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A SHORT NOTE ON LEX MAMILIA¹

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Abstract: When dealing with boundary disputes, Roman land-surveyors often refer to a law known as the *lex Mamilia*. References make clear that the law lays down a prohibition, namely that strips of land 5 or 6 feet broad cannot be acquired by *usucapio*. It referred to disputes where the breadth of the land in question did not exceed the above-mentioned limit. In the *Corpus Agrimensorum Romanorum* we find three short fragments that bear the name *lex Mamilia Roscia Peducaea Alliena Fabia*. This law deals with questions related to boundary signs situated between plots as well as with the duties of the magistrates of a *colonia*. The present study seeks to examine the relationship between the two laws and to consider how the surviving fragments can be interpreted in relation to each other.

Keywords: Roman land surveying, boundary disputes, *lex Mamilia*, *usucapio*, municipal laws.

One of the major tasks of Roman land-surveyors was to participate in settling land tenure disputes, either as experts or, more rarely, as judges. Therefore it seems reasonable that in the surviving collection of their works entitled *Corpus Agrimensorum Romanorum* there are as many as three works dealing with the conflicts arising from disputed boundaries. The works that could be summarized as *de controversiis* were written by Frontinus, Hyginus and the late antiquity writer Agennius Urbicus.² They all were followers of Roman casuistic law and thus treated land tenure disputes in groups of cases. Frontinus set up two major groups. One of them was related to the problem of *finis*, while the other was connected to *locus* (*materiae controversiarum sunt duae, finis et locus*).

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² The title of the three times consul (73, 98, 100 AD) Frontinus' work is *de controversiis* (4C). The next chronologically is Hyginus, whose work is entitled *de generibus controversiarum* (90C). At the beginning of the presumably late antiquity writer Agennius Urbicus' work we can find the title *de controversiis agrorum* (16C). On authors: Campbell 2000, xxvii–xxxvii and Castillo Pascual 1998.

However, he treated altogether 15 types of cases without defining the relationship between the two major groups and the 15 cases treated (Frontinus 4C).³

Hyginus, however, defines only six groups: *de alluvione, de fine, de loco, de modo, de iure subsicivorum, de iure territorii* (Hyginus 90C). At the end of his work he also considers some further possible categories which he does not detail but treats as pertaining to the field of law. Urbicus begins to describe his own grouping system by presenting abstract categories, but following a theoretical and philosophical introduction, he also deals with land disputes in terms of categories that are similar to the ones used by his predecessors mentioned above.⁴

The first group of cases was presumably the *de positione terminorum*. Frontinus mentions this first of all. Hyginus does not deal with this category, but Urbicus also regards it as the most important one. Urbicus' text is fragmentary at this particular point but on the basis of the surviving parts we can assume that he also started to present disputes with *de positione terminorum* (Frontinus 4C; Urbicus 26-28C).⁵ Both Frontinus' and Urbicus' descriptions show that the *de positione terminorum* was in the first place a preliminary procedure which decided on factual questions. The starting point of the procedure was the discrepancy between the location of boundary signs and the latest property description (*secundum proximi temporis possessionem non conveniunt*). The *agrimensores* had to define the initial correct location of these boundary signs and also to suggest how the signs could be repositioned in the right place. Consequently the procedure only made a statement of fact and it was a further procedure that clarified the legal situation. It is not by chance that Urbicus calls it *anticipalis* in nature. In terms of procedural law this is a *praeiudicium*, the results of which will be taken into account in the next trial. Naturally, the *agrimensores* give us an account of how the case went, but before that we should have a look at legal sources.

In Book 47 of the Digest we can read about the *actio de termino moto*, the name of which seems to be closely related to the following words of Urbicus: *haec controversia moti termini*. However parallel the two texts might seem, it is only the basic facts that are the same. In both cases regulation is based on the

³ The lack of explanation is mainly due to the uncertainty connected to Frontinus' works. Altogether 4 shorter works of his have been preserved, namely *de agrorum qualitate, de controversiis, de limitibus, de arte mensoria*. These works (in Campbell's edition are no longer than 7 pages (2-15C). We cannot decide whether they are four fragments of a larger piece of work or extracts from four different works Cf. Dilke 1971, 105-108.

⁴ Campbell 2000, 337.

⁵ Cf. Campbell 2000, 338.

fact that the location of boundary signs can be changed as a result of human activity, which affects land and tenure rights. While land surveyors' writings mainly refer to private lawsuits, the Digest tends to feature criminal law regulations.

Callistratus refers to two pieces of *lex agraria* (C. Caesar, Nerva), and Hadrian's *rescriptum* when presenting the rules. Hadrian ordered that if people from the higher ranks of society (*splendidiores personae*) committed such an act in order to occupy others' land, they were to be sent in exile for a period that was inversely proportional to their age. Those who moved boundary signs while performing some (other) task had to do hard labour for two years. Presumably this was the category into which land surveyors also fell. Those who committed such an act only by chance, or out of ignorance, were simply whipped.

The name Caius Caesar may refer either to Julius Caesar or Caligula. No matter whom the name referred to, the law containing his name is at least hundred years older than Hadrian's *rescriptum*. It stipulates that people who, *dolo malo*, change the location of boundary signs will have to pay fifty aurei per boundary sign. The procedure could be started by anyone, thus it was an *actio popularis*. Nerva's law added that slaves committing this act should be sentenced to death.

The development of sanctions is important from a sociological perspective as well. The offence was already punishable by a significant fine, although it seems rather to have been a compilation.⁶ Exile and hard labour, however, were much more serious threats for offenders. It must have been the growing number of land occupations (as a result of boundary mark movement) that prompted emperors to introduce more severe sanctions.⁷ This assumption is backed by the fact that Hadrian treats offenders coming from the higher ranks of society differently, and threatens to punish them more severely. The reason behind this is that it was precisely these social groups that enlarged their lands using such methods, without fear of punishment. It was the result of social processes that Modestinus (despite earlier laws) does not allow financial penalties, and provides for sanctions in concordance with Hadrian's provision.

After finishing the procedure of *de positione terminorum* the land owners concerned faced a further procedure. As Frontinus (4, 14-15C) puts it: *ab integro alius forte de loco alius de fine litigat*. Thus the real lawsuit following the settlement of the *de positione terminorum* problem had to decide on either *de loco* or *de fine*. Urbicus treats *locus* and *modus* as the subject of the next dis-

⁶ Crawford 1989, 185.

⁷ Urbicus 26, 33C also thinks that boundary marks are moved *usurpandi finis causa*.

pute, but after *de positione terminorum* he also writes about *finis*, treating it as a separate type of case. *De fine, de loco* and *de modo* also appear in Hyginus' work.

In *de fine* procedures agrimensores are concerned with what forms the boundary between two plots. They mention boundary stones such as marks, marked trees and alleys, ditches, streams, hilltops etc. They describe in details what circumstances and conditions land surveyors had to consider. For example on the basis of the marks on trees they had to decide whether the boundary marking tree was common or belonged to one of the owners only. Similarly, ditches also had to be examined carefully to decide who they belonged to and whether they were situated on the border line or not. A solution to the latter question is sought by Urbicus, who in fact does not deal with the question of ditches separating plots because that part of his work must have been lost. However, when analysing *termini sacrificales*, he tells us that the so-called boundary signs were not necessarily placed at the physical boundary of plots, but their placement could sometimes be influenced by *opportunitas* and *commoditas*. Both these words can be interpreted as religious and practical terms at the same time. The above mentioned aspects could also have been taken into consideration when designating the place for other boundary sign as well. When digging ditches, it was the soil parameters and facilitation of drainage that played the most important role.

Besides practical pieces of advice land surveyors also make some references to the legal nature of such boundary disputes. Frontinus specifies that the procedure is subject to *lex Mamilia* providing that the boundary dispute originates from *de rigore*. Their legal status is the same as that of conflicts arising from *de fine* causes. The only difference is that while *rigor* refers to a boundary line without any extension, *finis* is a border having some extension. According to land surveyor specialists both types of boundaries shall be analysed as subject to *lex Mamilia*. That may be the reason why, following the description of *de positione terminorum*, it is the case of *finis* rather than that of *rigor* that is paid great attention to besides *locus*, because borders with some extension were significant for practical reasons as well. The difference between disputes connected to *locus* and procedures *de fine* was that in the case of *de loco* procedures debate was about a territory or strip of land which was broader than the extent specified by law. It could also be relevant from the point of view of farming, in contrast to the strip of land determined by *lex Mamilia*, which was important mainly for transport. According to Hyginus (92, 11-12 C), who fails to mention the text of the law, the five or six feet wide strip of land was used by land owners to get to their plots (*iter culturas accedentium*), or it served as a place to turn the plough round (*circumactus aratri*).

Land surveyor specialists refer to this Mamilian law on several occasions. Frontinus states that it is the procedure connected to disputed plots or boundary lines not wider than five feet that are subject to the law mentioned above. Urbicus considers it important to mention in connection with this law that even legal scholars have doubts about how to interpret the measures specified by the law because its text is archaic (*antiqui sermonis*). The other uncertainty related to the law was the width of 5 or 6 feet (appr. 1.6 – 2 m) specified in the *lex*. What is most important from the legal point of view is the fact that in order to preserve this strip of 5 or 6 foot wide land for common use there was no possibility for its *usucapio*.⁸

Among the texts of *Corpus Agrimensorum Romanorum* we can find three short fragments from a law which bears the name of *lex Mamilia Roscia Peducaea Alliena Fabia* in the collection.⁹ The obvious question that arises is what the relationship between the two laws was.

The first fragment of *lex Mamilia Roscia Peducaea Alliena Fabia* states that it is the obligation of the plot owner/user (*cuius is ager erit*) to make up for the missing boundary lines (*terminum restituendum curato*). Meanwhile, their control falls within the scope of local magistrates. The second fragment sets out payment of a sanction for those who change the located boundary lines in any way, e.g. by ploughing them away or filling up the ditches. The third fragment also refers to the consequences of moving boundary lines by describing the procedure to be followed. The duty of the magistrates of *coloniae* was to appoint a judge to clarify and decide on the disputed case. The only means of proving one's right (in the fragment) is taking evidence, and also threatening to make the guilty party pay a fine. The fact that the authenticity of boundary lines was of community interest is shown by the following: the fine was collected with immediate execution (*primo quoque die exigit*), and half the amount was given to the person who initiated the case (*partem dimidiam ei cuius unius opera maxime is condemnatus erit*), who was probably one of the adjoining owners.

In relation to the latter mentioned law research has mainly been preoccupied with dating. The first fragment can be found word for word in the text of *lex Coloniae Genetivae*, while a part of the third in that of the Digest (XLVII 21, 3). The latter fragment – as we have already mentioned – is referred to as the law of a C. Caesar in connection with *de termino moto*. On the basis of the limited data at our disposal research has made several attempts to date the

⁸ Frontinus 4C; Urbicus 22-24C and 30C; Commentum 60C; Siculus Flaccus 110C; Hyginus Gromaticus 136C. On the basis of the definition the above mentioned Hyginus 92C can also be referred to here.

⁹ 216-219C. The text is quoted by Hardy 1925, 185 and also Crawford 1989, 180-181.

law.¹⁰ If we do not take into consideration the – as yet unreflected – view which dated the issue of *lex Mamilia Roscia Peducaea Alliena Fabia* back to the age of the early Empire after identifying the C. Caesar mentioned in the Digest with Caligula, we can say there are basically two different views on its dating. The first view considers this law to be part of the numerous judicial acts that started after 111 BC as a counter reaction to Gracchus' measures, and thus could be dated back to 109 BC. In this case the law can be linked to C. Mamilius Limetanus, who was also known for his actions against the abuse associated with Jugurtha (Sall., *Iug.* 40. Cic., *Brut.* 127).¹¹

The other view considers that *lex Mamilia Roscia Peducaea Alliena Fabia* was introduced at the time of Caesar's agrarian laws or colony founding program. Furthermore, there is disagreement concerning the exact year, even among those who date the law back to Caesar's age. Among the possible years 59, 55 and 49 have all been mentioned, together with the period between 47 and 44.¹²

So far, research has hardly dealt with clarifying the connection between the two laws mentioned by land surveyors. Kroll – though in an unspoken fashion – identifies the two laws as one when he uses Agennius Urbicus' (24C) statement on the archaisms found in *lex Mamilia* to date the other law.¹³ Crawford, however, establishes two groups: the fragments of *lex Mamilia Roscia Peducaea Alliena Fabia* on the one hand, and the references of land surveyors to *lex Mamilia* on the other.¹⁴ The basis of his argument is that the latter (i.e. the comments of land surveyors) mainly refer to problems governed by private law, while the former (law fragments) are part of public law.

It is Cicero that gives us clues for dating *lex Mamilia*. In his dialogue entitled *de legibus*, which was presumably written around 53-51 BC, he traces back the prohibition of the usucapio of the five-foot wide boundary strip to the

¹⁰ For a short insight on possibilities cf. Kroll, RE 12, 2397.

¹¹ Cf. Hardy 1925, 186 sqq. Heurgon 1960, 221 sqq. Crawford 1989, 187. Heurgon also dates back another extremely disputed piece of *CAR*, the so-called Vegoia prophecy to the beginning of the civil wars. Cf. Heurgon 1959.

¹² Cf. Kroll, RE 12, 2397. Cary 1929, 115, argues for year 55, which he explains on the basis of the growing number of soldiers needed as a result of Caesar's conquest of Gaul. Crawford 1989, 184 and 187 sqq. connects the law to Caesar's legislation of 59, while Hardy 1925 sees a connection between the law in question and the period between 47-44. The substantial difference between the positions of the two authors is that Crawford identifies the known fragments with a single *lex Iulia agraria*, and dates *lex Mamilia, Roscia, Peducaea, Alliena, and Fabia* with unknown content to year 109, while Hardy proves that the law bearing this name had the content we know today.

¹³ We must not forget that Urbicus wrote in late antiquity. Therefore his comment on the law having ancient wording should be taken into chronological consideration accordingly.

¹⁴ Crawford 1989, 183. He is followed by Campbell 2000, 321-322.

Twelve Table Laws. He also adds that upon the principles of ancient laws three judges (*arbitri*) were required in the case of *de finibus* disputes, while Mamilius' law only prescribed one judge (Cic., *leg.* I 55).¹⁵ Mamilius' law, to which land surveyors refer, presumably dates back to the period before the second half of the 50's, and its source was the text of the Twelve Table Laws, which he changed at least with respect to the number of judges involved.¹⁶

The content of the fragments of the two laws that can be related to the name Mamilius is fairly different. One of them concentrates on the five or six feet wide boundary strip and the prohibition of usucapio of this land, whereas the other deals with the authority and duties of magistrates of towns and the procedure itself. However, the aim of the fragments was similar as both of them aimed at the stability of current ownership.¹⁷ When trying to clarify their relationship we do not necessarily have to think in terms of the public law and private law dichotomy. The law called *lex municipii Salpensani*, which dates back to Domitian's time, regulates the freeing of slaves and appointing of guardians.¹⁸ These regulations pertaining to the field of private law are naturally suitable to be part of the law of a municipium because, for example, the regulation of the conditions that made freeing a slave possible had a great impact on the whole community and influenced local civil law and other public law matters.

In the case of the two laws named after Mamilius we should differentiate on the basis of another distinguishing feature. The law named *lex Mamilia Roscia Peducaea Alliena Fabia* contains regulations of a procedural type, whereas the *lex Mamilia* preserved by land surveyors states a substantive type of provision: the usucapio of the boundary strip is forbidden. The common goal of both provisions was the prevention of land boundary disputes by maintaining the unobtainability of these boundary strips between plots. This was not only in the interest of the state (public regulation) but also of private parties (private law regulation). Therefore it is possible that the fragments belong to the same law instead of being fragments of two separate laws.

The regulation of land ownership is often part of the laws of towns. The laws of *lex Irnitana* and *lex Malacitana*, which date back to Domitian's age, contain provisions on the obligations of guarantors and witnesses, as well as on

¹⁵ Cf. Flach 1990, 27.

¹⁶ Cf. Crawford 1989, 183.

¹⁷ Cary 1929, 114 refers to something similar when treating *lex Mamilia Roscia Peducaea Alliena Fabia*, but his conclusions lead in a totally different direction. What is more, he does not consider the *lex Mamilia* referred to in connection with land surveyors.

¹⁸ *Lex Salpensana* XXVIII, XXIX (Dessau, ILS 6088).

real estate.¹⁹ These laws naturally included solutions for possible later disputes on land tenure. The law of the *municipium* of Irni says in its rubric number LXXVI that it is the duty of duumviri to make proposals to the town council on the examination of town boundaries, lands and territories providing tax to the town. The examination was carried out by walking through these territories with the aim of detecting abuses.²⁰ The law of the town of Urso dating back to the age of Caesar sets a prohibition on selling common lands, woods or buildings and also sets a time limit for rental of five years.²¹ In addition to these provisions laws also make it clear that magistrates should act in a way that shall not damage the interests of individuals. The remaining fragments of the laws of Tarentum, Urso and Irni all have sections that provide for taking into consideration the interests of individuals when establishing roads, ditches or channels (*sine iniuria privatorum*).²²

The prohibition of usucapio in *lex Mamilia* would not have sounded strange in the basic law of a *municipium* or *colonia*, although our standpoint cannot be considered indisputable due to the fragmentary nature of the preserved laws of towns. The protection of individuals' interests in the case of community investments suggests that these interests could also have been protected from other individuals by legal regulations. The Digest lists as a public service mission of town magistrates the termination of the usucapio of anything that is town property. (*Dig. L 4,1,4*). It does not seem impossible that the regulation of usucapio also referred to the boundary strips lying between individuals' lands and not only to public lands. The boundary strip – as we could see – was used as a road. The law called *lex Ursonensis* (LXXVIII) sets the following regulation: *Quae viae publicae itinerave publica sunt fuerunt intra eos fines, qui colon. dati erunt, quicumque limites quaeque viae quaeque itinera per eos agros sunt erunt fueruntve, eae viae eique limites eaque itinera publica sunt*. Referring to *limites* (boundary strips, boundaries between lands) and roads in the same passage and setting them under the authority of public law could be a good explanation for the prohibition of usucapio in *lex Mamilia* as well if we also consider that according to Hyginus (92C) boundary strips between plots

¹⁹ Lex Iritana LXIV; Lex Malacitana LXIII-LXV (Dessau, ILS 6089). Cf. Illés 2007, 45, who does not mention the parallelism provided by lex Malacitana.

²⁰ Illés 2007, 53.

²¹ Lex coloniae Genetivae Iuliae s. Ursonensis LXXVIII (Dessau, ILS 6087).

²² Lex municipii Tarentini 39 (Dessau, ILS 6086); lex Ursonensis LXXVII; lex Iritana LXXXII. Cf. Galsterer 1988, 84; Illés 2007, 57.

were meant to be used as roads.²³ It is not only by chance that it was the task of magistrates to keep an eye on them, and not only for the sake of town property. The stability of land ownership and transport was also a primary interest of the town community. It was the magistrates who possessed the public power that could preserve and guarantee the existing legal status. Furthermore, magistrates were also in possession of authentic, or at least reference, data in connection with plots. During the *census* they made surveys which they recorded in the so-called *forma censualis*, which contained the name of the plot, the owner of the land and of the two adjoining plots, the location of the plot within the local administrative units, its size and how it was cultivated (*Dig. L. 15,4pr*).

The dating of *lex Mamilia* in relation to Cicero as a *terminus ante quem*, and the proposed dating of *lex Mamilia Roscia Peducaea Alliena Fabia* give us conforming dates. Urbicus' statement on the archaic language of the first law provides us only with a relative dating; and if we accept the idea that Urbicus wrote in late antiquity, his dating does not contradict our theory that *lex Mamilia* can also be considered as dating back to the first century B.C. The aim of the two laws, as we can deduce from fragments, is common: to guarantee that lot boundaries would not be disturbed. This is of paramount importance for individuals, the community and the state alike. Regulation on land tenure also appears in further municipal laws. All things considered we may draw the conclusion that the fragments are part of a single law and not two different ones.

²³ This is also emphasised by Hyginus Gromaticus 136C, according to whom: *linearii limites ... latitudinem secundum Mamiliam accipiunt. In Italia etiam itineri publico serviunt ... hos conditores coloniarum fructus asportandi causa publicaverunt.*

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