FURTUM PROPRIUM AND FURTUM IMPROPRIUM.

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According to P. Huvelin the lex Atinia read as follows: Quod subruptum erit, nisi in potestatem eius, cui subruptum est, revertatur, eius rei aeterna auctoritas esto. This reconstruction is no doubt fairly accurate. What, then, is the relation of the lex Atinia to the XII Tables? For, as it appears from the sources, it was already the XII Tables that excluded a res furtiva from usucaption.

In considering this question Huvelin starts, rightly, from the assumption that the lex Atinia did not simply repeat a well-established rule of the Code. His solution of the problem, however, is difficult to believe. There is a difference, he says, between a res furtiva and a res subrepta. He says that, whilst subripere refers only to those cases in which a thing is actually taken away in secret, furtum proper means fraud and—since immovables are not capable of being taken away from their places—usurpation of land. Hence it would follow that there may well have existed two separate laws, one of them concerning a res subrepta and the other a res furtiva. But at this point a new difficulty arises. Starting from the above text of the lex Atinia on the one hand and from the supposed distinction on the other hand, one is driven to the conclusion that the XII Tables cannot, in fact, have dealt with the res furtiva. It would be highly improbable that, if the lex Atinia applied only to goods that had actually been carried off, the XII Tables should have prohibited usucaption of goods obtained by fraud, thus having a much larger scope and referring to a subtler kind of offence at an earlier date. To evade this dilemma Huvelin states that, in spite of contrary tradition, the XII Tables did not mention the point at all. In his opinion the

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1 Études sur le Furtum, p. 287.
2 As to a minor point, see below note 43.
3 For references see P. Huvelin, loc. cit. p. 256.
4 Pp. 290 et seq.
5 Pp. 272 et seq.
6 In Huvelin's words, p. 272, furtum proper consists in détournements, abus de confiance, usurpation d'immobiliers etc.
7 Pp. 299 et seq.
lex Atinia, directed against usucaption of a res subrepta, was the first statute to take up the matter. When, subsequently, usucaption of a res furtiva became also forbidden, people falsely ascribed to the XII Tables this later and more comprehensive principle.

With regard to the method underlying these arguments, it may be remarked that it is certainly permissible to derive a theory from the texts—as in this case the contrast between res furtiva and res subrepta—even though the texts themselves do not make express mention of it. But it is always dangerous to go farther and to use this result, more or less conjectural in itself, for proving the sources wrong. In fact, if Huvelin's view as to res furtiva and res subrepta is not in harmony with the existing evidence, i.e. that both the XII Tables and the lex Atinia specified defects that should bar usucaption, this is a strong indication that a very different course must be taken.

We have now to examine his contentions in detail and, first of all, the view that there must have been a relevant difference between a res furtiva and a res subrepta. Obviously, the main basis of this view is the vague yet widely spread conception that, at the outset, words have a narrow, well-defined sense, which is only extended by gradual stages: thus furtum and subripere are held each to have had an individual, strictly exclusive meaning, and not to have been confused till after the lex Atinia. The premise, however, is weak. It is exactly in primitive times that the range of a word is comparatively wide, words representing a certain complex of ideas, a set of circumstances rather than a particular, concrete thing. Hence the characteristic use, made e.g. by the lex Aquilia, of simple verbs instead of compound ones. Hence the fact that caput signifies not only head as part of the body but also man. Hence the fact, too, that furtum means as well the crime of theft as the stolen thing.

Another reason advanced by Huvelin is taken from etymology. He claims that, considering the roots of subripere, and its frequent equivalent in early texts subrumpere, it is clear that these words imply the actual removal of a thing. But so, surely, does furtum, if one accepts the most probable explanation that it is connected with ferre. At any rate, it is not advisable to rely too much on etymology. There are several places in legal literature where subripere does not mean 'to take

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a We need not decide whether one of these meanings is prior to the other; cp. Huvelin, p. 487. Probably both of them are of equal age.

b Huvelin, p. 271, n. 3, suggests that subripere, wherever it occurs in Plautus, might be a sign of interpolation. But even if it were so, his theory could not be saved.
away,' but to creep up, to insinuate oneself. Again, the furtum of the XII Tables is certainly not deceit, but theft. This Code lays down that si nox furtum faxit, si im occisit, iure caesus esto: it is not likely that a man should be exempt from punishment, if he kills a peaceful visitor merely because he is trying to cheat him. Similarly the notions of furtum manifestum and nec manifestum are wholly unintelligible unless furtum is regarded as theft. We may suppose that even Huvelin does not go as far as to deny this. Yet he says that when Plautus uses furtum in the sense of subrepto, he is indulging in a colloquialism unknown to the technical language of law and lawyers. It may be observed that, quite apart from the fact that Plautus is in complete agreement with the XII Tables, laymen and jurists at 200 B.C. can hardly have used very different terms for one of the most common offences.

We may, then, assume that no material distinction is to be made between res furtiva and res subrepta on linguistic grounds alone. On the contrary, this case seems to show once more that, originally, words have a rather loose meaning. It should be noted in this connexion that also in Hebrew and in Greek the words corresponding to furtum cover theft and fraud. But from phrases like 25 22:13 or κλέπτειν νόον 14 one cannot possibly infer that, strictly speaking, 22:2 and κλέπτειν only designate fraud. However, there is still the possibility left of the lex Atinia deliberately adopting a special signification of subriperé, divergent from the ordinary one. As the law itself does not give any hint of it, one can only reason this way if evidence is offered by the Roman interpreters. Huvelin thinks there is, and as chief proof he cites D. 41. 2. 3. 3 (Paulus libro quinquagésimo quarto ad edictum).

Neratius et Proculus et solo animo non posse nos adquirere possessionem, si non antecedat naturalis possessio. ideoque si thensaevur in fundo meo positum sciam, continuo me possidere,

10 E.g. Cod. Theod. 2, 23, 1, 2 (Imp. Honorius et Theodosius AA. Crispino Comiti et Magistro Equitum): Ne quis sane post hanc definitionem nostri numinis surripiendo postulare audiat hanc spatia . . . poem viginti librarum auri iubemus adscribi. It may also be mentioned that, very possibly, the use of the word subriperé was not without influence on the signification of subriperé. Of course, ideas as to furtum and ideas as to subriperé are not always exactly identical: but this is not the same thing as a definite, recognized distinction between the words.
11 S. 12.
12 P. 272, n. 2.
13 Vide W. Genesius (F. Buhl), Handwörterbuch über das Alte Testament,
14 Homer's Iliad 14, 217.
15 Pp. 273 et seq. Huvelin only cites the passage from ceterum quod Brutus, to quia scit alienum esse.
simul atque possidendi affectum habuero, quia quod desit naturali possessioni, id animus impleat. ceterum quod Brutus et Manilius putant eum, qui fundum longa possessione cepit, etiam thensaurn cepisse, quamvis nesciat in fundo esse, non est verum: is enim qui nescit non possidet thensaurnum, quamvis fundum possideat. sed et si sciat, non capiet longa possessione, quia scit alienum esse. quidam putant Sabini sententiam veriorem esse nec alias eum qui scit possidere, nisi si loco motus sit, quia non sit sub custodia nostra: quibus consentio.

It is difficult to see what this text has to do with the suggested contrast between res furtiva and subrepta. Huvelin remarks that Brutus, Manilius and Paul did not recognize longi temporis praescriptio as a mode of acquisition: they must have spoken of usucapio, the text in its present form being corrupt. This is no doubt true as far as Brutus and Manilius are concerned and, though with less certainty, may also be admitted with regard to Paul. It does not, however, bear on the problem of the lex Atinia in the least, unless one argues that where there is one interpolation there must be some more.

After pointing out that the word thensaurs is used here in its older sense, i.e. of valuables which have been deposited in land but are nevertheless a definite owner’s property, Huvelin goes on to say that the phrase quamvis nesciat in fundo esse did not belong to the responsum of Brutus and Manilius. The ancient jurists, he says, wasted no words. He thinks that the clause has been inserted by Paul in order to emphasize the exceptional laxity of the pre-classical rule. On this view, what remains of the original decision is that a person, acquiring a field by usucaption, acquires in addition a treasure hidden there. Why, asks Huvelin, was this decision wanted? We must consider, he urges, the limited scope of the lex Atinia and the text will become clear. As we have seen, he holds that this law only concerned the res subrepta, but did not include the res furtiva; the point being that, whilst furtum is fraud in general, subripere merely signifies the actual secret removal of a thing. In one respect only he takes subripere as the wider term of the two: according to him it does not matter whether the removal is accompanied by bona or by mala fides. Hence he infers that laying hold on a treasure is always an act of subreptio and, consequently, one should expect usucaption to be impossible. It was this conclusion, he maintains, which was refuted by Brutus and Manilius. They regarded a treasure as part of the field in

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10 See pp. 274 and 276, n. 2; Huvelin’s criticism, however, goes too far here.
which it was found. Now, he says, in early law a field is indeed capable of being a res furtiva but, since it cannot be removed from its place, it is never a res subrepta and may be usucapted under all circumstances. Therefore, he thinks, Brutus and Manilius necessarily arrived at the result that treasure should also be gained by usucaption. Huvelin thus claims that everything depended on whether or not the object in question was a res subrepta in the strictest sense; and, he adds, the text shows that the lex Atinia still permitted usucaption, if it was a case of furtum not committed by subreptio. He admits that all these propositions which, in his opinion, had been set forth by Brutus and Manilius are no longer to be found in the text. But he takes the view that, from Sabinus onwards, the jurists amalgamated res subrepta and res furtiva. New problems arose and the texts were altered accordingly.

Three phases of this emendation can be distinguished. As a first step Huvelin eliminates that part of the rule which, as handed down to us, displays the essential point: quamvis nesciat in fundo esse. His reason is that ancient lawyers would deliver a plain decision, free from superfluous addenda. This done, however, he says that Brutus and Manilius must have given some explanation of the circumstances that required a responsum and, since he has erased this explanation, he considers it as lost. So there is room for a fresh one and he finally reaches the conclusion that the gist of the responsum was the contrast, obscured by the classical jurists, between res furtiva and res subrepta. The chain of these arguments is fragile enough.

Assuming for a moment that quamvis nesciat in fundo esse was added by Paul, does the remnant justify this enormous series of hypotheses? Neither the lex Atinia nor furtum nor subreptio is referred to in the text, not to mention the difference between the two crimes which is said to make the very basis of the decision. It is true that a person appropriating a thesaurus alienus usually knows that he has no right to it. One cannot, however, accept Huvelin's view that the finder always acts in secret and that, therefore, the text need not state expressly that it is a case of subreptio. It is generally assumed that of the older kinds of usucaption the usucapi pro herede and the usucaption of things abandoned by their owner were the most important ones. In these cases he who appropriated goods

17 We must always keep in mind that thesaurus is used here in the older sense of the word.
18 P. Collinet, Mélanges Fournier, pp. 71 et seq., and E. Levy, Zeitschrift der Savigny-Stiftung, Roman. Abtlg. 50, pp. 646 et seq.
did not commit an offence, although he knew they were not his. Moreover, Huvelin himself remarks that Brutus and Manilius treated a treasure as part of the field in which it lies. Thus, if that person took it who possessed the field in a manner sufficient for usucaption, subreptio was perhaps a priori out of question. But even if we consider the treasure mentioned in this text as res subrepta, how does it follow that this is not the same as a res furtiva? Indeed, Huvelin takes for granted what he sets out to prove. He asserts that Brutus and Manilius are concerned with the difficulty, arising under the lex Atinia, that a treasure, a res subrepta, is discovered in a field, a res furtiva. But there is not a single word to show that the field of which they speak is res furtiva. It is not even certain that Brutus and Manilius regarded a furtum fundi as at all possible. If, as Huvelin assumes, they did, what authority is there for saying that furtum was no bar to usucaption? If they did not, which seems to me much more likely, a problem not less imaginable than Huvelin's would have been whether usucaption of a field comprises accessories, such as a treasure, although they may be res furtivae. There is one other point in his argument which, though not very material, wants brief consideration. He holds that he who removes a thesaurus alienus, though always acting in secret, may well have bona fides: it is, he says, subreptio in any case, the implication being that subreptio, as occurring in the lex Atinia, differs from furtum in that mala fides is not required. L'apposition du préfixe sub, he says, ajoute au sens du radical une idée de clandestinité, de dissimulation... De l'idée de dissimulation à l'idée de mauvaise foi, il n'y a qu'un pas, que les interprètes de la loi ont, sans doute, franchi assez tardivement. It is, however, not understandable why a man, who acts in good faith, should conceal his doings. Again, supposing somebody did take a treasure in good faith—a case certainly

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19 According to D. 41. 3. 38 (Gainus libro secundo rerum cotidianarum sive antecorum) those jurists who declared theft of a field possible actually took the consequences and did not recognize usucaption of stolen land.

20 This in spite of the fact that furtum fundi was known to several lawyers called veteres by Gaius, among them Sabinus (D. 41. 3. 38, 47. 2. 25 pr. and 1—Ulpianus libro quadragensimo primo ad Sabinum—and Gellius, Noctes Atticae 11. 16. 13). I do not think that theft of land can have been an original species of furtum. The phrase furtum fundi sounds to me like something of a metaphor: it may be an ingenious one, but it seems too artificial to date from the period of Brutus and Manilius. Obviously the theft dealt with by the XII Tables is theft of movable property only. Moreover, comparative law and also the etymology of furtum—ferre—point the same way. But, of course, it is an open question, and Huvelin, pp. 378 et seq., takes the opposite view, in connexion with his whole theory of furtum proprium and furtum improprium.

21 Pp. 279 et seq.
very exceptional—, there is no evidence that it would be regarded as res subrepta. Last but not least, what should a law intend by excluding from usucaption goods which have been appropriated secretly, if not to exclude goods appropriated in bad faith? That the lex Atinia considered the possibility of a joke will scarcely be maintained. In fact, one simply cannot deny that subripere implies mala fides. There is no place where it does not. Huvelin lays stress on the fact that the lex Atinia merely has quod subruptum erit, without making it clear whether the subreptio is committed in good or in bad faith. But a text like, e.g., quod subruptum erit mala fide would contain a pleonasm quite unusual in early laws.

We may now give a more conservative interpretation of D. 41. 2. 3. 3. Paul deals here with the problem of corpus possessinis and animus possidenti.

22 P. 275.

23 The text has been the subject of much controversy recently; see Index Interpolationum, vol. 3. The writer owes much to Ch. Appleton's article, 'Lo trésor et la insta cues usucaptions,' Studi Bombante, vol. 3, pp. 10 et seq. I doubt, however, if the text has actually suffered the alterations which he thinks it has. He contends that the first sentence of the paragraph is more easily intelligible, if one reads: Narius et Proculeus et solo animo [non] posse nos adquirere possessioem, si [non] antecedat naturalis possessio. But it is possible that, originally, there existed a passage, now lost, which preceded this sentence and in which it was explained that possession cannot be acquired solo corpore. If such is the case, the text is perfectly tenable in its present form. A point of more importance is that he declares the whole statement sed et si sciat, non capiet longa possessione, quia se aut alienum esse to be interpolated. His linguistic argument is that a classical lawyer would not have used the same word scire twice within such a small space. Paul, he says, would have preferred to write quia non ignorant alienum esse. This is, however, not very convincing, since we do not know whether the horror of repetition was so strong among authors of the third century A.D. The material objection put forward by Ch. Appleton is the following. In that part of the text which he considers as genuine, it is laid down that he who acquires a field by usucaption simultaneously acquires a treasure 'even if he does not know that it lies in his field'. Obviously, the case that he does know it presented no difficulties, usucaption being allowed without question. Now Ch. Appleton claims that the jurists cannot possibly have had in mind here a thesaurus alienus, as it would appear from the 'interpolated' passage. He says that, leaving aside the exceptional case of a person erroneously regarding another person's treasure as his own, it is obvious furtement if one removes a thesaurus alienus before the period of usucaption is completed. Therefore, he goes on to say, it is not credible that a man, knowing a thesaurus alienus is in his field, should ever be able to usucapt it. It would be absurd, he thinks, that one should only have to wait patiently for one or two years and then be rightful owner of a thing which, had one taken it earlier, would have been res furitiva. According to him, whilst Brutus, Manilius and Paul spoke of a treasure in the ordinary sense, to wit, of which the ownership is no longer traceable, it was only an interpolator who, misunderstanding them, introduced the thesaurus alienus. But all this seems somewhat misleading. It has been stated earlier in this article that, at the period of Brutus and Manilius, a person who possessed a field in the way required for usucaption probably did not commit theft by removing a thesaurus alienus; since the treasure was regarded as part of the land; at least in those cases in which field and treasure belonged to a hereditis locens or were abandoned by their owner appropriation was certainly permitted, although carried out in bad faith. Thus there is no reason whatsoever why pre-classical lawyers should not have recognized usucaption of a thesaurus alienus. It was different, of course,
Neratius et Proculus et solo animo non posse nos adquirere possessionem, si non antecedat naturalis possessio.

Neratius and Proculus, we are told, deny that possession can be acquired by mere intention.

ideoque si thensaurum in fundo meo positum sciam, continuo me possidere, simul atque possidendi affectum habuero, quia quod desit naturali possessioni, id animus implet.

In this passage the importance of the intention is illustrated. If a treasure lies on my land, I acquire possession by my will to possess it no matter whether or not I actually lay hold on it. This rule, though opened with ideoque, does not immediately result from the preceding one, in which emphasis was laid on the requirement of naturalis possessio. Possibly part of the discussion has been dropped by the compilers. Neratius and Proculus may have stated that there are cases in which naturalis possessio does not exactly mean the physical detention of a thing, but effective control is sufficient. Thus—ideoque—if I know about a treasure stored in my field, I need not remove it in order to possess it. No doubt the indirect speech si thensaurum in fundo meo positum sciam, continuo me possidere contains the opinion of Neratius and Proculus, recorded by Paul. The following appendix, however, does not seem to represent early or even middle classical law. Neratius and Proculus would hardly have required, in addition to knowledge, a special possessendi affectus, this affectus being virtually contained in the knowledge in the vast majority of cases. Nor is it likely that it was they who introduced the conception of the animus filling up a deficient naturalis possessio: it is very probable that, in the case concerned, they did not regard the naturalis possessio as deficient in any way, but only gave it a wider meaning. We may, therefore, assume that from simul atque to animus implet it is Paul who explains the old decision.24 As will be seen, he himself does not entirely agree with it.

in the time of Paul. A treasure was no longer reckoned among the accessories of land, but treated separately. Usucapio pro herede and usucaption of abandoned goods had ceased to exist. Consequently, taking away a thensaurus alienus now constituted an offence: it was under these circumstances that Paul made the remark, held to be a gloss by Ch. Appleton, that usucaption should not take place even if the holder of the field knows about the treasure. We may observe that there is nothing to justify suspicion in the fact that Paul, though a late classical author, uses thensaurum in the older sense of the word. Clearly he comments here upon views expressed by much earlier lawyers, and it is only natural that he adopts their terminology.

24 I am not convinced that the affectus possidendi must always be interpolated.

On the other hand, however, Ch. Appleton, loc. cit. p. 10, goes probably too far when he ascribes to Proculus this requirement of a "special manifestation of the animus." It may be noted that the question does not affect the main problem of this article.
convey caption possidet vis [longa possessione] (usu) cepit, etiam thensaurum cepisse, quamvis nesciat in fundo esse, non est verum: is enim qui nescit non possidet thensaurum, quamvis fundum possideat.

Brutus and Manilius say that he who acquires a field by usucaption simultaneously acquires a treasure lying there even if he knows nothing about it. Paul, however, rejects this view since, in his opinion, possession of a field does not ipso facto convey possession of a treasure deposited in it. Huvelin claims that quamvis nesciat in fundo esse was not in the original responsum: ancient jurists, he says, used to be very concise. True, they were. But was it possible to omit the very point of a decision? It should be observed that Brutus and Manilius did not attempt here a general doctrine of possession, though a doctrine certainly underlies and may be derived from their statement. They merely settled a particular case which, because of its difficult character, was submitted to them. Obviously the problem was that a person had usucapted a field in which a treasure was deposited; but throughout the period of usucaption the presence of the treasure had remained unknown to him: was the treasure acquired all the same? Brutus and Manilius said it was, quamvis nesciat in fundo esse. It was precisely for this quamvis nesciat that the responsum had to be delivered, the lawyers doing nothing but make their answer fit the question put to them. In fact this problem, which had already come into notice in the time of Brutus and Manilius, was later solved in a different way. Whilst these two jurists took the archaic view that a treasure is a subordinate part of the land, resting their judgment on this objective, visible connexion rather than on elaborate subjective elements of possession, Paul and, as we have seen, Neratus and Proculus held that one cannot possess a treasure if one is not aware of it: and consequently, said Paul, usucapion is not possible in this case. It may be remarked that, since the early times of the Empire, it was even doubtful whether mere knowledge suffices. We shall see that Paul, referring to Sabinus, maintained that possession is not acquired, unless the treasure is actually removed. Clearly, all this goes to show that the questions concerning the animus possidentis are traditional, dating from the republican period; and thus one

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22 On the change from usucapio to longi temporis praescriptio, see above, p. 320.
23 Actually Paul does use their decision for illustrating the theory of possession in general.
24 Of course, we cannot be certain that this was a general principle, applicable in all cases.
may say that, even if it was Paul who inserted *quamvis nesciat in fundo esse*, he interpreted the *responsum* correctly. But if a further proof is needed that the clause is older than Paul, the following passage will supply it:—

*sed et si sciat, non capiet [longa possessione] (usu), quin scit alienum esse.*

Paul observes that usucaption of a *thesaurus alienus* is not only impossible, if I do not know that it lies on my land: it is also impossible if I know. 28 I may, indeed, possess it in this case. But I cannot acquire ownership, because I know that it is not mine. 29 According to Huvelin, the *responsum* delivered by Brutus and Manilius consisted only of the sentence *is qui fundum cepit etiam thesaurum cepit*; he contends that the words *quamvis nesciat in fundo esse* are Paul’s. But if one accepts this suggestion, Paul must have adopted a very strange course. He would first have restricted the tenor of the *responsum*, making it refer only to that case in which the holder of the field knows nothing of the treasure; next he would have stated that, contrary to what the *responsum* says, usucaption does not take place; lastly, however, he would have made an appendix, *sed et si sciat* to *alienum esse*, merely in order to reinsert that case which he himself had eliminated before and to say that usucaption is here equally impossible. It is difficult to see why the jurist should have proceeded thus. As it stands, the text is easily explained. Brutus and Manilius held that a person, though not aware of a treasure lying in his field, usucapts it by usucapting the field. Paul disagrees, since the *animus possidendi* is missing. In fact, he goes on to say, even if it exists, usucaption cannot be admitted, *mala fides* barring it. But this case was not mentioned by Brutus and Manilius: doubtless they were confident that ownership is here gained. We have already considered the reasons accounting for this divergence. First, Brutus and Manilius did not require *bona fides*, but only excluded *res furtivae* from usucaption. Now it is clear that they treated a treasure as part of the land in which it is found and, therefore, we may suppose that it was never a *furtum* if that person removed the treasure who possessed the field in a way

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28 Paul’s remark is very brief, indeed, almost abrupt. But this is easily explained. He discusses possession here and not usucaption. The *responsus* of Brutus and Manilius, chiefly regarding usucaption, is only mentioned because it has some bearing on the theory of possession. Therefore, as far as questions are concerned that merely relate to usucaption, Paul does not go into detail.

29 Paul does not take into account the very unusual case where the finder of another person’s treasure honestly believes that it is his own.
leading to usucaption. Secondly, it has to be noted that usucapio pro herede and usucaption of abandoned things were among the most important kinds of pre-classical usucaption. In these cases he who laid hold on the goods always knew that they were not his but, in spite of this, did not commit an offence. All this was, of course, different when Paul composed his commentaries. A treasure was then regarded independently from the field, bona fides was required under all circumstances, and so usucaption of a thensaurus alienus was no longer allowed.

Guidam putant Sabini sententiam veriorem esse nec alias eum qui scit possidere, nisi si loco motus sit, quia non sit sub custodia nostra: quibus consentio.

Sabinus, Paul and several other authorities say that, even if I know that a treasure lies in my field, I am not yet in possession of it; I only possess it, if I have removed it from its original place. It would perhaps be somewhat hasty to generalize this decision and to infer from it that, according to Sabinus and Paul, possession can never be acquired, unless one actually removes the thing in question. It is, e.g., not very likely that, if I buy some chairs and they are put in my garden, I have to convey them to another place in order to possess them. In the case of a thensaurus alienus, presenting some peculiar features, the jurists seem to have required something more than usual. The reason, advanced by Paul, why I do not possess the treasure without removing it is quia non sit sub custodia nostra. The word custodia has here its literal, untechnical meaning: custody, care, control. A thensaurus alienus, says Paul, is not under my control as long as it remains where its owner has put it and in a place whence he or those privy to his designs may, at any time, fetch it again. It is only safe if taken away, and only then is the naturalis possessio complete.

The foregoing remarks on D. 41. 2. 3. 3 certainly leave room

30 Similarly, even if we assume that Brutus and Manilius required bona fides, it was no doubt sufficient that there was bona fides with regard to the field; in other words, the bona fides relating to the field was considered to cover a treasure deposited there.
31 This is another argument against Ch. Appleton's view that the original text dealt with a treasure which has no traceable owner, the passage sed et si sciat aliem esse being interpolated.
32 Possibly this indicates that the argument quia non sit sub custodia nostra was already offered by Sabinus at a time when custodia was not yet primarily a technical term signifying a certain degree of liability. The fact that the clause quoniam to nostra is indirect speech seems equally to suggest that Paul adopted it from earlier sources.
33 It must not be forgotten that the jurists are always more careful in recognizing acquisition than continuation of possession. Thus it is not surprising to find that, in the case discussed, the owner's position with regard to the treasure is still strong enough to make it rather difficult for the holder of the field.
for doubt. But one may safely hold that no unprejudiced
interpretation can, on the basis of this text, support Huvelin's
view that there was a relevant difference under the lex Atinia
between res subcrepta and res furtiva: such a difference did not
exist. Thus, the main argument for his theory that the XII
Tables did not forbid usucaption of res furtivae loses its weight.
As has already been noted, this argument was that, since the
lex Atinia only mentions res subcretae, i.e. things that are
actually carried off, the XII Tables cannot have prohibited
usucaption of res furtivae, including things acquired by fraud.
However, he adduces yet another point in support of his proposi-
tion. C'est chez Gaius, he says, que les causes et le processus de
la confusion apparaissent le plus nettement. It may be well to
quote the passage he refers to, G. 2. 45 and 49:—

Sed aliquando etiam si maxime quis bona fide alienam rem
possideat, non tamen illi usucapio procedit, velut si quis rem
furtivam aut vi possessam possideat; nam furtivam lex duodecim
tabularum usucapi prohibet, vi possessam lex Julia et Plautia.
... Quod ergo vulgo dicitur furtivarum rerum et vi posses-
sarum usucapionem per legem duodecim tabularum prohibitam
esse, non eo pertinet, ut ne ipse fur quive per vim possidet usu-
capere possit (nam hic alia ratione usucapio non competit, quia
scilicet mala fide possideat), sed nec ullus alius, quamquam ab
eo bona fide emerit, usucapiendi ius habeat.

Huvelin points out that the lex Atinia is not mentioned
in this text. He claims that Gaius ascribes to the XII Tables
a provision respecting the res vi possessae—quod dicitur furti-
varum rerum et vi possessorum per legem duodecim tabularum
prohibitam esse—although, for all we know, it was only the
lex Julia et Plautia which dealt with this class of things.
Furthermore, he says, Gaius himself admits that his account
is based on quod vulgo dicitur, on a current but unscientific
belief. His conclusion is that Gaius was subject to the wide-
spread illusion that all venerable ancient rules went back to
the Code. In actual fact, he says, the XII Tables did not speak
of res furtivae: the lex Atinia was the first to exclude them
from usucaption.

If we examine these arguments one by one, we have to begin
with the fact that Gaius does not mention the lex Atinia. This
is no doubt remarkable, and Huvelin is right in saying that
also in Justinian's I. 2. 6. 2 the lex Atinia was not, originally,
referred to. Justinian reads: nam furtivarum rerum lex du-
deceim tabularum et lex Atinia inhibit usucapionem. The singular
of inhibit still shows that there can only have been one subject.
But the omission of the *lex Atinia* in Gaius and its interpolation in Justinian are rather a weak proof of the assertion that the XII Tables, which are not omitted and not interpolated, are mentioned by mistake. Yet this proof seems so plausible to Huvelin that he regards the * lex Atinia* as interpolated even in D. 41. 3. 33 pr., where it is certainly not. Julian says (libro quadragesimo quarto ad edictum) that *ex qua causa quis ancillam usucaperet, nisi lex duodecim tabularum vel Atinia obstaret, ex ea causa necesse est partum usucapi.* There is no sign of interpolation whatsoever, but if there were any, it would not follow that the XII Tables contained no rule on usucaption of *res furtivae* but, on the contrary, that the principle they laid down was considered as more important than the amendment introduced by the *lex Atinia.* It is, however, most improbable that, whilst Brutus, Manilius, P. M. Scaevola, Qu. M. Scaevola, Cicero, Sabinus, Cassius, Paul and, if not Justinian, at least an annotator of his Institutiones all cited the *lex Atinia,* Gaius and Julian should have forgotten it or denied its relation to usucaption. In fact, Julian in D. 41. 3. 33 pr. does cite it. That Gaius, author of a commentary on the XII Tables, only adduces this code, is easily understandable.

According to Huvelin, Gaius wrongly stated that it was the XII Tables which prohibited usucaption of a *res vi possessa.* But supposing he did, it would once more be erroneous to infer that the *res furtiva* also was not dealt with in the XII Tables. Much rather might one say that their provision about *res furtivae* was so essential that the jurists harmonized later rules with the earliest one. Actually, however, Gaius is quite clear as to the respective scope of the XII Tables on the one hand and the *lex Iulia et Plautia* on the other hand. In 2. 45 he states expressly that *furtivam (scil. rem) lex duodecim tabularum usucapi prohibet, vi possesam lex Iulia et Plautia.* True, 2. 49 is not so exact in this respect: *quod ergo vulgo dicitur furtivarum rerum et vi possessarum usucapionem per legem duodecim tabularum prohibitam esse, non eo pertinet, ut nec ipse fur quae per vim possidet usucapere possit, nam huic alia ratione usucapio non competit.* But, obviously, Gaius examines here a matter of

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34 Huvelin maintains that Julian would have put an *et,* not a *vel:* why?
35 Justinian I. 2. 6. 2 does not count, being dependent on Gaius. Besides, it is very possible that the words *et lex Atinia* have been inserted by his people; there is nothing which suggests a post-Justinian interpolation.
36 Huvelin emphasizes the fact that both Gaius and Julian belonged to the Sabinian school. But so did Sabinus. Moreover, the differences between the schools seem to me to lie in another field.
detail which is in no way affected by the question whether it is the XII Tables or the lex Iulia et Plautia that applies. It is, therefore, not very significant that the minute account of 2. 45 is not repeated in full. Moreover, it has to be remarked that, in 2. 49, the whole case of the res vi possessae may well be a supplementary insertion 37 made either by Gaius himself or by a glossator. The words et vi possessarum look very much like being an appendix to furtivarum rerum. Similarly the clause nam huic usucapio non competit suggests that, originally, the text referred only to the jur: had it been fur quive per vim possidet from the beginning, one would rather expect nam his usucapio non competit. Anyhow, considering that Gaius, in 2. 45, explains the relation between the XII Tables and the lex Iulia et Plautia perfectly correctly, one may prefer to speak of a slip in 2. 49 rather than of une erreur historique. 38

The third and last of Huvelin’s arguments is that, when Gaius relates the history of usucaption, he does not render scientific tradition but, as indicated by the phrase quod vulgo dicitur, a common, unreliable rumour. But this proposition also cannot be accepted. In 2. 45 Gaius says, distinctly and without any reservation, that usucaption of a res furtiva is forbidden by the XII Tables, of a res vi possessa by the lex Iulia et Plautia. Thus the words quod vulgo dicitur in 2. 49 can hardly import that the origin of these rules is doubtful. What Gaius wants to bring out is something entirely different, concerning not the origin but the precise extent of these rules. He means that the usual formulation, namely, that usucaption of res furtiva and res vi possessae is excluded by the XII Tables and the lex Iulia et Plautia, is somewhat vague. Naturally enough, the layman would take it that these provisions had also, and even primarily, regard to the thief or the ejector himself. Gaius, therefore, thinks it necessary to remind his pupils that a thief and an ejector are prevented from usucaption on the ground of their mala fides, no special laws being required. It must not be forgotten that the lay interpretation which Gaius sets right was correct at a time when usucaption was not yet conditional on bona fides.

37 Cp. F. Kniep, Gai Institutionum commentarius secundus, §§ 1—96, p. 17, n. 2.
38 On the ‘Exactitude of Gaius’, see W. W. Buckland, Reflections Suggested by the New Fragments of Gaius, Juridical Review, December, 1896, pp. 354 et seq. Prof. Buckland’s conclusion, p. 364, is ‘that Gaius is far from an exact writer, and that inferences that passages are interpolations or glosses which have slipped into the text, drawn from looseness or inaccuracy of language, are unjustified’. We may add, in this connexion, that it is similarly unjustified to use small points with regard to which Gaius seems to differ from the main bulk of the sources as the basis for important historical conclusions.
We have seen so far, first, that there is no legal difference between res furtiva and res subrepta, and, secondly, that the XII Tables as well as the lex Atinia dealt with the usucaption of this group of things. Consequently, in addition to the question what was the kind of reform established by the lex Atinia, we have now to consider another problem: why did the lex Atinia speak of subripere, if the XII Tables had spoken of a res furtiva?

This second problem does not create much difficulty. It is by no means certain that the XII Tables actually used the expression res furtiva. Nowhere is the rule in question quoted literally. The fact that, according to Roman jurists, the XII Tables prohibited rerum furtivarum usucapionem is no adequate evidence: they do not pretend that exactly these words were employed. Moreover, the same jurists say the same of the lex Atinia which, as is clear from the Noctes Atticae of Gellius, had subripere. In fact, it will be shown that, very probably, the XII Tables did not refer to the stolen thing at all, but only to the thief. Thief in Latin is fur, and so it is easily seen how the jurists came to speak of res furtiva in connexion with this rule. Again, the lex Atinia, when laying down that a stolen thing should not be usucapted till it had returned to him from whom it was stolen, had necessarily to find a verb in order to express 'he from whom it was stolen'. But there was no convenient derivative of furtum by means of which a clause like is cui subruptum est could be formed. This is the simple reason why subripere was chosen, although the XII Tables had fur or even res furtiva.

As to the question, raised at the beginning of this article, what was the material relation between the XII Tables and the lex Atinia, Th. Mommsen's opinion seems still worth while considering. He holds that, whilst the XII Tables debarred from usucaption only the thief himself, the lex Atinia debarred one who buys the stolen thing. Huvelin rejects this view. There is nothing to show, he says, that the lex Atinia applied exclusively to a man who obtains goods stolen by someone else: the text of the law makes it evident that it covered all cases in which a thing is subruptum. This is correct but, nevertheless, Th. Mommsen's theory holds good, in a slightly different form. That the XII Tables only prohibited usucaption by the thief himself is probable for several reasons. Buying and selling in that age

39 For references, see Huvelin, pp. 256 et seq., 259 et seq., 269 et seq.
40 According to the interpretation of the classical lawyers, the return must be to the dominus; see D. 41; 3, 4, 6 (Paulus libro quinquagesimo quarto ad edictum).
41 Römisches Strafrecht, p. 756, n. 1.
were more or less done in public. In most cases, therefore, a stolen thing would not be transferred, and it was perfectly sufficient to prevent the actual thief from gaining ownership. Moreover, it seems most likely that the lex Atinia, of very wide scope indeed, was preceded by some less general provision. Of course, precise reconstruction of a lost text must always remain guesswork. It should, however, be observed that the XII Tables in addition to the rule adversus hostem aeterna auctoritas,\textsuperscript{42} may well have had another similar one: adversus furem aeterna auctoritas. However this may be, there came a stage when the need was felt of an efficient safeguard against alienation by the thief, and against acquisition by a third party, of stolen goods. It was then that the lex Atinia was enacted, with the purpose of excluding usucaption also by a person other than the thief. Only this law was not, as Th. Mommsen thinks, entirely independent of the principle laid down by the Code. In other words, Huvelin is right in assuming that the lex Atinia did not merely apply to him who obtains things stolen by someone else, leaving the thief to the XII Tables. It took up the ancient rule and enlarged it. Whilst under the XII Tables the thief alone could not usucap, the lex Atinia said that a stolen thing is not capable of usucaption, no matter who has it, so long as it has not returned to that person who possessed it before the theft was committed.\textsuperscript{43} All this is somewhat hypothetical: but there is a passage in Gellius, Noctes Atticae 17. 7, which may be adduced in support:

\textit{Legis veteris Atiniae verba sunt: Quod subruptum erit, eius rei aeterna auctoritas esto. Quis altiud putet in hisce verbis quam de tempore tantum futuro legem loqui? Sed Q. Scaevola patrem suum et Brutum et Manilium, viros adprime doctos, quaeissse ait dubitatasseque, utrumne in post facta modo furta lex valueret et etiam in ante facta: quoniam subruptum erit utrumque tempus videretur ostendere tam praeteritum quam futurum. Itaque P. Nigidius, civitatis Romanae doctissimus, super dubitatione hac eorum scriptis in tertio vicissimo grammaticorum commentariorum...}

We need not quote here the learned exposé of P. Nigidius, who only considers the philological aspect of the matter. Clearly, for the jurists mentioned in this text the question what is the significance of subruptum erit was, above all, a practical one: they asked whether or not the lex Atinia should be of retroactive

\textsuperscript{42} 3, 7.

\textsuperscript{43} Thus one may, perhaps, suppose that the lex Atinia had \emph{dun} or \emph{dun non} or \emph{dun ne rectoratur} rather than Huvelin's \emph{ nisi}. The innovation consisted in the very fact that usucaption was now impossible, not only for the thief himself, but right up to the moment in which the thing returns to its previous holder.
effect. According to Huvelin, the lex Atinia was the first law to forbid usucaption of a res subrepta. If so, it will be difficult to explain how the idea of retroaction could ever arise. The economic and social implications would have been monstrous in this case. Besides, retroaction would have involved expropriation on a large scale, since no doubt a good many people were in possession of things which, though res subreptae, had been lawfully acquired under the former régime. But, not to mention the difficulties that would have been found in taking these things away from their present holders and ascertaining the legitimate owners, it is hardly believable that P. M. Scaevola and his contemporaries should have thought of an expropriation at all. The whole discussion becomes intelligible, if one takes the line suggested above. Whilst the XII Tables were solely directed against the actual thief, the lex Atinia excluded from usucaption the stolen object as such. Thus, when P. M. Scaevola asked utrumne in post facta modo furtu lex valeret an etiam in ante facta, he did not ask whether goods which, long before, had been lawfully acquired should now be confiscated as res furtivae. It was the extension of the ancient rule, it was the new element in the lex Atinia, with which the first interpreters had to deal and with regard to which the question of retroaction was raised. The innovation consisted in the fact that, from this time onwards, not even a third person should be allowed to usucap any stolen object, or, in the words of the law, anything quod subruptum erit. But here, indeed, there was some ambiguity. This much was certain that, if goods were stolen in future, neither the thief nor anyone else could ever usucapt them. But there was one difficult case: what if a thief did not sell some object till after the law was promulgated and yet had stolen it before? The purchaser would contend that quod subruptum erit means the same as quod subriprietur, referring only to goods.

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44 The passage in Gellius thus shows that the lex Atinia is not much older than Brutus, Manilius and P. M. Scaevola. These jurists would not have dealt with the question of retroaction, if the law had existed for a long time past. It has been suggested recently that the lex Atinia dates from 240 B.C. But the evidence proves that this cannot be the case; see P. F. Girard, Manuel Élémentaire de Droit Romain, 7th ed. p. 321, n. 5.

45 It may, incidentally, be observed that, as Huvelin himself points out, pp. 260 et seq., P. Nigidius is to be regarded as the real author of this text rather than Gellius. Now P. Nigidius, who was praetor in 58 B.C., some generations before Sabinus, calls the act of subrepto a furtum and has it called so by P. M. Scaevola, Brutus and Manilius: the question concerning subruptum erit was, according to him, utrumne in post facta modo furtu lex valeret an etiam in ante facta. It is clear that he at least did not make a distinction between res furtivae and res subrepta.

46 The grammatical argument for this view would be, according to Gellius: si dividis separaque dua verba haec subruptum et erit, at sic audias subruptum.
stolen at a later date—to post facta modo furta—and that, therefore, he is entitled to usucaption no less than he would have been before the law. On the other hand, he from whom the thing was stolen would claim to be protected under the new system. He would maintain that, strictly speaking, the words quod subruptum erit cover each and every thing that is subruptum no matter when the theft was committed. Consequently, he would say, even if it be a question of goods stolen before the law was enacted—of ante facta furta—provided they are bought afterwards, they cannot be usucapted. It is obvious that this kind of retroaction would not result in any economic disadvantages nor, for that matter, in any expropriation. As to usucaptions completed between the XII Tables and the lex Atinia, they would all be valid; and, in the case outlined, the purchaser would not lose ownership of the stolen thing, but would merely not acquire it. In fact, the issue so stated may well have attracted the attention of the leading lawyers of that time and it is perfectly understandable that they hesitated to decide it either way. We may note in conclusion that, in its whole structure, the problem concerning the clause quod subruptum erit is very similar to those questions which M. A. Seneca, the rhetor discusses in his Disputationes. There is, however, one remarkable difference. Whereas P. M. Scaevola, Brutus and Manilius, of the second century B.C., examine a particular question of practical importance, the numerous cases dealt with by M. A. Seneca, about a century later, are all imaginary, though, of course, the actually existing law has had some influence on the invention.

(eri) tanquam certamen erit aut sacrificium erit, tum videbitur lex in postfuturum locum.

Q. Scaevola says patrem suum et Brutum et Manilium quaesisse dubitasseque. Unfortunately, we know nothing about the outcome of the discussion.

I should like to mention that, although Huvelin's view on furtum proprium and furtum improprium cannot be accepted, his Études sur le Furtum are without doubt among the most brilliant monographs written on a Roman Law subject. As Ch. Appleton, loc. cit., p. 12, n. 19, points out, Huvelin himself seems finally to have given up the theory combated in this article. I am much indebted to Professor W. W. Buckland and to Mr. P. W. Duff for valuable criticism and suggestions.