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The Authenticity of the Twelve Tables

THE recent attack which has been made on the antiquity or authenticity of the Twelve Tables is the issue of two tendencies of investigation. The one has been directed by a belief in the insecurity of the evidence for early Roman history as furnished by the extant records, even by the *Fasti*; the other springs from a conviction, furnished by the comparative history of institutions, that the law of Rome ought at an early stage of its history to reproduce the primitiveness of form and conception which is revealed by the institutions of other infant civilisations, but of which little trace is discernible in her own. The first type of criticism is represented by the work of Ettore Pais,¹ the second by that of Edouard Lambert;² but the two types are far from being exclusive of one another. There are many points at which they meet, the chief and most vital of these being a profound disbelief in the view taken by the Romans of the antiquity of their own state. It is, in fact, the belief in the modernity, and the consequent fancifulness, of Roman historical literature as a whole, the unknown as well as the known, that is necessarily assumed by a critic who, like Pais, credits the annalists of Rome with the power not merely of supplying the gaps left by the ignorance of detail, but of creating the

¹ Pais, *Storia di Roma*, 1898, 1899.

² Lambert, *La Question de l'Authenticité des XII Tables et les Annales Maximi*, 1902; *L'Histoire Traditionnelle des XII Tables et les Critères d'Inauthenticité des Traditions en Usage dans l'École de Mommsen*, 1903; *La Fonction du Droit Civil Comparé* (1906), pp. 390-718.

material events which fill centuries of her imaginary life; and the critic is generally able to point to the precise circumstance of suspicion which leads to his belief in the special fabrication, and sometimes to the historical fact or institution which suggested the invention. The favourite hypothesis by which Pais exhibits the existence of the real void and its imaginary supplement is that of the duplication, or it may be triplication, of personalities and events.

This method, when applied to a history of the Twelve Tables, results in the transference of the decemviral legislation to the close of the fourth century (312-304) B.C. The justification for the transference is the identification of Appius Claudius the censor with Appius Claudius the decemvir, the publication of legal forms by the scribe Cn. Flavius being regarded as merely an alternative form of the decemviral tradition. For the external evidence for this view we have, besides the inconsistencies in the details which concern the composition and publication of the Tables, the cardinal fact that there was in tradition a real doubt about the difference between the work of Flavius and the work of the decemvirate, and that the learned of Cicero's day were puzzled by the resemblance between the two epochs of reform. The internal evidence reposes partly on a sense, which few can fail to feel, of the gradual growth of the legislation found in the Twelve Tables, a growth which, as the author says, is the result of the fusing of the rude national law with the more civilised dispositions of Greek culture, but mainly on the view that the provisions of the Tables presuppose conditions posterior to those of the middle of the fifth century. The first of these impressions can cause distrust only in the minds of those who disbelieve that Rome had had a long history before the traditional epoch of the decemviral legislation, and was touched by Greek influences at an early period of her career. The second we will reserve for a later examination, for it is as well to consider the indictment of the authenticity of the Tables as a whole.

Lambert differs from Pais in two important points. He holds that the anachronisms which the latter professes to have discovered are in many respects unreal, and he reproaches the historian with the excessive antiquity which he attributes to the collection known ultimately as that of the Twelve Tables. In giving a *résumé* of Lambert's own views I shall state them in the order in which they appear in his chief work dealing with this subject,³ although this may not prove the order best suited to a detailed examination of their validity.

The very fact of such early codification as that prefigured in the Twelve Tables is objected to; it is out of accordance with the tendencies usually observed in historical civilisations. We have to face the traditions of a dual publication of the civil code and a dual

³ *La Question de l'Authenticité des XII Tables et les Annales Maxim.*

publication of the calendar. A sane historical method demands that the evidence for such an event as the decemviral legislation should be examined with reference to the date at which each of the items of testimony was composed. When we examine the evidence for the publication of this code, we find that its actual publication is spoken of only for times anterior to the Gallic invasion. There is no tradition of its reconstitution after the burning of Rome by the Gauls.⁴ Even when we reach the zenith of the literary period of Rome there is still no mention of the code. It is not referred to by Plautus, Terence, Cato, or Lucilius. On the other hand, the literary productions of the end of the Republic and of the Principate teem with references to the decemviral legislation. The Twelve Tables first begin to dawn upon human knowledge in connexion with the name of their great interpreter, Sextus Aelius Paetus. It may be regarded as doubtful whether Paetus gave the ordinances this name or regarded the body of law on which he commented as the work of decemvirs; but there can be no doubt that the philologist Lucius Aelius Stilo knew it under the name that was soon to become familiar. Cassius Hemina and Sempronius Tuditanus were also acquainted with this name. We may therefore draw the tentative conclusion that the tradition appears at the soonest towards the beginning of the second century, but that already by the end of the same century it had gained universal acceptance.

The most effective method of exhibiting the unjustifiable character of the belief in the reality of the decemviral legislation is to contrast the acceptance universally accorded to it by the leaders of modern thought in the domain of Roman history with their almost universal rejection of the very similar compilation known as the *Leges Regiae*. But why this difference of treatment? The Royal Laws are attributed to a primitive Papirius, as the Twelve Tables to primitive decemvirs. Our knowledge of both systems rests on the same authorities—Livy, Dionysius, Pomponius. Yet eminent modern scholars believe that the author of the *Leges Regiae* as a code was one Granius Flaccus, a contemporary of Caesar. Why should not Paetus have occupied the same place in the decemviral myth? Why should not the first publisher and commentator of the Twelve Tables be in reality their compiler? The only marked difference between the two cases is that the legend of the pontiff Papirius is less perfect than that of the decemvirate, because it was more lately formed. But even the latter legend shows great imperfections in detail, and a list of inconsistencies in the accounts of the decemvirate given by our

⁴ The tradition of a reconstruction preserved by Livy (vi. 1, 10: 'In primis foedera ac leges—erant autem eas duodecim tabulae et quaedam regiae leges—conquiri . . . iusserunt') is disallowed by Lambert (p. 7), because he regards the unauthentic character of the *Leges Regiae* as proved.

authorities can easily be drawn up. If from matter we pass to style, we find that the phraseology of the Tables bears hardly any resemblance to that of extant Roman laws. Its style is not that habitual to the legislator, it is the style rather of the *traditionniste* and the prophet. And what are we to say about the Latinity of this fifth-century code? Its vocabulary is that of the age of Plautus, and there are hardly any of its inflexions which can be used to illustrate genuinely antique forms.

In the face of such damning evidence why have historians pinned their faith to the decemvirate? The reason is that the names of the decemvirs are mentioned in the *Fasti*. But the credit of the *Fasti* rests on that of their supposed source, the pontifical tablets known ultimately as the *Annales Maximi*. If an investigation of the character of this compilation revealed its intrinsic credibility, we might be forced to accept the existence of the decemvirate, and the existence of this body would seem to imply the reality of the code of which it is deemed the author. But what does investigation actually reveal? It shows that the pontifical annals formed a work more voluminous than Livy's, a work which professed to give information of mythical times, was tinged with Greek legend, and quoted the poet Hesiod. If the Twelve Tables rest on the decemvirate, the decemvirate on the *Fasti*, and the *Fasti* on the *Annales*, we can only say that this towering structure rests on a foundation which is rotten to the core. It is from such considerations that Lambert draws his conclusions, which may be summarised in three paragraphs of his own: 'The attribution of the redaction of the Twelve Tables to the decemvirs of 450 and 451 does not rest on more solid bases than the attribution of the *Leges Regiae* to Romulus and Numa.' 'The same presumptions which permit us to suspect that Granius Flaccus might have been the redactor of the compilation called *Ius Papirianum* seem to designate more sharply still Sextus Aelius Paetus as the author of these Roman *institutes coutumières* which have come down to us under the name of the Law of the Twelve Tables.' 'We are in presence of *brocards* or *maxims* of jurisprudence, certainly archaic but perhaps of unequal antiquity,* which have only been formed into a single compilation and attained a permanent written form towards the beginning of the second century.'

It will be convenient, in an examination of these views, to deal first with the somewhat adventitious elements of the *Leges Regiae* and the *Annales Maximi*. The reasoning connected with the first of these (or at least the form in which it is presented) is characteristic

* Lambert in *L'Histoire Traditionnelle*, p. 18, admits more fully than in his other works on the subject the possibility of preceding, but less extensive, juristic compilations, as lying at the basis of the Twelve Tables.

rather of the pleader than of the savant. It may be termed an *argumentum ad scholam*, and, like all arguments that strive to convince an individual or a school of inconsistency, is dependent for its force on the correctness of the position assumed by the individual or school for the conclusion admitted and used as a lever by its opponent. Yet, as there is some real resemblance between the histories of the sacred and secular codes of Rome, a consideration of the evidence on which the former rests is not inappropriate to the present subject. Some of the Royal Laws are cited (evidently from written sources) by Cicero;⁶ but Dionysius is the first to state the fact that they were compiled by the early pontiff Papirius.⁷ The *ius Papirianum* (in one case a *Lex Papiria*) is further mentioned by writers ranging from the second to the fifth century A.D.—Pomponius, Paulus, Macrobius, and Servius. Paulus mentions a certain Granius Flaccus, whom we have reason to regard as a contemporary of Caesar,⁸ as defining the word *pellex* in *libro de iure Papiriano*.⁹ From the circumstance that Papirius is first mentioned in authors later than Granius it has been inferred that this commentator was really the first redactor of this code of pontifical law.¹⁰ It is very questionable whether this assumption is justified by the facts. To Cicero and his contemporaries the code was a living thing, the laws of the kings, on the same level of reality as the laws of the decemvirs; the personality of the ancient redactor was a matter of no importance. On the other hand the personality was of importance to a Greek historian of the monarchy like Dionysius, or to later jurists to whom the compilation was an inert mass of *ius Papirianum*. When a work has become the prey of scholarship its author assumes as much importance as its contents, a process which we shall observe at work in the methods of reference to the Twelve Tables. The slight reference to Granius as the author of a book *De Iure Papiriano* does not necessarily imply that Granius arranged or rearranged this code, still less that he invented Papirius. The invention of a personality by an author is always a hazardous hypothesis, and it is rendered particularly hazardous in this case by the fact that Dionysius, who came to Rome perhaps during the lifetime of

⁶ *De Rep.* ii. 14, 26, v. 2, 8; *De Leg.* ii. 10, 23.

⁷ Dionys. iii. 26.

⁸ Censorinus (*De Die Nat.* iii. 2) cites Granius Flaccus 'in libro quem ad Caesarem de indigitamentis scriptum reliquit.'

⁹ Paulus in *Dig.* 50, 16, 144.

¹⁰ Mommsen was very cautious in his treatment of this subject. He did not attribute the creation of the code to Granius Flaccus, although he held that it was a private work of comparatively late date, and thought that justifiable doubts were aroused by the fact that the history of the religious edict breaks off after the burning of Rome by the Gauls, and suddenly reappears under Caesar (*Staat.* ii. 43). He perhaps overemphasised the view of its suppression after the Gallic conflagration. Livy (vi. 1) does not say that the *Leges Regiae* were suppressed, but only that 'quae . . . ad sacra pertinebant . . . suppressae.'

Granius,¹¹ accepts Papirius as an historical character of the early Republic. But, even if we suppose that Granius rearranged the laws and assigned them to their respective kings, the analogy of the attribution of the Twelve Tables to the decemvirs is rather that of the assignment of the Royal Laws to kings, or even to the pontifical college of the early Republic, than of their assignment to special monarchs. We may grant the possibility of the resemblance of the history of this compilation to that imagined by Lambert for the Twelve Tables in certain particulars. The ordinances may not be all of the same date, although none can be shown to have arisen in what is generally considered the historical epoch, and the compilation may have been subject to more than one redaction; but the genuinely antique character of the *Leges Regiæ* must remain an unquestioned fact. They reveal scarcely a thought that could have crept in in later times.¹² The view of marriage is the ancient view of the Roman hierarchy, not that of the civil law; the death penalty inflicted on a woman for drinking wine, the sacrifice to the infernal gods of the man who sells his wife, belong to a prehistoric age. That these pontifical ordinances should have remained unwritten for centuries is inconceivable: it is almost as incredible that they should have been unattached to the names of the kings at a very early date. What pontiff first saw to their redaction, whether his name was really Papirius, are questions of minor importance. In default of evidence to the contrary we must assume the truth of the view that was current in the time of Augustus. If we accept this view, the important fact revealed by these Royal Laws is the existence of a written compilation (if it cannot be called a code) anteriorly to the epoch of the decemvirs. The language of this compilation has of course passed through the crucible of scholars and scribes, and its original diplomatic tenor has been almost wholly lost.¹³

The *Annales Maximi*, to which we now turn, have a more intimate connexion with the history of the Twelve Tables, in so far as we are no longer in the region of analogy but of possible, although it must be admitted very doubtful, testimony. Their importance in this question is threefold: for, if they go back to the fifth century, first they exhibit the use of writing on a tolerably

¹¹ Dionysius (l. 7) states that he came to Italy at the close of the civil war in the middle of the 187th olympiad—that is, about 39 B.C.

¹² The mention of the largesse of *aeris coc* in the law about the *spoila optima* (Festus, p. 189) is the only probable 'modernisation' in this code. But the question of the antiquity of the *as* is a disputed one; see below, p. 18. There is nothing necessarily modern in the ordinance against the threefold sale of the son, for the *Leges Regiæ* do not connect it with adoption. Lambert (*L'Histoire Traditionnelle*, p. 20) objects to the references to the popular assemblies. Whether this be an anachronism or not, it is certainly not an obvious or provable one.

¹³ The imperative in '*Si nurus, sacra divis parentum estod*' (Festus, p. 230) shows the only antique form which the extant laws preserve.

extensive scale for official purposes, and thus render easier the acceptance of a written code of law; secondly, they must have mentioned both the decemvirate and the code; thirdly, they may be the source of the extant *Fasti*. If we accept the very probable conclusions of recent scholars, such as Seeck and Cichorius, the *Annales* had their origin in the annually exhibited *tabula pontificis maximi*, which was none other than the calendar;¹⁴ certain events, such as eclipses, prodigies, droughts, were entered under the dates at which they occurred, and the object of these entries was of a wholly religious or priestly character and closely connected with the pontifical ritual.¹⁵ The names of the eponymous magistrates of the year would almost certainly have appeared at the head of the table, and it seems that in later times the year of the city was given as well.¹⁶ With the course of time the entries became fuller; triumphs, expeditions, elections were mentioned; and it was such scattered notices, not a continuous priestly chronicle, that became the sole source of information for the earliest annalists. Even when an historical literature existed in Rome the annual publication of the tables was still continued, and it was not until the pontificate of P. Mucius Scaevola, consul in 183 B.C. and pontifex maximus probably from about 129 B.C.,¹⁷ that this task was finally surrendered.¹⁸ The cessation of the issue of the tables may be set between the years 129 and 114 B.C., the latter year being the latest to which the life of Scaevola is held to have been prolonged.¹⁹ The tables were ultimately to be found in a collected edition of eighty books,²⁰ and it was doubtless to this compilation that the name *Annales Maximi* was given, the lesser annals from which it was distinguished being those of the private historiographers.²¹ We are not told who was the author of this compilation, but it may have been effected under the supervision of Scaevola himself.

The two questions of most importance in connexion with these annals are, first, what was the period covered by this great work, and secondly, what was the type of its contents? They are questions of very different import for the history of the Twelve Tables. With respect to the first question, it has been held, in consequence of a statement of Cicero, that the earliest recorded eclipse was that of 5 June circa 850 A.U.C. (404 B.C.),²²

¹⁴ Seeck, *Die Kalendertafel der Pontifizes*, p. 62.

¹⁵ Cichorius in Pauly-Wissowa, *Real-Enc.* i. 2247 foll.

¹⁶ Dionys. i. 74. Cf. Cichorius, *Lc.*

¹⁷ The exact date of the death of his predecessor, Scipio Nasica, is not known. Nasica became pontifex maximus in 180, but died shortly afterwards in Asia.

¹⁸ Cic. *De Or.* ii. 12, 52.

¹⁹ Peter, *Hist. Rom. Reliq.* p. xviii.

²⁰ Serv. *In Aen.* i. 878.

²¹ Cichorius, *Lc.*

²² Cic. *De Rep.* i. 16, 25. See Seeck, *op. cit.* pp. 75, 119 foll. Cicero may here imply, although he does not state, that this was the first recorded eclipse. He says

that the extant *Annales* could only have extended a little beyond that period—a view which has been naturally brought into connexion with the Gallic conflagration, but can only be held if we believe that Cicero's statement that the information furnished by the annals covered the period *ab initio rerum Romanarum*²² refers not to the record extant in his day, but to the methods of the record as a whole, and also if we neglect (as it has been often held that we should) the statement by one of the Augustan historians that the interregnum after the death of Romulus was mentioned in some pontifical work.²⁴ It is clear that, if we adopt the view that the tables stopped short somewhere about the close of the fifth century, they may not have reached the period of the decemvirate, although there is a possibility of other epigraphic records, containing at least the names of magistrates, which may be the basis of the extant *Fasti*. But controversy as to the credibility of the *Annales* has chiefly gathered round two other points—the enormous size of the work and the extant quotations from its contents. It has been calculated that, if the *Annales* did not go much beyond the year 350 A.U.C., it treated only three to four years in a single book, whereas Livy treats five to six; if it went back to the beginning of the Republic, it treated four to five years per book, whereas Livy treats six to seven.²⁵ This diffuseness of treatment seems at first sight to imply the absorption of legendary elements, and such absorption seems to be indicated by such a citation from the *Annales* as that made by Gellius.²⁶ But one fact may be taken as certain, and that is that the compiler of the *Annales* did not actually fuse the dry contents of the pontifical *Tabulae* with legendary matter drawn from Hellenic or other sources. A work in which this was done would have been the leading history of Rome, which would have made its author famous,²⁷ which would have been freely drawn on by later historians, and which would have been lively and pleasing in contents if not in style. The facts, on the contrary, are that the compiler or compilers of the *Annales* remain unknown, that the only authors known to have had an independent knowledge of the work are Cicero, Atticus, and Verrius,²⁸ and that the jejune character of the early historiography is dwelt on by Cicero.²⁹ There seem to be but two alternative

that it was one on which the calculation of earlier eclipses was based. The numerals for the year mentioned in this passage are also not quite certain.

²² Cic. *De Or.* II. 12, 52.

²⁴ *Vita Tac.* I. 1.

²⁵ Cleborius, *l.c.*

²⁶ *iv.* 5, 5. Gellius here gives the story which explains the apothym 'Malum consilium consultori pessimum est.' For the discussion which has gathered round the question whether the use of *consultor* in this sense is really antique see Bücheler in *Rhein. Mus.*, N.F., xii. p. 2, Cleborius, *l.c.*, Lambert, p. 48 foll.

²⁷ Cleborius, *l.c.*

²⁸ *Ibid.*

²⁹ Even apart from the question whether *senatus* should not be read for *senectus* in Cic. *De Leg.* I. 2, 6, the *criticisms* of the contents or style of all the early historio-

hypotheses which can explain the difficulty. One rests on the view that Gellius had seen the work and cites correctly. In this case the mythical element was appended to, but was not taken up into, the work. In other words, Scaevola, if we suppose him to be the compiler, had in the publication of the pontifical *Tabulae* followed the method of treatment adopted by Aelius Paetus in his edition of the Twelve Tables, and published a text of the *Tabulae* with a commentary. This explanation, however, is rendered improbable by the fact that the author of such a work should have been as well or perhaps better known than Paetus, and that later historians would almost certainly have drawn freely from so rich a source. The second hypothesis rests on the assumption that the mythical element which is found in Gellius's citation, and in those of authors of a less degree of value, can be explained away. If this were possible, few would be willing to deny assent to the brilliant hypothesis of Cichorius that the *Annales Maximi* were neither more nor less than the actual calendar tables of the pontifices, and that these tables were put together with not a day eliminated. Even those days on which nothing occurred stared the weary reader in the face. Such a work would certainly have the jejune character attributed to the *Annals* by Cicero, and would successfully frighten away any later historian in search of the picturesque.

A great deal has been made of the supposed mythical element in the *Annales Maximi* in connexion with the decemvirate, but really this mythical element is as nothing in comparison with the doubt whether the *Annales Maximi* extended beyond the close of the fifth century.²⁰ The mythical element might have given colour and detail, but could it have given a list of decemvirs? ²¹ On the other hand, if the *Annales* began much later than 450 B.C., we can assign no origin to the names of the decemvirs in the *Fasti*. The source of this portion of the *Fasti* is, and seems likely to remain, a closed book. A feeble attempt to open it has been made by supposing that the compilers of the *Fasti* in the Augustan period used the *Annalis* of Atticus—a little book that happens to be known out of perhaps many others of the same type. From the descriptions

graphy is dwelt on in this passage. *Cl. De Or.* ii. 12, 58, where, after speaking of the *Annales Maximi*, he says: 'Hanc similitudinem scribendi multi secuti sunt, qui sine ullis ornamentis monumenta solum temporum, hominum, locorum, gestarumque rerum reliquerunt.'

²⁰ The doubt must be based chiefly on the belief in their destruction during the burning of Rome, for the evidence furnished by the eclipse of 850 is very doubtful. See above, pp. 7, 8.

²¹ The critics vary in their view of the historical suggestion which they believe to underlie the mythical decemvirate. Pais (*Storia di Roma*, I. 1, p. 391) thinks of the *Decemviri litibus radicandis*, Lambert (*L'Histoire Traditionnelle*, pp. 118, 129) of the decemviral commissions appointed for the provinces and of the *Decemviri sacris faciendis*.

of Cicero and Nepos (if indeed they are referring to the same work)²² Atticus's book seems to have been a summary review of the history of Rome and of other peoples with which the city was brought into contact,²³ in a very small compass, with an appendix containing genealogical tables. There may have been less Roman history in it than there is in the epitome of Velleius. The scholars of the Augustan period were set to ransack the archives for the purpose of compiling the *Fasti*, and we are asked to believe that they found the chief satisfaction for their curiosity in scanning the pages of a small universal history. The other, more professedly genealogical works of Atticus²⁴ may sometimes have served their purpose; but it is useless to discuss the possible bearing of such works on the structure of the earlier portion of the *Fasti*.

Let us leave this region of conjecture, where doubt and confidence are equally misplaced, for the more solid subject of the manner in which writers of the Ciceronian and later periods regarded the history of the Twelve Tables. The gravest point of all is that which touches the character of the work ascribed respectively to the decemvirs of the middle of the fifth century and to the scribe Cn. Flavius of the close of the fourth. It has sometimes been maintained that Flavius is credited by some of our sources with the publication not merely of the calendar and of the actions of law, but of the body of the civil law itself. If this interpretation is correct, it would seem to follow that the Romans were unable to fix the epoch of the codification of their law within a period of a century and a half. But it is very questionable whether this interpretation is justified. As a rule brief and less specific accounts of an event given by some authorities must be interpreted in terms of longer and more specific accounts by others. When Livy says that Flavius *civile ius, repositum in penetralibus pontificum, divulgavit*,²⁵ his words must be interpreted in terms of those accounts which speak of this scribe as revealing the forms of action.²⁶ Livy, who has already described the work of the decemvirs, certainly does not himself believe that the substantive law of Rome was at this time

²² Cicero's references to the work are as follows: 'Iste omnem rerum memoriam breviter et . . . perdiligenter complexus est' (*Brut.* 8, 14), 'Ille vero et nova . . . mihi quidem multa et eam utilitatem, quam requirebam, ut explicatis ordinibus temporum uno in conspectu omnia viderem' (*ibid.* 4, 15). Nepos (*Atticus*, 18, 1) thus describes the historical activity of Atticus: 'Summus . . . fuit . . . antiquitatis amator; quam adeo diligenter habuit cognitam ut eam totam in eo volumine exposuerit quo magistratus ordinavit. Nulla enim lex neque pax neque bellum neque res illustres est populi Rom. quae non in eo suo tempore sit notata, et . . . sic familiarum originem subtextit ut ex eo clarorum virorum propagines possumus cognoscere.' These passages are both treated as referring to the *Annales* of Atticus in Tenffel-Schwabe, *Gesch. der röm. Lit.* § 173 (b).

²³ *Cic. Orator*, 84, 120.

²⁴ Nepos, *Att.* 18, 3.

²⁵ *Liv.* ix. 46, 5. Valerius Maximus (ii. 5, 2) follows the account of Livy.

²⁶ *Cic. De Or.* i. 41, 186, *Ad Att.* vi. 1, 8; Pompon. in *Dig.* 1, 2, 2, 7. For a criticism of the ancient sources dealing with Cn. Flavius see Boeck, *op. cit.* pp. 1-56.

hidden in the *penetrabilia* of the *Pontifices*, and his description of what Flavius did reveal can scarcely be called even inaccurate. For is not procedure a more important part of civil law than the lifeless letter of the code itself? The utmost that any tradition attributes to Flavius seems to have been the publication of the forms of action. Some ancient sources, however, were silent on this point³⁷ and spoke of him only as the publisher of the calendar. It is with respect to this enterprise that we find a twofold difficulty. First, was the calendar a mere record of Dies Fasti, Nefasti, and Comitiales, or was it a more helpful judicial calendar giving forms of action appropriate to certain days? Secondly, what relation did the publication of the calendar by Flavius bear to its previous publication by the decemvirs? A reader of the famous passage in Cicero's *Pro Murena* may well feel that in his account of the work of Flavius the orator is, rightly or wrongly, describing the publication of something more than a mere record of court days.³⁸ If we believe that Flavius published a kind of judicial *vade mecum*—Actions and Calendar in one—we are rid of the difficulty of the dual publication of the Calendar. All that had been published by the decemvirs was a list of court days. But it is a curious fact that in a letter written thirteen years after the delivery of the *Pro Murena* Cicero adopts another, equally reasonable, explanation of the dual publication. He suggests that the decemviral table which contained the calendar had been concealed,³⁹ a statement which agrees perfectly with Livy's description of what happened after the Gallic conflagration. There we read that, while the record of the Twelve Tables was collected from various sources, *quae autem ad sacra pertinebant, a pontificibus maxime, ut religione obstrictos haberent multitudinis animos, suppressa.*⁴⁰ Among things *quae ad*

³⁷ Cicero says (*l.c.*): 'Nec vero pauci sunt auctores On. Flavium scribam fastos protulisse actionesque composuisse.'

³⁸ *Cic. Pro Murena*, 11, 25: Possent agi lege necne pauci quondam sciebant: fastos enim vulgo non habebant. Errant in magna potentia qui consulebantur: a quibus etiam dies, tamquam a Chaldaeis, petebatur. Inventus est scriba quidam On. Flavius, qui cornu oculos confixerit et singulis diebus ediscendos fastos populo proponerit et ab ipse causis (*causis*) iuriconsultorum (*causis iuriconsultis scribam*) sapientiam compilerit. Itaque isti illi, quod sunt veriti, ne dierum ratione pervulgata et cognita sine sua opera (lege) agi posset, verba quaedam (?) composuerunt ut omnibus in rebus ipsi interessent.' If *verba quaedam* is the correct reading, Cicero might mean, not that the jurists invented the Forms of Action after the publication of the calendar (Seeck, *op. cit.* p. 53), but that they made them more intricate (Haitland *in loc.*) He would thus presuppose the publication of the forms. But the passage is mere banter and hardly admits of serious interpretation. It has been remarked (*e.g.* by Niebuhr) that any observant Roman might have discovered the calendar for himself. But this is true only on the assumption that it was not tampered with by the pontiffs (Hartmann, *Der römische Kalender*, p. 118). The Actions too might have been discovered by observation; but the process would have been difficult. Cf. Seeck, *op. cit.* p. 8.

³⁹ *Cic. Ad Att.* vi. 1, 8. 'Occultatam putant quodam tempore istam tabulam, ut dies agendi peterentur a paucis.'

⁴⁰ *Liv.* vi. 1, 10. Cf. Schöll, *Leg. duod. tab. reliq.* p. 1.

sacra pertinebant the pontiffs might well have included the calendar. And we may suggest another motive for its suppression in its possibly obsolete character. A calendar issued in the year 450 might have been a misleading guide for the year 388. It cannot be said that any fundamental inconsistencies result from a comparison of the legal reforms associated with the two great Appii. But it cannot be denied that there was considerable uncertainty as to the proceedings of the protégé of the later Appius. Atticus appears to have written on one occasion to Cicero in a condition of scholarly panic, caused by the discovery of the tradition of the dual publication of the calendar. If Flavius *first* issued the calendar, must he not be anterior to the decemvirs? Cicero answers that Flavius was certainly later, but that, if he himself has erred on the point, he has done so amid an ample company.⁴¹ It does not seem that our faith in the Twelve Tables need be seriously shaken by such doubts; for the conditions of knowledge relative to the fact of the publication of the Tables and the fact of the publication or republication of the *Fasti* were not the same. The Tables were a permanent record of an imposing magistracy; but it might well have been difficult to determine how or when the *Fasti* had been issued or reissued by or from the pontifical college.

We now pass to the traditions relative to the publication of the Tables themselves. They are represented as being on view down to the time that Rome was sacked by the Gauls. After that disaster they, with the *Leges Regiæ* and other documents, are said to have been restored.⁴² Their republication on tablets of bronze is not described, but, if the view mentioned by Cicero that the tablet with the calendar was concealed has any foundation in fact, we have the implication that the other tables were in some way accessible to the public. But, apart from these traditions, we have no evidence for their exhibition either in Rome or in any other place until a chance reference in Cyprian reveals the surprising fact of their presence in the Forum at Carthage in the third century A.D.⁴³ It has been suggested that this venerable document was sent to Carthage with the Augustan colony,⁴⁴ and such an anachronistic feat was certainly characteristic of the national and archæological revival of that age. The spirit that created the *Fasti* revived the Twelve Tables. For could it have been more than a revival? It has been argued by Schöll that the modernisation of the language of the Tables, and what is known of the character of the work of

⁴¹ *Cl. Ad Att.* vi. 1, 8. *Cl.* vi. 1, 18.

⁴² *Id.* vi. 1.

⁴³ Cyprian, *Epist.* ii. 4 (cited by Schöll, *op. cit.* p. 15). It is not so certain that the passage of Salvianus (*De Gub. Dei*, viii. 5, cited by Schöll, *op. cit.* p. 17) supplies evidence for the existence of the Tables in the Forum of Carthage in the fifth century.

⁴⁴ Schöll, *op. cit.* p. 17.

their interpreters and commentators from the beginning of the second century, show that no ancient and authentic document could have been in existence. The later *grammatici*, he thinks, borrowed from the earlier instead of appealing to an original source.⁴⁵ The argument is not quite conclusive, for how few even of modern scholars take the trouble to collate a printed inscription with its original! Still the absence of really antique forms in the grammarians does make it probable that there was no one public and authentic copy which was easily accessible. This discontinuance of publication, which may go back to the early part of the second century, may be easily explained. The Tables, never obsolete, were yet becoming antiquated by the growth of jurisprudence. They would have been a very misleading guide for the unassisted litigant. The praetor's edict had taken their place in the Forum as a century later it took their place in the schools.⁴⁶ The Tables themselves, since they required interpretation, naturally fell into the hands of editors and of commentators, whether juristic or grammatical. Even before this they had passed into general circulation and were learnt by heart by schoolboys. On the whole it cannot be said that the history of their continued existence and publication (in forms varying with the needs of the age) presents any abnormal difficulties. Considering the lateness of our sources of information, we could hardly look for much more light than we possess on their adventures down to the beginning of the second century. From that point onwards we can trace their history with fuller certainty in the works of the commentators.

When the Tables had become the terror of schoolboys their influence on literature was inevitable. Echoes of their language can be traced in Plautus, Terence, Ennius, Lucilius.⁴⁷ Yet none of these writers speaks of the Twelve Tables. Cato, when mentioning one of their provisions, speaks of it as being found in *legibus*, a reference of characteristic vagueness.⁴⁸ How, it is asked, can we account for this silence, as compared with the frequency of reference to this code in the later Republic and the Principate, except on the supposition that no code was known to these authors of the second century? The estimate of the probability that a mention of the Twelve Tables should have occurred in the fragments of Ennius, Lucilius, and even Cato, is a task beyond my powers; but I confess that it is surprising that no specific reference to the Twelve Tables is to be found in Plautus, if the code was at that time usually designated by this name. It is unquestionably a literary surprise,

⁴⁵ Schöll, *op. cit.* p. 10. Cf. Volgt, *XII Tafeln*, i. 82 foll.

⁴⁶ Cic. *De Leg.* ii. 28, 59: 'Discebamus enim pueri XII, ut carmen necessarium, quas iam nunc discit.' Cf. ii. 4, 9.

⁴⁷ Schöll, *op. cit.* p. 9.

⁴⁸ Cato, *R. R.* pr. 1. We may compare his puzzling anonymous reference to a great agrarian law still valid in his time (sp. Gell. vi. [vil.], 8, 57)

although it is not one of the first magnitude. It is by no means comparable, for instance, to the paucity of the reference to written characters in the Homeric poems. But may it not be that we are here in touch with a literary fashion, explicable on historical and psychological grounds? Plantus, Ennius, Cato, Terence were all earlier or later contemporaries of the earliest of the known commentators, S. Aelius Paetus. The name Twelve Tables is the name of a code or of a book rather than of a system of law. It is possible that students of the earlier period learnt the code simply as the *ius civile* of Rome—*fons omnis publici privatique iuris*.³⁹ It is possible, in other words, that the influence of Paetus and other commentators did imprint the somewhat lifeless and artificial name Twelve Tables on what had hitherto been the living voice of Rome's early legislators. As in the case of the *ius Papirianum*, the scholarly title, which recalled definite historical associations, may have prevailed in proportion to the waning of the living force of the great code. We may make this concession to the influence of the commentators without holding that they were the original collectors, and so far the authors, of the legal system issued under their names.

It is to these commentators that we now turn to discover, if we can, the justification for the kernel of Lambert's theory of origin. S. Aelius Paetus Catus, consul in 198 and censor in 194 B.C., is the earliest of the interpreters of whom we have any knowledge. He was the author of the *Tripertita*, a work which gave a text of the Tables, an explanation of the text, and finally the *legis actio* of which the Tables formed the basis.⁴⁰ Next a certain Acilius or Atilius, surnamed Sapiens, is mentioned among the *veteres interpretes*.⁴¹ Lastly we have L. Aelius Stilo Praeconinus of Lanuvium, the philologist. It is often difficult to distinguish the extant relics of his work from those of his earlier namesake,⁴² but it is probable that, while Aelius Paetus was mainly a juristic commentator, the interpretation of Aelius Stilo was almost entirely philological and grammatical.⁴³ Little is known of the work of Acilius, but it probably resembled that of Paetus more closely than that of Stilo.⁴⁴ The age of the two latter of these commentators is a question of great importance in the literary history of the Tables, for we should wish to be able to discover whether the traditions which may have been started by Aelius Paetus were immediately perpetuated. Our infor-

³⁹ Liv. III. 84.

⁴⁰ Pompon. in *Dig.* I. 2, 2, 88.

⁴¹ Acilius in Cic. *De Leg.* II. 23, 59; Atilius in Pompon. *l.c.* The context in Cicerone seems to prove that Acilius is mentioned as an *interpretes* of the Tables, although Lambert doubts it (*Droit Civil Comparé*, p. 569).

⁴² Schöll, *op. cit.* pp. 80, 81.

⁴³ *Ibid.* pp. 25, 26.

⁴⁴ This conclusion may be drawn from the facts that Pomponius speaks of him in connexion with Paetus, and that Cicerone classes him among the *veteres interpretes*. See Schöll, *op. cit.* p. 26.

mation is unfortunately meagre, but, as regards Acilius, the fact that he is reckoned among the *veteres interpretes* makes it probable that he was a contemporary of Paetus, and the fact that Pomponius mentions him after this jurist would seem to show that he was a late contemporary. As to Aelius Stilo, the extreme data about his life reveal him as the friend of Caelius Antipater and as the teacher of Varro and Cicero.⁵⁵ He seems to have reached a great age, and may have been born about 154 B.C.,⁵⁶ perhaps before the death of Paetus. If our conclusions about Acilius are correct the three scholars overlapped each other. Each could be influenced by the other's teaching. What bearing has this on the supposed fiction of the Twelve Tables? It means that a fiction consciously or unconsciously perpetrated by Paetus was perpetuated in the full light of knowledge and scholarship. The participation of Stilo in the fiction is above all astonishing. This savant commented on the *Carmen Saliare*,⁵⁷ yet he took a compilation by Paetus for an ancient and authentic document. We may also remark that two learned historians of the period were as grossly deceived as the grammarian. Cassius Hemina (*circa* 146 B.C.) and C. Sempronius Tuditanus, consul of 129 B.C., accepted the story of the decemvirate with implicit faith.⁵⁸ But the most surprising fact connected with the legend which Paetus is believed to have floated still remains to be mentioned. The *Tripartita* was not a mere memory to the later world; it was extant in the time of Pomponius.⁵⁹ This work bore on the face of it the fact that it contained the Twelve Tables; it is therefore difficult to accept the view hinted at by Lambert,⁶⁰ that Paetus himself did not give this name to his compilation. But, if he did, we have but two alternatives before us. One is that Paetus invented the legend—a proceeding hardly worthy of a *consularis*, a *censorius*, of the greatest living student of law—a proceeding which involves the hypothesis that the invention was accepted by Acilius and Stilo, not to mention the fact that at the time of its perpetration the learned Cato was in existence to protest against it. The reception of a recently formed legend by ignorant minds is possible; but the literary reception of such a legend in an age of historical writing, scholarship, close juristic investigation, seems beyond the bounds of probability. Our second alternative of course is that Aelius Paetus found the tradition of the Twelve Tables and the decemvirate and accepted it. It appears certainly to be the more reasonable of the two.

We must now pass to the difficulties which are held to be pre-

⁵⁵ Cic. *Brut.* 56, 206, 207; [Cic.] *Ad Herenn.* iv. 12, 18.

⁵⁶ Teuffel-Schwabe, § 143.

⁵⁷ Varro, *L. L.* vii. 2.

⁵⁸ Macrobi. *Sat.* I. 13, 21: 'Tuditanus refert . . . decemviros, qui decem tabulis duas addiderunt, de intercalando populum rogasse. Cassius eodem scribit auctores.'

⁵⁹ Pompon. in *Dig.* i. 2, 2, 88: 'Exstat illius liber qui inscribitur "tripartita."'

⁶⁰ *La Question de l'Authenticité*, etc., pp. 12, 27.

sented by the style and the language of the Tables. As regards the element of style, there are considerable difficulties even in considering the view that the tenor of the Tables is not the typical mode of utterance of Roman Law. Even if we hold (as I do hold) that the extant citations from the Tables, which form a very small part of their known content, are not a mere *memoria technica* devised for the use of schoolboys or the public, but are genuine fragments of the original provisions, can we be certain that they are more than mere sentences torn from a larger context—the key sentences that express the essence of the particular injunction or prohibition? Cicero's imitation of the language of the Tables in his work *De Legibus* seems to prove that the type of sentence familiar to us from the extant fragments was the style of the whole code as known to him. There was an absence of relative clauses and subordinate periods. But, for all we know, even the longer of the extant fragments, such as those referring to jurisdiction or to testament, may have had a considerable context of their own. Is there any means of proving that early Roman legislation, however ample in detail, was not of this brief, imperative type? I can discover none. We have no fragment of any other law that is certainly earlier than the third century, and the one paragraph which has been preserved from the *lex Aquilia de damno* of that epoch is as simple and straightforward as anything in the Tables, but quite insufficient, on account of its brevity, to throw any real light on the question of style. The *lex Silia de ponderibus publicis* differs from any extant provision of the code in the complexity and detail of the subject which it treats, and the one line from the *lex Atinia de usucapione* might easily have come from the Twelve Tables.* It is not until we reach the close of the second century that we are in possession of complicated acts of legislation of the later familiar type, and their appearance simply serves to raise the question whether the style of Roman legislation had not changed in the course of ages, whether the refinements of the legislator and the draughtsman were not a late product of overdeveloped legal caution. But, even supposing that the ponderously interwoven sentences of the later style were always characteristic of a Roman *lex*, is there any reason why the style of a code should resemble that of an act of parliament? Would an English code reproduce the literary graces of our present statutes? That it need not do so is patent to any one who glances at the crystal pages of the *Gesetzbuch für das deutsche Reich*. The complexity of Roman statutes does not appear in the praetor's edict. Why, then, should we demand its presence in a code? Cicero's legal and literary sense saw clearly that the foundations of law must be as pregnant and pellucid as the gnomes of the *Leges*

* Gall. xvii. 7. 'Quod abruptum erit, eius rei aeterna auctoritas erit.' Lambert (op. cit. p. 28) regards this as a 'brocard juridique.'

Regias and the Twelve Tables. It is probable that the decemvirs held similar views. Had they framed jaw-breaking and mind-shattering acts of parliament, which create misconceptions by the very observance and statement of their possibility, these acts would have been superseded in a few years. Diodorus is right in saying that the *νομοθεσία* which lived was *βραχύως καὶ ἀπερίττως συγκαίμενη*.⁶³

If from style we pass to language, and consider first the vocabulary of the Tables, there is every reason why this vocabulary should be practically that of the later literary period. The interval between the decemviral legislation and the birth of Plautus is the interval between the reign of Queen Anne and our own day. But even 400 years does not make much difference in the essentials of the vocabulary of acts of parliament, as may be proved by any one who cares to consult a statute of Henry VIII. It may be objected, however, that such comparisons are vitiated by the fact that literature has given a greater fixity to the language of the modern world. Such an objection might be valid if we were not dealing with legal language. The fixity of legal forms, words, and phrases in a community such as Rome was probably attained at a very early date. As a matter of fact, however, there was infinitely more of the antiquated and the obsolete in the Twelve Tables than can be illustrated by our present knowledge. The proof lies in the fact that the Tables required the philological labours of an Aelius Stilo as well as the juristic labours of an Aelius Paetus.

On the other hand, when we pass from vocabulary to orthography, the modernity of the Tables is patent and undeniable. Their philological value is almost nothing. Such late and common forms as the final *d* in the ablative and imperative can no longer be traced. We find *r* for the soft *s* between vowels, a change which came into vogue in the fourth century.⁶⁴ The gutturals *c* and *g* are distinguished, the old use of *c* surviving perhaps only in *pacunt* and *pacit*, and even in this case it was doubted whether the word was really connected with *pango* and not with *paciscor*.⁶⁵ Schöll observes⁶⁶ that the Tables are nearer than the *Tituli* of the Scipios to the language of Ciceronian times, not to speak of the *horrida vetustas* of the Saliar and Arval hymns. He wisely remarks that we cannot wonder that a religious ceremonial (perhaps not understood by the priests themselves) should be preserved in a truer form than a law destined for common use. The interpreter, the schoolmaster, and the schoolboy have in fact brought about the inevitable changes that made for facility of learning or citation, and perhaps the only valuable conclusion that issues from the modernity of the form of the Tables is the view,

⁶³ Diod. xii. 26.⁶⁴ Cic. *Ad Fam.* ix. 21, 2; Pompon. in *Dig.* l. 2, 2, 86.⁶⁵ Quinct. l. 6, 10-11; Ter. *Secur.* vii. 16 K.: cf. *Festus*, p. 260.⁶⁶ P. 6.

already noticed, that the commentators soon lost sight of any antique original. The philological lateness of the few extant fragments of the code is indeed to be regretted, but such perfectly adequate grounds can be assigned for it that it furnishes no argument for the tardy creation of the code itself.

It would be desirable, on grounds of completeness, to conclude this sketch by a detailed examination of the internal arguments which have been urged against the genuineness of the decemviral legislation; but here the serious question arises, Do such arguments, in their pure form (that is, when they are not supported by external evidence drawn from the history of the nation itself), deserve examination or admit of refutation? It may be said generally that any imaginative critic can take any system of law and, if circumstances permit him to know sufficiently little about the past history of the nation to which it belongs, can develop anachronisms almost at his pleasure. Such seems to me the character of Pais's arguments about the provisions of the code so far as they relate to testamentary disposition, to the marriage without *confarreatio* or *coemptio*, to the emancipation of the son. Such doubts seem to be the fruit of that dualism which pervades the whole of Roman law—a dualism probably to be formulated in the terms 'patrician' and 'plebeian.' The explanation of the liberalism of the decemvirs is perhaps to be found in the fact that in most cases they made plebeian custom a possible law for the whole community; but, as legal history only begins for us with the Twelve Tables, it is impossible for us to estimate the degree of their liberalism or the extent of their work of innovation. Elsewhere the critic is on firmer ground. He can point to inconsistencies in the traditions as to the date of the prohibition of cremation in the city,⁶⁴ as to the use of the term *meridies* in the Tables;⁶⁵ but who can determine whether in such cases the tradition unfavourable to the Tables may not be a sheer blunder on the part of its transmitter? The only serious argument, resting on external evidence, against the authenticity of a provision of the code is that connected with the history of Roman currency. The mention of the *as* and of *unciarium fenus* is held to be an indication of a date later than the middle of the fifth century. But there seems to be even now some difference of opinion among numismatists as to the propriety of attributing some form of the libral *as* to the decemviral period,⁶⁶ and even if it were certain that such

⁶⁴ Pais, *Storia di Roma*, I. p. 578.

⁶⁵ The conflict lies between Gallus, xvii. 2, 10 (cf. Censor. 23, 8), and Pliny (*H. N.* vii. 212). Schöll (p. 11) regards Pliny's denial of this use of *meridies* as a sheer blunder. He gives a list of such mistakes in various authors, some of whom (like Gaius) are jurists.

⁶⁶ Samwer (*Gesch. des Alterth. röm. Münzwessens*, 1868, p. 14 foll.) places the commencement of the issue of *as* græce at Rome at the middle of the fourth century. Milani ('*As rude signatum et grave*,') in *Rivista Italiana di Numismatica*, iv. 1891,

an attribution was impossible, we might still believe in a provision as to the rate of interest and need only allow that a later equivalent has been inserted both as regards fines and interest to make the terms of the law effective.⁶⁹

Yet, unsubstantial as are the majority of such arguments, which are based either on detailed inconsistencies of tradition or on *a priori* views of unsuitability to the times,⁷⁰ the system of criticism which gives them the first place is preferable to that which lays almost exclusive stress on external literary evidence, the system which, according to Lambert, follows the 'sane historic method' of examining each testimony with reference to the date at which it was composed. Such a system is admirable where it is applicable. It may be applied with success to a great and continuous mass of medieval or modern literature, it may even—but with much more doubtful chances of success—be employed in connexion with the thin literatures of the ancient world, when these profess to convey definitely historical facts. But to appeal to the chances of allusion in the scanty fragments of pre-Ciceronian literature is not merely hazardous, but almost futile.⁷¹ The *a priori* grounds for believing that the decemvirate and the Twelve Tables were mentioned by the early annalists are strong, for Paetus, Stilo, Tuditanus, and Cicero knew these annals and we do not. On the other hand, when we consider the character of the extant pre-Ciceronian literature, the *a posteriori* grounds for disbelieving in such a mention are extremely weak. In no instance save in that of Plautus does the silence of our authorities deserve to excite a genuine surprise; and the silence is in this case concerned rather with a name than with a fact.

But is there any ground for confidence in the reality of the decemvirate and the code save that supplied by the probability that those of our extant writers who speak of the Twelve Tables are the inheritors of a continuous line of hidden literary tradition? There is another, and that is the essential probability and consistency of the tradition itself. From this point of view the fact of a fifth-century code must be considered as well as its details. Is codification at this period an anachronism? Certainly, if with Pais we reject practically all the traditions of the early history of Rome;

pp. 75, 76) admits a date as early as the decemvirate for some of the bronze quadrilaterals.

⁶⁹ Rates of interest might easily have been reckoned in *aes rude* or, at a still earlier period, in cattle or even grain.

⁷⁰ Lambert in his *Droit Civil Comparé* (pp. 611, 612) objects to the sumptuary ordinances and the association clause of the Tables. But the point which distinguishes the former from most of the later ordinances on luxury is that they refer to *funerary* observances—that is, to a religious and family obligation. As to the latter, rules of association are one of the first problems that a developing society has to face. We may compare the tradition about Numa's guilds.

⁷¹ Lambert himself recognises the danger (*La Question de l'Authenticité, &c.*, p. 28.

certainly not, if we retain them. One who takes the latter view should rather confine his wonder to the circumstance of the comparative lateness of the code. The work attributed to Servius Tullius resembles in some respects that of Solon, in other respects that of his supposed contemporary Cleisthenes. But there is one important difference. The work of Solon was accompanied, that of Cleisthenes preceded, by a code; and even before Solon there was Draco. In Rome a renewed political organisation, and perhaps a renewed judicature, were unaccompanied by a code. That is a singular fact in her early history; but it is a singularity which makes the work of the decemvirate a comparatively late incident in her life. But consistency in essentials is a still better index of the probability of a tradition than the mere suitability to the times of the facts which it enshrines. The extreme difficulty of the creation, especially by Hellenic minds, of such a structure as the history of the early Roman constitution is an element in criticism of which Pais has taken too little account. In spite of the absurdity and improbability of many details the grand lines of the structure still remain, indestructible because they are the work of nature, not of man. How fares it with the Twelve Tables from this point of view? Its late compiler (if we may pass from Pais's to Lambert's doctrine) was certainly a marvellously cautious and consistent man. He must have known his history by heart, for it cannot be proved that he has introduced any essential element that belongs to a period later than the fifth century. But he seems to have forgotten something, and something of importance—nothing less than the plebs and its magistrates. Would Paetus have done this? Were there no *brocards juridiques* that had reference to the *lex sacrata* and the sacrosanct magistrates of the people? We can understand the omission well enough, if the code belongs to the decemvirs. But who shall explain it if the code belongs to Paetus?

We may conclude with the merest glance at a subject far too large for treatment in this place. How is the history of process at Rome to be rewritten if the Twelve Tables were not in existence until the second century? What is the meaning of *lex* in *legis actio*, and in contrast to what system was the honorary law of the praetor developed? If the *ius civile* resided chiefly in statutes, why did these statutes fail to take account of such essentials as the laws of marriage, testament, adoption, property, and process? or, if they did take account of them, why should the essential rules of such departments of law become specially enshrined in unwritten juristic maxims? It may be answered, perhaps, that they are rules of practice evolved from statute, or even perhaps rules of custom which had never received statutory sanction. The second answer cannot be literally correct, unless we disbelieve in all the early laws of appeal, for the *provocatio* was mentioned in the Twelve Tables.⁷³

⁷³ Cic. *De Rep.* ii. 81, 84.

The first solution is at least conceivable, although it would not explain the very close connexion of *actio* with *lex* which is insisted on by Gaius,⁷² for to base the verbal accuracy of a form of process on a legal maxim is not precisely the same thing as basing it on a *lex*, and we can scarcely hold that this verbal correspondence of action to law was first developed by the commentators of the second century. But both solutions ignore a very important literary fact. This is, that the leading maxims of Roman civil law could not have remained unwritten until the time of Paetus. The actions at least to which they gave rise must have appeared ages before in that portion of the praetor's *album* which dealt with the civil law. And is it likely that successive praetors based the main portion of their jurisdiction on a law transmitted by verbal tradition?⁷⁴

Here we may conclude our survey of the character and results of the new theory of the origin of the Twelve Tables. It is only fair to add that there is one type of argument employed by the authors of this and similar theories which has not been noticed in the present summary. They appeal to the cases where in other ages and in other lands systems of customary law have been falsely attributed to specific human legislators or to certain definite epochs. They appeal to the Hebrew Books of the Covenant, to the Koran, to the Hindu Dharma-sûtras, to the Irish Customs, to the laws of Solon, Zaleucus, and Charondas,⁷⁵ to the attribution of the creation of a parliament to Magna Carta.⁷⁶ I am far from ignoring the value of such analogies. They at least reveal the possibility of erroneous attribution. But they scarcely enter into the sphere of evidence unless the source of the deception in each of these cases (presuming such a deception to exist) can be shown to be similar to that which has tainted the tradition relating to the Twelve Tables. For such an investigation (one far larger than that which I have actually undertaken) I have had no space, even if I possessed the knowledge requisite for its fulfilment. I have preferred to confine the controversy as to the authenticity of the Twelve Tables within the limits of Roman history and of the Greek and Latin sources from which this history is constructed. The sources are undeniably defective, and unfortunately there is little probability of their ever becoming fuller and purer. But I have been unable to share the view of the newest school of criticism that the taint consists not in the occasional ignorance of the truth, but in the wholesale construction of falsehood, and to attribute to an age of literary cultivation and juristic refinement an ignorance and a credulity the appearance of which would be surprising even in an unlettered period of civic life.

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⁷² Inst. iv. 11.

⁷⁴ The difficulty is lessened, if we adopt Lambert's later view (see above, p. 4, n. 5) of successive redactions of juristic rules, but it is scarcely removed. For procedure would here be based on a private compilation, which had no public authority behind it.

⁷⁵ Lambert, p. 28.

⁷⁶ Pals, l. 586.