

## SOME ULPIAN TEXTS ATTRIBUTED TO PAUL

This article\* concerns some texts attributed in the Digest to Paul but which seem really to be texts of Ulpian. The reason for thinking that these texts are wrongly inscribed is mainly the difference in style between the two writers, but also turns in part on the way in which Digest titles were constructed. Moreover differences of style are not ultimately distinct from differences in legal outlook.

In *Ulpian* I suggested that Paul had a more conservative outlook than Ulpian.<sup>1</sup> His style was also more restrained in that, though they write in ways that closely resemble each other, Paul kept to a more conventional word order and avoided unusual words. Ulpian's, on the other hand, was an oral style. He dictated most of his work, and more readily embraced expressions that were unusual, or at any rate commoner in speech than in writing. Whether or not this is a correct assessment, the writings of these two contemporary authors are relatively easy to distinguish. And the detection of misattributed texts throws light either on mistakes made by scribes in copying the Digest or on the detailed supervision of the compilers' work.

I list nine texts that seem to be wrongly attributed to Paul, and one in which Paul has cited Ulpian without acknowledgement. The texts themselves, or the relevant part of them, are set out in footnotes. In each there is a case for supposing that these texts, or part of them, have been attributed to the wrong author. The strength of the case however varies. No doubt there are other examples of misattribution that I have overlooked.<sup>2</sup>

(a) **D. 47.2.21.** To begin with a text that is agreed to be misattributed, *F1* and *B* inscribe this text to Paul 40 Sab., but *F2* and most editors, including Lenel, opt for Ulpian 40 Sab. The text fits Ulpian's book 40, which is about *tutela* and *furtum*. Paul *ad Sabinum* runs to only 16 books and *furtum* comes in book 9. D 47.2.20 is a text from book 9 of Paul and so is 47.2.22. So the attribution 47.2.21 to Paul seems to reflect a mistake by a scribe who repeated the previous inscription. In it Ulpian, for it is really he, argues that a person who handles (*contrectat*) part of a whole steals only the part that he handles and could carry

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<sup>1</sup> T. Honoré, *Ulpian. Pioneer of Human Rights* (2<sup>nd</sup> ed. Oxford 2002) 37,74-5,136-8): henceforth *Ulpian*<sup>2</sup>.

<sup>2</sup> These include cases where the Ulpian text is followed e.g. by one of Gaius: D. 18.6.2 (Gai. 2 *rer. cott.*) where 18.6.2.1 is from Ulpian 28 *ad Sab.*, as noted by W. Kalb, *Roms Juristen nach ihrer Sprache dargestellt* (Leipzig 1890) 131. Three more texts which seem to have been wrongly attributed to Paul rather than Ulpian are dealt with in the Appendix, below.

away, not the whole heap of corn, cupboard, ship's cargo etc. This is true even if he intended to take more.

There is another mistaken attribution in 47.2.21.2, where the received text reads:

Si quis aes subripuit, dum aurum se subripere putat, vel contra, ex libro octavo Pomponii ad Sabinum aut minus esse, cum plus esset: ius quod subripuit furtum committit: idem Ulpianus.

According to a plausible reconstruction the compilers intended the following sequence:

Ulpianus *libro quadragesimo ad Sabinum*....Si quis aes subripuit, dum aurum se subripere putat, vel contra,  
Pomponius *libro octavo* <add *decimo*, Lenel> *ad Sabinum* aut minus esse, cum plus esset  
Ulpianus *libro quadragesimo ad Sabinum* eius quod subripuit, furtum committit.

The thief makes a mistake as to substance or amount. The reference to Ulpian at this point seems to be a distorted version of the fact that, after the short text of Pomponius, the compilers returned to Ulpian's commentary on Sabinus. The text as a whole contains a number of words and expressions characteristic of Ulpian: *proinde*;<sup>3</sup> *utrum... an vero*;<sup>4</sup> *et magis est*;<sup>5</sup> *proinde si*;<sup>6</sup> *et ita et Sabinus ait*;<sup>7</sup> *et ita utimur*;<sup>8</sup> *quamvis ... attamen*.<sup>9</sup> His authorship is not in doubt, but there is one feature, insufficiently noticed in my *Ulpian*, which is important

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<sup>3</sup> D. 47.2.21 pr.; *Ulpian*<sup>2</sup> cit., 43 nn.30-31; 44 nn.38-39; 46 nn.42-27: 65 of 68 texts in which *proinde* is a conjunction on its own. There is no text from Paul.

<sup>4</sup> D. 47.2.21.5; *Ulpian*<sup>2</sup> cit. 51 n.142; 21 of 25 texts, of which one from Paul (D 44.7.44.6)

<sup>5</sup> D. 47.2.21.2; *Ulpian*<sup>2</sup> cit. 47 n.70: 84 of 104 texts, including 7 from Paul, of which D 11.3.14.2 is really Ulpian.

<sup>6</sup> D. 47.2.21.8; *Ulpian*<sup>2</sup> cit. 44, 46 nn.43-44; 85 of 88 texts, with two from Paul, of which D 9.2.22 pr is editorial, 47.2.21.8 is part of this text, really of Ulpian, as is 13.7.16.1 (below nn.55-58).

<sup>7</sup> D. 47.2.21.8; *Ulpian*<sup>2</sup> cit. 48 n.100-102: 118 texts of 123, with two from Paul, of which 23.2.60.4 is a citation from Ulpian: below n.69.

<sup>8</sup> D. 47.2.21.9; *Ulpian*<sup>2</sup> cit. 55 n.199: all 6 texts.

<sup>9</sup> D. 4.2.21.10; *Ulpian*<sup>2</sup> cit.50 n.117; 16 of 18 texts, and the one attributed to Paul (D. 47.2.21.10) is part of this text of Ulpian. .

from the point of view of the writer's outlook, the use of *si proponas* in 47.2.21.6.<sup>10</sup>

*Si mihi proponas* is found only in Ulpian.<sup>11</sup> But that is not the whole picture. *Proponere* and the form *si proponas* are primarily used in the legal sources of a petitioner putting forward a view of the facts to which a legal response is requested. The response may take the form of a formal reply (*responsum*), an imperial ruling (*rescriptum*) or an answer to a question put (*quaestio*). This is true of the two texts, apart from the spurious D 47.2.21, in which Paul used the form *sed* or *si proponas*. In one he is answering a petitioner who has stated in his petition that the creditor was absent.<sup>12</sup> The other is the celebrated case of *Arecusa*, about which Nörr has written a delightful study.<sup>13</sup> This text consists of Paul's answer to an inquiry by a correspondent who presents him with a legal problem.<sup>14</sup>

Ulpian has one text on this sort, in which he cites from a rescript of Antoninus and Severus that refers to a fact asserted by the petitioner.<sup>15</sup> But he has another 34 texts, including the ten already mentioned,<sup>16</sup> in which *si proponas* is used not of a view of the facts put forward by a petitioner but of a version that someone might put forward and that demands a legal answer.<sup>17</sup> In only one of these 34 texts, from Ulpian's *disputationes*,<sup>18</sup> can we suppose that there was really an interlocutor. In the seventeen texts from *ad Sabinum*, the fourteen *ad edictum* and the two on *fideicommissa* there cannot have been. Take as an example Ulpian's discussion of fraud on a patron. If the freedman does not alienate *dolo malo*, the patron must prove that the alienation was on death (*mortis causa*). For

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<sup>10</sup> *Certe si proponas in apotheca amphoras esse vini easque subtractas, singularum furtum fit, non totius apothecae, quemadmodum si ex pluribus rebus moventibus in horreo reclusis unam tulerit.*

<sup>11</sup> Ulpian<sup>2</sup> cit. s.44 mentions nine such texts, but there are ten: D 28.6.10.5 (4 Sab.); 49.17.6 (6 Sab.); 32.52. 7A (24 Sab.); 17.2.55 (30 Sab.); 46.3.12.3 (30 Sab.); 47.3.2 (42 Sab.); 40.4.13.3 (5 disp); 16.1.8.13 (29 ed.); 44.2.7 (75 ed.); 44.4.4.23 (76 ed.).

<sup>12</sup> D. 17.1.58.1 (Paul 4 qu.: *cum proponas eum afuisse...*)

<sup>13</sup> Donor, *Moriches Recht: Geschichte und Geschichten. Der Fall Arecusa et alii (Dig. 19.1.43 sq.)* (Minchin 2005)

<sup>14</sup> D. 19.1.43 (Paul 5 quest.: *plane si... proponas*).

<sup>15</sup> D. 19.2.19.9 (Ulp. 32 ad ed.: *cum per te non stetisse proponas..*).

<sup>16</sup> Above n.11.

<sup>17</sup> Above n.11 and D 28.3.3.6 (3 ad Sab.); 29.2.30.2.6 (8 ad Sab.); 7.1.25.6 (18 ad Sab.); 33.8.6.1 (25 ad Sab.); 19.1.1.1 (28 ad Sab.); 23.3.5.4 (31 ad Sab.); 24.1.5.14 (32 ad Sab.); 26.2.10.2 (ad 36 Sab.); 47.3.2 (42 ad Sab.); 47.2.46.5 (42 ad Sab.); 11.4.1.8a (1 ad ed.); 10.4.11.1 (24 ad ed.); 26.10.3.7 (35 ad ed.); 37.11.1.11 (39 ad ed.); 37.5.3.5 (40 ad ed.); 38.5.1.1 (44 ad ed.); 38.2.16.8 (45 ad ed.); 29.4.1.9 (50 ad ed.); 47.8.2.7 (56 ad ed.); 42.5.17.pr (63 ad ed.); 29.2.24.1 (81 ad ed.); 36.1.17.9 (4 fid.); 5.1.52.2 (6 fid.).

<sup>18</sup> D. 40.4.13.3 (Ulp. 5 disp.).

if you allege (*si enim proponas*) that it was on death we do not ask whether it was alienated *dolo malo*. Liability is automatic.<sup>19</sup>

‘You’ is here not an actual petitioner but stands for anyone interested in the law on the subject. Ulpian imagines an interlocutor who suggests a certain set of facts or interpretation of the facts. He thinks of law as emerging from a dialogue, and in that way comes closest of the Roman jurists to the common law tradition by which the law emerges from a dialogue between judge and advocate.

### Ulpian inscription omitted.

Some attributions that seem wrong come after texts of Ulpian to which a brief comment by Paul is added.<sup>20</sup> The Digest then returns to the Ulpian text but does not repeat the Ulpian inscription. The latter part of the text looks like part of Paul’s text, not Ulpian’s.

**(b) D. 2.7.3-4.** In this title on the praetor’s edict against removing one summoned to court by force (<*qui*> *vi eximat*) or fraud (*neve facit dolo malo quo magis eximeretur*) there is a discussion about whether both force and fraud are needed or whether one will suffice.<sup>21</sup> In D 2.7.3 Ulpian says that force is enough without fraud. A text of Paul is then inserted which makes the point that removing (*eximere*) is a general term, and covers any form of removal. The text goes on to give examples of non-forcible removal, for instance causing a delay so that the action is lost. *Ut puta*, which introduces the examples, is markedly Ulpianic: he has the phrase 298 times in the Digest out of 317.<sup>22</sup> Other phrases in the rest of this text (*eo loci*,<sup>23</sup> *praetor ait*<sup>24</sup>) also point to Ulpian.

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<sup>19</sup> D. 38.5.1.1 (Ulp. 44 ad ed.).

<sup>20</sup> Below (b) to (h).

<sup>21</sup> D. 2.7.3.2 Ulpianus *libro quinto ad edictum* Quod praetor praecepit ‘vi eximat’: vi an et dolo malo? Sufficit vi, quamvis dolus malus cesset. 2.7.4 Paulus *libro quarto ad edictum* Sed eximendi verbum generale est, ut Pomponius ait. Eripere enim est de manibus auferre per raptum: eximere quoque modo auferre.// <Ulp. 5 ad ed.> Ut puta si quis non rapuerit quem, sed moram fecerit quo minus in ius veniret, ut actionis dies exiret vel res tempore amitteretur: videbitur eximisse, quamvis corpus non exemerit. Sed et si eo loci retinuerit, non abduxit, his verbis tenetur. 1. Item si quis eum, qui per calumniam vocabatur, exemerit: constat eum hoc edicto teneri. Praetor ait ‘neve faciat dolo malo, quo magis eximeretur’: nam potest sine dolo malo id fieri, veluti cum iusta causa est exemptionis.

<sup>22</sup> *Ulpian*<sup>2</sup> cit. 65 n.433.

<sup>23</sup> D. 2.4.7. pr.; Theodore, *Ulpian*<sup>2</sup> cit. 71 n.723: 19 of 20 texts: the other is D 14.2.10.1 (Labeo 1 *pith. Paul epit*).

<sup>24</sup> D. 2.4.7.1; *Vocabularium Iurisprudentiae Romanae* (Berlin 1903-1985 = *VIR*) I 326.16-43.

One may reasonably conclude that D 2.7.4, after the first two sentences (or one sentence) from Paul, returns to the text of Ulpian book 5 on the edict. But this was overlooked by the scribe copying the Digest title. The phrase *praetor ait* is particularly significant, since this phrase is found in 53 Ulpian texts and only once in Paul,<sup>25</sup> in this very text. Moreover *ait praetor* is found in 117 Ulpian texts and only twice in Paul.<sup>26</sup> It is not that the use of *ait* was foreign to Paul, especially when he quotes jurists.<sup>27</sup> But only Ulpian is cited as using *ait/ aiunt* to give the words of the edict of the praetor or curule aediles.<sup>28</sup> The few other texts that give the words of part of the edict do so with a formula such as *verba autem edicti haec/talia sunt*.<sup>29</sup> The three instances of *ait praetor/praetor ait* attributed to Paul, though not doubted by Lenel,<sup>30</sup> are all in my view spurious.<sup>31</sup> The closest Paul comes to using *ait* of a clause of the edict is in D 9.4.31, but this text is concerned to interpret edictal words rather than to record them.<sup>32</sup>

Ulpian also uses *ait* to give the text of a *lex*,<sup>33</sup> *senatus consultum*,<sup>34</sup> *oratio principalis*,<sup>35</sup> or enactment of a particular emperor (Traianus,<sup>36</sup> Antoninus

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<sup>25</sup> VIR I 326.16-25.

<sup>26</sup> VIR I s.326.25-41; The Paul texts are D 4.7.8.1 (Paul 12 *ad ed.*); 43.3.2.1 (Paul 63 *ad ed.*), both in texts attributable to Ulpian: below nn. 49,60.

<sup>27</sup> A.M.(T.) Honoré and J.Menner, *Concordance to the Digest Jurists* (Oxford 1980) lists 216 instances of *ait*, all relating to jurists, e.g. D 44.4.5.1 (Paul 71 *ad ed.*: *Marcellus ait*), apart from the three which refer to the praetor but which I argue are Ulpianic or editorial (above n.26, below n.31).

<sup>28</sup> VIR IV.I s.1092.5-29 lists 177 Ulpian texts for *praetor ait* and *ait praetor*. VIR I 332.37-39 lists four texts for the curule aediles: 21.1.1.1; 21.1.19.5 (Ulp. 1 *ad ed. aed. cur.*) 21.1.38 pr., 21.1.40 (Ulp. 2 *ad ed. aed. cur.*). D 28.8.10 (Marc. 28 *dig.*) gives the effect rather than the wording of an edict: *per singulos observaturum se ait praetor id quod praefiniendo tempore deliberationis edicit...*

<sup>29</sup> D. 4.6.1.1 (Ulp. 1 *ad ed.*); 4.3.1.1 (Ulp. 11 *ad ed.*); 15.1.1.2 (Ulp. 29 *ad ed.*); 27.6.1.1 (Ulp. 12 *ad ed.*); 4.4.1.1 (Ulp. 11 *ad ed.*: *praetor edicit*); 39.4.12.1 (Ulp. 38 *ad ed.*: *praetor hoc edictum proposuit*); 2.6.1 (Paul 1 *ad ed.*: *edicto cavetur ut...*); 13.5.17 (Paul 29 *ad ed.*: *ut illa verba 'neque fecisset <fecisse S>' hoc significant, ut neque in diem in quem constituit fecerit neque postea.*); 50.16.8 pr (Paul 3 *ad ed.*: *verbum 'oportebit' tam praesens quam futurum tempus significat*); 50.16.227 (Paul 2 *man.*: *ex illa parte edicti 'cum quem ei heredem esse oportet'*).

<sup>30</sup> O.Lenel, *Das Edictum Perpetuum*<sup>3</sup> (Leipzig 1927) 74 (D. 2.7.4.2); 125 (D. 4.7.8.1); 453 (D. 43.3.2.1).

<sup>31</sup> This text and below nn.48,59-60.

<sup>32</sup> D. 9.4.31 (Paul 7 *ad Plaut.*): *Quod ait praetor, cum familia furtum faciat, ad eum modum se actionem daturum, ut tantum actor consequatur, quantum si liber fecisset consequeretur, quaeritur, utrum....*

<sup>33</sup> VIR I 326.44-47; 9 texts: D. 5.1.2.1 (Ulp. 3 *ad ed.*); 9.2.21 pr., 9.2.27.5 (Ulp. 18 *ad ed.*); 23.2.45.4 (Ulp. 3 *ad leg. Iul. Pap.*); 24.2.11 pr.,1 (Ulp. 3 *ad leg. Iul. Pap.*) 24.3.64.10 (Ulp. 7 *ad leg. Iul. Pap.*); 48.5.24 pr.,4 (Ulp. 1 *adult.*).

<sup>34</sup> VIR I 326.47-49; 7 texts: D. 5.3.20.7,17; 5.3.25.2,3 (Ulp. 15 *ad ed.*); 14.6.7.3 (Ulp. 29 *ad ed.*); 38.17.1.12; 38.17. 2.23 (Ulp. 1 *ad Sab.*).

Augustus<sup>37</sup>). But his practice in his regard is not consistent. He and other writers have a variety of ways, for example, of introducing the text of a rescript.<sup>38</sup>

The consistent formula employed for the words of the praetor's edict and that of the curule aediles throws light on the organisation of the Digest project. It must have been an instruction to the excerpters and editors that the texts of these edicts were to be taken from Ulpian's commentaries, not, for example, Paul's. According to Lenel, Paul put the edict in a different, though historically more correct, order from that adopted in Julian's *Digesta* and by Ulpian.<sup>39</sup> It cannot be supposed that in his 78 book commentary Paul did not cite the words of the edict on which he was commenting. But only Ulpian's citations have survived. This is one aspect of Tribonian's reliance on Ulpian, never expressly acknowledged. And Ulpian, with few exceptions,<sup>40</sup> introduced his citations of the edict's *ipsissima verba* with *ait* or *aiunt*.

(c) **D. 3.4.5-6.**<sup>41</sup> In book 3 of the Digest we have a longer passage mistakenly attributed to Paul in much the same way.<sup>42</sup> In the title dealing with persons who may sue or be sued on behalf of a *universitas*, Ulpian deals with rule that the representative be appointed by a two-thirds majority of those voting. A father's vote, he says, benefits a son and a son's the father. There is then a sentence of Paul which extends this principle to persons in the same *potestas*, since they vote as decurions (members of the council), not in their domestic capacity. The text attributed to Paul goes on to say that the same principle applies to elections to office (*honores*). But this sentence contains the phrase *erit servandum*, a future tense with an inversion of word order, which is a common feature of Ulpian's writing, and also appears in an earlier text of Ulpian.<sup>43</sup> In D 3.4.6.1 and

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<sup>35</sup> VIR I 326.49-50; 3 texts: D. 24.1.32.9, 14 (Ulp. 33 *ad Sab.*); 49.4.1.7 (Ulp. 1 *appell.*).

<sup>36</sup> VIR I 326.50-51; D. 49.14.16 (Ulp. 8 *ad leg. Iul. Pap.*).

<sup>37</sup> VIR I 326.51: D. 24.2.3 pr. (Ulp. 32 *ad Sab.*).

<sup>38</sup> e.g. D 22.6.9.5 (Paul 1 *de iur. fact. ignor.: rescripsisse in haec verba*); 27.9.13 pr. (Paul 1 *ad or. d. Sev.: et imperator Antoninus et divus pater eius in haec verba rescripserunt*); 47.21.2 (Call. 3 cogn.: *in haec verba rescripsit*).

<sup>39</sup> O.Lenel, *Das Edictum Perpetuum*, cit., 3-13.

<sup>40</sup> Above n.29.

<sup>41</sup> *Ulpian*<sup>2</sup> cit. 74.

<sup>42</sup> D. 3.4.5 Ulpianus *libro octavo* <Lenel *nono*> *ad edictum* Illud notandum Pomponius ait, quod et patris suffragium filio proderit et filii patro 3.4.6 Paulus *libro nono ad edictum* pr. item eorum, qui in eiusdem potestate sunt: quasi decurio enim hoc dedit, non quasi domestica persona. // <Ulp. 8 *ad ed.*> Quod et in honorum petitione erit servandum, nisi lex municipii vel perpetua consuetudo prohibeat...1...2...3.

<sup>43</sup> D. 3.2.19 (Ulp. 8 *ad ed.*).

2 the text continues with other Ulpianic phrases: *parvi enim refert*;<sup>44</sup> *et puto sic hoc accipiendum*.<sup>45</sup> The discussion of the procedure for appointing an agent to sue or be sued and the comparison between the agent and the procurator of a private person seems, then, to be taken from Ulpian's edictal commentary, apart from Paul's remark about councillors in the same *potestas*.

**(d) D. 2.14.12-13.** In the title on pacts we have what looks like another example of the phenomenon.<sup>46</sup> In Digest 2.14.12 Ulpian says that a pact made by the principal's procurator can operate either in his favour or against him. In 2.14.13 pr. a text attributed to Paul by *S* and *B* but to Ulpian by *F* says that, if a procurator is appointed only to bring or defend an action, the pact that he makes does not prejudice the principal because payment cannot validly be made to the procurator. D. 2.13.13.1 goes on to say that if the procurator is appointed to act on his own behalf, he takes the place of the principal and so the pact must be observed. The text as it stands in the Digest is awkward, because both sentences in 2.14.13 begin *sed si*, and neither Ulpian nor Paul is likely to have begun two successive sentences in this way. The most likely explanation is that the first sentence is Paul's and the second, which qualifies the first, Ulpian's. Moreover *servandum erit* in the second sentence points more to Ulpian., who has *erit servandum* in D. 3.2.19. (Ulp. 8 <Lenel 9> ed.) and, as we saw, the same phrase in a text wrongly attributed to Paul.<sup>47</sup> Perhaps in copying the text one scribe has inscribed Paul's name, another Ulpian's, though both inscriptions occurred in the original.

**(e) D. 4.7.4-8.** At first sight this sequence does not appear to be one in which a passage from Paul that modifies one from Ulpian continues to be attributed to Paul after the text has returned to Ulpian. But in reality it is similar. In the title on alienation by a defendant in bad faith which prejudices the plaintiff in litigation<sup>48</sup> Ulpian, at the end of a long passage, says that the action is not penal but compensatory and is not given after a year.<sup>49</sup> Gaius in the next text points

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<sup>44</sup> *Ulpian*<sup>2</sup> cit. 39,48 n.72, 55 n.201, 74 n.826-7: 28 of 30 texts, with this the only Digest text attributed to Paul.

<sup>45</sup> *Ulpian*<sup>2</sup> cit. 47 n.53-55, 65 n. 432, 74 n.828. *Et puto* is Ulpian's 112 times out of 126. There are 7 texts of Paul, including this spurious text.

<sup>46</sup> D. 2.14.12 Ulpianus *libro quarto ad edictum* Nam et nocere constat, sive ei mandavi ut pacisceretur, sive omnium rerum mearum procurator fuit: ut et Puteolanus libro primo adesessoriorum scribit: cum placuit eum etiam rem in iudicium deducere 2.14.13 pr. Paulus *libro tertio ad edictum* Sed si tantum ad actionem procurator factus sit, conventio facta domino non nocet, quia nec solvi ei possit. // <Ulp. 4 *ad ed.*> 1. Sed si in rem suam datus sit procurator, loco domini habetur: et ideo servandum erit pactum conventum.

<sup>47</sup> D. 3.4.6 pr (Paul 9 ad ed.); *Ulpian*<sup>2</sup> cit. 74.

<sup>48</sup> *De alienatione iudicii mutandi causa facta*

<sup>49</sup> D. 4.7.4.6 Ulpianus *libro tertio decimo ad edictum* Haec actio non est poenalis, sed rei persecutionem arbitrio iudicis continet, quare et heredi dabitur: in heredem autem 4.7.5

out that the action is compensatory but resembles a delict. Paul then says that to produce the object sued for (*exhibere*) does not prevent the edict applying, if in the judge's opinion the previous position is not restored by its production. In 4.7.8.1 we find the actual words of the edict introduced by the phrase *Ait praetor*. As mentioned earlier,<sup>50</sup> though there are 91 Ulpian texts with this formula, this is the only one attributed to Paul. The attribution is clearly wrong, as is confirmed by the fact that D 4.7.8 and 4.7.9 are both inscribed to Paul, whereas if 4.7.8 had been entirely Paul's the next inscription should read *Idem*. One possible reason for duplicated inscriptions is that an intermediate text by another author has dropped out between the two. The intermediate text of Ulpian has been overlooked by the scribe copying the Digest text, and this has resulted in a duplication of the Paul inscriptions.

**(f) D. 11.3.13-14.** There is another example in the title on the corruption of a slave. This title is mainly composed of texts from Ulpian on the edict with short interventions by Paul. But towards the end of the title there is apparently a change. A short text of Ulpian is followed by a long text of Paul on the edict.<sup>51</sup> According to Ulpian the action for corrupting a slave includes the case in which the slave belongs to an inheritance, and damages for corruption can be claimed in a suit for the inheritance. Paul adds that in a suit for the inheritance the damages are the same as in the action for corrupting a slave. The text attributed to Paul then goes on to discuss the corruption of a *filius familias*, which will not lie because the action presupposes patrimonial loss. There is a further discussion of corrupting a slave owned by plaintiff and defendant in common, and of the case where a slave owned in common corrupts another slave. There is reason to believe that this extensive discussion comes from Ulpian's edictal commentary. Phrases such as : *et magis est*;<sup>52</sup> *interdum tamen*;<sup>53</sup> and *utrum...an vero*;<sup>54</sup> point

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Paulus *libro undecimo ad edictum* vel similem 4.7.6 Ulpianus *libro tertio decimo ad edictum* vel post annum non dabitur 4.7.7 Gaius *libro quarto ad edictum provinciale* quia pertinet quidem ad rei persecutionem, videtur autem ex delicto dari 4.7.8 pr. Paulus *libro duodecimo ad edictum* Ex hoc edicto tenetur et qui rem exhibet, si arbitrato iudicis pristinam iudicii causam non restituit. // <Ulp. 13 ad ed.> 1. Ait praetor 'quaeve alienatio iudicii mutandi causa facta erit': id est si futuri iudicii causa, non eius quod iam sit. ..2...3...4...5...

<sup>50</sup> Above nn.26-27.

<sup>51</sup> D. 11.3.13 Ulpianus *libro vicesimo tertio ad edictum* 1. Sed et si quis servum hereditarium corruerit, hac actione tenebitur: sed et petitione hereditatis quasi praedo tenebitur D 11.3.14 pr. Paulus *libro non decimo ad edictum* ut tantum veniat in hereditatis petitionem quantum in hanc actionem. // <Ulp. 23 ad ed.> 1. De filio filiave familias corruptis huic edicto locus non est, quia servi corrupti constituta actio est, qui in patrimonio nostro esset, (ubi insert *B*) et pauperiorem se factum esse dominus probare potest dignitate et fama domus integra manente....2... 3... 4 ...5...6...7...8...9.

<sup>52</sup> D. 11.3.14.2: *Ulpian*<sup>2</sup> cit. 44,47 n. 70; 88 out of 104 texts. There are 7 texts of Paul, including this one and D 47.2.21.5, both of which are really Ulpian's (above n.5).

<sup>53</sup> D. 11.3.14.9; *Ulpian*<sup>2</sup> cit. 51 n.147: 11 of 13 texts. The only text attributed to Paul is this one.

to him. Moreover there is no reason why the structure of the title should change towards the end, with Ulpian's edictal commentary being replaced by Paul's.

**(g) D. 13.7.15-16** falls in the title on mortgage and pledge.<sup>55</sup> In it Ulpian's edictal commentary is prominent. In lex 15 he considers the duty of the creditor of mortgaged land, and in lex 16 pr. Paul turns to the tutor or curator who pledges his pupil, minor or insane person's property.<sup>56</sup> 16.1 begins with a compilatorial sentence giving the creditor a right to sue the debtor by contrary action. It continues with examples of a debtor who pledged the property of another or property already pledged to another or liable to the state, whose claim takes priority. The examples are introduced with *proinde si*, a phrase that is strongly Ulpianic. He has 214 texts in which it means 'hence', and there are only six others in the Digest, two attributed to Paul.<sup>57</sup> Neither is genuine Paul, but both are interesting in their way. In D 9.2.22 pr. the phrase introduces an example by Paul of the principle stated by Ulpian in 9.2.21 that in the lex Aquilia actual loss (*id quod interest*) must be paid for. The link is editorial, and shows that the editor of the title was influenced by reading Ulpian, who was fond of *proinde*.

The present text conceals, I think, a reversion by the title editor to Ulpian's commentary. This is confirmed by the reference in the text to Marcellus *libro sexto digestorum*. Ulpian often cites Marcellus, to whom he refers 193 times as against 18 references by Paul. But the crucial difference is that 53 of Ulpian's references to Marcellus are by book (*libro ..*)<sup>58</sup> whereas the only such reference attributed to Paul is in this text, which has in my view been misallocated from *proinde si* onwards, at least to the end of 13.7.16.1.

**(h) D. 43.3.1-2.** Much the same applies to the title *Quod legatorum*, dealing with an interdict that protects the heir or *bonorum possessor* against a legatee who takes possession of the property bequeathed without consent. It contains

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<sup>54</sup> D. 11.3.14.9; above n.4.

<sup>55</sup> *De pignoratitia actione vel contra*.

<sup>56</sup> D. 13.7.16 pr. Paulus *libro vicensimo nono ad edictum* Tutor lege non refragante si dederit rem pupilli pignori, tuendum erit, scilicet si in rem pupilli pecuniam accipiat. Idem est et in curatore adulescentis vel furiosi. 1. <Ulp. 28 ad ed.> [Contrariam pignoratitiam creditori actionem competere certum est.] proinde si rem alienam vel alii pigneratam vel in publicum obligatum dedit, tenebitur, quamvis et stellionatus crimen committat. Sed utrum ita demum, si scit, an et si ignoravit? Et quantum ad crimen pertinet, excusat ignorantia: quantum ad contrarium iudicium, ignorantia eum non excusat, ut Marcellus libro sexto digestorum scribit. Sed si sciens creditor accipiat vel alienum vel obligatum vel morbosum, contrarium ei non competit...2.

<sup>57</sup> *Ulpian*<sup>2</sup> cit. 46 nn.43-47.

<sup>58</sup> A.M.Honoré and J.Menner (above n.29) fiche 63.

only two texts, the first a long text of Ulpian, the second a shorter but still substantial text inscribed to Paul. The end of the long Ulpian text deals with the giving of security by the *bonorum possessor* to a legatee to whom a legacy is due. The *bonorum possessor* can bring an interdict only for property for which he has given security.<sup>59</sup> The Paul text begins with the point that giving security for a legacy includes security for anything that later accrues to it. The text attributed to Paul then goes on to another part of the edict, the text of which is introduced with *ait praetor*. It deals with the position of the *bonorum possessor* if it is not his fault that security has not been given. This means that he must be willing to give security and must not delay unduly when security is demanded. The phrases *ait praetor*<sup>60</sup> and *accipimus*<sup>61</sup> are typical of Ulpian and there is no reason, again, why the title editor should have shifted from Ulpian's commentary to Paul's when he introduced a fresh part of the edict *quod legatorum*.

**(j) D. 2.14.9.** So far we have examined sequences in which the text of Ulpian was followed by a short text of Paul which appears to be longer than it really is, because the inscription returning to Ulpian's commentary has been omitted. The converse can also happen. Sometimes a text of Paul contains an insertion from Ulpian. There is perhaps an instance of this in title 2.14. The discussion is about a pact by an heir with creditors of the deceased. If the majority of the creditors agree on the proportion of the debts to be paid, the praetor issues a decree adopting their wishes. According to Ulpian this means the wishes of those who are owed most of the debt. But if the amount owed by those who agree and those who do not is equal, Papinian says that the view of the greater number of creditors prevails. A Paul text<sup>62</sup> then makes the point that if several creditors

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<sup>59</sup> D. 43.3.1.18 Ulpianus *libro sexagesimo septimo ad edictum* Si quarumdam rerum nomine satisdatum sit, quarundam non sit satisdatum, earum rerum nomine sine impedimento agi poterit, de quibus satisdatum est, ceterarum non poterit. 43.3.2 pr. Paulus *libro sexagesimo tertio ad edictum* pr. Diversum est, si postea pars legato adcreverit: nam hoc nomine tenentur fideiussores in totum. // <Ulp. 67 ad ed.> 43.3.2.1. Quod ait praetor 'si per bonorum possessorem non stat, ut satisdetur', sic accipimus, si paratus sit satisdare; non ergo offerre debet satisfactionem, sed petenti moram non facere...2...3...4.

<sup>60</sup> Above nn.24-32.

<sup>61</sup> D. 43.3.2.1; *Ulpian*<sup>2</sup> cit. 64 n.430: 60 texts out of 62, with two of Paul including this one wrongly attributed to him.

<sup>62</sup> D. 2.14.9 pr. *Paulus sexagesimo secundo ad edictum* Si plures sint qui eandem actionem habent, unius loco habentur. // <Ulp. 4 ad ed.> Ut puta plures sunt rei stipulandi vel plures argentarii, quorum nomina simul facta sunt: unius loco numerabuntur, quia unum debitum est. et cum tutores pupilli creditoris plures convenissent, unius loco numerantur, qui unius pupilli nomine convenerant. nec non et unus tutor plurium pupillorum nomine unum debitum praetendentium si convenerit, placuit unius loco esse. nam difficile est, ut unus homo duorum vicem sustineat. // <Paul. 62 ad ed.> nam nec is, qui plures actiones habet, adversus eum, qui unum actionem habet, plurium personarum loco accipitur. 1. Cumulum debiti et ad plures summas referemus.....

have the same action they are regarded, for purposes of counting creditors, as one. Some examples are then given which, to judge by the drafting, come from Ulpian rather than Paul. The examples are introduced by *ut puta*,<sup>63</sup> and one of them begins *nec non et*,<sup>64</sup> which is also Ulpianic.<sup>65</sup> *Difficile est, ut...* also points to him.<sup>66</sup>

The text returns again in my view from Ulpian to Paul in the next sentence, which takes up his original point, by asserting that a creditor who has several actions is not treated as several persons in relation to a creditor who has only one action. Another reason for thinking that the Paul text has resumed is that the sentence begins *nam nec is*, whereas the previous sentence began *nam difficile est*. It is not likely that two successive sentence by the same author began with the same introductory word. The rest of the text (D 2.14.9.1) concerns how to calculate the amount of debt, and is in my view also Paul's.

**(k) D. 23.2.60.** A different text, in which the attribution is not mistaken, but Paul incorporates in his own work some sentences from Ulpian, comes towards the end of the title on marriage.<sup>67</sup> It is the only text from Paul's book on the oration of Marcus Antoninus and Commodus.<sup>68</sup> There is no doubt that this is a text of Paul, but he seems to have excerpted in s. 4. at least two sentences of Ulpian, who must therefore have written on the same subject.<sup>69</sup> The topic discussed is whether a tutor who wished to be excused from office but has not yet assembled the evidence to be excused could marry a *pupilla* who had in the meantime reached puberty so that the tutor's office was at an end. That these

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<sup>63</sup> Above n.22.

<sup>64</sup> *Ulpian*<sup>2</sup> cit. 49 n.104: 9 of 11 texts: this is the only one supposedly of Paul.

<sup>65</sup> D. 2.14.9 pr.; *Ulpian*<sup>2</sup> cit. 49 nn.104: 9 of 11 texts, the only one of Paul being this text.

<sup>66</sup> *VIR* II s. .5-7: D. 18.6.4.1 (Ulp. 28 ad Sab.); 21.1.38.4 (Ulp 1 ad ed. cur.); 49.4.1.15 (Ulp. 1 appell.) and this text 2.14.9 pr ( Paul. 62 ad ed.?).

<sup>67</sup> *De ritu nuptiarum*.

<sup>68</sup> *Libro singulari ad orationem divi Antonini et Commodi*; T.Honoré, *Ulpian*<sup>2</sup> cit. 123,186,202,205; D.Liebs, in *HLL* 4 (1997) §423.17.

<sup>69</sup> D 23.2.60 *Idem (Paulus) libro singulari ad orationem divi Antonini et Commodi* ..3 *Quin autem ille, qui, cum datus est tutor, cessat in administratione, petineat ad orationem, non est dubitandum, quia perinde tenetur ex sacris constitutionibus atque si gessisset. 4. Quid ergo si, cum se vellet excusare aliquo titulo nec in promptu probationes haberet, excusationis negotium fuerit dilatum et inter moras pupilla adolverit, an ad senatus consultum pertineat? [Ulp. Quaestio in eo est, an et post pubertatem officio finito excusationem eius recipi oporteat: nam si recipitur et excusaverit <excusatus erit Mommsen> impune potest ducere: si vero non debeat recipi post officium finitum, non recte ducit. et ait Papinianus libro quinto responsorum officio finito excusationem recipi non oportere et ideo exacti temporis periculum ad eum pertinere.] sed mihi hoc nequaquam placet; iniquum enim est propter dilationem, quae forte non dolo, sed quae ex necessitate contingit, non excusari vel nuptias impediri excusatione recepta... 5...6...7...8.*

sentences are Ulpian's appears from the phrase *quaestio in eo est*<sup>70</sup> and the sentence beginning *et ait Papinianus*.<sup>71</sup> But though Ulpian raises the question he does not expressly answer it, and Paul differs from Papinian,<sup>72</sup> and perhaps by implication from Ulpian, in that he thinks that the tutor can be excused if he marries the ward in these circumstances.

That Paul here cited Ulpian without naming him does not show that there were bad relations, as opposed to differences of outlook on legal issues, between the two. Ulpian seems also to have cited Paul without naming him. To avoid citing the opinion of a contemporary by name could save embarrassment.<sup>73</sup>

### **Addendum.**

Reading through the Digest texts again I find another instance of what appears to be a Ulpian text wrongly attributed by the compilers or a copyist to Paul.

The Digest title 38.17 concerns two senatus consulta (the Tertullianum of 133 AD and the Orphitianum of 178 AD) that dealt with the succession on intestacy of a mother to her children. It is constructed from two long texts from Ulpian *ad Sabinum* followed by some shorter texts. Five of these from 38.17.5-9 are inscribed successively to Paul on the SC Tertullianum, Paul on the SC Orphitianum, Paul on the SCC Tertullianum and Orphitianum, Gaius on the SC Tertullianum and Gaius on the SC Orphitianum. There is evidently something wrong with these inscriptions, since Paul can hardly have written three monographs, one on the Tertullianum, one on the Orphitianum and a third devoted to both. Mommsen dealt with this problem by suggesting that the third of these texts should be inscribed to Paul on the Tertullianum alone, the reference to the Orphitianum being eliminated. Hence 38.17.7, inscribed *Idem (Paulus) libro singulari ad senatus consultum Tertullianum et Orphitianum* is correctly inscribed, but 'et Orphitianum' should be deleted.' I think this is right, and would take the suggestion further. The first of these texts (D 38.17.5 inscribed Paulus ad SC Tertullianum) should be attributed to Ulpian rather than Paul.<sup>74</sup> In other words Ulpian, like Paul, wrote a monograph on this SC, and

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<sup>70</sup> T.Honoré, *Ulpian*<sup>2</sup> cit. 52 n.155 : four texts: D. 37.6.1.21 (Ulp. 40 ed.); 43.26.6.4 (Ulp. 71 ed.); 47.2.43.14 (Ulp. 41 Sab); 41.1.23.1 (Ulp. 43 Sab.) and the present text attributed to Paul.

<sup>71</sup> Above n.7.

<sup>72</sup> Cf. D. 20.4.16 (Paul 3 qu.: *mihi nequaquam hoc iustum esse videbatur*).

<sup>73</sup> T.Honoré, *Ulpian*<sup>2</sup> cit. 137-8. There are other examples: Julian citing his teacher Iavolenus (H.Buhl, *Salvius Julianus*, 1886), Paul his teacher Cervidius Scaevola (D. 32.78 pr.,2,3; 32.93.2; 32.101.1; 33.7.20.6).

<sup>74</sup> D 38.17.5 (Paulus <Ulpianus> libro singulari ad senatus consultum Tertullianum)

Aequissimum visum est omnes filios matri praeferri, etiamsi per adoptionem in familiam relictis essent. Sed et nepos ex adoptivo natus ex verbis senatus consulti matri obstat. Si ex filio nepotem avus manumiserit isque patre et avo et matre superstitibus decesserit, potest

38.17.5 was taken from his monograph. But 38.17.7 and two other texts inscribed to Paul in other Digest titles will have come from Paul, not Ulpian.<sup>75</sup> The order of texts in 38.17.5-9 would therefore be: (5) Ulpian ad Tertullianum, (6) Paul ad Orphitianum, (7) Paul ad Tertullianum, (8) Gaius ad Tertullianum, (9) Gaius ad Orphitianum. The sequence of Paul texts would then agree with that in D. 50.16.230-231 where text 230 is inscribed *Idem (Paulus) libro singulari ad senatus consultum Orfitianum* and text 231 *Idem libro singulari ad senatus consultum Tertullianum*. The order set out in Digest 50.16, which is generally reliable, is confirmed if my suggestion is correct. It is true that the order listed for Gaius is chronologically more correct than that for Paul, but that consideration may not have determined the order in which Paul's *libri singulares* were read by the compilers of the Papinian mass from which these texts are taken. The writers themselves are often excerpted in anti-chronological order, as in the edictal commentaries, so that Ulpian comes before Paul, and Paul before Gaius. The reason for the anti-chronological sequence may be that the most recent author is likely to be the most comprehensive and up-to-date. But my reconstruction assumes that the attribution of 38.17.5 to Paul is mistaken, and it is to the reasons for supposing this that I now turn.

D 38.17.5 begins *aequissimum visum est*. *Aequissimus* in its various inflections accounts for 80 Ulpian texts in the Digest out of 86,<sup>76</sup> and though there are four Paul texts, including this doubtful one,<sup>77</sup> Paul nowhere else uses *aequissimus videri* or begins a sentence with *aequissimus*. Ulpian on the other hand has ten texts with *aequissimum visum est*.<sup>78</sup> or *videtur*.<sup>79</sup> Some of these may pick up a phrase in the original enactment, as is the case with his citation of the senatus consultum Trebellianum.<sup>80</sup> The present text may also echo the original senatusconsultum, but whereas *aequissimum praetori visum est* is in order<sup>81</sup>, *aequissimum senatui visum est* would be presumptuous, since one must assume that what the senate prescribes is equitable.

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quaeri, quis potior esse debeat. Nam si mater excluserit avum manumissorem, qui patre anteponitur, edicto praetoris inducetur pater defuncti, quo admissio desinit senatus consulto locus esse et rursus avus vocabitur. Itaque rectius est avo ius suum conservare, qui et contra scriptos heredes bonorum possessionem accipere solet.

<sup>75</sup> D 38.17.7; 50.16.231; 32.28.

<sup>76</sup> T.Honoré, Ulpian<sup>2</sup> cit. 71 n.721.

<sup>77</sup> D 17.1.22.4 (Paul 32 ed.); 14.2.2.pr (Paul 35 ed.); 48.20.7 pr. (Paul 1 port. lib. damn.).

<sup>78</sup> D 7.9.1. pr (79 ed.); 11.7.16 (25 ed.); 36.2.8 (34 Sab.); 37.12.1 pr (45 ed.); 43.3.1.2 (67 ed.); 43.20.1.38 (70 ed.); 44.4.4.27 (76 ed.); 46.3.1 (43 Sab.).

<sup>79</sup> D 2.1.1 pr (4 ed.); 18.4.2.18 (49 Sab.);

<sup>80</sup> D 36.1.1.2 (Ulp. 3 fid.: cuius verba haec sunt: 'Cum esset aequissimum ...).

<sup>81</sup> D 7.9.1 pr (79 ed.); 7.1.1 pr (45 ed.).

Moreover the futures *obstabit*<sup>82</sup> and *vocabitur* fit Ulpian's liking for future tenses.<sup>83</sup> So it is likely that this article has uncovered two hitherto unknown monographs of Ulpian that ran parallel to those of Paul. This latter *liber singularis* of Ulpian would appear in the Papinian mass, contrary to the general assignment of such works to the Sabinian mass, because they were naturally grouped with the similar commentaries of Paul and Gaius on these two *senatus consulta*.

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<sup>82</sup> Ten Ulpian texts: A.M.Honoré and J.Menner, (above n.27) fiche 65.

<sup>83</sup> *Ulpian*<sup>2</sup> 59-62.