

IUS COMMUNE

Zeitschrift für Europäische Rechtsgeschichte

Veröffentlichungen des Max-Planck-Instituts
für Europäische Rechtsgeschichte
Frankfurt am Main

XIX

Herausgegeben von DIETER SIMON
und MICHAEL STOLLEIS

Vittorio Klostermann Frankfurt am Main

1992

Magna Jurisprudentiae Injuria

Cornelius van Bynkershoek on early legal humanist philology

In the first four books of his *Observationes juris Romani*, published at Leiden in 1710¹, Bynkershoek displays a rare perception of the havoc wreaked on the Digest text by the scholarly activities of the early legal humanists. These activities are commonly comprehended under the euphemism of philology. Only a long and painstaking study will reveal the full extent of the damage which this philology wrought on the texts of the *Corpus Iuris* published in the first half of the 16th century. Even modern studies are apt to be drawn into the vortex of almost inextricable confusion created by the work of the early humanists. Nevertheless, it is clear that the essential mechanism whereby the apparently remorseless process of textual corruption was set in motion by the humanists was already precisely known to Bynkershoek at the beginning of the 18th century.

Bynkershoek was of course intimately acquainted with the leading works of the humanist tradition from Budaeus and Alciatus onwards. What lends his *Observationes* a particular interest in the present context is his acquisition and use of a large collection of early 16th century editions of the Digest.² He was thus not only familiar with the inadequacies of humanist philology in themselves, but had first hand experience of the baleful consequences experienced by the legal texts themselves. These editions were not easy to obtain at The Hague at the beginning of the 18th century, and we have intimations of how they came to Bynkershoek when his work was already in progress.³ When he was eventually

¹ *Observationum juris Romani libri quatuor, in quibus plurima juris civilis aliorumque auctorum loca explicantur & emendantur. Lugduni Batavorum, apud Joannem vander Linden juniorem, 1710. 4°.* [Copy: D:FMPI].

² *Obs. jur. Rom.* Ad lectorem, 4*1r: 'certum est in vetustissimis, praeter codicem MS, editionibus comparandis me satis diligentem et beatum fuisse'. The list of editions cited by Bynkershoek in the course of the work is almost identical with that discussed in detail by HENRICUS BRENCMANNUS in his *Historia Pandectarum* III. 5; indeed, several of the copies used by Brencmannus were borrowed from Bynkershoek. A list of the editions cited by Bynkershoek will be found in the appendix to this article.

³ See his lament quoted below, p. 74. In Chapter I. 7, p. 40, arguing for the emendation of *puncti* to *functi* in C. 2.7.23.2, he adds an amusing note at the end: 'sed dum eo probando occupor, incido in editionem quae Parisiis prodiiit apud Claudium Chevallon anno 1521, ubi cum et *functi* sit, me defunctum arbitror.'

able to turn their pages he shrank back in horror. The work of the early legal humanists Bynkershoek dismisses in a memorable phrase: humanist philology constituted, in time, *magna posteritatis injuria*, and in context *magna jurisprudentiae injuria*.⁴

Properly understood, the opinion of Bynkershoek is incontrovertible. Moreover, it requires little insight to appreciate why the essential wisdom of his judgment has been forgotten in the meantime. Noodt, Bynkershoek and Schultingh knew the contents of the works of the humanist tradition almost by heart. Since the decay of the Dutch legal humanist school at the end of the 18th century no individual scholar has had any comparable acquaintance with these works. From various angles, therefore, it may perhaps be of interest to trace how Bynkershoek arrived at his lost insight into the work of Budaeus, Alciatus, Zoannetus and their successors.

Let us plunge into the thick of the fray, with the humanist practice of attributing conjectural readings to spurious manuscript authority. This notion is so amusingly quaint to us that it no doubt evokes a salacious curiosity out of proportion to its actual importance. Behind the phenomenon, however, lies a fundamental feature of humanist philology. Manuscripts in this period generally belonged not to great public collections but to private individuals. As such, their whereabouts changed as rapidly as their owners. Given both the character and span of human existence, the possibility of checking a citation of their contents was strictly limited. One consequence of this fact is that it is difficult to read far into the works of the humanists without encountering a distinct scepticism, to put it discreetly, about the allegation of manuscript authority in other works of humanist scholarship. Not infrequently this scepticism spills over into an outright charge of bad faith, to the effect that the manuscript authority cited is pure invention. The phenomenon is well captured by E. J. Kenney in his magisterial survey of humanist philology, *The Classical Text*. He writes:⁵

An unidentified scholar (perhaps ... Achilles Statius) claimed to have found *pardus* in a MS, a claim we now know to have been perfectly tenable. Robortello pours scorn on the assertion and ascribes *pardus* to conjecture. This firm belief that Statius or whoever it was must be lying illuminates an odd feature of contemporary scholar-

⁴ *Obs. jur. Rom.* I. 23, p. 94; and III. 18, p. 294.

⁵ E. J. KENNEY, *The Classical Text. Aspects of Editing in the Age of the Printed Book*. (Sather Classical Lectures Volume 44). Berkeley, Los Angeles, London 1974, at pp. 32-33.

ship. Since emendation *ingenii ope* ranked below emendation *ex codicum auctoritate*, and since indeed the severer breed of critic, in theory at any rate, altogether rejected conjecture as a legitimate source of improvement to the text, there was a standing temptation for a scholar who wished to gain a respectful hearing for his own ideas to father them on a non-existent MS. To modern ways of thinking this seems curious ... Nevertheless the phenomenon is amply attested. Often no doubt, as one suspects the case to be with Robortello, the charge was made on principle as a routine polemical item which no self-respecting controversialist would dream of omitting from his indictment. Stephanus was in fact a notorious and hardened offender, as modern investigation of his work on Euripides has shown ... Robortello himself lied vigorously about the MS sources of his edition of Aelian (1562). Many others were tarred with the same brush. A well-known example is that of S. Dubois (Bosius), who fathered many of his conjectures in the text of Cicero's letters 'upon two MSS of his own invention, which he called Crusellinus and Decurtatus'; he even went to the length of 'including "corruptions" to cover his tracks'. Sometimes it seems as if we have to do with a recognized *façon de parler* ... a licensed fiction in a conventional and well-understood mode.

Only if we appreciate the existence of this phenomenon will we understand the wording of some passages in which Bynkershoek refers to the manuscript readings alleged by his predecessors. Thus he writes:

- (I. 14) Zoannettus *tanquam* ex codice suo rescripsit ...
- (II. 10) De codicibus M.SS. subsisto, cum qui hoc adfirmat auctor mihi vix videatur idoneus.
- (II. 11) Sunt qui *tanquam* ex veteribus libris ita legunt ...
- (II. 14) Eguinarius Baro in Comm. ad h.l. *ait se librum habere* in quo legatur ...
- (IV. 3) Andreas Alciatus ... sic exhibet *tanquam* ex antiquo exemplari.
- (IV. 7) Connanus ... legendum putabat ... ex vestigio, *inquit*, veteris libri.

Bynkershoek's use of *tanquam* in this context seems almost to be a reflex action. Is he justified? Certainly, Kenney's point that the allegations of fraud far outnumber actual cases of its occurrence has to be stressed; this may hold as much for modern studies as for the allegations of the humanists themselves. One of the most basic causes of possible misunderstanding in this respect is that the philological vocabulary and usage of the humanists is so breathtakingly confused that it is vir-

tually impossible to be certain when they are referring to manuscripts in the first place. The ubiquitous phrase *antiqui codices* is a case in point. In standard humanist usage this could indeed be a reference to a manuscript (in passing we might note that it could refer to one manuscript or several, of an age range spanning antiquity to the 15th century: on successive pages it will be described at will as *vetus*, *pervetus*, *antiquus*, *antiquior* and *antiquissimus*). Secondly, *antiqui codices* could mean early printed editions. Finally, the expression could mean no more than ancient books, that is to say, ancient authors. All three usages will, in addition, appear side by side in the same work of scholarship. The phrase *ex antiquis codicibus legendum* . . . is thus one of some considerable ambiguity, and the notion that a scholar was falsely attributing a conjecture to a manuscript may often be traceable to this problem. The complaint of fraud will often have to be dropped in favour of what is perhaps the equally serious charge of gross negligence in the citation of sources; and on this latter indictment no humanist scholar has yet escaped a verdict of guilty.

Whatever may have been the extent of outright fraud in the citation of manuscripts, what is certainly undeniable is the general atmosphere of suspicion which permeates the scholarship of the humanists. Alciatus, Baro, Connanus, Zoannettus: these are among the greatest names of Renaissance legal humanist scholarship. It is a foreign world indeed in which the natural reaction of a scholar to the citation of manuscript evidence by his colleagues ranges from scepticism to outright disbelief. For in the case of Alciatus, Bynkershoek does on one occasion state explicitly that he considered him to be lying in his allegation of manuscript authority.

The case in question arises towards the beginning of Alciatus' most important philological work, the *Dispunctiones* published in 1518.⁶ In the preface to Book 1 Alciatus gives a very full description of a *volumen antiquissimum* of the Digest which he personally owned. It was bound in two volumes, not the customary three; there was no Accursian Gloss, but only some scholia on the last Digest title *De regulis iuris*; the inscriptions of the individual fragments were preserved intact. The readings of this manuscript are cited throughout Book 1 – at least insofar as we can

⁶ The first edition of this work is in the collection bearing the title: *Paradoxorum ad Pratum lib. VI. Dispunctionum lib. IIII. In treis lib. Cod. lib. III. De eo quod interest lib. I. Praetermissorum lib. II. Declamatio una.* [Milan, Alexander Minutianus, 1518]. 2°. [Copy: I:RBNC].

divine whether Alciatus is citing this particular manuscript. Thus the allegations of authority in the first five chapters run: 1) *in eo veteri libro*; 2) *in antiquo codice*; 3) *in antiquo exemplari*; 4) *in eo codice*; 5) *cum veteri nostro codice*. Thus chapters 1, 4 and 5 unambiguously refer to the stated manuscript, while from the context we should expect the same to hold for chapters 2 and 3.

Chapter 3 deals with an apparent antinomy of the Roman law. A Digest text of Marcian seems to state that theft from a *civitas* constituted *peculatus*, while a text of Papinian seems to deny this:

D. 48.13.5.4

Marcianus libro quarto decimo Institutionum

Sed et si de re civitatis aliquid subripiatur, constitutionibus principum divorum Traiani et Hadriani cavetur *peculatus* crimen committi, et hoc iure utimur.

D. 47.2.82

Papinianus libro primo Responsorum

Ob pecuniam civitati subtractam actione furti, non crimine *peculatus* tenetur.

Alciatus claims that in his manuscript the latter text had a different reading. He writes:

In antiquo exemplari ita refertur:

Ob pecuniam civitati subtractam, actione furti *necnon* crimine *peculatus* tenetur.

In this case Bynkershoek did not content himself with the sceptical *tanquam*. He writes:⁷

Mihi non alia ratione improbatur ea lectio quam quod pessimi exempli res sit bruta crisi negationes legibus addere vel demere, nam de libro antiquo quod monuit Alciatus non usquequaque mihi persuadetur, qui sciam de Alciati bona fide amplius esse deliberandum.

⁷ *Obs. jur. Rom.* IV.3, p. 342.

Forthright as this statement undoubtedly is, we should perhaps not ignore the concluding remark: *certe in antiquis libris qui mihi sunt ad manum ea lectio frustra quaeritur*.⁸ If this had been Bynkershoek's sole evidence it would have been slim grounds indeed to level such a charge against Alciatus. The dearth of legal manuscripts available to the Dutch humanists is notorious. But we should note the *certe*. What lay behind Bynkershoek's judgment was not, of course, any survey of the surviving manuscript evidence, but simply his critical sense. Bynkershoek, following in a long tradition including also such as Iacobus Cuiacius,⁹ simply did not believe a word of Alciatus' alleged manuscript.

It is perhaps not a very positive start to our survey of Bynkershoek's assessment of early humanist scholarship to uncover his conviction, justified or otherwise, that the founding father of legal humanism had invented a manuscript to which he was in the habit of attributing conjectural readings. Of the conjectural readings of the other founding father, Gulielmus Budaeus, Bynkershoek has an equally unflattering judgment:¹⁰

Postquam autem id annotavit Budaeus ... continuo id migravit in editiones, ut fere reliquae Budaei emendationes, magna jurisprudentiae injuria.

The work of Budaeus on the Digest text has been honoured for centuries as the first great masterpiece of legal humanism. It therefore comes as something of a shock to find it described as the infliction of serious damage on the discipline of jurisprudence.

It is in the context of both the above passages on Alciatus' manuscript and Budaeus' conjectures that we have to understand another significant comment passed by Bynkershoek on the work of Alciatus:¹¹

⁸ Similarly his statement in II. 10 is followed by the note, 'sane nemo eorum unus qui varias lectiones ex M.SS. repraesentarunt et mihi sunt ad manum edidit ...' In passing we may note that Bynkershoek in these statements is relying on the knowledge of manuscript readings which might be gleaned from the early humanist editions.

⁹ Cuiacius writes: 'Cetera etiam Alciatus perfidiose, dum reponit hoc loco Graecam vocem ἀσύναντος, usurpata auctoritate antiqui libri *qualem nullum viderat unquam* ...' Vol. II, col. 1516 in: IACOBI CUIACII ... operum tomus primus (-quartus) ... Lugduni, sumptibus Ioannis Pillehotte, 1614. 2^o. [Copy: D:FMPI].

¹⁰ *Obs. jur. Rom.* III. 18, p. 294.

¹¹ *Obs. jur. Rom.* III. 4, p. 231.

Alciati emendatio, ut saepe aliae ejusdem, in varias editiones postea irrepsit, quod non miror, sed indignor, cum sit pessima.

There is perhaps more to this passage than meets the eye, for once again in the case in question Alciatus would seem to be attributing the emendation to manuscript authority. This is not certain, however, and it is perhaps worth indicating the problem facing Bynkershoek in this respect.

Book 2 of Alciatus' *Dispunctiones*, to which the above quoted remark pertains, consists of 29 chapters, most of which are addressed to the restoration of a Greek word or passage to a Digest text. An impression of the character of Alciatus' citation of his sources will best be gained by listing his allegations of authority *in toto* for this book. These are as follows:

1. legendum hoc modo . . . nam et illud mirum Accursium praeter morem suum non admonuisse lectorem Graeca testatoris verba in archetypis esse.
2. in Pandectis Florentinis
3. *no source stated*
4. *no source stated*
5. *no source stated*
6. in Pandectis
7. *no source stated*
8. *no source stated*
9. nedum/non solum in Thuscorum celebri archetypo, sed et in aliis antiquis codicibus
10. ut antiqui codices habent . . . in castigatis voluminibus
11. in emendatis codicibus
12. in emendatis codicibus (intelligo autem Florentinorum Pandectas) . . . ex fideliori lectione
13. *no source stated*
14. *no source stated*
15. ex Pisano codice
16. *no source stated*
17. *no source stated*
18. ex quibusam antiquis codicibus et ex Etrusco volumine
19. *no source stated*
20. *no source stated*
21. in Pandectis Florentinorum . . . in Pandectis Etruscis (the latter not a Greek restoration)
22. – [no Greek restoration]
23. *no source stated*
24. – [no Greek restoration]
25. cum ad veteres codices confugissem . . .
26. – [Codex: indicio sunt antiqui codices]

- 27. – [no Greek restoration]
- 28. – [Codex: *no source stated*]
- 29. – [no Greek restoration: in Pandectis Florentinis ... noster codex]

What should the reader of Alciatus' *Dispunctiones* make of this unmitigated chaos? Leaving aside six chapters dealing with other themes, (Chapters 22, 24, 26–29), there are 23 chapters in which Alciatus restores a Greek word or passage to the Digest. In more than half of these cases no authority whatsoever for the reading is stated. Are these restorations based on manuscript authority or on conjecture?

In the dedicatory epistle of the work Alciatus stresses at length the priority of manuscript evidence. He writes:

... non sine summa trepidatione quicquam innovare ausus fui, etiam si certissimis fere rationibus adducerer, donec *emendatissimis quoque codicibus* nostras annotationes comprobari posse cognovissem. Cum igitur et *plura* a nobis *collata exemplaria* fuissent, cum item *Hetruscorum Pandectas* obiter ceu per transennam legere mihi datum esset, decrevi pauculas aliquas de multis insigniores tamen in codicillum observationes redigere.

Clearly, therefore, the accent is on manuscript evidence. Yet the reader would scarcely be entitled to conclude from the above statement that Alciatus would never resort to conjecture in the work. Indeed, three years before writing these words Alciatus had published a work¹² restoring the Greek to some seventy Digest texts – the same central theme continued in the *Dispunctiones* – almost exclusively on the basis of conjecture. Thus, at least in the case of the restorations of single Greek words, (as in Book 2 chapters 3, 4, 8, 13, 20, 23) the reader of Alciatus is simply left to guess: conjecture or manuscript reading?

The next question must be directed to the manuscript citations themselves. In the above quoted passage we hear of *plura exemplaria* and specifically of the Florentine manuscript; in the preface to Book I we learn further of Alciatus' *volumen antiquissimum*. The multiplicity of manuscripts is again apparent from two citations in Book II: *nedum in Thuscorum celebri archetypo sed et in aliis antiquis codicibus* (II. 9), and again, *ex quibusdam antiquis codicibus et ex Etrusco volumine* (II 18). This fact immediately renders all Alciatus' anonymous citations ambi-

¹² The latter work in: In tres posteriores Codicis Iustiniani [libros] annotationes, in quibus obiter quam plurima aliorum authorum loca explanantur. Eiusdem opusculum quo Graecae dictiones fere ubique in Digestis restituuntur. Argentinae, Ioannes Schottus presit, 1515. 2^o.

guous: there is no means whereby a reader could tell whether a reference to *antiqui codices* related to the Florentine, to Alciatus' personal manuscript, or to any of the innominate *plura exemplaria* he had "colated". What does it mean, for example, when Alciatus writes in Chapter 10 that the reading is found in *castigatis voluminibus*? Should the *castigata volumina* be traced back, through the *antiqui codices* of Chapter 9 which are *contrasted* to the Florentine manuscript, to a manuscript other than the Florentine; or should they be traced forward, through the *emendati codices* of Chapter 11, to the Florentine manuscript of Chapter 12?

The character of these citations is highlighted in the two following chapters. Chapter 11 gives a reading stated to be found in *emendatis codicibus*. The citation of the following chapter runs: *in emendatis codicibus (intelligo autem Florentinorum Pandectas)*. Doubtless the anonymous citation of the previous chapter was also intended to refer to the Florentine manuscript; thus in a separate work published in the same collection, the commentary *De eo quod interest*, the Greek word in this text is stated to be found in *Pandectis Florentinis*. Similarly, the Greek restoration in *Dispunctiones* I. 17 is made *ex antiquis codicibus*, while in a separate work in the collection the authority is cited as *in Pandectis*¹³ – in the latter work Alciatus' standard means of referring to the Florentine. Thus at different points in the same collection of works Alciatus would randomly attribute a reading to the Florentine manuscript or to anonymous *antiqui codices*.

Hitherto we have been taking Alciatus' text at face value. In fact we know precisely whence almost all of these readings derive, and it is neither from the Florentine nor any other ancient manuscript. Alciatus' source was in fact the series of notebooks left by Ludovicus Bologninus on his death to the Dominicans of Bologna. These notebooks, in their turn, contained a copy of the collation of the Florentine manuscript executed by Politian in 1490 – although, predictably enough, with a small admixture of conjectural restorations contaminating the relatively pure fount from which it springs. His real source, Bologninus, is never identified by Alciatus; instead, the readings which derive from these notebooks are attributed, without the slightest rationale, to the Florentine manuscript, to innominate *antiqui codices*, even on occasion, it would

¹³ The reference is added in the second edition of the *Opusculum*, (now issued as Book II of the *Praetermissa*), at D. 48.19.16.8: 'In Pandectis tamen aliud legitur carmen, ut in Dispunctionibus annotabimus'.

seem, to a personal *volumen antiquissimum*, but generally to no source at all. In short, for Alciatus it was a matter of no concern whatsoever to distinguish between conjecture and manuscript reading, nor between different manuscripts. In this respect he exhibits perfectly the character of what is called, in the oxymoronic phrase, "humanist philology".

Small wonder, then, that Bynkershoek had difficulties with Alciatus' *Dispunctiones*. The above-mentioned text which drew his particular attention was Alciatus' restoration of D. 46.3.102.pr. in *Dispunctiones* II. 25. The text runs:

Creditor oblatam a debitore pecuniam ut alia die accepturus distulit: mox pecunia, qua illa res publica utebatur, quasi *aerosa* iussu praesidis sublata est.

According to this reading the coins were confiscated as having been adulterated by an admixture of copper. Alciatus' text read not *aerosa*, but the meaningless *herosa*. This, Alciatus maintains, was a corruption of the proper reading, the Greek word ἑρᾶνος. ἑρᾶνος means a contribution to a kind of mutual support society, which were generally treated as illegal organisations in the Roman Empire. For this reason the money was confiscated by the provincial governor. This is all a plausible reconstruction, but nevertheless entirely erroneous. Interesting, therefore, is the authority which Alciatus cites for his reading. He writes:

Videndum est quid significet vox illa insolens *herosa*; et ut mittam Accursii ineptias, cum *ad veteres codices* confugissem, depraendi Graecam dictionem corruptam circumferri. Non igitur legendum est *herosa*, sed ἑρᾶνος.

Now, we may start from the premise that the Greek word ἑρᾶνος is not to be found in this text in any early Digest manuscripts. Certainly, there are a few instances in the *Dispunctiones* in which Alciatus attributes to the Florentine or other manuscripts readings derived from Bologninus which turn out – unknown to Alciatus – to be founded on conjecture. In this case, however, I found no Greek word in Bologninus' notebooks for this text. There is another possible explanation, which will serve to complete our survey of the confusion which envelops humanist philological usage. As stated before, a phrase like *veteres codices* could mean no more than ancient authors. Accordingly, Alciatus might in this instance not be intending to cite manuscript evidence, but rather to say that *when he turned to classical writings he discovered the use of the word ἑρᾶνος* – as in the letter of Pliny which he cites; and from this observation he was able to restore, *by conjecture*, the Greek word. Although I think it more

likely that in this case Alciatus did indeed intend, through some confusion in his sources, to attribute this reading to a manuscript source, the latter possible interpretation will serve to indicate the ambiguity of humanist philological vocabulary (and also how false allegations of inventing manuscript readings could easily arise). It is easy to understand how contemporary editors of the Digest would take this reference as pertaining to manuscripts among all the other similar allegations in Alciatus' work. At any rate, this Greek word simply flowed, along with all Alciatus' other Greek restorations, into the text of the Digest editions printed in the first half of the 16th century.

It was precisely the process whereby a reading such as this – *cum sit pessima* – ended up in the texts themselves which drew Bynkershoek's fire. It is not so much the conjectures of the humanists which were the problem; these Bynkershoek was anxious to assemble and assess. Rather, it was the fundamentally unphilological character of humanist editing which was corrupting the text. The standard approach of the humanist editor was to start from a previously printed edition. This itself could probably trace its pedigree, through a number of incunable editions, to some random manuscript which had lain conveniently to hand for its earliest printer. From this wholly unsound foundation the humanist editor would go on to construct his text *ope codicum et ingenii* – with the aid of conjecture and whatever manuscripts, or what he understood to be notices of manuscripts, happened to be situated conveniently at his disposal. In doing so he considered it wholly superfluous to indicate upon which of these often equally questionable supports his text rested. Some early 16th century Digest editions do have a few rudimentary notes appended in their margins; at best these will indicate alternative readings by some such phrase as *alias* or *antiq. cod.*, or possibly cite the humanist from which the reading is derived. Many editions, however, do not even provide this level of information. In such cases the readings of Budaëus and Alciatus are simply thrown pell-mell into the Digest text, without any indication of their provenance. It is this process of humanist editing which provoked Bynkershoek's comment:¹⁴

Sed vereor ne haec ex ingenio suo aliorumve non ex auctoritate manuscritorum; nam saepe evenit, maxime post Budaëum, Alciatum et Zoannettum, editores ea quae turbata sunt repraesentare ex illorum conjectura vel etiam sua, si quid sapiant, neque haec distin-

¹⁴ *Obs. jur. Rom.* I. 23, p. 94.

guere a fide librorum, si quando hos sequuti sunt – magna posteritatis injuria!

Bynkershoek was right, of course, to highlight the perilous character of the work of the early humanist editors – Blaublommus, Stephanus, Haloander and the others. Yet in truth the contamination reaches further back. Even if they had conceived the idea, which of course they did not, there was no means whereby an editor could provide accurate information on the provenance of his readings working from the likes of Alciatus' *Dispunctiones*. As we have seen, already at this point of the operation the sources are inextricably confused. It is in the work of Alciatus that the virus was nurtured which the humanist editors went on to inject into the bloodstream of the text itself. And once it had reached this point it would become increasingly difficult to isolate.

Bynkershoek's uncompromising verdict on early humanist philology can better be appreciated if we observe the effect the humanists' efforts were actually having on these texts. If we look, for example, at the Digest title on the Lex Aquilia, we find that some at least of the humanist influence is conspicuously apparent. The simple examples are those unusual Latin terms which had been corrupted in the Middle Ages, being unknown to the scribes, and to which the first efforts of the humanists, of Budaeus in particular, were directed. Thus we encounter a whole series of famous cases in D. 9.2: *thymelicis* for *gemellis* (22.1), *for-nacarius* for *fornicarius* (27.9), *vietori* for *tectori* (27.35), *gubernaculum* for *serraculum* (29.2), *dolon* for *dolor* (52.1). These are readings which continued to excite the antiquarians of the humanist school for centuries; in the edition of Robertus Stephanus, published at Paris in 1527, all are to be found in the text, with no indication either of their provenance or even of the fact that they are derogations from the standard text.

No doubt these examples are conspicuous enough. Much more insidious were those minute changes in a simple piece of Latin prose which are nevertheless capable of completely altering the legal sense. The alteration of even a few letters is sufficient to stand a text on its head: the presence or absence of a *non*, a *nec* for an *et*, an *et* for an *aut*, a *qui* for a *cui*, an *emptor* for a *venditor*, or any of a myriad possible inventions. Once such changes start flowing surreptitiously into the text the waters are not merely being muddied, but positively polluted. One example from D. 9.2 illustrates the point. In the Florentine manuscript D. 9.2.13.3 reads as follows:

Si servus legatus post aditam hereditatem sit occisus, competere legis Aquiliae actionem legatario, si *non* post mortem servi adgnovit legatum.

The question at issue is to whom the action on the *lex Aquilia* pertains, whether the heir or the legatee, if a slave left as a legacy is negligently killed after the heir has entered on the inheritance. The text states that the legatee has the action if he accepted the legacy *non post mortem servi* – before the death of the slave. This can hardly be right, however. A legal dubiety only arises in the event that the slave dies before the legatee has accepted the legacy; if the legatee had accepted the legacy before the death of the slave he would already have become owner and so have the action without question. In accordance with this logic, the text printed by Stephanus in 1527 simply omits the *non*: *competere legis Aquiliae actionem legatario, si post mortem servi adgnovit legatum*.¹⁵ Logically this is not quite right either, since obviously the legatee would also have the action if he accepted *before* the death of the slave; thus we want *even if* rather than *if* (as in Mommsen's suggestion of *uel* for *non*). Haloander's text meets the same objection, but takes account of the Florentine's *non*, for he prints *si modo post mortem servi*. It has to be recalled that these readings are being selected by the humanist editor and planted in the text without any indication of their source. No hint will be found that the text has been altered, or whether the new reading derives from a manuscript or from conjecture. Thus different versions of Europe's legal code are reading *si*, *si non*, or *si modo* at will.¹⁶

This is the problem which Bynkershoek encountered when he checked the readings of the early 16th century Digest editions which he had assembled. The problem for him was all the more acute, since his interest in these editions lay in that they provided, *faut de mieux*, a kind of compendium of variant vulgate readings. They constituted in fact a surrogate for the manuscripts to which he had no means of access. As he managed to lay his hands on more of these editions, he found that many of the textual problems with which he was wrestling were already solved in their texts. Thus at one point he laments that much of his previous work had been in vain.¹⁷

¹⁵ This, however, seems to be the standard vulgate reading, found also in earlier editions, as for example that of Venice, Baptista de Tortis, 4 Aug. 1488.

¹⁶ Arguing from the palaeographical similarity of *non* and *modo*, it is of course always possible to change the meaning of a text by altering *si non* to *si modo*. For another example in Haloander's text, relating to D. 2.11.2.pr., see *Obs. jur. Rom.* III. 5.

¹⁷ *Obs. jur. Rom.* III. 23, p. 321.

Igitur sequenda est emendatio vel, si mavis, genuina lectio ex veteribus libris. Postquam enim nactus sum varias editiones, Florentina antiquiores, magna pars emendationum quas pridem annotaveram mihi periit.

From this statement it would appear that it was with a touch of hindsight that he argued for the paramountcy of manuscript evidence in the preface to the work:¹⁸

Franc. Robortellus, quique alii artem criticam docuerunt, recte monuisse videntur ne quis de emendationibus aut emendandi legibus decernat nisi auctorum quos emendare constituit libros antiquissimos manu *vel typis* descriptos diligenter consuluerit et viderit an non ope & auctoritate potius alicuius libri quam ex ingenio mendosa restituat. Illa ratio certior et tutior est, haec magis lubrica . . . In iure nostro praesertim ea de libris antiquis cautio necessaria est; nam si quis ibi cum fructu quid conari velit in re critica oportet ei ad manum sint codices MSS. *aut certe veterum editionum*, in primis ante Florentinam, copia quae haberi potest maxima.

The appeal to the value of early printed editions, which I have highlighted in the passage, is surely Bynkershoek's rather lame response to his own scholarly predicament. Sitting in The Hague, unable to travel, the manuscript sources of the Digest were beyond his reach. He had, it is true, managed to obtain his own manuscript of the Digest, which he cites occasionally in the *Observationes*, and later he was to purchase a second manuscript.¹⁹ But for the most part he had to rely on the manuscript readings which could be deduced from early printed editions of the Digest. Given the primacy which he accorded to manuscript evidence over conjecture,²⁰ it was vital for him to know whether the readings he found in these editions derived from manuscript sources or from humanist conjecture. After the humanists' conjectures began to filter into the text it became very difficult for him to isolate the manuscript readings. Thus in addition to the above-quoted passage, we find Bynkershoek highlighting the problem elsewhere:²¹

¹⁸ *Obs. jur. Rom.* Ad lectorem, signature 3*4r.

¹⁹ Both manuscripts are now in the Universiteitsbibliotheek Leiden, BPL 6C and BPL 11D.

²⁰ See for example the statements in *Obs. jur. Rom.* I. 20, p. 82, 'At vero absque auctoritate librorum si sit, ut hic est, nunquam mihi probabitur emendatio nisi modestior', or again II. 5, p. 127, 'auctoritate, ni fallor, sua, non alicujus libri, quod nunquam sequar si, ut esse constat, vis, major est'.

²¹ *Obs. jur. Rom.* III. 19, p. 298.

Non est hic locus integer; principio enim excidit vocula *qui* . . . quam idcirco recte addiderunt veteres editores quos vidi omnes, *sua auctoritate an librorum fide haud facile dixerim*.

The problem is well illustrated by the example which Bynkershoek himself selected to indicate the importance of textual criticism for legal studies. This is the famous case which came before the Dutch courts and turned on the reading of D. 10.4.3.pr.:²²

In hac actione actor omnia nosse debet et *dicere* argumenta rei de qua agitur.

Bynkershoek suggested that the text was corrupt, and proposed reading *discere* in place of *dicere*. This of course completely alters the meaning of the text: instead of having *to inform*, the plaintiff has *to be informed*. It was only later that he discovered that this was a manuscript reading. Or at least so he believed. He writes:²³

Postquam id notatum vidi in margine editionis apud Sennetonios, Lugduni 1549, amplius de ea lectione dubitandum non credidi.

Yet the implicit assumption that this must have been a manuscript reading seems in fact to be mistaken.²⁴

The fact that it was extremely difficult for Bynkershoek to extrapolate from these editions what might be a manuscript reading and what was due to humanist conjecture, lies behind his condemnation of the work of the early legal humanists as *magna posteritatis injuria*. This judgement is all the more arresting in that it does indeed address the standard method of editing classical texts as it continued for three centuries until the foundation of the science of philology in the 19th century. The textual history of the Digest, however, was different, and for a very simple reason: the existence of the Florentine manuscript. With the publication of the facsimile edition of this manuscript by the Taurelli in 1553 the process of humanist corruption of the Digest text was halted overnight. After 1553 only a few rogue editions recall the pre-Taurellian

²² On this famous example, see GOVAERT VAN DEN BERGH, *Geschichtsbewußtsein im 17. Jahrhundert. Die Verdunkelung der rechtshistorischen Leistungen der Eleganten Schule durch die Historische Schule*, in: *Akten des 26. Deutschen Rechtshistorikertages*, Frankfurt am Main, 22. bis 26. September 1986, ed. DIETER SIMON, Frankfurt am Main 1987, pp. 527–39, at pp. 531–32, and also *IDEM*, *The Life and Work of Gerard Noodt (1647–1725)*, *Dutch Legal Scholarship between Humanism and Enlightenment*, Oxford 1988, at pp. 307–308.

²³ *Obs. jur. Rom. Ad lectorem*, 3*2r.

²⁴ See GOVAERT VAN DEN BERGH, *loc.cit.*, note 22 *supra*.

confusion; the Digest edition of Guarinus published at Basel in 1580, which reproduces the text of Haloander, is an exotic creature indeed. After 1553 the standard text began to settle down as that of the Florentine manuscript. Changes might be introduced, of course, but these, even if not indicated in the accompanying humanist gloss, could at least easily be controlled by consulting the edition of the Taurelli.

The most significant characteristic of early legal humanist philology, then, is precisely that, through wholly exceptional circumstances, it did not, in the end, constitute a *damnosa hereditas* for posterity. Not that Bynkershoek's analysis is mistaken; the damage caused to the text of the Digest through the combined efforts of Budaeus, Alciatus and the early humanist editors was real enough, and little needs to be added to his account. Yet this damage was effectively contained within the thirty years between 1520 and 1550. After 1553 its potential for harm had been curtailed. Thus the usual course of development of humanist textual editing over three centuries was compressed into three decades. It is only Bynkershoek's personal interest in these early editions, as a surrogate for the manuscripts beyond his reach, which summoned up the sleeping demon of early humanist philology.

From the wider perspective of the history of the Digest text we have to say that Bynkershoek's invective against the work of the early humanists, accurate though it may be, is nevertheless misplaced. In fact humanist influence was felt very late on the legal texts – long after the invention of printing. As such it is easier to control. We are not faced with 15th century manuscripts, such as cause such problems in other textual traditions, which are a thorough amalgam of manuscript reading and humanist conjecture. It is only in the early humanist *editions* that we meet the typical humanist text described by Kenney in the context of humanist manuscripts:²⁵

The typical humanist MS is ... in no real sense a 'philological' production, but a random hotchpotch of tradition and often wilful and occasionally violent alteration. Of course the result of such activity may be highly deceptive, what looks like a 'good' text though it is nothing of the sort.

This statement mirrors precisely Bynkershoek's description of the early humanist *editions* of the Digest.

²⁵ Cf. E. J. KENNEY, *The Character of Humanist Philology*, in: *Classical Influences on European Culture A.D. 500–1500*, ed. R. R. BOLGAR, Cambridge 1971, pp. 119–28, at p. 122.

The truth is that in the case of the legal texts the situation is far worse. The process of corruption described by Kenney began much earlier, and was not the work of the humanists. The difficulty inherent in the legal texts has always lain in their juristic meaning, not in the grammar or vocabulary of their language. The problem is not to understand *emptor actionem habet*, but rather to understand why the text does not read *emptor actionem non habet*, and this problem was felt as soon as the texts began to be read. What could be called conjecture, or at least alteration, whether conscious or unconscious, began not with the humanists, but with the first scholars who tried to attribute a meaning to these texts, the Glossators of the 12th century, and continued unabated thereafter. As a result, every manuscript of the Digest presents the random hotchpotch of tradition and conjecture described by Kenney.

The true dichotomy is thus not Bynkershoek's simplistic contrast of manuscript reading and humanist conjecture. Rather, the dichotomy lies within the manuscript tradition itself, between what may derive ultimately from a manuscript source independent of the Florentine, and what may be due to the intervention of juristic thought at some point in the course of the Medieval centuries. In other words, in the legal texts the process of uncontrolled intervention began long before the humanists began to do their worst. In his invective against the legal humanists Bynkershoek manifests a shrewd perception of the character of their work, but at the same time reveals how far he was from being able to approach the real problem of the Digest text. Bynkershoek's use of early humanist editions of the Digest as a source for manuscript readings – not to mention the wildly imprecise manner in which he often cites them: *multi libri habent; editores fere reliqui hic habent; veteres edd. fere habent; aliquot antiquae edd.*²⁶ – reminds us that Bynkershoek too belongs to the pre-philological age which he so accurately, and so devastatingly, depicts.

²⁶ These examples are drawn from Book II Chapters 8, 9, 14, 18. Alongside such vague citations Bynkershoek does generally state specifically the edition from which he derives a reading, although this, too, does not exclude the possibility of the same reading occurring in one or more of the other editions which he routinely cites.

Appendix

Bynkershoek's Digest editions²⁷1) BLAUBLOMMIUS, Ludovicus (*Brenemannus* pp. 290–91)

Digestorum seu Pandectarum prima (-tertia) pars. In alma Parisiorum Lute-tia, prostat apud Claudium Chevallon, (1523–24). 2°

(*Obs. jur. Rom.* I. 5. II. 19. III. 12, 18, 19, 20, 21, 23. IV. 10, 14). I take the reference to an edition of Blaublommus of 1532 in *Obs. jur. Rom.* II. 19 to be a misprint for 1523. Bynkershoek's copy was used by Brenemannus: See *Historia Pandectarum* III. 4, p. 265, note 5.

2) STEPHANUS, Robertus (*Brenemannus* p. 291)

Digestorum seu Pandectarum iuris civilis volumen primum (-quintum). Parisiis, ex officina Roberti Stephani, 1527–28. 8°

(*Obs. jur. Rom.* I. 4, 5, 10, 14, 17, 25. II. 9, 19, 23. III. 5, 12, 21, 23. IV. 4, 5, 14, 16). Bynkershoek's copy was used by Brenemannus: See *Historia Pandectarum* III. 4, p. 265, note 6. This copy is now in NL:HKb (232.G.5–9).

3) HALOANDER, Gregorius (*Brenemannus* p. 291)

Digestorum seu Pandectarum libri quinquaginta. (Noremburgae, excudebat Ioan. Petreius), [1529]. 4°

This is the first edition of Haloander's text, but it seems not to have been available to Bynkershoek. Thus in *Obs. jur. Rom.* I. 10, p. 49, he writes, 'Quin et Haloandrum ita legere retulit Viglius Zuichem . . . sed hoc ejus fide esse jubeo, nam in editione Basiliensi ann. 1541 legitur, ut vulgo . . .' Since this is the only occasion in the work on which Bynkershoek cites the edition of Basel 1541, it may be that this latter edition is in fact his source for Haloander's text throughout; the title of the Basel 1541 edition indicates that it is Haloander's text: see below. This might also explain why Brenemannus, before obtaining his own copy of the 1529 edition at Naples, borrowed a copy not from Bynkershoek but from Alexander Cunningham: *Historia Pandectarum* III. 4, p. 265, note 2. Cunningham was also a friend of Bynkershoek: see *Obs. jur. Rom.* I. 18, p. 76, and I. 21, p. 86. Citations of Haloander's text are the most frequent in the *Obs. jur. Rom.*: I. 4, 5, 6, 9, 10, 16, 17, 20, 23, 25. II. 7, 12, 18, 23, 24. III. 1, 3, 5, 6, 7, 8, 9, 11, 12, 15, 17, 18, 21. IV. 4, 5, 6, 13, 14, 16, 17, 18, 20, 24, 25).

4) HERVAGIUS, Ioannes (*Brenemannus* p. 292)

Pandectarum seu Digestorum Dn. Iustiniani Imp. libri quinquaginta, non solum ad editionem Gregorii Haloandri diligenter collati, sed et Andreae Alciati . . . consilio iudicioque in quam plurimis locis feliciter recogniti. Basileae, apud

²⁷ In brackets I give the page reference to Henricus Brenemannus' description of the editions which he used for his work on the Digest text: *Historia Pandectarum* III. 5, pp. 290–300. See the *Tabula editionum* in: G. C. J. J. VAN DEN BERGH and B. H. STOLTE JR., *The Unfinished Digest Edition of Henrik Brenkman (1681–1736)*, TRG 45 (1977), pp. 227–305, at p. 252.

Io. Hervagium, 1541. 2°. (*Obs. jur. Rom.* I. 10).

5) VINTIMILLIUS, Iacobus (*Brenemannus* pp. 293–94)

Digestorum seu Pandectarum juris civilis libri L. Parisiis, apud Carolam Guildard, viduam Claudii Chevalloni, & Gulielmum Desbois, 1548. 8°. (*Obs. jur. Rom.* II. 12, 18. III. 6, 9. IV. 14, 16). Bynkershoek's copy was used by Brenemannus: See *Historia Pandectarum* III. 4, p. 269, note 1.

6) SENNETONII FRATRES

Digestum vetus – Infortiatum – Digestum novum. Lugduni, ad Salamandrae, apud Sennetonios fratres, 1549–50. 2°. (*Obs. jur. Rom.* Ad lectorem. I. 10, 23. II. 9, 12, 19. III. 12. IV. 4, 13, 14.).

7) A PORTA, Hugo (*Brenemannus* pp. 292–93)

Digestum vetus – Infortiatum – Digestum novum. Lugduni, apud Hugonem à Porta & Antonium Vincentium, 1551. 4°. (*Obs. jur. Rom.* I. 5. II. 12, 19, 23. III. 12. IV. 14, 16). Bynkershoek's copy was used by Brenemannus: See *Historia Pandectarum* III. 4, p. 270, note 1.

8) TAURELIUS, Franciscus (*Brenemannus* p. 294)

Digestorum seu Pandectarum libri quinquaginta, ex Florentinis Pandectis repraesentati. Florentiae, in officina Laurentii Torrentini, 1553. 2°. This edition is generally referred to by Bynkershoek simply as the Florentine manuscript, and of course is cited throughout the *Obs. jur. Rom.*

9) RUSSARDUS, Ludovicus (*Brenemannus* pp. 294–96)

Ius civile, manuscriptorum librorum ope summa diligentia & integerrima fide infinitis locis emendatum & perpetuis notis illustratum, L. Russardo ... auctore. Lugduni, apud G. Rovillium, 1560. (Re-issued 1561). 2°. (*Obs. jur. Rom.* I. 17, 25. II. 20, 23. III. 9, 21, 23. IV. 12, 14, 20, 25).

10) CHARONDAS, Ludovicus (*Brenemannus*, pp. 297–98)

Digestorum seu Pandectarum libri quinquaginta. Antverpiae, ex officina Christophori Plantini, 1575. 2°. (*Obs. jur. Rom.* II. 2, 5, 18. III. 15. IV. 3, 10.)

11) BAUDOZA CESTIUS, Petrus ab Area (*Brenemannus* pp. 298–99)

Universi iuris civilis in quatuor tomos distributi corpus. Lugduni, excudebat Gabriel Carterius, sumptibus Ioannae Furnerianae, viduae Gabrielis Balaxerdi, 1593. 2°. (*Obs. jur. Rom.* I. 16, 17. II. 5. III. 23. IV. 4, 13). This edition was re-issued, Lugduni, device of lion and bees, 1600, the date 1593 appearing in the colophon; cf. Bynkershoek's sole reference to a Lugduni 1600 edition in *Obs. jur. Rom.* IV. 13: 'in editione ... Lugdunensi 1593 & 1600'.