

the main assertion of the first sentence, underscoring Anacharsis' wisdom before providing an explanation for it.

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A MISUNDERSTANDING ABOUT ROMAN DIVORCE LAW: THE MEANING OF 'PRAETER' IN *DIGEST* 24.2.9

The extract from Paul's second book *de adulteriis* which is quoted at *Digest* 24.2.9 has been the source of much discussion about its implications for Roman divorce procedure. The text reads:

nullum divortium ratum est nisi septem civibus Romanis puberibus adhibitis praeter libertum eius qui divortium faciet. libertum accipimus etiam eum, qui a patre avo proavo et ceteris susum verum manumissus sit.

The debate about divorce procedure has tended to obscure the difficulties created by the phrase *praeter libertum*. In the most recent translation, by G. McLeod in the edition of the *Digest* edited by A. Watson,¹ the whole passage is rendered:

A divorce is invalid unless it takes place in the presence of seven Roman citizens of full age as well as the freedman of the person seeking divorce. We take a 'freedman' here to include a person who was manumitted by the father, grandfather or great-grandfather or other relatives.

It will be argued here, on grounds both of language and of sense, that *praeter* should not be translated by 'as well as the...' but by 'excluding any...'. The correct translation was proposed over a century ago, but the arguments seem to have been overlooked and need to be restated.

Praeter can be used as a preposition with the accusative to include or exclude the noun it governs. Used inclusively, it means 'as well as' or 'in addition to'; used exclusively, it means 'other than', 'apart from', 'except', 'excluding'. More generally, it can often be translated by 'beyond' or 'beside'.

Praeter is used by Paul in ten other passages in the *Digest*.² In none of them does the Watson edition translate it by 'as well as'. In a number of cases, it clearly excludes the noun it governs, e.g. *D.* 2.11.7:

praeter hanc autem exceptionem ceterae, quia communes sunt, tam in libero homine quam in servo locum habent.

But the other defences, apart from this, being common, are available equally in the case of free man and slave.³

In four passages in which it is used 'inclusively', it is part of a negative expression such as *nihil praeter*.⁴ In the two remaining passages, the Watson edition translates it as 'after' and 'beyond' respectively,⁵ and in neither case would 'as well as' be a natural translation.

The passage closest to *D.* 24.2.9 is 38.1.37.pr, from Paul's commentary on the *lex*

¹ T. Mommsen, P. Krueger and A. Watson (edd.), *The Digest of Justinian* (Philadelphia, 1985).

² 2.11.7, 3.1.10, 18.2.14.4, 24.3.25.4, 25.5.2.1, 32.46, 32.78.4, 33.9.4.6, 38.1.37.pr, 44.7.29.

³ Tr. D. McCormick (in the Watson edition). At 3.1.10, the Watson edition translates it as 'not in cases of', at 33.9.4.6 'other than' and 'except', at 38.1.37.pr 'apart from'.

⁴ It is used with *nihil* in 18.2.14.4 and 32.78.4, with *non* in 44.7.29, and with *inutilis erit* in 25.5.2.1.

⁵ 24.3.25.4 and 32.46.

Iulia et Papia, where he is apparently quoting from the text of the law (as he might possibly be doing in the first sentence of 24.2.9):

qui libertinus duos pluresve a se genitos natusve in sua potestate habebit praeter eum, qui artem ludicram fecerit ...

In this case, the Watson edition's translation of *praeter* is 'apart from', and the passage clearly means that the child who is an actor does not count towards the two children who exempt a *libertus* from *operae*. The singular is used where a plural would be more natural in English ('apart from those who are actors'). Celsus quotes similar language, explicitly from the *lex Papia*:⁶

Lege Papia cavetur omnibus ingenuis praeter senatores eorumque liberos libertinam uxorem habere licere.

although here the plural is used.

An equally serious objection to the translation in the Watson edition lies in its implications for how the law would have worked. Some of the difficulties were noted by R. Schlesinger, who first proposed the 'excluding any ...' translation.⁷ Taken literally, the law would apparently have prevented someone who did not have a freedman from carrying out a divorce. The purpose of requiring a freedman to be present has been assumed by the commentators who have adopted the 'as well as' translation to be the need for him to deliver the *repudium* to the (implicitly absent) other spouse. The sending of a messenger with a notice of divorce is mentioned in a number of legal texts, and there is a well-known passage of Juvenal in which the messenger is specifically said to be a *libertus*:

'collige sarcinulas' dicet libertus 'et exi!
iam gravis es nobis et saepe emungeris; exi
ocius et propera! sicco venit altera naso.'⁸

but this is no reason to suppose that only a freedman could serve notice of divorce. A procedure like that described by Juvenal may well have been common among the upper classes, but it seems highly unlikely that the law would have prescribed it for everyone, although G. Brini suggested that this was the case.⁹ It would also be absurd for the law to have implied that the message might be taken by someone's great-grandfather's freedman but not by a friend, relative, other employee or slave. The assumption that the freedman's presence was required by the law so that he could take the message is not in fact justified by the text of *D.* 24.2.9, which states nothing about such a reason for mentioning him. If the freedman in question was supposed to be the messenger, Paul would surely have referred to him as *nuntius* or used the verb *nuntio*, and would not have needed the second sentence defining the sort of freedman he meant.

By analogy with Paul's usage elsewhere in the *Digest*, and by consideration of the sense, it seems that *praeter libertum* in 24.2.9 must be translated 'excluding any freedman', i.e. a freedman could not be included among the seven witnesses required for the act of divorce. Schlesinger notes that this is the way in which the passage was apparently understood by Byzantine and medieval commentators. In the *Basilica*,

⁶ *D.* 23.2.23.

⁷ 'Über die Form der Ehescheidung bei den Römern seit der *lex Iulia de adulteriis*', *ZRG* 5 (1866), 193–218, at pp. 197–9.

⁸ *Juv.* 6.146–8.

⁹ G. Brini, *Matrimonio e divorzio nel diritto romano*, 3: *Il diritto romano nel divorzio* (Bologna, 1889; reprinted Rome, 1975), p. 75.

praeter libertum is translated into Greek as “χωρίς ἀπελευθέρου”, which Schlesinger took to mean that the freedman was excluded.¹⁰

Why should the law have excluded a freedman from witnessing his patron's divorce? The problem which seems to have been envisaged was the relationship of divorce to the *lex Iulia de adulteriis*, the law which established the new procedure.¹¹ The debate about whether all divorces had to take place under the new form or whether only divorces concerning adultery were affected now seems to have been won by the latter argument.¹² After the *lex Iulia*, the criminal law had an interest in knowing whether a divorce had taken place, and even in knowing the date on which it took place.¹³

That being so, consideration had to be given to the question of who would be able to give reliable evidence about a divorce. The evidence might be required by either prosecution or defence, according to the point at issue. It is very likely that a freedman's evidence in a case against his patron would not be acceptable.¹⁴ Although the only direct information about rules of evidence under the *lex Iulia* concerns testimony from slaves, it is clear from other legal texts that freedmen could not be compelled to give evidence against their patrons, and at least under some statutes they could not even offer such evidence voluntarily.¹⁵

No texts appear to say explicitly that a freedman could not give evidence on his patron's behalf, but it seems from instructions to judges about evaluating witnesses' independence and reliability that what he said would carry little weight.¹⁶ One biased freedman would not count for much against six independent witnesses, but perhaps the law was concerned with the possibility that most or all of the witnesses to a

¹⁰ *Basilica* 28.7.15.

¹¹ *D.* 24.2.9 is taken from Paul's commentary on this law, and Ulpian in *D.* 38.11.1.1 says that the adultery law treated divorce as invalid *nisi certo modo...factum sit*.

¹² The reasons for this view are best set out by M. Andreev, 'Divorce et adultère dans le droit romain classique', *RHD* 35 (1957). It is adopted by, for example, M. Kaser, *Roman Private Law* (3rd ed., tr. R. Dannenbring, Pretoria, 1980), p. 295; A. Rousselle, 'Concubinat et adultère', *Opus* 3 (1984), 75–84, at p. 78; G. Longo, 'Riflessione critica in tema di matrimonio', in *Scritti A. Guarino* (Rome, 1985), 2357–83, at p. 2378; and J. Gardner, *Women in Roman Law and Society* (London, 1986), pp. 85–6. P. Corbett, *The Roman Law of Marriage* (Oxford, 1930), pp. 228–39 argues at length but unconvincingly that all divorces were affected. The main reasons for disbelieving this are the lack of legal or literary references to the new procedure and the continued possibility of confusion arising over whether or not a divorce had taken place – such confusion would surely have been very unlikely if every divorce required seven witnesses. F. de Martino, 'Chiesa e stato di fronte al divorzio nell'età romana', in *Festschrift W. Flume* i (1978), 137–51, at p. 148, maintains Corbett's view, but without considering the difficulties it raises.

¹³ A. Rousselle, *op. cit.* (n. 12), p. 78 considers two specific cases where a man might need formal proof of divorce: where he was going to bring a charge against his wife and needed a defence against any accusation of *lenocinium*, and where he intended to live with a concubine after his divorce.

¹⁴ The freedman might be required to testify against his patron if, for example, a patron being prosecuted for *lenocinium* (because he had remained married to an adulterous wife) claimed that he had in fact divorced his wife and that the divorce had been witnessed by the freedman. If the freedman's evidence was not acceptable against his patron, he would not be able to testify that he knew nothing of any such divorce. Such a complication would be avoided if the law allowed only independent citizens to witness a divorce.

¹⁵ The question is discussed in detail by A. Manfredini, 'La testimonianza del liberto contro il patrono nel processo criminale di età classica', *Studi A. Biscardi* 3 (Milan, 1982), 223–44.

¹⁶ *D.* 22.5.3 Callistratus records advice issued by Hadrian to various provincial governors about evaluating witnesses, and h.1.6 Licinius Rufinus specifically says that those who can be ordered to be witnesses are not suitable. *Paul* 5.15.1 (= *Coll.* 9.3.1, partly reproduced at *D.* 22.5.24) says that witnesses brought by the accuser *de domo* are suspect. According to *Codex* 4.20.3 (255), *domestici testimonii fides improbat*.

divorce might be the freedmen of the instigator. If a man caught his wife in adultery and wanted to divorce her immediately, as the law prescribed, his own freedmen might well be the nearest adult male citizens available, if he had a large household. A witness to a divorce whose testimony could not be used by either side if the divorce became an issue in court was worse than useless.¹⁷ There were also restrictions on a freedman's giving evidence against his patron's family, which explain the thinking in the second sentence of *D.* 24.2.9.¹⁸

It seems therefore that the reason for the *lex Iulia de adulteriis* not accepting a freedman as a witness to a divorce was the difficulty of using his testimony in court. There was a clear possibility that he might be induced to give false evidence on his patron's behalf – a possibility which would make the freedman's evidence appear worthless even if he was in fact perfectly honest. Why might a patron want a freedman to give false evidence about a divorce? Assuming that the patron was a man whose wife had committed or was suspected of committing adultery, two possible reasons can be imagined:

(a) To say that a divorce had taken place when really it had not. A man who killed his wife's lover was obliged to divorce her immediately, to avoid a charge of murder.¹⁹ A man who caught his wife *in flagrante* but did not divorce her could be charged with *lenocinium*.²⁰ In either of these cases, a man faced with a criminal charge after failing to carry out the prescribed divorce procedure might want to concoct evidence that there had been a divorce.

(b) To provide false information about the date of a divorce. The period during which a woman could be charged with *adulterium* for an offence committed while she was married was counted from the date of her divorce.²¹ Her ex-husband might like to pretend that the divorce was earlier or later than it really was – in the former case, so that a charge brought against her could be said to be outside the time limit; in the latter, so that he or a third party could still bring a charge after the real time limit had expired.

It is also conceivable, although unlikely, that a subsequent reconciliation might mean that an ex-husband and wife would prefer to forget that a divorce had been carried out,²² perhaps with the intention of protecting the woman from possible charges.

The rules about the Augustan divorce procedure receive little attention in the *Digest*, and apparently fell into obscurity. The reason for this may well have been the changes to the adultery law made by Constantine. He established that a man could bring an adultery charge against his wife without divorcing her, and severely limited the rights of outsiders to bring such a charge.²³ After that, divorce lost most of its

¹⁷ A number of these points are also noted by E. Levy, *Der Hergang der römischen Ehescheidung* (Weimar, 1925), pp. 45–6, although his explanation of the new procedure as a means of breaking *manus* has not found any support.

¹⁸ E.g. *D.* 22.5.3.5 Callistratus says that under the *lex Iulia de vi* a freedman could not give evidence against his patron's children.

¹⁹ *Coll.* 4.3.5 Paul. The husband could kill a lover only of a specified low social rank.

²⁰ *Paul* 2.26.8 (= *Coll.* 4.12.7).

²¹ *D.* 48.5.15(14).2 Scaevola, 48.5.30(29).5 Ulpian.

²² Apart from the adultery law, there might be considerations about dowry and other property arrangements which would make a continuation of the first marriage seem preferable to starting a new marriage. The possibility of a divorced couple reuniting interested the jurists considerably. If the husband was freeborn, a divorced couple could not renew their marriage after the woman had been convicted of adultery.

²³ *Codex* 9.9.29(30) (326).

relevance for the criminal law, and the possibility of giving false evidence about it retained little significance.²⁴

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FOUR TESTIMONIA ON THE ACADEMY

(1) Hesychius ε 7592 Latte

†'Εχεδημία· ἡ νῦν 'Ακαδημία καλουμένη.

Latte's obelization is unnecessary.¹ The form finds confirmation in a text from which this one may itself derive, a fragment of Dicaearchus' *Bíos 'Ελλάδος* preserved by Plutarch:²

ὁ δὲ Δικαίαρχος 'Εχέμου φησὶ καὶ Μαράθου συστρατευσάντων τότε τοῖς Τυνδαρίδαις ἐξ 'Αρκαδίας, ἀφ' οὗ μὲν 'Εχεδημίαν προσαγορευθῆναι τὴν νῦν 'Ακαδήμειαν, ἀφ' οὗ δὲ Μαραθῶνα τὸν δῆμον, ἐπιδιδόντος ἑαυτὸν ἐκουσίως κατὰ τι λόγιον σφαγιάσασθαι πρὸ τῆς παρατάξεως.

(2) Stephanus Byzantius, *Ethnica*, s.v. 'Εκαδήμεια

'Εκαδήμεια ἡ 'Ακαδήμεια, ἀπὸ 'Ακαδήμου. καὶ 'Αθήνησι τόπος, ὁ Κεραμικός. ὁ ἥρως δὲ διὰ τοῦ εἰ γράφεται. οἱ δ' ὅτι 'Εχεμος ὁ 'Αρκὰς συστρατεύσας τοῖς Διοσκούροις ὑποχείριον ἔσχε τὴν 'Αττικὴν, ἐξ οὗ 'Εχεμῆδειόν φασι.

The text, given above as in Meineke's edition,³ has been variously emended. Ménage⁴ arbitrarily corrected 'Ακαδήμου to 'Εκαδήμου; Schwedler⁵ proposed to rewrite the second sentence and the opening of the third as follows: <γυμνάσιον> 'Αθήνησι <καὶ> τόπος ὁ Κεραμικός. ὁ ἥρως δὲ <καὶ>...⁶ This does in fact receive some support from a gloss in Hesychius,⁷ 'Ακαδημία· λουτρόν, ἡ πόλις. λέγεται δὲ γυμνάσιον 'Αθήνησιν, ἀπὸ 'Ακαδήμου ἀναθέντος. καὶ τόπος. καλεῖται γὰρ οὕτως <ὁ> Κεραμικός, although it remains quite possible that the anonymous excerptor of Stephanus was himself responsible for some of the looseness of expression (especially καὶ 'Αθήνησι) and obscurity.⁸ But the supplement <καὶ> after ὁ ἥρως δέ is

¹ The text was correctly printed by Alberti (Leiden, 1766) and Schmidt (Jena, 1862), but Latte's obelization now recurs in the recent *Diccionario griego-español* (Madrid, 1980) i.105, s.v. 'Ακαδημία.

² Plut. *Vit. Thesei* 32.5 = Dicaearchus fr. 66 Wehrli.

³ *Stephani Byzantii Ethnicorum quae supersunt* ex. rec. A. Meinekii (Berlin, 1849), p. 262. Following the indications and stemma drawn up by A. Diller, 'The Tradition of Stephanus Byzantius', *TAPA* 69 (1938), 333–48, I have collated P (Vaticanus Palatinus graec. 57) and Q (Vat. Pal. gr. 253), which along with R (Wrocław, Rehdig. xxiii = S.1.3.18), are the ancestors of the entire tradition. R is known to me only through the collations of Fr. Passow (Wrocław, 1820 and 1824), reprinted by W. Dindorf, *Stephanus Byzantius cum adnotationibus L. Holstenii*, A. Berkelii et Th. De Pinedo (Leipzig, 1825), i.ciii.

⁴ In his commentary on Diogenes Laertius 3.7. I follow the edition of H. G. Hübner (Leipzig, 1830), i.471.

⁵ G. I. Schwedler, 'De rebus Tegeaticis', *Leipziger Studien* 9 (1886), 302 n. 1.

⁶ Schwedler's spelling of 'Εκαδήμεια with rough breathing finds confirmation in R, P and N (Neapolitanus III AA 18).

⁷ Hesychius α 2221 Latte.

⁸ For the fortunes of the *Ethnica*, cf. E. Honigmann, 'Stephanos (Byzantios)' (no. 12), *RE* 3A:2 (1929), 2369–99, and H. Hunger, *Die hochsprachliche profane Literatur der Byzantiner* (Handbuch der Altertumswissenschaft 12:5:2; Munich, 1978), i.530–1.