THE DEFINITION OF FURTUM AND THE TRICHOTOMY

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The following definition of theft is found in D.47.2.1.3. (Paul 39 ad ed.)

Furtum est contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus eius possessionisve, quod lege naturali prohibitum est admittere.

It is repeated, but with a variation, in Justinian's Institutes 4.1.1.

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The Digest definition appears as above, so far as I am aware, in all editions of the Digest with the exception of those of Haloander, while the one from the Institutes is in that form in the very early editions but not in most of those dating from the end of the first quarter of the 16th to the beginning of the 18th century.

The former definition as we have it, although it does not give a completely accurate picture of the law, makes good sense. It is a much finer definition than those of the classical period which have come down to us outside the Corpus Iuris Civilis 1), and it is regarded as seriously interpolated 2). Apart from purely formal indications, there are two reasons which make it unlikely that this is to any great extent the work of Paul. First, this would be the only example of an important definition from the pen of Paul. Secondly, we have another definition of furtum by Paul and this is much closer to those of Sabinus and Gaius than to that ascribed to him in the Digest.

P.S. 2.31.1. Fur est qui dolo malo rem alienam contractat 3).

If Paul is the author of the Sententiae, then there is internal evidence to show that his Commentaries ad edictum (from which the Digest definition is taken), are earlier than the Sententiae 4), and it is difficult to understand why Paul, after producing such a good definition, should revert to the traditional, inferior one 5). If the Sententiae are a postclassical compilation from the works of Paul 6), it is

1) Sabinus, reported in Aulus Gellius Noctes Atticae XI.18.20., has 'Qui alienam rem adtructavit, cum id se invito domino facere iudicare debet, furti tenetur.' For G.3.195., if indeed a definition is intended, see infra p. 4.
3) Repeated in Coll. 7.5.2., but with the omission of dolo malo.
5) If, however, Paul intended the Sententiae for the education of his son, it is just possible that he would prefer to give the old definition because it is simpler.
equally difficult to see why the author chose the inferior definition even if it were the earlier. Nor are formal indications of interpolation lacking.

The elements of the definition may be broken down in this way.

**Contrectatio rei:** In general, *contrectatio* was necessary and sufficient for *furtum*, although there were a few exceptions 7). Sabinus’ definition reported by Aulus Gellius shows that in his time handling, not asportation was the requirement for theft. It is sometimes maintained that *contrectatio* is wider in meaning and can be used to signify ‘meddling’ whether or not there is actual touching or handling 8). But those who adopt this point of view produce no evidence for it, and it would appear from the texts — lay and legal — that the word is not so used 9). On the other hand, *contrectatio* usually has a more restricted sense and means a handling or touching which is improper in some way, whether illicit, immoral, illegal or merely disgusting 10). *Contrectatio* also requires an objective genitive and this is provided in the present text by *rei*. Here too, one must admit that the definition needs qualification. The *res*, for example, must be *mobilius* 11), and children, wives in *manu*, etc. who are not *res*, may be stolen 12).

**fraudulosa:** This word is certainly interpolated. It is said that in Latin literature it occurs only in these two texts and, as Schulz has pointed out 13), it cannot have been written by Paul since the jurists avoided uncommon words. Nor, since *contrectatio* means an improper handling, is it necessary.

**lucri faciendi gratia:** This phrase may or may not be classical. In favour of its classicality are the following points. First and most important, Aulus Gellius reports 14) Sabinus as saying: *Qui alienum iacens lucri faciendi causa sustulit, furti obstringitur* . . . . Hence, Sabinus seems to have regarded intention to make a gain an essential. Ulpian, too, in the 41st book of his commentary on Sabinus uses almost exactly the same words 15), and in the 1st book of his commentary on the Edict of the Curule Aediles has (D.47.2.66.):

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8) E.g. Ferrini, *op. cit.*, p. 113.
9) Cf. *Thesaurus Linguae Latinae*.
11) E.g. D.47.2.25.pr.; G.2.51.; it must also be a *res in commercio*.
14) *Noctes Atticae* XI.18.21.
15) D.47.2.43.4.