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# *Tignum iunctum,* the XII Tables and a Lost Word

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*For A.H. Campbell*

A text of the scholar Festus, which is famous among Latinists and lawyers alike, reads:

*Tignum non solum in aedificiis, quo utuntur, appellatur, sed etiam in vineis, ut est in XII: "Tignum iunctum aedibus vineave et concapit ne solvito".*

For the quotation from the XII Tables, the manuscripts show some variation for *vineave*: *victum* in *W*, *vineaque* in *V* and *minerve* in *X*. But these we can happily leave aside and come to the crux of the text, *concapit*, which appears in all the manuscripts. "*Concapit*, a corrupt word, and difficult of explanation" say Lewis and Short<sup>(1)</sup>! And the emendations proposed are numerous and lacking in general approval<sup>(2)</sup>. J.J. Scaliger suggested *e concapi*, Cuiacius *et concapit <um>*, Mommsen *e compage*, Götz *e concapidine*, Müller *e concape*, but Schoell reverts to *e concapi* and Huschke has *sei concapit*. Riccobono excises the words altogether<sup>(3)</sup>. To show that the age of invention is not over I wish to propose and defend yet another emendation which will have its own particular virtues, legal and linguistic.

(1) *A Latin Dictionary* (Oxford, 1951), p. 396.

(2) Cf. G. MELILLO, *Tignum iunctum* (Naples, 1964), pp. 13ff.

(3) For references to these scholars and appropriate editions see MELILLO, *loc. cit.*; C.G. BRUNS, *Fontes Iuris Romani Antiqui*, 7th edit. by O. GRADENWITZ (Tübingen, 1909), p. 26; and S. RICCOBONO, *Fontes Iuris Romani Antejustiniani* i, 2nd edit. (Florence, 1941), p. 46.

The clause of the XII Tables read, I suggest, "*Tignum iunctum aedibus vineave concaput ne solvito*".

What it may well be asked is *concaput*, and what does it mean? Answer: It is a noun, compounded from *cum* and *caput*, exactly like *compes* is compounded from *cum* and *pes*. And as *compes* means 'something attached to the feet, fetters' so *concaput* has the sense 'something attached to the head or top, support'. The clause in question then originally meant 'Do not take away a beam built into a house or a support from a vine'.

To justify this reconstruction one must first explain *concaput*, then show that substantial benefits accrue from the reconstruction, and finally indicate how the present state of the text in Festus could be reached from the suggested original wording of the XII Tables.

The word *concaput* does not appear anywhere in Latin. Proof that there ever was such a word cannot be directly provided, no more than proof exists in any other instance where it is alleged that a word must have occurred though it is otherwise unknown. The best that can be done is to show that if the word did exist, then (a) its formation would be regular, (b) that it would reasonably bear the meaning ascribed to it, and (c) that difficulties for the text — which otherwise have no solution — disappear entirely.

The formation of *concaput* from *cum* and *caput* is perfectly regular: before c, d, f, g, j, s, t and v *con* is the form adopted from *cum* (4). This, of course, is in itself no justification for holding that the word *concaput* actually existed. But the suggestion gains in plausibility when it is recalled that compound formations with the preposition *cum* are common in early Latin, and that several are known from Plautus to have existed but are not evidenced thereafter: thus for instance, the nouns, *commers*, *consuetio*; adjectives, *confusicius*, *consucidus*; and verbs, *collabasco*, *collutulento*, *concaleo*, *conscreeor*. Moreover more than one word which we know appeared in the XII Tables was not in use

(4) R. KÜHNER - F. HOLZWEISSIG, *Ausführliche Grammatik der lateinischen Sprache* I, 2nd edn. (reprinted Darmstadt, 1966), p. 927.

in more historical times: *ricinium*, *adsiduus* (as a noun), *lessus*, *heredium*, *obvagulare*, *rupitia*.

No difficulty arises for the meaning which has been suggested for *concaput*. We have evidence from early times that *caput* was used to mean not only 'head' in a literal sense applying to humans and animals, but also the 'top' of other things<sup>(5)</sup>. And vines would be attached, or would attach themselves at their tops to the supports: *Quam altissimam viniam facito*, says Cato the Censor<sup>(6)</sup>.

The first major advantage to accrue from the emendation to *concaput* is that a reasonable meaning can now be ascribed to *tignum*. On any other reconstruction of *e concapit*, — or indeed even if the words are excised altogether — *Tignum iunctum aedibus vincave* must be taken together as one phrase. The meaning of *tignum* then has to be wide enough to refer to supports for vines. But *tignum*, as has been emphasised by scholars, normally means in other contexts 'a beam'<sup>(7)</sup>. Only with regard to this clause of the XII Tables does it ever appear that *tignum* was even used to mean 'building materials'<sup>(8)</sup>. It might reasonably be suggested that the word was used in the XII Tables to signify building material of all kinds yet even so, of course, a word with a narrow meaning like 'beam' would here have especial importance; removal of a beam could adversely affect the existence of the whole structure, removal of a roof tile would not. But the idea that the XII Tables used the word *tignum* with a still wider meaning including supports for vines seems very difficult to accept. The Romans of the Empire betray their puzzlement. Festus himself in the text which opened this article quotes the provision of the XII Tables really to show that *tignum* was a word which was even used in connection with vines as well as houses. Obviously such a use needed to be noted. Very

(5) See the entries in *Thesaurus Linguae Latinae iii* (Leipzig, 1907), 408ff.

(6) *De agri cult.* 33.2.

(7) Cf. A. ERNOUT & A. MEILLET, *Dictionnaire étymologique de la langue latine* ii, 4th edit. (Paris, 1960), p. 691.

(8) Cf. ERNOUT & MEILLET, *loc. cit.*

few juristic texts on the subject of *tignum iunctum* have survived, but a surprisingly large proportion of these is devoted to explaining the meaning of *tignum*. Thus around the middle of the 2nd century A.D. Gaius took *tignum* in the XII Tables as meaning all kinds of material which make up buildings:

D. 50.16.62 (26 ad ed. prov.). *Tigni appellatione in lege duodecim tabularum omne genus materiae, ex qua aedificia constant, significatur.*

Half a century later Ulpian spelled out the details, and explicitly made *tignum* apply also to everything necessary for vines:

D. 47.3.1.1 (37 ad ed.). *Tigni autem appellatione continetur omnis materia, ex qua aedificium constet, vineaeque necessaria. unde quidam aiunt tegulam quoque et lapidem et testam ceteraque, si qua aedificiis sunt utilia (tigna enim a tegendo dicta sunt), hoc amplius et calcem et harenam tignorum appellatione contineri. sed et in vineis tigni appellatione omnia vineis necessaria continentur, ut puta perticae pedamenta.*

In several ways this is a most revealing text. To begin with, Ulpian explains that *tignum* has a broad meaning. He continues that some say that a roof tile, a stone, a brick etc. are included. Though he does not say so directly it appears that he shares this view of *tignum*. Next he defends this very wide usage by a false etymology: *tigna* derives from *tegendum*. From Ulpian's treatment it seems to emerge that there are problems in attributing to *tignum* the meaning of 'materials of all kinds for a building'. But then Ulpian comes to the vines, and has *sed et in vineis*. *Sed et*, 'but even', introduces a more extreme case. A further text of Ulpian confirms one's impression.

D. 10.4.7.pr (24 ad ed.). *Tigni appellatione omnem materiam in lege duodecim tabularum accipimus, ut quibusdam recte videtur.*

From this also it is apparent that *tignum* in the XII Tables was invested with a meaning much wider than was usual, that such a meaning was not accepted by all jurists without protest, and that Ulpian favoured the wide meaning. The more one looks

at these four texts of Festus, Gaius and Ulpian, the more difficult it becomes to believe the XII Tables could ever have used *tignum* to include the meaning of 'support for vines'. The reconstruction *concaput* would enable us to restore a natural meaning to *tignum* for the first time.

If the arguments to this point are correct, then it follows that the loss of the word *concaput* (and its meaning) from the XII Tables' clause had occurred before Festus who apparently lived in the later second century A.D. The probability, indeed, is that the loss was earlier since it is likely that the corruption *et concapit* occurred in two stages (?).

The second major advantage which accrues from the reconstruction *concaput*, is that one avoids the further problems raised by all other emendations. It is not proposed here to have a full discussion of these reconstructions; the failure of any to win wide support makes that unnecessary. It is enough to stress that they fall into two types each of which has its own difficulties. One type makes *et concapit* refer to a joining together, a unification, of the material with the building or vine. Mommsen's *e compage* is a good example<sup>(10)</sup>. The real problem here is to understand why any reference to the joining was necessary or desirable since it already appears clearly from *iunctum*. The difficulty is not diminished if one takes *e compage ne solvito* as a single phrase. The other approach is to deduce from *et concapit* a reference somehow or another to theft, an approach based largely on the similarity in appearance between *concapit* and *furtum conceptum*<sup>(11)</sup>. But there is simply no room for a reference to theft in this clause. If one were to suggest that the clause concerned only stolen material then it seems absurd that stolen material and only stolen material could not be removed when incorporated into a building. If the suggestion were that the

(9) Cf. *infra*, p. 342. One cannot conclude from D. 50.16.62 that the version known to Gaius was corrupt.

(10) T. MOMMSEN, 'Festi codicis quaternionem decimum sextum', *Abhandlungen der Berliner Akademie der Wissenschaften* (Philol.-Hist. Kl., 1864), pp. 57ff at p. 76.

(11) Cf. e.g. M. VOIGT, *Die XII Tafeln* II (Leipzig, 1883), pp. 574ff.

clause referred specially to theft in order to show that no material, whether stolen or incorporated innocently, could be removed, then one must concede that a reference to innocently taken material has apparently been lost. The text would need far greater emendation.

There was, of course, an *actio de tigno iuncto* available to the owner of the material for double its value and this action was established by the XII Tables<sup>(12)</sup>, and necessarily by a different clause. It has long been a matter of dispute whether the action was available only when the builder was in bad faith, or was given even against an innocent builder<sup>(13)</sup>. We need not enter into this dispute: the prohibition against the removal has its motivation — the avoidance of disproportionate economic loss — which is distinct from any penalisation of the builder. The prohibition could exist even where a builder was not penalised.

Finally we must consider the history of the corruption of the clause *Tignum iunctum aedibus vineave concaput ne solvito*. Once the word *concaput* had gone out of use any scribe might be forgiven for misreading an 'i' for a 'u'. When that had happened it would not seem that *vineave* could be taken with *concapit* and *Tignum iunctum aedibus vineave* would be understood together. *Concapit* would just not fit at all, but the rest of the text would be perfectly sensible; hence it would be a natural step to distance *concapit* — which now looked like a verb — from the remainder of the provision by the insertion of an *et*, so that *et concapit* looked like a separate clause, and the rest of the text could be interpreted and understood without it<sup>(14)</sup>.

(12) D. 47.3.1pr; 10.4.6 (Paul 14 *ad Sab.*); 24.1.63 (Paul 3 *ad Nerat.*).

(13) Cf. e.g. MELILLO, *Tignum iunctum*, pp. 42ff; M. KASER, *Das römische Privatrecht* ii, 2nd edit. (Munich, 1971), pp. 138f and the authors they cite.

(14) I am grateful to Mr. Roy PINKERTON for very generous advice.