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‘Graeci Salarium ὀψωνιον Interpretantur’

Remuneration under Ἐντολή (mandatum) in Byzantine Law

Abstract: In classical law and Justinianic law, the contract of ἔντολή (*mandatum*, mandate) had to be gratuitous. Any remuneration in this case was not agreed upon, but given out of a feeling of moral obligation as a token of gratitude. The so-called *honorarium* was used in classical law mainly for the remuneration of a lawyer or teacher in the liberal arts in recompense for their services. In early Byzantine law the sixth-century legal scholar Stephanos regularly spoke in this respect of an ἀντίδωρον (a gift in return). In addition to an *honorarium* or ἀντίδωρον, a *salarium* or σαλάριον could also be paid. This payment had to be appropriate to the efforts made by the mandatory to that effect and could only be claimed *extra ordinem*. A shift apparently took place here from a pure, (moral) natural obligation (*honorarium* or ἀντίδωρον) to a semi-natural obligation (*salarium* or σαλάριον) that was indeed enforceable by law. This distinction between the two kinds of remuneration can clearly be derived from a new reading of a scholion by Stephanos. It appears that in later Byzantine law the ‘new’ terms ὀψωνιον, σιτηρέσιον and δόμα were used for *salarium* or σαλάριον. These terms came from the military.

1. INTRODUCTION

Under Roman and Byzantine law, a contract of mandate (*mandatum*) must be gratuitous. That is well-nigh a hard and fast rule. Can the *mandatarius* (mandatory) nevertheless accept something from the *mandator* (mandator)? Two Digest texts do indeed allow for something of the sort. D. 17,1,6, pr. and 7 mention *remunerare* (remunerate), but they do not deal with the same situation.¹ Constantinus Matheussen explained the ostensible contrast between the two fragments with the help of a scholion in the Basilica² in which a distinction is supposedly made between remuneration that has been agreed and remuneration that the *mandator* gives unsolicitedly, i.e. *sua sponte*, for example as a gift.³ Is Matheussen’s explanation correct? How did Byzantine legal scholars view this problem?

2. MATHEEUSSEN AND THE OLD BASILICA SCHOLION

Before dealing with the question of whether remuneration is possible under a *mandatum* and with the two texts mentioned above (D. 17,1,6, pr. and 7), I will discuss Matheussen’s analysis of the scholion. In his article, Matheussen pointed to two different interpretations of an *old* Basilica

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¹ See notes 53 and 54 below.

² For the Basilica and Justinian’s legislation see, H. DE JONG, Using the Basilica. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 133 (2016) 286–321, 290–292.

³ C. MATHEEUSSEN, L’interprétation de la gratuité du mandat dans les scholies des Basiliques et la réductibilité du ‘salaire’ du mandataire. *Subseciva Groningana* III (1988) 49–59, 53: “L’essentiel du système se trouve dans la distinction, suggérée dans le texte grec des Basiliques (Bas. 14,1,6 et 7), entre ἀντίδωρον (§6) et ὀρισθὲν ὀψωνιον (§7), mots qui ont permis à Stéphane de distinguer un διδόμενον σαλάριον d’un σαλάριον ὀρισθὲν. [...] Le système de Stéphane que nous venons d’esquisser n’est discernable qu’à travers l’édition critique de Scheltema. Il résulte d’une lecture plus précise du manuscrit et d’une conjecture fort heureuse: dans l’édition de Heimbach (II, 68), le rapprochement explicite des deux fragments manque (le texte ne parle pas du fragment 7) et la distinction διδόμενον–ὀρισθὲν (suite de la conjecture de Scheltema) ne s’y trouve pas (Heimbach n’avait pas lu la phrase indiquant le fragment 7)”.

scholion by the sixth-century legal scholar Stephanos at B. 14,1,1 (D. 17,1,1,4).⁴ This concerned a comment on the words *mandatum nisi gratuitum nullum est*: there is only a valid contract of mandate (*mandatum*) if one acts gratuitously. The two different interpretations of the *old* Basilica scholion follow below. The interpretation of the text with the Latin translation in the left-hand column is taken from the Heimbach edition,⁵ the Greek text from the right-hand column is taken from the Groningen edition,⁶ and the French translation of this is by Matheeußen. The differences between the two texts are printed in bold type:

Heimbach II 68:

Στεφαν. Σημειῶσαι, ὅτι κατὰ χάριν εἶναι δεῖ τὸ μανδάτον· μισθὸς γὰρ ἐντεθεὶς ἀμείβει τοῦ μανδάτου τὴν φύσιν καὶ ποιεῖ λοκάτον καὶ κονδοῦκτον τὸ συνάλλαγμα. ἕτερον δέ ἐστιν, εἰ σαλάριον ἐχωρήγησεν ὁ ἐντειλάμενος ἢ ἀντίδωρον δέδωκεν· ἐπὶ τούτοις γὰρ μένει ἢ τοῦ μανδάτου φύσις ἐπὶ σχήματος σωζομένη, καὶ οὐκ ἀμείβεται διὰ τοῦ διδομένου σαλαρίου, ὡς ὁ Οὐλπιανὸς ἐν τῷ ζ'. κεφ. τοῦ παρόντος **τιτ. φησίν, ἔνθα καὶ τοῦτο προετίθησιν, τό· τὴν ἀπαιτήσιν ἔχει τοῦ ὀρισθέντος σαλαρίου, ἐν ᾧ σύμμετρόν ἐστιν. ἔξτρα ὀρδινεμ δὲ αὐτὸ ἀπαιτεῖσθαί φησιν.**

Stephani. Nota, mandatum gratuitum esse debere: nam merces interveniens mandati naturam mutat et efficit, ut contractus locatio et conductio fiat. Aliud autem est, si salarium mandans praebuit, aut remunerationem dedit: his enim datis mandati natura in suo statu manet, et per salarium datum non mutatur, ut Ulpianus cap. 6 huius tit. ait, ubi et hoc adiicit, salarium definitum peti posse, si modicum sit. Extra ordinem autem peti illud ait.

BS 700/17–25:

Στεφάνου. Σημειῶσαι, ὅτι κατὰ χάριν εἶναι δεῖ τὸ μανδάτον· μισθὸς γὰρ ὀρισθεὶς ἀμείβει τοῦ μανδάτου τὴν φύσιν καὶ ποιεῖ **λοιπὸν** λοκάτον καὶ κονδοῦκτον τὸ συνάλλαγμα. ἕτερον δέ ἐστιν, εἰ σαλάριον ἐχωρήγησεν ὁ ἐντειλάμενος ἢ ἀντίδωρον δέδωκεν· ἐπὶ τούτοις γὰρ μένει ἢ τοῦ μανδάτου φύσις ἐπὶ σχήματος σωζομένη καὶ οὐκ ἀμείβεται διὰ τοῦ διδομένου σαλαρίου, ὡς ὁ Οὐλπιανὸς ἐν τῷ ζ'. κεφ. τοῦ παρόντος **τίτλου** φησίν. **Ὡσπερ οὖν οὐ διὰ τοῦ διδομένου σαλαρίου, <οὐδὲ διὰ τοῦ ὀρισθέντος>, ὡς ὁ Οὐλπιανὸς ἐν τῷ ζ'. διγ. τοῦ παρόντος τιτ. φησίν· τότε ἀπαιτήσιν ἔχει τὸ ὀρισθὲν σαλάριον, ἐν ᾧ σύμμετρόν ἐστιν.** ἔξτρα ὀρδινεμ δὲ αὐτὸ ἀπαιτεῖσθαί φησιν.

Remarquez que le mandat doit être gratuit. Le fait de stipuler un salaire change la nature du mandat et fait entrer ensuite le contrat dans le domaine de la *locatio conductio*. Tout autre est le cas dans lequel le mandant se charge des frais ou donne une rémunération. Dans ces cas, la nature du mandat reste intacte et ne se voit pas changée par le salaire donné, comme le dit Ulpien dans le fragment six du titre sous rubrique. Tout à fait comme la nature du mandat ne se change pas par le salaire donné, <elle ne se change non plus par un salaire convenu>, comme le dit Ulpien dans le fragment sept du titre sous rubrique; dans ce cas, on peut exiger en justice le salaire convenu, si celui-ci est symétrique.⁷

⁴ For Stephanos, see H. J. SCHELTEMA, L'enseignement de droit des antécédents. *Byzantina neerlandica*. Series B: Studia. I. Leiden 1970, 24–29 (reprint in: N. VAN DER WAL *et alii*, H. J. Scheltema Opera minora. Groningen 2004, 75–79) and H. DE JONG, Stephanos en zijn Digestenonderwijs. Den Haag 2008, 3–38.

⁵ Basilicorum libri LX, Post Annibalis Fabroti curas ope codicum manuscriptorum a Gustavo Ernesto Heimbachio aliisque collatorum integrioribus cum scholiis edidit, editos denuo recensuit, deperditos restituit, translationem latinam et adnotationem criticam adiecit... Tomus II: libros XIII–XXIII continens, ed. W. HEIMBACH. Lipsiae 1840, 68. Abbreviation HB quoted after volume and page number. See MATHEEUSSEN, L'interprétation de la gratuité du mandat (as note 1) 59.

⁶ Basilicorum libri LX, ed. H. J. SCHELTEMA – N. VAN DER WAL – D. HOLWERDA. Groningen 1953–1988, B II, BS 700/17–25 [Stephanos]. Abbreviations: Series A (Textus) BT, Series B (Scholia) BS quoted after page and line. MATHEEUSSEN, L'interprétation de la gratuité du mandat, 58–59.

⁷ MATHEEUSSEN, L'interprétation de la gratuité du mandat 52.

The contract of *mandatum* must be gratuitous. This means that no payment (μισθός, *merces*) can be agreed for the services of the mandatory. If remuneration is indeed agreed, the contract is called *locatio conductio*. The mandatory can nevertheless receive money on the basis of D. 17,1,6 and D. 17,1,7. This is a permitted payment, a remuneration. In relation to the *mandatum*, the verb *remunerare* is constantly used in the Digest for this. In the system of Stephanos that he discovered, Matheussen points to the accurate reading of the manuscript and the conjecture, valid in his opinion, <οὐδὲ διὰ τοῦ ὀρισθέντος> from the critical Groningen edition, on which he based the comparison – and the harmonisation with D. 17,1,1,4⁸ – of the two fragments 6 and 7 of D. 17,1 and, with that, the distinction between the two types of permitted payments διδόμενον–ὀρισθέν. Matheussen mentions the distinction between διδόμενον σαλάριον (salaire donné spontanément) and σαλάριον ὀρισθέν (salaire convenu).⁹ He then sees – without explaining where these (new) terms come from – the distinction by Stephanos repeated in the Basilica text with ἀντίδωρον (D. 17,1,6,pr.) and ὀρισθέν ὀψώνιον (D. 17,1,7).¹⁰ Unfortunately, Matheussen does not seem to have checked the Basilica scholion in the manuscript. A new study of the manuscript codex graecus Coislinianus 152 (Ca) shows that both the text in the Heimbach edition and the one in the Groningen edition are incorrect.¹¹ The new reading of the scholion and the study of other scholia lead one to conclude that the conjecture in the Groningen edition is not credible. Matheussen’s interpretation of the Basilica scholion must therefore be revised as regards the distinction between διδόμενον σαλάριον (salaire donné spontanément) and σαλάριον ὀρισθέν (salaire convenu). Moreover, in the Basilica, terms other than σαλάριον for remuneration in relation to *mandatum* – such as the ὀψώνιον already mentioned by Matheussen – also appear. In this context, a distinction should be made between the *old* scholia and the Basilica text together with the *new* scholia.¹² In later Byzantine law other terminology was used.¹³ This special usage appears to have come from the military.

In order to arrive at a correct and complete interpretation of the *old* Basilica scholion in the new reading and to discover a development in the interpretation of classical law up to and including later Byzantine law, it is important to take into account the classical Roman law and Justinianic law first (3). This section focuses on the term *remunerare* in classical Roman law and Justinianic law. What exactly is remuneration? And how exactly is remuneration outside of *mandatum* shaped? Subsequently, the different terms for remuneration in relation to *mandatum* are dealt with. Afterwards, in (4), the new reading and interpretation of the Basilica scholion by Stephanos is presented. It appears that Stephanos uses two specific terms for *remunerare* in cases of μανδάτων, namely ἀντίδωρον and σαλάριον. In (5) other – *old* – scholia about remuneration are discussed. The question is whether the antecessors differed in opinion regarding the names of permitted payments in cases of μανδάτων.¹⁴ In the *new* scholia, new terms prove to be used for σαλάριον. In (6) these terms, namely ὀψώνιον, σιτηρέσιον and δόμα, are discussed together with the old terms for permitted payments from the

⁸ MATHEEUSSEN points here to the φύσις theory of Stephanos (MATHEEUSSEN, L’interprétation de la gratuité du mandat 52–53). See also H. DE JONG, The application of natura (φύσις) in Byzantine law. *BZ* 106–2 (2013) 683–712.

⁹ MATHEEUSSEN, L’interprétation de la gratuité du mandat 53.

¹⁰ BT 738/17 and BT 739/15.

¹¹ See L. BURGMANN – M. TH. FÖGEN – A. SCHMINCK – D. SIMON, Repertorium der Handschriften des byzantinischen Rechts (= RHBR), Teil I: Die Handschriften des weltlichen Rechts [No 1–327]. Frankfurt 1995, nr. 203.

¹² In the margins of the text of the Basilica so-called scholia, containing remarks on the texts, were written. Besides the *new* scholia, which were written after the compilation of the Basilica, *old* scholia from the Justinianic period were inserted around the Basilica text, see DE JONG, Using the Basilica (as note 2) 305–313.

¹³ For the different interpretations of the periods of Roman law (classical law, Justinianic law and (early and later) Byzantine law) and the methodology of research of Byzantine legal sources, see DE JONG, Using the Basilica 292–302.

¹⁴ Antecessors are professors who gave legal education from 533 to about 560 (N. VAN DER WAL – J.H.A. LOKIN, *Historiae iuris graecoromani delineatio. Les sources du droit byzantin de 300 à 1453*. Groningen 1985, 38).

Basilica text and *new scholia*. In (7) the origin of the terms ὀψώνιον, σιτηρέσιον and δόμα is dealt with. In this section, Jacques Cujas (1522–1590) is briefly cited in connection with ὀψώνιον. He believes he knows where the Greeks got the term ὀψώνιον from. The conclusion follows in (8).

3. CLASSICAL AND JUSTINIANIC LAW

3.1 REMUNERARE IN THE CORPUS IURIS

This section focuses on remuneration outside the contract of *mandatum*.¹⁵ In the Corpus iuris the word *remuneratio* does not appear as a noun.¹⁶ Only the verb *remunerare* is used. The word *munus*, which is contained in *remunerare*, does, however, appear. In the Digest, a clear difference is made between the different meanings of *munus*:

D. 50,16,18:

Munus ' is understood in three ways: first, as a gift, whence we talk of *munera* being given or sent; second, as a burden, and when this is remitted, release from military service or a *munus* is as a result called immunity; third, as a duty, whence we talk of military *munera* and call some soldiers *munifices*; and, therefore, we talk of *municipes* because they undertake civil *munera*.¹⁷

Here we focus on the first meaning of *munus*, namely 'gift' (*donum*). In the following fragments the distinction between *donum* and *munus* is explained:

D. 50,16,194:

There is the same difference between 'donum' and 'munus' as between genus and species, for Labeo says that the genus is 'donum' and is named after giving and 'munus' is a species; for a 'munus' is a 'donum' with a reason (*causa*), as, for instance, for a birthday or a wedding.¹⁸

D. 50,16,214:

Properly speaking, a 'munus' is what we are forced to undertake by law or custom or the command of someone who has the right to command. 'Gifts', however, are properly speaking those things which are offered under no legal necessity out of a sense of duty and from choice; and if they are not offered, no censure is involved; and if they are offered, it is very praiseworthy. But to sum up, we have reached a position where not every *munus* is regarded also as a gift, but any gift is rightly called a *munus*.¹⁹

¹⁵ In this article I do not deal with the debate concerning interpolations.

¹⁶ A. BERGER, *Encyclopedic dictionary of Roman law*. Philadelphia 2004, 674 [Remunerare] "To give a reward to a person for a service gratuitously rendered. To give such a reward is a kind of liberality since it is not a fulfillment of a legal duty and not even of an *obligatio naturalis*, the only motive being to recompense another for a meritorious performance to which he was not obligated to do".

¹⁷ *Paulus libro nono ad edictum*: "Munus' tribus modis dicitur: uno donum, et inde munera dici dari mittive: altero onus, quod cum remittatur; vacationem militiae munerisque praestat inde immunitatem appellari. Tertio officium, unde munera militaria et quosdam milites munificos vocari: igitur municipes dici, quod munera civilia capiant". Translations from the Digest are based on A. WATSON, *The Digest of Justinian*. Philadelphia 1985.

¹⁸ *Ulpianus libro quadragesimo tertio ad edictum*: "Inter 'donum' et 'munus' hoc interest, quod inter genus et speciem: nam genus esse donum Labeo a donando dictum, munus speciem: nam munus esse donum cum causa, ut puta natalicium, nuptalium".

¹⁹ *Marcianus libro primo publicorum iudiciorum*: "Munus' proprie est, quod necessarie obimus lege more imperiove eius, qui iubendi habet potestatem. 'Dona' autem proprie sunt, quae nulla necessitate iuris officii et sponte praestantur: quae si non praestentur, nulla repraehensio est et, si praestentur, plerumque laus inest. Sed in summa in hoc ventum est, ut non quodcumque munus, id et donum accipiatur, at quod donum fuerit, id munus recte dicatur".

Munus is understood as a *species* of the *donum* as *genus*. If a *munus* is concerned, there must then be a reason for it.²⁰ It is not a voluntary gift, but one that is required in one way or another by law, by the prevailing customs or by someone’s authority. In the text, a birthday or wedding gift is given as an example. In a legal sense, one can construe *munus* as a sort of (moral) natural obligation.²¹ The giver of a *munus* is under a moral obligation to give, but this moral obligation is not enforceable by law. A gift (*donum*) is an act that is performed without obligation. It is performed on one’s own account and based on liberality.

The Digest contains even more texts that deal with the difference between *donum* and *munus*. In the following fragment in the case of a gift (*donum*), a *remunerare* is expected.²² Apparently a *donum* thus gives cause, a reason, for a *munus*. In the discussion of liability for enrichment, we find the following distinction between a gift and a gift in return:²³

D. 5,3,25,11:

[...] and if they have given a gift, they will not be deemed to have become richer in spite of the fact that they have put someone under a moral obligation to give a gift in return. Obviously, if they have received gifts in return (*antidora*), it must be said that they have been made richer to the extent of what they have received, as if this were almost a sort of barter.²⁴

To give (*donare*) obliges someone *naturaliter*, by prevailing custom, to give recompense (*remunerare*).²⁵ This fragment therefore explicitly refers to the fact that this is a (moral) natural obligation. And because it cannot be compelled *civiliter*, the giver is not made richer by a claim: it does not form part of one’s assets (or inheritance). Then an example is given of recompense, namely, literally, a gift in return. It is not clear what this gift in return is. To give substance to such *remunerare*, the Greek word $\alpha\upsilon\tau\iota\delta\omicron\rho\omicron\nu$ is used. Apparently no equivalent in the form of a noun could be found in Latin: *donum* as such could not be used since this is not a gift out of liberality, whereas *donum* is. The gift in return is not obligatory, because it concerns a (moral) natural obligation: the gift in return cannot be demanded. But if the other party gives a gift in return, the first party is indeed made richer by this, since now the moral claim, legally unenforceable, has been converted into an asset. Because a free gift has been compensated with a morally obliged gift, it is an exchange of comparable gifts (the morally obliged gift being free in as much it cannot be enforced legally), this is a sort of barter. Therefore, at the end of the fragment, Ulpianus also points to the fact that this must be a form of barter (*permutatio*). After all, neither party becomes richer by way of a gift and a gift in return. The gift in return is, in fact, not a pure gift, because the characteristic of giving, liberality, is lacking. This can also be concluded from the following fragment. In this fragment a distinction is made between pure giving (*donare*) and giving as a kind of recompense. The verb *remunerare* is used for such recompense:

²⁰ See also R. ZIMMERMANN, *The Law of Obligations, Roman Foundations of the Civilian Tradition*. Oxford 1996, 415: “[...] a visible sign of his estimation, with which he, in turn, honoured the *mandatarius*. This honorarium, as it came indeed to be called, was a ‘remuneration’ in the true sense of the word: a present given for a cause (‘munus’), [...]”. For a general overview of the nature of a ‘donation rémunératoire’ see P. TIMBAL, *Des donations rémunératoires en droit romain et en droit français*. Paris 1925, 7–59.

²¹ Cf. D. 46,1,16,4.

²² In this article I do not deal further with the different types of gifts, see D. 39,5,1, pr.

²³ For the discussion about the juridical nature of remuneration (‘un acte a titre gratuit’ or ‘un acte a titre onéreux’), see TIMBAL, *Des donations rémunératoires* (as note 20) 15–41.

²⁴ *Ulpianus libro quinto decimo ad edictum*: “[...] *Nec si donaverint, locupletiores facti videbuntur, quamvis ad remunerandum sibi aliquem naturaliter obligaverunt. Plane si $\alpha\upsilon\tau\iota\delta\omicron\rho\omicron\nu$ acceperunt, dicendum est eatenus locupletiores factos, quatenus acceperunt: velut genus quoddam hoc esset permutationis*”.

²⁵ Cf. D. 15,3,10,7, in which a gift (*donare*) from a master with the intention to remunerate (*remunerare*) is not considered enrichment. Cf. M. T. GRIFFIN, *Seneca on society: a guide to De Beneficiis*. Oxford 2013.

D. 39,5,27:

A young man called Aquilius Regulus wrote to the rhetor Nicostratus as follows: “In view of the fact that you were always with my father and that you benefited me by your eloquence and attention, I give and grant to you the right to live in and make use of such and such an apartment”. When Regulus died Nicostratus was subjected to a dispute about his right of habitation and when he consulted me on the matter, I said that it was a defensible view that it was not a case of simple gift but that Regulus had rewarded Nicostratus’s services as a *magister* with a kind of recompense (*quadam mercede*) and that, consequently, the gift should not be held to be invalid at any future date. [...].²⁶

The gift for the training in eloquence is not construed as a pure gift (*donare*), but as recompense for what Aquilius Regulus was able to learn in the course of Nicostratus’ association with his father. Nicostratus did that as a favor, not as an (engaged) teacher of Aquilius Regulus.²⁷ It should be noted that, in this case, the reward for those services was not given in the form of a gift in return, but in the form of a kind of payment, namely (*qua*) *merces*.²⁸ Nicostratus was able to use an apartment free of charge, which, of course, had monetary value. But it was not a real payment either; it was not paid or agreed during the teaching. A monetary reward is meant here, but no pure *merces*. It is remarkable that this is the only fragment in which *remunerare* is given shape with regards to *merces*, although not pure *merces*, but this is probably due to the comparison with regular education. The point was to allow Nicostratus to use the apartment. It is odd that the word *merces* is used, because normally speaking, *merces* is the financial recompense in the contract *locatio conductio*.²⁹ For instance, among others, teachers in free studies, namely eloquence, literature teachers, land surveyors and physicians could claim *merces* for their services.³⁰ Such *merces* should expressly *not* be construed as a gift, as is demonstrated in the following:

D. 39,5,19,1:

Labeo writes that recompense for services of the sort ‘if I support you’, ‘if I give security for you’, ‘if in any matter you make use of my services or influence’, does not come within the category of gift.³¹

In the aforementioned fragment (D. 39,5,27) *qua merces* is mentioned, an impure *merces*. There was a friendly relationship between the father of Aquilius Regulus and Nicostratus, and not specifically a request to teach Aquilius Regulus. In addition, it could be that a close relation or friend rendered a specially requested service, in which case it was customary to render this service gratuitously. He

²⁶ *Papinianus libro vicensimo nono quaestionum*: ‘*Aquilius Regulus iuvenis ad Nicostratum rhetorem ita scripsit: “Quoniam et cum patre meo semper fuisti et me eloquentia et diligentia tua meliorem reddidisti, dono et permitto tibi habitare in illo cenaculo eoque uti”. Defuncto Regulo controversiam habitationis patiebatur Nicostratus et cum de ea re mecum contulisset, dixi posse defendi non meram donationem esse, verum officium magistri quadam mercede remuneratum Regulum ideoque non videri donationem sequentis temporis irritam esse. [...]”*’.

²⁷ Cf. also BT 2133/9 (B 47,1,26 = D. 39,5,27) (...) οὐκ ἔστι δωρεά, ἀλλὰ διὰ μισθὸν ἀντίδωρον (...).

²⁸ BERGER, *Encyclopedic dictionary* (as note 16) 581 *Merces*: “A payment (wages, salary, rent) in money agreed upon in a lease or hire of services [...]. A recompense paid for any kind of services, without a preceding agreement (e.g., for saving one’s life) is called also *merces*”.

²⁹ M. KASER, *Das römische Privatrecht I (= RP I)*. München 21971, 566 ff. For the history of *merces*, see H. A. KAUFMANN, *Die altrömische Miete: ihre Zusammenhänge mit Gesellschaft, Wirtschaft und staatlicher Vermögensverwaltung*. Köln 1964, 136 ff.

³⁰ D. 50,13,1,pr.–2.

³¹ *Ulpianus libro septuagesimo sexto ad edictum*: ‘*Labeo scribit extra causam donationum esse talium officiorum mercedes ut puta: si tibi adfuero, si satis pro te dedero, si qualibet in re opera vel gratia mea usus fueris*’.

could, however, receive an *honorarium* in that case.³² We see this *honorarium* again in the following fragment as the specific content of *remunerare*:

D. 11,6,1,pr.:

[...] The reason why the praetor has provided this action (*actio in factum*) is that the early lawyers held that when one engages someone like a surveyor, one does not hire him, but rather he provides his services as a favor (*beneficium*), and the payment (*remunerare*) he receives is by way of *honorarium* [...].³³

In this fragment it is clearly stated that there is no question of *locatio conductio*. The surveyor provided his services as a favour (*beneficium*), or as a gift, which socially obliges one to recompense him (a [moral] natural obligation). The payment as recompense is called an *honorarium*.³⁴ The next fragment explains what the foregoing means in legal terms:

D. 11,6,1,pr.:

This action only applies where there is *dolus malus*. For it is agreed that there is an entirely sufficient check on surveyors if, having no obligations *civiliter*, they can be sued for *dolus malus* alone. Accordingly, if the surveyor has been incompetent, the person who engaged him has only himself to blame; even if the surveyor has been negligent, he is not at risk, though obviously extreme negligence will be regarded as *dolus*. Even if he accepts payment (*merces*), he is not liable for every kind of negligence, because of the wording of the edict; for the praetor certainly knows that surveyors sometimes act for payment (*merces*).³⁵

In this fragment it is stated that the surveyor is not bound *civiliter*. He cannot be held liable under a contract, because a (moral) natural obligation is concerned. The praetor had an *actio in factum* included in the Edict for malicious intent (*dolus malus*) of the surveyor. It is remarkable that it is stated at the end of the fragment that the surveyor – even if he accepts payment (*sed et si mercedem accepit*) – is not liable for every kind of negligence. One could think of a specific agreement (*pactum*).

D. 11,6,1,pr. is the only fragment in the Corpus iuris where a *remunerare* explicitly refers to an *honorarium*. In section 3.2 a similar fragment is discussed. In this fragment, the reason to remunerate in the case of *mandatum* is indeed *honor*, but an *honorarium* is not explicitly mentioned. It is striking that – with the exception of D. 17,1,7 – *remunerare* is never combined with the term *salarium*.

³² KASER, RP I (as note 29) 569: “Wer als Angehöriger dieser Stände für einen anderen tätig wurde, pflegte unentgeltlich zu handeln, allenfalls in dessen Auftrag. Doch machte es das Herkommen dem Empfänger solcher Gefälligkeiten zu einer gefestigten sittlichen Pflicht, dem anderen Teil hierfür eine Ehrengabe (*honorarium, salarium*) darzubringen. Erst die späte Klassik sah dieses Honorar als rechtlich geschuldete Gegenleistung an, die aber nicht mit der *actio locati*, sondern nur in der *cognitio extra ordinem* eingeklagt werden konnte”.

³³ *Ulpianus libro vicensimo quarto ad edictum*: “[...] *Ideo autem hanc actionem proposuit, quia non crediderunt veteres inter talem personam locationem et conductionem esse, sed magis operam beneficium loco praeberi et id quod datur ei, ad remunerandum dari et inde honorarium appellari* [...]”.

³⁴ BERGER, Encyclopedic dictionary 488: Honorarium]: “A gift, an *honorarium* paid (under the Principate) to persons exercising liberal professions (lawyers, teachers, physicians, architects, etc.). For physical labor a *merces* was paid, *honorarium* indicated the compensation for higher, intellectual services. [...] The payment of an *honorarium* could be enforced through extraordinary proceedings (*cognitio extra ordinem*) in which gradually the principle was recognized that such kind of professional services should be recompensed. [...]”.

³⁵ *Ulpianus libro vicensimo quarto ad edictum*: “*Haec actio dolum malum dumtaxat exigit: visum est enim satis abundeque coerceri mensorem, si dolus malus solus conveniatur eius hominis, qui civiliter obligatus non est. Proinde si imperite versatus est, sibi imputare debet qui eum adhibuit: sed et si neglegenter, aequè mensor securus erit: lata culpa plane dolo comparabitur. Sed et si mercedem accepit, non omnem culpam eum praestare propter verba edicti: utique enim scit praetor et mercede eos intervenire*”.

In the time of classical law, it was generally accepted that services from the *artes liberales*, such as those of a lawyer (*advocatus*) – just as an instructor in law and a philosopher³⁶ – were rewarded by an *honorarium*.³⁷ The lawyer did not ask to be paid.³⁸ Payment of the *honorarium* could not be enforced by law because these *artes liberales* were not considered professions, but the use of their services did create a (moral) natural obligation. In late classical jurisprudence this changes due to a change in social perceptions in the course of the Principate. Receiving a sum of money in exchange for services was no longer deemed a humiliation and the low-class connotation of *salarium* disappeared. In addition, receipt of a clearly specified and agreed *salarium* – also for imperial and senatorial officials – was customary.³⁹ In this institutionalization of *salaria* in the context of the organization of the state, we also come upon the military.⁴⁰ The positions of these officials and soldiers arises from the *munus*, the duty to hold a public office or perform a public duty. The gift in return from the emperor was the *salarium*, a payment in money.

In the Digest we therefore find different – albeit a limited number of – payments that can be construed as remuneration, namely (*qua*) *merces*, ἀντίδωρον and *honorarium*. These forms of remuneration cannot be enforced by law. *Salarium* is – with the exception of D. 17,1,7 – never combined with *remunerare*. Which permitted payments were indeed possible under the contract of *mandatum*?

3.2 PAYMENT UNDER *MANDATUM*

A mandate (*mandatum*) is a contract by which one party, the mandatory (*mandatarius*, also called *procurator*), binds himself to do something for the other party, the mandator (*mandatory* or principal).⁴¹ This contract arises through pure consensus between the parties. According to the Institutes of the second century jurist Gaius,⁴² the mandate is a gratuitous contract:⁴³

³⁶ See D. 50,13,1,4–5.

³⁷ ZIMMERMANN, The Law of Obligations (as note 20) 415. BERGER, Encyclopedic dictionary 609: Operae liberales “Services rendered by persons exercising a profession worthy of a free (*liber*) man, primarily intellectuals (lawyers, physicians, architects, landsurveyors, etc.). The *operae liberales* could not be the object of contract of hire (*locatio conductio operarum*). But payment for such services could be claimed through proceedings of *cognitio extra ordinem*”. See for the *artes liberales* for example A. BERNARD, La rémunération des professions libérales en droit romain classique. Paris 1936; J. MICHEL, Gratuité en droit romain. Bruxelles 1962, 198–232; K. VISKY, Geistige Arbeit und die “Artes liberales” in den Quellen des römischen Rechts. Budapest 1977. Cf. the agreed payment in D. 17,1,6,7 which could be claimed by an *actio mandatio utilis*.

³⁸ The *honorarium* for a lawyer had to meet certain conditions (D. 50,13, 1,10). It is striking that in the same fragment (D. 50,13,1,13) in relation to the payment of a lawyer, a different remuneration (*merces*) is unabashedly mentioned. In this case, the heirs of the deceased lawyer claimed payment for his services rendered. It is probably impossible to call this payment an *honorarium*, as someone *other* than the lawyer is claiming it. It could also be that in this case the services of the lawyer had already been construed as being an employment contract (*locatio conductio*). Cf. D. 19,2,38,1 in which *merces* and *honorarium* are mentioned separately.

³⁹ ZIMMERMANN, The Law of Obligations 416–418; See A. BÜRGE, Salarium und ähnliche Leistungsentgelte beim *mandatum*, in: *Mandatum und Verwandtes. Beiträge zum römischen und modernen Recht*, ed. D. Nörr and S. Nishimura. Berlin 1993, 319–338, especially 324–329. See also R. VAN DEN BERGH, A rule must arise from the law as it is – and it is not cast in stone. *Fundamina* 20–2 (2014) 965–971. In this article the author emphasizes that *aequitas* was the reason for a reward, because it was unfair that professional services not be rewarded. See, for example, D. 50,9,4,2; D. 50,13,4; C. 10,53,6,1.

⁴⁰ BÜRGE, Salarium und ähnliche Leistungsentgelte (as note 39) 333. Cf. ZIMMERMANN, The Law of Obligations 417.

⁴¹ For the origin of the term *mandatum*, see KASER, RP I, 577 n. 1.

⁴² For Gaius see Juristen. Ein biographisches Lexikon: Von der Antike bis zum 20. Jahrhundert, ed. J. Stolleis. Munich 1995, 229–231.

⁴³ For the mandate as a gratuitous contract, see A. WATSON, Contract of mandate in Roman law. Oxford 1961 (reprint Aalen 1984) 102–111; F. DUMONT, La gratuité du mandat en droit romain, in: *Studi in onore di Vincenzo Arangio-Ruiz*, II. Napoli 1953, 307–322; MICHEL, Gratuité en droit romain (as note 37) 168–197; KASER, RP I 577; ZIMMERMANN, The Law of Obligations 415–418.

Gaius 3,162:

Lastly, it is important to notice that wherever I give something to be done for nothing in circumstances in which, had I fixed a *merces*, there would have been a contract of *locatio conductio*, the *actio mandati* lies, for instance, if I give clothes to a cleaner for cleaning or for some other treatment or to a tailor for repair.⁴⁴

Inst. 3,26,13:

Lastly, it is important to notice that a *mandatum* which is not gratuitous falls under a different contractual head. Once a *merces* is made, the transaction becomes *locatio conductio*. As we have said, the general rule is that if a contract of *mandatum* or *depositum* is formed when a task is undertaken without a *merces*, on the same facts if a *merces* is made the contract become hire. So, if clothes are given to a cleaner for cleaning or for some other treatment, or a tailor for repair, the action which lies if no *merces* is fixed or promised is the *actio mandati*.⁴⁵

When payment (*merces*) is agreed, the contract must be classified as *locatio conductio*.⁴⁶ The same is also stated in a Digest fragment, although the use of the word *potius* here seems to entail some doubt. This fragment also points to the origin of the *mandatum gratuitum*:

D. 17,1,1,4:

There is no mandate unless it is gratuitous. The reason is that it derives its origins from duty and friendship, and the fact is that payment for services rendered is incompatible with this duty. For if money is involved, the matter rather pertains to *locatio conductio*.⁴⁷

It was one of the moral obligations of the Romans to render a service gratuitously in the interest of someone else. The *mandatum* was, for instance, interpreted as a task of duty and friendship. In that case, there was (most likely) a social obligation – a (moral) natural obligation – to render a service in return or to show gratitude in another way (*remunerare*). The case and its legal consequence can be compared with fragments D. 11,6,1,pr. and 1 from section 3. 1. However, as soon as this was done

⁴⁴ ‘*In summa sciendum <est, quotiens> aliquid gratis <faciendum> dederim, quo nomine, si mercedem statuisssem, locatio et conductio contraheretur, mandati esse actionem; ueluti si fulloni polienda curandaue uestimenta <dederim> aut sarcinatori sarcienda*’. The translation from Gaius’ Institutes is based on W.M. GORDON – O.F. ROBINSON, *The Institutes of Gaius*. Translated with an Introduction; with the Latin Text of Seckel and Kuebler. London 1988.

⁴⁵ ‘*In summa sciendum est mandatum, nisi gratuitum sit, in aliam formam negotii cadere: nam mercede constituta, incipit locatio et conductio esse. et ut generaliter dixerimus: quibus casibus, sine mercede suscepto officio, mandati aut depositi contrahitur negotium, his casibus, interveniente mercede, locatio et conductio contrahi intellegitur. et ideo si fulloni polienda curandave vestimenta dederis aut sarcinatori sarcienda, nulla mercede constituta neque promissa, mandati competit actio*’. The translation from Justinian’s Institutes is based on P. BIRKS and G. MCLEOD, *Justinian’s Institutes*. Translated with an Introduction; with the Latin Text of Paul Krueger. Ithaca, New York 1987.

Cf. D. 19,5,5,2 *Paulus libro quinto quaestionum*: ‘*Et si quidem pecuniam dem, ut rem accipiam, emptio et venditio est: sin autem rem do, ut rem accipiam, quia non placet permutationem rerum emptionem esse, dubium non est nasci civilem obligationem, in qua actione id veniet, non ut reddas quod acceperis, sed ut damneris mihi, quanti interest mea illud de quo convenit accipere: vel si meum recipere velim, repetatur quod datum est, quasi ob rem datum re non secuta. Sed si Scyphos tibi dedi, ut Stichum mihi dares, periculo meo Stichus erit ac tu dumtaxat culpam praestare debes. Explicitus est articulus ille do ut des*’. The *actio praescriptis verbis* applies if money has been paid, but the action is of such a nature that contracting (*locatio conductio*) is impossible or if – as is stated in D. 19,5,22 – after entering into the contract, the parties discussed the remuneration to be given.

⁴⁶ There is, however, one fragment in D. 17,1, namely D. 17,1,26,8, where the mandatory seems indeed to be able to claim payment in the form of *merces* in case of a *mandatum*. I do not deal with this specifically, because that would not be entirely appropriate in this context. I return to this specific fragment in a separate article (H. DE JONG, *The benefit to Romanists of using the Basilica: the example of B. 14,1,26,8* [D. 17,1,26,8]. *Tijdschrift voor Rechtsgeschiedenis* 84 [2016] 423–436).

⁴⁷ *Paulus libro trigensimo secundo ad edictum*: ‘*Mandatum nisi gratuitum nullum est: nam originem ex officio atque amicitia trahit, contrarium ergo est officio merces: interveniente enim pecunia res ad locationem et conductionem potius respicit*’.

with money (which was not appropriate), the friendship was degraded to work for pay and the giver humiliated.

In this title, too, – just as it became clear in the preceding section – a distinction is made between *donare* and *remunerare*.⁴⁸ In the following two fragments no specific shape is given to *remunerare*:

D. 17,1,10,13:

If a creditor releases a guarantor [by *acceptilatio*] with the intention of making a gift, I think that if the creditor wished to remunerate the guarantor, the latter is entitled to an *actio mandati*. [...]⁴⁹

D. 17,1,12,pr.:

If, however, [a creditor] renounces his action against a guarantor, not by way of remuneration, but primarily with a view to making a gift, [the guarantor] will not have the *actio mandati*.⁵⁰

If the creditor has renounced his action against the guarantor with the intention of remunerating (*remunerare*) the guarantor, the guarantor will then have the *actio mandati* against the debtor. Such *remunerare* should be construed as a gift in return from the creditor to the guarantor, because the guarantor has rendered him a service and this is not equated with fulfilling the guarantor's guarantee (otherwise it would not be a gift in return). This *remunerare* therefore concerns the personal creditor and the guarantor. The guarantor is now deemed to have paid the creditor and he held the mandator liable for this with the *actio mandati*. If the creditor renounces the action against the guarantor as a pure gift (*donare*), the guarantor will not have an *actio mandati* against the debtor. The guarantor will be deemed not to have paid the creditor. Where there is no gift in return, no previous service has been provided by the guarantor either, and nothing can be equated with a payment. This is different if a third party gives a gift to the guarantor personally, as in D. 17,1,26,3, where the third party cancels the debt of the creditor who is his debtor (and this is then equated with the debt that the guarantor guarantees).⁵¹ This gift has nothing to do with the debt the debtor has to the creditor. The guarantor is then indeed deemed to have paid this debt, and he can apply the *actio mandati*.

Although the *mandatum* had to be gratuitous, *remunerare* was possible. This is dealt with specifically in the following fragments, and *remunerare* is substantiated. It concerns payment in the form of a term not explicitly mentioned in the Digest which is based on *honor* – an *honorarium* – or a clearly specified *salarium*.⁵²

D. 17,1,6,pr.:

Should there be an *honorarium* by way of remuneration, the *actio mandati* will lie.⁵³

⁴⁸ Paligenetically, these two fragments follow each other. See O. LENEL, *Palingenesia iuris civilis*, II. Leipzig 1889 (reprint Graz 1960) Fr. 910.

⁴⁹ *Ulpianus libro trigensimo primo ad edictum*: ‘*Si fideiussori donationis causa acceptum factum sit a creditore, puto, si fideiussorem remunerari voluit creditor, habere eum mandati actionem*: [...].’

⁵⁰ *Ulpianus libro trigensimo primo ad edictum*: ‘*Si vero non remunerandi causa, sed principaliter donando fideiussori remisit actionem, mandati eum non acturum*’.

⁵¹ *Paulus libro trigensimo secundo ad edictum*: ‘*Si is, qui fideiussori donare vult, creditorem eius habeat debitorem suum eumque liberaverit, continuo aget fideiussor mandati, quatenus nihil intersit, utrum nummos solverit creditori an eum liberaverit*’.

⁵² BERGER, *Encyclopedic dictionary* 689 (*Salarium*): ‘An *honorarium* given to persons exercising a liberal profession (*ars liberalis*), such as physicians, teachers, and the like, who enjoyed high esteem in society. In municipalities the municipal council could grant such persons a yearly salary. Augustus introduced a fixed salary for public officials serving in Italy and overseas. The sum was understood to be an allowance for covering living expenses (*salarium* = money for salt). [...] the regular soldier's pay = *stipendium*’.

⁵³ *Ulpianus libro trigensimo primo ad edictum*: ‘*Si remunerandi gratia honor intervenit, erit mandati actio*’.

D. 17,1,7:

If proceedings have been started *extra ordinem* to obtain a *salarium* which it has been agreed to pay to a *procurator*, it will have to be considered whether his principal wished to remunerate him for his services and thus the terms agreed ought to be honored, or whether, contrary to sound morals, the *procurator* has undertaken the risk of the suits [he is conducting] for a consideration in the hope of obtaining a larger sum [for his efforts].⁵⁴

C. 4,35,1:

You can bring an *actio mandati* against the person whose business was transacted by you, to recover the money, together with interest, which you paid out (for him) from your own resources or which you received from others as a loan. The matter of *salarium* which he promised you will be investigated by the president of the province.⁵⁵

The first two fragments concern *remunerare*. The first fragment relates to an honorary gift (*honorarium*), and the second fragment relates to remuneration (*salarium*) for the efforts (*labor*) of the mandatory. The mandatory in this case was a *procurator*. As already stated in section 3.1, payment of the *honorarium* could not be enforced by law, because it concerned a (moral) natural obligation. This appears to be different for the *salarium*. Agreeing a *salarium* as a mandatory was possible if the work could not be arranged as an employment contract (the performance of unskilled, physical labor for payment of wages) or as an award of work (achieving a result with the other party's assets). The *salarium* was claimed *extra ordinem* (D. 17,1,7), in other words, payment of an agreed *salarium* was enforced in proceedings before the magistrate, i.e. provincial governor (C. 4,35,1). Unlike the *honorarium*, which cannot be enforced by law, one can call this a semi-natural obligation. The old legal institution of *mandatum* actually remained unchanged: one could not claim an *honorarium* or a *salarium* with the *actio mandati*, as for the ordinary procedure it was a natural obligation. But one could claim an agreed payment (*salarium*) *extra ordinem*, if the mandator was unwilling to pay it. Thus, in the extraordinary procedure it was an enforceable obligation (cf. the *fideicommissum*). The principle in fragment 7 is worked out in more detail in the following two fragments, in which it is stipulated that an indefinite *salarium* is not possible:

D. 17,1,56,3:

A *salarium* depending on an indefinite unilateral promise is not properly sued for either *extra ordinem* or by an *actio mandati* to establish a *salarium* for you.⁵⁶

This text also stems from D. 17,1,7 from Papinianus' Responsa.

C. 4,35,17:

Suit cannot be brought for an *salarium* proffered in uncertain terms.⁵⁷

⁵⁴ Papinianus libro tertio responsorum: ‘Salarium procuratori constitutum si extra ordinem peti coeperit, considerandum erit, laborem dominus remunerare voluerit atque ideo fidem adhiberi placitis oporteat an eventum litium maioris pecuniae praemio contra bonos mores procurator redemerit’.

⁵⁵ Imp. Severus et Antonius AA. Leonidae: ‘Adversus eum, cuius negotia gesta sunt, de pecunia, quam de propriis opibus vel ab aliis mutuo acceptam erogasti, mandati actione pro sorte et usuris potes experiri: de salario quod promisit a praeside provinciae cognitio praebetur’. Translations from the Code are based on F. H. Blume's translation of the Code (<http://www.uwo.edu/lawlib/blume-justinian/ajc-edition-2/books/>).

⁵⁶ Papinianus libro tertio responsorum: ‘Salarium incertae pollicitationis neque extra ordinem recte petitur neque iudicio mandati, ut salarium tibi constituat’. See O. LENEL, Palingenesia iuris civilis, I. Leipzig 1889 (reprint Graz 1960) Fr. 462–463, 893.

⁵⁷ Imp. Diocletianus et Maximianus AA. et CC. Aurelio Gorgonio. Salarium incertae pollicitationis peti non potest. [294?]

Only a clearly specified *salarium* can be claimed. The word *salarium* also appears in fragment D. 17,1,10,9 :

D.17,1,10,9:

[...] indeed, if he has incurred any expenses while traveling to the estates [of his principal] for the purpose of transporting the fruits, I think he should take these expenses, too, into account, unless he was in salaried employment and it was agreed that he should meet the expenses of such journeys out of his own pocket, that is, out of his *salarium*.⁵⁸

From this fragment dealing with the costs it can be concluded that a *procurator* can claim that, strictly speaking, the costs are not part of the *salarium*. They can be part of it, but in that case this must have been specifically agreed.

The *mandatum gratuitum* not only means that – except for an *honorarium* and *salarium* – the mandatory may not receive any payment, but also that he may not gain anything from the *mandatum*:

D. 17,1,36,1:

[...] But neither ought you to make gain for yourself for this reason, because mandate ought to be gratuitous [...].⁵⁹

4. A NEW READING OF THE STEPHANOS SCHOLION

4.1 THREE ARGUMENTS AGAINST THE DISTINCTION BY MATHEEUSSEN

Mattheussen read the end of the scholion as follows: [...] Ὡσπερ οὖν οὐ διὰ τοῦ διδομένου σαλαρίου, <οὐδὲ διὰ τοῦ ὀρισθέντος>, ὡς ὁ Οὐλπιανὸς ἐν τῷ ζ'. διγ. τοῦ παρόντος τιτ. φησίν· τότε ἀπαίτησιν ἔχει τὸ ὀρισθὲν σαλάριον, ἐν ᾧ σύμμετρόν ἐστιν. Ἐξτρα ὄρδινεμ δὲ αὐτὸ ἀπαιτεῖσθαί φησιν. A careful study of the manuscript – that is of fol. 129v⁶⁰ – led me to the following reading.⁶¹ For the purposes of this article, only the most relevant passage is printed in bold type. This concerns the reference to fragment 7 from D. 17,1:

Ca 3 ad B. 14,1,1,4 = D. 17,1,1,4 (BS 700/17–25 [Stephanos]):⁶²

Τοῦ Στεφάνου. Σημείωσαι, ὅτι κατὰ χάριν εἶναι δεῖ τὸ μανδάτον· μισθὸς γὰρ ὀρισθεὶς ἀμείβει τοῦ μανδάτου τὴν φύσιν καὶ ποιεῖ λοιπὸν λοκατίων καὶ κονδουκτίων τὸ συνάλλαγμα. Ἐτερον δὲ ἐστίν, εἰ σαλάριον ἐχορήγησεν ὁ ἐντειλάμενος ἢ ἀντίδωρον δέδωκεν· ἐπὶ τούτοις γὰρ μένει ἢ τοῦ μανδάτου φύσις ἐπὶ σχήματος σωζομένη καὶ οὐκ ἀμείβεται διὰ τοῦ διδομένου σαλαρίου, ὡς ὁ Οὐλπιανὸς ἐν τῷ ζ'. κεφ. τοῦ παρόντος τίτλου φησίν, **ὥσπερ οὖν οὐ διὰ τοῦ διδομένου σαλαρίου, ὡς ὁ Οὐλπιανὸς ἐν τῷ ζ'. διγ. τοῦ παρόντος τιτ. φησίν, ἔνθα καὶ τοῦτο προστίθῃσι, τότε τὴν ἀπαίτησιν ἔχει τὸ ὀρισθὲν σαλάριον, ἐν ᾧ σύμμετρόν ἐστιν. Ἐξτρα ὄρδινεμ δὲ αὐτὸ ἀπαιτεῖσθαί φησιν.**

By Stephanos. Note that the mandate must be based on a favor; for a fixed payment changes the nature of the mandate and then leads to the contract *locatio* and *conductio*. This is different if the principal

⁵⁸ *Ulpianus libro trigensimo primo ad edictum*: '[...] sed et si ad vecturas suas, dum excurrit in praedia, sumptum fecit, puto hos quoque sumptus reputare eum oportere, nisi si salariarius fuit et hoc convenit, ut sumptus de suo faceret ad haec itinera, hoc est de salario'.

⁵⁹ *Iavolenus libro septimo ex Cassio*: '[...] Sed nec lucrum tibi ex hac causa acquirere debes, cum mandatum gratuitum esse debet: [...]'].

⁶⁰ For the manuscript, see note 11 above.

⁶¹ I thank Diether Roderich Reinsch / Berlin for the correction of my rendition of the Basilica scholion.

⁶² For the same Greek text (other readings), see supra section 2.

has paid a *salarium* or has given a gift in return; for in these cases the nature of the mandate is maintained in its own form, and it is not changed by the paid *salarium*, as Ulpianus says in chapter 6 of the title in question, thus not by the paid *salarium*, as Ulpianus says in fragment 7 of the title in question; where he also adds to this that the fixed *salarium* gives cause for a claim, provided it is appropriate. He says that this is claimed *extra ordinem*.⁶³

The words [...] ὡς ὁ Οὐλπιανὸς ἐν τῷ ζ´. κεφ. τοῦ παρόντος τίτλου φησίν. Ὡσπερ οὖν οὐ διὰ τοῦ διδομένου σαλαρίου, ὡς ὁ Οὐλπιανὸς ἐν τῷ ζ´. διγ. τοῦ παρόντος τιτ. φησίν[...] stand out in three ways. First of all, the references come from two different periods. Matheussen, unfortunately, does not point this out. The reference to κεφ. (i.e. κεφάλαιον) actually refers to a Basilica chapter, and the reference with διγ. (i.e. δίγιστον) refers to a Digest fragment. The scholion thus seems to have been adapted.⁶⁴ Secondly, the duplication – with a minor variation – of διὰ τοῦ διδομένου σαλαρίου, ὡς ὁ Οὐλπιανὸς ἐν τῷ ζ´. κεφ. τοῦ παρόντος τίτλου φησίν stands out. The second reference with fragment 7 is, as Matheussen also notes, not by Ulpianus, but by Papinianus. The Groningen edition has attempted to solve the duplication with the conjecture <οὐδὲ διὰ τοῦ ὀρισθέντος>, so that Matheussen could make a distinction between the two fragments 6 and 7.⁶⁵ But now that ἔνθα καὶ τοῦτο προστίθησιν has been added to the text in the new reading, the conjecture has become meaningless. Namely, the words ἔνθα καὶ τοῦτο προστίθησιν indicate that the content of the following sentence is an addition to what preceded it.⁶⁶ The preceding sentence with διὰ τοῦ διδομένου σαλαρίου is specified in more detail. This case thus concerns a permitted σαλάριον. And that σαλάριον must be clearly specified and appropriate.⁶⁷ Thirdly, it is striking that a verb is missing in the sentence ὥσπερ ... ὡς. It is an unclear linking-up of phrases. Based on the foregoing, it must be concluded that the first phrase ὡς ὁ Οὐλπιανὸς ἐν τῷ ζ´. κεφ. τοῦ παρόντος τίτλου φησίν was either added by mistake or was passed on incompletely. The conclusion is – and this is also supported by the other scholia discussed below – that the distinction mentioned by Matheussen between διδομένον σαλάριον (salaire donné spontanément) and σαλάριον ὀρισθέν (salaire convenu) does not exist.⁶⁸ But what distinction did Stephanos himself make?

4.2 ΤΟ ΑΝΤΙΔΩΡΟΝ ΑΝΔ ΤΟ ΣΑΛΑΡΙΟΝ

The scholion discussed above and a scholion by Stephanos to be discussed below give arguments for an interpretation of the scholion which differs from that of Matheussen, and from that of the distinction between fragments 6 and 7 from D. 17,1. Two examples where payment is permitted

⁶³ The Greek fragments are translated by the author.

⁶⁴ See DE JONG, Using the Basilica 307 and 312.

⁶⁵ See also the Index BS 708/31–33: Ἐνετειλάμην σοι τὰ ἐμὰ διοικῆσαι πράγματα ἢ ἕτερόν τι πράξει. Δίδοται μοι ἡ μανδάτι, καὶ εἴ τι προσήγαγόν σοι τιμῶν καὶ τὸν σὸν ἀμειβόμενος κάματον. ‘I have given you a mandate to manage my affairs or to do something else. The *actio mandati* is given to me, even if I have brought something to you, honoring you and rewarding your efforts’. An index is a free Greek translation of the Latin text (VAN DER WAL/LOKIN, Delineatio [as note 14] 40).

⁶⁶ In the Basilica scholia the expression ‘ἔνθα καὶ τοῦτο προστίθησιν’ appears two more times. See BS 1113/10–14 [anonymous] and BS 1766/11–27 [Stephanos?].

⁶⁷ See BS 815/8 (P) and BS 711/16–712/25. In the latter scholion it states: [...] σκοπεῖσθαι χρή, πότερον ἀμειβόμενος τὸν τοῦ προκουράτωρος κάματον ὁ τῆς δίκης δεσπότης ὄρισε σύμμετρόν τι σαλάριον [...] ‘it should be examined whether the owner of the process, in rewarding the efforts of the *procurator*, has stipulated an appropriate *salarium* [...]’. It is striking that Matheussen does not refer to these scholia in discussing the words ἐν ᾧ σύμμετρόν ἐστίν (la réductibilité du salaire). These scholia refer to the appropriateness of the *salarium*. The *salarium* must be in accordance with the efforts made (MATHEUSSEN, L’interprétation de la gratuité du mandat 55). Cf. BS 715/16–22 [Stephanos] with a reference to the excessive and impermissible *honoraria* (C. 2,6,5).

⁶⁸ MATHEUSSEN, L’interprétation de la gratuité du mandat 53.

in the case of a *mandatum* are mentioned in the Digest. As Stephanos says at the beginning of his comment, a *mandatum* is based on obligingness (κατὰ χάριν).⁶⁹ A clearly specified payment turns the contract of *mandatum* into a contract of *locatio conductio*. The mandator can give an honorary stipend (*remunerandi gratia honor*) or pay the mandatory a *salarium* (explicitly mentioned in 7).⁷⁰ Stephanos gives these terms the following names: σαλάριον for *salarium* and ἀντίδωρον for the honorary fee. Stephanos continues by referring in his comment to both cases (ἐπὶ τούτοις) and stating that in the case of these types of remuneration, the nature of the contract does not change into *locatio conductio*.⁷¹ This would indeed have been the case if μισθός were paid. The question, according to Stephanos, is how this ἀντίδωρον should be interpreted and where exactly this belongs. The word ἀντίδωρον is actually an (almost) literal, substantiated translation of *remunerare*, which appears in both fragments 6 and 7. *Remunerare* therefore relates not only to *honor* (6), but also to *salarium* (7). It is evident from the scholion that Stephanos makes a distinction between the two types of remuneration. He uses ἦ. Therefore, he does not equate the two terms σαλάριον and ἀντίδωρον. The next scholion by Stephanos at D. 17,1,6 gives a further definite answer:

Ca 3 ad B. 14,1,6 = D. 17,1,6 (BS 709/1–2 [Stephanos]):

Στεφάνου. Ἴδου ἐνταῦθα· σημείωσαι, ὅτι κἄν τι δωρήσωμαι τῷ ἐνταλθέντι, οὐκ ἐμποδίζεται τὸ μανδάτον.

By Stephanos. See here; note that even if I give something to the mandatory, the *mandatum* is not precluded.

Stephanos interprets the *remunerare* of an *honor* as a gift, namely – as we have seen above – a gift in return (ἀντίδωρον). This gift in return cannot be enforced by law, because a natural (moral) obligation is concerned. If the remuneration is linked to the profession of a lawyer, Stephanos then calls this an *honorarium* that was indeed enforceable in his time.⁷² This is also a gift in return (ἀντίδωρον). The *honorarium* apparently lost its pure nature as a (moral) natural obligation and became enforceable as a semi-natural obligation.⁷³ It is not clear whether all gifts in return are enforceable in Stephanos' theory. There is no evidence of this. Stephanos thus divides *remunerare* in cases of ἐντολή (*mandatum*) into ἀντίδωρον and σαλάριον. In doing so, he explicitly follows the distinction in the Digest between pure (unenforceable *secundum ordinem*) and semi-natural (enforceable *extra ordinem*) obligations.

5. THE ANONYMOS AND AN ANONYMOUS AUTHOR: ONOPAPION

The Anonymos does not seem to make the specific distinction by Stephanos between a ἀντίδωρον and a σαλάριον.⁷⁴

⁶⁹ See also the index in BS 700/12–16 [Stephanos]: Δεῖ τὸ μανδάτον εἶναι γρατούτον ἢτοι κατὰ χάριν· τὴν γὰρ ἀρχαιογονίαν ἐκ τοῦ καθήκοντος καὶ φιλίας ἔλκει· ἐναντιοῦται δὲ τούτοις ἡ τοῦ μισθοῦ δόσις· πρόδηλον γάρ, ὡς ὁ τῷ μανδάτῳ ὑπουργῶν ἐπὶ μισθῷ οὐ διὰ φιλίαν, ὅπερ ἐπαγγέλλεται ἡ μανδάτι, ἀλλὰ διὰ τὸ κέρδος τοῦτο ποιεῖ· χρυσίου γὰρ διδομένου μίσθωσις καὶ ἐκμίσθωσις μᾶλλον ἢ μανδάτον ἐστίν. ‘The *mandatum* must be gratuitous, namely on the basis of obligingness; for its origin lies in showing obligingness and friendship; the payment of salary is inconsistent with this; for it is crystal clear that he who performs the mandate for payment does not do so on the basis of friendship, which is required for the *actio mandati*, but for gain; for when money is paid, there is rather *locatio* and *conductio* than *mandatum*’.

⁷⁰ See also BS 790/29–34 [Index]; BS 791/1 [Cyrillos]; BS 791/2–5 [Stephanos]. For Cyrillos, see SCHELTEMA, L' enseignement (as note 4) 5 (62).

⁷¹ Cf. also BS 639/23–29 [Stephanos]. In this scholion, Stephanos says that *depositum* must be gratuitous, because otherwise there would be a contract *locati conducti*.

⁷² BS 715/16–22 [Stephanos].

⁷³ See also note 32 above.

⁷⁴ For Anonymos, see N. VAN DER WAL, Wer war der ‘Enantiophanes’? *Tijdschrift voor Rechtsgeschiedenis* 48 (1980) 125–136, 125.

Ca 4 ad B. 14,1,1 = D. 17,1,1 (BS 700/26–28 [Anonymos]):

Τοῦ Ἀνωνύμου. Καλῶς καὶ ἐπὶ τοῦ μανδάτου κερδοῦκτον σαλάριον ὀρίζεται, ὡς ἐν τῇ ἀρχῇ τοῦ ζ´. καὶ ζ´. <διγ.> καὶ τοῦ νζ´. <διγ.> θεμ. προτελευτ.

By Anonymos. A specified *salarium* is rightly paid in the case of the *mandatum*, as stated at the beginning of fragments 6 and 7 and fragment 56, next-to-last case [56,3].

The Anonymos pastes the three main fragments with *salarium* together. He emphasizes that this must concern a *certum salarium* without explaining what he means by that.⁷⁵ Moreover, he uses the word *honorarium* as a synonym for *salarium*:

Ca 4 ad B. 14,1,6 = D. 17,1,6 (BS 709/2–3 [Anonymos]):

Τοῦ Ἀνωνύμου. Ἀνάγνωθι περὶ τῶν ὀνοραρίων διγ. ζ´. καὶ τὸ τέλος τοῦ α´. διγ. καὶ διγ. νζ´. θέμα προτελευτ.

By Anonymos. Read about the *honoraria* in fragment 7 and at the end of fragment 1 and in fragment 56, next-to-last case.

The Anonymos also connects the same fragments here, without making a distinction in the remuneration. The terms *σαλάριον* and *ὀνοράριον* are interchangeable.⁷⁶ There seems to be no question of an *ἀντίδωρον* (gift in return).

Another – anonymous – author of a *new* scholion also seems to want to use the word *honorarium* in this case. In an interlinear scholion at D. 17,1,6,pr. in relation to the word *ἀντίδωρον*, he refers to a comment by Thalelaios at C. 4,6,11.⁷⁷ This fragment deals with remuneration paid to an *συνήγορος* (*advocatus*). If the lawyer proves not to have complied with the agreement, the money has to be refunded. Thalelaios says the following and explicitly mentions the remuneration:

Pa 1 ad B. 24,1,39 = C. 4,6,11 (BS 1733/31–1734/2 [Thalelaios]):

Θαλελαίου. Ἐπειδὴ γὰρ τοῦτο οὔτε δωρεὰ οὔτε μισθός ἐστιν, ἀλλὰ καλεῖται ὀνοράριον, [...].

⁷⁵ In a scholion pertaining to B. 14,1,79 = C. 4,35,17 it is made more or less clear what is meant by *certum salarium*: Sch. Ca 1 ad B. 14,1,79 = C. 4,35,17 (BS 804/18–27): Ἐπηγγέλατο γὰρ μόνον δίδοναι σαλάριον μὴ εἰπὼν, πόσον. Οὐ δύναται δὲ ἀπαιτεῖσθαι· ἔξεστι γὰρ, αὐτὸν ... Διὰ ταῦτα γὰρ καὶ ἐπὶ τῶν ἐπερωτήσεων λέγομεν, ὅτι, ἔνθα τις ἐπηρωτήθη σίτον ἢ οἶνον, καὶ μὴ εἶπη μέτρον, ἄχρηστος ἢ ἐπερώτησις, ἐπεὶ διὰ τὸ σύμμετρόν τινα παρέχειν ἐκφυγεῖν ἔχουσι τὴν ἀγωγὴν. Δεῖ οὖν ὀρισεῖσθαι κατ’ ἐνιαυτὸν τυχόν, ἢ κατὰ μῆνα, ἢ καθ’ ἡμέραν τὸ σαλάριον. Εἰ δὲ ἦν ἐναγωγὴ ἐπὶ σαλαρίου, <ἐ>δυνάμεθα παρασχεῖν τὴν πραεσκρίπτις βέρβις. Ἀλλ’ ἐπειδὴ οὐδέποτε κινεῖται ἀγωγὴ ἐπὶ σαλαρίου, διὰ τοῦτο ἄχρηστον λέγομεν τὸ ἴνκερτον σαλάριον. Ὅτι δὲ τὸ ἴνκερτον σαλάριον οὐκ ἀπαιτεῖται, εἴρηται [ὡς] βιβ. ζ´. τῶν δερέβους τιτ. α´. διγ. λδ´. (56), ὅπερ ἐστὶν Παπιανοῦ. ‘For he stated that he would give only a *salarium*, not saying how much. A claim cannot be made. For it is possible ... That is why we say also regarding stipulations – that whenever someone stipulated wine or grain, and said nothing about the quantity, the stipulation is null and void. By providing some measure, they can avoid the action. The *salarium* must therefore be determined per year or per month or per day. If a complaint is made about a *salarium*, we can provide the *actio praescriptis verbis*. But because an action is never brought in relation to a *salarium*, we therefore say that an indefinite *salarium* is null and void. Because the indefinite *salarium* cannot be claimed, which is said in book 6 of *rebus*, title 1, fragment 34 (56), which is by Papinianus’.

⁷⁶ In the scholia, Anonymos points out twice that a *mandatum* must be gratuitous. In the first scholion at B. 14,1,32 (= D. 17,1,32) that is the case for an estate that would be accepted only if any losses were compensated. (BS 767/18–19 [Anonymos]). The second scholion at D. 14,1,48,2 (= D. 17,1,48,2) concerns the mandate to lend out to anyone you like (BS 797/6–7 [Anonymos]).

⁷⁷ BS 715/25–26: Ζῆτει βιβ. κδ´. τιτ. α´. κεφ. τελευτ. καὶ τὴν ἐκεῖ Θαλελαίου <παραγραφὴν>. ‘Search book 24, title 1, final chapter and the remark in it by Thalelaios’. Said Codex (534) fragment is C. 4,6,11: *Impp. Diocletianus et Maximianus AA. et CC. Stratonicae. ‘Advocationis causa datam pecuniam, si per eos qui acceperant, quominus susceptam fidem impleant, stetisse probetur, restituendam esse convenit’*. S. XVIIk. Ian. CC. Conss. For Thalelaios, see VAN DER WAL/LOKIN, *Delineatio* 42–43.

By Thalelaios. For, because this is neither a gift (out of liberality) nor salary, but is called an *honorarium*, [...]

The *honorarium* as a gift in return assumes a gift, but is called *causa data causa non secuta* here, as the title of C. 4,6 leads to this assumption. It cannot be concluded from this scholion that Thalelaios himself equates *salarium* and *honorarium*, given that *salarium* is not mentioned in C. 4,6,11.⁷⁸ On the other hand, the author of the scholion in which Thalelaios is mentioned does seem to equate these terms.

6. OLD AND NEW TERMS IN LATER BYZANTINE LAW

6.1. THE PRESENCE OF ΑΝΤΙΔΩΡΟΝ

We saw in D. 17,1,6,pr. that the term ἀντίδωρον was used for a gift in return in the high classical period. It is remarkable in itself that the Romans did not have their own term. How is this term used in the Basilica?

The word ἀντίδωρον appears ten times in the Basilica, as in the Basilica text B. 14,1,6,pr. (= D. 17,1,6,pr.) already put forward by Matheussen.⁷⁹ In this text, in manuscript codex Parisinus graecus 1352 (P) – although the scholion is at fragment 3 according to the Groningen edition – there is a striking scholion:⁸⁰

B. 14,1,6,pr. = D. 17,1,6,pr. (BT 738/17–18):

Ἰϋλι. Εἰ καὶ παρεντεθῆ ἀντίδωρον,⁸¹ χῶρα τῆ περι ἐντολῆς ἀγωγῆ.⁸²

By Ulpianus. Even if there was a gift in return in exchange for this, there is room for the *actio mandati*.

P 2 ad B. 14,1,6,pr. = D. 17,1,6,pr. (BS 815/13–15 [anonymous]):

Ἀντίδωρον – Εἰ δὲ δοθῆ τι παρὰ τοῦ ἐντειλαμένου τῷ ἐνταλθέντι, κακῶς διοικήσαντι ἐνάγει αὐτῷ ὁ ἐντειλάμενος, ἢ ὁ ἐνταλθεὶς πλείονα δαπανήσας ἐνάγει κατὰ τοῦ ἐντειλαμένου.

Gift in return – If the mandator gives something to the mandatory, then the mandator wrongfully complains against the person who has represented the affairs, or the mandatory complains against the mandator, because he has expended more.

In the first case, the mandator cannot reclaim because there is a natural obligation that has been fulfilled. In the second case, it is not entirely clear how the relationship between ἀντίδωρον and δαπάνη should be interpreted. Is δαπάνη an element of ἀντίδωρον or not? Based on the scholion, δαπάνη does indeed appear to be an element of ἀντίδωρον. After deduction of the costs, the *mandatarius* can keep some of his ἀντίδωρον as an *honorarium*. In this case the costs were, after all, higher than

⁷⁸ Cf. BS 154/26–155/12 [Thalelaios] and BS 155/13–17 [anonymous] at B. 8,2,89 = C. 2,12,15.

⁷⁹ The fragments not worked out in this article with ἀντίδωρον are: BT 130/9 (B. 5,2,1 = Nov. 120,1); BT 139/22 (B. 5,2,13 = Nov. 120,11); BT 741/19 (B 14,1,10,13 = D. 17,1,10,13); BT 743/1 (B 14,1,12,pr. = D. 17,1,12, pr.); BT 1902/6 (B 42,3,25,11 = D. 5,3,25,11); BT 2110/1 (B. 45,4,9,3 = C. 6,61,6,3); BT 2133/9 (B. 47,1,26 = D. 39,5,27).

⁸⁰ See BURGMANN (*et alii*), RHBR I (as note 11) no. 166.

⁸¹ At the word ἀντίδωρον the following interlinear scholion BS 715/23–24 is placed: Ζήτηι βιβ. β'. ττ. β'. κεφ. ρ'δ', ιη', σι'. περι τό, πόσα σημαίνει τὸ δόνουμ καὶ τὸ μόνουμ. 'Search book 2, title 2, chapter 194, 18 [16], 210 [214] about this, for what *donum* and *munus* mean'. These books correspond to D. 50,16,194, D. 50,16,18 and D. 50,16,214. See supra section 2.

⁸² In his translation of the Greek Basilica text, Bernard expressly points to the word καὶ, which is missing in D. 17,1,6, pr. (BERNARD, *La rémunération des professions libérales* [as note 37] 39–40). Cf. W. ERDMANN, *Freie Berufe und Arbeitsverträge in Rom. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 66 (1948) 567–571, 569.

previously assumed. The same manuscript contains an interlinear scholion at ἀντίδωρον: Onorario.⁸³ The gift in return seems to be construed as an *honorarium* in this manuscript.⁸⁴

In Basilica text 14,1 (= D. 17,1), ἀντίδωρον appears twice more, namely in D. 17,1,10,13 and D. 17,1,12, pr.⁸⁵ In these Basilica texts – just as in the Digest fragments – a clear distinction is made between the pure gift and the gift as recompense.⁸⁶ The following is stated in the Basilica text belonging to D. 17,1,12, pr.:

B. 14,1,12 pr = D. 17,1,12, pr. (BT 743/1–3):

Ἵπρι. Εἰ μέντοι μὴ ἐπ’ ἀντιδώρω, ἀλλ’ ἀπλῶς δωρούμενος ὁ δανειστής τῷ ἐγγυητῇ παρεχώρησεν, οὐκ ἔχει τὴν περὶ ἐντολῆς ἀγωγὴν.

By Ulpianus. If, however, the creditor renounces the action against the guarantor not as recompense, but simply as a gift, he does not have the *actio mandati*.

The Basilica gives substantively the same decision as D. 17,1,12, pr.⁸⁷ A gift to the guarantor obviates the *actio mandati*. The guarantor is deemed not to have paid the debt. In an *old* scholion at this fragment, it is pointed out that the giver has bound the receiver by nature to give a gift in return. A natural obligation exists. In this, the author refers to D. 5,3,25,11.⁸⁸ This Digest fragment is also referred to in a *new* scholion:⁸⁹

Ca 35 ad B. 14,1,12,pr = D. 17,1,10,12,pr. (BS 736/20–22):

Ἐπ’ ἀντιδώρω δηλονότι τῷ κατ’ ἐνέργειαν δοθέντι, μὴ μέντοιγε κατὰ φύσιν χρεωστούμενω· ὁ γὰρ δωρούμενος δοκεῖ φυσικῶς ἔχειν ἔνοχον τόν, πρὸς ὃν δωρεῖται, ὡς βιβ. μβ’. τιτ. α’. κεφ. κε’. θεμ. ζ’.

Naturally in the case of a gift in return that is given to him on the basis of a task, but is not owed to him by nature; for the giver appears to be bound by nature to the person to whom he gives the gift, as in book 42, title 1, chapter 25, case 6 (B. 42,1,25,11 = D. 5,3,25,11).

In BT 14,1,10,13 it is expressly stated that remuneration as ἀντίδωρον is permitted and the *actio mandati* can be applied. The following – anonymous – scholion is placed next to this text:

Ca 36 ad B. 14,1,10,13 = D. 17,1,10,13 (BS 723/31–724/9):

Δανεισάμενος ἐγὼ παρὰ Τίτιου ἔσχον ἐγγυητήν. Τίτιος δωρεᾶς χάριν ἀκεπιλατίονι τὸν ἐμὸν ἠλευθέρωσεν ἐγγυητήν. Εἰ μὲν ἐπ’ ἀντιδώρω (τυχὸν γὰρ ἤδη δεξάμενος ἦν τινας ὁ Τίτιος δωρεᾶς,

⁸³ BS 817/7 (P).

⁸⁴ Anonymos and an anonymous author also do this, see supra section 5 and n. 77. See ἀντίδωρον for *honorarium* for the remuneration of a land surveyor in BT 2808/8 (B. 60,9,1 = D. 11,6,1, pr.) with BS 3288/32 Οὐ γὰρ ἐστὶ μισθός, ἀλλ’ ἀντίδωρον. ‘For it is not salary, but a gift in return’. And BS 3289/18 [Cyrillos?]; BS 3289/22 [Cyrillos]. In the latter scholion, a ἡ ἀντιμισθία is also mentioned. See also BERNARD, La rémunération des professions liberales 106.

⁸⁵ Scholia in these fragments are BS 729/21; BS 729/30; BS 731/23; BS 731/27 [Enantios]. See for Enantios, VAN DER WAL, Wer war der ‘Enantiophanes’? (as note 74) 125–136.

⁸⁶ In this fragment, Timbal points to the incorrect reading in the Basilica text: “Mais écartons tout d’abord la lecture isolée des Basiliques (l. 14, tit. 1, th. 10 – Heimbach II, 90 (= BT 743/1–3 *HdJ*)) qui voient dans la loi 12 pr, *simpliciter* (ἀπλῶς *HdJ*) au lieu de *principaliter*, et créent ainsi une opposition entre la donation simple et la donation rémunératoire, qui n’existe pas dans le texte pur” (TIMBAL, Des donations rémunératoires 22–24, 23). Timbal sees a difference in the interpretation of the giver’s intention. In the first case (D. 17,1,10,13) the giver only wants to enrich the guarantor; in the second case (D. 17,1,12,pr.), he specifically wants to give to the guarantor *and* the debtor.

⁸⁷ For D. 17,1,12, pr., see note 50 above.

⁸⁸ BS 731/27–29 [Enantios].

⁸⁹ See also BS 736/23–29.

ἢ καὶ εὐεργετηθεὶς ἔν τισιν ὑπὸ τοῦ ἐμοῦ ἐγγυητοῦ) διὰ τοῦτο τὴν ἀκεπιλατίονα ἐποίησεν, ἐναχθήσομαι τῇ μανδάτι· δοκεῖ γὰρ τὰ προγεγενημένα εἰς τὸν Τίτιον καταβολὴ τρόπον τινὰ τοῦ χρέους εἶναι. [...]

When I borrowed from Titius, I engaged a guarantor for myself. Titius has granted discharge by way of a gift to my guarantor. If it had been a gift in return (for example Titius had received some gift or he was favored with those things by my guarantor) he would have granted formal discharge, and I would be held liable by the *actio mandati*; because the things that Titius received for this were deemed in one way or another to be payment of the debt. [...]

In this scholion – an index – it is clear that the creditor gives the remuneration as a result of a gift or favor by the guarantor. The remuneration has nothing to do with the *mandatum* itself, but since it is construed as a discharge, it amounts to payment of the debt. The guarantor can therefore subsequently bring the *actio mandati* against the debtor. The term ἀντίδωρον therefore still seems to be used in the original sense in later Byzantine law.

6.2. THE ABSENCE OF ΣΑΛΑΡΙΟΝ

We saw that Stephanos also used the term σαλάριον. How is σαλάριον used in the Basilica and how does it relate to other terms?

In the Basilica text, the word σαλάριον appears only once in the form of a quote.⁹⁰ It appears to have ceased to be used as an independent word in Byzantine law as a result of ‘exhellenismoi’, i.e. Greek renderings of Latin technical terms.⁹¹ The terms σαλάριον and ἀντίδωρον appear together in the *new* scholia only in the following fragment. The scholion is placed next to the word μίσθωσις from D. 17,1,1,4.

B. 14,1,1,4 = D. 17,1,1,4 (BT 737/9–10):

Κατὰ χάριν εἶναι δεῖ τὴν ἐντολήν· παρεντιθεμένων γὰρ χρημάτων μίσθωσις γίνεται.

The *mandatum* must always be gratuitous; for if money is paid, it is hire.

Ca 8 ad B. 14,1,1 = D. 17,1,1 (BS 702/21–703/5 [anonymous]):

Εἰ μήπω ἀντίδωρον δέδοται, ὡς τὸ ζ´. κεφ. φησὶν, ἢ σαλάριον συμπεφώνηται, ὡς τὸ ζ´. Τότε γὰρ πάλιν τὸ μανδάτον τετήρηται. Σαλάριον δὲ τὸ κέρτον νόει· τὸ γὰρ ἴνκερτον ἀπαίτησιν οὐκ ἔχει, οὔτε διὰ τῆς περὶ ἐντολῆς ἀγωγῆς, οὔτε ἐξτραορδιναρίως, ὡς τὸ παρατελευτ. θεμ. τοῦ νς´. κεφ. φησὶν καὶ τὸ οθ´. τὸ ἀφανὲς ἐπερωτηθὲν δόμα ἀπαίτησιν οὐκ ἔχει [...]

If a gift in return has not yet been given, as chapter 6 says, or a *salarium* has been agreed, as chapter 7 says. For in that case the *mandatum* is reconsidered. Bear in mind that the *salarium* must be clearly specified. Because there is no claim for the indefinite, not by way of the *actio mandati*, nor *extra ordinem*, as in the next-to-last case of chapter 56 and chapter 79. Remuneration that is stipulated without certainty has no claim. [...]

It should be noted that the anonymous author of the scholion uses the same terms (ἀντίδωρον and σαλάριον) as Stephanos. Perhaps he used the commentary by Stephanos? Like him, the anonymous

⁹⁰ BT 2192/16 (B. 48,4,41,6 = D. 40,5,41,6).

⁹¹ N. VAN DER WAL, Die Schreibweise der dem Lateinischen entlehnten Fachworte in der frühbyzantinischen Juristensprache. *Script XXXVII* 1 (1983) 50–52; N. VAN DER WAL, Der Basilikentext und die Griechischen Kommentare des sechsten Jahrhunderts, in: Synteleia Vincenzo Arangio-Ruiz, ed. A. Guarino – L. Labruna (*Biblioteca di Labeo* 2). Napoli 1964, 1159; 1161f.

author refers to the same fragments 6 and 7 in the scholion.⁹² In observing that the *salarium* must be clearly specified, the author refers to fragments D. 17,1,56,3 and C. 4,35,17, and the corresponding Basilica fragment 14,1,79, where the term δόμα for *salarium* from the Basilica text is used.⁹³

6.3 ANOTHER TERM FOR ΣΑΛΑΡΙΟΝ: ΤΟ ΟΨΩΝΙΟΝ⁹⁴

In late Byzantine law, Greek terms from early Byzantine law other than the term *salarium* (σαλάριον) are used.⁹⁵ This concerns the ‘exhellenismoi’ already mentioned above. In the Basilica text, the term οψώνιον for *salarium* appears in D. 14,1,7 (= D. 17,1,7):

B. 14,1,7 = D. 17,1,7 (BT 739/15–16):

Τὸ ὀρισθὲν τῷ διοικητῇ τῆς δίκης οψώνιον ἐξτραορδίνως ἀπαιτεῖται, καὶ σκοπεῖ ὁ δικαστής, εἰ ὑπὲρ καμάτου συνεφωνήθη· τότε γὰρ ὀφείλει δοθῆναι, οὐ μὴν ὅτε τὸ τῆς δίκης ἀποτέλεσμα πολλοῖς χρήμασιν ὁ διοικητῆς τῆς δίκης παρανόμως ἠγόρασεν.

The fixed οψώνιον for a legal representative is claimed *extra ordinem*, and the judge examines whether an effort was agreed; for in that case it has to be paid, but not if, in conflict with the law, the legal representative has bought the result for more money.

The term οψώνιον is related to the word ὄψων (‘Zukunft’), i.e. ‘side-dish’.⁹⁶ Next to this word is an interlinear scholion with one odd word,⁹⁷ namely λαγωτροφῆς, which literally means ‘Hasenfutter’.⁹⁸ The idea behind this is not clear. Is it irony due to the small amount, because a hare eats mainly grass and herbs?⁹⁹ Or does it refer without irony to a minimal fee, and is λαοτρόφος (‘das Volk, Menschen ernährend’) meant? And does it indicate distribution of food to the people free of charge?¹⁰⁰

The word οψώνιον appears in the Basilica four more times. Once οψώνιον is used for the *salarium* of the staff of an imperial stadtholder.¹⁰¹ Another time, no equivalent is mentioned in the Latin text

⁹² See also the corresponding scholion BS 814/17–19 in the codex Parisinus graecus 1352 (P) (see BURGMANN *et alii*, RHBR I, nr. 166).

⁹³ See supra section 3.2. In the second half of his comment, he refers to the fee (τὸ συνηγορικὸς) of the συνηγορος (*advocatus*). It would be better to limit this fee to the extent of the proceedings, the eloquence and the custom of the court.

⁹⁴ LBG οψώνιον, τό: Lebensmittel, Verpflegung, Speise, Mahlzeit.

⁹⁵ See C. C. CARAGOUNIS, ΟΨΩΝΙΟΝ: A Reconsideration of its Meaning. *Novum Testamentum XVI/1* (1974) 35: “It is generally claimed that our word was for the first time used in Menander, ‘the star of the New Comedy’, and that Polybius made a free use of it in military contexts for the ‘pay’ of soldiers”.

⁹⁶ See R. BEEKES, *Etymological dictionary of Greek*. Leiden 2010, 1139–1140, 1139: ὄψων: “side-dish, especially meat; in Athens and other places especially ‘fish’”. See also P. CHANTRAINE, *Dictionnaire étymologique de la langue grecque. Histoire des mots*. Paris 1968–1980, 846: οψώνιον: n. un ou deux ex. du sens de ‘provisions’, généralement ‘solde destinée à acheter l’ὄψων’ (tandis que la farine est distribuée), dit aussi de toute espèce de salaire, le mot se substituant à μισθός. And: ὄψων: ce qui accompagne la galette ou le pain: légumes, oignons, olives, parfois viande, souvent poisson. See also CARAGOUNIS, ΟΨΩΝΙΟΝ (as note 95) 47–49. Caragounis attempts to explain the two divergent meanings of οψώνιον (‘provisions’ and ‘wages’) 48–49: “In as much as these provisions formed part if not most of the reward the soldiers were to get for fighting, they could, at the same time, be regarded as a kind of ‘pay’. [...] The evidence reviewed suggests that οψώνιον must never be understood as = μισθός absolutely, but only in certain contexts, all of which bear, indelibly imprinted on them, the underlying significance of ‘provisions’”.

⁹⁷ BS §817/18 (P) (§ indicates the scholion is interlinear). See codex Parisinus graecus 1352, f. 156v.

⁹⁸ LBG λαγωτροφή, ἡ.

⁹⁹ In the Dutch language, the word ‘hazenslaap’ is used (literally ‘Hasenschlaf’, which means ‘Schläfchen’ [catnap]). The figurative meaning is ‘irregular, light sleep’. It is called that because a hare never seems to sleep: its short eyelids do not completely cover its eyes. Cf. Eustathius Thessalonicensis in G. STALLBAUM, *Eustathii archiepiscopi Thessalonicensis commentarii ad Homeri Odysseam*, volume 2. Leipzig 1826 (reprint Hildesheim 1960) 147 and Manuel Philes, *Carmen* 149, 111 (II 180 MILLER).

¹⁰⁰ Cf. CTh 14,4,10,3 and 5 with the term *obsonium* in the title *de buariis, pecuariis et susceptoribus vini ceterisque corporatis*.

¹⁰¹ B. 20,1,19,10 = D. 19,2,19,10 (BT 988/19).

(C. 5,16,11), but it could very well be a *salarium*. In this case it concerns an allowance from a husband that he promises to his wife. This allowance cannot be reclaimed.¹⁰² On the other two occasions, ὀψώνιον is used as a translation of the Latin term *cibaria*.¹⁰³ It is striking that the Latin equivalent of ὀψώνιον, *opsonium*, appears only once in the Digest in the latter meaning (*cibaria*) of the word:¹⁰⁴

D. 24,1,31,9:

A wife is not held to have been enriched if she spends the money given to her on banquets, perfume, or food for her slaves.¹⁰⁵

It can be concluded that ὀψώνιον has different meanings in the Basilica. It is not clear what the relationship between *salarium* and ὀψώνιον is.¹⁰⁶

6.4 A SECOND TERM FOR ΣΑΛΑΡΙΟΝ: Τὸ ΣΙΤΗΡΕΣΙΟΝ¹⁰⁷

The second Greek term used for *salarium* in the Basilica is τὸ σιτηρέσιον:

B. 14,1,10,9 = D. 17,1,10,9 (BT 742/7–10):

Ἄντελλογισμοὺς ἢ περὶ ἐντολῆς ἀγωγῆ δέχεται, καὶ ὡσπερ ὁ διοικητὴς ἀπαιτεῖται καρπούς, οὕτως ὑπεξαίρει τὰς παρ' αὐτοῦ γινομένας δαπάνας καὶ τὰ δοθέντα κτηνομίσθια, εἰ μὴ ἄρα συμφωνήθη αὐτὰ δίδοσθαι ἐκ τοῦ δίδομένου αὐτῷ σιτηρέσιου.

The *actio mandati* accepts deductions, for example if the manager claims fruits, and in this way deducts the expenses that he incurred for this and that were paid to transport them, unless it was agreed that this was to be paid out of the subsistence allowance (σιτηρέσιον) that had been paid to him.

The word σιτηρέσιον means ‘provision money’ and is related to the word σῖτος (‘corn [especially wheat], bread, food’).¹⁰⁸ In B. 14,1 (= D. 17,1) there is another fragment with τὸ σιτηρέσιον.¹⁰⁹

B. 14,1,56,3 = D. 17,1,53,3 (BT 756/16–17):

Τὸ ἀφανὲς σιτηρέσιον οὔτε διὰ τῆς περὶ ἐντολῆς ἀγωγῆς οὔτε ἐξτραορδιναρῶς ἀπαιτεῖται.

¹⁰² B. 30,1,78 = C. 5,16,11 (BT 1516/17).

¹⁰³ B. 44,14,21 = D. 34,1,21 (BT 2031/6); B. 13,1,18 = D. 13,6,18 (BS 634/13 (P)). BERGER, Encyclopedic dictionary 388 *Cibaria* “Food, provisions. Interpretative rules for *cibaria* in legacies are abundant in juristic writings. *Cibaria* is also the daily remuneration granted to imperial officials during their service travels through the empire”.

¹⁰⁴ The translation of *opsonium* is that from 1. from the Oxford Latin Dictionary: *Opsonium* (also *ops-*) = 1. The purchasing of food, getting provisions, catering. b. (sg. or pl.) provisions for a meal, victuals. *that which is eaten with bread; victuals, viands, esp. fish*. 2. pl. A maintenance allowance, pension.

¹⁰⁵ *Pomponius libro quarto decimo ad Sabinum: ‘Non videtur locupletior facta esse mulier, si aut in opsonio aut in unguentis aut in cibariis familiae donatam sibi pecuniam impenderit’.*

¹⁰⁶ BÜRGE, *Salarium und ähnliche Leistungsentgelte* 327, note 43 also noted this once. He said that it was important to study the relationship between these terms because they sometimes also appear next to each other. According to Bürge, the same also holds for the term μισθός. Bürge notes that the relationship of *salarium* to other terms with similar meanings, such as ὀψώνιον or μισθός should be studied. For example, μισθός and σάλαριον appear next to each other in P. Oxy. 1626.

¹⁰⁷ LBG σιτηρέσιον, τό: Verpflegungsgeld.

¹⁰⁸ See BEEKES, *Etymological dictionary of Greek* (as note 96) 1136–1137. See also CHANTRAINE, *Dictionnaire étymologique* (as note 96) 1007: σιτηρέσιον: allocation de céréales, argent pour s’en procurer. Cf. B. SIRKS, *Food for Rome. The Legal Structure of the Transportation and Processing of Supplies for the Imperial Distributions in Rome and Constantinople (Studia Amstelodamensia ad epigraphicam, ius antiquum et papyrologicam pertinentia* 31). Amsterdam 1991, 324–328. See also F. MITTHOF, *Annona militaris*, Volume 1. Florence 2001, 8.

¹⁰⁹ D. 17,1,56,3 *Papinianus libro nono questionum: ‘Salarium incertae pollicitationis neque extra ordinem recte petitur neque iudicio mandati, ut salarium tibi constituat’.*

The indefinite subsistence allowance (σιτηρέσιον) cannot be claimed either by the *actio mandati* or *extra ordinem*.

In the Basilica, σιτηρέσιον appears 14 more times, 12 times in the text and twice in the scholia. In three more cases, σιτηρέσιον corresponds to *salarium* from the Digest text. The first Basilica fragment B. 12,1,50,8 corresponds to D. 17,2,52,8. It is stated in this fragment that if brothers have voluntarily formed a partnership, not only *salaria* (τὰ σιτηρέσια), but also *stipendia* (τὰ ἀπὸ στρατείας προσγιγνώμενα) can be made over to the common stock by instituting the partnership action.¹¹⁰ The second fragment is written in Greek in the Digest and mentions σαλάριον. In this fragment, σιτηρέσιον is the *salarium* for a person who teaches eloquence in Rome.¹¹¹ The third fragment concerns a *salarium* for teaching the liberal arts and medicine.¹¹² In the other cases, the word σιτηρέσιον has a different meaning.¹¹³ The term σιτηρέσιον in the Basilica has many different meanings, even more than the term ὀψωνιον.¹¹⁴

6.5 A THIRD TERM FOR ΣΑΛΑΡΙΟΝ: ΤΟ ΔΟΜΑ¹¹⁵

In the Basilica text that corresponds to the Codex,¹¹⁶ another word appears for *salarium*, namely τὸ δόμα (gift, payment). This δόμα can be claimed from the provincial governor:

B. 14,1,63 = C. 4,35,1 (BT 759/14–17):

Ὁ διοικητῆς ὅσα οἰκοθεν ἢ καὶ δανεισάμενος ἐδαπάνησεν ἀπαιτεῖ διὰ τῆς περι ἐντολῆς ἀγωγῆς τὸν δεσπότην τῶν πραγμάτων μετὰ καὶ τῶν τόκων αὐτῶν· τὸ δὲ ἐπαγγελθὲν αὐτῷ δόμα διὰ τοῦ ἄρχοντος μεθοδεύει.

The manager demands payment, as far as possible out of his own funds or also after having received this as a loan, claims from the owner of the fruits with the interest on them by an *actio mandati*; he claims the remuneration promised to him from the provincial governor.

Unfortunately, the folio with this Basilica text is missing in manuscript Ca. Fabrot emended manuscript P δόγμα according to the critical apparatus in δόμα.¹¹⁷ This is the reading the editors of the Groningen edition adopted. The word δόμα also appears – besides in a literal reference to B. 14,1,79 – in yet another fragment, namely in B. 14,1,79 (= C. 4,35,17):

¹¹⁰ BT 685/12 (B. 12,1,50,8 = D. 17,2,52,8). At the word σιτηρέσια there is an interlinear scholion, BS 490/30: Σαλάρια· ζητεῖται βιβ. μα'. ττ. ζ'. κεφ. λη'. καὶ μ'. καὶ κα'. 'Salaria; search book 41, title 7, chapter 38 and 40 and 21'.

¹¹¹ BT 1684/2 (B. 38,1,6,11 = D. 27,1,6,11).

¹¹² BT 2501/8 and 10 (B. 54,11,4 = D. 50,9,4,2).

¹¹³ On three occasions this must relate to government money, see B. 60,42,5,13 = D. 39,9,5,13 (BT 3806/17); B. 60,45,2 = D. 48,13,1 (BT 3825/12); BS 3825/12. The term σιτηρέσιον is used once as a synonym for *stipendium* (and *tributum*) or in the sense of 'contribution', see B. 56,8,13,1 = C. 10,16,1 (BT 2570/27). Twice σιτηρέσιον is used in the sense of 'foodstuffs', see B. 6,1,97 = C. 1,46,5 (BT 162/11); B. 6,1,99 = C. 1,44,1 (BT 162/22). The term σιτηρέσιον appears four times in the sense of 'grain distribution', see B. 7,5,51,1 = D. 5,1,52,1 (BT 341/5); B. 13,2,46 = Nov. 88,1 (BT 735/6; BT 735/16; BT 735/23). The word is used once in combination with a lawyer (BS 3806/17).

¹¹⁴ M. C. BARTUSIS, *Land and Privilege in Byzantium. The Institution of Pronoia*. Cambridge 2012, 277 ff. mentions the differences in meaning: "Siteresion is a problematic word that had a number of meanings which fall into three main categories: (i) provisions in kind, especially to soldiers, but also at times to monasteries; (ii) an allowance for provisions, again especially for soldiers, but also at times for monasteries; (iii) salaries, especially to soldiers, but more generally to anyone in imperial service. It is this last sense of the word that is commonly found in thirteenth- and fourteenth-century literary sources". Bartusis then gives some examples of this. See also M. C. BARTUSIS, *The Late Byzantine Army. Arms and Society, 1204–1453*. Philadelphia 1992, 247–248.

¹¹⁵ LBG δόμα, τό: Abgabe.

¹¹⁶ For the Basilica and the Codex, see note 2 above.

¹¹⁷ See the critical apparatus 16: δόμα: δόγμα P, corr. Fabr.

B. 14,1,79 = C. 4,35,17 (BT 761/6–7):

Τὸ ἀφανὲς ἐπερωτηθὲν δόμα ἀπαίτησιν οὐκ ἔχει.

Remuneration that is uncertain has no claim.

It is not clear why this word only appears in the Codex section of the Basilica, while the terms ὀψώνιον and σιτηρέσιον only appear in the Digest section of the Basilica. This might very well be due to way in which the texts were passed down.¹¹⁸

7. ORIGIN OF ΟΨΩΝΙΟΝ, ΣΙΤΗΡΕΣΙΟΝ AND ΔΟΜΑ

7.1 MEANING OF ΣΑΛΑΡΙΟΝ IN EARLY BYZANTINE LAW

In order to discover the origin of ὀψώνιον, σιτηρέσιον and δόμα, it is sensible to look first for texts containing these words that relate to the meaning of σαλάριον. In the Basilica, we find various old scholia that deal with the meaning of σαλάριον, such as in an index and another scholion at B. 12,1,50,8 that corresponds to D. 17,2,52,8:

D. 17,2,52,8:

Papinian, in the same book, says that if two brothers have voluntarily formed a partnership, even *salaria* in addition to the other *stipendia* can be made over to the common stock by an *actio pro socio*, although, as he goes on to say, an emancipated son is not compelled to contribute these for the benefit of a brother who is still under power.¹¹⁹

Ca 33 ad B. 12,1,50,8 = D. 17,2,52,8 (BS 484/29–485/13 here BS 485/4–7[anonymous]):

[...] Εἰ συμβῆ τὸν ἕτερον τούτων εἶναι στρατιώτην, τὰς ἀννόνας τὰς ἀπὸ στρατείας (λέγεται δὲ ταῦτα σιπένδα), ἔτι δὲ καὶ τὰ λοιπὰ σαλάρια, τουτέστιν τὰ τοῖς στρατευομένοις χορηγούμενα, εἰς κοινὸν φέρεται κέρδος διὰ τῆς πρὸ σόκιο. [...]

[...] If one of them happened to be a soldier, then *annonae militares* (this is called *stipendia*), and in addition also *salaria*, namely the income provided to those who are soldiers, can be signed over to the common stock by an *actio pro socio* [...]

Ca 36 ad B. 12,1,50,8 = D. 17,2,52,8 (BS 485/19–21 [Anonymos]):

Τοῦ Ἄνωνύμου. Σιπένδια τὰς στρατιωτικὰς ἀνόνας, σαλάρια τὸ διδόμενον ἀπὸ τοῦ δημοσίου ἄρχοντι ἢ συνέδρῳ ἢ ἰατρῷ ἢ παιδευτῇ. Λέγεται σαλάριον καὶ τὸ ἀπὸ στρατείας, ὡς βιβ. ιθ'. τιτ. α'. διγ. νβ'. θεμ. γ'.

By Anonymos. *Stipendia: annonae militares, salaria*, which are paid on the basis of the imperial state treasury to a manager or valuer, or physician or instructor. This is also called *salarium* for an official position, as in book 19, title 1, fragment 52, case 3.

In later times, *annona* came to mean the portion of grain to which someone was entitled, either by way of the public distributions, or as part of his salary or his pay.¹²⁰

¹¹⁸ Cf. the commentary by Jacques Cujas in section 7.2 below.

¹¹⁹ *Ulpianus libro trigensimo primo ad edictum: 'Idem Papinianus eodem libro ait, si inter fratres voluntarium consortium initum fuerit, et stipendia ceteraque salaria in commune redigi iudicio societatis, quamvis filius emancipatus haec non cogatur conferre fratri, inquit, in potestate manenti, quia et si in potestate maneret, praecipua ea haberet'.*

¹²⁰ See SIRKS, *Food for Rome* (as note 108) 21–22. Cf. note 132 below.

A distinction is made in these fragments between *stipendium* and *salarium*.¹²¹ Anonymos refers to D. 19,1,52,2, in which someone purchases an official position, whereby the purchaser is entitled to the *salarium*. In D. 2,15,8,23, Anonymos also dwells on the meaning of *salarium*:

D. 2,15,8,23:

If a certain amount of money has been left annually to someone, a man of high rank, for example, an annual salary or a usufruct, a *transactio* can be made even without the praetor. But if a modest usufruct is made by way of maintenance, I say that a *transactio* made without the praetor is of no effect.¹²²

Ca 38 ad B. 11,2,8,23 = D. 2,15,8,23 (BS 380/5–8 [Anonymos]):

Τοῦ Ἀνωνύμου. Σαλάριον κυρίως λέγεται τὸ διδόμενον ἀξιοματικῶ, σαλάρια τὰ διδόμενα θυμελικοῖς, σολέμνια δὲ τὰ διδόμενα παιδευταῖς, ἰατροῖς καὶ τοῖς τοιοῦτοις. Περὶ σαλαρίου διαλαμβάνεται τιτ. λζ'. τοῦ ιβ'. βιβ. τοῦ Κωδ. καὶ βιβ. ν'. τιτ. θ'. διγ. δ'.

By Anonymos. *Salarium* in its actual sense means that which a person of high status is paid, *salaria* means that which is paid to actors, and *solemnia* means that which is paid to instructors, physicians and suchlike. The term *salarium* is dealt with at length in title 37 of book 12 of the Codex and book 50, title 9, fragment 4.

In his comment, Anonymos refers to C. 12,37, the title dealing with distribution of the grain intended for the army, *annona militaris*.¹²³ It is clear that Anonymos connects the *salarium* as a form of remuneration primarily to official positions. It is remarkable that in this period actors were also paid a fixed remuneration, as their status was not very high. Lower ranking persons such as soldiers also received a *salarium*.

7.2 THE THREE TERMS IN A MILITARY CONTEXT

In the introduction to his comments on C. 4,35, Jacques Cujas (1522–1590) who, among other sources, used the Basilica in his comments on the Corpus iuris,¹²⁴ refers to the use of ὀψώνιον by the Greeks. Here we ultimately end up in a military context:

[...] Ergo petitur salarium, vel honorarium, sive ἀντίδωρον extra ordinem, non ordinaria actione. At dicit l. si vero remuner. ait esse actionem mandati, si intervenerit honor, id est, honorarium. [...] Graeci salarium ὀψώνιον interpretantur.¹²⁵ Gregorius Nazianzenus contra Julianum Imper. indicat ὀψώνιον

¹²¹ In classical Roman law BERGER, Encyclopedic dictionary 715 stipendium The soldier's pay. From the fourth post-Christian century on, the soldiers received the stipendium in kind which in times of shortage was replaced by money; *op. cit.* 716 [stipendium] (In public law.) A contribution imposed on the defeated enemy; it served to cover the expenses of war. During the armistice the enemy had to pay the Roman soldiers' salary (*stipendium*). This may explain how the term came to mean contribution. In later times *stipendium* was the term for land-taxes paid by provincials. The rate of the *stipendium* was fixed, whereas the so-called *tributum* depended upon the value of the proceeds from the soil. See also C. 3,28,37,1e (*stipendia* and *salaria*).

¹²² *Ulpianus libro quinto de omnibus tribunalibus*: ‘Si in annos singulos certa quantitas alicui fuerit relicta homini honestioris loci veluti salarium annuum vel usus fructus, transactio et sine praetore fieri poterit: ceterum si usus fructus modicus alimenterum vice sit relictus, dico transactionem citra praetorem factam nullius esse momenti’.

¹²³ See also J. F. HALDON, *Byzantine Praetorians: an administrative, institutional and social survey of the opsikion and tagmata*, c. 580–900. Bonn 1984, 584. Haldon discusses the word σιτηρέσιον in this context. He refers to C. 12,37,19 and B. 57,4,19.

¹²⁴ See H. E. TROJE, *Graeca leguntur: die Aneignung des byzantinischen Rechts und die Entstehung eines humanistischen Corpus iuris civilis in der Jurisprudenz des 16. Jahrhunderts*. Köln 1971, 114 ff.

¹²⁵ In his comments at D. 17,1,7, Cujas adds the word *hic* (JACQUES CUJAS, *Opera omnia, in decem tomos distributa ... jam a Carolo Annibale Fabroto, ... disposita. Accessere in hac novissima editione ... dissertatio Emundi Merillii et interpretatio*

significare omne stipendium. Mandatum igitur recipit salarium, non mercedem. Verum ita demum potest salarium a procuratore peti extra ordinem, si dominus, sive mandator id constituerit, & taxaverit, id est, si de certo salarii modo conventum fuerit. Incerti salar. persecutio non est, l. 17. infr. hoc ipso tit. [C. 4,35,17] quae sententia sumpta est, & deprompta ex Papiniano in l. qui mutuum, § salarium, ff. eod. tit. [D. 17,1,56,3]. [...]¹²⁶

It is striking – but this can be due to the way in which it was passed down – that Cujas, precisely at C. 4,35, freely refers to ὀψώνιον, because the Basilica text that corresponds to the Codex always reads δόμα. Only the Basilica fragments that correspond to the Digest have ὀψώνιον (or σιτηρέσιον). In his reference to ὀψώνιον, Cujas refers to a work by Gregorius Nazianzenus, an archbishop of Constantinople from the 4th century. He must have meant the following fragment:¹²⁷

Gregor. *Ad Julianum tributorum exaequatorem* (orat. 19) 11 Ἀρκεῖσθε τοῖς ἰδίοις ὀψωνίοις, οἱ στρατιῶται, καὶ μηδὲν ὑπὲρ τὸ διατεταγμένον ἀπαιτεῖτε. [...] Τί λέγων ὀψώνιον; Τὸ βασιλικὸν σιτηρέσιον δηλονότι, καὶ τὰς ὑπαρχούσας ἐκ νόμου τοῖς ἀξιώμασι δωρεάς. [...]

Soldiers, be satisfied with your pay, and do not ask for more than has been determined. [...] Meaning which ὀψώνιον? Namely the royal provision money, and the gifts that distinguished persons are allowed to receive by law [...]

By ὀψώνιον, the pay (*stipendium*) of the soldiers is meant.¹²⁸ In the explanation, the word ὀψώνιον is equated with σιτηρέσιον. This word is also used in the Basilica as an equivalent for *salarium*.

Cujas appears to be right as far as the origin of ὀψώνιον is concerned. For that matter, his reference to the military context proves to hold not only for ὀψώνιον, but also for the two other terms, σιτηρέσιον and δόμα. All terms actually appear frequently in documents from military practice and, in addition to the allowance for other occupations, also mention an allowance for soldiers. Marcel Launey introduces his study of the terms for – elements of – allowances for soldiers of the Hellenistic armies as follows:

“Une des plus grandes causes d’irritation pour qui cherche à établir la rétribution des soldats résulte de la variété, de l’imprécision, souvent de l’inexactitude des termes employés dans les textes anciens. La première recherche doit être de caractère lexicographique: efforçons-nous de déterminer par des rapprochements la signification des différents termes, ὀψώνιον, μισθός, σιτηρέσιον, μέτρημα, ἀγορά, πρόδομα, δόμα etc., qui foisonnent chez les auteurs et dans les documents de la pratique”.¹²⁹

ab eodem facta variantium ex Cujacio observatarum ... postremo controversiae Joannis Roberti, Tomus 10. Naples 1758, 438).

¹²⁶ JACQUES CUJAS, *Opera omnia* (as note *) 355.

¹²⁷ PG 35, 1056A. Cf. C. MORESCHINI, *Gregorio di Nazianzo, Tutte le orazioni*. Milan 2000, LXII–LXIII, 479–491 and note 45 (on p. 1278): “La spiegazione di che cosa sia lo stipendio è evidentemente una glossa penetrata nel testo”. At D. 17,1,7 CUJAS, *Opera omnia* (as note 125) 438 refers to “D. Gregorius Naz. in 2. orat. contra Jul.”, ed. J. BERNARDI (SC 309). Paris 1983.

¹²⁸ Cf. L. BURGMANN, *Das Lexikon αὐσηθ*. FM 8 (1990) 324 (Σ nr. 40): *stipendium ὀψώνια*; M. TH. FÖGEN, *Das Lexikon zur Hexabiblos aucta*. FM 8 (1990) 205 (Σ nr. 30): *Στιπενδιούμ διὰ τὸ ἀπὸ λεπτῶν ἀργυρίων συνάγεσθαι· τὸ δὲ αὐτὸ καὶ τριβοῦτο(ν) λέγεται ἀπὸ τοῦ ἐπικλᾶσθαι τοῖς καταβάλλουσιν ἢ ἐπιμερίζεσθαι τοῖς στρατιώταις*. Cf. BT 24/23–25/2 (B. 2,2,25,1 = D. 50,16,271): *Στιπενδιούμ λέγεται τὸ σιτηρέσιον διὰ τὸ ἀπὸ λεπτῶν ἀργυρίων συνάγεσθαι· τὸ δὲ αὐτὸ καὶ τριβοῦτον ἦγον φόρος λέγεται ἀπὸ τοῦ ἐπικλᾶσθαι τοῖς καταβάλλουσιν ἢ ἐπιμερίζεσθαι τοῖς στρατιώταις*. A *stipendium*, namely σιτηρέσιον, is called that because of the collection of small amounts; the same also holds for *tributum*, or φόρος, which means that which is allocated to the *solventes* or that which is allotted to the soldiers. Cf. B. H. STOLTE, *The Lexicon Μαγκίπιου*. FM 8 (1990) 372 (Σ nr. 53). See also F. MITTHOF, *Annona militaris*, Volume 2. Florence 2001, 309ff.

¹²⁹ M. LAUNEY, *Recherches sur les armées hellénistiques*, Vol. II. Paris 1987, 725–726.

In the continuation of his text, Launey discusses the terms, primarily ὀψώνιον, on the basis of examples from practice. He starts by discussing occupations other than that of soldiers, namely, the term ὀψώνιον in the documents is the remuneration for assigned work (*travail donné*), i.e. ‘émoluments de professeurs’, ‘rémunération de juges et de magistrats’, ‘salaires d’ouvriers’ and ‘salaire d’un harpiste’.¹³⁰ Launey says that ὀψώνιον superseded the classical word μισθός in Egypt and Asia.¹³¹ The terms ὀψώνιον and μισθός were therefore apparently – already in the Hellenistic period – taken to be synonyms, by which the old term was almost supplanted. Launey points to the two elements of the allowance of a soldier, namely cash and the distribution of grain. The first is represented by ὀψώνιον and μισθός, the second by σιτηρέσιον.¹³² In the late Byzantine period the terms ὀψώνιον and σιτηρέσιον, referring to salary, appear to be interchangeable. This becomes clear when Niketas Choniates in early thirteenth century describes a change in the manner by which Manuel I Komnenos (1143–80) financed the military. The word ὀψώνιον in its actual sense of ‘provision’ or ‘military supply’, but usually used in the sense of ‘wages’, is synonymous with σιτηρέσιον: victual or forage money. That there is no doubt about this assertion, namely that ὀψώνιον and σιτηρέσιον are synonyms, is due to the fact that Choniates had had a long career in the financial world of that period.¹³³ In *ODB* III 1529 for soldiers on campaign, ὀψώνιον in the sense of provision is equated with σιτηρέσιον. These payments ὀψώνιον and σιτηρέσιον were not restricted to the military, but could also mean payments in cash or kind to monasteries or the salaries of civil officials.

8. CONCLUSION

If the remuneration in cases of ἐντολή (*mandatum*) has not been agreed, but is given as a token of gratitude from a feeling of moral obligation, in classical law and Justinianic law, this was then taken to be an honorary stipend, *honorarium*, a term that was used in classical law mainly for the remuneration of a lawyer or teacher in the liberal arts. It was not a pure gift (*donum*), in other words out of generosity, but rather a gift with a reason (*munus*), as recompense for a service rendered, or as a gift in return for a service that was also viewed as a gift (*munus*). The term ἀντίδωρον is used once in this case. However, as soon as this gift consisted of (an indefinite amount of) money, there was no longer a *mandatum*, but rather a *locatio/conductio*. The gift in return could not be claimed in an action, but could be claimed *extra ordinem*.

In early Byzantine law, in the case of an honorary stipend in relation to ἐντολή (*mandatum*), Stephanos regularly spoke of a ἀντίδωρον (gift in return). In addition, a *salarium* could be paid. This payment had to be appropriate to the efforts made by the mandatory to that effect. In classical law, Justinianic law and early Byzantine law, the term *salarium* or σαλάριον is used for a permissible pay-

¹³⁰ See also L. BURGMANN, *Lexicon ἄδεν – ein Theophilosglossar. FM* 6 (1984) 60 (Σ r. 35: [salaria] τὰ διδόμενα τοῖς συνηγόροις; IDEM, *Das Lexikon αὐσηθ* (as note 128) 284 (Σ no. 34): [salaria] δαπανήματα; STOLTE, *The Lexicon Μαγκίπιου* (as note 128) 372 (Σ no. 3): Σαλάριον· δαπάνη, δῶρον ἡμερήσιον ἢ μηνιαῖον ἢ ἐνιαύσιον, κυρίως δὲ τὸ διδόμενον ἀξιοματικοῖς, ἄλλοτε δὲ τὸ διδόμενον θυμελικοῖς. σαλάρια τὰ διδόμενα ἀπὸ τοῦ δημοσίου ἄρχοντι ἢ συνέδρῳ ἢ ἱατρῷ ἢ παιδευτῇ, λέγεται δὲ καὶ τὸ ἀπὸ στρατείας. Cf. BS 485/19–21 [Anonymos] supra section 7. 1.

¹³¹ LAUNEY, *Recherches sur les armées hellénistiques* (as note 129) 726: “Ὀψώνιον tend à éliminer, dans la langue des documents de la pratique, surtout en Égypte et en Asie, le mot classique μισθός, qui n’a d’ailleurs pas disparu et garde en particulier une vitalité notable chez les écrivains. Il représente toujours un salaire en espèces”.

¹³² LAUNEY, *Recherches sur les armées hellénistiques* 729 ff. See also G. OSTROGORSKY, *Löhne und Preise in Byzanz. BZ* 32 (1932) 293–333, especially 303: “In der frühbyzantinischen Epoche bekamen die Soldaten neben dem Sold (stipendium) auch Geldgeschenke (donativa) und vor allem die notwendigen Lebensmittel (annona) wie auch Kleidung auf Grund des canon vestium und eine bestimmte Jahresration für ihre Pferde und Lasttiere (capitum)”. See also note 120 above. Cf. H. ANTONIADIS-BIBICOU, *Démographie, salaires et prix à Byzance au XIe siècle. Annales ESC* 27/1 (1972) 215–246, especially 223.

¹³³ Niketas Choniates, *Chronike diegesis* 208–209 (VAN DIETEN). J. W. BIRKENMEIER, *The development of the Komnenian army (History of warfare 5)*. Leiden 2002, 173. See also BARTUSIS, *Land and Privilege in Byzantium* (as note 114) 64–65.

ment in the case of ἐντολή (*mandatum*), if remuneration for the mandatory was agreed. This payment must be clearly specified and could only be claimed *extra ordinem*. This concerns recompense which, even though it is actually a (moral) natural obligation, could nevertheless be claimed, but not under ordinary procedural law. The *honorarium*, strictly speaking a gift in return and not enforceable by law, can also be compelled, according to Stephanos. A shift apparently took place here from a pure, (moral) natural obligation to a semi-natural obligation that was indeed enforceable by law.

The distinction Matheussen makes on the basis of the scholion by Stephanos between διδόμενον σαλάριον (*salaire donné spontanément*) and σαλάριον ὀρισθέν (*salaire convenu*) appears to be incorrect, because the text was not edited correctly. In the correct reading, the conjecture in the Groningen edition proves to be meaningless. Stephanos uses ἀντίδωρον instead of διδόμενον σαλάριον as put forward by Matheussen. The terms ἀντίδωρον and σαλάριον prove to be two different terms. The first indicates a pure, natural obligation and is not enforceable by law. The second is a semi-natural obligation and enforceable only *extra ordinem*. The term ἀντίδωρον occurs frequently in Byzantine law. Furthermore, it is not uncommon in classical law and Justinianic law, because there appears to be no Latin term for it.

Matheussen also pointed to the term ὀψώνιον, but this term was only used in later Byzantine law for *salarium* (σαλάριον). In addition, the terms σιτηρέσιον and δόμα are also found in this period. It is remarkable that only ὀψώνιον and σιτηρέσιον appear in the section of the Basilica that corresponds to the Digest, and δόμα only in the section that corresponds to the Codex. The term ὀψώνιον is a synonym for the classical μισθός (*merces*) that seems to have disappeared in the late Byzantine period. In late Byzantine law, ὀψώνιον and σιτηρέσιον appear to be synonyms.

In classical law, *salarium* was already used in a different sense than the sense it had under *mandatum*. It became a payment by the government. For example, the payment of a *salarium* to imperial officials became customary. In early Byzantine law, σαλάριον was also given to different occupational groups as remuneration. Anonymos, for instance, points out that σαλάριον can also be the *salarium* for an official position. The terms ὀψώνιον, σιτηρέσιον and δόμα are ‘exhellenismoi’ and mostly come from the military. They appear to be found frequently in documents on the practice in relation to the payment of soldiers. The positions of the imperial officials and the soldiers ensue from the *munus*, the duty to hold a public office. The emperor’s ‘gift in return’ was the *salarium*, a payment in money. These officials and soldiers therefore did not have a *locatio/conductio* with the emperor. The distinction of the *merces* from the *locatio/conductio* thus continued to exist until deep into the Byzantine period, while, on the other hand, the true *mandatum* – gratuitousness – was maintained as well.