DELICTS

1. Watson quits without considering Table VIII. His method requires him to do so. What has come down to us is a mass of material that has little to do with the later law. If we are going to cast any light on it at all, it is going to have to be done comparatively. Let's go through the Table, as it exists in our text. As I've mentioned before, the provisions that have to do *iniuria* and with theft are found in in Table 1 in the new edition by Crawford. His argument for putting them there seems pretty solid. We'll consider those provisions first. Doing that doesn't make much difference so far as the provisions themselves are concerned, although I have preferred some of Crawford's texts and translations over those found in the *Materials*. Putting these provisions here does, however, raise interesting questions about what those provisions that are left in Table VIII have in common. We'll go through almost all the provisions that are in our text of Table VIII, pointing out some of the things that need explaining. So first, what do they say?

2. VIII.2 = Crawford I.13.[1] <Composition, *talio*>

   IF HE HAS MAIMED A PART (OF THE BODY) AND DOES NOT COME TO AGREEMENT WITH HIM, LET THERE BE *TALIO*.

   Talio, English 'talion', is retribution in kind: 'An eye for an eye, and a tooth for a tooth', a phrase drawn from Leviticus 24:19–21.

3. VIII.3 = Crawford I.14[2]

   IF HE HAS BROKEN A BONE OF A FREE MAN, 300, IF OF A SLAVE, 150 (ASSES) ARE TO BE THE PENALTY.

   Our source for this provision, and the following one is:

   Paul, De iniuriis in Collatio: One kind of action for *iniuria* is founded on a *lex*. . . . The kind founded on a *lex* is based on the XII Tables: "whoever does *iniuria* to another, let him undergo a penalty of 25 sesterces." This law is general. There were also special ones like this: "If he breaks a free man's bone with his hand or club, let him undergo a penalty of 300 sesterces, [if] of a slave 150 sesterces."

4. VIII.4=Crawford I.15[3]

   IF HE DOES *INIURIA* TO ANOTHER, LET TWENTY-FIVE BE THE PENALTY.

   In addition to our source for this provision in Paul, we have the following report in Aulus Gellius from Labeo's work on the XII Tables:

   L. Veratius was an egregious nuisance and a frightful fool besides. He enjoyed slapping free men in the mouth. A slave followed him carrying a purse full of asses, so that whenever he slapped someone, he immediately ordered that twenty-five asses be counted out according to the XII Tables. On account of this, (Labeo) says, the praetors thought that this law was obsolete and to be abandoned, and they made an edict that they would give *recuperatores* for estimating *iniuria*.

[1] =Crawford I.13.

[2] =Crawford I.14.

[3] =Crawford I.15.

This is, of course, a classic illustration of the proposition that fixed penalties won't work as intended if the value of money in which they are expressed changes.

5. VIII.5, combined in Crawford with I.13[4]

6. VIII.11=Crawford I.16[5] another *iniuria*, also 25 asses: *Pliny nat. hist*. 17.1.7: it was provided in the XII Tables that anyone who wrongfully (*iniuria*) cut down someone else's (trees), would pay 25 of bronze for each.

7. VIII.12–16.[6] Let's now turn to theft (*furtum*, in Latin). As we have already seen, the later law had four categories: manifest theft, *furtum oblatum*, *furtum conceptum*, and non-manifest theft. *Furtum oblatum* was passing off stolen goods to another with the intent that they be found in the other's possession. *Furtum conceptum* was an action for theft where the goods had been discovered after search in someone's house. The penalty for manifest theft was fourfold the value of the goods, for *oblatum* and *conceptum* three-fold the value of the goods, and non-manifest theft two-fold the value of the goods. In addition, a *condictio* was available for recovery of the goods themselves. These categories are certainly old. Gaius' *Institutes* tells us that they go back to the XII Tables (GI.3.189–191). There are those who have doubted that this was the case. With one exception, Gaius' *Institutes* does not give us the words of the laws, and only fragments of those words survive in other authors.

   At the time of the XII Tables, Gaius tells us, the penalty for manifest theft was capital. He goes on to explain, however, that he does not mean 'capital' as we normally mean it. What he means is loss of *caput*, that is to say, loss of status. The free man was scourged and assigned to the victim of theft either as a slave or as a judgment debtor. It was debated by the early lawyers, G. tells us, which it was. A slave, who had no *caput*, was simply scourged and put to death. He also tells us that the penalties for *oblatum*, *conceptum*, and non-manifest theft were as they were in his day: three-fold, three-fold, and two-fold.

   There are many who doubt that Gaius got this quite right. Not the least of the difficulties is figuring out what the relationship between *oblatum* and *conceptum* might be. This is even a problem in the classical law, if we start thinking about who might be suing whom in these situations. It is not made any clearer by the fact that Gaius, having said that the penalty for *furtum conceptum* was three-fold as it was in his day (GI.4.191), goes on to say (GI.4.194): "the statute [and the only statute to which he could be referring is the XII) enacts that in such case [a search *lance et licio*, of which more in a moment] there is manifest theft." He says this not only once but twice. Previously, he had said right after he gives the penalties for *conceptum* and *oblatum* (GI.4.192): "An action for preventing search (*prohibiti furti*) for fourfold has been introduced by the praetor's Edict. The law of the Twelve Tables provides no penalty for this, but merely ordains that one wishing to search must do so naked, girt with a *licium* and holding a platter; if he finds anything, the law says it is to be manifest theft."

   That the XII contained the phrase *lance et licio* seems reasonably clear. *Lance* pretty clearly means 'with a platter' from *lanx*, the standard Latin word for a platter. *Licio* is much harder to figure out. The word did not survive into classical Latin with any meaning that makes much

[4] =Crawford I.13; discussed in his Intro. sec. 9 (7).

[5] =Crawford I.16.

[6] =Crawford I.17–21.

sense here, but the grammarians thought that it referred to a loincloth, colloquially we might call it a jock strap or a thong, and that seems likely to be right.[7] The searcher conducted his search with a platter and a loincloth and nothing else.

Gaius has some fun with this fact for the benefit of his first-year law students: "The whole thing is ridiculous; for one who will not let you search with your clothes on is not going to let you do so with them off, especially when, if you search and find in this manner, he is brought under a heavier penalty [GI.4.193]."

Those who study ancient law comparatively have found parallels in a number of legal systems, including a number of Greek ones. This is a ritualized search for stolen goods. The costume, or rather the lack of it, and the platter may indicate that the searcher is putting himself in the position of a suppliant, and the homeowner could not refuse him entry. The sanction, if one was ever necessary, was probably like that attached to tab. 21: *sacer esto*, 'let him be accursed', which we might imagine is somewhat equivalent to excommunication or outlawry.

The suggestions about how all of this related to the overall concepts of *furtum conceptum* and *furtum oblatum* are many and ingenious.[8] Unfortunately, none of them is at all certain. Let us move on to see if we can at least tie down the basics without getting into the question how the intermediate categories might have worked.

8. VIII.12=Crawford I.17 IF HE COMMIT THEFT BY NIGHT (AND) HE KILLED HIM, HE IS TO BE LAWFULLY KILLED.

9. VIII.13=Crawford I.18 IF (HE COMMIT THEFT) BY DAY (AND) HE DEFENDED HIMSELF WITH A WEAPON, . . . AND HE IS TO CALL OUT.

That these words occurred in the XII is attested in many sources with variants depending on how much modernization of the language the author has done and how badly the scribes mucked it up. The distinction between theft at night and theft during the day is found in many legal systems, including our own. That the victim may kill the thief by night seems clear. That he may kill the thief by day if the thief defends himself with a weapon is not stated, but seems likely. If it is by day, however, the victim is to call out. A parallel to the hue and cry of the common law also seems likely. There is nothing in these provisions that suggests a distinction between manifest and non-manifest theft, nor is there anything about what is to happen if the thief is caught alive.

10. VIII.14=Crawford I.19 <<<IF THE THEFT IS MANIFEST. UNLESS HE SETTLES, HE (THE MAGISTRATE) IS TO FLOG (HIM)>>> AND HE IS TO HAND (HIM) OVER. <<<IF (HE IS) A SLAVE, HE IS TO FLOG (HIM) AND HE IS TO HURL (HIM) FROM THE ROCK. IF HE IS BELOW PUBERTY, HE IS TO FLOG (HIM) AND HE (THE THIEF) IS TO REPAIR THE DAMAGE.>>>

The only words that Crawford has found that he believes may be ascribed to the XII are 'and he is to hand him over'. The words in triple diamond brackets are his reconstruction on the basis of paraphrases of the contents. Although 'and he is to hand him over' does not say to whom, it can be read in conjunction with Gaius to mean that he is to hand him over to the victim of the theft, leading to the question that Gaius raises whether the thief so handed over

[7] Crawford does not think so, 2:617, and hence he doubts that the search was conducted nude.

[8] Zulueta, Commentary 201-203.

became a slave or whether he was in *mancipio*. Arguing for the latter possibility is that if he became a slave, it would be the only instance that we know of from this period and for a long time thereafter when a free Roman could become a slave at Rome. The provisions about judgment debtors have them sold 'across the Tiber' (tab. 3.7), i.e., outside of Rome.

11. VIII.15=Crawford I.20 (IF) WITH *LANX* AND *LICIUM* <<<HE SHALL HAVE SOUGHT, AND IF HE SHALL HAVE FOUND, THE THEFT IS TO BE MANIFEST.>>>

This is, of course, a reconstruction of what was in the XII said about searches. Crawford has reconstructed everything except *lance et licio*, the presence of which in the XII is attested by many sources. He solves the problem of the conflict in Gaius' text by assuming that there was nothing that used the terms *conceptum* or *oblatum*, and that there was no mention anyplace of a three-fold penalty.

12. VIII.16=Crawford I.21 . . . IF HE ACCUSES OF THEFT WHICH SHALL BE NOT MANIFEST, <<<DOUBLE IS TO BE THE PENALTY.>>>

There are too many sources that attest to the part before we get to the part that Crawford reconstructs for it not to be likely that some such words were in the XII. It's a bit unclear why Crawford puts an ellipsis before the beginning of what he gives here. Granted the generally cryptic language of the XII, it may not be necessary. We can be less sure about the double penalty. Multiplication of penalties became very common in later law. They are not nearly so common in the XII, but there are enough of them that we should not suspect this provision just on that ground.

So now let's go to what Crawford leaves in Table VIII.

13. VIII.1[9] [Witchcraft and poetry]

1a. WHOEVER SINGS AN EVIL SONG

There are a number of varying sources of this provision, so many that Crawford suggests that the words OR SINGS PUBLICLY OR COMPOSES A SONG may also have been in the provision. It is generally thought that we are not dealing here with just any song or poem, but with a magical one, and that the magic is black magic.

1b. *Cicero quoted in Aug. City of God*: Our XII Tables, although they punish very few things capitally, considered that this thing should be so punished in this way: if anyone cast a spell or concocted a song which did *infamia* or disgrace to another.

Iniuria, as we have seen, in later law was a broad delict that dealt with any kind of intentional injury, physical or verbal, to another person. The passage from Cicero just quoted seems to suggest that XII Tables contained a provision about verbal abuse, the ancestor of the later law on slander and defamation, which was part of the delict of *iniuria*. Capital punishment for

[9] =Crawford VIII.1; adds VIII.25 from Gaius on XII bk. 4 (D.50.16.236pr, Watson): "Someone who talks of 'drug' (*venenum*) must add whether it is harmful or beneficial; for medicaments are also drugs since under that heading everything is contained which when applied to something changes the nature of that to which it is applied. Given that that which we call drug is called by the Greeks *pharmakon*, among them also medicaments as well as harmful drugs are included in this category; therefore, the distinction arises by the addition of another term. Their greatest poet Homer informs us of this; for he says: 'Drugs mixed together, many beneficial and many harmful.'" It's part of an elaborate argument that *incantassit* and *occentassit* both occurred in VIII.1 and that they both refer to witchcraft. The argument is further that *iniuria* in the XII did not include defamation.

verbal abuse, even if it is poetical, seems pretty extreme. Capital punishment for witchcraft does not seem extreme if you believe in witchcraft, and tab. 8.8 seems to be dealing with witchcraft regarding the crops. It is not specifically said that there that the offense is capital, but the ones that follow (taking someone's crops or deliberately burning someone's corn rick) were.

That what is involved here was thought of as something different from *iniuria* seems more likely if we, with Crawford, move the basic provisions concerning *iniuria* to tab. 1.

14. VIII.6=Crawford VIII.2[10] <Liability for animals and *noxae deditio*

Ulpian D.9.1.1pr: If a four-footed animal is said to have done *pauperies*, an action according to the XII Tables comes down to us. That law prescribed either that thing which had done the damage be given . . . or that the value of the harm be offered.

Pauperies is very strange word in this context. The normal meaning of the word is 'poverty', and it is an alternative for the more usual *paupertas*. Here it means the liability of an animal for the damage that the animal has caused. The notion that the animal should be liable for anything seems pretty strange to us, and it seems to have made little sense to the classical jurists either. Perhaps *pauperies* lability was preserved because it had the effect of limiting the liability of the owner of the animal to the value of the animal.

Compare XII.2a, which clearly describes an institution known as *noxae deditio*:

15. XII.2a=Crawford XII.2

IF A SLAVE COMMITS THEFT OR CAUSES DAMAGE (*noxiamve noxit*) HE IS TO BE GIVEN FOR THE DAMAGE (*noxiae*).

The position of this text in the supplementary tables is pretty solid, because Gaius' treatise on the XII discusses it in book 6 (D.50.16.238.3), where he tells us that *noxia* in the XII includes all kinds of delicts. The source of the language of the table is D.9.4.2.1, Ulpian quoting Julian, from which we may also derive the notion that *noxia* in this context means damage to property. Some help may derived from a passage in GI, though we need to be cautious about it, because Gaius is clearly influenced by what noxal actions later became:

Gaius 4.75–6: Because of the evil-doing of sons in power and of slaves . . . noxal actions were invented, so that the father or owner may either bear the value of the amount at stake or give as *noxa*. . . . Noxal actions are established by statutes or by the edict of the praetor: by statutes such as the law of the XII Tables for theft.

16. VIII.7=Crawford VIII.3

The base text for this is: *Ulpian* (*bk. 41 ad Sabinum*) D. 19.5.14.3: If an acorn from your tree falls on my land, and I send in the cattle to feed off it . . . neither an action on the law of the XII Tables concerning the pasturing of cattle, because they are not pasturing on your land, nor one *de pauperie* . . . can be brought. From this (and other refs) Crawford reconstructs: GLANDE IN ALIENO PASTUM NE INMITTITO ("He is not to send to pasture on fruit on another's land."). Syntax complicated; relevance to tab. 8 vs. tab.7.10 unclear.

The next three provisions deal with religion and the crops:

[10] =Crawford VIII.2

17. VIII.8=Crawford VIII.4

8a. WHOEVER HAS BEWITCHED THE CROP . . . b. . . . <?OR WHOEVER> HAS DRAWN AWAY BY MAGIC ANOTHER'S HARVEST

The reconstruction of the precise text of the tab. 8.8 is somewhat problematic; it is clear, however, that we are dealing with black magic with regard to crops. The sanction is not given in the texts that we have, but comparison with tab. 8.1 and what is immediately below would suggest that it was capital.

18. VIII.9=Crawford VIII.5

9. *Pliny Nat. Hist. 18.13.12*: In the XII tables it was indeed a capital offense for anyone above the age of puberty to pasture on at night or cut the crop obtained by the plough, and they had him hanged and killed for Ceres . . . Someone below the age of puberty they had whipped at the discretion of the praetor and adjudged [to pay] either the harm or double.

Ceres was the Roman goddess of fields and harvest. Pliny is not a particularly reliable source for legal details, and in this case, he is the only source that we have. Crawford reconstructs the provision in such a way that either the pasturing or the harvesting had to take place at night in order for the capital sanction to apply. The *impubes* was to be whipped and settle for double the penalty.

19. VIII.10=Crawford VIII.6

10. *Gaius book 4 on the XII Tables* (*D.47.9.9*): Anyone who burns a building or a corn rick placed next to a house is ordered bound, beaten, and killed by fire, if he did it knowingly and with forethought; if, however, by accident, that is negligently, he is ordered to make good the harm or if he is less fitting, he is punished more lightly.

That this provision was in table 7 or 8 is confirmed by its treatment in book 4 of Gaius' treatise on the XII. Although there are those that have their doubts, Crawford accepts the language up to the word 'fire' as being in the XII. Crawford also accepts that the phrase 'by accident' was in the table. 'Knowingly and with forethought' and 'negligently' Crawford, and almost everyone else, thinks were added by Gaius to explain the law as he understood it.

Burning a corn rick was serious business. It likely contained what the family needed to survive during the winter when crops could not be raised.

The passages that follow VIII.10 include in our version, the provisions on theft that we have already considered and some isolated provisions that are of some interest though quite problematic. Let us skip to a couple of provisions that we have looked at before in order to set up one that we have not looked at before.

20. VIII.21. IF A PATRON CHEATS HIS CLIENT, LET HIM BE ACCURSED.

Although it has been reconstructed from a fairly late source, there is substantial agreement about the Latin of this text. Crawford is more qualified than I, and others, have been about the translation: "If a patron has done harm to his client, let him be *sacer*." The difference in the description of the offense depends on how we translate the Latin *fraus*, which is our word 'fraud', and which usually captures the meaning if we are not too technical about fraud. For the significance of *sacer*, which is translated above as 'accursed', I can do no better than what

Crawford says in his commentary: "Someone who is *sacer* is too sinister and polluted to keep in the world."

21. VIII.22. 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).

Once more, there is little disagreement as to what the Latin says. Crawford offers the translation: "Whoever shall have allowed himself to bear witness or shall have been balance-holder, unless he stand by (his} evidence, he is to be unacceptable and unable to bear witness." I am inclined to think that Crawford has caught the import of *improbus* and *intestabilis*. I'm less sure that he has got right what I translated as "does not speak testimony" (which is what it literally says). I don't think that we are dealing here with perjury; that is the subject of the next fragment. I think we are dealing here with someone who, having participated in a mancipation, now refuses to testify to what he saw.

22. VIII.23. We do not have the words of this provision. The jurist Sextus Caelius in Aulus Gellius' imaginary dialogue about the XII says at one point: (*Gellius* 20.1.53:)) "Or do you suppose, Favorinus, that if the penalty provided by the *Twelve Tables* for false witness had not become obsolete, and if now, as formerly, one who was convicted of giving false witness was hurled from the Tarpeian Rock, that we should see so many guilty of lying on the witness stand?"

On the basis of this Crawford reconstructs a possible text: "IF HE SHALL HAVE SPOKEN FALSE TESTIMONY, LET HIM BE CAST FROM THE ROCK."

23. VIII.24.[11] IF THE WEAPON FLIES FROM THE HAND MORE THAN HE THREW IT, A RAM IS SUBSTITUTED.

The original text is suggested in many places[12] and a literal translation is offered here. There seems little doubt that it is referring to an accidental killing, and that the substitution of the ram is a sacrifice, the ram being substituted for the killing of the person who cast the javelin.

What ties VIII.21 through VIII.24 together is that they all involve what seem to be either religious obligations or religious sanctions. This is most obvious in the case of 21 and 24. In the former the sanction is clearly religious, "let him be sacer"; in the latter it is the substitution of the sacrifice of a ram for what we might imagine was the normal capital, and not necessarily religious, sanction. The connection of 22 and 23 is less obvious, but we might imagine that oaths are involved in both cases, the refusal to take one in the former, and perjury in the latter.

It is of some interest that the only two places in the XII where diminished liability for accidental as opposed to intentional conduct is specifically mentioned, law 24 here and law 10 involving the burning of the hayrick, both involve potential religion sanctions, the sacrifice to an unnamed god in law 24, and the less certain but possible connection with Ceres in law 10.

Does this mean that all the other offenses mentioned in this lecture were absolute liability offenses, and particularly those involving physical harm to another person that were later

[11] =Crawford VIII.13.

[12] E.g., Cicero in three different places.

called *iniuria*? Certainty is not possible. What we can say is that laws 10 and 24 show that the makers of the XII were capable of distinguishing intentional and unintentional conduct. For the rest we have to fall back on Oliver Wendell Holmes' aphorism: "Even a dog distinguishes between being stumbled over and being kicked**.**"

A FRAMEWORK

1. Let us try to create a framework for trying to understand Table VIII:
2. If we look to the comparative history of the Indo-European peoples and to a lesser extent the Semitic, certain broad patterns appear at the very beginning of their history:
    i. the basic unit of society is the patriarchal, patrilineal, patrilocal family with some hints of joint or extended family.
    ii. these families are organized into patriclans. I won't get into the debates about what is properly called a clan. Let me just mention the Irish *thuoch*, the Scottish clan, the Greek *phyle*, the Germanic *Sippe*, and the Roman *gens*.
    iii. the authority that holds the patriclans together is weak.

    In such circumstances a wrong to an individual is regarded as a wrong to the group. To right the wrong the group will have recourse to revenge, the blood feud.

    But there are, at the beginning of legal history, already limits on revenge-taking. The techniques of limitation include:

    i. the notion of talion, limiting the amount of harm that can be inflicted on the wrongdoer to the harm that he has done
    ii. the notion of *wergeld*, or less precisely, but avoiding the Germanic context, fixed compensation payments
    iii. the notion of single combat
    iv. the notion of excluding the individual from the group — outlawry if you will

    Now these ideas do not arise legislatively. They arise by a groping process which involves varying elements:

    i. appeal to negotiation
    ii. threats of public force
    iii. ritual
    iv. appeal to religion.

    At some point an effort will by made by the central authority to clarify the situation. The XII, the laws of Solon, the Brehon laws, the laws of Aethelberht. The way the process has worked up until that point and what is happening when that point is reached will have a great deal to do with the way the system is fixed.
3. Now there is some evidence for all of the elements I mentioned above in the XII and the material surrounding them. Limitation techniques:
    i. talion: "If he has maimed a part (of the body), let there be *talio*" (VIII.2)

ii. fixed compensation payment: “If he has broken a free man’s bone, 300 asses, if of a slave 150.” (VIII.3)

iii. single combat. This is less certain. It is sometimes thought to lie behind *in manum conserere* in tab. 6.6a or even the praetor’s ‘unhand him both of you’ in the legis actio sacramento in rem. We certainly see in the combat of the Horatii with the Alban Curatii (p.4.90)

iv. excluding the individual: “If a patron cheats his client, let him be *sacer*.” (VIII.21).

Process elements:

i. negotiation: again VIII.2 with its qualification ‘unless he comes to agreement with him’

ii. threats of public force, for example, VIII.23 casting the perjurer from the Tarpeian rock

iii. ritual, for example, the *sacramentum* or searching *lance et licio*

iv. appeals to religion VIII.24a the sacrifice of the ram substituted in an accidental killing

4. The question is how had the Romans put them all together. I have earlier argued the importance of religion as a key element in the social cement of Rome of the archaic period. What made Rome Rome rather than a collection of villages was a common cultic observance. The Etruscan kings may well have founded the city, and they took over the cultic function and added some things like Aeneas, an Etruscan hero. The expulsion of the kings created a crisis in the legal system. A notion of separation of powers was devised. *Ius* and *fas* originally combined tended to divided. *Fas* is the word for what is religiously right; the word is derived from *fari* which means to speak, as in an oracle or the results of an augury. The fact, however, that sacral law is still called *ius sacrum* or *ius pontificium* shows that the division was by no means clean. Perhaps the most important development was in procedure. Human means must be found for the taking of the auspices; the *fas* element in what we imagined was the original procedure is now missing. The *ius* element, the oath element, becomes all-important.

   Gradually certain things become generalized. The normal outcomes of the procedure become rules. Maimed limbs are still subject to the *talio* though the case may be compromised. Broken bones are subject to a fixed tariff, but other kinds of situations remain to be worked out in the process. The community was reluctant to give the magistrate too much power, so the penalty is fixed at the relatively small 25 asses, but the nature of the offense is not. If this is right, then the confining VIII.4 to intentional personal injuries is not right. That the l. Aquilia speaks of *damnum iniuria datum*,’harm created by *iniuria*’, and the classical jurists knew that it repealed a number of provisions of the XII (and interpretations of it, we might add). Whether it went beyond delictual law is a more difficult question. Our knowledge of the law of non-delictual obligations temp XII is weak. We do know that substantial developments had already been made in ideas about personal status and property, and perhaps it is best to leave *iniuria* as an action on the case.

CONSIDERING THE XII AS A WHOLE

1. Let me begin with a very long quotation from Sir Henry Maine. I do this because most accounts of Maine give you only the aphorism at the end, but there is quite a bit more to it than that.

   "The movement of progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the Family, as the unit of which civil laws take account. . . . Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals. In Western Europe the progress achieved in this direction has been considerable. Thus the status of the Slave has disappeared — it has been superseded by the contractual relation of the servant to his master. . . . The apparent exceptions are exceptions of that stamp which illustrate the rule. The child before years of discretion, the orphan under guardianship, the adjudged lunatic, have all their capacities and incapacities regulated by the Law of Persons. But why? The reason is . . . that the classes of persons just mentioned are subject to extrinsic control on the single ground that they do not possess the faculty of forming a judgment on their own interests; in other words, that they are wanting in the first essential of an engagement by Contract.

   "All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*."[13]

   a. In order to understand what Maine is saying here it helps to go to another of his aphorisms, which appears later in the book: "Ancient Law . . . knows next to nothing of Individuals. It is concerned not with Individuals, but with Families, not with single human beings, but groups."[14] There may be some truth to this. The problem with it is that the aphorism tends to equate the family, which Maine generally takes to mean the co-resident household, with the group. But as we have already seen that was not the only relevant group at the time of the XII tables. There was also the gens, and there was a complicated relationship between the gens and institution of patronage.

   b. Perhaps the most striking illustration of the move from status to contract at the time of the XII is in the relationship of patron to client. If we have it even half right, a former law that elaborately described a mutual set of rights and duties has ended by the time of the XII with, insofar as we can tell, a single negative duty imposed on the patron and none at all on the client. We also know that one version of the relationship, that of freedman and patron, was defined, at least in later law, by contract. Other examples that probably exist

[13] Henry Maine, *Ancient Law* 163–65 (5th ed. 1888).

[14] P. 229 of the 1861 ed.

at the time of the XII are the choice between *manus* and non-*manus* marriage, the consensual nature of divorce, the possibility of a peculium, at least for slaves (and if for slaves, it must have been for sons), and the possibility of making a tetament.

c. Maine's "movement from status to contract" is not in fashion today; it has even been argued that it is necessarily a normative rather than a descriptive statement. I have some trouble with this argument. Take patron and client at the time of the XII. If our guesses are right, there had been a movement in the law from imposing on the parties to the relationship rights and duties that were dependent on the fact of the relationship to imposing on the parties only those rights and duties that they had agreed to at the time they entered into the relationship. Now I can see an argument that this the seeming freedom that the law gives to parties to contract is a sham, that the realities of power have been unaffected by the change in the law, or even that the position of the client has been made worse. What I have difficulty seeing is that the statement that there was a movement here from status to contract is not a valid descriptive statement of what happened.

d. Despite this fact, I think the critics have something. In the first place, they are uncomfortable – as I think we all should be – with Maine's notion of 'progressive societies'. But even if we take out his rather obvious normative biases, the critics point to a basic flaw in what Maine seems to be saying: a move from status to contract is not the same thing as a move to equalize the position of persons before the law, and a move that equalizes the position of persons before the law does not necessarily equalize the position of persons in fact.

2. My last remarks on the XII are addressed to the problem of the uniqueness of the XII.

a. Of the three most famous ancient law codes, the first one begins: "When the exalted (god) Anum . . . and the (god) Illil . . . allotted the divine lordship of the multitude of the people unto (the god) Marduk . . . , called Babylon by its exalted name and so made it pre-eminent in the four quarters of the world, and established for him an everlasting kingdom whose foundations are firmly laid in heaven and earth, at that time Anum and Illil for the prosperity of the people called me by name Hammurabi, the reverent God-fearing prince, to make justice to appear in the land, to destroy the evil and the wicked that the strong might not oppress the weak, to rise indeed like (the god) Shamash over the dark-haired folk to give light to the land."

The second one begins: "I am the Lord thy God, who delivered thee out of the land of Egypt, out of the house of bondage. Thou shalt not have strange gods before me. Thou shalt not make to thyself a graven thing, nor the likeness of any thing in the heavens above, or the earth beneath, or the waters below the earth. Thou shalt not adore them, nor serve them. For I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children, unto the third and fourth generation of them that hate me: And shewing mercy unto thousands to them that love me, and keep my commandments."[15]

And the third one begins: "If someone calls someone else to law, let him go."

[15] The trans. is mixed Douay-Rheims, KJV, and CD's memory.

b. Is the difference then between the XII and the rest of the ancient codes the religious base? For I think it is relatively easy to see why those with a religious base would develop differently. In both the Decalogue with its apodictic moral phrases and the Mosaic law generally with its mixture of religious and civil law and also the Code of Hammurabi, which is a marvelous piece of craftsmanship but which depends on the divine sanction of the legislator, in both we can see policy at work, but in both the method of promulgation masks the policy and blocks the means to certain kinds of rational development. Ultimately the Jews were to develop an extraordinary jurisprudence but it is dependent on the text, it is deeply religious, and it is deductive; it does not, by and large, intuit or question first principles. The contribution of the Romans can be defined by the opposite of these: they were not particularly dependent on text, although they had a deeply conservative sense about continuity; they are not based on religious sanctions, and they tend to be inductive, to reason from cases back to principles. You can like this or not as you wish — I am not trying to make a normative statement — but it is these characteristics that distinguish the Romans from others, and it was these characteristics that the west picked up.

c. Now it has been suggested by no less an authority than Franz Wieacker that however different the XII may be from the religious laws of the ANE, they are really no different from the Greek city laws of roughly the same period. What ultimately made Rome different was the jurists. Take the XII as a starting point, secular autonomia, even a tendency to isonomia (formal equality before the law) (another marked contrast to the ANE) and you can still end up with democracy run amok, as happened in Athens, or oligarchy, i.e. with no rule of law. The jurists and the empire prevented this.

d. The only way I know of to test this proposition is to look at the most complete Greek code that we have. It's the Gortyn code of roughly the same period as the XII, and there is a remarkable similarity in method, though not in substantive provisions. We haven't got time to analyze it, but it is in your materials and you might want to take a look at it. In order to allow you to do so, let me tell you enough about it so that you can see that there's something to Wieacker's argument. If somebody wants to write a paper about the Gortyn Code, let me know, because there are better translations than the one that is in the materials. If Gortyn fascinates you, you really should consider taking Adriaan Lanni's course in Ancient Law in the spring.

3. Gortyn – Basics

a. Gortyn was city-state on the island of Crete. What you are looking at is called the 'Great Code' by far the largest of about 70 legal inscriptions from Gortyn from the Hellenic period, roughly the 7th through the 4th centuries BC. The inscription itself has been dated to c. 450 BC, almost exactly contemporary with the XII Tables, but it clearly contains much older elements.

b. It is inscribed on 12 columns with writing going from left to right and then right to left with no division between the words, which makes it a bear to read, particularly because it is written in the Doric dialect, a dialect of classical Greek of which far less survives than survives of Attic, the language spoken and written in Athens.

c. We have nearly the entire inscription. It begins with *theoi,* 'the gods', in large letters spread out over first column, which is a traditional way of beginning a decree. The last column is only partially filled, so we seem to have the end.

d. Starting with Section 15 (the last column and a half), it's written in a different hand. Many of these provisions expand on topics treated earlier in the text, so these seem to have been later additions.

e. Unlike the XII tables, we don't know anything about the context of in which it was written down.

f. We do know something about Gortynian society from Aristotle's *Politics* and other later writers. It was an oligarchy, ruled by aristocratic magistrates called *kosmoi*, a council of elders probably made up of former magistrates, and an assembly of citizens that had little real power.[16]

g. <skip>Gortyn may have originally been a colony of Sparta, and there are some elements that seem to reflect Spartan notions of community — e.g., eating clubs where male citizens eat together and to which they all contributed food, and a mass wedding ceremony for all boys when they reached a certain age.

4. Gortyn – Organization, Purpose

a. Most of ANE codes – the Decalogue is an exception – begin with a provision about homicide. Gortyn does not. It begins with a provision about disputes about status – slave vs. free.

b. It quickly, however, turns into a concern quite similar to the beginning of tab. 1 of the XII: There is to be no self-help before trial. Although this provision only applies to self-help in disputes over status, there may be implied a broader statement at the beginning of the code that one should forego self-help in favor of legal redress. First you get the general rule (no one is to be seized before trial) and the penalty for violation; then a space in the inscription, marking, it would seem, the end of the provision.

c. Like the ANE codes, however, you then get some related specifics: what to do if there are no witnesses, or the witnesses disagree, or if the loser in a dispute refuses to release the seized person, then a series of individual subsections which seem to reflect results in unusual individual cases (eg if the seized person dies during trial, or if one of the parties is a magistrate). But there some evidence that this is not just academic spinning off of variations as in the ANE, because the individual provisions are not integrated and seem to reflect separate enactments or separate decisions that are then listed together in the Code.

5. That will have to suffice about Gortyn for purposes of this lecture. There is, indeed, something to Wieacker's point. My own view would lay a heavier emphasis on things we can already see in the XII:

a. the unique position of the individual — partially a fraud (as in the case of the debtor), partially a mask (as in the case of property-holding within the family) — but in both cases leading to a very broad scope for private initiative.

[16] (mostly ratification)

b. A tendency toward organic growth, particularly noticeable in the use of the mancipation ceremony.

c. The sense for the general case. What you find in Gortyn and in the ANE is a seemingly endless spinning out of variants. Yes, Gortyn does seem to have a better sense for the general than do some of the ANE codes, but the overall impression is one of a mass of detail not tied together with much in the way of general principles.

The XII is not a scheme of autonomous, rational private law yet, but it's a particularly good legacy from which to build such a scheme. It took the jurists to do it, and it is to them that we will turn for the rest of the course.