

CORPUS IURIS CIVILIS THE 'SECOND LIFE' OF ROMAN LAW

1. This lecture will focus on the *Corpus Juris Civilis*, particularly the Code and the Digest, both as sources of law and as sources of our knowledge of the law. The two are not quite the same thing both because these sources of law may not tell us all we want to know and because as historians we may want to use these documents as sources of knowledge of the law in periods different from that in which they were promulgated. After expounding that problem, the lecture will then go on to make the argument that the history of Continental European law since Justinian can be seen as a history of different ways of coming to grips with these texts. That treatment will have to be quite superficial. There is a whole course on Continental European Legal History.
2. The Code is quite massive
 - a. 12 books.
 - b. 765 titles
 - c. 4,652 extracts from imperial constitutions
 - a. There is some structure in the order of the books: book 1 ecclesiastical material, courts and administration; 2–8 private law; 9 criminal law; 10–12 administrative law, though it is difficult to discern what the order is in the books that deal with private law.
 - b. The arrangement of titles within each book has only a vague order
 - c. The extracts from the constitutions within each title are arranged chronologically.
3. The *Digest* is even more massive
 - a. 50 books
 - b. 432 titles, about half of the number that there are in the Code, though the work is much longer
 - c. 9,123 extracts from juristic writing

The juristic extracts are arranged in no discernible order (more of that later). The order of the titles is clearly not random. Subjects seem to follow each other in a way that seems to make some sense, but the pattern is not that of Gaius' and Justinian's *Institutes*, both of which are, from our point of view, much more systematic. More so than the Code, the Digest deals largely with private law, and there is some resemblance in the order of the material in the Digest to that in books 2–8 of the Code.
4. Justinian himself gives us some idea of what he thought about the arrangement of the material in the Digest in the constitution that confirms the Digest.¹ In order to do this, we must necessarily introduce some new terminology that we will clarify only in the second quarter of the course.
 - a. Books 1–4 – “first things” (πρωτα). They combine sources of law and constitutional law, with a few hints of what we would call ‘legal philosophy’.

¹ *Tanta*, Δεδωκεν; there are versions of the constitution in both languages.

- b. Books 5–11 – “legal proceedings” (*de iudiciis*). They are largely devoted to the law of actions (procedure), but necessarily include some substantive material, and a whole book on the substantive law of servitudes (roughly equivalent to our easements) (bk. 8).
- c. Books 12–19 – “everything that comes under the title ‘things’.” Very little of Gaius’ law of single things (roughly equivalent to our ‘property’) is here. The books deal almost entirely with the law of obligations: *condictio* (the basic action for recovery of debt) (bks. 12–13), *negotiorum gestio* (an odd category for us: defined as ‘management of or interference with the business or affairs of another without authority’ Webster) (bk. 14), *peculium* (property set off for a son-in-power or a slave) (bk. 15), set-off (in actions) and deposit (bailment that advantaged only the bailor) (bk. 16), mandate (a type of agency) and *societas* (partnership) (bk. 17), sales of goods (bk. 18), actions for sale and *locatio/conductio* (letting and hiring) (bk. 19).
- d. Books 20–27 – “the centerpiece of the whole composition”, “the most useful and best expressed law drawn from everywhere”. A unifying theme is hard to find in these books. Books 20–22 deal with a miscellany of topics, closely related, as J. points out, to the topics dealt with in bks. 12–19. Books 23–27 deal with marriage, dowry, marital property, and guardian and ward.)
- e. Books 28–36 – “testaments.” The description is accurate, though more space is devoted to legacies and *fideicommissa* (trusts) than to testaments themselves.
- f. Books 37–44 – “all kinds of *bonorum possessio* (a process by which the praetor gave legal possession, usually to someone who claimed as heir of a deceased).” J’s description covers only the first two books, which might be broadened to the whole law of intestacy. There follows a highly miscellaneous series of titles many of which have to do with property in our sense, though some belong more properly with the law of obligations.
- g. Books 45–50 – J. makes no attempt to summarize the contents of bks. 45–50, though their overall outline is clear enough: stipulations (a type of formal contract) (bks. 45–46), delicts and crimes (bks. 47–48), appeals (bk. 49), miscellaneous topics of public law, definitions, maxims (bk. 50).)

The whole of the Digest, then, is divided into seven parts, each part containing an average of seven books.

- 5. The fact that the order of the books corresponds, at least roughly, to that of bks. 2–8 of the Code, which, in turn, seem to follow that of the Theodosian Code, suggests that the pattern is older than the compilers. Many have seen in this pattern the pattern of the *edictum perpetuum*, which, as we have said, has been reconstructed almost completely. The pattern of the *edictum perpetuum* was not an organization of substantive law, as we understand substantive law, but an organization of types of actions. It is also a pattern that reflects, in some respects, the growth of the edict over time. New things were stuck in in odd places rather than where one might have put them if one were starting from scratch. The fact that the lawyers, both classical and post-classical, had this pattern in their minds is important. We are going to see that both Gaius’ and Justinian’s Institutes have a very different scheme of organization. That was what was used for instructing first-year law students, but not, it would seem, what was used when the jurists were actually doing their work.
- 6. Sample titles from both the Code and the Digest are contained in the *Materials*, Digest 23.2, ‘On the rite of nuptials’, or, more loosely, ‘Formation of marriage’ (*Materials*, p. 18–26 with

extensive notes on p. 26–28) and Codex 5.4 (‘On nuptials’, or, more loosely, ‘On marriage’) (*Materials*, p. 29–34). Let us look them with an eye to seeing what a legal historian can do with such material.

7. We begin with Code 5.4, which is simpler. The translation in the *Materials* is not from the modern critical edition of the Code but from the ‘Vulgate’ edition, the edition that was used in the Middle Ages and early modern periods. The translation so that you can see the main differences between the two texts: (1) The Vulgate edition includes after the constitution in question extracts from Justinian’s Novels where the Novel affects the law stated in the Code. (2) the Vulgate edition omits C.5.4.29, a constitution of Justinian’s, which is available only Greek.

- a. As can be seen at a glance, the extracts appear in chronological order beginning with Septimius Severus and Caracalla (C.5.4.1) and ending with Justinian himself (C.5.4.28). The critical edition in most cases has a dating clause that allows us to determine the day of the month and year of the constitution. Almost all of them have the name of the addressee. Quite a few seem to be just citizens, not officials. The first sixteen are so addressed, including, perhaps not surprisingly granted the topic, a number addressed to women.

There are a number of things that a legal historian can do with this information, perhaps most obviously, s/he can use it to create what is sometimes called a ‘palingensia’, literally ‘a born-again’. There are no constitutions of Constantine in this title, but many of the titles have one or more of that emperor. Put them all together and one can come up with collection that might allow reconstruction of specifically Constantinian policies. A recent study has done just that.²

- b. Justinian rendered what are sometimes called ‘the 50 decisions’ resolving controversies among the jurists and abolishing obsolete institutions. It is not always possible to tell which constitutions belong in this group but C.5.4.25 and C.5.4.26 almost certainly do. Both begin by referring specifically to a ‘discussion’ or ‘doubt’ ‘among the ancients’: “The question was discussed by the ancients whether the children of insane parents, under whose control they were, could marry.” in C.5.4.25, and “If anyone should grant freedom to his foster-daughter, and marry her, a doubt arose among the ancients whether a marriage of this kind should be considered lawful or not.” in C.5.4.26. Both resolve the question in favor of allowing the marriage, and may even be influenced by the notion of ‘favor of marriage’ found, at least in later, canon law.
- c. The absence of system in the Code is a problem, particularly for those who are seeking reconstruct doctrine. The most important provision in the Code on precisely when a marriage is to be regarded as having taken place is not in this title, but in C.5.3.6. It tells us that where the woman was given a gift by her husband on their wedding day, the gift is revocable if it was made when she was in his house but not if it was made before she was led to his house.
- d. Finally, the fact that we have the dates of most of the constitutions allows us, in some cases, to determine the context in which they were made. For example, C.5.4.23, a constitution of Justinian’s uncle and adoptive father Justin, abolishes the law prohibiting

² J. E. Grubbs, *Law and Family in Late Antiquity: The Emperor Constantine’s Marriage Legislation* (1995).

actresses from marrying members of the senatorial class. It is prefaced by quite grand language: “We have determined that the errors of women on account of which, through the weakness of their sex, they have chosen to be guilty of dishonorable conduct, should be corrected by a display of proper moderation, and that they should by no means be deprived of the hope of an improvement of status, so that, taking this into consideration, they may the more readily abandon the improvident and disgraceful choice of life which they have made. For we believe that the benevolence of God, and His exceeding clemency towards the human race, should be imitated by us (as far as our nature will permit), who is always willing to pardon the sins daily committed by man, accept our repentance, and bring us to a better condition.” The Byzantine historian Procopius, whose *Secret History* is not always reliable but probably is in this case, suggests that the constitution had a more specific purpose. He tells us that Justinian’s wife Theodora, who became his empress when Justinian became emperor, was not only an actress before she married him but a well-known courtesan with a large upper-class clientele.

8. What one can do with the *Digest* 23.2 is more complicated.
- a. As D.23.2.1 shows specifically, every extract in the Digest begins with a citation of the name of the jurist who wrote it, the title of the work in which he wrote it, and the book in the work in which the extract is found. D.23.2.1: “MODESTINUS, *Rules*, book 1” that is to say, the late classical jurist Modestinus wrote a work called *Rules*, and this extract is found in book 1 of that work. The possibilities for palingensia here are quite obvious. One can take all of these citations and rearrange them, so that we get some sense of what was contained in each work. The German scholar Otto Lenel did this in a work published in 1889.³ It’s a huge work, longer than the Digest itself. It shows that Modestinus’ *Rules* was a work in 10 books. There are 102 extracts in the Digest, enough to give a good sense of order of the material in Modestinus’ work. Lenel grouped the extracts by topic and suggested a possible title for each group. The collection shows well what Modestinus thought a legal rule was. This extract is unusual because it is really more a definition than a rule. Most of the rest of the extracts are closer to what we would think of as a legal rule. The next citation (D.23.1.2) is “PAUL, *Edict*, book 35.” This is the jurist Paul’s commentary on the praetor’s edict, a massive work in 80 books from which there are 767 extracts in the Digest. From this work and the even more massive commentary of Ulpian on the edict, the same Otto Lenel produced a palingensia of the *edictum perpetuum*.⁴
- This does not exhaust the possibilities of palingensiae of material in the Digest. D.23.2 contains numerous references to the *Lex Julia de maritandis ordinibus* (18 BC) and the *Lex Papia Poppaea* (9 AD) – important Augustan legislation designed to encourage child-bearing among the aristocracy. There are other references to this legislation scattered throughout the Digest. Here the efforts at a palingensia have been less satisfactory. The jurists combined their references to these statutes as *leges Juliae et Papia Poppaeae* and rarely cited chapter numbers, much less quoted the provisions. As a result, we have a pretty good idea of what was in the statutes as a general matter, but a less clear idea what was in each statute, much less exactly what they said.

³ Otto Lenel, *Palingensia Iuris Civilis* (Leipzig 1889).

⁴ Otto Lenel, *Das Edictum perpetuum*, 3d ed. (Leipzig 1927).

- b. Trying to reconstruct doctrine from the Digest is a difficult task, granted the way in which the extracts are arranged. D.23.2.1 seems to give a basic definition of marriage, D.23.2.2 what seems to be a fundamental rule, but after that the provisions seem to be a total jumble, and, as is the case with Code, rules about the formation of marriage can be found in other titles. For centuries students of the Digest wondered if there was any order at all to the extracts. There seemed to be some kind of order to the works cited in the extracts, particularly in the longer titles, but that order jumped around from title to title. In 1820, the young Friedrich Bluhme came up with a solution that, with modifications, has been accepted ever since.

Bluhme's notion was that the commissioners had worked with what might be imagined as three stacks – he called them 'masses' – of juristic works. The three masses are called 'Edictal', 'Sabinnianic', and 'Papinnianic' on the basis of what seems to be the dominant feature of each mass, but there is no real division of the masses on the basis of the subject-matter of the works. The principle, such as it was, seems to have been to create masses of roughly equal size, though the Papinnianic mass is smaller than the other two. The commissioners divided themselves into three groups, and each group went through one of the masses and assigned extracts from them to predetermined titles. We might imagine that they had a very brief discussion and that the leader of the group dictated extracts that were chosen for inclusion to a group of scribes, each of whom had papyrus sheets for a number of titles. The results were then consolidated into the titles that we now see. The masses themselves could appear in any order, but the order within the mass tended to remain constant.

Not everything, however, is within the order. What is out of order is what is interesting, because it means that someone, at some point, decided that this particular extract belonged someplace other than where it was in the basically random order of the mass.

An analysis of Digest 23.2 according to the masses (*Materials*, p. 26–27) is of some interest.

Ed*	1. Modestinus, Regulae, 1	Pap	36. Paul, Quaestiones, 5
Sab*	2. Paul, Ad edictum, 35	Pap	37. Paul, Responsa, 7
Sab	3. Paul, Ad Sabinum, 1	Pap	38. Paul, Sententiae, 2
Sab	4. Pomponius, Ad Sab, 3	Ed	39. Paul, Ad Plautium, 6
Sab	5. Pomponius, Ad Sab, 4	Ed	40. Pomponius, Ex Plautio, 4
Sab*	6. Ulpian, Ad Sab, 35	Ed	41. Marcellus, Digesta, 26
Pap*	7. Paul, Ad legem Falcidiam 4	Ed	42. Modestinus, De ritu nuptiarum
Sab	8. Pomponius, Ad Sab, 5	Ed	43. Ulpian, Ad leg. I & P, 1
Sab	9. Ulpian, Ad Sab, 26	Ed	44. Paul, Ad leg. I & P, 1
Sab*	10. Paul, Ad edictum, 35	Ed	45. Ulpian, Ad leg. I & P, 3
Sab*	11. Julian, Digesta, 62	Ed	46. Gaius, Ad leg. I & P, 8
Sab	12. Ulpian, Ad Sab, 26	Ed *	47. Paul, Ad leg. I & P, 2
Sab	13. Ulpian, Ad Sab, 34	Ed	48. Terentius Clemens, Ad. leg. I. & P., 8
Sab	14. Paul, Ad edictum, 35	Ed	49. Marcellus, Ad leg. I & P, 1
Pap*	15. Papinian, Responsa, 4	Ed	50. Marcellus, Ad leg. I & P, 3
Sab	16. Paul, Ad edictum, 35	Ed	51. Licinnius Rufinus, Regulae, 1
Sab	17. Gaius, Ad ed. prov., 11	Sab	52. Paul, Ad Sab, 6
Sab	18. Julian, Digesta, 16	Sab	53. Gaius, Ad ed. prov., 11
Sab	19. Marcianus, Institutiones, 16	Sab*	54. Scaevola, Regulae, 1
Sab	20. Paul, Ad orationem divorum Severi & Comodi	Sab	55. Gaius, Ad ed. prov., 11

Ed*	21. Terentius Clemens, Ad leg. I. & P., 3	Sab	56. Ulpian, Disputationes, 3
Ed	22. Celsus, Digesta, 15	Sab	57. Marcianus, Institutiones, 2
Ed	23. Celsus, Digesta, 30	Sab	57a. Marcianus, Notae ad Papinian, De Adulteriis, 2
Ed	24. Modestinus, Regulae, 1	Sab	58. Marcianus, Regulae, 4
Ed	25. Modestinus, Regulae, 2	Sab	59. Paul, De Adsignatione libertorum
Ed	26. Modestinus, Responsa, 26	Sab	60. Paul, Ad orationem divorum Antonini et Commodi
Ed	27. Ulpian, Ad leg. I & P, 3	Pap	61. Papinian, Quaestiones, 32
Sab*	28. Marcianus, Institutiones, 10	Pap	62. Papinian, Responsa 4
Ed	29. Ulpian, Ad leg. I & P, 3	Pap	63. Papinian, Definitiones, 1
Ed	30. Gaius, Ad leg. I & P, 2	Pap	64. Callistratus, Quaestiones, 2
Ed	31. Ulpian, Ad leg. I & P, 6	Pap	65. Paul, Responsa, 7
Ed	32. Marcellus, Ad leg. I & P, 1	Pap	66. Paul, Sententiae, 2
Ed	33. Marcellus, Ad leg. I & P, 3	Pap	67. Tryphoninus, Disputationes, 9
Pap	34. Papinian, Responsa, 4	Pap	68. Paul, Ad SC. Turpillianum
Pap	35. Papinian, Responsa, 6		

Digest 23.2 is a double title. There are two run-throughs of the masses: Sabinnianic, Edictal, Papinnianic, and then Edictal, Sabinnianic, and Papinnianic. This may be because the title was originally two titles, ‘On the right of nuptials’ and, perhaps, ‘On the *leges Iuliae and Papia Poppaeae*’, which were then combined into one. There are a number of extracts that are out of order (indicated with an asterisk in the table), particularly in the first run-through. The reason that they are out of order is, in most cases, relatively easy to see.

- i. D.23.2.1* – is a definition: “Marriage is the union of a man and a woman, a partnership for life involving divine as well as human law.” What that might mean in a pagan context is a topic to which we will have to return. Why the compilers put it at the beginning seems pretty obvious. It defines the topic of the entire title.
- ii. D.23.2.2* – states what seems to be a pretty fundamental rule about the formation of marriage, one that is elaborated in a number of the extracts that follow: “Marriage cannot take place unless everyone involved consents, that is, those who are being united and those in whose power they are.” This is the only rule about the formation of marriage that is found in Justinian’s *Institutes*.
- iii. D.23.2.5, 6*–7* – Why D.23.2.7 has been put together with D.23.2.6 is easy to see. Fragment 7 follows upon fragment 6, and makes no sense without it: 6: “Finally according to Cinna, where a man married a woman in her absence, and on his way back from dinner by the side of the Tiber, he died, it was held that she ought to mourn for him as his wife.” 7: “So it is possible here for a virgin to have a dowry and an action for dowry.” “Here” in fragment 7 refers to the situation described in fragment 6, and assumes that you have just read it. Then both fragments have been taken out of their normal order and made to follow fragment 5, which states a general rule about marriages where the parties are not in each other’s presence: “It is settled that a woman can be married by a man in his absence, either by letter or by messenger, if she is led to his house. But where she is absent, she cannot be married by letter or by messenger because she must be led to her husband’s house, not her own, since the former is, as it were, the domicile of the marriage.” Not only do fragments 6 and 7 seem to deal with the same problem as fragment 5, they also seem to contradict it. In fragments 6 and 7 it

looks as if the woman is the one who is absent, but the Republican jurist Cinna, backed up by both Ulpian and Paul, seems to hold that the marriage is nonetheless valid. We'll return to this seeming contradiction later. What needs to be noted here is that groups of texts like this, related to each other and out of normal order, are frequently called a *catena*, a 'chain'. There are quite few of these *catenae* in the Digest. Many modern commentators think that they were already there in the texts that the compilers were extracting. Some of them are quite subtle, and there are too many of them for the compilers to have created them in the time that they had.

- iv. D.23.2.9, 10*–11* – are another *catena*; fragments 10 and 11 are out of order: 9: “If a grandson wishes to marry and the grandfather is insane, his father’s consent will be absolutely necessary, but if his father is insane and his grandfather sane, the grandfather’s consent will suffice. 1. A man whose father has been captured by the enemy can marry, if he does not return within three years.” 10: “There is justifiable doubt about what to do where a father is absent, so that it is not known where he is or whether he is still alive. If three years have passed from the time when it was known for sure where the father was and whether he was alive or not, his children of either sex will not be prevented from contracting a lawful marriage.” 11: “Where the son of a man who is in enemy hands, or otherwise absent, marries before his father has been in captivity or absent for three years, or if his daughter gets married, I think that both marriages will be valid, provided the son or daughter marries someone the father will be sure not to repudiate.” All three texts deal with the same problem. If marriage requires paternal consent, what are we to do if the father is insane, captured by the enemy (and so, incapable of giving valid consent), or simply disappeared? Ulpian, Paul, and Julian come up with somewhat different resolutions of pieces of the problem. Put them all together and you may be able to devise a general rule, or, at least, something more comprehensive than any one of them would be. The problem of the insane father was of sufficient concern in the time of the compilers that Justinian rendered one of his ‘fifty decisions’ on the topic, C.5.4.25.
- v. D.23.2.21 – states a general principle (“A son-in-power cannot be compelled to marry.”) that has been taken out of order and put at head of D.32.2.22, which is more specific and possibly contradictory. The same thing has happened with D.23.2.28. A general principle (“A patron cannot marry his freedwoman against her will”) is put at the head of D.23.2.29, which states the same principle and gives an exception to it. The same topic is the subject of D.23.2.31 and .32, but they are in order. Sometimes the substantively random order of the masses produces fragments that deal with the same topic. D.23.2.30 is also in order and is quite irrelevant to the other four.
- vi. D.23.2.39–68 – the second run-through of the masses is more in order. There are only a couple of fragments that are out of order, and none involves a movement from one mass to another. That may be because the compilers were less interested in the topics treated here.
- vii. D.23.2.47* – The two fragments that are out of order in the second run-through are a bit different from what we have seen before. D.23.2.47 states an exception to, and follows after, the general rules of D.23.2.44 through D.23.2.46, which

expound the general principle that those of senatorial rank cannot marry those radically below them in social class.

viii. D.23.2.54* – a general principle, that incest rules apply to biological relationships that are not legal relationships, is taken out of order and placed in the middle of 4 fragments that deal with incest, D.23.2.52–53 and D.23.2.55–56.

9. Although there are many things that one can do with the Digest as currently structured, it remains a difficult text to use, whether our purpose is to figure out what the law was in the time of Justinian or, more broadly, to use it for legal-historical purposes.
 - a. Despite the commissioners' rather modest efforts to make the titles systematic, the Digest is not a systematic work. It is a collection of extracts from juristic works arranged in titles, the extracts being, for the most part, ordered according to a scheme that has nothing to do with law. Contradictions abound, despite some attempts to remove them, attempts that were sufficiently incomplete that they raise more problems than they resolve. In order to reconstruct legal doctrine, one needs range widely to make sure that one has all the relevant texts and puzzle hard over what they all might mean.
 - b. The fact that extracts in the Digest are just that, extracts torn out of the context in which they appeared in any given work means that it is hard to determine the potential limits of what is there. A particularly dramatic example is in D.1.3.31: "ULPIAN, *Lex Julia et Papia*, book 13: The emperor is not bound by statutes. And though the empress is bound by them, nevertheless, emperors give the empress the same privileges as they have themselves." In the context of its title in the *Digest* ("Statutes, *senatus consulta*, and Long-Established Custom"), we might take this as a statement of a quite absolutistic piece of political theory, and it has been so taken. Here, however, as in many cases we do not, we have a hint of the context in the title of Ulpian's work: the *leges Iuliae et Papiae Poppaeae*, the body of Augustan legislation that dealt with marriage and inheritance. Ulpian may have been saying nothing more than that these statutes do not apply to the *princeps* and his wife.
 - c. As we said in the last lecture, the texts of the classical jurists have been altered by Justinian's commissioners. That this has been done could be known to anyone who read Justinian's instructions to the commissioners, which appear at the beginning of the Digest. It was known to the jurists of Roman law in the Middle Ages. By and large they were uninterested in that fact. They wanted to recover the law of Justinian, not that of the pagan jurists who lived three centuries and more before him. The humanist jurists of Roman law in the 16th century were interested in recovering the law of the classical jurists, and it is to them that we owe the discovery of the relatively few and skimpy post-classical reports of juristic writing that antedate Justinian. The virtually complete text of Gaius' *Institutes* was not discovered until the beginning of the 19th century, and comparison of Gaius' with Justinian's *Institutes* is probably the most fruitful method of discovering what the differences are between the classical law and Justinian's. As we noted in the previous lecture, modern scholarship has rejected the methods of radical interpolationists of the first half of the 20th century, but interpolations do exist in the Digest texts. In some cases we have to take into account the possibility that a text is interpolated without the confidence that the radical interpolationists had that it is. For example, in D.23.2.9.1, 10, and 11, quoted above, mention is made of a father not returning from the enemy or an absence in unknown parts within three years. The

classical jurists practically never decided cases on the basis fixed periods like this, and the consensus of modern scholarship is that the reference to the three-year period is interpolated.

- d. What we have in the *Digest* is extracts from the works of the classical jurists. Some of these writings seem to have been opinions given by the jurists in actual cases. Many of the extracts could not have been such opinions. They come from general works, some of which verge on the theoretical. The historian who is looking for evidence of how classical Roman law was actually applied needs to be careful. Much of what is in the *Digest* is quite far removed from actual practice, and the extracts that do seem to be derived from actual practice frequently, in the form in which we have them, give only a skimpy recitation of the facts. Those who are looking for actual practice need also to remember that once the formula was settled, the jurists' job was over. The case then went *apud iudicem* for a decision.
 - e. For those who are seeking evidence of relationship between the Roman law as found in the *Digest* and Roman society, the *Digest* itself is only a start. The extracts themselves range over three centuries, during which there were some quite profound changes in Roman society. They were compiled some three centuries after most of the last ones were written in a place that was emphatically not Rome. There is evidence about the nature of Roman society in various periods. It can be found in literary works, such as Livy and Tacitus, the letters of Cicero, the satirists, such as Juvenal, and so on. There is also documentary evidence in the large number of Roman inscriptions that have survived. Inscriptions contain not only official texts, but private ones as well. Later in the course we may have occasion to look at an inscription that a Roman wrote on the tomb of his wife early in the Principate. There is much about law hidden in the story. Papyri, largely found in rubbish heaps in Egypt, give us more evidence. Some of these papyri are specifically legal in content, e.g., fragments of contracts or wills. Wax tablets have been found in various places that also give us evidence of practice. The amount of such material that is specifically legal is not large (it all can be contained in a small book), but it does exist.
10. The stages in development of Roman law during its second life is frequently seen as an the alternation of faithfulness to the text and application of it to current conditions. Many of the characters that illustrate the different periods in the following list can be found in the commentary on D.23.2.5–7 in the *Materials*, p. 27–28.
- 1100–1300 – The glossators – Irnerius (early 12th c.) to Accursius (mid-13th c.)
 - 1300–1500 – The commentators – e.g., Bartolus (d. 1357), Baldus (d. 1400)
 - 1500–1600 – The humanists – e.g., Jacobus Cuiacius (d. 1590), Dionysius Godofredus (d. 1622), Antonius Faber (d. 1624)
 - 1600–1750 – The natural law school – e.g., Hugo Grotius (d. 1645), Samuel von Pufendorf (d. 1694)
 - 1700–1890 – The *usus modernus pandectarum* → the pandectists – e.g., Samuel Stryk (d. 1710), F. C. von Savigny (d. 1861)
 - 1800–1900 – Codification of European law, e.g., Code Napoléon (French Civil Code, 1803), Bürgerliches Gesetzbuch (German Civil Code, 1900)

1825–1925 – The historical school – e.g., F. C. von Savigny (again), Theodor Mommsen (d. 1903)

1925–present – The modern historical school – too many who stand out to specify just a couple

The traditional way of outlining this history described it as alternation between those who were seeking to discover the meaning of the texts of Roman law and those who were less concerned about the meaning of the Roman texts for the Romans but were seeking to use those texts to create a workable law for their own time. In the former category, this tradition put the glossators, the humanists, at least the Mommsen part of the historical school, and the modern historical school; in the latter category, it put the commentators, the natural law school, the *usus modernus pandectarum*, the pandectists, and those who codified European law in the late 18th and 19th centuries. As is the case with almost all grand historical classifications, this one has something to it, but is quite misleading if one just stops there. The fact that Savigny ends up in both camps gives some sense for what is likely to be misleading about it. A more sophisticated version of the story is told in the course in Continental Legal History.

11. In order to get some sense of the differences in the ways of interpreting Roman legal texts, let us return to the *catena* that we found in D.23.2.5–7:

“5. POMPONIUS, *Sabinus*, book 4: It is settled that a woman can be married by a man in his absence, either by letter or by messenger, if she is led to his house. But where she is absent, she cannot be married by letter or by messenger because she must be led to her husband’s house, not her own, since the former is, as it were, the domicile of the marriage.”

“6. ULPIAN, *Sabinus*, book 85: Finally according to Cinna [a Republican jurist], where a man married a woman in her absence, and on his way back from dinner by the side of the Tiber, he died, it was held that she ought to mourn for him as his wife.”

“7. PAUL, *Lex Falcidia*, sole book: So it is possible here for a virgin to have a dowry and an action for dowry.”

The conflict between the two texts is fairly obvious. In D.23.2.5, we are told that an absent man can marry a woman if the latter is led to his house, but a man cannot marry an absent woman because she must be led to his house. In D.23.2.6–7, we are told that a man married an absent woman and died before he had sexual intercourse with her. Cinna nonetheless held that she was married to him and must observe the mourning period for widows, and Paul adds that she is entitled to get her dowry back as his widow.

That these texts were placed together in D.23.2 suggests that the Byzantine jurists puzzled over how they might be reconciled. Everyone who has looked at these texts since that time has asked the same question.

12. It turns out that D.23.2.5 poses a more fundamental problem than its potential conflict with D.23.2.6–7. Many Roman-law texts about marriage say that sexual intercourse is not necessary to make a marriage, and quite a few seem to imply that consent of the couple (and of their fathers, if they are in the power of their fathers) is all that is necessary to form a valid marriage. So the issue is whether D.23.2.5 is telling us that the transfer of the wife to the house of husband was also necessary in order to complete the marriage, in which case D.23.2.6–7 are anomalous and need to be explained, or whether D.23.2.6–7 are giving us the

basic rule (a transfer of the wife to the house of the husband is not necessary to complete the marriage), in which case D.23.2.5 is anomalous and needs to be explained.

- a. Here are some of the modern solutions to the puzzle proposed by these texts:
 - i. the rule changed after Cinna's time, i.e., in the Republic a leading of the bride into the house of the groom was not required but later on it was – Alan Watson
 - ii. the text is bad; it does not take much of change in the Latin to make D.23.2.6 say “where an absent man married a woman” – Pietro Pescani
 - iii. the text doesn't mean what it seems to mean; the ‘absence’ of which D.23.2.6 speaks is not absence from each other but absence from Rome; the man exchanged consent with the woman where she was and died as he was bringing her back to Rome – Alvaro d’Ors
 - iv. D.23.2.5 is to be confined to its facts, i.e., it was a special rule for situations of what we call proxy marriages – Percy Corbett (he does not deal with the conflict with D.23.2.6)
 - v. what they were really talking about was proof, i.e., Roman law required some outward manifestation of consent; the leading of the bride to the house of the groom sufficed, but other things did as well – Riccardo Orestano
 - b. Historically, which of these types of arguments do we see:
 - i. That the rule changed during the period of the jurists is an argument that you hardly ever see before the 16th c.
 - ii. Recognizing that the text may be corrupt was certainly was part of the glossators' equipment but they weren't very good at finding and fixing the corruptions. The humanists got better at it in the 16th c.
 - iii. The form of argument, that ‘absence’ in the text does not mean what it seems to mean, is glossatorial, but the social context, that the jurists always speak as if they were in Rome, which gives d’Ors's argument its force, is not
 - iv. Limiting a rule to its facts is a perfectly good glossatorial argument but may not work here. There are other texts that seem to require a leading of the bride to the house of groom. – It is interesting that Corbett is an Englishman, because limiting cases to their facts is more of a common-law technique than a civil-law one.
 - v. That the texts are not talking about substantive rules but about what is required for proof is also a perfectly good glossatorial argument, and it's one that they ultimately adopt in this case.
13. Now let's try to put this in a broader historical context. The glossators struggled not only with the conflicts in the Roman-law texts but also with the fact that the canon law of the time was developing in a somewhat different way, and they were trying to reconcile the texts not only with each other but also with the canon law. They ultimately seem to decide that both D.2.2.5 and D.23.2.6–7 are dealing not with the requisites of a valid marriage but with what you need to prove it. They may – the texts that we have are not completely clear – like Pescani, and the humanist jurist Antonius Faber, have emended D.23.2.6 to make it the man who was absent. For the commentators this will suffice – it is the law or as close to it as we can get. The humanists will worry again about the conflict in the text. The natural-law school and the

pandectists will settle on the consent motif. The codifiers will preserve the principle but get the state involved. Throughout the long pre-codification period, the expounders of the Roman-law texts preserved the parental-consent requirement of the those texts, despite the fact that canon law did not require it. So long as the canon law was controlling the formation of marriage as a practical legal matter, this preservation was more academic than practical, but when in the time of the Reformation, the nascent nation-states of Europe were willing to cast off the control that canon law had over the formation of marriage, parental consent returned, in many places, as a requirement for valid marriages.

You can make up your own minds. What I'm suggesting is that a long period of history like this one is better seen if we deal with a specific example, such as the one I just offered.