

De falsis: D 48 10 1 1 and 20; where is the forgery?*

Phillip Thomas

Mr (Erasmus University), LL.D (UNISA)

Research Fellow, Department of Legal History, Comparative Law and Legal Philosophy, University of Pretoria

OPSOMMING

De falsis: D 48 10 1 1 en 20; watter vervalsing?

Die *lex Cornelia de falsis* was uitgevaardig om vervalsing van dokumente te straf. Die *Digesta* title 48 10 bevat egter twee tekste wat die neem van geld om 'n advokaat of getuienis te reël kriminaliseer. Die artikel ondersoek die verskillende interpretasies van hierdie tekste deur die eeue; van Bynkershoek verdien spesiale aandag. Na analiese word 'n alternatiewe lesing en interpretasie aan die hand gedoen.

1 Introduction

D 48 10 deals with the *lex Cornelia de falsis* and the *SenatusConsultum Libonianum*. The topic of this title is usually translated as forgery as the majority of the texts relate to the forgery of documents, in particular wills. However, miscellaneous texts dealing with matters varying from impersonating a soldier to giving false evidence are also collected under this heading. A number of texts relative to the legal process can be distinguished and this paper shall deal with the rather obscure and, at first glance, incomprehensible crime which appears to consist of accepting money for organising advocacy or testimony. Initially mentioned in D 48 10 1 1, the text is repeated in D 48 10 20 and is also found in the *Collatio*. After a survey of the multiple interpretations of these texts another reading will be suggested.

2 Various Interpretations

2 1 *Glossa*¹

The first interpretation is found in the *glossa*. The gloss *advocationem*² explains that this text penalises someone who accepts money to make a

* This is the text of a paper presented at the 63rd session of the Société internationale "Fernand de Visscher" pour l'Histoire des droits de l'Antiquité on 24th Sept 2009 in Kavala, Greece. An elaborate version will be published in the *Liber amicorum Eltjo Schrage* during 2010.

¹ Lokin & Zwolve *Hoofdstukken uit de Europese Codificatie-geschiedenis* (2001) 110ff.

false advocacy or to give false testimony. However, the gloss continues that the penalty also applies if correct testimony had been given against payment, drawing the analogy with the judge accepting money to give the correct decision.

The gloss on *D* 48 20 consists of a *casus* explaining that persons who have accepted money to institute false litigation are punished under the *lex Cornelia*. False litigation is defined as taking legal steps against someone either on the basis of false advocacy or on the basis of false testimony.³

The *glossa* identified that falsity of the advocacy or testimony is required. However, the reference to the judge who accepted money to give the correct decision, and the resulting conclusion that even a person who had accepted money and gave correct testimony was guilty under the *lex Cornelia* creates confusion and raises the question whether falsity or accepting money was held to be the criterion.

2 2 Bartolus

This question was answered by Bartolus⁴ who holds in his commentary [on *D* 48 10 1 1] that a person delivering true testimony against payment commits the crime of *falsum* basing his argument on the analogy of the judge who accepted money to give the correct decision.⁵ The addition to the commentary by Tartagni⁶ confirms that this opinion was generally accepted.⁷

2 *Digestum Novum (Lugduni apud Hugonem a Porta 1551) n Advocationem. Accipit quis pecuniam, ut falsam advocationem faceret. Item ut faceret et falsum testimonium, vel etiam verum redderet per pecuniam: ut diximus de iudice, qui accipit, ut etiam bonam sententiam det: ut. s. de condi. ob tur. cau. l. ij.*

3 *Falsi. Casus. Poena falsi coercentur, qui acceperunt pecuniam vel ob litem falsam instituendam id est movendam contra aliquem: vel ob advocationem falsam: vel ob testimonium falsum dicendum: vel ob aliquid simile, quod in litera subijcitur. Franc. Accur.*

4 Bartolus de Saxoferrato (1314–1357) *In primam Digesti novi partem Commentaria* (Augustae Taurinorum apud haeredes Nicolai Beuilaquae 1577).

5 *Ad D 48 10 1. Quaero quod si quis accipit pecuniam ut dicat testimonium verum? Dic tenet pena falsi, sicut dicimus in iudicem, qui accipit pecuniam, ut veram sententiam det, l 2 supra de cond ob tur cau. Responsum est: quia deponentes testes debent facere gratis, non ob pecuniam, ut infra prox § ergo, &c. Nam quicquid debet fieri gratis, si fit per pecuniam, turpiter fit: ut notatur in l 4 § si tibi supra de cond ob tur cau. Contrarium videtur notare Inn. in c licet causam Extra de pb. Sed intelligo ut haberetur in l divus supra de re iud.*

6 Alessandro Tartagni (1424–1477). The title page of the 1577 edition of Bartolus' commentary indicates notes by the following authors: *Quibus praeter Alex. Barb. Seissell. Pom. Nicelli & aliorum Adnotationes.*

7 *In primam Digesti novi partem Commentaria Ad D 48 10 1. Additio. Alex. Verum. Testis accipiens pecuniam, ut verum testimonium dicat, punitur.* Tartagni supports this argument by citing sources from both civil and canon law sources and their interpreters.

2 3 Cuiacius

Cuiacius⁸ explains *ob instruendam advocacionem, testimoniave* as to arrange the aid of counsel or testimony for litigation and attributes collusion to accuse innocent persons to another later *senatusconsultum*. Although he corrects himself and states this to have been a mistake,⁹ he omits to explain the text.¹⁰ In his *Interpretationes* on Paulus' *Sententiae*¹¹ Cuiacius follows the text¹² and the current interpretation and holds that accepting money for testimony constitutes the crime.

The topic appears not to have caused problems in practice and in consequence the commentaries of Zoesius,¹³ Westenberg,¹⁴ and Johannes Voet¹⁵ pay no or scant attention to the problem raised by the texts under discussion.

2 4 Van Bynkershoek

It was thus left to the intellectual curiosity of the Dutch humanist Cornelius van Bynkershoek¹⁶ to question *D 48 10 1 1* and *48 10 20*. Whilst Judge-President of the Hooge Raad van Holland en Zeeland¹⁷ from 1724 until his death in 1743, van Bynkershoek published widely, but his hobby was Roman law.

8 Jacques Cujas, prominent French humanist (1522–1590).

9 *Ibid* *Quartum & ultimum Senatusconsultum factum fuit sub eodem Tiberio duobus Geminis Coss. Et eo Senatusconsult. . . . redigitur ad poenam legis Corneliae testamentaria, qui coierit ad accusationem innocentium dolo malo: ergo erro. Nam haec etiam, quod dixi, est tribuendum Senatusconsulto tertio, si quis coierit ad accusationem innocentium dolo malo.*

10 *Opera Pars posterior tomus decimus* (Mutinae Societas Typographica 1782) *Notae* the note on *D 48 10 1 1* explains the correct grammar: *Itemque ob* Legendum. *Item qui ob instr. advoc. Testimoniave pecuniam acceperit pactusve fuerit, societatem coierit, ad accusationem innocentium, ut apparet ex l. 2. sup. de concussionem, & ex l. falsi, inf. eodem.*

11 *Interpretationes in Julii Pauli receptorum Sententiarum libros V* in *Opera Pars Prior Tomus Primus* (1758) in *Lib V Tit 23 2. Legis Corneliae poena afficitur, qui ob testimonium dicendum, vel non dicendum pecuniam acceperit, dederit, & qui iudicem corruerit.*

12 *V 23 2. Qui ob falsum testimonium perhibendum, vel verum non perhibendum pecuniam acceperit, dederit, iudicemve ut sententiam ferat.*

13 1571–1627. Professor of law at Louvain. *Commentarius ad L libros Digestorum seu Pandectarum* (Coloniae Agrippinae Wilhelmus Metternich 1709).

14 1667–1737. Professor of law at Steinfurt, Harderwijk, Franeker and Leiden. *Principia Juris secundum ordinem Digestorum seu Pandectarum* (Vindobonae Joannis Thoma Trattner 1764).

15 1647–1713. Professor of law at Herborn, Utrecht and Leiden. *Commentarius ad Pandectas* (Hagae-Comitum Petrus de Hondt 1731).

16 1673–1743. Star Numan *Cornelis van Bynkershoek Zijn leven en zijne geschriften* (1869). Hahlo and Kahn *The South African Legal System and its Background* (1973) 557–559, Roberts *A South African Legal Bibliography* (1942) 68ff.

17 The Hoogen Raad van Holland en Zeeland was from 1582 the Supreme Court of Appeal in Holland and from 1587 the same for Zeeland. See Halo and Kahn 542f; De Monte Verboten – Spruit *Hoofdlijnen uit de ontwikkeling der rechterlijke organisatie in de Noordelijke Nederlanden tot de Bataafse omwenteling* (1982) 136f.

In his *Observationes juris romani*,¹⁸ he comments on *D 48 10 1 1*.¹⁹ Having established the text, van Bynkershoek mentions that in the 1524 edition of Blaublommus the word *falsa* was inserted after *testimoniave*, although it is noted in the margin that this word is not found in the manuscripts,²⁰ nor is it found in any other edition or in the *Collatio*.²¹ Van Bynkershoek immediately addresses the *crux* of the text and states that he supposes that Blaublommus inserted *falsa* to explain why it had been made a crime to accept money for arranging advocacy or witnesses.²² He questions this criminalisation and is of the opinion that such conduct can be completely lawful; for example, when one undertakes the instruction of an advocate or witnesses in respect of the case of a friend and accepts money for the services provided or expenses made.²³ Thus the question is posed why Marcian, Ulpian and Hermogenian wrote that in terms of a *senatusconsultum* such conduct is penalised as forgery?

Van Bynkershoek investigates the recent literature on this text. He analyses the explanation proposed by the French humanist Salmasius²⁴ and mentions Heraldus²⁵ and de Groot²⁶ without entering into the merits of their opinions. The Judge-President refutes Salmasius' attempt to link the text to the advocate fees of *Digesta 50 13 1 12*²⁷ as well as his

18 Two volumes published respectively in 1710 and 1735.

19 *Observationum juris Romani Libri quatuor* (Lugduni Batavorum apud Samuelem Luchtmans et filios 1752) III XIX.

20 At 298: Deinde post *testimoniave* additum est *falsa* in Editione Ludovici Blaublommii 1524 quam tamen voculam in scriptis Libris non reperiri margo notat.

21 At 298f: (i)n gemino Ulpiani loco, qui apud *Collatorem LL. Mos. & Rom. T. VIII.* ita legitur: *Item qui ob obstruendam advocacionem testimoniave pecuniam acceperit, pacituse fuerit, societatem coierit, aut aliquam delationem interposuerit. Item si quis coierit ad occisionem innocentium, Scto, quod Cotta & Messala factum est, coercentur.*

22 At 299: *Suspikor autem, illud falsa in ea Editione ideo additum fuisse, ne quaeri posset, cur crimini datum fuerit, pecuniam, accipere vel pacisci ob instruendam advocacionem vel testimonia?*

23 *Ibid idque simpliciter, nec quoquam addito, unde dolus, vel mala fides posset argui? videbatur enim id etiam fieri posse jure licito. Quidni enim amici mei causam vel litem instruam advocacione vel testibus, accepta etiam in hanc rem pecunia, vel pro opera, quam praesto, vel pro expensis, quas fero?*

24 Claude Saumaise (1588–1653), French protestant classicist and jurist, successor of Scaliger at Leiden. His observations on the topic are found in his *Observationes de Jure Attico ac Romano* (1650).

25 Didier Héroult (died 1649), French classicist and jurist, councillor of the Parliament of Paris, whose relevant work is *De Rerum Judicatarum Auctoritate* (1640). Van Bynkershoek 299: *Non licet haec ita interpretari, ut interpretatus est Heraldus de Auctor. Rer. Judic. L. I. C. 6. & tacito nomine sequutus Grotius Flor. spars. ad h. L. nam, si quid video, ejus sententiam recte profligavit Salmasius Observat. ad Jus Att. & Rom. C. XXX. p. 843. & seqq. nec placet ea hic describere.*

26 Grotius (1583–1645), Dutch humanist, father of Roman-Dutch law, one of the greats of public international law. His work in question is *Florum Sparsio ad ius iustinianum* (Parisiis apud viduam Gulielmi Pele 1642).

27 At 299: *Ipse Salmasius, quod Marcianus, Ulpianus & Hermogenianus dixerunt, tentat accipere de ipsis Advocatis, qui, priusquam linguas & verba locant, honoraria praecipunt, deve iis paciscuntur, malo more, inquit ex l. 1. §. 12. ff. de Extraord. cognit. Sed non est, ut de eo Jure sibi tantum polliceatur Salmasius, & si esset, quis ex eo Advocatum falsi poena condemnet?*

alternative,²⁸ namely the amendment of *instruendam* into *struendam*, which would imply *dolus malus*.²⁹

Van Bynkershoek's interpretation is that accepting money for instructing an advocate or witnesses would not constitute a criminal offence *an sich*,³⁰ but that in order to incur the penalty for forgery such behaviour must have as objective *obligationem innocentium*.³¹ However, the various texts have different readings in this respect,³² as a result of which different amendments were proposed.³³ Van Bynkershoek relies on both the *Basilica*³⁴, that is against innocents, and Salmasius' interpretation of the word *obligare*,³⁵ namely to implicate. The text in the *Collatio* he amends to

28 Van Bynkershoek held that Salmasius himself left this argument. At 299f: (*quod ipse Salmasius d. C. XXX p. 855. ab eo commento desistat, ratus, si de Advocatis sermo esset, non apte dici, eos instruere, sed suscipere, vel praeberere advocacionem.*

29 At 300: *Igitur eo redit, ut de aliis, quam Advocatis, haec exaudiat, de his nempe, ut ante dixerat, qui conductis Advocatis subornatisque, & coemptis testibus, Viris bonis solent negotium facessere. Utque id obtineat, apud Marcianum hic, & apud Hermogenianum in d. l. 20. h. T. pro instruendam, ex Ulpiani fragmento, quod exhibui, restituit struendam, quia ea vox habet μ••••• doli mali, atque ita struere advocacionem vel testimonia, vel struere litem advocacione vel testibus, ea esset machinatio, qua alius alium lite pulsare & circumvenire constituit, cum alias, inquit, lis possit instrui advocacione & testibus, citra dolum & fraudem. Quod autem instruendam nunc legatur struendam, ex interpolatione Triboniani esse dixit. Sed quae fuisset ratio interpolandi me latet, & latuit, opinor. Salmasium, nam struendi vox si apta fuerit, cur minus aptam substituisset Tribonianus? . . . Ego quidem non negavero, struendi verbum, si apud Marcianum & Hermogenianum legeretur, satis fore commodum, sed quum non legatur, nolim rescribere.*

30 At 301: *Caeterum non sum sollicitus de eo, qui bona fide & jure licito advocacionem & testimonia instruxit, quia ex Scto non coercetur, nisi qui dolo malo instruxerit, ut modo dixerat Marcianus in pr. d. l. 1. nec opus erat hic repetere. Salva quoque res erit, si haec, qui ob instruendam advocacionem testimoniave pecuniam acceperit, pactusve fuerit, non intelligamus, quasi per se subsistant, & sufficiant ad poenam.*

31 *Ibid. (a) ut pertineant. & referantur ad obligationem innocentium, quod continuo sequitur.* Van Bynkershoek finds the argument for this linkage in the *Basilica*. *Ibid. Atque ita plane exhibent sententiam h. §. Basilici L. LX. T. XLI. C. 1. §. 1. quo pacto sensus non differet ab eo, quem Salmasium per struendi vocem, simpliciter positam expressit. •••••••••• habent Basilici d. loc. quod, cum sit componere, aequè instruendam ac struendam vocabulo conveniet.*

32 *Ibid. Porro dicit, societatem coierit ad obligationem innocentium. Quamvis constanter ubique legatur, tamen varie sollicitata est haec lectio.*

33 At 301f Van Bynkershoek discusses Heraldus' proposed reading (*De Rerum Judicatarum Auctoritate* I 6) of *obloquutionem* instead of *obligationem*, which reading was followed by De Groot (*Florum Sparsio ad jus Justinianum* (1642) ad D 48 10 1 1). He then deals with Pithoeus on *Collatio* VIII 6 who on the basis of D 47 13 2 preferred in *accusationem* to *ad obligationem*.

34 At 301: *Sed quod de Basilicis ajunt (Heraldus and Grotius), minus profecto verum est, cum illi simpliciter verterint, ••••••••••, adversus innocentes.*

35 At 302: *In primis autem probo quod Salmasius d. C. XXX, p. 865. tueatur Marciani locutionem, ad obligationem innocentium, & genuinam esse probet ex significatione verbi obligare & obligatio. At 303. implicare & obligare liti non differeunt, nisi nominis sono.*

in *necem innocentium* instead of *ad occisionem innocentium*.³⁶ He holds that *D 48 10 20* states the same with the use of the word “obligation” and that Salmasius’ accusation that Tribonian had deleted the word *innocentium* is superfluous.³⁷ This allows him to state that the *SenatusConsultum* penalised those who, in order to implicate innocent persons in criminal proceedings have accepted money to instruct an advocate or witnesses, or had entered into an agreement or partnership for this purpose.³⁸

2.5 Leyser and Pothier

The fact that scientific studies of Roman law did not affect the application thereof is confirmed by Leyser.³⁹ In his discussion of forgery⁴⁰ he reiterates that witnesses who accept money are guilty of *falsum*, even if they give testimony which is truthful,⁴¹ and cites a decision of the aldermen of Leipzig.⁴²

36 At 302: *Utique magis placere debet ad obligationem, quam occisionem, quae vox est apud Collat. LL. Mos. & Rom. d. loc. Hanc tamen si servum, non interpreter, ut Salmasius interpretandum censuit, de societate, quam dumtaxat sicarii coierunt ad mortem innocentibus inferendam, sed simpliciter, quam quicumque etiam alii, in necem innocentium, hoc est, in damnum & praejudicium, quo innocentibus noceatur, ea plane sententia, quam de obligatione innocentium mox exponam. Apud Jctos vulgare est, in necem alicuius quid fieri, non vulgare, ad occisionem, sed tamen & alia aequo animo toleramus, quae vulgo recepta non sunt.*

37 At 303f: *Igitur, ut uno verbo absolvam, ad obligationem innocentium hic erit ad irretiendos falsa criminatione innocentes, quemadmodum & Hermogenianus in l. 20. ff. h. T. cum idem, ut credible est, dicere voluisset, eodem obligationis verbo usus est. Sed contra d. l. 20 seu potius contra Tribonianum, qui hanc, si credas, subtracta innocentium voce, mutasset, prolixè declamavit Salmasius. Verum non est, ut hoc jam agamus.*

38 At 301: *Hac sententia: Scto coërceri, qui ad obligationem innocentium pecuniam acceperit ob instruendam advocationem testimoniave, vel pactus fuerit, vel denique societatem coierit. At 302f: (s)ed potius inde efficere, ad obligandos innocentes, tunc coiri, cum id agitur, ut innocentes vel crimine implicentur, instituta accusatione, vel cum remora struitur, quae impedimento esset, quominus se expediant accusati. At 303: (ad obligationem innocentium hic erit ad irretiendos falsa criminatione innocentes.*

39 *Meditationes ad Pandectas* (Lipsiae et Guelpherbyti apud Ioh Christophorum Meisnerum 1741–1762); Roberts 189.

40 *Op cit* vol IX (1748) *Specimen DCXV De falsis, quae vulgo ignorantur.*

41 Vol IX XXIV. *Testis mercede conductus, etsi verum dicat, falsum committit.* Falsum committunt testes, qui mercedem accipiunt, etiam ut verum testimonium perhibeant, L. 1. §. 1. & 2. de L. Cornel. de fals. C. Crim. art. 64. can. 15. XIV. qu. 5.

42 *Ibid* Et ita responderunt Scabini Lipsienses apud Carpzovium *Quaest. crim.* 93. no. 51: *So wird N. P. Aussage von den Acten billig removit, und er möchte deswegen, dass er Geld genommen, die Wahrheit zu berichten, willführlichen entweder eine Zeitlang mit Gefängnis, oder mit zeitlicher Landesverweisung in Strafe genommen werden. Dissentit quidem Julius Clarus Sententiarum lib. 5 Falsum n. 13. negatque, testés corruptos, si veritatem dicant, falsum committere. At unicam ejus rationem, quod scilicet falsum sine immutatione veritatis esse nequeat, supra jam in §. 6. refutavi, & refut at pluribus Hunnius ad Treutl. vol. poster. disp. 32. qu. 70.*

Pothier, however, had followed the scholarly debate on the texts,⁴³ and agreed with van Bynkershoek's observations on the topic.⁴⁴

2.6 Van der Keessel

This brings us to the eve of codification in the person of Dionysius van der Keessel⁴⁵ who held a chair of law at Leiden from 1770 until 1808. His lectures contain a digest of Dutch jurisprudence of the preceding two centuries and provide closure to the law of Holland.⁴⁶

Van der Keessel taught his students that two Cornelian laws on falsity had been enacted⁴⁷ and that various *senatusconsulta* were added to the statute on testaments. He appears confused concerning the exact content of the various additions. At first he opined on the authority of Bachius⁴⁸ that one chapter of the Licinian *senatusconsultum* dealt with those who conspired to kill innocent persons, while another *senatusconsultum* penalised a person who accepted money for arranging legal assistance.⁴⁹

43 He followed a slightly different reading of the Ulpianus text in the *Collatio*, see Lib 48 Tit 10 Sectio II. *Item qui ob struendam advocacionem testimoniave, pecuniam acceperit, pactisve fuerit, societatem coierit, aut aliquam delationem (7) interposuerit: Item si quis coierit ad occisionem (8) innocentium, Senatusconsulto quod Cotta et Messala (9) factum est, coercentur. Pothier was aware of Schulting's suggestions in this respect. Ibid n (7). Delationem falsam scilicet, pecunia accepta. Schultingius legit, obligationem; ut in l. 20. ff. h. tit. infra N. 28. n (8). Id est, in necem et perniciem. Schultingius legit ad accusationem. Vide l. 1, § 1, ff. h. tit. infra N. 28. Ubi Marcianus ait obligationem.*

44 Articulus III. XXVIII. n (1). Macer in l. fin. ff. de Concussion. dicit ad Accusationem innocentium; eodem sensu. Nam Obligare idem est quod nectere, implicare: ut in l.3. § 3 ff de Bonis eor. qui ante Sent. dicitur Nexus crimine pro Accusatus. Igitur ad Obligationem innocentium coire dicuntur, qui confingunt crimina adversus innocentes, ut eos litibus obligent seu implicant, vel qui remoram struunt, quominus se accusati expediant. Ita Bynkershoek. Apud Collatorem legitur ad occisionem innocentium, quo sensu dicimus in necem seu in praepjudicium alicujus. Also n. (2). (on Obligationem in D 48 10 20). Nimirum si ea quaecumque hic recensetur, sunt ad obligationem innocentium aut alius dolo, ut mox supra.

45 1738–1816.

46 Hahlo and Kahn 559f; Roberts 172f; van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1979) 392–394. This motivated van Warmelo to undertake the publication and translation of these lectures in two series; first Van der Keessel's lectures on de Groot's *Inleidinge* and secondly the lectures on Van Eck's criminal law, resp D G van der Keessel *Praelectiones Iuris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam* edd P van Warmelo et al (1961–1967) and *Praelectiones in libros XLVII et XLVIII Digestorum exhibentes jurisprudentiam criminalem ad usum fori Batavi applicatam (duce Cornelio Van Eck) et in novum Codicem Criminalem, 1809* edd Beinart and Van Warmelo (1969–1981).

47 See supra n 2.

48 Johann August Bach (Bachius) 1721–1758, German jurist and professor of history of law at Leipzig. His *Historia jurisprudentiae Romanae quattuor libris comprehensa* (Lipsiae 1754) was highly esteemed. Roberts 42.

49 Ad 48 10 at 1298. *Aliud caput de eis qui coierint ad occisionem innocentium* (Bachius, op. cit. p. 355, § 6). *Aliud porro senatusconsultum de eo qui pecuniam acceperit ob struendam advocacionem, . . .* (Bachius, p. 357, § 9).

However, in another passage he relied upon the authority of Schulting⁵⁰ that two chapters of the same *senatusconsultum* placed those who had accepted money for arranging legal assistance or evidence and those who conspired to kill innocent people under the penalty of the Cornelian law.⁵¹

The *a priori* that the texts under discussion derived from two different *senatusconsulta*, or at least from two different chapters of the same *senatusconsultum*, caused Van der Keessel to reject the interpretation proposed by Van Bynkershoek.⁵² Consequently, he continued the distinction between a type of falsity consisting of accepting money for arranging advocacy or testimony,⁵³ and another variety of falsity composed of entering a partnership to implicate innocent persons in litigation.⁵⁴ The question, why the person accepting money for arranging advocacy or testimony should be held liable under the *lex Cornelia de falsis*, is parried with the remarks that this has been done with wrongful intent and to make a dishonest profit and that the culprits are responsible for someone suffering vexation through a lawsuit.⁵⁵

50 Antonius Schultingh (Schultingius), 1659–1734, Dutch legal scholar in the humanist tradition. His important work is the *Jurisprudentia vetus ante-Justiniana ex recensione et cum notis Antonii Schultingii*, Lipsiae 1737; Roberts 282f.

51 Ad 48 10 § 8 at 1354. *Dein anno urbis 775 sub Tiberio factum est Cotta et Messala consulibus senatusconsultum ut poena legis Corneliae coercerentur qui ob struendam advocacionem testimoniave pecuniam acceperint. Item qui coierint ad occisionem innocentium: Collationis, loc. cit.; Bachius, Historia, lib. 3, cap. 1, § 6. Haec enim duo capita ejusdem senatusconsulti fuere: videte Schultingium, ad Collationem, VIII. 2, nota 20; at 1360. qui societatem coierit ad obligationem innocentium. Videntur enim haec verba continere novum caput ejus senatusconsulti quod Cotta et Messala consulibus factum est (videte Schultingium, ad Collationem, VIII. 7, nota 20), nam in dicto loco a priore distinguitur: Item si quis coierit ad occisionem innocentium.*

52 At 1358: *Quos male habuit (Van Bynkershoek) quod hic inter crimina referatur advocato vel testi persuadere ut amici causam agant, et pro hac opera impensa pecunia accipere . . . licet cum amplissimo Bynkershoekio, loc. cit., haec non conjugas cum sequentibus verbis ad obligationem innocentium: quae nobis videntur ad aliud ejusdem senatusconsulti caput pertinere.*

53 *Ibid Secunda species falsi in testimoniis admissi priori similis est, quae in D. 48.10.1.1 sic proponitur: item ob instruendam advocacionem testimoniave pecuniam acceperit, pactusve fuerit. Eadem verba sunt in Collatione, loc. cit., nisi quod ibi struendam legatur. Plenius eadem sententia exhibetur in D. 48.10.20: qui ad litem instruendam advocacione, testibus, pecuniam acceperunt.*

54 At 1360: *Tertia species falsi in testimoniis et judiciis est quae ob connexionem cum praecedenti hic explicanda venit, quam his verbis proponit jurisconsultus in dicta D. 48.10.1.1, in fine: qui societatem coierit ad obligationem innocentium. Van der Keessel mentions the different readings, obligationem and occisionem and the protagonists of accusationem (Pithoeus and Schulting) and sides with the latter when he concludes: (m)anifesto hoc sensu falsi teneri illos qui dolo malo societatem iniverunt ut innocentes falsa quadam accusatione opprimeretur; vel saltem id egerunt, ne reus injuste accusatus se possit expedire.*

55 At 1358: *Sed si cogitemus hic sermonem esse de casu quo haec dolo malo gesta sunt, adeoque turpe lucrum quaesitum, it viris honestis negotium facesseretur, haec difficultas evanescit . . . Nam et illi faciunt ut quis lite vexetur, qua propter et merito sunt exosi.*

2.7 Mommsen, Robinson, Watson & Spruit Translations

Mommsen⁵⁶ discusses both Digest texts under the heading *Prozess- und Advocatendelictē*⁵⁷ and distinguishes between accepting a bribe for instituting or omitting to institute a criminal charge or for testifying in such proceedings⁵⁸ and conspiring in order to have an innocent person sentenced.⁵⁹

Robinson⁶⁰ mentions the extension from false wills to false witnesses introduced by the *SCC Messalianum* and *Geminianum* and states that such false witness might be for gain, and included conspiring to ensnare the innocent, but does not elaborate on this cryptic statement.

The Watson translation of *D 48 10 1 1* can be interpreted any which way, but the translation of *D 48 10 20* is highly problematic.

The Dutch translations follow the distinction between he who takes money for furnishing advocacy or evidence, and he who has conspired to accuse/murder innocent persons.⁶¹

3 Analysis

The majority of interpretations find two different forms of falsity in the texts under discussion namely, first accepting money or contracting to accept money in order to arrange advocacy or testimony; and second, colluding to implicate innocent persons in judicial proceedings.

As Van Bynkershoek already pointed out, the questionable point of the first definition remains where the element of unlawfulness is to be found. Van der Keessel's solution that this was done with evil intent to make a profit does not provide a real answer and it is submitted that patrons, family, friends, attorneys, and jurists all fulfil the requirements of this form of falsity.

Secondly, the collusion to implicate innocent people in judicial proceedings applies to anyone involved in a failed prosecution.

In consequence, the traditional interpretation is in need of revision. The division into two forms of falsity is mainly founded on the belief originated by the word *Item* in the Collation, that there were two *senatusconsulta* or two chapters within the same *senatusconsultum*. This is not the place to argue the respective authorities of the *Digesta* and the *Collatio*.

56 Mommsen *Römisches Strafrecht* (1899).

57 At 674: III. *Prozess- und Advocatendelictē*.

58 At 675: 4. *Bestechung oder Annahme der Bestechung zur Herbeiführung oder Unterlassung einer Criminalklage oder der Zeugnissablegung in einer solchen*.

59 *Ibid*: 6. *Vereinbarung zum Zweck der gerichtlichen Verurtheilung eines Unschuldigen*.

60 Robinson *The Criminal Law of Ancient Rome* (1995) 36–39.

61 *Dig.* 48.10.1. *Marcianus, Instituten XIV. 1. Voorts wordt op grond van een senaatsbesluit bestraft wie(5) voor het ondersteunen van een verdediging in rechte of van getuigenverklaringen geld in ontvangst heeft genomen, een afspraak heeft gemaakt of heeft samengespannen; verder wie heeft samengespannen(6) om onschuldige personen aan te klagen.(7) 5. Vertaald is de invoeging qui; 6. Vertaald is de invoeging item qui coierit; 7. Vertaald is de conjectuur accusationem.*

The Marcian text is however, grammatically, the most correct. This text also provides a logical instance of falsity and, as a result, should be considered to be the starting point of interpretation.

The following hypothesis is proposed. All forms of “forgery” described in *D 48 10* must contain the element of falsity, that is emendation of the truth. This is contained in the word *innocentium*, as the purpose of the perpetrators has to be sentencing of innocent persons, which can only be achieved by falsifying of the truth. Van Bynkershoek relied on Salmasius’ explanation of *obligare* and *obligatio* to move away from the traditional private law meaning of obligation and it is submitted that in this context an interpretation suitable to public law should be sought, which could be “to make liable for punishment”. Thus, *obligationem innocentium* refers to acts purporting to have innocent persons punished.

This interpretation also answers another hidden question, namely, into what type of litigation is the innocent to be embroiled? The answer may be found in the words *innocent* as well as *occisionem*, which both point in the direction of criminal law. Thus, the arranged advocacy or testimony, the collusion or whatever other means the perpetrators have used, by implication must all have been manufactured to have innocents punished.

The next question is whether *D 48 10 20* is an unfortunately phrased repetition or represents a different form of forgery.

It is suggested that the similarities indicate the former. However, the Watson translation clearly indicates some malfunction. The *pecuniam acceperit pactusve fuerit* has become *pecuniam acceperunt, obligationem pactionem fecerunt*, and the introduction of *obligationem* has broken the link between *accipere* and *paciscire*. Since this link was beyond query, it is suggested that the word *obligationem* has been misplaced and should be removed to restore the continuity. This results in the following “Those who accept money for providing a criminal prosecution with advocacy and testimony, or have agreed to do so, or collude to this purpose, or have organised any of the above are punished by the penalty for forgery.”, which leaves the element of falsity unexplained and only the word *obligationem* to fulfil this role. It is submitted that the misplaced *obligationem* constitutes the remnant of *ad obligationem innocentium*.

The source and origin of the interpretational problems concerning the application of forgery to the manipulation of criminal prosecutions has been the Ulpian text in the *Collatio*.

The grammar of this text deserves attention. Instead of *Item qui* followed by *item qui*, the text reads *Item qui* followed by *item si quis*. This suggests that we do not deal with an enumeration of potential perpetrators, but rather with a parallel, *item si quis*, that is “just as if someone”. This would translate as follows “Also he who has taken money for arranging advocacy or evidence or has made an agreement to do so [or] has colluded or in any other way agreed in respect of such matter, just as if someone had colluded to the murder of innocent persons, is punished in terms of the *senatusconsultum* passed during the consulate of Cotta and Messala.”

4 Conclusion

Van Bynkershoek appears to have been the only jurist with the acumen to question the traditionally held *communis opinio*. The fact that he held, at the same time, the highest judicial office in the United States of the Netherlands and published groundbreaking work on public international law, is of relevance as this reveals the existence of different paradigms before the revelations of Thomas Kuhn. Moreover, it shows that the same author could be working within more than one paradigm and how the paradigm can be deduced from the sources used.

The positivists of the *usus modernus* were of necessity tradition bound, while the adherents of the humanist tradition allowed themselves the freedom to examine the roots, thus unknowingly accepting the risk of killing the plant.

The above research reiterates the separate paths of legal practice and legal science and the fact that the latter was often pursued outside the universities.

The work of Van der Keessel is of interest as his lectures show that his attention was neither exclusively devoted to preparation for legal practicalities nor to the scientific study of Roman law.

Van Bynkershoek's interpretation reveals the sophistication of Roman law as he shows that the reach of the *lex Cornelia* was extended beyond false denunciations, accusations and testimony to the *auctores intellectuales* thereof. Thus the manipulators, the organisers of spurious prosecutions, the so-called brains behind the scene, were the real target of the texts in question and not the witness who had accepted money, but spoke the truth.