

PRAEMITTENDUM

The quest about the true Digest text has a remarkably long history and literature abounds. The discussion up to 1700 is best accessible in H. Brenkman, *Historia Pandectarum seu fatum exemplaris Florentini*, Utrecht 1722. It was not until 1870 that a truly new edition appeared which is still the standard one: *Digesta Iustiniani Augusti* [ed.] Th. Mommsen, 2 vols, Berlin 1870, quoted as *editio maior*; there is also an *editio stereotypa* that sometimes supplements the former; I suppose the reader to have the *editio maior* and especially its *Praefatio* at hand. Of the codex Florentinus, properly *codex Laurentianus S(ine) N(umero)* there exists a photographic reproduction: *Iustiniani Augusti Digestorum seu Pandectarum Codex Florentinus phototypice expressus*, Rome 1902-1910. Numerous descriptions and photographs can be found elsewhere: see E.A. Lowe, *Codices Latini Antiquiores* III (Oxford 1938), nr 295 and *Supplement*. The manuscript has recently been restored and subsequently made the theme of an exhibition in the Biblioteca Laurenziana; see the useful catalogue by E. Spagnesi, *Le Pandette di Giustiniano. Storia e fortuna della 'littera Florentina'*, Florence 1983.

As a general introduction to the Digest text may be consulted F. Schulz, *Einführung in das Studium der Digesten*, Tübingen 1916, based on, above all, Mommsen's *Praefatio* and on H.U. Kantorowicz, 'Ueber die Entstehung der Digestenvulgata. Ergänzungen zu Mommsen', *SZRom* 30 (1909), pp. 183-271 and 31 (1910), pp. 14-88, repr. with addenda in Weimar 1910. Accounts of the Digest tradition are in

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every text-book of the history of the sources of Roman law; useful for its bibliography is P. Weimar, 'Die legistische Literatur der Glossatorenzeit, 1, Digesten', in: H. Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* I (Munich 1973), pp. 158-160. An article by J. Miquel, 'Mechanische Fehler in der Ueberlieferung der Digesten', *SZRom* 80 (1963), pp. 233-286, broke fresh ground in that it took into account the results of 20th-century scholarship. The articles by R. Röhle (e.g., 'Digestorum editio maior und Theodor Mommsen', *BIDR* 73 (1970), pp. 19-34) and P. Pescani (most recently 'Studi sul Digestum Vetus', *BIDR* 84 (1981), pp. 159-250) are inspired by a very critical attitude towards Mommsen's edition; their work must ultimately lead to a new *editio maior*. Much is also to be gained from H.E. Troje, *Graeca leguntur* (Forschungen zur neueren Privatrechtsgeschichte 18), Cologne-Vienna 1971. After a preliminary paper together with G.C.J.J. van den Bergh (*TRG* 45 [1977] pp. 227-305), I have tried to shed some light on various questions connected with the vast amount of material collected by Brenkman and pertinent to textual criticism on the Digest: *Henrik Brenkman (1681-1736). Jurist and Classicist*, Groningen 1981.

The contribution to our knowledge about the Justinian text that can be made by a study of the Byzantine tradition has been, if not misunderstood, underestimated generally. For the subject of this paper H.J. Scheltema, *L'enseignement de droit des antécédents*, Leiden 1970, is essential, in combination with the Basilica edition by Scheltema-Van der Wal-Holwerda (in progress). For the sources of Byzantine-Roman law, see now P.E. Pieler, 'Byzantinische Rechtsliteratur', [ch. xiii in:] H. Hunger (ed.), *Die hochsprachliche profane Literatur der Byzantiner* II (Handbuch der Altertumswissenschaft xii.2.5), Munich 1978, pp. 341-480. Under the title *Historiae iuris graeco-romani delineatio*, N. van der Wal and J.H.A. Lokin will publish a (French) history of the sources of civil and canon law. Much is to be found in scattered papers. A special series of editions and studies of the sources is *Fontes Minores*, edited by D. Simon, and will also be, we hope, *Subseciva Groningana*.

Literature mentioned above will be quoted by authors' name, sometimes with short title, only. Articles by E.A. Lowe will be quoted from his collected *Palaeographical Papers 1907-1965*, ed. L. Bieler, Oxford 1972, 2 vols, paginated continuously. *BIDR* = Bullettino dell' Istituto di diritto romano; *CQ* = Classical Quarterly; *SZRom* = Zeitschrift der Savigny-Stiftung, romanistische Abteilung; *TRG* = Tijdschrift voor Rechtsgeschiedenis.

## I

Of our oldest Latin manuscripts few can boast the same prestige as the so-called *codex Florentinus* of Justinian's Digest. It has been the subject of an almost superstitious veneration for some nine centuries at least. Its photographic reproduction at the beginning of this century has made it accessible to anyone who cares to study it, except for its bindings and writing-material. Mommsen's *editio maior* has accounted for its readings in the minutest detail. Yet no unanimity exists as to its age, origin and position in the transmission of the Digest. It is the purpose of this paper to point out a fact that has so far remained unobserved and that is in my view fundamental for an answer to these three vexed questions.

Let me start by mentioning some external features of our manuscript. It was written by at least twelve different scribes<sup>1</sup> on 101 gatherings of parchment of mostly ten leaves. In Florence in the fifteenth century it was bound in two volumes; the remains of these bindings have been preserved.<sup>2</sup> These bindings may be the ones that caused some loss of glosses in the margins,<sup>3</sup> but the

1 Mommsen, *Praef.* pp. xxvi-xxvii; Kantorowicz (pp. 4-6) supposes thirteen.

2 Spagnesi, pp. 52-53.

3 Brenkman, pp. 93-94; Mommsen, *Praef.* pp. xxxi-xxxii.

manuscript in its present state does not allow any conclusions as to previous bindings - if any - and certainly not as to the way in which it was preserved and protected originally. I shall return to this point later, but first I would like to dwell a few moments on the 101 gatherings and their scribes.

It does not come as a surprise that a manuscript consisting of 907 leaves should have been written by twelve scribes. It is, however, interesting to see that dividing the labour of writing cannot have been a mechanical process,<sup>4</sup> for the portions written by the respective scribes are vastly different. This is not the outcome of chance, as I hope to demonstrate, but the result of a predetermined plan. Mommsen has presented the evidence of how the writing of 101 gatherings of different sizes had been distributed among twelve scribes in a table in the preface to his *editio maior*.<sup>5</sup> From this table the following pattern emerges. Leaving aside the introductory constitutions and the two indices, F has 98 gatherings, 65 of which are *quinterniones*. Each gathering has been written by one scribe, although exceptions occur in the quires x, xii, xxiii, lix and lxxviii. As a rule, each scribe has written several quires at a stretch. Every time a new scribe starts a new gathering, an irregularity in the gatherings is to be observed: after a series of *quinterniones*, one or two quires of different size will follow; the verso of the last leaf may be left blank partially or in full, and then a new *quinternio* will be started by the next scribe. Thus, as Mommsen's table suggests by horizontal lines, groups of gatherings come

4 As was the copying of Vat. Reg. lat. 762 from Paris. lat. 5730, to quote a well-known ninth-century example (see F.W. Hall, *A Companion to Classical Texts*, Oxford 1913, p. 85).

5 pp. xxviii-xxx.



into being. As these groups are of different sizes, varying between two and 11 quires and between 18 and 101 leaves, one wants to know whether these groups perhaps also form units as to their contents.

Of the 50 books of the Digest, 19 begin on a new gathering, written by a scribe different from the one who wrote the preceding book and who had ended with an irregular quire. These 19 books each open a group of gatherings. Another four books are started on a new gathering, but are written by the same hand that wrote the foregoing book and do not fit into the pattern of regular and irregular gatherings as outlined before. The remaining 27 books, that is a slight majority, start in the middle of a gathering. To put it differently, of 98 quires, 19 start with a new book, so as to open a group of books, four are doubtful cases, while 75 start in the middle of a book. Groups of gatherings correspond with groups of books. That leaves the question whether these groups of books form logical units.

In legal literature after 533, reference to one of the 50 books of the Digest could be made in two ways: by its book-number *ex ordine* from i to l, or by its place in certain groups of books. In the introductory constitution *Tanta/Δέδωκεν*, Justinian explains how he had arranged the Digest in seven *partes* or *articuli*, a division in accordance with the *numerorum natura et ars*. Whatever that may be, in §§ 2-8 he communicates which books belonged to each *pars* and which subjects they dealt with. These *partes* also figure in the introductory constitution *Omnem* (§§ 2-5), addressed to eight professors of Constantinople and Beirut, in which Justinian described the old law curriculum and set forth a new programme that was to come into force with his codification. Here Justinian not only mentioned the division of the 50 books into seven *partes*, but also referred to

smaller units into which the fourth and fifth *partes* fell, assigning to each year of the curriculum the teaching of each *pars* or unit. Thus the division into *partes* was, in a slightly modified form, made the basis of teaching in the law schools. The first (τὰ πρῶτα), second (*de iudiciis*) and third (*de rebus*) *partes* remained undivided. The fourth and fifth *partes* were taken together and their 17 books called *libri singulares*, which in turn were assigned to sub-groups like *de dotibus*, *de testamentis* etc. The sixth and seventh *partes* (book xxxvii-xliv and xlv-l) were excepted from the course and should be read later. Evidence of these divisions and subdivisions is to be found in the *index titulorum* in F, in three places in the text of our manuscript in *explicit/incipit* subscriptions and inscriptions of books and above all in references to the Digest in the works of the Byzantine law professors, the *antecessores*.<sup>6</sup> As has been pointed out by the late Prof. Scheltema, the abandonment of the Justinian curriculum in the law schools soon after 557 also meant the end of reference being made to the *partes*, a purely academic division.<sup>7</sup> This is a fact of significance, as will be seen later on.

I submit that this arrangement of the Digest into smaller and larger units can be traced in the arrangement of the quires of the *codex Florentinus*. One may compare the table of the quires with another table in Mommsen's *praefatio*, that conveniently sets out the books of the Digest *ex ordine* and according to their place in a unit insofar as has been recorded either in

6 Mommsen, *Praef.* pp. vii-x; C.G.E. Heimbach, *Prolegomena* to his Basilica edition, vol. VI, Leipzig 1870 (repr. Amsterdam 1962), pp. 21-23; Scheltema, pp. 8-9.

7 Scheltema, p. 9

or outside the Digest.<sup>8</sup> Mommsen does not indicate the *partes* by their numbers, but otherwise he gives all the names by which a book has been referred to in legal literature.

Returning to Mommsen's table with the quires of F, the first hand turns out to have written the *pars prima*, books i-iv, ending with a *quaternio*, the last page of which has been left blank. Books v-xi, the *pars secunda de iudiciis*, do not so clearly form a single unit. Three scribes have been writing its gatherings, but perhaps the fact that Mommsen's *manus iiia* has written part of quire xii and the whole of quires xiii-xviii, effectively bridging the separation between the two groups into which books v-xi here are seemingly divided, admits the conclusion that the *pars de iudiciis* may also be seen as a whole codicologically. In any case, the last gathering is irregular, consisting of four leaves only.

The *pars tertia de rebus* with books xii-xix has been written by three hands, too. A change of scribe takes place in quire xxiii for no apparent reason, while a different hand again starts quire xxiv, continuing up to quire xxvii inclusive, to make place for the scribe who had also written part of quire xxiii. Within this group (or groups!)<sup>9</sup> the beginning of a book not only coincides with the first gathering, but the same phenomenon occurs three more times. Therefore the *pars tertia* only fits into the pattern to the extent that it is marked off from the fourth by a change of hand and a

8 pp. vii-viii.

9 It is interesting to note that the group with quires xix-xxiii, written by scribes iv/iiia, contains books xii-xv, the very same books that made up the lost *τεῦχος* of the Digest *Index* of Stephanos. See H.J. Scheltema, 'Ueber die Werke des Stephanos', *TRG* 26 (1958) pp. 5-14, esp. p. 6; and his *Antecessors*, p. 26.

change of quire.<sup>10</sup>

Then follow the so-called *libri singulares* (xx-xxxvi) of the fourth and fifth partes. The smaller units into which they are divided stand out clearly in the arrangement of the gatherings. The *libri antipapiniani* (xx-xxii) occupy a set of quires written by one hand and ending in an irregular gathering, the last page of which has been left blank. The same may be said of the *libri de dotibus* (xxiii-xxv),<sup>11</sup> *de tutelis et curationibus* (xxvi-xxvii) and *de testamentis* (xxviii-xxix). The rest of the *pars quinta* with the seven *libri de legatis et fideicommissis* (xxx-xxxvi) falls, like the third *pars*, into three groups of gatherings, each ending with a partly blank last page (Mommsen's table does not state this). In this *pars*, again like in the third, the beginning of a new book more than once coincides with that of a new quire, and, similarly again, in the middle of one (lix), a change of hand may be observed. We may therefore draw the same conclusion as we did as regards the third *pars*.

This leaves the books xxxvii-1, forming the two *partes* that had been excluded from the law course by Justinian. They, too, fall into groups of gatherings, perhaps even one more than the six units that Mommsen presents, for quire lxxv is irregular and ends with a partly blank last page; moreover, quire lxxvi does not only start with a new book, but perhaps it has even been written by a different hand from the one that wrote quire lxxv. Be that as it may, two facts remain to be observed. First, that a group of two *libri de bonorum possessio-*

10 Precisely here there is a textual problem: there seems to have been some loss of text. See Mommsen's apparatus ad vol. I, p. 580, l. 8.

11 More than half of the last page of q. xxxvii has been left blank (not in Mommsen's table).

*nibus* (xxxvii-xxxviii), although not a subject in the curriculum, is mentioned as a group in the *index titulorum* and forms a codicological unit as well. Secondly, that in quire lxxxii books xliv and xlv, the last book of the *pars sexta* and the first one of the *pars septima* respectively, are only marked off by the usual *explicit/incipit* formula. Book xlv begins on the verso of a leaf, without a change of hand. This is the only case in which a separation as to contents does not correspond with a separation in the manuscript. At the same time it is a case in which the separation did not have any significance, neither academic - for the *partes sexta* and *septima* were not taught at the university - nor practical.

From what has been seen so far, I conclude that for making the present *codex Florentinus* the quires had been distributed among the scribes in such a way as to take account of the division into *partes* or their subdivisions, a division meaningless outside the law schools of Justinian. If this conclusion is acceptable, the possible consequences are far-reaching. For the moment I cannot do more than outline some of them.

## II

It has never been doubted seriously that the *codex Florentinus* is one of our oldest Latin manuscripts,<sup>12</sup> but debate on its precise age has always been vigorous. Opinions have diverged from 533, the date of the promulgation of the Digest, to as late as the early seventh century. Palaeographically, there do not seem to be

12 See E.A. Lowe, 'Some Facts about our Oldest Latin Manuscripts', *CQ* 19 (1925), pp. 197-208; and 'More Facts about our Oldest Latin Manuscripts', *CQ* 22 (1928), pp. 43-62; in *Palaeographical Papers*, pp. 187-202 and 251-274.

objections against either date. Authorities such as Lowe and Bischoff are in favour of a very early date. Lowe does not exclude the possibility that F is an 'official' Digest copy.<sup>13</sup> Bischoff treats it as a 'manuscrit daté' of 533.<sup>14</sup> On strictly palaeographical grounds, however, a date in the seventh century is quite possible as well. Probability must turn the scale, and for Mommsen it did so in favour of a rather late date.<sup>15</sup> I shall not now recount all arguments *pro* and *contra*. Generally speaking, the splendour of the manuscript may be felt to be at variance with imperfections of its text. On the one hand, scholars in favour of an early date either do not bother about the quality of the text or simply exclude the possibility that, after Justinian, interest in the Latin Digest text was still sufficient to have such an expensive copy produced. On the other hand, students of the Digest text with a perfect archetype in mind need, in a strictly stemmatic conception of the textual transmission, one or more generations of manuscripts to explain the 'corruptions' of the text of F and therefore end up in the late sixth or early seventh century.<sup>16</sup>

13 'Greek Symptoms in a Sixth-Century Manuscript of St. Augustine and in a Group of Latin Legal Manuscripts', *Didascaliae: Studies in Honor of Anselm M. Albareda*, Ed. by Sesto Prete, New York 1961, pp. 279-289; in *Palaeographical Papers*, pp. 466-474 with plates 108-113, esp. p. 471.

14 B. Bischoff, *Paläographie des römischen Altertums und des abendländischen Mittelalters* (Grundlagen der Germanistik 24), Berlin 1979, pp. 90, 97 (despite some confusion of codex Florentinus of the Digest and Codex Justinianus).

15 *Praef.* p. xxxx.

16 As Mommsen did. This begs the question whether there has ever been an 'archetype' of all Digest manuscripts, including lost ones. See below.

In the light of what has been said so far, I think I can offer a theory on the birth of the *codex Florentinus* that allows for the arguments of both sides, as long as it is understood that we are concerned with F<sup>1</sup>, i.e. the manuscript as it has been written *prima manu* by the twelve or so scribes.

We must go back to December 16th 533, when Justinian faced the problem of providing both professional men and scholars with copies of his codification.<sup>17</sup> If the idea of effectively promulgating the new legislation was not to remain altogether imaginary, at least some 70 copies were needed. Even if we reckon with a smaller quantity, the labour of writing would still be tremendous and the need of doing so within a very short time pressing.<sup>18</sup> A way of speeding up the copying involved would have to be devised. Long before the *pecia*-system of Bologna<sup>19</sup> was to be invented, quires of existing manuscripts were sometimes distributed among scribes to be copied simultaneously.<sup>20</sup> It is highly probable that a similar system

17 Const. *Tanta*/Δέδωκεν, §§ 23-24.

18 The const. *Tanta*/Δέδωκεν, promulgated on 16th December 533, contains a clause (§ 23) that made the Digest come into force on 30th December of the same year, i.e. a fortnight later. Even if one considers the speed with which Tribonian's commission had worked (see T. Honoré, *Tribonian*, London 1978) and even if one does not exclude the possibility that already before 16th December copying of the Digest had started (cf. E. Huschke, *Zur Pandektenkritik*, Leipzig 1875, pp. 7-8), the word 'pressing' hardly meets the case.

19 See e.g. G. Pollard, 'The *pecia* system in the medieval universities', *Medieval Scribes, Manuscripts and Libraries. Essays presented to N.R. Ker*, ed. by M.B. Parkes and Andrew G. Watson, London 1978, pp. 145-161.

20 Cf. the example quoted above, n. 4.



would be used for providing Digest copies. But how would an exemplar be divided? The *codex Florentinus* leads us to infer that the *partes*, expressly mentioned by Justinian in both the const. *Tanta/Ἀέδωκεν* and the const. *Omnes*, played an important role. Whatever the view one takes as to the manuscript that left the hands of Tribonian's commission, whether it had been made with scissors and paste or perhaps copied laboriously before it was submitted to the emperor for authorization, at some stage between the conception of the idea of a Digest and the copying of the finished product as demonstrated in e.g. F, the *partes* materialized in the form of variously sized groups of quires, which could be copied by groups of scribes - or, one at a time, by one scribe provided there was no hurry. The *codex Florentinus* strongly suggests that it either started the system of copying of *partes*, or, more probably, that it was copied from a similarly divided manuscript - should we perhaps say, collection of quires? - and externally preserved the system. That such *partes* as were not in themselves, like the fourth and fifth, divided into smaller units, were somehow split up to facilitate simultaneous copying, does not disturb the emerging pattern of *partes* corresponding with groups of quires. Indeed, precisely the fact that it does not disturb this pattern contributes to its significance.

If this view is acceptable, two conclusions follow. First, as the *partes* as logical units lost all significance after the collapse of the Justinian curriculum between 557 and 565,<sup>21</sup> it is highly improbable that a manuscript written after that date should leave expensive parchment blank in order to preserve the *partes*-system in its gatherings. The need for Digest manuscripts

21 Cf. n. 7.



in December 533 suggests an early rather than a late date in the period concerned. Secondly, a system of rapidly copying groups of quires instead of manuscripts can cause rapid contamination and corruption of the textual tradition.<sup>22</sup> The codicologist may be satisfied with an early *terminus ante quem*, the philologist with an explanation for all sorts of 'faults', if necessary already in 533/4.

Related to the question of age is that of the origin of the *codex Florentinus*, *olim Pisanus*. Before it reached Florence in 1406, it was kept in Pisa, where its presence in the middle of the 12th century is above suspicion.<sup>23</sup> Attempts to trace the travels of the manuscript further back have come to nothing: the story of Amalfi has been relegated to the province of legend.<sup>24</sup> The manuscript is supposed to have received an 'unfortunately illegible jotting' in an Italian hand of the 9th or 10th century,

22 Cf. Pollard's warning (*op. cit.* pp. 160-161): 'The tacit assumption in the creation of a stemma is that each codex therein is a coherent whole copied from another codex also homogeneous.' If the assumption does not hold good, as is in my view the comparable case of the *codex Florentinus*, the quality of the text of the quires of such a manuscript may diverge widely. There may be a connection with the differences in quality of the 'corrections' made by F<sup>2</sup>, differences already noticed by Mommsen: *Praef.* p. lvii.

23 Mommsen, *Praef.* p. xii; Kantorowicz, p. 21; Spagnesi, p. 35 sqq.

24 F.C. von Savigny, *Geschichte des römischen Rechts im Mittelalter*, 2nd ed., III (Heidelberg 1834), pp. 94-98; Spagnesi, p. 37; see, however, also Miquel (p. 283), who seems to give Amalfi the benefit of the doubt.

from which it is inferred that it was in Italy by then,<sup>25</sup> but we simply do not know anything of its whereabouts before Pisa.<sup>26</sup> As it is extremely unlikely that it should have been written there, we must weigh the candidates for its birth-place.

The most serious competitors for the honour of having produced F are Constantinople and Southern Italy. In 1961 Lowe advocated Constantinople in his article on 'Greek Symptoms in a Sixth-Century Manuscript of St. Augustine and in a Group of Latin Legal Manuscripts'.<sup>27</sup> If one accepts an early date for F, especially if one were to take it for an 'official copy', Constantinople is the most probable candidate. One has to have a good reason for taking a different view, for which the mere fact that the manuscript turns up in Italy in the twelfth or perhaps already in the ninth century is insufficient.

The results of this study of the quires of F once more strengthen the candidature of Constantinople. A relation between F and the law curriculum as laid down by Justinian

25 Kantorowicz, p. 19 and p. 11 with references in n. 5. The jotting seems to be on the last leaf of our manuscript, but has been erased. There is a facsimile in *SZRom* 11 (1890), p. 303. Miquel (p. 283 n. 115a) tells that Prof. Bischoff had pointed out a 'Zusatz in typisch beneventanischer Schrift etwa des 10. Jahrhunderts'. It is on fol. 257r of vol. I. Both these jottings have no other significance than that of attesting a somewhat earlier presence of F in Italy, which was probable in any case on grounds connected with the textual transmission of the Digest. (Only Kantorowicz, not Miquel, wants to draw conclusions as to the origin of F itself.) See below.

26 There seems to have been a tradition that the Pisans had the Pandects from Constantinople. See Spagnesi, nr 34 (pp. 43-44).

27 *Palaeographical Papers*, pp. 471-473 (cf. folder between pp. 470/471).

suggests the presence of a university near the place where F was written. The only cities with a law school entitled to teach the *cupida legum iuventus* were Constantinople, Rome and Beirut.<sup>28</sup> Of these, Constantinople is the 'centre that leaps to the mind'.<sup>29</sup> In this period Byzantine authority in the city of Rome was problematic, to say the least, and Beirut, although a flourishing city until the earthquake of 551, may not have had the same facilities as Constantinople for producing Latin manuscripts. So everything points to the emperor's residence. Why then Southern Italy?

The case for Southern Italy rests for the greater part on the supposed nationality of the scribes. Kantorowicz has taken much trouble to prove that they were Latin and therefore 'at home' in Italy.<sup>30</sup> But he has to concede that the correctors were Byzantines who emended in Greek and in the Greek way. Considering the Greek symptoms in the Latin text of the first hand (F<sup>1</sup>)<sup>31</sup> and the Greek corrections of the second (F<sup>2</sup>), I will not deny the possibility of F having been written in a Byzantine centre in the periphery of the empire, such as Southern Italy, but I fail to see why it should be a more probable candi-

28 Const. *Omnem* § 7.

29 Lowe, *Palaeographical Papers*, p. 472.

30 Kantorowicz, p. 6 sqq., esp. p. 11; cf. Mommsen, *Praef.* p. xxxvii-xxxx.

31 Lowe, *op. cit.* (n. 13); cf. N. van der Wal, 'Die Schreibweise der dem Lateinischen entlehnten Fachworte in der frühbyzantinischen Juristensprache', *Scriptorium* 37 (1983), pp. 35-36.

date than Constantinople.<sup>32</sup> Surely the imperial city with its chancery will have had scribes who were able to write a fluent Latin hand? As for subsequent traveling to Italy, manuscripts have made stranger journeys.

The one valid objection I can think of has been voiced again recently by Pescani.<sup>33</sup> It concerns the two familiar lacunae in book xlvi at the end of titles 20 and 22. The scribe of F was aware of these lacunae, for space was left blank to be filled up later. The fact that this has never happened leads Pescani to the conclusion that F had not been produced in Constantinople, because surely in that city a perfect copy of the Digest would have been available. But we do not know whether F was used much in early times,<sup>34</sup> and it may have escaped these and

32 See also G. Cavallo, 'La circolazione libraria nell'età di Giustiniano', in: G.G. Archi (ed.), *L'imperatore Giustiniano. Storia e mito*, Milan 1978 (Circolo Toscano di diritto romano e storia del diritto 5), pp. 201-236, esp. 233-234. Cavallo emphasizes the hypothetical character of speculations on the origin of F. Miquel (p. 265) does not so much go into the origin of F, as into the origin of its exemplar and that of its correctors, i.e. the exemplars of F<sup>1</sup> and of F<sup>2</sup>. He advances the hypothesis that the exemplar of F<sup>1</sup> should stem from the periphery, but that of F<sup>2</sup> from Constantinople. In his note 78a Miquel records objections by Bischoff who (following Lowe) advocates Constantinople as the origin of a whole series of Digest texts. Bischoff argues from the results of modern palaeography which 'mit einer Art Regie für die Produktion der juristischen Texte, vor allem in der ersten Zeit nach der Publikation rechnet' (Bischoff's words as quoted by Miquel).

33 p. 163.

34 Not to be confused with the question whether the Digest were used all that much. As to F, the most interesting corrections in this respect are those represented by Mommsen as F<sup>3</sup>, i.e.

other corrections, either because the corrector did not have time enough to hunt out a better exemplar, or because initially there simply did not exist such a better exemplar. After all, the evidence that these lacunae were filled up in at least one manuscript solely rests on the Basilica. Pescani suggests Ravenna as the origin of F. I cannot disprove this, but we deal with probabilities, not with proof.

To sum up, in the contest for the birth-place of F, palaeographical grounds, historical probability and connection with legal teaching must decide in favour of Constantinople.

If one accepts that F was written in Constantinople between 533 and 565 and that the distribution of its quires connects it with legal teaching, then who ordered it?

Lowe has suggested<sup>35</sup> that it was an 'official copy', without explaining what he meant by this term. He did so in reference to the quality of the script of F, 'a masterpiece of calligraphy'. (In this respect he valued F a lot higher than Mommsen and Kantorowicz had done, but I trust Lowe had seen more uncial manuscripts.) To return for a moment to Justinian's need to provide his courts of justice, administration and universities with Digest manuscripts, let us assume that 'official' copies

those made by 'ancient' hands other than the two *ordinarii correctores* (F<sup>2</sup>). (Or three? See Mommsen, *Praef.* ['Emendanda et Addenda'], p. lxxxviii; cf. Röhle, pp. 24-25, also criticizing Mommsen for using the siglum F<sup>em</sup>.) On the difficult question of even approximately dating these and other corrections, see Mommsen, *Praef.* pp. xxxvii-xxxx and lvi-lxii; Huschke, *op. cit.* (n. 18), pp. 2-4; and Kantorowicz, pp. 12-13.

35 *Palaeographical Papers*, p. 471; cf. N. van der Wal, *op. cit.* (n. 31), p. 37.

were issued by the imperial chancery for that purpose. At first sight, F would hardly be one of these because of the lacunae discussed above. Perhaps this is expecting too high a standard of even an official Digest copy. Suspicion, however, seems to be justified.

Even if F were an official copy, there remains the question whether all manuscripts would show the relation between quires and *partes* as demonstrated. As has been said above, outside legal teaching in accordance with the Justinian curriculum the *partes* had no use whatsoever. This suggests that F was produced for the university and that non-university copies need not have been written after the same system. After all, it caused blank pages of expensive parchment. This, however, is not proof that they were not produced this way. We have no evidence either way, as far as I can see. More important is the question, what advantage a manuscript had that could be split up in parts that corresponded with the subject-matter of different years of the law course. Two considerations provide an answer: bulk and expense. A complete Digest manuscript is large in size, heavy to carry, awkward to handle and must also have been expensive to buy. We do not know much about the organization of legal teaching in practice. How many students were there in a class? Did they all have books? Did they take notes? Despite this lack of information, it is hardly possible to imagine the *antecessores* teaching without at least some of their students having texts in front of them.<sup>36</sup>

36 There is evidence that teachers first dictated the text on which they were going to comment. See D. Simon, 'Aus dem Kodex-unterricht des Thalelaios', *SZRom* 86 (1969), p. 334 sqq., esp. pp. 335-338. If, however the major problem of the *antecessores* was the fact that they had to teach a predominantly Latin codification to Greek speaking students (Scheltema p. 11 sqq.),

If a student did not need to buy a full Digest text at the beginning of his study, it would greatly reduce his expenses.<sup>37</sup> The existence of separate manuscripts of the *partes* would also remove the problems caused by the sheer size of a complete Digest manuscript.

The quires of F point to a system of providing the law students (and professors?) with such relatively inexpensive, easy to handle, text-books. F itself cannot have been one of these. Its outward splendour militates against this idea, as does the fact that the same scribes and correctors return in different *partes*, thus making the manuscript a whole, not just a collection of parts.

would they really dictate the *Latin* text as well? One shudders to think what would have been the results! In my view, students would procure a Latin text and note down (dictated) explanatory comment by the teacher, either in the margins of their manuscripts or separately, with or without lemmata. At least, that is consistent with the existence of Latin manuscripts with Greek *paragraphai* in the margin and also with those Basilica scholia that contain a Latin lemma followed by a Greek text. See Scheltema, pp. 10 and 27.

37 It is attractive to suppose a connection with § 12 (13) of the const. *Tanta/Δέδωκεν*, in which Justinian boasts about the possibility for everyone to buy cheap texts of the law, but alas, the text does not permit such a supposition. But 'how did students passing through a full course of Byzantine education furnish themselves with the numerous texts that were read?' (N. Wilson, 'Books and Readers in Byzantium', in: *Byzantine Books and Bookmen*. [Dumbarton Oaks Colloquium 1971], Washington 1975, p. 8. Wilson was not speaking about law studies in particular; the problem, however, is the same. As he said: 'One may reasonably hope that the large surviving correspondence of Byzantine schoolmasters will sooner or later yield information on this point.' [*loc. cit.*]).

I have never had the opportunity to inspect the quires of F, but I have it on the authority of Mrs Morandini, the librarian of the Laurenziana, that they do not show traces of an original binding in more than two volumes. Of course I would like to say that the relation between the quires and the *partes* was originally present in some sort of bindings as well, but unfortunately there is no such evidence, neither for nor against.

I therefore offer as a suggestion for discussion that the *codex Florentinus* was an official copy of the Digest, produced for the university of Constantinople, where it may have gone to rest in a show-case rather than on the shelves of a working-library and from where it has somehow found its way to Italy subsequently. If one would not accept a connection between legal teaching and F itself, one must face the probability that even non-university manuscripts were made in accordance with the *partes*-system.

### III

One other aspect of the relation between the quires of the *codex Florentinus* and the *partes* of the law curriculum deserves to be considered. To say the least, we cannot rule out the possibility that other Digest manuscripts show the same relation. In other words, the transmission of the Digest text may have been influenced not only by complete manuscripts, but also by single gatherings. This may have happened at any stage. We have seen that multiplication of collections of quires instead of complete manuscripts will produce a contaminated tradition from the very beginning. The *codex Florentinus* is the only complete manuscript representing this early stage and may have preserved readings resulting from contamination. Now in what has been the traditional view



of the transmission of the Digest text since Mommsen, F is represented as the fountain-head of this transmission in the later Middle Ages. I need not go into details here.<sup>38</sup> As is well known among legal historians, the principal problem is the exact relation between F and the other extant Digest manuscripts dating from the eleventh century onwards. (The small group of *subsidia antiqua* are generally considered to be independent from F. Important as they are in themselves, they have no concern with this problem.)<sup>39</sup> In the accepted theory these so-called 'vulgate'<sup>40</sup> manuscripts all derive from a lost *codex S(ecundi ordinis)*, which in turn goes back to F and to another also lost manuscript.<sup>41</sup> The codex S is needed to explain peculiarities common to all vulgate manuscripts, the second source to account for readings different from F and considered to be true readings that could not have been found by conjecture. Scholars are divided about the question whether these independent true readings are to be found in the Digestum Vetus and Infortiatum (without the Tres Partes), i.e. in books i-xxxiv only, or occur throughout all fifty books; in

38 See *Praemittendum*.

39 Mommsen, *Praef.* pp. xxxx-xxxxiii with *Additamenta* at the end of vol. I, pp. 1\*-16\*, 'emendanda et addenda' to which are placed in front, pp. lxxxx-lxxxxiii. A special case is perhaps the ninth-century Berlin fragment (R): cf. Mommsen, *Praef.* pp. lxii-lxiii and recently R. Röhle, 'Das Berliner Institutionen- und Digestenfragment Ms. Lat. Fol. N 269', *BIDR* 71 (1968), pp. 129-173, and P. Pescani, 'La posizione del "R" nella tradizione della "Littera Bononiensis"', in: *La critica del testo* (Atti del secondo congresso internazionale della Società Italiana di storia del diritto), II (Florence 1971), pp. 671-690.

40 Stolte, pp. 73-75.

41 Mommsen, *Praef.* pp. lxii-lxxiii.

other words, whether or not books xxxv-1 are dependent upon F only.<sup>42</sup>

It is this second source that is of some interest to us here. Because of the alleged paucity of independent true readings, it has also been called a Digest epitome.<sup>43</sup> This is not the time and place to go into specific readings, nor need we decide whether we deal with an epitome or a complete Digest text. I think, however, that there are sufficient grounds to reconsider the whole problem of the relation between the *codex Florentinus* and the medieval Digest tradition in the light of my argument so far. If we were to examine the Digest text for concentrations of true readings independent from F,<sup>44</sup> we might find out more about the nature of this elusive 'epitome'. We might - but not necessarily will - come to the conclusion that it is not so much the *Digestum vetus* that has been influenced by an independent tradition, but one or more *partes* or subdivisions of *partes*. The epitome might prove to have been a full text of only part or parts of the Digest, not a collection of scattered

42 The first position was taken by Mommsen (*loc. cit.*), the second by Kantorowicz, pp. 41-58, and has gained support increasingly in the last two decades. See also the survey of opinions in Troje, pp. 47-48.

43 Kantorowicz, p. 50; disputed by Miquel, p. 281.

44 or their absence. Mommsen found none in books xviii-xxix (*Praef.* p. lxx); Kantorowicz thought he had 'bridged the gap' by having found one example in book xxviii (pp. 43, 46). Apart from the fact that I am not convinced that this example (D. 28.6.1.1, cf. ed. mai. app. ad I, 850, 24-25) is not a medieval conjecture, books xx-xxvii (*Antipapiani*, *de dotibus*, *de tutelis* and *de testamentis*) would still remain 'unspoilt' by such 'authentic emendations'. For the time being a *non liquet* seems to be indicated.

fragments. At least we would then be able to explain how it could happen that the independent source contained only this part or these parts. If the existence of manuscripts, each containing one of the Justinian *partes*, is a reasonable supposition, so is their possible influence on the transmission of the Digest text, both in the sixth and in the eleventh and in any other century.

I started this paper by saying that I hoped to contribute to our understanding of the *codex Florentinus* as the oldest Digest manuscript, of its age, origin and position in the transmission of the text. From the preceding pages it will have become clear that more problems are involved than can be solved within the compass of this paper. It is my intention to continue research in this direction and to report on my findings in future issues of the *Subseciva Groningana*.

B.H. Stolte jr

