law of the *lex Aquilia*, as a refined instrument to regulate damage to personal property, is the sophisticated product of centuries of interpretation by elite Roman jurists. The original resolution of the *concilium plebis*, initiated by the plebeian tribune Aquilius, was not and should not be mistaken for a comprehensive enactment designed to address, in a systematic manner, the many aspects of the law on damage to personal property. The enactment of the *lex Aquilia* was an event in Roman political history and it must have had a political dimension. The provisions included in the *plebiscitum* must have served a comprehensible political purpose, which in the social, political and economic context of the time the plebeians found important enough to push through the legislative process. A politically loaded act became the basis from which republican and classical *iurisperiti* later unfolded, by way of refined statutory interpretation, the classical law of the *lex Aquilia* in all its intellectual splendour. What the *plebiscitum* of 287 BCE might have lacked in jurisprudential nuance it must have made good with a major benefit for members of the plebeian order. This contribution tries to reconstruct the political element in the making of the *lex Aquilia*. To prioritise narrative coherence, little effort will be made to engage critically with the many earlier efforts to explain the origins of the *lex Aquilia*.

The *lex Aquilia* was initiated as a plebiscite (D. 9,2,1,1 Ulp. 18 *ad ed.*), which Byzantine sources link to a preceding *secessio plebis*[1], where the plebeian order revolted against the ruling patricians.

Theophilos, *Institutionum Graeca Paraphrasis*, 4.3.15[2]:

1 For the following *Graeca*, I have had T. Rüfner's support. On the whole body of relevant Byzantine sources, see M. Miglietta, '*Il terzo capo della lex Aquilia è, ora, il secondo*', *Considerazione sul testo des plebiscito aquiliano alla luce della tradizione giuridica bizantina*, Annali del Seminario Giuridico dell'Università di Palermo (AUPA), 55 (2012), p. 403-442.

2 J.H.A. Lokin, R. Meijering, B.H. Stolte [and] N. van der Wal (edd.), *Theophili Antecessoris Paraphrasis Institutionum*, with a translation by A.F. Murison, Groningen 2010, p. 772 seq.

> ὁ γὰρ Ῥωμαϊκὸς χυδαῖος δῆμος κατὰ τὸν καιρὸν τῆς διαστάσεως τοῦ χυδαίου δῆμου καὶ τῆς συγκλήτου, τοῦ AQUILIU (δήμαρχος δὲ οὗτος) τὸν παρόντα νόμον τιθέντος, ἠρκέσθη τῷ PLURIMI ῥήματι ἐν τῷ πρώτῳ κειμένῳ κεφαλαίῳ.
>
> For the plebeians of Rome, at the time of their secession from the senate, when Aquilius – who was tribune of the plebeians – proposed the present statute, contented themselves with the expression *plurimi* on the first head. (based on Murison's tr.)

An anonymous scholiast to Bas. 60.3.1 tells us[3]:

> Ὁ Ἀκουΐλιος δήμαρχος ἦν τοῦ χυδαίου [...]. Ὅτε γὰρ ἐστασίασε τὸ πλῆθος πρὸς τοὺς συγκλητικοὺς καὶ διέστη ἀπ' αὐτῶν, εἶχον τοῦτον ἄρχοντα καὶ τὸ παρ' αὐτοῦ νομοθετούμενον οὕτως ἐκλήθη. Ὅθεν πλεσβίκιτόν ἐστι μᾶλλον ὁ Ἀκουΐλιος ἢ νόμος. [...]
>
> Aquilius was the tribune [...]. For when the common people/plebs revolted against the senators and separated themselves from them, they had him as their magistrate and the measure which was introduced by him was named thus. Hence the Aquilian is a plebiscite rather than a law. [...]

While this evidence is scant, there is no reason to discard these Byzantine notices as fabrications[4]. Today, most scholars identify the *secessio* mentioned in these texts with the *secessio* to the Ianiculum hill, which ancient authors described as the cause of the Hortensian reforms of 287 BCE[5]. This view will be accepted here as a working hypothesis.

The Byzantine statements would be of little relevance if they were understood as suggesting a mere temporal coincidence between the enactment of the *lex Aquilia* and a *secessio plebis*. But they go further than that: they imply a causal connection. The *lex Aquilia* was the product of the *secessio*, or better, of the reconciliation between the two orders after this secession, since it was not

3 Sch. Pe 4§ B. 60.3.1 (= D. 9,2,1*pr.*), H.J. Scheltema, D. Holwerda, and N. van der Wal (edd.), *Series B Volumen VIII Scholia in Libros LVIII-LX*, *16*, Groningen 1983, p. 3090/28-31.

4 For a more sceptical view, cf. P. Pieler, *Die beschädigten Objekte nach dem 1. Kapitel der lex Aquilia*, in: Constans et perpetua voluntas, Pocta Petrovi Blahovi k. 75. Narodeniá, edited by P. Mach et al., Trnave 2014, p. 485-491, at p. 486 seq.

5 The attempts to disprove the year 287 BCE have not been successful; see D. Ibbetson, *The dating of the lex Aquilia*, in: Judge and jurist, Essays in memory of Lord Rodger of Earlsferry, edited by A. Burrows, D. Johnston, and R. Zimmermann, Oxford 2013, p. 167 seq.; H.L.W. Nelson [und] U. Manthe, *Gai Instituiones III 182-225*, Berlin 2007, p. 212.

possible to pass the *lex Aquilia* without patrician assent[6]. The argument was made convincingly by Ben Beinart[7]. At its core, his analysis has not been, and I think cannot be, disproved[8]: there was a link between the last *secessio plebis* and the enactment of the *lex Aquilia.* The *lex* was part of the reconciliation of the two orders that ended this *secessio.* The destruction that the parties had inflicted on each other was the issue that the plebiscite was meant to address. *Urere*, *frangere*, *rumpere*, *pecudes/servos occidere* – these are acts typical of violent rioting[9]. *Iniuria* means lawlessly. In the course of the unrest, there were no doubt instances where a slave was killed through the legitimate use of force, in cases of self-defence or under colour of magisterial authority, which of course did not call for compensation.

In our search for the political motives that drove Aquilius, the crux is to identify the benefit that the *lex* brought to the members of the plebeian order. Were the plebeians seeking better protection as the victims of civil unrest (e.g. compensation closer to real market values)[10], or were they rather the perpetrators, fearing the harshness of the law then in place? Beinart considered that the focus was on the damage suffered by plebeians. The *lex* for him was 'very much a plebeian measure', giving the plebeians the prospect of a fairer measure of pecuniary compensation. To support this view, he was forced to speculate about the deficiencies in the pre-Aquilian law of personal property damage[11].

This contribution argues that the *lex Aquilia* channelled claims arising from the destruction of 'personal property' into a more modern procedure. For the cases it covered, it barred the traditional procedure *per sacramentum*. The reform provided a compensation mechanism for the destruction that the rioting adversaries of the *secessio plebis* of 287 BCE had inflicted on each other. In judicial disputes over the reparations due for such destruction, the *lex* established a level procedural playing field for parties from both orders.

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6 *Infra* VIII.1.

7 B. Beinart, *De lege Aquilia*, Tydskrif vir Hedendaagse Romeins-Hollandse Reg, 10 (1946), p. 192 seq.; B. Beinart, *Once more on the origin of the lex Aquilia*, Butterworths South African Law Review, 70 (1956), p. 70.

8 Beinart's view has been rightly defended against Fritz Pringsheim's contention that the *lex* was 'non-political', by R. Baumann, *Lawyers in Roman republican politics*, *A study of the Roman jurists in their political setting, 316-82 BC*, [Münchener Beiträge zur Papyrusforschung und Antiken Rechtgeschichte, 82], Munich 1983, p. 83 seq. For renewed criticism of Beinart's contribution, see R. Westbrook *The coherence of the lex Aquilia*, RIDA, 42 (1995), p. 437-471, reprinted in: R. Westbrook, *Ex oriente lex*, *Near Eastern influences on ancient Greek and Roman law*, ed. by D. Lyons, K.A. Raaflaub, Baltimore 2015, p. 124-145.

9 Beinart, *De lege Aquilia* (*supra*, n. 7), p. 196.

10 This is tentatively supported by Ibbetson, *The dating* (*supra*, n. 5), p. 177.

11 Beinart, *De lege Aquilia* (*supra*, n. 7), p. 197-198.

A more modern procedure removed the *sacramentum* requirement, a serious handicap for the cash-poor litigant, whether he was plaintiff or defendant. For Chapter I, the modern procedure was *manus iniectio*, probably *pro iudicato*. This improved the procedural position of plebeian parties, whether they were plaintiffs or defendants. Its general applicability to all Romans resulted from the political compromise struck in order to end the civil unrest.

II Damage to personal property – the civil procedure aspect in mid-republican Rome

1 *Before the* lex Aquilia

Our knowledge of the pre-Aquilian laws that regulated damage to personal property is limited. Legal mechanisms were in place, set out in the XII Tables and later enactments, each of which addressed a different type of damage, with few general principles[12]. For my argument, it is not necessary to return to the pre-Aquilian 'substantive' law. Since it is proposed that the *lex* was primarily intended to reform an unfair framework of procedure, the focus shifts to pre-Aquilian civil procedure and potential fairness issues that might have constituted a socio-political grievance.

At the time the *lex Aquilia* was enacted, all civil proceedings were conducted by way of *legis actiones*[13]. We have a considerable, albeit fragmentary, understanding of this early phase in the development of civil procedure. The evidentiary basis is not ideal, so the following description can only be approximate. Before the establishment of the *per formulam* procedure, claims based on delictual infringements, however they may have been construed at the time, were dealt with by way of the ordinary *legis actio per sacramentum in personam*[14]. This was the default procedure, available as a matter of course if no other, specialised procedure was prescribed for the case. According to Gai. 4,13, the *legis actio per sacramentum in personam* was the *legis actio generalis*. It had a touch of the sacred about it. Each party was required to deposit a sum of money. We might speak of a legal wager. The losing party's deposit was forfeited, while the winner had his deposit returned. We know about the tariffs

12 For the law of the XII tables, see M.F. Cursi, *Gli illeciti privati*, in: XII Tabulae, Testo e commento, ed. M.F. Cursi, vol. II, Naples 2018, p. 561-646, at p. 601 seq.

13 For the following, see M. Varvaro, *Legisaktionenprozess*, in: Handbuch des Römischen Privatrechts (henceforth HRP), edited by U. Babusiaux, C. Baldus, W. Ernst, F.-St. Meissel, J. Platschek [und] T. Rüfner, Tübingen 2022, § 9 N. 1 seq.

14 W. Selb, '*Gewaltenteilung*' *im republikanischen Rom*, in: Festschrift für Hubert Niederländer zum 70. Geburtstag, edited by E. Jayme et al., Heidelberg 1991, p. 117-126, at p. 120.

that were statutorily fixed for the procedure *in rem*[15]. The amounts were not at all negligible, as a comparison with fines fixed in the XII Tables for various *iniuria* cases shows[16]. We have no similar knowledge for *in personam* claims. The figures will have been similarly substantial. It has long been observed that the *sacramentum* procedure was a hardship for the poor man, since participation, whether as plaintiff or defendant, required ready cash[17]. Without cash, a plaintiff could not sue, and if sued, the cashless defendant had no choice but to confess, whether guilty or not. While there were already well-resourced plebeians, it is plausible that this feature worked against plebeians rather more than it did against members of the patrician order.

2 *Litiscrescence is the key*

There is no direct evidence that would expressly connect the *lex Aquilia* with one of the standard types of *legis actio* procedures. It is only by circumstantial evidence that we can hope to establish the procedural focus of the *lex* and its details. For this contribution, I presume that the procedural features of *lex Aquilia* claims were not introduced in additional clauses, e.g. a putative *caput IV* or *V*, of which we have no trace[18]. I will assume that these features came with the type of proceeding that the *lex* made available for victims of property damage. Litiscrescence was an outstanding feature of claims brought under the *lex Aquilia* that must have had a basis in the *lex* itself. As litiscrescence was a hallmark of the *manus iniectio* procedures, I will try to establish that Chapter I (but not Chapter III) of the *lex Aquilia* allowed victims to pursue their claim by *manus iniectio*: it will be the *thema probandum* that the *lex Aquilia* was one of the cases where specific legislation allowed plaintiffs to do so.

The two explicit statements regarding Aquilian litiscrescence concern the Chapter I claim, namely D. 9,2,2,1 Gai. 7 *ad ed. prov*. and D. 9,2,23,10 Ulp. 18 *ad ed.*, where the following sentence (§ 11) deals with a defendant's false confession that he killed a slave. There is also an allusion in D. 9,3,1,4-5 Ulp. 23 *ad ed.*, from Ulpian's commentary on the *actio de deiectis vel effusis*, telling us that a possible denial of liability (as well as the matter of culpability) is of no relevance here, *quamvis damni iniuriae utrumque exiget*. The following sentence (§ 5) states that where a *homo liber* is killed by the falling object, *damni*

15 Gai 4,13.

16 The *sacramentum* tariff for *in rem* disputes about the most valuable category of *res* was 500 As (Gai. 4,16), compared to a fine of 300 As due to a free man for *os fractum*.

17 J.M. Kelly, *Roman litigation*, [Oxford] 1966, p. 82 seq. Kelly was inspired by R. von Jhering, *Reich und arm im altrömischen Civilprozess*, in: idem, Scherz und Ernst in der Jurisprudenz, 13. Aufl., Leipzig 1924, p. 175-232.

18 In Gai. 3,210, 215, 217 and D. 9,2,27,5 Ulp. 18 *ad ed.* we only learn about three chapters.

aestimatio non fit in duplum (since a free person has no monetary value, a fixed monetary fine was instead introduced as the sanction). From an Aquilian perspective, the effect, in this case, would point to Chapter I.

3 *The* manus iniectio *of old*

The procedure *per manus iniectionem* and the power of *manus iniectio* itself belong to the archaic stratum of Roman law[19]. *Manus iniectio*, literally 'laying on of hands', was a procedural act, performed directly between two parties. It was a recognized legal instrument in several different contexts. In each, one party first demanded that another party do something. The accompanying *manus iniectio* made sure that non-compliance was met by consequences that varied according to the nature of the second party's default. The availability of *manus iniectio* encouraged parties to agree to lawful demands: the formal 'laying on of hands' symbolized the imminent shortcut to enforcement proceedings. *Manus iniectio* was in play in several procedural contexts. It lent enforceability to the *in ius vocare*, the summoning of one's opponent before the praetor. It was also used in the exercise of paternal powers and the control of slaves. Another prominent case was the securitized acceptance of money owed (*nexum*), which gave the creditor the power to proceed against the defaulting borrower directly *per manus iniectionem*. From our total knowledge of *manus iniectio*, the following description will focus on those features which are relevant to my argument concerning the *lex Aquilia*.

The archetypical *legis actio per manus iniectionem*, and the model that is of interest here, provided an enforcement procedure against a *condemnatus* who did not comply with the judgment that had been given against him. This was called the *manus iniectio iudicati*[20]. The victorious judgment creditor took the *condemnatus* to the praetor, where he formally announced the sum due and stated the default, which began thirty days (*dies iusti*) after the judgment. The ensuing enforcement procedure underwent considerable changes, which are not relevant here. The (total) grace period of sixty days allowed third persons,

19 For overviews, cf. T. Rüfner, *Manus iniectio*, in: R.S. Bagnall, K. Brodersen, C.B. Champion, A. Erskine [and] S.R. Huebner (edd.), The encyclopedia of ancient history, first published: 26 October 2012, https://doi.org/10.1002/9781444338386.wbeah13182, consulted online on 28 January 2022; C. Paulus, *Manus iniectio*, in: Brill's New Pauly, Antiquity volumes / English edition edited by C.F. Salazar, first published online: 2006, consulted online on 19 December 2021, http://dx.doi.org/10.1163/1574-9347_bnp_e721810.

20 On *manus iniectio* in the *XII tabulae* see R. Fiori, *Il processo privato*, in: *XII* Tabulae, Testo e commento, vol. I, edited by M.F. Cursi, Naples 2018, p. 45-149, at p. 105-128, with ample references.

e.g. friends or family, to lay down the outstanding sum to effect the *condemnatus*'s release.

If the defendant wished to dispute that he owed money under a judicial *sententia*, he could halt the procedure and bring the case before a trial judge. In order to do so, he needed to produce a qualified *vindex* to step into his shoes. The *vindex* had to be willing to take up the defence and guarantee that the plaintiff would receive his due, should the judicial review uphold his claim[21]. But, for the defendant, taking the matter back to court came at a price. If the defendant lost before the judge, he had to pay double whatever the plaintiff initially claimed. The *legis actio per manus iniectionem* is the archetypical case of an *actio* that *per infitationem in lite crescit*. The doubling effect was meant to deter defendants from contesting the proceedings without good cause. The XII Tables allowed the same procedure to be taken likewise against a *confessus*, provided that the confession was for a specified number of minted coins[22]. (One may note here that *aes* was an operative term of the *lex Aquilia*.). The *confessus* was taken *pro iudicato* (D. 42,2,1 Paul. 56 *ad ed.*).

Apart from procedures against those who had confessed or had been found liable in a judgment, several more cases qualified for *manus iniectio*. They were introduced for new specific purposes, always by a formal act of legislation: *per manus iniectionem de his rebus agebatur, de quibus ut ita ageretur lege … cautum est, veluti lege XII tabularum* (Gai. 4,21)[23]. While the details of the *manus iniectio* procedure varied from case to case, at all points the key characteristic was the swift transition into enforced debt collection, potentially leapfrogging the trial stage. There is no need here to search for a shared characteristic that might have united the diverse uses of *manus iniectio* for execution purposes. One possibility, often invoked, is that the debt in these cases was, for different reasons, on public record and therefore recognized as uncontroversial.

It is useful for comparative purposes to survey some of the different uses of *manus iniectio*[24]. (1) The *lex Publilia* helped a *vindex* who had stepped in for a party[25]. If that party's case was lost, the *vindex* was forced to pay up. A special *actio*, the *actio depensi*, was provided for the *vindex* to claim reimbursement. It was initiated per *manus iniectionem* and also featured the litiscrescence

21 The persistent difficulty of understanding exactly the role of a *vindex* is not addressed here.

22 Gellius 20.1.42: *Confessi igitur aeris ac debiti iudicatis XXX dies sunt dati.*

23 More on this text, *infra II*.5.

24 We are not dealing with the *actio ex testamento*, on which see L. Isola, *Überlegungen zur Litiskreszenz bei der actio ex testamento*, Zeitschrift für Rechtsgeschichte, Romanistische Abteilung (ZRG Rom. Abt.), 137 (2020), p. 70-135.

25 On this *lex* and the *actio depensi* see Ph. Schmieder, *Bürgschaftsstipulationen und Mehrheiten von Stipulationsschuldnern*, in: HRP § 73 N. 26, with further references.

mechanism[26]. (2) The *lex Furia de sponsu* allowed one of several co-guarantors to use *manus iniectio* to recover what the creditor had extracted from him (also by way of *manus iniectio*?) in excess of his proportionate liability[27]. (3) The *lex Marcia adversus faeneratores*, targeting money-lenders, had a political background, born of socioeconomic tensions that in all likelihood coincided with the conflict of the patrician and plebeian orders[28]. The *lex* allowed for *manus iniectio*, *ut si usuras exegissent, de his reddendis per manus iniectionem cum eis ageretur*: a borrower could use *manus iniectio* against a money-lender to reclaim interest charged and extracted (by way of *manus iniectio*?) in excess of the statutory limit placed on permissible rates of interest[29]. (4) *Manus iniectio* powers also feature in various city charters. The *lex Coloniae Genetivae Iuliae Ursonis* (61) regulated *manus iniectio* (*iudicati?*) largely in the traditional Roman manner[30]. (5) The 2nd century BCE enactment called *lex Luci Lucerni* addressed fly-tipping (illegal waste-dumping) in a sacred forest. For the wrongdoer, it provided *pro nummum L manum iniectio esto: sive magistratus volet multare, liceto*[31]. In this enactment, there is no express provision for the eventual doubling of the fifty *nummi*.

4 *The problem of* certa pecunia

If we consider the possibility that the *lex Aquilia* provided for *manus iniectio* as the procedure making Chapter I claims, we encounter the problem that the procedure was available only for a liquidated sum of money or *certa pecunia*. Early *manus iniectio* powers were available to enforce a personally secured loan (*nexum*) or a judgment-debt, and hence were always for an ascertained sum of money. The species of *manus iniectio* enumerated above all involved liquidated sums[32]. Disputes about damage to personal property, on the other

26 Gai. 4,22.

27 On this *lex* see Schmieder, *Bürgschaftsstipulationen* (*supra*, n. 5), § 73 N. 17, 33; L. Fascione, *Ancora sulla lex furia de sponsu*, Studia et documenta historiae et iuris (SDHI), 82 (2016), p. 363-385.

28 On this *lex* see Baumann, *Lawyers* (*supra*, n. 8), p. 364 note 150.

29 Cf. M.S. Revuelta, *La represión penal de la usura en la república romana y su evolución*, Estudios Histórico-Jurídicos, 26 (2004), p. 85–111.

30 J.G. Wolf, *Jurisdiction in Urso*, in: Judge and jurist, Essays in memory of Lord Rodger of Earlsferry, edited by A. Burrows et al., Oxford 2013, p. 307-323.

31 This transposition into clean Latin is taken from J.-D. Rodríguez Martín, *Vollstreckungsprozess ohne Urteil im römischen Recht* (*Kommentar zur lex Luci Lucerni*), in: Ad Fontes, Europäisches Forum Junger Rechtshistorikerinnen und Rechtshistoriker Wien 2002, hrsgg. von B. Feldner et al., Frankfurt/M. etc. 2002, p. 319-331.

32 For the *manus iniectio* against the *confessus*, one can rely upon D. 42,2,6*pr*.-1 Ulp. 5 *de omn. trib*.

hand, seem to lead inevitably to the assessment of case-specific compensation, with compensation determined by judicial evaluation.

However, the problem of the *certa pecunia* requirement disappears when we consider the Aquilian rule that the plaintiff under Chapter I demanded compensation based on what the slave/animal *in eo anno plurimi fuit*. Classical jurists later put this clause to sophisticated work. For example, they used it to ignore the loss of a thumb that had reduced a slave painter's value at some point before the slaying; the owner could claim the highest value the slave had as a valuable painter[33]. Such elaborate uses cannot have been in the mind of the plebeian legislators. Again, no attempt will be made here to evaluate the many theories about the original rationale for this element of the *lex*. Suffice it to say that despite I. 4,3,9, the preceding-year rule was not included for a penal effect: such an effect would have been at the mercy of the volatility of the past year's prices[34]. The theory of the penal nature of the rule runs into the additional difficulty that it cannot explain why the same mechanism was not also provided in Chapter III[35].

The *in eo anno* clause must have had some sensible function for claims accruing under Chapter I and for the procedure used to bring them. I suggest that the preceding-year rule gave the victim's claim the status of a *certa pecunia* claim: it allowed the plaintiff to start proceedings by demanding a liquidated sum of money. The plaintiff could choose one price demonstrably paid for an equivalent slave or animal during the previous year. The defendant could not counter the figure presented by the plaintiff with the argument that the buyer in that transaction had paid more than the market value. The preceding-year rule was a means to overcome the difficulty in ascertaining a concrete monetary figure that could stand as a pecuniary equivalent for the destroyed object. This difficulty must have been considerable in an economy that was not yet fully monetarized. On the other hand, basic price information was readily available, in so far as objects coming under Chapter I were conveyed by way of *mancipatio*. This procedure required five witnesses who could later attest to the price paid[36].

One might argue that the plaintiff's price information from the preceding year could have been challenged on the ground that the slave or the animal

33 D. 9,2,23,3 Ulp. 18 *ad ed.*; similarly, Gai. 3,214.

34 See, comprehensively, Th. Finkenauer, *Pönale Elemente der lex Aquilia*, in: Ausgleich oder Busse als Grundproblem des Schadensersatzrecht von der lex Aquilia bis zur Gegenwart, hrsgg. von R. Gamauf, Vienna 2017, p. 35-71, at p. 44 seq.

35 On the penal nature of the actions, see again *infra*, VIII. 3.

36 There is no need to 'explain' why one year was chosen and not another time period. A year seems a natural enough choice.

killed was different in quality or value from the one whose purchase was used as a price reference. It was presumably not impossible, after the initiation of a *manus iniectio* proceeding, to make arguments about matters of evidence *in iure*, before the praetor. If one takes the *lex Marcia adversus faeneratores*, for example, the plaintiff must have shown the sum of money paid qualified as interest. The *actio depensi* likewise must have required some proof of the sum paid by the *vindex*. In the case of the *lex Furia de sponsu* the plaintiff must have disclosed at least the number of *co-sponsores*. All these matters may well have been dealt with before the praetor. What was not necessary in any *manus iniectio* procedures, however, was the subsequent installation of a *iudex* or an *arbiter* to perform a judicial evaluation of the sum owed. The same was true, I believe, for Chapter I claims. Even if we allow for some form of review by the praetor, a reference price derived from a sale, no older than a year, turned the claim into one for a liquidated sum (*certa pecunia*).

We must dismiss the idea that Chapter I instructed the trial judge (or an *arbiter*/appraiser) to determine and award the peak value ('If …, the owner shall be awarded the highest value the object has had in the past year'). Such an instruction would have been difficult to follow. There was no record of running market quotations for slaves or cattle that could have established that the peak price was such and such, reached on this specific trading day or that. The reference to the previous year was not just a qualification, or variant, of a judicial *aestimatio litis*, specifically ordering the judge (or the *arbiter*) to figure out, in retrospect, the highest value in the preceding year. Rather, it avoided all need for a subsequent *aestimatio* by a trial judge.

5 *Identifying the procedure*

There is disagreement about the classification of the procedures that were introduced for claims falling under the *lex.* According to one view, which I support in relation to Chapter I, the newly instituted procedure was *manus iniectio*[37]. Others argue that, in the absence of incontrovertible evidence, we should accept that *lex Aquilia* claims were handled *per sacramentum*[38].

37 R. Cardilli, *Damnatio e oportere nell'obbligazione*, Naples 2016, p. 193 seq.; J.M. Kelly, *Further reflections on the* 'lex Aquilia', in: Studi in onore di Edoardo Volterra, vol. I, Milano 1971, p. 235-241, at p. 241 note 20; U. Manthe, *Geschichte des römischen Rechts*, 2nd ed., Munich 2003, p. 63; V. Arangio-Ruiz, *Rariora*, Rome 1946, p. 218 seq.; from the 19th century: O. Karlowa, *Römische Rechtsgeschichte*, vol. II, Leipzig 1901, p. 802-803; F.L. Keller, *Der römische Civilprozess und die Actionen*, 6. Aufl. hrsg. von A. Wach, Leipzig 1883, p. 100.

38 Selb, *Gewaltenteilung* (*supra*, n. 14), at p. 120; similarly, G. Broggini, *Iudex Arbiterve*, Cologne 1957, p. 154 note 108; in the 19th ct.; the same view was arrived at by E. Huschke, *Die Multa und das Sacramentum*, Leipzig 1874, p. 399 with note 130.

Let us sum up the evidence. As the *manus iniectio* comes with an in-built doubling of the sum owed by the defendant who contests the claim, it seems more natural to identify the Chapter I procedure as *per manus iniectionem*. The liquidated sum requirement was overcome by allowing the plaintiff to rely on proof of a sale price of his choosing, but not older than one year. According to Gaius, below the first sentence of Chapter I, there was the instruction *ut adversus infitiantem in duplum actio esset* (D. 9,2,2*pr*. Gai. 7 *ad ed. prov*.). What was the original wording of this part of the enactment? The simplest addition expressing the doubling of the penalty against the *inifitians* may have been '*per manus iniectionem cum eo agatur*'[39], following right under (*infra*) the principal clause of Chapter I.

In the scheme of the *lex*, the ordinary expected case seems to have been the defendant who confessed. Coll. 2.4 and Coll. 12.7 suggest that the title of the praetorian edict, which dealt with the *lex Aquilia*, came under the official heading '*Si fatebitur iniuria occisum esse*', as we may expect that Ulpian for his commentary on the praetorian edict used the authentic headings from the Edict. If we further rely on D. 9,2,2*pr*. Gai. 7 *ad ed. prov*., the *lex* provided in its first clause a procedure for dealing with the confessing defendant. The defendant faced condemnation *in simplum*. The *eo anno* clause was part of the functionality of Chapter I in particular with regard to the confessing defendant, because a *confessio in iure*, in order to settle the matter for good, required a *certa pecunia* claim. The primacy of the confessing defendant betrays an expectation that wrongdoers, when confronted with their violent misdeeds, would be incentivised to accept the easy way out and settle the matter by *confessio*, to avoid exposure to double liability.

Two further arguments have been advanced to support the *manus iniectio* thesis, each the subject of controversy. I will set out both arguments here, though I do not rely on either, tempting though they are at first. My thesis does not depend on the validity of either of these arguments. The first is the view, originally offered by Huschke[40], that the words *damnas esto*, wherever they appear, are indicative of a *manus iniectio*[41]. At first glance, this is an attractive proposition. Based on this theory, the *damnas esto* in Chapter I (D. 9,2,2 Gai. 7 *ad ed. prov.*) could be compellingly linked to *manus iniectio*. As will be shown later, however, the *manus iniectio* hypothesis does not cover Chapter III, which, according to D. 9,2,27,5 Ulp. 18 *ad ed*. used the *damnas esto* formulation

39 Taken from the *lex Marcia adversus faeneratores*, *supra* at note 28.

40 Ph.E. Huschke, *Über das Recht des nexum und das alte Römische Schuldrecht*, Leipzig 1846, p. 50 seq.

41 R. Cardilli, *Damnatio e oportere nell'obbligazione*, Naples 2016, p. 193 seq.

as well[42]. Several later scholars have struggled with Huschke's interpretation of *damnas esto*[43]. The ambivalent evidence may reflect a development away from an earlier stage when the phrase did denote *manus iniectio*. As only a full analysis of all uses of *damnas esto* could substantiate this argument, I will not rely on it here.

Second, Gai. 4,21 might offer a piece of direct evidence, depending on how we read the Veronese Codex[44]. Instead of *per manus iniectionem aeque de his rebus agebatur, de quibus ut ita ageretur, lege aliqua cautum est, velut iudicati lege XII tabularum* one might read: *per manus iniectionem aeque de his rebus agebatur, de quibus ut ita ageretur, lege aquilia cautum est velut iudicati lege XII tabularum*. The latter reading would need to be translated in the following manner: 'By way of *manus iniectio* one likewise sues in such cases for which statute law orders that one so proceeds, [as it is] provided for by the *lex Aquilia* just as by the XII Tables on the *iudicatus*'. In the former reading, which a majority of scholars seem to prefer, a specific reference to the XII Tables exemplifies the more general *lege aliqua*. A new imaging of the palimpsest may make it possible to resolve the issue; but until then, there is too much uncertainty to rely on this argument.

Of course, *per manus iniectionem* and *per sacramentum* were not the only *legis actiones* that could have served as the original Aquilian procedure. The *legis actio per condictionem,* in particular, merits some attention. In the development of procedures within the *condictio* family, the *condictio certae pecuniae* was the earliest model. The extension to claims for a *certa res* or an *incertum* seems to have occurred only in late republican times[45]. This is the main reason why modern scholars have rejected the idea that the *lex Aquilia* could have been tailored to a *condictio*-type procedure[46]. Our suggestion that the *in eo anno* clause allowed the plaintiff's suit to qualify as a claim for *certa pecunia* overcomes this obstacle for the *condictio* theory. However, the *manus iniectio* theory is preferable, because it offers the more natural explanation for

42 *Infra*, V.

43 The discussion of this issue has been summed up by T. Spitzl, *Lex municipii Malacitani*, [Vestigia, 10], Munich 1984, p. 59 seq.

44 See R. Cardilli, *Damnas esto e manus iniectio nella lex Aquilia: un indizio paleografico?*, Fundamina, 20 (2014), p. 110-24; vehemently against Cardilli, M. Varvaro, *Gai 4.21 e la presunta manus iniectio ex lege Aquilia*, AUPA, 59 (2016), p. 335-347, relying on his earlier study, M. Varvaro, *Per la storia del 'certum', Alle radici della categoria delle cose fungibili*, Palermo 2008, p. 256 seq.; the author recently confirmed his position, Varvaro, *Legisaktionenprozess* (*supra*, n. 13), § 9 N. 62.

45 See J. Platschek, *Zur Formel der condictio in der Rechtsentwicklung*, in: HRP (*supra*, n. 13), § 69 N. 15 seq.

46 See Platschek, *Zur Formel* (*supra*, n. 45), § 69 N. 1 seq.

litiscrescence[47]. We do not know, for the mid-republican procedural framework, of another mechanism that automatically discriminated between defendants who denied liability and those who accepted it.

Why might the Aquilian legislators have chosen a procedure with litiscrescence? I assume that, when the plebiscite was passed, there was still uncompensated damage from the violence of the *secessio.* The livestock covered by Chapter 1 must have been vital, particularly for smallholders. The slaughter of these animals might have threatened livelihoods until replacements could be purchased. Victims might have become desperate to get compensation as quickly as possible. With some urgency, the legislators had a reason to incentivise non-contentious reparations that swiftly put money into the hands of the victims. If this was the objective, making a *manus iniectio* procedure available was the obvious choice. It was a tried and tested mechanism.

6 Manus iniecito pro iudicato *or* manus iniectio pura

While the various uses of *manus iniectio* differed in detail, two main variants can be distinguished. We must now examine which variant of *manus iniectio* was adopted in the *lex Aquilia*. In the more severe version, which we find for example in *manus iniectio* against the *condemnatus* or the *confessus*, the defendant needed a *vindex* to bring the case before a trial judge[48]. A defendant who could not produce a *vindex* was irrebuttably taken to owe the sum claimed and had to undergo enforced debt collection. If a *vindex* was appointed, he stepped into the defendant's shoes to conduct the defence[49]. There was a price for contesting proceedings that were already on the brink of enforced debt collection: the amount at stake was doubled. If the plaintiff's claim was upheld by the judge, the *vindex* had to comply. He could then expect the original defendant, for whom he had stepped in, to reimburse him for the judgment debt he was

47 Rejecting the *condictio* as the original type of *lex Aquilia* procedure is not to deny that, in the course of future developments, the Aquilian claims may have come to be handled as a *condictio*. The question is not discussed here (cf. *infra,* X.2). D. 12,1,9,1 Ulp. 26 *ad ed.* lists the Aquilian claims as cases of a *condictio*; the authenticity of this text has been questioned, cf. O. Lenel, *Das Edictum Perpetuum, Ein Versuch zu seiner Wiederherstellung*, 3. Aufl., Leipzig 1927, p. 202.

48 The necessity of relying on a *vindex* can be found in various instances of *legis actio* procedures. Their legal role was context-dependent. The text only refers to the *vindex* needed to counter a *manus iniectio*.

49 The *vindex* entered into the proceedings by a formal act which laid the ground for his participation. This act must have had a large oral component, but it is otherwise unclear what kind of act it was. It is presumed here that the *vindex*, at one point or another, gave a formal verbal promise.

required to pay. If the original defendant was unwilling to pay, the *vindex* could bring the *actio depensi* against him. This was a special action with the single purpose of allowing the *vindex* to recoup his 'expenses'[50]. It was initiated *per manus iniectionem* and featured the litiscrescence mechanism.

In the less severe version of *manus iniectio*, the defendant could extract himself from the plaintiff's power (*manus*) to take his case to court himself (*manum sibi depellere et pro se lege agere*). There was no need to produce a *vindex* who took over the defence. This variant was called *manus iniectio pura* (Gai. 4,23). Among the special cases in which legislation had introduced *manus iniectio*, the *actio depensi* and the claim under the *lex Furia de sponsu* involved the more challenging version of the procedure. In the others, the *manus iniectio* was *pura*. The litiscrescence mechanism was part of the *manus iniectio pura* as well. There, the defendant himself, rather than the *vindex*, faced enforced debt-collection for the doubled sum.

Is it possible to determine whether the *manus iniectio* used for claims under Chapter I was *pura*, such that it allowed the defendant *manum sibi depellere*? The following sections of this contribution will suggest that the plaintiff who had initiated proceedings *manu iniectio* could expect to be given a verbal guarantee from the defendant's side. This could well be a verbal promise by which a *vindex* entered into the proceedings. This would point to a *manus iniectio pro iudicato*, that is, the more serious type of the procedure.

What is to be said of the expectation (not a hard and fast rule) that *manus iniectio pro iudicato* was reserved for claims that were on the public record or for other reasons were recognised as incontrovertible? Destruction in the course of civil unrest is not a clandestine matter. It happens in broad daylight and the victims often witness what is done to their property. The one evidentiary issue that was potentially problematic was the identification of the individual rioter who caused specific damage. In civil unrest, violence by gangs rather than lone attackers is the norm. The problem was overcome by an interpretative effort of the *veteres*, who worked in some temporal proximity to the original enactment. They determined that a group of attackers who came together to kill a slave were jointly and severally liable if the owner could not identify who had administered the deadly blow (D. 9,2,11,2 Ulp. 18 *ad ed.*; D. 9,2,51 Iul. 86 *dig.*)[51].

50 The *actio depensi* was needed because the mechanism which allowed a guarantor (*sponsor*) to claim reimbursement could not be used, as the *vindex* was not a mere guarantor. On the *actio depensi* see Schmieder, *Bürgschaftsstipulationen* (*supra*, n. 25), § 73 N. 26.

51 On these texts see W. Ernst, *Justinian's Digest 9.2.51*, Cambridge 2019, p. 119 seq., 125 seq.

7 *Replacing the* vindex*: the* lex Vallia

A *lex Vallia* of unknown date reduced the number of scenarios in which a plaintiff could proceed by the more serious *manus iniectio pro iudicato*. Following this reform, only the *iudicatus* and the defendant in the *actio depensi* still had to rely on a *vindex*[52]. This may indicate that there had been a proliferation of cases where *manus iniectio* had been introduced in its more severe variant. As Gaius informs us, the *vindex* was replaced by a personal guarantor who guaranteed that the judgment, if it went against the defendant, would be satisfied. This guarantee was a *cautio iudicatum solvi*, given by a third party, a *sponsio*. The defendant defended himself in court. If he failed, the *sponsor*'s guarantee made sure that the plaintiff would be paid double the sum claimed, since litiscrescence remained in play. In effect, where the *manus iniectio pro iudicato* was 'downgraded' by the *lex Vallia*, the resulting procedure was *manus iniectio pura*, but with the additional security of a *cautio iudicatum solvi*.

We have no direct information that would allow us to determine the temporal sequence of the *lex Aquilia* and the *lex Vallia*. There are two possibilities. The first is that the *lex Aquilia* introduced, for Chapter I, the *manus iniectio pro iudicato*, forcing the defendant to appoint a *vindex*; this procedure was only later, by the *lex Vallia*, relaxed into a *manus iniectio pura*, which allowed the defendant to bring the case before a judge, provided a third party gave a *cautio iudicatum solvi*. The *actio depensi*, which began as part of old *vindex*-system, developed according to this same pattern[53]. In the second scenario, the latter model (without a *vindex*) was the very mechanism that was introduced by the *lex Aquilia* from the start. A fresh interpretation of Chapter II will suggest that the mechanism introduced by the *lex Aquilia* entailed a *vindex*, making the first scenario more likely. In either case, *manus iniectio* remained the procedure for Chapter I claims. It involved the litiscrescence mechanism at all points.

III On chapter II

Our knowledge of the original subject matter of Chapter II is based solely on Gai. 3,215. Chapter II introduced a new *actio* against an *adstipulator qui pecuniam in fraudem stipulatoris acceptam fecerit*. Gaius thought that, by his time, this chapter had become redundant because the *actio mandati* could protect the primary creditor, albeit without the doubling of the liability against the

52 Gai. 4,25. Was a *confessus*, after the *lex Vallia*, dealt with differently than a *iudicatus*?

53 M. Kaser [und] K. Hackl, *Das römische Zivilprozessrecht*, 2. Aufl., Munich 1996, p. 281 note 26.

adstipulator who denied liability, for which Gaius reports, Chapter II provided. Many theories have been advanced to explain the original subject matter of Chapter II. From a modern perspective, it seems odd that Chapter II, sandwiched between two chapters dealing with 'delict', addresses an issue from the law of contract, more specifically a highly specialized variant of verbal contracts. If we instead accept that a civil procedure reform was at the heart of the *lex Aquilia*, we might come to a different understanding of Chapter II. A certain degree of subject-matter coherence is to be expected from the three chapters, even though at the time the Roman legislator was not yet prevented from including diverse topics in one enactment[54].

The fact pattern to which Chapter II applied involved a verbal guarantee: a *stipulator* and an *adstipulator* received a promise, necessarily a verbal promise, from someone else. We shall explore the exact nature of this promise below. The salient point is this: if the *lex Aquilia* was a civil procedure reform, Chapter II may have dealt with the issue of verbal guarantees in a procedural context[55]. The course of a traditional Roman lawsuit was peppered with verbal guarantees that ensured parties remained involved. A *vadimonium* had long been in place to ensure that those summoned to court did in fact appear[56]. Under the versions of *manus iniectio* that required a *vindex* if the matter was referred to a court, the *vindex* had to give a verbal guarantee. In the *condictio* procedures, the *stipulatio tertiae partis* and the corresponding *repromissio* provided substitutes for the *sacramenta*[57]. Verbal guarantees were considered indispensable for the continuation of a suit, and I suggest that Chapter II addressed a problem arising out of guarantees received during legal process.

It is surprisingly easy to place the *adstipulator* in a procedural setting. The *legis actio* procedures did not allow the parties to be represented in court. Instead, they had to plead their cases themselves, asking for the appropriate *sponsiones* by speaking the required solemn words (*nemo alieno nomine agere potest*: D. 50,17,123*pr*. Ulp. 14 *ad ed.*). Under the *legis actio* procedures, there was no option for a litigant to appoint a *procurator* (or *cognitor*) who would take over the litigant's role in the proceeding. In the *legis actio* procedures,

54 The so-called *leges saturatae* (*omnibus* enactments) were only forbidden by the *lex Caecilia Didia* in 98 BCE.

55 The following takes up an argument first laid out by A.A.F. Rudorff, *Über die Litiscrescenz*, Zeitschrift für Rechtsgeschichte (ZRG), 14 (1848), p. 287-478, at p. 385 seq.

56 On *vadimonia*, cf. E. Metzger, *Litigation in Roman law*, Oxford 2005, p. 7 seq.; N. Donadio, *Vadimonium e contendere in iure, Tra 'certezza di tutela' e 'diritto alla difesa'*, Milano 2011; Varvaro, *Legisaktionenprozess* (*supra*, n. 13), § 9 N. 18; Th. Rüfner, *Vadimonium und andere Prozessstipulationen*, in: HRP (*supra*, n. 13), § 75 N. 1 seq., all with references.

57 Gai. 4,25.

there was the possibility, however, that specific acts were done 'in unison' by a litigant and a person acting as a companion, or seconder. If a party needed to give a procedural guarantee, the companion served as *co-promissor*. If a litigant needed to receive a guarantee from his adversary, the request was phrased and asked by the litigant as well as by his companion, so that both were given the same verbal promise. In this case, the person who received the same guarantee as the litigant was an *adstipulator*. Cicero refers to such *adstipulatores* in two court speeches. Although these texts are from a later period, they suffice to relate the *adstipulator* of Chapter II to litigation procedure[58].

> Cic. *Pro. Quinct*. 18:
> Litterae P. Quincti, testes tot, quibus omnibus causa iustissima est cur scire potuerint, nulla cur mentiantur, cum astipulatore tuo comparabuntur.
>
> The letters of P. Quinctius, those numerous witnesses, all of whom had the strongest reasons for being able to know the truth and none for lying, shall be confronted with your assistant *stipulator*. (J.H. Freese tr.)

In the dispute between Quinctius, Cicero's client, and Naevius[59], a controversy ensued over Naevius's assertion that he had received a *vadimonium* from Quinctius on the Nones of February (83 BCE). Quinctius said he was in Gaul on that date and so could not have given the *vadimonium*. He offered the testimony of his friend, his slaves and his letters to prove he was absent from Rome. Against Quinctius's evidence (friend, slaves, letters), Naevius merely offered his *a*(*d*)*stipulator* as a witness. Cicero's point is that the weight of evidence is with his client; all Naevius can offer is his alleged *a*(*d*)*stipulator* who, as a member of Naevius's 'camp', is likely to be biased.

> Cic. *In Pison*. 9:
> … Quasi vero non modo ego, qui multis saepe auxilio fuerim, sed quisquam tam inops fuerit umquam qui isto non modo propugnatore tutiorem se sed advocato aut adstipulatore paratiorem fore putaret.

58 Elsewhere, Gaius explains the functioning of an *adstipulator* with an example from another context (Gai. 3,117), which might have been a red herring for earlier investigations of Chapter II.

59 On the case and its legal aspects, cf. A. Lintott, *Cicero as evidence: a historian's companion*, Oxford 2008, p. 43-59; J. Platschek, *Studien zu Ciceros Rede für P. Quinctius*, Munich 2005.

> … Just as if not only I who had often been of assistance to many others, but as if anyone were ever in so wholly desperate a condition as to consider himself not only safer if he had that man for a protector but more ready for the struggle if he had him only for an advocate or seconder. (Yonge tr.)

Here, the term *adstipulator* is used metaphorically to refer to a stalwart companion, an ally one can rely upon. The parallelism with the *advocatus* suggests a forensic background for the *adstipulator*, too.

It seems that *adstipulatores* were sometimes remunerated[60]. A much later text implies that acting as *adstipulator* could be a professional occupation, and one of a bad repute at that.

> Ps. Cic. *ep. ad Octav*. 9:
> … an esse quendam annos xix natum cuius avus fuerit argentarius, adstipulator pater.
>
> … that there is someone nineteen years of age, whose grandfather was a moneychanger and his father an adstipulator.

This was a libel against Augustus, whose father allegedly earned his livelihood as an *adstipulator* and whose grandfather as a moneylender, similarly odious activities in the eyes of the polemic's author. The relevant insight here is that *adstipulatores* were not necessarily trusted friends or altruistic neighbours.

Why did litigants bring in *adstipulatores* in the first place? Did their involvement not just make matters more complicated? A hypothesis will be offered which would need to be verified against a wider range of material. The rights that came with the verbal promise that was received jointly could nonetheless be exercised independently by each co-promisee. If, for the proceedings to be moved on, one side needed to rely on the rights that came with the adversary's procedural guarantee, this could be done in the absence of the other promisee. According to Gai. 3,114, slaves could not become *adstipulatores*. The most plausible explanation for this rule is that slaves could not go to court to enforce the stipulation. Perhaps more importantly, the *adstipulator* could also be of assistance in properly phrasing the shared request for the procedural guarantee. Drafting *cautiones* could be a complex business[61]. In this respect, the *adstipulator* might have assisted the unpractised litigant, thereby assuming

60 The development of advocates' remuneration is not a topic of this contribution.

61 Metzger, *Litigation* (*supra*, n. 56), p. 73 note 39.

a role similar to that of an accompanying counsel. A seconder who acted in unison with the litigant reconciled the imperative to perform all performative acts in the flesh, which made agency in *legis actio* procedures impossible, with the need to be advised and supported in an alien court setting. This would have made for a relationship similar to that between client and attorney.

The *adstipulator* was in control of the guarantee received, which was given to him as well as to the party he accompanied. When the guarantee fell due, the *adstipulator* could receive the sum or, upon default, sue for the amount guaranteed. The *adstipulator* could also independently release the *promissor* from liability, which ended the client's claim on the same guarantee[62]. The *acceptilatio* to which Gaius referred in Gai. 3,215 was a formal release that could be given without receipt of the promised sum. We have documentary evidence of such *acceptilationes*, most importantly P. Ant 22 (*verso*), recorded in a civil trial[63]. Chapter II, I suggest, concerned situations where an *adstipulator* gave this kind of release without the *stipulator*'s knowledge and against his interest. Whatever the underlying guarantee, its loss must have been detrimental to the litigating *stipulator*. In modern terms, Chapter II introduced a special action against the 'treacherous attorney'. The *lex Aquilia* made the disloyal *adstipulator* liable for the loss inflicted on the client by forfeiting the guarantee both had received. The procedure was *manus iniectio.* That meant that, if the disloyal *adstipulator* confessed, he was liable for the sum originally claimed by the plaintiff from the defendant. If the *adstipulator* denied responsibility, the matter was referred to a trial judge. If judgment went against the *adstipulator*, his liability was doubled, as was standard in a *manus iniectio* procedure.

Why did the plebeian legislator care about the treacherous *adstipulator*? Typically, it will have been the plebeian party who needed an *adstipulator*, experienced in the handling of arcane court procedures. A plebeian is most likely to have wanted a respectable, knowledgeable, and well-resourced person to act as his *adstipulator*. Such a person, who stood a better chance of phrasing and eventually enforcing the guarantee, was more easily to be found among patrician ranks. If this was so, there might have been a real risk that the patrician *adstipulator* would release a fellow patrician who had become involved in the case by verbal promise.

The sequence of chapters suggests that Chapter II was an accessorial safeguard for claims brought under Chapter I. Can we identify a specific verbal guarantee, operative for Chapter I cases, that needed special protection when

62 Th. Finkenauer, *Stipulation* (*Verbalkontrakt*), in: HRP (*supra*, n. 13), § 21 N. 12; O. Gradenwitz, *Alias mutuam dedit alias stipulatue est*, ZRG Rom. Abt, 27 (1906), p. 336 seq., at 339-340.

63 The document is discussed by Metzger, *Litigation* (*supra*, n. 56), p. 137-154.

it was given to an *adstipulator*? Roman civil procedure saw all kinds of *cautiones* in play, and it is difficult to single out one in particular. However, assuming that Chapter II was geared to Chapter I, we should look for a verbal promise that came naturally with the *manus iniectio*. We can narrow down the search in one more respect. If an *adstipulator* forsook the guarantee that was received jointly with a litigant, this must have been fatal for the procedural prospects of the betrayed party. If, in the eyes of the plebeian lawmakers, the problem of the *adstipulator*'s disloyalty merited a special chapter in the *lex*, then the newly introduced procedure for Chapter I must have come with a verbal guarantee of utmost importance for the entire court process. This excludes, as possible candidates, *cautiones* like the *cautio iudicatum solvi*. An uncalled-for loss of this *cautio* would deprive the plaintiff of an additional security but leave his prospects of winning the case intact.

If we are looking for a verbal guarantee that was an indispensable requirement for the entire conduct of the lawsuit, we must focus on the verbal guarantee demanded from the person who was willing to take over the defendant's case as his *vindex*[64]. If the *vindex* enlisted by the defence was treacherously released by the plaintiff's *adstipulator*, the plaintiff's case was instantly lost once and for all, since his right to claim was extinguished when proceedings were initiated. With the *vindex* released, the litigation was over. This argument makes it more likely that the *lex Aquilia* originally installed the *manus iniectio pro iudicato*, since only in this variant of the *manus iniectio* did a *vindex* come into play[65]. His verbal promise given at the point of entry into the proceedings must have become the procedural basis for subsequent, contested proceedings between the vindiex and the plaintiff. It was fatal for the plaintiff's case if the right based on this verbal promise was given up.

If another verbal guarantee could be identified, in mid-republican civil procedure, that played a similarly decisive role in a specific type of *legis actio*, one would have to review such a candidate and reconsider the theory that Chapter I introduced the *manus iniectio pro iudicato* and Chapter II secured that the necessary *vindex* was not left off the hook by an *adstipulator* who betrayed the claimant for whom he had entered into the proceedings. The matter should be seen as remaining *sub iudice*.

64 The XII Tables required that a *vindex* who stepped up for a landowning party must also own land. We do not know whether this rule was in force at the time of the *lex Aquilia* and with respect to the claims the *lex* covered, but if it was, landowner *vindices* were more likely to be patricians. On XII Tab. 1,4 (Gell. 16,5,10) with its distinction between *adsiduus* and *proletarius*, see Fiori, *Il processo privato* (*supra*, n. 20), p. 114 seq.

65 It follows that the *lex Vallia* post-dated the *lex Aquilia*.

Chapter II did not establish a new general delict on the same level as the wrongdoings under Chapter I and Chapter III but, rather, protected litigants against their seconder's disloyalty in the proceedings for a Chapter I claim. The notion that Chapter II contained a general delict can also be discarded on the basis of Gai. 3,215, since a general delict could hardly be put out of use by the subsequent availability of a highly specific claim presupposing a contract of mandate.

IV Going to court for a chapter I claim

1 Adversus confessum*: the confessing defendant*

The plaintiff whose slave had been slain took the alleged killer to court, equipped with whatever price information he had obtained from the previous year's commerce. A defendant who confessed *in iure* became a *confessus*, liable for the amount evidenced *in iure* by reference to the sales price the victim had produced. The *confessus* was given a grace period for payment, whether made by himself or by members of his family or other acquaintances. If the sum remained unpaid, the *confessus* became subject to *ductio*: the praetor authorized that the *confessus* be apprehended and the execution procedure could begin. At this point, the proceedings could only be suspended by the late intervention of a *vindex*, who would have to claim a defence, such as that the plaintiff had already been paid. In this situation, the case was transferred to a *iudex* (or *iudices*), who reviewed the protest lodged for the *confessus*. If it was found baseless, the execution could proceed, but now for double the amount that had originally been claimed and confessed.

All this should be uncontroversial: it is an ordinary consequence of the regular *manus iniectio pro iudicato* in the case of a *confessio in iure*[66], provided we accept that the victim's claim, under the wording of Chapter I, was for *certa pecunia*, as this was the precondition for a *confessio in iure*. This view differs from that of other scholars, who maintain that, after the *confessio*, a Chapter I case still had to be referred to an *arbiter* (or *iudex*) for the determination of the sum for which the *confessus* was liable. According to my view, it was for the plaintiff *in iure* to state the monetary value of the slave or cattle killed: this made his claim one for *certa pecunia*[67]. It was not sufficient for the plaintiff

66 The same view is expressed, *inter alios*, by Kaser/Hackl, *Zivilprozessrecht* (*supra*, n. 53), p. 133, and Rodríguez Martín, *Vollstreckungsprozess* (*supra*, n. 30), p. 327.

67 In late classical times, we find Paul discussing the case that the plaintiff *magni litem aestimat*, D. 9,2,26 Paul. 22 *ad ed.*

to allege the killing and leave the determination of the peak value to a judge later entrusted with *aestimatio*. The requirement that the plaintiff specify a monetary value in court was not, however, a *taxatio*, designed to narrow down the range in which the pecuniary equivalent of an *incertum* could be found[68]; rather, the requirement was inherent in all lawsuits in which *certa pecunia* was at stake.

2 Adversus infitiantem*: the defendant who denied liability*

The defendant could contest the claim *in iure*. From then on, double the amount of the price already stated/evidenced by the plaintiff was at stake. On the assumption that the *manus iniectio* was *pro iudicato*, which would make for neat coherence with Chapter II, the *infitians* had to produce a *vindex.* An *adstipulator* who might have come in on the plaintiff's side would receive, alongside the plaintiff, the verbal guarantee by which the *vindex* entered into the proceedings.

The case was referred to a trial judge or a bench of judges[69]. It is not altogether clear what type of adversarial trial procedure then followed in the third century BCE. This, however, is a general problem of all forms of *manus iniectio*, which could only be addressed if the whole range of such procedures were scrutinized afresh. Be that as it may, the judge(s) only had to decide on the truth of the plaintiff's allegation regarding *hominem*/*pecudem occisum iniuria*. No *aestimatio* was called for. The trial led to an acquittal or, if the defendant was found guilty, to a condemnation for double the amount initially claimed. If the *vindex* was made to pay up for the original defendant's wrong, he could expect to be reimbursed. In effect, the original defendant bore the risk of litiscrescence, a feature that was meant to deter defendants from contesting a claim that would in all likelihood prevail. If the defendant failed to satisfy the *vindex* within sixty days, the *vindex* could bring the *actio depensi* which would double the amount due to the *vindex* as reimbursement (Gai. 3,127). In this case, the obstinate defendant saw his original liability quadrupled.

68 As hinted at by Ph. Grizmek, *Studien zur Taxatio*, [Münchener Beiträge zur Papyrusforschung und Antiken Rechtgeschichte, 88], Munich 2001, p. 137 seq. The requirement for the plaintiff to determine an amount *in iure* was already postulated by J. Paoli, *Lis infitiando crescit in duplum*, Paris 1933, p. 95 seq.

69 No attempt is made here to determine whether the case would end before a single judge or a panel of judges.

v On chapter III

The procedure under Chapter III did not replicate the procedure used for Chapter I claims. Several elements suggest that the procedures were not identical. The *condemnatio* for Chapter III was determined by *quanti ea res erit/fuerit*. Chapter III also required the attacker's action to have resulted in a *damnum*. Modern scholarship does not agree on how the *quanti ea res* clause worked here; the dispute will be briefly set out below. Whichever view one prefers, determining the amount to be awarded required a judicial *aestimatio*. The *lex* provided no mechanism that would have turned Chapter III claims into *certa pecunia* claims, as it did for Chapter I claims. The conventional view relies on the writings of classical lawyers, who liberally use Chapter III in a way that covers both (total) destruction and (partial) damage. To support this view, *res* is read as *causa.* One assumes that the *aestimatio* from early on assessed the concrete damage, not just the value of the object to which damage was done[70]. Focusing on the concrete damage done to the owner's object necessitated judicial estimation of the damage (*damnum*), something which Chapter I sidestepped with its *plurimi*-clause. The plebeians, however, for Chapter III had not insisted on the same mechanism provided by Chapter I; Theoph., *Inst.* 4.3.15.

Herbert Jolowicz suggested that Chapter III was originally limited to cases of total destruction[71]. This matches the civil unrest context of the last *secessio*, when rioters presumably tried to destroy the property of members of the opposite order. Farm instruments were broken, livestock slaughtered, barns burnt down. In such cases, it would be plausible that *res* was meant to refer to the destroyed object, with the *aestimatio* aimed at determining the object's value. A broad range of objects could come under Chapter III, many of which will have been purchased without the performance of a *mancipatio*. The *mancipatio* procedure, in case of *res mancipi*, meant price information was easily available since it could be supplied by the necessary witnesses. It is plausible that the drafters did not replicate the mechanism of Chapter I for objects *nec mancipi*, where no *mancipatio* was performed. Regardless of whether *res* meant the damage in question or the object destroyed, for Chapter III cases an *aestimatio* was needed. Chapter III claims must have involved a *iudex*[72].

70 Finkenauer, *Pönale Elemente* (*supra*, n. 34), p. 48 seq.

71 H.F. Jolowicz, *The original scope of the lex Aquilia and the question of damages*, Law Quarterly Review, 38 (1922), p. 265; Jolowicz's view has been rejected by D. Daube, *On the third chapter of the lex Aquilia*, Law Quarterly Review, 52 (1936), p. 265.

72 In this contribution, no effort will be made to define precisely and distinguish cleanly the roles of *arbiter* and *iudex*, although these were of course considerably different roles.

Because claims under Chapter III were not for *certa pecunia*, the doubling entailed by the *manus iniectio* procedure cannot have been in play here[73]. Indeed, for Chapter III, there is no real evidence for an original litiscrescence distinction between the confessing defendant and the *infitians* who insisted on his day in court. This distinction is set out by Ulpian with regard to *haec actio*, at a point where he has been dealing solely with Chapter I (D. 9,2,23,10 Ulp. 18 *ad ed.*). Chapter III is addressed in Ulpian's commentary only at a later stage. All other clear evidence for the litiscrescence mechanism relates to Chapter I cases as well[74]. Some further texts that mention the doubling liability of the *infitians* refer to the *lex Aquilia* in general. This is the case in Gai. 4,9 and 4,171. In D. 5,3,20,4 Ulp. 15 *ad ed.*, we learn that, when a plaintiff sues for an estate which owns an outstanding *lex Aquilia* claim, the value of the litigation-right should be accounted using the *simplum*, not the *duplum*. D. 11,3,5,2 Ulp. 13 *ad ed.* informs us that, for the *actio servi corrupti*, the doubling takes place even against the confessing defendant, *quamvis Aquilia infitiantem dumtaxat coercat*. These references confirm that, in the application of the *lex Aquilia*, a distinction between *simplum*/*duplum* and *confessus*/*infitians* was in play. They do not, however, necessarily imply that all cases handled under the *lex Aquilia* shared this characteristic. The allusion to a confessing defendant in Ps.-Quint. Decl. maior 13, where the hypothetical case is under Chapter III (*urere*), does not point to a litiscrescence mechanism, either[75].

Coll. 2.4 and Coll. 12.7 are taken from Book 18 of Ulpian's Commentary on the Edict, which dealt with the *lex Aquilia*. Both texts start with the same *inscriptio* that according to most editions reads: *VLPIANUS libro XVIII ad edictum sub titulo si fatebitur iniuria occisum esse, in simplum et cum diceret*[76]. If we take '*si fatebitur iniuria occisum esse*' as the heading which Ulpian borrowed from the Edict for his chapter on the *lex Aquilia*, the continuation could be

73 Isola has demonstrated that the litiscrescence in the case of the *actio ex testamento* was limited to the *actio certi ex testamento*; *supra*, note 24.

74 *Supra*, II.2.

75 On this text, see A. Corbino, *Actio in factum adversus confitentem, Quint., Declam. Maior XIII*, in: Studi in onore di Antonino Metro, vol. I, Milano 2010, p. 511-524; D. Mantovani, *I giuristi, i retori e le api, Ius controversum e natura nella declamatio maior XIII*, Seminarios Complutenses, 19 (2006), p. 205 seq.; G. Krapinger, *Die Bienen des armen Mannes: Grössere Deklamationen, 13*, Cassino 2005.

76 Cf. R.M. Frakes, *Compiling the Collatio legum Mosaicarum et Romanarum in Late Antiquity*, [Oxford Studies in Roman Society and Law], Oxford 2011, p. 161, 185. The manuscript tradition is notoriously problematic. According to Mommsen, manuscripts have as variants, instead of *et eum diceret*: *et cum diceret* and *et cum dicere* (Coll. 2.4) and *et cum doceret* and *et cum docere* (Coll. 12.7), Th. Mommsen [und] P. Krüger, *Fragmenta vaticana, Mosaicarvm et romanarvm legvm collatio* [...], Berlin 1890, p. 144, 177.

read *Ulpianus* [...] *in simplum* [sc *esse*] *et cum diceret*. That is: 'Ulpian, in On the Edict, under the title 'If one confesses to wrongful killing', [said that] liability was also *in simplum* when he said: [...]'. In other words, Ulpian explained that *confessio* under Chapter I was *in simplum* and that liability was also *in simplum* in the following cases. These cases concern *rumpere* (Coll. 2.4) and *urere* (Coll. 12.7), two of the operative verbs of Chapter III. Can we deduce that Chapter III always led to a *condemnatio in simplum*? Because nothing is said about confessing, the possible inference is that liability is always *in simplum* in the cases of *rumpere* and *urere*, and hence in the cases coming under Chapter III.

It must be conceded, however, that we find classical lawyers discussing *confessio* also in the case of Chapter III claims[77]. The classical commentaries on the edict seem to suggest the existence of a separate *actio confessoria* for Chapter III claims, as well as for Chapter I claims[78]. None of the few relevant texts, however, speaks of – or even hints at – the *confessus*'s interest in avoiding the kind of doubled liability that, if Chapter III involved litiscrescence, would have befallen him had he denied the claim and then lost in court.

If Chapter I and Chapter III involved the same type of civil procedure, Chapter II ought to have extended its safeguard to claims under both Chapters: if so, we would expect it to appear *after* Chapters I and III, not between them. This argument, incidentally, gives us greater clarity about the nature of Chapter II. If the Chapter II safeguard attached to Chapter I proceedings only, it may have been tailored to a specific verbal guarantee in play in Chapter I, but not in Chapter III. I suggested above that the likely candidate is the guarantee given by a *vindex*, who was needed for the *manus iniectio* to be referred to a trial judge, provided we accept that Chapter I involved *manus iniectio pro iudicato*[79].

Can we identify the procedure by which Chapter III cases were litigated? All the evidence we have for the procedural reform motivating Aquilius pertains to Chapter I, so the traditional procedure *per sacramentum* might well have remained applicable to Chapter III cases. The requirement for litigants to come to court with money in hand might have been less oppressive for Chapter III claims, which on average will have involved smaller sums. More valuable *res* were perhaps more likely to have been stolen than damaged, in the

77 D. 9,2,24 Paul. 22 *ad ed.* (continued in D. 9,2,26) deals with a defendant falsely confessing to having maimed a slave. D. 9,2,25 Ulp. 18 *ad ed.* also deals with a *confessio* to a Chapter III delict.

78 Cf. the previous footnote.

79 *Supra*, II.5. and 6.

course of civil unrest. Furthermore, the procurement of replacements might have been less urgent in Chapter III cases.

Did the *lex Aquilia* entail any procedural innovation regarding claims coming under Chapter III? For an answer, we may consider thirty days which according to D. 9,2,27,5 Ulp. 18 *ad ed.*, featured in the brief text of the *lex*. Classical lawyers discuss whether changes in the damage suffered (or the value of the object damaged) during this period can be taken into account[80]; but allowing for *ex post facto* changes in value cannot have been the original reason the period was instituted. I suggest the thirty days were originally a procedural period. Unfortunately, thirty days are the archetypical Roman procedural period, whose ubiquitous use in all sorts of procedures leaves it nearly impossible to identify conclusively a specific procedure here[81]. Völkl assumed that it was a period in which the wrongdoer could try to 'make amends' by providing an equivalent object *in forma specifica*[82]. Kelly took the thirty days to be a payment period[83]. He pointed to the possibility that '*in diebus triginta proximis*' was not a qualification of the preceding *quanti ea res est*, but rather the beginning of the clause *in diebus triginta proximis tantum aes domino dare damnas esto* (D. 9,2,27,5 Ulp. 18 *ad ed.*). One may also think of an intermediate mechanism that turned the unliquidated *damnum* into a *certa pecunia* claim, that would have allowed the defendant to properly confess to the claim. The *legis actio per iudicis arbitrive postulationem* comes into view.

At the time of the *legis actiones*, parties traditionally faced their adversarial trial on 'the day after next' (*dies comperendinus*). A *lex Pinaria* of unknown date introduced a statutory delay of thirty days that preceded the appointment of the *iudex* (Gai. 4,15)[84]. The litigants were intended to use that interval to come to an amicable settlement, averting a trial. Given our lack of detailed information regarding the *lex Pinaria*, we may not discard the scenario that the *lex Aquilia* introduced (or reproduced) an identical time interval specifically for Chapter III claims. This would explain why the thirty days feature in the text of the plebiscite. The trial may then have been about the defendant's unwillingness to comply with the statutory (civil law) obligation to compensate the victim. One way or another, the thirty days will have been a last-chance period for amends to be made by the defendant if he wanted to avert a further escalation

80 D. 9,2,29,8 Ulp. 18 *ad ed.*

81 For some examples see E. Metzger, *A new outline of the Roman civil trial*, Oxford 1997, p. 59.

82 A. Völkl, *Quanti ea res erit in diebus triginta proximis, Zum dritten Kapitel der lex Aquilia*, Revue Internationale des Droits de l'Antiquité (RHDA 3rd. Ser.), 24 (1977), p. 461-486.

83 *Supra*, note 37.

84 On the *lex Pinaria*, see Platschek, *Zur Formel* (*supra*, n. 45), § 69 N. 5; on the matter of the dating, see Varvaro, *Legisaktionenprozess* (*supra*, n. 13), § 9 N. 35.

to proceedings requiring *sacramenta*. This would have made for a fitting counterpart to Chapter I. In different ways, each chapter incentivized wrongdoers to compensate victims in an uncontentious manner.

VI Chapters I and III juxtaposed

Let us now juxtapose chapters I and III afresh. Chapter I introduced *manus iniectio* for slaughtering someone else's cattle (or other grazing animals) and for killing someone else's slave – heinous acts, especially when motivated by hatred of the owner for belonging to the other order. *Iniuria* indeed! Subjecting such killers to the *manus iniectio* procedure was by no means disproportionate. Chapter III provided a somewhat less aggressive legal procedure, for other losses caused by damage to property. The difference in the procedure explains why acts damaging someone else's property were split into two different categories. This explanation is necessary, because the basic legislative purpose of compensating victims is the same in both types of cases. David Pugsley has asked why Justinian did not abolish Chapter I[85]. One must go a step back further, and ask why Aquilius provided a separate chapter for some deeds, if there was just one aim in all cases: to provide victims with adequate compensation. The explanation offered here is that, for destructions falling under Chapter I, a more aggressive procedure was provided for that put increased pressure on wrongdoers to acknowledge their liability and compensate the victim. Objects protected by Chapter I were far more likely to be indispensable for the continued generation of the victim's livelihood. Effective compensation was a matter of urgency.

Chapters I and III did not differ simply in the instructions to the trial judge, with Chapter I requiring exceptional, retrospective, 'historical' evaluation. Scholars have generally assumed that this was the key difference, but no one has come up with a convincing reason for such a legislative scheme. The real difference was far more profound. The *lex* made sure that Chapter I claims without further ado qualified as *certa pecunia* claims. It thus functioned, as long as the defendant confessed, without any involvement of a trial judge. If the defendant denied his liability, the judge only had to decide the issue of whether the delict had been committed by the defendant or not; again, no *aestimatio* was called for. The *eo anno* rule in Chapter I and the thirty days in Chapter III had entirely different technical functions. We must discard the

85 D. Pugsley, *A potted history of Chapter I of the LEX AQUILIA*, in: Liber Amicorum Guido Tsuno, hrsg. von F. Sturm et al., Francfort/M. 2013, p. 335-340, at p. 339 seq.

view that both periods provided the time frames, albeit of different lengths, by reference to which the judicial *aestimatio* was reckoned. The *eo anno* rule brought claims under Chapter I into a *certa pecunia*-format, so as to permit *manus iniectio*. The thirty days allowed the defendant who faced a Chapter III claim to settle the matter before the adversarial trial began.

There have been speculations that Chapter III came as a later amendment to the *lex Aquilia*, which, some have surmised, was originally concerned only with the acts set out in Chapter I[86]. No evidence directly supports this idea. The main argument for the amendment theory is Chapter II, which is said to interrupt the thematic consistency of the *lex* by deviating from delict. This argument falls away with the re-interpretation of Chapter II outlined above. The theory of a staggered enactment has always been unacceptable because the *lex Aquilia* is reported to have derogated all earlier laws concerning *damnum iniuria*[87]. Without Chapter III, this would have left a gaping *lacuna* in the law of property damage, and a rump enactment of Chapter I alone could hardly have worked as a satisfying reparation scheme. We must accept that all three chapters were enacted, in one go, at Aquilius's proposal[88]. On the assumption that the context of the *lex* concerned reparations for damage sustained during the last secession, both chapters together, I and III, were intended to cover comprehensively the typical range of property destruction. In civil unrest, one tries to render adversaries' property useless, and this regularly must amount to total destruction, rather than to partial damage.

VII Aquilian liability for wrongs committed by slaves

For Aquilian liability, there was a noxal variant[89]. According to Gai. 4,76, noxal liability for *damnum iniuria* was provided for by the *lex Aquilia*; it was not a later addition deriving from a praetorian improvement[90]. The *manus iniectio*

86 The idea of a proto-Aquilian statute was first floated, on a phantasmagorically speculative basis, by F. Pringsheim, *The origin of the 'Lex Aquilia'*, in: Droit de l'antiquite et sociologie juridique, Mélanges Henri Lévy-Bruhl, Paris 1959, p. 233-244; his view was tentatively followed by R. Zimmermann, *Law of obligations*, Cape Town 1990, p. 958, and D. Pugsley, *Si quis alteri damnum faxis*, Acta Juridica, 95 (1977), p. 299.

87 *Infra*, VIII.2.

88 D. Nörr, *Texte zur lex Aquilia*, in: *Iuris professio*, Festgabe für Max Kaser zum 80. Geburtstag, hrsg. von H.P. Benöhr et al., Vienna – Cologne – Graz 1986, p. 211-219, at p. 214 seq.

89 On noxal liabilities and their historical development, see B. Sirks, *Noxa caput sequitur*, Tijdschrift voor Rechtsgeschiedenis, 81 (2013), p. 81-108; M. Pennitz, *Noxalhaftung*, in: HRP (*supra*, n. 13), § 105 N. 1 seq.

90 This is confirmed by D. 9,4,2 Ulp. 18 *ad ed.* (*in lege Aquilia … utriusque legis reddit rationem*).

procedure at the core of Chapter I was incompatible with the kind of noxal action that allowed the slave's owner to avoid liability by surrendering the slave to the plaintiff. The liability of slave-owners that originally complemented Aquilian liability must have been so-called 'direct' liability. Victims who had lost a slave or a head of cattle owing to a slave's attack will have been allowed to sue the slave's owner who had no option to escape liability by *noxae deditio*. As David Daube has shown, the terms *noxa* and *nocere* were not confined to the indirect liability for which the *noxae deditio* option is the hallmark[91]. The direct action without the *noxae deditio* option for the slave owner defendant who had been involved in the slave's actions remained a variant of masters' liability that later jurists continued to discuss when they wrote *de noxalibus actionibus*.

For the Aquilian action to lie directly against the owner, he must have appeared personally responsible for his slave's attack. As Celsus maintained, *in lege Aquilia dominus suo nomine tenetur* (D. 9,4,2,1 Ulp. 18 *ad ed.*). The deed is the master's, not the slave's. Classical jurists elucidated the concept of this action against an owner who, because of his orders or knowledge/consent[92], is directly responsible for the slave's killing act: in this variant, the owner does not have the option of *noxae deditio*. If he sells the slave or sets him free, he cannot rely on the *noxa caput sequitur* principle, which ordinarily transferred the noxal liability to the slave's new owner or to the new freedman in his own right. At the time of its enactment, the *lex* did not provide the more sophisticated procedure that included *noxae deditio*, for cases where a slave had killed another (or someone else's cattle) on his own initiative, unbeknownst to his master. This state of affairs was to undergo considerable changes, which will be addressed below[93].

Slaves causing destruction during the *secessio* will mostly have acted on their owners' behalf. Slaves of patrician masters were probably sent out to inflict damage on plebeian property, and vice versa. Such cases could easily be taken care of under the original *lex*, which justifies Gaius's statement (4,76). The Aquilian victim proceeded *per manus iniectionem* against the slave's owner, and the option of *noxae deditio* was not yet integrated into the proceedings, which took their regular course.

91 D. Daube, *Nocere and noxa*, Cambridge Law Journal (CLJ), 7 (1939), p. 23-55.

92 The different shades of the owner's involvement and the question of whether they led to different consequences are beyond my scope.

93 *Infra*, X.2.

VIII Enacting plebiscite and lex

1 *Constitutional law matters*

The *lex Aquilia* was a plebiscite. Before the *secessio* of 287 BCE, the *concilium plebis* had no unconditional authority to make laws for the entire citizenry. The patrician bodies had preserved their right to stop plebiscites from becoming general laws. The *lex Aquilia*, however, was to be used by – and against – members of both orders. This is where the *lex Hortensia* may come into play: the *lex Hortensia* was passed after the *secessio* and provided that plebiscites were generally afforded the force of *leges publicae*[94] (without the need for *patrum auctoritas*). We do not know the temporal sequence of the *lex Hortensia* and Aquilius's initiative. It is, after all, mostly by conjecture that we can place the *lex Aquilia* in the context of the last *secessio* and hence date it to roughly the same time as the Hortensian reform. The scenario that seems least likely is that the *lex Hortensia* gave 'carte blanche' to the *concilium plebis* that then unexpectedly used its new powers to spring the Aquilian enactment on the entire citizenry[95]. It is more plausible that both the *plebiscitum Aquilium* and the *lex Hortensia* were enacted in a coordinated manner, as part of the reconciliation of both orders. It may well be that the *lex Hortensia*, which of course would be of enduring importance, originally had the restricted goal of assuring that the Aquilian law reform bound patricians and plebeians alike. One way or another, it seems safe to assume that the *lex Aquilia* became the 'law of the land' with the consent of the patricians, as a concession extracted during the reconciliation process: either the patricians gave their special assent to the Aquilian plebiscite, elevating it to the status of a constitutionally enacted *lex*; or the *lex Hortensia* was passed with the Aquilian plebiscite in view, which in turn became a general *lex* by virtue of the Hortensian law.

2 *The* clausula derogatoria

According to D. 9,2,*1pr.* Ulp. 18 *ad ed.*, the *lex Aquilia* derogated earlier laws dealing with *damnum iniuria*, which must include the relevant provisions in the XII Tables. This is an oddity that calls for explanation. When a new regime for delictual liability is introduced, it is usually possible to let the old law peter out, in the confidence that future cases will be dealt with under the new law. Why were the Aquilian drafters anxious to bar expressly any reliance on the old laws? If the political objective was to place plebeians and patricians on a level procedural footing in pending disputes over destroyed property, it was

94 P. Buongiorno, *Republik*, in: HRP (*supra*, n. 13), § 2 N. 31, with references.

95 This is the scenario assumed by Ibbetson, *The dating* (*supra*, n. 5), p. 177.

not enough merely to open a more modern type of proceeding to plebeian plaintiffs. It was also necessary to bar potential plaintiffs, including patricians, from relying on an older stratum of delictual liabilities for which the *per sacramentum* procedure might still be invoked as the default type of civil procedure. The *clausula derogatoria* foreclosed this possibility. Implicitly, the *clausula derogatoria* shows, in my view, that the Aquilian legislators were dealing with very recent property damage that still awaited reparations when the *plebiscitum* was enacted.

3 *Structure and taxonomy*

The structure of the *lex Aquilia* might have been as follows. Chapter I allowed the owner of a killed slave or slaughtered head of cattle to commence *manus iniectio* proceedings for a liquidated sum of money (*certa pecunia*), based on price information from the preceding year. With no need for additional statutory provisions, this type of procedure facilitated the different treatment of the defendant who confessed and the defendant who denied liability: the prospect of litiscrescence was meant to incentivize the swift payment of reparations. A defendant who wanted to contest the claim needed a *vindex*. Chapter II safeguarded the procedure in case a party (probably the plebeian plaintiff) had to rely on the assistance of a (patrician?) seconder of uncertain loyalty. The claim against a treacherous *adstipulator* was also fortified by *manus iniectio* powers. Chapter III dealt with other kinds of damage. Here, assessment of the damage was entrusted to a trial judge or an *arbiter*. In the *lex* as enacted, the *noxa* variant came in the form of a direct action against the killing slave's complicit owner: this action was available on the plain text of Chapter I, without any need for additional provisions. The *clausula derogatoria* may have been placed at the beginning or end of the statute. All three chapters, together with the *clausula derogatoria* came together in a coherent and properly sequenced manner.

When the *lex Aquilia* was enacted, the drafters will not have considered whether the new species of claim were to be classified as penal or reipersecutory. Such taxonomical efforts, and various second-order issues relating to the penal character of an action (e.g. transmissibility in the case of death), belong to a later stage[96]. The *lex* made sure that victims were compensated. In D. 47,10,7,1 Ulp. 57 *ad ed.*, we read, regarding the penal functions of the *lex*

96 See Finkenauer, *Pönale Elemente* (*supra*, n. 34), p. 35-71; G. Rossetti, *Alle origini della moderna responsabilità extracontrattuale, L'actio ex lege Aquilia tra 'natura penale' e 'funzione reipersecutoria'*, forum historiae iuris (fhi) 2020, https://forhistiur.de/2020-05-rossetti, visited 30 January 2022.

Cornelia: *... Quid ergo de lege Aquiliam dicemus? ... Ibi principaliter de damno agitur, quod domino datum est*. At the same time, the *lex* was about destructive violence, which at all times cries out for a penalty[97].

A clarification seems in order, addressing the taxonomical juxtaposition of substantive and procedural rules in private law. The *lex Aquilia* was, of course, not 'just' a civil procedure reform. The *lex* also defined the claims for which it prescribed new procedures. This was an integrated statutory project, tying together what we see as substantive law requirements with their procedural implementation. It is only in retrospect, from the perspective of modern private law theory, that we are driven to distinguish requirements for liability (*pecudes occidere* etc.) and their legal consequences (compensation due) which together we characterize as 'substantive law', from 'merely' procedural aspects, which today we consider ancillary to the substantive rules.

IX The year 287 BCE – a new narrative

By reverse engineering, we can go from the legal mechanisms introduced to provide reparations back to the civil unrest that brought about those mechanisms. The *secessio* was not a peaceful walkout; it was a rebellion that challenged the rule of the patrician-controlled institutions of the *res publica*. 'It was about a revolution and its prevention', as Mommsen found[98]. It must have become a violent and bloody affair, like the previous *secessio* of 450/449 BCE. Livy speaks of *graves et longae seditiones*[99]. It was a case of collective political violence. In quelling the unrest, the patricians probably did not subscribe to a policy of de-escalation. The matter was serious enough for the patricians to appoint a *dictator*, Quintus Horatius[100]. In civil war and civil unrest, the adversaries try to inflict damage on the assets that provide their opponents with their livelihood. Slaves were killed and livestock slaughtered. On both sides, there were victims and aggressors. Rioters and counter-rioters will have ganged up on victims, rather than acting individually. Slaveholders sent out their slaves to inflict damage on members of the other order. If the plebeians had taken their

97 There is not sufficient evidence to accept the idea that the *lex Aquilia* included an extra criminal-law provision for *homo occisus* which Huschke assumed was later repealed by the *lex Cornelia de sicariis*; Ph.E. Huschke, *Gaius, Beiträge zur Kritik und zum Verständniss seiner Institutionen*, Leipzig 1855, p. 104 seq.

98 Th. Mommsen, *Römisches Staatsrecht*, Dritter Band, 1. Teil, 4. Aufl. = reprint Tübingen 1952, p. 145.

99 Livy, *Periochae* 11.

100 Pliny, *Naturalis Historia* 16,10,37.

cattle with them to the Ianiculum, the animals could have become a preferred target of patrician violence. All this happened in broad daylight.

When the rioting and civil unrest were brought to an end by a reconciliation between the two orders, a legal framework was needed to deal with damage and destruction. Assets providing the basis of livelihood had been destroyed, and time was of the essence for reparation urgently needed. The prospect that reparations would be determined by a wave of trials *per sacramentum* must have worried many plebeians, since they lacked the ready cash to initiate proceedings or defend themselves in court. As part of the reconciliation, a new procedure was made available, utilizing the well-established *manus iniectio* technique for the most severe cases, the killing of slaves and cattle. The litiscrescence that came with this mechanism incentivised wrongdoers to agree to pay reparations, by way of *confessio in iure*[101]. The *lex Aquilia* reformed the regime of protection for private property but the context in which it was enacted meant that the reform was a matter of high politics.

The thrust of the reform was the abolition of the *sacramentum* requirement. The *lex* remedied, for the cases it covered, a serious access-to-justice problem that, as a result of the riots, had become a substantial political grievance. Plaintiffs were expressly barred from relying on pre-Aquilian laws, through which they could have fallen back on the *per sacramentum* proceeding, which was not abolished altogether. The turn away from *per sacramentum* procedures has been observed in many other contexts as well. The introduction of the *legis actio per iudicis arbitrive postulationem* was driven, it is presumed, by the wish to abolish *per sacramentum* procedures for a range of disputes, notably those stemming from formal promises[102]. A similar motive has been ascribed to the introduction of the *legis actio per condictionem*, which did away with the *sacramentum*, introducing instead the *stipulatio tertiae partis* as a mutual security exchanged between parties. There was perhaps a tug-of-war between representatives of each order. The plebeians wanted to get rid of the cash requirement that came with the *sacramentum*[103]. Another functioning procedure was needed, for which *sponsiones* seemed appropriate. The plebeians were

101 A comparative legal history survey could probably show that reparation schemes after large-scale outbreaks of violence frequently offer similar mechanisms for speedy dispute resolution with reduced judicial oversight as a preliminary to a proper adversarial trial.

102 Kaser/Hackl, *Zivilprozessrecht* (*supra*, n. 53), p. 108.

103 Jhering (*supra*, n. 17) argued that the need to provide a *vindex* created an access-to-justice problem no less oppressive than that created by the need to put up a *sacramentum*. But it is possible that by relying on a sense of solidarity, getting another member of one's order to step in as a *vindex* would not have been that difficult, especially if one were demonstrably being sued baselessly.

reluctant because they saw the risk that an *adstipulator*, on whom many of them had to rely, might be disloyal and give up his party's rights on a procedural promise that was necessary for the trial to continue; hence Chapter II was added.

The *lex* improved the procedural lot of plebeian parties, whether they were plaintiffs or defendants. Various features of the law add up to give the overall impression that particular attention was afforded to the plight of plebeian plaintiffs. That is consistent with the promulgation of the measure in the *consilium plebis*. The ancillary safeguarding measure in Chapter II betrays considerable anxiety about the patricians' trustworthiness.

X What lay in the future?

1 *Before the incorporation into the praetor's edict*

While the driving motives for the reform wrought by the *lex Aquilia* were the destruction brought by the civil unrest and the importance of a civil procedure that allowed swift reparations, the *lex* was not meant to operate for just this immediate occasion. It was a law reform intended to endure, as evidenced by the *clausula derogatoria*. The subsequent procedural handling of *lex Aquilia* claims underwent complex changes that raise numerous intricate issues for further research. The *lex*'s incorporation into the praetorian edict and its structuring as a *per formulam* proceeding resulted in a suite of adaptations that are well-attested in the later juristic writing (below X.2). Earlier changes were no doubt also made in republican times, well before they were given a basis in the praetorian edict[104]. In the almost complete absence of concrete evidence, we can only speculate about these changes. While these developments lie beyond the scope of this contribution, some tentative suggestions are relevant to my thesis. The *lex Vallia* has been discussed above[105].

In the case of Chapter II, we learn from Gaius (3,215) that the statutory *actio* had become (almost) redundant. Indeed, as the *bonae fidei iudicium* became available on the strength of the contract of mandate, perhaps in the last century of the republic, the function of Chapter II could be assumed by the *actio mandati*. Two generations later, Ulpian stated that Chapter II had fallen into disuse (D. 9,2,27,4 Ulp. 18 *ad ed.*, confirmed in I. 4,3,12). This is not quite what

104 Cf. Selb, *Gewaltenteilung* (*supra*, n. 14), p. 122 seq., who considered the possibility of an intermediate phase when an *arbitrium liti aestimandi* was introduced.

105 *Supra*, II.7.

Gaius said: his text did not expressly rule out a Chapter II claim, in his time. Chapter II, we can surmise, was never formally repealed.

2 *Aquilian claims pursued* per formulam

As the *per formulam* procedure came into ever wider use, at a certain point the praetor must have turned to the *lex Aquilia*, recasting the statutory parameters into *formulae* he included in his edict. The *legis actio* procedure gave way to procedures based on these praetorian *formulae*[106]. At least for Chapter I, two different *formulae* were needed, one for an *actio confessoria in simplum* and another for an *actio adversus infitiantem in duplum*. There is no direct evidence for the wording of these edictal *formulae*. The many attempts to reconstruct or at least classify them are not a topic for this contribution[107]. From the thesis here developed, no compelling argument can be deduced to support a specific theory for the reconstruction of those *formulae*. However, some tangential remarks can be made.

The function of the *in eo anno* rule of Chapter I became part of how the *iudex* had to handle the *condemnatio*. The problems the classical lawyers discuss with regard to this rule are no longer compatible with the idea that the amount sought by the plaintiff was announced and definitively fixed at the moment proceedings were initiated. It is a well-known feature of the evolution of the Aquilian system that special damages came to be included in the calculation of the monetary judgment[108]. If we assume that Chapter I claims initially were for *certa pecunia*, this must have been an especially dramatic step. Statements from Roman jurists indeed indicate there had been a controversy. Ulpian, who asks whether the correct approach is to evaluate the owner's full interest in the slave's or cattle's not being killed, states *et hoc iure utimur, ut eius quod interest fiat aestimatio* (D. 9,2,21,2*pr*. Ulp. 18 *ad ed.*). Gai. 3,212 expresses the same view. Neratius is named as the first who argued that the expectation of an inheritance should be taken into account (D. 9,2,23*pr*. Ulp. 18 *ad ed.*), an opinion for which Julian's support was also invoked (D. 9,2,23,1 Ulp. 18 *ad ed.*).

106 For the purpose of this contribution, there is no need to revive the debate about the precise impact of the *lex Aebutia*.

107 See, most recently, D. Mantovani, *Le formule del processo privato romano*, 2. ed., Milano 2009, p. 64-66, no. 54 to 61; D. Nörr, *Zur Formel der actio legis Aquiliae*, in: Festschrift für Rolf Knütel zum 70. Geburtstag, hrsg. von H. Altmeppen et al., Heidelberg 2009, p. 833-848; reprinted in: D. Nörr, *Schriften 2001-2010*, edited by T.J. Chiusi [and] H.-D. Spengler, Madrid 2012, p. 705-722. Nörr took up the idea that there was but one unitary *formula* used for claims under both chapters (I and III), first floated by P. Birks, *The model pleading of the action for wrongful loss*, The Irish Jurist, 25/7 (1990/2), p. 315 seq.

108 Cf. R. Gamauf, *And then there were three, Drittschadensliquidation nach dem ersten Kapitel der lex Aquilia*, Fundamina, 20 (2014), p. 322-335.

These developments came with a change in the treatment of the Chapter I defendant who confessed liability. While under the original *lex* the *confessus* became automatically liable for the fixed amount for which the claim was lodged, in a procedure *per formulam* the case still had be referred to the trial judge, whose task was focussed, however, on assessing the amount due to the plaintiff as compensation[109]. With this innovation, Chapter I proceedings must have become similar to those that had been in use for Chapter III from the start. While in the application of the law, one still needed to bring cases under one of the two chapters[110], the fundamental procedural distinction that had been the reason for the two-chapter design was no longer in play, once all Aquilian claims were pursued *per formulam*.

The transition to a *per formulam* procedure must have called for a re-interpretation of Chapter III. The thirty days no longer signified the delayed start of the trial. In a somewhat clumsy manner, it was now taken to be a period relevant for the judicial evaluation of *quanti ea res est*. Is it possible that the thirty days that the *lex* had introduced with the expectation that the defendant averted the trial by compensating the plaintiff, was morphed into a procedural framework that allowed for an *in iure* agreement between plaintiff and defendant to see the matter handled on the basis of an admission of guilt (*actio confessoria* for Chapter III)?

The order in which *formulae* appeared in the edict is also worth attention. Lenel saw the original priority of the proceedings against the *confessus* reflected in the edictal design, since the *actio confessoria* came first[111]. We do not know whether a *formula* for the Chapter II claim was included in the *Edictum Perpetuum*. Lenel did not think so, perhaps too rashly, since the praetor could not abrogate statutory claims.

The *formulae* for different claims under the *lex* were probably accompanied by clauses that addressed Aquilian delicts committed by a slave, allowing the uninvolved master to escape liability by *noxae deditio*[112]. This was the endpoint of a laborious jurisprudential dispute about the nature of Aquilian liability for deeds committed by slaves. A dispute shines through in D. 9,4,2,1 Ulp. 18 *ad ed*. It seems that Celsus defended, in a somewhat tortured manner, the view that Aquilian liability for slaves was based on the master's responsibility for the slave's deed as his own (whatever conduct was necessary to

109 D. 9,2,23,11 Ulp. 18 *ad ed*.

110 The borderline cases that the jurists came to discuss, thereby fine-tuning each chapter's range of application, are not topical here.

111 Lenel, *Edictum Perpetuum* (*supra*, n. 47), p. 199.

112 Lenel, *Edictum Perpetuum* (*supra*, n. 47), p. 201-202.

establish this responsibility), whereas later jurists advocated the applicability of the *noxae deditio* variant, which allowed suing masters regardless of their personal responsibility. Julian advanced the argument that the *noxae deditio* mechanism established in the XII Tables applied also to delicts introduced by future legislators. Late classical jurists intensively discussed the *noxae deditio* mechanism in the context of the *lex*[113].

Relying on the barren text of the *lex Aquilia*, which was eventually recast into praetorian *formulae*, Roman *iurisperiti* developed an intricate and nuanced law of damage to personal property, with only a few elements still betraying the political origin of the *lex*. While the *lex Aquilia* was introduced as a reaction to acts of violence by which other persons' property was wilfully damaged or destroyed, centuries of interpretation successfully transformed it into a general 'law of accidents'.

3 *Justinian's law and beyond*

Justinian's codification eradicated all cases where *lis infitiando crescit in duplum*[114] except that of the *lex Aquilia*, retaining a constitution by Diocletian in the Codex (C. 3,35,5, Diocl./Maxim. a. 293) as well as pertinent passages from works by Ulpian and Gaius. The *lex Aquilia* came to be identified, contrary to the historical reality, with the very origin of the litiscrescence concept. Justinian's Nov. 18 harked back to the *lex Aquilia* when re-introducing a litiscrescence mechanism, i.a. in order to improve the enforcement of children's legitimate shares in inheritances (Nov. 18,8, a. 536 CE). In the *interpretatio* to the *sententiae Pauli* in the *Lex Romana Visigothorum*, the *lex Aquilia* is referred to as the enactment that comprehensively defined all cases of litiscrescence (1,19,1).

113 See, e.g., D. 9,2,27,2 Ulp. 18 *ad ed.*, citing Celsus; D. 9,2,27,11 Ulp. 18 *ad ed.*; D. 9,4,19 Paul. 22 *ad ed.*

114 To be clear, Justinian's reform concerned only cases where the doubling was the result of denying liability in court, not the cases of *duplum* liability where the doubling was a feature of the obligation in the first place, nor those where liability is doubled by failure to perform, as in the case of the *actio redhibitoria*; for the complexity of doubling mechanisms in Justinian's law, cf. H. de Jong, *Die actio in duplum (ἡ τοῦ διπλοῦ ἀπαίτησις) bei Sachbeschädigung – Ein Mysterium im byzantinischen Recht*, ZRG Rom. Abt., 132 (2015), p. 324-361.