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INTERPOLATIONS IN THE DIGEST

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I

That many of the passages in the Digest are not in their original state is no new discovery. Cujas and earlier writers were fully aware of the fact, and there has been no age since the revival of learning in which it has not been pointed out and illustrated. It is plain that there must have been great alterations. Justinian's compilers were instructed to make such changes as were necessary to bring the texts into accord with the existing law. Practically all the material of the Digest was from books written at least three centuries earlier. In the interval there had been a vast amount of legislation, and a system of law which had been created in the West, and was based on essentially Latin traditions, was, from the time of Constantine onwards, elaborated in the East, in a community in which the traditions and environment were essentially Greek. In such conditions propositions of law must insensibly change their content; terms become charged with new meanings and a new spirit, and the most conservative editor, even though he intend no more than the incorporation of the effects of legislation, will inevitably do much more. It was not till about a century ago, when Savigny called attention to the importance of these "Emblemata Triboniani" (now commonly called Interpolations) and gave several illustrations,¹ that their importance in the reconstruction of the classical law was recognized. It was hardly indeed till the last quarter of the nineteenth century that scholars concerned with the history of the Roman Law fully realized the value of the instrument which the study of interpolations placed in their hands. The remarkable results obtained by Lenel, Eisele, and Gradenwitz, by the use of methods indicated by them, suggested similar work to others, and before long a large number of such interpolations had been indicated.²

¹ *System Des heutigen Römischen Rechts* (1840) 257 et seq.

² See Bonfante, *Lezioni di Storia del Diritto Romano* (1922) 83 for a bibliography up to the outbreak of the European War.

But this tool, like all others, may be misused. A writer with a thesis to which the texts are recalcitrant readily convinces himself that some of these have been altered, and the various tests, especially the linguistic tests, began to be applied with excessive confidence, based on somewhat hasty assumptions as to second and third century latinity, assumptions all the more hazardous as the juristic writings dealt with were largely the work of provincials. Then came a series of writings, especially those of Kalb,³ in which the linguistic possibilities were reexamined. In *Die Jagd*⁴ Kalb points out the danger and observes that the certainty that interpolations exist: "hat . . . eine förmliche Jagd nach Interpolationen hervorgerufen und manche Gelehrte zu einer allzuweitgehenden Kritik verleitet." His writings, coupled with the fact that a well-known text,⁵ which had been generally denounced, proved by discovery of the text in an earlier form not to have been affected in doctrine by the compilers, led to a slackening of speed, and, for a time, more sober methods prevailed. But the temptation is strong, and recent years have seen a revival of a more hasty method, especially, as it seems, in the Italian school. This school shows every sign of abundant vitality, and of an effort, thoroughly justified by the results, to take its proper place in a field of enquiry to which that people would seem to be primarily called. For this fertility a certain price has been paid: in particular there seems to be too much readiness in the matter of interpolations to take indications for proofs, to make too hasty inferences, and in short to neglect the lessons of the immediate past. In the later part of this paper some attempt will be made to justify these criticisms which are entirely consistent with a profound admiration for the work of the Italian school.

One possible misconception must be pointed out. To say that the compilers interpolated (the word is conveniently used to denote adding, altering, and omitting) is not to say that they engaged in law reform. They had a heavy task. They were to abridge, to harmonise, and to bring up to date a vast mass of juristic writings. They completed their work in three years, and it is hardly likely that they would have, or could have, added to their burden that of law reform, of which there is no hint in their instructions, which can still be read in the Constitution *Omnem* ordinarily printed at the beginning of the Digest. Professor Collinet, indeed, himself not an extremist in the matter of interpolations, says in his *Études Historiques sur le Droit de Justinien*,⁶ what might mean that the compilers definitely set themselves to mould the law in the direction of Greek tradition. But in a course of lectures delivered

³ *Das Juristenlatein* (1888); *Roms Juristen* (1890); *Die Jagd nach Interpolationen* (1897); *Wegweiser in die Römische Rechtssprache* (1912).

⁴ *Supra* note 3, at p. 13.

⁵ D. 15. 1. 32. pr.

⁶ I *ibid.* (1912). See especially pp. xxv *et seq.*

at Oxford⁷ he makes it clear that, in his view, the graecising interpolations, the existence of which he has made it impossible to doubt, were in the main taken over by the compilers from the edited texts produced by their immediate predecessors of the school of Berytus, on which they mainly relied, rather than on the originals. It can be seen from the Code that a vast number of legislative changes, some of them on small points, were made during the progress of the Digest, apparently in order to smooth the way for the compilers. If it had been within their power to make the changes, it is not easy to see why they should have been at the pains to procure enactments. Where they did change the law it is probable that they did so, in the main, unconsciously. They saw the Roman texts with oriental eyes. Often, no doubt, what were intended for mere explanations, were in fact changes of an existing rule which they had not understood. The remark in the Institutes about the contract *literis* is in all probability a case of this kind.⁸ To the editors, a writing embodying a contract was itself the contract, and it did not occur to them that the old rule which gave a similar practical result was in point of legal theory entirely different. But from these unconscious changes to a plan of reform is a far cry. The view of Peters⁹ that the work of the compilers was much less ambitious than is commonly supposed and that in fact they worked on a previous compilation—a predigest—is generally rejected.¹⁰ But that they were greatly helped by preëxisting collections made for instructional purposes, especially at Berytus, is a proposition gaining much acceptance¹¹ with the corollary that a good deal of the interpolation which certainly exists was really done before the compilers took the matter in hand. This would explain how it was possible for them to do so great a work in so short a time.¹²

But it is a secondary question whether the changes were made by Tribonian and his colleagues or by their predecessors at Berytus. The real question is one of scale. What is the extent of these changes? Has there been a drastic overhauling of nearly all parts of the law? Are the mass of equitable relaxations, so many of which are stated in terms which have invited suspicion as to their genuineness, the work, mainly, of the Byzantines? May we, from the existence of suspicious words in a text infer a change of doctrine? The answer to these latter questions seems to me negative.

It is not necessary, if indeed it were possible, to set out in detail the

⁷ *The General Problems raised by the codification of Justinian* (1922) 4 TIJDSCHRIFT VOOR RECHTSGESCH, 1 *et seq.*

⁸ 3. 21.

⁹ *Die Oströmische Digestencommentare und die Entstehung der Digesten* (1913).

¹⁰ Lenel, *Die Entstehung der Digesten* (1913) ZEITS. DER SAV.-ST. (RÖM. ABT.) 373 *et seq.*; Mitteis, *Review of Peters' Work*, *ibid.* 402 *et seq.*

¹¹ See Mitteis, *loc. cit. supra* note 10.

¹² Collinet, *loc. cit. supra* note 7.

various tests or indications which have been used in the detection of interpolations. Fresh points are constantly being made. An excellent account of the matter will be found in the *Lezioni* of Bonfante,¹³ and in H. Appleton's *Interpolations dans les Pandectes* (1895). An admirable book, specially devoted to the subject, is Schulz, *Einführung in das Studium der Digesten* (1916), a work which, excellent as it is, betrays in its title, as compared with its content, just that prepossession which has led to some of the hastiness with which conclusions have been reached in some recent work on Interpolations. The "study of the Digest" is not, or should not be, merely the study of interpolations: most of the Digest is in its original form.

Among the many tests, there are some which require much caution in their use. Graecisms prove little, since many of the jurists were Orientals. False tense sequence is by no means a monopoly of the Byzantines. The "pluralis majestatis" is proof of compilers' activity, for it shows that the Emperor, and not a jurist, is speaking. But it must be clear that it is that particular plural. In view of the common use of the plural by the jurists, in speaking of their views,¹⁴ one needs more evidence than one usually gets in the actual case, that the plural is, in fact, "majestatis." Change of subject, omission of subject, pendent ablative absolute, errors of grammar ("cum causale" with the indicative, "licet" and "quia" with the wrong moods, etc.), all these are evidence that the text has been altered, but, in view of the fact that the compilers were abbreviating, they are very poor evidence of change of doctrine. M. Collinet has shown that the omission of the word *actio* is characteristic of the compilers, who say "furti tenetur" where a classic said "actione furti tenetur."¹⁵ But this may have been done over and over again for brevity, without other change. "Hodie" in the sense of "nowadays" to indicate a change, without a reference to the event causing the change, will be discussed later. It is not to be denied that in a great many cases in which one or more of these phenomena occur there is substantial interpolation. All that is here maintained is that the presence of such a fact is no more than a starting point: it needs more than bad grammar in the text, and a strong conviction in the commentator, to substantiate a material interpolation.

Where we get a laborious clause with "quod" instead of the infinitive construction, we are on firmer ground: the compilers are at least paraphrasing and are probably doing more. Where a text begins in one person and proceeds in another, there is interpolation, but it is not

¹³ *Supra* note 2, and see Ch. V.

¹⁴ E. g., G. I. 30, 45, 63, 78, etc.; Paul, *Vat. Fr.* III; Ulpian, *Vat. Fr.* 165; *Frag. Dos.* 8, etc.

¹⁵ *Un Nouveau Critère d'Interpretation: la Designation des Actions sans "Actio" ou "Iudicium"* (1910) 34 NOUVELLE REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER, 157. Gaius makes the same omission. G. 3. 156; 3. 202; 3. 209. See also P. *Sen.* 2. 32. 15; 5. 4. 9.

always easy to say which part is new. In D. 18. 4. 21 the text begins in the third person, passes to the first, and ends in the third. Some of this is no doubt new, but which part? The matter has been the subject of dispute, into which we need not go. Where a text reasons to one conclusion and suddenly gives the other¹⁶ or, having said there is great doubt, adds that there is none at all,¹⁷ we may reasonably suspect the compilers. Bad reasoning is not conclusive. When Paul says that there is no *actio redhibitoria* where a slave sold has lost a tooth, since, if this were a *vitium*, all babies must be defective, as they have no teeth at all,¹⁸ we might easily put down this absurdity (for it is equally true of inability to walk), to some foolish Levantine, but for the fact that the argument is attributed to Labeo by Aulus Gellius.¹⁹ It is often objected to a text that the reasoning is not logical. That a proposition not strictly logical cannot have been uttered by a jurist seems a doubtful doctrine, not merely because every one is liable to error, but because the law is not always strictly logical. No legal formula is adequate to deal with the ever varying fact. When a combination of facts arises in which the application of the accepted rule will give an unsatisfactory result, there are but two ways of dealing with the matter. We may take the line "Logic is logic, that's all I say!", as the English Courts did in the recent betting cheque cases and in the Free Church case, when legislation was needed to put things right.²⁰ The logic in *Cornfoot v. Fowke*²¹ seems impeccable, but the result was so unsatisfactory that the case is treated as of no authority. Or we may "distinguish" which is often the process of drawing a correct inference from premises one of which is false. The result is a modification of the accepted rule, and Dean Pound has shown us how this is brought about, often unconsciously, under the pressure of contemporary tendencies of thought. In Rome there was no case law, but though the machinery was different, the process was substantially the same. It dates from the earliest times. No one really believed in the absurd logic of the Pontiffs as recorded by Gaius²² but the convenient rule was accepted. The same process was no doubt going on in the classical age. It is not safe to infer tampering from the fact that what a jurist says in one passage is not wholly consistent with what he has said elsewhere. Still less safe is it, though it is not uncommon, to assume that all inevitable logical deductions from an existing rule were in fact drawn. Well known texts

¹⁶ E. g., D. 49. 8. 1. 1 and 4, and see H. Appleton, *Interpolations dans les Pandectes* (1895) 181 *et seq.*

¹⁷ E. g., D. 13. 6. 22.

¹⁸ D. 21. 1. 11.

¹⁹ *Noctes Att.* 4. 2. 12.

²⁰ (1905) 5 Edw. VII, c. 12 (as to the Free Church case); (1922) 12 & 13 Geo. V, c. 19 (as to betting cheques).

²¹ (1840, Exch. Ch.) 6 M. & W. 358.

²² 2. 54.

warn us against both dangers. "Quod contra rationem iuris receptum est non est producendum ad consequentia;"²³ "quae propter necessitatem recepta sunt non debent in argumentum trahi."²⁴ And Julian tells us that "non omnium quae a maioribus constituta sunt ratio reddi potest."²⁵

A connected objection is that a certain argument is not "logisch-juristisch," "logico-giuridico." It is true that the law has a logic of its own but this does not mean a special kind of logic, but only a special form. Every science uses its own symbols. The salient features of any group of facts are not the same for a lawyer and for a doctor. When one sees propositions set out in a form which would not be adopted by a skilled lawyer, or emphasising considerations which would not affect a lawyer's mind, it is legitimate to infer that unskilled persons have been at work. But there is a snake in the grass. There is more than one kind of juristic thinking. The Common Lawyer, the French Lawyer, trained in the Civil Code, the German Lawyer trained in the *Gemeines Recht*, do not think quite alike, and none of them thinks quite like the Roman. The danger is especially great with those trained in *Gemeines Recht*, since that is a sort of Roman Law. A well-known German jurist held that the notions of the German Law of Bankruptcy must be applied to the analysis of Roman texts, in an attempt to ascertain the classical law.²⁶ Another deservedly eminent German writer, discussing an edictal action on a slave's contract, the *actio institoria*, applies to it modern notions of representation, though it is unlikely that that was the Roman standpoint. He applies even the specially German form of the conception. There must, he says, have been notice of the appointment, and that the transaction was for a certain principal. The fact that there actually was an undisclosed principal "würde juristisch gar keine Bedeutung haben."²⁷ The common law has had a good deal to say of the undisclosed principal. Much caution is needed before deciding that a text is interpolated because it is "unjuristic:" it is not easy to be sure that we "think their thoughts."

When one reviews the various doctrines which are said not to be classical, but Byzantine, one is inclined to think that, if all this be true, the jurists were not what they have been taken for. On this assumption their achievement was hardly more than a severely logical, almost scholastic, application of principles handed down to them by their more fertile predecessors. It was the Byzantines, who, in a host of cases in which the facts, though not within the rule, were within the equity of it, suggested an *actio utilis* to meet the case. It was not the Praetor, advised by jurists, who modified the effect of *litis contestatio* in the *actio de peculio*, where justice certainly required this. It was

²³ Paul, D. 50. 17. 141.

²⁴ Paul, D. 50. 17. 162.

²⁵ D. 1. 3. 20.

²⁶ Von Tuhr, *Actio de in rem verso* (1895) 123 et seq.

²⁷ 2 Karlowa, *Römische Rechtsgeschichte* (1901) 1129.

not they, but the Byzantines, who reached the convenient conception known as "constitutum possessorium." There are many similar cases. If the most iconoclastic views are to be accepted, we must hold that the classics did but little towards making a somewhat primitive set of rules meet the needs of their time. It may be so, but some will be slow to believe it on the evidence yet offered.

On the question of the scale on which doctrinal interpolations were made some evidence, of which, however, it is easy to overestimate the importance, is provided by the surviving classical texts which also occur in the Digest (about one hundred and sixty-five) indicated in Girard, *Textes*, and in the *Collectio librorum iuris antejustiniani*. Comparison of these texts with their rendering in the Digest is easy, and it gives results which seem worth attention. It would be tedious to set out all the references, and it may be that a few have been omitted: the possible error cannot be such as to vitiate the result. Of these texts about one hundred and twenty-five show no change whatever of doctrine, though most of them show changes of wording. In some cases explanatory matter is added and, of a series of passages, some are often omitted. Some of the differences of wording are no doubt variations in the manuscript source, some are no doubt intended for improvement, and the explanations may be new, or older glosses worked into the text. These changes are important, as they show clearly that such alterations and additions, even though shown to be by the compilers, do not indicate further alteration of the text. A further twenty or so show doctrinal changes of the kind one would expect from the instructions to the compilers. Accounts of disputes are cut out or abridged. Usually the view stated is that at which the original arrives, but sometimes a question left open is settled. Allusions to obsolete institutions (*manus, tutela mulierum*, civil bondage, *adrogatio per populum, sponsores, fideipromissores*, the *aerarium*) are excised. So too are allusions to institutions abolished by Justinian, e. g., *mancipatio*, bonitary ownership, latins, forms of legacy, *fiducia, actio rei uxoriae* and the rule that parties to a *stipulatio* must always be present. The last case is typical, for it shows that they interpreted his legislation or the point erroneously, *more graeco*.²⁸ What had been praetorian reliefs appear with no indication of this. Texts dealing with acquisition through *filius*, and on "nominatio" in disherison, are altered in conformity with legislation. Sometimes illustrative cases are added. In all this there is no indication of reforming activity. But in three of these texts, though it is true that the earlier form is substantially reproduced, there is an additional clause modifying the result, and in all probability, in form, Byzantine.

D. 35. 2. 1. 9 (*Vat. Fr.* 68) following the earlier text, states a view of certain early jurists on a point in usufruct, adopts a conflicting view

²⁸D. 44. 7. 2, where the statement of Gaius (3. 136.) that parties to *stipulatio* must be present is omitted. Cf. C. 8. 37. 14. 2.

of Aristo and Julian, and then adds what is not in the original, i. e., that in *operae servorum*, as Aristo's rule cannot be applied, we must take the view of the *Veteres*. This is sometimes said to be an interpolated rule, but it is hard to see what other view can have been held by Paul, who wrote the original.

D. 39. 5. 31. 1 (*Vat. Fr.* 254). Here a modifying clause is added, but it expresses a change made by legislation.²⁹

D. 9. 2. 27. 11 (*Coll.* 12. 7. 9). Here we are told, in accordance with the earlier text, that if the slaves of a *colonus* set the property on fire, the *colonus* is liable, with a right of noxal surrender. Then follow words to the effect that if the *colonus* was negligent in his choice of slaves for the work in hand he is directly liable. The language of this is loose and inexact, for it seems to make it negligence even to own an incompetent slave. There can be little doubt that this is Byzantine work, but it is only an inaccurate expression of the doctrine of *culpa in eligendo*.

There remain about twenty texts in which the doctrine of the earlier text is altered, and this is not due to one of the elementary fundamental changes above stated, so that it is not immediately clear that the compilers as such were not responsible for the change. They need brief examination:

D. 22. 5. 17 (*Ulp. Reg.* 20. 6). A rule as to capacity of witnesses in the mancipatory will is widened (obsolete points being omitted) by the words "vel eodem negotio," so as to cover all transactions. But in the original text the rule is stated as an application of a general rule to a specific case.

D. 3. 5. 36. 1 (*P. Sent.* 1. 4. 3). The original says that if A is managing B's business, and lends money on his behalf, the risk is with A if the debtor is insolvent at the time of action. The Digest says that A is so responsible unless the insolvency arose after the transaction, and the wording "fortuitis casibus" is held to suggest that this is compilers' work and not the full statement of a rule abridged in the *Sententiae*. But the rule is not new. It is not true that "in bonae fidei iudiciis convenit" that a *gestor* who has invested the funds with due caution should be responsible for loss from "casus fortuitus." We are elsewhere told that *gestor*, guardian, and agent are not responsible for "casus fortuitus." The texts, third century rescripts,³⁰ do not purport to enact anything new and even if they are interpolated, which is entirely unproved, they were presumably in the first edition of the Code, and our text does not indicate any initiative in reform on the part of the compilers of the Digest as such. It is probably a case in which the Digest is nearer the original than the abridgement of the *Sententiae* is.

D. 48. 10. 18. 1 (*P. Sent.* 3. 6. 15). Paul says that one who, writing

²⁹ C. Th. 8. 13. 1 and 4. See Girard, *Manual Elementaire de Droit Romain* (6th ed. 1918) 960, note 8.

³⁰ C. 2. 18. 22; 4. 35. 13; 5. 38. 4.

a will, inserts a provision that he is to be *tutor*, is removed: *ultra videtur adfectasse*. The Digest adds that, if worthy, he can still be appointed *ex decreto*, though not *ex testamento*, and he can plead no excuse. The words have no indication of interpolation and are not generally thought to be interpolated. They may well have been in the original text though they are not in the scrappy title in the abridgement which we have.

D. 20. 3. 5. (P. *Sent.* 5. 1. 1); D. 48. 19. 38. 9 (P. *Sent.* 5. 25. 10). Here there are capricious looking substitutions of *relegatio* for *deportatio* and vice versa. In classical law punishments varied greatly according to the rank of the offender,³¹ and it may be that a varying selection has been made.

D. 22. 5. 16 (P. 5. 15. 5 = *Coll.* 8. 3). The earlier text gives a number of punishments for false witness. The Digest substitutes "a iudicibus competenter puniuntur." This interpolation expresses only a long standing tendency to give *iudices* discretion in criminal matters.³²

D. 48. 18. 4 (P. *Sent.* 5. 16. 2). Paul says that *servi hereditarii* may be tortured if necessary by *index tutelaris* or *centumviri*. The Digest widens this, by saying merely "iudex." Slaves could be tortured to get their evidence. Paul's statement is not a limitation but an extension. He means that the rule against examining slaves for or against their masters does not bar examinations of slaves of a *hereditas*, in disputes as to *tutela* under the will.

D. 18. 6. 19. 1 (*Vat. Fr.* 12). The doctrine is reversed, but this is not due to the compilers.³³ The rule does not seem to be interpolated there, but in any case the change, if there is one, was not due to the compilers of the Digest as such.

D. 12. 6. 26. 3 (*Vat. Fr.* 266). The original says that money paid, where there was a *perpetua exceptio*, can be recovered. The Digest adds that this is not so, if the payer knew of the *exceptio*. This is classical.³⁴

D. 3. 2. 1. pr. (*Vat. Fr.* 320). It is doubtful whether these texts are the same. In any case, apart from mere corruptions in the *Vatican Fragments*, the only change is that the Vatican version deals with exclusions from the office of, or appointment of, *cognitores*, while, in the Digest, the acts stigmatised are merely said to create *infamia*. This well-known change is not due to the compilers: it is continuing a practice dating from soon after classical times.³⁵

D. 9. 2. 5. pr. (*Coll.* 7. 3. 2-4). The important change is that the *Collatio* discusses the rule of the twelve Tables, allowing killing of a nocturnal thief, or of one who by day defends himself with arms, and

³¹ See *Coll. passim*.

³² See Mommsen, *Römisches Strafrecht* (1899) 1038 *et seq.*

³³ Krüger, *collectio librorum iuris aut ejustissimi* (1890) *ad Vat. Fr.* 12, shows that it follows C. 8. 44. 24. pr. (Diocletian).

³⁴ See, e. g., G. 3. 91.

³⁵ Girard, *op. cit. supra* note 29, at p. 202.

notes that Pomponius doubts if the rule be still in force. Acting apparently on this suggestion, the compilers suppress the discussion and, for the words "si quis noctu furem occiderit" substitute the words "et si metu quis mortis furem occiderit." There is nothing new in this.

D. 22. 5. 3. 5 (*Coll.* 9. 2. 2). The texts are not the same, but they cite the same enactment in different terms. It excludes some persons from giving evidence under the *l. Iulia de vi*. Apart from differences immaterial to the present purpose, the Digest excludes those freed by the accused or his *parens*, while the *Collatio* seems also to exclude those freed by his *liberti*. The *Collatio* text is not certain, but there was clearly some such extension. If it is classical, it had disappeared long before Justinian. There is no trace of it in the enactments of *C. Theodosianus* in which the point is handled.³⁶

D. 28. 3. 17 (*Papin. Resp.* 5. 4. 14). This deals with omission of a son in a will. If he claims, the will is void. If he does not, and here the manuscript of the *Responsa* becomes illegible except for the last three letters of the sentence: "tat." But the Digest proceeds: "licet subtilitas iuris refragari videtur, attamen voluntas testatoris ex bono et aequo tuebitur." The turgid language suggests the compilers (though D. 15. 1. 32. pr. stands as a warning) and there is nothing corresponding to the "tat" of the *Responsa*. The sentence there is shorter and it seems likely that it was a statement that someone "dubitat." The compilers may have decided the doubt. The text is not in the *Basilica*.

The remaining three texts raise an important question, already hinted at. Where the independent source is of a secondary or in any way inferior character, it is not unlikely that the text in the Digest is nearer the original than the independent source is. This is specially true of the *Collatio*, of which we have no manuscript earlier than the ninth century, though it seems to have been compiled about the end of the fourth. It does not appear to be the work of a lawyer and the manuscripts are full of corruptions.

D. 9. 2. 27. 17 (*Coll.* 2. 4). Both texts say that the Aquilian action lies only for *damnum*, and that therefore if harm is done to a slave of no value there is no Aquilian action. The *Collatio* then proceeds: "ergo et si pretio quidem non sit deterior servus factus verum sumptus in salutem eius et sanitatem facti sunt, in haec nec mihi videri damni Aquilia lege (agi) posse." The Digest says after the remark above paraphrased: "Aquilia enim eas ruptiones, quae damnadant persequitur Ergo etsi pretio quidem non sit deterior servus factus verum sumptus in salutem eius et sanitatem facti sunt, in haec mihi videri damnum datum: atque ideoque lege Aquilia, agi posse." The doctrine is reversed. The conclusion in the *Collatio* follows naturally on the "ergo." The contrary conclusion in the Digest follows equally naturally

³⁶ E. g., 4. 10. 2; 9. 6. 4.

on the "ergo," on account of the proposition "Aquila enim . . . persequitur." The solution in the Digest is the rational one, and it is in harmony with recorded classical doctrine. The proposition in the *Collatio* is absurd. Any one who thinks that a slave can be so injured that expense will be incurred in curing him, without effect on his market value, will be undeceived when he takes the slave to market. To make the rule intelligible it must be understood to mean that damage did not bring in the Aquilian claim unless it was permanent. But Gaius tells us that the action lies if the *res* is "quoquo modo vitiata" or the slave "aliqua parte corporis laesus."³⁷ It is the *damnum* to the owner which is in question: "si quis alteri damnum faxit, quod usserit" etc.³⁸ *Erogationes* come into account³⁹ and it is indifferent that the slave has now recovered.⁴⁰ Altogether it seems clear that the Digest text is the correct one. Possibly the clause before the "ergo" having been dropped by accident, the "nec" was inserted to make sense.

D. 9. 2. 27. 8 (*Coll.* 12. 7. 3). There is here a small change which may be a restoration of the original: it makes the text clearer and more significant. The *Collatio* says: "si quis insulam voluerit exurere et ignis etiam ad vicini insulam pervenerit," he is liable *ex Aquilia*, "vicino et iam non minus inquilinis ob res eorum exustas." The Digest inserts "meam" after "voluerit." Thus the point is that it was intended to do harm to one person and another was injured. The fact that there was no intent to harm him is no reply to his action. In the *Collatio*, the point is obscure: it might be his own house he set on fire. There is no reason to suppose a change in law.

D. 23. 3. 33 (*Schol. Sin.* 12. 33). This is not the case of two versions of a text: it is one version and the remarks of a late Greek scholiast from which may be inferred, with more or less confidence, what the text said. Ulpian would appear to have said, after declaring the husband liable, in some cases, if a promisor of *dos adventitia* became insolvent after he could properly have been sued, that this is equally true of *dos* promised by the *pater*, if given as *dos adventitia*. The Digest denies that he can ever be so liable if the *dos* is from the *pater*. But it shows that the view rejected was that of Julian, and that adopted and shortly stated was that of Sabinus. It seems also to be that of Ulpian. Elsewhere he defines *dos adventitia* as that from an outside source.⁴¹

This concludes the list. The texts are numerous and widely distributed (thirty-six books of the Digest are represented) and the conclusion from our review is that they show very little evidence of any reforming activity in the compilers or their predecessors at Berytus, or of a tendency to graecise the law. But they are very few in relation to the bulk of the Digest and no further inference can be drawn. It is certain that they did make alterations, and that they

³⁷ 3. 217, 219.

³⁸ See Grüber, *Lex Aquilia* (1886) 233.

³⁹ D. 9. 2. 33. pr.

⁴⁰ D. 9. 2. 45. 1.

⁴¹ Ulp. *Reg.* 6. 3.

did introduce Greek ideas. No one can doubt this after study of M. Collinet's work, already cited,⁴² and that work does not by any means stand alone. The only conclusion that it is desired to draw is that, on the whole, the presumption is against an alleged interpolation of doctrine, and that the case for any such must be clearly made out before it is entitled to acceptance. In such conditions the most exact reason is called for. In the following pages an attempt is made to show, not that the allegations of interpolation now being made from all sides are mistaken, but that in the ardor of the chase much reasoning of a hasty character has found its way into print, and that this hunt for interpolations exercises a demoralising effect on the work not only of inexperienced writers, but on that of men whose merit is recognized wherever Roman Law is read.

II

It unfortunately happens (indeed it is the thesis of these pages) that the field for selection is very large. The tendency to which attention is drawn in these pages is of course most marked in those writers whose primary object is the discovery of interpolations, but it is evident elsewhere and it is difficult to avoid an uneasy feeling that younger writers are allowing themselves to be satisfied in these matters with a loose method because it appears to satisfy their seniors.

Dr. Ebrard has studied to very good purpose in a very good school. But his excellent book *Die Digestenfragmente ad formulam hypothecariam* (1917) contains several cases of slapdash argument in the matter of interpolations, and, in particular, of a readiness to reject words and texts on which suspicion has once been cast, no matter what may have been said about them since. He discusses D. 15. 1. 32. pr. which allows the *actio de peculio* to be renewed in a certain case.⁴³ The language is inflated and, though opinions varied as to the classicality of the rule, nearly everyone agreed that the language could not be that of Ulpian or of Julian whom he is quoting. A few years ago a fragment of the text in an earlier form was discovered, substantially the same. The fragment appears to be of late in the fourth or early in the fifth century. This at any rate clears Tribonian and for most people raises a presumption of genuineness. But Ebrard sets out to show that it is a pre-Justinian interpolation. He calls the text in the Digest, "eine längst als unecht bekannte Stelle" and cites a number of writers who hold it such. But all these wrote before the discovery of the fragment (except Beseler) and the situation is entirely changed by the discovery. To show that the fragment is not genuine he says that it is improbable that the fragment is from Ulpian himself, since paleographic considerations show it to be of the fifth century. Why should this make it improbable?

⁴² *Supra* p. 343.

⁴³ At p. 40, note 28.

Of how much ancient literature, legal or not, have we manuscript evidence nearer the source? Yet this is the whole argument.

On D. 20. 1. 13. 5: "Si sub condicione debiti nomine obligata sit hypotheca, dicendum est ante condicionem non recte agi, cum nihil interim debeatur; sed si sub condicione debiti condicio venerit, rursus agere poterit," he says⁴⁴ that here we know the earliest time when this interpolation can have been made, since it was in A. D. 486-7 that Zeno abolished the destructive effect of *litis contestatio* in *plus petitio tempore*. He does not note that there is other good authority for the view that the condition by its arrival created a new obligation and the action could be renewed.⁴⁵ In fact the equivocal nature of a condition obligation is notorious.⁴⁶ We are not concerned with the question whether there has or has not been interpolation, but only with this particular argument. Ebrard has in fact a good deal more to say on the point itself.

On D. 13. 7. 17 he observes⁴⁷ that it is "ausserordentlich fehlerhaft," and, in a certain sense, so it is: "sane divi Severus et Antoninus rescripserunt ut sine diminutione mercedis soli obligabitur." "Ut . . . obligabitur" is impossible. But as editors have pointed out, the "ut" is in the wrong place: the text should be read "sane, ut divi Severus et Antoninus rescripserunt, sine" etc. Ebrard observes this but adds that this makes the "häufig verdächtig sane nur um so auffälliger." Why? It seems entirely in place. The fact is that Seckel has thrown suspicion on "sane"⁴⁸ and this seems to settle the matter. The fact that "sane" is not a word used by Justinian in the Code, and is "ungemein häufig" among the classical jurists, pointed out by Kalb,⁴⁹ though noted by Ebrard, is not allowed to offset his argument.

Steiner, *Datio in solutum* (1914) is a work marked in general by very careful analysis, but, on the first clause of D. 13. 5. 1. 5, he remarks⁵⁰ in order to show that it is interpolated that it harmonises ill with the historical evolution of *Datio in solutum*. The extinctive effect on obligation of a *datio in solutum* is, he says, almost as old as that of *solutio* itself. It cannot therefore have been the recognition of this which did away with the difficulty in admitting a *constitutum* for something other than what was due; otherwise this would have become permissible so soon as the *actio de pecunia constituta* was created. Apart from the historical question as to the antiquity of *datio in solutum*, as to which some evidence might have been expected, the significant

⁴⁴ At p. 105.

⁴⁵ D. 21. 1. 43. 9. The texts in fact conflict in some degree. See, e. g., D. 44. 7. 42. pr. and Inst. 4. 6. 33b, where the words "vel sub condicione" which make this a case of *plus petitio tempore* are supposed by Krüger to be due to Justinian.

⁴⁶ See Girard, *op. cit. supra* note 29, at pp. 483 *et seq.*

⁴⁷ At p. 115.

⁴⁸ Heumann-Seckel, *Handlexicon* (1914) *sub voce*.

⁴⁹ *Die Jagd nach Interpolationen*, 24.

⁵⁰ At p. 88.

point is, that this argument assumes that all logical inferences which could be drawn from an existing rule were actually drawn.

Vassali (whom it would be impertinent of me to praise) in his *Misc. critica* (1917) maintains⁵¹ the very probable thesis that the word "impersonaliter," wherever it purports to be said by a jurist, is interpolated. It is not unlikely indeed that it often merely replaces a longer formula, e. g., "sine ulla adiectione personae," and any inference of doctrinal change drawn from the use of this word is rather hazardous. The thesis in support of which this interpolation is maintained is that in classical law any stipulation had to indicate the person who was acquiring through the stipulation, except indeed where it was between two *cives* or the *stipulator* was a slave in whom there was no lesser or other interest than that of one owner so that there could be no doubt who acquired and the indication was implied. Accordingly he declares interpolated a number of texts in which a slave with two owners stipulates and there is discussion of the effect where this is without any "adiectio personae." Apart from the latinity of the texts themselves Vassali's main arguments are two. The *intentio* in the formula "si paret N. N. Ao. Ao. X dare oportere" proves, he says, that in the *stipulatio* itself "il complemento 'mihi' o altro corrispondente risulta da inserire." It is difficult to follow this argument, which looks like a *petitio principii*. The *iudex* must be satisfied that *Agerius* is the person entitled, but the argument assumes what ought to have been proved, i. e., that an *adiectio personae* was the only way in which this could be done. The question who acquired under the stipulation of a common slave was settled by well-known rules. And the slave's "mihi dari spondes?" would give the *iudex* no more information on the point than would "dari spondes?" He further remarks on G. 3. 103: "praeterea inutilis est stipulatio si ei dari stipulemur cuius iuri subiecti non sumus," that the rule could not have been "utilmente" framed in this manner unless the *stipulatio* had stated the person to whom the *datio* was to be made. This is of course perfectly true, but no one denies that there might be an *adiectio personae* or indeed that there commonly would be one. This particular point could not arise unless there was such an *adiectio*. There are other texts with which Vassali should have dealt. In D. 45. 3. 17 there is a *stipulatio* by a common slave "sine adiectione nominis nostri." This does not in terms exclude the use of "mihi," but the *stipulatio* was for a right of way and was valid. A slave could not validly stipulate "sibi" for a "ius."⁵² In D. 45. 3. 7. 1 the text runs "sine ulla adiectione pure stipulatus sit" *servus communis*, and it is valid. Gaius persistently gives the form of *stipulatio* without any *adiectio* though one would have expected statement of a rule so fundamentally affecting the formation of a contract. So does Paul in *Vat. Fr.* 98. Vassali holds that Gaius is merely stating the invariable parts of the *stipulatio*, but the most

⁵¹ *Fasc.* 3, pp. 37 *et seq.*

⁵² 45. 1. 38. 6-9.

natural inference is that there was no such rule. Vassali makes it clear that the verb ("dari," etc.) would be in the passive, but this does not seem to affect the present point.

Albertario may be treated as representative of the most advanced Italian school. His contributions are numerous and valuable, but he is specially interesting as his work seems to show a progressive increase of confidence in the hunt for interpolations, as such, and in a recent work he invites greater confidence in the "metodo interpolazionistico, anche quando non disdegna certe audacie"⁵³ Italian works are sometimes difficult to come by, either because printed in small numbers or because the Italian book trade has not adopted modern methods of distribution, and Albertario's *Hodie* I have not been able to get. But his argument is set out and accepted by Mitteis,⁵⁴ as follows:

"Hodie" in the sense of nowadays, used to introduce a statement of a new rule of law, is found both in Justinianian texts and in classical texts. But in classical texts it is always, with a few easily explained exceptions, accompanied by the naming of the source of new law. But in the *Institutes*, Justinian, out of nine uses by him, only twice cites the changing enactment. From this Albertario infers that where "hodie" in the Digest is thus supported it is genuine, i. e., in ten cases, and where it is without this support, i. e., in twenty-six cases, it is interpolated.

On this Mitteis observes that Albertario's results have provided a new criterion of interpolation. It should be added that most of the twenty-six texts had already been doubted, and Albertario sets out to show on various grounds that the rest are no better. Our only concern however is with the "hodie" argument. If we accept Albertario's facts, we are still entitled to object to the reasoning. From the proposition that classics using "hodie" in this sense nearly always support it, and that Justinian rarely does so, it is impossible to infer that in all cases in the Digest in which it is "naked" it is interpolated. It is perhaps this consideration which makes Albertario in a later publication⁵⁵ put the matter more strongly and assert that in all the classical texts the "hodie" is supported. But the facts are not as he states them. "Hodie" in this sense occurs at least twelve times in the *Institutes*. In six of these the legislation is mentioned.⁵⁶ Thus in half the cases the legislation is stated. But that is not all. In two others⁵⁷ the cause of the change was not legislation but desuetude and the fact of desuetude is stated. In two others⁵⁸ we do not know that there was any legislation and the use in both cases of the word "observare" strongly suggests

⁵³ *Due Osservazioni sul Frag. de Form Fabiana* (1920) 5.

⁵⁴ *Review of Albertario's Work* (1912) 33 ZEITS. DER SAV.-ST. (RÖM. ABT.) 636. Albertario's work was published in 1911.

⁵⁵ (1912) 25 BULLETTINO DELL'ISTITUTO DI DIRITTO ROMANO, 241.

⁵⁶ I. II. 2; 2. 14. pr.; 3. 7. 4; 3. 9. pr.; 3. 21 (second use); 4. 13. 10.

⁵⁷ 3. 21 (first use); 4. i. 4.

⁵⁸ 4. 11. 2; 4. 15. 4a. Cf. 4. 1. 4.

that there was not. In another the reason is expressly given: "super-vacuum est hodie dicere, nam . . ." ⁵⁹ In the same text "hodie" is used again and there the legislation ought to have been mentioned: it seems to be the only case in which Justinian followed what Albertario considers to have been his habitual practice.

It is much the same with the texts independent of Justinian. Where there is an express enactment it is usually cited.⁶⁰ But where the change is due to jurisprudence or to desuetude this is usually left to be inferred. In *Vat. Fr.* 156 the rule said to be "hodie in usu" is not due to the statute mentioned, but to juristic practice. In Ulp. 20. 2 there is no statute to mention and the language is similar to that of *Inst.* 3. 21. pr. *init.*, and 4. 1. 4. In P. 5. 24, (which has however probably been altered), the method said to exist "hodie" seems not to be the result of the l. Pompeia, but of change from its provisions, introduced by practice.⁶¹

The obvious conclusion is that there was no great difference between the classical practice and that of the Institutes. Unsupported "hodie" in this sense has long been held suspicious. It suggests interpolation only where we know there was a statute and this is not mentioned. But the interpolation may well be only the omission of a reference which seemed useless. For the classical lawyers, the legislation is their authority. For Justinian the source of the provision is immaterial: his book is an enactment.

In 25 BULLETTINO DELL' ISTITUTO DI DIRITTO ROMANO, page 17, he discusses D. 16. 3. 1. 6. which states that a pact for liability for *culpa* in deposit is valid. He does not accept this for classical law. One of his arguments is that the immediately following words, "contractus enim legem ex conventionem accipiunt," are commonly held interpolated and the word "enim" so links the two passages together that it is difficult to suppose them from different authors. The jurist, he says, must have given his reason: why should the compilers erase it and give another? But jurists very commonly give no reason and the Digest contains a large number of reasons added by the compilers.⁶² He objects to the form "in deposito," not without predecessors, yet it seems very like "in hereditate" in G. 3. 64 and other passages in that neighborhood. He cites as evidence of interpolation of the same form in D. 3. 2. 6. 6, the fact that in the previous passage Ulpian is discussing only *mandati condemnatus*, and here he cites both mandate and deposit. Thus deposit is an addition. It may be pointed out that he cites also *tutela* and *societas* and that these four are precisely the relations discussed together in the clause of the Edict on which Ulpian is comment-

⁵⁹ 4. 15. 8 (first use).

⁶⁰ G. 2. 195; Ulp. 1. 10; 11. 8; 17. 2; *Vat. Fr.* 125, 127, 128, and possibly *Coll.* 15. 2. 1.

⁶¹ Mommsen, *op. cit. supra* note 32, at p. 923.

⁶² H. Appleton, *op. cit. supra* note 16, at p. 229.

ing.⁶³ On page 26 he discusses D. 17. 1. 39 and holds, not without probability, that it dealt originally with *fiducia*. He supports this by an argument drawn from the alleged fact that the text at first considers *mandatum* alone and then proceeds to talk about deposit also. In fact it speaks of both throughout.

On page 35 he discusses pacts not to be liable for *dolus* which are clearly void, and holds that texts which say that there could be a valid pact not to bring *actio depositi* are interpolated.⁶⁴ But it is one thing to contract out of liability beforehand and another to agree, after the fact, for release, and this is the distinction intended in D. 2. 14. 7. 15 as appears from the concluding words of h. t. 14: "nam et de furto pascisci lex permittit." And D. 2. 14. 27. 3 means the same thing in saying that a pact not to bring *actio depositi* is valid though it may operate as if there had been a pact not to be liable for *dolus*.

In 26 BULLETTINO, 106, Albertario maintains that all cases of joint wrong in which payment by one discharged the others are due to Justinian: the release being the work of the compilers. In D. 4. 2. 14. 15, he holds that Ulpian said that in *metus* satisfaction by one did not release the others, and that h. t. 15 is entirely the work of the compilers. In 4. 3. 17. pr. Ulpian appears to say the same for *dolus* and here too Albertario holds that he really said the opposite. The principles as to cumulation in penal actions are much controverted. Here it is enough to say that *dolus* and *metus* are not delicts, in the strict sense: the Praetor could no more create a delict than he could create a contract, and that though text-books commonly lay down the rule of absolute cumulation for "penal actions" they give usually no authority which justifies this.⁶⁵ In *dolus* the action lies only if "non aliter res servari potest."⁶⁶ Will it lie when the *res* is already *servata*? If two persons commit a *dolus* and a third party comes to their relief and puts the matter right, are they both still liable? The payment in such cases is a means of avoiding liability rather than payment of damages. The case may possibly be different where the payment is under the action: it satisfies another obligation, that arising from the *litis contestatio*.⁶⁷ It is also no doubt different in those praetorian wrongs which are based on civil law. But liability for *dolus* and *metus* depends entirely on the words of the Edict.

In a study of *Actio de Universitate e Actio specialis in rem* (1919) Albertario maintains, with others, that the conception of the *hereditas* as an abstract unity consisting of rights and duties is post-classical. He has occasion to refer to the word "universitas" as applied to a community, and holds that here too it meant in classical law only the people who

⁶³ D. 3. 2. 1.

⁶⁴ D. 2. 14. 7. 15; h. t. 27. 3.

⁶⁵ See on these texts, Levy, *Konkurrenz* (1922) 2. 1. at p. 81.

⁶⁶ D. 4. 3. 1. 8; h. t. 5.

⁶⁷ See Biondi, *Studi sulle Actiones arbitrarie* (1913) 42 et seq.

made up the community. On G. 2. 11 he says that Gaius does not mean the *universitas* in a corporate sense but only the people who make it up. The text runs "Quae publicae sunt, nullius in bonis sunt: ipsius enim universitatis esse creduntur." Apart from the awkwardness of saying, as Albertario understands the text, that what belongs to all does not belong to any, there is the difficulty of the word "ipsius." It presumably has a meaning and it seems precisely to signify the corporate character which Albertario denies. Gaius clearly has corporate character in mind, as he has in D. 50. 16. 16: "civitates enim privatorum loco habentur," and in the obscure D. 3. 4. 1 where he is discussing the corporate character of some bodies.⁶⁸

Even as to the conception of *hereditas* the real trend of Albertario's argument is rather to show that the word "universitas" was not applied by classical lawyers to the *hereditas* than to show that this was not in effect conceived of as an abstract whole and not as a mere aggregation of property. The passage of Gaius in which he is discussing *res incorporales*⁶⁹ and in which he mentions *hereditas* as his first example seems to call for explanation. It is not easy to see how a mere aggregation of physical objects could have been a *res incorporalis*. It is difficult to resist the conclusion that, for Gaius, the *hereditas* was a unity, whether he would have included the debts or not.

On pages 7 and 64 of this essay, Albertario observes, quoting Ferrini, Rotondi and Bonfante, that late western sources show a "stretto parallelismo" in their doctrine with the post-classical doctrines from oriental sources. He quotes Rotondi's words, "Nonostante le profonde diversità nell'evoluzione degli istituti nelle due parti dell'impero, la dogmatica giuridica pur nelle sue aberrazioni più singolari e sostanzialmente uniforme." If this indeed were so, it would be something like a miracle. A much more probable view is that one of these systems borrowed the notions from the other, and for historical reasons this would mean that the East borrowed them from the West. On that view they were known to western jurisprudence before the two systems started on their separate journeys. If they are post-classical they are not very late and it is absurd to call them Byzantine which indeed Albertario does not, though others are less careful. The terminology "actio de universitate," "actio specialis in rem," was not invented in the East. It may be post-classical: it does not follow that the idea which it expresses was.⁷⁰

Other writers of the Italian school have been similarly active in this matter, but none of them approaches in whole-heartedness a recent German writer, Gerhard Beseler, who must at least be acquitted of

⁶⁸ 1 Mitteis, *Römisches Privatrecht bis auf die Zeit Diokletians* (1908) 376.

⁶⁹ 2. 14.

⁷⁰ Much space has here been given to Albertario: the justification is that he is a very distinguished writer who has long since given us the right to expect clear thinking and close reasoning.

paying too much respect to his seniors. This author brings to the task an exceptionally good equipment, both philological and juristic, but his method seems open to a good deal of criticism, which indeed it has received. His principal work on the matter is his *Beiträge zur Kritik der Römischen Rechtsquellen* of which four *Heften* have as yet appeared.⁷¹ The author's first principle is a repudiation of the view propounded by Kalb, and widely accepted, that search for interpolations, as such, is unsound and likely to give untrustworthy results; that the sound method is to start from investigation of the history of doctrine and to infer interpolation from this with the help of linguistic tests, with a resulting interaction by which one checks the other. An obvious corollary is that pure linguistic tests are suspicious. All this Beseler repudiates. Not only is direct hunting his method: it is expressly declared to be the proper plan⁷² and linguistic tests are declared all sufficient.⁷³ It is difficult to avoid the impression that with the assumptions he makes his task is an easy one: they are so far-reaching as almost to exclude the possibility of effective check. To the plain man a comparison with the existing literature of the silver latinity seems a good touchstone by which to judge whether a "classical" jurist could have used a particular word or idiom. But this road is closed to Beseler's critics. The classical jurists were "Attizisten strenger Observanz."⁷⁴ This means not merely that they wrote a very pure Latin, but that their vocabulary is far more strict than that of the lay writers. Even "atquin" though a good enough word for golden latinity is too "unruhig" for a classical jurist.⁷⁵ Cicero is no guide: he is given to Greek forms, no Atticist and no jurist.⁷⁶ What Vergil, Quintilian, Pliny the younger might have said is no guide to what a jurist could say.⁷⁷ The lay Atticists of their own age are not Atticists in the same sense.⁷⁸ If the Digest contains some of these forms, possible to laymen but not to the lawyers, these are mere reminiscences among the Byzantine jurists of the Latin lessons of their school days.⁷⁹ No reliance can be placed even on the pre-Justinian legal texts, for Gaius, besides having undergone contamination, was a "Graecist"⁸⁰ and was not observant as other lawyers were of the proper "consecutio temporum,"⁸¹ and the other texts, Ulpian's *Regulae*, the *Vatican Fragments*, the *Collatio* have all undergone post-classical revision, a very prob-

⁷¹ 1910, 1911, 1913, 1920.

⁷² 4 *Beiträge zur Kritik*, etc. 303.

⁷³ 4 *ibid.* 117.

⁷⁴ 3 *ibid.* 3, etc.

⁷⁵ 4 *ibid.* 191.

⁸⁰ 2 *ibid.* 62, 64. The ability to write impeccable Latin is, it seems, part of the definition of a "classical" jurist. In (1923) *ZEITS. DER SAV.-ST. (RÖM. ABT.)* 421 Gaius, who wrote in the second century, is described as "der Nicht-klassiker Gaius."

⁸¹ 4 *ibid.* 159.

⁷⁶ 2 *ibid.* 8.

⁷⁷ 3 *ibid.* 95, 201; 4 *ibid.* 191, 255.

⁷⁸ 4 *ibid.* 315.

⁷⁹ 3 *ibid.* 112.

able opinion, the *Sententiae* of Paul being indeed, not a work of Paul, but a *florilegium* by a post-classical Rhetor out of the works of Paul.⁸² However, the Atticism of the classical jurists has its limits. Papinian is no guide for Ulpian, for he is inclined to the "constitutional" style, and Scaevola is given to original forms, so that the thesis does not fully apply to them.⁸³ It does not even wholly apply to Ulpian himself, for some of his books (*Opiniones*, *De officio curatoris reipublicae*, *De omnibus tribunalibus*) are not in the classical style, probably they are post-classical collections.⁸⁴ Apart from this Ulpian is the real classic, no mere bungler and forerunner of Tribonian, as Erman says,⁸⁵ or defective in style as Binding says.⁸⁶ The days when people thought this are over. Finally, one who does not accept all this has no "Stilgefühl" and no right to an opinion.⁸⁷ It is clear that a writer with all these assumptions cannot easily be proved in the wrong. It is however possible that not all these assumptions are true. One of Beseler's critics asks, "Who told Beseler that he knew Ulpian's style better than I do?" The present writer cannot take this position: he is willing to admit that Beseler is much better qualified. But one would have more confidence in his views on Ulpian, if he had produced some specimens of this splendidly pure Atticistic, highly improbable, Ulpian whose Latin was so good that Quintilian would make him "gasp and stare." Whence does he derive his doctrine that Ulpian can never give a bad reason, never use an unnecessary word, or give a superfluous explanation or reflexion? For him Ulpian is a superman, as is, presumably, Paul also. He tells us that "atquin" is too "unruhig" for a classical jurist and in a study of the texts employing this word, he rejects them all, this *a priori* assumption being the starting point. In 42 ZEITS. DER SAV.-ST. 515 *et seq.*, Kübler has an exhaustive discussion of this matter. He points out *inter alia* that "atquin" is not used by the Byzantine writers in their Latin work. The inference is that they found it in the texts and did not insert it. On D. 29. 1. 40. pr. (Paul) Beseler strikes out the words "et quomodo possunt," with the comment that they are not necessary.⁸⁸ As they were not necessary Paul could not have written them. But it so chances that there is hardly a word in the Digest which has better evidence of authenticity. These words, substantially, were in the enactment that Paul is discussing. It is quoted in D. 29. 1. 1: "faciant igitur testamenta quomodo volent, faciant quomodo poterint. . . ." No doubt they might have been added there, too, by the compilers, though it is hard to see why. But it is clear that

⁸² 1 *ibid.* 71; 2 *ibid.* 35, 105; 4 *ibid.* 255, etc. As to P. *Sent.* see, e. g., 1 *ibid.* 99 and 4 *ibid.* 336.

⁸³ 2 *ibid.* 21; 4 *ibid.* 254.

⁸⁴ 1 *ibid.* 99; 3 *ibid.* 164; 4 *ibid.* 118. As to the *Opiniones* see also 2 Lenel, *Paltingenesia juris civilis juris consultorum reliquae* (1889) 1001, cited by Beseler.

⁸⁵ 2 *Beiträge*, etc. 14; 4 *ibid.* 18.

⁸⁷ 3 *ibid.* 121; 4 *ibid.* 250, 282.

⁸⁶ 4 *ibid.* 250.

⁸⁸ 2 *ibid.* 10.

they were not so added. They are in Gaius, "quomodo velint vel quomodo possint permittitur testamentum facere."⁸⁹ They are also in the *Regulae* of Ulpian, "permissum est illis quomodocumque vellent, quomodocumque possent testari."⁹⁰ It will be noted that the most turgid of all the forms is that of Ulpian. Things of this kind hardly inspire confidence in the *a priori* method even in the hands of so unmistakably competent a man as Beseler.

In 4 *Beiträge, etc.* 124 *et seq.*, Beseler discusses D. 9. 2. 23. 2, 3. Ulp. The Aquilian action is brought in respect of a slave killed. Ulpian quotes, or is made to quote, Julian as saying that if the owner had been instituted on condition of freeing the slave, and the death made it impossible to do so, so that the *hereditas* was lost, "in aestimationem etiam hereditatis pretium me consecuturum." Beseler objects to some of this on various grounds: the only point with which we are concerned is that he holds the "etiam" to be "sinnlos." He tells us that, putting the matter to his class and asking what is recovered besides the value of the slave, expecting the answer "that of the *hereditas*," he got instead from a freshman, Herr Marius Molsen, the unexpected answer: "The value of the *hereditas* less that of the slave," since to get the *hereditas* he must free, and lose the slave. This acute remark Beseler accepts and holds that as he gets the value of the slave and the *hereditas*, less the value of the slave, the "etiam" has no meaning. But, though the student is to be congratulated, the "etiam" is not "sinnlos." What he loses by freeing is the present value of the slave: what he recovers under the *lex* is his highest value in the last year. And of course there might be other accessions. The "value of the slave" has two different meanings and Beseler argues as if they were the same. He will recover the value of the *hereditas* as well as whatever else there may be in the slave's "value."

In 3 *Beiträge, etc.* 39, in his discussion of the word "attamen" he observes, on D. 47. 14. 1. 3 = *Coll.* 11. 8. 3, to avoid the difficulty that the word "attamen" occurs in both, that the *Collatio* often departs from the juristic style. This seems entirely to miss the point. No doubt the occurrence of the word in the *Collatio* would prove little for its use by classical jurists. The point is however that this is the same text, and the appearance of the word in the *Collatio* version of the text increases the evidence for its authenticity unless, indeed, it is Beseler's contention that the compilers used the *Collatio*. At page 59, in his discussion of "contendere," he comes on a similar case.⁹¹ Here the argument is altered. It may be, he says, that the compilers of the *Digest* and the writer of the *Collatio* used the same glossed edition of Ulpian. In that case the linguistic habits of the author of the *Collatio* have nothing to do with the matter. The evidence for the incriminated word is carried further back, and in view of the somewhat unlikely nature of the hypothesis that they had happened on the same glossed

⁸⁹ 2. 114.

⁹⁰ 23. 10.

⁹¹ D. 9. 2. 5. 1. *Coll.* 7. 3. 4.

edition, one is inclined to prefer the view that the word was in the original text. On page 83 there is another case: D. 9. 2. 27. 10 = *Coll.* 12. 7. 8. Here it is put more strongly: "die Kompilatoren scheinen den glossierten Text vor sich gehabt zu haben."

In 3 *Beiträge, etc.* 141, he objects against a critic who says of a solution of his that it is "juristisch unhaltbar," that this is a "wohlfeile Wörtlein" and no argument. This is no doubt correct, yet he himself not uncommonly objects to a passage in the Digest that it is "unjuristisch" without further explanation.⁹² Indeed he seems rather to resent being asked to give reasons. He says, with truth, that it must not be assumed that he has none, but he adds that he cannot be expected to be so explicit as in lecturing to a class of students, and that he omits reasons because they will be clear to qualified persons. This is optimistic: even trained minds do not move along the same lines. But the remark has another point of interest. He does not claim to be always right: infallibility is "übermenschlich" (though he seems inclined to attribute this quality to Ulpian). Where his reason may chance to be wrong, is it assumed that a properly equipped reader will divine it? As it is only good reasons that readers could be expected to see for themselves, this is in effect a claim that his reasons, except where he gives them, are necessarily sound. Where he says, as he not unfrequently does, "Unrichtig So and So," it may be doubted whether "So and So" will feel that the proof is adequate.

There is a well-known piece of medieval controversy which is entitled "de ineptiis cuiusdam idiotae." Beseler does not go so far as this, but his treatment of his critics lacks urbanity. His manner led Kübler to protest and invite him not to reject the more courteous methods nowadays in use. To this he replied that he does not agree that these times are "höflich" and he adds: "Sie haben doch auch im Felde gestanden, verehrter lieber Herr Kübler."⁹³ For him literary controversy is a form of warfare in which the object is to defeat the enemy, not a discussion in which colleagues with different opinions are seeking to arrive at the truth. Most of us offend in this way occasionally, but Beseler seems to erect it into a principle. It is difficult for him to believe that an opponent can be in good faith or can possibly be right. His violent attacks on England are perhaps excusable: indeed they need not be taken seriously, since he tells us⁹⁴ that it is an advocate's duty to correct the truth in the interest of a "schutzwürdig" client. But, when all deductions are made there are few modern Romanists from whom so much can be learnt as from this very able writer.⁹⁵

⁹² E. g., 3 *Beiträge, etc.* 24.

⁹³ 4 *ibid.* 257.

⁹⁴ 4 *ibid.* 256.

⁹⁵ While this article was in proof, Prof. A. Berger of Vienna kindly sent to the writer a copy of his review of 4 Beseler, *Beiträge* in the (1923) *ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT*, 328 *et seq.*, which will be found to deal, in the course of a very judicious criticism, with many of the points to which attention is called in the foregoing remarks on Beseler's work.