

## Papinian on the Road?

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*D.* 43.10.1, despite its attribution to Papinian, is not a Romanists' favourite. To begin with, it is in Greek; moreover, its subject is slightly boring in the eyes of most lawyers. It deals with keeping a modicum of order in public roads, and although it prescribes eminently sensible rules of behaviour, it is hard to see what could have attracted the famous Papinian here. Indeed, his authorship has been doubted, both because the subject would not have been worthy of Papinian, and because it is his only work in Greek. All this is interesting enough, but my concern lies primarily elsewhere: in the transmission of this text, on the road from its origin *via* the *Digest* to the *Basilica*, and back.

Thanks to the *codex Florentinus* we have at this point in book xliii a *lex unica* in a separate title: *De via publica et si quid in ea factum esse dicatur*. The compilers apparently found only one fragment to be inserted here.<sup>1</sup> The fragment, as well as its inscription are in Greek; the latter is remarkable, to say the least. Moreover, the inscription is phrased in an unusual way: it begins with the work and only then does the name of the jurist follow: Ἐκ τοῦ ἀστυνομικοῦ μονοβιβλίου τοῦ Παπινιανοῦ. Various difficulties arise.<sup>2</sup>

1. In the *Index titulorum* this title is lacking. The corrector has not supplemented the missing title, but has corrected the numeration. The first hand of the famous manuscript of the *Digest*<sup>3</sup> had written η' *R/ Ne quid in loco sacro uel itinere fiat*, then θ' *R/ De loco publico fruendo* and omitted the present tenth title (possibly caused by *homoiarchon*), continuing with ι' *R/ De uia publica et itinere publico reficiendo*. The corrector deleted η' *R/ Ne quid in loco sacro uel itinere fiat* and adapted the numeration by lowering the series θ to λβ (9-32) from the next title onwards by one into η to λα (8-31; see *Mo.* I, p. xvii\*, note 3 *apparatus ad l.* 4). All this indicates some uncertainty as to the composition of the *Digest* at this point. In the *Basilica*, fragments from six titles, among which title 10, have been gathered within one new title, to which we will return below (section 5).

2. According to the inscription, Papinian wrote a μονόβιβλος or *liber singularis* on the office of *astynomos*. The *Index Florentinus* lists this work as ἀστυνομικὸς (!) βιβλίον ἐν (*Mo.* I, p. lii\*, line 15). In Greek cities the *astynomos* is 'the magistrate who had the care of the police, streets and public buildings'<sup>4</sup> and this seems to have been intended here. Mommsen put the office in a Roman context and interpreted it as the *quattuorviri viis in*

1 Incidentally, in the entire forty-third book only one other fragment of Papinian was included: *D.* 43.16.18, Papinianus libro uicensimo sexto quaestionum (Lenel 318).

2 For the status quaestionis, see D. Liebs, 'Jurisprudenz', in *Handbuch der lateinischen Literatur der Antike IV: Die Literatur des Umbruchs. Von der römischen zur christlichen Literatur 117 bis 283 n. Chr.*, hrsg. von K. Sallmann, München 1997, 83-217, esp. 118-119 with references.

3 For the scribes of the manuscript see the careful investigation by W. Kaiser, 'Schreiber und Korrektoren des Codex Florentinus', *ZSSRom* 118 (2001), 133-219.

4 LSJ s.v.

*urbe purgandis*.<sup>5</sup> Schulz agreed with Mommsen and inferred from this that the compilers must have had a Greek epitome of an original Latin work by Papinian.<sup>6</sup> I am not sure that this is the way to uphold the authorship of Papinian and at the same time to argue that the subject of *astynomoi* of Greek cities is ‘not of the slightest importance to a man in his position’, as Schulz has it.<sup>7</sup> Would a monograph on the *quattuorviri viis in urbe purgandis* have been worthy of Papinian, even if in Latin? I will return to this point below (section 6).

3. So far, we have a fragment of dubious attribution, inserted into the *Digest* in a way that deviates from the normal procedure. In such a case the present author’s first port of call for additional information would be the Byzantine tradition, in particular the *Basilica*. So, of course, was Mommsen’s. Unfortunately, when he was preparing his edition, he had less material to guide him than we have now. His usual reference to the *Basilica*, in a frame in the right hand corner of the first line of the fragment, records ‘B. 58,8,12 (cf. vol. 6 p. 58 Heimb.)’ (Mo. II, 577, 18). In fact, we are dealing with a lost book of the *Basilica*, but know of its contents, and are able to reconstruct them to a certain extent from indirect evidence. Heimbach, however, had less evidence than has been discovered since. Consequently, his reconstruction of Bas. 58,8 (vol. V, p. 202-203) looks entirely different from Scheltema’s (A VII, 2647-2650). At this point, the difference is mainly caused by the publication of the so-called *Florilegium Ambrosianum*, an anthology from the *Basilica* in the palimpsested lower layer of Ambrosianus F 106 sup. The Groningen edition offers the following restitution of the text:

<i>D.</i> 43.10	<i>Bas.</i> 58,8,13	<i>Source</i>	<i>Heimbach</i>
§§ pr. 1.2	BT 2649,16-22	(Flor.) A(mbros.)	—
§ 3	BT 2649,23-24	<b>Vind</b> (obonensis iur. gr. 2)	—
§§ 4.5	BT 2649,26-2650,2	<b>Syn.</b> (Bas Maior) K,IX,24	Syn.

Heimbach had no more to offer than Fabrot had already printed. The *Florilegium Ambrosianum* (**A**) had not yet been discovered. It was later published in part by Ferrini and Mercati,<sup>8</sup> and collated again for the Groningen *Basilica* edition. The manuscript from Vienna (**Vind**) was known to Heimbach, and it is to this that Mommsen referred with the reference to vol. 6 of the Heimbach edition: in the first part of his *Prolegomena*, which is a ‘history of legal scholarship in the Oriental Empire from Justinian to Basilius

<sup>5</sup> Th. Mommsen, *Römisches Staatsrecht*, 3II, Leipzig 1887, 498; 505-510; 603-604.

<sup>6</sup> F. Schulz, *History of Roman Legal Science*, Oxford 1946 (1967), 247.

<sup>7</sup> *Ibid.*

<sup>8</sup> C. Ferrini-J. Mercati, *Basilicorum libri LX, vol. VII. Editionis Heimbachianae supplementum alterum*, Leipzig-Milan 1897.

Macedon', Heimbach had mentioned this manuscript<sup>9</sup> as a source for fragments from the *Digest* commentaries of Dorotheos and Cyrillus, and printed there (p. 58) a fragment containing an 'index [Cyrilli] L. 1 § 3 D. XLIII.10'. Heimbach did not consider it part of the *Basilica* and therefore did not include it in his edition. Scheltema and Van der Wal were of a different opinion, as they argued in 1974 in the *Praefatio* to vol. A VII (p.xix-xx):

One series of fragments in this manuscript Vind. iur. gr. 2] at ff. 21v-71v<sup>10</sup> contains the texts that we have used. They have been put into an order that differs only in few places from the one in which they are found in the *Basilica* themselves. These begin on the last line of f. 64r and end at line 7 on f. 66r, with the exception of B. 58,9,4 § 11 and 5, which chapters are found at f. 55r. From the titles B. 58, 1.2.6.7 and 8, in addition to some chapters, even rubrics have been included. The order of the excerpts and also the fact that these rubrics occur prove that all these texts really have been drawn from the *Basilica*, although this source is nowhere indicated in so many words.<sup>11</sup>

In sum, Mommsen followed Heimbach and thus the modern user of his edition is not alerted to the possibility that it could be compared at this point to the *codex Florentinus* (F) of the *Digest* with the Byzantine tradition.

4. If we accept the restitution of the *Basilica* text as it figures in the Groningen edition, we may now look again at the *Digest* text as it stands in Mommsen's *editio maior*, which contains a few problems, to which the reader is alerted by notes 3 and 4 and the critical apparatus. The main problems are encountered in the paragraphs *pr.*-2, i.e. the passage that in the *Basilica* reconstruction has been drawn from the *Florilegium Ambrosianum*. Here are the versions in the *Digest* and in the *Basilica*:

D. 48.10.1 = Mo. II,577,18 ssq.

Οἱ ἀστυνομικοὶ ἐπιμελείσθωσαν  
τῶν κατὰ τὴν πόλιν ὁδῶν,  
ὅπως ἂν ὁμαλισθῶσιν καὶ τὰ  
ρεύματα μὴ βλάπτῃ τὰς οἰκίας  
καὶ γέφυραι ὧσιν οὐ ἂν δέη.  
1. Ἐπιμελείσθωσαν δὲ ὅπως οἱ  
ἴδιοι τοῖχοι ἢ τῶν ἄλλων ἢ τῶν  
περὶ τὰς οἰκίας ἅ εἰς τὴν ὁδὸν  
φέρει μὴ σφαλερὰ ἦ, ἵνα ὡς  
δεῖ καθαιρῶσιν οἱ δεσπότηται  
τῶν οἰκιῶν καὶ ἐπισκευάζωσιν.  
ἐὰν δὲ μὴ καθαιρῶσιν μηδὲ  
ἐπισκευάζωσιν, ζημιούτωσαν  
αὐτοὺς, ἕως ἂν ἀσφαλῆ

B. 58,8,13 = BT 2649,16 ssq.

Οἱ ἀστυνόμοι ἐπιμελείσθωσαν  
ὁμαλίζεσθαι τὰς ὁδοὺς καὶ  
τὰ ρεύματα μὴ βλάπτειν τὰς  
οἰκίας καὶ γεφύρας εἶναι οὐ  
5 ἂν δέη 1. καὶ τοὺς τοίχους  
τῶν οἰκῶν καὶ τὰ ἄλλα τὰ εἰς  
τὴν δημοσίαν ὁδὸν φέροντα  
ἀσφαλῆ εἶναι καὶ μηδὲ ἐκ τῶν  
οἰκῶν φέρεσθαι τι βλάπτον  
10 τὰς ὁδοὺς, ἐπεὶ τοῦτο  
δημόσιον βάρος ἐστὶ τὸ  
ἐξιθύνειν καὶ ἐπισκευάζειν  
τὰς ὁδοὺς· εἰ δὲ μὴ  
ποιήσωσιν, ζημιούσιν αὐτοῦς.

<sup>9</sup> In older literature it goes under the shelf-mark iur. gr. 3. See also Heimbach, Prol. 42-43 and 176. See now for a full description L. Burgmann et al., *Repertorium der Handschriften des Byzantinischen Rechts* I (Frankfurt 1995), no. 309, pos. 11 (p. 354).

<sup>10</sup> These are the series described under pos. 11 in *RHBR* (see previous footnote).

<sup>11</sup> My translation from their Latin preface.

ποιήσωσιν. 2. Ἐπιμελείσθωσαν δὲ ὅπως μηδεὶς ὀρύσση τὰς ὁδοὺς μηδὲ χωνύσση μηδὲ κτίσση εἰς τὰς ὁδοὺς μηδὲν· εἰ δὲ μή, ὁ μὲν δοῦλος ὑπὸ τοῦ ἐντυχόντος μαστιγούσθω, ὁ δὲ ἐλεύθερος ἐπιδεικνύσθω τοῖς ἀστυνόμοις, οἱ δὲ ἀστυνόμοι ζημιούτωσαν κατὰ τὸν νόμον καὶ τὸ γεγονός καταλυέτωσαν.	15 2. Προνοεῖτωσαν δὲ καὶ τοῦ μὴ βλάπτεσθαι τὰς ὁδοὺς· ἐπειτοίγε δοῦλος μὲν μαστιγοῦται, ἐλεύθερος δὲ προστιμᾶται.  20   25
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A superficial comparison confirms that the *Basilica* version is a summary of the *Digest* text, and that it reads much better. In my view, it also enables us to solve two problems pointed out by Mommsen's notes. Note 3 *ad* ἀστυνομικοί in line 1 [Mo. I. 19] records a conjecture of Brenkman, who proposed to read here ἀστυνόμοι. There could be hardly any doubt that he was right, and the conjecture is confirmed by the *Basilica*. Note 4 reports a proposal by Hercher to delete the words ἢ τῶν ἄλλων in line 6 [Mo. II. 20-21]. In fact, this seems a desperate attempt to save a suspect sentence. The summary in the *Basilica* tells us what § 1 intended: [the *astynomoi* should take care that] καὶ τοὺς τοίχους τῶν οἰκῶν καὶ τὰ ἄλλα τὰ εἰς τὴν δημοσίαν ὁδὸν φέροντα ('that also the walls of the houses and other buildings that give onto the road [be safe]'). Something similar must have been in the *Digest*, and the relative clause ἃ εἰς τὴν ὁδὸν φέρει (7-8 = Mo. I. 21) must have an antecedent. It is not improbable that this should have been a (τὰ) ἄλλα. At this point the *Digest* text seems corrupt. It is possible that ἢ τῶν ἄλλων is the opposite of ἴδιοι, even though the houses, not their walls are private ('private walls as well as those of other buildings'). Another possibility is that the antecedent of the relative clause is hiding at the wrong spot in τῶν ἄλλων in line 6 (= Mo. II. 20-21). Or, perhaps has the inelegant construction of ἐπιμελεῖσθαι with *genitivus obiectivus* as well as with the subordinate clause ὅπως led the author and/or scribe astray?<sup>12</sup>

The final part of this passage in A, printed as § 2 in the *Basilica*, is a much more concise summary when compared to what we read in the *Digest*; no particular difficulties occur.

5. But the *Basilica* furnish other evidence as to the contents of *D.* 43.10. Some of their manuscripts contain an *index titulorum*. I pass over their precise nature,<sup>13</sup> and just mention that they are lists of title rubrics, but containing, in some cases, other interesting information as well. One of these manuscripts is the Coislinianus gr. 151. The index concerned, known in secondary literature as *Index Coislinianus (ICb)*, has been edited in part in the critical apparatus of the Groningen edition from Bas. 17 onwards, by listing with every title rubric the relevant part of the index. Although the text of B. 58 has been lost, the index testifies to its contents. At B. 58,8 (BT 2647,4), *ICb* gives in Greek translation the rubrics of the six titles from the *Digest* from which fragments have been

<sup>12</sup> See also the neo-Latin translation in the *editio stereotypa*: *Item curam agant, parietes privati [aliorumve delendum] quaeve alia [my emphasis] circa domus viam attingunt vitiosa ne sint etc.* This is a sensible, but not exact rendering of the Greek text.

<sup>13</sup> See now Th.E. van Bochove, 'Index titulorum. Merely Table of Contents or 'Αρχὴ σὺν Θεῶ τῶν Βασιλικῶν?', *Subseciva Groningana* 6 (1999), 1-58, esp. 1-5.

taken to compile B. 58,8. The quality of these Greek translations is uneven, but the result allows us to verify which titles of *D.* 43 are meant. Titles 7-9 can be identified, and so can titles 11 and 19. The information on title 10, however, does not immediately echo the Latin rubric, nor does it show any resemblance to the contents, even if we take into account that the manuscript is difficult to read at this point:

βιβ. μγ' τῶν Διγ. τιτ. ι'· ἰντέρδικτον ἐφ' ᾧ παντὶ ἐξεῖναι τὴν δημοσίον· σετρ· καὶ τὸ πα<sup>τλ</sup>  
ἀνανερ<sup>·</sup>·<sup>14</sup>

The editors' commentary in the critical apparatus seems to be based on a misunderstanding: their words *quid velint ductus quas transcripsimus* σετρ· et πα<sup>τλ</sup> ἀνανερ<sup>·</sup>, *non liquet; expectes* τὴν δημοσί<αν> ὁδὸν ἀνοίγειν καὶ τὴν παλαιὰν ἀνανεοῦν imply that they bear on title 11 (*De via publica et itinere publico reficiendo*). In any case, *ICb* does not contain the slightest evidence of *astynomoi* or their activity. At best we may deduce from this entry that the compilers of *ICb* read into the fragment the concern for unhampered accessibility of public roads '*interdictum* to the effect that everybody is free to use public roads'. I feel unable to explain, let alone translate, the second part of the rubric.<sup>15</sup>

6. To sum up, the text of our fragment has fared better in later times, but many questions remain. Having said that, we now have to travel back along the same road to the *codex Florentinus* of the *Digest* and perhaps even beyond that point.

First, it is possible to correct the *Digest* text in F with the help of the *Basilica*. The correction ἀστυνόμοι has already been mentioned, and a conjecture for the incriminated words ἢ τῶν ἄλλων ἢ τῶν περὶ τὰς οἰκίας would be an improvement. My suggestion would be not to delete ἢ τῶν ἄλλων, but to postulate the omission of a word or words.

Second, the critical apparatus shows that the text in F was not written very carefully in the first place.<sup>16</sup> My impression from a glance at the apparatus of *D.* 27.1 is that those long Greek passages have fared better than this brief fragment, where moreover the hands change in the middle of a line; neither of these two wrote *D.* 27.1.<sup>17</sup>

Third, what does the inscription tell us? The question is twofold: what is an *astynomos*, and how reliable is the attribution to Papinian? If we interpret *astynomos* as a Greek word for a Roman institution, as I think we should, first of all we must break with a long humanist tradition. From Haloander onwards,<sup>18</sup> scholars have translated it as *aedilis*. In fact, as already noted by Mommsen<sup>19</sup> and De Ruggiero,<sup>20</sup> an *aedilis* is an *agoranomos*,

<sup>14</sup> Another manuscript, the Athonensis Pantokrator 234, has an index reading at this point ἰντέρδικτον ἐφ' ᾧ παντὶ ἐξεῖναι τὴν δημοσίαν ὁδὸν καὶ τὸ μονοπάτιον ἀνανεοῦν (I am indebted to Tom van Bochove for this information).

<sup>15</sup> The divergent second part in Pantokrator 234 (see the previous note) is translatable, of course ('and to repair a footpath'), which would make it refer to *D.* 43.11.

<sup>16</sup> I am puzzled by the note on καθαρωσιν suggesting that F has the wrong accent. In fact, F does not write accents at all in this fragment.

<sup>17</sup> For the data see Kaiser (n. 3 above), esp. 144, 150 and 156. The change from Manus I to XIII occurs at Mo. II, 577,27; Manus III has written *D.* 27.1.

<sup>18</sup> See, e.g., the *Digest* edition by Gebauer and Spangenberg (Göttingen 1776), ad *D.* 43.10 (p. 890), building on Brenkman's collations and annotations.

<sup>19</sup> N. 5 Above.

<sup>20</sup> E. De Ruggiero, *Dizionario epigrafico* I (1895) 219.

whereas an *astynomos* is either a *praetor urbanus*, as Dio Cassius has it, or a *curator rei publicae* on whose office Ulpian wrote a *liber singularis*. As has been said above, Mommsen identified the office as one of the minor *curae* with which many a career started and which was closely related to the task of the *aediles*: the *quattuorviri viis in urbe purgandis*.<sup>21</sup> It seems clear that the work that was the source of our fragment belongs to a genre defined by Schulz as ‘works describing the procedure to be observed by this or that magistrate’ and of which he notes that it made ‘a fresh appearance in the Severan age’.<sup>22</sup> Although it is possible that the author is not dealing with a Roman magistracy, but with a similar office in provincial cities, the other works in this genre all treat magistrates nominated at the level of central government. I am therefore inclined to agree with Mommsen and to opt for a “Roman” office,<sup>23</sup> even though it carries the wrong name.

The authorship of *D.* 43.10.1 does not seem to admit of proof. True, the *inscriptio* attributes it to Papinian, but as we have seen, it is difficult to reconcile the contents of this fragment with its alleged source, a work on astynomia. And if we cannot trust the title, why should we believe the name of the author?<sup>24</sup> All this does not exactly increase confidence in the existence of an ἀστυνομικὸν μονοβιβλίον τοῦ Παπινιανοῦ. In fact, I doubt that it was Papinian himself whom we have met on the road: I rather believe that it was some other jurist writing on the *cura viarum*. The title of the book may have been a later invention.

It is, of course, of little importance whether Papinian did or did not write *D.* 43.10.1. It is of far greater interest that the *codex Florentinus*, our oldest witness of the Digest text and at this point our only direct witness, should contain a text of dubious attribution and in a form that is inferior to its testimony in *Basilica* 58.8.13. It raises the question of the source of this indirect witness. Was it a *Digest* manuscript, now lost, which was at this point of better quality than F? This would not be surprising; after all, the end of the titles *D.* 48.20 and 22 is lacking in F, and only from the indirect evidence of the *Basilica* is it possible to reconstruct the contents of these fragments. The example is well known and has recently been studied in detail by Wolfgang Kaiser.<sup>25</sup>

In short, the combined evidence from F’s *Index titulorum* and *D.* 43.10, compared with the *Index Coislinianus* and *Basilica* 58,8,13, gives food for thought on the vicissitudes of the text of this fragment, and ultimately, on the authority of the *codex Florentinus*, or rather, on its representativeness for the final redaction of the *Digest*.

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<sup>21</sup> I am most grateful to Prof. Werner Eck for a helpful discussion of the *cura viarum* when commenting on an earlier version of this paper. He is not, of course, responsible for the opinions expressed by me.

<sup>22</sup> Schulz (n. 6 above), 242.

<sup>23</sup> Pace D. Liebs, who opts for a provincial municipal office: ‘Jurisprudenz’ (n. 2 above), 119, and Id., ‘Römische Provinzialjurisprudenz’, in *ANRW* II 15 (1976), 288-362, esp. 292.

<sup>24</sup> V. Giuffrè, ‘Papiniano fra tradizione ed innovazione’, in *ANRW* II 15, 632-660, esp. 640 with note 28, agrees to the *quattuorviri*, but does not believe in Papinian’s authorship.

<sup>25</sup> W. Kaiser, ‘Die Lücken in *D.* 48,20 und *D.* 48,22’, in: I. Reichard, M. Armgardt, F. Klinck (eds.), *Festschrift für Christoph Krampe zum 70. Geburtstag*, Berlin 2013, 333-358.