REFLECTIONS ON USUCAPIO *)

by

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Few institutions of Roman law have undergone as fundamental changes in the course of their development as did usucapio. Some of these may be assumed to have occurred fairly early, others will have taken place in the later republic, at the end of the 3rd century B.C., or early in the 2nd, with delayed repercussions in the 1st century. Since in many of its significant features usucapio had reached its more or less final form already before the end of the republic, it is only to be expected that in the sources available to us (in the main classical and late) some early distinctions will have been lost altogether, or at least blurred. Some landmarks stand indeed out clearly enough, and make it possible to understand the general nature of early usucapio: for the moment it will be sufficient to mention usucapio pro herede and usureceptio, which are commonly referred to as showing that bona fides

*) The following writings are quoted in abbreviation:
Lévy-Bruhl NE  H. Lévy-Bruhl, Nouvelles études sur le très ancien droit romain, 1947.
was not yet required in early law 1). Nevertheless, it is perhaps not unexpected that in some cases one may be misled, simply because one tends to view usucapio from the vantage point of classical law, neglecting to some extent the historical perspective, and also the social and economic background.

Usucapio has for many years been the topic of a great deal of attention and discussion, with the proliferation of widely divergent opinions as an inevitable consequence. Recently a stimulating series of contributions by Mayer-Maly has cut a path through this jungle 2); these shall serve as our starting point also where we happen to disagree with him 3). It is a field in which it is difficult to break new ground; rather we shall wish to reargue some points and to suggest modifications of views which have been put forward by others. Some of the topics which we shall consider concern early law, other developments in the later republic. We shall discuss, A. The original function of usucapio; B. Auctoritas; C. Usus and possessio; D. Iusta causa and bona fides; E. Usucapio of res furtivae; F. The lex Scribonia.

A. The original function of usucapio

Developed usucapio had two functions, served as remedy for two situations: (i) where formal requirements of the law have not been met, more specifically where a res mancipi was handed over without performing mancipatio (or in iure cessio); (ii) where a chattel was conveyed by a person not entitled to do so (but in circumstances not amounting to furtum). For these two functions one may refer to G. 2.41,43.

It is plausible to assume that two so very different functions of usucapio will not have come into being at one and the same

1) See also the discussion on the lex Scribonia, and on usucapio libertatis, p. [36], below.
2) See, in addition to the list of abbreviations, his book Das Putativtitelproblem bei der „usucapio“, 1962, and his paper Der Erstitzungsbesitz am Sachbestandteil, SDHI 26 (1960), pp. 176—189.
3) As Mayer-Maly himself stresses (PW, col. 1095, note), his views on various points have changed considerably in the course of his work.