

THE *LEGIS ACTIONES* – OUTLINE

(The primary sources referred to in this outline are attached, and cited in the outline as ‘Mats.’ with a hyperlinked number (easier to pull up with a right click) indicating where they appear. The Mats. themselves are hypelinked to bring you back to the reference. Where there is more than one reference, the link brings you back to the principal reference. The full context of many of the texts is given. This makes them quite long, but the context is important for evaluating their reliability.)

1. We begin with procedure because this is the place where law and society intersect. Most scholars believe that it lies at the origins of any legal system, and there are three theories as to how it comes about:
 - a. Arbitration
 - b. Order
 - c. Religion

Most of what we know about procedure at the time of the XII is contained in Gaius (Mats. 1), but cf. Tab. I-III (Mats. 2), VI.6a (*manum consere*) (Mats. 7, 8, and 6), XI.3 (the *fasti*) (Mats. 5), and XII.1 (*pignoris capio*) (Mats. 3).

2. General remarks on Gaius (Mats. 1):
 - a. What is a *legis actio* – *lex* in an extended sense meaning also custom?
 - b. Are the administrative procedures – *in iure cessio*, *adrogatio* – *legis actiones*?
 - c. How about the last two – *manus iniectio* and *pignoris capio*?
 - d. *Iudicis postulatio* must be later than *legis actio sacramento* – the legal ground *sponsio* is mentioned – the bet is apparently missing
 - e. Gaius history → a methodological point – here we know of the phenomenon for the Romans, we know of the analogies – thus there is legitimate ground for speculation – contrast speculation from the state of society.
3. The problem of procedure temp. XII
 - a. Gaius gives us the middle but not the beginning and the end and about both of them there are problems:
 - i. How did the plaintiff get the defendant into court?
 - ii. What happened after the oath was taken?
 - i. For Gaius the answer to question ii is easy the *legis actio sacramento*. was only used in his time for cases before the centumviral court – a kind of jury notionally of 100. G. probably assumed that in ancient times a *iudex* was appointed. He did not stop to consider why there was a separate *actio iudicis arbitrive postulatio* prescribed by the XII, so he tells us, for actions of stipulations and for dividing an inheritance. As to question i the problem is a puzzle thruout Roman law, and we’ll have to return to it in a later context. For temp. XII we have some evidence independent of G. in Tab. I (Mats. 2). The concern seems to be with limiting the use of force, and this would suggest that it’s the rich suing the poor that’s the main issue. The system might work in suits among equals. It’s hard to see how it worked in cases poor vs. rich, but remember *clientela*. Some light on both problems may be shed by the origins of

- the procedure which we discussed earlier. Of the three theories, arbitration, order, religion. The shape of the procedure suggests the last.
- ii. If arbitration, the answer to question i is consent and the answer to question ii is the *iudex* from the very beginning – Table I (Mats. 2) certainly does not suggest consent. The oaths are hard to fit into arbitration as is the fact that *iudicis arbitrive postulatio* seems to be an innovation.
 - iii. If public order, the total lack of mention of use of magistral force is certainly odd, as is the separate *iudex* at least in the later procedure.
 - iv. If religion, which is what seems to be suggested by the text, then the sanction for non-appearance, in addition to private force, may also be religious. The oath of the *fetiales* (Mats. 4) may give us a clue as to a procedure originally entirely before the king with a religious outcome. How done? We don't know. Augury is possible. As is assignment of another oath. As is a judgment as to which is the better oath.
- b. All this is gone by the time of the XII Tables, long gone if we can judge from the absence of evidence in the surviving fragments. In its place we have the *iudicis arbitrive postulatio* (an innovation?), II.2 which may be general, and II.3 which certainly doesn't look like an innovation (Mats. 2).
 - c. We can make sense out of this if we posit that the expulsion of the kings created a procedural problem, ultimately resolved by the use of a separate *iudex* who proceeds more or less rationally. This in turn weakened the religious sanction of the *sacramentum*, led to a need to make more precise how the summons worked, and to a desire by litigants to avoid the oath procedure entirely, a desire which is met in part by II.1.b (Mats. 2). If this is right, it would tend to suggest that the traditional date for the expulsion is correct.
4. To sum up: of the three possible explanations for the origins of the procedure, arbitration, public order, and religion, the latter made the most sense if we are forced to choose. We ended up with a picture of a highly ritualistic procedure conducted before the king in which final phase of the procedure involved some kind of religious test, perhaps augury, perhaps assignment of another oath, perhaps a judgment as to who had sworn the better oath.
 5. As to who had the burden of proof in the *sacramentum* procedure, I find Watson (p. 125–133) convincing for the later period. Cicero *pro Murena* suggests as much (Mats. 6) (Cf. Mats. 7; Mats. 8). Watson's solution is that the defendant was the first to speak, and the defendant is the only one who asks the other party to justify his claim. For what the situation was at the time of the XII Tables we may have more doubt. The Verginia story (Mats. 9 and Mats. 10, Watson, p. 96–97, esp. 168–169), if not totally fanciful, suggests that the magistrate had considerable discretion. It takes some doing to adapt that story to what we are imagining was the procedure in the time of the XII Tables, but it may be possible.

MATERIALS FOR CLASS 13

1. *Gaius, Institutes 4.11–4.30*:¹

11. The actions of the practice of older times were called *legis actiones*, either because they were the creation of statutes (of course in those days the praetorian edicts, whereby a large number of actions have been introduced, were not yet in use), or because they were framed in the very words of statutes and were consequently treated as no less immutable than statutes. Hence it was held that a man who, when suing for the cutting down of his vines, had used the word ‘vines’, had lost his claim, because he ought to have said ‘trees’, seeing that the law of the Twelve Tables, on which his action for the cutting down of his vines lay, spoke of cutting down trees in general. **12.** Procedure by *legis actio* was in five forms: *sacramentum*, *iudicis postulatio*, *condictio*, *manus iniectio* and *pignoris capio*.

13. Procedure by *sacramentum* was of general application: one proceeded by it in any cases for which another procedure had not been prescribed by statute. It involved, for parties found guilty of falsehood, the same sort of risk as is involved at the present day by the *actio certae creditae pecuniae* owing to the *sponsio* which the defendant risks, in case he is denying the debt rashly, and to the counter-*stipulatio* which the plaintiff risks, in case he is suing for what is not due. For the defeated party forfeited the amount of the *sacramentum* by way of penalty, and this went to the public treasury, sureties for it being given to the praetor, instead of going into the pocket of the successful party, as the penalty of the *sponsio* or the counter-*stipulatio* now does. **14.** The penal sum of the *sacramentum* was either 500 or 50 *asses*: concerning matters worth 1,000 *asses* or more one proceeded by a *sacramentum* of 500 *asses*, but concerning matters of lower value by a *sacramentum* of 50 *asses*. For so the law of the Twelve Tables had provided. But where the dispute was as to a man’s freedom, it was provided by the same law that the contest should be with a *sacramentum* of 50 *asses*, however great the value of the man might be, obviously in order to favour freedom by not burdening assertors of freedom.

15. . . .² should come to receive a *iudex*; on their subsequent reappearance a *iudex* was appointed. That he was appointed on the thirtieth day was due to the *L. Pinaria*; but before that statute he was appointed at once. As we know from what has already been said, if the action concerned a matter of less value than 1,000 *asses*, proceedings were by *sacramentum* of 50, not 500 *asses*. After the appointment of the *iudex* the parties gave each other notice to appear before him on the next day but one. Then, on their appearance before him, previously to arguing their case in detail, they stated it to him in summary outline; this was called *causae coniectio*, as being a gathering up of their case into an epitome.

16. If the action was *in rem*, movables, inanimate and animate, provided they could be carried or led into court, were claimed in court in the following manner. The claimant, holding a rod and laying hold of the actual thing – let us say a slave – said: ‘I affirm that this man is mine by Quiritary right according to his proper title. As I have declared, so, look you, I have laid my staff on him’, and at that moment he laid his rod on the man. His opponent spoke and did the selfsame things. Both parties having thus laid claim, the praetor said: ‘Unhand the man, both of you.’ They did so. The first claimant then put the following question to the other: ‘I ask, will you declare on what title you have laid claim?’ and he answered: ‘By laying on my staff I have exercised my right.’ Thereupon the first claimant said: ‘Seeing that you have laid claim unrightfully, I challenge you by a *sacramentum* of 500 *asses*.’ And his opponent likewise said:

¹ From *Materials*, §2A2, p 36–39.

² One page is virtually illegible. It probably contained a fuller account of the *actio in personam*.

‘And I you.’ (Of course, if the thing was worth less than 1,000 *asses* they named a *sacramentum* of 50 *asses*.) Next followed the same proceedings as in an action *in personam*. Thereafter the praetor declared *uindiciae* in favour of one of the parties, that is, he established him as interim possessor, and ordered him to give his opponent sureties *litis et unidiciarum*, that is, for the thing and its profits. Other sureties were taken from both parties for the *sacramentum* by the praetor himself, because this went to the public treasury. The rod was employed to represent a spear, the symbol of lawful ownership, because they considered things they had captured from the enemy to be preeminently theirs by lawful ownership; and this is why in centumviral cases a spear is displayed. **17.** If the thing was such as could not be carried or led into court without inconvenience—for example, if it was a column or a ship or a flock or herd—some part was taken from it and brought into court, and claim was laid on that part as representing the whole thing. Thus from a flock a single sheep or goat would be led into court or just a hair was detached and brought in, while from a ship or a column some bit would be broken off. Similarly, if the dispute was over land or a house or an inheritance, some part of it was taken and brought to court, and claim was made on this part as representing the whole: thus a clod would be taken from the land or a tile from the house, or, where the dispute was as to an inheritance, some article was similarly taken from it. . . .³

17a. One proceeded by *iudicis postulatio* in any case in which statute had authorized such procedure: thus the law of the Twelve Tables authorized it in a claim arising out of a stipulation. The procedure was somewhat as follows. The plaintiff said: ‘I affirm that under a *sponsio* you ought to pay me 10,000 sesterces. I ask whether you affirm or deny this.’ The defendant denied the debt. The plaintiff said: ‘Since you deny, I ask you, Praetor, to grant a *iudex* or *arbiter*.’ Thus in this kind of action one denied without penalty. The same law authorized procedure by *iudicis postulatio* likewise in suits for the partition of an inheritance between coheirs. The *L. Licinnia* did the same in suits for the partition of any common property. Thus, after the declaration of the cause of action, an *arbiter* was at once demanded.

17b. One proceeded by *condictio* as follows: ‘I affirm that you ought to pay me 10,000 sesterces: I ask whether you affirm or deny this.’ The defendant denied the debt. The plaintiff said: ‘Since you deny, I give you notice (*condico*) to appear on the thirtieth day in order to take a *iudex*.’ Thereafter they had to appear on the thirtieth day in order to take a *iudex*. **18.** *Condicere* (the word used by the plaintiff), in primitive language, means to give notice. Thus this action was properly called *condictio*; for the plaintiff gave notice to his opponent to appear on the thirtieth day in order to receive a *iudex*. But in modern terminology a conduction is an action *in personam* in which we claim that something ought to be conveyed to us—an improper usage, since nowadays no such notice is given. **19.** This *legis actio* was established by the *L. Silia* and the *L. Calpurnia*, by the former when the debt claimed was of a definite sum of money, by the latter when of any definite thing. **20.** But there is much question why this action was needed, seeing that it was possible to proceed either by *sacramentum* or by *iudicis postulatio* on a claim for something to be conveyed to one.

21. One proceeded by *manus iniectio* likewise in those cases in which such procedure was prescribed by some statute, for example, under the law of the Twelve Tables for a judgment debt. The proceedings were as follows: the plaintiff spoke thus: ‘Whereas you are indebted to me by judgment’ (or ‘by damnation’) ‘in 10,000 sesterces, seeing that you have not paid, on that account I lay my hand on you for 10,000 sesterces of judgment debt’; and at the same time he laid hold of some part of the debtor’s body. The judgment debtor was not allowed to throw off

³ Our mss. here are deficient; neither gives an account of the end of the *sacramentum* procedure.

the hand himself and to conduct the *legis actio* on his own behalf, but gave a *uindex* who conducted it for him. One who did not give a *uindex* was led off by the plaintiff to his house and put in fetters. **22.** Various subsequent statutes granted *manus iniectio* as for a judgment debt on a number of other grounds against certain persons. Thus, the *L. Publilia* granted it against one on whose behalf his *sponsor* had paid, if he had not repaid the *sponsor* within the next 6 months. Again, the *L. Furia de sponsu* granted it against a creditor who had exacted from a *sponsor* more than his rateable part of the debt. And, in short, numerous other statutes authorized this procedure on many accounts. **23.** Other statutes, however, set up procedure by *manus iniectio* on various accounts, but in the form called *pura*, that is to say not as for a judgment debt. For example, the *L. Furia testamentaria* authorized it against one who had taken by way of legacy or gift *mortis causa* more than 1,000 asses, he not being privileged by that statute to take more; and again, the *L. Marcia* against usurers provided that if they had exacted interest, proceedings by *manus iniectio* for repayment should lie against them. **24.** In proceedings under these last-mentioned statutes and any like them the defendant was allowed to throw off the hand himself and to conduct the *legis actio* on his own behalf. For in his formal claim the plaintiff did not use the phrase ‘as for a judgment debt’, but after stating his cause of action said: ‘on that account I lay my hand on you’, whereas a plaintiff permitted to proceed by *manus iniectio* as for a judgment debt, after naming his cause of action, concluded thus: ‘on that account I lay my hand on you as for a judgment debt.’ I am aware that in the scheme of claim under the *L. Furia testamentaria* the phrase ‘as for a judgment debt’ is inserted, though it is not in the statute itself; the insertion appears to be unwarranted. **25.** But later, by the *L. Vallia*, all persons subjected to *manus iniectio*, except judgment debtors and those on whose behalf their *sponsor* had paid, were allowed to throw off the hand themselves and to conduct the action on their own behalf. Thus even after the *L. Vallia* a judgment debtor and one on whose behalf his *sponsor* had paid were bound to give a *uindex*; in default of doing so they were led off to the creditor’s house. And, so long as the *legis actiones* were in use, these rules continued to be observed, which is why at the present day a party sued upon a judgment debt or on account of payment by his *sponsor* is obliged to give security for the satisfaction of the judgment: (which may be given against him).

26. *Legis actio* by *pignoris capio* rested in some cases on custom, in others on statute. **27.** By custom it was established in the military sphere: For a soldier was allowed to distrain for his pay on the person responsible for paying it, if he defaulted; money given to a soldier by way of pay was called *aes militare*. He might also distrain for money assigned for the buying of his horse, this being called *aes equestre*; likewise for money assigned for buying barley for the horses, this being called *aes hordiarium*. **28.** By statute it was established, for instance, by the law of the Twelve Tables against one who had bought a sacrificial victim, but failed to pay for it; likewise against one who failed to pay the reward for a beast of burden which another had hired to him in order to raise money for a sacrificial feast. (Mats. 3) Again, by the censorial conditions farmers of public taxes of the Roman people were allowed to distrain upon anyone who owed taxes under some statute. **29.** In all these cases the levy of distress was accompanied by a set form of words, and for this reason it was generally held that *pignoris capio* was a further *legis actio*; some, however, held that it was not, first because the seizure was performed outside court, that is, not before the praetor, and usually when the other party was absent, whereas it was not possible to perform the other *legis actiones* except before the praetor and in the presence of the other party; and further because *pignoris capio* could be performed on a *dies nefastus*, that is, on a day on which a *legis actio* was not allowed.

30. But all these *legis actiones* gradually became unpopular. For the excessive technicality of the early makers of the law was carried so far that a party who made the slightest mistake lost his

case. Consequently by the *L. Aebutia* and the two *Ll. Iuliae* they were abolished, and litigation by means of adapted pleadings, that is by *formulae*, was established. **31.** In two cases only may one proceed by *legis actio*, namely for *damnum infectum* and where the trial is to be before the centumviral court. But though, when one is going before the centumvirs, a *legis actio* by *sacramentum* is previously enacted before the urban or the peregrine praetor, one never wishes to proceed by *legis actio* for *damnum infectum*, but prefers to bind the other party by the stipulation published in the Edict, this being a more convenient and a fuller remedy. By *pignoris capio*⁴

2. XII tab. 1–3 (CD trans.):

Tab. 1.1. 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. 2. If there is an evasion or a plying of the foot, let there be a laying on of hand.⁵ 3. If sickness or age is a hindrance, let him [who calls into law] give a vehicle. If there is no willing, let there be no spreading of cushions on the carriage.

Tab. 1.4 Let an *adsiduus* (rate-payer) be surety for an *adsiduus*; for a proletarian [from the time he is a citizen] let anyone who wishes be surety.

Tab. 1.5. *Nex[i]* (of bond). . . for the steadfast (*forti*) [and] for the person restored to allegiance (*sanati*) (but *forti* and *sanati* may be place-names).

Tab. 1.6. Where they agree on the matter, let there be a pleading. 7. If they do not agree, let them put forward the case in the assembly or in the forum before noon. Then (reading *tum* for *com*) let them plead [the case] through both of them being present. (Alternatively, read *perorant* and translate: ‘When they plead [the case] through, [let] both be present.’) 8. After noon let the stake (*litem*) be adjudged (*addicito*) to the one who is present. 9. If both are present, let sunset be the final time.

Tab. 1.10. *Gellius* 16.10.8: since proletarians and rate-payers and people restored to allegiance and SURETIES and SUBSURETIES and 25 asses and talions and the search for thieves WITH PLATTER AND LOINCLOTH had fallen into obscurity, all this old stuff from the XII Tables was . . . laid to rest by the passage of the *lex Aebutia*

Tab. 2.1a. *Gaius* 4.14: The penalty of the *sacramentum* (a solemn form of procedure) was either 500 or 50: Concerning matters worth 1000 *asses* or more one proceeded with 500 *asses*, concerning those of less value one proceeded with 50. For so the law of the XII Tables had provided. [But] if the dispute was about a man’s freedom, even if the man were of very great value, the same law, nonetheless, provided that one proceeded with 50 *asses*.

Tab. 2.1b. *Gaius* 4.17a [text restored but reasonably certain]: One proceeded by *iudicis postulatio* (request for a judge) in any case where a *lex* (statute) had authorized it, as, for example, the *lex* of the XII Tables about something which was claimed on the ground of a stipulation (formal contract).

Tab. 2.2 critical illness . . . or an appointed day with an alien . . . any of these things was a hinderance for the judge or the arbiter or one of the parties (lit. ‘defendant’), on account of this let the day be put off.

Tab. 2.3. Let he to whom evidence is wanting go on the third days before the gate to shout aloud.

⁴ A whole page is illegible. It probably dealt with the *formulae quae ad legis actionem exprimuntur*. Cf. GI.4.10.

⁵ The same words that are used in Tab. 3.2.

⁶Tab. 3.1–3. Of bronze acknowledged and for matters adjudged in law (*in iure*), let thirty days be right (*iusti*). 2. Next after let there be a *manus iniectio* (a casting on of hand). 3. If he does not do the thing adjudged or (no-)one stands surety for him in law (*iure*) let there be a leading with him (the creditor), let there be a binding either with a thong or with fetters of 15 pounds, not less, or if he wishes, let there be a binding with a greater.⁷

Tab. 3.4. If he wishes, let him live on his own. If he does not live on his own, let he who has him bound give him a pound (reading *libram*) of spelt a day. If he wishes, let him give more.

Tab. 3.5. *Gellius* 20.1.15.46.47: There was moreover a right to make an agreement in the meantime and if they did not make an agreement, they were kept in chains sixty days. During those days they were produced before the praetor in the assembly on three consecutive market days, and the amount of money that had been adjudged against them was announced. On the third market day they underwent capital punishment or were sold abroad, across the Tiber.

Tab. 3.6. On the third market day let them cut shares. If they cut more or less, let it be without damage.

3. XII tab. 12.1 (CD trans.):

Tab. 12.1. *Gaius* 4.28: *Pignoris capio* (seizure of pledge) was introduced by statute (*lex*), for example, by the Law of the XII Tables against one who had purchased a sacrificial offering and did not pay the price; also against one who did not pay the price for a team which someone leased to him for the purpose of raising money for a sacrificial feast.

4. The ‘oath of the fetial priests’ from *Livy* 1.23–26. The events that *Livy* describes here are supposed to have taken place around 670 B.C. The Romans are at war with a local tribe, the Albans, whose king *Cluilius* has just died. The Roman king is *Tullus Hostilius*; the commander of the Albans, one *Mettius Fufetius*. You may find that *David’s* famous painting of the “Oath of the *Horatii*” (below)⁸ somewhat misses our point. (Materials, p. 339–341):



⁶ We will return to execution of judgment when we consider *nexum*.

⁷ The most recent edition of the XII reads ‘not more, or if he wishes, there be a binding with less’. The arguments supporting this reading are solid, but not overwhelming.

⁸ Jacques-Louis David, *Le serment des Horaces*, Paris, Louvre (Wikipedia).

. . . Cluilius's death acted like a tonic upon Tullus; the powers of heaven, he declared, had begun their vengeance on the wicked war-makers. Their king had been the first to suffer; soon the wrath of God would be felt by every man and woman in Alba. With the boast still on his lips, he advanced under cover of darkness past the enemy's position into Alban territory. The move roused Mettius to action; leaving his entrenchments he made straight for the Roman army, sending in advance a spokesman with orders to propose to Tullus that a conference should be held before engaging; for he was confident, should Tullus agree to meet him, that he could make a suggestion which would prove of equal value to both parties. Tullus did not reject the proposal; nevertheless, in case the conference should prove abortive, he took the precaution of setting his troops in order of battle. The Albans followed suit, and Tullus and Mettius, attended by a few high officers, stepped forward to meet each other between the marshalled armies.

Mettius was the first to speak. 'Our king Cluilius,' he said, 'told me, if I remember, that we were about to fight over a matter of brigandage and the refusal to restore stolen property in accordance with our treaty; and I have no doubt that you, Tullus, are prepared to retort in similar terms. So be it. If, however, we let specious arguments go and tell each other the truth, we should admit that our two nations, close neighbors and blood relations as we are, have a deeper reason for going to war: I mean, ambition and the love of power. Whether rightly or wrongly I will not venture to say, for that is a question decided, no doubt, by him who undertook to wage this war. As for me, I am only the man the Albans chose to conduct it. But what I would suggest to you, Tullus, is this: you know the strength of the Etruscans who threaten to encircle us, and you know it even better than we, as you are closer to them. They are strong on land, and at sea very strong indeed. Do not forget, when you give the signal for battle, that they will be watching us, ready, when we have worn each other out, to attack us both, victor and vanquished alike. Surely, therefore, unless both our countries are condemned to perdition, we should be able to find a better solution. The assurance of liberty is not, it seems, enough for us, and we are about to gamble for empire or slavery; nevertheless, can we not find some means of deciding the issue between us which, however the fight may go, will at least avoid crippling losses either to you or to ourselves?'

Tullus was not displeased by the proposal, though he was confident of victory and enjoyed a fight as much as any man. Ways and means were therefore considered; a plan was adopted, and a fortunate circumstance provided the means of carrying it out. In each army there were three brothers – triplets – all equally young and active, belonging to the families of the Horatii and Curiatii. That these were their names has never been in doubt, and the story is one of the great stories of ancient times; yet in spite of its celebrity historians have disagreed about which name belonged to which set of brothers. The majority, I find, say that the Haratii were Roman, and I am willing to follow their lead.

To these young men the two rival commanders made their proposal, that they should fight, three against three, as the champions of their countries, the victorious to have dominion over the vanquished: the proposal was accepted; the time and place for the contest were arranged and a solemn agreement entered into by the Romans and Albans to the effect that whichever of the two people should prove victorious through the prowess of its champions should be undisputed master of the other. The terms of treaties of course vary according to circumstance, but the form remains constant; on the present occasion, that of the oldest treaty on record, the procedure, we read, was as follows: the 'fetial' (priest) approached Tullus, the king.

'My lord,' he asked, 'do you bid me make this compact with the representative of the Alban people?'

‘I do.’

‘Then I demand of you, my lord, the holy herb.’

‘Go and pluck it untainted.’

The priest brought from the sacred enclosure a fresh green plant, and said:

‘My lord, do you grant me, with my emblems and companions, the king’s sanction to speak for the people of Rome?’

‘I grant it,’ the king replied, ‘without prejudice to myself and the people of Rome.’

The priest was Marcus Valerius, and he appointed Spurius Fusius, touching his head and hair with the ceremonial leaves, as pater patratus, or ‘spokesman’, whose duty is to pronounce the oath and thus to solemnize the compact. This he does in a long metrical formula, which is not worth the trouble of quoting here. Finally, the terms of the treaty having been read out, ‘Hear me, Jupiter,’ Fusius cried; ‘hear me, Alba, and you who speak on her behalf: from the terms of this compact, as they have been publicly and openly read from these tablets today and clearly understood by us assembled here, the Roman people will never be the first to depart. Should they do so treacherously, and by public consent, then, great Jove, I pray that thou mayst strike them even as I strike this pig, and the more fiercely in that thy power and might are greater than mine.’ He then dispatched the pig with a flint knife. The Albans, on their side, took a similar oath according to their own formula, and the treaty was made.

The six champions now made ready for battle. As they stepped forward into the lists between the two armies their hearts were high, and ringing in their ears were the voices of friends, bidding them remember that their parents, their country, and their country’s gods, their fellow-soldiers and all they loved at home, would be watching their prowess and that all eyes were on their swords. The rival armies were still in position; danger there was none, but every man present was tense with anxiety. The stakes were high; upon the luck or valour of the three men hung empire or slavery. In an agony of suspense the onlookers prepared for spectacle.

The trumpet blared. The brothers drew their swords, and with all the pride of embattled armies advanced to the combat. Careless of death and danger, each thought only of his country’s fate, of the grim choice between lordship and ignominy, which they themselves, and they only, were about to decide. They met. At the flash of steel and the clang of shield on shield a thrill ran through the massed spectators, breathless and speechless while as yet neither side had the advantage. Soon the combatants were locked in a deadly grapple; bodies writhed and twisted, the leaping blades parried and thrust, and blood began to flow. Alba’s three champions were wounded; a Roman fell, then another, stretched across his body and both at the point of death. A cheer burst from the Alban army, as the two Romans went down, while from their adversaries all hope was gone; life seemed to drain from them, as they contemplated the dreadful predicament of their one survivor, surrounded by the three Curiatii.

The young man, though alone, was unhurt. No match for his three opponents together, he was yet confident of his ability to face them singly, and, with this purpose in mind, he took to his heels, sure that they would be after him with such speed as their wounds allowed. Not far from the scene of the first fight he looked back. His three enemies were coming, strung out one behind the other, the foremost almost upon him. He turned and attacked furiously. A cry rose from the Alban army: ‘Your brother! Save him!’ But it was too late. Horatius had already killed his man and, flushed with triumph, was looking for his next victim. The Romans’ cheer for their young soldier was like the roar of the crowd at the race when luck turns defeat into victory. Horatius

pressed on to make an end. He killed his second man before the last, near though he was, could come to his aid.

Now it was one against one; but the two antagonists were far from equally matched in all else that makes for victory. Horatius was unhurt, and elated by his double success; his opponent, exhausted from running and loss of blood, could hardly drag himself along; his brothers had been killed before his eyes; he was a beaten man facing a victorious enemy. What followed cannot be called a fight. 'I have killed two already,' the Roman cried, 'to avenge my brothers' ghosts. I offer the last to settle our quarrel, that Rome may be mistress of Alba.' With these proud words he plunged his sword with a downward stroke into the throat of his enemy, now too weak to sustain his shield, and then stripped him where he lay.

The cheering ranks of the Roman army, whose joy was the keener by the narrow escape from disaster, welcomed back their champion. The two sides then buried their dead, a common task but performed with very different feelings by victors and vanquished. Alba was subject now to her Roman mistress. The graves are still to be seen at the place where each man fell: those of the two Romans together, in the direction of Alba; those of the three Albans nearer Rome and at some distance from each other.

Before the troops left their stations, Mettius asked Tullus what, by the terms of the agreement, he now required him to do, and Tullus instructed him to keep his men under arms as they would be a useful reinforcement if Rome should find herself at war with Veii

*5. This is a somewhat more flowing translation than what appears in the Materials of what is virtually the only authority for the presence of Tab. 11.3 in the XII tables. Cicero to Atticus, 6.1:*⁹

I have given six books [Cicero's *De republica*] as bail, so to speak, for my good conduct. I am very glad you like them, though in one point – about Cn. Flavius, son of Annius – you question my history. [The reference is to a now-lost passage.] He, it is true, did not live before the decemvirs, for he was curule aedile, an office created many years after the decemvirs. What good did he do, then, by publishing the Fasti? It is supposed that the tablet containing them had been kept concealed up to a certain date, in order that information as to days for doing business might have to be sought from a small coterie. And indeed several of our authorities relate that a scribe named Cn. Flavius¹⁰ published the Fasti and composed forms of pleading – so don't imagine that I, or rather Africanus (for he is the spokesman) [the *De republica* is a dialogue, and Africanus is speaking here], invented the fact.

*6. Cicero, Pro Murena 11.25–12.26:*¹¹

[25] First of all, what dignity can there be in so limited a science?¹² For they are but small matters, conversant chiefly about single letters and punctuation between words. Secondly, if in the time of our ancestors there was any inclination to marvel at that study of yours, now that all

⁹ Cicero. *The Letters of Cicero; the whole extant correspondence in chronological order, in four volumes.* Evelyn S. Shuckburgh. London. George Bell and Sons. 1908-1909

¹⁰ ca. 300 BC. Son of freedman and secretary to Appius Claudius Caecus. OCD
<https://oxfordre.com/classics/view/10.1093/acrefore/9780199381135.001.0001/acrefore-9780199381135-e-1616?rskey=DUhKQQ&result=1> and
<https://oxfordre.com/classics/view/10.1093/acrefore/9780199381135.001.0001/acrefore-9780199381135-e-2679>

¹¹ M. Tullius Cicero. *The Orations of Marcus Tullius Cicero, literally translated by C. D. Yonge, B. A.* London. Henry G. Bohn, York Street, Covent Garden. 1856.

¹² The person being addressed here is Servius Sulpicius Rufus, who was counsel on the other side. Cicero is here speaking of jurists generally.

your mysteries are revealed, it is wholly despised and disregarded. At one time few men knew whether a thing might be lawfully done or not; for men ordinarily had no records; those were possessed of great power who were consulted, so that even days for consultation were begged of them beforehand, as from the Chaldean astrologers. A certain notary was found, by name Cnaeus Flavius, who could deceive¹³ the most wary, and who set the people records to be learnt by heart each day, and who pilfered their own learning from the profoundest lawyers. So they, being angry because they were afraid, lest, when their daily course of action was divulged and understood, people would be able to proceed by law without their assistance, adopted a sort of cipher, in order to make their presence necessary in every cause.

[26] When this might have been well transacted thus – “The Sabine farm is mine.” “No; it is mine:” – then a trial; they would not have it so. “The farm,” says he, “which is in the territory which is called Sabine:” – verbose enough – well, what next? “That farm, I say, is mine according to the rights of Roman citizens.” What then? – “and therefore I summon you according to law, seizing you by the hand.”

The man of whom the field was demanded did not know how to answer one who was so talkatively litigious. The same lawyer goes across, like a Latin flute-player, – says he, “In the place from whence you summoned me having seized me by the hand, from thence I recall you there.” In the meantime, as to the praetor, lest he should think himself a fine fellow and a fortunate one, and himself say something of his own accord, a form of words is composed for him also, absurd in other points, and especially in this: “Each of them being alive and being present I say that that is the way.” “Enter on the way.” That wise man was at hand who was to show them the way. “Return on your path.” They returned with the same guide. These things, I may well suppose, appeared ridiculous to full-grown men; that men when they have stood rightly and in their proper place should be ordered to depart, in order that they might immediately return again to the place they had left. Everything was tainted with the same childish folly. “When I behold you in the power of the law.” And this – “But do you say this who claim the right?” And while all this was made a mystery of, they who had the key to the mystery were necessarily sought after by men; but as soon as these things were revealed, and were bandied about and sifted in men's hands, they were found to be thoroughly destitute of wisdom, but very full of fraud and folly.

7. The institution that Cicero is describing here is referenced in XII tab. 6a:

6a. If [any persons] join hand in *iure* (law, court) . . . (SI [QUI] IN IURE MANUM CONSERUNT . . .)

*8. And explained in Aulus Gellius, Attic Nights 20.10:*¹⁴

Ex iure manum consertum, or “lay on hands according to law,” is a phrase taken from ancient cases at law, and commonly used to-day when a case is tried before the praetor and claims are made. I asked a Roman grammarian, a man of wide reputation and great name, what the meaning of these words was. But he, looking scornfully at me, said: “Either you are making a mistake, youngster, or you are jesting; for I teach grammar and do not give legal advice. If you want to know anything connected with Virgil, Plautus or Ennius, you may ask me.”

“It is a question from Ennius then, master,” said I, “that I am asking. For it was Ennius who used those words.” And when the grammarian said in great surprise that the words were unsuited to

¹³ Translator’s note: The Latin strictly is, “pierce the eyes of ravens.” It was a proverbial expression.

¹⁴ The Attic Nights of Aulus Gellius. With An English Translation. John C. Rolfe. Cambridge. Cambridge, Mass., Harvard University Press; London, William Heinemann, Ltd. 1927.

poetry and that they were not to be found anywhere in the poems of Ennius, I quoted from memory the following lines from the eighth book of the *Annals*; for it chanced that I remembered them because of their particularly striking character:¹⁵

Wisdom is driven forth and force prevails;
They scorn the speaker good, the rude soldier love.
[p. 449] Contending not with learning nor abuse,
They join in strife, not laying claim by law,
(Non ex iure consertum, sed magis ferro)
But, seeking with the sword both wealth and power,
With force resistless rush.

When I had recited these verses from Ennius, the grammarian rejoined: “Now I believe you. But I would have you believe me, when I say that Quintus Ennius learned this, not from his reading of the poets, but from someone learned in the law. Do you too then go and learn from the same source as Ennius.”

I followed the advice of this teacher, when he referred me to another from whom I could learn what he ought to have taught me himself: And I thought that I ought to include in these notes of mine what I have learned from jurists and their writings, since those who are living in the midst of affairs and among men ought not to be ignorant of the commoner legal expressions. *Manum conserere*, “to lay on hands.” . . . For with one's opponent to lay hold of and claim in the prescribed formula anything about which there is a dispute, whether it be a field or something else, is called *vindicia*, or “a claim.” A seizing with the hand of the thing or place in question took place in the presence of the praetor according to the *Twelve Tables*, in which it was written¹⁶ “If any lay on hands in the presence of the magistrate.”¹⁷ But when the boundaries of Italy were extended and the praetors were greatly occupied with legal business, they found it hard to go to distant places to settle claims. Therefore it became [p. 451] usual by silent consent, though contrary to the *Twelve Tables*, for the litigants not to lay on hands in court in the presence of the praetor, but to call for “a laying on of hands according to law”; that is, that the one litigant should summon the other to the object in question, to lay hands on it according to law, and that they should go together to the field under dispute and bring some earth from it to the city to the praetor's court, for example one clod, and should lay claim to that clod, as if it were the whole field. Accordingly Ennius, wishing to describe such action, said that restitution was demanded, not by legal processes, such as are carried on before a praetor, nor by a laying on of hands according to law, but by war and the sword, and by genuine and resistless violence; and he seems to have expressed this by comparing that civil and symbolic¹⁸ power which is exercised in name only and not actually, with warlike and sanguinary violence.

9. XII tab. 6.7:

Tab. 6.7. *Livy* 3.44.11,12: The advocates (for Verginia) . . . asked that (Ap. Claudius) . . . give *vindiciae* (temporary possession) according to liberty in accordance with the law which he himself had proposed.

¹⁵ Translator's note: vv. 268 ff., Vahlen.

¹⁶ Translator's note: vi. 5.

¹⁷ Translator's note: Cf. xx. i. 48; see Allen, *Remnants of Early Latin*, p. 85.

¹⁸ Translator's note: 1 *festuca*, “a stalk or stem,” was used of the rod with which slaves were touched in the ceremony of manumission. Here *festucariam* (a [ἄπαξ λεγόμενον](#)) is extended in meaning to include any symbolic legal process.

10. *Livy 3.44–48, the whole story*:¹⁹

44. This was followed by a second atrocity, the result of brutal lust, which occurred in the City and led to consequences no less tragic than the outrage and death of Lucretia, which had brought about the expulsion of the royal family. Not only was the end of the decemvirs the same as that of the kings, but the cause of their losing their power was the same in each case. [2] Ap. Claudius had conceived a guilty passion for a girl of plebeian birth. The girl's father, L. Verginius, held a high rank in the army on Algidus; he was a man of exemplary character both at home and in the field. [3] His wife had been brought up on equally high principles, and their children were being brought up in the same way. He had betrothed his daughter to L. Icilius, who had been tribune, an active and energetic man whose courage had been proved in his battles for the plebs. [4] This girl, now in the bloom of her youth and beauty, excited Appius' passions, and he tried to prevail on her by presents and promises. When he found that her virtue was proof against all temptation, he had recourse to unscrupulous and brutal violence. [5] He commissioned a client, M. Claudius, to claim the girl as his slave, and to bar any claim on the part of her friends to retain possession of her till the case was tried, as he thought that the father's absence afforded a good opportunity for this illegal action.²⁰ [6] As the girl was going to her school in the Forum –the grammar schools were held in booths there –the decemvir's pander laid his hand upon her, declaring that she was the daughter of a slave of his, and a slave herself. [7] He then ordered her to follow him, and threatened, if she hesitated, to carry her off by force. While the girl was stupefied with terror, her maid's shrieks, invoking 'the protection of the Quirites,' drew a crowd together. The names of her father Verginius and her betrothed lover, Icilius, were held in universal respect. [8] Regard for them brought their friends, feelings of indignation brought the crowd to the maiden's support. She was now safe from violence; the man who claimed her said that he was proceeding according to law, not by violence, there was no need for any excited gathering. [9] He cited the girl into court. Her supporters advised her to follow him; they came before the tribunal of Appius. The claimant rehearsed a story already perfectly familiar to the judge as he was the author of the plot, how the girl had been born in his house, stolen from there, transferred to the house of Verginius and fathered on him; [10] these allegations would be supported by definite evidence, and he would prove them to the satisfaction of Verginius himself, who was really most concerned, as an injury had been done to him. Meanwhile, he urged, it was only right that a slave girl should follow her master. [11] The girl's advocates contended that Verginius was absent on the service of the State, he would be present in two days' time if information were sent to him, and it was contrary to equity that in his absence he should incur risk with regard to his children. [12] They demanded that he should adjourn the whole of the proceedings till the father's arrival, and in accordance with the law which he himself had enacted, grant the custody of the girl to those who asserted her freedom, and not suffer a maiden of ripe age to incur danger to her reputation before her liberty was imperilled.

45. Before giving judgment, Appius showed how liberty was upheld by that very law to which the friends of Verginia had appealed in support of their demand. [2] But, he went on to say, it guaranteed liberty only so far as its provisions were strictly adhered to as regarded both persons and cases. For where personal freedom is the matter of claim, that provision holds good, because

¹⁹ Livy. History of Rome. English Translation by. Rev. Canon Roberts. New York, New York. E. P. Dutton and Co. 1912. 1. Livy. History of Rome. English Translation. Rev. Canon Roberts. New York, New York. E. P. Dutton and Co. 1912. 2.

²⁰ Translator's note: In cases where a person's status was in question, whether he were a freeman or not, the custody of the person was by the Twelve Tables assigned to those who claimed his freedom, and who had to give security to the other side to produce him for trial. Appius therefore was breaking a law which he had taken a part in enacting.

any one can lawfully plead, but in the case of one who is still in her father's power, there is none but her father to whom her master need renounce possession. [3] His decision, therefore, was that the father should be summoned, and in the meanwhile the man who claimed her should not forego his right to take the girl and give security to produce her on the arrival of her reputed father.

[4] The injustice of this sentence called forth many murmurs, but no one ventured on open protest, until P. Numitorius, the girl's grandfather, and Icilius, her betrothed, appeared on the scene. [5] The intervention of Icilius seemed to offer the best chance of thwarting Appius, and the crowd made way for him. The lictor said that judgment had been given, and as Icilius continued loudly protesting he attempted to remove him. [6] Such rank injustice would have fired even a gentle temper. He exclaimed, 'I am, at your orders, Appius, to be removed at the point of the sword, that you may stifle all comment on what you want to keep concealed. [7] I am going to marry this maiden, and I am determined to have a chaste wife. Summon all the lictors of all your colleagues, give orders for the axes and rods to be in readiness –the betrothed of Icilius shall not remain outside her father's house. [8] Even if you have deprived us of the two bulwarks of our liberty –the aid of our tribunes and the right of appeal to the Roman plebs –that has given you no right to our wives and children, the victims of your lust. [9] Vent your cruelty upon our backs and necks; let female honour at least be safe. If violence is offered to this girl, I shall invoke the aid of the Quirites here for my betrothed, Verginius that of the soldiers for his only daughter; [10] we shall all invoke the aid of gods and men, and you shall not carry out that judgment except at the cost of our lives. [11] Reflect, Appius, I demand of you, whither you are going! When Verginius has come, he must decide what action to take about his daughter; if he submits to this man's claim, he must look out another husband for her. Meantime I will vindicate her liberty at the price of my life, sooner than sacrifice my honour.'

46. The people were excited and a conflict appeared imminent. [2] The lictors had closed round Icilius, but matters had not got beyond threats on both sides when Appius declared that it was not the defence of Verginia that was Icilius' main object; a restless intriguer, even yet breathing the spirit of the tribuneship, was looking out for a chance of creating sedition. [3] He would not, however, afford him material for it that day, but that he might allow that it was not to his insolence that he was making a concession, but to the absent Verginius, to the name of father, and to liberty, he would not adjudicate on that day, or issue any decree. He would ask M. Claudius to forego his right, and allow the girl to be in the custody of her friends till the morrow. [4] If the father did not then appear, he warned Icilius and men of his stamp that neither as legislator would he be disloyal to his own law, nor as decemvir would he lack firmness to execute it. He certainly would not call upon the lictors of his colleagues to repress the ringleaders of sedition, he should be content with his own. [5] The time for perpetrating this illegality was thus postponed, and after the girl's supporters had withdrawn, it was decided as the very first thing to be done that the brother of Icilius and one of Numitor's sons, both active youths, should make their way straight to the gate and summon Verginius from the camp with all possible speed. [6] They knew that the girl's safety turned upon her protector against lawlessness being present in time. They started on their mission, and riding at full speed brought the news to the father. [7] While the claimant of the girl was pressing Icilius to enter his plea and name his sureties, and Icilius kept asserting that this very thing was being arranged, purposely spinning out the time to allow of his messengers getting first to the camp, the crowd everywhere held up their hands to show that every one of them was ready to be security for him. [8] With tears in his eyes, he said, 'It is most kind of you. To-morrow I may need your help, now I have sufficient securities.' So Verginia was bailed on the security of her relatives.

[9] Appius remained for some time on the bench, to avoid the appearance of having taken his seat for that one case only. When he found that owing to the universal interest in this one case no other suitors appeared, he withdrew to his home and wrote to his colleagues in camp not to grant leave of absence to Verginius, and actually to keep him under arrest. [10] This wicked advice came too late, as it deserved to do; Verginius had already obtained leave, and started in the first watch. The letter ordering his detention was delivered the next morning, and was therefore useless.

47. In the City, the citizens were standing in the Forum in the early dawn, on the tiptoe of expectation. Verginius, in mourning garb, brought his daughter, similarly attired, and accompanied by a number of matrons, into the Forum. An immense body of sympathisers stood round him. [2] He went amongst the people, took them by the hand and appealed to them to help him, not out of compassion only but because they owed it to him; he was at the front day by day, in defence of their children and their wives; of no man could they recount more numerous deeds of endurance and of daring than of him. What good was it all, he asked, if while the City was safe, their children were exposed to what would be their worst fate if it were actually captured? Men gathered round him, whilst he spoke as though he were addressing the Assembly. [3] Icilius followed in the same strain. The women who accompanied him made a profounder impression by their silent weeping than any words could have made.

[4] Unmoved by all this –it was really madness rather than love that had clouded his judgment – Appius mounted the tribunal. The claimant began by a brief protest against the proceedings of the previous day; judgment, he said, had not been given owing to the partiality of the judge. But before he could proceed with his claim or any opportunity was given to Verginius of replying, Appius intervened. [5] It is possible that the ancient writers may have correctly stated some ground which he alleged for his decision, but I do not find one anywhere that would justify such an iniquitous decision. The one thing which can be propounded as being generally admitted is the judgment itself. [6] His decision was that the girl was a slave.

At first all were stupefied with amazement at this atrocity, and for a few moments there was a dead silence. [7] Then, as M. Claudius approached the matrons standing round the girl, to seize her amidst their outcries and tears, Verginius, pointing with outstretched arm to Appius, cried, ‘It is to Icilius and not to you, Appius, that I have betrothed my daughter; I have brought her up for wedlock, not for outrage. Are you determined to satisfy your brutal lusts like cattle and wild beasts? Whether these people will put up with this, I know not, but I hope that those who possess arms will refuse to do so.’ [8] Whilst the man who claimed the maiden was being pushed back by the group of women and her supporters who stood round, the crier called for silence.

48. The decemvir, utterly abandoned to his passion, addressed the crowd and told them that he had ascertained not only through the insolent abuse of Icilius on the previous day and the violent behaviour of Verginius, which the Roman people could testify to, but mainly from certain definite information received, that all through the night meetings had been held in the City to organise a seditious movement. [2] Forewarned of the likelihood of disturbances, he had come down into the Forum with an armed escort, not to injure peaceable citizens, but to uphold the authority of the government by putting down the disturbers of public tranquillity. [3] ‘It will therefore,’ he proceeded, ‘be better for you to keep quiet. Go, lictor, remove the crowd and clear a way for the master to take possession of his slave.’ When, in a transport of rage, he had thundered out these words, the people fell back and left the deserted girl a prey to injustice.

[4] Verginius, seeing no prospect of help anywhere, turned to the tribunal. ‘Pardon me, Appius, I pray you, if I have spoken disrespectfully to you, pardon a father's grief. Allow me to question

the nurse here, in the maiden's presence, as to what are the real facts of the case, that if I have been falsely called her father, I may leave her with the greater resignation.' [5] Permission being granted, he took the girl and her nurse aside to the booths near the temple of Venus Cloacina, now known as the 'New Booths,' and there, snatching up a butcher's knife, he plunged it into her breast, saying, 'In this the only way in which I can, I vindicate, my child, thy freedom.' Then, looking towards the tribunal, 'By this blood, Appius, I devote thy head to the infernal gods.' [6] Alarmed at the outcry which arose at this terrible deed, the decemvir ordered Verginius to be arrested. Brandishing the knife, he cleared the way before him, until, protected by a crowd of sympathisers, he reached the city gate. [7] Icilius and Numitorius took up the lifeless body and showed it to the people; they deplored the villainy of Appius, the ill-starred beauty of the girl, the terrible compulsion under which the father had acted. [8] The matrons, who followed with angry cries, asked, 'Was this the condition on which they were to rear children, was this the reward of modesty and purity?' with other manifestations of that womanly grief, which, owing to their keener sensibility, is more demonstrative, and so expresses itself in more moving and pitiful fashion. [9] The men, and especially Icilius, talked of nothing but the abolition of the tribunitian power and the right of appeal and loudly expressed their indignation at the condition of public affairs.

[The story continues leading eventually to the second secession of the plebs, the dismissal of the decemvirs, and the restoration of the Republican constitution under the consuls Valerius and Horatius.]