

The Tenant, the Borrower and the *lex Aquilia*

by O.E. TELLEGEN-COUPERUS
(Tilburg)

I. In the modern literature it is sometimes claimed that under Roman law the owner was not the only person entitled to bring the *actio legis Aquiliae*; this action could also be brought by the usufructuary, the pledge creditor and even by the tenant and the borrower. Of course, such persons were granted an action with an adapted formula. The fact that the usufructuary and the pledge creditor had this right is not surprising because they had a right *in rem* to the damaged object; moreover, they were only granted the *actio legis Aquiliae utilis* in exceptional cases (¹).

It is much more difficult to understand why an adapted *actio legis Aquiliae* was granted to *detentores* such as a tenant and a

1) The five texts that refer to the usufructuary bringing the *actio legis Aquiliae* all seem to me to be about cases in which the owner himself has caused the damage; J. ILIFFE, *The Usufructuary as Plaintiff under the lex Aquilia according to the Classical Jurists*, in: *RIDA* 12 (1965) 325 ff. is more hesitant. As far as the pledge creditor is concerned: in Ulp. D. 9.2.17 he can bring the action if the owner damages the property; according to D. 9.2.30.1 the pledge creditor can also bring an *actio utilis* if the owner/debtor is insolvent or refuses to take action himself.

borrower. In the following I shall first deal with the case of the tenant and secondly with that of the borrower.

The assumption that the tenant as detentor had an *actio in factum* modelled on the *actio legis Aquiliae* is based only on the interpretation of one Digest text, not even on the actual wording of that text. The same assumption holds with regard to the borrower. I shall try to show here that the various interpretations of these two texts that have been made over the years are not correct. The texts in question do not break the rule that only the owner was allowed to bring the *actio legis Aquiliae*, in that the tenant referred to in the first Digest text was acting as an owner, not as a detentor, whereas the borrower referred to in the second text did not bring the action at all.

II. The text dealing with the tenant is D. 9.2.27.14. It is a text by Ulpian in which he quotes a *responsum* given by Celsus. The text runs as follows:

Ulpianus libro octavo decimo ad edictum. (14) Et ideo Celsus quaerit, si lolium aut avenam in segetem alienam inieceris, quo eam tu inquinare, non solum quod vi aut clam dominum posse agere vel, si locatus fundus sit, colonum, sed et in factum agendum, et si colonus eam exercuit, cavere eum debere amplius non agi, scilicet ne dominus amplius inquietet: nam alia quaedam species damni est ipsum quid corrumpere et mutare, ut lex Aquilia locum habeat, alia nulla ipsius mutatione applicare aliud, cuius molesta separatio sit.

Ulpian in the 18th book of his commentary *ad edictum*. (14) And therefore Celsus asks whether, if you have sown darnel or wild oats in someone else's cornfield as a result of which you have spoilt it, the owner or, if the ground is leased, the tenant farmer can bring the interdict *quod vi aut clam* but also proceedings must be taken *in factum*, and whether, if the tenant has brought this action, he must give security that there will be no further proceedings, namely that the owner will not annoy him any further. For it is one kind of damage to spoil or alter something so that the *lex Aquilia* is applicable and another to add something which is very troublesome to separate again but without any other change being made.

The wording shows that the text has come down to us in a defective form. Ulpian begins with '*Celsus quaerit*' but that is followed by only the beginning of his question and probably only part of his answer. Also the form of the verb in '*non solum ... posse agere*' does not correspond to the form in '*sed et in factum agendum*'. Apparently the text has been shortened in an awkward manner, either by postclassical revisers or by the compilers. The shortening of the text is probably one of the reasons why modern Romanists have had problems with it.

The text forms part of Ulpian's commentary on the *actio legis Aquiliae* and in particular on the term *rumpere* in that law. In D. 9.2.27.13 Ulpian states that the *veteres* nearly always interpreted the word '*ruperit*' as '*corruperit*'. In the fragment in question Ulpian quotes a *responsum* of Celsus in which Celsus explores

the scope of the word '*corrumpere*'. According to Celsus the *actio legis Aquiliae* can be granted if the damaged object is spoilt and altered, but not if it is spoilt without being altered: in that case an *actio in factum*, modelled on the *actio legis Aquiliae*, has to be granted. Ulpian has included this *responsum* of Celsus in order to give an example of spoiling without altering.

The case arose because someone had sown darnel or wild oats in someone else's cornfield. *Lolium temulente* is a kind of grass which produces poisonous seeds and which is dangerous if it gets in among the corn. *Avena* is wild or barren oats, a weed which is not dangerous but a nuisance and which takes at least six years to get rid of ⁽²⁾. The farmer does not realize that the weeds have been sown until the corn begins to ripen in the field. Only then does it become clear that the harvest is worthless because it is almost impossible to separate the poisonous and barren seeds from the corn.

At the end of the last century Romanists like FERRINI, DE MEDIO, PAMPALONI and BESELER began to see a dogmatic problem in this text because Celsus seemed to grant an *actio legis Aquiliae* to a tenant, i.e. a detentor, although according to the *lex*

2) U. VON LÜBTOW, *Untersuchungen zur lex Aquilia de damno iniuria dato*, Berlin 1971, 165 thinks that the damage consisted of the fact that the *lolium* and the *avena* would prevent the crop from growing as well as it otherwise would have grown. In the same vein G. MACCORMACK, *Celsus quaerit: D. 9.2.27.14*, in: *RIDA* 20 (1973) 344. In fact the damage is much more serious. See the entry for *lolium temulente*, which is also mentioned in the New Testament (Matth.13:24-30 and Matth. 13:36-43), *Brockhaus Enzyklopädie* XIII, 19th ed., Mannheim 1990, 506 s.v. *Lolch*. I am grateful to prof. dr. P. ZONDERWIJK, former professor at Wageningen University, for giving me useful information on these weeds.

Aquila only the owner was allowed to bring the action (3). They solved the problem in a way that was fashionable at the time, namely they regarded the text as having been interpolated. In classical law a detentor was not allowed to bring the *actio legis Aquiliae*; Justinian was the first to grant such a right to a detentor and he adapted the text accordingly. The view that the text has been interpolated was upheld for a long time, and until quite recently by LÜBTOW and KASER (4).

About twenty years ago when 'interpolation criticism' began to decline in popularity, some Romanists started claiming that the content of the text was indeed classical and that even in classical law the tenant as detentor was allowed to bring the *actio legis Aquiliae*. This view is expressed in works of many authors including THOMAS, VALIÑO, GUARINO and HAUSMANINGER (5). However, they do not explain why they take this view

3) C. FERRINI, *La legittimazione attiva nell' "actio legis Aquiliae"*, in *RISG* 12 (1891) 210 = *Opere di Contardo Ferrini* 5, Milan 1930, 191 ff.; A. DE MEDIO, *La legittimazione attiva nell' "actio legis Aquiliae" in diritto romano classico*, in: *St. Scialoja* I, Milan 1905, 27 ff.; M. PAMPALONI, *Sulla l.27.§14 D. ad legem Aquiliam* 9.2, in: *Bull.* 3 (1909) 241 ff.; G. BESELER, *Miscellanea*, in: *SZ* 44 (1924) 368 and in: *Festschrift Schulz* I (Weimar 1951) 20 ff.

4) U. VON LÜBTOW, *Untersuchungen zur lex Aquilia de damno iniuria dato*, Berlin 1971, 166; M. KASER, *Das römische Privatrecht* I, 2nd ed, Munich 1971, 622 note 41.

5) J.A.C. THOMAS, *Textbook of Roman Law*, Amsterdam-New York-Oxford 1976, 368; E. VALIÑO, *Acciones pretorias complementarias de la acción civil de la ley Aquilia*, Pamplona 1973, 81 ff.; A. GUARINO, *Diritto privato romano*, 10th ed., Naples 1994, 1007; H. HAUSMANINGER, *Das Schadenersatzrecht der lex Aquilia*, 4th ed., Vienna 1990, 35. Other Romanists don't mention this text, e.g. G. PUGLIESE, *Istituzioni di diritto romano*, Padua 1986, 673, or they express the view that this text has nothing to do with the right to bring the *actio legis Aquiliae*, e.g. W. SELB in his

although it is based only on the interpretation of one Digest text, not even on the actual wording of that text.

The only modern Romanist who gives a well-thought-out interpretation of this text is MACCORMACK. In 1973 he wrote an article in which he regarded the text of D. 9.2.27.14 as classical and in which he explained how the tenant as detentor could bring the *actio legis Aquiliae* ⁽⁶⁾. However, his explanation does not seem very convincing. I shall now summarize his interpretation of the text and indicate why it seems to be incorrect. Then I shall give my own interpretation.

III. In his article '*Celsus quaerit: D. 9.2.27.14*' MACCORMACK assumes that Celsus was dealing with two questions:

1. Could the *interdictum quod vi aut clam* or the *actio in factum* be brought by the *dominus*?
2. Were these actions available to the *colonus* in addition to or in lieu of the *dominus*?

review of VALIÑO's book mentioned above, in SZ 94 (1977) 430. G. VALDITARA, *Superamento dell'aestimatio rei nella valutazione del danno Aquiliano ed estensione della tutela ai non-domini*, Milan 1992, 480 ff. assumes that the tenant as detentor was allowed to bring the *actio legis Aquiliae* but he gives no further attention to this text because, like P. CERAMI, *La concezione celsina del "ius". Presupposti culturali e implicazioni metodologiche I: L'interpretazione degli atti autoritativi*, in: *Annali Palermo* 38 (1985) 130 he believes that in this case the main problem was the *aestimatio rei*.

6) G. MACCORMACK, *Celsus quaerit: D. 9.2.27.14*, in: 20 (1973) 341-348.

According to MACCORMACK the answer to the first question depended on the way in which the damage was caused. For the *actio legis Aquiliae* the criterion of *corrumpere* was not fulfilled in this case, so, according to Celsus, an *actio in factum* had to be granted. For the *interdictum quod vi aut clam* the criterion was that something had been done with regard to the ground (*opera quaecumque in solo vi aut clam fiunt*) (7). According to MACCORMACK, there may have been some uncertainty about whether the sowing of weeds in a cornfield constituted an *opus* carried out in another person's ground, because possibly the interdict was available only when there had been some damage (*corrumpere*) or alteration (*mutare*) to the ground. Celsus' arguments supporting the view that the interdict should nevertheless be accorded to the owner may have been abridged twice, the first time round by Ulpian and the second time round by the compilers.

Next, MACCORMACK deals with the second question, namely whether these actions were available to the *colonus* in addition to or in lieu of the *dominus*. In connection with the interdict *quod vi aut clam* he refers to several Digest texts which indicate that the tenant himself, as owner of the crop, could apparently bring the interdict. According to MACCORMACK, the question of whether a tenant had the *actio in factum* is more complicated. The text is about whether the sowing of weeds is a case of *corrumpere* in the sense of the *lex Aquilia*. Hence he considers it to be totally unhelpful to put the issue in terms of the

7) Ulp. D. 43.24.1.4.

type of right protected by the *lex Aquilia*. He believes that first of all one has to consider the relevance of the reference to the *cautio non amplius peti*. According to Celsus, the tenant bringing the *actio in factum* had to guarantee that the owner would not bring the action as well. MACCORMACK thinks there are two possible explanations; either the *colonus* and the *dominus* were each accorded an *actio in factum* but they were not regarded as having independent interests, or the *actio* was accorded to the *dominus* alone but might be brought by the *colonus* acting under a mandate. MACCORMACK prefers the second explanation because the *cautio* seems to have been primarily of importance in cases where one person brought an action as *procurator* for another; that person then had to furnish security that the action would not subsequently be brought by the principal ⁽⁸⁾.

MACCORMACK's analysis of D. 9.2.27.14 is certainly surprising but it is not convincing. First of all, I do not believe that Celsus was dealing with the two questions as formulated by MACCORMACK. Celsus does not deal primarily with the position of the owner and secondly with the position of the tenant. His *responsum* is directed towards the tenant only. This is apparent from the fact that most of the text is about the tenant. Because the problem is rather complicated, Celsus divides it into a number of

8) A similar view was held by E. GRÜBER, *The Roman Law of Damage to Property*, Oxford 1886, 250, namely that the tenant could only bring the action on behalf of the owner. At the end of his paper MACCORMACK suggests that the jurists may even have advised prospective tenants to insist upon the inclusion of a clause in the contract making them procurators of the landlord. However, he does not mention any source showing that this had actually occurred.

subsidiary problems. He starts with the simplest case and ends with the most difficult one, namely that of the tenant.

Secondly, I do not think that there was ever any doubt about whether the interdict *quod vi aut clam* was applicable in this case. The relevant Digest texts do not support the view that the interdict was available only when some damage (*corrumpere*) or alteration (*mutare*) to the ground had taken place.

Thirdly, I do not believe that in the case of an *actio in factum* the tenant acted under a mandate from the landlord. That would have meant that the tenant did not have his own individual right to the *actio in factum* but had it with regard to the interdict. Finally, the *cautio non amplius peti*, which is supposed to prove that in this case the tenant acted as a *procurator*, was not only relevant in cases where someone brought an action as *procurator* but it was relevant in other cases too.

IV. How is the text to be explained then? In my opinion the *responsum* of Celsus is about a tenant farmer whose harvest has been seriously damaged and who now has asked whether he can bring the *actio legis Aquiliae*. In this case there are two problems to solve: 1) the fact that the damaging action was not covered by the term *rumpere* in the *lex Aquilia* and 2) the fact that not only the tenant but also the landlord might want to bring the *actio legis Aquiliae*. Celsus divides the case into four subsidiary problems; he starts with the simplest case and in every following case adds a complication. The four cases were probably as follows:

1. Suppose that the land is not leased; what legal action can the owner easily take against the person who has sown weeds in his ground?

2. Suppose that the land is leased; can the tenant take the same legal action as the owner? Here Celsus adds the complication of the tenant.

3. Suppose that the land is not leased, can the owner obtain the *actio legis Aquiliae*? Here Celsus adds the complication of the *actio legis Aquiliae*.

4. Suppose that the land is leased, can the tenant also obtain the *actio legis Aquiliae*? Here Celsus adds the complication that both the landlord and the tenant may have an interest in bringing the *actio legis Aquiliae*.

The *responsum* in the form in which it has come down to us contains only three of the four cases, namely the first, the second and the fourth; the compilers apparently considered that the third case was superfluous. Let us now take a closer look at these four cases.

ad 1. If someone sows darnel or wild oats in someone else's cornfield, the owner of the cornfield has at his disposal the interdict *quod vi aut clam*. Unlike MACCORMACK, I believe that this case is covered adequately by the words of the interdict 'if an *opus* is carried out in the ground'. It also fits in with the other cases in which this interdict was granted. For instance, in the Digest title D. 43.24 concerning the interdict *quod vi aut clam* it is stated that secret ploughing or the secret digging of a ditch does

come under the interdict, but not the burning of a pile of wood because it lies on top of the ground and is not attached to the ground (9). The polluting of spring water also comes under the interdict because fresh water is considered to be part of the ground (10).

ad 2. If someone sows darnel or wild oats in someone else's cornfield and that cornfield is leased to a tenant, the tenant as owner of the harvest is entitled to bring the interdict. This view is also to be found in a *responsum* of the jurist Venuleius, namely in D. 43.24.12:

Venuleius libro secundo interdictorum. Quamquam autem colonus et fructuarius fructuum nomine in hoc interdictum admittantur, tamen et domino id competet, si quid praeterea eius intersit.

Venuleius in the 2nd book on the interdicts. And although the tenant and the usufructuary are permitted to bring this interdict with regard to the harvest, it is also accorded to the owner if he too has some interest in it.

The tenant and the usufructuary are accorded the interdict solely as owners of the fruits, i.e. the harvest.

ad 3. If someone sows darnel or wild oats in someone else's cornfield, the owner of the cornfield does not have an *actio legis Aquiliae*, because there is no question of *corrumpere*, but he does

9) Ulp. D. 43.24.9.3.

10) Ulp. D. 43.24.11 pr.

have an *actio in factum* on the model of the *actio legis Aquiliae*. This case is no longer contained in D. 9.2.27.14, but the reason why an *actio in factum* must be accorded is still in the text, namely at the end: *nam alia quaedam species damni est ... cuius molesta separatio sit*.

ad 4. If someone sows darnel or wild oats in someone else's cornfield and that cornfield is leased to a tenant, the tenant has an *actio in factum* modelled on the *actio legis Aquiliae*. In contrast to MACCORMACK, I think that the tenant has this action in his own right and not by virtue of a mandate from the landlord. This follows from the way in which Celsus solved the problem of the plaintiff being a tenant; he did this by comparing the tenant's position in the interdict with his position in the *actio in factum*. In case two the tenant can bring the interdict as owner of the crop; in case four he can bring the *actio in factum* as owner of the crop too. However, just as in case two, there is the problem of the landlord. The landlord as owner of the ground may also have an interest in the *actio legis Aquiliae*. It is conceivable that after the tenant has received the fine from the perpetrator he ceases to be a tenant; for example, he may move from the area or die. It is very likely that even if the ground has been ploughed, the weeds will come up again the following year. The owner himself will then be saddled with the problem of the weeds and may himself want to take action against the perpetrator by means of the *lex Aquilia*. Another problem for the owner may be that the next tenant will not want to pay as much rent as the first one. Therefore the

owner may want to bring the *actio legis Aquiliae* too ⁽¹¹⁾. However, it would be unfair to the perpetrator if he were to be punished twice for the same crime. This is why Celsus says that the tenant must give security that the landlord will take no further legal proceedings. The question that remains is why he does not have to give security in the case of an interdict, but does have to give it in the case of an *actio legis Aquiliae* ⁽¹²⁾? In my view the reason simply is that the interdict is only applicable within one year after the damage has been done, whereas there is no time restriction on the *actio legis Aquiliae*; that action can also be brought in the following years when the field is again ready for harvesting and the harvest is again spoilt by the weeds.

I hope that it is clear from the foregoing that the text in question (D. 9.2.27.14) does not indicate that the tenant as detentor of the ground could bring the *actio in factum* on the model of the *lex Aquilia*. The only possible conclusion is that he is allowed to bring the action in accordance with the *lex Aquilia* as the owner of the spoilt harvest.

11) The right to bring the action might have been granted in a different way if the tenant's lease had expired shortly after the damage became visible; cf. D. 9.2.30.1 about the right of the pledge creditor to bring the *actio legis Aquiliae* up to the amount of the debt, the debtor being entitled to bring the action for the amount exceeding the debt.

12) The *cautio non amplius agi* or *non amplius peti* was not used very often; sometimes it was linked with the *cautio ratam rem haberi*. See M. KASER, *Das römische Zivilprozeßrecht*, Munich 1966, 209 f.; O. LENEL, *Das edictum perpetuum*, 3rd ed., Leipzig 1927, 542 note 1 believes that the *cautio* in D. 9.2.27.14 is an interpolation. However, there is no reason why this part of the text should have been interpolated.

V. Let us now have a look at the case of the borrower. Some Romanists think that, at least according to Marcellus, the borrower was allowed to bring the *actio legis Aquiliae utilis*. They base their opinion on one Digest text, namely D. 19.2.41. It is a text by Ulpian in which he quotes Julian and Marcellus. The text runs as follows:

Ulpianus libro quinto ad edictum. Sed de damno ab alio dato agi cum eo non posse Iulianus ait: qua enim custodia consequi potuit, ne damnum iniuria ab alio dari possit? sed Marcellus interdum esse posse ait, sive custodiri potuit, ne damnum daretur, sive ipse custos damnum dedit: quae sententia Marcelli probanda est.

Ulpian in the 5th book *ad edictum*. But Julian says that there can be no action against him over damage caused by a third party; for by what kind of safe-keeping can he ensure that wrongful damage cannot be done by a third party? But Marcellus says that this can sometimes occur, either if he could have guarded against the damage being done or if the guard has himself caused the damage; the opinion of Marcellus is to be preferred.

It can be deduced from the context that the passage is about a case where someone has accepted money to take care of something; according to Gaius in D. 19.2.40 such a *conductor* was liable for *custodia* (13). In D. 19.2.41 Ulpian deals with the

13) According to E. VALIÑO, *Acciones pretorias complementarias a la acción civil de la ley Aquilia*, Pamplona 1973, 95 the text is probably not about a normal case of the liability of a *conductor* or a borrower for *custodia*,

question of whether *custodia* also involves being liable for wrongful damage caused by another person. He begins by asserting that Julian did not believe this to be the case. According to Julian a *conductor* of this kind cannot be expected to take care in such a way that a third party is unable to damage the object in question. In another text that has come down to us in a different section of the Digest Julian applies the same reasoning to the borrower (14). In D. 19.2.41 Ulpian compares Julian's opinion with a different view as expressed by Marcellus. The latter believes that in two situations *custodia* does include preventing a third party from wrongfully damaging the object in question. The first situation is when, from an objective point of view, the *conductor* could have guarded against the damage being done; the second situation is when the guard has himself damaged the object. Ulpian supports the interpretation given by Marcellus.

but it is about the liability of a *sequester*, i.e. a person with whom two persons disputing over the ownership of a thing have deposited this thing. VALIÑO's argument that neither the *conductor* nor the borrower is mentioned in the text can also be used to refute his own hypothesis.

14) D. 13.6.19 *Iulianus libro primo digestorum. Ad eos, qui servandum aliquid conducunt aut utendum accipiunt, damnum iniuria ab alio datum non pertinere procul dubio est: qua enim cura aut diligentia consequi possumus, ne aliquis damnum nobis iniuria det?*

Julian in the first book of his Digest. It is out of the question that those who take something away with them for safe-keeping or those who receive something for use should bear the loss wrongfully inflicted by a third party. For how much care or alertness do we need to exercise to ensure that no one does wrongful damage to us?

Over the last hundred years or so quite a number of Romanists have racked their brain over this text (15). They approached the text mainly in connection with the term *custodia*. As far as I know, the latest publication on this subject is the article that KNÜTEL wrote about ten years ago on liability for assistants ('Hilfspersonen') in Roman law. KNÜTEL concentrates on the view of Marcellus, namely that in two situations the *custodia*-obligation does indeed involve preventing a third party from wrongfully damaging the object. According to KNÜTEL, with regard to the first situation (where the object, objectively speaking, could indeed have been effectively guarded) Marcellus weighs up what a guard in general can do. For instance, if silverplate is lent out it should be kept in such a way that no third party has access to it. But if, for instance, a horse is lent out for someone to ride the borrower cannot guarantee that it will not be injured by a third party. According to Marcellus, in the case of the silverplate the borrower is responsible for damage caused by a third party, but he is not responsible for injuries to the horse. According to KNÜTEL, the second case that Marcellus mentions concerns damage that is not caused by the borrower himself but is caused by someone subordinate to the borrower, i.e. an assistant. This interpretation is already to be found in the Gloss (16). KNÜTEL explains that at the beginning of the text it is

15) See the review by R. KNÜTEL in his article *Die Haftung für Hilfspersonen im römischen Recht*, in SZ 100 (1983) 410 ff.

16) See the Glosse *custos* on D. 19.2.41: "cuius factum debet conductor prestare: ut supra nau cau sta l. fi in princ." [D. 4.9.1 pr.]. B. ALBANESE does not agree; see D. 13.6.19 e D. 19.2.41 nel quadro dei problemi della

emphasized that the damage has been caused by a third party, and therefore not by the borrower personally. He thinks that Julian had this case in mind too when he gave his narrow interpretation of *custodia*.

On the basis of D. 19.2.41 some Romanists like ALBANESE, LÜBTOW, HAUSMANINGER and VALDITARA take the view that, at least according to Marcellus, a borrower was allowed to bring the *actio legis Aquiliae utilis* against the third party (17). The issue would have been a controversial one. Julian believed that the borrower's *custodia*-obligation did not include liability for wrongful damage by a third party and therefore, according to Julian, it would not be necessary to grant him the action against that person. In this connection the above-mentioned Romanists

"*custodia*", in: *St. Grosso I* (Turin 1968) 88. On the basis of the words "*ipse custos*" he believes that the borrower himself has caused the damage.

17) B. ALBANESE, *D. 13.6.19 e D. 19.2.41 nel quadro dei problemi della "custodia"*, in: *St. Grosso I* (Turin 1968) 81 ff.; U. VON LÜBTOW, *Die lex Aquilia de damno iniuria dato*, Berlin 1971, 169 nt. 180, referring to an article by DEBRAY in: *NRH* 33 (1909) 664 nt. 2; H. HAUSMANINGER, *Das Schadenersatzrecht der lex Aquilia*, 4th ed., Vienna 1990, 35; G. VALDITARA, *Superamento dell'aestimatio rei nella valutazione del danno Aquiliano ed estensione della tutela ai non-domini*, Milan 1992, 480 ff. In the same vein M. KASER, *Das römische Privatrecht I*, 2nd ed., Munich 1971, 622 nt. 38 and A. GUARINO, *Diritto privato romano*, 10th ed., Naples 1994, 1007. According to E. VALIÑO, *Acciones pretorias complementarias de la acción civil de la ley Aquilia*, Pamplona 1973, 96 the borrower was granted an *actio in factum* (*decretalis* or *ex lege Aquilia*), because *commodatum* was a legal relationship protected by the praetor and for that reason an *actio utilis* would have been impossible.

refer to D. 9.2.11.9 ⁽¹⁸⁾. On the other hand, Marcellus would have liked to make the borrower liable *ex contractu* in certain cases and would therefore have granted him the *actio utilis* against the third party. VALDITARA believes that Marcellus would also like to have granted this action in respect of loss other than that based on the contract, namely in respect of loss incurred by the borrower, because, as a result of this damage, he could not use the object for economic purposes. According to all these Romanists, the criterion determining whether or not the action was granted was the borrower's interest in being able to sue the perpetrator. In my view their interpretation is incorrect, for the following reasons.

First of all, I do not believe that there was a controversy between Julian and Marcellus about whether the borrower himself could bring an action by virtue of the *lex Aquilia*. If there had been a controversy, Ulpian was very inconsistent in his reasoning. In the text in question Ulpian would have approved of Marcellus' view that the borrower sometimes was allowed to act against the person who had damaged the borrowed object, whereas in D. 9.2.11.9 he quotes Julian - apparently also approvingly - where the latter states that only an owner was

18) D. 9.2.11.9 *Ulpianus libro octavo decimo ad edictum. Eum cui vestimenta commodata sunt, non posse, si scissa fuerint, lege Aquilia agere Iulianus ait, sed domino eam competere.*

Ulpian in the 18th book *ad edictum*. Julian says that the person to whom clothes have been lent cannot act by virtue of the *lex Aquilia* if the clothes get torn, but that the action is available to the owner.

permitted to bring the action, not a borrower (19). In my view, however, D. 9.2.11.9 does not contradict D. 19.2.41 at all. The controversy between Julian and Marcellus mentioned in D. 19.2.41 is about *custodia* and in this controversy Ulpian follows the interpretation of Marcellus. In D. 9.2.11.9 Ulpian reproduces Julian's opinion about the question of who is allowed to bring the *actio legis Aquiliae*; evidently in this matter he agrees with Julian's view.

My second objection to the interpretation given by ALBANESE *et al.* is that there is hardly any justification for the assumption that the borrower was permitted to bring an *actio legis Aquiliae* against the third party. Such permission would only be a possibility in the first case mentioned by Marcellus; in the second case someone subordinate to the borrower caused the damage, so the borrower himself could be held liable by the owner/lender, not only with the *actio commodati* but also with the *actio legis*

19) G. VALDITARA, *Superamento dell'aestimatio rei nella valutazione del danno Aquiliano ed estensione della tutela ai non-domini*, Milan 1992, 488 ff. believes that the words '*sed domino eam competere*' at the end of D. 9.2.11.9 have been interpolated; originally Ulpian must have stated here that the borrower was permitted to bring the action against the third party because of the loss he suffered personally. In my view, however, there is no compelling reason to assume that there has been an interpolation here. D. 9.2.11.9 is perfectly comprehensible without such a 'tour de force'. Also according to B. ALBANESE, *D. 13.6.19 e D. 19.2.41 nel quadro dei problemi della "custodia"*, in: *St. Grosso I* (Turin 1968) 89 ff. these words have been interpolated; he believes that the original controversy was about whether *perisse* was involved in cases of *scindere et frangere*, cf. D. 50.16.9, and that because of a post-classical alteration to the text the compilers turned the controversy into a dispute about *custodia*. There is no basis for this assumption either, so it need not be considered further here.

Aquiliae ⁽²⁰⁾. Besides, Marcellus is only discussing here the case of a *conductor*, not that of a borrower. The fact that Julian in D. 13.6.19 mentions both a *conductor* and a borrower does not justify the conclusion that Marcellus in D. 19.2.46 was dealing with a borrower as well.

My third and principal objection to this interpretation is that Marcellus, in the case of the negligent safe-keeping, does not explicitly state that the borrower may take action against the third party by virtue of the *lex Aquilia*. ALBANESE *et al.* have deduced this from the text by interpretation. They were probably influenced by the criteria determining the use of the *actio furti*, the *actio de pauperie* and the *actio vi bonorum raptorum*. If something lent to someone was stolen, damaged by animals or stolen with violence, then the borrower was liable by contract and as the interested party could bring the action in question against the perpetrator ⁽²¹⁾. The *actio legis Aquiliae*, however, worked differently. According to that law, the penalty had to be paid to the owner. It appears from the sources that this clause was never interpreted so liberally that the term owner included every

20) According to R. KNÜTEL, *Die Haftung für Hilfspersonen im römischen Recht*, in: SZ 100 (1983) 414 nt. 310, it makes no difference whether the subordinate is a freeman or a slave.

21) Regarding the *actio furti* see Gaius, *Inst.* 3.205/206, regarding the *actio de pauperie* see Paul. D. 9.1.2 pr. and regarding the *actio vi bonorum raptorum* see Ulp. D. 47.8.2.22.

interested party (22). This may be connected with the fact that the *actio legis Aquiliae* was based on a law but the *actio furti*, the *actio de pauperie* and the *actio vi bonorum raptorum* were not. Apparently actions based on a law could not be interpreted as freely as other actions (23).

As has been shown above, it cannot be deduced from D. 19.2.41 that, at least according to Marcellus, the borrower was sometimes granted an *actio legis Aquiliae utilis* against the person who had damaged the borrowed object. The controversy between Julian and Marcellus was about the interpretation of the *custodia*-obligation and not about whether the borrower could take action against the third party by virtue of the *lex Aquilia*. Since Marcellus does not even mention the second point it is even very probable that he agreed with Julian on this.

VI. I hope that I have succeeded in making it clear that in Roman law a detentor was not permitted to act on the basis of the *lex Aquilia*: in the Digest texts in question the tenant took action

22) E. VALIÑO, *Acciones pretorias complementarias de la acción civil de la ley Aquilia*, Pamplona 1973, 94 refers to this too. However, he does not explain why he thinks Marcellus did allow the borrower to act against the third party.

23) This was also the case in Justinian's day. In Inst. 4.6.19 he calls the *actio legis Aquiliae* an *actio mixta*, meaning that it is an action which is directed towards compensation for damage but which in two particular cases also has a penal element: if it turns out that the defendant has denied his guilt but is in fact guilty and if the highest value of the damaged object in the past year or in the past 30 days was higher than the actual damage. Perhaps Justinian did not abolish these penal elements because they were explicitly mentioned in the law.

as owner of the harvest, whereas the borrower was not allowed to take action at all. In summary, in both cases the main principle of the *lex Aquilia* was applicable, namely the owner was the only person who could take action by virtue of this law.