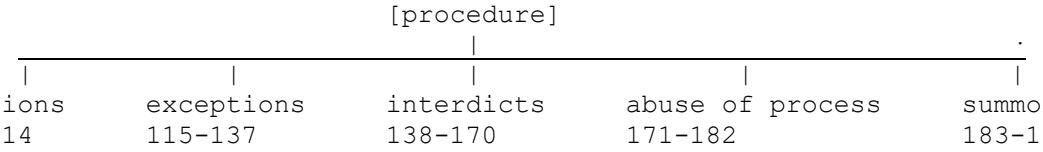
Need paper statements by the end of the day. Watson's *Rome of the Twelve Tables* is in Canvas under the tab 'Files'.

I did two things in Lecture 12 that are related only by the fact that we will devote some time them in this class. The first is to outline briefly the scheme of Gaius' Institutes book 4, the book about procedure. The second is to give a basic introduction to the XII Tables, which will be the topic of the next five classes. If you are listening to the lecture in two sittings, the part on the XII Tables begins at Slide 14.

PROCEDURE

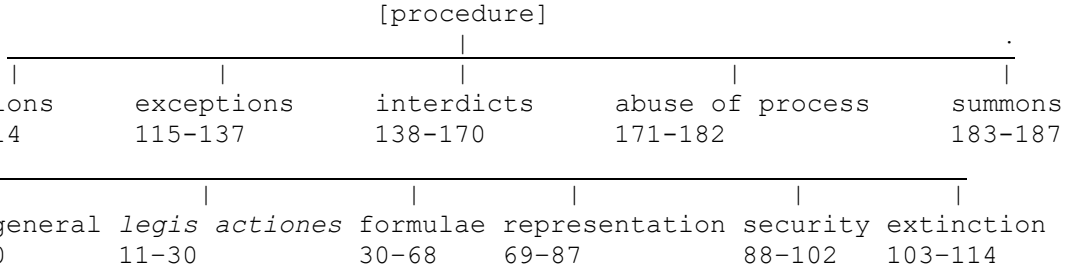
We have already discussed the various forms of procedure that the Romans used over the course of 1000 years of legal development. We deal here only with the way in which Gaius organizes the topic. He says nothing about the *extraordinaria cognitio*, which existed in his time (how well developed we do not know), but is, so far as G. is concerned, off the radar screen. He does say something about the *legis actiones*. Indeed, he says almost everything that we know about them, but that for him is legal history. His concern is with the formulary system, which is very much the topic of the entire book.

1. When we began our treatment of Gaius, we said that the basic scheme of the treatise was persons, things and actions. But book 4 does not deal only with actions although actions take up the greater part of it:



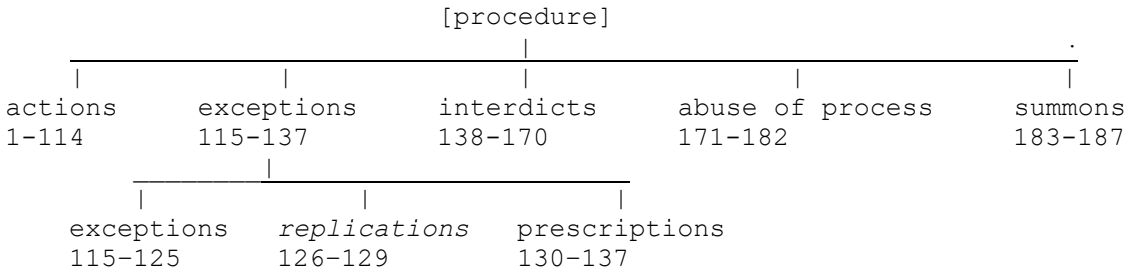
2. *Actio* is derived from *agere*, a basic Latin verb that means 'to do', in the sense of 'put in motion'. In law *actio* refers to both the capacity to complain and the procedure of complaining, but in classical law it always implies bifurcated proceedings. The praetor's *dabo actionem*, 'I will give an action', implies a preference for proceedings *apud iudicem*. If this is right, then the scheme of Gaius' book 4 becomes clear. It deals with civil legal proceedings, normally contested ones, but there is no general term for it. The most important topic within that category is actions.

   Some things that don't have to do with actions but with defenses or the defendant get attached by convenience.



   E.g., parties and representation (§§ 69-87), security (§§ 88-102), passive and active transmissibility (§§ 112-113, under extinction).

3. But exceptions, i.e., defenses, are not actions, nor are replications, answers to exceptions.

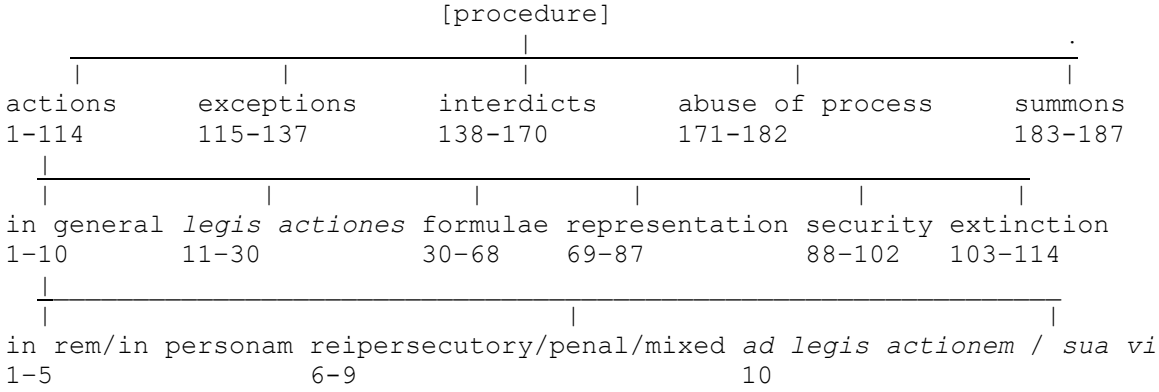


Prescriptions are in a queer place: after exceptions and replications. They were written at the head of the formula to avoid extinction. For example if I am suing on an obligation to pay a debt owed in installments, I will put a prescription at the head of the formula to say that I am suing only for the installment due now. Perhaps Gaius put them where he did because they can be raised by either party.

Interdicts are where they are because they are not actions; they have no proceedings *apud iudicem*.

Abuse of process can apply to either the plaintiff or the defendant, but it may be significant that Gaius begins with the defendant.

Summons is not an action. The fact that it is at the end should strike us as really odd. All the medieval treatises on procedure begin with it. As Bracton says in another context "You must first catch your buck before you skin it."[1] I think what this may be telling us is that Gaius was not training litigating lawyers. Perhaps he was training bureaucrats; perhaps he was training budding jurists. Jurists, however, were not litigating lawyers.



4. Gaius offers three general divisions of actions:

In rem vs. *in personam* we have already discussed at some length. It is the basic and problematic distinction between property and obligation.

Reipersecutory vs. penal vs. mixed applies principally to obligations, because Gaius does not regard *in rem* actions as reipersecutory. How, he asks, can we sue for something that is already ours? Hence, his distinction corresponds fairly closely to our distinction between compensatory damages and penal damages, except, as we have seen, all the delicts have a

[1] "First catch your hare" turns out to be an early 19th misquotation of an 18th century cookbook. https://wordhistories.net/2017/07/03/first-catch-your-hare-origin/ Bracton f.191 Thorne ed. 3:86.

penal element. All contractual actions, Gaius tells us, are reipersecutory only. He regards the actions for *furtu*m and *iniuria* as penal only. (He apparently does not regard the *condictio* for stolen goods as part of the *furtum* action.) The mixed actions are those where the defendant has to pay double damages if s/he denies liability.[2]

Ad legis actionem vs. *sua vi*, 'on the model of a *legis actio*' vs. 'on their own force', we have not seen before. Gaius says little about it because the mention of *legis actio* brings him right into his excursus on the *legis actiones*. The link may be to fictitious formulae in §§ 32-38, which follows after the excursus on the *legis actiones*.[3] It is possible that Gaius was thinking that all civil-law actions were modelled after the *legis actiones*, and that he is referring to praetorian actions as those arising *sua vi*. But that is almost certainly not right as an historical matter, and G. probably knew that. That fictions comes first in the treatment of the formulae suggests, perhaps, a priority in time, and may be a source of Maine's dictum that change in the law comes as a result of fiction, equity, and legislation in that order. Gaius' order certainly suggests the priority in time of the *legis actiones*, and it is to them that we will turn when we begin our discussion of the specific provisions of the XII Tables.

5. Let us return for just a moment to the very beginning of this book. We said that it is about procedure, but that the Romans did not have a word for it. That they had the concept I think is pretty clear. All the topics treated here are topics that we would call procedural, and the description of books 2 and 3 as being about *res* can bear the translation that they are about substance, one of the many possible meanings of the word *res*. What we do not find anyplace in the classical jurists is an express distinction between substance and procedure. That, as I have suggested before, may be the result of the fact that they did not see the two as separate, but intertwined.

6. Justinian's treatment of the law of procedure is disappointing. He does not begin the topic until title 6 of book 4. He then gets sidetracked with titles on contracts made with persons in power, noxal actions (an archaic institution that G. treats with only briefly), *pauperies* (and even more archaic institution that G. doesn't deal with at all and that J. should have abolished) before returning to titles on representation, security, extinction of actions, exceptions, replications, interdicts, penalties for reckless litigation, the duties of the judge, and public criminal actions, all except for the last two being topics that Gaius treats. In the process he takes out everything that shows how the formulary system worked without substituting much that shows how the *extraordinaria cognitio* worked. When the medieval jurists created Romano-canonical procedures, the direct ancestor of both the civil and criminal procedure of Continental Europe today, they basically were creating a new entity, half imaginative reconstruction of what the *extraordinaria cognitio* might have been and half what has to be there in order to make it work.

7. One should try to summarize this long exercise on Gaius and his categories, but any summary would be incomplete at this point. I said when we began the exercise that I thought that

---

[2] The examples that he gives are "an action on a judgment debt, an *actio depensi* (by a *sponsor* against his principal), an action under the *L. Aquilia* for wrongful damage, and an action for a legacy of a definite amount left by damnation."

[3] Zulueta seems to think so. See his translation.

lawyers' categories were important but that in order to do real legal history one had to do more. The second part of this course is designed to prove that point. But we will constantly be returning to the categories, not only as benchmarks from which to begin discussion but also to ask the question what effect did they have.

INTRODUCTION TO THE XII TABLES

1. I would now like to say a few words generally about the XII. We've now come to the parts of the course that undercut the other two. We will try to deal here with (a) real history, (b) with law and society, (c) and with juristic method. In the first of the two parts we'll to run through the XII topic by topic with the aid of Alan Watson's book, *Rome of the Twelve Tables*, which is on Canvas under 'Files'. There will be no lectures, except at the end. I'm going to ask you read the primary materials, which are in the digitized *Materials*, and Watson if you can, and react to them on the Discussion Board in Canvas. Watson does not do procedure or delicts separately; so we'll have to strike out on our own at the beginning and at the end.
2. We should, however, say a word about our method. The name of the game is law and society, and the problem is that we don't know nearly as much as we would like to know about either in 450 B.C. Watson is cautious, perhaps overly cautious. His fundamental methodological point is that you can posit neither a state of law nor a state of society on the basis of the knowledge of the other. Further, he will admit the use of comparative material only to the extent that he has direct but incomplete evidence of a phenomenon in the society which he is studying. He also believes that subsequent developments in a legal system can be used to describe what the prior legal system was like. The Roman law of persons and property reflects a continuous development from the time of the XII. In the Roman law of delicts and procedure, on the other hand, there were radical breaks. Hence, Watson largely confines himself to persons and property.
3. Our approach is a bit more open than Watson's. I agree with Watson that it is the sheerest of speculation to posit a state of a society from its laws, if one knows nothing about the society; and that the converse is perhaps even more dangerous. The relationship between law and society is not that tight, or at least no one has come up with a predictive theory that will hold up. But the fact is that we are not trying to reconstruct Roman society in 450 B.C. from the fragments of the XII alone, nor are we trying to reconstruct the XII from what Cicero, Livy, Dionysius of Halicarnassus, Plutarch, and the archaeological remains tell us about the state of society. We have some evidence about the law and some evidence about the society, but not as much as we would like. The question is what can we use to fill in these gaps? There are essentially two approaches to problem, the second of which has a whole series of sub-possibilities:
    a. One approach is diachronic. Watson makes considerable use of it. You take a point in time when you are reasonably clear what the law was and try to reason to back to what it must have been like in some prior time.
    b. The other approach is synchronic, here much depends on what chronology are you talking about:
        i. One can look to social anthropology generally, and here our chronology may be more imagined than real. We know of a number of societies, including some that still exist today and quite a few that were studied in the relatively recent past that

had many of what seem to be the characteristics of Roman society in the mid-5th century BC: households organized under the control of a single male (hence, patriarchal in a rather technical sense), a kinship pattern that emphasized relationships through males (hence, patrilineal), and households located where the male figure was and the wife came to live there (hence, patrilocal). The predominant economic activity was agriculture. The society was organized for war and fought with its neighbors frequently. The basic element in the military was the quite heavily armed foot soldier. The society had a dominant class that thought of itself as being organized into clans. It also had an underclass which had a group identity. Below both was a rather large population of enslaved people. All, both slave and free, shared a common religion, and performance of the common religious rites meant that most people lived within relatively easy walking distance of each other, though they might have use of land that was further away. The question is how far can you go to filling in what we don't know about this society with evidence from other societies that share those characteristics?

ii. The other possibility for synchronic study pays closer attention to chronology in s stricter sense. It sometimes goes under the name of ancient law. What law might qualify under that moniker?

– certainly the laws of the literate peoples of the Mediterranean basin. We know something about the laws of Athens in the 5th century BC. The city of Gortyn in central Crete has a surviving code that deals with many topics that are also found in the XII Tables. It probably dates from the 6th century BC and seems to have been revised around 450 BC. The Semitic peoples of the Mediterranean had their own laws. Perhaps the best known are those of the Jews, an extensive compilation of law both religious and secular is found in the Hebrew Bible.

— Latin is an Indo-European language, so is Greek, so are a very large number of both European and Asian languages, including the Celtic languages, the Germanic languages, the Iranian languages, and some of the languages of India, notably Hindi. They all ultimately derive from a hypothetical proto-Indo-European language that was spoken by a people that probably lived on the steppes north of and between the Black and Caspian Seas around the year 4000 BC.

Slide 20 in the lecture shows a reconstruction of possible migration patterns of the Indo-European peoples from 4000 BC to 1000 BC. None of this evidence supports the racist views to which the linguistic evidence has been put, particularly in the mid-20th century, but language does structure thought. Let me give an example. We have already spoken of Roman patronage, a relationship between free people in which both the superior patron and the inferior client owed each other mutual support. The Latin word for a client is *cliens*. Ancient Irish society seems to have had a similar social institution that can be traced back to a period in which no Irishman had ever seen a Roman or vice-versa. The Old Irish word for a client is *ciele* and that that word is etymologically related to *cliens* is as certain as any etymology can be.

4. Each of these approaches is fascinating and each of them is dangerous. Fascinating because the more you learn about them the more you realize that there is something to each of them.

Dangerous because what begins as an exercise in trying to fill in gaps in evidence can easily become a self-proving hypothesis about the relationship between law and society. Let me give two examples:

a. We can use the diachronic approach to fill in gaps about our knowledge of the early law; we then can use the patterns that thus emerge to demonstrate that Roman law developed largely as the result of an autonomous group of professionals manipulating their law within a closed system. Relationships there were between law and society to start off with. The concept of *patria potestas* could hardly have emerged from a society that was not patrilineal, patrilocal and patriarchal, but once the concept was taken over by the lawyers it took on a life of its own. Its survival in Rome does not tell us anything about the Roman family later on; indeed, it was totally dysfunctional in later periods. This is an argument that Alan Watson has made in other writings, and it is adumbrated in *Rome of the Twelve Tables*.

   The problem with the argument is that it makes some assumptions about function, and shows how the law was dysfunctional in the light of those assumptions. It is supported by the fact that Rome, unlike some of its contemporary societies, notably the Greeks, did develop a semi-autonomous group of professionals who devoted themselves to private law. If we reject the argument as an all-embracing generality – which I would urge you to do – you still need to ask what function *patria potestas* might have served even for Justinian, who retained it. After all, Gaius tells us that no one but the Romans had it.

b. We can use social anthropology to fill in gaps in our knowledge of the early law. Then we can use the patterns that emerge to demonstrate the validity of social anthropology. Patrilineal, patrilocal, patriarchal peoples tend to favor males in inheritance patterns. Many develop a system of male primogeniture. The Romans were patrilineal, patrilocal, patriarchal; therefore they had a system of male primogeniture. This fact confirms the hypothesis about the general patterns of inheritance among patrilineal, patrilocal, patriarchal peoples. It seems absurd when you sketch it this way, and we know for a fact that the Romans did not develop a system of male primogeniture, but no less a scholar than Fustel de Coulanges fell into this trap.

   But once you don't fall into the trap, you still have to ask a question. Many patrilineal, patrilocal, patriarchal peoples do develop systems of male primogeniture, perhaps even more have some sort of male preference in their inheritance systems. Rome did not develop male primogeniture, and all children inherited equally, though there was some male preference when you get to the remoter degrees. Why did the Romans not do what most patrilineal, patrilocal, patriarchal peoples do do?

5. The only way to stay out of the traps is carefully to define in advance what you know and don't know, what your methodological assumptions are, and what questions you want to answer. It seems easy; it's not. The older I grow the more convinced I become that there is no pure science of legal history. Knowledge in this field cannot proceed without postulates, although we must constantly guard against postulating propositions that can either be proved or disproved.

   In particular the approaches that I outlined above contain within them the three of the principal theories of causation in legal history:

a. Law is the product of autonomous development by professionals, frequently if not always, unrelated to social and economic forces.

b. Or is it the opposite: social and economic structure determines what the law is.

c. Or is it that law is determined by culture, and culture is a pattern of thought largely determined by language.

If one is inclined, as I am, to the eclectic when faced with potentially univocal choices among these three, then what is likely to be the dominant force in each particular area?

GENERALITIES ABOUT THE XII

1. We need to say a few words more specifically about the XII. First, what do we know about the circumstances of their adoption? We have 2 narrative accounts of the passage of the XII — one in Livy, the other in Dionysius of Halicarnassus, who was roughly a contemporary of Livy's and who wrote in Greek a book called *Roman Antiquities*. There is also some information on the topic in the surviving parts of Cicero's *On the Republic*. There are some modern Roman historians who will not write about anything that happened in Rome before 400 BC. There is certainly much in the later accounts that is demonstrably legendary. We will be a bit more open and follow Livy's account, though with caution.

   a. The whole of the first part of Livy has been devoted to the struggle between patrician and plebeian, and to the struggle against the Etruscan rulers of Rome. While there is much in Livy's account, particularly of the former, that is anachronistic – he saw the struggle between patrician and plebeian as like the struggle between the *optimates* and *populares* of more recent Roman history – there is no sound reason to doubt the basic historicity of Livy's account.

      Rome gradually freed itself from Etruscan rulers and Etruscan influence, probably between the years 500 BC and 450 BC. "Lars Porsena of Clusium by the nine gods he swore that the great house of Tarquin should suffer wrong no more." Nobody reads Macauley anymore, but his poem 'Horatius' is a great read.[4] There was a break. Nor do we have any reason to doubt that the chief issues in the social struggle were: debt and the power of the tribunes of the plebs. In 494 Livy reports the plebeians refused to fight, and some such revolt is probably historical though it may not have happened in 494.

   b. In 462 BC a *l. Terentila* calling for codification was passed by an assembly of the plebs arranged according to tribes according to the *l. Publia* of 471 BC. But the measure was not approved by the Senate. Where we have specific names of laws, like this, we are probably dealing with history. Whether we have the contents right is another story.

   c. There follows the story of Cincinnatus, culminating in his dictatorship of 458 BC, when he led the Roman forces to defeat the Aequi, an Italic tribe that had trapped the forces of the consul on a mountain. Whether Cincinnatus was called from the plough to become dictator, either in 458 or in 439, as is reported elsewhere, we may doubt. But it's a good story.

[4] https://englishverse.com/poems/horatius. The Etruscan inscription describing the career of one Laris Pulena is probably about him, but no one has yet figured out what it says.

d. In 454 BC Livy reports an the embassy to Athens that may or may not be historical. He reports famine and plague in the same year that probably is historical.

e. In 451 we get the first decemvirate, ten men appointed to write a code. Their names seem historical, at least in the sense that men with similar or the same names are found this far back in Roman history. They were, according to Livy, responsible for the first 10 tables.

f. In 450 we get 2d decemvirate. The names given do not inspire confidence, none of them appears until much later in Roman history. The 2d decemvirate were, according to Livy, responsible for last 2 Tables. The contrast in Livy between the good men who produced the good 10 tables and the bad men who produced the bad final two need not be believed, although Cicero has basically the same story.

g. There follows in Livy the threat of war and the summoning of the Senate; the legend of L. Siccius, the Roman Achilles; and the legend of Verginia and Appius Claudius, to which we will have to return. It is certainly legendary, but it may contain historically plausible details.

h. In 449 BC Livy reports a 2d secession of the plebs. According to Livy Valerius and Horatius, the good consuls, enacted that plebs could pass *plebiscita*, that anyone condemned by a magistrate could appeal to the people (*provocatio*), and that the tribunes of the plebs could not be touched (*sacrosanctitas*). All of these institutions certainly eventually existed as part of the Republican constitution. Whether Livy has the dates rights is quite questionable.[5]

i. In 445 BC Livy reports the *1. Canuleia*, which abolished the prohibition on *conubium*, intermarriage, between patrician and plebeian that had been a provision in one of the last two tables. After this we get a dual language pun made up by 9th grade American students of Roman history. A patrician man promises to marry a plebeian maiden and has sex with her. He then says "Ha, ha. I can't marry you; it's against the law." And she says "Oh yes, you can, you liah." 445 BC also marks the beginning of the military tribunes, who served in place of the consuls, a dodge related, perhaps, to a desire to get plebeians into power.

j. Two pieces of history that are not in Livy. In 474 BC the Etruscans suffered a crushing defeat at Cumae at the hands of Hiero of Syracuse. About the middle of the 5th c. Etruscan remains in Rome cease. The funeral provisions in the XII Tables may be anti-Etruscan.

2. We now should say a word about the surviving fragments of the XII. We haven't got the full text. The supposedly 'bronze' tablets on which they were written were destroyed by the Gauls when they sacked the city around 390 BC. But the text of them was committed to memory.[6] Cicero, *De legibus* 2.59: "we learned the Law of the Twelve Tables in our boyhood as a required formula (*carmen necessarium*)." Cicero *De legibus* 2.9: "Ever since we were

---

[5] See OCD s.nn. https://oxfordre.com/classics/view/10.1093/acrefore/9780199381135.001.0001/acrefore-9780199381135-e-6687?rskey=tAnT1F&result=1

[6] De legibus 2.59: we learned the Law of the Twelve Tables in our boyhood as a required formula (*carmen necessarium*). (Although he gripes that they aren't doing it any more.)

children, Quintus, we have learned to call, 'If one summon another to court [*si in ius vocat*],' and other rules of the same kind, laws." Unfortunately, nobody wrote down what they had in their memories, at least nobody wrote it down in a way that has survived.

Section 4 of the Materials has all the surviving fragments. The text is by Salvatore Riccobono and dates from the mid-20th century. It is the culmination of centuries of work of reconstruction of the XII Tables going all the way back to the humanists of the 16th century. There is a more recent text by Michael Crawford. Crawford is much less sanguine than Riccobono in that there are many places where Riccobono gives a quotation or at least a summary of a text, and Crawford says we simply don't know. I think that Crawford is too pessimistic. We will use Riccobono's text, which is also the one that Watson uses. We'll mention Crawford's text in a few places where he offers plausible alternative views. We should mention here that he doubts that the XII had their origins in the patrician/plebeian conflict described by Livy. He also doubts contrary to Watson – and this is pretty fundamental – that we can use later law to reconstruct the law at the time of the XII Tables.

The left-hand side of the page in the *Materials* has, in Latin, those that are quoted in the ancient sources and those that are summarized, with the quotations being in caps and small caps, followed by Latin notes about the sources of our knowledge.

The right hand side of the page has two English translations, one painstakingly literal, the other more flowing with a few explanatory notes in English.

The order in the *Materials* both of the tables and of the laws within them is traditional, but the tradition does not go back before the Renaissance. We do, however, have some evidence of the order.

a. There are four instances of references to a provision of the Tables by number:

   i. Table II, law 2 is the only one where we have a specific reference to both the table number and the fragment number. (Cicero's reference, of course, implies that *si in ius vocat* was in Table I, fragment 1.) The reference is in Festus, a dictionary-writer probably of the 2d century of our era, who based himself on a similar, but much longer work, from the Augustan period:[7] The definition is of *reus* which F. says in old language can mean either plaintiff or defendant, whereas in his time and for many years before it referred only to the defendant: 'And Capito Ateius [the late Republican jurist],' Festus says, 'is of the same opinion, but he supports his interpretation with an example, for in the second table, second law 'Whatever of these things was a [hindrance] to the judge or the arbiter or the reus, for that reason, let the day be put off.'. Here both actor and reus are called 'reus'."[8]

---

[7] Festus Lexicon Project https://web.archive.org/web/20110629215342/http://www.ucl.ac.uk/history2/research/festus/index.htm. Standard ed. Wallace M. Lindsay, Sexti Pompei Festi De verborum significatu quae supersunt cum Pauli Epitome (Leipzig 1913) is a total mess bc it's a diplomatic transcription of the codex unicus https://babel.hathitrust.org/cgi/pt?id=njp.32101077773990&view=1up&seq=402&q1=273 p. 336. Festus is an Epitome of Verrius Flaccus, the Augustan Encyclopedist.

[8] *At Capito Ateius in eadem opinione est* [that the word means either plaintiff or defendant]*, sed exemplo adiuvat interpretationem; nam in secunda tabula secunda lege, in qua scriptum est "quid horum fuit unum* [*vitium*, Cuj.] *iudici*

ii. Dionysius of Halicarnassus reports that what we have as Table IV, law 2b ("If a father sells his son thrice, let the son be free from the father.")[9] was among the laws of Romulus, the legendary first king of Rome, and then he says: "The decemviri referred to this law among others and it exists in the 4th of what they call the twelve tables."

iii. Cicero in the *De legibus* reports that the provisions concerning funerals in the laws of Athenian law-giver Solon were carried over almost word for by the decemviri in the 10th table.

iv. Cicero in the *De republica* tells us: "After the ten had written ten tables of laws with the greatest fairness and foresight, they substituted another ten for the next year . . . who in a most inhumane law in two additional tables of wicked laws established the *plebs* not have *conubia* (lawful marriage) with the patricians." It's in our text as Table XI, law 1.

b. There are three sources of further information about the order of the Tables:

i. There is a commentary on the XII written by Gaius. 28 fragments from it appear in the Digest (though a number of them are combined). From this we learn that each of G's books dealt with 2 Tables. If this is right, then a lot of our numbers are wrong. For example, Table 1 probably had some provisions dealing with theft and *iniuria*. Crawford's new text follows Gaius' order quite rigidly.

ii. Commentaries on the *ius civile*. Of these Sabinus seems to have followed the order of XII. Almost no fragments survive of his three books, but there are a number of commentaries on Sabinus that give some sense of Sabinus' order.

iii. The Edict of the Urban Praetor, as we have noted, has been reconstructed from the commentaries on the edict. Although there is much material in it that seems to have been added in odd places, it is generally thought that the basic structure of the work followed the order of the XII.

There are actually very few archaic collections of laws that are organized by topics in the way that we would order them or that seem to us logical. This is particularly true of collections that were promulgated by writing them in media of a fixed size, like metal tablets, though that may not have been the case with the XII TAbles. Both Sabinus and the Edict are likely to have put things more in an order that made sense to them, which is an order that also makes sense to us.

c. From what we have the following pattern emerges which is traditional, if not totally supported by the surviving evidence:

I-III Procedure

IV-V Persons and Succession

VI-VII Property

---

arbitrove reove, eo dies diffisus esto" hic uterque, actor reusque, in iudicio 'reus' vocatur .... diffisus is from diffindo, and 'put off' 'postponed' is pretty standard meaning L&S.

[9] *pater si filium*

VIII-X Delicts

XI-XII Various topics, clearly additional

d. How accurate is the language that we have? There is very little writing in Latin that dates this far back. What is called the *lapis niger*, an inscription on a black stone that seems to be of a religious nature and that dates from c. 500 BC, contains about 16 full words and about 16 more partial ones.

Only 3 are relevant here, *quoi*, *sakros*, and *iouxmenta*:

qui 'who' 'whoever' which occurs many times in the XII (I.1, III.3, III.4, III.22, VI.6a, VIII.1a, IX.8a, IX.22, X.7), is written on the *lapis niger* as *quoi*

sacer which occurs in the XII meaning 'accursed' (VIII.21) is *sakros* on the *lapis niger*

iumentum which occurs in the XII meaning 'cart' (I.3) is *iouxmenta* (probably plural) on the *lapis niger*

In a way, this is encouraging. These are simply modernizations of spelling, reflecting changes in pronunciation. Words the later authors didn't understand, they retained e.g., *morbus sonticus* in II.2. The grammarians puzzled over these words and came up with suggestions that are frequently plausible, though, of course, they don't always match what can be done with modern scientific linguistics.[10] In all probability they kept the syntax when they were quoting.

e. What does the syntax tell us? (This is topic to which we will return.}[11]

i. It's very terse, suggesting that these are not folks to whom writing comes easily. The grammar makes sense if we take the terseness into account: For example, Table I.1. SI IN IUS VOCAT, [ITO.] NI IT, ANTESTAMINO: IGITUR EM CAPITO. A flowing translation of that would read 'If the plaintiff summons the defendant to court, the defendant shall go. If the defendant does not go, the plaintiff shall call a witness thereto. Only then the plaintiff shall seize the defendant.' But that's not what it says. No subject of the verbs is ever stated nor is any object stated until we get to the last phrase. We might capture it literally if we translated: 'If there is a calling to law, [let there be a going]. If there is no going, let there be a calling to witness: then, let there be a seizing of him.'

On the previous paragraph 'ito' and the corresponding English 'let there be a going' are in square brackets. That is because an editor supplied them. Not everyone agrees that they have to be supplied.[12] If we take *ni* as meaning what the later *nec* meant, then you don't need to add anything, and you can read 'If there is a calling to law and there is no going'. That reading would fit with the fact that as

[10] Festus gets the meaning right, but is off base in thinking that it's related to *nocere*. It's related to *sons*, 'guilty', which in turn is derived from the same root that is in *sum*, 'I am'.

[11] AS has a number of slides that do I.1 through I.4. They are all on his version of this if we need them.

[12] Daube's suggestion. I can't remember where.

a general matter, the XII don't tell us what normally happened; they tell us what is supposed to happen if what normally happens does not.

ii. The *si* ('if') form dominates in the XII, where we have the text. As in Table I.1, the Tables say 'if this happens, then this is what should happen'. Such a form of law is called casuistic, and is very common in early collections of laws, so much so that it is thought to be the original form of legal expression. The only full exception in the XII seems to be in VIII.22 which uses the *qui* 'whoever' form.

QUI SE SIERIT TESTARIER LIBRIPENSVE FUERIT, NI TESTIMONIUM [FATIATUR,] INPROBUS INTESTABILIS QUE ESTO. 'Whoever allows himself to be a witness or was scale-bearer, and does not speak testimony, let him be *inprobus* (morally bad) and *intestabilis* (incapable of ?testimony or of ?making a testament)'. There are two other places where there may have been similar laws, but we do not have the text that gives the consequence: VIII.1: QUI MALUM CARMEN INCANTASSIT, 'Whoever sings an evil song'; VIII.8a QUI FRUGES EXCANTASSIT, 'Whoever charms away crops'. The use of 'whoever' captures a generalizing tendency and is thought to be the next step in writing laws. In the XII, there are no apodictic laws, general legal commands, such as 'Thou shalt not kill'.

iii. There are no laws in the XII that separate prohibition from penalty. This suggests novelty either in the protasis or in the apodosis. If everyone knew what the consequences of something were, there would be no necessity to state it. People who have difficulty writing do not write down what everyone knows.

iv. The commands of the law in the apodosis of the conditional are expressed in the third person imperative. This remained a characteristic of Roman statutory writing for centuries. There is an alternative way of expressing this, which is to use the verb *opportet* with an infinitive, 'this ought to happen'. In the Roman context of the time the fact that *opportet* is not used, may, I emphasize 'may', mean that the duty is non-religious.

That should suffice for an introduction. Next time we'll plunge into what the XII Tables and Gaius tell us about procedure. There's an outline that gives you some statements that could be made about this topic backed up with the texts themselves. We'll work it out in class with the aid of those who are writing papers on this topic.