

GRAECA PANDECTARUM IN BASILICIS

One of the great steps forward in the historiography of Byzantine law surely has been the discovery of how Roman law was taught in the Greek-speaking East before and after Justinian's codification, and of the prominent role teaching has played in the genesis of the texts that have reached our time.¹ Much has been written about the linguistic difficulties that students and teachers faced as a result of Justinian's decision to codify in Latin, although the majority of his subjects were Greek-speaking. Much less attention has been paid to the cases in which – implicitly – no such difficulty was presumed. All three parts of the codification contain passages in Greek, which are supposed to have been easier to understand for the greater number of the *cupida legum iuventus*. But were they? And if so, how is this reflected in our sources? For an answer we should look at a comparison of the codification with the Basilica and their scholia.

Of the three parts of the codification – the *Novellae constitutiones*, strictly speaking, do not belong to the codification and are a separate case in that they do not draw on pre-existing material –, the Institutes have just a few Greek words and quotations. The Paraphrasis of Theophilus reflects the way the Institutes were taught; its basis is a full Greek version of the Latin text. The Codex contains the greatest quantity of Greek by far, but these words and passages have almost all been reconstructed from Byzantine sources, so that there is hardly anything to compare them with. By reason of the availability of the *codex Florentinus* (*F*), however, the transmission of the Digest text affords an opportunity to compare the *Graeca in Pandectis*² with the Basilica and their scholia. In the first place one thinks, of course, of D. 27,1 with Modestinus' treatise on *excusationes*, but there are many other cases. Traditionally these Greek passages have exercised a certain fascination, not least because, until the publication of Torelli's edition of the Digest, the readings of *F*

1 H.J. Scheltema, *L'enseignement de droit des antécédents*, [Byzantina neerlandica. Series B: Studia, I], Leiden 1970 (repr. in: Id., *Opera minora ad iuris historiam pertinentia*, (collegerunt N. van der Wal, J.H.A. Lokin, B.H. Stolte, Roos Meijering), Chimaira, Groningen 2004, 58-110.

2 For the fullest compilation of material bearing on *Graeca in Pandectis* one probably still has to turn to an unpublished treatise under that title by Henrik Brenkman: Göttingen, Niedersächsische Staats- und Universitätsbibliothek, Cod. ms. jurid. 46. Unfortunately it has not been possible to revisit the manuscript while preparing this paper. See, however, B.H. Stolte, *Henrik Brenkman (1681-1736), Jurist and Classicist. A Chapter from the History of Roman Law as Part of the Classical Tradition*, Groningen 1981, 58-60 and 120-121.

were surrounded with uncertainty and speculation. Let us leave the history of the restitution into the Digest tradition of these *Graeca* on one side and concentrate instead on the question of how they were treated in teaching and commenting in the sixth century.

For this purpose I have studied all passages in which more than just one or two words occur. Three categories may be distinguished:³ first, the passages written by Roman lawyers in Greek, above all the extracts from Modestinus' *excusationes* just-mentioned; second, quotations of documents and imperial rescripts in Greek; and third, quotations of Greek non-legal literature, such as Homer and Demosthenes. In addition, I have looked at D. 50,15 *De verborum significatione*; it did not take long, however, to see that this title gives rise to special questions which fall outside the compass of this paper and will receive attention at another occasion. I have compared all these texts with the corresponding passages in the Basilica. Obviously, we are served best when manuscripts with scholia have been preserved, especially 'old' scholia, i.e., scholia originally written in explanation of the Digest text. Where the pertinent book of the Basilica has been lost, we are dependent on a reliable restitution of the text, and almost never have scholia been transmitted with these passages. Unfortunately, there also some cases in which nothing has been preserved that could be used for the purpose. In spite of these restrictions, in my view the material will allow us to draw some conclusions.

The following table presents the 43 texts in question in the order of the Digest. For the purpose of a comparison between the Digest and the Basilica, the Digest fragments written in Greek and those which quote documents in Greek⁴ are more interesting than those containing literary quotations. I have numbered the fragments for easy reference. References to the Basilica with numbers and 'rest.' between square brackets indicate that the Greek passage in the Digest does not occur in the restituted part of the Basilica. They indicate its absence in the transmission as we know it, but should of course not be taken as proof of their absence in the original Basilica text.

No.	Digesta	Mo. ed. mai.	Basilica	BS	Contents
1	1,3,2	I, 11/22	2,1,13-14	4/19	Demosthenes, Chrysippus
2	1,3,6 = 5,4,3	I, 12/7 = I, 198/29	2,1,17	5/16	Theophrastus
3	1,4,4	I, 15/5	2,6,5	-	Graeca Modestiniana
4	5,1,48	I, 170/19	7,5,47	-	Epistula Hadriani

3 The distinction into four groups by H.E. Troje, *Graeca leguntur. Die Aneignung des byzantinischen Rechts und die Entstehung eines humanistischen Corpus iuris civilis in der Jurisprudenz des 16. Jahrhunderts*, [Forschungen zur neueren Privatrechtsgeschichte, Band 18], Köln/Wien 1971, 12-18, serves to describe the history of their gradual restitution from the Middle Ages onward.

4 For the latter, see B. Kübler, 'Griechische Tatbestände in den Werken der kassuistischen Literatur', *SZ* 28 (1907), 174-210.

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5	8,3,37	I, 263/28	58,3,37 rest.	-	Document (donation)
6	10,1,13	I, 308/11	58,9,13 rest.	-	Solon
7	14,2,9	I, 421/27	[53,3 rest.]	-	Volusius Maecianus ex lege Rodia
8	16,3,26,1	I, 476/31	13,2,26,1	663/19	Document (IOY)
9	17,1,60,4	I, 497/22	14,1,60,4	802/25; 836/14	Document (mandate of administratio)
10	18,1,1	I, 513/19, 24, 27	[19,1,1 rest.]	-	Homer
11	20,1,34,1	I, 587/38	25,2,34,1	-	Document (pignus)
12	26,3,1	I, 751/36	[37,3 rest.]	-	Graeca Modestiniana
13	26,5,21	I, 756/43	37,5,21 rest.	-	Graeca Modestiniana
14	26,6,2	I, 758/1-30	37,6,2 rest.	-	Graeca Modestiniana
15	26,7,47 pr.	I, 770/16	[37,7,46 rest.]	-	Document (tutela)
16	27,1,1-15	I, 781/4	38,1,1-15	2159-2172	Graeca Modestiniana
17	31,34,1	II, 44/3	[44,2,34,7 rest.]	-	Testament
18	31,34,7	II, 45/28	44,2,34,7 rest.	-	Codicil
19	31,88,15	II, 68/20	[44,2,87 rest.]	-	Testament
20	32,37,5	II, 82/1	[44,3,37 rest.]	-	Testament
21	32,37,6	II, 82/9	44,3,37 rest.	-	Testament
22	32,101	II, 99/38	[44,3 rest.]	-	Codicil
23	33,4,14	II, 118/37	[44,7 rest.]	-	Codicil
24	33,8,23,2	II, 136/42	[44,11 rest.]	-	Testament
25	34,1,4 pr.	II, 142/29	44,14,4 rest.	-	Testament
26	34,4,30,1	II, 169/31	44,17,30 rest.	-	Codicil
27	34,4,30,3	II, 170/2	[44,17,30 rest.]	-	Testament
28	36,1,76 pr.	II, 253/31	[35,11 rest.]	-	Testament
29	40,4,60	II, 436/18	48,3,60	2843/6	Testament
30	40,5,41,4	II, 450/39	48,4,41,4	2878/12	Testament
31	40,5,46,3	II, 453/27	48,4,46	2883/28-29	Testament (fideicommissum)
32	43,10,1	II, 577/18	58,8,13 rest.	-	Papinian ἐκ τοῦ ἀστυνομικοῦ μονοβήλου
33	44,7,61	II, 648/26	52,1,60	-	Document (IOY of procurator)
34	47,22,4	II, 793/22	60,32,4	3620/27	Solon
35	48,19,16,6.8	II, 850/7, 17	60,51,6.8	3887/10; 3888/17	Demosthenes; Homerus
36	49,1,1	II, 864/12	9,1,1	-	Rescript of Antoninus Pius

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37	49,1,25	II, 868/20	9,1,24	-	Rescript of Alexander Severus
38	50,6,6,2	II, 919/8	54,6,6,2	-	Rescript of Pertinax
39	50,6,6,6	II, 919/23	[54,6 rest.]	-	Rescript of <i>divi fratres</i>
40	50,9,6	II, 925/6	-	-	Lex municipii
41	50,11,2	II, 926/25	-	-	Plato
42	50,12,10	II, 928/20	[54,13 rest.]	-	Document (pollicitatio)
43	50,16, 104	II, 942/20	2,2,101	-	Graeca Modestiniana = D. 27,1,2,7

The number of 43 is misleading, since the *Graeca Modestiniana* of D. 27,1 have been taken as one fragment. As demonstrated by the table, the textual transmission has not been particularly kind. 23 of the Basilica fragments belong to lost books, and 14 of these 23 have proved to be impossible to reconstitute by lack of *testimonia*. Not only have no scholia been transmitted with these lost fragments, of the 20 preserved Basilica texts in direct transmission only 10 carry scholia, among them fortunately the *Graeca Modestiniana* in B. 38,1, on which more below. Finally, in the present state of our knowledge, two fragments have not been included in the Basilica.

First, a brief survey of the fragments listed in the table. The first one, D. 1,3,2, contains quotations from Demosthenes and Chrysippus. In D. 1,3,1 Papinian translates part of Demosthenes' words; D. 1,3,1 and the first part of 2 in fact say the same. Since B. 2,1,13 represents D. 1,3,1, there is no need for B. 2,1,14 to repeat this and it suffices with the laconic addition: ἔστι δὲ καὶ θεῖον εὔρημα. The scholion preserved with the latter text (BS 4/19) just records that these words are Demosthenes', and continues with a full quotation of Chrysippus, omitting the concluding words καὶ τῶν φύσει πολιτικῶν ζώων προστακτικὸν μὲν ὧν ποιητέον, ἀπαγορευτικὸν δὲ ὧν οὐ ποιητέον, after which some comment follows. It must be pointed out that Mommsen's critical apparatus, which is based on Heimbach's edition, reports readings from this scholion that are very different from the version in the Groningen edition.⁵

Fr. 2 is summarized in the Basilica; the scholion repeats it in roughly the same words. In the summary of D. 5,4,3 it is not mentioned, nor do the scholia refer to it.

Fr. 3 is quoted literally in the Basilica; no scholia have been preserved, although it concerns the important principle of *lex posterior derogat legi priori*.

The next three fragments are represented in the Basilica with a summary, but all lack scholia; fr. 7 is lacking altogether, since no source is available for the restitution of the lost Basilica text at this point.

5 I have not been able to verify the readings in the manuscript, cod. Paris. gr. 1352, f. 6v.

Fr. 8 is briefly summarized in the Basilica text, whereas a scholion (BS 663/19) quotes the Greek document literally, followed by a translation of the rest of the fragment, pointing out in parenthesis that this was not a case of *stipulatio*.

Fr. 9 is paraphrased in the Basilica text, while a scholion (BS 802/25) in cod. Coisl. gr. 152 has a literal quotation of the Greek part of the Digest text with minor variants. The edition contains another scholion (BS 836/14), from cod. Paris. gr. 1352, reducing the contents of the fragment to a legal maxim: ‘He who instructs someone to do as he pleases, is not considered to permit him to commit *dolus*, nor to waste his money or to give security’.

Fr. 10 contains the famous passages from Homer on sale and barter. Parts of D. 18,1 *De contrahenda emptione* have been restituted in the corresponding book 19 of the Basilica, but not the present passage. The recently discovered palimpsest cod. Vindob. Hist. gr. 10 has not helped at this point.⁶

Fr. 11 is a summary; there are no scholia.

Fr. 12-14 and 16 are the so-called *Graeca Modestiniana*, which stem from his *libri excusationum*. Since book 37 of the Basilica has not been preserved, for fr. 12-14 we are dependent on other sources for their restitution. No representative for fr. 12 has been transmitted; of fr. 13 and 14 we have summaries. Fr. 16 consists in fact of the first 15 *leges* of D. 27,1 *De excusationibus*, which have been excerpted – with a few exceptions, all brief fragments: h.t. 3,5,7,9,11 – from Modestinus’ *libri excusationum* in Greek. The title is represented in the Basilica as B. 38,1 and will be discussed below.

The restitution of the lost book 37 of the Basilica has not yielded a text corresponding to fr. 15.

The equivalents of fr. 17-27 were all found in B. 44, now lost. Four have been restituted, for seven others no sources are available.

No source is available for the restitution of fr. 28 in the lost book B. 35.

Fr. 29 is a case similar to yet different from fr. 9: a summary in the Basilica text and a literal quotation of the Greek text in the scholion (BS 2843/6). The rendering of the Latin part of this fragment, however, is more literal than in the case of fr. 9.

6 On the manuscript, see J. Grusková, ‘Zwei neue Basiliken-Handschriften in der Österreichischen Nationalbibliothek. I: Paläographisch-kodikologische Analyse. Mit vier Tabellen und 30 Tafeln’, in: Ch. Gastgeber, [ed.], *Quellen zur byzantinischen Rechtspraxis. Aspekte der Textüberlieferung, Paläographie und Diplomatik*. Akten des internationalen Symposiums Wien, 5.–7. 11. 2007, [Österreichische Akademie der Wissenschaften, philosophisch-historische Klasse. Denkschriften, 413. Band. Veröffentlichungen zur Byzanzforschung, Band XXV], Wien 2010, 107-138 (108-122 and 133-134); B.H. Stolte, ‘Zwei neue Basiliken-Handschriften in der Österreichischen Nationalbibliothek. II: Rechtshistorische Analyse. Mit 30 Tafeln’, in: Gastgeber, *Quellen zur byzantinischen Rechtspraxis*, 139-182 (139-146 and 153-166).

Fr. 30: The Basilica text quotes the Greek testamentary clause, in the transmitted version changing Stichos and Damas into Petros and Paulos and summarizing the rest of the fragment. A scholion (BS 2878/12) quotes the same Greek text – preserving Stichos and Damas – and continues with a full translation of the rest of the fragment. There can be no doubt that the scholion preserves the sixth-century version of the Digest text.

Fr. 31 is represented in the Basilica, but it is precisely the passage with the Greek *fideicommissum* that has been omitted. A scholion (BS 2883/28-29), however, contains a literal quotation. Perhaps even more remarkable is the fact that it also translates *Graecis verbis* explicitly: Ἑλληνικοῖς ῥήμασιν.

Fr. 32 is a Greek fragment, according to its *inscriptio* written by Papinian. The corresponding Basilica text has been lost, but could be restituted almost entirely. The authorship of Papinian has generally been doubted and the restituted text makes a more credible impression than the ‘original’.⁷

Fr. 33 is represented by a summary in the Basilica; there are no scholia. The Digest text cites two documents, one Greek, one Latin. Interestingly, the Greek text in the *principium* is not quoted in the Basilica; the Latin one in § 1 is translated faithfully, followed by a summary of the rest of the Digest text.

Fr. 34 is summarized in B. 60,32,4 and commented upon in a scholion (BS 3620/27) in cod. Paris. gr. 1350. Gaius’ Latin words are paraphrased, followed by a literal quotation of Solon’s law, with one interesting variant: μηνῶται instead of ἢ ναῦται (see also Mommsen’s apparatus and conjecture of θύται).

Fr. 35 contains a quotation from Demosthenes and one from Homer. Neither is mentioned in the Basilica text, but both are cited in scholia. Here we may note that a more recent hand in cod. Paris. gr. 1350 has added a memory verse (BS 3888/23; cf. 3887/19).

Fr. 36-38 (38 rest.) are summarized in the Basilica; there are no scholia.

Of fr. 39-42 no equivalents have been preserved in the Basilica; we cannot be sure that any of them ever existed.

Finally, fr. 43 is a *lex geminata* of a *Graecum Modestinianum*, or rather, it is an edited quotation of Modestinus’ argument in D. 27,1,2,7. It is unremarkable, except perhaps that its equivalent in the Basilica is a literal quotation. On the other hand, in the light of the nature of the title *De verborum significatione* hardly anything else was to be expected.

7 B.H. Stolte, ‘Papinian on the Road’, forthcoming.

1. Graeca Modestini

The case of the Greek treatise on *excusationes* by Modestinus is very illuminating and deserves a separate treatment. Apart from the brief but important fragment in D. 1,4,4 (see above, fr. 3), which does not seem to have elicited any comment, and some fragments in D. 26 for which no suitable parallel version in the Basilica has reached our day (see above), we have D. 27,1,1-15; its equivalent in the Basilica, B. 38,1,1-15 with scholia, offers excellent material for comparison.

Modestinus starts his treatise with an apologetic letter to Egnatius Dexter by way of introduction (D. 27,1,1pr.-2):

Herennius Modestinus to Egnatius Dexter. I have sent you a work, in my opinion most useful, that I have given the title “exemption from *tutela* and *cura*”. I shall make the information as clear as I can, setting out the law in Greek, even if I know that it is notoriously hard to express when it comes to such translations. In the course of my exposition, I will add the actual words of the laws wherever necessary, in order that, by having at our disposal both what has to be said and has to be read, we provide to those who need it the whole as well as what is useful.⁸

If this is what Modestinus says, he then goes on to deliver as promised, setting out the grounds for various categories of people to be excused from undertaking a tutorship or curatorship and frequently quoting from imperial rescripts. The language is Greek, but when he cites other jurists, he does so in Latin, e.g., h.t. 6,5-6; 8,9. Imperial rescripts are either paraphrased in Greek or quoted in Latin: see, e.g., h.t. 8,10 τοῦτο δὲ καὶ ἐπὶ τῶν κουρατοριῶν ἐστὶν νενομοθετημένον, ὡς δηλοῖ θεία διάταξις Σεβήρου καὶ Ἀντωνίνου, but h.t. 10,4: ὡς δηλοῖ ἡ ὑποτεταγμένη τοῦ θειοτάτου Σεβήρου διάταξις: *Divi Severus et Antoninus Augusti Valerio. Testamento tutor datus (...)*.

These comprehensive passages have been summarized in the Basilica. Every *lex* has been rendered concisely. No rescripts are quoted, no emperor is mentioned by name. In the scholia, however, it is not Modestinus’ Greek that is drawn upon for illumination of the summaries. In the rare cases where a passage is rendered in full, the choice of words seems to be deliberately non-Modestinian. Perhaps Modestinus was right after all. In his own time, it was not easy to write about Roman law in Greek. In the sixth century this had

8 The translation does not claim praise for its literary quality. Because of *παρασχόμεθα* at the end, I am suspicious of the proposed conjecture *παρέχοντες* for *ἔχοντες* (see Mommsen), at the same time admitting that the Greek raises several questions that have to remain unanswered here. E.g., the work has already been sent (*πέπομφα*), but only then will he make additions (*προσθήσω*)? Published translations in all languages, Latin and the vernacular, diverge.

changed: a new vocabulary had become current. Two examples: In h.t. 2pr. Modestinus uses the verb προσέρχομαι for ‘accepting an inheritance’: ἐν ἐκείνῳ τῷ χρόνῳ, (...) ἐν ᾧ τῆ κληρονομία προσέρχεται τις. The Basilica text (BT 1682/12) has ἐν τῷ καιρῷ τῆς ὑπεισελεύσεως τῆς κληρονομίας. A scholion (BS 2159/17) has the original technical term: κατὰ τὸν καιρὸν τῆς ἀδιτίονος τῆς κληρονομίας. And in fact, ὑπεισέλευσις became the standard equivalent for *aditio*.⁹ While Theophilus seems to prefer *adition*, the Basilica text often has ὑπεισέλευσις. Another example may be found at h.t. 4pr. Modestinus uses for ‘pending trial’ the words μετεώρου οὔσης τῆς δίκης. A corresponding scholion (BS 2160/27) renders this as τῆς (...) δίκης ἡρτημένης (28). In Justinian’s time the latter is standard: see, e.g., D. 3,2,6,1 *pendente iudicio* = B. 21,2,6,1 ἡρτημένης τῆς ἐκκλήτου; D. 4,8,49pr. *litigio pendente* = B. 7,2,48 (49)pr. τῆς δίκης ἡρτημένης. But it is not just the vocabulary, the language is different. If we compare h.t. 13 with B. 38,1,13, we seem to be reading different texts. Even more telling is the fact that in the scholia no passages are quoted from Modestinus’ own words in D. 27,1,13. Indeed, this is hardly ever the case in Modestinus’ fragments of this title. Apparently, the original words, though Greek, were no longer considered to be helpful.

Not all summaries are perfect, or at least do not seem to be in the case of the Basilica version of D. 27,1,14,4 (Mo. ed. mai. I, 787/41-43). Modestinus writes:

Ἐὰν πολλοὶ ἀπελευθερώσωσιν ἕνα, πάντων τοῖς τέκνοις ἐπίτροπος δοθήσεται καὶ ἀπὸ τριῶν ἐπιτροπῶν οὐκ ἀπολυθήσεται.	If many persons free one slave, he will be appointed tutor of the children of all of them and he will not be excused on the basis of three tutorships.
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Or rather, this is the reading of *F*¹, adopted by Mommsen, against the reading of *F*²:

Ἐὰν πολλοὶ ἀπελεύθεροι ᾧσιν, εἰς ἀπάντων etc.

A text such as *F*² clearly is the basis of the summary in B. 38,1,14,4 quoted by Mommsen in the apparatus (‘item ad eandem ineptam interpolationem’):

Πολλῶν ὄντων ἀπελευθέρων εἰς ἐπιτροπεύει, καὶ τρεῖς ἐπιτροπαὶ οὐ περιποιούσιν αὐτῷ ἄφεσιν.	If there are many freedmen, one is tutor, and three tutorships do not effect for him an exemption.
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9 See, e.g., D. 4,4,22 = B. 10,4,22; D. 5,2,7 = B. 39,1,7 and especially the scholion BS 2304/33 to ὑπεισέλευσις: Ἡ προνερεδεγεριτίων ἢ ἀδιτίων.

At this point, the transmission of the text of the Basilica depends upon one manuscript only, cod. Paris. gr. 1345, with scholia, and the scholia tell a different story. We are not dealing with a case of many *liberti*, but with the problem of two or more owners of one and the same *libertus* who, by manumitting him, have become his *patroni*, and on the unfortunate *libertus* rests the obligation of undertaking the guardianship of an unlimited number of children of all of his *patroni*. In the scholia the difficulty is noted. The correct explanation of the fragment is given in BS 2168/24, which clearly is based on a text such as preserved in *F^l*, and does not contain any indication that the text to be explained read differently:

<p>Εἰ δὲ καὶ τις ὑπὸ πολλῶν δεσποτῶν ἠλευθέρωται, ἀναγκάζεται τῶν τέκνων ἀπάντων τῶν πατρῶνων ἐπιτροπεύειν, καὶ οὐδὲ ὡς ἔχων τρεῖς ἐπιτροπὰς ἐξκουσατίονι δύναιται κεχρησθαι.</p>	<p>Even if someone has been set free by many masters, he is obliged to be the guardian of the children of all the <i>patroni</i>, and he is unable to use the <i>excusatio</i> on the grounds that he has three guardianships.</p>
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Two further scholia, one in the outer margin (BS 2168/27) and the other between the lines (BS 2169/3), point out that the version of τὸ Πλάτος is the correct one in contrast with the Basilica text; as always, we cannot be sure what the *Platos* is, but it definitely is not identical with the Basilica text.

We may conclude from all this that, on the one hand, the text had been read and understood in the sixth century, but, on the other hand, had also been summarized and incorporated in the Basilica in a form that is at variance with Modestinus' words. Was this due to negligence or was the manuscript tradition the root of the problem?

Interestingly, this controversy is reflected in the Western tradition of the Digest text. At some point a Latin version was included in the 'Vulgate'.¹⁰ Whoever was the translator of these passages, and whatever one thinks of the quality of the translation, the result is unfortunate at this point, to say the least. See, e.g., the (1968 reprint of the) incunable of *De Tortis*, Venice 1488, generally considered a reasonable representation of the Vulgate, at f. 37v:

Si plures liberti fuerint, omniu(m) liberis tutor datur.

In the Gloss matters are improved by commenting on *plures*:

Si plures, unus omnium libertorum i(d est) unus de numero libertorum.

10 I use 'Vulgate' in the sense of the generally accepted text of the mediaeval manuscripts.

and on *liberis*:

s(cilicet) patroni.

The conditional clause clearly reflects the reading of F^2 , and even with the Gloss the problem is not expressed in the sense of Modestinus.

For the restitution of the *Graeca* to the Digest editions the evidence of F was of course indispensable. The turning-point was, or could have been, the publication of its ‘quasi-facsimile’ by Torelli in 1553, but Torelli printed F^2 without alerting the reader to it being a correction, not in the text, nor in the *Adnotata* or the *Errata*. Torelli’s translation faithfully renders this as ‘Si plures liberti sint, unus ex omnibus, liberis tutor dabitur’ [note the comma after *omnibus*!]. The Gothofredus editions with or without the Gloss perpetuated the reading of F^2 . The edition of Lyon 1612 prints the Greek and adds two Latin translations:

[*Antonius*] ‘Si plures liberti sint, unus **ex** [my emphasis] omnibus patroni liberis tutor dabitur (...)’.¹¹

[*Vulgaris*] ‘Si plures liberti sint, unus omnibus liberis tutor dabitur (...)’.¹²

The two versions share the conditional clause with *plures liberti*, and the difference lies in the presence or absence of the preposition *ex*. The Gloss here refers to the same difference: ‘alias, omnium, scilicet libertorum, id est unus de numero libertorum’. It presupposes a text with *omnibus*, of course. The waters are muddled even more by the addition of a humanist note in some Gothofredus editions:

Ἐὰν πολλοὶ ἀπελευθέρωσιν [sic], εἰς. Author τοῦ Πλάτους, ita legit Cujacius.

This is a partial quotation of what Cujacius had written. It stems from Cujacius’ commentary on D. 27,1 *De excusationibus*, published in 1564.¹³ He concludes his observations on h.t. 14 as follows:

In fine legis auctor τοῦ πλάτους videtur legisse, Ἐὰν πολλοὶ ἀπελευθέρωσιν εἰς ἀπάντων etc. nam ita fingit, plures manumisisse servum communem, et omnium patronorum liberis

11 Antonius Contius, who agrees with Torelli.

12 This does not correspond with the Vulgate as given above. The main point seems to me the fact that the conditional clause in the vulgate version, whatever the exact words of the entire passage, confirms the version of F^2 as its ultimate source.

13 See Troje, *Graeca leguntur* (note 3 above), 257ff.

eum tutorem esse compelli, nec excusari onere trium tutelarum, ut si habuerit quattuor patronos, et trium liberis tutor esse coeperit, a tutela liberorum quarti non liberatur.

Three observations seem to be in order. First, what was Cujacius' source? In other words, what does he mean with *auctor* τοῦ Πλάτους? 'Videtur legisse': does this mean that Cujacius had not read, but ingeniously conjectured a reading of a fuller text, attributing it to that elusive Byzantine phenomenon τὸ Πλάτος? I am not aware of an extant Byzantine source reading as Cujacius suggests.

Second, he does not explicitly refer to the scholia of cod. Paris. gr. 1345. Had he known them, he could have supported his case with evidence from a *codex*: the explanation of BS 2168/24 cited above. Or should we conclude that he had in fact read both this scholion and the two other ones explicitly attributing this explanation to the *Platos*, and combined all this into the Greek conjecture? In favour of the latter view is a close resemblance of Cujacius' words to the Greek scholion BS 2168/24:

<p>Εἰ δὲ καὶ τις ὑπὸ πολλῶν δεσποτῶν ἤλευ- θέρῳται, ἀναγκάζεται τῶν τέκνων ἀπάντων τῶν πατρῶνων ἐπιτροπεύειν, καὶ οὐδὲ ὡς ἔχων τρεῖς ἐπιτροπὰς ἐξκουσσατίονι δύναται κεχρηθῆσθαι.</p>	<p>(...) plures manumisisse servum communem, et omnium patronorum liberis eum tutorem esse compelli, nec excusari onere trium tutelarum (...)</p>
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Decisive surely is the fact that Cujacius had at his disposal a manuscript with Basilica books 38-42, on loan from Viglius, but sold to Petrus Faber by Cujacius' heirs, the present cod. Paris. gr. 1345.¹⁴ Cujacius did not edit these Basilica books during his lifetime, but his Latin translation of books 38-39 appeared posthumously in 1609. Its title tells all: 'Books 38-39 of the Basilica in which 31 titles of the civil law (...) are explained by scholia of the ancient Greek jurists. In the translation of Jac. Cujacius. From the autograph of the same now for the first time edited by Carolus Labbaeus'.¹⁵ After every title a number of scholia are printed, referred to from the text with letters. At p. 7, n. *m* reads as follows:

Sed et si quis a pluribus dominis manumittatur, liberorum omnium patronorum tutelam gerere cogitur, et quasi habeat tres tutelas excusatione uti non potest.

14 Troje, *Graeca leguntur* (note 3 above), 260 with n. 74, and quoted in the dedicatory preface to the book quoted in the next footnote. Cujacius speaks of *commendati*. For the 'Vorbesitzer' of the manuscript, see RHBR, I, No. 158 (p. 186).

15 Full title quoted by Troje, *Graeca leguntur* (note 3 above), 262 n. 81.

One only has to compare this with the quotation from his commentary on D. 27,1 *De excusationibus*, cited above.

Third, the Torelli edition may have made the text of *F* accessible, the manuscript itself was not. If it had been, autopsy might have divulged the variant reading of *F*¹ and changed the discussion. As it was, scholars had to rely on the Torelli edition and simply could not know that *F* originally contained an alternative reading, let alone a preferable one. In these conditions Cujacius' conjecture of the offending passage in the Digest is sensible and, though almost certainly wrong, in fact ingenious, changing as little as possible in the transmitted text:

Ἐάν πολλοὶ ἀπελευθεροὶ ὄσιν, εἰς ἀπάντων *F*²
 Ἐάν πολλοὶ ἀπελευθερώσιν [*lege* ἀπελευθερώσιν], εἰς ἀπάντων *Cujacius*

Cujacius, we know, attributed greater authority to *ratio juris* than to *scriptura*. Here, the authority of *scriptura* must have made it even easier for him to follow what he considered to be the *ratio juris*.

Whatever the fortunes of the text in West and in East in later times, in the sixth century two versions seem to have circulated of the conditional clause opening D. 27,1,14,4, reflected in our only manuscript in the original reading of the Florentine (*F*¹) and in its correction (*F*²). The text of B. 38,1,14,4, I would suggest, at this point contains a summary of the latter version. It is a competent summary of a flawed text. The scholia prove that the former version was known, too. A later Byzantine reader, commenting on the Basilia text, noted (BS 2168/27):

Ἐχρῆν εἰπεῖν κατὰ τὴν τοῦ Πλάτους	One should say in the sense of the <i>Platos</i> :
ἔννοιαν· ὁ πολλῶν ἀπελευθερος τῶν παίδων	the freedman of many is the guardian of all
πάντων ἐπιτροπεύει.	the children.

He was right, of course. So was Cujacius, and conjectured accordingly.

2. Conclusion

Perhaps the most striking impression left by this brief tour through the *Graeca Pandectarum in Basilicis* is the fact that they are not treated differently from the Latin texts. Latin and Greek texts are summarized and commented upon in the same way. Sometimes the original Greek texts are quoted, but hardly ever in the Basilia text. It is true that the unfortunate preponderance of restituted Basilia books and therefore absence of scholia do not permit us to make a reliable statistical investigation, but it seems that the

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presence of Greek in the Digest text did not automatically lead to literal quotations in scholia in order to illuminate the summaries, nor were they always considered to be superfluous. The equal treatment of Greek and Latin rather confirms our view of the legal world of sixth-century Byzantium as a bilingual culture. Striking is also the fact that Modestinus' Greek was perceived as different from sixth-century legal Greek and therefore in need of rephrasing in that language.

It is in the western mediaeval and early modern tradition that the *Graeca in Pandectis* presented a problem, first by their absence and then by their gradual restitution. The history of that process is fascinating and our knowledge still far from complete. It may be helpful to keep in mind that the Byzantines did not see these Greek passages as especially helpful and unproblematic. It would probably be wrong to assume that the Basilica are of greater help with the recension of these Greek passages in the Digest than they are with the Latin text. Rather, they serve both in equal measure.

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