

SOME THOUGHTS ON THE EARLY HISTORY OF THE DIGEST TEXT

The transmission of the Digest text is one of the unsolved problems of legal history. As so often where Theodor Mommsen has trodden, the grass has taken a long time to recover, but the field still needs attention. Later generations have concentrated on the medieval phase of this transmission. Gradually it was becoming clear that there was more to be said than Mommsen had done. The earlier part of this history has received much less attention, yet is in need of a fresh investigation just as much. It is one such an investigation¹ that has given rise to the present paper.

Boudewijn Sirks has recently offered his views on one of the early witnesses of the Digest text, the Pommersfelden papyrus fragments of book XLV, title 1. While agreeing with him in most factual aspects, I beg to differ with some of the observations on the Digest tradition to which the Pommersfelden fragments (Pomm) have led him.² It is the purpose of this paper to present an outline of the direction which in my view work on the early history of the Digest ought to take.³ In one respect, however, I can agree with Sirks whole-heartedly: that it will not do to neglect the Pommersfelden fragments.

Of the numerous presentations of the transmission of the Digest and the witnesses of its text it is convenient simply to mention the concise survey by Franz Wieacker in the *Handbuch der Altertumswissenschaft*.⁴ Wieacker's work renders long introductions superfluous and, helped by the prestige of its author and the place of publication, it will no doubt be used as the standard work of reference for many years to come. One of its merits is the extensive bibliography in the footnotes, where one finds almost everything of

- 1 Ein frühbyzantinisches Szenario für die Amtswechslung in der Sitonie. Die griechischen Papyri aus Pommersfelden (PPG) mit einem Anhang über: die Pommersfeldener Digestenfragmente und die Überlieferungsgeschichte der Digesten. Herausgegeben von A.J.B. Sirks, P.J. Sijpesteijn und K.A. Worp [=Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte 86], München 1996, VIII+166 pp., 23 plates. I have reviewed the book in TRG (forthcoming); it is of course the appendix that is of special interest here.
- 2 As the appendix on the Digest papyri is by Sirks, I further refer to this as Sirks, Anhang.
- 3 See also my two earlier papers: 'The partes of the Digest and the codex Florentinus', SG I (1984), 69-91; 'Finium regundorum and the Agrimensores', SG V (1992), 61-76 [repr. in *Miscellanea Domenico Maffei dicata. Historia-Ius-Studium*, IV, Goldbach 1995, 17-32]
- 4 F. Wieacker, *Römische Rechtsgeschichte. Erster Abschnitt. Einleitung, Quellenkunde, Frühzeit und Republik* [=Handbuch der Altertumswissenschaft X.3.1.1], Munich 1988, Zweiter Teil. *Romanistische Quellenkunde*, 112 ff., esp. 122-127. Some additional literature may be found in D. Nörr, 'Zur neuen Faksimile-Ausgabe der littera Florentina', *Iura* 39 (1988, publ. 1991), 121-136. See also the papers in SG V (1992).

consequence that has been written on the subject.⁵ Contrary to Wieacker's and other surveys I should like to pay closer attention to the oldest witnesses, which in my opinion deserve more careful study than they usually receive. They are the essential backdrop for the foundation of our Digest text, the *codex Florentinus*, which is our only sixth-century manuscript preserved in its entirety. It is my firm conviction that, without them, it is easy to misunderstand the importance of this manuscript and its relation to the later medieval tradition altogether. Moreover, through the presentation of well-known facts with a different emphasis, this relation can be shown in a different light.

I

The history of the transmission of the text is not the same for all books of the Digest. The medieval manuscripts demonstrate a division into three parts, the Digestum Vetus, the Infortiatum and the Digestum Novum. While the Digestum Novum and, to a lesser extent, the Infortiatum are closely related to F, the crux in the transmission of the Digestum Vetus will always remain the relation between the Florentine (F) and the manuscripts of the 11th century onwards, the *codices Bononienses* as Mommsen called them in the preface to his editio maior and which usually and imprecisely are called the Vulgate (Vulg).⁶ While F can be shown to have influenced Vulg, Vulg also shows features that neither stem from F nor can have been found through conjecture, so-called 'authentic emendations'. This difficulty has been resolved by the hypothesis of a medieval manuscript which would be the common ancestor of the entire medieval tradition and has been given the somewhat unfortunate name of *codex Secundus* (S), which would have been composed on the basis of F and a second ancient witness, which I shall call X. Dependent on one's critical views, the respective contributions of F and X to S may vary considerably. Mommsen is among those who concede to X only a minor role, as he believed that such authentic emendations were only to be found in a number of the first 34 books. Kantorowicz found them in other books as well, but as so many faults remained uncorrected, he supposed that X was a *Pandektenauszug*.⁷ Recently, however, the champions of F have been inclined to let themselves be somewhat rattled by the battle-cry of *recentiores non deteriores* raised by the patrons of Vulg; consequently the role of X has been emphasized, explicitly or implicitly. It should be stressed that both S and X lead a hypothetical existence. If they ever existed, both S and X are now lost irretrievably. Therefore any student of the Digest text is more or less free to attribute a variant reading in Vulg to S and thus to X in order to

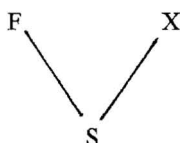
5 I therefore refrain from repeating this documentation here. Starting-point is of course Mommsen's editio maior with its Praefatio (Berlin 1870, repr. - without the facsimiles - 1962), here referred to as 'Mommsen'.

6 The siglum Vulg is thus used for an unspecified number of manuscripts collectively forming a textual tradition which, while still constituting one family, may show considerable variation.

7 H.U. Kantorowicz, 'Über die Entstehung der Digestenvulgata', SZ 30 (1909) 183-271 and 31 (1910) 14-88, also printed together Weimar 1910.

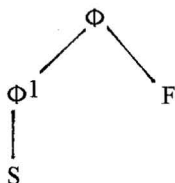
EARLY HISTORY OF THE DIGEST TEXT

authenticate as Justinianic what in fact may be anything other than that. However this may be, the traditional view of the transmission of the Digest text can be presented in the following simplified schema:⁸



Vulgate tradition

Another way to resolve the problem has been taken by Pietro Pescani. In a series of papers from 1962 onwards he has argued for a different stemma, which, if I am not mistaken, assumes two different branches, one leading to F and one to a subarchetype F^1 , leading to S and so to Vulg. The similarities between F and Vulg would be explained by the fact that both branches would go back to one archetype F. Pescani has made a thorough study of one of the oldest 'vulgate' manuscripts of the Digestum Vetus, namely Vat. lat. 1406 (V), which actually may even be older than Paris. lat. 4450 (P) and date to the third quarter of the 11th century.⁹ Pescani's view may be presented as follows:¹⁰



Even this scheme, however, silently operates with X: if we have two variant readings, a faulty one in F and a correct one in S, and we would be unable to explain one as a

8 See the stemmata drawn by Kantorowicz, *Entstehung* § 15 n. 6 (SZ 1909, 253), and F. Schulz, *Einführung in das Studium der Digesten*, Tübingen 1916, 11.

9 Opinion of Armando Petrucci, reported by Ch.M. Radding, 'Vatican Latin 1406, Mommsen's Ms. S, and the Reception of the Digest in the Middle Ages', SZ 110 (1993), 501-551, at 523.

10 I have not found this schema in his papers on the subject, which are listed by Radding, Vatican Latin 1406, 518 n. 38; see however his 'Studi sul Digestum Vetus', BIDR 84 (1981) 159-250, at p. 159, and 'Origine delle lezioni della littera Bononiensis superiori a quelle della littera Florentina', BIDR 85 (1982) 205-282, esp. 205-207 and 281-282. Pescani distinguishes between B and S ('Origine' 205), but that need not concern us here.

corruption of the other, and S (or Φ^1) could not have found that reading through conjecture, we have to assume X as the source of that reading in Φ^1 or S.

The discussion on the text of the Digest, however, is more than just a problem of F versus Vulg, or, more precisely, of F versus X. Even F and X may have been unrepresentative of the 'original' text, a phenomenon to which I shall return below. As we do not have access to X, it is of vital importance to make the most of all available witnesses of the early history of the Digest text, as they are our only standards with which to measure the representativeness and quality of F, these in turn being the mirror of those of our mysterious X and therefore also of Vulg. After all, if we have to judge two variant readings, one in F and one in Vulg, there is still no certainty that either of them is the correct one. As soon as F or Vulg is confirmed by an independent witness, a considerably greater degree of certainty may be reached.

None of this new; yet it is curious that no greater weight should have been attached to early witnesses of the textual transmission that are independent of F. It has been said time and again that our knowledge of the vulgate tradition has increased since Mommsen's day, and with it, it seems, has increased the value that is now generally being attributed to it. No less considerable advances, however, have been made as to our insight in the age and circumstances in which the Digest was compiled, a fact that does not seem to have had the same consequences.

Let us first dwell on F itself for a moment. Some years ago I wrote a paper on 'The partes of the Digest and the codex Florentinus',¹¹ in which I proved to my own satisfaction that the division of labour in writing this manuscript as reflected by the composition of its quires showed a relation with the division of the Digest into seven *partes* as outlined in, *inter alia*, the constitutions *Omnem* and *Tanta*/Δέδωκεν. Of the conclusions I drew from this fact I should like to return to the one that has received least attention, namely the possibility that the exemplar of F was not one manuscript, but a collection of quires stemming from different manuscripts. F would then represent a stage in the transmission of the Digest text in which it would already be impossible to draw a stemma due to contamination between the early manuscripts. More precisely, each quire might have its own textual history, which might differ from that of the other quires. If this were the case, S could still be based on F + X, and to that extent our view of the tradition would not be affected. The chance, however, that F and X would carry us more or less in a straight line to the 'original' manuscript of the Digest would then be minimal. The nature of F and therefore of that of its exemplar(s), and perhaps also of X, would then need reconsideration.

The conclusion that traditional, 'Lachmannian' methods of reconstructing the Digest text were unsuitable in this case was reached through a different route in 1963 by Juan

11 SG I (1984), 69-91.

EARLY HISTORY OF THE DIGEST TEXT

Miquel, who emphasized the phenomenon of (a different type of) contamination in the earliest stages.¹² He begins his discussion of the Digest tradition in the sixth century as follows: 'Für das 6. Jh. erscheint die Vorstellung von Archetypen von vornherein als wenig wahrscheinlich' (259) ... 'Bei der weiten Verbreitung der Digestenhandschriften ist es schwer denkbar, dass die uns erhaltenen Texte unabhängig von einander in selbständiger Abstammung, wenn auch in mannigfacher Durchkreuzung, von den Urexemplaren der Kompilatoren herrühren' (260).¹³ Miquel then investigates Mommsen's theory of a 'wissenschaftliche[n] Überarbeitung der Digesten im Laufe des 6. Jh.s' (263) and is inclined to the view that the compilers of the Digest themselves already made corrections which failed to reach all existing copies: hence the differences between F¹ and F², which he takes to represent 'zwei Textrezensionen' (265), in the former of which contamination would have played a smaller role (*ibid.*).

From a combination of Miquel's and my own results the early transmission of the Digest text emerges as one for which it is utterly impossible to draw a stemma of manuscripts. The codicological evidence of at least one manuscript, the Florentine, points in the same direction as the evidence that a study of the textual variants yields; each of the two types of contamination must have reinforced the other's effects.

Not only the evidence of F, but also other considerations contribute to the probability that there never existed one 'official', authentic copy of the Digest from which the entire manuscript tradition has sprung. Scholars have always shown great interest in the way the Digest was compiled by a committee in a relatively short time.¹⁴ Whichever theory one adopts, with or without a predigest, to name but one of the spectres that haunt the literature on the subject, the committee evidently produced a Digest text as the result of its labours which then was promulgated officially by Justinian on December 16th, to come into effect on December 30th of the same year 529. On the outward appearance of this text we can only speculate, but if we are to take Justinian seriously, a considerable number of texts must have been prepared simultaneously in a short time. It is questionable that all texts produced in that first generation should have been copied from and, more importantly, collated against one and the same official copy.¹⁵

From all this it may be inferred that we are probably not dealing with a conventional problem of reconstruction of the one and only archetype, by definition lost, of the entire

12 'Mechanische Fehler in der Überlieferung der Digesten', SZ 80 (1963) 233-286.

13 It may be noted that Miquel rightly accepts as an established fact that numerous copies of the Digest circulated in the sixth century, a fact in sharp contrast with the small number that has reached our day. Still, we have not been unfortunate; see G. Lanata, *Legislazione e natura nelle novelle giustinianee*, Naples 1984, 23-24.

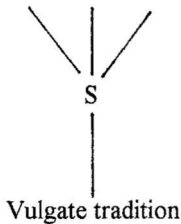
14 Cf., e.g., the work by Tony Honoré, summed up in his *Tribonian* (London 1978), and David Pugsley, *Justinian's Digest and the Compilers*, Exeter 1995.

15 See also Nörr, *Zur neuen Faksimile-Ausgabe*, 133 ff.

Digest tradition.¹⁶ The difficulty, and perhaps impossibility, of reconstructing such an archetype makes it extremely difficult to be certain of 'what Justinian wrote'. At the very least it is a more complicated process than simply isolating the authentic variants in S that must have come from X.

Again I stress this need not affect the reconstruction of S as the archetype of the vulgate tradition. This reconstruction is in itself a legitimate end insofar as the history of medieval legal scholarship is concerned. It is even necessary for our knowledge of the earlier history of the text insofar as it helps to isolate X as a sixth-century (?) witness of the text. But we should be aware of the fact that we are dealing with two separate problems. One is that of the early text: the question of the representativeness of F and other early witnesses of the Justinianic text. The other is that of our hypothetical S and the entire medieval tradition of the text. Only when we have formed a clear image of both can we try and connect the two traditions, the early and the medieval one. To put it another way: The most probable hypothesis seems to me the assumption that the medieval or Vulgate tradition is dependent on a manuscript S. We know that S has not been copied exclusively from, but is closely related to F. We do not know what other ancient sources have served the makers of S. Thus S is the lock through which the stream of the Digest text has passed, before flowing out into the broader bed of the Vulgate tradition. The main contributory to the stream before the lock is F, which even has bypassed the lock at some points. Other contributaries, for the moment collectively termed X, may be identified from an analysis of the traces they have left in Vulg, but then these traces have of course to be compared with the rivulets upstream. Not until we have completed that comparison will we be able to speak with confidence about Vulg as the repository of genuine ancient readings. These considerations may be presented in the following schema:

Manuscripts antedating S, among which F and X



This brings us back to our mysterious X. X represents in all existing theories an authentic tradition independent from F. Theoretically it may be an epitome, be it a short or a long

16 M.L. West, *Textual Criticism and Editorial Technique applicable to Greek and Latin Texts*, Stuttgart 1973, 32.

EARLY HISTORY OF THE DIGEST TEXT

one, a collection of quires representing (some of) the *partes*,¹⁷ a complete text, or even several manuscripts. I repeat that at least in theory there is nothing against the possibility that the scribes of S made use of more than one manuscript, in which case the siglum X does not stand for one codex, but for an unspecified number of them. If X signifies one manuscript, it may have been of the same age and quality as F, but it is well to remember that, just as F, it may have been the result of an already contaminated tradition. And it is also well to remember that, again in theory, there is nothing against or in favour of the identification of X with one of our still extant ancient witnesses, such as the Pommersfelden fragments.

II

Apart from F, the witnesses antedating S comprise:¹⁸

- i. Direct witnesses: fragments from (1) Naples (N) and (2) Pommersfelden (Pomm); smaller ones from (3) Heidelberg, (4) Manchester and (5) Paris; and (6) a somewhat younger fragment from Berlin (R).
- ii. Testimonia in (1) the *Corpus Gromaticorum* (G) and (2) quotations of much less importance in a few other works.
- iii. The 'Greek tradition', consisting of (1) quotations (strictly speaking these belong to the testimonia just mentioned at ii), (2) translations and paraphrases, and (3) commentaries.

In the following list I provide references to manuscripts, facsimiles, and editions of these witnesses, at the risk of repeating information to be found in Wieacker and elsewhere; it may be thought convenient to have on these pages at least the references to E.A. Lowe, *Codices Latini Antiquiores* (CLA), and R. Seider, *Paläographie der lateinischen Papyri*, ii,2: *Juristische und christliche Texte*, Stuttgart 1981 (Seider), where one finds the literature up to 1980.

i Direct witnesses

1. Four palimpsest parchment leaves from Naples: IV.A.8, fol. 36-39 (CLA iii, nr 402, p. 39 and 48; Suppl. p. 51).

See Mommsen, *Praefatio* xxxv; vol. i, *additamentum* i (p. 1*-10*) and supplement in *Praef.* lxxxx-lxxxxi. Facsimile: CLA has a photograph of fol. 39 with clear traces of the primary script; apographum in Mommsen, *additam.* i, p. 3*-10*; the *editio princeps* by E.Th. Gaupp (*Quatuor folia antiquissimi alicujus Digestorum codicis rescripta Neapoli nuper reperta ...*, Breslau 1823) also has an apographum and a '*specimen scripturae antiquae*'. Contents: D. 10,2,3-16; 10,3,23-29; 10,4,12-19. Date: saec. vi² (Lowe).

17 Cf. my *Partes of the Digest*, 88-91.

18 Cf. Wieacker, 122-123.

Provenance: 'Written doubtless in Italy' (Lowe); Ravenna probably (Tjäder, *Scriptorium* 12, 1958, 40-41).

2. Seven papyrus fragments (one of which is now lost) from Pommersfelden: Schlossbibliothek, P.P.L. 5 (CLA ix, nr 1351, p. 33 and 65; Suppl. p. 64; Seider, nr 36, p. 102-105, with pl. xvii).

See Mommsen, *Praef.* xxxx-xxxxi; vol. i, additam. ii (p. 11*-16*) and its supplement in *Praef.* lxxxii-lxxxiii. Facsimile: CLA has part of fol. 5r and 1v; Seider depicts fol. 5r and 5v; the full set, except the now lost fol. 6 is in Mommsen, vol. ii i.f. (but not in the reprint); J. Herrmann ('Die Papyrussammlung von Pommersfelden', *Atti dell' XI Congresso Internazionale di Papirologia*, Milan 1966, 188-194 [=Kleine Schriften zur Rechtsgeschichte, Munich 1990, 138-151], Anlage I) shows fol. 1r; apographum in Mommsen, vol. i, addit. ii, p. 12*-16*; fol. 6 is known from the editio princeps by K.E. Zachariä von Lingenthal, *Zeitschrift für die geschichtliche Rechtswissenschaft* 11 (1842) 239 ff. (=Kleine Schriften i, 84 ff.). Contents: D. 45,1,35-73. Date: saec. vi (Lowe). Provenance: 'Written in the eastern part of the Roman Empire' (Lowe).¹⁹

3. Two papyrus fragments from Heidelberg: P. Heid. Lat. 4, olim 1272 (CLA viii [1959], nr 1221, p. 55 and 69; Seider, nr 40, p. 110-112).

Facsimile: CLA has part of recto and verso of the main fragment, Seider (pl. xix, nr 40) depicts the entire recto. G.A. Gerhard-O. Gradenwitz show the full recto and verso (*Philologus* 62 [1903], plates between p. 160 and 161). Editio princeps: Gerhard-Gradenwitz, *ibid.*, 95-124, with revision by Gerhard in *Philologus* 66 (1907), 477-480, on the basis of an additional fragment (the second one), discovered in 1906; no facsimile. Contents: D. 5,2,17-19, with Greek glosses. Date: saec. vi. Provenance: found in Egypt.

4. Five papyrus fragments from Manchester: P. Ryl. 479 (CLA Suppl. [1971], nr. 1273, p. 16 and 70; Seider nr 37, p. 105-107).

Facsimile: all plates are of the same fr. b verso (CLA; Seider pl. xvii, nr 37; C.H. Roberts, *Catalogue of the Greek Papyri of the John Rylands Library at Manchester* iii [1938], pl. 4). Editio princeps: Roberts, *ibid.*, p. 85-90; additional information by F. Schulz, *TRG* 17 (1941), 19-27; revised edition by R. Düll-E. Seidl, *SZ* 61 (1941), 406-410. Contents: D. 30,8; 10; 11; 12; 14; 19; 22-26. Date: saec. vi. Provenance: found in Egypt, written, according to Lowe, probably in Byzantium.

5. Two papyrus fragments from Paris: P. Reinach 2173 (Seider, nr 18, p. 68-69).

Facsimile: Seider has recto and verso of fr. B (or A? see p. 68) (pl. vi, nr 18). Apographum in Seymour de Ricci, 'Deux nouveaux papyrus juridiques', *Études d'histoire juridique offertes à Paul Frédéric Girard*, i (Paris 1912), 277, which is also the editio princeps (*ibid.* 273-282), revised by H.J. Scheltema, 'Über die Werke des Stephanus', *TRG* 26 (1958), 5-14, esp. 9 ff., and repeated in the same, *L'enseignement de droit des antécédents*, Leiden 1970, App. ii, p. 66-67. Contents: D. 19,2,54 pr. and possibly also 56, with a commentary

19 To be added now: Sirks, *Anhang*.

EARLY HISTORY OF THE DIGEST TEXT

by Stephanus. Date: saec. vi. Provenance: bought in Egypt. Note the confusion as to the designation of the fragments and the terms of recto and verso (cf. N. van der Wal, 'Encore une fois le P. Reinach 2173', TRG 47 (1979), 275-276).

6. A quire in a manuscript in Berlin: Lat. fol. 269 (e bibliotheca Rosnyana: R), fol. 183-190.

Facsimile of two lines in Mommsen, i, at the end (not in the reprint); plate of fol. 188v in R. Röhle, 'Das Berliner Institutionen- und Digestenfragment MS. Lat. Fol. N. 269', BIDR 71 (1968), 129-173, with full collation (147-149) and transcription (150-173) of the entire fragment. Description in Mommsen, Praef. xxxix-xxxv and lxii-lxiii and Röhle, op. cit.; cf. also P. Pescani, 'La posizione del R nella tradizione della "litera Bononiensis"', La critica del testo. Atti del secondo congresso internazionale della Società italiana di storia del diritto, ii (Florence 1971), 671-690. Contents: (end of Institutes and) D. 1,1-1,7,3. Date: saec. ix; viii fin. (Röhle); according to Pescani, 'pur con qualche riluttanza' (679), saec. vi-vii. Provenance: 'burgundische Schreibstube'? Note: although according to the communis opinio the manuscript does not date to the sixth century, its exemplar may (see, e.g., Röhle's conclusion at p. 146).

ii Testimonia

i. *Corpus Gromaticorum*. Among the writings of the Gromatici or Agrimensores there are some legal fragments, inter alia the text of D. 10,1 though in a different order from that of the Digest. It is assumed that the Digest was the source from which someone compiling a manuscript with a *Corpus Gromaticorum* copied these fragments. Our fragments occur in two manuscripts, Vat. Palat. lat. 1564 (P, saec. ix), and its indirect copy of Wolfenbüttel, Gud. lat. 105 (G, saec. ix).²⁰ Mommsen has used the Gromatici for his edition, G through the edition by Lachmann *et al.*, P through a collation made at his request by R. Kekulé.²¹ Since Mommsen the *Corpus Gromaticorum* has been studied in detail and partly edited anew by C. Thulin, whose essay 'Die Handschriften des Corpus agrimensorum Romanorum', *Abhandlungen der königlich preussischen Akademie der Wissenschaften*, 1911, Philos.-hist. Classe, Abh. ii, is a first guide through the material. I should like to make one point: Mommsen considered the source of the compiler of the *Corpus Gromaticorum* to have used a different and better manuscript of the Digest than F. My own findings confirm that it was occasionally of better, but sometimes of poorer quality than F. P and G are the descendants of this manuscript.

20 For a short survey of the extremely complicated history of the *Corpus Gromaticorum* see M.D. Reeve in *Texts and Transmission. A Survey of the Latin Classics*, ed. L.D. Reynolds, Oxford 1983, 1-6. For the relation between D. X,1 as transmitted in the Agrimensores and the Digest itself, see also my 'Finium regundorum and the Agrimensores'.

21 Praef. xxxxi (see also the note at i, 306); F. Blume, K. Lachmann, A. Rudorff, *Die Schriften der römischen Feldmesser*, i (Berlin 1848; repr. Hildesheim 1967), 276-270.

ii. Quotations in other sources. These are extremely rare for the early period:

1. Gregory the Great, *Epist.* 13,45 quotes D. 48,4,7,3; see Mo. ii,803 with app.. This is the only clear case of an early direct citation.
2. A similar case may be the two glosses in a ninth- or tenth-century manuscript of the *Institutes* from Bamberg, D II 3, ad Inst. 2,1,9; there are reasons to assume that the glosses draw on an early manuscript other than F or S. See the discussion by M. Conrat (Cohn), *Die Epitome exactis regibus*, Berlin 1884, xlv ff. The glosses contain D. 11,7,2,4-5 and are edited by Conrat on p. xlvii with facing Digest text from Mommsen's *editio maior*, which brings out the variant readings.
3. In a treatise on (con)tutores the antecessor Julian paraphrases D. 27,3,1,11-15. See Mo. i,796; the treatise is in the same codex R that also contains the Berlin Digest fragment; see above.
4. Johannes Lydus gives a Greek translation of a number of Digest passages in his *De magistratibus*: 1,2,2,4 in i,34; 1,2,2,22 in i,26; 1,2,2,34 in i,48; 1,13,1 in 1,28 cf. also i,24; 1,15,1 in i,50. See Mommsen, *Praef.* xxxii n. 3, who also observes that in all these references not the Digest is mentioned, but the jurist and his work as recorded in the *inscriptio*. Lydus has one reference (i,48=p. 51,8 Wunsch) that cannot be traced to the Digest. It has been suggested that he did not draw on the Digest, but on the original writings, which seems incompatible with a mistake he makes in i,34 and 26.²²
5. Sixth-century references to the Digest without actual quotations or paraphrases are to be found in the so-called *Glossa Taurinensis* in a manuscript of the *Institutes* from Turin, D III 13 X²³ and in the *Paratitla* of the *Epitome Juliani*.²⁴ For the text of the Digest they are of no value, but they are an indication of its circulation in this period.

iii The 'Greek' tradition

The fact that Justinian promulgated his Latin codification in a Greek speaking environment has determined the peculiar nature of sixth-century legal teaching and scholarship. There is no need to go into details here.²⁵ Suffice it to say that few students of Roman law have taken the trouble to study the evidence available in the witnesses of this teaching and scholarship, partly no doubt due to linguistic difficulties, partly perhaps because the focus

22 See Mommsen, *ibid.*

23 Scheltema, *Antécédents*, 43-46.

24 New editions by N. van der Wal, 'Die Paratitla zur Epitome Juliani', SG ii (1985), 93-137; D. Liebs, *Die Jurisprudenz im spätantiken Italien (260-640 n. Chr.)* [Freiburger Rechtshistorische Arbeiten, NF 8], Berlin 1987, 246-259.

25 See P. Pieler, 'Byzantinische Rechtsliteratur', in: H. Hunger, *Die hochsprachliche profane Literatur der Byzantiner*, II [=Handbuch der Altertumswissenschaft XII,5,2], Munich 1978, 341-480, esp. 405-407, 414-417, 419-426 (on the Digest in particular 421-423); N. van der Wal-J.H.A. Lokin, *Historiae iuris graeco-romani delineatio. Les sources du droit byzantin de 300 à 1453*, Groningen 1985, esp. 31-51.

EARLY HISTORY OF THE DIGEST TEXT

of interest traditionally has been not on Justinian's codification, but rather on the writings it has preserved from the 'classical' age of Roman law. Yet methodically this neglect of the so-called Greek or Byzantine sources is indefensible.

No systematic collection has been made of the quotations, translations and commentaries originating in the sixth century. A first and extremely important step is the relevant portion of C.W.E. Heimbach, *Manuale Basilicorum* [Basilicorum libri LX, VI, 2], Leipzig 1870, 221-337. It has to be noted that the material collected here is from the Basilica only, and of course based on the Heimbach edition. That means that corrections are necessary and additional material is available, both within and outside the Basilica tradition.²⁶ Some of these texts were not known to Mommsen and our insight in the Greek tradition has advanced considerably.

As we have to thank mainly the *antecessores* of the sixth century for this material, a full palinogenesis of the individual sixth-century jurists would be helpful, but so far nobody has come forward to undertake that task.²⁷ We would then be in a better position to study the characteristics of the various translations *et sim.*, which obviously would help us in the reconstruction of the Latin texts on which they were based. A recent study by Frits Brandsma on Dorotheos gives an idea of what might be gained for the constitution of the Digest text.²⁸

III

Most of these ancient witnesses of the Digest text have been studied in the past. F has been the subject of a monograph as far back as 1722, a book still not entirely obsolete.²⁹ Mommsen's Praefatio deals with the *subsidia antiqua* which were known in his time. The 'Greek' tradition has mainly been used for occasional papers on particular textual problems, but has never been exploited systematically. Most ancient witnesses are available in satisfactory editions or collations. A study of this material as a whole seems to me a desideratum. It should lead to a better insight in the early history of the Digest text and to a reappraisal of Mommsen's editio maior in this respect.

To avoid misunderstanding and disappointment, especially in connection with the last-mentioned point, it may be useful to conclude with a few words about the ultimate goal of such research. In my view the evaluation of these ancient witnesses will demonstrate the limited value of S for the reconstruction of the sixth-century Digest text or texts. In an earlier paper I have already set out this view in a study of 'Finium regundorum and the

26 E.g., a few papyri preserve a translation of and commentary on, and even some direct information about, the Latin Digest text: see PSI 55 and 1350, and an unpublished Oxyrhynchus papyrus (information from Professor P.J. Parsons).

27 On an unpublished attempt by Zachariä von Lingenthal, see M.Th. Fögen, 'Rendezvous in Rom', RJ 9 (1990), 278-286, esp. 278-280.

28 F. Brandsma, *Dorotheos and His Digest Translation*, Groningen 1996.

29 H. Brenemann, *Historia Pandectarum, seu fatum exemplaris Florentini*, Utrecht 1722.

Agrimensores'; I submit an appendix below on the palimpsest from Naples, which seems to me to provide additional proof. If my view is acceptable, two conclusions follow.

In the first place, the medieval history of the Digest text remains based on S. One may differ as to the relation between F and S, but as far as I can see, not as to the relation between S and the Vulgate tradition. The *communis opinio* about the subsequent collation of manuscripts with F and the gradual incorporation of readings of F into Vulg during the Middle Ages as the result of that process has not been challenged. At the same time it does not provide us with additional information about Justinian's own time, as F itself has been preserved.

Secondly, a new edition after Mommsen will not be able to satisfy all needs.³⁰ Ideally, it would be useful to have two texts: one which aims at reconstructing as far as possible the 'Justinianic' text(s), and one of S setting out the subsequent medieval history.

Obviously the work to be done for the reconstruction of these two texts with their appropriate apparatus is quite different in each case. Equally obviously the two texts are no strangers to each other and a clear insight in one is a great help for work on the other.

To return to Sirks' notes on the Pommersfelden papyrus fragments and the history of the transmission of the Digest text, which have prompted these observations. Until we have a proper understanding of the position of these fragments in the sixth-century history of the text will all attempts to bring them to bear on S be purely speculative. It is precisely for that reason that we should not neglect them.

Bernard H. Stolte

30 See also Nörr, *Zur neuen Faksimile-Ausgabe*, 135.

Appendix: Ms. Naples IV.A.8 foll. 36-39 rescr.

Among our ancient witnesses of the Digest text are the remains of a sixth-century manuscript, now preserved in the Biblioteca Nazionale of Naples. Four parchment leaves, the present fol. 36-39 of ms. IV.A.8, once belonged to a codex with (part of) the Digest. Apparently this manuscript had ceased to be of practical use, for the Digest text was erased and replaced with, inter alia, Charisius' *Ars grammatica*. We know that as a Charisius text it was kept in the library of the monastery of Bobbio in Northern Italy. Details may be found through E.A. Lowe's *Codices Latini Antiquiores*.³¹

The four leaves have played a minor role in the modern history of the constitution of the Digest text. They had first been published by Gaupp in 1823.³² Chemicals were used in the attempt to decipher the erased text. Mommsen knew of these *parvae reliquiae*, of course, and used them for his edition, but he had to rely on apographa and collations by others.³³ The leaves have been separated from the manuscript and are now preserved between glass plates, according to Lowe, who gives a facsimile: a photograph of part of fol. 39 shows clear traces of the primary script of which we also find a reproduction in Mommsen's editio maior.³⁴ There seems to be no doubt about its Italian provenance and dating to the sixth century.³⁵ The Latin numerals in the margins counting the *leges* distinguish this manuscript from remains of Digest manuscripts in Pommersfelden (P. Pomm. lat. 1-6) and Manchester (P. Ryl. 479), where one finds Greek numerals.

A full page of the original manuscript contains 32 lines of on average 36 letters. The contents of the four leaves are D. 10,2,3-16; 10,3,23-29; 10,4,12-19. Unfortunately they narrowly escape coinciding with the title *Finium regundorum* (D. 10,1), for which we have independent evidence in the *Corpus agrimensorum*.³⁶

31 CLA iii, nr 402, p. 39 and 48; Suppl. p. 51. See esp. H. Keil, *Grammatici Latini I* (Leipzig 1887), p. xi, and add several papers by P. Pescani, inter al. 'Studi sul Digestum Vetus', *BIDR* 84 (1981), 159-250, esp. 159, and A.B.J. Sirks in: *Ein frühbyzantinisches Szenario für die Amtswechslung in der Sitonie. Die griechischen Papyri aus Pommersfelden (PPG) mit einem Anhang über: die Pommersfeldener Digestenfragmente und die Überlieferungsgeschichte der Digesten*. Herausgegeben von A.J.B. Sirks, P.J. Sijpesteijn und K.A. Worp [=Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte 86], München 1996, p. 140 with n. 9.

32 E.Th. Gaupp, *Quatuor folia antiquissimi alicujus Digestorum codicis rescripta Neapoli nuper reperta* ..., Breslau 1823, with an apographum and a 'specimen scripturae antiquae'.

33 Mommsen, *Praefatio* xxxv; vol. i, additamentum i (p. 1*-10*, with annotated apographum at p. 3*-10*) and supplement in *Praef.* lxxxx-lxxxxi.

34 Vol. i, addit. i, p. 2*, corrected in the *Praef.* lxxxxi.

35 Date: saec. vi2 (Lowe). Provenance: 'Written doubtless in Italy' (Lowe); Ravenna probably (Tjäder, *Scriptorium* 12, 1958, 40-41).

36 B.H. Stolte, 'Finium regundorum and the Agrimensores', *SG V* (1992) 71-76, repr. in *Miscellanea Domenico Maffei dicata. Historia-Ius-Studium*, IV (Goldbach 1995), 17-32.

Assessing the quality of N on the basis of its published readings is dependent on the quality of the work of those who provided the readings. Modern technology may yet enable us to improve on that work, but I trust that it will suffice as a provisional guide.

For obvious reasons I have tried to base my representation of N in this paper on undisputed readings. Where there seemed to be genuine disagreement among scholars, I have either left those readings out of consideration or at least tried to steer a prudent course. The sigla are as in Mommsen's editio maior, to which I have added S for the consensus of the 'Bononienses'. As a working hypothesis, I have assumed that the concordance of the first hands of P and V in a given reading would prove the occurrence of that reading in S. I realize that there are serious methodological problems in doing so, but I believe these can be eliminated if one leaves out of consideration those cases where Mommsen's additional witnesses L and U — insofar as represented in his apparatus — cast doubt on this assumption. Of the two manuscripts P and V, I have only been able to check Mommsen's readings of V from a microfilm. It did not come as a surprise that Mommsen's apparatus does not contain a full picture of that manuscript, but then Mommsen never made that claim. Particularly striking is the number of corrections of Vb towards readings also in F.

In the following cases N has a better reading than all other witnesses:³⁷

- D. 10,2,7=310,7 *hostes haberet* N, *hostes adiectum eo haberet* F, *hostes adiectum haberet* S
- D. 10,2,8,2=310,27 *non* N, *om.* FS
- D. 10,3,26=329,15 *reciperari* N,³⁸ *reciperare* F, *recuperare* S
- D. 10,3,28=329,18 *ait* N,³⁹ *om.* FS

Especially the first case is interesting. Undoubtedly N has the correct text, i.e. without *adiectum eo*, which in F has been clumsily repeated from the preceding *adiectum co* (thus Mommsen in the apparatus), but the repetition is also found in PVL and must therefore have been in S. This may be taken to prove the dependence of S on F; alternatively one may think of a similar mistake in their common exemplar, as Pescani probably would.⁴⁰ In any case it is an indication of the independence of N. That independence may also be seen in cases where N goes against FS but does not have the obviously correct reading:

- D. 10,2,4,2=310,28 *aut* (adgressura) FS, *uel* N
- D. 10,2,6=310,4 *neque mihi* FS, *mihi* N
- D. 10,3,28=329,23 *sarciri* FS, *resarcire* N
- D. 10,3,28=329,24 *quid* FS, *quis* N
- D. 10,4,18=335,24 *creditor* FS, *om.* N

37 Digest quotations are accompanied by references to the first volume of Mommsen's editio maior.

38 But last letter uncertain, according to Krüger (Praefatio, p. lxxxxi ad 8*, 3).

39 Apparently not seen by Krüger (Praefatio, p. lxxxxi ad 8*, 9 in.).

40 See, e.g., P. Pescani, 'Studi sul Digestum Vetus', 159-161; Id., 'Origine delle lezioni della littera Bononiensis superiori a quelle della littera Florentina', BIDR 85 (1982) 205-282, esp. 205.

EARLY HISTORY OF THE DIGEST TEXT

In the same category belongs:

D. 10,3,25=329,11 liberaui F, -uit N, -bit S

This case is special only in that N stands alone, while F and S do not agree, either.

In a rather greater number of cases N goes with F against S:

D. 10,2,4,1=309,26 et FN, ut S

D. 10,2,4,1=309,26 improbatae FN, probatae S

D. 10,2,4,3=309,29 debebit FN, dividebit S(?)

D. 10,2,5=309,34-35 ceteri ... faciant FN, ceteris faciat S(?)

D. 10,2,7=310,10 faciendam FN, faciendo S

D. 10,2,8,1=310,23 nobis FN, omnibus S

D. 10,2,12,2=311,2 and 5 heredum FN, hereditatis S

D. 10,2,12,2=311,3 eximatur ... condicione FN, om. S (homioteleuton)

D. 10,2,12,2=311,4 a FN, om. S(?)

D. 10,2,14,1=311,11 deducatur FN, deductum S(?)

D. 10,3,24 pr.=329,4 praecipuum FN, pretium S, ἐξάριετον BΣ 578,12

D. 10,3,25=329,11 adquisierat FN, -it S

D. 10,4,15=335,12 iudicium FN, exhibitio(nem) S

D. 10,4,19=335,27 haec actio F, hae**ctio N, edictio S

D. 10,4,19=335,28 respondit FN, respondi S

In all these cases the combination of two ancient, and probably independent, witnesses against S argues in favour of their having preserved the authentic Digest text. This, however, is not the end of the story. There are also a few cases in which N goes with S against F:

D. 10,2,8 pr.=310,15 fuerint fNS, fuerit F

D. 10,2,8,2=310,24 bestia F, bestiis NS, ὑπὸ τῶν θηρῶν BΣ 2591,9

D. 10,2,9=310,29 usuceperunt F, -int NS

D. 10,3,23=328,34 cum NS, sum F

These cases further prove the independence of F and N; in the light of the numerous contrary cases of F with N against S they cannot be considered to prove a relation between N and S other than that both probably have preserved the authentic Digest text. N's independence of both F and S is also evident in a few cases in which there is no clear picture of the *littera Bononiensis*, in other words where we do not know what our hypothetical codex S read, as P diverges from V:

D. 10,2,12,1=310,37 seruis NVPb, seruus FPaL

D. 10,2,12,1=311,1 hereditariis NV, hereditarius F?L, P?

Perhaps this should be treated as one case, if I could be certain about P; if P contains the same correction from hereditarius to -is as in seruus, we might suppose a variant in P as compared with V. There is also the case of:

D. 10,4,13=335,3 *peculiariter* N, *peculiater* F, *peculiariter* f.

Mommsen quotes *peculiariter* as the reading of N in the apparatus, but Vesmius later reported *pecuni*****er* (see Praefatio p. lxxxxi). The apparatus of the editio stereotypa has *peculiariter* N, *peculiater* F. Again there is the question of P; as far as I can see from the microfilm, V has *peculiariter*, the letters perhaps having been rewritten for the sake of clarity, as has happened also elsewhere. Probably the prudent course would be to omit these two or three cases altogether from our considerations.

Especially important may be the cases in which F¹ and F² diverge and N goes with either of them. Of these we may note:

- D. 10,2,4,2=309,28 *quaesitum* F²NS, *adquaesitum* F¹
- D. 10,2,14,1=311,12 ab F² **, [probably⁴¹ ab] N, om. F¹S(?)⁴²
- D. 10,3,25=329,10 *milia* F¹N, om. F²S⁴³
- D. 10,3,26=329,14 *quid* F²NS, *quidem* F¹
- D. 10,3,29 pr.=329,25 *existimauerit* F¹N, *existimaret* F², S(?)⁴⁴
- D. 10,4,15=335,8 aut F²N, an F¹, et S, ¶ BΣ 920,15
- D. 10,4,19=335,30 *studiosum* F¹NPbVb, *studiorum* F²Va, inc. Pa

From these cases it transpires that N goes with F¹ and F² in an almost equal number of cases, thus further proving its independence.

Without losing sight of the minimal size of the portion of the Digest text which has been preserved in N, we may infer some provisional conclusions from the readings examined so far.

First, in the debate about the representativeness of F of the original, authentic Digest text, scholars usually have concentrated on the cases in which S had a 'better' text than F.⁴⁵ This was to some extent a reaction to Mommsen, whose rather quick dismissal of the value of the so-called *recentiores* provoked that response. It is an established fact, and was also admitted by Mommsen, that especially the Digestum Vetus contains passages in which the reading of the hyparchetypus of the Bononienses, S, is to be preferred. Whether one follows the basic stemma of Mommsen *et al.*, in which S is the product of F plus another source X, or adheres to Pescani's view, who sees S as the copy of Φ¹, Φ¹ and F having been copied from a common archetype F, the final decision whether F or S represents the authentic Digest text would be helped greatly if we would possess an independent third

41 There is space for two letters, so there must have been something, instead of the absence of a word in F¹S.

42 V has a longer omission here.

43 Mommsen proposes to read *mihi*, as already suggested by 'quidam apud Schultingium'.

44 V not reported correctly by Mommsen; the ms has *exstimaret*.

45 See, e.g., Pescani, 'Origine delle lezioni'.

EARLY HISTORY OF THE DIGEST TEXT

witness. Such a witness is N.⁴⁶ It may therefore be useful tentatively to draw up the balance-sheet for the passages occurring in N. The result does not look too good for S. The *communis opinio* seems to be that there are no cases in which S is superior to F and/or N,⁴⁷ while only in very few passages NS is to be preferred to F. In the vast majority of cases F is confirmed, or at least the probability increased that F has preserved the authentic reading. Although N is too small to draw far-reaching conclusions, it is obvious that we have to be cautious when choosing between F and S if no additional evidence is available: the burden of proof continues to rest on those who prefer a reading from S.

Second, if N helps us to assess the quality of S, it also reminds us that we have to be equally cautious in following F. In the rather small amount of text for which we have both F and N, the (at least) two or three cases in which N is to be preferred to F (and S) is not an entirely negligible amount. If we were to extend N into a full Digest manuscript, the two or three cases would grow into an alarming number. N covers 135 lines in Mommsen's *editio maior*, in which a page has on average at least 35 lines. The entire Digest covers 1875 pages, i.e. more than 65,625 lines. If the number of two or three is representative, the Digest would potentially contain more than $486 \times (2 \text{ to } 3)$, i.e. between 972 and 1458 passages in which F would not have the authentic reading. Of course there is no guarantee that this is an accurate estimate; it is merely another salutary reminder that F has serious defects, too. But the most disturbing aspect is that we would have no means of checking F against independent witnesses unless there would be other (fragments of) manuscripts such as N. Such fragments there are, not to mention the mass of Byzantine sources. Obviously they deserve the closest attention.

Bernard Stolte

46 Pescani, 'Studi sul Digestum Vetus' 159 makes N (with question-mark) derive from Φ as well.

47 Pescani, 'Origine delle lezioni' 226-230 has a few cases in D. 10 in which S is to be preferred to F, but these do not coincide with N.

