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Gaius on pedantry and erudition: the *quaestio lance et licio* at *Institutes* 3.193

The second-century CE jurist Gaius devotes part of *Institutes* book 3 to a discussion of theft and its legal remedies. In the course of this discussion, we are told about a type of search for stolen goods that was available under the laws of the Twelve Tables. Before the praetor introduced the so-called *prohibiti furti actio* (3.188 and 192),<sup>1</sup> the Twelve Tables allowed a person who suspected someone of hiding a stolen good to search that person's place.

Absolutely crucial to this provision was “that he who wants to search should do so naked, girt with a *licium*, holding a dish. And if he should find anything, the law mandates this to be ‘manifest theft’” (*hoc solum praecipit ut qui quaerere velit nudus quaerat licio cinctus lancem habens. qui si quid invenerit, iubet id lex furtum manifestum esse, 3.192*).<sup>2</sup> Perhaps not surprisingly, this provision puzzled Gaius and many others, including modern scholars:<sup>3</sup>

**3.193** quid sit autem licium quaesitum est. set verius est consuti genus esse, quo necessariae partes tegerentur, q r l(ex) tota ridicula est. nam qui vestitum quaerere prohibet, is et nudum quaerere prohibiturus est, eo magis quod ita quaesita re inventa maiori poenae subiciatur. deinde quod lancem sive ideo haberi iubeat, ut manibus occupatis nihil subiciat, sive ideo, ut quod invenerit, ibi imponat, neutrum eorum procedit, si id quod quaeratur, eius magnitudinis aut naturae sit, ut neque subici neque ibi inponi possit. certe non dubitatur, cuiuscumque materiae sit ea lanx, satis legi fieri.

However, it has been asked what a *licium* is. But the better answer is that it is a sort of cloth to cover the private parts, wherefore this entire law is ridiculous. For if a person

prohibits someone wearing clothes from searching, he is also bound to prohibit him from searching naked; and all the more so because he will suffer a higher penalty if the thing searched for in this way is actually found.<sup>4</sup> Next, as for the fact that it mandates to hold a dish, this is either so that he does not secretly bring in anything because his hands are occupied, or so that he can place in it what he finds; neither suggestion will do, if that which is sought is of such a size or nature that it does not let itself be smuggled or placed in it. At least it is not doubted that, whatever material the dish is made of, it satisfies the *lex*.

The questions that Gaius reviews give an impression of the ancient debate, especially when contextualized with the discussions in his contemporaries Festus and Gellius. At the same time, the passage's textual problems and its rich history of editorial interventions highlight the struggle to make sense of it from a more diachronic perspective. Even though the transmitted text undeniably has textual difficulties,<sup>5</sup> I think that modern editors have created (and continued to debate) problems that have primarily resulted from misunderstanding the passage's context, both the immediate context in Gaius' work and the intellectual context in which Gaius was active. In this paper, I will discuss two places that demand particular attention: the use of *linteum/licium* and the occurrence of *q r l(ex)*.<sup>6</sup> In the first case, I will argue that, while the MS unambiguously transmits *linteum*, an emendation into *licium* is warranted given that this is the jargon required here. As for *q r l(ex)*, I will show that it is most plausibly resolved as *quare lex*, which none of the modern editions even considers; furthermore, careful contextualization will reveal that there are no compelling reasons to emend this transmitted reading.

The first textual difficulty concerns the word *linteum/licium*. Our single textual witness for this passage, a codex now at Verona, preserves *linteum* instead of *licium* (193, *linto* at 192), whereas the specific provision under discussion is known as the *quaestio lance et licio* (Festus) or *per lancem liciumque* (Gellius).<sup>7</sup> It seems therefore that the nouns *lanx* and *licium* are the technical terms by which this type of search is known. In this connection, it should be noted that Festus and Gellius are contemporaries of Gaius who are working outside the strictly juristic sphere but who are nonetheless familiar with the technical vocabulary. For this reason, it is implausible to presume that Gaius, who was a jurist, would be unfamiliar with the jargon terms.<sup>8</sup> This point can be further substantiated by observing that Gaius wrote an extensive commentary on the Twelve Tables, of which Justinian's *Digest* preserves a few dozen fragments.<sup>9</sup> Since Gaius must have known the technical terms, then, most modern editions emend the MS reading into (a form of) *licium* at both 192 and 193, although Nelson and Manthe's recent *editio maior* is a notable exception.

Even though it is highly likely that Gaius knew the jargon terms, one may still counter that this need not imply that he actually used them. But the argument in favor of printing *licium* can be supported by at least two further observations. First and foremost, several places in the *Institutes* indicate that Gaius does not avoid or simplify jargon terms, even if their meaning is not entirely clear. The most relevant case in point is his discussion of an old type of *societas* known as *ercto non cito* (3.154a-154b).<sup>10</sup> Rather than shunning or simplifying the technical language, Gaius helps the reader by elucidating the terms through (ancient) etymologies before laying out the doctrine. Furthermore, it is worth noting that this short antiquarian digression is preserved only in the fragmentary Florentine parchment folia (F), not in the codex Veronensis (V).<sup>11</sup> Since there is little in V that points to a lacuna, the absence of

the digression may reflect an editorial intervention in V (or its lineage),<sup>12</sup> presumably so as to reduce the amount of antiquarian material and jargon. If this is indeed the case, the fact that the *societas ercto non cito* has been edited out could be a parallel for the replacement of *licium* by *lintheum*, which makes *prima facie* more sense given the explanation that follows (*consuti genus*). On closer inspection, however, the question that introduces the explanation may in fact be tailored more to the word *licium*. That is, apart from the tendency of the *Institutes* to preserve jargon terms, we may also find support for reading *licium* by looking at how Gaius frames the ancient debate about the meaning of the provision's vocabulary. We should note that in Gaius' time both *lanx* and *licium* are perfectly ordinary words for a dish and a thread, respectively, but that their meanings in the context of the Twelve Tables are vigorously contested and debated by ancient scholars.<sup>13</sup> Thus Festus glosses *lanx* in terms of its function while ignoring *licium*,<sup>14</sup> and Gellius mentions both terms in passing but avoids getting into any detail about their meanings. Gaius himself also indicates that the terms were debated: the phrase *quid sit autem lintheum/licium quaesitum est* is a rather heavy-caliber demand for elucidation. Passive forms of the verb of *quaerere*, as well as the noun *quaestio* are used as technical terms to introduce legal issues that are the subject of juristic debate.<sup>15</sup> Gaius uses the vocabulary of *quaerere* throughout the *Institutes* in this way, and a glance at the *Digest* reveals that the terms are in general use among jurists.<sup>16</sup> As for Gaius' *quaesitum est* at 3.193, we should note that it asks what the *licium* is, rather than what purpose the *licium* serves or how it should be used. This suggests that the general semantic category of the *licium* was under discussion. Gaius at this point indicates that for him a "cloth" (*consuti*) constitutes the "better" choice (*set verius est*) from a range of possible answers that were apparently debated. In short, then, the word *licium* and its ordinary meaning must have posed such a

puzzle that a debate arose as to the general direction in which to interpret it in the context of the Twelve-Table provision. On the other hand, the transmitted reading *lintheum* fits the scholarly *quaestio* much less neatly. For although it is perfectly conceivable that *lintheum* would inspire debate over its use, it is harder to see why a common term for a piece of linen cloth, with a wide range of specific meanings, would trigger a question as to what it is, rather than as to how it is used or what it is used for (cf. the *quaestio* about the *lanx* later in 3.193, which focuses on the use).<sup>17</sup> That is to say, the word *lintheum* is not obscure enough in this context to warrant the demand for elucidation that the text features.<sup>18</sup> In this passage, *lintheum* can be explained as a gloss that ousted the technical yet more enigmatic *licium* at some stage in the transmission process.

The other major problem in 3.193 emerges from the transmitted element *q r l(ex)*. Two issues are at stake here. In the first place, there has been a lot of confusion among editors as to how to resolve properly the abbreviated notation *q r*. Secondly and relatedly, upon further reflection we may wonder what exactly is ridiculed in the passage, and how we are to read Gaius' explanatory note starting with *nam* in connection with *q r l(ex)*. I will discuss these two points in some detail, because in my view the challenges posed by the passage have been misconstrued in the scholarship.

As mentioned, the codex Veronensis, the single witness for this passage, reads *q r l(ex)*. While the last two letters *-ex* have been written in a somewhat smaller script, the shape of the letters and the ductus give no reason to believe that they are by a different hand.<sup>19</sup> Furthermore, the codex does not display any abbreviation signs at *q r*. To be sure, the nineteenth-century apographs of Böcking (1866) and Studemund (1874) both report  $\bar{q} R$ , but Briguglio's multispectral images appear to indicate no abbreviation strokes, which I was able

to confirm through autopsy.<sup>20</sup> Since *R*'s generally taken to serve as the *nota* for *res*, the apographs have led virtually all editors to resolve *q r l(ex)* as *quae res lex*, without even considering alternatives.<sup>21</sup> Yet there are strong reasons to consider *quare lex* as a much more plausible, if not the only reasonable resolution.<sup>22</sup> First, even apart from the observation that the Veronensis uses *notae* flexibly and somewhat inconsistently, this locus in the MS does not seem to feature the *nota* for *res* in the first place.<sup>23</sup> There is therefore no necessity to read *res*. Second, reading *quare lex* results in a perfectly syntactical phrase, whereas *quae res lex* introduces a syntactic problem (two nominative nouns) in need of fixing. Taking *q r* as *quare*, the text reads as follows:

*set verius est consuti genus esse, quo necessariae partes teherentur, quare lex tota  
ridicula est. nam qui vestitum quaerere prohibet (...)*

But the better answer is that it is a sort of cloth to cover the private parts, wherefore this entire law is ridiculous. For if a person prohibits someone wearing clothes from searching (...)

This reading should pose no real difficulties in terms of Gaius' train of thought nor in terms of syntax. The word *quare* marks an inferential transition that leads the reader into the next sentence explicating the predicate *ridicula*.<sup>24</sup> As already mentioned, the whole passage makes good Latin, and we can find parallels of the same construction with *quare* and *nam* in other juristic works.<sup>25</sup>

At this point, it is worth articulating briefly the problems that have bedeviled the editorial debate on this passage. Since editors have agreed for over a century that *quae res lex* is the only possible reading, their contributions have focused on the question whether to delete *res* or *lex*. For example, the ever-popular Teubner edition prints *quae [res] lex tota ridicula est*,<sup>26</sup> while the more recent text of David reads *quae res [lex] tota ridicula est*.<sup>27</sup> Older editions sometimes delete *tota* as well.<sup>28</sup> However, we have seen that the certainty about *quae res* is misplaced on paleographical as well as grammatical grounds. These points in fact indicate strongly that we should consider *quare lex* as the transmitted reading here, and that the editorial debate has been misguided if not simply beside the point. On this note, I should emphasize that, in addressing any perceived (further) difficulties in the passage, the issue before us is not the editorial choice between two transmitted nominatives. Instead, I would like to suggest that the question we are faced with is whether or not to emend a grammatically sound transmitted reading. Needless to say, an emendation requires much stronger, i.e. compelling, arguments.

Apart from issues of transmission, then, what further complications may be found in the passage? And might these warrant an emendation? In this connection it is helpful to disentangle the following two questions. On the one hand, it has been debated how Gaius' explanation starting with *nam* should be understood in relation to the preceding parts of the text. Gaius tells us that allowing a naked search is absurd because, if successful, it will lead to a higher penalty (fourfold, since it would be considered a case of *manifestum furtum*, 3.192). The comparative *maiori poenae* presupposes a lesser *poena*, but it remains somewhat vague what the exact legal form corresponding to the lower penalty is. We may think of simply giving someone permission to nose around on your premises (which could lead to *nec*



*manifestum furtum*, with twofold penalty, 3.190). At the same time, however, Gaius' use of the vocabulary of searching (*nam qui vestitum quaerere prohibet*) invites us to think as well of the search before witnesses that he discussed at 3.186: "theft is called *conceptum*, when a stolen thing is searched for and found at someone's place in the presence of witnesses" (*conceptum furtum dicitur, cum apud aliquem testibus praesentibus furtiva res quaesita et inventa est*).<sup>29</sup> We hear that the penalty incurred in this case is threefold (3.191). Now, it should be clear that, no matter which of these readings we prefer, the point of Gaius' comment is that the search *lance et licio* would always have been refused,<sup>30</sup> since, apart from the slightly bizarre conditions imposed on its execution, this search would entail an unnecessary risk for an unnecessarily high penalty. Thus the provision for this type of search, with all its elaborations and complications, is redundant, as it cannot solve the (supposed) problem it was created for. Some scholars, on the other hand, have argued that Gaius derides the entire situation (*res [lex] tota*) in which the Twelve Tables provided for multiple types of search that could all be refused.<sup>31</sup> But this view faces the following major problem: this interpretation only fits with the reading *res*; and since this second interpretation thus presupposes rather than justifies printing *res*, it fundamentally lacks the force to support an emendation. All things considered, then, it is not obvious that any of these understandings of the *nam* clause pose insurmountable problems with reading *quare lex* in the preceding clause. Hence, this line of argument seems to provide little ground for changing the text.

This brings us to a second issue that has informed the interpretation of the passage. Several scholars have objected to the idea that a jurist (rather than just any Roman author) should ridicule the Twelve Tables or one of its provisions.<sup>32</sup> While we find plenty of irreverent statements about the Twelve Tables already in Plautus, a derisive rejection of (part

of) the Twelve Tables seems unparalleled in technical juristic discourse.<sup>33</sup> It is likely that this point has had considerable weight for editors who have bracketed *lex*, even though most of them have left their reasoning implicit.<sup>34</sup> The issue is indeed worth considering in more detail, especially given that Gaius throughout the *Institutes* shows extensive interest in the arcana of legal history, including all sorts of detail pertaining to the Twelve Tables. As we will see, by situating Gaius carefully in his intellectual context, we can garner several pieces of (primarily) indirect evidence suggesting that a disdainful stance on Gaius' part is not as problematic as has been presumed.

First and foremost, while Gaius' dismissal at 3.193 is unique for being cast in such strong language, it is in fact not the only place at which he explicitly flags up his misgivings about a Twelve-Table provision.<sup>35</sup> Thus the long excursus on the *legis actiones* at the beginning of the fourth book (4.11-30) is introduced and closed by statements about the overly strict nature of this type of legal procedure. At 4.11 we hear about a man who lost (*perdidisse*) his case against the person who cut down his vines because, in formulating the action, he used the word "vines" (*vitibus succisis*) rather than "trees" (*arboribus succisis*); the latter was the term required by the Twelve Tables. Having underscored that this slip made the plaintiff lose the case, Gaius sets out on an antiquarian digression about the *legis actiones*. In resuming his main exposé, Gaius reiterates that, under this procedural regime, the slightest error would spoil the case (*qui minimum errasset, litem perderet*, 4.30), and this time he adds that the system of *legis actiones* was devised with *nimia subtilitas* and has long since been replaced by the formulary system. Now, even though the sting of *nimia subtilitas* is very mild in comparison to the *ridicula* of *Inst.* 3.193, and even though the criticism is mostly deflected to the *veteres* who developed these regulations, the passage nonetheless expresses discontent

with the Twelve Tables and the way they facilitated the remedying of injustices.<sup>36</sup> In short, the Twelve Tables command respect in Gaius' work, but they are certainly not sacrosanct.

In the second place, we can find clues in the work of some of Gaius' contemporaries that a blind reverence of the Twelve Tables came under increasing pressure during the second century. For instance, the *Attic Nights* of Gellius feature several depictions of juristic debate organized around a confrontation over the value of legal antiquarianism. While Gellius never claims to be a jurist, careful reading reveals that he possessed detailed knowledge of Roman law and that his text shows considerable familiarity with juristic discourse.<sup>37</sup> Nonetheless, in reading Gellius we should be aware that his vignettes of jurists' quarreling over the value of the Twelve Tables are indeed dramatizations involving a good deal of rhetorical enhancement and slanting. I do contend, however, that the resurfacing problematization of the Twelve Tables throughout Gellius' work establishes a theme that must have resonated in his intellectual world. Two cases are particularly relevant in this connection. The first of these is the denunciation of the Twelve Table provision on *iniuria* by the character Favorinus in chapter 20.1. Arguing extensively with the jurist Sextus Caecilius over the value of the Twelve Tables, Favorinus claims that the penalty of 25 *asses* for *iniuria* is so incredibly low that it will not stop anyone from beating up other Romans, and that the provision is therefore completely ineffective. In support of his point, Favorinus quotes the Twelve-Table commentary of the Augustan-Age jurist Labeo (20.1.13). The quoted text reports the case of a man who used to hit people in the face on his walks around Rome while having his slave pay out 25 *asses* on the spot, before his victims could even consider pressing charges. Whereas the quote does not explicitly tell us that Labeo criticized this law, and whereas it is Favorinus who perhaps somewhat rhetorically claims that Labeo disagreed (*non probaret*), it is in fact

difficult to see how the commentary would not have entailed criticism (if not rejection) of the regulation. In any case, the debate between Caecilius and Favorinus appears to dramatize a tension over legal antiquarianism and the value of the Twelve Tables, for which the great Labeo could be enlisted as well.<sup>38</sup> A second place in Gellius that stages a similar clash over the Twelve Tables is *Attic Nights* 16.10. Here we encounter a jurist who, after having been quizzed about the meaning of certain terms in the Twelve Tables, lashes out, saying that there is no need for him to know about the Twelve Tables since they have been “put to bed” (*consopita*, 16.10.8). The only thing that matters to him is the law valid in his days (*quibus utimur*). The character Gellius gets upset and works out the meaning of the terms with the aid of a poet. Now, as mentioned above, I think it would be a mistake to claim that these vignettes constitute accurate reports of any historical juristic debates. However, since Gellius brings up repeatedly the theme of opposing attitudes towards the Twelve Tables, I do think that his sketches reflect some of the concerns and preoccupations of the intellectual world of later-second century Rome, including the world of legal scholarship.

This reading of dissonant and changing attitudes about legal antiquarianism fits well with some of the fragmentary juristic evidence. We have already seen that Labeo may have carped the Twelve-Table penalty on *iniuria*. Furthermore, a survey of the works produced by jurists indicates that over the course of second century legal scholarship occupied itself increasingly less with legal antiquarian matters.<sup>39</sup> Gaius is for example the last jurist known to have written a commentary on the Twelve Tables, thus bringing to a close a tradition that flourished in the Republic and Early Principate.<sup>40</sup> Along the same lines, while Gaius and his (near-) contemporaries Pomponius and Laelius Felix followed good tradition in writing works on the towering Republican jurist Q. Mucius Scaevola (consul 95 BCE), the evidence tells us

that they were in fact the last ones to do so. No such work is attested after about 180 CE;<sup>41</sup> instead, Severan jurists such as Paul and Ulpian wrote works *Ad Sabinum*, additions to and updates of Masurius Sabinus' revolutionary and highly popular textbook of the mid first century CE.<sup>42</sup> These additions and updates are overwhelmingly legal-dogmatic: the Severan jurists show hardly any antiquarian or historical interest in practicing law.

What does this all this mean for the text of *Inst.* 3.193? Although the evidence discussed above does not provide parallels for the vitriol that characterizes Gaius' derision, it does indicate that jurists at times criticized and even rejected the Twelve Tables, also when the Twelve Tables were still a keystone of Roman legal scholarship. In my view, therefore, it is doubtful that there are compelling reasons to emend *quare lex* in order to prevent Gaius from calling the law *ridicula*. As for Gaius' passionate formulation, we should note that reading 3.193 to the end suggests that it may have been stirred not least by the (in his view) pointless scholarship surrounding the *quaestio lance et licio*: after indicating that the function of the *lanx* cannot be established, Gaius finishes on a sarcastic note by claiming that at least no one debates what the specific material required for the *lanx* is. That is, the target of 3.193 is as much a provision whose function and meaning are beyond grasp, as it is the circle of pedants who are wasting their time bickering over unanswerable questions.

All things considered, then, I do not see overwhelming problems with the transmitted reading *quare lex tota ridicula est* at *Inst.* 3.193, although I admit that Gaius' fervor is somewhat unusual. In my view, this also puts the burden on those in favor of emending to prove that their views are based on more than simply their implicit assumptions and feelings about Gaius as an author/person. In light of the juristic papyri that keep being discovered, we may hope that new textual witnesses will come to light before too long.



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<sup>1</sup> This action was available against someone who prohibited a search for a stolen good on his property (*Inst.* 3.188). The penalty was four times the value of the item in case it was found (3.192).

<sup>2</sup> Gaius reports that jurists debated what exactly counts as manifest theft (3.184); the matter revolved around the question as to what counts as “caught in the act” (*dum fit, deprehenditur*).

<sup>3</sup> The text is preserved in a fifth/early sixth-century CE palimpsest codex kept in Verona (Biblioteca Capitolare XV (13), fol. 34v. lines 8-17), for which I have consulted Studemund’s apograph of 1874, Briguglio’s reproductions based on multispectral imaging (2012), as well as the much-damaged original. The text printed above has the following emendations: *licium* instead of *linteum* (discussed below); *verius est* instead of *verius seam* (already suggested in the *editio princeps*, Göschen 1820); and *tegerentur* instead of *tegerent* (universally accepted since the second edition, Göschen 1824; the MS may in fact have a (by now indiscernible) abbreviation sign). The element *q r l(ex)* is also discussed below. In line with customary practice in editing juristic texts, italics indicate a supplemented letter where no ligature or abbreviation sign is visible. All translations are mine.

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<sup>4</sup> A search would at most result in a charge for *furtum conceptum*, with a penalty thrice the value of the stolen good (3.186, 191). The search *lance et licio* could result in manifest theft at fourfold penalty (3.189-90). See further below.

<sup>5</sup> See my n. 3 and 6.

<sup>6</sup> Having looked at parallels in Gaius and other jurists, I see no reason to diverge from Göschen's emendation of *verius seam* into *verius est*. Hence, I will not discuss this any further. I also see no good reason to change, orthographically, *set* into *sed* with all recent editors.

<sup>7</sup> Fest. 10 p. 104 L and Gell. 11.18.9 respectively; Gell. 16.10.8 has *cum lance et licio*.

<sup>8</sup> This raises the problematic question about the sources of all three authors. Festus and Gellius were familiar with older lexicographers, among whom most importantly Verrius Flaccus (active at the time of Augustus). Gaius relied on a juristic school-text tradition stretching back to the first half of the first century CE (Nelson 1981, 338-70; Nelson and Manthe 2007, 83-86). This makes it all the more plausible that he found *licium* in his sources and hence knew the term.

<sup>9</sup> The commentary's discussion of the *quaestio lance et licio* does not survive.

<sup>10</sup> Similar cases are the terms *aes militare*, *aes equestre*, and *aes hordiarium* (4.27) in the antiquarian excursus on the *legis actiones* (4.11-30).

<sup>11</sup> The parchment folia, dated to the fifth century, provide parallel transmissions for only a few passages of the *Institutes*. See Nelson 1981, 55-79.

<sup>12</sup> There is no compelling support for Nelson's view that any intervention must go back to Gaius himself (1981, 61, 72-5). His argument entails that the digression has been edited out

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carefully (by changing *quidem* into *quoque* in 3.154, thus removing the expectation of the digression starting with *autem*), and that since the editor showed no care in updating outdated points and references he must have lived in the same period as Gaius did. However, apart from the *non sequitur*, note the problems with the idea of editorial care: (1) *quidem* can perfectly operate alone in Latin, (2) the reading *quoque* is in fact uncertain, and (3) the digression of 3.154a/b closes off the topic of *societas* and 3.155 starts afresh with *mandatum*. *Inst.* 4.16 may feature a similar divergence between V and F.

<sup>13</sup> This paper focuses on the ancient debate and emphatically does not address the historical question as to the nature and function of the *lanx* and *licium*. Modern scholarship on the *quaestio lance et licio* is massive; Horak 1963 as well as Nelson and Manthe 2007, 284-296 give useful overviews. Speculations include but are not limited to taking *licium* as a rope to bind the thief (Kaser 1949, 340) or to lead back stolen cattle (Jörs, Kunkel, and Wenger 1949, 254 n. 10), an apotropaic cord (Goldmann 1925), a cultic headband (Wolf 1970) or garment (Manthe 2005, who perceives a connection with Pythagoreanism albeit without any real evidence), or as related to *inlicium* (Crawford 1996, 2: 617; cf. Varro, *Ling.* 6.88-95); *lanx* as a sacrificial bowl (Wolf 1970 *et plerique*) or a magical mirror (Goldmann 1925).

<sup>14</sup> This part of Festus' text survives only in an excerpt by Paul the Deacon (eighth century CE), who may have cut out Festus' elucidation of *licium*. Festus tells us that since the searcher entered someone else's *domus*, the *lanx* should be worn over his eyes "lest any matron or daughters be present" (*propter matrum familiae aut virginum praesentiam*, Fest. 10 s.v. *lance et licio* = p. 104 L).

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<sup>15</sup> We can find dramatizations of such juristic-antiquarian discussions, on several different *quaestiones*, in the work of Gellius. Examples featuring the Twelve Tables are 16.10 (with *quaeri*) and 20.1. See below.

<sup>16</sup> Wibier 2014 discusses the didactic use of *quaestiones* in Gaius' *Institutes*, with special interest for cases in which Gaius does not express a preference. Outside the legal sphere, we find the vocabulary of *quaestiones* (cf. Greek ζητεῖται/ζήτημα) among grammarians, medical writers, and philosophers. Examples from Latin grammarians of the Early Empire are Scaur. 24.3, 25.15, 27.3 K; Vel. 53.16 K; Acron *ap.* Char. 261.7 B; cf. for the spread of the terminology e.g. Quint. *Inst.* 1.5.68. Oikonomopoulou 2013 discusses (the vocabulary of) question-and-answer literature in medicine and philosophy (predominantly in Greek).

<sup>17</sup> Manthe has decided to print *linteum* in the recent *editio maior* (Nelson and Manthe 2007) on the argument that Gaius' explanation has little to do with what a *licium* was and actually describes a *linteum* (Manthe 2005, 167; cf. Nelson and Manthe 2007, 295). Given the ordinary meaning of *linteum* in the second century, this misrecognizes the scholarly *quaestio* that Gaius presents. Furthermore, any attempt to see the phrase *quo necessariae partes tegerentur* (which expresses purpose) as the only information of interest here faces a major challenge in that the formulation *quid sit autem linteum/licium est* does not encourage this reading. Of course, taking Manthe's point further, a skeptical reader might object that Gaius' *quaestio* is framed less precisely than I read it or that it asks 'what <this> *linteum* is <in the context of this law>'. While I maintain that this is a contestable reading of the *quaestio*, I do not think that it – if granted – offsets my earlier arguments.

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<sup>18</sup> The emendation was originally proposed by Van der Hoeven 1868, 258 (and universally accepted until Nelson and Manthe 2007) on the grounds that *linterum* would not need any clarification whatsoever.

<sup>19</sup> See the photographic reproduction at Briguglio 2012, 124.

<sup>20</sup> In addition, Professor Briguglio tells me *per litteras* that he cannot confirm abbreviation signs on the basis of the high-resolution, optically enhanced infrared images in his possession. Study of the original MS indicates that what Böcking (and the scholars on whose notes he based himself) and Studemund identified as (faded) abbreviation strokes must be letter characters on the other side of the parchment shining through.

<sup>21</sup> On this *nota*, see Lindsay 1915, 273. On the inconsistent usage of *notae* in the codex Veronensis, see my n. 23 below.

<sup>22</sup> Göschen 1820, Göschen 1824, Huschke's early editions (starting 1860), and Giraud 1873 prefer *quare lex* to *quae res lex*. The former reading appears to have been abandoned after the publication of Studemund's apograph (1874), although the re-editions of Huschke reveal that he held onto it until his death in 1886.

<sup>23</sup> The fluidity of V's *notae* becomes crystal clear from the table of abbreviations at the back of Studemund's apograph. The list reports that *R* in this MS can designate many things (*res*, *rem*, *re*, *respondit*, *rescriptum*, *rubrica*, *rubra*, *regula*). Consequently, should future high-tech readings of V reveal *R* instead of *R*, one might still argue for the resolution *re* rather than *res* on the basis of the flexible usage of this symbol. Note that two lines down on the same MS page *r* is used for *re* (fol. 34v. line 11; I read *R*, Studemund *R*). Along the same lines, the table indicates that the use of *q* / *q̄* is flexible too, thereby barring a mechanical, one-solution

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expansion for the first character of the sequence *q r l(ex)* (cf. in particular *Inst.* 2.188, fol. 22v. line 5). Finally, might *q r* somehow be a variant of the *nota* for *quare*? The classic form of this *nota* is  $q\bar{r}$  (with some variations, it seems; Lindsay 1915, 225); those in favor of arguing that *q r* is a variant of  $q\bar{r}$  may find support one line up in the MS where (it seems) we read *at* for *autem* (instead of the classic *nota* form  $a\bar{r}$ ; Lindsay 1915, 13).

<sup>24</sup> For so-called inferential *quare*, see *OLD* s.v. (B.). The ‘logic’ of the passage was contested by several textual critics in the nineteenth century. See for example Polenaar 1876 *app. ad loc.* for a discussion with older references.

<sup>25</sup> See for example at *Dig.* 48.5.39.2 (Papinian) and *Dig.* 49.4.1.7 (Ulpian).

<sup>26</sup> This edition is the end point of a series of revisions and updates starting from Huschke 1860. Its enduring popularity emerges from its use by Gordon and Robinson 1988 and Crawford 1996, 2: 558 without any argument.

<sup>27</sup> David 1963 with Nelson 1981. The *editio maior* (slightly adapted) is now Nelson and Manthe 2007. This reading is also printed by Krüger and Studemund 1877 (only in their first edition) upon Mommsen’s personal urging, Muirhead 1880, and Reinach 2002. Though not printing it, De Zulueta 1946-52 considers this reading not impossible.

<sup>28</sup> *res [lex tota]*: e.g. Polenaar 1876, Dubois 1881, Krüger and Studemund all editions post 1877, Girard 1923, Bizoukides 1937-39, Baviera 1940-43, and De Zulueta 1946-52. Kniep 1917, 55 is favorable to this reading, but keeps *lex tota* in the text as an apposition to *res* that may be the work of a “Nachgajaner”.

<sup>29</sup> Note the verbal echo with the *nam* sentence: *quaesita re inventa* 3.193, which seems to be formulaic.



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<sup>30</sup> Roman legal historians generally hold that the search could not in fact be refused in Archaic Rome but that Gaius was ignorant of this. See Nelson and Manthe 2007, 156.

<sup>31</sup> Nelson and Manthe 2007, 156, as part of their argument for reading *quae res [lex] tota ridicula est*. It should be pointed out that their argument seems to drift in two directions. While focusing on the uselessness of both searches, they also claim that Gaius “hielt daher die Regelung des Zwölftafelgesetzes für lächerlich”. This latter point seems (at first sight) an argument in favor of reading *lex*. Since they nonetheless print *res*, I take it that they look beyond the *quaestio lance et licio* provision narrowly conceived (and that “Regelung” is a collective).

<sup>32</sup> Bizoukides is most vocal about this (1937-39, 2: 121 n. 554). It also appears to be the reasoning behind Mommsen’s suggestion (see Krüger and Studemund 1877 *app. ad loc.*). Bizoukides claims that *lex tota* can only refer to the Twelve Tables as a whole, yet this is not the most straightforward interpretation. While it is undeniable that Gaius uses the singular *lex* in all cases in which he unambiguously refers to the Twelve Tables as a whole, he also uses the singular to refer to specific provisions. In 3.193, *lex tota* is probably most easily understood as the provision about the *quaestio lance et licio*. But the preceding sections make it somewhat ambiguous: in 3.191 we find *ex lege XII tabularum*, which seems continued by the first (and possibly also the second) *lex* of 3.192.

<sup>33</sup> e.g. Plaut. *Curc.* 399-403, *Amph.* 928-30; cf. also Hor. *Epist.* 2.1.23-7 and Sen. *Ep.* 114.13. In juristic texts, we regularly find the predicates *ridiculus* and *absurdus* in connection to someone’s interpretation of a particular authoritative formulation of the law, rather than as a critique of the law itself.

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<sup>34</sup> See my n. 32 above.

<sup>35</sup> Nörr 1974, 92-102 argues that Gaius' critiques are targeted towards outdated points of law.

<sup>36</sup> Similarly, Gaius' famous critique of the need for women to have *tutores* (an old institute probably connected in some way to the Twelve Tables) mainly targets the popular explanation for it (*vulgo creditur*), namely that this is supposedly due to women's *levitas animi* (the point is called *magis speciosa ... quam vera* at *Inst.* 1.190); yet by extension it undercuts the very legal institute itself. Note further Gaius' remark that, in the case of a suit on *damnum infecti*, which was the only case still allowing a *legis actio* in his day next to other remedies, no one will actually choose the *legis actio* (*nemo vult lege agere*, 4.31).

<sup>37</sup> See, for example, Harries 2007, 50-54; Howley 2013.

<sup>38</sup> Favorinus' most heated rejection of the Twelve Tables involves his calling "ridiculous" the infinite spiral of violence (that he sees) resulting from the regulation on *talio* (*res ridiculae atrocitatis*, 20.1.18) because retaliation can by definition never be identical to the injury. To be sure, even though the phraseology comes very close to Gaius' at 1.193, this passage in Gellius would in many ways constitute a misleading parallel, since Favorinus' ridicule focuses on the extreme and hypothetical consequences of a very particular reading of the law rather than that it calls the law itself ridiculous (cf. Caecilius' riposte *lubitum est arguendi*, 20.1.21).

<sup>39</sup> The most convenient overview is provided by the indices to Lenel 1889.

<sup>40</sup> The earliest selection and discussion of the Twelve Tables about which there is some certain information is that of Sextus Aelius (consul 198 BCE); see e.g. *Cic. Leg.* 2.59, *Dig.* 1.2.2.38 (Pomponius). Cicero refers to multiple Twelve-Table commentators in his *Leg.*, e.g.

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at 2.59. While Labeo's was the authoritative commentary until Gaius', it is likely that Masurius Sabinus' *Liber memorialium* included discussions pertaining to the Twelve Tables too, as did his work *De furtis* (see Gell. 11.18.13).

<sup>41</sup> As has long been suggested, the two consecutive fragments in the *Digest* that are ascribed to Modestinus' *Ad Mucium* (fl. later Severan Age) are probably a red herring (41.1.53, 54). Both excerpts are inscribed with *idem* rather than their author's name, and they follow immediately on an excerpt ascribed by name to Modestinus. Since inscriptions are notorious for their corruptions and the work by Modestinus is otherwise unattested, suspicion seems justified. Following the anonymous scholiast to the *Basilica*, many have posited Pomponius' authorship (sch. B. 13.1.13.10 Sch.-Holw.; Mommsen *app.* ad *Dig.* 41.1.53, Lenel 1889, 2: col. 69 n. 5, col. 75 n. 3).

<sup>42</sup> The title of Sabinus' work, *Iuris civilis libri III*, is often taken as a sign that he based himself on Q. Mucius Scaevola's *De iure civili*. The first attested work *Ad Sabinum* is by Pomponius.