PROPERTY *TEMP*. XII – OUTLINE

(The primary sources referred to in this outline are attached, and cited in the outline as 'Mats.' with a hyperlink indicating where they appear. Clicking on the heading of the item in the Mats. will, in most cases, bring you back to where you were in the outline.)

I. AUCTORITAS

The concept of *auctoritas* is difficult, but it may be the key to understanding archaic property.

1. Read *Opinions of Paul* 2.17.1 (Mats. 1). The work is probably of the late 3d or early 4th century; it is an important source because *mancipatio* and *auctoritas* had been abolished by Justinian's time.

2. There is nothing here that suggests that the two actions described here, the *actio auctoritatis*[1] in the case of eviction, and the *actio de modo agri* in the case of false boundaries go back to the time of XII, but it is generally thought that they do. In the case of the latter, tab. 6.2 may be evidence for it. Cicero, *De officiis* 3.16.65 (Mats. 2, the language is quite murky), our source for tab.6.2, says that the table required the vendor, literally, "make good those things named by the tongue" and specified a double penalty for those who expressly denied something. This passage from Cicero, however, goes on to describe an action in the late Republic in which the seller was held liable for having failed to disclose a defect known to him (that the authorities had ordered the buildings on the property reduced in height). This later action was based on the *bona fides* provisions of the *actio empti* and clearly is later than the XII.

   In the case of the former, our best evidence for its antiquity is the fact that the only way the liability could be avoided was by pretending that the sale was for a small price. Our first firm evidence of that comes from the first or second century A.D.,[2] but the fact that the dodge is used suggests at least by that time the liability could not be avoided by seller's simply saying that s/he makes no warranty.

3. The other piece of evidence that liability *auctoritatis* existed at the time of the XII is that there are a two key uses of the term in the XII, and it is possible to make sense of them if we assume that the lability existed:

4. XII tab. 6.4 (Mats. 3): "Against an alien let warranty be perpetual."[3] This is the easier of the two provisions though it is by no means clear. If it means, as it is frequently taken to mean, that the *auctoritas* liability lasts forever in the case of a sale to a non-Roman, then the word 'against' (*adversus*) is strange. If, on the other hand, it means, as Watson suggests, that the right or title of the previous owner lasts against the foreigner forever, then that would fit with the known inability of the foreigner to usucape (this applied even to foreigners with *commercium*) and would also imply that the *auctoritas* liability would last forever, even though it doesn't say so.

[1] Not the classical term but we don't know the name of the action, Schulz, sec. 920.

[2] See Zulueta, *Roman Law of Sale*.

[3] *Adversus hostem aeterna auctoritas [esto]*.

5. XII tab. 6.3 (Mats. 4): "*Usus auctoritas* (?warranty against prescription) of land (*fundi*) is for two years . . . of everything else . . . prescription is for one year."[4] (The context from which this quotation is derived, Cicero, Topics 4.23, is quite interesting. [Mats. 5].) GI.2.42 (Mats. 6) tells us that the basic one-year, two-year provision was in the XII.) This means *usus auctoritas* (whatever that means) of a piece of agricultural land (following Watson here on the meaning of *fundus*) is for a period of two years; *usus* of all other things is for one year. Watson gives us the following readings: *Auctoritas* means the right or title of the previous owner. *Usus* is literal. Later authors took *usus* as an old form of *usucapio*, but there is no reason not to take it in Watson's (and Yaron's) sense as meaning literally "use." *Fundus* is a piece of farm land. The residence (*aedes*) was in the city, and the danger was usucapion in the fallow period of land outside of the city. Hence, W. suggests that the prescription period for land was extended from 1 to 2 years in the XII. I think there may be something to this. My problem is with the basic meaning of the provision. *Usus* and *auctoritas*, according to Watson, are both nominative. Watson would have us believe that provision is a portmanteau provision: the right of the former owner lasts for two years, and *usus* of two years will give the new owner a right. That's a strange reading of the Latin, though it has considerable support.[5] I rather prefer the translation that suggests that the "*auctoritas* of *usus*" lasts for two years. The fact that to us this could mean two entirely different things: usucapion is perfected in two years and the *auctoritas* liability of the former owner who has mancipated the land expires after two years may be a reflection of the fact that we are reading a later concept of ownership into an earlier one. For the Roman of the 5th century it was all the same thing. What you got by using the land for two years was the ability to defend any action on the basis of your own *auctoritas*; if you hadn't been using it for two years, you needed your predecessor in title's *auctoritas*.

6. Other provisions on usucapion emphasize the importance of the institution, and also tend to confirm our reading: XII tab.5.2 (=G.2.47 [Mats. 7]): No usucapion of *res mancipi* against women in agnatic *tutela* unless the thing was handed over by the authority [admittedly that's supplied] of the tutor. If this is right, then the *auctoritas* liability of the vendor is not just an interesting provision designed to prevent fraud (although the double penalty fits in nicely with fraud penalties) but rather an essential element in the Roman system of conveyance, indeed of the system of ownership at the time.

II. THE CONCEPT OF PROPERTY

1. There are a number of provisions in the XII concerning property and quite a bit else that could be referred to that time. Everyone believes that private property existed. The issues are: (1) to what extent it differs from other forms of rights and (2) to what extent it is a relative right.

   a. A strong notion of Quiritary right: "I say this man is mine by Quiritary right"[6] (Mats. 8).

      i. [7]As to the *legis actio sacramento in rem* we may say: (1) that the claimants were on equal terms, but that does not correspond to Gaius' account; (2) that the person in control had to prove ownership; (3) that the plaintiff had to prove it. The second

[4] *Usus auctoritas fundi biennium est, ceterarum rerum omnium annuus est usus*.

[5] See Jolowicz-Nicholas p. 146 n.1.

[6] *Hunc ego hominem ex iure Quirtium meum esso aio*.

[7] This material is also in the Procedure outline.

seems bizarre despite the argument that defendant may be under suspicion of theft. The to-me convincing argument comes from Cicero *pro Murena* 11.25–12.26 (Mats. 9, careful it's a joke), which clearly indicates that the defendant was the first to speak, and the absence of any note of a change. Cicero also shows a claim of non-relative ownership, as does the claim of ownership by Quiritary right, about which I have more doubts, considering the original nature of the oaths.

ii. XII tab. 6.6a: "If [any persons] join hand *in iure* (law, court) . . . " (Mats. 10). Aulus Gellius (NA 20.10, Mats. 11) says that this took place in front of the land in question and only later was the visit to the land with the praetor not present substituted. (GI.4.17, Mats. 12). Thus, *manum consere* cannot mean the agreement to meet again in front of the land. Exactly how this fits into the whole story is unclear.

iii. No real evidence that it could not be used for *res nec mancipi*. Actions as to status (vs. ownership) probably differed in wording. A single concept for all forms of control? Clearly not, though the parallels are much stronger than in modern systems and that tells us a lot about the family.

b. *Res mancipi* (i.e., hand take) and *res nec mancipi*, giving rise to a conveyancing distinction: *mancipatio* and probably *in iure cessio* for the *res mancipi*, probably *traditio* for the *res nec mancipi*. The existence of a provision about *traditio* in the XII is suspect because of the late source (JI.2.1.41, Mats. 13), but there must have been some way to sell sheep.

c. *Mancipatio*. A basic institution, classically a conveyance; the form would seem to be that described by Gaius (GI.1.119, Mats. 14). Contractual elements mix in even though the transferor said nothing. Quintus Mucius derives *emptio venditio* from it. *Res mancipi* (horses not important for early farming). The list may be derived from an Indo-European list of the good things in life.[8] Note the weighing of the bronze. The business with the scales is real not formal until 280 BC, when the Romans first used coined money. *Coemptio* shows that real price not necessary as does *testamentum per aes et libram*:

i. Possibility of nominal price (connected with limiting *auctoritas* liability).

ii. Omission of price entirely. Seems unlikely; why would anyone use it?

iii. Must there be payment or security? Do you need the *traditio* described in J.2.1.41 (above, Mats. 13) "When ... a thing is sold and delivered, it does not become the purchaser's property until he has paid the price to the vendor, or satisfied him in some other way, as by getting some one else to accept liability for him, or by pledge. And this rule, though laid down also in the statute of the Twelve Tables, is rightly said to be a dictate of the law of all nations, that is, of natural law."? Watson doubts it as do I. Indeed, I doubt the whole passage.

iv. *Cum nexum faciet* (tab. 7.1, Mats. 15): (a) Simply an affirmation? (b) A question of intention vs. what was said (later called the *scripta-voluntas* problem)? (c) *Leges mancipio datae*, e.g., servitudes retained, seems the best argument.

[8] Watkins article.

d. XII tab. 7.11 (above, Mats. 13). *Traditio* can't deal with *auctoritas* or *mancipatio*. The provision must deal with credit sales. Why should this be impossible a priori?

e. Paul, in Vatican Fragments 50 (Mats. 16) ("the law of the XII confirms both *mancipatio* and *in iure cessio*") may only refer to tab. 7.1 (above, Mats. 15), and to *leges manicipio datae* (stipulations or conditions that accompanied a *mancipatio*), which by Paul's time could also be done by way of *in iure cessio*. (This is suggested by the context in which Paul seems to arguing with Pomponius about the validity of certain kinds of *leges*.) If so our only evidence for *in iure cessio* is the probable existence of *manumissio vindicta*.

f. Usucapion is all over the XII. In addition to the ones mentioned above: XII tab. 7.4 (Mats. 17): No usucapion within 5 feet of boundary. No *bona fides* or *iusta causa*, but a thief (probably applies just to the stealer of the goods; see the *lex Atinia* below) could not usucape (tab. 7.17 [=G.2.45, Mats. 18]). Tab.10.10 (Mats. 19): No usucapion of tombs. Nothing about original modes of acquisition. Hence usucapion is an important institution and somewhat in transition.

2. Much of what we see makes sense in the context:

a. I am attracted to Watson's suggestion that two year usucapion for land was an invention of the XII necessitated by the practice of fallowing Watson's statement that the weighing in *mancipatio* is real should be emphasized – no coins until c. 280 B.C.

b. The land use provisions in Table VII – we hear of vines, rain water damaging property, boundary disputes, rights of way – later land use law is surprisingly deficient – this is not. Examples: Gaius says that the action for marking boundaries (*actio finium regundorum*) was established according to Solon's laws (D.10.1.13=tab. 7.2, Mats. 20). No usucapion within 5 feet (tab. 7.4, above, Mats. 17). The *actio finium regundorum* was heard by arbiters (tab. 7.5, Mats. 21). Overhanging branches should be cut to the height of 15 feet. (tab. 7.9, Mats. 22). One may enter on another's land to pick up acorns from one's trees. (tab. 7.10, Mats. 23). Damage done by pasturing animals. (tab. 8.7, Mats. 24). Damage from rain water or an aqueduct (tab. 7.8, Mats. 25 and Mats. 26). Of the rustic servitudes only *via* is mentioned, the broadest of them (tab. 7.7, Mats. 27). Note that the passage imposes a kind of affirmative obligation. The width provisions deal with a servitude by *usus* (tab. 7.6, Mats. 28). We cannot be sure whether *superficies solo cedit* (fixtures placed on another's land belong to the owner of the land) was in effect. There is no evidence either way, unless it's contained in the mysterious provisions about a linked beam (*tignum iunctum*) (tab. 6.7, Mats. 29).

3. Now what's at stake here is important. The Roman notion of property is the Western notion of property. The English notion with considerable pulling and hauling has been adapted to the Roman. It makes a sharp distinction between ownership and possession. It tends to agglomerate. It regards individual ownership of things as the norm and anything other than that – joint ownership, community rights – as abnormal. A clear idea of its origins would be most useful. Can we get a clear idea of what's going on? Perhaps not a complete idea, but some pieces may add up to something.

a. What we said above about land use suggests that an absolute right of use was not part of the original notion.

b. The relationship between the law of persons and the law of property.

c. The relationship between ownership and possession depends on what the requirements for usucapion were: (1) There is no evidence of *bona fides* and *iusta causa*. There was some kind of provision about stolen goods, but a *lex Atinia* of the 2d century seems to have said that usucapion of stolen goods was not possible –> Mommsen's suggestion that the XII provision concerned only the thief and this seems to conform to the juristic debate that is reported about whether the *lex* was retrospective. Read Aulus Gellius, 17.7.1 (Mats. 30) and D.41.3.4.6 (Mats. 31).[9] (2) tab. 6.3 (above, Mats. 4), which, as we have seen above, creates a possible relation between *auctoritas* liability and *usus*.

4. The claim that a thing is mine 'by Quiritary right' may mean nothing more than that it was conveyed to me by *mancipatio* or that I've had it for two years or one year as the case may be. All of this suggests an origin of property in possession. It also suggests that a lot of the key elements in the Western idea of property were already there:

a. a distinction between contract and conveyance

b. substantial but known land use control provisions

c. a device for settling title in those who had acquired by defective conveyance

All quite remarkable why:

a. *beati possidentes* – the liberal fallacy, but why have recourse to a fallacy?

b. focus on the individual, but we know it's not true – the family, the *gens*, the client, the very notion of *suus heres* –> the notion of moves in legal development – the *gens* in decline (mixture), patron and client in decline (hoplites), the family not quite there yet; wives will be the first to break out – at this time the move – can we associate it with nascent professionalism?

[9] The literature is substantial, but the most recent literature, e.g., Vishnia in http://ezp-prod1.hul.harvard.edu/login?url=https://www.jstor.org/stable/24817211 seems to be focused on the passage of the law not its content but this may be another lex Atinia; Crawford deals with it in 2.745.

PROPERTY *TEMP*. XII – MATERIALS

1. *Opinions of Paul 2.17.1 (Scott trans.)*:

If the seller is not the owner of the thing he has sold, he remains liable on *auctoritas* for the price he received; otherwise he cannot be obliged. 2. If things simply handed over are evicted, the seller is to be condemned to pay the buyer as much as he would have paid if he made a stipulation against eviction. 3. If a sale has been completed by mancipation and handing over, if the thing is evicted, the seller is obliged up to double by *auctoritas*. 4. If anyone lies about the boundary when a piece of land has been subdivided, he may be condemned in double the amount about which he lied by the office of the judge, an estimate having been made.

2. *Cicero, De officiis 3.16.65–66 (= Table VI.2) (Miller trans.)*:

[65] In the laws pertaining to the sale of real property it is stipulated in our civil code that when a transfer of any real estate is made, all its defects shall be declared as far as they are known to the vendor. According to the laws of the Twelve Tables it used to be sufficient that such faults as had been expressly declared should be made good and that for any flaws which the vendor expressly denied, when questioned, he should be assessed double damages. A like penalty for failure to make such declaration also has now been secured by our jurisconsults: they have decided that any defect in a piece of real estate, if known to the vendor but not expressly stated, must be made good by him.

(The Latin about the XII Tables is cryptic to the point of obscurity: “cum ex XII tab. satis esset ea praestari, quae essent lingua nuncupata, quae qui infitiatus esset, dupli poenam subiret, a juris consultis etiam reticentiae poena est constituta.” The broader context suggests that he is talking about *vitia*, ‘defects’, which may not necessarily include misdescription of the boundaries.)

[66] For example, the augurs were proposing to take observations from the citadel and they ordered Tiberius Claudius Centumalus, who owned a house upon the Caelian Hill, to pull down such parts of the building as obstructed the augurs' view by reason of their height. Claudius at once advertised his block for sale, and Publius Calpurnius Lanarius bought it. The same notice was served also upon him. And so, when Calpurnius had pulled down those parts of the building and discovered that Claudius had advertised it for sale only after the augurs had ordered them to be pulled down, he summoned the former owner before a court [p. 337] of equity to decide “what indemnity the owner was under obligation 'in good faith ' to pay and deliver to him.” (Latin: “Itaque Calpurnius cum demolitus esset cognossetque Claudium aedes postea proscripsisse, quam esset ab auguribus demoliri iussus, arbitrum illum adegit QUICQUID SIBI DARE FACERE OPORTERET EX FIDE BONA.”) The verdict was pronounced by Marcus Cato, the father of our Cato (for as other men receive a distinguishing name from their fathers, so he who bestowed upon the world so bright a luminary must have his distinguishing name from his son); he, as I was saying, was presiding judge and pronounced the verdict that “since the augurs' mandate was known to the vendor at the time of making the transfer and since he had not made it known, he was bound to make good the purchaser's loss.”

3. *XII tab. 6.4 (CD trans.)*:

Against an alien (*hostis*), *auctoritas* shall be perpetual.[10]

[10] *Adversus hostem aeterna auctoritas esto*.

4. XII tab. 6.3 (CD trans.):

Usus auctoritas (?warranty against prescription) of land is for two years . . . of everything else ... prescription is for one year.[11]

5. Cicero, Topics 4.23 (Hubbell trans.):

All arguments from comparison are valid if they are of the following character: What is valid in the greater should be valid in the less, as for example since there is no action for regulating boundaries in the city, there should be no action for excluding water in the city. Likewise the reverse: What is valid in the less should be valid in the greater; the same example may be used if reversed. Likewise: What is valid in one of two equal cases should be valid in the other; for example: Since use and warranty run for two years in the case of a farm, the same should be true of a (city) house. But a (city) house is not mentioned in the law, and is included with the other things use of which runs for one year. Equity should prevail, which requires equal laws in equal cases.

6. Gaius, Institutes 2.42:

42. Usucapion of movables is completed in one year, of lands and buildings in two: so the law of the Twelve Tables provides.

7. Gaius, Institutes 2.47 (=XII, tab. 5.2):

47. Again, in former times the *res mancipi* of a woman who was in the *tutela* of her agnates could not be acquired by usucapion, except where she had delivered them with the *auctoritas* of her tutor; this was provided by the law of the Twelve Tables.

8. Gaius, Institutes 4.16:

16. If the action was *in rem*, movables, inanimate and animate, provided they could be carried or led into court, were claimed in court in the following manner. The claimant, holding a rod and laying hold of the actual thing – let us say a slave – said: 'I affirm that this man is mine by Quiritary right according to his proper title. As I have declared, so, look you, I have laid my staff on him', and at that moment he laid his rod on the man. His opponent spoke and did the selfsame things. Both parties having thus laid claim, the praetor said: 'Unhand the man, both of you.' They did so. The first claimant then put the following question to the other: 'I ask, will you declare on what title you have laid claim?' and he answered: 'By laying on my staff I have exercised my right.' Thereupon the first claimant said: 'Seeing that you have laid claim unrightfully, I challenge you by a *sacramentum* of 500 *asses*.' And his opponent likewise said: 'And I you.' (Of course, if the thing was worth less than 1,000 *asses* they named a *sacramentum* of 50 *asses*.) Next followed the same proceedings as in an action *in personam*. Thereafter the praetor declared *uindiciae* in favour of one of the parties, that is, he established him as interim possessor, and ordered him to give his opponent sureties *litis et unidiciarum*, that is, for the thing and its profits. Other sureties were taken from both parties for the *sacramentum* by the praetor himself, because this went to the public treasury. The rod was employed to represent a spear, the symbol of lawful ownership, because they considered things they had captured from the enemy to be preeminently theirs by lawful ownership; and this is why in centumviral cases a spear is displayed.

9. Cicero, Pro Murena 11.25–12.26:[12]

[11] *Usus auctoritas fundi biennium est, ceterarum rerum omnium annuus est usus*.

[25] First of all, what dignity can there be in so limited a science?[13] For they are but small matters, conversant chiefly about single letters and punctuation between words. Secondly, if in the time of our ancestors there was any inclination to marvel at that study of yours, now that all your mysteries are revealed, it is wholly despised and disregarded. At one time few men knew whether a thing might be lawfully done or not; for men ordinarily had no records; those were possessed of great power who were consulted, so that even days for consultation were begged of them beforehand, as from the Chaldean astrologers. A certain notary was found, by name Cnaeus Flavius, who could deceive[14] the most wary, and who set the people records to be learnt by heart each day, and who pilfered their own learning from the profoundest lawyers. So they, being angry because they were afraid, lest, when their daily course of action was divulged and understood, people would be able to proceed by law without their assistance, adopted a sort of cipher, in order to make their presence necessary in every cause.

[26] When this might have been well transacted thus – "The Sabine farm is mine." "No; it is mine:" – then a trial; they would not have it so. "The farm," says he, "which is in the territory which is called Sabine:" – verbose enough – well, what next? "That farm, I say, is mine according to the rights of Roman citizens." What then? – "and therefore I summon you according to law, seizing you by the hand."

The man of whom the field was demanded did not know how to answer one who was so talkatively litigious. The same lawyer goes across, like a Latin flute-player, – says he, "In the place from whence you summoned me having seized me by the hand, from thence I recall you there." In the meantime, as to the praetor, lest he should think himself a fine fellow and a fortunate one, and himself say something of his own accord, a form of words is composed for him also, absurd in other points, and especially in this: "Each of them being alive and being present I say that that is the way." "Enter on the way." That wise man was at hand who was to show them the way. "Return on your path." They returned with the same guide. These things, I may well suppose, appeared ridiculous to full-grown men; that men when they have stood rightly and in their proper place should be ordered to depart, in order that they might immediately return again to the place they had left. Everything was tainted with the same childish folly. "When I behold you in the power of the law." And this – "But do you say this who claim the right?" And while all this was made a mystery of, they who had the key to the mystery were necessarily sought after by men; but as soon as these things were revealed, and were bandied about and sifted in men's hands, they were found to be thoroughly destitute of wisdom, but very full of fraud and folly.

10. *The institution that Cicero is describing here is referenced in XII tab. 6a*:

If [any persons] join hand in *iure* (law, court) . . . . [15]

11. *And explained in Aulus Gellius, Attic Nights 20.10*:[16]

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[12] M. Tullius Cicero. The Orations of Marcus Tullius Cicero, literally translated by C. D. Yonge, B. A. London. Henry G. Bohn, York Street, Covent Garden. 1856.

[13] The person being addressed here is Servius Sulpicius Rufus, who was counsel on the other side. Cicero is here speaking of jurists generally.

[14] Translator's note: The Latin strictly is, "pierce the eyes of ravens." It was a proverbial expression.

[15] *Si [qui] in iure manum conserunt . . . ,*

[16] The Attic Nights of Aulus Gellius. With An English Translation. John C. Rolfe. Cambridge. Cambridge, Mass., Harvard University Press; London, William Heinemann, Ltd. 1927.

Ex iure manum consertum, or "lay on hands according to law," is a phrase taken from ancient cases at law, and commonly used to-day when a case is tried before the praetor and claims are made. I asked a Roman grammarian, a man of wide reputation and great name, what the meaning of these words was. But he, looking scornfully at me, said: "Either you are making a mistake, youngster, or you are jesting; for I teach grammar and do not give legal advice. If you want to know anything connected with Virgil, Plautus or Ennius, you may ask me."

"It is a question from Ennius then, master," said I, "that I am asking. For it was Ennius who used those words." And when the grammarian said in great surprise that the words were unsuited to poetry and that they were not to be found anywhere in the poems of Ennius, I quoted from memory the following lines from the eighth book of the *Annals;* for it chanced that I remembered them because of their particularly striking character:[17]

> Wisdom is driven forth and force prevails;
> They scorn the speaker good, the rude soldier love.
> [p. 449] Contending not with learning nor abuse,
> They join in strife, not laying claim by law,
> (Non ex iure consertum, sed magis ferro)
> But, seeking with the sword both wealth and power,
> With force resistless rush.

When I had recited these verses from Ennius, the grammarian rejoined: "Now I believe you. But I would have you believe me, when I say that Quintus Ennius learned this, not from his reading of the poets, but from someone learned in the law. Do you too then go and learn from the same source as Ennius."

I followed the advice of this teacher, when he referred me to another from whom I could learn what he ought to have taught me himself: And I thought that I ought to include in these notes of mine what I have learned from jurists and their writings, since those who are living in the midst of affairs and among men ought not to be ignorant of the commoner legal expressions. *Manum conserere,* "to lay on hands." . . . For with one's opponent to lay hold of and claim in the prescribed formula anything about which there is a dispute, whether it be a field or something else, is called *vindicia,* or "a claim." A seizing with the hand of the thing or place in question took place in the presence of the praetor according to the *Twelve Tables,* in which it was written[18] "If any lay on hands in the presence of the magistrate."[19] But when the boundaries of Italy were extended and the praetors were greatly occupied with legal business, they found it hard to go to distant places to settle claims. Therefore it became [p. 451] usual by silent consent, though contrary to the *Twelve Tables,* for the litigants not to lay on hands in court in the presence of the praetor, but to call for "a laying on of hands according to law"; that is, that the one litigant should summon the other to the object in question, to lay hands on it according to law, and that they should go together to the field under dispute and bring some earth from it to the city to the praetor's court, for example one clod, and should lay claim to that clod, as if it were the whole field. Accordingly Ennius, wishing to describe such action, said that restitution was demanded, not by legal processes, such as are carried on before a praetor, nor by a laying on of hands according to law, but by war and the sword, and by

[17] Translator's note: vv. 268 ff., Vahlen.

[18] Translator's note: vi. 5.

[19] Translator's note: Cf. xx. i. 48; see Allen, *Remnants of Early Latin,* p. 85.

genuine and resistless violence; and he seems to have expressed this by comparing that civil and symbolic[20] power which is exercised in name only and not actually, with warlike and sanguinary violence.

12. *And in Gaius Institutes 4.17*:

17. If the thing was such as could not be carried or led into court without inconvenience–for example, if it was a column or a ship or a flock or herd–some part was taken from it and brought into court, and claim was laid on that part as representing the whole thing. Thus from a flock a single sheep or goat would be led into court or just a hair was detached and brought in, while from a ship or a column some bit would be broken off. Similarly, if the dispute was over land or a house or an inheritance, some part of it was taken and brought to court, and claim was made on this part as representing the whole: thus a clod would be taken from the land or a tile from the house, or, where the dispute was as to an inheritance, some article was similarly taken from it. . . .[21]

13. *Justinian Institutes 2.1.41 (=tab. 7.11)*:

When . . . a thing is sold and delivered, it does not become the purchaser's property until he has paid the price to the vendor, or satisfied him in some other way, as by getting some one else to accept liability for him, or by pledge. And this rule, though laid down also in the statute of the Twelve Tables, is rightly said to be a dictate of the law of all nations, that is, of natural law.

14. *Gaius Institutes 1.119*:

119. Now mancipation, as we have already said, is a sort of imaginary sale, and it too is an institution peculiar to Roman citizens. It is performed as follows: in the presence of not less than 5 Roman citizens of full age and also of a sixth person, having the same qualifications, known as the *libripens* (scale-holder), to hold a bronze scale, the party who is taking by the mancipation, holding a bronze ingot, says: 'I declare that this slave is mine by Quiritary right, and be he purchased to me with this bronze ingot and bronze scale.' He then strikes the scale with the ingot and gives it as a symbolic price to him from whom he is receiving by the mancipation.

15. *XII tab. 7.1 (CD trans.)*:[22]

When he makes *nexum* or *mancipium*, as the tongue has named, so let the law be.

16. *Paul, in Vat. Frag. 50 (=tab. ?6.6b) (CD trans.)*:

In the case of mancipation or *cessio in iure* it is doubtful whether it [a usufruct] can be reserved from a time or until a time (*ex tempore vel ad tempus*), or from the happening of a condition or until its happening (*ex condicione vel ad condicionem*): as if he who receives the *in iure cessio* says, 'I affirm that this land is mine, subject to a usufruct from Jan. 1,' or 'subject to a usufruct until Jan. 10,' or 'I affirm that this land is mine, subject to a usufruct if a ship shall arrive from Asia.' The same in the case of a mancipation: 'It shall be my purchase, subject to a usufruct from the first of such month,' or 'until the first of such month;' and the same words are used in a condition. Pomponius accordingly is of the opinion that it cannot be reserved for a fixed time (*ad certum tempus*), neither by *in iure cessio* nor by mancipation, but that only itself can be conveyed. I

[20] Translator's note: 1 *festuca,* "a stalk or stem," was used of the rod with which slaves were touched in the ceremony of manumission. Here *festucariam* (a ἅπαξ λεγόμενον) is extended in meaning to include any symbolic legal process.

[21] Our mss. here are deficient; neither gives an account of the end of the *sacramentum* procedure.

[22] *Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita ius esto*.

have taught that it can also be reserved until a time (*ad tempus*), because the Law of the Twelve Tables confirms both mancipation and *in iure cessio*. Can it therefore be reserved both from a time (*ex tempore*) and upon a condition (*condicione*)? It follows that a legacy can also be reserved until a time (*ad certum tempus*).

(The provision in XII that is traditionally derived from this (tab. 6.6b: "The Law of the Twelve Tables confirms both mancipation and *in iure cessio*") seems less certain when we put the quotation from Paul in context.)

17. *Cicero, Laws 1.55 (=tab. 7.4) (CD trans.)*:

The Twelve Tables have provided that usucapion shall not be within five feet of the boundary line.

18. *Gaius, Institutes 2.45 (=tab. 7.17)*:

45. But sometimes, though a man possess another's property in the best of faith, usucapion does not run in his favour, for example if he is in possession of a thing which has been stolen or taken by violence; for the law of the Twelve Tables forbids usucapion of a stolen thing, and the *L. Iulia et Plautia* that of a thing taken by violence.

19. *Cicero, Laws 2.61 (=tab. 10.10) (Fott trans.)*:

There are two more laws concerning graves, of which one takes precaution for private persons' buildings while the other takes precaution for graves themselves. The provision forbidding construction of a funeral pile or a tomb within sixty feet of others' dwellings against the will of the master is made from fear of fire in the dwellings. Moreover, the provision forbidding a forum (that is, the entry to a grave) or a tomb from being taken through use protects the right of graves.

20. *Justinian, Digest 10.1.13 (=tab. 7.2)*:

GAIUS, *XII Tables*, book 4: We must remember that in the action for regulating boundaries we should observe the rule which was formulated roughly on the model of the law which Solon is said to have passed at Athens; there it is stated: "If a man builds a dry stone wall next to someone else's land, he should not cross the boundary; if he builds a proper wall, he should leave a gap of one foot; if a building, two feet; if he digs a grave or pit, he should leave a gap equal to the depth; if a well, a gap of one fathom; he should plant an olive tree or fig tree nine feet away from the other man's land, other trees five feet away."

21. *XII tab. 7.5 (CD/AS trans.)*:

If they disagree, three arbiters are to regulate the boundaries.[23]

22. *Justinian, Digest 43.27.1.8 (=tab. 7.9)*:

ULPIAN, *Edict, book 71*: What the praetor says, the Law of the Twelve Tables also wished to effect, namely that the branches of the tree should be cut round to a height of fifteen feet.

23. *Pliny, Natural History 16.15 (=tab. 7.10) (Rackham trans.)*:

Moreover it was provided by law in the Twelve Tables that it was permissible to gather up acorns falling on to another person's land.

24. *Justinian, Digest 19.5.14.3 (=tab. 8.7)*:

[23] si iurgant, arbitros postulanto. This is very conservative reconstruction. Encouraged by AS, I went with si iurgant, <tres aribri fines regunto>. CD

ULPIAN, *Sabinus, book 41*: If acorns from your tree fall on my farm and I let loose my herd on them and consume them, . . . there can be no action from the Twelve Tables for the grazing of cattle since the pasturing was not on your land.

25. *XII tab. 7.8 (Crawford trans.)*:

If rainwater damages <it must be restrained>.[24]

26. *Justinian, Digest 43.8.5* (the source of tab. 7.8):

PAUL, *Sabinus*, *book 16*: If a watercourse conducted through a public place should harm a private person, an action will lie in favor of the private person under the Law of the Twelve Tables to make good the injury to the owner.

27. *XII tab. 7.7 (Crawford trans.)*:

They are to make roads. Unless they have placed stones along their own, he is to drive yoked beasts of burden, where he shall wish.[25]

28. *Justinian, Digest 8.3.8 (=XII tab. 7.6)*:

GAIUS, *Provincial Edict*, *book 7*: As regulated by the Twelve Tables, the width of a via is to be eight feet where the road is straight, and sixteen feet on an *anfractus*, that is, where there is a bend in the road.

29. *XII tab. 6.7 (Crawford trans.)*:

He is not to remove a linked beam from a house or a vineyard out of a joint.[26]

30. *Gellius, Attic Nights 17.7.1 (Rolfe trans.)*:

The words of the ancient Atinian law are as follows: "Whatever shall have been stolen, let the right to claim the thing be everlasting."[27] Who would suppose that in these words the law referred to anything else than to future time? But Quintus Scaevola says that his father and Brutus and Manilius, exceedingly learned men, inquired and were in doubt whether the law was valid in cases of future theft only or also in those already committed in the past . . . .

31. *Justinian, Digest 41.3.4.6*:

PAUL, *Edict*, *book 54*: Now, when the *lex Atinia* says that a stolen thing can be usucapted only if it has first returned into the power of the person from whom it was appropriated, this is to be interpreted as meaning that it must return into the power of its actual owner, not into that of the person from whom it was in fact taken. Hence, if a pledge be stolen from the pledgee or a borrowed thing from the borrower, the thing must return to the power of its real owner.

[24] si aqua pluvia nocet <arceto>.

[25] uias muniunto. ni sam delapidassint, qua uolet, iumenta agito.

[26] tignum iunctum aedibus uineaue e concap(edine) ne soluito.

[27] quod subruptum erit, eius rei aeterna auctoritas esto.