

Lecture

## From the Law of Citations to Justinian's Digest<sup>1)</sup>

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### Introduction

Since 1989 I have been working on and off on Justinian's Digest and I have published a series of articles about it. The earlier ones have been collected in three small volumes under the title *Justinian's Digest and the Compilers*, vol. I (1995), vol. II (2000), vol. III (2007). There are another eight articles published or in course of publication. This paper is an attempt at a chronological synthesis, as far as possible without getting lost in the details of the sources and alternative theories.

### The Law of Citations

Do you think that there are too many law books: too many books to buy and pay for; too many books to read; too many books to keep in your library?

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1) This is a revised version of a paper presented in Tokyo and Nagoya in November 2016. I am grateful to Professor Tsuno for his invitation, and to my Japanese colleagues for the stimulating debate on both occasions.

They thought that there were too many law books in the fifth century in Rome and Constantinople. That was the problem before the Law of Citations provided a solution in 426/438.<sup>2)</sup> The constitution gave primary authority to Papinian, Paul, Gaius, Ulpian and Modestinus, and secondary authority to those whose works were quoted by them, such as Scaevola, Sabinus, Julian and Marcellus.

There are many puzzling features in the constitution. First, why those five jurists in the first list? Papinian is obvious in view of his extraordinary reputation. Paul and Ulpian are not surprising. But Gaius and Modestinus are simply not on the same level, though they are given the same weight. If this is supposed to be a list of the five greatest jurists of the classical period, then the choice of names is positively bizarre. Hence the question, why those five? Or, if we accept that Papinian must be there, why the other four? What do the other four have in common?

Secondly, why those four jurists in the second list? Why Sabinus, but not Labeo? Why Julian and Marcellus, but not Celsus? Why not that most prolific of jurists, Pomponius? And why in that order? It happens to be chronological order; but if the leading clas-

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2) The law was addressed in the name of both emperors to the senate of the city of Rome, and in the Theodosian Code, 1.4.3, in 438 only Rome was mentioned. We may ask why? and what was the law in Constantinople previously? The emperors cannot have intended to create a difference between the two capitals. They must have intended to bring the law in Rome into line with the law in Constantinople. But if that was already the law in Constantinople, we may ask when and how that came about and why the Theodosian Code does not include the relevant text rather than the Roman Law of Citations.

sical jurists were cited in chronological order, it would be surprising to omit Labeo and Celsus. Hence the question: what do those four jurists have in common?

Thirdly, why is Julian, the greatest jurist of his age, the jurist who heads the Florentine Index, in the second rank, below Gaius and Modestinus in the first? It looks upside down.

Fourthly, why were the notes of Paul and Ulpian on Papinian excluded? They were later re-admitted by Justinian,<sup>3)</sup> and some of them have been included in the Digest. For example, D. 6.2.16 (Pap. 10 *quaest.*): *PAULUS notat: Exceptio iusti dominii Publicianae obicienda est.* If Paul had set out the same proposition in one of his own works it would have been acceptable and authoritative under the Law of Citations. It is indeed quite natural that Paul should have repeated in his own works the substance of his notes on Papinian. There is an example in D. 27.9.13.1 (Paul *lib. sing. ad orationem divi Severi*). Paul, commenting on Pap. 5 *resp.*, adds *ego autem notavi* and sets out a proviso. Is this admissible because it appears in a work of Paul? or inadmissible because it appears in a note on Papinian? The Law of Citations is silent.

The paradox could be quite acute. If Paul and Ulpian disagreed with Papinian in notes on his work, the notes are inadmissible and Papinian's view prevails (if we leave out the other two). But if Paul and Ulpian disagreed with Papinian in their own works, their view is admissible and prevails over that of Papinian. How did

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3) *Deo Auctore*, 6.

this strange position come about?

If Papinian really was so important, then the natural rule would be to make his view prevail in every case. In that case he should stand alone in the front line. We might perhaps add the jurists quoted by him. Let us just investigate that. In his *responsa* there are hardly any quotations of earlier jurists, who could not have commented on cases submitted to him. In his *quaestiones* there are several. Q Mucius (Scaevola) and Sabinus are mentioned in book 2; Julian is mentioned in book 6, and Marcellus in book 7.<sup>4)</sup>

And there is the answer to some of our questions. Why is Labeo not mentioned in the Law of Citations? Because he is first mentioned in Papinian, book 8 (and then again in book 28), and Papinian only gives the first four names as examples, he does not give a complete list. Why are Celsus and Pomponius not mentioned at all? Because, as far as we know, they are never quoted by Papinian. What do Scaevola, Sabinus, Julian and Marcellus have in common? The fact that they are all mentioned by Papinian, and in that order.

We can now return to the first five. Papinian must be there in any case. What are the other four doing there? What do Paul, Gaius, Ulpian and Modestinus have in common? The answer is now obvious. It is not that they were the greatest jurists of the classical period. They clearly were not. It is simply that they were not

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4) D. 10.2.22.5 (Ulpian 19 *ad edictum*): *Papinianus ... Marcellum reprehendit, quod non putat ...* Only quotations accepted or approved by Papinian would count.

quoted by Papinian, Gaius because he was never quoted by anyone, and the other three because they came after Papinian and therefore were not quoted by him. They could only be included if they were mentioned separately.

The explanation of all this may be that the constitution went through two stages: a first stage, restricted to Papinian and the jurists quoted by him, excluding the works and the notes of Paul and Ulpian; and a second stage, adding the works of the other four jurists in the first rank and also the jurists quoted by them, but overlooking the exclusion of the notes of Paul and Ulpian. Hence the final line-up of jurists.

### **Collatio codicum**

When the first five jurists included in their works quotations from the works of the second four which they approved or adopted, the constitution required that there should be *collatio codicum*, a comparison of the codices. That naturally means a comparison of the codices of the quoter and the quoted, to check that the quotation was accurate. Recently a different theory has been put forward. It says that what was required was a comparison of the different codices of the quoted jurist, for example Julian, and explains it on the basis that there must have been significant variations in the copies of his works.<sup>5)</sup>

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5) Peter Stein, *Roman Law in European History* (1999) p. 28: "The law also allowed reference to secondary works cited by the five primary authorities, but since manuscripts of their works would be scarce and unreliable, such reference required comparison of manuscripts. In practice, therefore, it was only the five jurists who counted." This theory goes back to Alan Watson, *Legal Origins and Le-*

This theory must be rejected. There is no evidence of any such problem in Julian's Digest, and when Justinian's compilers read it a century later there was no requirement to use a particular version or to make a *collatio codicum*, for which they simply did not have time. It is very unlikely that the manuscripts of Julian were scarce and unreliable. And the theory creates a problem, it does not solve one. If there were variations, which text was to be applied? how was the choice to be made? or were all versions to be rejected? There is no answer to these questions.

And how would it have worked in practice? If the plaintiff turned up in court with one copy of Julian and the defendant had a different one, what was the judge to do? Did he have to make his own comparison? And how many copies had to be consulted? all the copies in Constantinople? or the copies in Beirut and Alexandria as well? The whole idea is ridiculous. The codices to be compared were those of the quoter and the quoted. If the quotation was accurate there was no problem; if it was inaccurate it was simply ignored.

### **After the Law of Citations**

What happened after the Law of Citations? It must have had a dramatic effect on the manuscripts in circulation in the following century. The question is difficult, because those manuscripts were superseded by Justinian's Digest. We do not know how the constitution was applied in practice. The question is important, because if we know what manuscripts were in circulation or were

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*gal Change* (1991) 225–229.

available to Justinian's compilers, we may understand better how they worked and in particular how they managed to complete the Digest so fast.

One thing is clear: complete manuscripts of the works of all the classical jurists would no longer be useful, and if they were not useful they would no longer be copied in full. Previously a fragment of Paul, for example, could always be cited in court, or used in a lecture, even if it was a minority view. After the Law of Citations everything was changed. If a professor in his lecture quoted Paul a clever student might interrupt to ask what the other four said. If an advocate quoted Paul the judge might ask the same question. If the professor quoted Ulpian quoting Julian the same clever student might interrupt to ask whether the quotation had been checked. Everything was reduced to a matter of simple arithmetic. If on any issue Paul was in the minority, then he was wrong and there was no point in copying that passage from his works.

What was wanted was a composite work, setting out the majority view and ignoring all the rest and any inaccurate quotations. Inscriptions, attributing a text to its classical author, were superfluous and inconvenient. Often three or more might be needed, for example on the *vindicatio*: Ulpian 16 *ad edictum*, Paul 21 *ad edictum*, Gaius 7 *ad edictum provinciale*. Much simpler to have a single, inscription-less, multi-author account. We might talk of a *multitudo auctorum*.

What was the best way to compile such a composite work? To

take the complete manuscripts of one jurist that were in existence in the time of Theodosius II, probably Ulpian, whose commentaries were the longest available, and to annotate them in the light of the opinions of the other four primary authorities and the quotations of the secondary authorities. Once there was a master-copy with appropriate annotations, of which there would be a very large number, copies could be made of those passages that were still useful for the new inscription-less composite work which could then be used in the law schools and the courts. The original manuscripts, which might by then be falling to bits, could then be thrown away or simply dumped in a disorganised heap in a spare room in Justinian's palace, where they were forgotten for nearly a century.

### Justinian

Justinian came to power in 527. In 528 he appointed a commission to compose a New Code of Constitutions to replace the three old codes, Gregorian, Hermogenian and Theodosian, and to include other early constitutions. In the course of their research in the archives of Justinian's palace the members of the commission came across this treasure trove of old manuscripts, some of which quoted early constitutions which could be included in the New Code.<sup>6)</sup>

This was the *jus vetus*, the old law, the law before the reforms of the Law of Citations. These manuscripts were the *ipsa vetustatis*

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6) For example, D. 34.1.13.1, Scaevola 4 *responsorum*, quoting the constitution which was included in the Code at CJ. 6.17.1. Scaevola was not interested in the date or the consuls, and they do not appear in the Code.



*studiosissima opera, jam paene confusa et dissoluta*, the original works of the pre-Citations period, very heavily annotated, and now disorganised and falling to bits.<sup>7)</sup> They were *legitimi thesauri*, a legal treasure trove.<sup>8)</sup> They could be used, not only for supplementing the New Code of Constitutions, but also for composing a new *codex juris*, a new code of jurisprudence. It had never been done before, not even by Theodosius, though he had thought about it. It would be appropriate after the completion of the New Code. And there was another reason for doing it. Teaching in the law schools was in a total mess: it was incomplete, disorganised and unpractical.<sup>9)</sup> It needed to be reformed or completely replaced, preferably the latter.

The idea was attractive, but it was not clear whether it was possible or how it should be done. The first step was a feasibility study to compose a specimen Digest title. *De legibus senatusque consultis et longa consuetudine* was chosen. Fragments were selected from any book in the heap, including the works of minor jurists like Callistratus and Tertullian. Each fragment had an inscription

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7) *Tanta*, 1. Hofmann, *Die Compilation der Digesten Justinians*, 74–5, and Honore, *Tribonian*, 146, say that all, or many, of the works came from Tribonian's private library, citing *Tanta*, 17. It is unlikely that the contents of Tribonian's library were *confusa et dissoluta*. Hugo Krueger, *Die Herstellung der Digesten Justinians und der Gang der Excerptio*, 3, says that the works came from the library of the Constantinople law school. That seems equally unlikely. All that *Tanta*, 17, says is that Tribonian handed out the works (*praebuit*), he handed Julian's Digest to Theophilus, and the Digests of Celsus and Marcellus to Cratinus. Since he was in charge of the whole operation that seems quite likely.

8) *Omnem*, 2.

9) *Omnem*, 1, in great detail.

setting out author, book-number and work. The book-number was a figure, not a word, for example, V instead of *quinque*.<sup>10)</sup>

After the completion of the specimen title there was a planning meeting, involving Tribonian, Theophilus, and perhaps some others. The prospect of composing hundreds of titles from so many books of the *jus vetus* in that way was daunting. "Everyone said it was hopeless and no-one was prepared to vote for it."<sup>11)</sup> The decision was unanimous. They reported accordingly to Justinian. Even he thought that it was very difficult, if not actually impossible.

### Codex juris enucleati

But he was not beaten yet. The problem was that there was too big a pool of books from which to select the fragments. The solution was to reduce the amount of material by cutting out all repetition and contradiction, so that everything should be said once and once only, and producing a *codex juris enucleati* from which the future *codex* (which he later called the Digest) could be com-

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10) This was clearly forbidden in *Deo Auctore*, 13, and severely sanctioned in *Tanta*, 22, expressly including book-numbers in both texts. Nevertheless the specimen title appears in the Digest as D. 1.3, slightly revised and with extra fragments added with valid inscriptions, but also retaining the original fragments with invalid inscriptions. This is the only title in the Digest in which this occurs, and practically at the beginning, in the third title out of 430. That can only be explained if the offending inscriptions were written before *Deo Auctore*. See Pugsley, *Justinian's Digest: Lost in the translations?* In *Fundamina, A Journal of Legal History*, vol. 17 (2) 115.

11) *Deo Auctore*, 2: *nemo neque sperare nec optare ausus est*. This is the language of a formal meeting, not of casual conversation.

posed.<sup>12)</sup>

He seems to have made provision for this in a constitution addressed to the Senate on 22 July 530, of which only seven fragments have survived, whose purpose was that “immense volumes of books should finally be reduced within a reasonable compass.”<sup>13)</sup>

As a result of that constitution a working party was set up, led by Theophilus, which began to read the commentaries on Sabinus by Ulpian, Paul and Pomponius, which had already been found in the junk heap, and to produce a shortened version keeping the fragments under their inscriptions in their original order. Presumably the work started straight away after 22 July.

Meanwhile research continued in the junk heap, and a few weeks later Tribonian and the other silver-tongued *compositores juris enucleati* found the vital manuscript of Ulpian's commentary on the edict, with all its annotations, and rushed to tell Justinian about it.<sup>14)</sup>

As a result a second working party was set up, led by Cratinus, which began to read the commentaries on the edict by Ulpian, Paul and Gaius, and to produce a shortened version similar to

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12) *Deo Auctore*, 11.

13) CJ. 5.4.24, *in fine: immensa librorum volumina ad mediocrem modum tandem pervenient.*

14) CJ. 6.28.4.3. I am sure that they were all looking for, and excited to find, that manuscript, and not a mere *vitium* in it.

their colleagues on the first working party.

The two working parties proceeded in parallel. When the first had finished the commentaries on Sabinus, 103 books, the second had only read 67 books of the commentaries on the edict, including Ulpian, books 1–25, because they had started later.<sup>15)</sup> The remaining books on the edict were divided into two roughly equal parts, of which the first, including Ulpian, books 26–55, was given to the first working party and the second, including Ulpian, books 56–81, to the second.

This time the second working party finished first. They reached the end of the commentaries on the edict and the aedilician edict before their colleagues had finished their section. So Ulpian, books 54–55, and the corresponding books of Paul and Gaius, were returned to them. They read them, and still finished first. So Ulpian, books 52 (half) and 53, and the corresponding books of Paul and Gaius, were returned to them.<sup>16)</sup> And this time both working parties finished at the same time.

There was then a joint planning meeting to consider what recommendations to make to Justinian about the proposed work in the light of their experience so far. Two points emerged. First, the order of topics was different in Sabinus and the edict, and the edic-

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15) For all this see the table in Pugsley, *Justinian's Digest and the Compilers*, vol. II (2000) p. 141.

16) See Bluhme, *Die Ordnung der Fragmente*, First Table, between pages 266 and 267. If the compilers had been operating a card index system they could have put the fragments back in numerical order, but in a *codex juris enucleati* they could

tal order was to be preferred. Secondly, the proposed work was clearly possible, but at the rate of progress so far it would not be completed in a whole decade.<sup>17)</sup> They reported accordingly to Justinian.

He was too busy to give them a decision straight away, and while they were waiting they read some minor works. The Sabinians read four small works of Ulpian, amounting to 32 books; the second working party read three commentaries on Plautius and two small works by Paul, amounting to 36 books in all. And again they finished at the same time.

On 15 December 530 Justinian's decision was set out in the constitution *Deo Auctore*, addressed to Tribonian, and incorporating instructions for all the compilers.<sup>18)</sup> The work was to proceed in two stages. The first stage was to continue to read all the works and to cut out all repetition and contradiction, so as to say everything once only. The second stage was to compose the material into the future work in fifty books and distinct titles, following edictal order, which was also the order of the New Code, at the discretion of the compilers. It was to be called the Digest. There was no mention of ten years; but in the last section, after addressing all the compilers, Justinian turned back to Tribonian alone

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not. It has been generally assumed, ever since Bluhme, that the transfer of books to the Sabinians was a matter of content. But they were transferred as a numerical block; and when some were given back that was not because the wrong ones had been transferred, but because too much had been transferred.

17) *Dedoken*, 12.

18) *Deo Auctore*, 4–13.

(*tua prudentia*) to say that it was up to him to ensure that the new *codex* (the Digest) was completed very quickly. Since Tribonian was in charge of the whole project (*gubernatio*, total responsibility) and had been instructed to select the compilers,<sup>19)</sup> this looks like a clear hint that he should take steps to ensure that everything was done in much less than ten years. Justinian did not ask for, or impose, a timetable. It was up to Tribonian to sort it out.<sup>20)</sup> As a result a message was sent to Beirut for two more compilers.<sup>21)</sup>

Meanwhile work began again at once. Since the instructions were to compose a work following the order of the edict, which would be called the Digest, the choice was obvious. Tribonian handed out Julian's Digest to the Sabinianic compilers, and the Digests of Celsus and Marcellus to the edictal compilers. When Dorotheus and Anatolius arrived from Beirut some three months

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19) *Deo Auctore*, 3.

20) Honore, *Tribonian*, 141, says that "Justinian would not have launched the *Digest* without a detailed timetable." Actually he did not even impose a deadline, let alone a detailed timetable. Honore, *Justinian's Digest*, 20, says that "there must have been a timetable, since otherwise there was no way of ensuring that the three committees proceeded in tandem and finished at the same time." Actually there was no problem. The first committee to finish could then help the other two, in the way that was done for the edictal commentaries.

21) *Deo Auctore* does not mention three groups of compilers or three series of works, because at the time there were only two. Cp. Hofmann, 65. Nor does it say how many compilers there were, or who they were. *Tanta*, 9, says there were 17 and gives their names, and adds: "When they were all present together ... the work was completed." *Cum omnes in unum convenerunt ...opus consummatum est.* *Deo Auctore* does not say who or how many there were at the beginning, or say that there was anyone from Beirut.

later, a third working party was established.<sup>22)</sup> Tribonian realised that if the work was to be finished as quickly as Justinian wanted, he would have to do some of it himself. He was a practical lawyer; he appointed himself to this working party and decided that it should start with the *quaestiones* and *responsa* of Papinian, and then of Paul and Scaevola. And he handed out the Digest of Alfenus Varus and the works of Modestinus to the other two groups respectively.

The work of reading and abbreviating continued throughout the year 531. The compilers' progress can be reconstructed by comparing the order of the works read according to Bluhme's First Table and the order of the works cited in the constitutions issued during this year.<sup>23)</sup> If the order is the same in both cases that suggests that there is a connection and that the works were read first and cited afterwards, rather than the other way round. In the edictal series Celsus is cited on 20 February 531 (Paul Krueger's *Ordo librorum*, 134), and Modestinus, *lib.sing. de inofficioso testamento*, on 1 September (Krueger, 151<sup>24)</sup>). In the Papinianic series Papinian is cited on 29 July and 1 September (Krueger, 180–2); Ulpian, *de fideicommissis*, on 18 October (Krueger, 195, 203); and Paul, *ad SC Tertullianum* on 27 November (Krueger, 239).

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22) That is why it only read half as many books as the other two working parties. It also explains why the commentaries on the edict, which were divided into three roughly equal sections, were not distributed, one each, to the three working groups.

23) Rainer, *Ancora sulla nascita del Digesto di Giustiniano*, *Koinonia*, vol. 39 (Naples, 2015) 457 at 466–7. Pugsley, *Justinian's Digest*, 54–62, 128–130, 137–9. The relevant texts are conveniently listed in Hugo Krueger, 195.

24) Number unclear, but all Modestinus' works were read in a block, 137–151.

The fundamental text is CJ. 6.22.10.3.<sup>25)</sup> It is concerned with the law of wills and ends with the words *secundum quod Juventio Celso placuit*, according to what was approved by Juventius Celsus. This was the starting point for Longo's theory about the compilers' progress during the year 531.<sup>26)</sup> According to him it is obvious, e evidente, that the compilers had just read ... Ulpian 1 *ad Sabinum*. That cannot be right. It is true that in Ulpian 1 *ad Sabinum* there is a citation of Celsus in the context of the law of wills, but not of Juventius Celsus. Ulpian never refers to Celsus as Juventius Celsus. In Lenel's *Palingenesia* there are 277 fragments of Celsus, of which 113 are quotations by Ulpian, often with several references to Celsus in one fragment. In 111 fragments out of 113 Celsus appears simply as Celsus; once as Celsus Juventius,<sup>27)</sup> once as Juventius,<sup>28)</sup> as Juventius Celsus, never. Furthermore, in all Ulpian's citations of Celsus, the expression *Celso placet* or *Celso placuit* never appears.<sup>29)</sup>

On the other hand Celsus himself used both of his names, Juventius Celsus. They presumably appeared on the title page of his Digest; they certainly appear three times inside, in books 15, 20 and 37. And it was precisely in book 15 that Celsus dealt with the law of wills, which was also the subject of the constitution that cites him. I conclude that this was not an indirect citation via Ul-

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25) Pugsley, 59, 128–130.

26) *Bullettino*, vol. 19 (1907) 147–9.

27) Lenel, 107, D. 38.1.7.1.

28) Lenel, 156, D. 7.8.12.1.

29) The expression *quod etiam Juventio Celso apertissime placuit* appears in Julian 29 *digestorum*, which was probably read at the same time.



pian *ad Sabinum* but a direct citation of Celsus himself, and therefore that the compilers had reached Celsus book 15 before 20 February 531.

It was obvious to Longo that it was not a direct citation from Celsus because he thought that the compilers only started reading the Sabinianic and edictal commentaries after *Deo Auctore* on 15 December 530 and they could not have read so much so soon. In fact they started reading the previous summer after the Constitution *ad senatum* of 22 July; they had started Celsus straight after *Deo Auctore*; and they reached book 15 easily before 20 February 531.<sup>30)</sup>

There was then no difficulty in reaching Herennius Modestinus before 1 September.<sup>31)</sup>

The works of Papinian were read in a block (*quaestiones, responsa* and *definitiones*) at the beginning of the Papinianic series of works. They were cited in a block, seven times in four constitutions, in the summer of 531, on 29 July and 1 September. Since the edictal compilers started well before *Deo Auctore* and the Papinianic compilers started some three months after it the works of Papinian and Modestinus will have been read at about the same time and it is not surprising that they were cited at the same time.

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30) The same arguments apply to Honore. In 1978 he said that Celsus was read between 20 June and 29 August (p. 273). In 2010 the dates have disappeared (p. 159).

31) According to Honore (1978) it was read after 3 November.

There followed, in Bluhme order, the citation of Domitius Ulpianus on 18 October and Julius Paulus on 27 November.<sup>32)</sup> This last citation is particularly striking. CJ. 6.58.14.1: *sicut Julius Paulus in ipso principio libri singularis quem ad senatus consultum Tertullianum fecit, apertissime docuit*. This is extraordinarily precise. It is unparalleled. There is no citation that gives so much detail anywhere else in the Code. Perhaps it was read on the very day that the constitution was drafted.<sup>33)</sup>

This *liber singularis* is number 239 in Krueger's *Ordo librorum*, near the end of the Papinianic series. The reconstruction of this section of the series is to some extent conjectural because of the paucity of the evidence (only four fragments have survived in the Digest), but there is no doubt that this work came at, or near, the end of the series. The natural conclusion is that on 27 November 531 the compilers had very nearly reached the end of the Papinianic series.

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32) This interest in *nomina* as well as *cognomina* may be the explanation of an obscure and confusing passage in *Tanta*, 17: *In praesenti autem consummatione nostrorum digestorum e tantis leges collectae sunt voluminibus, quorum et nomina antiquiores homines non dicimus nesciebant, sed nec umquam audiebant*. People have names; volumes have titles. And indeed the German translation of the Digest translates *nomina* as Titel (Behrends et al. Heidelberg, 1995, p. 85). If the text meant to refer to *auctores* whose *nomina* were unknown to previous jurists, that would make sense.

33) Longo's theory was taken up by de Francisci in a series of articles which was never completed. He got as far as 18 October 531 (see the table in Pugsley, 70), but never reached 1 or 27 November. He must have realised that, if his theory was right, the compilers would have taken 15 years just to read all the works, before they even started composing the Digest. CJ. 6.58.14.1 was the last straw, and he gave up.

The number of books to be read after Modestinus in the edictal series is very close to the number of books to be read after Papinian in the Papinianic series. I count 245 and 233 respectively. The figures are not precise, but they are roughly right. That suggests that the two groups of compilers finished more or less at the same time. It seems reasonable to suppose that the Sabinianic compilers finished at the same time as well. So the three parts of the *codex juris enucleati* were complete towards the end of the year 531.

### **The so-called Appendix<sup>34)</sup>**

There were still about one hundred books in the junk heap, *confusi et dissoluti*. There were eleven works represented. Of those eleven, two seem to have been complete: Pomponii, *libri V senatus consultorum* and Venuleii, *libri VI interdictorum*. In both cases there is at least one fragment from each book. Each follows a larger work by the same author, and was perhaps included in the same manuscript.

All the other works were incomplete or *dissoluti*. Q Mucius, *lib. sing.* appears before Javolenus/Labeo in D. 50.16.241, and after it in D. 50.17.73. Displacements are unlikely in those two titles. So

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34) See Pugsley in *Festschrift Winkel* (2014) 748–755. The name, Appendix, is inappropriate. It implies something that comes after, but is attached to, something else. In fact it was an independent series, not attached to any of the others. The name was coined by Gustav Hugo in 1837: *Civilistisches Magazin*, vol. 6, p. 512 at 515. Hugo thought that the series were read consecutively, not concurrently (following Reimar, *Bemerkungen und Hypothesen*), and the name suggests that it came last in order, supporting his theory.

there must have been two scraps of manuscript. Scaevola, *lib. sing.* precedes Pomponius *epistulae* in D. 24.3.65, and follows it in D. 46.3.93. Again the simplest explanation is that there were two scraps of manuscript.

Pomponius *epistulae* begins at book 5. It is possible that the compilers found nothing interesting in books 1–4. But there are fragments from 12 out of the later books, so that it is more likely that books 1–4 were missing. Venuleius *actiones* begins at book 4 and is frequently used afterwards, leading to the same conclusion. Paul, Scaevola and Furius Anthianus all have fewer books than the *Index Auctorum* says, so the last books may have been missing.

This is not a collection of books which turned up late from Beirut or elsewhere. It is particularly unlikely that a great work like Scaevola's Digest should not have been available in Constantinople but should have been found somewhere else. These are works which were *read* late, because the compilers put them on one side in case the missing books turned up.

At the end of 531 the leading compilers were in a hurry to press on with stage 2 and the composition of the Digest, the *codex futurus*, the *codex juris compositi*. They did not think that these works were very important, or that they would add much to what had already been read. They therefore left them to a group of advocates. The result was that these works were not read in any organised fashion – major works first, minor works afterwards – or even joining up the different fragments of the same work. The ad-

vocates came to work when they could and did what they could, before returning to their practice. There was another consequence: the leading compilers could have read all these works in three months or so; the advocates took something more like nine months to draft this last part of the *codex juris enucleati*. It was not available to the leading compilers until they had already made considerable progress in composing the Digest, as we shall see...

### **Composing the Digest**

When the compilers started composing the Digest they did not have a complete plan or a timetable. There had to be 50 books. But there was no complete list of books and titles. If you asked them what book 22 was going to be about, or how many titles it would have, or when they would reach it, they had no idea.

Their instructions were to follow the order of the edict. They therefore started with a first instalment of 19 books, closely following the order of Ulpian's commentary on the edict and taking them up to his book 32.<sup>35)</sup> This instalment was divided into 3 parts: books 1–4, on procedure, composed by the Papinianic compilers, who had read the series of practical works; books 5–11, on property, composed by the edictal compilers, who had read the first third of the edictal commentaries, up to Ulpian book 25; and books 12–19, on obligations, composed by the Sabinianic compilers, who had read the second third of the edictal commentaries, from Ulpian book 26 up to his book 32. Theophilus took the opportunity to prepare his commentary, particularly on books

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35) 19 books out of 50 is 38%; 32 books out of 83 is 38.5%.

12 and 17. That was forbidden by *Deo Auctore*, 12, but not yet severely sanctioned by *Tanta*, 21. The three parts proceeded concurrently, so that progress was quick.

Meanwhile, just as they were starting, the Nika riots broke out and lasted from 13 to 18 January. Tribonian was sacked as *quaestor* and disappeared for six months. As a result he took no part in the composition of part 1, and was not there to supervise the other compilers or to stop Theophilus preparing his forbidden commentary. That is why his account, in *Tanta*, 2-4, of the first three parts is so laconic.<sup>36)</sup> He was not there; he was not interested. That contrasts with his account of part 4 and the rest of the Digest, when he was present and very active.

When Tribonian returned, books 1-19 had been completed and provisionally approved. It was now apparent to him, as a practical lawyer, that the order of the edict was not altogether satisfactory. It separated *pignus*, already covered in D. 13.7, from *hypotheca* near the end, Ulpian books 28 and 73 respectively. It separated sale, already covered in D. 18 and 19.1, from related actions near the end, Ulpian books 32 and 80-81 respectively, and from the aedilician edict which followed. If Tribonian and the compilers had made a plan at the beginning they might have put these things together. If Tribonian had been present, or had returned earlier, he would have been in time to take the necessary steps. But it was too late. It was no longer possible to incorporate the extra materi-

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36) He also re-named the parts, so that part 2 became *De judiciis*, the first two words of the rubric of book 5; and part 3 became *De rebus*, the first two words of the rubric of book 12.

al in part 3.

He did the next best thing. He departed from the order of the edict and moved *hypotheca* forward as close as possible to D. 13.7 to a new book 20, which compared *hypotheca* and *pignus*.<sup>37)</sup> He composed it himself with the other Papinianic compilers, and by a *bellissima machinatio* placed a fragment from Papinian at the head of five out of the six titles, so that the third year students who studied it should continue to be called Papinianisti.<sup>38)</sup>

He moved the material on sale from the end of the edict forward as close as possible to D. 18 and 19.1, where it really belonged, to a new book 21. And he thought up a new book 22.<sup>39)</sup> The contents are very miscellaneous. They do not seem to have been moved from anywhere else. It is not clear why they are there. There is no explanation in *Tanta*, 5, and no mention in *Omnem*, 4. All one can say is that it completes a group of three books before the Digest returns to the order of the edict in book 23.

These three books ought to have been attached as an appendix to part 3, where they really belong, but apparently it was too late to

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37) *Tanta*, 5.

38) *Omnem*, 4.

39) *Tanta*, 5: *Alius itaque liber post duos primos nobis excogitatus est*. See Pugsley, 154–5. On the traditional theory it is not possible to think up a new book at this stage. If it did not exist at the beginning no fragments would have been selected for it and it would be too late to go back and look for them. But if the compilers selected the fragments from the *codex juris enucleati* when they started composing the Digest books and titles it was quite possible for them to think up a new one.

do that and they appear incongruously at the beginning of part 4.

At this point the fourth part of the *codex juris enucleati* was finished and became available to the compilers working on the composition of the Digest. The fragments could only be added right at the end of a title, after the main series and any displaced fragments which followed them.<sup>40)</sup>

Meanwhile the compilers had begun to compose the second instalment of the Digest, covering the law of persons and succession. The main series of fragments were already in place. The fragments from the so-called Appendix could be placed immediately after them, followed by any displaced fragments there might be at the end.

From book 23 the compilers went back to the order of the edict, leaving out however the law of theft in Ulpian books 37–8, which we shall find in D. 47.2 after the end of the edictal order; and *bonorum possessio* in Ulpian books 39–49, which we shall find in D. 37–38 at the beginning of part 6. The reason for that may be that Justinian had imposed a deadline for the completion of D. 36, and when those two books were not ready in time they were simply held over to the next part, in the same way that books 20–22 were too late to be included in part 3 and therefore opened part 4.<sup>41)</sup>

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40) Mantovani, *Digesto e masse bluhmiane* (1987) 114–116.

41) I suggest that the Papinianic compilers were responsible for composing books 20–22 and 35–36, where the Papinianic series of fragments are prominent. That makes 5 books. The other two groups composed books 23–27 and 37–38, and books 28–34, that is, 7 books each. It is not clear which compilers composed



When the compilers started to compose the third instalment of the Digest, parts 6 and 7, the so-called Appendix was already available and could be treated in the same way as the other series, and from book 40 onwards it does not necessarily appear after them. The compilers continued to follow the order of the edict, but they left out Ulpian books 56 and 57 on various delicts, including *injuria*. At the end of D. 46.8 they had reached the end of the edict, the remaining bits having been already moved forward to books 20 and 21.<sup>42)</sup>

Their instructions were to produce 50 books, so four more books were needed. In D. 47 the compilers set out at considerable length most of the law of civil delicts, including *furtum* and *injuria*, which had been omitted earlier on. That is why D. 47.2 contains 92 fragments on the civil law, followed by fragment 93 which says that now it is normally a matter of criminal law; and D. 47.10 contains 44 fragments on the civil law, followed by fragment 45 which says that now it is normally a matter of criminal law. The rest of D. 47 and 48 was then devoted to criminal law. Tribonian then excogitated another book, which became D. 49, on appeals. Finally D. 50 was a most miscellaneous book. It would have ended neatly and appropriately at D. 50.15 with its extensive list of the cities *juris Italici*.

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which group of works.

42) It looks as if the edictal compilers composed books 41–44. If the Sabinian compilers composed books 39–40 and 45–46, that would balance, 4 books each, but why are those books separated and in separate parts?

### D. 50.16–17

After that come two long titles, D. 50.16 and 17. Clearly it had not been planned to put them here. They double the size of book 50 and contain frequent twin texts, although repetition was expressly and quite understandably forbidden. They appear to have been tacked on at the end at the last moment. Where did they come from? Obviously from somewhere where repetition was permitted, if not actually encouraged. It may be that they had been composed, instead of Institutes, for students, who like brief definitions and short statements of principle; that they had been rejected by Justinian who insisted on proper Institutes; and that they were tacked on here instead.

### *Tanta/Dedoken*

The Digest was approved by Justinian and promulgated in the two *orationes ad senatum*, *Tanta*, in Latin, and *Dedoken*, in Greek, on 16 December 533. It came into force two weeks later.