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ARTICLES

OBJECTIONS AND EXCEPTIONS: THE PALINGENESIA OF D.43.24.17

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I. INTRODUCTION

A, the owner of a house in Rome, hears that, when carrying out some building work, C intends to interfere with one of the walls. A gives notice to C that he objects to the work (*prohibet*). Despite this, C goes ahead with it. Or else, being aware that A would object if he knew, C deliberately carries out the work while A is away at his seaside villa at Baiae. In the first situation C is regarded as doing the work by force (*vi*); in the second he does it clandestinely (*clam*). In either event, the praetor will grant A an interdict ordering C to put the wall back to its original state so that the parties' rights may be determined and any appropriate security given: *quod vi aut clam factum est ... restituas*.[1] If A has let his house to B or granted him a life interest in it, C's work on the wall may well spoil B's enjoyment of the house. In that event, in similar circumstances, if B objects, or would object, to C doing the work, B can bring the interdict against C. To the extent that his remaining interest as owner is affected, A too can bring the interdict against C.[2] Suppose, however, that B originally objected to the work, but subsequently changed his mind and gave C permission to do it. That permission will give C a good defence if B then raises interdict proceedings. But will B's permission give C a defence against proceedings brought by A?

Our sources do not deal with those particular supposed facts. The purpose of this article is to suggest, however, that D.43.24.17,

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[1] O. Lenel, *Das Edictum Perpetuum* (3rd ed., Leipzig 1927; hereinafter "*E.P.* "), p. 482. On the law relating to the interdict see O. Karlowa, *Römische Rechtsgeschichte* vol. 2 (Leipzig 1901), pp. 1233–1239; A. Berger, "Interdictum" in Pauly-Wissowa, *Real-Encyclopädie* vol. 9.2 (1916), col. 1609, at coll. 1662–1666; P. Bonfante, *Corso di diritto romano* vol. 2.1 (Rome 1926, reprinted 1966), chap. 18; W. W. Buckland, *The Main Institutions of Roman Private Law* (Cambridge 1931), p. 292.

[2] D.43.24.11.14, Ulpian 71 *ad edictum*; *h.t.* 12, Venuleius 2 *interdictorum*.

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Paul 69 *ad edictum*, may well have been taken from a passage where Paul discussed the availability of the defence in situations of that general type. Up until now, the text has occasionally surfaced in modern accounts of the law, but simply as an example of an objection by B giving A the right to bring the interdict.[3] The lack of attention paid to the text is scarcely surprising since all that remains of Paul's discussion is this unprepossessing scrap:

> *Idem 69 ad edictum* interdictum quod vi aut clam per quemvis domino adquiritur, licet per inquilinum.
> *The same 69 on the edict* The interdict against force or stealth is acquired for the owner by anyone, even a lodger.[4]

The term *inquilinus*, which Thomas translates as "lodger", is also used of a tenant with exclusive occupation of a house, so that it is not clear precisely what situation Paul had in mind. The specific reference to the case of the *inquilinus* at the end of the text ("by anyone, even though by a lodger") seems perhaps even more abrupt in the original Latin than in Thomas's deceptively elegant translation. The compressed form of the text strongly suggests that the compilers of the Digest have taken a more complex passage in the original work of Paul and have cut it down so as to produce this generalisation—which is, of course, typical of their work.

We have referred to Paul as the author of the fragment. The use of *idem*, "the same", in the inscription is intended to indicate that the jurist who wrote this text also wrote the preceding text, D.43.24.16, which comes from book 67 of Paul's edictal commentary. In fact, however, on the authority of Lenel,[5] text 17 is generally attributed to Ulpian.[6] Since this obscures its significance, our first task must be to demonstrate that Lenel's attribution of the text to Ulpian is mistaken. For this we must examine its position in the context of title 43.24 as a whole.

II. The Position of Text 17 in Digest Title 43.24

Title 43.24 deals with the interdict *quod vi aut clam*. Its general structure fits a pattern which is found in many other titles in the

[3] Windscheid-Kipp, *Lehrbuch des Pandektenrechts* (9th ed., Frankfurt-am-Main 1906), vol. 2, § 465 n. 3; Berger, "Interdictum", col. 1664, line 11; Bonfante, *Corso*, vol. 2.1, pp. 468 and 473 n. 2.

[4] Translation by J.A.C. Thomas, in A. Watson ed., *The Digest of Justinian* (revised ed., Philadelphia 1998) vol. 2.

[5] *E.P.*, p. 482 n. 6; O. Lenel, *Palingenesia Iuris Civilis* (Leipzig 1889; hereinafter "*Palingenesia*"), vol. 2, col. 816.

[6] *Index Interpolationum*; apparently also A. M. Honoré, "Editing the Digest" (1973) 90 Z.S.S. 262, 298. Bonfante, *Corso*, vol.2.1, pp. 468 and 473 n. 2 quotes text 17 as coming from Paul without, however, noticing Lenel's argument.

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Digest.[7] The Edictal mass, *i.e.* the body of texts excerpted by the group of compilers assigned to deal, in particular, with most of the jurists' commentaries on the praetor's edict, is to be found between text 1 and text 19—although these texts are interspersed with a certain amount of material from other masses, in the shape of texts 2, 4, 8, 10, 12 and 14. For present purposes that other material can be ignored. As is to be expected, most of the Edictal mass was taken from book 71 of Ulpian's commentary since that is the *sedes materiae* where Ulpian's commentary on the interdict *quod vi aut clam* was to be found. Excerpts from book 71 make up texts 1, 3, 5, 7, 9, 11, 13 and 15. In them Ulpian goes through the wording of the interdict and on to the *formula arbitraria* or *iudicium secutorium*.[8] In 15.12 Ulpian remarks that, since the plaintiff is able to recover *quod interest*, if he obtains what the matter is worth to him in other proceedings, he should not be able to recover anything by this action.

With that, we reach the end of the excerpts which the compilers have preserved from Ulpian's commentary on the praetor's edict on this topic. Indeed, according to the inscriptions in the Digest, there is only one other excerpt from Ulpian's edictal commentary in the title. It is the very last excerpt in the Edictal mass, text 19, from book 57 of Ulpian's edictal commentary where he was dealing with *iniuria*. One topic to be covered was the edict *si ei, qui in alterius potestate erit, iniuria facta esse dicetur*, where the praetor indicated that, depending on the circumstances, he would be prepared to grant an action to someone who had been defamed, even though he was still *in potestate* and any action would normally have had to be brought by his father or grandfather. Lenel plausibly suggests that Ulpian was drawing a parallel between the availability of the defamation action to the son in these particular circumstances and the availability of the interdict *quod vi aut clam* not merely to the owner but to a son or a tenant in a case where their enjoyment of the land had been impaired by trees being cut down *vi aut clam*.[9] The compilers read book 57 before book 71 of Ulpian *ad edictum*.[10] Therefore, after the initial process of excerpting was over, text 19

[7] See, *e.g.*, the discussion of Digest title 3.3 in A. Rodger, "*Procurator Restitutus*" in U. Manthe and C. Krampe (eds.), *Quaestiones Iuris* (Berlin 2000), p. 207.

[8] Lenel, *E.P.*, p. 483. On the formula and action see Lenel's general observations: *E.P.*, pp. 448–449 and 450.

[9] *E.P.*, p. 402 n. 8; *Palingenesia* vol. 2, col. 777, drawing attention to D.2.4.12, also from book 57 *ad edictum*, where Ulpian refers to the possibility of a son *in potestate* taking action, in the absence of his father, against one of his father's freedmen who has summoned him to court.

[10] For the order of reading see the results of Bluhme's analysis as conveniently set out in the *Stereotype Digest*, Additamenta, p. 929: Ulpian 56–81 *ad edictum*, no. 101; Paul 53–78 *ad edictum*, no. 102; Celsus *digestorum*, no. 134. The detailed breakdown of the order of reading the books confirms that Ulpian 57 was read before both the part of Ulpian 71 dealing with the interdict *quod vi* (71 fin.) and Paul 67.

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would have been found in a position in front of all the other excerpts which the compilers have preserved from the Edictal mass. In other words, omitting text 17 for the moment, the order would have been: 19, 1, 3, 5, 6, 7, 9, 11, 13, 15, 16—plus 18 from Celsus 25 *digestorum*. Since text 19 dealt with a relatively minor matter, however, the editor of the title took it from the front of the Edictal mass and placed it at the end, leaving the title to begin with the excerpts from the key part of Ulpian's commentary.[11]

Between text 15, from book 71 of Ulpian's commentary, and text 19, from book 57, we find three other texts that were excerpted by the Edictal committee. We can leave text 18, from book 25 of Celsus' *digesta*, on one side and concentrate on texts 16 and 17.

Paul dealt with the interdict *quod vi aut clam* in book 67 of his edictal commentary.[12] The compilers took a short passage from that commentary and inserted it as text 6, where it expands on Ulpian's treatment, in *h.t.* 5.11 to 5.14, of the liability of a defendant who did not carry out the work himself but gave orders for it to be done. With that exception, immediately after the end of the excerpts from Ulpian's commentary on the edict *quod vi aut clam*, we find in text 16 all the equivalent material from Paul's commentary that the compilers thought worth preserving for this title.[13] Therefore, the text occurs at this point not because of any connexion between the subject-matter of 15.12 and 16 pr., but simply because the compilers' practice when constructing a Digest title was to put any useful unused material from Paul after the body of excerpts from Ulpian. Text 16 deals with two related matters. The principium and 16.1 consider who may bring the interdict.[14] In particular, Paul makes the point that the plaintiff need not have been in possession of the land in question. It is enough that his interest was affected by the work.[15] This appears to be taken from the part of Paul's commentary which would have corresponded to the part of Ulpian's commentary from which excerpts were taken to form *h.t.* 11.8 to 13.5. Then 16.2 deals with what the defendant might be required to do by way of *restitutio*,

[11] Honoré, 90 Z.S.S. 298.

[12] *E.P.*, p. 482 n. 6; *Palingenesia* vol. 1, col. 1083 (LVII is a misprint for LXVII).

[13] *E.P.*, p. 482 n. 6; *Palingenesia* vol. col. 1083, paras. 764 and 765. The compilers used a very short fragment in their title, 39.1, on *operis novi nuntiatio*: D.39.1.17. The inscription of that text refers to Paul 57 *ad edictum*, but Lenel corrects this to Paul 67 *ad edictum*: *E.P.*, p. 482 n. 6; *Palingenesia* vol. 1, col. 1083 n. 1. This correction seems to be sound and does not run up against the same kinds of difficulty with the order of the texts in the title as his purported correction of the inscription of D.43.24.17.

[14] Lenel notes that, on his reconstruction, the wording of the interdict itself did not indicate who could bring or who could be caught by the interdict: *E.P.*, p. 483.

[15] The text takes a noticeably wide view of the usufructuary's interest so as to include his pleasure in the beauty of non-fruit-bearing trees. See the discussion in F. Raber, "Zum pretium affectionis" in F. Horak, W. Waldstein (eds.), *Festgabe für Arnold Herdlitczka zu seinem 75. Geburtstag* (Munich 1972), p. 197 at pp. 209–210 with references.

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depending on how far he himself had been involved in acting *vi aut clam*. Again, at best, this is a small fragment from what must have been a much more extensive discussion, corresponding to the one by Ulpian which is the source for *h.t.* 13.6 to 15.4.[16]

All is plain sailing so far. But with text 17 we come across a difficulty. As we have seen, the inscription indicates that this text too preserves a fragment from Paul's edictal commentary—but, this time, from book 69 where Paul did not deal with the interdict *quod vi aut clam*. There can, of course, be no real question of the inscription mistakenly referring to book 69 (LXVIIII) rather than to book 67 (LXVII) since, if the material had been taken from book 67, it would simply have appeared as part of text 16, rather than as a separate text. As Lenel's analysis shows, what Paul dealt with in book 69 of his commentary was part of the Edictal title (XLIV) *de exceptionibus*, on exceptions, *i.e.* defences.[17] The connexion between that topic and the interdict *quod vi aut clam* is not immediately apparent. For this reason, Lenel decided that an error had indeed crept into the inscription of text 17, which was therefore pointing to the wrong origin for the text.

To Lenel, steeped in the jurists' commentaries, a comparatively simple solution seemed to be at hand. As he points out,[18] not infrequently inscriptions with *idem* are inaccurate and the excerpt is not, in fact, by the same author as the previous fragment. This may happen, for example, if the inscription originally referred back correctly to the author of the preceding text but that text was subsequently deleted during the editing of the title. For present purposes the phenomenon, rather than the explanation for the phenomenon, is what matters. Here, since he was unable to think of a suitable place for text 17 in book 69 of Paul's edictal commentary, Lenel suggested that it actually came from book 69 of Ulpian's edictal commentary where he dealt with the interdicts *unde vi* and *unde vi armata*.[19] And that suggestion has in effect been accepted by scholars ever since.[20]

Even on its own terms, however, Lenel's solution is not particularly compelling. Most obviously, Ulpian dealt with the

[16] As Beseler pointed out, the substance of 16.2 is somewhat surprising if it is intended to suggest that a defendant who acted *vi aut clam* and is in possession of the offending work need do no more than allow it to be removed at his expense: G. von Beseler, *Beiträge zur Kritik der römischen Rechtsquellen* vol. 4 (Tübingen 1920), p. 282. See also F. Schulz, "Die Lehre vom erzwungenen Rechtsgeschäft im antiken römischen Recht" (1922) 43 Z.S.S. 171, at p. 260. It is not at all clear why Schulz regards the discussion as being out of place at this point.

[17] *E.P.*, p. xxiv; pp. 501–503 and 506. Gaius' commentary *ad edictum provinciale* deals with this title at a different point: *E.P.*, pp. 9–11.

[18] *E.P.*, 8.

[19] *E.P.*, pp. 461–468.

[20] See note 6.

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interdict *quod vi aut clam* in book 71, rather than book 69 of his commentary. So one still has to explain why he would have mentioned it there. But Lenel might have pointed out that the specific reference to the *interdictum quod vi aut clam*, rather than just a non-specific reference to *hoc interdictum*, was indeed consistent with the text being taken from a book where Ulpian was dealing with other interdicts, *viz. unde vi* and *unde vi armata*. In support of his suggestion Lenel connects[21] text 17 with D.43.16.1.22, from book 69 *ad edictum*, where Ulpian says that, when considering whether a plaintiff "possesses" land for the purposes of the interdict *unde vi*,[22] no-one doubts that an owner possesses what his procurator (representative) or tenant holds and that, accordingly, if they are "ejected" from the land, he is too, even if at the time he does not know what has happened to them. Lenel must be taken to suppose that, when stating the rule for the interdict *unde vi*, Ulpian took the opportunity to point out that, somewhat similarly, in the case of the interdict *quod vi aut clam* the owner can bring the interdict if work is carried out in the face of an objection by his tenant.

In reality, to a sophisticated lawyer like Ulpian these cases would not be comparable in any meaningful way. In the case of the interdict *unde vi* the decision turns on the owner possessing the land through his procurator or tenant. The basis for the decision on the interdict *quod vi aut clam* appears to have been quite different—to judge, at least, by the argument attributed to Ulpian in D.43.24.3 pr., Ulpian 71 *ad edictum*:

> prohibere autem non utique per semet ipsum necesse est, sed et si quis per servum suum vel procuratorem prohibuerit, recte videtur prohibuisse. idem etiam si mercennarius meus prohibuerit. nec quem moveat, quod per liberam personam actio adquiri non solet: nam prohibitio haec demonstrat vi te facere, quid mirum, cum et si clam tu me feceris, habeam actionem? ergo facto magis tuo delinquentis quam alieno adquiritur mihi actio.
>
> Prohibition does not necessarily have to be by the adversary himself. If anyone expresses it through a slave or a procurator, he is rightly held to have prohibited, and the same applies even if a paid servant has prohibited. And it is of no moment that

[21] *E.P.*, p. 461 n. 19; *Palingenesia* vol. 2, col. 816.

[22] Lenel, *E.P.*, pp. 463–464, proceeds on the basis that the text of the interdict in Julian's revision of the Edict contained a clause, certainly found in the text at the time of Cicero, which specifically referred to the plaintiff having been in possession at the time of his ejection. There is, however, much to be said for Keller's view that the form of D.43.16.1.23 and the argument from the decision of Vivianus in *h.t.* 1.45, both from Ulpian 69 *ad edictum*, point to the requirement of possession being inferred from the requirement that the plaintiff should have been "ejected". Note that Lenel has some difficulty in pinpointing the context of 1.45 in Ulpian's commentary: *E.P.*, p. 465; *Palingenesia* vol. 2, col. 818 n. 1. The point, which does not matter for present purposes, cannot be discussed further here.

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> the right to an action is not usually acquired through a free person. For since this prohibition shows that you are using force, why should that be surprising, when, even if you had acted by stealth in my absence, I would have right to an action? Therefore I acquire the action by your wrongful act rather than by the act of another.[23]

The text deals first with the position where the owner's slave or procurator objects to the defendant's operations. In that situation the owner is treated as having made the objection himself. D.39.1.17, Paul 67 *ad edictum*,[24] shows that Paul too considered that the owner could bring the interdict if his procurator objected to the defendant's operations:

> si procurator opus novum facientem prohibuerit, domino competit quod vi aut clam interdictum.
> If a procurator restrains someone who is carrying out new work, an interdict against force or stealth is available to the principal.[25]

Presumably, therefore, Paul would have analysed this case in the same way as Ulpian. Ulpian then moves on to the case where I have hired someone to work for me and he seeks to prohibit the defendant's operations. The same applies there too. The text goes on to confront a possible argument against that view, to the effect that I do not usually acquire a right of action through a free person. The answer to that argument starts from the proposition that the prohibition simply serves to show that you have acted by force, *vi*. That being so, there is nothing surprising if I can bring the interdict in these circumstances since I can also do so where there has been no such prohibition: if, knowing that I would object if I were present, you deliberately did the same thing in my absence (*clam*), I would have an action. This shows, the text says, that I acquire the right to bring the interdict by reason of your wrongful act, rather than by reason of the act of anyone else. In other words, unlike *operis novi nuntiatio*, the interdict *quod vi aut clam* operates *in personam*, on the basis of the defendant's wrongful act, rather than *in rem* on the basis of the objection.[26]

Most of the passage has been attacked as interpolated.[27] For instance, in a study of *mirus*,[28] Beseler deletes everything from *idem etiam* to the end as postclassical. He does not indicate his reasons,

[23] Translation by Thomas, in Watson, *The Digest of Justinian* vol. 2. I have added a translation of the last sentence of the passage, which Thomas omitted.
[24] See note 13.
[25] Translation by C.J. Tuplin, in Watson, *The Digest of Justinian* vol. 2.
[26] Karlowa, *Römische Rechtsgeschichte*, vol. 2, pp. 1234–1235. On the effect *in rem* of *operis novi nuntiatio*, see, for instance, D.39.1.10, Ulpian 45 *ad Sabinum*; *Palingenesia* vol. 2, col. 1180.
[27] *Index Interpolationum*.
[28] *Beiträge*, vol. 4, p. 199. See also p. 238.

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but, so far as the substance of the text is concerned, he must have been of the view that in classical law the act of an independent third party could not be treated as the act of the owner so as to entitle him to bring the interdict. As to the language, Beseler would have pointed to the change from "if anyone" in the first sentence to "if my hired hand" in the second, with the introduction of "you" as the defendant. He might well have taken the point that it is unsatisfactory to frame an argument on the loosely expressed basis that a right is not "usually" acquired through a free person. He might also have shared Albertario's view that the use of *actio* in speaking of an interdict is not in accordance with the usage of the classical jurists and is therefore a sign of interpolation.[29] Then there is the rhetorical question using *mirum*, the somewhat strange word order *cum et si clam tu me feceris* and the unusual construction *facto ... tuo delinquentis*.[30]

I would not regard the case for the interpolation of the substance of this discussion as made out. The kind of grammatical change of subject that is found in the text is common in legal writing, both ancient and modern, and is certainly not an infallible mark of interpolation: often it suggests, at most, that the original has been shortened. While the reference to the fact that a right of action is not "usually" acquired through a free person may lack precision, as a form of shorthand it seems acceptable when an argument is being summarised. The construction *facto tuo ... delinquentis*, though unusual,[31] seems particularly apt here where it keeps the statement short without sacrificing the distinction between the "wrongful" act of the defendant and the act of the free person. Most importantly, there seems to be no *a priori* reason to reject the possibility that in the late classical period Ulpian was prepared to hold that the owner could bring the interdict when the defendant had gone on with his operations despite the objection made by someone whom the owner had hired to work for him. On the other hand, if the compilers had altered the text to allow the owner to bring the interdict in these circumstances, it would have been somewhat surprising if they had simultaneously included a potential contrary argument which then required to be refuted. Moroever, the refutation takes the form of a subtle argument which in substance—despite the rhetorical question—looks more like a

[29] See *E.P.*, p. 477 where Lenel rightly holds that the usage is found in classical writers.
[30] Cf., Berger, "Interdictum", col. 1664 lines 9–10; G. Segrè, "*Obligatio, obligare, obligari* nei testi della giurisprudenza classica e del tempo di Diocleziano", *Studi in onore di Pietro Bonfante nel XL anno d'insegnamento* (Milan 1930) vol. 3, p. 499 at p. 579.
[31] Leumann-Hofmann-Szantyr, *Lateinische Grammatik* vol. 2 (revised, 1972), p. 61.

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classical decision than something devised by the compilers to support an innovation that they themselves had made.[32]

The reasoning in *h.t.* 3 pr. therefore suggests that there would have been no true parallel between the legal situation of an owner possessing through his tenant for the purposes of the interdict *unde vi* and an owner being able to bring the interdict *quod vi aut clam* after work went ahead despite an objection by his tenant. It is therefore unlikely that Ulpian would have been drawing that parallel in text 17.

We need not consider the point further, however, since a fundamental objection to Lenel's solution has been overlooked. If text 17 really did come from Ulpian 69 *ad edictum*, then once the initial process of excerpting the texts for title 43.24 was complete, the material that now forms text 17 would have come before all the passages of edictal commentary that are found between texts 1 and 15, but *after* the excerpt from Ulpian 57 *ad edictum* which now makes up text 19.[33] So, on Lenel's hypothesis, the original order would have been: 19, 17, 1, 3, 5, 6, 7, 9, 11, 13, 15, 16—plus 18 from Celsus. Since text 17 is relatively unimportant and would certainly not have been worth a prominent position at the start of the title, we might reasonably have expected the title editor to move it down to the end of the Edictal material. If that had happened, however, it would have been found beside—but, again, *after*—text 19. Instead, it comes between texts 16 and 18. Of course, the editor might have taken it from its place after text 19 and put it where we now find it, either because it supplemented what was said in text 16, or because of its connexion with what Celsus said in 18. But, without exploring the point in detail, it is obvious that there is nothing which ties text 17 in with either of these texts. It is therefore implausible to suggest that the editor would have moved it to the place where it now is.

By contrast, if we assume that the inscription of text 17 is accurate, then the text comes exactly where we should expect to find it in the title, according to Bluhme's analysis.[34] As a text from book 69 of Paul's commentary, it should come—as it does—after the excerpts from book 67 of Paul's commentary that make up text 16, but before the excerpt from Celsus 25 *digestorum* in text 18. To be precise, the order of the Edictal mass texts after excerpting was: 19, 1, 3, 5, 6, 7, 9, 11, 13, 15, 16, 17, 18. Only what is now text 19 was moved during the course of the editing. In summary, the actual

[32] Karlowa, *Römische Rechtsgeschichte*, vol. 2, pp. 1234–1235 appears to accept this part of the text as genuine and as consonant indeed with the basic nature of the interdict.
[33] Cf., Honoré, 90 Z.S.S. 298; *Stereotype Digest*, p. 929.
[34] As seen in the *Stereotype Digest*, p. 929.

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position of text 17 is inexplicable on Lenel's theory that the inscription should read Ulpian 69 *ad edictum*. That theory must therefore be rejected. Equally, since the position of text 17 in the title is consistent with the inscription being correct, we must assume that it does indeed come from Paul 69 *ad edictum*.

III. The Original Context of D.43.24.17

The correction of Lenel's error in attributing D.43.24.17 to Ulpian can be regarded as certain. We can also say, with confidence, that the text came from Paul 69 *ad edictum*. In going further and suggesting a possible context for the text in book 69 of Paul's edictal commentary, we inevitably cross into a realm where certainty cannot be achieved. The difficulty may be thought the more striking in the present case where Lenel himself took refuge in altering the inscription of the text.

As has been remarked already, in book 69 Paul covered part of the Edictal title *de exceptionibus*, on defences. In that title the praetor set out certain defences which would be available to litigants in appropriate cases. In book 69 Paul commented on, at least, the part of the title down to the defences which were available in actions based on bankers' contracts, *si ex contractibus argentariorum agatur*.[35] Paul may indeed have gone a little further, but we cannot tell since there are no excerpts from his commentary on the *exceptio annalis* or the *exceptio ne praeiudicium hereditati fiat*. All we know for certain is that, by the time he was dealing with the *exceptio rei iudicatae vel in iudicium deductae*, Paul had reached book 70.[36] It has to be said immediately that none of the individual *exceptiones* which Paul either covered[37] or may have covered[38] in book 69 immediately stands out as offering a plausible occasion for Paul's remark about the interdict *quod vi aut clam* in D.43.24.17.

It should be remembered, however, that—as happened with many other titles in the Edict[39]—both Ulpian and Paul began their commentary on the Edictal title *de exceptionibus* by addressing general topics that would be relevant to the subject-matter of the new title as a whole.[40] After that they moved on to deal with the individual *exceptiones* mentioned in the Edict. On this occasion

[35] *E.P.*, p. 503 n. 10; *Palingenesia* vol. 1, coll. 1084–1085.
[36] *E.P.*, p. 506 n. 7; *Palingenesia* vol. 1, col. 1085.
[37] *Viz. si quis vadimoniis non obtemperaverit, litis dividuae et rei residuae, si alieno nomine agatur* and *si ex contractibus argentariorum agatur*.
[38] *Viz. exceptio annalis* and *ne praeiudicium hereditati fiat*.
[39] On the very first title see *E.P.*, p. 51 n. 1. On title VIII *de procuratoribus et defensoribus* see Rodger, "*Procurator Restitutus*", p. 218.
[40] *E.P.*, p. 501 n. 1.

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they will have discussed general points relating to defences and will have illustrated them by reference to examples drawn from a variety of situations. These general comments by Paul were to be found at the beginning of book 69. It is therefore worth considering whether text 17 might have come from this introduction, where Paul was using the case of the interdict *quod vi aut clam* to make some general point about the working of defences, *exceptiones*.

The praetor's edict on the interdict *quod vi aut clam* did not contain any clause that operated as a built-in *exceptio*.[41] But that is not, of course, to say that *exceptiones* were not available in appropriate cases.[42] Lenel draws attention[43] to two texts, D.43.24.7.3, Ulpian 71 *ad edictum*, and *h.t.* 22.2, Venuleius 2 *interdictorum*, which refer to an *exceptio quod non tu vi aut clam feceris*. If, for instance, the plaintiff sought an interdict against the defendant demolishing a wall *vi*, according to *h.t.* 7.3 Julian, at least, would have favoured allowing a defence if the plaintiff had himself erected the wall *vi*, in the face of objections by the defendant. Presumably, the classical jurists were divided on the point, but in a passage long attributed to Justinian's compilers,[44] the text goes on to say that the *exceptio* should be admitted only very sparingly; otherwise the matter should be left to the judge. Similarly, Lenel points out[45] that, in his discussion of the requirement that the work should have been done by force, *vi*, Ulpian mentions a number of situations where questions as to the availability of an *exceptio* arise.[46] In addition, in *h.t.* 7.4 Ulpian refers to a discussion, dating back to the Republic, about the availability of a defence to the interdict (and to the *actio legis Aquiliae*) where the plaintiff's house was demolished to create a fire-break.[47] These texts are sufficient to show that questions relating to *exceptiones* could indeed be thrown up by the interdict *quod vi aut clam*. That very fact suggests that Paul's introductory passage to the Edictal title *de exceptionibus* could have provided a setting for the discussion from which text 17 has been taken.

[41] M. Kaser and K. Hackl, *Das Römische Zivilprozessrecht* (2nd ed., Munich 1996), p. 412.
[42] See Karlowa, *Römische Rechtsgeschichte*, vol. 2, pp. 1237–1238; Bonfante, *Corso*, vol. 2.1, pp. 470–471.
[43] *E.P.*, p. 482 n. 15, at p. 483.
[44] *Index Interpolationum*; "probably interpolated" in the view of Bonfante, *Corso*, vol. 2.1, p. 470 n. 4.
[45] *E.P.*, p. 482 n. 10.
[46] *H.t.* 3.2–3.4.
[47] A. Rodger, "Labeo, Proculus and the Ones that Got Away" (1972) 88 L.Q.R. 402, at p. 405 with refs.

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Before turning to look at *h.t.* 3.2 and 3.3, it is useful to notice one of the texts that Lenel considers may have come from that introductory passage, D.43.5.4, Paul 69 *ad edictum*:

> si sint tabulae apud pupillum et dolo tutoris desierint esse, in ipsum tutorem competit interdictum: aequum enim est ipsum ex delicto suo teneri, non pupillum.
> If the documents are with a *pupillus* and cease to be because of the fraud of his tutor, the interdict lies against the tutor himself. For it is right that he and not his ward should be liable for his own offence.[48]

The text is concerned with the interdict *de tabulis exhibendis* which could be used to force anyone who was in possession of the wax tablets containing a will, or who had fraudulently got rid of them, to make them available.[49] The text tells us that, where the tablets were in the possession of a pupil and his tutor got rid of them, the interdict lay against the tutor rather than the pupil. There is no mention of an *exceptio*. This led Krüger to wonder whether the inscription is wrong and whether the text actually comes from book 64 of Paul's commentary where he dealt with this particular interdict.[50] Unfortunately, in this case the sequence of the texts in the Digest title does not allow us to decide that matter one way or the other. Happily, however, for present purposes, it does not really matter. What is interesting is Lenel's suggestion that, if the excerpt was from book 69, it might have come from an introductory passage in which Paul was discussing whether in an action brought by a pupil the defendant might have an *exceptio* on the basis that the pupil's tutor had acted fraudulently in the matter.[51] As Lenel himself realised, the suggestion is not particularly plausible, since D.43.5.4 does not seem to contemplate a situation in which the pupil would be a plaintiff, as opposed to a defendant. Again, this does not matter. The important point is that Lenel's reference to D.44.4.4.23, Ulpian 76 *ad edictum*, shows that a question which several jurists raised in connexion with the *exceptio doli mali et metus*[52] was whether an action by a pupil could be defeated by an *exceptio* based on the fraud of his tutor. And, whether or not the short passage from Paul 69 *ad edictum* in D.43.5.4 did actually come from a discussion of that point, Lenel was right to see that the point itself raises a general issue of a kind that Paul might well have covered in the introduction to this Edictal title.

[48] Translation by T. Braun, in Watson, *The Digest of Justinian* vol. 2.
[49] *E.P.*, p. 455.
[50] *Stereotype Digest*, p. 731 n. 2.
[51] *Palingenesia* vol. 1, col. 1084 n. 3.
[52] The text is from Ulpian's commentary on the *exceptio doli mali et metus*: *E.P.*, p. 512; *Palingenesia* vol. 2, col. 864.

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H.t. 3.2 and 3.3, Ulpian 71 *ad edictum*, are to be considered against that background:

> 2. sed si permiserit, adversus eum, qui utatur interdicto, exceptio erit necessaria. 3. non tantum autem si ego permisero, sed et si procurator meus vel tutor qui tutelam administrat vel curator pupilli furiosi sive adulescentis, dicendum erit exceptioni locum fore.[53]
> 2. But if the person availing himself of the interdict gave his permission, a defence will be necessary against him. 3. And not only if I give my permission; but even if it is given by my procurator, or the tutor who administers tutelage of a *pupillus*, or the curator of a lunatic or adolescent, it must be said that there will be scope for the defence.[54]

In 3.2 Ulpian says that, if the plaintiff has given permission for the work, then an *exceptio* will be necessary. In other words, if the work was actually done by force (*vi*), the fact that, at one point, the plaintiff gave permission will not change that. To defeat the interdict, the defendant will therefore need to have an *exceptio* inserted in the formula saying that he should not be found liable if the plaintiff consented to the work. In 3.3 Ulpian takes the matter further and considers the position if the plaintiff did not give permission, but his procurator did; or if a tutor or curator seeks the interdict on behalf of a pupil or a person of unsound mind even though the tutor or curator himself had actually given permission for the work to be done. In these cases Ulpian says that the defendant should have a good defence against the proceedings for interdict. The problem relating to the pupil and his tutor who gave permission for the work raises issues of the same kind as the problem of the pupil and his fraudulent tutor which Lenel envisaged might have been discussed in Paul's introduction to the Edictal title. The same can equally be said of the other examples mentioned by Ulpian in 3.3.

On that basis it is not hard to envisage that text 17 could derive from a passage in Paul's introduction to the Edictal title in which he discussed a case of this kind: B, the tenant of a house belonging to A—who is therefore in no sense A's representative—objects to work which C wishes to carry out and which will affect the house. In principle, as text 17 says, the owner becomes entitled to the interdict *quod vi aut clam* in these circumstances. But the position may not be so clear in various permutations of those basic facts. For example, when C proceeds with the work and A raises proceedings for the interdict, C defends them on the basis that,

[53] The words *pupilli* and *sive adulescentis* cause certain difficulties. See *Index Interpolationum*. Those difficulties do not matter for present purposes.
[54] Translation by Thomas, in Watson, *The Digest of Justinian* vol. 2.

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even though B did originally object, he subsequently gave C permission to go on with the work. That would clearly be a good defence to proceedings by B; but is it a good defence to proceedings by A? Or else, A has given C permission to do the work and so will be defeated by an *exceptio* if he tries to interdict C. Will the *exceptio* also bite if B brings interdict proceedings against C? The same kind of issue would arise where previously, in the face of an objection by C, B had built a wall on A's land *vi* and C then knocked it down *vi*, in the face of an objection by B. In any interdict proceedings by B, C could try to rely on the *exceptio quod non tu vi aut clam feceris*. But, if A tried to interdict C, would that defence be available against A? Or else, B brings interdict proceedings against C requiring him to demolish a wall that he had built *vi*, but is met with a defence that A had previously destroyed it by force, *vi*.

The general issue underlying all these cases—which remains as live in the law today as it was 2,000 years ago—is the extent to which a defence that may be available in proceedings brought by one person may also be available in proceedings relating to the same matter brought by someone else. That issue might have made any of the supposed cases on the defences to the interdict *quod vi aut clam* suitable for inclusion in Paul's general preface to the Edictal title *de exceptionibus*. As a matter of legal principle, one might think, the answer to the underlying question would depend, in part at least, on the extent to which the right of the person bringing the proceedings was to be regarded as independent of the right of the person whose prior act would give rise to the defence. It is therefore worth noticing that, in the Digest at least, *h. t.* 3.2 and 3.3 come shortly after the passage in 3 pr. which makes the point that, where a free person, such as the plaintiff's hired hand, objects to the defendant's operations, it is not his objection, but the defendant's wilful disregard of that objection, which entitles the owner to raise proceedings for an interdict *quod vi aut clam*. On that rather sophisticated analysis, one might surmise that Paul might have held that, where the tenant objected, the owner's right to bring interdict proceedings was an independent right which was not to be defeated by an *exceptio* relating to the subsequent actings of the tenant. Further it would not be safe to go.

IV. Conclusion

We should emend Lenel's *Palingenesia* by deleting D.43.24.17 from paragraph 1514 of Ulpian's works, where it appears as part of his commentary on the interdicts *unde vi* and *unde vi armata* in book

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69 *ad edictum*.[55] In accordance with its inscription, the text should be assigned instead to Paul 69 *ad edictum* and, if the suggestion made here is followed, it should be placed among the texts from his introduction to the Edictal title *de exceptionibus*.[56, 57]

[55] *Palingenesia* vol. 2, col. 812; *E.P.*, p. 461 n. 19.
[56] *Palingenesia* vol. 1, col. 1084, paragraphs 774–776; *E.P.*, p. 501 n. 1.
[57] I am grateful to David Johnston for reading and commenting on a draft of this paper.

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