

Dealing with the Abyss : The Nature and Purpose of the Rhodian Sea-law on Jettison (*Lex Rhodia De Iactu*, D 14.2) and the Making of Justinian's *Digest*

J-J Aubert

A. INTRODUCTION

Soon a violent wind, called the northeaster, rushed down from Crete. Since the ship was caught and could not be turned head-on into the wind, we gave way to it and were driven. By running under the lee of a small island called Cauda [or Clauda] we were scarcely able to get the ship's boat under control. After hoisting it they took measures to undergird the ship; then fearing that they would run on the Syrtis they lowered the sea anchor and so were driven. We were being pounded by the storm so violently that on the next day they began to throw the cargo overboard and on the third day with their own hands they threw the ship's tackle overboard. When neither sun nor stars appeared for many days, and no small tempest raged, all hope of our being saved was at last abandoned.¹

The apostle Paul's journey from Caesarea to Rome did not stop with that. Drifting at sea for two weeks, the travellers, all 276 of them, ended up swimming to shore on the island of Malta after part of the crew had tried to leave in smaller boats and the food had eventually been thrown overboard in a last effort to rescue the ship from final destruction as it was run aground. If the description of Paul's shipwreck is remarkable in its detail, the event it covers must have been rather banal throughout history. There was a lot of shipping carried out in Antiquity, especially in the Hellenistic and Roman periods, and in the last fifty years underwater archaeology has been steadily confirming what was already known through the literary sources: shipwreck (*naufragium*) was a fact of life, so much so that ancient laws could not escape taking it into account, developing legal arrangements regarding the consequences in the law of obligations (for both contracts and delicts) and the law of property. Roman law was no exception, as such titles as D 14.2 (*De lege*

1 Acts 27:14–20 (translation *New Revised Standard Version*).

Rhodia de iactu) or D 47.9 (*De incendio ruina naufragio rate nave expugnata*) of Justinian's *Digest* indicate.² Obviously, the compilers did not think it relevant to group together all aspects of Roman maritime law – or commercial law in general – when they had a unique chance of doing so: ‘Roman commercial law’ is a modern concept, not an ancient one.³

Because of the universal nature of legal problems connected with shipwreck, the solutions proposed in classical Antiquity had a tremendous impact on the subsequent legal history of maritime law, to the effect that many commentators have discussed the various, though relatively few, Greek and Latin texts dealing with these issues.⁴ The purpose of this chapter is to look, once again, at Title 14.2 of Justinian's *Digest*, although this is not the place to discuss the inspiring insights and puzzling errors of previous scholars, as the task has been done recently and – in my view – satisfactorily by Nathan Badoud, a graduate student at the universities of Neuchâtel and Bordeaux III, in his 2004 unpublished Master's (DEA) thesis on the topic.⁵ Instead, the discussion will focus here on the diversity of the contents of the title, on its place within the *Digest* as a whole, and on its overall organisation, in order to look at some larger issues of Roman commercial law, and its relation to known economic and social realities of the ancient world.

B. EXEGESIS OF D 14.2 AND PAULI SENTENTIAE 2.7

Title 14.2 is composed of ten excerpts from the work of well-known jurists ranging, chronologically, from Labeo in the Augustan period to Hermogenian

- 2 Of related interest are also D 4.9 (let seamen, innkeepers, and stablekeepers restore what they have received); D 47.5 (the action for theft against ships' masters, innkeepers, and liverymen); D 14.1 (the action against the shipowner); D 22.2 (transmarine loans); and isolated excerpts such as D 19.2.13.1 and 19.2.31 (lease and hire).
- 3 Cf D Johnston, *Roman Law in Context* (1999) 77 (ch 5: Commerce); and the lively debate on the issue that took place at the conference “Diritto commerciale romano: tra didattica e ricerca”, Circolo Toscano Ugo Coli, Certosa di Pontignano, 12–14 January 2006, organised by Prof R Martini and Dr G Cossa. I plan to discuss this point further in a chapter of the forthcoming *Cambridge Companion to Roman Law* edited by D Johnston.
- 4 Cf R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990, repr with rev 1996) 406–412.
- 5 N Badoud, *Le titre XIV,2 du Digeste de lege Rhodia de iactu* (DEA thesis, Lausanne-Neuchâtel 2004). Special thanks go to Mr Badoud, my former pupil, who shared with me the results of his research. Even though I do not wholly agree with Badoud's conclusion, I have relied on his thorough knowledge of the bibliography and his acute analysis of the text of D.14.2, and, as a result, this chapter owes more to his work than could be acknowledged in individual footnotes. The bibliography on the subject can also be traced through E Chevreau, “La *lex Rhodia de iactu*: un exemple de la réception d'une institution étrangère dans le droit romain” (2005) 73 *TvR* 67, esp 68, notes 7–8; G Purpura, “Ius naufragii, sylai e lex Rhodia. Genesi delle consuetudini maritime mediterranee” (2002) 47 *Annali dell'Università di Palermo* 275 and D Gourier, *Le droit maritime romain* (2004), which I have not seen.

in the Diocletianic period. Those authors themselves cite earlier, late-Republican jurists such as Servius Sulpicius Rufus and his students Ofilius and Alfenus Varus, as well as stars like Massurius Sabinus or little known figures like Papirius Fronto.

Title 14.2 is supplemented by another post-classical source, the *Sententiae* of Pseudo-Paul (an African writer dated around 300), which has come down to us through an independent channel, but which largely overlaps the text of the *Digest*, except on minor, though telling details. What is interesting here is that Pseudo-Paul is the author of one of the two excerpts that explicitly refer to the *lex Rhodia*, the other one being the text of a petition followed by an imperial rescript, transmitted by the mid-second-century jurist Volusius Maecianus. It is fair to say at the outset that in view of the fact that both excerpts may be – and have been – considered later interpolations, the whole concept of a “Rhodian” origin for the legal arrangement under consideration has repeatedly been questioned. The fact is that D 14.2.1, which provides the most basic and economical definition of the legal arrangement central to the whole title, cites a text by Paul that happens to have survived independently:⁶

Lege Rhodia cavetur ut si levandae navis gratia iactus mercium factus est omnium contributione sarciatur quod pro omnibus datum est.

The *lex Rhodia* provides that if jettison of merchandises has been carried out in order to lighten the ship, everyone has to contribute to compensate what has been given up for the sake of all.

This text is to be set against the matching passage in the *Sententiae* (2.7.1):

Levandae navis gratia iactus cum mercium factus est omnium intributione sarciatur quod pro omnibus iactum est.

Let us note that the explicit mention of the *lex Rhodia* is missing in the text of the *Sententiae*, although the alleged title [*Ad legem Rhodiam*], supplemented by the so-called *Breviarium Alarici* (dated to the early sixth century),⁷ justifies

6 G Purpura, “Ius naufragii” (n 5) 288–292 and notes 70–72, refers to a Latin inscription on a column in the harbour of Rhodes, to be dated on palaeographical grounds to the second or third century AD, and first published by G Marcou, “Nomos Rhodion Nautikos e la scoperta a Rodi di una colonna di marmo con l’iscrizione di Paolo (D 14 2)” in *Studi in onore di Lefebvre D’Ovidio* I (1995) 614 (non vidi). The text is a near-exact quotation of Paul’s definition: LEX RODIA (sic) CAVETVR VT SI LEVANDAE NAVIS GRATIA IACTVS MERCIVM FACTVM EST OMNIVM CONTRIBVTIONE SARCITVR (sic) QVOD PRO OMNIBVS DATVM EST. The nominative case (“lex Rodia”) with the passive voice (“cavetur”) is quite puzzling and unusual, and should raise suspicion about the inscription, unless the first two words are understood as the title of the following quotation (“Lex Rodia: cavetur ut”). An inadequate photograph is available online: www.archaeogate.it/iura/article.php?id=201. Cf Chevreau, “La *lex Rhodia de iactu*” (n 5) 71–72.

7 Also known as *lex Romana Visigothorum* (*FIRA* II², 319–417).

somewhat its absence in the text, while its appearance in D 14.2.1 can be explained as an adjustment by the compilers.⁸ Formally, on the basis of D 14.2.1 and *Sententiae* 2.7.1, the link between the law of contribution in case of jettison and the island of Rhodes is tenuous at best. Furthermore, it has been explained away as the trace of the development in the Byzantine period of a so-called Rhodian Sea-Law, expounded in the *Basilica* of Leo the Wise in the late ninth/early tenth centuries.⁹

The other excerpt (D 14.2.9) mentioning the *lex Rhodia* is problematic in its content, as we will see later on. The reference is actually twofold:

1. The title of the excerpted work is reportedly Volusius Maecianus' *ex lege Rhodia* or "from his *De lege Rhodia*". The inscription is somewhat unusual, perhaps less so if one looks at the excerpt placed directly above (D 14.2.8), ascribed to Julian's *libro secundo ex Minicio*, the whole work in ten books (at least) being entitled *Ad Minicium*.
2. The petition itself is followed by the imperial rescript which specifies that the case of *direptio ex naufragio* can, may, or must be judged (*krinesthō*) according to Rhodian maritime law as long as it does not contradict Roman (praetorian, civil, or imperial) law, as a previous – or senior emperor – had already ascertained.

Whatever the difficulties with the content of Maecianus' excerpt, it is not unrealistic to think that at the time of the island's political and economic splendour in the Hellenistic period, the Rhodians had developed some kind of customary law, if not specific legislation, dealing with the problems raised by what was then – and still is – perceived as one of their main economic activities, namely seaborne trade to, from or via the island. The problem is that this law is hard to reconstruct, for lack of evidence – even more so if one discards what seems to be available under the pretence of interpolation. What should draw our interest is not only the possibility of direct or indirect borrowing on the part of the Romans, but especially the way a Rhodian legal arrangement could have found its way into Roman law – which was undoubtedly the case at the time of the compilers, if not before – and the implication of such a model in our perception of Roman legal history.

As Pseudo-Paul's definition suggests, jettison calls for compensation on the part of those who did not suffer from it, provided that they had actually benefitted from it ("pro omnibus"). This is nothing less than an early form of cargo insurance. The real Paul, in so far as he is a different person in this

8 A Soubie, *Recherches sur les origines des rubriques du Digeste* (1960) 26, 32.

9 W Ashburner, *Nomos Rhodion nautikos, The Rhodian Sea-Law* (1909).

case, is next called upon to specify what the general principle entails. In the thirty-fourth book of his *Commentary on the praetorian edict* (D 14.2.2), Paul reviews several situations in which the law of jettison applies:

(a) The owners of the goods which have been jettisoned have a right to sue the captain (*magister navis*) on the basis of the contract of hire/lease (*locatio conductio*). Three conditions must be fulfilled explicitly for the legal remedy to apply: first, the plaintiffs must be the legitimate owners of the goods (*amissarum mercium domini*); second, they, as *locatores*, must have contracted with the captain, as *conductor*, for the transport of the goods, which means that the jettison of goods transported free of charge, either as a favour or stealthily, did not give rise to an action; third, jettison must have been carried out as the result of a crisis (*laborante nave*). This includes of course bad weather, but presumably not a brawl or mutiny. What about the effect of a structural dysfunction of the ship – if it could be detected or identified *a posteriori*? The liability of the captain – though the use of the term *magister navis* implies the liability of the shipper (*exercitor*) on the basis of the *actio exercitoria* discussed in D 14.1 – is undisputedly disproportionate if no fault can be ascribed to him. For that reason, the captain is then entitled to sue, on the basis of the same contract of hire and lease, those whose goods and belongings have been saved by the act of jettison. The point is that all are expected to chip in and share in the damage in proportion to something which is not clearly expounded. Without explicitly referring to the *lex Rhodia* and without using the word *contributio/intributio*, Paul shows the complexities of cases brought under the *lex Rhodia*. From what has been said, the Roman law of jettison is nothing but an extension of the modalities of the law of hire and lease (*locatio conductio*), as a result of very special and specific circumstances.

(b) The practical aspect of *contributio* is discussed by means of a citation of Servius Sulpicius Rufus, which brings us back to the late Republican period, as a *terminus ante quem*. The passage suggests that the action brought against the captain must result in his seizing and holding the goods of the other transporters until they pay their share of the damage. The citation is quite problematic, as the jurist seemingly allows for non-compliance with this order on the part of the captain, who nevertheless retains his action against the transporters/passengers (*vectores*). It is avowedly a simple matter of practicality (*commoditas*). Let us note here that Servius speaks of an *actio ex locato*, while Paul refers to an *actio ex conducto*, which indicates that notwithstanding a corruption of the text – as the discrepancy between the Florentine manuscript on the one hand and secondary manuscripts or the *Basilica* on

the other hand regarding the negation suggests – the context of the citation may be different. In Servius’ view, some passengers may not be transporters and carry little or no personal belongings at all, in which case they rent as *conductores* the space on the ship (as opposed to those transporters who have their goods transported). Even though the distinction is not classical, legal historians would speak of *locatio operis faciendi* versus *conductio rei*. Both Servius and Paul regard it as the expression of utmost fairness (“*aequissimum*”) that *contributio* is due only when the loss of material goods ensured the preservation and safekeeping of other material goods. In other words, it concerns real, movable property, not persons, slaves belonging – in principle at least – to the former category. It should perhaps be stressed that such an arrangement implies that Roman jurists considered that one’s physical safety could not be valued in monetary terms.¹⁰ Moreover, slaves lost at sea, like those who died of disease on board or committed suicide, were not to be counted as jettisoned goods, and consequently did not entitle their masters to compensation (D 14.2.2.5). Cicero, admittedly in a rhetorical context,¹¹ alluded to the practice of throwing slaves overboard – the famous and perennial dilemma between an expensive horse and a worthless slave – and one would like to think that Servius/Paul introduced such a limitation in order to discourage such cruelty.

(c) It is not too clear in D 14.2.2 where Servius’ citation ends – at the end of the preface or at the end of the title.¹² The ambiguity is perhaps intentional as Servius’ authority and the antiquity of his opinion add some weight to Paul’s demonstration. Next the jurist draws the line at what damage should be taken into consideration. Wear and tear on the ship – or on any other tool of production, such as an anvil or a hammer – is no cause for *contributio* (*collatio*), but circumstances may have called for drastic measures: in the report of St Paul’s shipwreck in Acts 27:18–19, *ekbolè* is shortly followed by the discarding of the ship implements (*skeuè tou ploiou*), while the food – and presumably fresh water – is thrown overboard only weeks later (27:38). Had the ship been saved, the deliberate removal of the riggings would have qualified the shipowner for *contributio*, no less than *ekbolè* (the object of which is unspecified) and *sitos*.

(d) As Acts 27 indicates, the ship may transport any combination of goods (or even a variety of them) and persons. Servius/Paul wonders (D 14.2.2.2)

¹⁰ D 14.2.2.2 (Paul, *Edict* 34): “corporum liberorum aestimationem nullam fieri posse”.

¹¹ Cicero, *De Officiis* 3.23.89. N Badoud, *Le titre XIV,2 du Digeste* (n 5) 36, rightly recalls, among others, that Cicero refers here to the work of the stoic philosopher Hekaton of Rhodes, who was a pupil of Panaetius.

¹² D 14.2.2.2 (Paul, *Edict* 34): “placuit” and “ex conducto dominos rerum amissarum cum nauta”.

whether those who transport valuables of insignificant weight should be called upon to “*iacturam praestare*”, which I understand as to share in the damage (i.e., to make *contributio*),¹³ considering that everyone would have acknowledged that the jettison of pearls, for instance, would have brought little relief to the ship. Of course, both the shipowner and the pearls’ owner were to contribute on the basis of the respective monetary value of discarded and saved goods, including, for the latter, clothes and jewellery, but excluding food, considered common property in times of crisis.¹⁴ The pricing of lost property is based on the purchase value, not on resale value, the merchant’s potential profit (*lucrum*) being a matter of personal loss. Conversely, the pricing of saved property depends on its resale value, partially damaged goods being of a lower resale value than their purchase value (D 14.2.2.4).

(e) In D 14.2.2.3, Servius, Ofilius and Labeo seem to extend the scope of the legal arrangement to the ransoming of the ship from pirates, whereby all passengers and most certainly the shipowner or his agent has to contribute. The ransomed ship undoubtedly includes its cargo and all the passengers’ personal belongings, otherwise it would be unreasonable to expect everybody to chip in for the sake of the shipper. Jettison (*iactus*) is no longer a necessary element for the legal arrangement to apply. Extension may not be the proper term, as one cannot rule out that the legal arrangement – whether it derives from a *lex Rhodia* or not – had developed simultaneously in connection with both shipwreck and piracy. Although there is no sign that it involves such a legal arrangement, the ransoming of Julius Caesar in 74 BC occurred on the island of Pharmacussa, off the coast of Asia Minor, while he was crossing to Rhodes:¹⁵ his companions and slaves were supposed to raise the money while he stayed behind with the pirates as a hostage. Interestingly, highway robbery is treated differently, and there is no analogy with seaborne trade. Travellers may have flocked together, but everyone was supposed to fend for himself. The ransoming of goods outside the context of a ship does not call for *contributio*.

Paul’s long excerpt ends with three minor issues (D 14.2.2.6–8) concerning

1. passengers’ insolvency, not to be shouldered by the captain;
2. the reversibility of *contributio*, if jettisoned goods reappear later – in that case contributors have an *actio ex locato* against the captain for refund,

13 D 14.2.2pr (Paul, *Edict* 34): “donec portionem damni praestent”.

14 D 14.2.2.2 (Paul, *Edict* 34): “itidem agitatum est ... in commune conferret”.

15 Suetonius, *Iulius Caesar* 4, 74.1.

while the captain has an *actio ex conducto* against the fortunate owners; and

3. the latter's permanent right of ownership, excluding *usucapio* because jettisoned goods are not to be regarded as abandoned (*derelictum*).

The reason why I dwell for so long on Paul's views in D 14.2.2 is not because of its exotic character as an excerpt from classical jurisprudence. In fact, in spite of its length, it shows standard features: following the definition of the initial excerpt of the title (D 14.2.1), it presents a general case listing all the necessary components, then moves to a citation of a pre-classical jurist, builds on analogies,¹⁶ explores more complex situations, some smacking of the rhetor's classroom (such as the case of the traveller carrying *gemmae margaritae*), others showing a really sophisticated approach to the problem of *aestimatio* (taking into consideration price variations), to conclude with secondary, though legally pregnant, issues (such as *usucapio*). What makes D 14.2.2 somewhat remarkable in this context (besides Ulpian's conspicuous absence in the whole title, in spite of D 19.5.14) is the fact that it is excerpted from Paul's *Commentary on the Praetorian Edict*, whereas it is evident that the *lex Rhodia de iactu* does not belong to the edict. In fact, as O Lenel's *Palingenesia* suggests,¹⁷ Book 34 of Paul's *Commentary* deals with the *actio locati conducti*. D 14.2 is, so far as we can see, nothing but a misplaced appendix to D 19.2, where the same work is excerpted several times.¹⁸ This is true too of other works excerpted in D 14.2: Alfenus' *liber tertius digestorum a Paulo epitomatorum*;¹⁹ Labeo's *liber primus pithanon/pithanorum a Paulo epitomatorum*;²⁰ Paul's *liber secundus sententiarum*;²¹ and Hermogenian's *liber secundus iuris epitomatum*.²²

The other excerpts included in D 14.2 do not help much to explain why the title on the *lex Rhodia de iactu* was not appended to the title on *locatio conductio*. Let us examine briefly a few of them:

D 14.2.3 is a text from Papinian's nineteenth book of *Responsa*. The excerpt *Ad legem Rhodiam* has been placed by Lenel just before texts dealing with *De re militari*, *De appellationibus*, or *De tributis*.²³ There is obviously no thematic unity, and the lone excerpt *de lege Rhodia de iactu* belongs to the

16 D 14.2.2.1: "nam et si faber incudem aut malleum fregerit".

17 O Lenel, *Palingenesia iuris civilis I* (1889) 1038–1039, no 521.

18 D 19.2.1, 19.2.20, 19.2.22, and 19.2.24.

19 D 14.2.7 and D 19.2.30.

20 D 14.2.10 and D 19.2.62.

21 D 14.2.1 and D 19.2.55.

22 D 14.2.5 and D 19.2.12 and 23.

23 Lenel, *Palingenesia I* (n 17) 945, no 744.

Varia. Actually, the text of D 14.2.3 is rather redundant with regard to D 14.2.2.1, as it merely specifies that *contributio* may derive from discarding the riggings of the ship (“*arbor aut aliud navis instrumentum*”), if it is done in order to remove a common danger (“*removendi communis periculi causa*”).

D 14.2.4, on the other hand, is most substantial. Excerpted from Callistratus’ second book of *Quaestiones*, it is the second longest text of D 14.2. It deals with the transfer of goods from a big ship to smaller riverboats, the central notion of *navis salva* (a prerequisite for *contributio*, only marginally mentioned by Paul in D 14.2.2), the possibility of multiple consecutive disasters, the anecdotic intervention of *urinatores* (rescue divers), occasionally seen at work in an excavated shipwreck, such as the Madrague of Giens in southern France,²⁴ and eventually gets into the technicalities of deteriorating goods and their ever fluctuating value as a basis of reckoning for *contributio*. Both Sabinus (twice) and Papirius Fronto are cited in reference. In Lenel’s *Palingenesia*,²⁵ the excerpt is located next to a text concerning eviction in the context of the sale of real estate;²⁶ and not too far from a text dealing with the related matter of *direptio ex naufragio*.²⁷

D 14.2.6 is excerpted from Julian’s eighty-sixth book of *Digesta* and comments *ad legem Rhodiam de iactu* next to *ad legem Aquiliam* (D 9.2) and *ad legem Iuliam de adulteriis* (D 48.5).²⁸ The series does not really make sense but for the fact that it deals with so-called *leges*. However, the connection between the *lex Aquilia*, concerned with physical damage inflicted to other people’s property, and the *lex Rhodia de iactu* is evident. The text deals with what sounds like a real, or at least realistic, case in view of the places mentioned: a ship was caught in a storm and had her rigging, mast and yard destroyed by a bolt of lightning. After emergency repairs in Hippo, in North Africa, she went on with her trip to Ostia and delivered her cargo without suffering any more damage. The question, which had already been answered in previous excerpts (D 14.2.2.1, and to some extent D 14.2.3 and 14.2.5.1), bears on whether the transporters (“*hi quorum onus fuit*”) should contribute to repair expenses. The answer is unsurprising:

24 A Tchernia, P Pomey and A Hesnard (eds), *L’épave romaine de la Madrague de Giens (Var)* (*Gallia Supp* 34) (1978) 29–31. Cf also E Nardi, “De urinatoribus, ovvero dei sub nell’antichità” (1984–1985) 73 *Rendiconti dell’Accademia delle Scienze dell’Istituto di Bologna* 51 (non vidi); and A Tchernia, “Les urinatores”, in *Navires et commerces de la Méditerranée antique: hommage à Jean Rougé* (1989) 33 *Cahiers d’histoire* 489.

25 Lenel, *Palingenesia* I (n 17) 102–103.

26 D 21.2.72; cf Lenel, *Palingenesia* I (n 17) 103, no 99.

27 D 47.9.7; cf Lenel, *Palingenesia* I (n 17) 103, no 107.

28 Lenel, *Palingenesia* I (n 17) 483, no 831, but I suspect a mistake.

non debere: hic enim sumptus instruendae magis navis quam conservandarum mercium gratia factus est.

it is not due: the expense was made to equip the ship rather than to save the cargo.

Real life legal practice is also meant to be reflected in Volusius Maecianus' text briefly described earlier (D 14.2.9). Although the text has been considered spurious for many different reasons, it seems to me that Maecianus, in his capacity of secretary *a libellis* under Antoninus Pius, prefect of Egypt in the early 160s, and then legal counsellor of Marcus Aurelius and Lucius Varus, was best placed to unearth such a document and most likely to use it in his work. Nothing is known of the monograph *De lege Rhodia*, of which D 14.2.9 is the only known fragment.²⁹ A provincial individual named Eudaimon of Nicomedia petitions the Emperor Antoninus (Antoninus Pius, Marcus Aurelius, or, less likely, Caracalla) to get redress from what is regarded as delinquent behaviour on the part of the local authorities (*dèmosioi*)³⁰ after Eudaimon's shipwreck on some Cycladic island (Icaria). Although the reply of the emperor explicitly refers to a Rhodian maritime "law" (*nomos tôn Rhodiôn nautikos*), the case deals, at best, only with a marginal aspect of the legal arrangement discussed by Paul: the status of shipwrecked goods. Eudaimon sues the *dèmosioi* for *direptio ex naufragio*, a practice perhaps common in ancient societies, which does not contradict the current opinion of other jurists, either Paul (D 14.2.2.8) or Julian (D 14.2.8), as long as the goods claimed by the *dèmosioi* have not been jettisoned, a point that the text does not specify. Both Paul and Julian insist on the fact that "res iacta domini manet" and "pro derelicto non habetur". And Julian, in his second book *Ad Minicium*, discusses *usucapio* (acquisition of ownership through long-time possession in good faith). Let us note that Lenel connects this text with D 41.7.7 and places it just before D 45.1.62.³¹ While the former text discusses the very same topic as D 14.2.8 in the title *pro derelicto*, the latter deals with a slave asking the question in a *stipulatio* despite his master's refusal, with the effect that the *promissor* contracts anyway an obligation toward the slave's master.

If D 14.2.9 seems to have a rather loose connection with the main aspect of the legal arrangement known as the *lex Rhodia de iactu*, namely *contributio*,

29 Lenel, *Palingenesia* I (n 17) 588, no 58. On Volusius Maecianus and his fragment in D 14.2.9, Cf N Badoud, *Le titre XIV,2 du Digeste* (n 5) 42.

30 *Dèmosioi* are more likely to be local public officials than public slaves: they are certainly not tax farmers (*dèmosiônes*).

31 Lenel, *Palingenesia* I (n 17) 486, nos 857–858.

it is even more so with the tenth and last excerpt of title 14.2, which is mostly concerned with specific provisions in transportation contracts: price to be paid for the slaves who die during the trip, civil liability of the shipper who takes the initiative of transferring cargo from one ship to another not only without the customer's consent and knowledge, but against his expressed will, and finally compared costs of bulk transport with unit-based tariffs. If D 14.2.10 does not shed much light on the *lex Rhodia*, it reminds us of our initial statement, that the title on the *lex Rhodia de iactu* is nothing but a misplaced appendix to the *actio locati conducti*.

C. WHY HERE, BETWEEN D 14.1 AND 14.3?

It has long been recognised that Justinian's *Digest* is organised along the lines of the *Perpetual Edict*. The arrangement of books 14 and 15 that deal with the so-called *actiones adiecticiae qualitatis* largely confirms this impression. At the time of the completion of the *Perpetual Edict* by Julian (c 130), the *lex Rhodia de iactu* was certainly not part of the edict, and had never been; moreover, it was not included, and would never be, among the *actiones adiecticiae qualitatis*. Gaius shows that in his time (middle of the second century AD) the *actio quod iussu*, the *actio exercitoria* and the *actio institoria* were thought of as a group, since they engaged the liability *in solidum* of the principal (as opposed to the *actiones de peculio et in rem verso* and *tributoria*).³² In the *Digest*, this notion of group seems to be weakened by the inclusion of Title 14.2 between 14.1 and 14.3 and the removal of the *actio quod iussu* to the end of book 15. The nice arrangement in Gaius was obviously lost on the compilers, and probably before, considering the sequence attested in the *Sententiae Pauli* (2.6–2.10). It does not take much to find a common denominator between D 14.1 and D 14.2 or D 14.3. It is somewhat more difficult to connect logically D 14.2 and D 14.3, so we can be sure that the intruder is D 14.2. The link between D 14.1 and D 14.2 is the *magister navis*, the centrepiece of D 14.1, and a rather marginal character in D 14.2, since everything which is being said about him in D 14.2 could be valid if the *nauta* had been an independent shipper, *exercitor* or *navicularius*. Evidence for this goes back to a fourth-century BC comic poet, Diphilos of

³² Gai Inst 4.69–4.72.

Sinope, who later inspired the Latin playwright Plautus:

ναύκληρος ἀποθύει τις εὐχὴν, ἀποβαλὼν
 τὸν ἰστὸν ἢ πηδάλια συντρίψας νεώς,
 ἢ φορτὴν ἔξέριψ' ὑπέραντλος γενόμενος·
 ἀφῆκα τὸν τοιοῦτον. οὐθέν ἡδέως
 ποιεῖ γὰρ οὗτος, ἀλλ' ὅσον νόμου χάριν·
 ὁμοῦ δὲ ταῖς σπονδαῖσι διαλογίζεται
 τοῖς συμπλέουσιν ὅποσον ἐπιβάλλει μέρος
 τιθεῖς, τὰ θ' αὐτοῦ σπλάγχχν' ἕκαστος ἐσθίει.

A shipper makes a sacrifice for his prayer, as he had thrown away the mast, broken his rudder, cast the cargo overboard, being overwhelmed by the waves. I avoid such a man, for he does nothing for fun, but everything for the sake of *nomos* [an ambiguous Greek word purportedly not translated here]. At the very moment of the libations, he reckons how much he will charge his fellow travellers, deciding on the value of each share; everyone will eat one's own guts.³³

In the *Sententiae Pauli* 2.6–2.8, the section on the *lex Rhodia* (2.7) is more detailed than the introductory section on both *exercitores* and *institores* (2.6, although only the former are concerned), and no less than the subsequent section on *institores* alone (2.8). All three sections, short or long, contain material not to be found in the *Digest*. In *Sententiae* 2.6, the *filius familias* operates a ship in compliance with his father's will and makes him liable for “*ea quae salva receperit*” whatever that means, be it a reference to *receptum nautarum* (D 4.9) or else (if *receptit* has *pater* as subject). In *Sententiae* 2.7, we find the definition of *contributio/intributio* discussed earlier (2.7.1), then a provision concerning the liability of passengers for the equipment of the ship (2.7.2), quite in agreement with what is found in the *Digest*.³⁴ This is not the case of the third provision (2.7.3), which sort of does away with the concept of *navis salva*, a concept which is then reaffirmed in the fourth and fifth ones (2.7.4–2.7.5). In *Sententiae* 2.8, all three paragraphs deal with the scope of the appointment of the agent, and the latter's profile. In fact, most, if not the whole, of D 14.1 and 14.3 is concerned with the tricky and consequential question of the scope of the agent's appointment. Most telling are

33 Diphilos of Sinope, *Zôgraphos*, frag Kock CAF II, 540 = PCG V, 73–74 (42.10–42.17). I owe this reference to N Badoud, *Le titre XIV,2 du Digeste* (n 5) 40, who translates *nomos* as “coutume”. There is a lively debate on the question of whether *nomos* should refer exclusively to written law in the classical and Hellenistic period; cf R Thomas, “Writing, law, and written law,” in M Gagarin and D Cohen (ed), *The Cambridge Companion to Ancient Greek Law* (2005) 41, 51, notes 27, 57 and 59. I owe this point and the reference to Thomas' article to Mr Jason Governale, Columbia University. In Volusius Maecianus' excerpt cited above (D 14.2.9), *nomos* undoubtedly translates the Latin *lex*, with all its ambiguities.

34 D 14.2.2.1 (Ulpian, *Edict* 34); D 14.2.3 (Papinian, *Replies* 19); D 14.2.5.1 (Hermogenian, *Epitome of the Law* 2); and D 14.2.6 (Julian, *Digest* 86).

two passages which can be viewed as complementary in this regard:

1. In D 14.1.1.12, Ulpian, in a commentary on the edict, describes the *certa lex praepositionis*, “drafted” for the sake of would-be contractors, the purpose of which is to define the activities/operations of the agent for which the principal would be held liable *in solidum* as an effect of the *praepositio*.³⁵
2. In D 14.3.11.2–6, the same Ulpian, in the same twenty-eighth book of his commentary, describes how the *praepositio* can be restricted through *proscriptio*, in the material form of a charter to be posted

claris litteris, unde de plano recte legi possit, ante tabernam scilicet vel ante eum locum in quo negotiatio exercetur, non in loco remoto, sed in evidenti. Litteris utrum Graecis an Latinis? puto secundum loci condicionem, ne quis causari possit ignorantiam litterarum. Certe si quis dicat ignorasse se litteras vel non observasse quod propositum erat, cum multi legerent cumque palam esset propositum, non audietur.

in clear letters, where it can be read at eye-level, in front of the shop, of course, or of the place where business is conducted, not in a remote spot, but quite in full view. Should it be written in Greek or in Latin? In my opinion, according to the place, lest someone could make excuse of his illiteracy. Indeed, if someone pretends that he is illiterate or that he has not seen what had been posted, although many had read it and the poster had been obvious, he will not be given a hearing.

In the best of all worlds, managers – or rather their principals – would be able to design perfect charters, *leges praepositionis*, occasionally qualified by partial or total *proscriptiones* (forbidding specific deals or business of any sort), or extended by explicit and precise orders (*iussus/iussa*) in order to anticipate all possible cases and situations potentially leading to litigation. This is what we call a job description, or *lex contractus*. In any pre-industrial society, such explicit, diverse, colourful and comprehensive documents were simply hard to find on a regular basis, although counter-examples easily come to mind, such as the *lex Puteolana parieti faciendo* or the *lex libitina Puteolana*, both from late second or first century BC Puteoli.³⁶ In most cases, people must have relied on common sense and/or customary law. I would like

35 D 14.1.1.12 (Ulpian, *Edict* 28): “Igitur praepositio certam legem dat contrahentibus.”

36 Cf J-J Aubert (ed), *Tâches publiques et entreprise privée dans le monde romain* (2003) 9–12 and 19–25; and Aubert, “L’estampillage des briques et des tuiles: une explication juridique fondée sur une approche globale,” in C Bruun (ed), *Interpretare in bolli laterizi di Roma e della valle del Tevere: Produzione, storia economica e topografia*, *Atti del Convegno all’Ecole Française de Rome e all’Institutum Romanum Finlandiae*, 31 marzo e 1 aprile 2000, organizzato da Christer Bruun e François Chausson (*Acta Instituti Romani Finlandiae* 32) (2005) 53. Cf also P J du Plessis, “Between theory and practice: new perspectives on the Roman law of letting and hiring” (2006) 65 *CLJ* 423, 433.

to suggest here that the *lex Rhodia de iactu* belongs to this category of *leges*. It is admittedly different from popular statutes, but it reflects the accumulation of experience in the context of sea-travelling, and deals with all the accidents that such an activity entails. Squeezed between D 14.1 and 14.3, D 14.2 on the *lex Rhodia de iactu* is the *certa lex* of the *magister navis* by default, within the context of his legal relationship with his customers and to some extent his principal, on the basis of which he is entitled to sue and be sued, to hold property, his and others', and to manage it for the benefit of his customers and himself.

The early history of the *lex Rhodia de iactu*, illustrated by D 14.2 and *Sententiae Pauli* 2.7 in classical Antiquity, its reception in the Byzantine period, and its adoption in later maritime regulations show that the scope of the law of jettison tends to vary over time.³⁷ The perceptible trend, already suggested in my reading of D 14.2, is a movement from the specific, narrow and rather strict application towards a wider, more flexible, and gradually encompassing use. This is compatible with what I consider the most likely historical development of the *actiones adiecticiae qualitatis*, from the limited scope of the earlier *actio quod iussu*, open to persons in power for a specific, controlled activity entailing the total liability of the principal, to the nearly unlimited scope of the somewhat later *actiones in iustitia, exercitoria, de peculio et de in rem verso*, and *tributoria*.³⁸ And if one looks at Gaius' *Institutes* 4.69 and following, this is precisely the story that he tells us.

D. CONCLUSION

The so-called *lex Rhodia de iactu* amounts to something more than just the topic of a misplaced appendix within a late Roman compilation, the making of which had both salutary and devastating effects upon the conservation of the works of classical jurists. It represents above all the possible leftover of a set of very old maritime customs going back to pre-Roman times as a practical response to the consequences of many a storm.³⁹ It probably

37 The literature on this development is quite extensive. Cf Zimmermann, *Obligations* (n 4) 409–412, mostly 409: “The history of the *lex Rhodia de iactu* can be told as one of gradual extension” and “In the Middle Ages the *lex Rhodia* began to be applied beyond the area of maritime law” with reference to G Wesener, “Von der *Lex Rhodia de iactu* zum §1043 ABGB”, in *Recht und Wirtschaft in Geschichte und Gegenwart. Festschrift für Johannes Bärnmann zum 70. Geburtstag* (1975) 31. Cf also N Badoud, *Le titre XIV,2 du Digeste* (n 5) 1–4.

38 Cf A Petrucci, “Ulteriori osservazioni sulla protezione dei contraenti con gli *institores* ed i *magistri navis* nel diritto romano dell’età commerciale,” (2002) 53 *Iura* 17.

39 Chevreau, “*La lex Rhodia de iactu*” (n 5) 68 (“Dans un tel contexte, il paraît opportun d’envisager l’utilisation par Rome d’usages commerciaux et maritimes étrangers, réunis sous la dénomination

developed in Eastern Mediterranean harbour cities, if the collective memory of ancient writers is to be trusted. It provided the framework within which legal arrangements based on good faith were devised among economic agents who were unlikely to be familiar with courts of law. It also reflects a culture that was too formalistic to allow for the concept of direct agency to arise, or to recognise contracts made without the explicit consent of the parties. As a matter of fact, the *lex Rhodia de iactu* may be one of the most disputed topics of Roman private law, although the problems raised by the texts which have been preserved tend to be more historical than juristic. This is due, of course, to the nature and importance of the economic context (sea trade) within which the rather complex system described in those ten excerpts collected in D 14.2 developed. The propensity of the legal arrangement referred to as *contributio* to further expand and adjust to new conditions and circumstances unavoidably constitutes a key factor in explaining its success as an institution and its subsequent notoriousness among legal and economic historians.⁴⁰

Because of the heterogeneous, elliptic, though somewhat redundant nature of the texts preserved in D 14.2, ancient and modern commentators have looked for opportunities to reconstruct the system of *contributio* as a whole and to identify how it was practically applied in various circumstances. The alleged, reconstructed origin and history of the legal arrangement naturally bear on this double quest. There is no doubt that classical and post-classical jurists, as well as the Justinianic compilers, could count on a better textual basis than modern legal historians do, both in quantitative and qualitative terms, mostly because the excerpts which survived could still be read in context in Antiquity. It is quite possible, too, that documents dealing with, or reflecting, practical situations in which the provisions of the *lex Rhodia de iactu* as *lex contractus* applied could be found in Antiquity. One would have to look for them among contracts, riders, judicial reports or individual petitions such as Eudaimon of Nicomedia's, as it was seemingly unearthed by Volusius Maecianus for the sake of his argument.⁴¹ Until further notice,

lex Rhodia de iactu"); 73 (*lex dicta, lex privata, lex mercatoria*); and 79 (where the author concludes to the reception in Roman Law of the Greek principle of *contributio*, short of a technical borrowing: "assimilation du principe, mais absence de réception technique;" contra, Purpura, "Ius naufragii" (n 5) 275 ("Non solo è inveterato, quanto errato, l'uso di considerare la legge rodia una sorta di contenitore di pratiche marine di qualsiasi tipo, ma se vi fu, come è assai probabile, una specifica legge rodia del mare") and 292 ("Non solo la legge rodia non fu una sorta di raccolta di usanze marine di qualsiasi tipo"), despite Isidore of Seville, *Origines sive Etymologiae*, 5.17 (quoted note 75): "De Legibus Rhodiis, Rhodiae leges navalium mercatorum sunt, ab insula Rhodo cognominatae, in qua antiquitus mercatorum usus fuit."

40 The comprehensive bibliography compiled by Badoud is a proof of it.

41 Volusius Maecianus (*ex lege Rhodia*) D 14.2.9: (Ἀξίωσις Εὐδαίμονος Νικομηδέως πρὸς Ἀντωνίνον βασιλῆα).

it seems that nothing of the documentary evidence of this kind has survived or has yet been discovered. Consequently, legal historians have no choice but to focus on the theoretical aspects of the system, the coherence, or near-coherence, of which may be postulated – at one time, at least. Alternatively, it is tempting to infer from the reconstruction of the whole system the way it was applied in real life, by rephrasing as precisely and accurately as can be the issues that the jurists were trying to address through a casuistic approach. The former pursuit deals with the history of ideas, the latter with economic and social history. In either case, the result is the making of a model.

Every excerpt raises a question or a set of questions, and the sheer length of some of these excerpts ensures that these questions are often tricky, not to say somewhat marginal, and that is precisely what makes them so interesting. However, text criticism and analysis remains a necessary, preliminary step. The traditional philological approach, whether it leads to a hunt for interpolations or heeds and favours the *lectio difficilior*, can and should be topped off with a more literary examination: in so far as biblical scholars have learned to read the Bible as literature, endowed with its own aesthetics and conventions, legal historians and classicists should try to look at the *Digest*, the *Codes*, and all remaining legal compendia as literary works in themselves, belonging to the genre of technical literature, with their own internal organisation, to be identified in one way or another. D 14.2 on the *lex Rhodia de iactu* should be viewed as a necessary, complementary component for the transition between D 14.1 on the *actio exercitoria* and D 14.3 on the *actio institutoria*, within the larger issue of indirect agency reflected by the praetorian remedies called *actiones adiecticiae qualitatis*. Such a reading implies some level of trust on the part of the reader in the logic of the compilers. It also compels the same reader to justify rationally the seeming inconsistency of the sequence (D 14.1–2–3).

The present interpretation of D 14.2 mainly rests upon intratextual, and to a lesser extent intertextual, considerations. Speculation has little part in it, and the conclusion to be reached is rather positive, in that it seems to be possible to account for every single piece of information of historical nature transmitted by the texts, and to fit it into the larger picture of ancient maritime law, without resorting to textual hypercriticism or to a negative evaluation of the work of classical jurists or late antique compilers. Let us hope that the model proposed here – for it is just a model – can hold water.