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[72] Summary

Jacques Cujas and Hugues Doneau are reputed to be the standard-bearers of humanist jurisprudence, an approach to law which gained ground in the fifteenth and sixteenth centuries. A school averse to medieval legal science, Cujas and Doneau are likely to share its bashing attitude. Yet, in recent literature it is argued that both scholars adopted a more balanced view on medieval legal writings. This paper aims to shed light on what this view entailed, first, by investigating Cujas' and Doneau's own writings on methodology and, secondly, by examining how these jurists put their methodology to practice in their efforts to solve difficult points of law in Justinian's *Codex iuris civilis*. The findings allow the author to speculate on Cujas' and Doneau's position vis-à-vis medieval legal heritage on the basis of a thorough analysis of their legal reasoning.

[73] 'No one is a better jurist than Accursius'. Medieval Legal Scholarship as the Fountainhead of Inspiration for Jacques Cujas and Hugues Doneau?¹

1. Introduction

In contemporary legal literature Jacques Cujas (1520-1590) and Hugues Doneau (1527-1591) are reputed to be the standard-bearers of legal humanism, a movement in legal thought which emerged in 15th – century Italy and spread throughout other parts of Western-Europe². Jurists with a humanist mindset were known by their aversion of what they called 'medieval' legal scholarship. In their eyes, medieval legal scholars had perverted and choked Justinian's *Corpus Iuris Civilis (CIC)* with their glosses and commentaries in rambling Latin law to such an extent that radical measures to purge this ancient compilation of jurisprudence from its medieval burden had become an absolute necessity³. Only then would a sound interpretation

¹ This paper is an elaborated version of a presentation given at the Belgisch-Nederlandse Rechtshistorische Dagen on 13 December 2012. My special thanks go to those who made valuable remarks during the session, especially to Prof. mr. Jan Hallebeek for commenting upon previous drafts and the reviewers of the TvR who provided me with useful comments.

² F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, Göttingen, 1967, p. 167.

³ G. Kisch, *Bartolus und Basel*, Basel 1960, p. 18: 'Der *mos docendi gallicus* wendete sich gegen die herkömmliche Jurisprudenz, ihre Verehrung der Autoritäten und scholastische Unterrichtsmethode. Seine Forderungen waren: Rückkehr zur reinen Rechtsquelle statt bloßer Anerkennung der Tradition, Erkenntnis der Rechtsidee statt des Autoritätenkults, System statt Exegese nach der Legalordnung'; P. Stein, 'Legal Humanism and Legal Science', *Tijdschrift voor Rechtsgeschiedenis*, 1986, vol. 54, p. 300; Wieacker, *op. cit.* (*supra*, n. 2), p. 92; J.H.A. Lokin & W.J. Zwavelle, *Europese codificatiegeschiedenis*, Den Haag, 2006, p. 176.

of the CIC be within reach of legal scholars⁴.

Yet, various studies have shown that this stereotype is not equally applicable to all the legal scholars who adhered to the humanist current⁵. Legal humanists often adopted a nuanced approach vis-à-vis their medieval predecessors. Besides, it is often neglected that legal humanism was not a monolithic school as different scholars applied their own accents. Cujas and Doneau, in particular, are known to have drawn on the inherited medieval *ius commune* in their own unique way⁶. However, their reasons for doing so have rarely been discussed. The same holds for Cujas' and Doneau' substantive treatment of the particular points of law in which their views come to the fore⁷. In this [74] contribution I attempt to discuss both. First, I will explore which methodological reasons moved the learned men to deal with the medieval legal inheritance in the way they did. Secondly, using two case studies, I will illustrate how Cujas and Doneau employed their methodological assumptions while treating questions of substantial law. Before embarking upon this legal journey, I will give a brief sketch of the humanist critique of medieval legal jurisprudence in general to provide the reader with an idea of the cultural climate in which Cujas and Doneau were active.

⁴ For all these points, see Claudius Cantiuncula's *De ratione studii legalis paraenesis*, Basel, 1522, thoroughly discussed by Kisch in G. Kisch, *Claudius Cantiuncula. Ein Basler Jurist und Humanist des 16. Jahrhunderts*, Basel, 1970.

⁵ D. Maffei, *Gli inizi dell'umanesimo giuridico*, Milaan, 1956, p. 38; G.C.J.J. van den Bergh, *Geleerd recht*, (5th edition), Deventer, 2007, p. 63, 68, 172.

⁶ For Cuiacius see J. Flach, 'Cujas, les Glossateurs et les Bartolistes', *Nouvelle revue historique de droit français et étranger*, 1883, p. 205-229; for Doneau: M.A. P. Eyssel, *Doneau, sa vie et ses ouvrages*, Dijon, 1860.

⁷ An exception is posed by DeCock who discusses the humanist thought on the question to what extent buyer and seller are allowed to trick each other. W. DeCock, *Theologians and Contract Law*, Leuven, 2011 (diss.), p. 460ff.

2. Humanists on Medieval Jurists

As far back as the 14th – century Francesco Petrarca (1304-1374) wrote already⁸:

'...pars magna legistarum nostri temporis de origine iuris et conditoribus legum nihil aut parum curat, didicisse contenta quid de contractibus deque iudiciis ac testamentis iure sit cautum, utque studii sui finem lucrum fecerit, cum tamen artium primordia et auctores nosse, et delectatione animi non vacet, et ad eius, de quo agitur, notitiam intellectui opem ferat (..).'

Petrarca criticised his contemporaries working in the legal profession – amongst whom Bartolus (1313-1357) and Baldus (1327-1400) numbered – for their lack of interest in historical matters. Indeed, critique of the a-historical character of medieval jurisprudence would become part of the standard repertoire of the humanistically inspired jurist.

The same can be said of the humanist censuring of the glossators' and commentators' idiomatic and allegedly opaque language. In particular Lorenzo Valla (1407-1457), a professor of rhetoric in Pavia, aimed his arrows at the dog Latin in use among medieval legal scholars. Compared to the beautiful chant of the classical jurists, this language merited no other qualification than the coarse gaggling of geese. [75]

'(...) in locum Sulpitii, Scaevolae, Pauli, Ulpiani aliorumque (...) cygnorum (...) successerunt anseres Bartolus, Baldus, Accursius, Dinus caeterique, id genus hominum, qui non Romana lingua loquantur, sed barbara; non urbanam quandam morum civilitatem, sed agrestem rusticanamque immanitatem prae se ferant, denique non olores, sed anseres (...) existimantes vocem cantumque habere cygnorum⁹.

The same Valla boasted that he was able to do in three years what the renowned glossator Accursius had taken a large part of his lifetime to accomplish, i.e. the writing of the *glossa ordinaria* to the CIC¹⁰. Unsurprisingly, this condescending language infuriated many of the traditionally-orientated jurists up to the point that the Pavian professor, pursued by an unleashed horde of Bartolist scholars, was even forced to flee the town and seek refuge in Milan¹¹.

Nevertheless, despite his quarrelsome character, Valla laid the foundations for a critique which reoccurred time and again, with later humanists contending that without proper knowledge of classical Latin and Greek every attempt to interpret the CIC was bound to fail.

The French humanist, practitioner and playwright François Rabelais (1494-1553) also

⁸ '...a major part of the jurists of our time only care little or do not care at all about the origins of the law and its founders, content as they are with knowing what is legally to be done with contracts and lawsuits, so that in the end their efforts are turned into profit. This despite the fact that it gives intellectual satisfaction to become acquainted with the foundations of the sciences and its authors, and that it provides one with the intellectual stock-in-trade needed to understand what a lawsuit is about', Francesco Petrarca, *Epistolae de rebus familiaribus et variae*, in: G. Fracassetti (red), Florence, 1863, p. 13; see F. Calasso, *Medio evo del diritto*, Milaan, 1954, p. 597. All translations are my own, unless otherwise indicated.

⁹ 'The geese Bartolus, Baldus, Accursius, Dinus and all others of the kind, a breed of men that does not speak the Roman language, but a barbarian, a breed of men that does not display any refinement of manners, but a coarse and burly barbarism, in one word, not swans, but gagglers, took the place of Sulpitius, Scaevaola, Paulus, Ulpian and of other (...) swans (...), imagining, o what blasphemy!, to possess the same voice and chant as queen-birds', Lorenzo Valla, *Laurentii Vallae opera*, Basel, 1540, p. 633; Cf. G. Kisch, *Gestalten und Probleme aus Humanismus und Jurisprudenz*, Berlijn, 1969, p. 37; Maffei, *op. cit. (supra, n. 5)*, p. 38.

¹⁰ Kisch, *op. cit. (supra, n. 9)*, p. 38, note 4.

¹¹ Maffei, *op. cit. (supra, n. 5)*, p. 39.

did not doubt that medieval jurists regularly misinterpreted the CIC. In his book *Pantagruel*, staging a homonymous giant who had once studied law in Bologna, Rabelais has the narrator put the following words in the mouth of this peculiar character:

'Et disoit aulcunesfois que les livres des loys luy sembloient une belle robbe d'or (...) qui feust brodée de merde; (...). (...) la brodure d'iceulx, c'est assavoir la Glose de Accurse, est tant salle, tant d'infame et punaise, que ce n'est que ordure et villenie'¹².

[76] A bit further on in the same book, Rabelais parodies the medieval jurists' lust for citing authorities, when he makes Pantagruel attend judicial proceedings against one judge Bridoye who had been wont to decide cases by dice¹³. To the president's question put to Bridoye to reveal how he had ended up himself being tried in court, the judge retorted that it was just his old age which evidently brought deficiencies with it and that for that reason he should not be blamed for taking a four for a five,

'(...) par disposition de droict, les imperfections de nature ne doibvent estre imputées à crime, comme appert, ff. de re milit. l. Qui cum uno, ff. de reg. iur. l. Fere, ff. de aedil. edi. per totum, ff. de term. mod. l. Divus Adrianus resolut., per Lud. Ro. in l. Si vero, ff. sol. matr. Et qui austrement feroit, non l'homme accuseroit, mais nature, comme est evident, in l. Maximum vitium C. de lib. praeter.'¹⁴.

The point that Rabelais wanted to bring home was that the medieval glosses and commentaries had turned the law into such a byzantine system that nearly every position could be defended, if one only managed to adduce the right authorities¹⁵.

¹² 'One time he said that, to him, the lawbooks resembled a beautiful golden robe (...) embroidered with dung (...). (...) their embroidery, i.e. the Accursian Gloss, is so dirty, so impudent and shallow that it is nothing but shitty crookery", François Rabelais, *Oeuvres*, vol. 1, Parijs, 1783, p. 220; Cf. Flach, *op. cit. (supra, n. 6)*, p. 214; Lokin & Zwolve, *op. cit. (supra, n. 3)*, p. 176.

¹³ Rabelais, *op. cit. (supra, n. 12)*, p. 544 : '*Comment Pantagruel assiste au jugement du juge Bridoye, lequel sentencioit les procès aus sort des dez*'.

¹⁴ Rabelais, *op. cit. (supra, n. 12)*, p. 544: 'for it is a rule of law that natural flaws may not be reckoned a crime, as is stated clearly in ff. de re milit. l. Qui cum uno [D. 49.16.4pr.], ff. de reg. iur. l. Fere [D. 50.17.108/109 (vulg.)], ff. de aedil. edi. per totum [D. 21.1, ff. de term. mod. l. Divus Adrianus resolut. [D. 47.21.2], per Lud. Ro. in l. Si vero, ff. sol. matr. [Ludovicus Bologninus' commentary on D. 24.3.64]. He who does otherwise, does not impute the man, but nature, as evidently follows from l. Maximum vitium, C. de lib. praeter [C. 6.28.4]'. Rabelais' allegations are not unequivocal illustrations of what he contends. Quite some imaginative thinking is required to distil the rule which Bridoye states from D. 49.16.4pr.: '*Qui cum uno testiculo natus est, (...), iure militabit, (...). Nam et duces Sulla et Cotta memorantur eo habitu fuisse naturae* (He who is born with only one testicle (...) shall rightly serve in the army. After all, it is remembered that the commanders Sulla and Cotta were of that condition by nature)'. Admittedly, medieval commentators likewise were not averse to what we would now consider rather overly loose interpretations of CIC texts.

¹⁵ Another passage in *Pantagruel* demonstrates that Rabelais uses the entire repertory of humanist objections. Asked to assist in a case, upon receiving a huge pile of documents Pantagruel launches into the following tirade: '*De quoy diable doncques (dict-il) servent tant de fatrasseries de papiers et copies que me baillez? N'est-ce le mieux ouyr par leur visve voix leur desbat, que lire ces babouyneries icy, qui ne sont que tromperies, cautelles diaboliques de Sapila, et subversions de droit? Car je suis seur que vous et tous ceulx par les mains desquels a passé le procès, y avez machiné ce qu'avez peu, pro et contra: et au cas que leur controverse estoit patente, et facile à juger, vous l'avez obscurcie par sottises et desraisonnables raisons et ineptes opinions d'Accurse, Balde, Bartole, de Castro, de Imola, Hippolytus, Panorme, Bertachin, Alexander, Curtius et ces austres vieulx mastins, qui jamais n'entendirent la moindre loy des pandectes, et n'estoyent que gros veaulx de disme, ignorants de tout ce que'est necessaire à l'intelligence des loix. (...). Dadvantaige veu que les loix sont extirpées du milieu de philosophie morale et naturelle, comment l'entendront ces fols qui ont par Dieu moins estudié en philosophie que ma mule? Au regard des lettres d'humanité et cognoissance des anticquitez et histoires, ils en estoyent*

[77] A final reproach of medieval jurisprudence is formulated by Doneau and concerns the superfluous character of many medieval commentaries:

'Nusquam enim fere plures scripserunt, nusquam maiores commentarii et prolixiores: apparetque maximam partem sedulo atque optimo studio scripsisse. (...) Ac si non iniqui istorum laborum aestimatores esse volumus, fatendum est, dignos esse omnes magna laude vel hoc nomine, quod publice, quae noverant, in commune contulerunt, et pro virili salutarem artem iuvare studuerunt. (...) Sed quod de omnibus in universum vere dicere liceat, saepe sedulitati et bonis conatibus successus non respondit, contraque evenit potius, ut multitudo scribentium augetur difficultates, non minueret'¹⁶.

To conclude: in the eyes of the humanists medieval legal scholarship was a-historical, used some kind of degenerated Latin, lost itself in myriads of references and did not succeed in producing elucidating works. Yet, humanists sportingly offered mitigating circumstances to explain this saying. Medieval jurists could not have helped but make mistakes, since the low level of legal scholarship was a logical consequence of the depraved conditions in which [78] medieval society as a whole was set¹⁷. Hence, the medieval jurist was not to blame because he simply could not have done better. It was up to the humanists to remedy these deficiencies.

chargez comme un crapaut de plumes, dont toutesfoit les droicts sont tous pleins, et sans ce ne peuvent estre entendus; (...),' Rabelais, *op. cit. (supra, n. 12)*, p. 248-49.

¹⁶ 'In hardly any other discipline have so many written such bulky and verbose commentaries, though it appears that the majority wrote with the utmost dilligence and willpower. (...) Now if we do not want to be insincere judges of their efforts, we must admit that they are all worthy of high praise for openly divulging to the community what they knew and for having strived for a healthy science as best as they could. (...) Nevertheless – and this can be said to apply to all in full – often their diligence and laudable attempts have not yielded succes. Rather the contrary occurred, so that the multitude of authors increased the difficulties, instead of reducing them', Hugo Donellus, *Hugonis Donelli commentarii de jure civili*, vol. 1, Neurenberg 1801, xl–xli.

¹⁷ This pardon repeatedly occurs in humanist discourse. Cf. Donellus, *op. cit. (supra, n. 16)*, xxxviii: '*Quod non magis iniquitati et imperitae temporum, quam rerum difficultati tribuendum est*'; Angeli Politiani *Operum: tomus primus*, vol. 1, Lyon 1539, p. 295, 10.4 (1453): '*Deprehendi igitur multa novis in codicibus vitia, multa in interpretibus: quoniam videlicet inerudito nati seculo (...)*', (I found many mistakes in recent [i.e. vulgate] lawbooks and works of commentators, of course because they lived in an uncouth age (...)). Geciteerd in Kisch, *op. cit. (supra, n. 9)*, p. 39; Bonifacius Amerbach, *Defensio interpretum iuris civilis*, 270. '*Equidem quod ad Accursium pertinet, parum latine scripsit crebroque in vocabulis paulo obscurioribus explicandis lapsus est, id quod mirum videri non debet seculo tam inerudito, (...)*'. Uitgegeven door G. Kisch, *Humanismus und Jurisprudenz*, Basel, 1955, p. 79-97; Maffei, *op. cit. (supra, n. 5)*, p. 57.

3. Cujas and Doneau

One might be inclined to think that it goes without saying that Cujas and Doneau, the putative standard-bearers of legal humanism, fully endorsed the humanist abhorrence of medieval jurisprudence as presented above. However, closer examination of their works shows that their attitude towards medieval legal scholarship was based on a more balanced judgement.

3.1. Cujas

Cujas was rather vocal about his admiration for Accursius (1185-c. 1263), the famous compiler of the glosses to the CIC which had been written up until his time. In a letter to Brassicanus¹⁸, a jurist friend, he wrote:

'Quare saepe, multumque cogitanti mihi videtur nemo melior esse Accursio IC. optime de iure civili merito. Multa enim, in eo sunt utilia, licet quaedam sint minus πρόσφορα και μη ἔναρμωσα, sed illa adscribemus temporum iniquitati. Casus in glossa minime sunt legendi, non sunt Accursii. Illud etiam pro certo habeas, semper unam ex opinionibus ab Accursio alatis esse veram'¹⁹.

[79] These remarks by Cujas are difficult to square with the picture of the humanistically inspired jurist as presented by Valla, Rabelais and other humanists. Cujas admiring a glossator and the most renowned man whom Bologna, centre of the so despised medieval legal scholarship, had ever produced at that!

In the following passages taken from Cujas' inaugural lecture *De ratione docendi iuris* it appears that he praised the glossators, because their methodology was strongly related to that of the jurists of Justinian's age. Cujas unfolds a few things in his treatment of the word gloss.

'Glossae inquam, ut vulgus loquitur, ut proprie loquar, Scholia, sunt, (...), interpretationes linguae secretioris, sive vocum minus usitatarum, quae verbum pro verbo reddunt:(...). Scholia hoc amplius et similes et in usum vel speciem dissimiles locos notant et distinctiones varias atque sententias priorum interpretum Irnerii, Jacobi, Ugolini, Bulgarii, Rogerii, Cypriani, Martini, Placentini, quorum magna pars fuit in concilio Friderici I, imperatoris [Barbarossa 1122-1190]). (...) atque ita complures me Scholia legisse profecto non poenitet: his dum potior facile transvolo illis aliquos adglutinare Doctores longe lateque recedentes a Juliano, Papiniano et Scholiorum quoque illorum auctoribus, qui verbis ad intellectum rei, qua

¹⁸ Ambrosius Brassicanus († after 1550), Flach, *op. cit.* (*supra*, n. 6), p. 207.

¹⁹ 'Therefore, frequently and deeply pondering over your question, it appears to me that no one is a better jurist than Accursius, who has made himself very creditable in civil law. Many things he has written are useful, though some of them are less to the point and not in harmony, but we shall blame the unfavourable age for that. The cases in the Gloss you should read only cursorily, since they are not his. Keep one thing for certain; there is always a right interpretation among those proposed by Accursius', Christophorus Colerus & Jacobus Cuiacius, *De ratione discendi ius civile oratio cum appensa Iacobi Cuiacii IC. principis epistola*, Straatsburg 1600, p. 25; for a discussion of the letter's authenticity see Flach, *op. cit.* (*supra*, n. 6), p. 205ff.; Eysell, *op. cit.* (*supra*, n. 6), p. 176.

de agitur, ultra quam satis est, utuntur. Absit igitur ut haec Scholia (quod faciunt quidem male sani et inexperientes rei quam tangunt) comparem panno insuto purpurae²⁰.

[80] It helps to understand Cujas' sympathy for the glossators when considering the goals he himself hoped to achieve with his legal writings. A humanist in the Erasmian sense of the word, Cujas' efforts were aimed at finding the right interpretation of the legal texts in Justinian's CIC. Just as Erasmus endeavoured to correct Jerome's Vulgate bible with the use of all the manuscripts he could find in the hope of enabling a better reading of the New Testament²¹, Cujas strived to make an emendation of Accursius' *Glossa Ordinaria* to the CIC by using all the texts from jurists before and after Accursius' time that he could lay his hands on²². To make a corrected version of the New Testament, Erasmus fell back on the early-church Fathers Origenes, Athanasius, Basilius, Gregorius of Nyssa, Chrysostomus, Cyrillus, Theophylactus, as well as on the medieval scholars Beda the Venerable and Thomas Aquinas, comparing their commentaries and glosses with the Vulgate²³. Cujas hoped that a better understanding of the CIC could be achieved by drawing from Byzantine legal commentaries and comparing these with the works of the glossators and commentators. Just as Erasmus had contended that he was doing no more than holy Jerome had done before him²⁴, Cujas saw himself as a member of the school of Irnerius [81] and Accursius, scholars who had worked to the best of their knowledge for no other purpose than to furnish law students with the finest

²⁰ I say 'glosses', in accordance with common understanding, but more properly speaking they are 'scholia', (...), interpretations of opaque language or words not so often used, which they explain word by word: (...). On top of this, scholia also note corresponding places or places that differ in use or appearance, and the various distinctions and opinions given by the earlier glossators Irnerius, Jacobus, Bulgarus, Rogerius, Cyprianus, Martinus and Placentinus, the majority of whom lived in the circle of Emperor Frederic I. (...) and so I do not at all regret having read many scholia, since with these I more easily pass over those things glued to the texts by some learned men who, departing from Julian, Papinian and the writers of those scholia, use more words than necessary in order to understand what something is about. Hence, let it be far from me to compare these scholia with a dirty cloth stuck on a purple mantle, as some mentally ill men, ignorant of the matter they touch upon, do', Jacobus Cuiacius, 'De ratione docendi iuris oratio', in: Cuiacius, J. *Opera omnia*, vol. 8, Napels, 1722, p. 1122 E. Lecture given in 1585 A.D.

²¹ 'Nos enim non sic proponimus hanc aeditionem, ut velimus per omnia haberi emendatam, sed quod apud Graecos frequentissimum habetur maximeque constans, id vertimus, (...)', (After all, we do not propose this edition as wanting it to be held for an in every sense corrected version. However, we translated that which is most frequently held by the Greek and most tenable (...)), D. Erasmus, 'Capita argumentorum contra morosos quosdam ac indoctos', in: *Opera omnia*, vol. 6, Basel, 1541, f^o b3v; Lokin & Zwolve, *op. cit.* (*supra*, n. 3), p. 177.

²² R. Lesaffer, *Inleiding tot de Europese rechtsgeschiedenis*, Leuven, 2004, p. 322, nr. 309.

²³ Cf. Erasmus' apologie to his New Testament edition: 'Illud potius spectandum quid legerint veteres Graeci, Origenes, Athanasius, Basilius, Gregorius Nazianzus, Chrysostomos, Cyrillus ac Theophylactus, (It is better to look at what was read by the ancient Greeks Origenes, Athanasius, Basilius, Gregorius of Nyssa, Chrysostomus, Cyrillus and Theophylactus)', Erasmus, *op. cit.* (*supra*, n. 21), f^o b3. References to Beda Venerabilis and Thomas Aquinas can be found in the same essay.

²⁴ 'Quum Damasus hoc negotii daret Hieronymo, ut novum testamentum ex Graecorum fontibus emendaret, habebat nimirum iam tum ecclesia quod legebatur et fortassis seculis aliquot legerat. Id si syncerum erat, quid opus erat emendatione Hieronymi? Sin corruptum, palam est ecclesiam ad tempus uti, quod sit in melius vertendum, (When Damasus gave Jerome the task of correcting the New Testament from Greek sources, the Church, unsurprisingly, was already in possession of a New Testament which it read and which, perhaps, it had already been reading for ages. If that was flawless, what need would there have been for Jerome's correction? However, if it was corrupt, the Church at the time was obviously using something in need of a better translation)', Erasmus, *op. cit.* (*supra*, n. 21), f^o b3.

tools to interpret Justinian's lawbook²⁵.

After all, in Cujas' eyes glosses or scholia also presented a helpful means of ensuring quick access and insight into Justinian's compilation. They show the scholar grappling with a difficult text the way to other relevant texts in the CIC, they note concurring opinions of other glossators, and they help to clarify obscure passages. All this ably supported the final aim Cujas always bore in mind: finding the right interpretation of the CIC's texts. Hence his disqualification of Rabelais flinging mud at the Gloss saying his actions provided less proof of Rabelais being a witty man than it did of revealing him to be utterly misinformed about legal matters²⁶.

In the preamble to his *Paratitla in libros ix codicis* Cujas explores the link between the glossators' working method and that of the Byzantine writers of interpretations 'that follow on the heels' (*κατὰ πόδας interpretationes*). Again, Cujas emphasises how glossators did law in the manner Justinian himself had envisaged it to be done. Furthermore, Cujas explains when legal scholarship lost track of the right course:

'(...) nobis fuisse necesse iuri antiquo et longa desuetudine corrupto obscuratoque ex commentariis lumen foenerare, non sufficiente, eo quod ab illo tempore attulerant [82] Summarum vel Glossarum auctores primi. (...) Hi caverant maxime ne ab Iustiniani edicto migrare viderentur, editis primum Summis, quas habuere pro paratitlis, deinde etiam glossis, pro ea quam idem Iustinianus κατὰ πόδας interpretationem appellat. Nam si praeter paratitla etiam Graeca lingua κατὰ πόδας fieri interpretationem Iustinianus permetteret, cur non sibi liceret etiam audere Latina, quod ille permetteret Graeca, existimarunt non esse causam, breviter scilicet et apte nec pluribus multo verbis, quam leges ipsae scriptae forent eae enim sunt proprie glossae, eae κατὰ πόδας interpretationes. Sed haec cum non explerent obtusiora ingenia, nec satis ius illustrare videntur, supervenere alii qui non mutato nomine glossas auctiores redderent, quam pateretur ipsum glossarum nomen, atque ita paulatim glossae factae gravidae quaesierunt sibi liberos ingentes, immanes, insanos commentarios²⁷.

²⁵ 'Eisdem temporibus dominus Vuernerius libros legum, qui dudum neglecti fuerant, nec quisquam in eis studuerat, ad petitionem Mathildae Comitissae renovavit. Et secundum quod olim a divae recordationis imperatore Justiniano compilati fuerant, paucis forte alicubi interpositis, eos distinxit, in quibus continentur instituta praefati Imperatoris, quasi principium et introductio iuris civilis, edicta quoque praetorum et aedilium curulium, quae rationem et firmitatem praestant iuri civili, haec in libro Pandectarum, videlicet, in Digestis continentur. Additur quoque his liber Codicis, in quo Imperatorem statuta describuntur. Quartus quoque est liber Autenticorum, quem praefatus Justinianus ad supplementationem et correctionem legum imperialium superaddidit' [my emphasis], Eccardus de Uraugia († c. 1125), *Chronicon*, Straatsburg, 1540, p. 212; Calasso, *op. cit.* (*supra*, n. 8), p. 526, n. 13.

²⁶ The last sentence quoted indeed seems to be a taunt at Rabelais' expense, as noted by Flach. Cf. the passages taken from Rabelais' *Pantagruel*. However, in common with Troje I do not endorse Flach's observation that Cuiacius tried to restore pre-Justinian classical Roman law, *faire revivre le véritable droit de la Rome ancienne*. Cuiacius made equal use of the Gloss and Byzantine writings as of classical sources to come to the best interpretation of the texts in the CIC. At times he followed the Roman jurists, at other times Tribonian. Flach, *op. cit.* (*supra*, n. 6), p. 214, 221–222; H.E. Troje, *Humanistische Jurisprudenz*, Goldbach, 1993, p. 186ff.

²⁷ '(..) For me it was necessary for the ancient law which had been corrupted and obfuscated because of long neglect to bring back light into the commentaries, while that which the earliest writers of glosses or summaries since then [the CIC's rediscovery] had produced did not suffice (...). True, they painstakingly saw to it not to move away from Justinian's edict,²⁷ first editing *Summae*, which they held for explanatory notes (*paratitla*), and then writing glosses, which they conceived of as that which Justinian called interpretations 'that follow on the heels'²⁷. After all, if, next to explanatory notes Justinian had allowed for the, what in Greek is called *κατὰ πόδας*-interpretations, why then would not they be at liberty to dare the same in Latin? They did not believe there was a

It is noteworthy that Cujas severely condemns the scholars who added all sorts of things to the glosses and that he reproaches other scholars, who 'under [83] the same header, expanded the glosses to such an extent that they no longer endured the name 'gloss'', and had caused the rampant growth of commentaries. It is a well-known fact that Cujas abhorred the commentators almost as much as he appreciated the glossators; his extensive library did not even contain a single copy of a book written by the former²⁸. After all, commentators did exactly the opposite of what a legal scholar, in Cujas' opinion, was supposed to do; not sticking to short remarks but rendering long-drawn-out expositions, they went beyond plainly indicating to the inquisitive jurist which road to follow to arrive at the right reading of the law text. Moreover, Cujas took offense to that other trade which commentators excelled in, i.e. creating rules. 'For the law existed prior to rules (...). Arguments deduced from rules of law are without substance and dangerous. In a word, one should not argue on their basis'²⁹.

It may be clear by now where Cujas' preferences lay. Short and to-the-point notes were the better instruments for the legal exegesis of Justinian's compilation. Glosses – in Cujas' true sense of the word that is – sufficed to get to the core of the texts in the CIC and nothing more than some explanatory marginal notes were needed to enable a jurist to work with the Justinianic sources.

Admittedly, the content of Cujas' *scholia* differed from that of the glosses written by his medieval predecessors. After all, the latter scholars had fewer and poorer quality tools at their disposal³⁰. Compared to 16th- century standards, their knowledge of history and classical languages was limited, whereas Cujas could make use of all the fresh fruits of renaissance learning. Eagerly doing so, he did not shrink from steering away from accepted doctrine when the newly interpreted sources induced him to do so. However, that should be considered a result which was less of a reaction against medieval scholarship than of a more thorough continuation of how law had been done in the past ages, something which I hope will become clear from the cases discussed later in this paper³¹.

particular reason for allowing it only in Greek, since their own glosses too, written in a concise and to-the-point manner and without many more words than the number with which the lawtexts themselves were written, were *κατὰ πόδας*- interpretations. However, when these glosses could not satisfy the more obtuse minds and when these did not seem to explain the law satisfactorily, other scholars followed who, under the same header, expanded the glosses to such an extent that they no longer endured the name 'gloss'. And so it gradually ensued that the glosses became pregnant and sought to produce monstrous children for themselves, obese, unhealthy commentaries", Jacobus Cuiacius, *Paratitla in libros ix. Codicis Iustiniani*, Keulen, 1577, p. 1–3.

²⁸ Flach, *op. cit.* (*supra*, n. 6), p. 216, note 3.

²⁹ 'Ius enim prius regula. (...) *levia sunt argumenta, quae deducuntur ex regula iuris et periculosa. Denique ex his non est argumentandum*', Cuiacius, *op. cit.* (*supra*, n. 20), p. 706.

³⁰ G.C.J.J. Van den Bergh, *Die holländische elegante Schule*, Frankfurt a/M, 2002, p. 37.

³¹ Calasso, *op. cit.* (*supra*, n. 8), p. 524–525, no. 12; R. Stintzing, *Geschichte der deutschen Rechtswissenschaften*, vol. I/3, book 4, 1880, p. 376: 'Cujas steht im entschiedensten Gegensatze zu den "Bartolisten", mit denen er in Toulouse in Conflict geräth, in so fern er eine exacte, alle Hilfsmittel der Kritik und der Alterthumswissenschaft verwendende Behandlung der Quellen fordert'.

[84] 3.2. Doneau

To Hugues Doneau, things were somewhat different. Although the one-time Leiden professor³² also sympathized with his medieval predecessors, it was not the glossators, but the commentators whom he trumpeted, though this too was in a balanced way³³. In the preamble to his *Commentarius de iure civile*, Doneau's *magnum opus* in which he systematically goes through Justinian's CIC, Doneau describes the difficulties that someone grappling with Justinianic law has to deal with. The major reason that the CIC is so hard to comprehend is its fragmentary tradition. Since Justinian, only a very few individuals can claim to have overcome the CIC's complex and confusing transmission and to possess a profound and certain knowledge of the law³⁴. Doneau wrote this rather uninviting introduction to the study of law:

'(...) ut intelligatur, parum esse ad studium suscipiendum praestantiae ullius, et amplitudinis, (...), commendationem, si aliunde adiumenta desunt ad ius pernoscendum (...) sine quibus haud unquam facile futurum sit, ut hic quisquam eum finem quem petit, attingat, iuris cognitionem. Aut enim difficultate debilitatus cum spe consequendi etiam cognoscendi studium abiiciet: aut si perseverandum putabit, hinc quidem obscuritate et perplexitate rerum circumventus facile pro veris falsa, pro utilibus inutilia, pro solidis inania complectetur, ut in tenebris errare et decipi facillimum est; illinc autem varietate negotiorum et multitudine impedito atque distracto eveniet, ut prius illum vita defecerit, quam vel unam partem ex innumeris totam plane sit assecutus. (...) Quod cum sentirent maiores nostri, illi maxime, qui post tempora Justiniani haec studia ante omissa velut postliminio revocarunt, sapienter providerunt, ne his studiis illa adiumenta desent. (...) Haec eadem cogitatio atque hic sensus patrum nostrorum memoria impulit tam multos, ut in ius civile scriberent, in quibus non pauci fuerunt excellenti ingenio, et, ut tum [85] tempora concedebant, etiam doctrina, quibus studium fuit occurrere tenebris iuris, et cursum horum studiorum ante non tam impeditum, quam interclusum, planiorem et faciliorem reddere'³⁵.

³² From 1579 to 1587 A.D. See R. Stintzing, *Hugo Donellus in Altdorf*, Erlangen, 1869, p. 18ff.

³³ Flach, *op. cit.* (*supra*, n. 6), p. 225. Curiously, Flach does not conclude this on the basis of Doneau's own writings.

³⁴ *'Vix enim dici potest, ex tam immenso numero eorum, qui se post Iustiniani tempora ad ius civile certatim contulerunt, quam pauci omnibus aetatibus extiterint, quibus huius iuris veram et solidam cognitionem concedas. (...) Quorsum haec de operis huius et disciplinae difficultate, ubi homines potius ad eius studium excitari conveniebat?'* Donellus, *op. cit.* (*supra*, n. 16), xxxviii.

³⁵ (...) in order that one understands that reverence for some pre-eminence and grandeur, (...), is not enough to take up the study of the law, if for the rest the means for understanding the law are lacking, without which means it will not easily happen that someone here achieves the final goal, i.e. knowledge of the law. Debilitated by the difficulties he will, together with the hope of acquiring knowledge, break off his efforts to learn, or, if he thinks he must persevere, it will happen that, deceived by the obscurity and perplexity of things, he will easily embrace false as true, useless as useful and trifles as things of the utmost importance, since in the dark one is lightly deceived and led astray. Hence, hindered and distracted by the variety and multitude of cases, he will sooner see the end of his days than that he will really succeed in completely mastering only a single fragment out of the innumerable existing. (...). While our forefathers and then in particular those who lived subsequent to Justinian's age realised this and called this until that moment neglected discipline back from banishment, so to speak, they wisely saw to it that this discipline would not lack instruments. (...). The same thought and idea as our forefathers' urged many to write on the civil law, among whom not a few possessed an excellent wit, and, in as much as their age allowed, a fine education, in the hope to fend off obscurity and to make the honorary curriculum of this discipline, though not so much shorter, plainer and easier, at least less impenetrable', Donellus, *op. cit.* (*supra*, n. 16), xxxvii-xl.

Doneau valued the medieval scholars' struggles to diminish the spinosities in interpreting the CIC, even though he found their efforts not particularly successful: 'Rather the contrary occurred, so that the multitude of authors increased the difficulties, instead of reducing them'³⁶. Yet, in keeping with his predecessors' ambitions, Doneau saw that the task set before him was to produce aids that did work. However, his methodological approach differed in considerable measure from that of his medieval precursors. Notwithstanding that Bartolus and his contemporaries had written commentaries in accordance with the sequence of the CIC' texts and had commented on and interpreted each title separately, Doneau dismissed Justinian's order as too incoherent and as one that did not do justice to the logical ideas and concepts lying behind the CIC's separate texts³⁷.

[86] Yet, Doneau did not want to discard the content of the medieval commentaries in the same breath. On the contrary, in our treatment of questions of substantial law, we shall see that Doneau did not recoil from drawing on medieval doctrinal heritage if it contained information which supported his interpretation of Justinianic law³⁸.

³⁶ (...) *contraque evenit potius, ut multitudo scribentium augetur difficultates, non minueret*', Donellus, *op. cit.* (*supra*, n. 16), p. 41.

³⁷ *'Sed et quae in singulis partibus et legibus adhibetur interpretatio, quo ordine ista tradita sunt, etiam si adhibeatur in omnibus, consistit tamen in disiunctis membris, minimeque cohaerentibus: quae quo plura sunt proposita ad explicandum, eo magis corpus ipsum divellunt ac distrahunt. (...). At qui nos totum quaerimus, non certas aliquas partes quamquam [quoniam?] nec partes, quatenus tales sunt, sine toto facile cognosci possunt'* (Yet, also the interpretation of separate fragments and laws derives from the order in which they are handed over. Nevertheless, even if an interpretation emerges out of it all, it is still grounded in loosely jointed fragments which show not the slightest coherence. Hence it happens that the more explanations are proposed, the more they tear apart and pull asunder the body of law (...). But we, who are in search of the complete picture, cannot easily understand some certain fragment, since the proper meaning of fragments cannot be known without an understanding of the whole)', Donellus, *op. cit.* (*supra*, n. 16), xlv; C.A. Cannata, 'Systématique et Dogmatique dans les Commentariis Iuris Civilis de Hugo Donellus' in B. Schmidlin en A. Dufour (red.), *Jacques Godefroy et l'Humanisme juridique à Genève. Actes du colloque Jacques Godefroy*, Basel 1991, p. 220.

³⁸ E.g. Doneau frequently refers to the works of Bartolus, both to underpin his own argument and to construe his own divergent opinion. Cf. (...) *quod Bartolus recte scripsit*', Donellus, *op. cit.* (*supra*, n. 16), p. 29; *'Hoc enim bene Bartolus expedit'*, Hugo Donellus, *Hugonis Donelli commentarii de jure civili*, vol. 3, p. 272; *'etsi Bartolus contra disputat et sensit'*, Idem, p. 373.

4. Cases

Now that we know a bit more about Cujas' and Doneau's methodological views, I would like to investigate how they were put to effect in their treatment of two debated points of law. For this purpose I largely draw on the findings of my Ph.D. – research on the seller's liability for latent defects in the early-modern period³⁹.

The Justinianic law regarding latent defects deals with cases in which someone bought a thing, e.g. a horse, which, after the sale, turns out to be defective, e.g. the horse suffers from a disease which could not have been discovered by either seller or buyer at the time the sale was concluded. Ancient Roman law (753 – ca. 200 B.C.) did not provide remedies under these circumstances, unless the seller had warranted the thing's quality or committed fraud⁴⁰. However, this rather strict law backfired on the banks of the River Tiber, where cattle and slaves were sold in large numbers by rather unreliable salesmen who were clever enough to conceal their fraud. The seller frequently argued that he was as unaware of the defect as the buyer was and could not have known about it. According to ancient Roman law, he then did not have to answer for the defect, since he had not behaved in a faulty manner. As a result, the buyer had to bear all incurred losses. Pre-classical Roman law (200 – 27 B.C.) tried to remedy the [87] buyer's predicament while attempting to steer a middle course between the position of the unknowing seller on the one hand and the duped buyer on the other. Rules pertaining to latent defects were spelled out in an edict promulgated by the *aediles curules*, turned into law no later than the first century B.C., according to which the buyer of a defective thing could claim a reduction of price (*actio quanti minoris*) or rescission of the contract (*actio redhibitoria*)⁴¹. Through a rather hard to follow development of Roman civil law, remedying latent defects also became possible by instituting the civil action on the sales contract from the second century A.D. onwards⁴². The edictal remedies and the remedies available under the action on the sales contract both found a place in Justinian's CIC. The first were brought under titles D. 21.1. and C. 4.58, the latter under titles D. 19.1.1 and C. 4.49.

4.1. First Case: Can the Aedilitian Remedies Be Used in Other Contracts than Sales?

In the Middle Ages, the question arose as to whether the rules pertaining to latent defects applied to contracts other than sales. E.g. could a lessee rescind the lease contract, if it turned

³⁹ This thesis is set to be finished in Spring 2016.

⁴⁰ R. Zimmermann, *The law of obligations. Roman foundations of the civilian tradition*, Oxford, 1996, p. 308-310.

⁴¹ A. de Senarclens, 'La date de l'édit des édiles de mancipiis vendundis', *Tijdschrift voor Rechtsgeschiedenis*, 4, 1923, p. 384, 392.

⁴² Zimmermann, *op. cit.* (*supra*, n. 42), p. 320-321.

out that the leased house suffered from a latent defect?⁴³ At first glance, the CIC seems rather straightforward. D. 21.1.63 reads:

Ulpianus libro primo ad edictum aedilium curulium : Sciendum est ad venditiones solas hoc edictum pertinere non tantum mancipiorum, verum ceterarum quoque rerum. Cur autem de locationibus nihil edicatur, mirum videbatur: haec tamen ratio redditur vel quia numquam istorum de hac re fuerat iurisdictio vel quia non similiter locationes ut venditiones⁴⁴ fiunt⁴⁵.

[88] By way of conclusion, the Gloss *fiunt* ('is carried out') to this text remarks that 'after all, in lease one does not intend to transfer property, as one does in sales, see above D. 19.2.39⁴⁶'. Thus, the Gloss appears to argue that the conveyance of ownership is crucial to applying the aedilitian edict to a contract other than sales. With D. 21.1.63 posing that the different character of sale and lease contracts impedes an extensive application of the edict's provisions and D. 19.2.39 providing that lease does not convey ownership, the Gloss assumes that it has grasped the meaning of the phrase 'because lease is not carried out in the same manner as sales'.

Reasoning thus, the Gloss departed from the literal text in Justinian's compilation, as no argument similar to 'the aedilitian remedies do not apply to lease, because in lease there is no intention of conveying ownership' is to be found in the entire Justinianic *corpus*. Drawing such a conclusion is only possible with the acceptance of an implicit premise, i.e. that the difference between sales and lease which D. 21.1.63 hints at is the transferral of ownership, as mentioned in D. 19.2.39⁴⁷. In accepting the implicit assumption that conveyance of ownership is needed for the application of the aedilitian edict, the Gloss applied itself to the rule-making so despised by Cujas⁴⁸.

⁴³ See e.g. H. Dilcher, *Die Theorie der Leistungsstörungen bei Glossatoren, Kommentatoren und Kanonisten*, Frankfurt a/M., 1960, p. 333ff.

⁴⁴ Translating *fiunt* is tricky. Spruit translates *fiunt* as 'aangegaan worden', which is problematic, since sales and lease are concluded in exactly the same manner, i.e. by consensus. Watson renders the words *non similiter fiunt* as 'circumstances are different', which is no less vague than the Latin text. I opted for an equally opaque 'carried out'. After all, as will appear, the glossators did not have a clear idea about the meaning of the passage. In doing so, I hope to limit bias in the rendering of the Latin as much as possible. J. Spruit e.a (red.), *Corpus iuris civilis*. Tekst en vertaling, vol. 8, Amsterdam, 2007; A. Watson (ed.), *The Digest of Justinian*, vol. 2, Philadelphia, 1985. My thanks go to Prof. mr. T. Wallinga and Dr. J. Jansen with whom I discussed this text.

⁴⁵ D. 21.1.63: *Ulpian. First book on the curulian aediles' edict*: 'You should know that the edict pertains to sales only. Not just sales of slaves, but of other goods as well. Why nothing has been promulgated for lease, seemed something to wonder about. However, this reasoning is given: either because there has never been legal competence for them [the aediles, NdB] for that subject, or because lease is not carried out in the same manner as sales'.

⁴⁶ *non enim in locatione intendit transferri dominium ut in emptione, ut s[upra] loca. Non solet* [D.19.2.39]; H. de la Porte (ed.), *Corpus iuris civilis*, Lyon, 1558; D. 19.2.39: Ulpianus libro secundo ad edictum: *Non solet locatio dominium mutare*, (lease is not wont to change ownership).

⁴⁷ For another example of the Glossator's inclination to surmise implicit arguments in the CIC when their existence is dubious see J. Gordley, *Ius Quaerens Intellectum: The Method of Medieval Civilians*, in: J.W. Cairns & P.J. Du Plessis (ed.), *The Creation of the Ius Commune: from Casus to Regula*, Edinburgh, 2012, p. 96.

⁴⁸ For a more thorough analysis of the glossator's rule-making, see Calasso, *op. cit. (supra, n. 8)*, p. 531–534.

4.1.1. Cujas on the Extension of the Aedilician Remedies to Lease

Hence it may be no surprise that Cujas did not heed the Gloss' denial of the application of the aedilician remedies to lease. In his *Observationum libri xii* he gives the following alternative interpretation of D. 21.1.63:

'(...) ratio est duplex: ἔνστασις et ἀντιπαράστασις, et ob id liquida neutra satis, ut plerumque eius quod mirum iuris auctoribus videtur, nulla con- [89] stat ratio certa, l. liberum, ff. De relig. Et prudenter Ulpianus refert tantum illas rationes reddi, quas ipse tamen se probare non indicat'⁴⁹.

As a consequence, the fact that the aediles did not promulgate about lease, Cujas comments, does not say anything about the aedilician remedies' applicability to that contract:

'At ex diverso ratio non parva est producendi aedilicii edicti ad locationes et conductiones: nam si forte aedes in quinquennium conduxero, ac primo anno deprehendero esse pestilentes, insalubres, male sanas, cur mihi non licebit agere redhibitoria ut locator aedes suas recipiat et recedamus a locatione conductione? Et sane haec videtur esse mens Constitutionis Zenonis in l. pen., C. de loc. et cond. ex qua locatori et conductori impune licet ubique intra annum a contractu discedere, nisi aliud nominatim convenerit. (...). Graeca est constitutio, cuius haec verba restant in Basilicis. Ἡκατέρω διάταξις ἐπιτρέπει καὶ τῷ μισθώσασαυτι καὶ τῷ μισθωσαμένῳ ἐξεῖναι ἐντός ἐνιαυτοῦ λύειν τὴν μίσθωσιν καὶ ἐν Ἰταλίᾳ καὶ ἐν πάσαις ταῖς ἐπαρχίαις καὶ μὴ διδόναι πρόστιμον ὡς ἐκ παραβασίας, εἰ μὴ ἄρα ἐν ἀρχῇ τοῦ συναλλάγματος ἀπετάξαντο ἰδικῶς τῷ τοιοῦτῳ συμφῶνῳ ἢ ἀγράφως ἀπεῖπον'⁵⁰.

Cujas cannot see how Ulpian's deliberation in D. 21.1.63 provides any proof for the exclusion of the aedilician remedies from lease. He draws this conclusion, first, by giving a new twist to D. 21.1.63, using linguistic arguments. The [90] humanist interpretes the Latin as indicating no more than that Ulpian is simply wondering to himself about the matter. The Roman jurist proposes anything but a definite argument to the question put forward as to whether the aedilician remedies could be applied to lease. Secondly, Cujas scoured an extended version of the CIC for texts that could present decisive answers. Notably, Byzantine law texts, which originally were part of the CIC but had fallen out of the Vulgate-version, regained their full force in Cujas' methodological approach⁵¹. Cujas' contemporary humanist colleagues had

⁴⁹ '(...) The argument is twofold and consists of a reply and a rejoinder. Since neither is sufficiently clear – what is the case most of the time when something appears remarkable to authorities who write on the law – no reason is firmly established, D. 11.7.9. Ulpian only judiciously notes that these are the arguments given, of which he himself gives no sign of approving', in: Jacobus Cuiacius, *Opera omnia*, vol. 3, Napels, 1758, p. 359, ch. 38.

⁵⁰ 'On the contrary, on various grounds there is a strong case for extending the aedilician edict to lease. For instance, if I lease a house for five years and I find out in the first year the house is rotten, unwholesome, bad for your health, why will I then not be allowed to sue for returning the thing, so that the landlord takes back the house and we rescind the contract for lease? Surely, this appears to be the drift of Zeno's constitution C. 4.65.34, on the grounds of which landlord and tenant are at liberty to rescind the contract with impunity at any time within a year, unless something else has been agreed on. (...). The constitution is in Greek and its wordings are still in the basilica: 'The decree provides that both lessor and lessee be allowed to rescind the lease as well in Italy as in all provinces and that a fine for breach of contract need not to be paid, unless at the time of the contract's conclusion they have - specified or unwritten - agreed to exclude that condition', Cuiacius (*supra*, n. 49), p. 359.

⁵¹ E.J.H. Schrage, *Utrumque ius. Een inleiding tot de studie van de bronnen van het middeleeuwse geleerde recht*, Amsterdam, 1987, p. 19-20; C.M. Radding & A. Ciarialli, *The Corpus Iuris Civilis in the Middle Ages*,

once again wrested these long-neglected texts from oblivion⁵². A key-role in this respect was played by Pierre Pithou, who also furnished Cujas with Byzantine texts, for which, according to the latter, 'the man could never be praised enough'⁵³. In the present case, it was a constitution by Zeno which provided Cujas' with what he was looking for. It had been part of the Basilica,⁵⁴ a ninth-century reordering of the CIC and later Byzantine scholia, which since Justinian's age had been accrued to the law text as a sort of second layer, offering legal humanists a rich source of interpretative wisdom to draw from.

Seen from a different angle, however, Cujas' approach did not differ much from that of his predecessors. Just as Irnerius and his followers had done, Cujas likewise endeavoured to explain the CIC' texts by referring to other texts which formed part of the same corpus, taking a similarly closed body of texts as his [91] point of departure⁵⁵. True, the more abundant supply of sources and Cujas' more profound knowledge of grammar, rhetorics, history and Greek enabled the humanist to achieve a more complete and critical reading of the texts in the CIC than the glossators had ever been capable of. Consequently, age-old interpretations could be altered within their Justinianic context, as our example illustrates. Yet, this does not change the fact that Cujas' basic assumptions of how to approach the law were medieval in outlook⁵⁶.

A last point requiring attention before turning to Doneau is Cujas' disregard for the Accursian Gloss, which attitude seems at odds with his earlier expressed sympathy. One explanation in the present case might be that here the words of the Gloss expanded 'to such an extent that they no longer endured the name 'gloss''⁵⁷. After all, the Gloss accepts implicit premises which are not justified by any text in the CIC⁵⁸. Cujas adhered to a stricter reading

Leiden, 2007, p. 133ff. See e.g. a 1475 Codex available online in which C. 4.65.35 (Krüger) directly follows upon C. 4.65.33. <http://daten.digital-sammlungen.de/~db/0008/bsb00083115/image_286>, f^o 141; the Codex editions by Haloander (1541) and La Porta (1558) similarly do not contain Zeno's constitution which was used by Cuiacius. Denis Godefroy's edition has a Latin translation of it with the addition that 'this Constitution has been restored from the Basilica by Cuiacius. See Jacobus Cuiacius, *Observationes et emendationes libri xviii*, Cologne 1574, nr. 38: (*hanc constitutionem ex Basilicis restituit Cuiacius* '); Gregorius Haloander, *Codex dn. Iustiniani sacratissimi principis ex repetita praelectione libri xii*, Basel, 1541, p. 221; Dennis Godefroy, *Codicis dn. Iustiniani sacratissimi pp. aug. repetitae praelectionis libri xii*, dl. 2, Lyon, 1583, p. 352.

⁵² Cuiacius himself observes that the books from number twenty to number thirty of the Basilica have never been consulted by anyone as of yet: '*J'ay apporté de Venize les 15 premiers livres des basiliques, et du 20 jusques au 30 que nul n'avoit encore veus*', letter to one of the Pithou brothers, published in E. Spangenberg, *Cujas und seine Zeitgenossen*, Leipzig 1822, VI; see also H.E. Troje, *Graeca leguntur*, Keulen, 1971, p. 260-263.

⁵³ '(...) *quam mihi communicavit Petrus Pithoeus homo nunquam laudatus satis* ((...)) which Pierre Pithou communicated to me, a man who can never be praised enough', Cujas, *op. cit.* (*supra*, n. 51), p. 359.

⁵⁴ B. 20.1.95 = C. 4.65.34.

⁵⁵ '(...) medieval jurists had to work with a closed *corpus* of texts (...)', Gordley, *op. cit.* (*supra*, n. 49), p. 89; Flach, *op. cit.* (*supra*, n. 6), p. 222.

⁵⁶ Van den Bergh, *op. cit.* (*supra*, n. 32), p. 37.

⁵⁷ Cf. Cuiacius' *Observatio* II.5 and the glosse to D. 19.1.21(22). There it is questioned whether the law text should have a negation (*non*)? Cuiacius accepts the vulgate-version with negation and dismisses the reading of the Codex Florentinus. He also accepts Accursius' references and comments. The only things added are further explanations of the Accursian Gloss ('*in gloss.* 'diximus' *ad finem adde* et l. quid tamen [D. 19.1.13.3]'), Jacobus Cuiacius, *Notae solennes*, Frankfurt, 1598, p. 125) and classical sources corroborating Accursius' interpretation. *op. cit.* (*supra*, n. 53), p. 43. See also Cuiacius' glosse *nulla subest causa* to D. 2.14.7.4: '*Acc.[ursius] recte causam accipit pro datione, vel facto, (...)*', Cuiacius, 'Commentarius ad titulum de pactis', in: *Opera omnia*, vol. 1, Napels, 1722, p. 926 B.

⁵⁸ Conversely, where the Gloss is content with short explanatory notes, Cuiacius does pay attention to its content. E.g. in *Observatio* II.4 Cuiacius discusses possible solutions propounded by Accursius to solve the

and interpretation of [92] the text of the restored CIC. Surprisingly, doing precisely just that resulted in Cujas' rather innovatively defending an extension of the aedilician remedies to lease, something deemed impossible from the twelfth century up until Cujas' time⁵⁹.

4.1.2. Doneau on the Extension of the Aedilician Remedies to Lease.

To Doneau the Gloss' reasoning was of more importance. According to Cujas' rival the different features of sales and lease were indeed decisive in determining whether the aedilician edict could be applied to lease. In his commentary on the *Titulus de aedilitio edicto*, Doneau devotes the following phrases to the issue:

'Apparet enim hoc edictum ad venditiones rerum pertinere. Unde tractatum est, an etiam ad alias res producendum esset, donatas puta, itemque locatas, ut si hae in eadem causa essent, resoluto contractu redhiberi possent. Et placet neque ad donationes pertinere, quia nullum sit pretium, quod donatarius recipiat: Neque ad locationes, quia non similiter locatio, ut emptio fiat. Locatio enim dominium mutare non solet'⁶⁰.

Virtually following the reasoning of the Gloss, Doneau too departs from a strict interpretation of the Justinianic law text. Just as his medieval predecessors had done, Doneau takes the implicit step that the difference between sales and lease, i.e. that the latter does not convey ownership, is sufficient reason enough for not applying the aedilician remedies to lease. However, this is not mentioned in so many words in the CIC, as we just saw in the discussion of Cujas' treatment of the matter.

Yet, Doneau's attitude is not unexpected. Admittedly, he strove for putting things right in the head-spinning labyrinth of commentaries to the civil law, but that did not mean he aimed at the summary dismissal of *all* glosses and commentaries written on the CIC. Doneau

contradiction between D. 18.1. 14 and D. 18.1.41.1. Why is the sale of a table void, if it appears to be only a wooden table with a silver-plating instead of a table entirely out of silver, as the buyer had imagined? In other words, when does one accept *error in materia*? Cuiacius pays particular attention to explanations proposed by the Bolognese professor which, according to Cuiacius, 'Accursius concocted in defiance of the spirit and the words of the law' (*praeter legis mentem et verba comminiscitur Accursius*). Accursius had held that the buyer must have stipulated that the table was made entirely of silver. As it was not, the sale was void. However, Cuiacius points out that no trace of such a condition was to be found in the pertinent Digest texts. Nonetheless, Cuiacius agrees with Accursius' alternative solution that one should consider whether the silver and other material could be separated. If not, there was no *error*. After all, a mixture of silver and other material is still silver. However, if the materials could be separated, the buyer was in *error*, which voided the sale, which was also the case if someone bought a massive gold bracelet which turned out to be only gilded (D. 18.1.14). Cuiacius opts for Accursius solution which most closely adheres to the text in the CIC. Cuiacius, *op. cit.* (*supra*, n. 53), p. 42–43.

⁵⁹ W. J. Klempt, *Die Grundlagen der Sachmängelhaftung des Verkäufers im Vernunftrecht und Usus modernus*, Stuttgart/Berlijn, 1967, p. 21.

⁶⁰ 'Now it appears that this edict pertains to the sale of things. Hence, it has been discussed whether it should be extended to other things also, e.g. things donated or leased out, so that in those cases it would also be possible to have the thing back after rescission of the contract. However, it is suited not to apply the edict to donations, because there is no price received by the donee, nor to apply it to lease, since lease is not carried out in the same manner as sales. After all, lease is not wont to change ownership', Hugo Donellus, *In titulum de usuris in Pandectis et sequentem Commentarius*, Lyon, 1558, p. 283.

wanted to achieve a systematic understanding of Justinian's civil law, which boiled down to solving [93] contradictions in the CIC, a task which more or less every glossator or commentator had also considered his own⁶¹. It would have been remarkable, to say the least, if none of the writers before him had written anything sensible at all. Unsurprisingly therefore, Doneau frequently draws from their writings. In this present case, the explanation put forward by the Gloss as to why the aedilician remedies were not applicable to lease apparently met with Doneau's approval.

4.2. Second Case: When do the Remedies for Latent Defects Expire?

A rescript by Emperor Gordian III⁶² reads as follows:

C. 4.58.2: *Imp. Gordianus A. Petilio Maximo*

Cum proponas servum, quem pridem comparasti, post anni tempus fugisse, qua ratione eo nomine cum venditore eiusdem congregi quaeras, non possum animadvertere: etenim redhibitoriam actionem sex mensum temporibus vel quanto minoris anno concludi manifesti iuris est.

*PP. K. Dec. Gordiano A. et Aviola conss. [a. 239]*⁶³.

The issue touched upon here is how long remedies for latent defects could be instituted for. The CIC contains the remedies spelled out in the aedilician edict and the almost identical remedies which could be brought with the action on the sales contract. According to Justinianic law, the latter were cancelled after a 30-year period⁶⁴. The aedilician remedies already expired after six months (*redhibitoria*) or one year (*quanto minoris*)⁶⁵.

[94] Nonetheless, in the rescript quoted above, Emperor Gordian seems to suggest that the action on the contract, when brought for rescission or reduction of price due to a latent defect, is similarly subject to the aedilician periods of limitation instead of the 30-year period. After all, Emperor Gordian says that he is unable to conceive of a valid action after one year has lapsed, which words appear to rule out a civil action for latent defects lasting longer. Medieval literature extensively debated whether the periods of limitation in the event

⁶¹ 'Solum de Iustiniani sententia videbimus, quid non inepti dici possit ad istas sententias, uti nobis relictæ sunt, conciliandas, ne videantur contrariæ, postquam Iustinianus vult, in Pandectis nullum videri inesse contrarium; et quidquid ad id efficiendum vel subtiliter excogitari potest, id esse recipiendum', (We only take the Justinianic interpretation into consideration, for which reason it is not misplaced to say of these views [of the Roman jurists] – such as they have been transmitted to us – that they must be reconciled, so that they do not seem to contradict each other. After all, Justinian wanted it to appear that there was no contradiction in the Digest. Whatever can be delicately thought out to bring that to pass must be accepted as the right solution), Hugo Donellus, *Commentarii de iure civili*, vol. 2, Neurenberg, 1822, p. 551.

⁶² Reigned from 238 to 244 A.D.

⁶³ *Emperor Gordian to A. Petilius Maximus*: When you say that a slave which you bought a long time ago ran away after one year, I cannot think of a valid reason by which you would be able to sue the seller of the said slave on that account, seeing that it is plain law that the *actio redhibitoria* expires after six months and the *actio quanto minoris* after one year.

⁶⁴ I. 4.12pr.

⁶⁵ D. 21.1.38pr.; D. 21.1.19.6.

of latent defects mentioned in the edict were indeed the only ones to be applied⁶⁶.

The Accursian Gloss explained the text in keeping with the CIC's two distinct periods of limitation and accepted a different limitation, according to whether a civil or praetorian remedy was brought⁶⁷. Falling back on other texts in the CIC, the Gloss conceded to Gordian's claim that the aedilitian remedies indeed expired after one year. Nevertheless, so the Gloss contended, it then still remained possible to bring an action on the sales contract⁶⁸. This begged the question as to whether Emperor Gordian had forgotten to mention that possibility.

He had not, so Bartolus (1313-1357) reasoned, because the plaintiff only had asked the Emperor about the aedilitian remedies, as clearly follows from the rescript's being accommodated under title C. 4.58. After all, this title discusses the aedilitian remedies and not the action on the contract. Consequently, texts under that heading cannot be used as a basis for assertions about the limitation period of the latter⁶⁹. Besides, another commentator contended, if asked, Emperor Gordian would undoubtedly have confirmed the civil action's perpetual character⁷⁰.

[95] Conversely, two jurist from the School of Orléans, Jacques de Révigny (†1296) and Pierre de Belleperche (†1308) held exactly the opposite view. On the basis of the same rescript they concluded that, with one year lapsed, *all* remedies to hold the seller of the escaped slave accountable ceased to be available, including the civil actions on the contract⁷¹. The only possible remedies for latent defects were those set out in the edict which, on the pain of forfeiting them, had to be brought within one year.

⁶⁶ J. Hallebeek, 'C. 4.58.2 and the Civil Remedy for Price Reduction. Two Ways of Reading the Corpus Iuris Civilis', *Revue internationale des droits de l'antiquité*, 2008, p. 267–281.

⁶⁷ Gloss *quanto minoris* D. 19.1.13pr.: '*Item quid differt quanto minoris civilis a praetoria? Respondeo haec civilis, illa praetoria. Item haec perpetua, illa annalis (...)*'.

⁶⁸ '(...) *ex empto vero civili cum sit perpetua agere potes*', Accursius in: *Corpus iuris civilis*, Lyon: Hugues de la Porte, 1558-1560, p. 752, Gloss *congregia* to C. 4.58.2.

⁶⁹ '(...) *non obstat* l. ii C. de edil. edic. [C. 4.58.2], *quia ut apparet in materia in qua posita est illa lex, ibi querebatur utrum possent agi quanto minoris pretoria et imperator respondet non animaduerto etc. et non fuit quesitum in genere utrum agere posset*', Bartolus, *Commentaria super primam partem Digestum veterum*, vol. 2, Venice, 1526 (reprint Rome 1996), f^o. 118, to D. 19.1.13pr, n. 1. Cited in Hallebeek, *op. cit.* (*supra*, n. 66), p. 280.

⁷⁰ '*Ad dictam legem* ii. C. de edil. act. [C. 4.58.2] *respondetur quod imperator ibi non fuit interrogatus nisi utrum competeret aliqua actio pretoria et si interrogatus fuisset de ciuili respondisset imperator eam perpetuo competere. Et ego hoc probo ratione illius rub. C. de edil. act. que loquitur de edilitiis actionibus tantum et sic de propriis. Vnde et lex illa de qua in dicta lege ii. eodem titulo debet intelligi, quod loquatur de pretoria tantum et quod nihil dicat uel tractet de ciuili redhibitoria* arg. l. Imperatores ff. de in diem adiect. [D. 18.2.16] *et quod notat glossa in c. Bone de confirma. uti. uel inutil. [X 2.30.3], que dicit in dubio tenendum est quod nigrum disponat, id quod rubrum*', Baptista a Sancto Blasio (ca. 1425-1492), *Tractatus utilissimus solemnissimusque de actione et eius natura*, in: *Volumen V Tractatum ex variis iuris interpretibus collectorum*, Lyon, 1549, *actio XXI*, n. 45, f^o 62, Cited in Hallebeek, *op. cit.* (*supra*, n. 66), p. 280.

⁷¹ '*Et dicit iurisconsultus* [De Révigny means Gordianus, NdB] *quod non animaduerto quod possit, ut C. de edilic e. l. ii [C. 4.58.2], set non diceret sic aliqua competeret. Et si dicas quod ciuiles actiones sunt perpetue, uerum est regulariter, sed non hic. Et est ratio, quia ista actio ex empto cum adiectione quanti minoris est redibitoria ad solutionem contractus et eius iura*', Jacques de Révigny, *Lectura Digesti Veteris ad D. 19.1.13*, Leiden, d'Ablaing 2, f^o 249; '*Dicit glossa, scire debetis, est quanto minoris, ut ff. de edic. e. l. Quod si nolit § Si plures* [D. 21.1.31.5] *et est effectus, quod pretoria est annalis. Est alia quanto minoris ciuilis et est perpetua, ut Inst. de perpe.act. in prin. [Inst. 4.12.1]. Credo quod non sit nisi una actio quanto minoris que usque ad annum competit tantum, ut infra de edil. act. l. ii in prin. [C. 4.58.2], cum idem sit quanto minoris et quanto minoris, ut ff. ad l. Fal. precia [D. 35.2.63]*', Pierre de Belleperche, *Lectura Codicis ad C. 4.49.9*, Firenze BML Plut 6 Sin 6, f^o 208 and Cambridge, Peterhouse 34. Cited in Hallebeek, *op. cit.* (*supra*, n. 67), p. 279.

4.2.1. Cujas on the Expiration of the Remedies for Latent Defects

This time, in keeping with the Accursian Gloss, Bartolus and De Sanbiagio and contrary to Doneau, Cujas thought the aedilician and civil remedies each had their own expiration period. In his *Paratitla in libros quinquaginta Digestorum seu Pandectarum* (Explanatory Notes to the 50 Books of the Digest) Cujas states:

'(...) aedilitiae temporariae sunt, veluti redhibitoria semestris, aestimatoria annalis, exceptis casibus certis (...) Civiles perpetuae sunt (...)'⁷².

[96] Cujas explains these differences as follows:

'Praecipua differentia inter eas actiones est, quod aedilitiae videntur esse poenales, d.l. 23. §. [D. 21.1.23.4] si servus, hoc tit. Quia nisi pareatur arbitrio iudicis (sunt enim arbitrariae) crescunt in duplum, l. 45. eodem tit. [D. 21.1.45] et ita poenam continent, et ob id sunt temporales actiones: empti vero actiones sunt perpetuae, id est, 30. annor. l. empti, inf[ra]. de evict'⁷³.

The CIC is crystal clear when it comes to the distinction it makes between the limitation periods attached to the civil and praetorian actions, of which the aedilician remedies as derived from the *ius honorarium* were considered a part. The remedy for price reduction based on the edict is cancelled after one year, whereas its civil counterpart expires only after 30. Cujas took great pains to explain this striking difference between two almost identical remedies. Again acting in a manner resembling that of a medieval glossator, the French scholar and humanist searched through the CIC for texts offering a possible explanation. He finally arrived at texts propounding the aedilician remedies' penal character, which he took as the decisive feature not shared by the action on the sales contract. With this to my knowledge not earlier posited find, Cujas managed to harmonize seemingly contradicting texts and to add some more coherence to the CIC as a closed *corpus* of texts.

4.2.2. Doneau on the Expiration of the Remedies for Latent Defects

Contrariwise, Doneau did not heed the Gloss but adhered to the dissenting views of the jurists from Orléans:

⁷² '(...) the aedilician remedies are temporal. Accordingly, the action for rescission lasts half a year and the action for price reduction one, certain instances excepted (...). The civil remedies are perpetual (...)', Jacobus Cuiacius, *Paratitla in libros quinquaginta digestorum seu pandectarum imperatoris Iustiniani*, in: *Opera omnia*, vol. 1, Napels, 1722, p. 778-779, to D. 21.1.

⁷³ 'The major difference between these actions is that the aedilician appear to be penal, D. 21.1.23.4, since they amount to the double, if the defendant does not heed the judgement's interlocutory order (after all, they are *actiones arbitrariae*), D. 21.1.45. Thus they contain a penalty and for that reason they are temporary actions. Contrariwise, the actions on the sales contract are perpetual, i.e. actions lasting for 30 years, C. 8.44.21pr.', Jacobus Cuiacius, *Commentarii ad Libros IV codicis*, in: *Opera Omnia*, vol. 9, Napels, 1758, p. 396 C, to C. 4.58.

'Non enim hoc agebatur, an aedilitia aliqua actio competeret, sed an aliquo modo posset agi iure. Ridiculum est enim, quod Bartolus ait, cum illud Gordiani rescriptum situm sit sub titulo de aedilitiis actionibus, accipiendum quoque esse de aedilitia quanto minoris actione. Quasi vero quia sub titulum de aedilitiis actionibus a Triboniano postea relatum est, efficere possit ut sententia Gordiani mutetur et cum appareat [97] illum *de omni actione*, quae eo nomine competere posset, respondisse, de eo non responderit [my emphasis]⁷⁴.

Bartolus was wrong in thinking that the theory of the Gloss would be saved by a strict reading of Gordian's edict. Doneau, at least, is of the opinion that his argumentation is flawed:

'Recte igitur sic dicitur: cum *de omni actione* consuleretur Gordianus vitii nomine, nulla autem alia actio quanto minoris competeret, quam ex edicto aedilium, eaque intra annum duntaxat, unde et generaliter de eo rescripsisset: rescriptum eius in titulum de aedilitiis actionibus bene relatum est [my emphasis]⁷⁵.

It is not the rubric which determines the rescript's meaning. It is exactly the other way round; the rescript's content determines its proper place under title C. 4.58, according to Doneau. The content in this instance being that there is only one type of remedy for a latent defect: the aedilitian.

In speaking about content, the humanist does not pose anything new with this interpretation. Long before he lived, Pierre de Belleperche had already attempted to bring the two separate remedies for price reduction back to one: 'I believe there is only one action for price reduction which is only available up until one year, as stated in C. 4.58.2, because *quanto minoris* is identical to *quanto minoris*'⁷⁶. On the other hand, Doneau makes use of a humanist tool, i.e. history. Relying on a reconstruction of the rescript's historical context, he [98] contends that Gordian was consulted about *all* available remedies, despite the fact that Tribonian had classed the rescript under title C. 4.58 'On the Aedilitian Actions'. Arguing in a humanist vein, Doneau reaches the solution most favourable to his better structured and simplified order of Justinianic law.

Yet, Doneau's argumentation is difficult to square with the rescript, even when seen in its original, pre-Justinianic context. Gordian, for example, might have been responding to a plaintiff who had brought the aedilitian action too late and, upon bringing the civil action afterwards, had seen his claim evaporating into thin air with the objection that one cannot start proceedings for the same issue twice⁷⁷. It is feasible to assume that Gordian meant just

⁷⁴ 'After all, the rescript was not about whether the aedilitian remedy applied, but about whether it was possible at all to start legal proceedings. In any case, what is said by Bartolus is ridiculous, namely that, since this rescript of Gordian is put under the title about the aedilitian actions, it likewise must be accepted that it is about the aedilitian action for price reduction. As if, because Tribonian placed it under the title about the aedilitian actions, it could be brought about that Gordian's sentence changed and that he, though he appears to have given an answer for *every action* possibly available under the given circumstances, he in fact did not respond in accordance with the situation!' [my emphasis], Donellus, *op. cit. (supra, n. 61)*, p. 306.

⁷⁵ 'One shall say it correctly in the following manner: since Gordian was consulted about *every action* available because of a defect, no other action for price reduction than that based on the edict applied and then only for one year. Because he responded in a general sense about the matter, his rescript is rightly placed under the title on the aedilitian actions' [my emphasis], *op. cit. (supra, n. 61)*, p. 307.

⁷⁶ '*Credo quod non sit nisi una actio quanto minoris que usque ad annum competit tantum, ut infra de edil. act. l. ii in prin. [C. 4.58.2], cum idem sit quanto minoris et quanto minoris, ut ff. ad l. fal. Precia [D. 35.2.63]*', Pierre de Belleperche, *Lectura Codicis ad C. 4.49.9*, Firenze BML Plut 6 Sin 6, f^o. 208 and Cambridge, Peterhouse 34. Cited in Hallebeek, *op. cit. (supra, n. 67)*, p. 279.

⁷⁷ D. 44.2.7.1: *Ulpianus libro septuagensimo quinto ad edictum: (...) et quidem ita definiri potest totiens eandem rem agi, quotiens apud iudicem posteriorem id quaeritur, quod apud priorem quaesitum est*; W.W. Buckland, *A Text-book of Roman Law*, Cambridge University Press 1921, p. 689.

that when he said he could not think of any valid reason that the plaintiff could have for suing the seller of the runaway slave. Finally, Doneau conveniently disregarded the texts in the CIC which plainly state that civil actions hold for thirty years. The urge to ingeniously solve texts which do not fit together easily, seems less present in Doneau than it is in Cujas. Doneau did not hesitate to throw nonconforming texts to the wolves, if this served his aim to achieving a better systematised version of the civil law. However, both scholars were equally pragmatic in using humanist arguments, if these only served their aims.

5. Conclusion

Legal humanism is rooted in the more general abhorrence of pre-renaissance society that humanist scholars felt. At first glance, Cujas and Doneau, reputed to be the standard-bearers of legal humanism in a lot of secondary literature, no less kept their ends up. Yet, contemporary secondary literature agrees that things were not as black as they seemed. The attitude of both humanistically inspired scholars towards their predecessors actually appears to have been a balanced one. However, it has seldomly been discussed which considerations led Cujas and Doneau to adopting their specific attitude toward medieval legal heritage. The same holds true for their substantive treatment of points of law in which their methodologies took shape. In this paper I have examined both Cujas' and Doneau's correspondence and their preambles to [99] authoritative works to ascertain the foundations of their methodological views and to discover how they put these methodologies to use. I have attempted to illustrate the latter by discussing two cases in which both jurists deal with substantial points of law.

From Cujas' correspondence it appeared that he was not inclined to steer a radically different course from that followed by the jurists who anteceded him. Just like his predecessors, Cujas strove for a consistent reading of the texts in the CIC within a Justinianic context. The main humanistic tool he applied to that effect was his knowledge of Greek. Steeped in the language of the ancients, Cujas accepted Byzantine sources as a part of the CIC and took Greek glosses, or scholia, into consideration, when interpreting difficult points of law, as I hope to have illustrated in the two cases discussed in this paper. By the same token – and in this he differed significantly from his medieval forebears – Cujas regarded Roman jurists as individuals propounding meanings which tenability could be judged. Hence, he notably extended the tools used for interpreting the CIC. Yet, Cujas kept working within a closed body of texts, be it an expanded version of that used by his medieval predecessors.

In the preamble to his *Commentarius* Doneau also expressed his appreciation of the efforts made by his medieval colleagues. Unlike Cujas, he mirrored his task not so much to the one the glossators had set themselves, as to the enterprise undertaken by the commentators. Doneau also considered commentaries as useful tools opening paths to insight into the CIC. However, by choosing a systematic approach which was no longer tied to the CIC's order of texts, Doneau thought he was able to do better than his predecessors. Yet, he was not bent on discarding all the fruits of medieval learning. Despite his criticism, Doneau did not shrink from accepting interpretations thought out by medieval commentators, even if the CIC's provisions hardly allowed for such.

Doneau's humanist inclinations surfaced where this contributed favourably to the systematisation of the law he so fervently propagated as a cure for the debilitated state into which medieval jurisprudence had slipped. Arguing from what he thought to be the historically authentic purport of an imperial rescript, Doneau, other than his predecessors, refrained from putting any value on the place a text occupied in the CIC. In the case discussed this boiled down to an interpretation the content of which was difficult to chime with that of other texts in the CIC dealing with the same matter, which the learned jurist conveniently left out of consideration. Doneau's exertions to cut a way through the dense copice of commentaries and learned treatises that had been rampantly growing since the High Middle Ages not only resulted in a well manicured landscape, but also in a dismissal of any unruly law texts that posed a hindrance to his own systematic ordering of the law.