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SOME OBSERVATIONS ON *FURTUM* *

Under this title. I wish only to give expression to the views which to me seem preferable on the various categories of *furtum* and on the general notion of *contrectatio lucri faciendi causa.*

I

The first thing which strikes the student of the Roman law of theft is surely that, certainly from the XII Tables, there was a marked difference between *furtum manifestum* and *furtum nec manifestum* and, though the praetor substituted a fourfold penalty for the more dramatic redress of the civil law, the distinction between *furtum manifestum* and *nec manifestum* lasted throughout Roman law and long after the other *furtum* actions — *a. furti concepti, oblati,* etc. — had disappeared.

The difference of penalty would seem to suggest that manifest theft should be a more serious form of theft than the other and, as we know, Roman writers of historical times clearly try to find a justification along these lines by speaking of *intoleranda audacia,* etc. [1] But in truth there is no difference in guilt. The nec manifest thief (I think of the principal thief who is traced only later, not of, e. g., a thief *ope consilio* in developed law) is no less guilty than a person caught in the act. Nor can it really be said that the owner would be more indignant with the thief caught in the act and that this is the explanation. Even if the owner were the person who caught the thief, only in special circumstances (viz., where the thief was *nocturnus or se telo defendens*) was he entitled to kill him out of hand — this shows surely an early imposition of restraint on the capturer. Again, in all probability, in earliest time the thief who was not taken with the stolen things on his person was traced only through the search *lance licioque* which would subject him to the same penalty anyway. And anyhow it need not be the owner who caught the *fur manifestus* [2]. Then again although it be true that guilt is more certainly visible where the thief is caught redhanded, this should not affect the question of the penalty once guilt has whatever way, been established.

Is the origin of the distinction then to be sought elsewhere and,

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[1] E. g., Aulus Gellius, N. A. XX. 1. 8; D. 48. 19. 16. 6.

[2] D. 47. 2. 3. 1.

as M. de Visscher and Huvelin thought, in the difference of process where the thief is caught with the goods and where he is not? [3] Under the XII Tables, the process for nec manifest theft would no doubt be *per sacramentum* to establish the guilt of the defendant [4]. But there was of course also a process in respect of the manifest thief. Even in the case of the thief *se telo defendens* (and perhaps *nocturnus*), a shout was necessary — no doubt to provide witnesses that this was no mere murder. And in the case of the ordinary *fur manifestus*, there was scourging and *addictio* to the victim of the theft (or death by flinging from the Tarpeian Rock in the case of a slave). Now this *addictio* shows the participation of the magistrate in the procedure and points a parallel with *manus iniectio iudicati.* The indications are that the aggrieved person brought the thief before the magistrate and stated that he was taken *in flagrante delicto*; just like the judgment debtor, the defendant was not able to defend himself and the magistrate would make the necessary *addictio.* In both cases the liability of the defendant was already established — for the judgment debtor because the previous action had gone against him and for the *fur manifestus* by the circumstances of his apprehension [5].

There is clearly a difference of process between *furtum manifestum* and *furtum nec manifestum* which is indeed the startingpoint of M. De Visschers's theory. That the *furtum manifestum* remedy is the earlier and that the *a. furti nec manifesti* may indeed be an innovation of the XII Tables is both reasonable and probable. In the first place, one notes the association of personal vengeance and monetary compensation which is reflected also in the Tables provisions for the other ancient delict, *iniuria.* There is also the fact that successful search *lance licioque* brings the same penalty as capture of the thief; indeed, as Gaius says [6], it is *furtum manifestum.* We shall return later to *furtum conceptum,* etc. [7] but no one can doubt the authenticity of *furtum lance licioque.* The picture which emerges pretty clearly is that there was initially only one redress for theft — that applicable where the thief was either caught with the goods or revealed by a solemn search. This remained (as *furtum manifestum*) when the Tables somewhat rationalised theft by the introduction of the other *furtum* remedies.

It is perhaps worth stressing that there were these other *furtum* remedies under the XII Tables. The main concern has always been with the distinction between *furtum manifestum* and *nec manifestum* and the basis of that distinction, without reference to *furtum oblatum,* etc. Huvelin maintained that the difference was based on the *res fur-*

[3] Huvelin, *Furtum;* De Visscher, *Etudes de Droit Romain,* 135 ff; and see Kaser, *Altromische Ius,* 213 ff.

[4] For methods of prof, cf. Lévy-Bruhl, *Actions de la Loi,* 214.

[5] See too De Zulueta, *Gaius,* II, p. 200.

[6] G. III. 194.

[7] Post. 7 II.

tiva, concretely styled *furtum*, and thus that the distinction was always based on the *furtum* being (or not being) *manifestum*. On the other hand, M. De Visscher asserts that the distinction was originally between *fur manifestus* and *fur nec manifestus*. The difference of process depended on whether the thief was caught thieving or not; and the change of terminology from *fur to furtum* in terms of being manifest came after praetorian intervention produced an action, a *iudicium* (and thus a similar process), in respect of manifest no less than non manifest thieving. It is after this, he maintains, that one finds the adjective pertaining to the theft and not to the theft, and consequently an attempt to find a distinction between the forms of theft themselves. For all the erudition and acuteness which mark the presentation of the two theories, however, one respectfully wonders whether the controversy is worthwhile.

The only cases in respect of which we have apparently the actual wording of the Tables themselves on the subject of theft are for nocturnal theft and for *furtum nec manifestum* where certainly the delict appears to be the idea represented by the term *furtum* [8]. Then again, if Gaius may be accepted, the XII Tables also gave *a. furti concepti* and *furti oblati*, where the term *furtum* clearly identifies the *res furtiva* [9]: and search *lance licioque* (for the *res furtiva*) constitutes *furtum manifestum*. Yet the main source of discussion for the jurists is always the distinction *furtum manifestum/nec manifestum*. Gaius tells us that, though some jurists thought of several forms of *furtum*, Labeo rightly said that there were only the two, *furtum manifestum* and *nec manifestum*, the others being only forms of *actio furti* [10].

If we leave aside Gaius's elementary account, *furtum manifestum* is always discussed in terms of the *fur* being *manifestus* [11]. Now, though the authorities therefor are of much later date, can we not see emerging a picture of XII Tables law in which all the three ideas — thief, delict and *res* — play their part? The XII Tables would appear to have deal fairly comprehensively with *furtum* and there seems to be sufficient data to discern an underlying stratum of the old law.

Furtum was originally committed — or perhaps one should say that a man was a *fur* — when the thief was caught with the goods or was revealed by the solemn search. This was the undifferentiated state of the delict which was modified by the Tables.

Then the *decemviri* introduced *a. furti concepti* (and *oblati*) in respect of search and finding, while their other provision, i. e., as to *furtum nec manifestum* would naturally cover all other cases. *A. furti nec manifesti* would thus apply where the thief was not found with

[8] See Tab. VIII. 16; cf. Tab. VIII. 12.
[9] G. III. 186, 187.
[10] G. III. 183.
[11] D. 47. 2. 3 — 8pr.; h. t. 21pr.

the goods or by the discovery of the goods on his premises but had to be established by *actio* — contrast the *a. furti concepti* whose higher penalty demonstrates the association of this remedy with the older law.

This suggests that, *ab initio*, the distinction was between *furtum manifestum* and *furtum nec manifestum* in terms of the *delict furtum*. The *furtum*, the *theft*, was manifested by the finding of the goods in the hands of the thief or in his house. Hence it is that, as G. III. 194 puts it, search *lance licioque* is *furtum manifestum*. In effect, the *a. furti concepti* and naturally also *f. oblati* were merely variants on the old law while *furtum nec manifestum* was a new departure. This is why the point of distinction was always whether the *furtum* was *manifestum* or *nec manifestum*, the other provisions of the Tables being passed over as it were in silence. This also suggests that the penalty of *a. furti nec manifesti* is smaller because the guilt of the thief is established by proof less certain than the discovery of the stolen property either on the person of the defendant or in his house [12].

But, setting aside the search cases for the present, one could in consequence formulate the distinction either in terms of the thief or with reference to the theft being manifest [13]. Little assistance either way can be derived from the uncertainty reported by Gaius on what constituted *furtum manifestum* [14]. For, if the present view be correct, there was in earliest times no problem: a uniform penalty was visited on *furtum*, a delict revealed — made manifest — in one of two ways. But under the XII Tables there could exist *furtum nec manifestum* because the thief had not been caught with the goods or revealed by a search or because the thing had not been recovered in one of these ways.

I am suggesting therefore that neither idea — manifest thief or manifest *res furtiva* — is the real answer to the distinction. This is to be found basically in the differing modes of revealing the guilt of the thief which are progressively demonstrated in the XII Tables. And it is the eventual desuetude of *furtum lance licioque* which obscured this distinction between the theft forms.

It is true that there was still the difference of process between *furtum manifestum* and *nec manifestum* which was rightly stressed by M. De Visscher. One wonders, however, whether in practice this would have made so clear a distinction between *furtum manifestum*

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[12] A very different explanation appears in Lemosse, *Mélanges Lévy-Bruhl*, 179ff.; on the subject of proof see too Jolowicz, *Digest XLVII. 2: De Furtis*, lxxii, ff.

[13] Hence the philological controversy between Huvelin and M. De Visscher.

[14] G. III. 184.

and *nec manifestum.* It has been noted that the penalty of *furtum manifestum* under the Tables was an *addictio.* As Gaius says:

G. III. 189 — Poena manifesti furti ex lege XII Tabularum capitalis erat. nam liber verberatus addicebatur ei cui furtum fecerat; utrum autem servus efficeretur ex addictione, an adiudicati loco constitueretur, veteres quaerebant. in servum aeque verberatum animadvertebatur. sed postea improbata est asperitas poenae et tam ex servi persona quam ex liberi quadrupli actio praetoris edicto constituta est.

The meaning of the term *capitalis* has been the object of discussion, for it can signify loss of *caput* or loss of life [15]. In the matter of *furtum manifestum,* in my view, both senses are involved. The slave thief, who does not really have a *caput* [16], loses his life; but the free man who steals loses his liberty and thus his *caput* when addicted by the praetor to his adversary. Now Gaius tells us also that the *veteres* wondered whether the free thief became a slave or not in consequence of the *addictio.* This is surely not uninteresting.

It is surely reasonable to assume that the free man who was a thief would, usually at any rate, be unable to pay damages if he were sued. Thus in most cases the nec manifest thief who was a free man would, in due course, become a judgment debtor through *manus iniectio* and so, initially, liable to execution or to sale *trans Tiberim.* It is hardly rash then to suppose that, by comparison, the *fur manifestus* would, by the initial direct *addictio,* have been reduced to slavery. But for present purposes the immediate point is that the fate of the two kinds of thief was ultimately similar. True the *lex Poetilia* early ameliorated the position of the judgment debtor But one may wonder whether there may not have been a similar or consequential amelioration — at least *de facto* — of the punishment of the *fur manifestus.* The praetor could hardly have produced out of the blue a new remedy for *furtum manifestum* if the Roman people were not already, to some degree, prepared for it. [17] The suggestion is, in short, there might have been only different methods of achieving the result that the thief should labour for his adversary — the *fur manifestus* was so subjected immediately as a *fur* while the *fur nec manifestus* became subject only as a judgment debtor [18].

Naturally this difference was important and of a formality which is clear beyond dispute. But once the civil remedy was replaced by the praetorian action for a fourfold penalty, even this formal difference in the basis of the thief's subjection to his opponent disappea-

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[15] For uses of *caput,* cf. Heumann/Seckel, *Handlexikon,* s. h. v.: for *capitalis* in the present connexion, cf. Zulueta, *loc. cit.*; Lévy-Bruhl, op. cit., 288, n. 1.

[16] Cf. D. 4. 3. 5. 1.

[17] See too Kaser, op. cit., 215.

[18] See too Arangio-Ruiz, *Rariora,* 199—230.

red. Both manifest and nec manifest thief were now likely to finish up in the same position and by the same process — *addictio* after a judgment. Moreover, and from the present point of view more significant, the process for revealing the *furtum* was the same: or rather, whether or not the thief were taken with the goods on him, whether or not they were found in his house, the same process had to be followed in the courts as if he had not been so taken. And even if the distinction had been previously in terms of the process used according as the thief were caught with the goods or not, one can well understand that lawyers should now come to seek the distinguishing feature in the theft itself. But, as already said. I do not think that this should be exaggerated. *Furtum* would be manifest only where the thief was taken with the loot on him. Hence texts which speak both of *fur manifestus* and of *furtum manifestum* [19]. Hence also the discussion by the texts of *furtum manifestum* in terms of the thief being seized [20].

Because there are no longer anything more than differences of penalty rather than different manifestations of theft, the jurists had to search elsewhere for the peculiarities of the two thefts. Hence the expressions, *intoleranda audacia*, etc. [21]

II

We may now look a little more closely at the other (at least allegedly) civil remedies which are bound up with the institution of search. Most important of course is *furtum lance licioque conceptum* which involved the penalties of *furtum manifestum* and of which Gaius gives us a somewhat contemptuous account. To go into the possible origin and function of the *lanx* and the *licium* is not here necessary; but it is desirable to consider the fact that, as Gaius says, there was no provision in the XII Tables for enforcing *furtum lance licioque* [22]. One can scarcely believe that, if he could refuse, a householder would admit a ritual searcher, especially since he would thereby run the risk of a greater (and originally more drastic) penalty. If, as previously suggested, the search *lance licioque* goes back before the XII Tables, however, the answer is probably that the householder could not in fact resist the ritual searcher.

We may conjecture the probable development.

First we must consider the relationship of *furtum lance licioque* with the *actio furti concepti* which (of course with *a. f. oblati*) is said

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[19] e. g. *P. Sent.* II. 31. 2 (*Furtorum genera sunt quattuor: manifesti.... Manifestus fur est qui....*).

[20] D 47. 2. 3 — 8pr.; h. t. 21pr.; and see p. 2 ante.

[21] Aulus Gellius, N. A. XX. 1. 8; D. 48. 19. 16. 6. G. III. 192.

by Gaius itself to go back to the XII Tables [23]. It has been suggested [24] that Gaius was wrong; but this is improbable. Gaius wrote a commentary on the XII Tables and would thus surely have known their provisions [25]. M. De Visscher [26] advanced the idea that there was in truth only one form of search, that *lance licioque*, but that only those were regarded as *fures manifesti* in whose house things were found and for whose guilt there was some further indication, e. g., a hue and cry and pursuit from the scene of the theft. Otherwise the householder in whose house stolen goods were found by the search would be liable only to *a. furti concepti.* But, though the thesis is learnedly supported by references to other primitive systems, the objection surely remains that this would nullify the whole purpose of the solemn search. For in such case it would be the pursuit — or other relevant factor — which really was responsible for the householder being a *fur manifestus.*

There are other scholars who maintain that the XII Tables would not have provided two forms of search, one formal and the other informal, because this would not be conformable to the „economy of forms" current in ancient systems of law [27]. They say further that one could scarcely imagine two forms of search — one formal without witness and the other informal but with witnesses. But, in the first place, the economy of forms is a theory not a fact. Then again, in the present view, the solemn search would be an institution going back before the Tables, to which the decemviral legislation added the informal search. It is obvious that the *X-iri* were much occupied with *furtum.* Nor are we obliged to deduce from the fact that Gaius mentions witnesses only in relation to *furtum conceptum* that search *lance licioque* would be unwitnessed.

If what has previously been said is acceptable, there was before the Twelve Tables only one redress applicable in two situations — where the theft was manifested by the catching of the thief with the goods or by the goods being found by ritual search. These are the *furtum manifestum* of the Tables. Whatever the origin of the ritual, its very solemnity would suggest that it could not be resisted. And the would-be searcher would doubtless have strong reason for supposing the premises to which he went to contain his property [28]. But there would no doubt be cases where a person was willing to allow his premises to be solemnly searched in this manner. Yet, if the goods were found, such person would be subjected to the same severe fate,

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[23] G. III. 191.

[24] e. g., Mommsen, *Strafrecht,* 752; Huvelin, op. cit., 53; Hitzig, 23 ZSS 315.

[25] As Jolowicz rightly notes, op. cit., lxxvi.

[26] *Etudes,* 215 ff.

[27] See Jolowicz, op. cit., lxxvi.

[28] To this extent M. De Visscher's point (supra) has relevance.

quamvis fur non esset. To meet this possibility, it is thought, the *decemviri* introduced the *a. furti concepti* — to deal with *furtum* established in consequence of an authorised search. And since a willing householder might well be innocent — as *quamvis fur non esset* in G. III. 186 recognises — there was further provided the *actio furti oblati* whereby the householder might obtain redress against the person who introduced the stolen property into his premises [29]. Moreover, if the householder be willing to let his premises be searched, there would be no need to resort to the old ritual with *lanx* and *licium* which would thus necessarily remain only for the recalcitrant householder. Again the implication is that the ritual search could not be resisted.

Of course, once the praetor introduced the *a. furti prohibiti,* the *lance licio* search would naturally disappear in time because the action gave as good relief as would the solemn search itself — i. e., the fourfold penalty which was now also the consequence of *furtum manifestum.* And in this connexion we may note that the *actio furti non exhibiti* [30] also links unwillingness for search with manifest theft. For the action could have relevance only where a householder whose premises were searched refused to hand over the goods found there. Once again discovery of the goods with the thief made for *furtum manifestum.*

In support of this view [31] it may be observed that according to Gaius [32] both searches — the solemn and that without ceremony — are *furtum conceptum*; it is precisely the presence of the *lanx* and *licium* which distinguishes one from the other. Then again, with regard to the *actio furti prohibiti,* it is surely reasonable that the praetor distinguishes it from *a. furti manifesti* precisely by the reference to *prohibitio.* This also points to a further factor in the distinction of *furtum.* One may conjecture that the relatively smaller penalties of *furtum conceptum* had virtually already eliminated the need for resort to *lanx* and *licium* in cases of search. This would have left *furtum manifestum* already restricted, in pratice, to the capture of the thief with the goods, once the praetor decided to offer remedies different from that prescribed by civil law. Hence again the distinction between *a. furti manifesti* and *prohibiti* and — from the standpoint of substantive law — the distinction between *furtum manifestum* and *nec manifestum* concentrated on the capture of the *fur.*

To sum up again, then, it appears that, in the XII Tables themselves the term *manifestum* applied to the delict, *furtum,* itself, manifested by the finding of the goods in the thief's hands or in his house. This distinction between *furtum manifestum* and *furtum nec mani-*

[29] Jolowicz, op. cit., lxxviii is here preferred to M. De Visscher.
[30] Cf. Inst. IV. 1. 4.
[31] See also Daube, 15 T. v. R. 48.
[32] G. III. 186, 191—194.

festum became obscured in consequence of the emergence of *furtum conceptum*, the eventual result of which was the disappearance of *furtum lance licioque*.

III

In Paul's definition, the material element of *furtum* is *contrectatio* [33], a term covering a range of situations ranging far beyond *amotio rerum* — the removal of movables — which is undoubtedly the etymological and historical original requirement of *furtum* [34]. The meaning to be placed on *contrectatio*, however, is debatable.

The word became a technical term only in the century after Sabinus. Now this seems significant. Certainly *contrectatio*, having a sense more extended than *amotio*, was a necessary element of theft in the time of Celsus and Pomponius [35]. On the other hand, it has a scope more restricted than the republican notion of *furtum*. The classical texts relate to us numerous decisions of the later centuries of the republic in which there seems to have been no requirement of *contrectatio* or of *amotio rerum* — for instance, the case of the muleteer (D. 47. 2. 67. 2) and that of the peacock chase (D. 47. 2. 37) [36]. There are also the cases from Mela reported by Ulpian. The older jurist gave the *actio furti* against the pledge creditor who refused to restore the pledge after the debt had been paid (47. 2. 52. 7); Mela said also that the man who lent false measures committed *furtum* against the vendor (h. t., 52. 22) and found *furtum* where a person persuaded his creditor's slave to erase his (the debtor's) name from the record of the transaction (h. t., 52. 23). There are also the case reported by Aulus Gellius of the fugitive slave hidden by a cloak (N. A. XI. 18. 13, 14) and the release of the fettered slave which was discussed by Labeo or Quintus (4. 3. 7. 7). There is only one notion which can embrace all these diverse cases — *furtum* is committed whenever the wrongdoer has knowingly done something to deprive the owner of his *res*.

In brief, according to the XII Tables, *furtum* was concerned with *amotio*, with the taking away of another's property. But in the course of the republic the interpreters of the law concerned themselves within the general framework, less with actual taking by the wrongdoer and more with the idea of an owner's being deprived of his property by another's conduct; after all, he suffered a loss of the same kind as he would endure if the wrongdoer took the property directly. Thus if the deliberate act of one person

[33] D. 47. 2. 1pr.

[34] See Albanese, 23 Annali Palermo (= *Furtum* I) and 25 Annali Palermo (= *Furtum* II); Buckland, 57 LQR 467; Jolowicz, op. cit., xvii ff; Huvelin, op. cit., 431 ff.

[35] D. 47. 2. 36, 37, 50. 1. See Watson, 77 LQR 326 and my article, 13, IURA 70.

[36] D. 47. 2. 37 (*Si aliquis...* etc. is addition of Pomponius).

resulted in fact in the deprivation of another, the first person was a thief. Hence also the emergence of the idea that there could be *furtum* of land. Impossible in the earlier law with *furtum* viewed as *amotio mobilium, furtum* of land could become conceivable with the development here suggested — concentration on A's deprivation through B's conduct. Hence the discussion of the possibility still visible in the texts [37].

But why should this development have taken place? Briefly, because of the lack of any effective other redress for proprietary loss. *Iniuria* was clearly a personal wrong. The *lex Aquilia*, much later than the XII Tables, particularised the wrongs with which it was concerned (*occisio servi/pecudis; ruptio*, etc.) in a way which clearly related it to physical damage *corpori corpore*. Then again there was no redress for fraud as such or for corruption of slaves [38]. But, while they prescribed the *penalties* for *furtum*, the XII Tables do not seem to have defined the *elements* of the delict [39]. Consequently the delict of *furtum* (above all the residuary notion of *furtum nec manifestum*) could be, and was, utilised, until the last century of the republic to cover any situation in which one person — through the deliberate effort of another — suffered a patrimonial loss other than damage inflicted *corpori corpore* [40].

But, deprivation naturally being effected without the owner's consent, the way was also open to regard as theft any dealing with a thing which was effected without the will of the owner (e. g. *furtum usus*) or of the person who might *pro tanto* be in the position of an owner or entitled to hold the thing (e. g., in the case of the so-called *furtum possessionis* where the *dominus* takes back his thing without having paid the creditor) [41].

In the course of the last century of the republic, however, new remedies were introduced with developing legal science — the *actio doli* and *actio servi corrupti*, the *actiones utiles* or *in factum ad exemplum legis Aquiliae* [42]. The jurists were in consequence obliged to reconsider and clarify the notion of *furtum*. For clear indication that juristic thought was now sorting situations into their appropriate categories, it is useful to compare the opinions of Mela, previously referred to, with those of other jurists of about the same period.

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[37] Cf. G. II. 51; D. 47. 2. 25pr.: qu. D. 13. 3. 1. 1; D. 43. 16. 1. 6: Aulus Gellius, N. A. XI. 18. 13.

[38] As has been well observed by M. Albanese, op. cit.

[39] Perhaps one may find the explanation thereof in the unitary concept of theft which, we maintain, existed before the XII Tables — ante, 7ff.

[40] Cf. Haymann, 40 ZSS 351ff; Huvelin, op. cit., 319ff; even Labeo still did not know the notion *furtum fieri possessionis* — cf. Huvelin, op. cit., 564ff.

[41] Cf. Aulus Gellius, N. A. VI. 15. 1 and n. 40 supra.

[42] Cf. D. 11. 3. 16; 9. 2. 9. 3; 19. 5. 23.

Although Mela accorded the *actio furti* against the creditor who refused to restore the pledge, this decision is not in accord with the opinions of Sabinus and his successors (D. 41. 2. 3. 18 — Sabinus & Cassius: 47. 2. 68 pr. — Celsus; 47. 2. 1. 2 — Paul). As to D. 47. 2. 52. 22[43], Trebatius would already grant the *actio de dolo, „de eo qui sciens commodasset pondera ut venditor emptori merces admenderet"* (D. 4. 3. 18. 3). Then again it is difficult to reconcile the decision of Mela found in D. 47. 2. 52. 23 with the opinions of Labeo on *furtum ope consilio* which are reported by Paul, D. 50. 16. 53. 2.

There has been discussion whether Mela was earlier or later than Labeo[44]. For myself, I am inclined to think, in view of his somewhat backward ideas, that Mela was probably an elder contemporary of Labeo and that his conservatism was a possible stimulus to the latter great jurist to clarify his conceptions; and Labeo was followed by others, notably Sabinus.

In any event, the inter-relation of *furtum* and the Aquilian delict soon became the object of intensive deliberation. This is easily understandable since it is the same pecuniary interest which was in issue and harmed in either delict[45]. It was thus necessary to determine the cases in which one would bring an *actio furti* rather than an action formulated in terms of the *lex Aquilia.* We see that this process of delimitation, already begun by Labeo and Sabinus[46], continued with Julian, Celsus and Pomponius[47]. Now deprivation will no longer suffice to indicate *furtum* — there is need of a more distinctive identification of the delict.

But at the same time, by reason of the developments already noted[48], a *dominus* himself could steal his own thing (viz., in the case of pledge or usufruct). There existed also *furtum usus.* In consequence, it was no longer possible to return to the simple notion of *amotio rerum mobilium.* Moreover, one had to differentiate *furtum* from the delict of *dolus* as such. In seeking the means to resolve all these problems, the jurists adopted the idea of *contrectatio,* of some direct interference by the thief with the thing. Naturally the development of this conception took time. We cannot but believe that deprivation of an owner by the conduct of the thief was still, for the earliest classical jurists, the essence of *furtum.* Hence the opinion of Labeo/Quintus in D. 4. 3. 7. 7, the decision of Sabinus in the case of the slave hidden by a toga (Aulus Gellius, N. A. XI. 18. 13. 14), the response of Proculus on the subject of the

[43] See ante p. 10.
[44] Cf. Huvelin, op. cit., 611ff; Albanese, *Furtum* I, 63ff.
[45] Cf. D. 9. 2. 22pr.; 47. 2. 68. 1; 9. 2. 23pr.; 47. 2. 52. 28.
[46] Cf. D. 47. 2. 50. 4; h. t., 31. 1; 9. 2. 27. 21; 47. 2. 52. 13.
[47] D. 9. 2. 27pr.; 9. 2. 41; 19. 5. 14. 2.
[48] See ante, p. 11. 12.

slave delivered up to the magistrate as a *fur manifestus* (D. 12. 4. 15).

In the same way, there developed the subjective element of the delict. So long as Aquilian reparation did not overlap the domain of *furtum*, the expression *dolus malus* would suffice to designate the mental element of theft. But by the beginning of the principate neither that nor the notion of an act done *invito domino* was any longer adequate. There was need of something more distinctive. Sometimes the subjective element is described without more — for instance, when the texts tell us that some act was effected with an intention which makes it delictual: D. 47. 2. 52. 7 where there was *furtum* when *creditor non reddat pignus* SI CELANDI ANIMO RETINEAT (Mela): *possessionem apisci* INTERVERTENDI CAUSA (47. 2. 68 pr. — Celsus): *socius qui rem communem* CELANDI ANIMO *contrectet* (17. 2. 47 — Sabinus/Ulpian). In similar manner, it may be said that there was *animus furandi*, to deny the possible innocence of an act of appropriation. Thus Julian says (D. 47. 2. 57. 3), *cum autem servus rem suam peculiarem* FURANDI CONSILIO *amovet*; and again, (9. 2. 51. 2), *cum plures trabem alienam* FURANDI CAUSA *sustulerint:* and Africanus says (D. 46. 3. 38. 1) *si non ea mente Titius nummos accepit* UT EOS LUCRETUR. The words *lucrandi animo* are found already in Sabinus and are used thereafter by Gaius, Pomponius and Ulpian (Aulus Gellius, N. A. XI. 18. 21; D. 41. 1. 9. 8; 47. 2. 76; 41. 1. 44; 47. 2. 43. 4). In each case there was need to mention the subjective element in order to establish that the *contrectatio* in issue (a notion inevitably more vague than that of *amotio*) was theftuous [49].

Although individual cases of theft might be adequately described by such expressions, however, there was need of some general conception. Thus, just as *contrectatio* came to designate the material element, so *animus lucri faciendi* came to designate the subjective element of *furtum*. This is understandable too. In the first place, one who appropriates another's property usually does so with the intention of his own advantage. Then again, it is not too difficult to see an advantage for the thief in *furtum usus* and *furtum possessionis*. But, because these situations just referred to could, without difficulty and without undue stretching of meanings, be brought within the concept of activity *invito domino*, it is possible to deduce that the notion of *lucrum* was adopted above all in order to differentiate theft from the Aquilian delict in those cases where the *veteres* would have given the *actio furti* but where now an action on the model of the *lex Aquilia* should be granted. In a case of damage

[49] In consequence, I cannot share the opinion of Huvelin (42 N. R. H. 73) and Albertario (*Studi* III, 209) that *animus furandi* is always an addition by the compilers.

not inflicted *corpori corpore*, in short, it was now essential to know why, with what intent, it was inflicted. Thus the jurists adopted as the evidence of *furtum*, the notion of *lucrum*.

And thus also we see that the material and the subjective elements of theft were thus clarified because of the extension of the Aquilian liability.

IV

Furtum is, par excellence, a juridical institution of lengthy development. The progress of the development which I have endeavoured to sketch is well summarised in D. 47. 2. 21 and 22 of Ulpian and Paul [50]. Although the compilers have adapted them somewhat, it is not difficult to discern what was said by the classical texts.

It is not my intention here to repeat the examination of the texts that. I have made elsewhere. But, briefly, I think that the texts have the sense which follows. If I touch, with the intention of appropriating it, a thing that must be regarded as a unity, I steal the whole thing (the slave in 47. 2. 21 pr.; the plate in h. t., 22. 3); on the other hand, if I remove a handful of corn from a pile or take a single jewel out of a cupboard, then I steal only the handful or the jewel. Although I touch the pile or the cupboard, it is only the handful or the jewel which I touch *lucri faciendi causa.* The compilers altered the texts because they could not appreciate the discussions of removal contained in the texts and coming from earlier jurists. For naturally, to the compilers, only *contrectatio*, not removal, was necessary. What they did not see was that removal was necessary, in the cases under consideration, in order that the *contrectatio* be accompanied by the intent to gain. It is the insistence on a *contrectatio* accompanied by *animus lucri faciendi* which explains the opinions on *furtum* shared by the last great jurists of classical law, Ulpian and Paul.

[50] Considerations of space prevent their reproduction *in extenso*. See further my contribution to the Labeo tribute to Arangio-Ruiz.