

LATE ARRIVALS. THE APPENDIX IN JUSTINIAN'S DIGEST RECONSIDERED*

Peter Birks owed much to John Kelly, who taught him Roman law, and to Herbert Hart, who commissioned the book on Restitution for the Clarendon Law Series and made, he told me, some 500 comments on Peter's first draft. As time went on, Peter's historical and analytical interests dovetailed. He appreciated how Roman texts and classifications could be used not merely as a teaching tool but to build up a branch of modern law. His commitment to the value of law as an intellectual discipline was total.

We were mutually supportive. But the paths of the 26th and 27th holders of the Regius Chair of Civil Law in Oxford ran parallel rather than converged. Peter's Roman-related modern interest was restitution/unjust enrichment, to which he made a fundamental contribution. Mine concerned trusts in the civil law. His classical focus was on early Roman law and the institutional tradition, mine on paligenetic studies and the later Empire. He had, before his sudden exodus, found my renewed attack on the compilation of Justinian's Digest exciting,¹ and the present tribute to the genius of Justinian's minister Tribonian would not come to him as a surprise.

In the course of a complex enterprise such as the compilation of Justinian's Digest in AD 530-533 changes of plan, to meet unexpected snags, are inevitable. This essay deals with a change of plan on the part of Tribonian, who was in charge of the operation, to deal with the fact that there were more works to be read and excerpted by the Digest commissioners than originally envisaged. It concerns the works known as the Appendix and proposes a new theory as to their character.

The term Appendix refers to a group of writings that seemed to fall outside the three main groups of work, termed the Sabinian, edictal and Papinian masses, detected by Bluhme in 1820.² Like the three main masses these writings appear in the Digest titles in a regular sequence. That suggests that they were read, excerpted and edited for inclusion in the Digest as an ordered group. In that sense, but only in that sense, they constitute a fourth mass, as Gustav Hugo, who invented the term

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¹ P. Birks, 'Roman Law in Twentieth-Century Britain' in J. Beatson and R. Zimmermann (eds) *Jurists Uprooted. German-Speaking Emigré Lawyers in Twentieth-Century Britain* (2004) 257 n.20.

² F. Bluhme, *ZGR* 4 (1920) 257-420; reprint in *Labeo* 6 (1960) 5096, 235-277, 368-404.

Appendix to describe them, stressed.³ But the number of works⁴, books⁵ and excerpts⁶ in this group is less than for the other masses, and in over three-quarters of the titles in which texts from them occur they come at the end of the title.⁷ This explains why the term ‘Appendix’ has gained currency.

I argue that the Appendix is a composite collection of texts, drawn from all three main masses. It consists, as has long been believed,⁸ of works that became available to Justinian’s compilers after the reading and excerpting of the main masses had begun. The late arrivals were each allotted to their appropriate main mass, according to a rational system.⁹ The committees charged with reading the main masses were however to read these books only when they had finished reading the works originally assigned to them. Through pressure of time, the three committees made only a modest start on the late arrivals. It was then decided to collect the works as yet unread from all three masses and entrust them to an ad hoc committee to read and excerpt. At the same time commissioners other than those charged with reading the Appendix began to edit the Digest titles. This they did methodically from book 1 onwards, title by title (50 books and 432 titles in all), combining the texts from all three masses. When the ad hoc committee had finished reading the Appendix the editors of the Digest titles inserted the excerpts from them in each title at a point that depended on the progress that had been made in editing that title.¹⁰ In the first half of the Digest, which had by then been fully edited, they inserted the Appendix excerpts at the end of the title. From about the

³ G.Hugo, ‘Der von Bluhme entdeckten Reihen sind vier’, *Civilistisches Magazin* 6.4 (1837) 512-523 at 514-5; but see D. Mantovani, *Digesto e masse Bluhmiane* (1987) 1-3,16-9,109-124; ‘Le masse Bluhmiane sono tre’, *Seminarios Complutenses de Derecho Romano* 4 (1993) 87-119. I am much indebted to Mantovani’s study but draw different conclusions from it. He comments on and replies to some suggestions in the present essay in ‘Postilla 1, Indagini recenti sull’Appendix,’ annexed to the text of his intervention in our debate in San Ginesio of 17 September 2004 and published in *Alberico Gentili. L’uso della forza nel diritto internazionale* (2006) pp.275-395 at 343-365.

⁴ At least eleven or twelve, listed below at nn.18-20.

⁵ Of a Digest total of 1,522 at least 101 or 110, depending on the view taken of the two series of inscriptions for Labeo’s *posteriora*, belong to the Appendix: below nn.18-9.

⁶ About 299 out of a Digest total of 9,133 (3.27 %).

⁷ On my count in 102 out of 127 titles in which there are Appendix texts. There are also 10 to 13 titles in which the Appendix is the last mass but is succeeded by codal texts: below nn.107-9.

⁸ Bluhme (above n.1) 317.

⁹ The works of Pomponius to the edictal committee, to which his works were in principle assigned; those of Scaevola to the Papinian committee for the same reason; those of Venuleius to the Sabinian committee; below nn.113-5.

¹⁰ What follows essentially adopts the theory proposed by Mantovani (above n.2, 1987) 114-6, 123.

middle, when the editors had settled the order of masses but had not decided how to introduce or end each title, they put the Appendix texts in the penultimate position, before whatever texts were chosen to end the title. From book 40 onwards the Appendix was treated as a fourth mass on a level with the other three. The editors then placed it wherever seemed best in relation to the other masses - not necessarily at or near the end of the title.

A number of problems need to be addressed. What works make up the Appendix? In what internal order do they come? What is their general character? How do the works that constitute the Appendix relate to the main masses? Were there late arrivals that are not part of the Appendix? In which titles of the Digest do Appendix texts appear? In what position, and in what order, have the editors placed them in each title?

1. *What works constitute the Appendix and in what internal order do they come?*

The Bluhme-Krueger *Ordo librorum iuris veteris in compilandis Digestis observatus* (BK Ordo)¹¹ lists thirteen works, which Krueger put after the Sabinian, edictal and Papinian masses and numbered from 263 to 275. Two, it is generally agreed, should be removed because their listing rests on a single text with a false inscription.¹² These are no. 266 (*Proculi libri III ex posterioribus Labeonis*) and no. 272 (*Valentis libri VII actionum*). As to the first, in D. 33.6.16, '*Idem <Proculi>*' is probably a mistake for '*Iavoleni*'. For the second, in D. 36.4.15, '*Valens*' should be '*Venuleius*'. The hypothetical Proculus and Valens works are not listed in the so-called Florentine *Index auctorum*,¹³ whereas the existence of the suggested alternatives by Iavolenus and Venuleius is confirmed by inscriptions to 44 and eight Digest texts respectively¹⁴. That leaves a list of eleven works, about four of which Mantovani expresses doubt.¹⁵ All four can, however, be plausibly be defended as members of the Appendix. In the table that follows this list of eleven (or, if the two versions of Labeo's *posteriora* are treated as separate works, twelve) defensible works are set out, in accordance with the conclusions I have reached, along with the number of books,¹⁶ texts and lines¹⁷ from each that appear in the Digest. They are set out in the order in which I think they were presented for

¹¹ Corpus Iuris Civilis (ed. T. Mommsens and P.Krueger stereotype ed.) 1.927-931.

¹² Mantovani (above n.2, 1987) 109.

¹³ Above n. 10 at 26-28.

¹⁴ Above n.10 at 935,946; Lenel *Pal.* 1.299-315.

¹⁵ Mantovani (above n.2, 1987) 109-112.

¹⁶ 101 or 110 books out of 1522.

¹⁷ As printed in Lenel's *Palingenesia Iuris Civilis* (1889).

incorporation in the Digest, with the Bluhme-Krueger number in brackets. The order is marginally uncertain in that the relative position of items 2 and 3 and of 10 and 11 is debatable.¹⁸

	<i>Work and number of books</i>	<i>Texts</i>	<i>Lines</i>
1 (BK 263)	Pauli imperialium sententiarum 2 (out of 6)	6	27
2 (BK 265)	Labeonis posteriorum a Iavoleno epit. books 2-10 (1-2 in Sabinian mass)	25	328
(BK 94)	Iavoleni ex posterioribus Labeonis books 2-10 (1-2 in Sabinian mass)	38	419
3 (BK 264)	Quinti Mucii Scaevolae ??? 1	4	20
4 (BK 267)	Scaevolae digestorum books 3-40 (1-2 in Papinian mass)	120	3072
5 (BK268)	Labeonis pithanon a Paulo epitomatorum 8	34	299
6 (BK 269)	Pomponii epistularum 20 ¹⁹	24	258
7 (BK 270)	Pomponii senatusconsultorum 5	9	103
8 (BK 271)	Scaevolae quaestionum publice tractatarum 1	9	158
9 (BK 273)	Venuleii Saturninii actionum 10	7	57
10 (BK 274)	Venuleii Saturnini de interdictis 6	20	246
11(BK 275)	Furii Anthiani ad edictum 1	3	15

The table serves to bring out the weight that, within the Appendix list, attaches to items 3 to 5, especially to Scaevola's *digesta*, which provides over half the lines from these works: 3,072 out of 5,002 (61.4 %).

I deal first with the four works (items 1,3,10 and 11) doubted by Mantovani²⁰ and then with the two (items 2 and 4) the first books of which seems to have been read by the Sabinian and Papinian committees respectively. Then I turn to those works that may belong to the Appendix though they are not listed as such.

¹⁸ Below nn.30-37, 46-54. The Table to some extent agrees with that set out by Hugo (above n.2) 520-1.

¹⁹ Of the texts inscribed to Pomponius *epistularum et variarum lectionum*, instead of just *epistularum*, some seem to belong to the edictal mass, where his *variae lectiones* come at BK 155. I have not attempted to assign them all to the correct mass, but see (above n.2, 1993) 112-3.

²⁰ The position of the first two is also doubted by H.Krueger, *Studi Bonfante* (1930) 2.234f.

The first suspect work is Paul's *imperiales sententiae in cognitionibus prolatae*, an account of cases heard by the emperor Severus in which Paul participated.²¹ Of the six books attributed to this work, which is not recorded in the *Index auctorum*, the Digest has only an epitome in two books. It can be assumed that only two were available to the compilers.²²

Mantovani's reason for doubting whether this work belongs to the Appendix is that of the six texts from it in the Digest three come at the end of the Papinian mass,²³ and so might be thought to belong to that mass rather than to the Appendix. Two other texts come at the end of the Appendix mass.²⁴ But Kaiser points out²⁵ that one of these last two appears in a series of texts that are plainly out of order, and there is reason to suppose that the text is not really the last in the title but was followed by two others the source of which is unknown.²⁶ The conflict between the remaining *imperiales sententiae* text that comes at the end of the Appendix, D 35.1.113, and D 50.16.240, which comes at the beginning should be solved, he argues, in favour of D 50.16.240. The title 50.16 *De Verborum Significatione* has suffered little editorial intervention, whereas 35.1 has about twenty displaced texts. The sixth text from *imperiales sententiae* (D 40.1.10) seems more likely to be an insertion in an earlier mass than to constitute the Appendix, since in the title in question there is another Appendix text in its normal position at the end of the title.²⁷ The case for moving this work to the Papinian mass is therefore weak.²⁸

In any case Paul's *imperiales sententiae* is closely related to his *decreta* in three books, which was excerpted as part of the Papinian mass at no.222 in the Bluhme-Krueger Ordo. There seem to have been two summaries of his original six book collection of cases.²⁹ Had both been available from the outset, they would have been read together as a group, rather than separated by forty works in the BK Ordo (nos. 222 and 263 respectively). That they were not read together is therefore

²¹ Mantovani (above n.2, 1987) 109-110; (1993) 103.

²² Liebs in *HLL* 4 (1997) § 423 no.79.

²³ D 28.5.93; 37.14.24; 50.16.240

²⁴ D 35.1.113; 36.1.83

²⁵ W.Kaiser, 'Digestenentstehung und Digestenüberlieferung', 108 *SZ* (1991) 330-350 at 339-340.

²⁶ D 36.1.84, 85 (Bas. 35.1.84,85)

²⁷ D 40.1.26 (Iav. 4 post. Lab.) is the final text in the title.

²⁸ So also Kaiser (above n.24) 339-340. Osler thinks that the texts are consistent with the work coming either at the end of the Papinian mass or at the beginning of the Appendix: 'Following Bluhme: a note on Dario Mantovani, "Digesto e masse Bluhmiane": *IVRA* 38 (1988) 137-158 at 147.

²⁹ Liebs (above n.21)

evidence that the second summary of *imperiales sententiae* became available only later. This conclusion holds even if Mantovani is right in thinking that this work may belong to the end of the Papinian mass or was read separately from any mass rather than the beginning of the Appendix. In general the works of the five authors honoured in the Valentinian Law of Citations (Papinian, Gaius, Ulpian, Paul and Modestinus) will have been available to the Digest commission from the start, but this need not apply to a summary of a work by one of these writers, such as the summaries of Paul's *imperiales sententiae*. It looks like a later arrival and, if it was assigned on arrival to the Papinian committee, it was assigned on the basis that it was not to be read until the reading of the works originally assigned to that committee had been completed.

The next suspect work is Quintus Mucius Scaevola's one book of ???³⁰ from which four texts survive. One of these comes at the end of a title after the Papinian mass.³¹ Another follows the Papinian mass but precedes a text from Labeo's *pithana*, item no. 5 in the Appendix list.³² A third comes after the text from Paul's *imperiales sententiae* in D. 50.16 just discussed and is followed by five Appendix texts.³³ The fourth³⁴ comes from the most regular of all titles, D 50.17, after a text from Iavolenus *ex posterioribus Labeonis*, a work which is for good reason to be listed in Appendix table.³⁵ There is little doubt that Quintus Mucius' monograph belongs to the Appendix.³⁶ Osler, on the basis of this fourth text, would place it after Labeo's *posteriora*.³⁷ This involves holding that the third text, D 50.16.241, is displaced within the Appendix mass, since it comes before 50.16.242 from Iavolenus *ex posterioribus Labeonis*. Such internal displacements with Appendix texts are not unknown.³⁸ I have with some hesitation adopted the suggested change of position in the above table.

The third work doubted by Mantovani is Venuleius' six books *de interdictis*.³⁹ He thinks that it is not possible to know where in the Bluhme-Krueger Ordo this work was read. This view is not persuasive. Of the texts from this work D 41.2.52 and

³⁰ Mantovani (above n.2,1987) 110; (1993) 103-4.

³¹ D 43.20.8

³² D 41.1.64.

³³ D 50.16.241.

³⁴ D 50.17.73

³⁵ Below nn. 39-53.

³⁶ Kaiser (above n.24) 340.

³⁷ Osler (above n.27) 149-150.

³⁸ Below nn.133-6.

³⁹ Mantovani (above n.2,1987) 111-112.

53 come after a text from Iavolenus' *posteriora Labeonis* book 5. D 41.1.66 comes after a text from Quintus Mucius' ??? ? and two from Labeo's *pithana*; D 44.3.15 after a text from Scaevola's *quaestiones publice tractatae*; 43.26.22 after one from Venuleius' *actiones*. Together these texts point to a position for Venuleius' *interdicta* after items 2,3,4,5 and 8 in the Appendix table, either just before or after Furius Anthianus. I have followed the Bluhme-Krueger Ordo in placing it before, but the precise order is not really important.

Mantovani draws attention to the fact that excerpts from Venuleius' work are found only in books 41 to 44 of the Digest, whereas one might expect the 20 texts from it to be more widely distributed. Thirteen texts come in book 43, which concerns interdicts.⁴⁰ Seven appear in neighbouring Digest books.⁴¹ At this very late stage in the process of reading and excerpting when, on Mantovani's plausible view, the editors had finished their work up to about book 40,⁴² the committee reading this work may have been encouraged to confine its attention to titles that were to appear in the last ten books of the Digest. Mantovani also notes that a number of texts are either interwoven with excerpts from Ulpian's books 70,⁴³ 71,⁴⁴ and 73⁴⁵ *ad edictum*, or come at the end of a title after an Ulpian text from these books.⁴⁶ Given that the Appendix excerpts were now available to the editors before they began to edit each title, it was easy for them to interweave the Appendix texts with texts from other masses. When they did not, it was normal to place Appendix texts at the end of a title. In sum, I see no reason to doubt that Venuleius' *de interdictis* was read in the ordinary way toward the end of the Appendix mass, but that the commissioners reading it took account of its place near the end of the long-drawn-out programme of reading and excerpting for the Digest.

The last work to be listed in the Appendix is Furius Anthianus's *ad edictum*, one of five books to which the compilers had access,⁴⁷ from which we have three fragments.⁴⁸ All come at the end of their respective titles and Mantovani doubts

⁴⁰ D 43.19.4; 21.4;23.2; 24.2,4,8,10,12,22; 26.7,22;29.2,4; 30.5

⁴¹ D 41.2.52,53; 41.1.66; 42.8.8,11,25; 44.3.15

⁴² Mantovani (above n.2, 1987); below nn. 153-160..

⁴³ D 43.19.4

⁴⁴ D 43.24.2,4,8,10,12.; 43.26.7; 43.29.2.

⁴⁵ D 42.8.11.

⁴⁶ D 43.21.4; 43.23.2; 43.29.4

⁴⁷ Index auctorum XXXVI ? ???? ?t??F?? ??? ????a??? µe??? edictu ββ???? pe?te; D.Liebs 'Variae Lectiones' (Zwei Juristenschriften), *Studi Volterra* V (1971) 65 n.59 I fine. .

⁴⁸ D 2.14.62; 4.3.40; 6.1.80.

whether this work can securely be attributed to the Appendix.⁴⁹ But one of these texts comes after two Appendix texts from Labeo's *pithana*.⁵⁰ Moreover the texts that he cites from the second book of Scaevola's *digesta* in titles 2.14⁵¹ and 4.3⁵² have been shown by Osler, convincingly, to belong to the Papinian mass.⁵³ Hence they do not show that the Appendix was placed in an earlier position in these titles. In that case there is no reason why the Furius Anthianus texts at the end of these two titles (D 2.14.47 and 4.3.32) should not belong to the Appendix, the end being the usual position for Appendix texts. It is likely that Furius Anthianus' book belongs to the Appendix⁵⁴ and comes at or near the end of that mass. If it does, the fact that it was incomplete and likely to have been found at a late stage is not, pace Mantovani,⁵⁵ an argument against the thesis that the Appendix consisted of works found after the reading and excerpting of the main masses had begun.

2. What is the general character of the Appendix works?

Various views have been held about the character of the Appendix. H. Krueger thought that it consisted of works destined for student to read in the fifth year of study, a 'constitution-mass'⁵⁶. But the works do not form a coherent object of study, and are by no means confined to constitutions. I adhere to the traditional view that these works were late arrivals. Moreover they were assigned to one of the three masses as they arrived – the mass to whom the works of the author in question were in principle assigned - but were to be read by each committee after its main assignment. The assumption that the Appendix works were late arrivals has been challenged by Mantovani.⁵⁷ He thinks that they were in the main parallel editions of works which formed part of the main masses. Thus Pomponius' *epistulae* in the Appendix (BK 269) were parallel to his *variae lectiones* in the edictal mass (BK 153). The parallel works may have been available from the beginning but were left on one side until, if ever, there was time for them to be read. But would this arrangement be sensible? At least in the Sabinian mass similar works by an author could be read together as part of a group. Papinian's *libri 2 de adulteriis* and his *liber singularis* on the same subject were read together (BK 31).

⁴⁹ Mantovani (above n.2) 112.

⁵⁰ D 6.1.80

⁵¹ D 2.14.47

⁵² D 4.3.32.

⁵³ Osler (above n.27) 154-157.

⁵⁴ Kaiser (above n.24) 338 n.53.

⁵⁵ Mantovani (above n.2, 1987) 112.

⁵⁶ H. Krüger, *Die Herstellung der Digesten Justinians und der Gang der Exzerption*, (1922).

⁵⁷ Mantovani (above n.2, 1993) 114-9.

So there was no ban on reading similar works by the same author as part of a group. Indeed, that was essential if the best texts were to be discovered and excerpted for the Digest. On the other hand if works previously not available arrived after the committees had begun reading those that were available from the start, they would be overburdened by having to add the new works to their load. It was then rational to postpone reading them until the programme of reading already agreed and calculated according to a timetable had been finished. Mantovani's observation explains rather why, when these parallel works arrived, they were either not incorporated in the reading programme for the main masses or were put towards the end of the mass. This happened in the case of Scaevola's *digesta* of which the first two books were read towards the end of the Papinian mass rather than along with his other works, which come near the beginning of the mass (BK 184,187,189, 191,193).⁵⁸

3. How do the works that constitute the Appendix relate to the main masses?

Bluhme considered that the Appendix works were assigned to the Papinian committee, since the Appendix normally follows the Papinian mass.⁵⁹ Mantovani rightly disputes this assignment.⁶⁰ One reason for doubting it is that the Appendix does not always follow the Papinian mass. It should be stressed that the position of the masses in each title does not depend on the ranking of the various committees,⁶¹ with the possible exception of D 50.17, where in this largely unedited title the order is Sabinian, Appendix, Papinian, edictal. In my view, as the order in this title suggests, the senior committee was the Sabinian, the second the Papinian, the third the edictal.⁶²

Normally however the titles were edited in a way that took account not so much of the ranking of the committees as of the relative character and bulk of the materials provided by each mass, and particularly of the convenience of treating Ulpian, whose work mainly falls in the Sabinian mass, as the lead author for most topics.⁶³ In the upshot the Sabinian mass is chosen as the first mass in 249 of the 431 titles,

⁵⁸ Below nn.94-108.

⁵⁹ Bluhme (above n.1) 309f.

⁶⁰ Mantovani (above n.2, 1987) 112, 116, 123-4 cf. Osler (above n.27) 144-146.

⁶¹ As suggested by Mantovani (above n.2, 1987) 114.

⁶² Honoré 'How Tribonian Organised the Compilation of Justinian's Digest' in *SZ* 121 (2004) 1-43 at 12-3.

cf. Kaiser (above n.24) 338.

⁶³ Honoré (above n. 61) 21.

the edictal in 163 and the Papinian in 19.⁶⁴ The Papinian mass usually falls in the third position not because it ranks as the third mass or because this is its ‘natural position’ but because it is less bulky than the others and consists largely of case law.

Although the Appendix usually follows the Papinian mass there are 20 titles with both a Papinian mass and an Appendix where the Appendix comes at the end of a title but after another mass.⁶⁵ There are also eight titles where the Appendix precedes another mass. In seven of these it precedes the Papinian mass; in the eighth it follows it.⁶⁶ We can disregard six titles where the only Appendix text is inserted in another mass,⁶⁷ and fourteen where there is no Papinian mass.⁶⁸ In the upshot the Appendix follows the Sabinian mass in 15 titles, the edictal mass in 12.⁶⁹ That leaves 80 titles in which the Appendix follows the Papinian mass, including ten or twelve where it is in turn followed by one or more codal texts.⁷⁰

The Appendix very often follows the Papinian mass because from an editorial point of view it was sensible to put the more bulky general material first and to leave the *quaestiones* and *responsa* of Papinian, Scaevola and Paul, essentially case law, to the end. The normal position of the Appendix, which contains less material than the other masses, is at the end of a title, either because it was not available to the editors earlier or, if it was, because of its slender character. It is

⁶⁴ The order of the masses in a title, and whether a text counts a part of a mass or as a detached text, is sometimes debatable. I have generally followed Krueger’s views except where, as discussed above, he seems to have placed texts in the wrong mass.

⁶⁵ D 2.14 (after Sab.), 4.4 (after Sab.), 5.3 (after Sab.), 6.1 (after ed.), 9.4 (after Sab.), 13.5 (after ed.), 14.2 (after Sab.), 14.6 (after ed.), 22.1 (after ed.), 22.3 (after Sab.), 23.5 (after ed.), 24.3 (after ed.), 34.5 (after ed.), 35.2 (after Sab.), 36.3 (after Sab.), 36.4 (after ed.), 42.1 (after Sab.), 44.7 (after ed.), 46.5 (after Sab.), 49.15 (after Sab.). My list does not entirely coincide with Osler’s list of titles in which the Papinian mass does not appear in the third position (above n.25 at 145-6 n.31). In my view in D 15.3 the Appendix (15.3.21) follows the Papinian mass (15.3.19-20). In D 43.30 there is no Papinian mass, only a displaced text (43.30.2). Osler rightly doubts D 33.4 and he was not bound to list D 50.1, since on his view Scaevola’s *digesta* books 1 and 2 belong to the Papinian mass. Mantovani (above n.2, 1987) 114 n.43 lists 19 titles to which I would add 8 (D 2.14, 4.4, 9.4, 13.5, 14.6, 22.3, 35.2, 36.3).

⁶⁶ D 40.5 (after ed.), 40.14 (after Sab.), 44.1 (after Sab.), 46.1 (after ed.), 46.3 (after ed.), 49.14 (after Sab.), and 50.17 (after Sab.). The only exception is D 48.10, where it comes between the Papinian and edictal masses.

⁶⁷ D 3.5 (Sab.); 4.8 (ed.), 7.4 (ed.); 40.13 (between ed. and Pap.); 43.19 (ed.), 45.1 (Pap.).

⁶⁸ D 4.3, 8.5, 12.2, 25.4, 28.8, 33.6, 41.9, 43.21, 43.23, 43.24, 43.26, 43.29, 43.30, 50.12.

⁶⁹ Above nn.62-3.

⁷⁰ Below n. 154.

found there in 102 of the 127 titles in which a text from it occurs.⁷¹ So it is not surprising that it often, though by no means always, comes straight after the Papinian mass. This does not make it part of the Papinian mass. The Appendix is not part of one of the main masses.

There was, however, a connection between the Appendix and the main masses. Two works that belong mainly to the Appendix were, it seems, read in part by one of the main committees. The evidence suggests that the first books in Labeo's *posteriora* and Scaevola's *digesta* were read as part of the Sabinian and Papinian masses respectively.

To begin with Labeo's *posteriora*, this appears in the Digest in two sets of texts, one inscribed Iavolenus *ex posterioribus Labeonis* or the like, the other Labeo *posteriorum a Iavoleno epitomatorum*. Both refer to a summary of Labeo's posthumous works in ten books. Whether the compilers had two different manuscripts in their hands and, if so, whether these came from different summaries of Labeo's *posteriora* is disputed.⁷² The two series of inscriptions occur in both the Sabinian and the Appendix masses. Neither is confined to a particular book or books. To Bluhme the different inscriptions represented separate works⁷³ and the BK Ordo accordingly puts the Iavolenus texts at the end of the Sabinian mass at no. 94 and the Labeo texts in the Appendix at no. 265. The *Index auctorum* VII.2, however, does not support the existence of two different works. It attributes ten books of *posteriorum* to Labeo and nothing comparable to Iavolenus, who is instead assigned *epistolae de aetate* (BK 153). Had the compilers regarded the *posteriora* as a single work by Iavolenus, it should have been assigned to the edictal mass, to which his 15 books *ex Cassio*, 14 of *epistulae*, and 5 *ex Plautio* belong.⁷⁴ But if the compilers considered that there were two different summaries of Labeo's manuscripts by Iavolenus, one predominantly of Labeo texts, the other in the nature of a commentary by Iavolenus, the two had obviously to be read together as a group. In that case, if they assigned the works of Labeo to the Sabinian committee, the Iavolenus work would be grouped with it in the Sabinian rather than the edictal mass.⁷⁵ This was the procedure with Paul's

⁷¹ Below n.136.

⁷² In 1974 (below n.76) I took the view that there were two different manuscripts, but not necessarily two different works. This still seems plausible cf. Mantovani (above n.2, 1987) 117 n.49. .

⁷³ Bluhme (above n.1) 320-3.

⁷⁴ BK Ordo 152,153.

⁷⁵ Honoré (below n.77) 162.

epitomarum Alfeni Digestorum libri VIII.⁷⁶ Though the *Index auctorum* is often unreliable it suggests that to the compilers the *posteriora* was a single work of Labeo. Lenel also treated it as a single work but assigned it to Iavolenus.⁷⁷

Even if there were separate works, the BK assignment of the Iavolenus work to the Sabinian mass and the Labeo work to the Appendix was a mistake. The excerpts from book 1 and some from book 2 of the *posteriora* in both the Labeo and the Iavolenus series of inscriptions belong to the end of the Sabinian mass, while a larger number of excerpts from book 2 and all those from books 3 to 10, again from both series, belong to the Appendix.⁷⁸ It is not necessary to review the evidence for this conclusion, which is now, despite some apparent exceptions,⁷⁹ well established.⁸⁰ But what conclusion should we draw? At least in this instance, what began as part of the Sabinian mass ended as an item in the Appendix. Mantovani has suggested, to my mind convincingly, that the transfer occurred because at a certain stage in the Digest project the compilers in the interests of speed began assembling the texts already excerpted from the three main masses into titles and books without waiting until the reading of the remaining works was ended.⁸¹ The Appendix therefore consists of the works that had not yet been read when that decision was taken. Mantovani goes on to suggest that the Appendix is a continuation of the Sabinian mass and that the *posteriora* were consequently read without interruption by the Sabinian committee.⁸² This last conclusion is rejected by two scholars⁸³ and is in my view wrong.

⁷⁶ BK 16, read next to Alfeni Vari libri XL digestorum <7> BK 15, since both available together.

⁷⁷ Lenel, *Pal. I.* 299 n.1

⁷⁸ Honoré, 'Labeo's *posteriora* and the Digest Commission', in *Daube Noster* (ed. A. Watson 1974) 161-181; Mantovani (above n.2, 1987) 117 n.48.

⁷⁹ Mantovani (above n.2, 1987) 17-121; 1993 (99). In D 28.1.25 (Iav. 5 post. Lab.) the inscription is a mistake for 1 post. Lab (Lenel, *Pal. I.* 312 n.2) so that the text is the last in the Sabinian mass. D 49.15.27 falls between the Sabinian mass and an Appendix text from Labeo's *pithana*. D 50.17.72 (Iav. 3 post. Lab.) falls between the Sabinian mass and a text, already cited, from Quintus Mucius' ???? So none of these falls unambiguously in the Sabinian mass: (above n.27) 153.

⁸⁰ Mantovani (above n.2, 1987) 116-120; Kaiser (above n.24) 338; Osler (above n.27) 150-153

⁸¹ Mantovani (above n.2, 1987) 115-123.

⁸² Mantovani (above n.2, 1987) 121, 124; (1993) 98-100, 107-8.

⁸³ Osler (above n.27) 146; Kaiser (above n.24) 341, citing the adding of codal texts to the Sabinian mass in 35.11.41-2 following on the excerpts from Labeo's *posteriora* books 1 and 2 at 39-40. This shows that the Sabinian mass was edited as a mass after the reading of these two books. It is inconsistent with *uninterrupted* reading of the *posteriora* but not necessarily with continued reading after an interval of time.

It is true that if the summary of Paul's *imperiales sententiae* really belongs to the Papinian mass, and if Quintus Mucius' ??? ? comes after Labeo's *posteriora* in the Appendix table, Labeo's *posteriora* from book 2 to book 10 could have been the first work in the Appendix list and have been read by the Sabinian committee without interruption. But Osler has pointed to an objection to this hypothesis.⁸⁴ In the article that first highlighted the different masses in which texts from the early and later books of the *posteriora* occurred, I suggested that the five texts from book 2 that form part of the Sabinian mass, however inscribed, come from the first part of that book, but the fourteen in the Appendix position come from the later part of that book.⁸⁵ But the subject-matter of these texts does not perhaps fit that hypothesis. The five texts in the Sabinian position come from titles 28.7 (*de condicionibus institutionum*),⁸⁶ 29.2 (*de acquirenda vel omittenda hereditate*),⁸⁷ 33.4 (*de dote praelegata*),⁸⁸ 34.2 (*de auro argento etc. legatis*),⁸⁹ and 35.1 (*de condicionibus et demonstrationibus*)⁹⁰. The fourteen texts in the Appendix position come from books 32,33,34,36 and 50 of the Digest,⁹¹ so that there is a good deal of overlap with the first five. Title 34.2, admittedly a title in which the various masses appear twice, has one text from book 2 of the *posteriora* in the Sabinian, another in the Appendix position.⁹² There are also two titles in which displaced texts from book 2 come between texts from the edictal mass.⁹³ It may be that further analysis will show that the fragments in the two masses relate respectively to topics that came earlier or later in that book.⁹⁴ Or might the committee charged with reading the Appendix works may have read book 2 again and taken a fresh, more copious series of excerpts from it than the Sabinian committee had done: fourteen texts against the previous five? In that case the Appendix committee cannot have consisted of the same commissioners as the Sabinian committee, and the Appendix cannot be a continuation of the Sabinian mass. Between the two there was an interval of time and a change of personnel. It may even be that the

⁸⁴ Osler (above n.27) 153-4. Mantovani (above n.2, 1993) 106 points out that Lenel Pal. I.299f. simply arranged the fragments of this work in the order in which they appear in the Digest.

⁸⁵ Above n.76.

⁸⁶ D 28.7.20

⁸⁷ D 29.2.64

⁸⁸ D 33.4.6

⁸⁹ D 34.2.31

⁹⁰ D 35.1.40

⁹¹ D 32.29,30,100; 33.1.17; 33.2.30; 32.2.31; 33.2.41; 33.5.20; 33.7.4,25; 33.8.22; 34.2.39; 36.4.14; 50.16.242.

⁹² D 34.2.31,39.

⁹³ D 33.6.7; D 34.3.17, also between two edictal texts. There are Appendix texts in a normal end position at 33.6.16 and 34.3.28.

⁹⁴ Mantovani (above n.2) 120 n.55; Mantovani (above n.2, 1993) 106,107⁸⁸.

plan of reading the Appendix works was left aside until it became clear that there would be time enough to read them.⁹⁵ Moreover, the *posteriora* need not have been the first work to be read by the Appendix committee. Paul's *imperiales sententiae* could have been the first.

Another objection to the supposed continuity between the Sabinian mass and the Appendix is Osler's thesis that the texts from Scaevola's *digesta*, like those from Labeo's *posteriora*, belong partly to the Papinian mass and partly to the Appendix.⁹⁶ Those from the first two books, he argues, belong to the Papinian mass, the rest to the Appendix. From the first two books we have eight fragments. In D. 2.14.47 (1 dig.) the Scaevola text comes near the end of the Papinian mass after a text from Tryphoninus' *disputationes*. It is followed by another text from the Papinian mass, 2.14.48 from Gaius *ad legem XII tabularum*. Then, after the Sabinian mass from 2.14.49 onwards, the title ends with an Appendix text, 2.14.62, from Furius Anthianus.⁹⁷ D 4.3 is similar in that 4.3.32 (2 dig.) follows the edictal mass and is followed by the Sabinian mass. The final text of the title, 4.3.40, presumably constituting the Appendix, again comes from Furius Anthianus.⁹⁸ There are no other texts from the Papinian mass in this title apart from one insertion in the edictal mass.⁹⁹ Much the same is true of D 4.4.39 (2 dig.) where the preceding Papinian mass text is from Paul's *decreta*, and, after the Sabinian mass from 4.4.40 onwards, the title ends with an Appendix text, 4.4.50, from Pomponius' *epistulae*.¹⁰⁰ In D 4.8.44 the Scaevola text from 2 dig. comes between the Papinian and Sabinian masses. At this early stage of the editorial process it would be unique for the Appendix to appear before another mass, something that does not happen until book 40,¹⁰¹ whereas the position of the text fits the end of the Papinian mass. D 50.1 and 50.7 are less strong cases, because here, though the Scaevola texts (50.1.24 and 50.7.13) come between the Papinian and edictal masses, at this stage in the editorial process the editors were free to put the Appendix in whatever position they thought best.¹⁰² But since in both titles the Scaevola texts come at the end of the Papinian mass, after texts from Hermogenianus *iuris epitomae* (BK no.206) and Paul *de iure libellorum* (BK no.250) respectively, and are not followed by Appendix texts, they are

⁹⁵ Mantovani (above n.2, 1987) 122.

⁹⁶ Osler (above n.27) 154-158; Mantovani (above n.2, 1993) 104.

⁹⁷ D 2.14.62

⁹⁸ D 4.3.40.

⁹⁹ D 4.3.19 (Pap. 37 quaest.).

¹⁰⁰ D 4.4.50.

¹⁰¹ Below n.161.

¹⁰² Below nn.161-5.

inconclusive. In D 2.15 the Scaevola text (2.15.3) is part of a trio of introductory texts all of which are displaced from their normal position. In D 50.9 the Scaevola text (50.9.6) comes at the end of the title but, as there is no other text from either the Papinian mass or the Appendix, we cannot tell to which mass it belongs.

In all eight cases the position of the text from books 1 and 2 of Scaevola's *digesta* is consistent with its coming near the end of the Papinian mass and in the first four listed it fits that position better than the Appendix. But D 2.14.48 (BK 247) shows that the first two books of the *digesta* may not have been read as the last of the Papinian mass but shortly before the last, since number of *libri singulares* come after Gaius on the XII Tables.¹⁰³ On the other hand it must have been read after BK 221 (Tryphoninus 12 disputationes) in view of D 2.14.46, which precedes 2.14.47 (Scae. 1 dig.). It also appears to have been read after Paul 1 *de iure libellorum* (BK 250) in view of D 50.7.12 from that work which precedes 50.7.13 (Scae 1 dig.). It is true that the exact position of Paul's *de iure libellorum* in the Papinian mass is uncertain,¹⁰⁴ but in general *libri singulares* come towards the end of that mass, at any rate after the Tryphoninus group at BK 219-222.¹⁰⁵ If we suppose that the first two books were read a week or two before the end and the rest detached to be read later, that would show that the idea of detaching Appendix works from the main masses was contemplated, as it should have been, in advance.

Osler makes the further point about the relation of the Appendix to the Papinian mass that, in the 32 titles he lists in which both the Papinian mass and the Appendix appear but the Papinian mass is not in its usual third position,¹⁰⁶ the Appendix seems to come immediately after it in only seven or eight cases. These at first sight include the six titles 2.14, 4.3, 4.4, 4.8, 50.1 and 50.7 just discussed, in all of which the Appendix does not in fact follow the Papinian mass if the first two books of Scaevola are taken to belong to the Papinian mass rather than the Appendix.¹⁰⁷ This is an extra argument against the view that the Appendix forms part of the Papinian mass. It would be odd if the Appendix followed the Papinian

¹⁰³ Mantovani (above n.2, 1993) 108.

¹⁰⁴ Mantovani (above n.2, 1987) 100.

¹⁰⁵ Mantovani (above n.2, 1987) 100 places Paul *de iure singulari* after BK 219 and Paul *de officio adessorum* after BK 220.

¹⁰⁶ Osler (above n.27) 145-6 n.31.

¹⁰⁷ Only in D 47.10.24 does the Appendix follow the Papinian mass when the latter is in the second position in the title. D 33.4 is not an exception, because there the text from Labeo's *posteriora* at 33.4.6 is part of the Sabinian mass, and the Appendix at 33.4.13-4 appears after the Papinian mass at 33.4.11-12, but is followed by three displaced texts at 33.4.15-7..

mass in just those few cases in which the Appendix text came from these two books of Scaevola's *digesta*.

We may, I think, safely assign the first two books of Scaevola's *digesta* to the Papinian mass and the remaining 38 to the Appendix. That has important implications. The Appendix cannot both be part of the Sabinian mass because Labeo's *posteriora* formed part of that mass and was read by the Sabinian committee and also part of the Papinian mass because Scaevola's *digesta* formed part of the Papinian mass and was read by the Papinian committee. The Appendix cannot, in fact, be part of either, but must be a collection of books drawn from both and also, probably, from the edictal mass. The case of Scaevola's *digesta* is particularly revealing, if we assume that it was treated as part of the Papinian mass before its transfer to the Appendix. For it cannot have been available to the compilers at the outset of their work. Such a substantial work, in 40 books, would in that case have been read earlier in the operations of the Papinian committee. From the BK Ordo it is clear that the programme of all three main committees required them to read the most substantial works first, in particular the Sabinian and edictal commentaries and the works of Papinian. In all three masses the number of lines per book declines towards the end.¹⁰⁸ In the Sabinian (BK 69-92) and Papinian (BK 224-261) masses there is a long list of minor works read towards the end of the mass. Many of these are *libri singulares* of Paul, of which the compilers read sixty, none of which can be confirmed as part of the edictal mass.¹⁰⁹ Although it is often doubtful whether a *liber singularis* should be assigned to the Sabinian or Papinian mass or where within the mass it should be placed, there are enough whose position is secure to show that the general scheme was for the minor works to be read towards the end of these two masses.¹¹⁰ The *posteriora* of Labeo and the *digesta* of Scaevola do not fit this scheme. That is a reason for regarding them, and also Paul's *imperiales sententiae*, if it belongs to the Appendix,¹¹¹ as late arrivals that had to be fitted in after the initial assignment of works to the three committees had been made. Mantovani's scepticism about whether the Appendix consists of late arrivals, and whether the *digesta* of Scaevola was a late arrival,¹¹² therefore seems unjustified.

¹⁰⁸ Honoré (above n.61) p.7.

¹⁰⁹ Paul *ad legem Cinciam* is his only *liber singularis* allotted to the edictal mass (BK 170) but its real mass is uncertain (Mantovani, above n.2, 1987, 97).

¹¹⁰ Mantovani's analysis (above n.2, 1987, at 90-103) confirms the existence of 17 *libri singulares* of Paul in the Sabinian and 17 in the Papinian mass but leaves 26 doubtful, including 11 which have left no excerpts in the Digest..

¹¹¹ Above nn.20-8.

¹¹² Mantovani (above n.2, 1987) 116.

How was it decided to which committee to assign each work? The system by which Tribonian allotted works to the committees has been explained elsewhere.¹¹³ Each author was assigned to a particular mass, but some of his works could be hived off to another mass to form an interrelated group, for example a group of works on adultery or of commentaries on Plautius. Papinian provides a convenient example. His *quaestiones*, *responsa* and *definitiones*, 58 books in all, were assigned to the Papinian mass, but his three books *de adulteriis* went to the Sabinian mass to be combined with the works of Ulpian and Paul on that subject at BK 28 - 31. One *liber singularis*, *ast???μ????*, appears in the BK Ordo in the edictal mass at 111, but its real mass is indeterminate.¹¹⁴ It should be moved, in my view, to the Papinian mass which inherits Papinian's works except those required to form a group in another mass, or to the Appendix.

How does this apply to the Appendix works? In the case of Labeo's *posteriora* there was no previous Labeo work to go by. The choice of committee was open and the Sabinian was selected. In the case of Scaevola, however, his *quaestiones* and *responsa* had already been assigned to the Papinian mass, his four books of *regulae* to the *regulae* group in the Sabinian mass.¹¹⁵ The Papinian mass was therefore the appropriate one for his *digesta* unless this work was to be allocated to a group of works similar in point of subject-matter or genre. The *digesta*, had they been available from the start, might (but would not necessarily) have been combined with the *digesta* of Celsus and Marcellus in the edictal mass. In fact, as Osler shows,¹¹⁶ it went to the Papinian mass. Applying the same principles to the other Appendix works, Venuleius' *actiones* and *interdicta* went to the Papinian committee, given his 19 books of *stipulationes* at BK 216. Pomponius' *epistulae* and *senatusconsulta* went to the edictal committee in view of his books *ad Quintum Mucium* and *variae lectiones* at BK 154 and 156. The summary of Paul's *imperiales sententiae* went to the Papinian committee not because Paul's works were assigned to this committee (on the contrary, they were divided more or less equally between the three masses) but because the other summary, Paul's *decreta*, had already been assigned to that mass at BK 222. The *quaestiones publice tractatae* of Scaevola, assuming the compilers regarded this as a work of Cervidius Scaevola, would also go to the Papinian committee. The monographs by Quintus Mucius and the only available part of the commentary by Furius Anthianus might

¹¹³ Honoré (above n.61) 18-25.

¹¹⁴ Mantovani (above n.2, 1987) 111.

¹¹⁵ BK 36-46. One ought probably to add to this group as 46 bis Marcellus, *responsorum* 1 (BK 59): Mantovani (above n.2, 1987) 104-5.

¹¹⁶ Above nn.52,82.

have been placed in any of the masses, since these were the only works of theirs available to the compilers. Given the allocation to the Sabinian committee of Labeo's *posteriora*, his *pithana* would also be allotted to it.

The extra works, especially Scaevola's *digesta*, would impose a heavier burden on the Papinian committee (57 books) than on the other committees (17 or 26 for the Sabinian committee, 25 for the edictal). This may have been one reason for reorganising the programme of reading and excerpting.

We do not know how the Appendix committee was composed. It is not likely to have consisted of any of the committees charged with reading the original three masses. The Sabinian and Papinian committees were the two senior committees and must have been headed by Tribonian and Constantinus,¹¹⁷ who would be needed for the editorial work that, as Mantovani convincingly argues, went on at the same time. The same is, I think, true of Theophilus, who as the senior law professor must have been in charge of the edictal committee.¹¹⁸ Those charged with reading and excerpting the Appendix are likely to have been chosen from among the three more junior law professors, Dorotheus, Anatolius and Cratinus.

4. *Were there late arrivals that are not part of the Appendix?*

It is possible that there were late arrivals that are not listed as part of the Appendix since the only text or texts from them come at the end of a title. An example is Callistratus 4 *de iure fisci* (BK no. 158) which Mantovani lists as possibly belonging to the Appendix since the two texts from it each come at the end of a title.¹¹⁹ D 29.5.27 comes after 29.5.26 (Scaevola 34 dig.) and 40.15.4 (Call. 1 iur. fisc.) comes after two Papinian mass texts. If this were so, it would clear up a difficulty about the editing of D 29.5,¹²⁰ which would then end in two Appendix texts rather than an Appendix text and a codal text.

There may be other works of this sort that belong to the Appendix but are not easy to detect as such. In particular it is worth inquiring whether works not listed in the *Index auctorum* of which we have excerpts in the Digest belong to the Appendix and were not listed because the compiler of the Index had an incomplete list of these late arrivals. A possible example of an Appendix work is Maecianus' *ex lege*

¹¹⁷ Honoré (above n.61) 12-13.

¹¹⁸ Ibid.

¹¹⁹ D 14.2.9 (Maec. 1 ex leg. Rhod.) before 14.2.10 (Lab. 1 pith.).

¹²⁰ Kaiser (1991) 341⁶⁴; Mantovani (above n.2, 1993) 105; below nn. 156-9.

Rhodia,¹²¹ the only excerpt from which comes just before an Appendix text at the end of a title. Four *libri singulares* of Gaius (the Index does not list his $\mu\text{???}\beta\text{B??}a$) are also possible candidates. The single texts from Gaius *ad sc. Tertullianum*¹²² and *ad sc. Orphitianum*,¹²³ each precede an Appendix text at the end of D 38.17.¹²⁴ The single text from *de tacitis fideicommissis*¹²⁵ comes before two displaced Papinian mass texts¹²⁶ and a final Appendix text.¹²⁷ At this point in the process of editing Appendix texts can be placed before codal texts,¹²⁸ and this may be an example. The single text from the mysterious *lex Glitia*,¹²⁹ which appears in the title *de inofficioso testamento*, is in a group of introductory texts from at least the Sabinian and edictal masses and could have been an Appendix text inserted by the title editor like some others in these early books.¹³⁰ On the other hand Papinian's *ast???μ ????*¹³¹ which provides the only text in a title,¹³² Arcadius Charisius *de muneribus civilibus*¹³³ and Paul *de gradibus et adfinibus et nominibus eorum*,¹³⁴ which provide a single, long text at the end of a title¹³⁵ and from that point of view could belong to the Appendix are all listed in the Index.¹³⁶

5. In which titles of the Digest do Appendix texts appear?

On the basis of the works identified above as belonging to the Appendix an Appendix text or texts appears in 127 titles of the Digest.¹³⁷ These are: D 2.14.62* (Furius Anth. 1 ed.), 3.5.42 (Labeo 6 post.), 4.3.40* (Furius Anth. 1 ed.), 4.4.50* (Pomp. 9 epist.), 4.8.18 (Pomp. 17 epist.), 5.3.58* (Scae. 3 dig.), 6.1.78-80* (Lab.

¹²¹ BK 93. Mantovani (above n.2, 1993) 109 also suggests this possibility.

¹²² D 38.17.8

¹²³ D 38.17.9

¹²⁴ D 38.17. 10 (Pomp. 2 SCC).

¹²⁵ D 34.9.23.

¹²⁶ D 34.9.24 (Pap. 18 quaest.), 25 (id. 14 resp.).

¹²⁷ D 34.9.26 (Scae. 30 dig.)

¹²⁸ Mantovani (above n.2, 1987) 14-5; below nn. 153-160.

¹²⁹ D 5.2.4.

¹³⁰ Below nn.145-7.

¹³¹ D 38.10.1 (Pap. 1 astu.).

¹³² BK 111.

¹³³ BK 260.

¹³⁴ BK 254.

¹³⁵ D 38.10.10 (Paul 1 grad. et adfin.); 50.4.18 (Arc. Char. 1 mun. civ.).

¹³⁶ Index auctorum II 6; XXXIV 3; XXV 29.

¹³⁷ Mantovani (above n.2,1987) lists 131 titles. D 28.7 should be removed because of the assignment to the Sabinian mass of Labeo's *posteriora* in the Labeo inscribed series book 1 and some texts from book 2. The assignment of Scaevola's *digesta* books 1 and 2 to the Papinian mass leads to the removal of D 2.15, 50.1, 50.7 and 50.9. D 40.13 should in my view be added.

4 pith., 6 pith., Furius Anth. 1 ed.), 7.4.24 (Iav. 3 post. Lab.), 8.1 19-20* (Lab. 4 post., Iav. 5 post. Lab.), 8.5.20-1* (Scae. 4 dig., Lab 1 pith.), 9.2 57* (Iav. 6 post. Lab.), 9.4 43* (Pomp. 8 epist.), 11.1.22* (Scae. 4 dig.), 12.2.42* (Pomp. 18 epist.), 12.6.67* (Scae. 5 dig.), 13.5.31* (Scae. 5 dig.), 13.7.31* (Scae. 5 dig.), 14.2.10* (Lab. 1 pith.), 14.3.20* (Scae. 5 dig.), 14.6.20* (Pomp. 5 SCC), 15.1.58* (Scae. 5 dig.), 15.3.21* (Scae. 5 dig.), 16.1.32* (Pomp. 1 SCC), 16.3.33-4* (Lab. 6 post., 2 pith.), 17.1.62* (Scae. 6 dig.), 17.2.84* (Lab. 6 post.), 18.1.77-81* (Iav. 4 post. Lab., Lab. 4 post., Iav. 5 post. Lab., Lab. 5 post., Scae. 7 dig.), 18.3.8* (Scae. 7 dig.), 18.4.24-5* (Lab. 4 post., 2 pith.), 18.5.9-10* (Scae. 4 dig., 7 dig.), 18.7.10* (Scae. 7 dig.), 19.1 50-5* (Lab. 4 post., 5 post., Scae. 7 dig., Lab. 1 pith., 2 pith., Pomp. 10 epist.), 19.2.28/57-62* (Lab. 4 post./Iav. 4 post. Lab., Lab. 4 post., Iav. 5 post. Lab., Lab. 5 post., Scae. 7 dig., Lab. 1 pith.), 20.1.34-5* (Scae. 27 dig., Lab. 1 pith.), 20.2.10* (Scae. 6 dig.), 20.4.21* (Scae. 17 dig.), 20.5.14* (Scae. 6 dig.), 20.6.14-5* (Lab. 5 post., Scae 6 dig.), 21.1.64-5* (Pomp. 17 epist., Ven. 5 act.), 22.1.47-9* (Scae. 9 dig., 22 dig., Iav. 3 post. Lab.), 22.2.9* (Lab. 5 pith.), 22.3.27-9* (Scae. 33 dig., Lab. 7 pith., Scae. 9 dig.), 23.3.79-80/83-5* (Lab. 6 post., Iav. 6 post. Lab./Iav. 6 post. Lab., Lab. 6 pith., Scae. 8 dig.), 23.4.32* (Iav. 6 post. Lab.), 23.5.18* (Iav. 6 post. Lab.), 24.1.64-7* (Iav. 6 post. Lab., Lab. 6 post., Scae. 9 dig., Lab. 2 pith.), 24.3.65-7* (Scae. 1 quaest. pub. tract., Iav. 6 post. Lab., Pomp. 20 epist.), 25.4 4* (Scae. 20 dig.), 26.2.33-4* (Iav. 8 post. Lab., Scae. 10 dig.), 26.3.11* (Scae. 20 dig.), 26.7.56-61* (Scae. 4 dig., 10 dig., 11 dig., 26 dig., Pomp. 8 epist., 20 epist.), 26.8.20-2* (Scae. 10 dig., 26 dig., Lab. 5 pith.), 28.3.20* (Scae. 13 dig.), 28.5.93* (Paul. 2 imp. sent.), 28.6.48* (Scae. 1 quaest. pub. tract.), 28.8.11* (Iav. 4 post. Lab.), 29.2.98-9* (Scae. 26 dig., Pomp. 1 SCC), 29.5.26 (Scae. 34 dig.)*?, 30.46 (Pomp. 9 epist.), 32.29-42*/100-3* (Lab. 2 post., 2 post., 1 pith., Scae. 14 dig., 15 dig., 16 dig., 17 dig., 18 dig., 18 dig., 19 dig., 20 dig., 21 dig., 22 dig., 33 dig./ Iav. 2 post. Lab., Scae. 16 dig., 17 dig., 1 quaest. pub. tract.), 33.1.17-21 (Lab. 2 post., Scae. 14 dig., 17 dig., 18 dig., 22 dig.), 33.2.30-7/41-3* (Iav. 2 post. Lab., Lab. 2 post., Scae. 15 dig., 17 dig., 18 dig., 22 dig., 25 dig., 33 dig./Iav. 2 post. Lab., 5 post. Lab., Ven. 10 act.), 33.4.13-4 (Lab. 1 pith., Scae. 15 dig.), 33.5.20-2* (Lab. 2 post., Scae. 22 dig., 17 dig.), 33.6.7-8*/16* (Iav. 2 post. Lab., Pomp. 6 epist./Iav. 3 post. Lab.), 33.7.4-7*/25-9* (Iav. 2 post. Lab., Lab.1 pith., Scae. 16 dig., Scae. 2 dig./Iav. 2 post. Lab., 5 post. Lab., Scae. 16 dig., 23 dig., Lab. 1 pith.), 33.8.22-3 (Lab. 2 post., Scae. 15 dig.), 33.10.10-2 (Iav. 3 post. Lab., 10 post. Lab., Lab. 4 pith.), 34.1.15-9 (Scae. 17 dig., 18 dig., 19 dig., 20 dig., 22 dig.), 34.2.13,15-6,18*/39-40* (Scae. 15 dig., 15 dig., 18 dig., 22 dig./Iav. 2 post. Lab., Scae. 17 dig.), 34.3 28 (Scae. 16 dig.), 34.4.30-2* (Scae. 20 dig., 14 dig., Ven. 10 act.), 34.5.28-9* (Iav. 3 post. Lab., Scae. 18 dig.), 34.9.26* (Scae. 30 dig.), 35.1.105, 108-113* (Pomp. 5 epist./Scae. 19 dig., 20 dig., Pomp. 9 epist., 11 epist., 12 epist., Paul 2 imp. sent.), 35.2.94-6* (Scae. 21 dig., 21 dig., 1 quaest.

pub. tract.), 36.1.77-83* (Scae. 18 dig., 19 dig., 20 dig., 21 dig., 1 quaest. pub. tract., 15 dig., Paul 2 imp. sent.), 36.2.30-1* (Lab. 3 post., Scae. 14 dig.), 36.3.18* (Scae. 29 dig.), 36.4.14-5* (Lab. 2 post., Ven. 7 act.), 37.14.24* (Paul 1 imp. sent.), 38.2.51* (Lab. 1 pith.), 38.4.2,4,12-3* (Pomp. 4 SCC, 4 SCC/12 epist., 4 SCC), 38.17.10* (Pomp. 2 SCC), 39.5.35* (Scae. 31 dig.), 40.1.10,26* (Paul 2 imp. sent., Iav. 4 post. Lab.), 40.4.29/59-61* (Scae. 13 dig./23 dig., 24 dig., Pomp. 11 epist.), 40.5.17-20 (Scae. 21 dig., 23 dig., 24 dig., Pomp. 7 epist.), 40.7.39-42* (Iav. 4 post. Lab., Scae. 24 dig., Lab. 1 pith., 3 pith.), 40.12.42-4* (Lab. 4 post., Pomp. 3 SCC, Ven. 7 act.), 40.13.3 (Pomp. 11 epist.), 40.14.3 (Pomp. 5 SCC), 41.1.64-6* (Quintus Mucius 1 ????, Lab. 6 pith., Ven. 6 interdict.), 41.2.51-3* (Iav. 5 post. Lab., Ven. 1 interdict., 5 interdict.), 41.3.49* (Lab. 5 pith.), 41.4.14* (Scae. 25 dig.), 41.9.3* (Scae. 25 dig.), 42.1.64* (Scae. 25 dig.), 42.8.8,11/23-5* (Ven. 6 interdict., 6 interdict./Scae. 32 dig., 1 quaest. pub. tract., Ven. 6 interdict.), 43.16.20* (Lab. 3 pith.), 43.19.4 (Ven. 1 interdict.), 43.20.8* (Quintus Mucius 1 ????), 43.21.4* (Ven. 1 interdict.), 43.23.2* (Ven. 1 interdict.), 43.24.2,4,8,10,12/22* (Ven. 2 interdict., 2 interdict., 2 interdict., 2 interdict., 2 interdict./2 interdict.), 43.26.7/21-2* (Ven. 3 interdict./ 4 act., 3 interdict.), 43.29.2,4* (Ven. 4 interdict., 4 interdict.), 43.30.5* (Ven. 4 interdict.), 44.1.23 (Lab. 6 pith.), 44.3.14-5 (Scae. 1 quaest. pub. tract., Ven. 5 interdict.), 44.4.17* (Scae. 17 dig.), 44.7.61* (Scae. 28 dig.), 45.1.122 (Scae. 28 dig.), 46.1.45-6 (Scae. 6 dig., Iav. 10 post. Lab.), 46.3.88-93 (Scae. 5 dig., 29 dig., 26 dig., Lab. 6 pith., Pomp. 9 epist., Scae. 1 quaest. pub. tract.), 46.4.23* (Lab. 5 pith.), 46.5.11* (Ven. 8 act.), 46.7.20-1* (Scae. 29 dig., 1 quaest. pub. tract.), 47.2.91-2 (Iav. 9 post. Lab., Lab. 2 pith.), 47.10.44 (Iav. 9 post. Lab.), 48.10.24 (Scae. 22 dig.), 49.1.28* (Scae. 25 dig.), 49.14.35 (Pomp. 11 epist.), 49.15.27-30* (Iav. 9 post. Lab., Lab. 4 pith., 6 pith., 8 pith.), 50.12.14 (Pomp., 6 epist.), 50.16.240-6* (Paul 1 imp. sent., Quintus Mucius 1 ????, Iav. 2 post. Lab., Scae. 18 dig., Lab. 4 pith., Pomp. 10 epist.), 50.17.72-3 (Iav. 3 post. Lab., Quintus Mucius 1 ????)

An asterisk indicates one of the 102 titles that end with the Appendix.¹³⁸ In the complex titles 32, 33.6, 33.7 and 34.2 two asterisks are inserted to indicate that the Appendix comes at the end of both cycles of masses. On my count there are 25 titles with an Appendix text that do not end with the Appendix, but this includes six titles with only a single displaced Appendix text.¹³⁹ In some ten to thirteen titles the Appendix is in the penultimate position followed by one or more codal texts.¹⁴⁰

¹³⁸ Including D 36.1 and 36.4 which are doubtful in view of the hypothetical codal texts 36.1.84-5 and 36.4.16-7. D 29.5 also possibly ends with the Appendix: above n.118.

¹³⁹ D 3.5, 4.8, 7.4, 30, 43.19, 45.1.

¹⁴⁰ D (29.5?), 33.1, 33.4, 33.8, 33.10, 34.1, 34.3, (36.1, 36.4?), 44.3, 47.2, 47.10, 50.12.

In eight titles, all in the last ten books of the Digest, the Appendix precedes another mass.¹⁴¹ Six titles recorded in the stereotype edition of the Digest as containing one or more Appendix texts are not in the above list,¹⁴² because books 1 and 2 of Scaevola's *digesta* and books 1 and some texts from book 2 of Labeo's *posteriora* both with the Labeo and the Iavolenus inscriptions are now taken to belong to the Papinian or Sabinian mass rather than the Appendix.¹⁴³

6. *In what position did the editors place the Appendix texts in the Digest titles?*

The list just set out enables us to see how the Appendix texts were edited by the Digest compilers. It supports, and indeed strengthens, Mantovani's analysis. In the early books of the Digest the titles seem to have been fully edited before the Appendix texts became available. The editors had already, when appropriate, added codal texts.¹⁴⁴ By a codal text is meant one either chosen as suitable to end a mass or title or one that has become detached from the main mass to which it originally belonged and is then added at the end in a sort of tidying operation. At least up to D 22.3 the Appendix excerpts were added at the end, if necessary after the intended codal texts.¹⁴⁵ There were very few insertions of Appendix texts in the first four books of the Digest.¹⁴⁶

Five titles present difficulties: D 3.5, 4.8, 7.4, 19.2 and 23.3. In the first three a single Appendix text is inserted in the Sabinian or edictal mass. How was this possible if these titles had been fully edited? In D 4.8 the apparent insertion, inscribed Pomponius 17 *epistularum et variarum lectionum*, may be not an Appendix text but, as treated by Krueger,¹⁴⁷ one from Pomponius' *variae lectiones* in the edictal mass (BK 156), but displaced within that mass. In D 3.5 and 7.4 the insertions in the Sabinian mass, both relevant, come from Labeo's *posteriora* books 6 and 3.¹⁴⁸ Was the editor of these titles keeping track of how the excerpting of the *posteriora*, read early on in the Appendix operation,¹⁴⁹ was progressing? Since the

¹⁴¹ D 40.5, 40.14, 44.1, 46.1, 46.3, 48.10, 49.14 and 50.17.

¹⁴² D 2.15 (2.15.3, Scae. 1 dig.); 28.1 (28.1.2, Lab. 1 post.); 28.7 (28.7.20, Lab. 2 post.); 50.1 (50.1.24, Scae. 2 dig.); 50.7 (50.7.13, Scae. 1 dig.); 50.9 (50.9.6, Scae. 1 dig.).

¹⁴³ Above nn.71-103.

¹⁴⁴ Mantovani (above n.2, 1987) 104-6.

¹⁴⁵ The Appendix comes after one or more codal texts in eight titles: D 2.14, 4.4, 11.1, 12.6, 13.5, 16.3, 21.1 and 22.3: Mantovani (above n.2, 1987) 115 n.47. I do not share M.'s doubts about 2.14 and 4.4.

¹⁴⁶ Mantovani (above n.2, 1993) 110-3 argues that there were none.

¹⁴⁷ *Corpus Iuris*, Stereotype ed. I.96 n.14; also Mantovani (above n.2, 1993) 112..

¹⁴⁸ D 3.5.42 (Lab. 6 post.); 7.4 24 (Iav. 3 post. Lab.).

¹⁴⁹ Above nn.17-37.

work was taking place in the imperial palace and the texts excerpted had to be assigned to a title, presumably at once, this would have been possible. The title editor could then discover which Appendix texts were marked for his title and perhaps pre-empt a relevant text. In D 19.2 an apposite text from Labeo's *posteriora* book 4¹⁵⁰ is again inserted in the Sabinian mass, though the bulk of the Appendix consists of six texts at the end of the title. In D 23.3 there are five Appendix texts at the end of the title, the first two separated from the last three by two insertions, a text of Papinian from the Papinian mass¹⁵¹ and one of Proculus from the edictal mass.¹⁵² Neither insertion really fits the position in which it occurs, and they seem more like texts that have become detached. But, as Kaiser suggests,¹⁵³ in that case the last two Appendix texts in this title, which invert the order the Scaevola's *digesta* and Labeo's *pithana*,¹⁵⁴ may form part not of the regular Appendix but of a detached group of codal texts. It might follow that the phase of the editorial process in which the Appendix comes in principle before the codal texts had already begun at D 23.3. Whatever the truth about D 23.3, the conclusion is that Mantovani's theory about the placing of the Appendix in the earlier books of the Digest is sound, but that texts from Labeo's *posteriora* in both series of inscriptions seem to have been available before the process of reading and excerpting the Appendix works was complete.

From D 33.1, and perhaps as early as 23.3, a change in editing takes place.¹⁵⁵ In some titles Appendix texts appear in a penultimate position, before the codal texts that are meant to end the title. The title editors apparently had access to the Appendix texts after they had settled the order of the three main masses but before they had finished editing the title. This is true in D 33.1, 33.4, 33.8, 33.10, 34.1, 34.3, 35.1 and perhaps 29.5, 36.1 and 36.4.¹⁵⁶ In most of these titles the codal texts

¹⁵⁰ D 19.2.28 (Lab. 4 post.)

¹⁵¹ D 23.2.81 (Pap. 8 quaest.)

¹⁵² D 23.2.82 (Proc. 5 epist.)

¹⁵³ Kaiser (above n.24) 340 n.60.

¹⁵⁴ D 23.3.84 (Lab. 6 pith.), 23.3.85 (Scae. 8 dig.).

¹⁵⁵ Mantovani (above n.2, 1987) 115; (1993) 104-6.

¹⁵⁶ It continues in the later titles 44.3, 47.2, 47.10, and 50.12: below nn.126-7. Mantovani (above n.2, 1987) 115 n.47 regards 7.4 as an exception but there the Appendix text is an insertion in the edictal mass. D 35.2 really is an exception (below n.159). D 29.5 may not contain any codal text but merely end with two Appendix texts (above n.118). D 23.3 (above nn.149-152) perhaps belongs to a transitional phase and shows that the change in editing took place earlier than book 33.

look as if they had become detached from the main mass or masses.¹⁵⁷ D 29.5, where the codal text has been chosen to end the title, presents a problem. There, although in the Florentine MS the apparent codal text follows the Appendix,¹⁵⁸ Kaiser stresses that it has been shifted by the Florentine editor from the end of D 29.6, where the text he was copying had mistakenly placed it.¹⁵⁹ Hence in 29.5 the Appendix text originally ended the title. But it may be that 29.5.27 (Call. 1 iur. fisc.) is not really a codal text but part of the Appendix.¹⁶⁰ In D 35.2 three Appendix texts end the title but come after a codal text from the Papinian mass. Here the title editor seems to have inserted before the Appendix a detached Papinian text that either did not fit the main Papinian mass or had been overlooked.¹⁶¹ Editorial practice was evidently not uniform. The Appendix texts were now available to be inserted after the main masses and before any codal texts. Most editors seem to have put the Appendix before the codal texts but perhaps some left them to the end where they would previously have gone.

There are in these books where the Appendix appears before the codal texts also titles in which the Appendix ends the title, as before, and follows directly on one of the three main masses.¹⁶² Moreover some Appendix texts are inserted in other masses. D 30.46 (Pomp. 9 epist.) is inserted in the Sabinian mass at a relevant point. The same is true of D 38.4.2 and 4 (Pomp. 4 SCC), also in the Sabinian mass. But D 35.1.105 (Pomp. 5 epist.) comes after a series of Papinian mass texts that are out of order, and before two Sabinian mass texts, also out of order. There is no obvious reason why it should come where it does. It seems to belong to a group of texts detached from their masses. In D 40.1 an Appendix text comes at the end of the title and another Appendix text is inserted between the Sabinian and edictal masses. In 40.4 three Appendix texts come at the end but one is inserted between the Sabinian and edictal masses. In neither case is the reason for the insertion obvious.

¹⁵⁷ D 33.1.22-4 (from the Sabinian mass); 33.4.15-7 (from all three masses); 33.8.24-6 (all three masses); 33.10.13-4 (edictal mass); 34.1.20.23 (Papinian mass); 34.3.29-31 (edictal and Papinian masses); 35.1 105-107 (perhaps from all three masses).

¹⁵⁸ D 29.5.26 (Scae. 4 dig.), 29.5.27 (Call. 1 iur. fisc.).

¹⁵⁹ Kaiser (above n. 24) 340-1; Mantovani (above n.2, 1993) 105.

¹⁶⁰ Above n.118.

¹⁶¹ Kaiser (above n.24) 340; Mantovani (above n.2, 1993) 105. There is an earlier text from the same book of Papinian at D 35.2.10 (Pap. 20 quaest.)

¹⁶² D 32 (two cycles); 33.5; 33.6 (two cycles); 33.7 (two cycles); 34.2 (two cycles); 34.4; 34.5; 34.9; 35.1; 35.2; 36.2; 36.3; 37.14; 38.2; 38.4; 38.17; 39.5; 40.1; 40.4.

The pattern detected by Mantovani for these books in the thirties of the Digest is convincing, but allowance must be made for some editorial discretion when there are both codal and Appendix texts.

Towards the end of book 40 a fresh approach to editing is seen.¹⁶³ In D 40.5 the Appendix for the first time comes before the Sabinian and Papinian masses. This pattern is repeated in 40.14, 44.1, 46.1, 46.3 and 49.14, in all of which the Appendix precedes the Papinian mass and 48.10, where the single Appendix text precedes the edictal mass. In 50.17 the Appendix comes before both the Papinian and edictal masses. It has become possible, as Mantovani stresses, for the Appendix to be treated like the other masses and to come before another mass when the title editors think it convenient. Editing is now more flexible. There are three titles (44.3, 47.2, 47.10) in which the Appendix comes before a carefully chosen codal text¹⁶⁴ and one (50.12) in which it precedes a detached Sabinian text that has been put at the end of the title because it does not cohere with the first text in the title.¹⁶⁵ There are also titles in which, as before, Appendix texts have been inserted in other masses.¹⁶⁶ In some cases the Appendix appears both as a mass of its own and as an insertion in other masses.¹⁶⁷

7. Did the editors insert the Appendix works strictly in order?

Anyone who reads the Digest inscriptions with the Bluhme-Krueger Ordo in mind must be impressed by the discipline with which the order, tabled above,¹⁶⁸ is in general observed. There are some exceptions. If the *posteriora* texts inscribed Labeo and Iavolenus are treated as equivalent, the following sequences appear to be in the wrong order:

D 22.3.27-29: Scae. 33 dig., Lab. 7 pith., Scae 9 dig.

D 23.3.84-5: Lab. 6 pith., Scae. 8 dig.

D 24.3.65-7: Scae. 1 quaest. pub. tract., Iav. 6 post. Lab., Pomp. 20 epist.

D 32.31-32: Lab. 1 pith., Scae. 14 dig.

D 33.4.13-4: Lab. 1 pith., Scae. 15 dig.

¹⁶³ Mantovani (above n.2, 1987) 115-6.

¹⁶⁴ D 44.3.16 (Paul 3 Sab.); 47.2.92 (Ulp. 38 ed.); 47.10.45 (Herm. 5 epit.)

¹⁶⁵ D 50.12.1,15 (Ulp. 1 de off. cur. reip.)

¹⁶⁶ D 43.19.4 (in the edictal mass); 45.1.122 (one text in the Papinian mass);

¹⁶⁷ D 42.8.23-5 but also 42.8.8,11; 43.24.22 but also 43.24.2,4,8,10,12; 43.26, 21-2 but also 43.26.7; 43.29.4 but also 43.29.2. All these instances involve Venuleius' *de interdictis*, but in principle the technique is not confined to this work. It occurred earlier in D 19.2.

¹⁶⁸ Above nn.17-9.

D 33.5.20-2: Lab. 2 post., Scae. 22 dig., Scae. 17 dig.
D 33.7.4-7, 28-9: Iav. 2 post. Lab., Lab. 1 pith., Scae. 16 dig., Scae. 22 dig./ Scae.
23 dig., Lab. 1 pith.
D 34.4.30-32: Scae. 20 dig., Scae 14 dig., Ven. 10 act.
D 36.1.80-83: Scae. 21 dig., Scae 1 quaest. pub. tract., Scae. 5/?15 dig., Paul 2
imp. sent.
D 46.1.45-6: Scae. 6 dig., Iav. 10 post. Lab.
D 50.16.241-2: Quintus Mucius 1 ?????, Iav. 2 post. Lab.

It is difficult to say whether the inversions of the normal order are unusually many, except perhaps in the case of Labeo's *pithana* and Scaevola's *digesta*. Labeo comes after Scaevola in ten instances,¹⁶⁹ but precedes him in four.¹⁷⁰ In D 22.3 Labeo both follows and precedes Scaevola. A curious feature of D 33.7, a composite title, is that Labeo precedes Scaevola in the first cycle at 33.7.5-6 and follows him in the second at 33.7.28-9. What this suggests is that the titles that go to make up 33.7 *De instructo vel instrumento legato* were edited separately by different commissioners before they were amalgamated.¹⁷¹

In the upshot the explanation of the irregular sequence of these works of Scaevola and Labeo is obscure, but it may be relevant, as I have argued elsewhere,¹⁷² that both belong to a group of 48 books excerpted as a whole but divided into two lots of 24 books each.

Tony Honoré

¹⁶⁹ D 8.5, 19.1, 19.2, 20.1, 24.1, 26.8, 33.7, 40.7, 46.3, 50.16.

¹⁷⁰ D 23.3, 32, 33.4, 33.7.

¹⁷¹ The first cycle runs from 33.7.1-7 and the second from 33.7.8-29.

¹⁷² A.M. Honoré and A.Rodger, 'How the Digest Commissioners worked' in *SZ* 87 (1970) 246-314, at 312; Honoré (above n.107) 36-7.