Comptes rendus

M. Humbert, *La Loi des XII tables, Édition et commentaire*. [Sources et documents, 7].
 Rome 2018. 952 p.

The Statute of the Twelve Tables has enjoyed a warm interest in the last twenty-two years. Following the latest edition in *Lois des Romains* of 1967¹, first an edition in *Roman Statutes* (RS) came out in 1996². Then, in 2018, a substantial edition of 882 pages with contributions on various topics of the Twelve Tables by various authors appeared, *XII Tabulae*, edited by Maria Floriana Cursi³. In the same year the Romanist world had a second surprise with the edition with commentary by Michel Humbert, counting 952 pages. We can certainly not say that the statute suffers from neglect or disinterest. The structure Humbert follows is, like the one in the contributions in Cursi's edition, the traditional one as set first by Dirksen in 1824⁴. Both do not follow the reshift of half of the delicts from Table VIII to Table II as practised by RS but keep to the traditional order as practised in, e.g., FIRA⁵. That is very fortunate since the structure in itself is merely a construct of a law, of which about half the provisions are not literally transmitted nor allocated in the tradition to a table. Romanists are therefore not waiting for two different ways of referencing. Far more, if not all important is the evaluation of the references to these provisions.

1 The difference between the three works is as follows

- 1 P.F. Girard, F. Senn, *Textes de droit romain*, Vol. 1: *Lois des Romains*, 7. éd. par un groupe de romanistes, Paris 1967.
- 2 *Roman Statutes*, ed. by M.H. Crawford with contributions, [BICS Suppl., 64], London 1996, p. 555-721: authors (Michel Humbert), A.D.E. Lewis and Michael Crawford. Humbert, however, had by that time apparently himself withdrawn as author.
- 3 *XII Tabulae, Testo e commento*, a cura di Maria Floriana Cursi, 2 vols., Napoli 2018.
- 4 H.E. Dirksen, *Übersicht der bisherigen Versuche zur Kritik und Herstellung des Textes der Zwölf-Tafel-Fragmente*, Leipzig 1824..
- 5 See for this and other observations A.J.B. Sirks, *The edition of the Twelve Tables in Roman Statutes*, *Tijdschrift voor Rechtsgeschiedenis*, 85 (2017), p. 65-78.

a) *Roman Statutes* tries to reconstruct the original text, which is in around half of the cases impossible, and in the other half leads to fragmentary texts. It provides all the relevant sources, a short commentary and a bibliography to each rule.

b) *XII Tabulae* consists of 20 contributions, each dealing with a particular theme, such as '*La successione ab intestato*', or '*I rapporti di vicinato*', or '*Gli illiciti privati*'. Such themes often cover more than one rule of the statute. There is no attempt to reconstruct, but in view of the results elsewhere this is no loss. More important is the analysis of the texts transmitted. Relevant literature is dealt with, joined by many notes, and at the end of each chapter an ample bibliography is included. No (explicit) attempt is made here to reconstruct the original text, the aim is to analyse the references and to recover the original purport. The result is a substantial coverage of the statute and a coherent treatment of connected provisions.

c) Humbert has proceeded in the same way as *RS*, but has followed the traditional structure of the Twelve Tables. After an introduction the fragments are listed in their traditional order. The system of notation used is as follows. Capitals indicate words which are certain, italic words are reconstructions (for which the commentary should be consulted), and if there is nothing transmitted or if nothing can be reconstructed, the author and the quotation with the reference to the Twelve Tables rule is given. After this general overview Humbert considers and analyses each provision in a separate section. Such a section starts with the text of the rule, either as quotation or as transmitted indirectly, with a translation. Complementary sources follow. In the ensuing commentary Humbert deals with the question of textual reconstruction, then places the rule in the context of the 5th century BC, and ends with a conclusion. A reconstruction, if possible, is presented. Relevant literature is used, the very extensive bibliography is at the end of the book, followed by indices of sources and authors.

2 Table VI.2-3

In view of the size of Humbert's edition (847 pages of text!) a complete review is out of question. A single sample may give an impression of the differences between *RS* and Humbert, and where *XII Tabulae* may give support. We focus on the treatment of VI.2-3 in both editions.

VI.2 rules that who denies his verbal obligation or transfer, has to pay the double amount.

2.1 Both Humbert and *RS* make the link with VI.1 which deals with *nexum*, viz. with its ending that who utters the required words (of being obliged),

is legally bound (*ita ius esto*). Both works cite Cicero *de officiis* 3.65 as source, which has *qui infitiatus esset dupli poenam subiret*. *RS* reconstructs the text as '<<*ni fariatur, duplum poena esto*>>'' ('may have stood here'), Humbert as '*si infitias ierit, damnas esto*' (FIRA does not provide here a reconstruction). The reader of *RS* has no idea that other readings may exist, nor gives *RS* an explanation why *ni fariatur* should be equal to *infitiatus esset*. There is merely a reference to *RS* VIII.11 where the term, a hapax, occurs. There it is assumed that it derives from *fari* and may mean 'to endorse', for which suggestion *RS* refers to VI.2. That, of course, is a circular argument and therefore not of any help. One misses a comparison with other occurrences of *infitiari*.

2.2 Humbert, on the other hand, comments extensively on the words *verba nuncupata* in VI.1, the litiscrescence in the archaic and preclassic period, in the classic period, thereafter on litiscrescence and *ita ius esto* as such. These three words at the end of VI.1 are to indicate the efficacy of the act, whereas VI.2 describes the consequences when the condemned person denies this efficacy. Humbert sets out the entire procedure which ends in a procedure against the denying debtor where he will be condemned to pay the double because of his denial. This is a very acceptable reason to reconstruct the reference to the *dupli poena* as *dupli damnas esto* in line with *formulae* as transmitted to us.

These words are also found in the *Lex Colon. Genetivae* c. 61, mentioned by both authors regarding the double. Why *RS* does not use this text for the reconstruction remains unknown. Why Humbert opts for *ierit* (which apparently as *sierit* occurs in VIII.22 (in the different order of *RS* as VIII.11)), he does not say. Apparently he simply takes over Godefroy's *si infitias* [*Goth.: inficias*] *ierit, duplione damnatur* [*Goth.: damnator*], whom he cites under 4, in this respect⁶.

2.3 *RS* inserts after this text VI.1-2(a), which is with Humbert and others (Bruns, FIRA) included as VII.12. Also Godefroy placed this rule here in Table VI⁷. It says that if a slave has been freed by testament under the condition that he pay the heir a sum, and he has been alienated by the heir before he could pay, he will become free by paying to the buyer. *RS* doubts whether there were at the time of the Twelve Tables so many slaves that a rule on the conditionally *ab testamento* freed justified a rule; but there will have been sufficient *nexi* for

6 J. Godefroy, *Fragmenta XII. Tabularum suis nunc primum tabulis restituta, probationibus, notis et indice munita*, Heidelbergae 1616, used by Humbert in the edition of E. Otto, *Thesaurus Juris Romani*, Trajecti ad Rhenum 1733, Vol. III.

7 Because Godefroy grouped this and other texts under the rubric *De dominio et de possessione*.

this. Then, to quote RS, 'It would be reasonable to suppose that the Twelve Tables granted the capacity to free a *nexus* whose debt was paid to a man to whom he had been transferred. The position of such a man will have been assimilated to that of a *statuliber* in a piece of retrospective erudition'. This is, apparently, the reason for placing this text here. But this argument is 'unnachvollziehbar'. It supposes that in archaic times a third party could release a *nexus* by paying his debt; that later on the problem of a conditional manumission by testament arose, viz. if the heir had sold already before the *statuliber* could have amassed the sum required; that jurists were at a loss how to solve this, and that they then adapted the Twelve Tables text in this sense: making the obligation of the *nexus* into a possibility for the *statuliber* (he does not have to pay, there is no *obligatio* for him), dropping the third party and making the *statuliber* paying for himself (the *nexus* could that also, so there is no need to introduce a third party). That is a hard thing to argue since there is nothing which supports this speculative interpretation. Since it would only be the connection with *nexus* in VI.1 which justifies a shift, there is no reason to do this. Besides, one must also argue why the text as it is does not fit in the context of the Twelve Tables. But the Twelve Tables know the testament and the manumission. A conditional manumission and sale as described could have failed due to the strict interpretation, at that time certainly usual. In later times the Stoic view on the working of conditions might have solved the problem (payment to the heir releases the slave retrospectively, the sale is invalid, the buyer can reclaim the price). As long as there is no good reason to doubt the texts, one should refrain from any inventive treatment⁸.

Humbert, on the other hand, dedicates much more text to VII.12. After mentioning principal and complementary sources, he discusses the conditional testamentary manumission, the *auctoritas* liability incurred by the seller, and the effect of the present rule, viz. that it derogates to the rule *usus auctoritas annuus esto* (formulated in VI.3, to which he indeed refers); and the obligation to guarantee. Rejecting Godefroy's reconstruction, he proposes *si statuliber venum datur, aeterna auctoritas esto*. The apparent inspiration for this is D. 21,2,39,4. Humbert accepts the usual interpretation of the *actio auctoritatis* as a guarantee as definitive (although in my opinion one should be careful: are we to suppose that the *auctoritas* in the 5th century BC is the equivalent of the *actio auctoritatis* or the obligation to provide *auctoritas* in the 1st century BC?

8 For Godefroy the reason to place the text here was that he thought Table VI dealt with the *ius dominii*. Since the text has *emptori* it should be included here, before the next text, VI.3, also on the *ius dominii*. One may not agree with this but in any case Godefroy did not read *nexus* into the text.

What if the latter is merely the derivative of the first, *auctoritas* meaning the – now by the *usus* in time limited – *ius quiritorium*?). In this case there is no eviction but the fulfilment of the testamentary condition by the slave paying the testamentary heir which robs the buyer of his property. The heir may avoid this by either warning the buyer or avoiding the *mancipatio*. Two problems arise: the rule of VI.3, viz. the *usus* of the slave, would obliterate the testator's will, and the seller (the heir) may consequently not invoke the obliteration of the duty of *auctoritas* after the period of a year.

Humbert does not enter upon D. 40,7,25, cited by him as a principal source, according to which an heir may sell a *statuliber* but not under more onerous conditions, viz. than set by the testament. Is it possible that this refers to an heir who sells a slave for more than the sum set in the testament with an increased financial condition for manumission⁹? E.g., when he thinks that the slave could and should pay more than the testator stipulated? He would get more than otherwise and the buyer too, if the price was in between. In that case the slave has a dilemma: if he pays the heir, he will still not be free; if he pays the buyer, he has to pay more which is against the testator's wish. The Twelve Tables provide an answer to this. It suffices that he pays the sum due under the testament to the buyer. Could this not have been the situation envisaged in the Twelve Tables? There would be no need to consider the rule of VI.3, nor complications with the *actio auctoritatis*, nor to apply D. 21,2,39,4, or to reject Godefroy's reconstruction: *statuliber emptori dando liber esto* (although I would miss here a reference to the testamentary condition).

3 Table VI.3

The following provision VI.3, which both authors have, derives from the well-known texts Cic. *top.* 4.23: *usus auctoritas fundi biennium est, sit etiam aedium. At in leges aedes non appellantur et sunt ceterarum rerum quarum annuus est usus* and Cic. *Caec.* 54: *lex usum et auctoritatem fundi iubet esse biennium; at utimur eodem iure in aedibus, quae in lege non appellantur*. Humbert presents as reconstructed rule 'VSUS AVCTORITAS FVNDI BIENNIUM ESTO; ceterarum rerum annuus VSVS ESTO'; RS as 'auctoritas fundi biennium <esto. ?ceterarum rerum? annus esto>.

Humbert states that *usus* restricted the duration of *auctoritas* to two years. Hence both words are inseparable. The word *usucapio* came up later, *usus* implies in the Twelve Tables what later is called *usucapio*. Thus VI.3 deals with

9 It was possible to sell a slave with the condition *ut servus manumittetur* (see M. Kaser, *Das römische Privatrecht*, Vol. I, München 1975, p. 562). In that case an additional condition would be possible too, viz. to pay a sum to the buyer.

one of the aspects of *usucapio*. Further, *usus* is for the *ceterae res* in the second part of the phrase the only determinant. This is another argument that in the first part *usus* is an original element. These considerations we do not find in *RS*. There it is said that *usus auctoritas* is an asyndeton, that it is simply only about *usucapio* (with reference to Boethius' 6th century commentary on the *Topica*), and that Cicero used 'the word of his own day – *usus* – and the word of the Twelve Tables *auctoritas*.'. By excluding *usus*, one reaches the conclusion of Mayer-Maly regarding *auctoritas* (which conclusion *RS* unfortunately does not communicate to the reader)¹⁰. *RS* also refers to VI.4 where merely *auctoritas* is present, but with some wariness. Follows a digression on *auctoritas*, which the author guesses meant 'something like 'eminent title'. There are clearly fallacies in this argument. If the text is about *usucapio*, then the word of Cicero's days was certainly *usucapio*, whereas *usus* in his days was restricted to 'use' as such. The digression on *auctoritas* is hampered by the fact that other instances of *auctoritas* as with the *tutor auctor* are not included. It is certainly not 'only by combing material very disparate in nature and date' that it is assumed that during the *usucapio* the *usucapient* was dependent on his foreman against claims¹¹. The reader draws far more profit from Humbert's commentary on *usucapio*, *usus* and *auctoritas*.

In *XII Tabulae* which as said deals with themes, VI.2 is merely mentioned in two footnotes, but VI.3 receives an ample discussion in the context of *mancipatio* and *mancipatio familiae*¹². Cursi considers the text of Cicero to be more authentic than Boethius' interpretation which equals *usus* and *auctoritas*. Perhaps everybody knows that there is a lot of Gaius in Boethius, but he will then also know that Boethius' context and thus his interpretation was different (which may have been the origin of *RS*' error, although it is, unfortunately for the reader, not explained – should we assume that what was equivalent in the 6th century AD, was already so in the 1st century BC?)¹³. Her intensive exposi-

10 Th. Mayer-Maly, *Studien zur Frühgeschichte der usucapio* II, ZSS romAbt 78 (1961), p. 230-231.

11 The suggestion that this also had as consequence that an acquirer by *mancipatio* did not at once become the owner is not relevant because the question here is about *usucapio* and not about the consequences of *mancipatio*. Besides, that turns the argument around. Although one became at once owner by *mancipatio*, *usucapio* retained its use if witnesses could not be found etc. *Usucapio* in that case has an evidentiary function. It could not reduce the ownership to mere possession.

12 M.F. Cursi, *La mancipatio e la mancipatio familiae, XII Tabulae*, p. 339-380, here 345-351.

13 The way ownership of land in Boethius' days was established and proven will have differed to such an extent that both terms were equalised, since it concerned provincial land of which ownership consisted only of a protected possession (the mention of *mancipatio* in the Ravennate papyri is a pure formality). See for this the excellent contribution of L.

tion touches other aspects than Humbert's and is for that reason alone already indispensable. From her note 35 on p. 346 it appears that *RS* meant by Mayer-Maly's interpretation that *usus* is to be read as a genitive, hence it would be 'the authority of the *usus*', an interpretation which generally is not followed and rightly so: *auctoritas* is always linked with a person or group of persons like the Senate, and never with a concept. It also does not fit the idea of an *asyndeton*, which, however, *RS* correctly sustains is the case here.

4 It will be clear that one is advised to use the edition in *RS* with caution. On the other hand, the chapters in *XII Tabulae* and Humbert's edition with its commentaries are indispensable for anyone studying the law of the Twelve Tables. Both works supplement each other admirably and provide much food for thought.

A.J.B. Sirks

University of Oxford

boudewijn.sirks@law.ox.ac.uk

Vacca, *La riforma di Giustiniano in materia di ,usucapio' e ,longi temporis praescriptio' fra concezioni dommatiche classiche e prassi postclassica*, BIDR 35/36 (1993/1994), p. 147-186.