

Bas. XX,1,55 (BT 995,16): 'Εάν ὁ δανειστῆς μισθώσῃ τῷ  
χρεώστῃ τὸ ἐνέχυρον, αὐτὸς μὲν ἔχει κατὰ τοῦ μισθωτοῦ  
ἀγωγὴν, ὁ δὲ χρεώστης οὐκ ἔχει κατὰ τοῦ μισθώσαντος  
ἀγωγὴν.

While the first title of book XX of the Basilica (Περὶ  
ἀγωγῆς μισθώσεως καὶ ἐκμισθώσεως) closely follows the  
text of the second title of book XIX of the Digest (Locati  
conducti), the Digest lacks a fragment corresponding to  
the above-cited Basilica passage. Mommsen mentioned the  
Basilica text in critical notes on D. 19.2.56 both in  
his editio maior and in the editio stereotypa, but at  
the same time expressed doubts as to whether this frag-  
ment originally had been a separate lex in the Digest  
(ed. maior I, 571, 22 app.). His objections against the  
view that a lex should have been lost in our Digest  
manuscripts lean on these same Basilica.

First, Mommsen argues that Bas. XX,1,55 lacks an in-  
scriptio with the name of a jurist, in contrast with all  
other fragments in this book. Secondly, he points out  
that Stephanus in a scholion on Bas. XX,1,32 (BS 1197,3)  
refers to 'Javolenus in the 59th fragment of this title',  
while that text by Javolenus forms the 59th fragment in  
our Digest manuscripts as well. If a lex had been lost,  
Mommsen argues, Stephanus ought to have referred to this  
lex by Javolenus as the 60th fragment, that is, if Ste-  
phanus had at his disposition a Digest copy *not* wanting  
this lex. (It goes without saying that Stephanus com-  
mented on the Digest, not on the Basilica!) Next, Mommsen  
considers the possibility of this fragment being not a  
separate lex, but the last part of D. 19.2.55 by Paulus,  
a part omitted by the scribe of the codex Florentinus

and thereby in the entire Digest transmission. In other words, not a whole lex would have been lost between D. 19.2.55 and 56, but only part of lex 55. Not only the fact that the lacking fragment does not seem to be unworthy of Paulus points in this direction ('nec ... Paulus indigna') but also is this conclusion in accordance with the above-mentioned scholion by Stephanus. At the end of his long critical note in the editio maior, however, Mommsen declares himself still unconvinced of the genuineness of this fragment, the more so as the two 'interpretes' (Stephanus and Cyrillus?), who almost continuously figure in this title of the Basilica, are not present here by name: the scholiast of this fragment is anonymous (Stephanus?). Are his doubts justified?

Mommsen's argument from the lack of an inscriptio leans on a falsification by Fabrot and Heimbach in their Basilica editions. In contrast with the text they print, these inscriptions hardly ever occur in this title in the only known manuscript, Paris. gr. 1348. Certainly they do not occur anywhere near Bas. XX,1,55,<sup>1</sup> as one can see in the Basilica edition by Scheltema-Van der Wal-Holwerda (BT 983 sqq.).

Mommsen's second argument cannot stand, either. As has been seen above, he argues from a scholion by Stephanus on Bas. XX,1,32. Here again he has been deceived by Heimbach (II,357) who, following Fabrot (II,473 i) 'emended' the text. One glance at the manuscript demonstrates that Stephanus refers to Javolenus in the 60th (ξ') fragment of this title, not the 59th (vθ'): cf. BS 1197,3. Apparently Stephanus had a Digest copy containing a lex that is wanting in the codex Florentinus. Once undeceived, one sees the probability of a whole lex having been

1 The only fragments in Bas. XX,1 with an inscriptio are 1, 2, 3, 5, 6, 9 and 10.

omitted from the Florentinus instead of just the last part of D. 19.2.55. Which lex could be more plausible than one that corresponds with this Basilica fragment?

Another fact points in that direction. In the codex Florentinus D. 19.2.56 is attributed to Paulus by an 'Idem', referring to D. 19.2.54, whereas the scholion on Bas. XX,1,56 ascribes D. 19.2.56 to Ulpianus. Now if one supposes that the missing fragment is by Ulpianus, the difference is removed: in that case, the 'Idem' would make Ulpianus the author of D. 19.2.56 as well. This is the more probable as Ulpianus, too, has written a *liber singularis de officio praefecti vigilum* (see D. 1.15.2 and Lenel, Pal. II col. 960 no. 2081).

Mommsen's argument that Bas. XX,1,55 lacks scholia by the two 'interpretes' occurring almost everywhere in this title does not carry much weight. It is true that Cyrillus has annotated a great number of fragments of this title, but Stephanus is speaking much less frequently. Moreover, many fragments of this title are not accompanied by scholia at all.<sup>2</sup> Therefore the fact that this fragment has a scholion speaks in favour of its presence in the original Digest text rather than against it.

The conclusion that Mommsen's arguments contra were based on a misrepresentation of the Basilica text by Fabrot and Heimbach does not detract anything from his arguments pro. As Mommsen himself says, where else would this text, also recorded in the Tipucitus,<sup>3</sup> have come from?

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2 No scholia in Bas. XX,1 on fr. 2, 8, 10, 12, 16-18, 33, 36, 40, 42, 79, 82, 83, 85-89, 92, 94-96.

3 M. Κρύτου τοῦ Πατρὸς Τιμοῦκελος ... (vol. II) libr. XIII-XXIII ed. F. Doelger, Rome 1929 (*Studi e testi* 51), p. 164: (55)  
καὶ περὶ τοῦ ἐὰν ὁ δανειστὴς μισθώσῃ τῷ χρεώστῃ τὸ ἐνέχυρον.

