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The Origins of Usus

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It has long been recognised that the XII Tables was not a complete statement of the law, and that some topics of great legal importance were either not set out or were very partially treated. The general opinion has been, however, that the fragmentary state of our knowledge of the XII Tables' provisions makes it impossible to be precise as to the topics not dealt with or treated only in part. Recently, though, I have tried to show that we have some information on the great majority of the clauses in the XII Tables: hence on this view, where we have no indication that a topic was dealt with in the code the strong presumption must be that no relevant provision ever existed. I also argued that reasons can be found for the inclusion of many topics in the XII Tables, reasons which largely relate to legal innovation or uncertainty in the law. When basic matters are omitted from the code this is largely because the law was well settled (1).

Two examples will make the argument plain. First, with one important exception we have no evidence for any provision in the XII Tables on legal capacity and requirements for marriage; there is nothing on minimum age, prohibited degrees of relationship, necessary consents, personal status or nationality. The exception where we do have evidence is a clause prohibiting intermarriage between patricians and plebeians, a prohibition which is consistently represented in the sources as an innovation

(1) See A. Watson, *Rome of the XII Tables, Persons and Property* (Princeton, 1975), especially at pp. 6f, 20ff, 38f, 61, 92f, 156, 182ff.

of the XII Tables (2). Our conclusion should be that the XII Tables contained the clause prohibiting intermarriage precisely because it was an innovation; for the rest the law on capacity and conditions for marriage was settled and left unchanged by the XII Tables, hence the code contained no provisions on these matters. We have no evidence of such clauses just because they never existed (3).

Secondly, for the law of theft evidence is totally lacking precisely on the three most basic issues, namely a) the physical activity — handling or moving — which was required before there could be *furtum*; b) the state of mind required in the wrongdoer; and c) the basis of the distinction between *furtum manifestum* and *furtum nec manifestum* (4).

Indeed it can be positively demonstrated that the distinction between *furtum manifestum* and *furtum nec manifestum* was not explained in the code (5). Yet we have clear proof that on other aspects of the delict several provisions (6) did exist in the XII Tables and we can reconstruct the law tolerably well. That there is no evidence of any provision on the most important aspects of theft while we know of the existence of several provisions on less important points constitutes a pattern which itself indicates that he basic law of theft was not set out in the XII Tables. This is in line with the view that a fundamental rule may be regarded as so obvious that it can be taken for granted and not set out (7).

If the argument is accurate then it can be used — with great caution — to cast light both on the history of rules in the XII

(2) Cicero, *Rep.* 2.37.63; Livy, 4.1.1,2; 4.2.6; 4.4.5-12; 4.6.2; Dionysius of Halicarnassus, 10.6.5.

(3) See WATSON, *Rome of the XII Tables*, pp. 20ff.

(4) One might also add as basic issues on which we have no direct evidence of a XII Tables' clause d) the things which could be stolen; and e) who could be the plaintiff in an action for theft.

(5) Otherwise the various views as to where the dividing line between the two should be drawn could not have existed in classical law: G.3.184.

(6) Now collected in *Tab.* VIII.

(7) See D. DAUBE, 'The Self-Understood in Legal History', *Juridical Review* 18 (1973), pp. 126ff.

Tables and on the state of Roman law before that code was promulgated. The main purpose of this paper is to consider one topic, *usus*, from this angle.

For the acquisition of ownership of property by *usus*, the XII Tables, we know, contained clauses to the following effect:

1. The period of use required for prescription is two years for land, one year for other things ([8]).
2. Foreigners cannot acquire by prescription ([9]).
3. *Res mancipi* belonging to a woman in the tutelage of her agnates cannot be acquired by prescription unless they are transferred with the tutors' authority ([10]).
4. Stolen property cannot be acquired by prescription; or possibly, the thief cannot usucapt ([11]).
5. The place where a body is burned and buried and the entrance to a tomb cannot be acquired by prescription ([12]).
6. A five-foot strip along boundaries cannot be usucapted ([13]).

Together the clauses provide a comprehensive account of acquisition of property by prescription; the period of use required, the property which cannot be so acquired, the persons who cannot so acquire. There would have been no need to define the meaning of *usus*, especially if as Reuven Yaron has persuasively argued *usus* had the literal meaning of use ([14]).

This comprehensive treatment, which is so well-documented, stands in complete contrast to the utter silence of the sources on other aspects of acquisition — as distinct from transfer — of property. We have no information of clauses in the XII Tables on the various forms of *occupatio, thesauri inventio, fructuum*

(8) Cicero, *top.* 4.23; *pro Caecina* 19.54; G.2.42,54,204.
(9) Cicero, *de off.* 1.12.37.
(10) G.2.47.
(11) G.2.45,49; D.41.3.33pr; J.2.6.2.
(12) Cicero, *de leg.* 2.24.61.
(13) Cicero, *de leg.* 1.21.55.
(14) 'Reflections on *usucapio*', *T.v.R.* 35 (1967), pp. 191ff at pp. 209ff; followed by e.g. G. Diósdi, *Ownership in Ancient and Preclassical Roman Law* (Budapest, 1970), p. 89; Watson, *Rome of the XII Tables*, p. 151.

perceptio, fructuum separatio, specificatio and the varieties of *accessio*. Elsewhere I have already suggested that the silence of the sources meant that these matters were not dealt with in the code (15); presumably because the law was clear.

A comparison between the comprehensive treatment of *usus* and what we know the XII Tables contained on transfer of ownership by *mancipatio* is equally instructive. So far as our information goes, the code did not list the things classified as *res mancipi*, nor set out the essential requirements of the ceremony, nor declare who could take part in the ceremony or acquire ownership by *mancipatio*. In all probability these matters were not treated. Presumably here, too, the law was well settled and did not need restatement. We do, however, know of a clause of much disputed meaning, '*Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita ius esto*' (16). There was probably also a provision concerning the *actio de modo agri* (17); and many scholars (18) believe that a provision, reported in Justinian's *Institutes*, that ownership was not to pass unless the price was paid or security given somehow related to *mancipatio* (19).

What emerges from all this is not just that an explanation should be sought — and often can be found — for the omission of topics from the code. We must also account for a subject such as *usus* being treated so fully and, indeed, comprehensively. The explanation cannot be that in certain aspects of *usus* the XII Tables were innovating, nor that some rules were disputable and clarification was needed. That explanation might be persuasive if what we had were one or two provisions, but it cannot be sufficient for the fact of a comprehensive treatment. If I am correct in asserting that it is significant that acquisition of ownership by *usus* was fully set out in the XII Tables, the sole

(15) *Rome of the XII Tables*, p. 156.

(16) Festus, *s.v. Numerata pecunia*.

(17) Appears from Cicero, *de off.* 3.16.65.

(18) E.g. recently, J.A.C. THOMAS, *The Institutes of Justinian* (Cape Town, 1975), p. 83; *contra*, WATSON, *Rome of the XII Tables*, pp. 145ff.

(19) J.2.1.41; D.18.1.19.

explanation possible is that prescription was a creation of the code. Before that, in legal theory long use of something which had an owner would not give rise to a title of ownership in the user, nor would the title of the owner be adversely affected. The practical reality would be rather different. After the lapse of even a relatively short time it would become difficult for an owner out of control of property to prove his title. And open use of something would give the appearance of ownership. Often, of course, the truth would emerge. In this situation the XII Tables created *usus* to reduce confusion and avoid disputes (20).

Usus at the time of the XII Tables was not just a means whereby ownership of property was acquired. The same term denoted one way by which a husband or his *paterfamilias* obtained *manus* over a wife. The question must therefore be posed whether *usus* as a way of creating *manus* was also an innovation of the XII Tables, or alternatively whether *usus* in marriage provided the model for *usus* as a means of acquiring property. For those numerous scholars who regard the power of the early Roman *paterfamilias* over his wife, children, slaves, animals and inanimate property as undifferentiated (21), the question is unreal: *manus* conferred by *usus* could not be older than *usus* as a mode of acquiring ownership. For those who, like myself, do not share that view the question remains.

Though certainty is lacking, the balance of probabilities is, I submit, that *usus* for marriage was also the creation of the XII Tables (22). A first argument is that there was a provision

(20) Cicero declares *Fundus a patre relinqui potest, at usucapio fundi ... non a patre relinquitur, sed a legibus*: *pro Caecina* 26.74. M. Michel Nuyens kindly observes that this allusion would be more pointed if *usucapio* was actually a creation of statute.

(21) See, e.g. M. Kaser, *Eigentum und Besitz im älteren römischen Recht*, 2nd edit. (Cologne, Graz, 1956); F. Gallo, '*Potestas* e *dominium* nell'esperienza giuridica romana', *Labeo* 16 (1970), pp. 17ff; L. Capogrossi Colognesi, 'Ancora sui poteri del *pater familias*', *BIDR* 73 (1970), pp. 357ff.

(22) For Kaser, the clause of the code setting out the time required for *usus* related also to the acquisition of *manus*; *Das römische Privatrecht* 1, 2nd edit. (Munich, 1971), p. 78. We need not here consider the accuracy of this view.

of the XII Tables which listed the ways in which *manus* was acquired: '*usu farre(o) coemptione*' (23). The existence of such a clause, prima facie puzzling, becomes explicable if *usus* here represents an innovation. Secondly, the order in the list, *usus*, *confarreatio*, *coemptio*, which can scarcely be the historical order of emergence of the ways of acquiring ownership (24), makes sense if the list was primarily the result of the introduction of *usus*. *Usus* would then reasonably come first, followed by *confarreatio* which was apparently the oldest (25), the most formal and the most prestigious.

On this view many marriages before the XII Tables would always have remained *sine manu*. Perhaps the growing social demands of the plebs which, we are told, led to the very promulgation of the XII Tables (26), contributed to a feeling that in general their wives, too, should be *in manu*. There was an equalisation of the general legal effects of marriage. Or, possibly, the function of *usus* here was to simplify proof: after one year of marriage it would not be necessary to prove that there had been *confarreatio* or a *coemptio* (27). But since some women or their *patresfamiliarum* would prefer that their marriage remain permanently free from *manus*, a means had to be devised whereby a woman, by taking steps, could avoid *manus*. Hence the creation of *usurpatio* which was also specifically regulated by the XII Tables (28).

(23) For the existence of such a provision see now WATSON, *Rome of the XII Tables*, pp. 9ff.

(24) Though C.W. WESTRUP suggests from this order that *usus* was considered the earliest: 'Über den sogenannten Brautkauf des Altertums', *Zeitschrift für vergleichende Rechtswissenschaft* 42 (1927), pp. 47ff at p. 54.

(25) Tradition has it that *confarreatio* was the work of Romulus; Dionysius of Halicarnassus, 2.25.1.

(26) See, above all, Livy 3.9-34.

(27) See e.g. H.F. JOLOWICZ and B. NICHOLAS, *Historical Introduction to the Study of Roman Law*, 3rd edit. (Cambridge, 1973), pp. 116f.

(28) Aulus Gellius, *N.A.* 3.2.13.