By Joel Leininger, LS

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The Roots of Prescription

Mention the need for "prescription" in modern society, and the non-surveyor is likely to have an urge to feel your forehead. However the origins of our mode of prescription are considerably older than corner pharmacies. In fact, as with many other doctrines of law, we have the early Romans to thank for the idea.

Rome had no written transfers of land, instead using a complex and intricate public ceremony called "Mancipation" to convey title. This procedure, involving no less than five witnesses, in addition to a person holding a pair of scales (which figured in the ceremony) and the grantee and grantor, was intended to cement the event in the memory of the participants. (One of the consequences of an unwritten cadastre is that its elements depend on memory.) Furthermore, any slight deviation from the scripted procedure would render the whole affair a nullity. Thus, legal title – that which was backed by strict observance of Roman law – was separated from equitable title – that which the participants intended to effect.

Impediment to Commerce

Once the pace of Roman commerce accelerated beyond a certain point, the cumbersome process by which title could be legally transferred proved an impediment. In other words, the infrastructure necessary to effect a workable system of rapid title transfer was beyond Roman society.

As a consequence, Roman lawyers invented the concept of bona fide possession legitimizing faulty legal title. Invented prior to the writing of the Twelve Tables in 450 B.C. (which places the doctrine as one of the very early tenets of Roman law – the Twelve Tables being the first attempt at written codification thereof), it is the subject of Table 6. They named the device *usucapion*. A possessor who had a defect in the process of Mancipation, and who thus had no actual legal title, would acquire that title after uninterrupted possession of two years.

Prescription now does not require any particular mindset on the part of the possessor, nor does it require that the initiation of the possession be the result of a transaction. Mere possession for the required time, in a manner open, notorious and hostile to the record title, will suffice. Second, the period necessary to ripen the title under usucapion could be as little as one to two years. Our current requirements vary from state to state, but nowhere will title ripen in that short amount of time.

Nothing displayed the genius of Roman lawyers like *usucapion.*

They thus used usucapion in a curative manner: legal and equitable title, if temporarily separated from one another, were constantly in process of merging back together.

There are a couple of fundamental differences between the ancient practice and our present doctrine, however. First, the Romans required that the actual possession begin in good faith. In other words, the possessor must have been under the impression that he lawfully acquired the property. He also must have participated in a Mancipation, which, for some reason, failed to have the desired effect. It seems to me that our present doctrine of "color of title" is a close parallel to the failures contemplated by the Roman jurists. Color of title is a document that purports to convey title, but in fact does not, because of some defect. The defect can be most anything, up to and including a defect of the grantor not owning the property he purports to convey.

Henry Sumner Maine, the famous English legal historian, put it this way: "Owing to the complexity of their system, which as yet they had neither the courage nor the power to reconstruct, actual right was constantly getting divorced from technical right, the equitable ownership from the legal. But usucapion, as manipulated by the jurisconsults, supplied a self-acting machinery, by which the defects of titles to property were always in course of being cured, and by which the ownerships that were temporarily separated were again rapidly cemented together with the briefest possible delay."

Maine went on to observe that nothing displayed the genius of Roman lawyers like the invention of usucapion.

continued on page 70

Leininger, *continued from page 10*

Possessions of all Kinds

The doctrine of usucapion was not limited to land tenure. As do English and American Law, Roman law recognized the distinction between movables and immovables, what we now know as realty and personalty. All immovables required two years' possession to ripen title while movables required but one year. One method of marriage – *Usus* – perhaps what we would refer to as common-law marriage – could be ripened by continuous "possession" of the woman by the man for one year. But the woman could interrupt the usucapion by absenting herself from him for three nights in order to interrupt the "possession." Thus, as in the modern day prescription, continuity was an essential element of usucapion. "Open" and "notorious" elements probably played an essential part too, but since considering wives as possessions today can get one into hot water, I am going to exercise my writer's privilege and leave the subject there. You get the point.

In later years, the Romans distinguished between occupiers that hailed from the same province (requiring 10 years uninterrupted possession) and those from elsewhere (requiring 20 years).

Usucapion lost its advantages under the reforms of Justinian in 533 A.D. with the elimination of Mancipation and with the fusion of law and equity.

Middle Ages

In the middle ages, prescription was not looked upon favorably. Particularly among that class of legal scholars known as "realists," the doctrine of prescription collided with the theory that a vested right, however long neglected, could not be taken away. (Some struggle over that concept today.) But the defects of land conveyancing and description so rampant in ancient Rome manifested themselves all over again in England, such that a method of bringing the cadastre into alignment with actual use was necessary. Grudgingly, the English Parliament enacted a series of statutes that, step by step, re-animated the ancient doctrine of usucapion in its present form of prescription.

The Romans were right. Our system of land tenure is not perfect, and prescription acts as an effective cure for the failures of written title. Ignore it at your peril.