
ON PRE-DIGESTS

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It is often worth while to read the works of unorthodox scholars and heretics. The advantage of heretics is that they have been thinking. It is possible to agree with a theory without thinking at all, to agree with a theory for the reasons given by its author. It is difficult to disagree with a theory without thinking, without re-examining the evidence and the arguments.

Bluhme's *Massentheorie*, first published in 1820,¹ quickly became the standard, orthodox account of the compilation of Justinian's *Digest*, but there have always been some people who were not wholly convinced, and there have been two main attacks, by Hofmann in 1900² and by Peters in 1913.³

Hofmann was a brilliant thinker, a full professor at a very young age, an inspiring teacher, a gifted linguist, conversationalist and poet, *un versatile ingegno* as they say in Italian. His memorial in the Arcadenhof in Vienna is next to the bust of Hans Kelsen. His book is worth reading.⁴

Peters has always been recognised as a brilliant scholar, even by those who totally reject his theory, which was even baptised by one of them. It too is worth reading.

1 Compiled in three years

The *Digest* was compiled in three years, 530-533 AD. How was it possible for Justinian's compilers to read 2,000 books and three million lines of classical works in order to produce the *Digest* in fifty books and 150,000 lines in so short a time? Bluhme himself had not been interested in the question and perhaps had not even seen it as a problem.

It was Hofmann who first set out in detail the difficulties of doing so much so quickly: difficult manuscripts, poor lighting, the Victory Riots and inconvenient writing materials.⁵ His solution was simple and radical: the compilers had not read the original works but some simplified version of them,⁶ which enabled

1 "Die Ordnung der Fragmente in den Pandekentiteln" in 1820 (4) *Zeitschrift für geschichtliche Rechtswissenschaft* 257-472, reprinted Keip Verlag (Goldbach) (1997).

2 *Die Compilation der Digesten Justinians* (1900).

3 "Die Oströmischen Digestenkommentare und die Entstehung der Digesten" 1913 (65) *BSGW* 3-113, reprinted in 1970 (16) *Labes* 183 335.

4 Pugsley *Justinian's Digest and the Compilers* Vol 2 (2000) 181-202.

5 Hofmann (n 2) 8-13.

6 *Idem* 125.

them to work much faster and to finish in three years in stead of the more than ten years which had been originally expected; and anything to the contrary in *Tanta/Dedoken* was simply untrue.

We were all brought up to believe that Peters belonged to the same school of thought as Hofmann. It is interesting therefore to see exactly what Peters said; and that for two reasons: first, Peters expressly and categorically rejected Hofmann's view;⁷ and secondly it was for Peters' theory that Rotondi coined the expression *predigesto*,⁸ pre-*Digest*, which we have all used ever since.

Peters was actually concerned with the fact that the compiler, Theophilus, wrote a commentary on texts that are in the *Digest*, in spite of the prohibition on commentaries in the *Digest* prefaces and the serious penalty for infringing it, as if for *falsum* (forgery). Peters' solution was that Theophilus was commenting on some previous version of the *Digest*.

He does *not* say: that would explain how the *Digest* was compiled so quickly. He *does* say: (1) that would explain why Theophilus was summoned on to the *Digest* commission – he wrote a commentary on the previous version of the *Digest*; he would be a good man to work on the *Digest* itself; (2) that the *Digest* followed the example of the *Code*, which was built on previous collections – the Hermogenian, Gregorian and Theodosian Codes – so the *Digest* was built on a previous collection or collections of jurisprudence; (3) that it would explain the very short delay from publication to entry into force: only fourteen days. He does *not* say: that would explain compilation in three years.

The connection of Peters with compilation in three years is due to Rotondi, and above all to Lenel, who actually says that Peters' theory would solve lots of problems: (1) three years for the compilation; (2) two weeks to come into force.⁹ It is always easier to attack someone's theory if you re-write it first. Both of them condemn the theory, and everyone has done so ever since.

Actually the two problems cannot be solved in the same way, with the same pre-*Digest*. On the one hand it is clear, it is expressly stated in *Tanta/Dedoken* 17, that the works read by the compilers to compile the *Digest* were unknown even to the most learned men, and in view of the prominence of that assertion we must believe it. On the other hand for entry into force within fourteen days

7 Peters (n 3) 55 and n 152.

8 Rotondi *Scritti giuridici* Vol 1 (1922) 88.

9 1913 (34) ZSS 373 374.

some sort of well-known pre-publication was a practical necessity. The *Digest* was going to the three main universities in the Roman Empire (Constantinople, Beirut and Rome), and the professors were expected to start lecturing on it and the *Institutes* the following year. And, as we all know, you cannot prepare a completely new course of lectures in fourteen days.

I would reject the idea of a pre-*Digest* to explain compilation in three years; but I like the idea of a pre-*Digest* to explain entry into force in fourteen days.

So what did the compilers read? We know that it was material which had not previously been known to them. And since it was immediately superseded by the *Digest* itself, it was not copied or preserved, and has not been transmitted to us. We are looking *backwards* for something which has since disappeared but which would explain the present state of our sources. That is like looking for black ice at mid-day when it has already melted. That looks fairly hopeless.

Let us therefore go back one hundred years and look *forwards* in stead, starting from the *Law of Citations* in 426. What happened after the *Law of Citations*? The question is important and difficult: important because it may tell us what materials were in circulation or available to the compilers a century later; difficult because those materials have disappeared because of the success of the *Digest*. But at least we have a firm starting point in the text of the *Law of Citations*.

The *Law of Citations* condemned the notes by Paul and Ulpian on the works of Papinian. What happened next? One would imagine that no-one copied them any longer and they dropped out of circulation. But some of them are preserved in the *Digest*.¹⁰ We must conclude that *either* people went on copying out what was no longer good law, *or* that the compilers worked on pre-426 manuscripts.

The *Law of Citations* required a counting of heads among five named jurists. What happened next? What happened to the lectures of the professors of law? Every time that the professors quoted Ulpian, the students, who dislike copying out unnecessary text, shouted out: "What did the other four think?" The professors were practically bound to build up a concordance of jurists' views on controversial issues, and to prepare a collection of fragments which had majority support. What is the simplest way to do that? It is to take the longest work by one of the five jurists on a particular topic and to annotate on it the views of the other four. Who wrote the longest commentary on Sabinus?

10 See, eg, *D* 6 2 16.

Ulpian: so take a manuscript of Ulpian on Sabinus and annotate on it the variants in Pomponius and Paul. If they are small they can be written in full; if not there will have to be a cross-reference. What is the longest commentary on the Edict (after Pomponius, which did not travel to the East)? Ulpian: so take a manuscript of Ulpian on the Edict and annotate on it the variants of the other four. And so on.

From the annotated originals it is quite easy to make a collection of fragments with majority support. What should be done about an inscription, showing author, work and book number? Putting the name of only one jurist is unsatisfactory; putting the names of all relevant jurists would be inconvenient. The simplest solution would be to leave out the inscriptions altogether and to use a title to show that it was a collection of fragments (or *leges*) with majority support. And that seems to have been something like what was used in the law schools before the compilation of the *Digest* according to the *Constitutio Omnem*. In their second year, students studied *prima pars legum*. And the answer to Peters' question: "*Was sind das für leges?*"¹¹ is, I think, such a collection of inscription-less fragments. That explains *Tanta/Dedoken* 17: the professors had not even heard the names of the early works. They were brought up in an inscription-less world.

That collection was in circulation; it was well known. From the garbled account in *Omnem* 1, it seems to have been very unsatisfactory: it included passages which should have been left out; it got things in the wrong order; it was generally disorganised. It was not what was used by the compilers. They could not have put the inscriptions back in, or even decided which inscriptions to put back in.

So that was not what the compilers used.

And that leads to another question: What happened to the original annotated manuscripts? They were out of date and useless. They could have been thrown away, or they could have been re-used as the Veronese palimpsest of Gaius was re-used for the works of St Jerome. Or they could just have been thrown into an empty room until someone decided what to do with them – in any old order – it did not matter because they were no longer the law in force.

With that introduction we can turn to the question: What works did the compilers read?

Here is the answer: *ipsa vetustatis studiosissima opera, iam paene confusa et dissoluta*.

All the words are important here: *ipsa opera* – the works themselves, in some sense the original works, not editions or collections or anthologies, and certainly not a pre-*Digest*. *Vetustatis* – not *antiquitatis*. The two words are frequently synonyms and interchangeable, but in the *Digest* prefaces there seems to be a distinction: *antiquitas* is old and should be revered;¹² *vetustas* is old and out of date and useless, it should be reformed.¹³ So here: not original classical manuscripts, but original out of date pre-426 manuscripts. *Studiosissima* – very heavily annotated. *Iam paene confusa et dissoluta* – all jumbled together and falling to bits. This was not Tribonian's library, which was surely well organised if he had one. It was not the library of the university law school in Constantinople. It was part of the law library in the palace, for which Tribonian was responsible, so that the books could be made available by him. It was probably discovered during the compilation of the first *Code* which took the compilers back beyond the three existing codes to constitutions cited in the works of the classical jurists. It was unknown to the most learned men. It was not a pre-*Digest*. But it will have been an enormous help to the compilers in compiling the *Digest* in three years.

2 In force in two weeks

Peters was much more forthright about the short time between publication and entry into force.¹⁴ How could enough copies of the *Digest* be made in two weeks? How could anyone assimilate such an enormous and comprehensive code? For Peters there was only one possible answer: this was a fairly minor revision of a well-known compilation with which all lawyers were familiar at law school.¹⁵ It was only necessary to check and compare the two versions. In fourteen days it was possible to do that, but nothing more.

For Rotondi fourteen days were hardly enough for sending copies to the law schools in Beirut and Rome, but Justinian simply insisted on having everything in force during his third consulate, whether it was practicable or not.¹⁶ Lenel thought that fourteen days were far too few, with or without Peters' pre-*Digest*: it would have taken years.¹⁷ So the solution was rejected. But the problem

12 *Tantal/Dedoken* 10.

13 Cf *Nov* 75 2.

14 Peters (n 3) 66-67.

15 *Idem* 55.

16 Rotondi (n 8) 105-6.

17 Lenel (n 9) 374 389.

remains: how can you sensibly bring a law reform into force within such a short time that it is impossible to send copies out to everyone and for everyone to read it, let alone understand and learn it?

Justinian's *Digest* is on a scale comparable to Halsbury's *Laws of England*, which was published in instalments, two or three volumes a year for two decades. Would it not have been better to publish the *Digest* in instalments? And that leads us on to the question: Did they publish the *Digest* in instalments?

To answer that question we need to study stage two of the process of compiling the *Digest*. Stage one was reading the classical works and selecting the fragments.¹⁸ Stage two was putting the fragments back together again in fifty books sub-divided into titles, following the order of the Edict.¹⁹

Stage two has been very little studied, partly perhaps because there is so little agreement about the details of stage one; but we do in fact have a fair amount of information about it both in the *Digest* prefaces and in the final form of the *Digest* itself.

There have been three studies of stage two. In 1922 Krueger plucked three months out of the air as long enough, in his opinion, to edit the final work, which took place, he thought, in August/September/October 533, but without going into details of how the compilers worked.²⁰

In 1978 Honoré²¹ suggested that the three committees used to read the three Masses at stage one might have been kept on to edit the *Digest* at stage two. That would have been administratively convenient and practically efficient, allowing the compilers to go on working in groups which they were used to. He then went off into some arithmetic of his own, based on the number of displacements of fragments from Bluhme order in each book of the *Digest*; and concluded that each committee edited sixteen books (counting books thirty to thirty two as one book) in the regular order SPE: so that S edited books one, four, seven, *et cetera*; P edited books two, five, eight, *et cetera*; and E edited books three, six, nine, *et cetera*.

I am bound to say that I think that that is wrong. I cannot believe that the number of displacements depends so much on the editors and so little on the

18 *Deo Auctore* 4.

19 *Idem* 5. See diagram "Follow the order of the Edict" (*Deo Auctore* 5).

20 See Pugsley *Justinian's Digest and the Compilers* Vol 1 (1995) 74.

21 Honoré *Tribonian* (1978) 173-185. See Pugsley (n 20) 74.

subject matter. It would mean that *condictiones* were edited by different groups of compilers in *Digest* 12 and 13; it would mean that sale was edited by different groups in *Digest* 18 and 19; and that wills were edited by different groups in *Digest* 28 and 29. It ignores the natural breaks in the subject matter which the compilers took into account according to *Tanta/Dedoken* 1. And, unaccountably, it gives the same work load to P as to S and E, even though Honoré thought that there were good reasons for giving P a lighter load at stage one.

So I reject Honoré's arithmetical theory, though I think that the idea of keeping the same committees for stage two is worth examining.

I have had a look at stage two on a number of occasions, most recently in the *Festschrift* for Margaret Hewett three years ago.²² I think that stage one finished at the end of 531 and that stage two therefore started at the beginning of 532 and lasted nearly two years;²³ and obviously the sooner it started the sooner it would have been possible to publish a first instalment. If we look at the numbers in the *Digest* prefaces, the first natural break comes at the end of *D* 19. Up to that point there are three parts of the *Digest* in four, seven and eight books respectively, that is two of about the same length and a third which is half as long, or just over half as long, as the other two. That is a familiar pattern, which we have already seen at stage one: the S and E Masses contained nearly 580 books, the P Mass contained about 290 books.

So perhaps the four books in part one were read by P. I note that though in part one the first Mass is regularly E, no doubt for reasons of substance, the second Mass is very frequently P, presumably for reasons of personal preference, giving an overall order EPS, which is rare elsewhere in the *Digest*. The other two parts would go to S and E. In part two the most frequent opening Mass is E: it was presumably edited by the E committee. In part three the first Mass, with very few exceptions, is regularly S, and indeed in *Digest* 14 in Bluhme's table 2²⁴ there is no E Mass at all. (Incidentally, if we accept, with Bluhme,²⁵ that Theophilus was on this committee, that will explain why nearly all his commentary is devoted to this part, and in particular to *Digest* 12 and 17, which in Honoré's theory were edited by E and P respectively.)

22 "Editing Justinian's *Digest*" in *Summa Eloquentia: Essays in Honour of Margaret Hewett* (2002) 174-182.

23 Pugsley (n 20) 72.

24 Bluhme (n 1) 459.

25 *Idem* 276: "es würde keinen Zweifel leiden."

At that point there is a break in edictal order, which had been followed fairly closely up to *Digest* 19 and which continues in *Digest* 23. In between there is a little group of three books. The first, *Digest* 20, brings hypothec, mortgage, forward out of edictal order so that it is closer to *pignus*, pledge, in *Digest* 13 7. The second, *Digest* 21, brings another section on the law of sale forward out of edictal order so that it is closer to the rest of the law of sale in *Digest* 18 and 191. The third book, *Digest* 22, is miscellaneous; there seems to be no justification for it in substance; it is not designed to bring anything closer to anything else. Its only merit is that it brings this little group up to three books. It has six titles, five of which begin with the P Mass. I have no hesitation in allocating it to P. It is in fact the most Papinianic book in the whole *Digest*. (Honoré would allocate it to S.) Looking at the opening Masses in the other two books I would allocate *Digest* 20 to S and *Digest* 21 to E.

This little group of three books is odd. If it is possible to move hypothec all the way up to *Digest* 20, so that it is nearer to *pignus* in *Digest* 13 7, why was it not moved all the way up to *Digest* 14, so that it would actually be next to *pignus*? *Digest* 14 is one of the shortest books in the *Digest*, only just over half the average length of the other books, so that there should have been room for hypothec there. More broadly speaking, if hypothec and sale were moved up to be near to things in part three, why were they not put in part three? Why are these books not at least an annex or addendum to part three? As it is, they stand at the head of part four, which is otherwise concerned with the law of persons, with which they have no connection at all.

There are no prizes for guessing my answer. The first nineteen books had been finished, approved and sent off as the first instalment of the *Digest*. It was too late to add anything. Any new material would have to go in part four in the next instalment.

That phenomenon, of material appearing out of order and in what is as a matter of substance the wrong part, recurs in *D* 37-38 on intestacy. In the Edict intestacy came before testate succession, and in any case it belongs to the same part. What is it doing in part six?

I suggest a similar solution. Parts four and five were the second instalment, and there was a deadline for approving and sending them off, to give the professors enough time to prepare their lectures. The compilers responsible for editing intestacy fell behind schedule, perhaps because there were so many books of edictal commentary devoted to the subject which had to be compressed into

two books of the *Digest*. When they failed to meet the deadline it was too late and their work was simply relegated to the next instalment.

In this second instalment the P Mass is very prominent in *Digest* 35 and 36, and I allocate them to P. That leaves fourteen books for S and E. *Digest* 28 and 29 on wills and *Digest* 30-34 on legacies are a natural unit of seven books. *Digest* 23-25, on marriage, *Digest* 26-27, on *tutela*, and *Digest* 37-38, on intestacy, make a balancing unit of seven books. It follows the order of the Edict. Since S worked slightly more slowly than E at stage one, they are more likely to be the committee which missed the deadline; and I have allocated those two groups of seven books accordingly.

If those two instalments went off early, the professors will have had far longer than two weeks to prepare their lectures. And from that point of view the third instalment was not important at all. According to the *Constitutio Omnem* students were only required to study and the professors therefore to lecture, on the first thirty six books of the *Digest*. The last fourteen books could be dealt with later. Hence, if the professors were required in due course to lecture on those books as well, they would have had much longer than two weeks to prepare.

We can now return to Peters and to Theophilus and his commentaries. The prohibition on commentaries appears in *Deo Auctore* 12, without a sanction in December 530. It appears again in *Tanta/Dedoken* 21, in greater detail and with a serious sanction in December 533. Perhaps that sanction would have been enough to discourage Theophilus from writing any commentaries or any more commentaries. But if the first instalment of the *Digest*, *D* 1-19, was published in about October 532, no sanction had yet been laid down. Indeed it is possible that the sanction was added precisely because of Theophilus' commentaries. In any case he had to prepare his lectures. His commentaries may have been part of his lecture notes. They were based on the first instalment, which was indeed a kind of pre-*Digest*.

“FOLLOW THE ORDER OF THE EDICT” (*DEO AUCTORE* 5)

Ulpian	Digest			
1 – 14in	1 – 4	P	Part 1	
14fin – 25	5 – 11	E	Part 2	
26 – 32	12 – 19	S	Part 3	
	20	S	Mortgage	
	21	E	Sale	
	22	P	Etc	Part 4
33 – 36	23 – 25	S	Marriage	
37 – 38	26 – 27	“	<i>Tutela</i>	
39 – 40			Intestacy	
50 – 52in	28 – 29	E	Wills	
	30 – 34	“	Legacies	Part 5
	35	P	<i>Falcidia</i>	
	36	“	<i>Trebellianum</i>	
	37 – 38	S	Intestacy	
	39	E		
52fin – 55	40			
56 – 57	41		Part 6	
58 – 66	42			
67 – 73in	43			
73med				
73fin – 76	44			
77 – 80in	45 – 46	S	Stipulations	
80fin – 81in	47 – 48	E	Theft, robbery	
81fin	49	P	Part 7	
	50.1 – 15			
	50.16	E		
	50.17	E		