Daube and Palingenesia

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Professor David Daube's interest in palingenesia is well known, especially as a result of his 1959 paper on the palingenesia of some classical texts.[1] What I particularly value about his approach is that it goes beyond "pure" palingenesia: Daube does not just identify where a text originally belonged in a classical work but goes on to put flesh on the bones, by exploring the ramifications legal, social, linguistic and philosophical of his palingenetic research. He was also (notoriously) fascinated by the social history of Roman law, as his 1966 Gray Lectures show,[2] as well as a series of papers on such things as slave-catching and "dodges and rackets" (his words) in Roman law.[3] All that this very short paper does is look at a text that certainly fits into one of these contexts and may perhaps belong in both. Although the title of the paper is very general, it will be enough to look at a single sentence of 11 words.

The text is *D.*50.17.163, a fragment from Ulpian *ad edictum* book 55:

> Cui ius est donandi, eidem et vendendi et concedendi ius est.
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> A person who has the right to make a gift of a thing also has the right to sell or to grant it.

In the *Palingenesia* Lenel suggests that the inscription of the fragment is false, although he does not propose any alternative.[4] His reasoning appears to be simply that it cannot readily be found a home in the subject matter of book 55, which dealt mainly with freedom and slavery but also with *publicani*.

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[1] D. Daube, "Zur Palingenesie einiger Klassikerfragmente," 76 *ZSS* (rom. Abt.) 149 (1959) [= *Collected Studies*, 2:789].

[2] D. Daube, *Roman Law: Linguistic, Social and Philosophical Aspects* (Edinburgh, 1969).

[3] D. Daube, "Slave-Catching," 64 *Jur. Rev.* 17 (1952) [= *Collected Studies*, 1:501]; "Dodges and Rackets in Roman Law," 61 *Proc. Class. Assoc.* 28 (1964) [= *Collected Studies*, 2:1081]; "Fraud No. 3," in N. MacCormick and P. Birks (edd.), *The Legal Mind: Essays for Tony Honoré* (Oxford, 1986), 1 [= *Collected Studies*, 2:1409].

[4] *Pal.*, 2:761 (Ulpian 1307).

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In his 1959 paper Daube discussed this text as an example of plucking a perfectly classical rule from its original limited context and generalizing it by excising all traces of its origin, so producing a rule that is not false to classical law but which there is no reason to believe was applied as a *regula* or interpretative principle.[5] He was clearly of the view that there is no reason to correct the inscription. He attributed the text to the edict on *publicani* and explained how it fitted within that general context. In his view it was concerned with the claim against *publicani* for forcible seizure of property. He gave various ingenious examples. For instance, the owner of a thing allows me to make a gift of it: can I instead pledge it? If I pledge it to a *publicanus* who then seizes it in respect of taxes, does a claim lie?[6]

I quite agree with Daube's view that the inscription need not be corrected, and the way in which it might relate to *publicani* does not strike me as implausible. If, however, one takes the opportunity to look at the text in the light of the order in which, according to Bluhme and Krueger, the compilers excerpted the classical works, it emerges that the text is probably not about *publicani* at all. The reason for this is that, according to Bluhme and Krueger, the compilers excerpted Ulpian's book 54 and the first part of book 55 together with Paul's books 50 and 51.[7] But they excerpted the end of Ulpian's book 55 with Paul's book 52.[8] We can tell this from the order of fragments elsewhere in the *Digest*, especially in its last two titles. The significance of this not obviously thrilling fact is that the text following the one with which we are concerned (i.e. *D.*50.17.164) comes from Paul's book 51. Accordingly Ulpian's text no. 163 ought to come from the first part of book 55, which was jointly excerpted with Paul's book 51. But *publicani* come in the second part of book 55. We are therefore left to find a new context for the fragment in the first part of book 55.

The first part dealt, according to Lenel, with 4 edicts, all under the general heading *de liberali causa*:[9]

E 179 Si ex libertate in servitutem petatur

Where a person is claimed from freedom into slavery

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[5] Daube (note 1), 226–29 [= *Collected Studies*, 2:862–65].

[6] *Id.* at 226–27 [= *Collected Studies*, 2:863].

[7] See F. Bluhme and P. Krueger, "Ordo librorum iuris veteris," in T. Mommsen and P. Krueger (edd.), *Digesta Iustiniani Augusti* (Berlin, 1870; reprinted 1963), app. 5, nos. 110 and 111.

[8] *Id.*, nos. 114 and 115.

[9] *Pal.*, 2:758–60 (Ulpian 1294–1302); Lenel, *Edictum*, 377, 382–87.

E 180 Si controversia erit, utrum ex servitute in libertatem petatur an ex libertate in servitutem

Where there is a dispute whether the claim is of a person from slavery to freedom or from freedom into slavery

E 181 Si quis ei, cui bona fide serviebat, damnum dedisse dicetur

Where a person is said to have caused loss to one as whose slave he was acting in good faith

E 182 Si quis, cum se liberum esse sciret, dolo malo passus erit se pro servo venum dari

Where he who knows himself to be free has fraudulently allowed himself to be sold as a slave

It therefore seems that our text needs to fall within the general category of discussion of the *causa liberalis* or of the case of the free man who knowingly allows himself to be sold as a slave. Of course it is much easier to say that an attribution is wrong than to identify a convincingly correct one. My proposal, however, is that the text belongs under the edict dealing with a person who fraudulently allows himself to be sold as a slave. The origin of the legal rules that applied in this context is not at all clear, although according to Buckland they go back a good distance in time.[10] The basic position appears to have been that a free man over the age of 20 who knowingly allowed himself to be sold as a slave in order to share the price was unable to vindicate his freedom subsequently.[11] Although emphasis is laid in many of the texts not just on sale but on the purported slave's actually participating in the sale proceeds,[12] some of the texts go a bit further. For instance Paul in book 50 of his commentary (which, it will be recalled, was jointly excerpted with our text) says:[13]

In summa sciendum est, quae de venditis servis, quibus denegatur ad libertatem proclamatio, dicta sunt, etiam ad donatos et in dotem datos referri posse, item ad eos, qui pignori se dari passi sunt.

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[10] W. W. Buckland, *The Roman Law of Slavery* (Cambridge, 1908), 431–33.

[11] See *id*. at 427–28.

[12] See *id*. at 428.

[13] *D*.40.12.23.1 (Paul 50 *ed*.).

> In general what has been said about slaves sold who are barred from making a claim for freedom also applies to those who are the subject of gifts, or given as part of a dowry, as well as those who have allowed themselves to be pledged.

Gifts, as we know from Daube's own work,[14] are the first refuge of the scoundrel when it comes to disguising a sale, although that apart it is perhaps not obvious how this legal regime could easily apply to gifts. So far as securities are concerned, it is readily seen that much the same considerations as for sale might apply. Suppose the purported slave was given as a pledge for a loan and it transpired that the security would (apart from the present rule) have been worthless owing to the supposed slave's actually being free. No more appears to be said in other texts about the case of pledge. This leaves a few questions open for resolution or — alternatively — speculation: notably the question how the rule could apply to the case of a pledge which transferred no more than possession and did not purport to make the pledge creditor the owner. It may therefore be that we should think of this case as being confined to *fiducia*. If the sanction for this fraud is (as it appears to be) simply that the purported slave cannot assert his claim for freedom against the person who has acquired him, then it seems virtually essential to conclude that the rules readily applied to *fiducia* but not to any other kind of security.

There is one more text to add, again from Ulpian book 55:[15]

> Quare si filius familias emit, si quidem ipse scit, pater ignoravit, non adquisiit patri actionem: hoc si peculiari nomine egerit. Ceterum si patre mandante, hic quaeritur, an filii scientia noceat: et puto adhuc nocere quemadmodum procuratoris nocet.
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> If a son in power has bought, when he himself knows but his father does not, he does not acquire an action for his father; that is, if he is acting on account of his *peculium*. But if his father has given him a mandate, the question is whether the son's knowledge harms him. I think it still harms him, just as the knowledge of his procurator would.

This text has a bearing on the issue and is mentioned precisely because it is from Ulpian's book 55. Its significance is that it reminds us that the sale or other transaction might involve those who were not *sui iuris* and so might raise points relating to their

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[14] See, e.g., Daube, "Dodges and Rackets in Roman Law" (note 3), 28 [= *Collected Studies*, 2:1081].

[15] *D.*40.12.16.3 (Ulpian 55 *ed.*).

capacity and their *peculia*, as well as (what the text is really about) their personal knowledge. Generally speaking, it is clear that *filii familias* were not empowered to make donations from their *peculium*; they were instead meant to be operating the *peculium* for the sake of gain rather than dissipation.[16] *D.*50.17.163 is relevant here since Ulpian could have been explaining by reference to particular categories of person whether they were or were not capable of making a gift. And hence whether they were or were not capable of coming under the rule by virtue of having purported to do so.

So far as our text is concerned, it seems to me that this context provides a possible home. On that view Ulpian would be explaining that the right to make a gift carries with it the right to sell and make a composition with creditors; the converse is not true, so the right to sell does not carry with it the right to make a gift.[17] If the *filius familias* was in a particular case in fact able to make a gift, this edict could come into play since it was capable of extending beyond sales to gifts. If he had no such right, he might still have the right to sell or to pledge, and the edict could come into play in those cases but not in the case of a gift.

It would be foolish to claim that this is definitely the right place to locate our fragment but the suggestion has perhaps a degree of plausibility. In particular, it is significant that this context can be supplied from a combination of the relevant books of Ulpian's and Paul's commentaries, and especially from the reference in Paul's text to sale, gift and pledge. While I therefore suggest that the text ought to be located in a different place from the one Daube suggested, in other respects it strikes me that he would be quite content with this conclusion. First, because his general thesis that the text has been extracted from a specific context to form a broad (not clearly classical) general rule is unaffected. (It may therefore be, as he thought, that all the compilers actually did to the text apart from moving it was add *cui* at the beginning.[18]) Second, because on my hypothesis it fits into the area of dodges and rackets which Daube did so much to explore — an area which is a fine example of the unique illumination that he was able to bring to bear upon the curiosities of Roman law and its workings in Roman society.

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[16] *D.*39.5.7 pr.–1 (Ulpian 44 *Sab.*); *D.*2.14.28.2 (Gaius 1 *ed. prov.*).
[17] *Cf. D.*20.6.8.13 (Marcian *form. hypoth.*).
[18] Daube (note 1), 229 [= *Collected Studies*, 2:865].