

Paul Krüger, Theodor Mommsen, and the Theodosian Code

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Abstract – The present article contains a full transcription plus an English translation of Mommsen’s and Krüger’s correspondence regarding the Theodosian Code edition, as far as it is extant. This so far largely unpublished material shows that the gloomy picture of Mommsen robbing Krüger of his work and due honors (painted by Matthews and others) has little to do with reality. In a nutshell, Krüger’s complaint was not that Mommsen appropriated and used his material, but rather that Mommsen rejected it and preferred to start from scratch.

Nor is it convincing to call Krüger’s later edition – into which he conjecturally incorporated material from the Justinian Code – “nearer to the original Theodosian Code.” This woefully downplays the fact that such additions may only inform us about some further topics which were treated in the original Theodosian Code. The legal rule itself, however, could be modified, possibly to its exact opposite, and since we know that the Justinian Code compilers created a structure quite independent from their Theodosian predecessors, the position assigned to a given Justinian Code fragment is rarely more than mere guesswork.

Conversely, the real merits of Krüger’s edition have mostly gone unnoticed. When it comes to readings of **R** or completion of lost bits of **T**, Mommsen was often overconfident, and it certainly makes sense to check Krüger’s alternative ideas.

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The following are cited in an abbreviated form: C.Th. = Codex Theodosianus; C.I. = Codex Iustinianus; Mommsen, “Prolegomena” = T. Mommsen, *Theodosiani libri XVI cum constitutionibus Sirmondianis. Voluminis I pars prior. Prolegomena* (Berlin 1905).

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In his highly influential book *Laying Down the Law*, John F. Matthews devoted several pages to the relationship between Theodor Mommsen and Paul Krüger, and their respective efforts in editing the Theodosian Code.¹ Matthews' account seems unanimously accepted today, though it includes arguably stretched interpretations. The present article intends to give a fuller picture of what actually transpired between Krüger and Mommsen.²

¹ J. F. Matthews, *Laying Down the Law. A Study of the Theodosian Code* (New Haven 2000), 97–101.

² I felt more than once that I was overstretching my capabilities with this article. Having edited both Latin and Greek from unkempt manuscripts, I naively believed that I could master any script quickly by systematically noting down known letters and then redrawing full words to understand the scribe's practices. Enter Mommsen. I knew his handwriting to be infamously illegible (see, e.g., S. Rebenich, *Theodor Mommsen und Adolf Harnack. Wissenschaft und Politik im Berlin des ausgehenden 19. Jahrhunderts. Mit einem Anhang: Edition und Kommentierung des Briefwechsels* (Berlin 1997), 21–22), but its reality is more nightmarish than the worst anticipation. Add to this the notorious difficulty of early twentieth century German and, more specifically, the fondness of Mommsen – a Nobel Prize Laureate for literature, after all – for unusual words. While I am quite confident that my editions of Latin and Greek do not include any reading mistakes, this time I can only hope that the transcriptions presented in this article are not marred by too many of them! It provides little comfort that (amongst countless others) Paul Krüger, Fritz Schulz, and even Mommsen's daughter Adelheid have, in places, misunderstood his handwriting.

I. The Theodosian Code

In order to understand the issues at stake, we need to start off with a brief introduction to the nature of the Theodosian Code.³ Late antique emperors legislated by issuing various kinds of texts which we call collectively “constitutions.” Unlike other cultures (including ours) in which laws are as brief and unequivocal as possible – after all, only commands that are understood can be carried out – Roman constitutions were composed in a highly complicated Latin style (*Kunstprosa*); they were often shockingly long, their actual legal core covering just a fraction of the rambling text, and they might mix instructions on strikingly different subjects in the same text. Worse, there was no equivalent to a “Statutes at Large,” nor was there an archive that could claim any degree of completeness. In Late Antiquity, with several legitimate emperors issuing valid laws in different regions, the situation had become a horrifying

Never have I depended so much on the help of others while authoring an article. Without Isabel Niemöller’s competence in *Kurrentschrift*, this article would not have seen the light of day. Her contribution is too large to be acknowledged in any other way than by co-authorship. Uta Lerche amicably solved several mysteries. Sylvain Destephen helped with some of the French letters. I owe an embarrassingly huge debt of gratitude to Stefan Rebenich: both for elucidating the most challenging enigmas contained in Mommsen’s handwriting, and for tirelessly and kindly replying to my numerous questions on individual details, such as Mommsen’s parsimony or his eyesight. I am also much obliged to the staff of the many archives that provided reproductions: *Staatsbibliothek zu Berlin* (Krüger’s letters among Mommsen’s papers), *Universitäts- und Landesbibliothek Bonn* (Mommsen’s and Girard’s letters among Krüger’s papers), *Universitäts- und Landesbibliothek Münster* (the Mommsen letters among Seeck’s papers), and the *Archiv der Berlin-Brandenburgischen Akademie der Wissenschaften* (documentation of the C.Th. edition). Without Matthew Hoskin’s help, the tight-rope act of rendering the taxing German of the letters into acceptable English would have been unfeasible.

Finally, I must very much insist on the fact that any factual mistakes (and polemics) must be imputed to me alone. I am the only one to have seen all the texts quoted here, I decided on their final transcription, and I phrased all remarks including what Mommsen would have called the “specialische Kritik.”

³ Having recently published a monograph on the subject – P. Riedlberger, *Prolegomena zu den spätantiken Konstitutionen. Nebst einer Analyse der erbrechtlichen und verwandten Sanktionen gegen Heterodoxe* (Stuttgart-Bad Cannstatt 2020) – I will mostly point toward its relevant pages, where full references for my claims can be found.

Repeating the often long-winded argument and expansive bibliography appears superfluous. The book and this article are complementary anyway: the present contribution is a much-augmented version of pages 181–84 which adds the source material (i.e., the mostly unpublished letters exchanged by Mommsen and Krüger).

pandemonium, in which nobody could know the laws in force, and fakes were rife.⁴

Taking inspiration from earlier private collections focusing on part of the material, Emperor Theodosius II set a great enterprise in motion: in 429, he tasked a commission to collect all available constitutions; to discard those that were fake, those enacted before Constantine, those issued by illegitimate emperors, and those devoid of *generalitas* (general validity); to reduce the remaining texts to their bare legal cores; to split these into several sections if they pertained to different subjects; and to systematically arrange these excerpts under newly created headings (“titles”). For example, anything related to heretics could go into a section appropriately labeled “Heretics” (*De haereticis*).

Theodosius II also set out a red line: he instructed his redactors to refrain from any modification of the contents. Originally, they were only allowed to excerpt texts, though in a later amendment, Theodosius II bent to realities and authorized them to change the wording, as long as this helped make things clearer, and they kept to the rule not to alter the content. Crucially, they were explicitly told *not* to discard *any* excerpt that matched the criteria summarized above, even if such a text was partially superseded or expressly revoked by later legislation. By chronologically arranging these excerpts within each title, users could quickly find out about the latest (and hence currently valid) rule: they just had to read the fragments of a given title backwards. Theodosius II envisaged a second project stage in which editors would track down and remove any discrepancies, creating a truly consistent law book. But nothing came of it.⁵ Nevertheless, his redactors *did* accomplish the first step, a structured collection of relevant excerpts: the *Codex Theodosianus*.

Sadly, there is no extant manuscript that transmits the complete work. But as the Theodosian Code remained popular into the Early Middle Ages, there are many sources that provide pieces from which most of its text can be reconstructed. The Theodosian Code is comprised of 16 books. The two most important manuscripts, **R** and **V**, transmit books 6–8 and 9–16, respectively. There are some lacunae (especially in book 16, but also in books 6–8), but these can mostly be filled in by other sources. For books 1–5, however, we depend completely on such “other sources.” They comprise individual C.Th. passages cited in other contexts, remainders of some palimpsested full C.Th. manuscripts, and most notably the Visi-

⁴ Riedlberger (note 3), 20–26, 40–64, 227–40.

⁵ *Id.*, 132–52.

gothic Breviary.⁶

In fact, the numerous contradictions in the Theodosian Code were an invitation for later rulers to finish the work so splendidly undertaken in the first place. There were two such projects, although they were initiated independently from one another and followed very different methods. In 506, the Visigothic King Alaric II published a legal collection which we call the Breviary. Unlike the Theodosian Code, the Breviary is fully extant today in a profusion of manuscripts. The largest chunk of the Breviary is a selection from the Theodosian Code. Yet, of the originally 3,400 texts once contained in the Theodosian Code, the Breviary retained only 398 (in other words: almost 90 percent were discarded). Fortunately, the Breviary editors held a special interest in private law, which was the subject of C.Th. books 2–4, so they kept a disproportionate number of fragments stemming from these books (it will be remembered that for books 1–5, we cannot rely on a full manuscript).

For those interested in editing the C.Th., the *modus operandi* employed by the Breviary redactors has both welcome, and frustrating, aspects. On the one hand, they almost never shorten or modify the text of a C.Th. fragment (the few exceptions are pointed out in the Visigothic commentary added to each adopted C.Th. text, the so-called *interpretatio*). Further, they clearly state the original book number and the name of the title from which they take over a given fragment, and they never change the original order of books, titles, or fragments. In other words, although 90 percent was removed, the rest was not rearranged and retained its headings. On the other hand, the Breviary compilers failed to include the *numbers* for titles or fragments. Accordingly, whenever they left out whole titles (which they did very often), there is no way for modern editors to identify such omissions without the help of external evidence, nor is it possible for them to assign the correct numbers to the titles and fragments of which we only know from the Breviary (since between two given Breviary titles or fragments, an arbitrary number of titles or fragments could have stood in the original C.Th.). Using the Breviary and all other evidence, it is possible to piece together around one third of the text of books 1–5; together with books 6–16, which we have virtually complete, we can reconstruct around 75 percent of the text of the original Theodosian Code.⁷

The second project to achieve Theodosius' aspirations was, of

⁶ Id., 174–77.

⁷ Id., 172–74, 179.

course, the Justinian Code. Its compilation was carried out according to fundamentally different policies, as Justinian's goal was not a faithful compilation of the will of earlier emperors, but a consistent code in which all contradictions were removed, all instructions updated to the contemporary legal status quo, and any incomprehensible literary flourishes sacrificed on the altar of clarity. Justinian's redactors readily replaced words that were difficult to make sense of (without showing the least care for the strict rhythm of *Kunstprosa*). They discarded outdated rules. They massively shortened texts and even rewrote them, not only to make them shorter and thus more straightforward to understand, but also to adapt the legal contents to the state of things under Justinian. A few examples are in order. By removing or changing some words, they generalized rules (cases in point are *nullum praedium per Africam* or *a provincialibus Afris*, or, conversely, by enlarging *Romam aeternam* to *Romam veterem et novam*). Sometimes, they explained terms, though not always in the originally intended sense (for example, *perpetuarii iuris hoc est emphyteuticarii iuris* or *exceptis Caesarianis id est catholicianis*). By adding a precise definition, they e.g. curtailed the discretionary power which was earlier left to the judge (*in minoribus causis id est usque ad quinquaginta solidorum summam*). Small modifications could lead to deliberate and profound changes in the sense of the original constitution. For example, C.Th. 1.1.1 was an excerpt from a constitution by Constantine; he had enacted that no law (*edicta sive constitutiones*) be presented in court if devoid of a date. This was a necessary precaution in a culture where it was a constant challenge to find out whether a specific law actually existed – having at least a date facilitated archive searches. In C.I. 1.23.4, *edicta sive constitutiones* is replaced by *beneficia personalia*, so that, apparently, Constantine ruled on the validity of strictly personal privileges – not of generally applicable laws! While the excerpt from Constantine's law could be found in the C.Th. title *De constitutionibus principum et edictis*, it is only logical that in C.I. it was moved to a title called *De diversis rescriptis et pragmaticis sanctionibus*, addressing questions of personal privileges. Under these circumstances, does it make much sense when e.g. Dillon notes “= C.Th. 1.1.1” in reference to C.I. 1.23.4? Such drastic modifications could also be achieved by disingenuous deletions. A case in point is C.Th. 1.2.3, again a Constantinian law, on the validity of a rescript under very specific circumstances. The Justinianic redactors recklessly removed the actual legal rule; what they left was a musing of Constantine which in the original text just gave the reasoning for his legislation. In the much shortened C.I.

version, this then stands as a rule in its own right: to the emperor alone belongs the interpretation of law! A constitution once issued to settle a narrow technical problem became a sweeping general statement.⁸

Justinianic redactors went so far as to merge various C.Th. fragments into one C.I. text. Out of C.Th. 16.6.1 (a western law of 373) and C.Th. 16.6.2 (a law of 377), they created C.I. 1.6.1, with the formal indications of C.Th. 16.6.2: accordingly, we find the words of a letter which Valentinian I had sent to the Proconsul of Africa in the C.I. (together with text foreign to this letter!) under the name of Valens, addressed to the Vicar of Asia. There are even more peculiar cases: C.Th. 16.9.1 (335, Constantine), C.Th. 16.9.2 (339, Constantine [*sic*]) and C.Th. 16.9.4 (417, Theodosius II) are combined as C.I. 1.10.1, with the formal indications of C.Th. 16.9.2. An unguarded reader would assume that words written in 419 actually went back to an emperor almost 80 years earlier! C.I. 1.5.2 is a combination of C.Th. 16.5.5 (379), C.Th. 16.5.24 (394) and C.Th. 16.5.28 (395), with the formal data of the 379 law. Consequently, for a reader of C.I. alone, there was already in 379 a legal definition of “heresy,” which in truth is attested in a constitution of 395 (and there hardly intended as a legal definition, but scarcely more than a sidenote embedded in a reply to a very specific question submitted to the emperor, on the case of a certain Bishop by the name of Heuresius). C.I. 9.28.1 is a creative rewrite of C.Th. 9.28.1 and C.Th. 9.28.2. This time, the redactor in charge did not give preference to the formal data of either of the two laws; rather, he opted for a nonsensical combination of the inscription of C.Th. 9.28.1 and the subscription of C.Th. 9.28.2!⁹

Most Justinianic interventions are not this bizarre. Yet the run-of-the-mill interventions we encounter in countless cases are not any less problematic for a modern researcher. These changes update the legal content of a fragment to the situation under Justinian, and do so in a surreptitious way. Take C.Th. 4.4.7 § 2

⁸ Id., 168–72; there, the references to the quoted passages can be found (the Dillon reference is contained in note 255 on 169). The case of C.Th. 1.2.3 requires some additional comment. This fragment is transmitted only by a stray page of palimpsest **T**, and sadly lacks its end, as it is penned at the end of the page, and the following page of **T** is lost. Its last nine words are added from the C.I. version. This, of course, means that the whole argument could very much be circular: we cannot exclude that these nine words from the C.I. version are massively rewritten. In that case, the change in meaning from C.Th. to C.I. would be achieved by textual modification (not by cutting, as I suggest here).

⁹ Riedlberger (note 3), 170.

and C.I. 6.36.8 § 3, for example. The C.Th. version unambiguously requires five or seven witnesses for the creation of a testament or a codicil. In the C.I. version, for any *ultima voluntas excepto* (!) *testamento*, five witnesses are required; but this rule still bears the name of Theodosius II as its author – who, on the contrary, had testaments included in this constitution. Or compare C.Th. 16.5.65 § 2, a Theodosian law once more, according to which Manichaeans are to be driven out of any city. In C.I. 1.5.5 § 1, it receives a harsh addition: the unfortunate Manichaeans are now also *ultimo supplicio tradendi* [“to be executed”]. For a user of the C.I. alone, the death penalty against Manichaeans (attested in legal sources only by 510) apparently had been instituted by Theodosius II three generations earlier.¹⁰

These examples will likely seem tedious by now. However, it is crucial to understand that, whenever the C.Th. original has been lost and therefore an external validation made impossible, there is no way to exclude the possibility that a C.I. fragment stemming from C.Th. might be modified, and these modifications can indeed be profound. I have to be very clear on this: the examples I have cited above are far from being exceptional. *Rather, an excerpt that weathered the passage from C.Th. to C.I. without any modification is the exception.* As far as I know, nobody has ever assessed the changes in all C.I. fragments for which we are lucky enough to possess the originals, but for a sample of 338 such texts, Sirks found out that 172 were rewritten, and merely 111 were not, or only slightly, modified.¹¹

This result comes as a disappointment: although we know for certain that – excepting some special cases¹² – all excerpts included in the Justinian Code for the period 313–437 derive from the Theodosian Code, there is no sound way of using this material to add to our reconstructed Theodosian Code. As any such fragment could be drastically modified, it is important to let readers know by citing it with a “C.I.” label. Furthermore, it would be impossible to relocate these texts into our reconstructed C.Th.: while the C.I.

¹⁰ Id., 805–806 & n.46.

¹¹ B. Sirks, *The Theodosian Code* (Friedrichsdorf 2007), 83 n.213. Note that 172 plus 111 makes 283, not 338. Sirks does not explain this difference. However that may be, the proportion 172 to 111 is impressive at any rate.

¹² Matthews (note 1), 90: “It has never been doubted that the Theodosian Code was the source for the laws included in the Codex Justinianus for the period 312–437; nor has it been claimed that any other source apart from the Theodosian Code was involved.” This is mistaken; see Mommsen, “Prolegomena,” LIX–LX, even if such cases are rare (see Riedlberger (note 3), 171–72 n.260, for the details and references).

uses an identical principle of disposition – numbered books with numbered titles which contain numbered fragments – the labels of the various titles, the fragments that they include, and their disposition among the various books were devised from scratch by the Justinianic compilers. A few examples will suffice: equivalents of titles contained in the eleventh book of C.Th. can be found in C.I. books 1, 4, 7, 10, and 11. Another example is the twelfth book of C.Th. Equivalents of its titles can be found, if at all, in the tenth book of C.I., but in the following order (“ø” means that the specific C.Th. title is not taken up in the C.I.; the following order refers to the tenth C.I. book, for example, C.Th. 12.1 corresponds to C.I. 10.32): 32, 37, 34, 36, 43, 72–75, ø, ø, 65, 76–77, ø, ø, 52, 38, ø. So far, I have only taken the *titles* into account. If we go down to the level of fragments, things get even more complicated. One could add lengthy tables and discuss countless examples, but let us just consider a single case here, namely C.Th. 12.1, which is part of the title C.Th. 12.1 *De decurionibus*. Most of the fragments in this C.Th. title find their equivalent in C.I. 10.32, *De decurionibus et filiis eorum et qui decuriones habentur quibus modis a fortuna curiae liberentur* [“Decurions, their sons, those considered as decurions, and how they might be freed from the lot of the curia”]. C.Th. 12.1.6 penalizes illegitimate relationships between decurions and female slaves, and this text could, of course, have been placed into C.I. 10.32. But the C.I. compilers found it more appropriate to shift it to a different location, namely to C.I. 5.5, *De incestis et inutilibus nuptiis* [“Incest and invalid marriages”].¹³

I believe it is clear by now what I mean: while one may speculate on the original position of C.I. texts without equivalent in C.Th., there is no reliable way of actually restoring the structure of missing C.Th. parts based on them. Attempts at doing so make for a challenging intellectual game, but cannot claim much scholarly value.

To sum up: using the C.I. fragments without extant C.Th. counterparts to add to the C.Th. reconstruction is not viable. first, in most cases it is impossible to determine the exact position “where they should go.” An editor would need to fabricate new titles of which both name and position cannot be ascertained according to any rigorous method. Secondly, we know that these texts were updated according to the legal situation under Justinian, without being flagged as such. We cannot trust their contents or their wordings. Thirdly, if we accept all of these shortcomings and still insist on adding the C.I. material, this would not be a gamechanger

¹³ More references in Riedlberger (note 3), 171 n.259.

in terms of completeness: after all, what we get would be around another 5 percent of the original C.Th. material, so we have perhaps 80 percent instead of 75 percent of its original text mass.¹⁴

II. The backstory

The C.Th. reference edition in the latter half of the nineteenth century was Hänel's. It also was the first edition after the work of early modern scholars. Gustav Hänel (1792–1878) was a highly prolific editor, churning out editions of Latin legal works at a dizzying pace. These include the fragments of the Gregorian and Hermogenian Codes (1837), the Theodosian Code (1842), the post-Theodosian *novellae* and the Sirmondians (1844), the Breviary (1849), the extant unabridged imperial constitutions (1857) and the *epitome Iuliani*, a collection of Justinianic *novellae* in Latin (1873). Several of these have still not been superseded (this is true, for example, for his Breviary and also the unabridged constitutions). While Hänel did an impressive job in tracking down manuscripts, his work as an editor left much to be desired. His apparatus were (and are) infamous for their clutter, they are bustling with factual mistakes,¹⁵ and, inexcusably, he uses vague, unscholarly indications such as “many manuscripts” or “some manuscripts.” But Hänel had laid the base for a proper C.Th. edition: he had gathered almost all relevant manuscripts, and one just needed to wait for a more careful editor than he was to make his edition come to fruition.

An ideal person for that task would certainly have been Paul Krüger (1840–1926).¹⁶ From the age of 24, he had been preparing juristic editions. A trained jurist and extraordinary paleographer with enviably sharp eyes and uncompromising rigor, Krüger supported Mommsen in his work on the Digest and then proceeded to edit on his own the texts of the Justinianic Institutes and the

¹⁴ Id., 179 & n.280.

¹⁵ P. Krüger, “Über Mommsens Ausgabe des Codex Theodosianus,” ZSS (RA), 26 (1905), 316–31, at 317 (“[S]eine Angaben über die Lesung der Handschriften sind in hohem Grade unvollständig und selbst unrichtig.”); Mommsen, “Prolegomena,” CXVII–CXVIII. In his longer proposal for the C.Th. edition, Mommsen calls it *bis zur Unbrauchbarkeit unzuverlässig*, “unreliable to a degree that makes it unusable” (Academy Archive, document no. 6).

¹⁶ The main source publications on Krüger's life are his obituary by Fritz Schulz (F. Schulz, “Paul Krüger †,” ZSS (RA), 47 (1927), IX–XXXII) and his own autobiography (P. Krüger, “Paul Krüger,” in H. Planitz, ed., *Die Rechtswissenschaft der Gegenwart in Selbstdarstellungen*, 2 (Leipzig 1925), 152–69), although this text is problematic (see pages 31–32 below).

Justinian Code (today, all of these still serve as reference editions). In addition, Krüger published the standard editions of many minor juristic texts. Such is the case for the *Sententiae Pauli*, Pseudo-Ulpian, the *Consultatio* and the Autun fragments (more on these below). While Krüger could spend a lot of time travelling and inspecting manuscripts in his earlier years (especially in 1868–1870), his successful academic career entailed many time-consuming obligations. He became professor of Law at Marburg in 1870, chairholder there a year later, then a year after that chairholder at Innsbruck, yet another year later chairholder at Königsberg, where he stayed for a while, until he moved to Bonn in 1888, his final position.

While Krüger was an exceptional scholar, he was not particularly good with people. We will see in the letters below how Mommsen addressed uncomfortable issues in an unambiguous and blunt way, while Krüger was constantly beating around the bush; more specifically, he had an unpleasant habit of complaining indirectly. While Krüger's many positions as professor seem to indicate constant promotions, they had in truth more to do with his constant troubles with his colleagues. Krüger was unusually resentful, too. In his autobiography of 1925 (which he authored well beyond the age of 80, already in a somewhat mentally impaired state, see below), he described a minor incident during his time in Marburg (55 years earlier!) which brought him into a confrontation. Even though we must fear (and actually *expect*) the details to be wrong (note how confused Krüger's version of the C.Th. story in the autobiography is, see also below), the story is worth repeating, as one may understand how easy it was to offend Krüger, how much weight he attached to such trivial frictions, and how he could never let go of his grudges:¹⁷ at Marburg, only two students attended a course of his, so Krüger would have been entitled to cancel it (or at least so he thought) but nevertheless he continued to hold the class. According to Krüger's version, the Dean nevertheless wrote to him, for no apparent reason, telling him that he was *obliged* to teach the course. Most people would have shrugged, and that would have been the end of this story. Not Krüger. He found the Dean's letter outrageous for several reasons: the Dean had not talked to him before in person, he (Krüger) found the letter insulting, as he had never tried to cancel the course anyway, and finally, the Dean was factually mistaken, as it would have been Krüger's right to cancel the course *if* he had wanted to do so. Krüger pressed the matter and wrote to the relevant Ministry to obtain confirmation that he,

¹⁷ Krüger (note 16), 163–64.

theoretically, *could* have cancelled his class. Apparently, there was never a reply. When Krüger received an offer from the University of Innsbruck in the subsequent year, the Ministry showed little interest in keeping the troublemaker. Similar things happened at Innsbruck. According to Krüger, his colleagues failed to tell him that there was an unwritten obligation for any new faculty member to introduce oneself personally to the Emperor at Vienna; as he was unaware of this and failed to do so, the Austrian government happily let him depart for Königsberg for which university he had happened to receive an offer. Krüger's autobiography (165–166) creates the impression that his fifteen years at Königsberg (1873–1888) were blissful; but in truth,¹⁸ he had already written in 1882 to Althoff (then in charge at the Prussian Ministry of Education) that he did not feel comfortable there and would like to move to a different Prussian university. When Althoff offered Greifswald, Krüger declined. Althoff tried to find a position for him in either Göttingen or Halle, but neither faculty wanted Krüger, as was apparently also the case at Breslau (though Krüger was not sure himself if he had wanted to go there in the first place). Finally, Althoff could offer Bonn to him in 1888; when Krüger, always the worrywart, once again started to waver (Althoff: *wenn irgendein Ort Ihnen näher rückt, sehen Sie nur noch die Schattenseiten* [“whenever any university comes within reach of you, you start to see nothing but the downsides”]), Althoff sent him a final take-it-or-leave-it note: either accept the Bonn position or stay at Königsberg. So Krüger opted for Bonn and suffered, as he did not get along at all with his new colleague Zitelmann (notwithstanding, he remained in Bonn when Althoff offered Breslau to him once more later). Schulz's obituary is brutally blunt on the relationship between Krüger (*der größere Gelehrte* [“the better scholar”]; *Krügers Dozierkunst war bescheiden, so sorgfältig er seine Vorlesungen vorbereitete* [“Krüger's teaching was poor, although he put a lot of effort into preparing his lectures”]) and Zitelmann (*Krüger im Fakultäts- und allgemeinen Universitätsleben entschieden überlegen* [“decisively superior to Krüger in terms of faculty and general academic relations”]; *der gerade als Dozent Hervorragendes leistete und den widerstrebendsten Studenten in seinen Hörsaal zu ziehen verstand* [“who especially excelled as an academic teacher and who succeeded in attracting even the most reluctant student to his

¹⁸ Schulz (note 16), XIX–XXI.

courses”]).¹⁹ Schulz summarizes: *es war für Krüger nicht leicht, neben Zitelmann in derselben Fakultät zu leben* [“being with Zitelmann in the same faculty was not easy for Krüger”].

III. The Mommsen-Krüger correspondence on the Theodosian Code

Our story starts in the fall of 1898.²⁰ By then, Krüger had already been in Bonn for ten years. Aged 58, his most productive years were over. As Schulz indicates and Krüger’s letters confirm, he spent a lot of his time preparing his courses. Worse, barely one and a half years were left until the *Bürgerliche Gesetzbuch* would go into effect, meaning that anyone working in a legal profession in the German lands would have to invest a great deal of time familiarizing oneself with this brand-new law code. At the same time, Krüger’s erstwhile superior, Theodor Mommsen, was running out of lifetime . . . and work. Born in 1817, Mommsen had just finished the manuscript for his magisterial (and to this day, un superseded) *Römisches Strafrecht*. Shortly before his eighty-first birthday, Mommsen, ever restless, looked for another major task to accomplish in the few years that were left to him. While working on the *Strafrecht* (in which he often gives references to the C.Th.), Mommsen had apparently felt the shortcomings of Hänel’s edition on a regular basis.

Mommsen started his undertaking by inquiring with the one person that had already carried out some of the required work: Paul Krüger. During a three-year long journey through European libraries decades ago, Krüger had been tasked with collating the manuscripts for the Justinian Code, although, while doing so, he was also to keep an eye open for material relevant to the Theodosian Code.²¹ One extremely important article grew out of

¹⁹ P. Jaillette, “Un *opus* inachevé: le Code Théodosien de Paul Krüger,” *Koinonia*, 43 (2019), 11–24, at 18, writes: “[I]l est confronté à un enseignant hors pair, Ernst Zitelmann, simple *Dozent* [actually, he was a chairholder just like Krüger] qui prenait un malin plaisir à chasser sur les terres de ses collègues pour s’accaparer les meilleurs étudiants.” This seems to be based on a linguistic misunderstanding of this passage in Schulz’ obituary, not on additional evidence.

²⁰ The following section is predominantly based on the contents of the letters edited in the present article; its purpose is to provide some preliminary orientation to the reader.

²¹ [K. G.] Bruns, “Die Savigny-Stiftung,” *ZSS* (RA), 1 (1880), III–XIX, at XVIII: *Reisestipendium zur Beschaffung des kritischen Apparates für eine neue Ausgabe des Codex Justinianus unter Erstreckung der Nachfor-*

this: the publication of a marvelously careful transcription of **T** in 1880. It is of key importance: we know many C.Th. constitutions only through **T**, the original of which was destroyed in the great fire of the Turin library in 1904. Krüger's transcription saved its content for posterity. Further, to the Festschrift for Mommsen's sixtieth birthday, Krüger had contributed an article rectifying the chronology of some C.Th. constitutions, in a way outlining the work which Seeck carried out much later.²²

To Mommsen's surprise (that is, if it was genuine and he did not feign it), Krüger replied that he had already started on a printing manuscript,²³ containing books 6–16. Apart from the published transcription of **T**, Krüger had collations²⁴ of the main manuscripts **R** and **V**, of the Breviary manuscripts **M**, **P**, **L**, **N**, **E*** and **A** (**A** further contains many additions from C.Th. book 1), of C.Th. book 16 which was added to **E** (though not of the Breviary proper contained in **E**), of the Vatican pages of palimpsest **W**,²⁵ and of the single readable page of the palimpsest Paris. Lat. 12161.

Mommsen now suggested they team up: based on Krüger's

schungen auf die Handschriften des Codex Theodosianus ["travel award for obtaining [the material for] the apparatus criticus for a new edition of the Justinian Code; the research shall also encompass the manuscripts of the Theodosian Code"].

²² For the **T** apographum, see note 84 below. The reference for the Festschrift article is "Über die Zeitbestimmung der Konstitutionen aus den Jahren 364 bis 373. Ein Beitrag zur Kritik des Codex Theodosianus," in *Commentationes philologicae in honorem Theodori Mommsen* (Berlin 1877), 75–83.

²³ I.e., a draft manuscript laid out in a way that it could immediately be used by typesetters.

²⁴ There is no one-stop directory of Krüger's collations, but the list can be pieced together from various sources. In the manuscript list at the start of Krüger's own edition, he indicates the manuscripts he collated himself. When Mommsen discusses the various witnesses in his preface, he usually notes who collated it, listing Krüger and himself separately. Further, many of these collations appear in their correspondence. Mommsen, "Prolegomena," LXXV, failed to indicate who collated **M** and **P**, but from a letter (Jan. 29, 1899) we learn that both Krüger and he himself did so. According to Mommsen (id., LXXIII), just he himself and, before him, Hänel had collated **G**, although this manuscript is also in Krüger's list (P. Krüger, *Codex Theodosianus recognovit P. Krueger. Fasciculus I. Liber I–VI* (Berlin 1923), I); being kept in Germany and easily accessible, Krüger probably examined it after 1903. Krüger also indicates **E**, without restricting the extent of his collation to book 16. Presumably, he used the photographs made for Mommsen, "Prolegomena," LXVIII, which are now kept in the Universitätsbibliothek Heidelberg (J. M. Coma Fort, *Codex Theodosianus: historia de un texto* (Madrid 2014), 148 & n.187).

²⁵ Like **T**, **W** consists of various unattached pages, some of which ended up in the Vatican, some in Turin. Krüger only knew the former.

prior work, he would try to complete the edition. He further proposed adding a third and younger colleague as backup, in view of Krüger's busy schedule, and also of his own advanced age. Possibly, this was also meant to avoid the impression that he wished to simply usurp Krüger's work and put his name on it. Characteristically for Mommsen, even at this early stage he did not beat around the bush, and talked money: any income from the edition – these were fortunate times when classicists were remunerated for such work – would go to Krüger and the possible future collaborator, while Mommsen (otherwise not known to be indifferent to money) would relinquish any claim. In this letter, it is quite clear that Mommsen did not expect Krüger to actually share the workload: he speaks of “taking upon himself” the *rest* of the work, not *part* of the work; but he certainly considered Krüger a co-editor, as the envisaged younger co-worker would be a third (!) associate.

Krüger replied with a comprehensive though unfortunately lost letter. Some of the contents can be reconstructed from Mommsen's reply which answered issues raised by Krüger. First, Mommsen stressed that, while it would not be a problem to have any expenses for collations covered by the Berlin Academy, it would be highly unusual to ask for personal remuneration; second, he voiced his concern against adding the fragments from the Justinian Code – remarkably, Mommsen's only counter-argument was the impossibility of knowing *where* to add them (ignoring the problem of their often profound modifications); in an afterthought, Mommsen even mulled integrating those whose original location was (apparently) quite clear. Mommsen mentioned two further editorial questions to settle: on the one hand, he wanted to conspicuously indicate the sources of any given constitution in the edition of the reconstructed C.Th., so that one could see which constitutions were contributed by the Breviary (in the case of the *Sententiae Pauli*, the situation is quite similar; most of the fragments stem from the Breviary, although there are other sources as well – in Krüger's edition, this was and is not easy to see); on the other hand, Mommsen insisted that while sorting the constitutions chronologically was important, it did not make sense to present the texts thus in an edition. The letter further suggests that Krüger, at this stage, had at least suggested the possibility of shouldering some of the burden. Mommsen, unambiguous as always, required a clear commitment: Krüger should tell him which tasks he wanted to accomplish, and with what deadline.

Krüger replied immediately (again, this letter could not be found), as did Mommsen, for his next letter is postmarked only two days after the preceding one. Here, he was crystal clear: he told

Krüger not to send him anything before their relationship was defined. This suggests that Krüger had offered to forward his preparatory work without addressing the numerous questions Mommsen had raised regarding their mutual relationship. Consequently, Mommsen insisted on a clear-cut statement by Krüger that he “hand over” his work to Mommsen, with Mommsen being free to fashion the edition in whatever way pleased him. Krüger would remain co-editor and receive regular reports on the progress of the work (Mommsen did not mention a third associate this time.) Also, Mommsen insisted that he would not hold it against Krüger if he declined, but he wanted an unambiguous statement.

Again, Krüger responded by return of post, for Mommsen’s next letter is once more dated two days later. It begins with “*Iacta alea est!* I will try to finish this business. Mail to me what you have.” Obviously, *iacta alea est* refers to a great decision taken; the “Caesar” here is not Mommsen but Krüger, who had made up his mind and crossed his Rubicon by passing on his preparatory work.²⁶

It is not clear how pleased Krüger really was. Schulz²⁷ claims that Krüger was *durch Mommsens Vorschlag alles andere als erfreut* [“anything but happy about Mommsen’s proposal”], *Der Entschluß ist ihm durchaus nicht leicht gefallen* [“This decision was by no means an easy one for him”]. Schulz further claims that Krüger did not consent at once, that more letters followed, that *Mommsen fordert . . . ihn in ultimativer*²⁸ *Form . . . nochmals auf, sich zu entscheiden, ob er seine Vorarbeiten abgeben wolle oder nicht* [“Mommsen demands [i.e., demanded] from him once more in an emphatical fashion to make up his mind whether he wanted to pass over his preparatory work or not”]. Schulz continues: *Nach diesem Briefe blieb Krüger wohl nicht viel anderes übrig, als die schmerzliche Zession vorzunehmen. Den großen Meister abzuweisen, dem er so viel verdankte . . . , das schien ihm unmöglich* [“After that letter, Krüger probably had little other choice than performing the painful cession. It seemed impossible to him to turn down the great master to whom he owed so much”].

Schulz’ interpretation appears to be based on the Mommsen letters he found among Krüger’s papers and which he edited in

²⁶ Matthews (note 1), 98: “Dear friend,’ replied Mommsen . . . with what one can only call Caesarian decisiveness, ‘*Iacta alea est . . .*,’ seems an untenable interpretation to me.

²⁷ Schulz (note 16), XXIV.

²⁸ The main meaning of *ultimativ* in German is *mit Nachdruck* [“emphatically”]; it does not necessarily imply an ultimatum. As there is none in Mommsen’s letter, it is clear that Schulz uses the word in this main sense.

part, as he tried to prove his conclusions in the obituary by recourse to these letters. *He does not resort to hearsay or orally communicated information.* And even if Krüger had been a source for him, this would mean little: Schulz had arrived in 1923 in Bonn, when Krüger was already very old and suffered from intellectual impairment; besides, in an ex-post view, judgments of events 25 years ago might have changed.

But if Schulz had no additional sources other than what we have now, let us analyze these primary sources without a recourse to him. We shall arrive at a different impression: on October 8, 1898, Mommsen had suggested that he bring the edition to a conclusion, clearly indicating *wenn Sie die Arbeit nicht abgeben wollen, ist die Sache damit für mich zu Ende* ["if you do not want to hand over the task, this business is over for me"]; on October 10, replying to a lost letter by Krüger, Mommsen was ready to share the necessary work, but he asked Krüger for a clear indication of how much he would like to assume; Krüger had already offered at this stage (i.e., after Mommsen's very first letter!) to forward his work, as Mommsen wrote *die Sendung der Exemplare . . . soll mir lieb sein, jedoch erst dann, wenn wir zu einem festen Entschluß gekommen sind* ["I will welcome it when you send your copies . . . , but only once we have reached a firm decision"], i.e., Mommsen did not demand Krüger's work, but rather a clear settlement. The letter of October 12 clearly presupposes that *Krüger had once more announced his sending of his preparatory work: Was den Theodosianus anlangt, so bat ich Sie und wiederhole dies, mir nichts herzuschicken, bis wir einig sind* ["As for the Theodosianus, I have [already] asked you and now repeat it: do not to send me anything until we have reached an agreement"]. Mommsen did not demand that Krüger send his work, rather he demanded *that Krüger not send his work* unless Mommsen received full liberty with regard to the nascent edition (i.e., no C.I. material, his unusual layout, etc.). This (and their later communication, see Mommsen's letter of February 9, 1903 [No. 26]) also very much suggests that in his preceding letter, Krüger had declared that he would not be able to share any of the load. I cannot see how anybody can claim that by these letters, Mommsen tried to snatch Krüger's material – on the contrary, he repeatedly demanded that Krüger keep it until they had sorted out the terms on which Mommsen might use it.

In his review, Krüger claimed that he had accepted Mommsen's proposal *mit Freuden* ["gladly"].²⁹ This could easily be a lie just as much as his claim that it was he himself who had renounced

²⁹ Krüger (note 15), 319.

co-editor status (a blatantly wrong assertion by Krüger to be found on this very same page).³⁰ More interesting is his autobiography. Its chronology is all a jumble, and the aged Krüger was more resentful than he would have been in the full possession of his mental powers. But even in this bitter account, in which he accused Mommsen of having planned to ditch him from the outset and of excluding him deliberately from the correction – even there, Krüger did not make the *least* hint of any feeling of having been “robbed” in 1898. In any case, there was no way whatsoever in which Mommsen could have forced Krüger to pass on his work. Krüger was not a young student assistant, but a powerful chairholder in one of Germany’s most important universities. One postcard indicating that he would finish his edition soon enough (“but thanks for asking”) would have been enough to end the matter. Mommsen’s proposals had left Krüger ample room for declining (see above), and furthermore, he had explicitly expressed not to hold it against him (besides, he could not have hurt Krüger anyway). Finally, given the age of Mommsen, any grudge of his would have been over soon enough.

Yet Krüger offered to forward his preparatory work immediately, after Mommsen’s first card (if I understand the references in Mommsen’s letters correctly). This is why I, contrary to Schulz, believe that Mommsen’s offer did not come as totally unwelcome to Krüger: if there is one thing that we can be sure of, it is Krüger’s persistent feeling of overexertion. Krüger undoubtedly expected Mommsen to use his draft printing manuscript as the basis for books 6–16, to add books 1–5, to compose an introduction and to put together some indices, and to submit all of it to the press. In essence, it would have been Krüger’s edition. Yes, Krüger would have preferred to include the C.I. material, and yes, he would have preferred a more traditional presentation; but in his review of Mommsen’s edition – in which Krüger does *clearly* criticize any aspect which objectively deserves criticism – he even guardedly praises Mommsen’s layout³¹ and partly understands Mommsen’s decision to leave out the C.I. material.³² In other words: this issue certainly mattered much less to Krüger than modern authors believe. He could swallow this (not overly bitter) pill and finally see *his* Theodosianus edition completed while concentrating on the BGB and his other obligations.

During the next six weeks, Mommsen regularly reported to

³⁰ Id.

³¹ Id.

³² Id., 328.

Krüger on his progress, writing six times to him in all. Krüger never failed to answer; his letters were invariably helpful if succinct. Mommsen inquired about a manuscript he did not know (Krüger gave him the reference plus an additional one), Mommsen reported on his first findings regarding the stemmatic relationship of the Breviary manuscripts (Krüger voiced some doubt, without going into detail – that he did seven years later in his review), Krüger passed on further notes he came across as well as the few collations he had for the *novellae*. Krüger even forwarded two copies of Hänel's edition of the Sirmondians and *novellae* to serve as working material. From this exchange it was clear that Krüger would not actively help in the edition: he courteously answered any question Mommsen had and provided support by forwarding books and notes, but did not actually contribute. One remark by Krüger is striking: he suggests to Mommsen that a third associate (*noch ein Mitstreiter*, literally “an additional comrade-in-arms”) would be unnecessary, given Mommsen's work ethic. The odd thing is that in the preceding letter Mommsen had not even mentioned his search for a further helper (and he had certainly not asked Krüger for such advice). Krüger's motivation can only be guessed: just a light-hearted compliment to industrious Mommsen? Or a wish not to have a third name on the edition-to-come? Or perhaps even a scheme to hamstring the enterprise, in case Mommsen failed to complete it? However that may be, Mommsen ignored the remark.

Already at this stage, i.e. during his first weeks of work on the C.Th. text, Mommsen made a major discovery. Within the multitude of Breviary manuscripts, he managed to discern two different transmission strands which were in a way complementary (though one of the two was correct more often). He also understood that **L** – a Breviary manuscript much used by both Hänel and Krüger (for his *Sententiae Pauli* edition) – was actually rather useless. In a much later letter to Seeck, Mommsen (February 11, 1902, see pages 23–24 below) will call his observations on the Breviary transmission one of the two things which he really did well in the C.Th. edition; and Krüger, too, praises these results.³³ Without any question, disentangling the confusing transmission strands of the Breviary is the single greatest challenge an editor of the C.Th. faces, and this success belongs to Mommsen alone.

On December 15, 1898, the session of the philosophical-historical division of the Berlin Academy retained Mommsen's C.Th. proposal for funding. The papers of the Berlin Academy actually include *two* handwritten proposals by Mommsen, a shorter

³³ Id., 325–26.

and a longer one. The longer one bears a handwritten note *Dringlich. Genauere Darlegung des Hrn. Mommsen. ad acta* ["Urgent. More detailed proposal by Mr. Mommsen. For the record"]. Apparently, the division had decided only on the basis of the shorter proposal (which would fit on a single letter-sized paper) but insisted on filing a more substantial document (the longer proposal has, perhaps, two-and-a-half times as much text). As their line of thought is similar, I will just quote the longer version. Mommsen pointed out that a long time ago, Krüger had collated the Justinian Code manuscripts by order of the Academy, and Krüger's C.I. edition had grown out of this. He added that Krüger's mission then had also included collating C.Th. manuscripts. The hope that Krüger would edit the C.Th. as he had edited the C.I. had come to naught. Krüger had officially given it up by handing over his collations to the Academy in 1879;³⁴ furthermore, some later attempts by Krüger to resume the work had failed as well; *ich habe in der letzten Zeit durch Verhandlungen mit ihm mich davon überzeugt, daß dieselbe durch ihn nicht zu Ende geführt werden wird und habe alle zum Theil inzwischen wieder an ihn gelangten Materialien von ihm zu freier Verfügung erhalten* ["in a recent exchange with him, I assured myself that it [the C.Th. edition] will not be completed by him. I have obtained all the material from him (which, in the meantime, had partly reverted to him), for free disposal"]. While Paul M. Meyer is already mentioned in both proposals as future co-editor, Krüger makes his appearance only as the one who hands over the collations which had been made, as Mommsen points out in the proposals, by order of the Academy in the first place. It cannot be doubted that by December 1898, Mommsen did not envisage a collaboration with Krüger, apparent-

³⁴ In his letters to Krüger, Mommsen never gave the slightest hint, but legally, Krüger's collations did not belong to him; rather they were the property of the Academy. In 1880, Bruns (note 21), XIX, wrote regarding Krüger's collations: *Dabei ist aber zu bemerken, dass die gesammten Resultate der Nachforschungen nach den Handschriften des Codex Theodosianus der Bestimmung der Berliner Akademie zufolge dieser zu Eigenthum übergeben sind, und bei ihr zur Benutzung für eine demnächstige neue Ausgabe des Codex Theodosianus aufbewahrt werden* ["However, it has to be noted that in keeping with the provisions of the Berlin Academy, all results regarding research on the manuscripts of the Theodosian Code have been handed over to it as its property, where they are kept for use for the soon forthcoming edition of the Theodosian Code"]. Apparently, Krüger had deposited his collations in 1879 at which time one still believed in a "soon forthcoming" C.Th. edition.

ly not even in name.³⁵ In his later letters to Krüger, he never would mention the Academy. The proposals also contain another interesting remark: from the outset, Mommsen insisted on including in Meyer's contract the term that he was obliged to conclude the C.Th. edition if circumstances would not permit Mommsen himself to do so. Although the old man dared to start this bold race against his own life expectancy, he did not do so without a backstop.

After a gap of two months, Mommsen gave Krüger a further update on January 29, 1899: he already had two manuscripts rechecked and would now recheck **L** and **N** (for which he had Krüger's collations!) too, because after adding Krüger's collations to his own draft manuscript, such a verification was mandatory anyway (and better done against the original than against Krüger's notes), and in addition, Krüger had omitted the Visigothic commentary (the *interpretatio*). This is significant: by now, Mommsen had decided to leave much of Krüger's work unused: he had chosen not to rely on Krüger's collation of these four manuscripts, and more importantly, had rejected Krüger's draft printing manuscript. Mommsen also gave notice that he had found somebody to take care of the *novellae*; in contrast to Mommsen's earlier promise, he did not ask for Krüger's approval.

After this letter, there was very little communication on the Theodosian Code edition between them. As Krüger did not show any interest at all in its progress (there is not one single card in the vein of "how are things going?"; "do you need any help?"; etc.), Mommsen probably saw no point in involving him any further. Before the edition reached the typesetting stage, there were only three further exchanges on it: in June 1899 Mommsen asked Krüger whether he could help with any contacts at the library of Ivrea (he couldn't); more than a year later, in August 1900 Mommsen inquired whether Krüger knew of any work done on explaining the unusually comprehensive range of subjects covered in the Theodosian Code (he didn't). Finally, in November 1900 Mommsen forwarded a layout sample and asked Krüger for his comments. Krüger answered merely with a postcard, raising three points of varying significance: he noted that Mommsen kept certain modifications introduced by the Visigothic compilers (in criticizing this, Krüger was of course right); he doubted whether Mommsen's idea to put the modified C.I. versions in the margin would work out (in actual fact, it did, and even brilliantly so; having these in the

³⁵ The cited documents can be found in the Archive of the *Berlin-Brandenburgische Akademie der Wissenschaften* in the Bestand PAW (1812–1945), II-VIII-8; their numbers are 1–2, 5–7.

margin excludes any confusion with textual variants in the apparatus below); and proposed not to use lines above abbreviations (i.e., for example PPO with a line above it or not; this is essentially a purely esthetical choice, but Mommsen's use of it was inconsistent, so Krüger was in this right, too). Mommsen does not seem to have replied to this, but perhaps he at least heeded the first point, as in the printed edition, the Visigothic modification Krüger cited as an example is bracketed.

While Mommsen no longer reported to Krüger on the Theodosian Code after January 29, 1899, their communication was otherwise quite lively! In the six months between April and October 1899, they exchanged around two dozen letters, almost all of them concerned with the Autun fragments. This is a completely different matter: in Autun, France, a palimpsest with a juristic text had recently been identified. Its content turned out to be a late antique paraphrase of Gaius meant to serve as commentary. The authoritative Gaius edition then was Krüger's; as Mommsen knew the relevant French scholars much better, he assumed the role of intermediary between them. The next updated edition of Krüger's Gaius edition was already overdue (the preceding print run had almost sold out), but the Frenchman to whom belonged the honor of publishing the new snippets, Émile Chatelain, was painfully slow to do so; he also was a poor editor, at least according to the opinions expressed by Krüger and others in their letters.³⁶ In the end, Krüger could go ahead and add this text to his new edition, relying on a transcription by Chatelain, while Chatelain himself never published the Autun Gaius in full (the feedback by Krüger and others had likely convinced Chatelain that editing juristic texts was not his forte).

After the Autun business was settled, Mommsen and Krüger's communication thinned out to a trickle. Apart from the two requests by Mommsen already mentioned (bibliographical help on C.Th.'s subject range and forwarding of the layout sample, both in

³⁶ Editing the letters on the Autun manuscript would make for another intriguing article. Recently, when making the case for a re-edition of the Autun fragments, J.-D. Rodríguez Martín ("Neu entdeckte Schriftspuren im Palimpsest des Gaius von Autun," *ZSS (RA)*, 130 (2013), 478–87) argued that *despite* the high competence of Chatelain, new research on the palimpsest might add to our knowledge. Rodríguez Martín tried to prove this alleged competence by pointing to *published* statements by Krüger and other scholars of Chatelain's time. In truth, Rodríguez Martín's case for new research is even stronger, as contemporary scholars acknowledged Chatelain's competence only in *published* texts. See page 55 below, and notes 212 and 217 below and accompanying text, on Krüger's, Mommsen's, and Girard's candid opinions on Chatelain's editorial work.

the second half of 1900), there is just one postcard extant, written by Mommsen in January 1901: he informs Krüger that he has submitted his review article (namely of a highly problematic book by Hofmann) to Pernice (editor of the *Savigny Zeitschrift*, Roman series, who was to die later in that same year) and that he shares Krüger's (apparently very bad) impression of (Hofmann's) book. Krüger's poor opinion of Hofmann's book can be found in the same volume of the *Savigny Zeitschrift*, Roman series (namely 1901), directly subsequent to Mommsen's. Mommsen's postcard therefore does not presuppose an undocumented exchange between Mommsen and Krüger; it seems more likely that Pernice had forwarded the proofs of Krüger's review to Mommsen.

During the next two years, there is no indication of any kind of communication between Mommsen and Krüger. Mommsen was busy completing the edition, and his yearly if succinct reports in the *Sitzungsberichte* of the Prussian Academy provide us with a rough outline of his progress: on January 25, 1900, Mommsen declared that collating work for the edition was almost finished; on January 24, 1901, Mommsen reported that he himself had completed the critical text of the C.Th., the preface was mostly finished, and typesetting had reached book 2, while Meyer had collated most Breviary manuscripts for the edition of the *novellae*; on January 23, 1902, Mommsen notified the public that typesetting had advanced as far as book 9, while Meyer had traveled in the preceding year to Rome, Ivrea, and Paris, and would soon start establishing the text; on January 29, 1903, Mommsen could declare that typesetting had reached book 16, and the typesetting of the preface had commenced, while Meyer had completed much of the text of the *novellae*, and was starting work on the preface and index.³⁷ Significantly, in none of these widely publicized reports did Mommsen make any mention of Krüger; perhaps even more significantly, he had already publicly declared in the first report that he intended to use Schöll's collation for **V**, while having collated **R** himself (implying that he had rejected Krüger's collation of that manuscript).

There is additional telltale evidence from this time. Mommsen had been bickering with Seeck on chronological issues unrelated to our questions here. This transpired in the shape of short notes in

³⁷ *Sitzungsberichte der Königlich Preussischen Akademie der Wissenschaften zu Berlin* (Berlin 1900), 1:44–45; (1901), 1:75; (1902), 1:53; (1903), 1:103.

the journal *Hermes*.³⁸ In early 1902, Mommsen had again responded to Seeck, and the *Hermes* editors had forwarded the first proofs of Mommsen's text to Seeck in case he wanted to answer yet again. Seeck spotted a goof by Mommsen and chose to directly contact him, so that Mommsen could remove it before the fascicle went to print. This noble deed apparently impressed Mommsen, because he used the occasion to ask Seeck to see his Theodosianus through the press in case he died too early to do so himself. In these letters to Seeck, Mommsen does not allude once to Krüger, and he calls the Theodosianus unambiguously "my Theodosianus." The most revealing passage is the following: *Unter dem wenigen, was ich glaube, gut gemacht zu haben, ist die Richtigstellung der Handschriftenverhältnisse und die Genauigkeit der Collationen dieses Hauptstücks* ["Among the few things I believe to have done well is the rectification of the manuscript relationships and the accuracy of the collations of this crucial text"]. The last indication is of key importance. It suggests that Mommsen had rejected Krüger's collations not only for the reasons he would politely state when writing to Krüger himself (it is always better to check original manuscripts than to rely on second-hand evidence; the *interpretatio*, omitted by Krüger, also demanded verification); he clearly thought Krüger's collations deficient and in need of replacement.

Mommsen's and Krüger's communication resumed abruptly on February 6, 1903, and remained intensive during the next seven days. In this short period, they exchanged no fewer than six letters. Mommsen informed Krüger that the Theodosianus edition was now almost complete, and he was faced with the problem of how to indicate Krüger's contribution, which eventually was not very significant: Mommsen had created a printing manuscript of his own, renouncing Krüger's prior work; Mommsen had checked in person or by proxy almost all the manuscripts Krüger had collated earlier, with the exception of the palimpsests **T** and **W**. This was not much: in the case of **T**, Krüger's transcription was published and hence publicly available at any rate; **W** comprised merely 14

³⁸ Initially, Mommsen protested against an article by Seeck (*Hermes*, 36 (1901), 28–35) and authored a response which appeared in the same journal in a later fascicle of the same year (*Hermes*, 36, (1901), 602–605). Seeck replied to that early in the next year (*Hermes*, 37 (1902), 155–56) to which Mommsen could immediately reply, as the *Hermes* editors forwarded the text to him at typesetting stage (*Hermes*, 37 (1902), 156–57). The editors also mailed Mommsen's response to Seeck who spotted Mommsen's blunder. Seeck tells the story in his Mommsen obituary (O. Seeck, "Zur Charakteristik Mommsens," *Deutsche Rundschau*, 118 (1904), 75–108, at 82–83). See also note 284 below.

folios from books 14–16, i.e., did not contain any unique texts, and of these 14 folios, Krüger had copied only those 11 kept in Rome. Mommsen also employed other “remote collators,”³⁹ most famously Anna Parker in Oxford, so it is difficult to see how Krüger’s work was any more important than, for example, hers. From the outset, Mommsen excluded indicating Krüger as a co-editor, but conceded that just mentioning him in the preface was not sufficient; hence he left it to Krüger what to put on the title page.

Krüger replied that he had already understood several years ago when he received the sample layout (in late 1900) that his own worked-out printing manuscript had not been used and that consequently all his work had been in vain, just as all the collations he had created. Before that, he had thought of “based on Krüger’s preparatory work,” but this was now simply not the case. In an oddly worded phrase, Krüger remarks that he had not helped in the correction of the proofs; he had not offered his help as he feared he would not have been quick enough for Mommsen. Had he done so, he would have a clearer idea now to which extent his own work had been used; but as things stood, he had to leave the title phrasing to Mommsen. Krüger’s letter is awkward on several accounts. Instead of simply suggesting a title (as Mommsen had invited him), he does this in an unpleasantly indirect way. The part on the correction was probably meant as a reproach to Mommsen for failing to invite him to do so (at least Krüger suggests so later, after Mommsen’s death: just as an adumbration in the review, explicitly in the autobiography). And that Mommsen might not use his printing manuscript was already certain from January 1899, when Mommsen wrote to him that he re-collated some manuscripts as Krüger’s collation had been copied into Mommsen’s own (!) printing manuscript. Mommsen’s insistence from the outset to have a free hand in fashioning the edition once he took over had not merely meant to introduce a few changes in Krüger’s manuscript (like, perhaps, removing the additions from C.I.); it had meant to reject it if need be.

³⁹ But Mommsen did not “mobiliser une équipe internationale,” as Blaudeau claims (P. Blaudeau, “Faire de l’histoire romaine avec l’édition mommsénienne du Code Théodosien: entre modèle de compréhension du maître et inflexions de la recherche récente,” in I. Fagnoli and S. Rebenich, eds., *Theodor Mommsen und die Bedeutung des Römischen Rechts* (Berlin 2013), 141–54, at 143), with the curious footnote 10, “non sans user de persuasive contrainte (sur Krüger en particulier).” Everybody was paid, nobody was forced; these helpers were contractors (as Anna Parker) or dispatched by the Academy (as Violet) with a clear predefined collation task to accomplish, they were not part of “a team.”

In a (for his standards) surprisingly conciliatory letter, Mommsen assured Krüger that his work had by no means been in vain; he would surely understand that after copying his collations, they had to be rechecked at any rate, which was preferably done against the manuscripts themselves. Calling him a co-editor was simply against the facts and surely not desired by Krüger himself (note that Krüger had not asked for this in his letter – Mommsen again refrained from beating around the bush and expressed what Krüger perhaps, or at least in Mommsen's imagination, was secretly wishing for), but it was fine with him to use the formula proposed by Krüger rendered into idiomatic Latin: *adsumpto apparatusu Kruegeriano*. Uncharacteristically, Mommsen added a few explanatory words: he did not regret having assumed this work which Krüger had been unlikely to complete, based on what Krüger had expressed back in 1898 and also now (this referred to Krüger's lack of time which had kept him from helping with the corrections). Nevertheless, he could not shrug off a certain unease for having crossed him.

Krüger in his answer confirms Mommsen's proposal with a minor modification (*P. Kruegeri* instead of *Kruegeriano*; Krüger's version is exactly what stands on the title), but insists that he would definitely have completed the edition. In his indirect ways, he reproached Mommsen for not telling him earlier that he wanted to do this edition: Krüger writes that he would never have started it in the first place if he had known about Mommsen's intentions. He also told Mommsen about a further planned project of his, which he now declared dead: a chronological collection of the constitutions, according to reconstructed, correct dates. In his reply, Mommsen confirmed the wording of the title and adds that this obscure phrase would receive further explanation in his preface; he also took up Krüger's suggestion and offered him to contribute a reconstructed chronology of the constitutions (though of course not a complete edition of these) as an appendix. Unsurprisingly, Krüger declined.

A month later, they exchanged three further letters: Mommsen had a Breviary manuscript from Warsaw on loan, which might also have been important for Krüger's *Sententiae Pauli* text. Krüger replied that he would find out whether a new edition was planned by his publisher, and Mommsen told him to hurry up, as the manuscript was on loan only for a few weeks. This was their last communication we know of before Mommsen died on November 1, 1903.

IV. From Mommsen's death to Krüger's obituary by Schulz

Mommsen did not keep his promise: there is no further explanation in the preface. As death intervened, Mommsen can hardly be blamed, but one cannot fail to notice that the loan and collation of the Warsaw manuscript which transpired in March and April 1903 is mentioned in his preface (XCIX: *Vidi eum, sero tamen, missum Berolinum*). Apparently, Mommsen was not in a hurry to author the final paragraphs, clarifying his relationship with Krüger. Strikingly, the preface follows no consistent way in mentioning Krüger. A few times, he is cited in a way that suggests him being a co-editor (most significantly on XXXIX: *cum Paulo Kruegero operis nostri socio*, on **T**; but also LXXII: *Contulimus Paulus Krueger olim, nuper missum Berolinum ego*, on **N**; LXXVII: *Librum contulimus . . . Krueger . . . et transmissum Berolinum ego*, on **L**; LXXXIV: *Librum . . . recognovimus editores Theodosiani Haenel et Vesme et a. 1868/9 Paulus Krueger noster et a. 1899 ipse ego*) but most of the time Krüger is cited as an uninvolved third party (one instance may suffice: LVIII: *Nos illis utimur diligentissime descriptis a Kruegero*, on the Vatican pages of **W**). All of this was authored and released by Mommsen, as he himself, during the final months of his long life, managed to see the prolegomena through the press up to CLXXXV; only the rest (containing some tables and a separate essay on the Breviary, but none of the text proper of the prolegomena on the C.Th.) was prepared for printing by Seeck and Paul M. Meyer.⁴⁰ For all his foresight, apparently Mommsen forgot to either author or to pass on the clarification regarding Krüger to them (if not, they failed to include it).⁴¹ The book itself shows a publication year of

⁴⁰ In the printed book itself, there is just the reference to unnamed friends on an unnumbered page (between VIII and IX). Croke's indication (B. Croke, "Mommsen's encounter with the Code," in J. [D.] Harries and I. Wood, eds., *The Theodosian Code. Studies in the Imperial Law of Late Antiquity*, 2nd ed. (London 2010), 217–39, at 235 n.82) that "Seeck's assistance was duly acknowledged," is wrong. At the location Croke indicates, somebody indeed expresses his gratitude towards Seeck for helping with the proofs – but the thanking person is A. von Wretschko (who added an appendix on the later fate of the Breviary), not a resurrected Mommsen. On Seeck and Paul M. Meyer as the "unnamed friends," see Diels' reports on the progress of the C.Th. project on Jan. 28, 1904, and on Jan. 26, 1905: *Sitzungsberichte der Königlich Preußischen Akademie der Wissenschaften zu Berlin* (Berlin 1904), 1:238; (1905), 1:132–33. The details can be found in the Archive of the *Berlin-Brandenburgische Akademie der Wissenschaften* in the Bestand PAW (1812–1945), II-VIII-8, document no. 85.

⁴¹ After Mommsen's death, the Academy summarized (Academy Archive, document no. 85): *Mommsen ist es vergönnt gewesen, den von ihm*

1905, but it was actually already available in the course of 1904.⁴²

The 1905 issue of the Savigny Zeitschrift, Roman series, brought Krüger's review. This is Krüger at his best: his review is highly competent, it is fair, and, while it appreciates the strengths of Mommsen's edition,⁴³ all of Krüger's criticism is to the point.⁴⁴ Apart from rectifying minor mistakes and even the title (Mommsen, relying on the manuscripts, wrongly preferred just *Theodosianus* to the correct *Codex Theodosianus*, the official name consistently attested in testimonies at the time of its creation), Krüger was particularly displeased by the way Mommsen had used Krüger's collation of **R**. The manuscript **R**, it will be remembered, is the sole witness for most constitutions of books 6–8. It is beautifully written, but suffered fire (and firefighting water) damage in the margins, so many lines are incomplete. When Mommsen had Krüger's printing manuscript transcribed, he took over several of Krüger's competent completions without noting their origin (which would have been fine if Krüger had been acknowledged as co-editor, but was unfair now); no less questionably, after Mommsen had checked **R** himself, he settled on several readings different from Krüger's. Without further verification (which has not happened ever since), it is impossible to say who is right, but chances are that the youthful eyes of punctilious Krüger deserve more confidence than those of 82-year-old Mommsen⁴⁵ who ploughed through a lot of manuscripts during his relatively short stay at Paris. As to

selbst übernommenen Teil der Ausgabe im Manuskripte völlig fertig zu stellen und den Druck desselben bis auf wenige, unwesentliche Schlussbogen selbst zu überwachen ["It was granted to Mommsen to totally [!] complete the part of the edition which he himself had assumed as a manuscript and to see it through the press himself excepting a few unimportant sheets at the end"]. Nevertheless, there are no acknowledgments which one would surely expect at the end: not only for Krüger, but also for the people who provided support with the proofs, including Mommsen's daughters, Seeck (see Seeck's letters to Mommsen on Jan. 7, 1901, and Feb. 11, 1903, kept at the StBB-PK), von Simson (Rebenich (note 2), 919), and probably others.

⁴² See the reference to Diels' 1905 report in note 40.

⁴³ See 319 on the layout: Krüger states that Mommsen preferred a layout different from his own preferences, but still calls it an "advantage" to be able to see immediately for each and every constitution where it is transmitted in the first place.

⁴⁴ Jaillette (note 19), 21: "Pas une ou presque des dix-neuf pages de son compte rendu qui n'exprime son ressentiment ou ne sous-entend combien il est furieux, outré et désappointé." While I can confidently assure that not one single remark of Krüger explicitly expresses "ressentiment," perceived implications of fury, outrage, or disappointment depend on the reader. At least I myself cannot detect any passage which might possibly support Jaillette's claim.

⁴⁵ See note 75 below.

Mommsen's decision not to add C.I. texts at a conjectured position within a reconstructed C.Th., Krüger acknowledged that this is understandable whenever their position is dubious, though otherwise it is not justifiable to leave them out just because in C.I. "the text is not always unmodified."⁴⁶

Krüger's review includes slightly more than two pages (318–20) on his own prior work and the contact with Mommsen. The unique phrase "adsumpto apparatu" on the title required explanation (which the edition itself failed to deliver), and one had also to understand how somebody who seemingly was himself involved in the edition got to review it. Krüger explained that he worked on the C.Th. since the time of his C.I. collations; that he couldn't finish his collation work because he failed to find further funding for necessary travel; that nevertheless, by 1896,⁴⁷ books 6–16 were completed and book 1 "in part." According to Krüger, Mommsen first suggested to do the work together, which Krüger had to decline because of work overload. Consequently, Mommsen proposed to do it alone: *Mit Freuden ging ich auf diesen Vorschlag ein*, "Gladly I accepted his proposal," writes Krüger, which has been considered a lie by Schulz, although I am not sure about that (see above). Krüger goes on to narrate how Mommsen regularly reported back until 1899, and that they had some meetings (of which we do not know much otherwise). After that, there was no further contact until Krüger received the layout sample which he approved (this is rather bending the truth: Mommsen did not ask for Krüger's approval nor did he explicitly receive it). *Die Korrektur des Textes übernahm Mommsen allein* ["Correcting the proofs was undertaken by Mommsen alone"], writes Krüger. This is (regarding Krüger)⁴⁸ technically true, but suggests that Mommsen deliberately did not involve Krüger.⁴⁹

Krüger then summarizes the content of Mommsen's letter, citing the key passage *da Sie bei der Herstellung des Apparats nicht betheiltigt und dafür nicht verantwortlich sind* almost verbatim in direct speech. Krüger continues: *Unter diesen Umständen trat ich von der Ausgabe zurück* ["Given these circumstances, I stepped

⁴⁶ Krüger (note 15), 328.

⁴⁷ This might be a printing mistake for 1898, because Krüger continues "when Mommsen contacted me," suggesting he is talking about the state of his work in this moment.

⁴⁸ In fact, many people provided help to Mommsen, see note 41 above.

⁴⁹ Compare Mommsen's and Krüger's correspondence: no fewer than three times does Mommsen offer help with correcting, every time gladly accepted by Krüger. Also, Mommsen had helped correct Krüger's *editio maior* of the C.I. (Krüger (note 16), 3).

back from the edition”] which is a clear lie (or, at best, wishful thinking). Krüger adds that now, after having seen the edition he knows that stepping back would have been necessary at any rate, because Mommsen had claimed things that seem factually wrong to him.⁵⁰

Eight years later, Krüger – by then 73 years old – could turn again to the Codex Theodosianus. In a series of articles called *Beiträge zum Codex Theodosianus*, published between 1913 and 1920 in the Savigny Zeitschrift, Roman series,⁵¹ he explained his views on several issues. In one of these contributions, he gave his methodological considerations for filling in C.Th. *lacunae* by adding C.I. texts.⁵² Though he doubted it as late as early 1920 (Savigny Zeitschrift, Roman series, 41, at 1), shortly afterwards his own Codex Theodosianus edition started to appear: the first fascicle containing books 1–6 in 1923 (though the title page says 1922), the second containing books 7–8 in 1926 (though the title page says 1925). In that year (1926), Krüger died, aged 86, shortly before the second volume was out (see *Gnomon*, 2 (1926), 496 n.1).

Among the papers he left, there is a transcription of most of the letters Mommsen sent to him concerning the Theodosian Code. This transcription omits personal passages as well as some of the less important letters; one page of the transcription is lost. Krüger added pencil notes in the margin from which one can understand

⁵⁰ A word of warning is in order here, as this passage was utterly misunderstood and thusly paraphrased by Coma Fort. Krüger (note 15), 320, writes he had to step back as an editor “weil Mommsen in vielen wichtigen Fragen zu Ergebnissen gelangt war, von deren Richtigkeit ich mich nicht überzeugen kann; und auch hinsichtlich der handschriftlichen Überlieferung ist Mommsen zu Angaben geführt worden, deren Vertretung er mir nicht zumuten konnte.” The paraphrase by Coma Fort (note 24), 462–63, changes this to its very contrary: “. . . porque [Krüger] reconocía en definitiva la superioridad de Mommsen al haber resuelto cuestiones importantes y problemas de la tradición manuscrita de las que él mismo admitía su falta de competencia.”

⁵¹ ZSS (RA), 34 (1913), 1–12; ZSS (RA), 37 (1916), 88–103; ZSS (RA), 38 (1917), 20–34; ZSS (RA), 41 (1920), 1–14.

⁵² ZSS (RA), 38 (1917), 20–28. Krüger argues that the C.I. text itself is often a reconstruction from later texts which might be rewritten (this is true; and it is rather unfortunate that many C.I. users do not understand which purported C.I. texts are actually just indirect versions from the Basilica!) and C.Th. texts might themselves be already a rewrite from the original constitutions. Yet by textual comparisons, we can see that very little was changed. At any rate, the comparison is certainly inappropriate as it effaces the great difference of the two codes: the Theodosian Code is supposed to be a collection of source texts *without any changes* to their contents, while in the Justinian Code, the compilers were tasked to *update every text* to their contemporary status quo.

that Krüger produced this transcription late in his life.⁵³ We do not know for sure why he did so, but there is a letter extant by a certain Dr. Lotte Bamberg of July 16, 1925, returning his transcription which he had made available *seiner Zeit Herrn Professor Partsch* [“at that time to Mr. Professor Partsch”].⁵⁴ Josef Partsch had arrived as newly recruited chairholder to Bonn in spring 1920, and it was he according to Schulz⁵⁵ who had secured external funding for Krüger’s C.Th. edition. Its typesetting commenced in late 1921, so one may perhaps assume that Krüger transcribed these letters only in 1920 on the request of Partsch, who needed some clarification on the relationship to Mommsen in order to secure funding; but this is speculation.

From this time stems another important primary source: Krüger’s whimsical autobiography. Between 1924 and 1929, a commercial publisher brought out a three-volume collection entitled *Rechtswissenschaft der Gegenwart in Selbstdarstellungen*, for which prominent law professors were invited to author their autobiography. One of these luminaries (together with, e.g., Otto Lenel and Otto Gradenwitz, but also Krüger’s antagonist in Bonn, Ernst Zitelmann) was Paul Krüger. His autobiography is contained in volume II of 1925. The textual genre would have been awkward enough anyway, but by then [*war*] *seine Kraft gebrochen; namentlich versagte häufig das Gedächtnis seinen Dienst. Freilich wechselte der Kräftezustand. In einer schlimmen Zeit ist die Selbstdiographie geschrieben* [“his force was broken; in particular, his memory often failed him, though his condition varied. The autobiography was written in a dreadful period.”]⁵⁶ Apart from Schulz and the analysis of the autobiography (see next paragraph), there is more evidence on the failing mental powers of Krüger. A sad testimony (first pointed out by Croke)⁵⁷ is a letter kept among Krüger’s papers. It was written on July 15, 1925 by an employee of Weidmann, the publisher of Krüger’s C.Th. edition. The author expressed his confusion regarding a card he had received from Krüger; in this card, Krüger had asked whether the second fascicle of his C.Th. edition would just include Book 7 or also, in addition,

⁵³ For example, see Krüger’s note to Mommsen’s letter of Feb. 12, 1903. Krüger writes that he cannot remember why nothing came of the proposed index and muses whether Traube’s death (in 1907) had to do with it. Hence, the note must have been written quite a while after 1907.

⁵⁴ Partsch could not return these himself, as he died on March 30, 1925, at 42 years of age.

⁵⁵ Schulz (note 16), XXX–XXXI.

⁵⁶ Id., XXXI & n.1.

⁵⁷ Croke (note 40), 238 n.101.

Book 8. His publisher wrote back that Book 8 was already typeset and in part even printed, and that they now really needed him to complete his work (i.e., correcting the remaining proofs of Book 8). Seemingly, Krüger had forgotten how far typesetting (and his proofreading) had progressed.

It was not much earlier that Krüger had authored his autobiography, and apparently the state of his mental powers was not much better at that time. The autobiography includes evident mistakes, especially regarding the chronology, both absolute and relative. For example, he misdates the start of his three-year journey in search for C.I. manuscripts to 1874 (correct is 1868). His narration of the C.Th. story is difficult to make sense of, even if one knows the backdrop: Mommsen and Krüger cooperate on the law texts, but they lose contact when Mommsen leaves for several years [?]. After his return, he asks for Krüger's preparatory work on the C.Th. When Krüger tells Mommsen that he is too busy with other obligations, Mommsen offers to add the rest. Their cooperation breaks down when Krüger disagrees on the textual value [!] of the manuscripts used for the edition. During visits of Krüger to Berlin, they still speak a few times about the Theodosian Code, but then Mommsen excludes [!] him from the correction. Krüger does not know about the progress of Mommsen's work until, at the start of the new century, he is surprised by Mommsen's request "which I already mentioned" to pass all of his collations to Mommsen [!]. Krüger already feels now that Mommsen decided to complete the edition on his own (remember, according to this version, typesetting had already started!), and this bad foreboding of Krüger is finally confirmed. To prove his point, he adds three transcribed letters of Mommsen and concludes that afterwards [!] their relationship was limited to other Latin juristic sources.

None of this should ever have been published in this shape; the collective volume's editor should have interfered and protected Krüger's dignity. A detailed analysis of this garbled account is out of the question, but still: the autobiography is sad proof of how much the Theodosian Code affair continued to torment Krüger (although, perhaps, the publication of his own C.Th. – which was ongoing at this period – had brought memories back which otherwise might have rested). As in his earlier report, he claimed to have had the upper hand, as being the one who ended the collaboration; regarding the correction, Krüger is more outspoken than ever, explicitly reproaching Mommsen that he did not let him participate in it.

The fact that Krüger devoted around a quarter of his autobiography to the C.Th. story, together with the incompre-

hensible account he gave, had another consequence: Schulz, who soon afterwards had to author Krüger's obituary in the *Savigny Zeitschrift*, Roman series, used an even greater share (7 pages out of 24!) for the C.Th. business, transcribing even more of Mommsen's letters. Schulz's verdict is that Mommsen behaved *vollkommen tadellos und loyal* ["completely irreproachable and loyal"], while Krüger felt bitter, cheated of a big success; *dieses Gefühl wurde er bis an sein Lebensende nicht mehr los* ["he could not rid himself of this feeling until the end of his life"].⁵⁸ Schulz had access exclusively to Mommsen's letters which he found among Krüger's papers, as Krüger did not retain copies of the letters he had mailed. Schulz could therefore not see that these beautifully confirm the impression one gains from Krüger's review: his main reproach against Mommsen is not *having* used his work, but rather *not* having used his work.

V. Modern verdicts

J. F. Matthews calls Krüger's contribution to Mommsen's edition "very considerable,"⁵⁹ but this is not true – it is, apart from some unacknowledged completions for **R**, mostly limited to an unpublished transcription of part of palimpsest **W**. He thinks "Krüger saw his own work annexed by the old man's demands, and his rights in it ignored,"⁶⁰ but this is not the point – Krüger was not bitter because somebody stole his work and put an alien name on it; the problem was rather that Mommsen discarded Krüger's prior work and had all the manuscripts rechecked, so that many hours had been spent by Krüger in vain (or so it seemed to him), and, worse, by not relying on him, Mommsen also hamstrung Krüger's claim to editorship. At any rate, it is utterly wrong to call Mommsen's edition "Mommsen's (and Krüger's and Meyer's) edition."⁶¹ Matthews further writes: "Indeed, Krüger's name stands with Mommsen's on the title page of the edition, as responsible for the apparatus criticus."⁶² But *apparatus* in the phrase *adsumpto apparatu P. Kruegeri* does not mean "apparatus criticus," it just signifies "preparatory work." Mommsen wrote in the preceding letter ([No. 24]; known to Matthews through Schulz's published transcription): *Als eigentlichen Mitherausgeber kann ich Sie nicht wohl bezeichnen, da Sie bei der Herstellung des Apparats nicht*

⁵⁸ Schulz (note 16), XXVIII.

⁵⁹ Matthews (note 1), 98.

⁶⁰ Id.

⁶¹ Id., 97.

⁶² Id.

betheiligte und dafür nicht verantwortlich sind [“I can hardly call you a co-editor properly speaking because you were not involved in the creation of the apparatus, nor are you responsible for it”], which is clear enough. Most problematic of all is Matthews’s statement: “His appearance on the title page as the author of the apparatus criticus was a compromise proposed by Mommsen that some may think inadequate for the nature of the contribution.”⁶³ First, we already saw that the phrase in question does not mean to indicate Krüger as author of the apparatus criticus, and, secondly, that Krüger’s contribution to Mommsen’s edition is much less significant than Matthews believes. Thirdly, this is not a “compromise proposed by Mommsen,” but it is exactly the formula *Krüger himself* suggested, translated into idiomatic Latin by Mommsen and then again readjusted by Krüger (who preferred *P. Kruegeri to Kruegeriano*).

Recently, Pierre Jaillette published an article on Krüger and the Theodosian Code. Jaillette characterizes Mommsen’s first polite inquiry as “une lettre comminatoire,” Mommsen exerts “de terrifiantes pressions” on Krüger, Krüger cannot resist against Mommsen’s “intimidation,” thusly Mommsen wins the “Blitzkrieg”⁶⁴ [*sic!*]; he takes possession of Krüger’s work “avec une brutalité inouïe,” an act which Jaillette calls a “hold-up”⁶⁵ Theodor Mommsen, the manuscript mugger? Hardly. Jaillette does not use any additional evidence, and it is clear that he did not always make use of the available material in the best way possible.⁶⁶

⁶³ Id., 98.

⁶⁴ Jaillette (note 19), 19.

⁶⁵ Id., 20.

⁶⁶ Hardly any German citation in Jaillette’s article is without mistake; as a crass example, at id., 21 n.26, the quoted text is unintelligible (without noticing, Jaillette jumped two lines in mid-sentence while copying). More than once, he misunderstands German. We have already seen how he demotes the chairholder Zitelmann to “simple *Dozent*” (see note 19 above); this is not only a linguistic misunderstanding, as there is not even such a rank in the German system. According to Jaillette (note 19), 15, Krüger’s teacher Keller was “assassiné en 1860 dans des circonstances mystérieuses.” Jaillette does not give evidence for this; as a matter of fact, Keller fell sick on a train trip (probably because of a stroke) and died soon after arrival at Berlin. I cannot see anybody claiming he was murdered, although the online version of the “Historische Lexikon der Schweiz” states that his exact cause of death could not be determined; this, perhaps, gave rise to the “mysterious circumstances.” Another case in point for Jaillette’s problematic claims is: “trois de ses fils sont morts à la guerre, le quatrième, mobilisé également, a été fait prisonnier à Tannenberg.” (Jaillette (note 19), 22). In actual fact, the three sons did not die *in* the war, but *before* the war (Krüger

VI. Mommsen's and Krüger's editions compared,
and the case for a new edition

It has become fashionable to call Krüger's edition "closer to the original Codex Theodosianus" than Mommsen's. This goes back to Matthews: "there is no doubt that Krüger's method in these books produced a text that is closer than Mommsen's to the original Theodosian Code."⁶⁷ By Krüger's method, Matthews means the addition of C.I. material. I am not entirely sure what is meant by "closer." Yes, it is true that by this method we gain five additional percentage points of text mass. But the location to which this text mass is added remains arbitrary, its content can in any given case have undergone profound modifications, and dates can be wrong by several generations. The examples we have discussed show that a C.I. fragment cannot even prove that the C.Th. had to say something on a specific subject (e.g., despite what might be understood, the C.Th. did not include a constitution on the importance of dates in rescripts). Matthews' opinion got traction in scholarship. Blaudeau calls Krüger's edition "considérée comme plus proche sans doute de l'édition originelle du Code,"⁶⁸ while Jaillette believes by adding the Justinianic material Krüger's "édition se rapproche le plus du *codex* du 438"⁶⁹ (although without ever referring to Matthews in his article). Both the affinity of the phrasing and the lack of supporting argument suggest that neither of the two has independently verified Matthews' claim.

While Matthews and his followers are passionate about the C.I. material, neither Mommsen nor Krüger were. In 1898, writing

(note 16), 167: "Von vier Söhnen, welche zum Teil jung starben, ging der letzte in den furchtbaren Brand des Weltkriegs."). Furthermore, Tannen-berg was a crushing *defeat* of the Russian army, while the triumphant Germans suffered very few casualties. It is unfortunate that Jaillette does not give any evidence for his claim that Krüger's last son was captured at Tannen-berg, of all encounters. Strangest of all is Jaillette's version of Mommsen's death. Mommsen had a stroke in the wee hours of Oct. 30 and was found unconscious. He never regained consciousness and died some 48 hours later, around 8:00 a.m. on Nov. 1, 1903, in the presence of his gathered family (A. Mommsen, *Mein Vater. Erinnerungen an Theodor Mommsen* (Munich 1992), 127; S. Rebenich, *Theodor Mommsen. Eine Biographie* (Munich 2002), 221). According to Jaillette (note 19), 19, however: "le 1^{er} novembre 1903, alors que, dans la bibliothèque de sa maison de Charlottenburg, il s'apprête à se saisir d'un livre, son geste s'interrompt, il est mort." Jaillette does not give a reference for this scene straight from the movies; it seems purely fictional.

⁶⁷ Matthews (note 1), 100.

⁶⁸ Blaudeau (note 39), 142.

⁶⁹ Jaillette (note 19), 22.

to Krüger Mommsen insisted only that unlocalizable matter must not be added to the C.Th. reconstruction (suggesting that he was open for a compromise regarding the rest), while Krüger in his review showed some sympathy for Mommsen's decision not to add unlocalizable texts, although he would certainly have added any texts for which the correct C.Th. title could be guessed with some likelihood. This is, however, not more than a sidenote in his comprehensive review.

Matthews sees the main merit of the Krüger edition in his addition of the C.I.⁷⁰ material (in this, he follows earlier verdicts⁷¹). But Matthews systematically downplays the challenges: "It is true that some texts have undergone editorial amendment in their citations in the Codex Justinianus" – not *some*, but *most*; not *editorial amendment*, but *massive modifications*, often changing their content to the contrary; "it cannot always be certain to which title in the Theodosian Code they should rightly be restored" – actually, not *not always*, but *never*. Matthews gives a telltale example of the alleged superiority of the Krüger edition: only there, we find the fragments of the Valentinianic *oratio* of 426 on general validity where they belong, i.e., in the first book of C.Th. Again, this is a lot more problematic than it seems: anything in the original C.Th. version of this text that did not match the status under Justinian was undoubtedly removed or rewritten, and this is something a careful scholar should always keep in mind. While discussing these fragments, Matthews claims that "it is clear . . . that they once stood there [in C.Th.]."⁷² No, they didn't. In C.Th., there was *some* text which, after modifications of an unfathomable degree, resulted in the C.I. versions which alone are extant. For example, one may wonder why Valentinian III in whose legislation pragmatic sanctions play such a striking role⁷³ fails to mention them in his detailed *oratio* on the general validity of individual types of enactments. There is no way to gain clarity in this respect, but it easily could be (and at any rate cannot be excluded) that during the Justinianic compilation – at a time when the role of pragmatic sanctions had much changed – their mention was removed.

There are few situations in which an addition of the C.I. texts to the C.Th. reconstruction might be helpful. For example, today's

⁷⁰ Matthews (note 1), 100.

⁷¹ Schulz (note 16), XXXI; further B. Kübler, [Review of Krüger's C.Th.], *Philologische Wochenschrift*, 44 (1924), 451–64, at col. 455.

⁷² Matthews (note 1), 66.

⁷³ Riedlberger (note 3), 32.

title C.Th. 1.27 is reconstructed: it includes only two texts which are cited in a manuscript as deriving from Theodosianus, title 27. For good reason, one can guess that this is title 27 of *book 1*. So, in Mommsen's edition, this title 1.27 holds just these two texts. Huck⁷⁴ now suggests that the compilers of the Theodosian Code *deliberately* only put two laws in this title, creating an "ideal" title with laws by the most Christian emperors Constantine and Theodosius II. But C.I. has a title with a very similar name, namely C.I. 1.4. "Our" C.Th. 1.27.2 is there picked up as C.I. 1.4.8. As I am not tiring to stress, it is impossible to prove that any other given C.I. 1.4 text derives from C.Th. 1.27, but it seems the most straightforward guess (e.g.) for C.I. 1.4.7. Huck does not offer any counter-argument; he seems to have simply overlooked the C.I. material (which would not have happened if he had had Krüger's edition on his desk). Admittedly, this example is far-fetched, yet I cannot think of a better one; it is just meant to illustrate that one needs considerable intellectual effort to come up with any scenario.

In most cases however, adding C.I. material to a C.Th. edition can easily prove toxic. Krüger's thinking is clear: is it not standard procedure when reconstructing a work to add both literal citations *and* rewritten testimonia? Krüger did what is usual in such cases: in his edition, he flagged C.I. material by having it typeset in italics. But this ignores a key difference. Imagine we have a lost work with some literal citations and some indirect attestations, perhaps summaries found in a much later author. Such a later author might have misunderstood things at times or perhaps summarized contents in an unclear way, but he would never ever *deliberately* and *clandestinely* change the contents to their contrary! But this happened to the C.Th. material whenever there was any difference to the legal situation under Justinian. It is of crucial importance to understand that we are faced here with a fundamental difference when compared to other reconstruction projects.

The real merit of Krüger's edition is quite different and, if I am not mistaken, ignored in modern scholarship. Mommsen rejected Krüger's collations and carried out the work from scratch. For that, he was of course highly qualified; but he had little time and the

⁷⁴ O. Huck, "Sur quelques textes 'absentes' du Code Théodosien. Le titre CTh I, 27 et la question du régime juridique de l'audience épiscopale," in S. Crogiez-Pétrequin and P. Jaillette, eds., *Le Code Théodosien. Diversité des approches et nouvelles perspectives* (Rome 2009), 37–59, at 54.

visual acuity of an octogenarian.⁷⁵ In his review, Krüger claimed that this entailed many mistakes especially regarding the challenge of **R**'s damaged margin. Such criticism (and not the C.I. material!) is the main focus of Krüger's review. It will be remembered that in his letter to Seeck, Mommsen saw the quality of his own C.Th. collations as one of the two major strengths of his work; this implies that he found fault with those of Krüger – and Mommsen was no fool. The case remains *sub iudice*, as so far nobody has carried out a recollation of **R**,⁷⁶ but if I were forced to make a bet, I would put my wager on the patient eyes of youthful Krüger. Another problematic witness is **T**, with many lacunae, which Mommsen filled in with some haphazard completions. Unfortunately, Krüger's readings and suggestions are mostly lacking in Mommsen's edition, and here Krüger's own comes into play. One case in point. C.Th. 3.30.4 is transmitted only in the palimpsest **T**. One passage reads *eosdemque contra ve[] nominaverint*. Mommsen writes *ve[rum]* and adds in the apparatus that this goes back to Vesme but is too short to completely fill the space occupied by the

⁷⁵ There is conflicting evidence regarding the eyesight of the aged Mommsen. Apparently, it was not dreadfully bad, as he still collated a manuscript in 1903 himself (see page 26 above). Yet Seeck repeatedly claimed that Mommsen's acuity of vision had much suffered: . . . *sein Auge versagte den Dienst. Nur mit Mühe konnte er in den Korrekturbogen noch die Buchstaben unterscheiden und brauchte die Hilfe seiner Töchter, um damit fertig zu werden* [“. . . his sight failed him. Barely could he distinguish between different letters in the galley proofs, and he had to rely on his daughters' aid to deal with this"]: Seeck (note 38), 108 (in 1904, regarding the C.Th. proofs); *Hatten doch auch seine Augen gelitten, so dass er nur noch mit Mühe lesen konnte. Er las daher wohl manchmal falsch* [“After all, his eyes had also suffered so much that he could barely read. Therefore, he was likely to have misread things at times”]: O. Seeck, “Neue und alte Daten zur Geschichte Diocletians und Constantins,” *Rheinisches Museum für Philologie*, 62 (1907), 489–535, at 506 (regarding the situation around 1900). I assume that these claims suffer from much exaggeration (a sin of which Seeck was guilty more than once) although it would be surprising if there were not at least an element of truth to them. According to Adelheid Mommsen, her father could in June 1899 still decipher a difficult-to-read palimpsest (A. Mommsen (note 66), 106); but this must be Paris. 12161, for which he had Krüger's transcription (Mommsen, “Prolegomena,” LXV). Only by fall 1903 did Mommsen suffer from major eye problems. According to Adelheid Mommsen (A. Mommsen (note 66), 126–27), his second eye failed him then, while he had been blind on the other one for a while “without noticing” (a striking claim!). At that time, Mommsen was at risk to turn completely blind within a short time; his death only a few weeks later saved him from this fate.

⁷⁶ B. Sirks, “Theodor Mommsen und der Theodosianus,” in I. Fargnoli and S. Rebenich, eds., *Theodor Mommsen und die Bedeutung des Römischen Rechts* (Berlin 2013), 121–40, at 124–25.

lacuna. Krüger prints *ve* . . . in the main text and writes in the apparatus that *verum* and *veritatem* do not match the available space, but *vetitum* or *veniam* would. I do not have the least doubt that *contra vetitum* is correct; this is rhythmically perfect and oft-attested in late constitutions, and it also makes perfect sense. Thus, whenever Mommsen suggests some addition to fill a lacuna, or proposes readings of **R**, it is certainly worth verifying what Krüger has in the apparatus.

Having said that, Krüger's edition is problematic for its lack of proof-reading quality. Even those contemporaries who clearly liked Krüger pointed that out.⁷⁷ Indeed, the number of typos in Krüger's edition is so shockingly high that only somebody having an advanced proficiency in Latin should confidently use it. It must also be noted that Krüger only used a handful of Breviary manuscripts for his edition: those he had seen himself plus **H** and **O** (these according to Mommsen's edition). Consequently, in terms of the exhaustiveness of the readings, Krüger's edition is certainly no match for Mommsen's.

The gratuitous discussion on whether or not to include the C.I. material, has, in my opinion, detracted from some incomparably

⁷⁷ Schulz (note 16), XXXI: *Es war zu spät geworden . . . namentlich versagte häufig das Gedächtnis seinen Dienst. Den Schwierigkeiten . . . [der] Drucklegung . . . war er nicht mehr vollkommen gewachsen. . . . Krügers Ausgabe . . . steht nicht ganz auf der Höhe seiner früheren Ausgaben* ["It was too late; in particular, his memory often failed him. He was no longer completely up to the task to see it through the press. Krüger's edition does not wholly match the quality of his earlier editions"]. Kübler (note 71), at coll. 461–462: *Die neue Ausgabe ist leider durch viele und zwar sehr sinnstörende Druckfehler entstellt Wenn sich in diese Ausgabe so viel Druckfehler eingeschlichen haben (es sind natürlich noch mehr, als ich entdeckt habe) . . .* ["Unfortunately, the new edition is defaced by numerous typos which are, furthermore, very disruptive . . . [a very long list of mistakes follows] If so many typos crept into this edition (of course, there are more than I managed to detect) . . ."]; an anti-democratic rant follows, blaming Germany's post-WWI democracy for the publisher's insufficient funds which, according to Kübler, have caused the numerous typos. This is nonsense, of course: when the typesetting of Krüger's C.Th. started, his publisher wrote a letter (Oct. 25, 1921) encouraging Krüger to report any problem with the typesetters: *sollte die Druckerei beim Fortgange der Arbeit zu Beanstandungen Veranlassung geben, dann bitten wir freundlich, uns davon zu benachrichtigen. Sie ist im allgemeinen durchaus zuverlässig* ["if the printer [i.e., typesetter] should give cause for complaints during the course of this project, please do notify us of that. In general, however, this company is quite reliable"]. Not Germany's fledgling (and doomed) democracy was responsible for the poor quality of proof-reading in Krüger's C.Th., but his failing mental powers (see pages 31–32 above).

more important issues. For I think there is indeed room for improvement of the Mommsen edition, though from quite different angles. Having written so much on the pros and cons of available editions, it will hopefully not detract too much from my subject if I here quickly make the case for a new C.Th. edition. First off, some of the main manuscripts require renewed attention (and a collation aided by all the technical equipment a twenty-first century paleographer can muster). This applies more specifically to **R** and **H** (the only Breviary manuscript that indeed comes from the Visigothic kingdom itself – there is one poor transcription whose faultiness Mommsen had already confirmed by sending Violet there, but nothing has happened ever since; more on that below in the letters). Furthermore, there are some new findings, even if their contribution appears at this time rather limited.⁷⁸ Secondly, the slavishly observed prose rhythm of the constitutions was ignored by Mommsen; Maas wrote to him on the subject, but Mommsen shruggingly wrote back that he understands the problem, but cannot do anything about it.⁷⁹ As the constitutions were abridged and sometimes gently rewritten during the compilation process, there are disturbances in the prose rhythm which do not need to indicate textual problems; but still the method is helpful (e.g., if a phrase does not make sense and has a bad rhythm, one should probably modify it instead of trying at all costs to explain it somehow). Thirdly, the C.Th. redactors were reluctant to change even obvious mistakes in their source texts. A case in point is C.Th. 16.5.40 § 6, *Servos etiam extra noxam esse volumus, si dominum sacrilegum revertentes ad ecclesiam catholicam servitio fideliore transierint* [“We further order that slaves do not do anything illegal if they leave a sacrilegious owner and pass to the Catholic Church in a more faithful service”]. The overall sense is clear enough. We have this fragment in two manuscripts, of which **V** has *revertentes*, **E** has *reverentes*, neither of which makes sense. The author of the original constitution probably wrote *relinquentes*, which was corrupted to *rever(t)entes* already in the copy that served as source to the C.Th. compilers. We know this because this text was taken over into C.I. 1.5.4 § 8, and the Justinianic compilers eliminated the problem by using the unambiguous, though critically unjustifiable *evitantes*. This proves that already the official C.Th. version, available to the C.I. compilers in early sixth century Constantinople, did not read *relinquentes*. In such cases, Mommsen sometimes corrects the text,

⁷⁸ For a list, see Riedlberger (note 3), 177–78 n.277.

⁷⁹ *Id.*, 233 n.351.

at other times he does not, or hides his idea in the apparatus.⁸⁰ Here, a methodologically sound approach should be found which guarantees on the one hand that an edition of the C.Th. indeed reconstructs the text of the C.Th. (and not of an earlier stage of the text) but on the other helps a user quickly find out what the original text might have looked like. Fourthly, while Mommsen's edition is generally wonderful to use, it would be a boon to have an indication of corrected dates (according to Seeck and later researchers), additional snippets (in cases of constitutions which were divided in various parts) and ungrammatical text (for some reason, Mommsen refrains from using the *cruces*).

VII. Results

1. Given that Krüger did not manage within thirty years to complete his C.Th. edition, Mommsen was right in being concerned that Krüger would never finish it. Reproaching him for *starting* the project is certainly not appropriate.
2. Nobody can be blamed for *repeating* collations. (Diverging from Krüger's findings in the case of **R** was probably unwise, but certainly not unethical.)
3. Mommsen did not "steal" (or "annex") any of Krüger's work; he gave him plenty of room for refusing. Even more importantly, Krüger's grievance was that Mommsen did not rely on it (not that he took it in the first place).
4. The greatest challenge for a C.Th. editor is establishing the relationships of the Breviary manuscripts. In that respect, Mommsen did not depend at all on Krüger; on the contrary, he refuted Krüger's earlier impressions, and Krüger praised the soundness of Mommsen's results later in his review.
5. Mommsen used a multitude of Breviary manuscripts, the vast majority of which were not exploited by Krüger, not even in his later edition.
6. It is less obvious whether Mommsen was morally justified in not even offering to Krüger an indication as co-editor; after all, this was what Mommsen had promised right at the start, saying in essence: "give me your material, I will complete it, and we will both be co-editors." But then again, things had changed. Mommsen had not "completed" Krüger's work, but

⁸⁰ See *id.*, 243 & n.364.

rather created his own edition (almost) from scratch. So, in actuality, Krüger had not much to do with it except giving it a head start.

7. Whoever has used both Mommsen's and Krüger's editions knows that we must be very grateful to Mommsen that he rejected Krüger's printing manuscript. Mommsen's solution is infinitely clearer in terms of layout.
8. To call Krüger's edition "nearer to the original Theodosian Code" is unconvincing: the position of any C.I. fragment added is guesswork, and more importantly, no instruction at odds with the legal status quo under Justinian had a chance of survival. This means that the content of any C.Th. fragment was, if necessary, changed, perhaps even to its exact opposite.
9. The real advantage of Krüger's edition is quite different: Mommsen's readings of the damaged **R** margin, and his additions for lacunae in **T**, are not fully trustworthy. Even if there is no guarantee that Krüger is right, comparing his edition at least helps highlight the problems.
10. A new C.Th. edition is overdue. This is true not only on the level of manuscripts (especially **R** and **H** must be rechecked, and newer findings added) but also from a methodological point of view: a new edition would need to take the prose rhythm into account and distinguish clearly the (likely) text of the C.Th. archetype and of the original source constitutions.

Appendix. The Correspondence

Letters by Mommsen which Krüger received are kept among Krüger's papers in the *Universitäts- und Landesbibliothek Bonn, Abteilung Handschriften und Rara, NL Krüger (S 1928)*. Probably all of the letters edited here are accessible online on their website (apparently, material digitized because of reproduction requests is put online – so, dear reader, you probably owe it to the present article that this is the case for Mommsen's letters to Krüger). Not all of Krüger's papers are kept in Bonn. In 1931, the Library of Congress in Washington, D.C., acquired Krüger's private library, containing "ca. 4,691 volumes which include ca. 3,000 monographs."⁸¹ Together with the books properly speaking, the Library

⁸¹ The Library of Congress has a typewritten catalog of this acquisition, called *The Paul Krueger Collection of Books on Roman and General*

of Congress also bought a collection of book manuscripts and notebooks. This “Krüger archive” has not been inventoried so far, but does not seem to include correspondence.⁸²

Conversely, the letters which Krüger mailed to Mommsen are kept at the *Staatsbibliothek zu Berlin*, distributed in three folders: letters 1864–1873, letters 1874–1903, and undated letters. We have checked all undated letters; according to their contents, they are all much earlier than 1898. In the file 1874–1903, there are many letters from October 23, 1898 onwards. They and Mommsen’s letters in Bonn mesh like cog wheels into one another; only exceedingly rarely, something seems to be lacking (see page 63 below). Yet Mommsen started the communication on C.Th. on September 27, 1898; until October 22, 1898, (at least) six letters by Krüger are missing. The preceding letter kept at Berlin is dated December 31, 1897.⁸³ The absence of the first C.Th. letters can scarcely be a coincidence, given how completely the rest is preserved.

The transcriptions keep to the original spelling, but are not diplomatic otherwise. This means that punctuation, quotes and italics found in my transcriptions do not necessarily go back to the original; they might have been added by me just to make difficult texts a little bit easier to understand. The primary purpose of the translations is to transport the intended sense into the target language (see e.g. my translation of *in ultimativer Form* as “in an emphatical fashion”). As far as possible, I have tried to keep to the sentence structure and expressions of the originals so that an interested reader may quickly verify how I understood individual words. However, the result sounds more often than not quite dowdy, and in some places, taking more liberties was unavoidable in order to create a readable English text.

Law in the Library of Congress, 1934. Its call number is Z6452.U58, but luckily, it is also available online as a PDF. The year 1931 as the date of the purchase of Krüger’s library is found in the catalog record for this item.

⁸² The only publication on it is J. Hessler, “Editing Justinian’s Corpus: A Study of the Paul Krueger Archive,” *Law Library Journal*, 103:3 (2011), 459–72, but despite its title, it is mostly an entry-level introduction to the *Corpus Iuris Civilis*, stemmatical editing, etc. We learn little about the archive. It is mostly comprised of collation notes, of which Hessler mentions those for the C.I. and Sinai scholia explicitly (he does not mention C.Th.). Further, “Krueger’s lectures, entitled by him *Romische Rechtsgeschichte*, comprise more than a thousand pages of manuscript” (id., 470); these are his painfully prepared courses. The reproductions of manuscripts drawn by Krüger (id., 471) testify to his skills as a draftsman.

⁸³ For this information, I owe a debt of gratitude to Antje Goerig from Berlin’s *Handschriftenabteilung*.

1. Postcard by Mommsen, September 27, 1898

Sie verpflichten mich, wenn Sie mir kurz angeben wollten, welche handschriftlichen Arbeiten nach Ihrer Meinung für den Theodosianus nebst den davon nicht zu trennenden Novellen auszuführen sein würden. Die Turiner Blätter⁸⁴ können ja wohl als erledigt gelten; welche Vorarbeiten aber haben Sie sonst ausgeführt? Auf die *turba* der Breviarhandschriften brauchen Sie die Antwort nicht zu erstrecken; das würde zur Zeit zu weit führen und ist auch m. E. nicht der eigentlich schwierige Theil⁸⁵ der Arbeit.

Mommsen

You oblige me if you could briefly indicate to me which work on manuscripts would need to be carried out, in your opinion, for [an edition of] the Theodosianus and the *novellae*, which cannot be dissociated from it. The Turin pages can be regarded as done, can't they? But which further preparatory work have you carried out? You do not need to include the multitude of Breviary manuscripts in your answer; that would carry things too far for the time being, and, besides, this is in my opinion not the really difficult part of the task.

Mommsen

[Krüger's answer to that card is lacking]

⁸⁴ This is T. Krüger had published a transcription of it in 1880: P. Krueger, *Codicis Theodosiani fragmenta Taurinensia* [= Abhandlungen der königlichen Akademie der Wissenschaften zu Berlin aus dem Jahre 1879. Philosophisch-historische Klasse. Abhandlung II] (Berlin 1880).

⁸⁵ What would be more difficult manuscript-wise for an editor of the Theodosian Code than coping with the numerous Breviary manuscripts? Mommsen later changed his opinion (*No. 12: Die Breviar-Kritik wird bedeutend erweitert werden müssen.*)

2. Double-sided card by Mommsen, October 8, 1898

Lieber Krüger,⁸⁶

Besten Dank für Ihre Auskunft; ich glaubte nicht, daß Ihre Vorarbeiten schon so umfanglich seien. Nun gestatten Sie mir aber die Frage, ob Sie einverstanden sein würden, wenn ich versuche, die doch immer noch sehr weitläufige Durchführung der Arbeit auf mich, vorbehaltlich eines dritten Sozius, zu nehmen. Selbstverständlich ist dabei, daß Sie als Mitherausgeber genannt und daß Sie befragt würden, ob der weiter zuzuziehende Mitarbeiter (zur Zeit habe ich keine bestimmte Person im Sinn) Ihnen genehm sei. In pekuniärer Hinsicht mache ich keinen Anspruch und könnte, was etwa bei der Ausgabe der Art herauskommt, zwischen den sonst Beteiligten getheilt werden.⁸⁷ Das ist, wie Sie sehen, alles noch recht blau,⁸⁸ ich frage aber schon jetzt, denn wenn Sie die Arbeit nicht abgeben wollen, ist die Sache damit für mich zu Ende, noch ehe sie angefangen ist.

Ich schicke Ihnen Delisles⁸⁹ Notiz über den Gaius-Codex von

⁸⁶ Mommsen uses many different forms of address (*Lieber Krüger*, *Lieber Herr Professor*, *Lieber Freund*, *Lieber College*) without much discernable difference. My only two respective observations are that Mommsen uses the affectionate *Lieber Freund* in his immediate reply to Krüger's sending of his preparatory work, and that in their exchange of 1903 (after a long break), Mommsen consistently uses *Lieber College*.

⁸⁷ In his transcription, Krüger added a note: *Ich habe keine Erwartung von Honorar angedeutet*, "I did not hint at expecting any remuneration." Mommsen probably tried to proactively address this thorny issue. It is remarkable that Mommsen relinquished any financial claim from the outset, given his permanent feeling of financial straits. Yet in 1898, with his numerous offspring having grown up, he perhaps felt more confident and could be unusually generous. See Rebenich (note 66), 197–98, on his financial situation. At any rate, Mommsen's C.Th. would not yield any income: a final statement by Weidmann, dated Dec. 16, 1911, indicates that Mommsen's C.Th. had sold 343 copies in the initial five-year period, while Meyer's *novellae* was hardly more successful with 350 copies. They would have needed to sell around 60–80 more each to cross the threshold. Any profits would have gone to the Academy (not to the editors or their estates).

⁸⁸ Schulz (note 16), XXIV, reads, or rather emends to, "blaß," while Krüger (note 16), 5, despairs and prints "bl**(?)," with a footnote stating that the word is not completely readable. My guess is that Mommsen uses "blau" in the sense of "vague," a meaning which is otherwise restricted to the fixed expression "ins Blaue" (cf. English "into the blue").

⁸⁹ Léopold Delisle (1826–1910), then director of the Bibliothèque Nationale. When Krüger transcribed the letters, he did not manage to

Autun, kürzlich⁹⁰ sprach ich Girard⁹¹ und Chatelain⁹² und habe versucht, Beschleunigung der Publikation zu erwirken; freilich ist das leichter gewünscht als gethan. Wenn ich weiteres erfahre, theile ich es mit. Der Gaius soll ja, wie der Verleger wünscht, wieder gedruckt werden.

Ihr M.

Dear Krüger,

Thank you very much for your informative reply. I did not think that your preparatory work was already so expansive. However, do concede to me now the question of whether you would agree to me trying to assume the execution of the work, which is unquestionably still very extensive, although one might add a third associate. As a matter of course, you would be indicated as co-editor and your approval of the third, still to be determined associate would be asked for (at this point, I do not have any specific person in mind). As to money, I do not make any claim. Whatever comes out financially from this edition [project] could be divided between the other people involved. All of this is, as you see, still quite vague. However, I am already asking now, because if you do not want to hand over the task, this business is over for me before it even started.

I send you Delisle's remarks on the Gaius manuscript from Autun. A short while ago, I talked with Girard and Chatelain and tried to make them accelerate their speed of publication, though this is easier to wish for than to obtain. When I learn

decipher the scarcely readable word "Delisles" and penciled "allerlei" ("sundry," quite meaningless in the context) above it, adding a question mark. The "Notiz" in question must be an offprint of L. Delisle, "Les vols de Libri au séminaire d'Autun," *Bibliothèque de l'École des Chartes*, 59 (1898), 379–92, at 383–85. At this point, Delisle believed the text to be a copy of Gaius itself (we can later see Mommsen's frustration when it turned out to be just an insipid paraphrase).

⁹⁰ Chatelain attended the St. Gall conference a week before (the minutes published by Ehrle (see note 108 below) include a list of attendees), although Girard did not. I do not know where he and Mommsen met. Nor did Delisle attend. Ehrle (in the article, not in the minutes) reports that Delisle had to cancel because of a grave sickness in his family.

⁹¹ Paul Frédéric Girard (1852–1926), professor of Roman law from 1880 at Montpellier, from 1888 at Paris. Girard was a friend of both: he had himself translated Mommsen's *Staatsrecht* and was in regular and cordial contact with Krüger.

⁹² Émile Chatelain (1851–1933), from 1881 chair of paleography at the École Pratique des Hautes Études.

more, I will communicate it to you. After all, the publisher wishes to print a new edition of [your] Gaius.

Your M.

[Krüger's answer to that card is lacking]

3. Letter by Mommsen, October 10, 1898

Lieber Herr Professor,

Auf Ihren Brief⁹³ lassen Sie mich zunächst desultorisch antworten; einen eigentlichen Plan zu entwerfen ist es noch zu früh, aber was ich schreibe, kann Ihnen dabei nützlich sein.

Unsere Akademie ist nicht gerade formell, aber nach stetiger Übung verpflichtet, ihren Mitgliedern die Arbeitskosten zu schaffen. Was für Collationen (sei es für Kauf, sei es durch Aufträge) erforderlich ist, werde ich, wenn ich in die Arbeit eintrete, ohne besondere Schwierigkeit beschaffen können; Arbeitsvergütung auf diesem Wege zu erhalten, ist – ich will nicht sagen: *contra bonos mores*, aber: *contra usum academiae*. Ich habe dergleichen bisher nie verlangt und bin sicher, damit nicht abgewiesen zu werden.⁹⁴

Die im justinianischen Codex wie in den Breviar-Anhängen⁹⁵ erhaltenen nachdiocletianischen Verordnungen würde ich vorschlagen, nicht conjectural einzureihen, wenigstens nicht, wo der Platz zweifelhaft ist, sondern als Extra-

⁹³ Krüger's letter must have been quite comprehensive, including many suggestions and questions regarding the joint edition project.

⁹⁴ Meyer's contract of early 1899 stipulated a base remuneration of 2,000 marks for him, although his case (at that time being a young, non-tenured scholar) is different from those of established chairholders like Mommsen or Krüger. A remuneration of 2,000 marks was also set in Maas's contract of 1903; we shall see that at that time, Mommsen once more made it clear to Krüger that any work of his would have to be done for free. (But again: at that time, Maas was only 22 years old and had just submitted his Ph.D. dissertation.)

⁹⁵ Some Breviary manuscripts include appendices containing a selection of additional Theodosianus (and other) texts, see Mommsen, "Prolegomena," LXXXIII. But all of these fragments can be rather safely added to the edition, as they appear unchanged (or, at most, only shortened), and their location is almost always unambiguous due to the indication of title numbers. If I am not mistaken, Mommsen ended up integrating all of these, although in (at least) two cases their location is just guesswork (C.Th. 2.18.2, 4.20.2).

vaganten⁹⁶ dem Corpus anzuschließen. Ob dies auf die nicht zahlreichen Erlasse aus dieser Epoche überhaupt zu erstrecken ist, wäre zu überlegen.⁹⁷ Aber wichtig scheint mir, die gesicherte Folge nicht durch oft recht zweifelhafte Einschaltungen zu unterbrechen. Auch müßte überhaupt das Breviar in seinem Umfang scharf hervortreten, was ja nicht schwer zu erreichen ist. Ich habe das bei Ihrem Paulus öfter vermißt.⁹⁸

Die chronologische Vorarbeit für die Constitutionen muß allerdings vorausgehen, und die Sendung der Exemplare, für deren Vervollständigung dann zu sorgen ist, soll mir lieb sein, jedoch erst dann, wenn wir zu einem festen Entschluß gekommen sind. Viel erwarte ich von der Arbeit nicht; die analoge diocletianische war in ihrer Art wichtiger.⁹⁹ Über die Form der Veröffentlichung¹⁰⁰ läßt sich erst entscheiden, wenn die Arbeit gemacht ist; wahrscheinlich wird es genügen, ein mit Einzelbemerkungen versehenes chronologisches Verzeichnis der Constitutionen anzufügen und das Allgemeine in einem Abschnitt der Vorrede zu erörtern;¹⁰¹ Einzelnes mag daneben in Zeitschriften oder Akademieschriften behandelt werden.

Eine Hauptfrage für mich ist es, was Sie an der Arbeit

⁹⁶ The term *extravagantes* stems from canon law and denotes papal enactments which, although missing in the canonical collections, are authentic and valid (see note 282 below).

⁹⁷ Even today, there is no serious edition of these unabridged constitutions transmitted beyond the codes (many of which are contained in *ACO*). We still have to rely on Hänel's problematic compilation of 1857.

⁹⁸ See Schulz (note 16), XVIII. Much of our reconstructed Paulus comes from the Breviary (which includes a selection from Paulus, just as it includes a selection from C.Th. and other works); this skeleton is then fleshed out with material from other sources. This is not easy to understand when using Krüger's edition, as he simply gives the manuscript abbreviations for the various Paulus passages; one has to know (e.g.) that **M** is a Breviary manuscript, while **F** is not, to understand the contribution of the Breviary selection by just browsing his apparatus.

⁹⁹ T. Mommsen, "Über die Zeitfolge der in den Rechtsbüchern enthaltenen Verordnungen Diocletians und seiner Mitregenten," *Philologische und historische Abhandlungen der Königlichen Preußischen Akademie der Wissenschaften zu Berlin aus dem Jahr 1860* (Berlin 1861), 349–448.

¹⁰⁰ *Veröffentlichung* sounds utterly wrong, and it is lacking in all dictionaries I would know of (including Grimm, the most comprehensive one for German). However, a search in Google Books for nineteenth-century attestations shows that Mommsen was not alone in using it as a synonym of *Veröffentlichung*.

¹⁰¹ This is indeed how Mommsen published it. The very expansive tables can be found in Mommsen, "Prolegomena," CCIX–CCCVI, the general remarks at CLIII–CLIX.

ausführen und wie bald Sie daran gehen können. Mein "Strafrecht" ist fertig; der Druck wird freilich wohl den Winter größtentheils in Anspruch nehmen.¹⁰² Sonst aber bin ich arbeitsfrei. In meinem Alter kann ich nur Pläne machen von heute auf morgen; die Nacht, da niemand wirken kann, ist unter allen Umständen nicht fern.¹⁰³ Ihre Verpflichtungen kenne ich; diese hauptsächlich haben mich zu dem Vorschlag bestimmt, einen dritten hinzuzuziehen.

Der jetzige Turiner Bibliothekar Carlo Frati¹⁰⁴ ist mir bekannt (Sohn des Bolognesers¹⁰⁵); er ist ein junger und fähiger Mann, und man könnte versuchen, ihn zu gewinnen. Eine Revision ist immer leichter als Abschrift. Wegen der Vesmeschen Paginen kann ich ihn fragen; die werden aber wohl in Sardinien sein.¹⁰⁶

Das Heft über die Handschrift von Autun werden Sie

¹⁰² More than a year passed (Oct. 15, 1899) before Krüger could thank Mommsen for receiving a copy of the *Strafrecht*. During his stay in Paris (June/July 1899, see note 204 below), Mommsen corrected the last proofs (A. Mommsen (note 66), 107). Note that despite his work on the *Strafrecht* proofs, Mommsen was going to be already quite busy with the Theodosianus edition in the winter of 1898/99.

¹⁰³ Rendering the highly poetic phrase in similarly attractive English is beyond my competence. The original sounds a lot better than my translation. The first part of it ("Die Nacht, da niemand wirken kann") is actually a citation from Luther's Bible translation of John 9:4.

¹⁰⁴ Carlo Frati (1863–1930), from 1897 at the Turin library, 1904–1905 as its head. I owe a debt of gratitude to Fabio Uliana for this identification. Krüger failed to read the name correctly and transcribed it as "Fonti." The Academy Archive holds a letter by Frati, expressing his gratitude for the free copy of the C.Th. edition the Academy had mailed to Turin.

¹⁰⁵ Luigi Frati (1815–1902), head of Biblioteca comunale dell'Archiginnasio from 1858 until his death.

¹⁰⁶ Around a month later (Nov. 7, 1898), Mommsen wrote to Krüger that he followed up on his indications and had received the transcription (namely a transcription of manuscript **R**) from Vesme's son, which must be the transcription mentioned here. Krüger had apparently told him about the existence of a complete transcription of **R** located in Turin, and added that, while being at it, Mommsen might also try to get the "Vesnian pages." These refer to preparatory work Vesme created for his C.Th. edition of which very little appeared (Mommsen, "Prolegomena," CXVIII); it cannot be a reference to the pages of **W** that went missing after Vesme had used them (see note 267 below), because already in November 1898 Mommsen receives the "Vesnian pages" and is not much impressed with them (see page 60 below). Baudi di Vesme divided his time between Turin and a manor he owned in Sardinia.

erhalten haben.¹⁰⁷

Ch[arlottenburg]. 10/10 98 Ihr Mommsen

Dear Mr. Professor,

Let me reply to your letter in an unsystematic fashion for now. It is still too early to draft an actual plan for the project, although this letter might help you do so.

Our Academy [in Berlin], though not formally obliged to, is bound by standing custom to provide any working costs to its members. Whatever is required for collations (for purchases or for subcontracting), I will be able to provide without much difficulty once I am part of the project. Securing remuneration in this way is – I do not want to say: *contra bonos mores*, but: *contra usum academiae*. I have never asked for anything like this, although I am sure that such a request from me would not be rejected.

I suggest not conjecturally inserting the post-Diocletianic enactments that are transmitted in the Justinian Code and in the additions to the Breviary, at least not in those cases in which their location remains doubtful. They should rather be added after the body of the text [of the C.Th. edition] as *extravagantes*. One might ponder whether one should not do so with [all] the numerous enactments from this period. However, it seems important to me not to interrupt the assured sequence [of C.Th. fragments] by insertions that are often rather dubious. Furthermore, the Breviary's contribution [for the reconstructed C.Th.] needs to stand out sharply, which actually shouldn't be too difficult to achieve. In your Paulus edition I have missed that regularly.

However, the preparatory work on the chronology of the constitutions must be done first. I will welcome it when you send your copies which then need to be completed, but only once we have reached a firm decision. I do not expect much from this project; the analogous Diocletianic one was more important in that respect. In what fashion this will be published one can only decide after the work has been done. It will likely be sufficient to add a chronological list of the constitutions furnished with individual comments, while

¹⁰⁷ Perhaps a reference to T. Mommsen, "Gaiushandschrift in Autun," ZSS (RA), 19 (1898), 365, though I am not sure whether one can call a journal issue containing a one-page notice on a manuscript "a fascicle on [!]" said manuscript.

discussing anything general in a section of the preface. In addition, specific questions may be discussed in journal articles or academy publications.

A key question for me is what share of the task you wish to carry out and when you could start with it. My *Strafrecht* is finished, although printing [preparations] will occupy most of [my working time during this] winter. Apart from that, I am out of work. At my age, one can make plans only from today to tomorrow; the night when no man can work is by all means not far. I know about your obligations; they were mostly what made me suggest adding a third team member.

Carlo Frati, now librarian in the Turin library (and son of the Bologna librarian), is known to me. He is a young and competent man, and one could try to get him involved. Revising is always easier than transcribing. I can ask him about the Vesme pages, although they are likely in Sardinia.

You have probably [already] received the fascicle about the Autun manuscript.

Charlottenburg 10/10/98 Your Mommsen

[Krüger's answer to that letter is lacking]

4. Letter by Mommsen, October 12, 1898

Lieber Herr Professor,

Ich kann nur davon abrathen, an Delisle zu schreiben. Die Pariser geben die Handschrift nimmermehr aus der Hand und können eine solche unverlangte Berathung leicht recht übel aufnehmen. Ich habe in St. Gallen¹⁰⁸ wegen des Fundes mit Chatelain gesprochen und ihn gebeten, die Publikation zu fördern; dies würde es mir möglich machen, ihm in der Sache zu schreiben und, wenn Sie mir einen Brief zugehen lassen die

¹⁰⁸ Mommsen and Chatelain met on Sept. 30 and Oct. 1, 1898, during an international conference on manuscript conservation. For details, see F. Ehrle, "Die internationale Konferenz in St. Gallen am 30. September und 1. Oktober 1898 zur Beratung über die Erhaltung und Ausbesserung alter Handschriften," 27–44, and F. Ehrle, "Protokoll der internationalen Konferenz zur Erhaltung und Ausbesserung alter Handschriften," 45–51, both contained in *Centralblatt für Bibliothekswesen*, 16 (1899).

Tinktur betreffend,¹⁰⁹ könnte ich den einsenden. Überhaupt möchte ich wissen, auch mit Rücksicht auf die St. Galler Verhandlungen,¹¹⁰ was das für eine Tinktur ist – doch wohl die bekannte Studemundsche.¹¹¹ – Übrigens habe ich wenig Hoffnung, daß die Handschrift von Autun rasch behandelt wird; es sind nur wenige Blätter in Paris (diese scheinen nicht palimpsestiert), die übrigen in Autun,¹¹² und sicher wird die Sache schleppen.

Was den Theodosianus anlangt, so bat ich Sie und wiederhole dies, mir nichts herzuschicken, bis wir einig sind, das heißt, bis Sie mir bestimmt angeben können, daß Sie die Vorarbeiten an mich abgeben wollen zur Ergänzung und zur Publikation. Ich könnte dies überhaupt nur annehmen, wenn ich alsdann darüber freie Hand erhalte und die Ausgabe so einrichten kann, wie es mir zweckmäßig scheint. Die Stellung als Mitherausgeber und die stetige Kenntnißnahme der Arbeiten würde selbstverständlich Ihnen bleiben; aber schließ-

¹⁰⁹ Namely a chemical which helps make palimpsested manuscripts readable. It must have been mentioned in the preceding letter by Krüger. One may guess that Krüger had the idea of directly contacting the head of the holding library (i.e., Delisle) and suggesting to him that he, Krüger, would be grateful to receive the manuscript on loan so that he could use a specific chemical on it.

¹¹⁰ At St. Gall, rendering the underlying script of palimpsests readable was one of the main discussion subjects. Various chemicals had been advanced there (for details, see the report by Ehrle (note 108).

¹¹¹ Wilhelm Studemund (1843–1889) was the best palimpsest expert of his time; his work in particular on Plautus, but also on Livy, Seneca, and Fronto, remains famous for good reason. It was little wonder that he was sent to Verona to decipher the unique and hence crucial Gaius palimpsest. But Studemund had no legal training at all, so he very much welcomed the collaboration of Paul Krüger. They remained friends for the rest of Studemund's terribly short life.

Studemund was cautious in using chemicals, mostly relying on his eyes and carefulness. Nevertheless, he developed various magical potions for applying in different cases (two recipes with references can be found in V. E. Gardthausen, *Griechische Paläographie*, 1, 2nd ed. (Leipzig 1911), 107).

¹¹² Guglielmo Libri (1803–1869), a notorious thief of books and manuscripts, had sold four folios of the Autun manuscript to Ashburnham in England, whence they found their way back to the National Library in Paris. Yet it was in one of the pages that still remained in Autun that the underscript had been recognized, and so far, there was no indication that the Paris folios, too, had hidden text. This is an additional reason why it did not make much sense to contact the library in Paris. In the end, the Paris pages indeed turned out to be palimpsested, too, but it proved impossible to read anything (see P. Krüger in P. Krueger and W. Studemund, *Gai Institutiones*, in *Collectio Librorum Iuris Anteiustiniani*, 1, 7th ed. (Berlin 1923), XL–XLI).

lich muß Einer die Entscheidung geben. Wollen Sie sich auf ein solche Cession nicht einlassen, so begreife ich das vollkommen und werde Ihnen das in keiner Weise verübeln; aber das Verhältniß muß von vorn herein klar sein, sonst giebt es Irrung und Wirrung.¹¹³

Sie wissen doch, daß der alte Breviar-Codex von Phillipps (Hänel 7) jetzt hier ist?¹¹⁴ Der Druck des Legionensis ist so schlecht,¹¹⁵ daß damit kaum etwas anzufangen sein wird – wenn es überhaupt einen Druck giebt; ich bin nicht recht orientiert, werde aber Zeumer¹¹⁶ fragen.

Ch[arlottenburg]. 12/10 98 Grüße von Ihrem Mommsen

Dear Mr. Professor,

I must advise against writing to Delisle. Under no circumstances will the Parisians hand over the manuscript, and they might easily resent such unsolicited advice. In St. Gall, I spoke with Chatelain about the discovery, and I asked him to rush publication. This [prior direct contact] would allow me to write

¹¹³ All of this is clear enough: Mommsen insists on having a free hand in shaping the edition, otherwise he will not start it; a condition that is quite understandable. It is also evident that he does not attempt to “snatch” the preparatory work – he leaves the decision to Krüger.

¹¹⁴ Thomas Phillipps (1792–1872) was an obsessed manuscript buyer who amassed a collection of several tens of thousands of manuscripts. After his death, it took decades to sell off all of it. Former manuscripts of his entered many libraries, including Berlin’s. The manuscript in question is **P**, Berolinensis Phillippsianus 1761, which was acquired together with many other Phillipps manuscripts in 1889. **P** was written in the sixth or seventh century and can therefore rightly be called an “old Breviary manuscript.”

¹¹⁵ The print Mommsen mentions is a facsimile including transcription of palimpsest **H**, León Archivo Catedralicio 15, entitled *Legis Romanae Wisigothorum Fragmenta ex Codice Palimpsesto Sanctae Legionensis Ecclesiae* . . . (Madrid 1896). Unfortunately, the facsimile is not a faithful reproduction but was “enhanced” by an artist according to the transcription, and the readings of the Spanish editors include many mistakes – which then find confirmation in the “enhanced” pictures! Reviews and opinions on this publication have been scathing ever since (see Coma Fort (note 24), 124 n.54). Mommsen had a few passages collated to the original (see note 165 below): the result was that whenever the editors diverge from the then standard edition of Hänel, they are right, but whenever **H** seems to confirm Hänel, one cannot trust them.

¹¹⁶ Karl Zeumer (1849–1914), member of the central directive body of the *Monumenta Germaniae Historica*. In 1897, Zeumer had published a sharp review of the Spanish apograph in *Neues Archiv der Gesellschaft für Ältere Deutsche Geschichtskunde*, 22 (1897), 780–82. As Zeumer had had the Spanish print in hand, he should know where Mommsen could find a copy.

to him in this business, and, if you send me a letter regarding the chemical, I could forward it. At any rate – also because of the St. Gall conference – I would like to know what kind of chemical it is; it is the well-known one of Studemund, isn't it? Anyhow, I have little hope that the Autun manuscript will be published soon. There are only a few pages in Paris (and these do not seem to be palimpsested), the rest is in Autun, and the whole business will certainly drag on for a quite a while.

As for the Theodosianus, I have [already] asked you and now repeat it: do not send me anything until we have reached an agreement, i.e., [not until] you can definitively declare to me that you pass over your preparatory work to me for completion and publication. I can only accept this if henceforward I have a free hand and can devise the edition as seems fit to me. Of course, you would keep your position as co-editor and receive steady information on the [progress of the] work. Yet at the end of the day, there must be *one* person to make decisions. In case you do not want to subscribe to such a cession, I completely understand that, and I will in no way hold it against you. However, the relationship must be clear from the outset, otherwise there will be error and confusion.

You know that the old Breviary manuscript of Philipps (Hänel 7) is now here [in Berlin], don't you? The print of the Legionensis is so poor that it won't be of much help – if there is a [copy of this] print [available], anyhow. I don't really know, but I'm going to ask Zeumer.

Charlottenburg, 12/10/98 Regards from your Mommsen

[Krüger's answer to that letter is lacking]

5. Letter by Mommsen, October 14, 1898

Lieber Freund,

*Iacta alea est.*¹¹⁷ Ich will versuchen, die Sache zu Ende zu führen.¹¹⁸ Schicken Sie mir, was Sie haben. Jedoch muß ich den Vorbehalt machen, daß ich, was Sie mir schicken, wieder an

¹¹⁷ The one who crossed the Rubicon and took an irreversible decision was Krüger – not Mommsen. Ascribing a “Caesarian decisiveness” (Matthews (note 1), 98) to Mommsen seems ungrounded.

¹¹⁸ Note that Mommsen speaks in the first person singular; accordingly, the idea really was that he would complete the edition on his own.

Sie zurückgeben kann, wenn ich vor Neujahr zu der Überzeugung komme, mehr übernommen zu haben, als ich zu leisten vermag.

Wegen des Gaius habe ich an Ehrle geschrieben und ihn gebeten, bei Delisle und den sonst Beikommenden zu intercedieren. Hier zu erweisen, daß jemand hingeschickt hatte einen, die Arbeit zu unternehmen, würde wohl möglich sein; aber eine directe Aufforderung könnte leicht mehr schaden als nützen. Chatelain ist ein sehr tüchtiger Paläograph; aber das allein genügt nicht. Wenn ich etwas von Belang erfahre, theile ich es mit. Die neue Ausgabe des Textes deswegen zu verschieben, scheint mir nicht rätlich.¹¹⁹

Ch[arlottenburg]. 14/10 98 Ihr M.

Ich habe Ehrle auch Ihr Recept geschickt; er wird es aber wohl kennen.

Dear friend,

Iacta alea est. I will try to finish this business. Mail to me what you have. However, I must enter a caveat, namely that I might return what you send to me if before New Year's Day I should reach the conviction that I have taken more upon myself than I can accomplish.

As for the Gaius, I wrote to Ehrle and asked him to intercede with Delisle and anybody else who is relevant. Confirming thereby that somebody was sent there to carry out the work should probably be feasible. However, a direct request could easily bring more harm than help. Chatelain is a very able paleographer; but this alone is not sufficient. If I learn of anything of import, I will communicate it to you. I would not recommend postponing the new edition of the [Gaius] text for this reason.

Charlottenburg, 14/10/98 Your M.

I have also forwarded your recipe to Ehrle; but he's probably already familiar with it.

¹¹⁹ Mommsen refers to Krüger's Gaius edition which is vol. 1 of *CLIA*. It had last appeared in its third edition in 1891, and the publisher (namely Weidmann, Berlin) wanted a new edition (see Mommsen's letter of Oct. 8, 1898 [No. 2]). Krüger's fourth edition did appear in 1900, and it included the Autun text.

[Krüger's answer to that letter – which must have included all his preparatory work – is lacking]

6. Double-sided card by Mommsen, October 16, 1898

Lieber Freund,

Diese Karte soll Ihnen nun den Empfang bestätigen, zugleich auch den Schreck aussprechen, wenn man so mit Händen greift und mit Augen sieht, wie groß die Arbeit ist. Jedoch einen Versuch will ich machen. Inzwischen¹²⁰ habe ich jemand gesetzt, um die Constitutionen einzeln auf Folioblätter¹²¹ zu verzetteln, so daß sie dann chronologisch oder wie man sonst es braucht zusammengelegt werden können; das muß auf alle Fälle geschehen. Die correspondirenden justinianischen könnten dazu geklebt, resp. eingeordnet werden.¹²²

Wundern Sie sich nicht, wenn in einigen Monaten all die Paginen wieder zurückwandern.

Ch[arlottenburg]. 16/10 98 Ihr Mommsen

Dear friend,

By this card, I confirm receipt to you, but likewise I herewith acknowledge the shock [that one feels] if one, as it were, thrusts one's hand and sees with one's own eyes how vast the work is. However, an attempt I shall undertake. In the meantime, I have instructed somebody to put all constitutions

¹²⁰ Mommsen's preceding letter is dated Oct. 14. It reached Bonn on Oct. 15, as the entry stamp proves. Krüger mailed his material on the same day to Mommsen, as Mommsen acknowledges receipt with this letter of Oct. 16. So, if Mommsen "meanwhile" tasked somebody to copy the constitutions on individual sheets, he had done so on the very day of receipt – or started before he had Krüger's material. At any rate, Mommsen does not seem to have had a problem with telling Krüger so.

¹²¹ This is roughly letter sized which leaves a lot of space for further annotations. Our own experience is quite different: if we need additional space, we create it in our word processor by pressing the enter key. In the nineteenth century, people had to use precaution.

¹²² This means: each and every fragment in the C.Th. receives its own folio page. If any such fragment was taken over into the C.I., these modified versions are glued (Mommsen was dissecting Krüger's printed edition in order to save time) on the same page; if there are orphaned texts in the C.I., they are not discarded but receive their own folio supports. In his chronological table in the published book, Mommsen includes of all these C.I. fragments.

individually on folio-sized sheets, so that they can later be arranged chronologically or in any other sequence one might require. This must be done at any rate. The corresponding Justinianic texts can be glued onto these sheets, too, or added to the sequence, respectively.

Don't be surprised if all of your sheets will return to you in a few months.

Charlottenburg, 16/10/98 Your Mommsen

[Krüger's answer to that card is lacking; he apparently requested a more formal confirmation of receipt]

7. Letter by Mommsen, October 22, 1898

Lieber College,

Um mir ein eigenes Urtheil über den Theodosianus zu bilden, habe ich das erste Buch, verzettelt, mit dem Variantenapparat ausgearbeitet. Die Bearbeitung der In- und Subscriptionen kann, wie ich mich überzeugt habe, nur ausgeführt werden, wenn nicht bloß die ganze Masse verzettelt ist, sondern auch auf jedem Blatt die zugehörigen Varianten stehen; ohne diese ist auch mit den Zetteln wenigstens in den ersten fünf Büchern nichts anzufangen.¹²³ Viel wird auch so nicht dabei herauskommen, aber gemacht werden muß die Arbeit einmal. Ich sollte meinen, daß diese Übersicht mit dem einschlagenden Apparat am besten am Schluß zusammenbleibt und der Apparat unter dem Text davon entlastet wird.¹²⁴

Zu zwingen wäre die Arbeit, nach Ihren vortrefflichen und

¹²³ Mommsen started off by having an aide glue each and every constitution (cut from Hänel's edition) on an individual sheet of paper; these he wanted to order chronologically. But he soon discovered that the date indications are often not very safely transmitted; given the numerous textual discrepancies and the consequent changes in chronology, he also had the textual variants (restricted to inscriptions and subscriptions?) added to his sheets. After the first five books, most constitutions are transmitted by unique witnesses (either **R** or **V**) anyway, so while date indications might be corrupt, there are rarely other manuscripts that would yield variants.

¹²⁴ In the end, Mommsen left the textual variants to the inscriptions and subscriptions where they belong (i.e., in the text edition) and did not include them in his chronological table.

weit reichenden¹²⁵ Vorarbeiten und auch Hänel's nicht ausreichender, aber doch nützlicher Voruntersuchung der geringeren Texte,¹²⁶ wohl; nur für die Novellen fasse ich zur Zeit noch keinen Rath.¹²⁷

Wo steckt der Solesmensis, den Sie aufführen?¹²⁸ Mir ist er nicht bekannt. Die Empfangsbescheinigung, die Sie zurückverlangen,¹²⁹ liegt bei.

Ch[arlottenburg]. 22/10 98 Ihr Mommsen

Dear colleague,

To form my own judgment on the Theodosianus, I have added the apparatus of [textual] variants to the first book, [with its individual constitutions placed] on separate sheets. I have

¹²⁵ This is, I think, the only time Mommsen actually praises the prior work of Krüger. In his longer research proposal of Dec. 15, 1898, Mommsen mentions Krüger's work on **T** and **R**, but writes regarding the Breviary manuscripts: *Die Krügerschen Vorarbeiten für diesen Theil sind gering, für die westgothische Interpretation so gut wie null. Hier ist noch ein gutes Stück Arbeit zu leisten* ["Krüger's preparatory work for this part is slight; regarding the Visigothic *interpretatio*, it is virtually non-existent. In this respect, a great deal of work still has to be carried out"]. Mommsen completed his own (or contracted) collations of the C.Th. text within little more than one year (Jan. 25, 1900: *Die . . . Bearbeitung des theodosianischen Codex . . . ist hinsichtlich der handschriftlichen Untersuchung . . . nahezu vollendet* ["The inspection of manuscripts required for the Codex Theodosianus project is all but completed"], in *Sitzungsberichte der Königlich Preußischen Akademie der Wissenschaften zu Berlin* (Berlin 1900), 1:44), almost without making any use of Krüger's "far-reaching" material. This is also a crucial observation: a task to which Krüger sacrificed all spare time during many years (see his letter of Feb. 7, 1903) was something which Mommsen not only could repeat in little more than a year, but massively extend to many other manuscripts.

¹²⁶ This must refer to the numerous Breviary manuscripts Hänel used and indicated in his edition.

¹²⁷ In his first letter less than one month before, Mommsen had judged that the *novellae* could not be separated from the C.Th. body; the remark here consequently cannot mean that he is wondering whether they should be left out. Mommsen probably wants to point out how little preparatory work has been done on them, and perhaps he also starts to hint at his wish to find somebody else for this task.

¹²⁸ See Krüger's answer. Correct is *Solmsianus* (belonging to the Solms-Baruth family), not *Solesmensis* (which would indicate a manuscript from Solesmes Abbey in France).

¹²⁹ Note that in the preceding postcard, Mommsen had already confirmed receipt. Obviously, Krüger insisted on something more formal. Krüger would not see his papers returned before Mommsen's death, and even then not completely (though luckily not much was lacking, see note 256 below).

reached the conclusion that work on the inscriptions and subscriptions can only be done if all texts are put on separate sheets and these individual sheets also include all variants. Without these [variants], even the sheets do not help much, at least in the case of the first five books. Even so, not much will come out of this, but the work has to be done, after all. I think that this synopsis with its pertinent apparatus should stay together [and be presented] at the end and that the apparatus below the text should be relieved of that.

Based on your excellent and far-reaching preparatory work and also Hänel's insufficient but useful research on the minor texts [i.e., manuscripts], the edition project should be feasible; only regarding the *novellae* I have not yet made up my mind.

Where is the Solesmensis located which you mention? I don't know it. The confirmation of receipt which you have requested is enclosed.

Charlottenburg 22/10/98 Your Mommsen

8. Postcard by Krüger, October 23, 1898

Hochverehrter Freund,

ich habe keinen Zweifel, daß Ihre Arbeitslust den Theod. leicht bewältigen wird. Ich würde es nicht für nöthig halten, daß außer für die Zusammenstellungen noch ein Mitstreiter nöthig und nützlich sein würde.¹³⁰

Bei der Weglassung der Varianten zu Inscr. und Subscr. in der Ausgabe besteht die Gefahr, daß die Benutzer durch das Fehlen derselben irreführt werden; vielleicht könnten die wichtigen Varianten allein angegeben werden.¹³¹

Über die Solms-Baruther Hs. in Bunzlau berichtet Z. für Rechtsgeschichte IX S. 389. Ich mache noch auf Bd. IX n. XIII über die Halberstädter Hs. aufmerksam.¹³²

¹³⁰ This unmotivated remark appears odd. See page 19 above.

¹³¹ Krüger is absolutely right in this; and Mommsen did not follow up on his earlier idea.

¹³² The references point to M. Conrad (Cohn), "Aus Handschriften – 2. Codex Theodosianus – II. Ein unbekannter Auszug von Buch 9–16," *ZSS (RA)*, 9 (1888), 389–92, and W. Schum, "Über das Halberstädter Bruchstück einer Handschrift des Codex Theodosianus," *ZSS (RA)*, 9 (1888), 365–75 (within *ZSS (RA)*, this is article no. 13).

Ihr Krüger 23/10 98

Highly esteemed friend,

I have no doubt that your passion for work will easily negotiate the Theodosianus. I would not deem it necessary that – except for creating the sheets – a further helper would be necessary or useful.

If the variants to inscriptions and subscriptions are omitted in the edition, there is danger that users might be misled by their absence; perhaps at least the important variants could be indicated.

Zeitschrift für Rechtsgeschichte vol. 9, p. 389, reports on the Solms-Baruth ms. kept at Bunzlau. I further bring vol. 9, article no. 13 on the Halberstadt ms. to your notice.

Your Krüger 23/10/98.

9. Letter by Mommsen, November 7, 1898

Lieber Herr Professor,

Die Vesmesche Abschrift habe ich, Ihren Indicationen nachgehend, von dem Sohn erhalten,¹³³ und sie wird, hoffe ich, die Arbeit fördern. Der Sohn hat auch die übrigen Vesmeschen Pagenen¹³⁴ hierbei übergeben, wie der beiliegende Brief zeigt. Ich finde nichts unter den Pagenen, das von Interesse wäre, bitte Sie aber in dieser Hinsicht um Ihren Rath. Sie schrieb

¹³³ Carlo Baudi di Vesme (1805–1877) planned and started a C.Th. edition of which only one fascicle appeared (Mommsen, “Prolegomena,” CXVIII). The copy in question is a transcription of the crucial manuscript **R** (see Mommsen, “Prolegomena,” XLIV: *Baudi a Vesme (qui adeo apographum eius diligentissime confecit ab ipso exhibitum Kruegero, deinde ab eius filio benigne mihi transmissum)*). See Mommsen’s letter of Oct. 10 [No. 3]: apparently in the preceding letter, Krüger had pointed him to the existence of this apograph and Baudi di Vesme’s further material, which Mommsen immediately undertook to secure. Mommsen indicates Vesme’s readings of the damaged margin of **R** in his apparatus, and ascribes to them great accuracy (XLIV: *Hanc nostra* [of various scholars, i.e. Cujas, Godefroy, Hänel, Baudi di Vesme, Krüger, Mommsen himself] *opera, maxime Baudii* [!], *antiquiorum errores non pauci sublatis sunt*); in one instance, Krüger (Krüger (note 15), 322–23) criticized Mommsen for not following Vesme’s readings (which coincide with his, Krüger’s, own). Vesme’s beautiful apograph is extant in the Academy Archive at Berlin.

¹³⁴ This likely refers to further preparatory work carried out by Baudi di Vesme (see note 106 above).

von einer Handschrift-Sigle, welche die expl. sign. nicht auflöst; ich kann der Art nicht finden.¹³⁵

Abgesehen von der mechanischen Auflösung des Codex in die einzelnen Constitutionen bin ich beschäftigt mit der Zusammenstellung des Apparats für I-V. Soweit ich bis jetzt gekommen bin (ich weiß, daß ich am Anfang bin, nicht am Ende),¹³⁶ sind für die Textconstituierung im Breviar alle mit Nachträgen oder Anhängen versehenen Handschriften abzuweisen¹³⁷ und giebt es zwei unabhängige Breviartraditionen,¹³⁸

¹³⁵ Given the context, this must be about the list of *sigla* used in the one fascicle of Vesme's edition that actually appeared. In Krüger's transcription of Mommsen's letters (which he created much later), Krüger added a remark in pencil: *mir unbekannt* ["unknown to me"].

¹³⁶ This is quite impressive: by now, Mommsen was working less than one month on the C.Th., but he already obtained his main result on manuscript relationships! In his review, Krüger acknowledges the correctness of Mommsen's observations regarding the two families (see Krüger (note 15), 325–26).

¹³⁷ Many Breviary manuscripts carry additions from full C.Th. manuscripts. Mommsen's idea is: *if* a Breviary scribe demonstrably had access to a full C.Th. manuscript, he is likely to have corrected the texts included in the Breviary according to the C.Th. manuscripts. Although this reasoning appears convincing at first sight, things are not as easy as this (see Krüger (note 15), 327). Also note that Mommsen would later not uphold this theory as radically as he does here, for he also assigns the heavily augmented manuscripts to his two families (and judges that one of these, **O**, *fortasse inter eos, quos habemus, primum locum obtinet* ["perhaps ranks first among all [Breviary manuscripts] that are extant," Mommsen, "Prolegomena," CXXXIII]).

¹³⁸ See Mommsen, "Prolegomena," LXV, CXXV, CXLI. In the edition for which Mommsen used many more manuscripts, these families are called **OAHNEBG** (*meliores*) and **XCPMLSQK** (*deteriores*). However, there is much contamination, especially in the case of **EBG**.

MP einerseits,¹³⁹ andererseits N (Par. 4404),¹⁴⁰ die sich gegenseitig corrigiren. Dagegen scheint mir L (Par. 4403) unbrauchbar;¹⁴¹ als contaminirt bezeichnen Sie die Handschrift ja auch. Sie ruht auf MP, ist aber vielfach corrigirt und erweitert.¹⁴²

Ch[arlottenburg]. 7/11 98 Ihr¹⁴³

Dear Mr. Professor,

Following up on your indications, I have obtained the Vesmian transcription from his son, and it will, so I hope, further the project. At the same time, his son also passed on the other Vesmian pages, as the letter I enclose shows. Among the pages, I do not find anything of interest, although I ask for your advice in one respect. You mention a manuscript siglum which is missing in the *explicatio signorum*. I cannot find anything of

¹³⁹ **M** and **P** are two closely related manuscripts, kept in Munich and Berlin. While Mommsen otherwise consistently indicates who collated a given manuscript, there is no such information to be found in the case of **M** and **P** (Mommsen, "Prolegomena," LXXV–LXXVI). Nor does he mention these manuscripts when he lists the collations of Krüger he has *not* used (letter of Feb. 9, 1903 [No. 26]). It is of course inconceivable that Mommsen did not consult a manuscript kept in Berlin himself, but one may wonder whether at this stage (a few weeks into the project!) he already had these manuscripts on his desk or whether he rather relied on a collation by Krüger. In his own edition (Krüger (note 24), I), Krüger states that he collated these two manuscripts though without indicating when. But the same is true for **G** (id.), for which Mommsen does not know of any collation by Krüger (Mommsen, "Prolegomena," LXXIII), so apparently Krüger resumed collating at some point after 1903.

¹⁴⁰ Mommsen found better witnesses of this class later. Mommsen had Krüger's collation of this manuscript at his disposal, but later collated it himself in Berlin (Mommsen, "Prolegomena," LXXII).

¹⁴¹ Editing the *Sententiae Pauli* is somewhat similar to editing C.Th. 1–5: in both cases, a skeleton provided by the Breviary needs to be fleshed out with other material. As editor of the reference edition of *Sententiae Pauli* (included in *CLIA*, 2, last edition: 1878), Krüger had first-hand experience with Breviary material. But his conclusion (*CLIA*, 2, 43) was completely different: **M** and **L** were the best manuscripts, and anything else belonged to the *deteriores*. Given the degree of contamination in many Breviary manuscripts, it *could* be that **M** and **L** are much better in the *Sententiae* than in the C.Th. part; but at first sight, this appears the less likely option.

¹⁴² This first impression was to remain: in his preface, Mommsen ("Prolegomena," CXXXVI) called **L** *huiusce ordinis longe deterrimus* ["by far the worst [of the manuscripts] of this class [namely the *deteriores*!"]]. Just as in the case of **N**, **L** had been collated by Krüger, but Mommsen himself repeated this work later in Berlin (id., LXXVII).

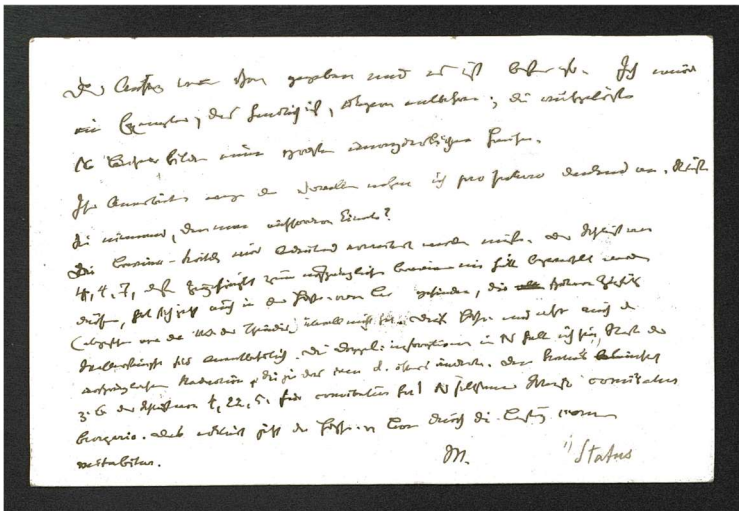
¹⁴³ Indeed: Mommsen forgot to sign.

that sort.

Apart from the physical disintegration of the Code in its individual constitutions, I am busy with compiling the apparatus for [books] I–V. As far as I have reached so far (knowing [very well] that I am at the start, not at the end), for constituting the text of the Breviary all manuscripts containing additions or supplements must be rejected. There are two independent transmission lines of the Breviary, on the one hand MP, on the other N (Par. 4404), which can be used to correct one another. By contrast, L (Par. 4403) seems useless to me; you, too, call this manuscript contaminated. It is based on [the] MP [tradition] but is corrected and augmented in many places.

Charlottenburg, 7/11/98 Your

[Apparently, Krüger asked a few days later for a copy of Hänel’s Codex Theodosianus edition, as he had none left]



Postcard of Nov. 18, 1898, reproduced by courtesy of Universitäts- und Landesbibliothek Bonn. Note Krüger’s penciled “Status” in the lower right corner, transcribing the hardly readable word three lines above (both marked with two small vertical lines resembling quotes). In the same line as Mommsen’s “Status,” slightly to the left, there is “idem A.” (if my reading is correct, that is). This image is mostly meant to illustrate the challenges posed by Mommsen’s handwriting.

10. Postcard by Mommsen, November 14, 1898

Mein Exemplar¹⁴⁴ kann ich nicht weggeben, weil die Novellen angebunden sind und ich von diesen ein zweites Exemplar nicht habe. Aber Sie erhalten dieser Tage ein neues Exemplar¹⁴⁵ von meinem Buchhändler. Es ist nur billig, daß Ihnen dies ersetzt wird. Die Arbeit geht vorwärts.

Ihr M.

I cannot give away my copy [of Hänel's Theodosian Code edition] as the *novellae* are bound into it, and I do not have another copy of these. However, you will receive a new copy from my bookseller in the next few days. It is only fair that you obtain a replacement. The work advances.

Your M.

11. Postcard by Krüger, November 15, 1898

Wenn nur die Novellae ein Hinderniß bilden, so könnte ich leicht aushelfen, da ich mehrere Exemplare der Ausgabe von Hänel¹⁴⁶ besitze, die für die künftige Ausgabe¹⁴⁷ als Ms.¹⁴⁸

¹⁴⁴ The book in question is the Theodosian Code (see Krüger's answer of Nov. 15, 1898 [No. 11]) in Hänel's edition (the only one available). Krüger had sent a Hänel copy including all or some of his collations as marginal notes (see Krüger's letter of Feb. 5, 1899 [No. 17]) to Mommsen; perhaps he also forwarded further copies to Mommsen for his cutting up. Whether that be so or not, Krüger had now run out of Hänel copies. He must have asked in his letter if Mommsen could possibly send him a spare copy.

¹⁴⁵ Hänel's edition had appeared in 1842, i.e. more than 50 years before the time of this letter. I do not know whether the book was reprinted or whether booksellers stocked such works for many decades.

¹⁴⁶ *Novellae constitutiones imperatorum . . . recognovit . . . Gustavus Haenel* (Bonn 1844).

¹⁴⁷ Thus, like Mommsen, Krüger had also planned to include the *novellae* in his C.Th. edition.

¹⁴⁸ Compare Mommsen's approach: if one wishes to have single sheets with the texts to which one can add observations, variants, possible modifications etc., one must either copy the known texts or, better, glue the text of the last available edition on them. For that, *two* copies of that edition are required; after all, every sheet has printed text on the verso and the recto page.

angeschafft wurden. Die Neubeschaffung eines Exemplars des Theod. überlassen Sie lieber mir.¹⁴⁹ An die Novellen gehen Sie doch jetzt noch nicht; ich habe vereinzelte Vergleichenungen, die ich Ihnen alsdann zur Verfügung stelle.¹⁵⁰

Ihr Krüger 15/11 98

If it is just the *novellae* that pose a problem, I could easily help, as I own several copies of Hänel's edition which were acquired to serve as a manuscript for the future edition. Better leave it to me to buy a new copy of the Theodosian Code. You won't start work on the *novellae* yet, will you? I have some collations which I will make available to you then.

Your Krüger 15/11/98

12. Postcard by Mommsen, November 18, 1898

Der Auftrag war schon gegeben, und es ist besser so. Ich würde ein Exemplar, das handlich ist, ungern entbehren; die aufgelösten 16 Bücher bilden einen großen unerquicklichen Haufen.¹⁵¹

Ihr Anerbieten wegen der Novellen nehme ich *pro futuro* dankend an. Wüßten Sie niemand, den man auffordern könnte?¹⁵²

¹⁴⁹ Note that this is an alternative: Krüger suggests that he could send Mommsen the *novellae*, so that Mommsen could send his Hänel copy (comprising both C.Th. and *novellae*) to him. If not, Krüger offers to buy himself a new Hänel copy (which again suggests that this book must be easily available).

¹⁵⁰ Krüger volunteers to share his collations (just as he readily informed Mommsen in a preceding letter about the Halberstadt manuscript). At this time, there is no grudge whatsoever discernable.

¹⁵¹ This suggests that Mommsen had only his own C.Th. plus *novellae* copy bound, and one (or rather two) Hänel C.Th., cut up and glued to folio sheets. What about Krüger's Hänel with his collations in the margin? Possibly this copy was likewise unbound; the Hänel Mommsen was soon going to send for collation purposes to Oxford was not bound either, and it still can be found in the Academy Archive (featuring Anna Parker's notes) in that condition. This fits Mommsen's descriptions of Krüger's material as "pages."

¹⁵² By now, just one month into the C.Th. project, Mommsen has made up his mind about work assignments: he would do the C.Th. on his own, while charging somebody else with the complete *novellae* edition. In less than one month, he was going to suggest Paul M. Meyer as co-editor to the Berlin Academy.

Die Breviar-Kritik wird bedeutend erweitert werden müssen. Der Schluß von 4,4,7,¹⁵³ dessen Zugehörigkeit zum ursprünglichen Breviar nie hätte bezweifelt werden dürfen,¹⁵⁴ hat sich jetzt auch in der Handschr. von Leon¹⁵⁵ gefunden, die spätere Zusätze (abgesehen von der VO. [Verordnung] des Theudis)¹⁵⁶ überall nicht hat. Diese Handschr. und also¹⁵⁷ auch

¹⁵³ C.Th. 4.4.7 § 2, lines 11–20 in Mommsen's edition. According to the Visigothic commentary, this part has not been commented upon because it is no longer valid, having been superseded by a later law (namely Nov. Val. 21.2); this is why almost all Breviary manuscripts (the exceptions are **BHE**) lack it. Now, was this part already absent in the original Breviary, and *later added* from a full C.Th. manuscript? Or was it rather present in the original Breviary, and later removed because the Visigothic *interpretatio* says it is invalid anyway?

¹⁵⁴ This final part of C.Th. 4.4.7 was missing in all previously known manuscripts. It was discovered by Hänel in the Wallerstein manuscript (**B**) and published first in Ch. G. Haubold, *Opuscula Academica*, 2 (Leipzig 1829), CLI–CLII, there with the indication that it was not part of the original Breviary. Nor did C. Baudi di Vesme, *Corpus iuris Romani pars prima* (Turin 1839), col. 170, n. 26, believe in its belonging to the original Breviary. However, the newly found and particularly old Spanish Breviary palimpsest also contained this ending of C.Th. 4.4.7; therefore, Mommsen was now convinced that this passage was an authentic part of the original Breviary and only removed later. Incidentally this concluding part of C.Th. 4.4.7 found its way into C.I., namely as C.I. 6.36.8 § 3. There, the content of this passage has been completely changed (see pages 7–8 above).

¹⁵⁵ I.e., palimpsest **H** (see note 115 above). Consequently, the concluding part of C.Th. 4.4.7 was now known through both **B** and **H** (the manuscript **E** had been identified by Baudi di Vesme who communicated the discovery to Hänel; Krüger later collated the integral book 16 added to **E**, see Mommsen, “Prolegomena,” LXVIII, but not the Breviary section itself; but nobody among these three discovered that **E**, too, had C.Th. 4.4.7 featuring this final section).

¹⁵⁶ Mommsen's argument is: the Spanish palimpsest **H** exhibits a particularly pure text of the Breviary. There is not a single addition from C.Th. and hence no hint of any contamination with full C.Th. manuscripts. There is, however, one single (and singular!) addition: an enactment by the Visigothic king Theudis from Nov. 24, 546, on trial costs which included the instruction to insert it into the Theodosian Code (meaning: into the Breviary) in title 16 of book 4! It was first seriously edited by Zeumer, “Über zwei neuentdeckte westgotische Gesetze, I, Das Processkostengesetz des Königs Theudis vom 24. November 546,” *Neues Archiv der Gesellschaft für ältere deutsche Geschichtskunde*, 23 (1898), 77–103, and later again, slightly modified, in *MGH LL nat. Germ.*, 1, 467–69.

¹⁵⁷ I.e., thanks to **H**, there was now good evidence that the presence of the concluding part of C.Th. 4.4.7 does not mean that the manuscript in question is contaminated; on the contrary, it means that it is especially close to the original Breviary. Accordingly, the only other manuscript known at this time to include this part, i.e. the Wallerstein ms. **B**, must be important,

die Wallersteinsche sind unentbehrlich. Die Doppelin-scriptionen in N halte ich für Reste der ursprünglichen Redaction,¹⁵⁸ die ja das *idem A.*¹⁵⁹ öfters änderte. Den Status beleuchtet z. B. der Schluß von 4,22,5; für *comitatur* hat N seltsamer Weise *comitatur burgario*. Das erklärt jetzt die Handschr. v. Leon durch die Lesung *commitabitur*.¹⁶⁰

M.

I had already made the order, and it is better like this. I would not like to lack a handy copy; the disintegrated 16 books constitute a huge and unpleasant heap.

Your proposal regarding the *novellae* I appreciatively accept for the future. Would you know of anybody one might invite [to become editor of the *novellae*]?

Textual work on the Breviary will require a significant expansion. The ending of 4,4,7, the inclusion of which in the

too. This idea of Mommsen's was not completely confirmed in the end: while **B** does indeed belong to his *melior* class, it is certainly not the best manuscript of that family (Mommsen, "Prolegomena," CXXXIV).

¹⁵⁸ In the full C.Th. manuscripts, the issuing imperial college is listed name by name only once in a given title; all subsequent laws enacted by this *same* college present *Idem A.*, *Idem AA.* or *Idem AAA.* (with the number of "A"s indicating the number of emperors). During the compilation of the Breviary, 90% of all constitutions were removed, so most of these *Idem A.* indications became orphaned. Later, some of these now meaningless references were replaced with the full details of the imperial college, but there, numerous mistakes happened (see Mommsen, "Prolegomena," CXXXVII–CXXXIX). **N** in a few places presents highly curious *combined* inscriptions, such as C.Th. 11.7.20, *Idem Aug. Imp. Hon. et Theod. Aug.* (cf. C.Th. 1.2.8). Mommsen here claims that the strange double inscriptions go back to the original Breviary. He does not give an argument, but his thinking is probably based on the fact that **N** does not have any additions of C.Th. texts at all (see Mommsen, "Prolegomena," LXXII); hence the indication of the emperors cannot come from a C.Th. manuscript. This is flimsy evidence, and Mommsen apparently did not repeat this idea in the published book. But Krüger (note 15), 27, criticizes him for that in the review, without giving a page number. Either I overlooked something in Mommsen's C.Th. preface, or Krüger is actually arguing against an idea only contained in this letter!

¹⁵⁹ This "*idem A.*" was possibly the most single difficult item to decipher in all of the letters published here. The only character beyond doubt is "i," everything else could be read in a different way.

¹⁶⁰ The phrase runs: *successorem auctoris sui culpa comitatur* ["a debt accompanies the heir of the person who contracted it"]. The word *comitatur* is evidently correct, and it also supported by the vast majority of manuscripts. Therefore, it is noteworthy that **H** and **N**, manuscripts Mommsen deemed especially good, both show corruptions here which, furthermore, seem to depend on one another (although *-bitur* and *burgario* do not share, apart from "b," much common ground).

original Breviary should never have been questioned, has now also turned up in the León manuscript which lacks later additions (apart from Theudis's enactment) anywhere. This manuscript and thus also the one of Wallerstein are crucial. I believe that the double inscriptions in N are remainders of the original redaction in which, after all, the *idem A.* indications are sometimes modified. The situation is illuminated, for example, by the conclusion of 4,22,4. Instead of *comitatur*, N has, strangely enough, *comitatur burgario*. This can now be understood thanks to the León manuscript, which reads *committatur*.

M.

13. Postcard by Krüger, November 19, 1898

Mir stoßen aber 2 Notizen auf über Revidenda:

Vat. reg. 520 fol. 94/95 enthält Th. 4,8,8. 4,10,2.3 4,13,1.2 4,11,1–3.6–8 (Zeitschr. d. Sav. Stift. 9 S. 987 f.¹⁶¹ – Casinus 522 enthält nach Thaner¹⁶² Th. 16,2,8.16.26.29.30.34 – Vat. 1321 ist zu suchen (meiner Zeit nicht zu finden) u. nachzusehen, ob er Th. 1,16,8 enthält (Hänel S. XXXI).¹⁶³ Soweit ich das

¹⁶¹ Again, Krüger is helpful without being prompted; there is no grudge discernable at this time. Krüger's reference includes a mistake (9 instead of 3), correct is: M. Conrat (Cohn), "Aus Handschriften, 2. Zum Codex Theodosianus," *ZSS (RA)*, 9 (1888), 387–89. See Mommsen, "Prolegomena," LXXXVI–LXXXVII.

¹⁶² Friedrich Thaner (1839–1915), Professor of Canon Law at Graz University. The reference points to F. Thaner, "Untersuchungen und Mittheilungen zur Quellenkunde des canonischen Rechtes. I. Die nachpseudo-Isidor'sche Sammlung des Codex 522 von Montecassino," *Sitzungsberichte der Kaiserlichen Akademie der Wissenschaften. Philosophisch-historische Classe*, 89 (1878), 601–32, at 607. See Mommsen, "Prolegomena," LXXXIX.

¹⁶³ C.Th. 1.16.8 is not just *any* constitution: it is Julian's law on subordinate judges, the unabridged version of which is epigraphically extant in part (see D. Feissel, *Documents, droit, diplomatique de l'Empire romain tardif* (Paris 2010), 205–22). Rarely do scholars pay attention to the fact that C.Th. 1.16.8 itself has a unique (and problematic) transmission: in fact, we have no manuscript evidence for this text at all. What we have is just Godefroy's edition. He claims that he added this text from "MSS. nonnullis, ac nominatim ex MS. P. Danielis." None of these manuscripts could ever be retrieved. The mentioned person is Pierre Daniel d'Orléans (1531–1604), but nobody ever succeeded in identifying Godefroy's Daniel manuscript. Most (though not all) of Daniel's manuscripts ended up in the

Apographum der Hs. v. Leon angesehen, macht es keinen ungünstigen Eindruck;¹⁶⁴ aber eine Probevergleichung wäre zu wünschen, um über die Genauigkeit ein Urteil zu gewinnen.¹⁶⁵

Für die Novellen, wenn diese jetzt schon in Angriff genommen werden sollten, wüßte ich keinen Vorschlag zu machen.

Bonn Königstr. 21 Ihr Krüger 19/11 98

However, I come across two notes regarding *revidenda*:

Vat. reg. 520 fol. 94/95 contains Th. 4,8,8. 4,10,2,3 4,13,1.2

Vatican library. Hänel therefore assumed that *if* the constitution could be retrieved it should be in all likelihood from a Vatican manuscript; but he checked all of them known to include Theodosian material and still failed to find it. However, there was one hope left: in 1829, F. Stieber (in: Ch. G. Haubold, *Opuscula Academica*, 2 (Leipzig 1829), CXLVII–CXLVIII) had pointed to an entry in the Vatican catalog, according to which Vat. lat. 1321 included, among other things “. . . Leonis Papae rescriptum ad Chalcedonense concilium. Interpr. Legis Theodosii iunioris . . .” But in 1829, this manuscript could not be found. Nor did Hänel succeed to track it down. Krüger’s letter proves that during his time (i.e., around 1869), the manuscript was still missing. There is no indication that Mommsen followed up on this lead. Regarding Vat. lat. 1321, I have good news and bad news. The good news is that this manuscript was rediscovered at some point in time, and reproductions of it are now available online. The bad news is that on f. 139r, we have both the incipit of Leo’s *rescriptum* and the explicit of the *interpretatio legis Theodosii iunioris*; Leo’s letter (ACO 2.4, 70–71) is this interpretation!

Our C.Th. 1.16.8 can be found identically as C.I. 3.3.5 in the Justinian Code, and already Hänel found it quite suspicious that Godefroy mentioned *several* manuscripts containing this text while *none* could be identified. Godefroy’s indication therefore likely refers to C.I. manuscripts, and we must suspect that C.Th. 1.16.8 was actually added from a C.I. (not a C.Th.) witness. The striking brevity of the fragment indeed suggests that the text went through a further round of shorting, i.e. the C.I. redaction. In a future C.Th. edition, it might be safer to leave it out, citing it henceforward as C.I. 3.3.5.

¹⁶⁴ See note 115 above. The Spanish transcription looks quite attractive *at first sight*, as the authors substituted anything they could not read from Hänel’s edition, so the resulting text appears polished; add to this the “enhanced” images which reinforce the impression of correctness, and one can understand Krüger’s remark.

¹⁶⁵ In summer 1899, the Berlin Academy dispatched Bruno Violet (1871–1945) to León for this “sample comparison” (Coma Fort (note 24), 124). The result was disturbing: wherever the apograph presents a text departing from Hänel, you can rely on it. But whenever the apograph reproduces Hänel’s text, this can simply mean that the Spanish failed to read the palimpsest and fell back on the text they found in the standard edition (Mommsen, “Prolegomena,” LXXI). Even more disturbing is that to this day, no other paleographer has undertaken the task to reexamine this extremely important manuscript!

4,11,1–3.6–8 (Zeitschr. d. Sav. Stift. 9 S. 987 f. – Casinus 522 contains, according to Thaner, Th. 16,2,8.16.26.29.30.34 – One has to search for Vat. 1321 (I could not find it in my time) and verify whether it contains Th. 1,16,8 (Hänel, p. XXXI). As far as I had a look at the transcription of the León manuscript, it did not strike me as bad; however, a sample comparison would be desirable to reach an opinion on its accuracy.

If the *novellae* are indeed going to be embarked upon right now, I couldn't think of anybody to recommend [as editor].

Bonn, Königstr. 21 Your Krüger 19/11/98

14. Postcard by Mommsen, November 21, 1898

Ich hoffe, Ihnen bald berichten zu können, daß sich für die Novellen ein Arbeiter gefunden hat. Inzwischen würde ich gerne die const. Sirmondianae zerscheiden und aufziehen lassen; Sie könnten mir die beiden¹⁶⁶ Exemplare schicken.

Maßgebend für die Breviarkritik ist die Subscription C.Th. 5,1,9. Die ursprüngliche Form haben der Codex N und der von Leon (neben einigen anderen, wie es scheint, contaminirten), MPL und die meisten füllen aus: *Tauro et Felice*.¹⁶⁷ Das ist also kundige Überarbeitung des Breviartextes (vgl. Neues Archiv 14,232),¹⁶⁸ wahrscheinlich wenig jünger als das Breviar

¹⁶⁶ Once again, the same procedure: two copies of the last edition (again, by Hänel) are sacrificed in order to have a head start. Glued to folio pages, one's own observations and corrections can be added. Note that Krüger mentioned that he had "several" copies of the *novellae* (Hänel's edition comprised both *novellae* and Sirmondians, so this is the same book) while Mommsen now asks for "the two copies." Either a letter by Krüger is lost or (rather) we have to understand "the two copies [needed to create the sheets]."

¹⁶⁷ This constitution was issued on Feb. 20, 428, in Constantinople. So early in the year it was not yet known who had been nominated in the Western part of the Empire as consul, so the consul indication was *Tauro et qui fuerit nuntiatus cons.* This indication can be found in **N** and **H** (and some other witnesses). Most other manuscripts present, however, *Tauro et Felice* which must be a later adjustment (and in fact, a *much* later modification, as the correct contemporary order would have been *Felice et Tauro*, see R. S. Bagnall, et al., *Consuls of the Later Roman Empire* (Atlanta 1987), 391). Once again, Mommsen could confirm the specific importance of **N** and **H**.

¹⁶⁸ T. Mommsen, "Die Consulardatierung des getheilten Reiches," *Neues Archiv der Gesellschaft für ältere deutsche Geschichtskunde*, 14 (1889), 226–49. At 232, Mommsen explains the *et qui fuerit nuntiatus* indication in consular dates.

selbst.¹⁶⁹ Danach also scheiden sich zwei Klassen recht scharf, und N und Leon gehören an die Spitze. Überall bestätigt sich dies; natürlich ist die zweite Klasse wieder an vielen Stellen besser.¹⁷⁰

Die spanische Collation ist gewiß nicht fehlerfrei, aber brauchbar. Ich hoffe, die Hauptstellen nachvergleichen zu lassen.¹⁷¹ Die Handschriften sind vorgemerkt.¹⁷² Ich lasse jetzt die Wallersteinsche kommen, die sicher zur ersten Klasse zählt.¹⁷³

M.

I hope I will soon be able to report to you that an editor for the *novellae* has been found. Meanwhile, I would like to have the Sirmondian Constitutions dissected and pasted; you might send me these two copies.

The subscription of C.Th. 5.1.9 is crucial for the Breviary's textual criticism. The original version can be found in manuscript N and the one of León (apart from a few others which apparently are contaminated), while MPL and most others fill in, resulting in *Tauro et Felice*. This is a competent modification of the Breviary's text (cf. Neues Archiv 14, p. 232), which likely happened not much later than the Breviary's redaction itself. Accordingly, there are two clearly distinguishable classes [of manuscripts], and N and León are in the fore. This finds confirmation everywhere, although, of course, the second class is in turn better in many places.

The transcription published in Spain is clearly not without mistakes, but useful. I hope I can have the main passages compared independently. I have noted down the manuscripts. Right now, I have sent for the Wallerstein manuscript which belongs certainly to the first class.

M.

¹⁶⁹ Mommsen's thinking seems to be: much later scribes cannot be expected to know or to care about consular *fasti*.

¹⁷⁰ This was also Mommsen's final verdict: two families, the one family with **NH** (and the later identified best copy **O**) better than the other, although the other family contributes many correct readings, too. See notes 136–138 above.

¹⁷¹ See note 165 above.

¹⁷² This must refer to Krüger's immediately preceding postcard [No. 13] in which he communicated three manuscripts to check.

¹⁷³ This is **B**. See notes 154 and 157 above.

15. Letter by Krüger, November 22, 1898

Hochverehrter Freund!

Mit den Sirmondianae sende ich auch¹⁷⁴ die zum Theod. gehörigen Novellen in 2 planirten¹⁷⁵ Exemplaren. Meine wenigen Vergleichen sind in mein Handexemplar eingetragen, das ich vorläufig nicht entbehren kann, als letztes,¹⁷⁶ aber seiner Zeit zum Aufschreiben meiner Notizen zur Verfügung hatte.

Zu Simond 1. ist der vollständigerer Inh. der Weingartner Hs. (jetzt Stuttgart) CII fol. 194v zu beachten, den v. Schulte herausgegeben hat (Wiener Sitzungsberichte 1889 S. 12).¹⁷⁷

Zu Th. 5,1,9 kann ich nur die Abweichungen des Iust. 6,18,1¹⁷⁸ konstatieren; was MPLN haben, ergibt die Ausgabe

¹⁷⁴ As already indicated, this is the same publication by Hänel anyway. However, the two copies Krüger forwards are not bound: thus he could have removed those pages which contain the text of the Sirmondians.

¹⁷⁵ The German verb “planieren” (in English: “to size”) refers to a bookbinding step which became unnecessary for books printed after ca. 1850. Earlier, printers used paper without surface treatment so that the printing ink could more easily soak in. Adding a protective layer was done by the bookbinder, who put all the pages through glue-water boiled with alum, a mixture called “size” in English and “Planierwasser” in German. The two copies Krüger forwarded to Mommsen had already passed this step.

¹⁷⁶ Krüger had forwarded all of his copies of Hänel’s C.Th. edition to Mommsen; regarding the *novellae*, he is now more prudent. First he wants a replacement copy before he hands over his personal copy with his annotations.

¹⁷⁷ The reference is to J. F. v. Schulte, “Vier Weingartner jetzt Stuttgarter Handschriften,” *Sitzungsberichte der Kaiserlichen Akademie der Wissenschaften. Philosophisch-historische Classe*, 117:11 (1889). The case of Sirm. 1 is unique. The text of the original constitution has been transmitted in two different canonical collections independently from one another: first in the Sirmondian collection (if we can call it a canonical collection), secondly as an addendum to the “Collectio Vetus Gallica” in one single manuscript. The text of these two transmission strands is quite different, with the Weingarten text being more complete, though the Sirmondian tradition helps to correct it. On this manuscript **W** (which must not be confused with the C.Th. manuscript **W**), see Mommsen, “Prolegomena,” CCCLXXX.

¹⁷⁸ C.I. 6.18.1 is a massively rewritten retake of the final part of C.Th. 5.1.9. The consular year of C.I. 6.18.1 is transmitted twice, by the Veronensis as *Hierio et Tauro*, and by Haloander’s edition (based on a lost manuscript) as *Hierio et Ardaburio*. The latter indicates the year 427 and is certainly wrong. We may assume that Haloander himself corrected the nonsensical *Hierio et Tauro* (one consul being of 427, the one of 428).

von Wenck¹⁷⁹ nicht, mit der ich mich vorläufig behelfe,¹⁸⁰ den Legionensis muß ich mir erst von der Bibliothek holen. Wenn L zurückstehen könnte, wäre es eine Wohlthat wegen der vielen Fehler und der Orthographie;¹⁸¹ aber daß N nicht aus Theod. durchcorrigiert wäre, möchte ich bezweifeln.¹⁸²

Beiliegender Zettel enthält das Verzeichniß meiner Vergleichenungen zu den Novellen.¹⁸³

Ihr Krüger

Highly esteemed friend!

Together with the Sirmondians I send the *novellae* belonging to the Theodosian Code in two sized copies. The few collations I have made are noted in my personal copy, which for the time being I cannot give away, as it is the last one I have; at the time, I had it at hand for noting down my observations.

Regarding Sirm. 1, the more complete version of the Wein-

Apparently, *Tauro et qui fuerit nuntiatus* was "corrected" to *Hierio et Tauro* during the C.I. compilation.

¹⁷⁹ C. F. Wenck, *Codicis Theodosiani libri V priores* (Leipzig 1825). See Coma Fort (note 24), 451–52.

¹⁸⁰ A gentle reminder that Krüger still has not received a replacement for the Hänel C.Th. copies he had sent to Mommsen.

¹⁸¹ On L, see Mommsen, "Prolegomena," LXXVII: "Orthographia tota barbara est." L includes oddities like *aut* (for *haud*) or *noveletaverit* (for *nobilitaverit*). Its problems reach beyond orthography: Mommsen, "Prolegomena," CXXXVI, considers L the *longe deterrimus* of all the manuscripts of his worse second class; indeed, he indicated its readings only because earlier editors had attached (too) much weight to it.

¹⁸² There is no doubt that N presents an excellent text; but is this the case because N is especially near to the original version of the Breviary (while other Breviary manuscripts present a later, adulterated text stage), as Mommsen thought? (His argument was that there are no additions from a full C.Th. manuscript to be found in N.) Or is it because the text of N was corrected against a full C.Th. codex? This was Krüger's opinion on which he did not follow up here, but he did so later in his review of Mommsen's edition (Krüger (note 15), 327–28). He persuasively pointed to the telltale double inscriptions (see note 158 above) which hardly can be explained otherwise. However that may be, for an editor of the Theodosian Code (as opposed to an editor of the Breviary) this is not an issue: the text presented by N is preferable when reconstructing the original C.Th.

¹⁸³ I am not entirely sure about that. Krüger writes at the start of this letter that his "few" collations (to the Sirmondians, to the *novellae*, or to both?) are contained in his working copy which he cannot lend for the time being. But then he attaches a list of collations (i.e., the collations themselves?) for the *novellae* to the letter. So is the remark on the working copy just for the Sirmondians? Or does his list just indicate for which *novellae* paragraphs he has collations (and not the collations themselves)?

garten (now Stuttgart) ms. CII fol. 194v has to be taken into account. It was edited by v. Schulte (Wiener Sitzungsberichte 1889 S. 12).

Regarding Th. 5.1.9 I can only note the deviation in Iust. 6.18.1. The edition by Wenck (with which I have to make do for the time being) does not tell what MPLN have. I still have to fetch the *Legionensis* from the library. If the [editorial] importance of L is not that great, it would be a boon, given all its mistakes and its orthography. But I rather doubt that N has not been corrected according to [a complete manuscript of] C.Th.

The enclosed sheet of paper contains a list of my collations for the *novellae*.

Your Krüger

16. Letter by Mommsen, January 29, 1899

Lieber Krüger,¹⁸⁴

Ich habe jetzt über die Handschrift von Autun eingehende Notiz durch Chatelain erhalten. Es ist ein wunderliches Stück, ein in die Sprache des 4. oder 5. Jahrh. umgeschriebener Gaius. Auch hier wird, wie 4,85,¹⁸⁵ auf den *primus commentarius* verwiesen;¹⁸⁶ aber der Text ist überall ein anderer, ungefähr wie die Constitutionen des Theodosianus in der *interpretatio* behandelt sind. Neues finde ich in dem mir Mitgetheilten nicht, es wird mit vielen und schlechten Worten

¹⁸⁴ After their lively exchange right at the beginning of the C.Th. project, more than two months had passed without any further communication. In this letter, Krüger will receive an update on Mommsen's work on the C.Th. Note, however, that this is not the reason why Mommsen is writing in the first place: rather, he had finally received robust information on the Autun palimpsest (which, sadly, turned out to be not a "Gaius" but a "crude Gaius paraphrase"). Mommsen had to forward this immediately to Krüger, as the latter still did not know what to do with the upcoming re-edition of his Gaius.

¹⁸⁵ G.4.85: *Tutores autem et curatores quemadmodum constituentur, primo commentario rettulimus*. The work of Gaius does not contain several "books," but "commentaries." The reference in G.4.85 is just one example of many.

¹⁸⁶ Gai. Aug. 91: *quemadmodum tutor vel curator constituentur in primo commentario relatam est*.

gesagt, was Gaius kurz und gut giebt.¹⁸⁷ Weiteres mitzutheilen halte ich mich nicht berechtigt,¹⁸⁸ die Publikation wird zum April in Aussicht gestellt,¹⁸⁹ aber ich glaube, Ihnen dies schon jetzt melden zu sollen, mit Rücksicht auf die neue Ausgabe und deren Vorrede. Dieselbe wegen des Fundes zu verzögern, scheint mir nicht angezeigt.

Die Arbeiten für den Theodosianus schreiten vor;¹⁹⁰ aber ich habe es nothwendig gefunden, das Fundament breiter zu erfassen.¹⁹¹ M und P sind nachverglichen und dasselbe wird mit LN geschehen, die hier sind.¹⁹² Es war dies nothwendig, theils, weil bei der Übertragung Ihrer Collationen in mein Exemplar Revision ohnehin erforderlich war, theils mit Rücksicht auf die *interpretatio*.¹⁹³ – Außerdem habe ich den

¹⁸⁷ I.e., the Autun palimpsest contains just a late antique paraphrase of the original Gaius. It was not, as hoped, a second palimpsest of Gaius which could have been used to fill in the gaps, and to correct the text, of the only witness available.

¹⁸⁸ Judging from Mommsen's hints, Chatelain had indeed shared some of the text he had managed to transcribe in the meantime.

¹⁸⁹ Chatelain was slow in publishing; the first portion came out only in June (see note 205 below).

¹⁹⁰ On Feb. 9, 1899, Mommsen was first awarded money for the C.Th. project by the Berlin academy (*Sitzungsberichte der Königlich Preußischen Akademie der Wissenschaften zu Berlin*, 1899:1, 109: 1,200 marks). It is interesting to note how much effort Mommsen put into the project before it even had formally started! Mommsen does not give the least hint to Krüger, neither in this letter nor in any of the later ones, regarding his dealings with the academy.

¹⁹¹ This is crucial. Mommsen will not rely on the work Krüger had done on some Breviary manuscripts, but he will rather verify (or have helpers verify) these and several more.

¹⁹² **M** and **P**, kept in Munich and Berlin, were easy to get hold of. **L** and **N** belong to the National Library in Paris; they were mailed to Mommsen so that he could use them in Berlin. Such liberality must appear striking to any modern scholar working on manuscripts, and it is even more amazing given the fact that several important manuscripts had been destroyed when Mommsen's study at his house in Charlottenburg burned in 1880!

¹⁹³ As Mommsen started to redo earlier work of Krüger's, thus making it superfluous, he gave a clear explanation of his rationale. On the one hand, when Krüger's variants were added to Mommsen's sheets, mistakes might have crept in. A careful verification was necessary by all means, and, as Mommsen much later writes, this is better done on the original manuscripts than on Krüger's indirect evidence. On the other hand, Krüger had not been interested in the Visigothic commentaries, the *interpretatio*. There are good reasons both for including it and for leaving it out: the *interpretatio* sometimes contains information we are otherwise unaware of, e.g. references to lost C.Th. constitutions. It is very useful to have it at hand (and many users of Krüger's *Sententiae Pauli* will have deplored the lack of the

Murbacensis (in der Baseler Abschrift)¹⁹⁴ und den Wallersteinensis¹⁹⁵ selbst verglichen und lasse den Seldenianus vergleichen,¹⁹⁶ diese Texte sind unentbehrlich.

Die Novellen hat Dr. Paul Meyer (der sog. Concubinats-

interpretatio there). Then again, the *interpretatio* is simply not part of the original Theodosian Code, and explanations given there reflect the ideas of scholars living in a Germanic state of the sixth century. In other words, it is just *one* possible interpretation, not necessarily the correct one. Many casual users of Mommsen's edition do not understand this, believing the much more understandable *interpretatio* would indeed render the true content of the C.Th. fragment.

¹⁹⁴ This is Mommsen's **C**, a not terribly important manuscript of the second class (Mommsen, "Prolegomena," LXXIII–LXXV, CXXXV–CXXXVI).

¹⁹⁵ See note 154 above.

¹⁹⁶ This is Mommsen's manuscript **O**, kept in Oxford and here called after its former owner, John Selden (1584–1654). Mommsen did not collate all manuscripts himself, but relied in a few cases on helpers (already in the letter of Oct. 10, 1898, Mommsen had mentioned that the Academy would pay for such commissions). We have already encountered Violet in León (see note 165 above), but there was, e.g., also "Clarkius Americanus" in Ivrea (Mommsen, "Prolegomena," LXXIV), i.e. Charles Upson Clark of later Ammianus fame. Most intriguing of all, however, is Mommsen's local proxy in Oxford: Anna Parker. Already on Dec. 29, 1898, Mommsen had written to Francis J. Haverfield, asking him to find somebody to collate C.Th. book IV in the **O** Breviary version. On Jan. 5, 1899, Haverfield sent word from Switzerland (where he was on vacation) to Oxford to find somebody, and two weeks later, on Jan. 19, 1899, a "(Miss) Annie F. Parker" mailed her finished collation to Mommsen. During the ensuing period, she took care of the full C.Th. portion of **O**, and also of the *novellae*. The enthusiastic judgments of her work by Mommsen ("your scholar [*sic*] work, which is admirable [*sic*] well done"; "I am greatly satisfied"; "careful and intelligent work"; "Please get Miss Parker, or if she is not to be had (I was fully satisfied with her work) . . .") can be found in Croke (note 40), 228–32. Her exceptionally careful collations are extant in the Academy Archive in Berlin. Anna F. Parker (later Mrs. News), daughter of Bodleian assistant librarian George Parker, undertook manuscript collations for various British and German scholars in the period 1890–1911, but otherwise little is known about this remarkable woman. I owe my knowledge about her to Simon Corcoran and Hope Williard. A comprehensive publication on Anna F. Parker by Hope Williard is eagerly awaited.

Meyer)¹⁹⁷ übernommen.¹⁹⁸

Es ist eine harte Arbeit und viel kommt dabei nicht heraus;¹⁹⁹ aber sie ist nothwendig, und ich hoffe, zum Ziel zu kommen.

Ch[arlottenburg]. 29/1 99 Ihr Mommsen

Es wird zweckmäßig sein, den Autuner Text späterhin an den Gaius anzuhängen; litterargeschichtlich und paläographisch ist er merkwürdig genug. Aber warten darum mit der Ausgabe ist wenigstens kein Bedürfniß.²⁰⁰

Dear Krüger,

I have now received from Chatelain detailed information about the Autun manuscript. It is a whimsical work, a Gaius rewritten in the language of the fourth or fifth century. In it, too, there is a cross-reference to the *primus commentarius*, just as in [Gai.] 4.85. But the text is nowhere identical, more or less in the way the *interpretatio* renders the content of the Theodosianus constitutions. I do not find anything new in what he communicated to me: in many poor words is said what Gaius

¹⁹⁷ Paul M. Meyer (1865–1935); Mommsen calls him “Concubinat Meyer” because of his Ph.D. thesis, *Der römische Concubinat nach den Rechtsquellen und Inschriften* (Leipzig 1895). The *novellae* remained Meyer’s only large-scale editing project from manuscripts; he became a papyrologist. Paul M. Meyer consistently used the “M.,” most probably to avoid confusion with the famous French philologist Paul Meyer (1840–1917).

¹⁹⁸ Originally, Mommsen had promised that he would add a third associate only after this person was approved by Krüger. Now, Mommsen just informed him. Apparently, Krüger’s lack of enthusiasm for the C.Th. project had made Mommsen reconsider.

Croke (note 40), 227, claims: “At the end of 1899 he [Mommsen] actually called for volunteers [for editing the *novellae*],” pointing to Mommsen’s report at the academy on Jan. 25, 1900 (*Sitzungsberichte der Königlich Preußischen Akademie der Wissenschaften zu Berlin*, 1900:1, 44–45). In truth, Mommsen just indicates in this session report that all necessary steps for recruiting a *novellae* editor have been taken; Meyer had already been chosen at the time of Mommsen’s initial proposal (Dec. 15, 1898), but signed his official contract only on Feb. 8, 1900, i.e., a fortnight after the Academy session. I do not know the reason for the huge time gap between Meyer’s recruitment and the official contract, but this has probably to do with either Academy procedures or Meyer’s professional situation.

¹⁹⁹ I.e., collating the numerous Breviary manuscripts which, after all, only include a small portion of the C.Th. text.

²⁰⁰ Mommsen repeats what he suggested earlier in the letter: do not wait for the text.

explains succinctly and well. I do not feel entitled to disclose to you more than this. The publication is scheduled for April, but I believe I ought to tell you all of this right now with respect to the new edition [of Krüger's Gaius] and its preface. It does not seem advisable to delay it because of the discovery [of the Autun manuscript.]

Work on the Theodosianus advances; but I deemed it necessary to broaden the base. M and P have already been rechecked, and the same will be done with LN, which are [already] here. This was necessary, partly because after copying your collations into my manuscript a verification was mandatory at any rate, partly because of the *interpretatio*. – Furthermore, I have collated myself the Murbacensis (in the shape of its Basel copy) and the Wallersteinensis, and I have somebody comparing the Seldenianus; these texts are indispensable.

Dr. Paul Meyer (the so-called “Concubinatus Meyer”) will take care of the *novellae*.

It is hard work, and not much comes out of it. But it is necessary, and I hope I will reach the goal.

Charlottenburg, 29/1/99 Your Mommsen

It will be in order to add the Autun text later [i.e., in a later printing] to the Gaius [edition]; after all, both in terms of literary history and of paleography, it is interesting. But, to say the least, there is no need to postpone the [new] edition for [accommodating] it.

17. Postcard by Krüger, February 5, 1899

Hochverehrter Freund, auf Grund Ihrer Mittheilungen über die Hs. von Autun habe ich das Ms. für Gaius abgeschlossen und abgesandt. Ihr Anerbieten, in der Korrektur Gaius einmal durchzusehen, welches mir die Buchhandlung mittheilte, nehme ich mit bestem Dank an und lasse Ihnen Abzüge der II Korrektur zugehen.²⁰¹ – In Bezug auf meine Vergleichenngen des Theod. bemerke ich, dass ich die Hänel'schen Angaben, wenn zutreffend, unterstrichen habe, nur das Fehl-

²⁰¹ Mommsen will help several times with Krüger's Gaius edition, sharing the burden of correction, while Krüger never offered to reciprocate with the C.Th. edition. Krüger seems to have expected to be asked.

ende steht am Rande des Textes mit Angabe der Hänel'schen Nummer.²⁰²

Bestens grüßend

5/2 99 Bonn

P. Krüger

Highly esteemed friend, following up your indications regarding the Autun ms., I have finalized and mailed the Gaius manuscript. I gratefully accept your offer (which was communicated to me by the publisher) to check the whole of Gaius at proofreading stage. I will have copies of the second proofs mailed to you. – Regarding my Theodosianus collations I want to remark that I underlined the indications of Hänel if correct; I only put what is lacking in the text margin, indicating the Hänel number [of the manuscript in question.]

Best greetings,

5/2/99 Bonn

P. Krüger

April 9, 1899. Mommsen suggests that Krüger send his Gaius proofs to Chatelain and tell him how much he would like to append the Autun text to the Gaius edition.

April 10, 1899. Krüger informs Mommsen that the typesetting for the Gaius edition is late and the book will not be ready for the start of the semester anyway; therefore, Krüger mulls postponing publication until Chatelain's work is out, but he has to ask for the publisher's approval.

April 16, 1899. Krüger's publisher has answered; he objects to postponing publication. Therefore, Krüger asks Mommsen to write a few lines for the Gaius preface, justifying by summarizing the Autun contents why the publication of Krüger's Gaius was not postponed until Chatelain's work was out.

April 21, 1899. Mommsen explains to Krüger that he cannot do so, as such remarks would reveal unpublished, privately communicated information. He instead volunteers to contact Chatelain

²⁰² Here one can see that Krüger's collations were noted down in a copy of Hänel's C.Th. (i.e., not on separate sheets). Hänel does not assign letters to manuscripts, but numbers. Krüger's late note on how to use his collation, several months into the project, is surprising.

again; and Krüger should tell his publisher once more not to rush publication.

April 30, 1899. Mommsen forwards Chatelain's answer to Krüger. Mommsen has changed his opinion: Krüger should definitely wait for Chatelain's publication and add the Autun text at the end of his Gaius edition. Chatelain has a question to Krüger regarding palimpsest chemicals; Mommsen forwards this question and suggests that Krüger write directly to Chatelain.

May 1, 1899. Krüger answers the question on chemicals. The preceding Gaius edition is now completely sold out; even if Chatelain plans to publish some Autun text soon, he has not deciphered much so far.

May 11, 1899. Mommsen forwards the corrected Gaius proofs to Krüger and emphatically advises not to complete typesetting; so far, no answer from Chatelain.

May 12, 1899. Krüger informs Mommsen that, though typesetting is completed, the publisher is now standing by. According to Girard, who had seen part of the Autun text, the palimpsest will not help in establishing the text of the actual Gaius (implying it will not entail changes to the edition itself; it could simply be added to the book without any changes to the already typeset text).

May 13, 1899. Mommsen confirms that halting publication was the right decision, although he actually just meant not completing the typesetting of the *preface*. He suggests that Krüger should send the passage in which he cites Chatelain directly to Chatelain for approval.

May 14, 1899. Krüger informs Mommsen that according to Girard (and contrary to earlier expectations), the content of a lacuna in Gaius can indeed now be reconstructed thanks to the Autun palimpsest.

18. Letter by Mommsen, June 20, 1899

Hôtel Louvois²⁰³

²⁰³ The historic Grand Hôtel Louvois was located on rue Richelieu, just across from the Bibliothèque Nationale. It can be found in contemporary guide books; furthermore, see Croke (note 40), 217; A. Mommsen (note 66), 102–103.

Paris 20/6 99

Lieber Krüger,

Erst gestern²⁰⁴ ist es mir gelungen, Chatelain zu sprechen, auch die Handschrift von Autun zu sehen. Die von Ch. gedruckte Partie²⁰⁵ haben sie wohl von ihm erhalten, indeß schicke ich sie Vorsichts halber, ich habe sie zweimal. Versprochen hat er, innerhalb eines Monats den Rest druckfertig oder gedruckt an Sie zu schicken,²⁰⁶ daß er Wort hält, kann man hoffen, sicher darauf bauen kann man nicht. Ich würde Ihnen rathen, wenn Ende Juli er nicht noch den Rest schickt, mit Berufung auf seine Zusage an ihn zu schreiben und zu versuchen, ob das hilft. Es ist meines Erachtens ziemlich gleichgültig, ob die neue Auflage jetzt oder im August oder September ausgegeben wird und ich rathe *in incertum eventum*, die Ausgabe bis dahin zu unterlassen.²⁰⁷

Ich habe keine Lust, mich mit dem Text abzugeben, und finde auch schlechterdings keine Zeit, behalte mir aber auf alle Fälle eine Auslassung darüber in Ihrer Vorrede vor.²⁰⁸

²⁰⁴ Mommsen arrived in Paris on June 8, 1899 (letter by Girard to Krüger, June 12, 1899, kept in Krüger's papers in Bonn) and stayed there until July 15, 1899 (A. Mommsen (note 66), 113). In Adelheid Mommsen's book, there is a huge section devoted to Mommsen's trip to Paris, Turin, and Ivrea (id., 100–125).

²⁰⁵ E. Chatelain, "Fragments de droit antéjustinien tirés d'un palimpseste d'Autun," *Revue de philologie, de littérature et d'histoire anciennes*, 23 (1899), 169–84. Despite its actual publication in June, the article was published in the (nominal) April fascicle. The portion published by Chatelain only equals a few pages in Krüger's later edition (Rodríguez Martín (note 36), 480 & n.24, mistakenly claims that this is the "erste[n] vollständige[n] Edition der erhaltenen Fragmente"). On Monday, June 12, 1899, Girard wrote to Krüger that the fascicle came out during the preceding week. Girard also wrote that he believes that Krüger likely already knew this, as Mommsen was in Paris. But Mommsen wanted to see the manuscript himself and meet Chatelain before he contacted Krüger.

²⁰⁶ In actual fact, Chatelain never published the rest himself. He probably understood that his first partial publication was not convincing. But in July he did forward much material (his own transcription and photographs) to Krüger (Krüger to Mommsen, Aug. 9, 1899).

²⁰⁷ By now, Mommsen wanted the Autun text included. His timeframe, however, was too optimistic. The 4th Gaius edition containing the full Autun text was available only around Nov. 1, 1899 (Girard to Krüger, Nov. 5, 1899, thanking him for the book which he had received on the preceding day).

²⁰⁸ This would become Mommsen's *epimetrum*, a three-page essay on the Autun text included in Krüger's edition (Mommsen, "Prolegomena,"

Die Arbeiten hier werden wohl Ende Juni oder Anfang Juli zu Ende sein,²⁰⁹ aber ich muß dann noch nach Ivrea; die dortige Handschrift ist nicht bloß für B. XVI erforderlich, sondern auch für den früheren, von Ihnen nicht verglichenen Theil.²¹⁰ Können Sie mir für die dortige Bibliothek Notizen geben, die mich orientieren, so wäre es mir lieb. Ein Versuch, die Handschrift nach Turin zu bekommen, ist fehlgeschlagen.²¹¹

Ihr Mommsen

Hôtel Louvois
Paris, 20/6/99

Dear Krüger,

Only yesterday did I succeed in meeting Chatelain and seeing the Autun manuscript. The portion which Ch. had printed you have probably already received from him. However, to be on the safe side I send it to you; I have it twice. He promised to mail the rest of it to you within one month, either as a ready-to-print draft or printed. One may hope that he keeps his word, but one cannot safely rely on it. I would suggest that if he has not sent the rest by the end of July, you should write to him, remind him of his promise and try if anything can be achieved

LXVII–LXIX). Mommsen did not restrain his opinion on the newly found text (the Autun text compares to the actual Gaius like coal to gemstone; we do not learn anything new about Roman law from the Autun text, but at least it gives us an insight into the condition of declining scholarship; Mommsen even calls it “our monster”).

²⁰⁹ Again, too optimistic: Mommsen departed only on July 15 (see note 204 above).

²¹⁰ This manuscript, **E**, is a key witness for any reconstruction of the Theodosian Code. It is the only known Breviary manuscript to include the *full* book 16 as an addition (which means that it is the *codex unicus* for several texts there); when Krüger was in Ivrea, he collated just that portion. However, the Breviary part of **E** is also important, as it belongs to the better class, just like **N**, **H**, or **O**. During his visit in Ivrea, Mommsen collated only part of **E**, but a certain Paolo Giacosa (perhaps a glitch for Pietro Giacosa) provided Mommsen with a full photographic reproduction. In his own edition, Krüger indicates that he completely collated **E**, and indeed, his apparatus gives variants in **E** which are lacking from Mommsen’s. Krüger likely used the photographic reproduction made for Mommsen (Mommsen, “Prolegomena,” LXVII–LXVIII, CXXXIV–CXXXV; Coma Fort (note 24), 148; see note 24 above).

²¹¹ This is the first reference to the Theodosian Code edition in Mommsen’s and Krüger’s correspondence since late January, despite the many letters they had exchanged meanwhile on the Autun Gaius. Regarding the C.Th., they apparently kept to a “don’t ask – don’t tell” policy.

by doing so. In my opinion, it does not make much of a difference if the new edition [of Krüger's Gaius] will be issued now or in August or in September, and, given the unclear outcome, I advise to refrain from issuing it until then.

I have no desire to deal with this text, and besides, I simply do not have the time to do so, but by all means I reserve the right to add an essay on it to your preface.

My work here [in Paris] will be finished by late June or early July, but then I need to go to Ivrea, too. The manuscript there is not only important for book 16, but also because of its earlier part which you did not collate. If you could give me some information on the library there which might provide some orientation to me, I would be grateful. An attempt to get the manuscript to Turin has failed.

Your Mommsen

19. Letter by Krüger, June 22, 1899

Bonn 22/6 99

Hochverehrter Freund!

Für Ihre Sendung der Fragmente danke ich bestens, ich hatte sie gleich nach Erscheinen des Heftes der Revue durchgesehen, erhielt aber später auch von Chatelain einen Separat-Abzug. Auf meine Bitte, mir sein Apographum zur Benutzung für die Ausgabe zu leihen, sandte er mir einen Abzug seiner Abschrift, mit dem ich leider nicht weiter kommen kann wie mit dem Druck. Mir wäre es darauf angekommen eine genaue Wiedergabe der Abkürzungen u. Lücken zu haben, aber das scheint versäumt zu sein. Ich kann die Vermuthung nicht unterdrücken, daß manches nicht richtig gelesen, manche Abkürzung nicht richtig aufgelöst ist. Auch die Worttheilung ist nicht immer richtig.²¹²

Mit der Ausgabe muß ich schon deshalb warten, weil ich zur Zeit nicht im Stande bin, die Bearbeitung der Fragmente gründlich durchzuführen. Ich lebe mit meinem Vorlesungsheft

²¹² Chatelain's edition clearly was not according to best standards. See Girard's letter to Krüger about Krüger's edition, Nov. 5, 1899: "une édition . . . meilleure que celle de la Revue de philologie . . . les très bonnes corrections que vous proposez, M. Mommsen et vous, à la partie déjà publiée." This is probably also the reason why Chatelain eventually let Krüger do the *editio princeps*.

von der Hand in den Mund und muß für 7 Stunden wöchentlich arbeiten; dazu andere Vorlesungen, Übungen, Prüfungen, es ist das schwerste Semester meiner Dozententätigkeit.²¹³

Über Ivrea weiß ich nichts zu sagen; ich arbeitete damals meiner Erinnerung in einem Raum unter der Sakristei und hatte reichlich Zeit. Von Turin aus hatte ich irgendeine Empfehlung an den Bibliothekar, damals Canonico Grosso,²¹⁴ außerdem an einige Beamte und Advokaten; aber alle diese Persönlichkeiten haben vermutlich längst das Zeitliche gesegnet. Aus Turin erhalten Sie gewiß den besten Bescheid über die Verhältnisse in Ivrea.

Ich hatte die Hoffnung gehegt, daß Sie auf der Rückreise von Paris hier vorsprechen würden.²¹⁵ So wünsche ich Ihnen eine glückliche Fahrt und gute Heimkehr. Vielleicht ist mir es möglich, im Herbst nach Berlin zu kommen und Sie aufzusuchen.

Mit bestem Gruß

P. Krüger

Bonn, 22/6/99

Highly esteemed friend!

I thank you very much for your mailing of the fragments. I looked through them immediately after the publication of the issue of the *Revue*, but I also later received an offprint from Chatelain. In response to my request to lend me his transcription for using it for the edition [Krüger's], he mailed me a copy of it which is unfortunately not of more help to me than the publication. Having a precise rendering of abbreviations and lacunae is what would have mattered to me, but this seems to have been neglected. I cannot suppress the hunch that some

²¹³ In summer 1899, Krüger already had to prepare his law students for the BGB which went into force on Jan. 1, 1900. Therefore, he could not use any of his earlier course preparations.

²¹⁴ Canonico Giovanni Grosso, born in the village of Drusacco, headed the Piccolo Seminario Vescovile and taught philosophy at the main Seminario Vescovile, both at Ivrea. I failed to ascertain his years of birth and death, but in 1873, he had been active for at least 27 years and must therefore have been quite old (A. Bertolotti, *Passeggiate nel Canavese*, VI (Ivrea 1873), 18–19 of the separately paginated *Correzioni, variazioni ed aggiunte al 5o volume* at the end of this volume; *Calendario generale del regno pel 1856* (Turin 1856), 101).

²¹⁵ From Paris to Berlin, Bonn would be on the way, but this is no longer the case after a detour to Piedmont.

things were not read correctly, that some abbreviations were not expanded correctly. Furthermore, the word division is not always correct.

At any rate, I have to suspend the edition because at present I am unable to carry out any thorough work on the fragments. I am living hand-to-mouth with my lecture manuscript and I must work [i.e., prepare lectures] for seven hours per week. Add to this further lectures, tutorials, examinations. This is the most taxing semester since I started teaching at university.

There is nothing I could tell you about Ivrea. According to my recollection, I was then working in a room under the sacristy, and I had lots of time. I had some recommendation from Turin to the librarian (then Canonico Grosso), furthermore to some officials and advocates. Yet by now, all of these personages have likely departed this life for quite a while. In Turin you will certainly obtain the best information about the conditions in Ivrea.

I had entertained hopes that you would call here on your return trip from Paris. I wish you a safe journey and a good return. Perhaps I will be able to come to Berlin in the fall and pay a visit to you.

With best regards

P. Krüger

August 8, 1899. Mommsen asks Krüger to notify him when he receives anything from Chatelain.

August 9, 1899. Krüger informs Mommsen that Chatelain has sent two further transcribed pages and photos of four pages in July. He hopes that Chatelain's article will appear in the July fascicle of *Revue de Philologie*.

August 10, 1899. Krüger received more material and furthermore a postcard from Chatelain, but Chatelain does not indicate if Krüger may publish the material or if Chatelain's article will be out in the July fascicle. Thus, Krüger cannot proceed; he will write again to Chatelain.

August 11, 1899. Mommsen explains to Krüger how to make things work the Mommsenian way: in his letter, Krüger should simply *thank* Chatelain for permitting him the publication of the fragments; and then wait and see whether Chatelain protests.

August 15, 1899. Krüger sends his first draft of the Autun text (obviously based on Chatelain's publication and the material he forwarded to Krüger in July and August) to Mommsen, asking him to return it with comments.

August 20, 1899. Mommsen returns the drafts with his comments; he tells Krüger to send him the proofs later, too, and to include appropriate praise for Chatelain's paleographical skills in his preface.

August 22, 1899. Krüger confirms receipt of Mommsen's comments and points out that the version already forwarded to Mommsen had included such praise. He adds that so far Chatelain has not answered Krüger's "Mommsenian" letter; Krüger had written to Chatelain that he would add the Autun text to his Gaius, as he does not doubt that Chatelain's version will appear in the meantime.

September 9, 1899. Mommsen asks for an update on the Autun text, as he promised a short contribution on it for *ZSS* (RA).²¹⁶

September 10, 1899. Krüger informs Mommsen that his draft manuscript on the Autun text is at the typesetter's. Chatelain has not published further text in the July fascicle, so Krüger assumes that Chatelain has decided to wait for the appearance of Krüger's text.

September 10, 1899. By coincidence, Mommsen has received the proofs on this day. He asks Krüger to return to him his comments which he sent to him in August.

September 13, 1899. Krüger returns Mommsen's comments.

September 19, 1899. Krüger has the third proofs forwarded to Mommsen; he remains skeptical regarding Chatelain's work²¹⁷ and notifies him that Chatelain will not publish before the subsequent year.²¹⁸ Krüger mulls postponing publication again, as Chatelain –

²¹⁶ This became T. Mommsen, "Der Pseudo-Gaius von Autun," *ZSS* (RA), 20 (1899), 235–36.

²¹⁷ *Zu Vorschlägen für Ergänzungen und Änderungen bin ich zurückhaltend gewesen, weil ich der Lesung nicht ganz traue; die meisten Anstöße giebt meines Erachtens nicht die Überlieferung, sondern die Vergleichung, welche nicht genügend zwischen sicher und unsicher Gelesenem unterscheidet* ["Regarding suggestions for completions and modifications, I have remained cautious, because I do not quite trust the readings; in my opinion, most problems are not caused by the transmission, but by the collation, which does not distinguish sufficiently between portions that were read reliably, and those that were not"].

²¹⁸ In the end, he never did publish any further portion himself.

who promised to send some improvements – is vacationing right now.

September 26, 1899. Mommsen returns the corrected proofs to Krüger. He urges him not to postpone publication any longer, as the value of the text is so limited that satisfying the public curiosity is more important than consummate accuracy.

October 15, 1899. Krüger thanks Mommsen for sending him the newly published *Strafrecht*.²¹⁹

Around November 1, 1899. Krüger's fourth edition of Gaius is finally available (on November 5, Girard dispatches a thank-you letter for his copy), but no correspondence by either Mommsen or Krüger is extant on the matter.

20. Postcard by Mommsen, August 29, 1900

Da Sie mit der Literatur besser Bescheid wissen als ich, so richte ich eine Anfrage an Sie in Betreff des Theodosianus.²²⁰ Es ist, wie mir scheint, bisher nicht genug hervorgehoben, daß er viel weiter ausgreift als die vorherigen allgemeinen Werke, daß, während das Edict, Greg., Herm. sich auf das eigentlich civilistische Gebiet beschränken (das merkwürdigerweise Theodosius im Publikationsgesetz (nov. I) ausschließlich erwähnt),²²¹ hier nicht bloß Strafrecht, sondern Munizipalrecht, Kriegerrecht, Verwaltungsrecht in weitem Umfang ver-

²¹⁹ Haverfield in Oxford sent a letter of thanks on Nov. 8, 1899, writing that he received it "a day or two since."

²²⁰ More than one year had passed since there was any communication on the C.Th. edition. Note Mommsen's reason for contacting Krüger: because the latter knows more about published work (not, as one might assume, because he is still somehow nominally involved in the project).

²²¹ *retro principum scita vulgavimus, . . . cum liquido pateat, quo pondere donatio deferatur, qua actione petatur hereditas, quibus verbis stipulatio colligatur, ut certum vel incertum debitum sit exigendum* ["we made the laws of preceding emperors publicly available, . . . as it should be easily accessible with which measure a donation must be offered, with which *actio* an inheritance must be claimed, with which words a stipulation must be phrased, how a determinable or an indeterminable debt must be exacted"]. The chasm between this announcement and the real contents of the Theodosian Code has often left scholars wondering (see Riedlberger (note 3), 179 n.281).

treten sind.²²² Sie haben in Ihrer Übersicht (S. 288)²²³ das ja angedeutet, aber ausgeführt in seiner Besonderheit ist es auch da nicht, und ebenso wenig kann ich eine Ausführung über den Cod. Iust. finden, die dessen Zwitternatur hervorhebt – er folgt in B. 1–8 dem Edict, B. 9–12 dem Theod, freilich stark beschränkend. Ist das nirgends ausgeführt? es liegt nahe genug. Bitte um möglich baldige Antwort.²²⁴

Ihr Mommsen

Given that you are better informed than I am regarding the literature, I make an inquiry to you with respect to the Theodosianus. It seems to me that so far, it has not been underscored enough that it is much broader in scope than prior general works, that – while the Edict, the Gregorianus, the Hermogenianus limit themselves to the area of civil law strictly speaking (which is, strangely enough, the only thing mentioned by Theodosius in the publication law, *nov. 1*) – here not only penal law, but also municipal law, military law, administrative law are represented to a large extent. Of course, you implied that in your synopsis (p. 288), but even there, its peculiarity is not explicated, and likewise, I fail to find a discussion of the Justinian Code which stresses its twin nature – in books 1–8, it follows the Edict, in books 9–12 the Theodosianus, even if to a considerably limited extent. Isn't that explicated anywhere? It is obvious enough. Please answer as soon as possible.

²²² The varying scope is not surprising at all, given the different ways these collections originated: the Edict, as offering the formulas for private lawsuits, could not contain anything but private law. The Gregorian and Hermogenian Codes which were created by excerpting the responses to private petitions could not touch on the other matters Mommsen mentions. Things are entirely different for the Theodosian Code. As a collection of all imperial constitutions which matched the criteria prescribed by Theodosius, it had to include all of these subjects by necessity. In Mommsen's edition, his take on the varying order of the different compilations had changed a lot; exhaustive tables show their different structure (Mommsen, "Prolegomena," XIII–XXVIII).

²²³ The indicated page refers to Krüger's *Geschichte der Quellen und Litteratur des römischen Rechts* (Leipzig 1888) (the first edition).

²²⁴ Mommsen's rushing is quite typical for him; his impatience when expecting answers can also be found (e.g.) in many letters to Harnack (Rebenich (note 2), 91). A letter by Seeck of Jan. 7, 1901 starts with *Da Ihre Karte mich zur Eile mahnte, habe ich die Korrekturen nur flüchtig durchsehen können* ["As your card urged me to hurry, I could check the corrections only cursorily"].

Your Mommsen

21. Postcard by Krüger, August 31, 1900

Über den Inhalt des Theod. ist in der Rechtsgeschichte beim Theod. selbst nur kurz berichtet, weil ich auf das Vorbild der Digestenwerke verweisen konnte sowie auf die Monographien von Paulus u. Vlp.²²⁵ Andere haben darüber m. W. nicht geschrieben, außer etwa I. Gothofredus.²²⁶ Ich bin nicht sicher, ob nicht auch der Gregorianus unmittelbarer Vorgänger in der umfassenden Behandlung der Rechtsstoffe gewesen, nur daß die dem I. Buch der Th. angehörigen Materien dort gefehlt haben mögen.²²⁷

Für die nächsten Tage bin in Mayen bei Andernach Kurhotel, vom 5/9 ab spätestens in Bonn

Mit besten Grüßen

Baden Baden 3/8 00 Ihr Krüger

About the content of the Theodosianus little is said in the “Legal History” at the [section devoted to the] Theodosianus, as I could point to the antecedent of the digest works as well as to the monographs by Paul and Ulpian. As far as I know, others have not written on this, except possibly I. Gothofredus. I am

²²⁵ See Krüger (note 223), 288: *Die sachlich zusammengehörigen Konstitutionen sind unter gemeinsamen Titelrubriken vereinigt, deren Ordnung sich der gegebenen Anweisung gemäss dem Gregorianus und Hermogenianus anschliesst, also wie diese der Ordnung der Digestenwerke entspricht* [“Those constitutions which, as regards content, belong together are aggregated under shared rubrics whose sequence follows – as it was set out in the instructions – the Gregorianus and Hermogenianus, i.e., matches, as these [works] do, the order of the works [by early imperial jurists] called *digesta*.”]. See further id., 281 (on Gregorianus and Hermogenianus) and 212 (on Paulus and Ulpian).

²²⁶ I am not sure to what Krüger is referring here; perhaps to *Series et collatio titulorum et constitutionum Codicis Iustinianei, quae continentur in Codice Theodosiano*. But this is merely a table before the prolegomena contained in Godefroy’s first volume, and not even put together by Godefroy himself.

²²⁷ This is an odd remark. If one checks Mommsen’s table (“Prolegomena,” XIII–XXVII), it is easy to see that apart from books 2–4 and 9, there is little common ground between the Gregorian and the Theodosian Codes, especially not regarding books 14–16 (whereas there is *some* regarding book 1).

not sure if the Gregorianus, too, was not an immediate predecessor regarding the extensive treatment of the [various] legal subject matters, barring that the subjects belonging to the first book of the Theodosianus may have been absent there.

During the next days I will be in Mayen near Andernach, Kurhotel, from September 5 at the latest [back] in Bonn.

With best regards,

Baden Baden 3 Aug 1900 Your Krüger

22. Double-sided card by Mommsen, November 2, 1900

Lieber Freund,

Sehen Sie sich diese Druckprobe an und sagen mir, wenn Sie etwas anderes wünschen, dies recht bald.²²⁸ Die Randnoten sollen die redactionellen Abweichungen des Iust. enthalten, die im kritischen Apparat stören. Sonst wird Ihnen alles klar sein, so weit es für die Beurtheilung nothwendig ist.

Ch[arlottenburg]. 2/11 1900 Ihr M.

Dear friend,

Have a look at this [enclosed] printing sample and tell me if you wish to have anything changed, and do so rather quickly. The marginal notes will contain the textual changes in the Justinian Code which would be distracting in the apparatus. Apart from that, everything will be obvious to you, as far as it is relevant for [forming] an opinion.

Charlottenburg, 2/11/1900 Your M.

23. Letter by Krüger, November 9, 1900

Hochverehrter Freund!

Aus der Druckprobe entnehme ich, daß für die nur in Br. enthaltenen Stellen die westgothischen Änderungen festgehalten werden sollen (so noch 1,1,2 inscr., mit dem Zusatz

²²⁸ For Mommsen's impatience, see note 224 above.

aus dem Theodosianus).²²⁹

Hinsichtlich der Druckeinrichtung kann ich mir nicht vorstellen, wie die umfangreicheren Abweichungen des Iust. auf dem Rand Platz finden sollen; ich würde glauben, daß sie wie im Iust. (und Dig.) über den kritischen Noten sich besser ausnehmen möchten, unter Verwendung von Notenzahlen; dort könnten dann auch die Vorschläge für Textemendationen stehen.²³⁰

Der Strich über u.c. könnte im Text wohl ebenso wegbleiben wie er bei ppo. und pu. verschwindet, und bei dn.²³¹

Mit bestem Gruß

Ihr Krüger

Highly esteemed friend!

I gather from the printing sample that for those passages which are extant only in the Breviary, the Visigothic changes shall be indicated (including 1,1,2 inscr., with the addition taken from the Theodosianus).

As to the layout, I cannot envisage how some of the more expansive modifications of the Justinian Code might fit into the margin. I should think they would – just like in [the edition of] the Justinian Code (and the Digest) – look better above the

²²⁹ Mommsen prints the inscription as *Idem AAA. [Imp. Valentianus Theodosius et Arcadius AAA.]*, explaining in the apparatus that some manuscripts give the first, others the second version, adding *vide prae f.* This reference goes to Mommsen, “Prolegomena,” CXXXVII. The addition in brackets (Krüger’s “Zusatz”) is a subsequent substitution based on a full C.Th. manuscript (i.e., somebody looked up in a full C.Th. manuscript to whom *Idem AAA.* referred); adding it to an edition of the C.Th. text is indeed questionable.

²³⁰ Unsurprisingly, this is the layout Krüger chose for his own edition. Personally, I find it much inferior to Mommsen’s solution: keeping ideas for textual emendation visually so close to the modifications introduced in the C.I. (mostly due to an *intended* change in content) does not make it easier to understand the text and its issues. At any rate, Mommsen’s typesetters succeeded in presenting even the most extensive modifications in the margin (see, e.g., C.Th. 16.5.65).

²³¹ Adding or leaving the abbreviation overlines is a matter of taste; but Krüger is right in pointing out Mommsen’s inconsistency (i.e., in the subscription of C.Th. 1.1.3, we have D. N. without overlines, but V. C. with).

If Krüger’s archive is complete (which seems likely), Mommsen never bothered to answer this letter. Also note that apparently Mommsen did not implement any of Krüger’s suggestions except, perhaps, the brackets around the added inscription.

critical annotations, using annotation numbers. There, one could also place suggestions for textual emendations.

The [abbreviation] line over u.c. could be omitted in the text just as in the case of ppo. and pu., and of dn.

With best regards

Your Krüger

January 9, 1901. Mommsen tells Krüger that he has submitted an article, adding that he shares Krüger's doubts on the (apparently: reviewed) work in question.²³²

24. Letter by Mommsen, February 6, 1903

Lieber College,

Mein oder vielmehr unser Theodosianus geht zum Ende; der Satz des Textes ist bis B. 16 vorgedrungen, die *prolegomena* sind im Satz.²³³ Ich möchte nun von Ihnen wissen, wie der Titel arrangirt werden soll, und der auf sie bezügliche Abschnitt der Vorrede.

Ihre Betheiligung, soweit die Ausgabe auf derselben ruht, beschränkt sich wesentlich auf die beiden Palimpseste, die ich lediglich nach Ihrem Abdruck des einen und der Abschrift des anderen gebe. Ihre übrigen Vorarbeiten, die Collation von RNL, sowie die Schöllsche des Vaticanus sind natürlich auch benutzt worden; aber die Parisini habe ich selbst nachverglichen, den Vaticanus an den Correcturbogen, zum Theil auch nach Photographien, in allen Einzelheiten nachprüfen lassen oder selber nachgeprüft.²³⁴

²³² This refers to "Hofmann versus Blume," published in *ZSS* (RA), 22 (1901), 1–11, in which Mommsen pulls to pieces a book by the Austrian legal historian Franz Hofmann (1900) which tried to attack Blume's theory of the redaction of the Digest. See page 23 above.

²³³ More than two years had passed, and for years, Mommsen had publicly reported on the progress of the C.Th. Project (see page 23 above). So probably this was not new information to Krüger.

²³⁴ Mommsen mentions just the palimpsests **TW**, the Parisian manuscripts **RNL**, and **V**. He passes over the two German manuscripts **MP** and the Italian manuscripts **AE** (as well as **V** book 16, which portion was

So ist die Sachlage. Mir wäre es am liebsten, Sie gäben mir nur kurz an, wie sich danach Titel und Vorrede gestalten sollen. Ganz leicht ist die Sache nicht. Wie wir die Digesten titulierten,²³⁵ das wird Ihnen jetzt schwerlich passen.²³⁶ Als eigentlichen Mitherausgeber kann ich Sie nicht wohl bezeichnen, da Sie bei der Herstellung des Apparats nicht beteiligt und dafür nicht verantwortlich sind.²³⁷ Eine Schlußnotiz der Vorrede ist eigentlich zu wenig; wer kümmert sich um dergleichen? ich bin zu jeder Form bereit, die Ihnen recht ist.²³⁸

Ich bin jetzt auch an die Tafeln²³⁹ gegangen oder habe vielmehr Traube²⁴⁰ dafür gewonnen, der das besser versteht als ich. Die beiden *rescripti* denken wir auszuschließen,²⁴¹ indeß schreibt mir Traube: "wenn die Krügerschen Abschriften über die Ausgabe hinaus von Nutzen sein können, so bitte ich darum." Das geht also an Sie.

Ch[arlottenburg]. 6/2 1903 Ihr Mommsen

Meine Frau macht mir Sorge, doch geht es seit einigen Tagen

collated by Krüger, not by Schöll). The photographs of **V** are still extant and are kept in the Academy Archive.

Croke's claim ((note 40), 227) that Mommsen relied on others for **V** is therefore true only in part.

²³⁵ Mommsen is referring to the *editio maior* of 1868: *Recogn. adsumpto in operis societatem Paulo Kruegero*.

²³⁶ See Mommsen's next letter [No. 26]: *für einen jüngeren Gehülffen angemessene Formel*.

²³⁷ This is the key phrase of this letter. Departing from his promise made years ago, Mommsen now incontestably rejects the idea of calling Krüger a co-editor. His argument is sound, of course: the sole responsibility for the apparatus is his.

²³⁸ Again, this is important: Mommsen leaves the phrasing of the title indication to Krüger (just excluding a co-editorship).

²³⁹ The original edition of 1905 included a folio-sized volume (although it does not bear a number and technically therefore is not a "third" volume) which contained four text pages authored by Traube and six plates (with reproductions from **R**, **V**, **P**, and **M**). This volume was omitted in later reprints of Mommsen's edition.

²⁴⁰ Ludwig Traube (1861–1907) was the first chairholder of Medieval Latin at the University of Munich. He was also a renowned paleographer. This third volume must be among his last publications (unfortunately, the preface does not include a date), as Traube died of blood cancer in 1907.

²⁴¹ This they did, which is most unfortunate: less than a year after Mommsen wrote this letter, the whole of **T** perished in the great fire of the Turin library. Apart from Krüger's transcription, only reproductions of a few pages remain.

besser.²⁴²

Dear colleague,

My, or rather our, Theodosianus is nearing conclusion. Type-setting of the text has reached book 16, typesetting of the *prolegomena* has started. Now, I would like to know from you how the title and the section of the preface devoted to you should be fashioned.

Your contribution, insofar as the edition depends on it, is limited essentially to the two palimpsests to which I refer exclusively according to your printed edition and your transcription, respectively. Of course, all of your other preparatory work, the collation of RNL, as well as Schöll's of the Vaticanus, have also been used. However, the Parisian manuscripts have been collated again by myself, and the Vaticanus has been rechecked at proof stage (partly with the help of photographs) in all details, either by proxy or by me personally.

Such is the situation. I would prefer if you simply tell me how I should accordingly fashion the title and preface. The matter is not exactly easy. What we put as title on the Digest would scarcely be acceptable to you today. I can hardly call you a co-editor properly speaking because you were not involved in the creation of the apparatus, nor are you responsible for it. A [mention in the] concluding section in the preface is, however, not enough; who cares for [i.e., reads] things like this? I will agree to any presentation that finds your approval.

I have now also started to take care of the plates or, rather, I have recruited Traube to do so, as he knows more about these things than I do. We plan to exclude the two palimpsests; nevertheless, Traube wrote to me: "If Krüger's transcriptions might be helpful beyond the edition, I would ask for them." This hence goes to you.

Charlottenburg, 6/2/1903 Your Mommsen

I am concerned about my wife, although things have been better now for a few days.

²⁴² Marie Mommsen had suffered a massive stroke in early January 1903 which left her mute, paralyzed, and mentally impaired. According to Mommsen's daughter Adelheid, Theodor Mommsen refused to accept the new reality (A. Mommsen (note 66), 61, 64).

25. Letter by Krüger, February 7, 1903

Bonn 7/2 3

Hochverehrter Freund!

Die Beantwortung Ihrer Frage setzt mich in Verlegenheit. Es ist mir natürlich schmerzlich, daß meine Arbeit, in welche ich mehrere Jahre meine freie Zeit gesteckt habe, Ihnen bei der Ausgabe so wenig Nutzen gebracht hat, daß sie, wie ich aus der vor Jahren übersandten Druckprobe entnehmen musste, nicht einmal die Grundlage für Ihr Ms. geworden ist.²⁴³ Ich hatte davor gedacht, daß der Titel etwa besagte: "auf Grund der Krügerschen Vorarbeiten"; aber da das nun doch nicht zutrifft, so weiß ich nicht, welche Vorschläge ich für Titel und Vorrede machen soll.²⁴⁴ Hätte ich noch die Korrektur mitgemacht, so könnte ich die Sachlage besser übersehen: aber ich trug Bedenken, Ihnen dies anzubieten, weil ich befürchten mußte, daß ich bei den beständig hier an mich heranretrenden dringenden Pflichten Ihr Tempo in der Förderung des Drucks nicht würde einhalten können.²⁴⁵ So muß ich die Entscheidung in Ihre Hand legen.

Nach dem Erscheinen der Ausgabe werde ich sie so schnell als möglich durcharbeiten, um die Nachträge für die

²⁴³ When Krüger received the layout sample, he did not show any disappointment (nor does he indicate such when he later tells the story again in his review: Krüger (note 15), 319). Furthermore, Krüger can hardly have been surprised back then. From the very start, Mommsen demanded complete liberty in arranging the layout, otherwise he would not take over. And in January 1899, Mommsen wrote about copying Krüger's collations into his own draft manuscript. Did Krüger really expect that Mommsen would later return to his manuscript? Hardly.

²⁴⁴ An example of Krüger's awkwardness: instead of simply suggesting the title he would like, he does so by circumlocution.

²⁴⁵ The reference to the correction process is odd. Apparently, Krüger wants to say that if he had helped with correcting, he could judge how much "Krüger" is in the final edition, but as things are, Mommsen must judge alone. This passage leaves no doubt that Krüger never offered help with the correction process; but apparently, he had expected Mommsen to *ask* him to do so. In the review version, this is only implied (Krüger (note 15), 319–20: *Die Korrektur des Textes übernahm Mommsen allein* ["Correcting the proofs was undertaken by Mommsen alone"]), but in the autobiography, Krüger is explicit (Krüger (note 16), 156: *doch beteiligte mich Mommsen nicht an der Korrektur* ["but Mommsen did not involve me in the correction process"]). Given that the other way around, Mommsen always offered help (Krüger never had to ask for it), it is difficult to support Krüger's position here.

Stereotyp-Ausgabe des Justinianus zusammenzustellen. Dabei möchte ich meine als Druckmanuscript zusammengestellte Vorarbeit benutzen und Sie deshalb bitten, mir diese nach Beendigung der Ausgabe zurückzusenden.²⁴⁶

Am Schluß Ihres Briefes lese ich doch richtig, daß Sie an die Tafeln gegangen sind und für diese Aufgabe Traube gewonnen haben, der den Wunsch hat, meine Abschriften, falls sie über die Ausgabe hinaus Werth haben, einzusehen. Was damit gemeint ist, darüber bin ich nicht klar.²⁴⁷

Zur Berufung Ihres Sohnes²⁴⁸ auf dem Oberbürgermeister-Posten in Danzig meinen nachträglichen Glückwunsch. Ich habe freilich nicht gelesen, ob er bereits bestätigt ist oder sein Amt angetreten hat. Seine bisherige Laufbahn hat Ihnen gewiß stets Freude gemacht. Meine besten Wünsche zur Genesung Ihrer Frau; was ist denn ihr Leiden?

Im vorigen Jahr hatten Sie sich zum Kongreß in Rom angesagt;²⁴⁹ würden Sie in diesem Jahr hinreisen? Ich habe den Wunsch theilzunehmen, doch könnte ich leicht durch häusliche Sorgen abgehalten werden.

Mit bestem Gruß

Ihr P. Krüger

Highly esteemed friend!

Answering your question puts me at a loss. It is of course painful for me that my work in which I invested my spare time

²⁴⁶ Another example for Krüger's indirect ways. Instead of simply asking to have his work back, he does so by circumlocution. Further, note that in the preceding passage, Krüger indicated he was too busy to work through the text at manuscript stage, but now he wants to go through it as quickly as possible. Perhaps this is meant as an indirect reproach ("if I had been asked, I would have worked quickly"). The "Stereotyp-Ausgabe" is the *editio minor* (vol. 2 of *Corpus Iuris Civilis*). The preceding edition, the 7th, had appeared in 1900, the 8th came out only in 1906. This does not suggest that Krüger truly was in a hurry to work on it.

²⁴⁷ Krüger had every right to be confused. Mommsen's letter was not only quite illegible (as always), but also unclear: why would anyone who is planning to reproduce *images* be interested in his *transcription*?

²⁴⁸ Karl Mommsen (1861–1922), who had a successful career both as manager (director of the *Mitteldeutsche Creditbank*) and politician (he was, inter alia, a member of the *Reichstag*). He was also going to be the grandfather of the two historians Wolfgang and Hans Mommsen. However, Karl Mommsen never was mayor of Danzig – see Mommsen's next letter [No. 26].

²⁴⁹ Regarding the conference, see note 257 below.

during several years was of so little use to your edition that – as I had to learn from the printing sample which was mailed to me years ago – it did not even become the basis of your manuscript. Previously, I had thought that the title would include something like, “based on Krüger’s preparatory work”; but as this is now not the case, I would not know what I should suggest to you regarding title and preface. If I had participated in the correction process, I could better survey the situation, but my concerns kept me from offering this to you as I had to fear that – given all the urgent duties constantly rushing onto me here – I would not be able to keep up with your speed in furthering the printing. Thus, I must lay the decision in your hands.

After the appearance of the edition I will work through it as quickly as possible in order to compile the addenda for the stereotype edition of the Justinianus. For that, I would like to use my preliminary work compiled as a printing manuscript, and therefore I would like to ask you to return it to me after the completion of the edition.

At the end of your letter I do read the following correctly, don’t I? Namely that you have started to take care of the plates and that you recruited for this task Traube who wishes to see my transcriptions, in case they have some value beyond the edition? I am not sure what is meant by that.

Regarding the appointment of your son to the position of chief mayor in Danzig, my belated congratulations. However, I have not read if he is already confirmed or has taken up office. His career so far must have certainly been a pleasure for you. My thoughts and prayers for the recovery of your wife; what is her ailment, by the way?

Last year, you announced your coming to the conference in Rome; would you travel there this year? I would like to take part, but it might easily happen that domestic troubles keep me from doing so.

With best regards

Your P. Krüger

26. Letter by Mommsen, February 9, 1903

Lieber College,

Daß Ihre Arbeit eine verlorene gewesen ist, trifft nicht zu. Ich habe Ihre Collationen zunächst in das Druckexemplar auf eingelegte Blätter eintragen lassen, die natürlich collationiert werden mußten; daß dies bei NL an den Handschriften selbst geschah, nicht an Ihren Notaten, werden Sie natürlich finden, um so mehr, als bei Ihnen die *interpretatio* ausgeschlossen worden war.²⁵⁰ Die Pariser Handschrift VI–VIII selbst zu vergleichen, gebot die große Schwierigkeit des zerstörten Randes; natürlich lag auch hier Ihre Collation zu Grunde.²⁵¹ Daß ich endlich den Vat. IX–XVI in den Druckbogen selbst (denen selbstverständlich Schölls und Ihre Collation zu Grunde lag) noch einmal am Msc. habe nachvergleichen lassen, billigen Sie sicher.²⁵²

In welcher Weise die Sachlage dem Publikum vorgeführt werden soll, darüber kann ich mich mit Ihrem Appell an mein Ermessen nicht zufrieden geben. Als Mitherausgeber Sie zu nennen, widerspricht den Thatsachen und sicherlich auch Ihrem eigenen Willen. Die bei den Digesten für einen jüngeren Gehülfen angemessene Formel scheint mir heute nicht zu passen; soll ich statt deren etwa setzen *adsumpto apparatus Kruegeriano* oder wie Sie dies²⁵³ formulieren wollen, so bin ich gern einverstanden. Wünschen Sie eine solche Titelform nicht, so bleibt nichts anderes übrig, als am Schluß der Vorrede eine Exposition des Thatbestandes, wie ich ihn vorher kurz angedeutet habe. Daß ich die Arbeit übernommen habe, kann ich insofern nicht bereuen, weil die Ausführung derselben durch Sie, nach Ihren damaligen und Ihren jetzigen Äußerungen,²⁵⁴ doch wenig gesichert war und die Arbeit einmal gemacht werden mußte. Aber das Bedauern, doch sozusagen Ihnen ins

²⁵⁰ See note 193 above.

²⁵¹ Mommsen does not give the least hint to Krüger, but a third and crucial reason for him rejecting Krüger's collations was probably his conviction of Krüger's work being unreliable (see page 24 above). This requires verification, but at first sight, Mommsen should perhaps have put more faith in Krüger (see pages 37–38 above).

²⁵² Again, Mommsen mentions only some of the manuscripts for which he had collations by Krüger (**NLRV**, but **MPA** and **E**, book 16, are omitted). In his review, Krüger will complain (Krüger (note 15), 324–25) that Mommsen had forgotten to mention Gardthausen in the section devoted to **V**. In actuality, Krüger had collated book 16, Schöll 10–15, Gardthausen 9.

²⁵³ The “dies” refers to Krüger's suggested title which Mommsen translates here into idiomatic Latin.

²⁵⁴ For “damalige,” see Mommsen's letter of October 10, 1898 [No. 3], referring to Krüger's preceding and lost letter, *Ihre Verpflichtungen kenne ich*; for “jetzige,” see the preceding letter [No. 25] (*bei den beständig hier an mich herantretenden dringenden Pflichten*).

Gehege gekommen zu sein, kann ich auch nicht loswerden.

Mein Sohn Karl, Direktor der Mitteldeutschen Creditbank hier, ist nicht BM. in Danzig geworden, sondern Reichstagsabgeordneter für Danzig, was *rebus sic stantibus* ein recht zweifelhaftes Glück ist.²⁵⁵ Übrigens geht es ihm recht gut und habe ich überhaupt an den Kindern Freude.

Traube fragte an, ob Sie für die beiden Palimpseste Zeichnungen oder sonstige Notizen hätten, die bei der Gestaltung der Tafeln gebraucht werden könnten. Was ist dabei unklar? Übrigens werden wir wahrscheinlich bei den Tafeln die Palimpseste ausschließen.

Ihre Materialien, die Sie für den Iust. brauchen, sende ich zurück, wenn mein Satz abgeschlossen ist, was in einigen Wochen der Fall sein wird.²⁵⁶

Nach Rom zum Congreß²⁵⁷ gehe ich sicher nicht, erwarte

²⁵⁵ In the election of 1903, Karl Mommsen's party (*Freisinnige Vereinigung*) was reduced from 13 to 9 seats; other liberal parties sustained similarly heavy losses. See Rebenich (note 66), 180–82, on the political backdrop.

²⁵⁶ This never happened during the lifetime of Theodor Mommsen. Among Krüger's papers there is a letter dated Apr. 10, 1904, written by Hans Mommsen, who returns Krüger's C.Th. materials by request of Hirschfeld (whom Krüger apparently had contacted). Krüger had sent a list of all the papers he had passed on in 1898; Hans Mommsen had to inform him that no. 5 (a transcription of Paris. Lat. 12161, a short fragment, see Mommsen, "Prolegomena," LXV) had not been found so far despite the best efforts of Paul M. Meyer.

²⁵⁷ The congress in question is the second International Congress of Historical Sciences which took place Apr. 1–9, 1903, at Rome. Originally, it had been scheduled for 1902, but there was a controversy surrounding the director of the organizing committee, Ettore Pais (1856–1939). Pais had studied in the early 1880s in Berlin, and was not only a pupil, but also a friend of Mommsen. Pais seemed too "German" to many Italians: he had invited both Helbig and Hülsen to the organizing committee, and his German-inspired *Quellenkritik* led him to doubt early Roman history (a sacrilege in the eyes of many Italian scholars). Furthermore, he was apparently not the most affable person. At any rate, so many Italian scholars protested against him and announced their boycott that Pais had to resign; the 1902 congress was cancelled. New invitations for 1903 were sent out, with Pasquale Villari (1827–1917) as new head organizer. Mommsen indeed did not attend, but he was nevertheless elected honorary president of the congress *in absentia*; Krüger, despite the doubts voiced in his preceding letter, managed to take part (see page 112 below; he is also on the list of participants: *Atti del congresso internazionale di scienze storiche, Roma, 1-9 Aprile 1903*, 1 (Rome 1907), 48). In his letter, Krüger knew of an earlier announcement by Mommsen that he would attend the 1902 event organized by Pais; given the immense interest in these

auch, nachdem man Pais durch Villari ersetzt hat, davon nicht viel Erfreuliches.

Bei mir im Hause geht es, ich darf noch nicht sagen: "gut", aber doch: "besser."²⁵⁸

Ch[arlottenburg]. 9/2 1903 Ihr M.

Dear Colleague,

It is not correct that your work was in vain. At the outset, I had your collations recorded into the printing copy on interposed pages. Of course, these had to be rechecked. You will certainly understand that in the case of NL, they were compared to the manuscripts [themselves] and not to your notes, [which was necessary] all the more, as you had omitted the *interpretatio*. A personal collation of the Paris manuscript VI–VIII was demanded by the great challenge presented by the destroyed margin; needless to say, also here, your collation provided the base. Finally, you will certainly approve that I had Vat. IX–XVI rechecked against the manuscript at the stage of the printing proofs (which, of course, were based on Schöll's and your collation).

I cannot accept that you commend to my discretion how the facts should be presented to the public. Indicating you as co-editor is against the facts and certainly also against your own will. The phrasing we used for the Digest edition and which was appropriate for a younger helper does not seem suitable to me this time. I gladly agree to using instead *adsumpto apparatu Kruegeriano* or however you might wish to phrase this. If you do not want such a phrasing of the title, the only thing left is to explain at the end of the preface the facts as I have indicated them summarily above. I cannot regret having assumed this work insofar as its execution by you – according to your statements then and now – was quite uncertain, and this task simply had to be carried out. On the other hand, however, I cannot shake off the regret of having got into your

congresses, this announcement might easily have been public, though I have no evidence for this. (This footnote is largely based on K. D. Erdmann, *Die Ökumene der Historiker, Geschichte der Internationalen Historikerkongresse und des Comité Internationale des Sciences Historiques* (Göttingen 1987), 39–42.)

²⁵⁸ The sad truth is that despite Mommsen's self-deception (note how he already claimed in the last letter that she was better), Marie Mommsen never actually showed any signs of recovery. Completely dependent on nursing care, she lived on till 1907.

way, as it were.

My son Karl, director of the Mitteldeutsche Creditbank here [i.e., in Berlin], has not become mayor of Danzig, but member of the Reichstag for Danzig, which, in the current situation, is a rather mixed fortune. Otherwise, he is doing very well, and I am pleased with all the children.

Traube inquired whether you have drawings or other notes concerning the two palimpsests which might be useful for designing the plates. What is not clear about this? Anyhow, we will probably exclude the palimpsests from the plates.

I will return your materials which you need for the Justinianus after the conclusion of my typesetting, which will be the case in a few weeks.

I certainly won't travel to the congress in Rome. I don't expect much good from it after Pais has been replaced by Villari.

Domestically, I can't say yet that things are "good," but at least "better."

Charlottenburg, 9/2/1903 Your Mommsen

27. Letter by Krüger, February 11, 1903

Bonn 11 Febr 1903
Königstr. 21

Hochverehrter Freund!

Ihrem Vorschlag *adsumpto apparatu P. Kruegeri* weiß ich keinen besseren entgegenzusetzen.²⁵⁹

Meine Arbeit hätte ich allerdings, nachdem sie einmal so weit gediehen war, nicht liegen lassen, aber ebensowenig bedauere ich, daß die Ausgabe in Ihre Hände übergegangen ist, da ich sie von vorneherein nicht angefangen hätte, wenn Sie die Absicht kundgegeben hätten, dieselbe zu übernehmen, da ich mir nicht verhehlen kann, daß Sie der Berufenere sind.²⁶⁰

²⁵⁹ Note that Krüger actually modifies it slightly (the genitive *P. Kruegeri* instead of the adjective *Kruegeriano*). I am not sure whether this change was indeed on purpose, but however that may have been, Mommsen kept exactly to the wording put forward in this letter here.

²⁶⁰ Another Krügerian circumlocution, a reproach clad in what is seemingly a compliment: "Why didn't you tell me much earlier that you wanted to do a C.Th. edition, so that I would not have wasted all that lifetime on mine?"

Mit dem Zurücktreten vom Theodosianus ist nun freilich auch ein anderer Plan gefallen, den ich im Anschluß daran durchzuführen gedachte, nämlich eine chronologische Sammlung und Restitution der Konstitutionen von Konstantin bis 438.²⁶¹

Für die spätere Zeit genügt die Novellenausgabe, welche hoffentlich auch die Extravagantes bringt,²⁶² für Justinians Zeit die Ausgabe von Zachariae²⁶³ neben dem Codex. Ich möchte Ihnen zur Erwägung geben, ob Sie dafür eine jüngere Kraft gewinnen könnten; das chronologische Register der Ausgabe entschädigt dafür nicht, umsoweniger als es notwendig zum Theil eine falsche Ordnung bringt mit Rücksicht auf die Fehler des Theodosianus.²⁶⁴

Von dem Vatikanischen Palimpsest habe ich keine Zeichnung, vom Taurinensis hatte ich nur die Scholien bei der Abschrift flüchtig nachgezeichnet und so im Apographum lithographieren lassen.²⁶⁵ Meiner Erinnerung nach habe ich in einer der paläographischen Sammlungen aus den letzten 30 Jahren (Wattenbach?) eine gute Photolithographie des Taurin-

²⁶¹ Krüger envisaged reconstructing the correct dates of the various constitutions, linking those that belong together, and printing them in this order. The first part of this plan was later executed by Otto Seeck (O. Seeck, *Regesten der Kaiser und Päpste für die Jahre 311 bis 476 n. Chr.* (Stuttgart 1919)), the latter in part by Tony Honoré (T. Honoré, *Law in the Crisis of Empire, 379–455 AD: the Theodosian Dynasty and its Quaestors. With a Palingenesia of Laws of the Dynasty* (Oxford 1998)), although his chronological reconstruction was contained only on a 3.5-inch floppy disk included in the book. While verifying (and, if possible, rectifying) the dates of the constitutions is key for any further research, reprinting the whole text chronologically arranged makes much less sense. Legislation, unlike political history, hardly provides a continuous narrative which could easily be read this way. Further, while it is often possible to prove that a transmitted date must be wrong, it is not nearly as easy to correct it beyond doubt; rearranging the laws might suggest more certainty than we actually possess.

²⁶² See note 282 below.

²⁶³ Karl Eduard Zachariae von Lingenthal (1812–1894) published in 1881 a chronologically arranged two-volume edition of the Justinianic novellae, *Imp. Iustiniani pp. A. novellae quae vocantur*. For example, his nov. 1 is the one usually counted as nov. 155.

²⁶⁴ While it is true that Mommsen's overview includes numerous mistakes, as he does not touch the transmitted dates, Krüger does not really explain why we would need a full edition of the texts chronologically arranged, as opposed to a chronologically sound register (as later created by Seeck).

²⁶⁵ See, e.g., 16, 24, 30 in Krüger's apographum (see note 84 above).

ensis gesehen, doch kann dies ein Irrtum sein.²⁶⁶

Daß die von Baudi di Vesme verlegten Blätter des mit dem Vaticanus zusammengehörigen Turiner Palimpsesten sich wieder gefunden haben, ist Ihnen wohl nicht entgangen.²⁶⁷

Meine Verwechslung hinsichtlich Ihres Sohnes war etwas wunderlich. Von seiner Thätigkeit als Berliner Stadtverwaltung hatte ich häufig Gelegenheit in der Nationalzeitung²⁶⁸ zu lesen. Meine besten Wünsche zur Genesung Ihrer Frau Gemahlin.

Ihr Krüger

Besten Dank für die schon erhaltenen Abzüge.²⁶⁹

Bonn 11 Febr 1903

Königstr. 21

Highly esteemed friend!

I would not know to propose anything better than your suggestion *adsumpto apparatu P. Kruegeri*.

However, given that my work was already thus far advanced, I would not have left it unfinished. Nevertheless, I do not regret that the [preparation of the] edition passed to your hands, as I would not have undertaken it in the first place if you had announced your intent to assume it, for I cannot turn a blind eye to the fact that you are the more suitable editor.

By withdrawing from the Theodosianus, another plan also has lapsed which I projected to carry out subsequently to it, namely a chronological collection and restitution of the constitutions from [the time of] Constantine to 438.

²⁶⁶ Krüger was right: K. Zangemeister and W. Wattenbach, *Exempla codicum latinorum litteris maiusculis scriptorum* (Heidelberg 1876), 6–7, plate no. 25.

²⁶⁷ Indeed, it had not escaped Mommsen's notice: already in an article published three years earlier, Mommsen had mentioned the rediscovered Turin pages (T. Mommsen, "Das theodosische Gesetzbuch," *ZSS* (RA), 21 (1900), 149–90, at 155), pointing to the relevant publication (F. Patteta, "Frammenti Torinesi del Codice Teodosiano," *Memorie della Reale Accademia delle Scienze di Torino, Serie seconda, Scienze morali, storiche e filologiche*, 45 (1896), 127–46; see esp. 128–29).

²⁶⁸ Not to be confused with later homonymous extremist newspapers! This "Nationalzeitung" was liberal and hence quite according to the political alignment of Karl (and Theodor) Mommsen.

²⁶⁹ In his preceding letter, Krüger had indicated his wish to work through Mommsen's edition as quickly as possible; therefore, Mommsen had arranged for having him forwarded the (already corrected) proofs.

The edition of the *novellae*, which hopefully also includes the *extravagantes*, suffices for the subsequent period, as does, for the time of Justinian, Zachariae's edition besides the Code. I would like to submit for your consideration the idea of tasking a younger scholar; the chronological index to the edition is no replacement for that, especially given that, by necessity, it presents a partly flawed order as a consequence of the mistakes of the Theodosianus.

I do not have a drawing of the Vatican palimpsest. I only roughly sketched the scholia of the Taurinensis in my copy, and I had them lithographed this way in the apographum. According to my memory, I saw a good photolithography of the Taurinensis in one of the paleographical collections which appeared during the last 30 years (Wattenbach?), but perhaps I am mistaken.

It certainly did not escape your attention that the Turin palimpsest pages which were misplaced by Baudi di Vesme and which belong together with the Vatican pages have surfaced again.

My confusion regarding your son was somewhat whimsical. There were many occasions for me to read about his activity as Berlin councilman in the *National-Zeitung*. My thoughts and prayers for the recovery of your wife.

Your Krüger

Thank you very much for the proofs which I have already received.

28. Letter by Mommsen, February 12, 1903

Lieber College,

Also bleibt es bei der vorgeschlagenen Formel, welche am Schluß meiner Prolegomena die nähere Erläuterung²⁷⁰ findet.

Ich habe früher niemals an eine Ausgabe des Theodosianus gedacht, bestimmt hat mich dazu – neben dem steigenden Zweifel, ob Sie dazu kommen würden – vor einigen Jahren,

²⁷⁰ Both Krüger and Schulz read "weitere Erledigung," which we cannot see.

nachdem ich die Vorlesungen aufgegeben²⁷¹ und das *Strafrecht*²⁷² abgeschlossen hatte, der Mangel einer anderen größeren Arbeit.²⁷³

Ich beantrage jetzt²⁷⁴ bei der Akademie die Herstellung eines *index rerum et verborum* nach dem Muster des Traubeschen zu Cassiodors *variae*,²⁷⁵ den Sie wohl kennen, unter Leitung Traubes, durch Dr. Paul Maas.²⁷⁶ Ein solcher Index wird den gothofredischen Commentar zum gut Theil in sich aufnehmen, resp. darauf und auf andere analoge Arbeiten verweisen können.²⁷⁷ Einem solchen Index könnte eine recon-

²⁷¹ See Rebenich (note 2), 40, 43: in 1885, Mommsen was released from his teaching obligations, and after 1887, he never taught again! Claiming a connection between the end of teaching and the C.Th. project seems far-fetched.

²⁷² See page 13 above and note 102 above.

²⁷³ Here Mommsen counters Krüger's reproach of not having been told much earlier about his own interest in such a project: the C.Th. edition was a late idea, born out of the doubt that Krüger's will ever see the day (this argument presupposes, of course, the pressing need of scholarship for such an edition) and as some kind of occupational therapy, as it were, for Mommsen, ever restless.

²⁷⁴ Mommsen's extant proposal (document no. 65 in the Academy Archive) is dated on the preceding day, i.e. Feb. 11, 1903. He asked for 2,000 M. as fee for Maas.

²⁷⁵ *Index rerum et verborum* (510–597) to Mommsen's Cassiodorus *Variae* edition (*Cassiodori senatori variae recensuit Mommsen* (Berlin 1894)).

²⁷⁶ Although the Academy granted the money and Paul Maas (1880–1964) signed the contract on May 16, 1903 (document no. 77 in the Academy Archive), this index never came into being. Apparently, Maas abandoned the project very quickly afterwards. In 1906, he published a highly competent review of Mommsen's edition in which he cursorily mentions earlier editions and additional material (Traube's plates, the contents of the introduction, the parts added after Mommsen's death, . . .), but does not give any hint at all of his work on such an index. In this transcription, Krüger notes: *Darüber versagt meine Erinnerung. Traubes frühzeitiger Tod ist wohl dazwischen getreten* ["My memory fails me in this regard. It was likely Traube's early decease which thwarted this"]. Traube had died in 1907 before even his 46th birthday, and he was already very sick in the preceding years. In 1910, Otto Gradenwitz initiated a similar project at the Heidelberg academy, but his project outline ("Plan für einen Index zum Theodosianus," *Sitzungsberichte der Heidelberger Akademie der Wissenschaften. Philologisch-historische Klasse*, 1910:3), in which he *does* mention the history of Mommsen's edition, does not give the least hint he knew about an earlier index project.

²⁷⁷ When Jacques Godefroy died in 1652, his monumental C.Th. commentary was unpublished. It is curious to note that after more than 350 years, Godefroy's work has still not been replaced. A modern one-stop commentary on the constitutions would be a dream for any scholar working in the field.

struirte²⁷⁸ Constitutionen-Chronologie²⁷⁹ füglich sich anschließen. Meine Tafel wird, wie Sie mit Recht voraussetzen, sich streng der arg zerrütteten Subscriptionen-Überlieferung anschließen, allerdings, wo deren Fehler sich erkennen oder bessern ließe, dies angeben, aber die Folge darum nicht ändern.

Daran könnte ein Verzeichnis, wie Sie es bezeichnen, sich anschließen, allerdings unter gewissen Voraussetzungen.

1) Sie müßten sich anheischig machen, die Arbeit binnen zwei Jahren fertig zu stellen.²⁸⁰

2) Sie müßten dieselbe auf die Novellen erstrecken.²⁸¹

3) Was nennen Sie Extravaganten? Unsere Ausgabe bringt die mit dem Theod. verknüpften Sirmondianae und von den posttheodosianischen, was mit dem Breviar überliefert ist, ohne dazu zu gehören. Die sonst bekannten Kaisererlasse aus dieser Epoche geben wir nicht.²⁸²

²⁷⁸ Krüger (note 16), 5, gives up and prints “veconodenirte (?)”! In the original letter, Krüger underlined the word with a red pencil and added a question mark above it. By Mommsen’s standards, “reconstruirte” is actually reasonably well readable.

²⁷⁹ Note that Mommsen does not think much of fully reprinting all constitutions in the right order: he at most would accept a list of the corrected dates.

²⁸⁰ This is certainly overambitious. For comparison: in 1907, Seeck, “Neue und alte Daten” (note 75), 501, writes: *So habe ich mich denn jahrelang gequält, in dies Chaos Ordnung zu bringen, und immer wieder die Feder in halber Verzweiflung weggelegt* [“Thus I toiled for years to bring order into this chaos, and again and again, I put the quill aside, almost despaired”]. Given that Seeck’s first article on chronology appeared in 1889, and his *Regesten* were eventually published in 1919, two years as time-frame is out of the question.

²⁸¹ This, however, is something that could be done during a leisurely afternoon: hardly any *novellae* dates are wrong (see Seeck (note 261), 439, entries in italics) and those few that are had already been corrected by that time.

²⁸² Mommsen’s inquiry is understandable: the term *extravagantes*, stemming from canon law, designates enactments that are lacking in official collections though one would expect them there. The problem with the post-Theodosian *novellae* is that there is nothing which could be unambiguously taken as an “official collection.” This fact is mostly ignored today (as many readers naively believe our modern collection reflects an ancient compilation). In fact, Meyer (following the lead of earlier editors) consolidated three late antique *novellae* collections: first, the Breviary itself contains a selection of some *novellae*; this is (chronologically) collection no. 2. This Breviary collection is actually based on an older collection, the *corpus Maioriani*, which only includes *novellae* by Theodosius II, Valentinian III, and Majorian; this is collection no. 1. Out of this collection,

Aber ich will nicht verschweigen, daß mir Ihr Plan selbst Bedenken erregt. Er fordert gewissermaßen eine Geschichte der Zeit mit Einfügung der Daten der Erlasse; Seecks Arbeit über Constantin zeigt, wohin man auf diesem Wege kommt, ich meine nicht die Einzelresultate, sondern die Methode selbst, die in der Sache liegt.²⁸³ Man muß dafür die Daten beispielweise der Kämpfe zwischen Constantin und Licinius

the Breviary compilers picked only some constitutions (so for the three enumerated emperors, collection no. 1 is more comprehensive), but on the other hand added some constitutions by the eastern emperor Marcian, meaning that neither collection no. 1 nor no. 2 is completely contained in the other. The Breviary was not a very stable compilation; in its C.Th. part, many fragments not part of the official Breviary were added by individual scribes (see note 137 above). The same happened in the *novellae* portion: the “official” selection (collection no. 2) was sometimes enriched with additional texts taken from collection no. 1, but also with later constitutions issued by Emperor Anthemius. This is counted as collection no. 3. Meyer’s edition can therefore be described as an edition of the Breviary selection enlarged by two other ancient collections which are somehow linked to it. Yet one could actually gather hundreds of additional constitutions from other sources: conciliar acts (especially ACO), canonical collections, epigraphy, and so on. In his letter, Krüger had written that Mommsen’s edition would “hopefully” include the *extravagantes*, too – but did he mean the additional *novellae* found in collections no. 1 and no. 3? Or did he mean all the scattered material? This is why Mommsen asks.

²⁸³ Back in 1889, Seeck had published a paper called “Die Zeitfolge der Gesetze Constantins,” ZSS (RA), 10 (1889), 1–44, 177–251. The first part contained important methodological thoughts; the second part was meant to put these ideas to the test by applying them to the chronology of Constantinian laws contained in the Theodosian Code. Their transmission through apparently quite unreliable private collections means that they are teeming with chronological mistakes, many of them likely impossible to rectify. In places, Seeck’s approach appears overly optimistic. Mommsen’s verdict in 1900 was damning: “wissenschaftlich . . . unbrauchbar” (note 267), 180; “Pseudokritik” (id., 181); “die Arbeit selbst ist eine wissenschaftliche Nullität” (id., 185). Purportedly, Mommsen apologized in private to Seeck for his verbal exaggeration, and a response by Seeck was left unprinted by the Savigny Zeitschrift after the editor asked Seeck to reconsider. Only after Mommsen’s death did Seeck publish a reply (Seeck, “Neue und alte Daten” (note 75), esp. 501–507). Seeck claims that Mommsen’s vision was much impaired (“so dass er nur noch mit Mühe lesen konnte”; nota bene: in 1900, i.e. around the time when Mommsen collated the manuscripts!), that his mental capacities grew weaker ([*er*] *verließ sich auf sein Gedächtniss, das gleichfalls nachzulassen began* [“he relied on his memory, which likewise started to fail”]), and even calls the Mommsen of 1900 a *müder Greis*, “tired oldster”! Incidentally, the main point of contention was the year of Constantine’s final victory (and Licinius’ defeat): Mommsen staunchly defended 323, while Seeck vigorously advocated 324. For once, there is a clear winner!

feststellen,²⁸⁴ historische Probleme größter und schwierigster Art anpacken, für die die Subscriptionsen nur einen garstigen Theil des Materials liefern.²⁸⁵

Wollen Sie sich auf eine solche Arbeit einlassen,²⁸⁶ so bin ich bereit, einen entsprechenden Antrag bei der Akademie einzubringen.²⁸⁷ Honorar könnte ich freilich für ein solches Parergon

²⁸⁴ This directly refers to Seeck's article and the further squabbling with him in *Hermes* 1901/02: in *Hermes* 1901, Seeck had published an article on the chronology of Licinius, based on papyri. In a later fascicle of the same volume, Mommsen answered with a rather polemical article of his own (once again defending 323 as year of the demise of Licinius). In the first fascicle of 1902, Seeck had written a reply to which Mommsen had been given the opportunity to answer again; the journal editors forwarded Mommsen's reply at proof stage to Seeck who spotted a grave mistake; he pointed it out to Mommsen so that Mommsen could correct it before publication. It was this noble deed which made Mommsen ask Seeck to see the Theodosianus through the press in case he died too early (Seeck proudly tells the story in Seeck, "Zur Charakteristik Mommsens" (note 38), 82–83; both Mommsen's and Seeck's letters about this matter are extant; they date from February 1902 – not "mid-1903" as Croke (note 40), 234, guessed). See also note 38 above.

²⁸⁵ Here, Mommsen is wrong. Methodologically, Seeck's work is first based on verifying the dates, i.e. do the date, imperial college, receiving office holder, and itinerary of the emperor match the indications of the constitution? If not, corrections are not haphazard but based on sensible assumptions, i.e. iteration numbers of imperial colleges might be wrong (which were often lacking in the first place), the indication of post-consulates was later changed to actual consulates, etc. All of this is very technical, but it makes sense and is far removed from Mommsen's reproach here.

In one of the letters Mommsen sent to Seeck about the *Codex Theodosianus*, Mommsen writes (Feb. 11, 1902): *Die Aufgabe selbst, wie Sie sie gefasst haben und fassen werden, halte ich bis auf die julianische Zeit für unlösbar, von da an ist sie (selbst für Valentinian und Valens) überflüssig, da sich hier nur Detailschwierigkeiten bieten* ["I believe that the task itself – the way you undertook it and are going to undertake it – is not feasible up to the epoch of Julian; from that moment onwards it is gratuitous (even for Valentinian and Valens), as there are only some detail issues"]. Mommsen's obstinacy regarding a systematic approach towards chronological corrections is remarkable; Seeck's *Regesten* provide impressive proof that this time, Mommsen was utterly wrong.

²⁸⁶ Krüger (note 16), 6 n.1, adds a footnote, "Die Arbeit war meinerseits bereits erledigt," which again testifies to the confused state in which he authored his autobiography.

²⁸⁷ Note that according to the extant evidence, Mommsen never offered such a thing to Seeck. Did he feel some remorse versus Krüger? Or did Mommsen believe that Krüger's reconstruction would be less haphazard than Seeck's (according to Mommsen's viewpoint)? Or did Mommsen offer this merely as a courtesy, in the knowledge that Krüger would surely decline?

nicht beantragen,²⁸⁸ und ich müßte Ihre Absicht bald erfahren, da die Angelegenheit zur Zeit der akademischen Berathung unterliegt.

Ch[arlottenburg]. 12/2 1903

Ihr M.

Was in den Novellen-Band kommen soll, ist noch *sub iudice*;²⁸⁹ wenn Sie darüber Vorschläge machen wollen, werden wir sie erwägen.

Dear colleague,

Thus, we stick to the proposed phrasing, which will receive further clarification at the end of my Prolegomena.

I had never thought earlier about an edition of the Theodosianus. What made me undertake it a few years ago after I had ceased my lectures and finished the “Penal Law” was – apart from my increasing doubt whether you would find the time for it – the lack of any other large-scale task.

I am now requesting from the Academy [financial means for] the creation of an *Index rerum et verborum* following the model of the one by Traube to Cassiodorus’ *Variae*, with which you are probably familiar, by Dr. Paul Maas under the direction of Traube. Such an index will incorporate much of Gothofredus’ commentary or refer to it or to other similar contributions. A reconstructed chronology of the constitutions would be a most suitable addition to such an index. As you assume correctly, my own table will strictly keep to the dreadfully confused [dates provided by the] transmission of the subscriptions, although it will point out any mistakes that can be recognized or rectified, but it will not change the [chronological] sequence because of this.

After that, a table as you propose could follow, but there are some conditions:

1) You would need to agree to complete the task within two years.

²⁸⁸ Both in the shape of a marginal note in his transcription (“Honorar habe ich nicht verlangt”) as well as of a footnote in Krüger (note 16), 6 n.2 (“Honorar habe ich nicht in Anspruch genommen; ich weiß nicht, wie Mommsen darauf gekommen ist”), Krüger protests against the implication. The truth is that Mommsen never beat around the bush and straightened out things before they could become an issue.

²⁸⁹ Mommsen means front or backmatter (indices, directories, etc.), as the list of constitutions to be included was fixed at this point in time (see his remark earlier on in this letter).

2) You would need to do the same for the *novellae*.

3) What do you mean by “Extravaganten”? Our edition includes the Sirmondians which are connected to the Theodosianus, and from the post-Theodosian [texts] those which are transmitted in the Breviary without being part of it. Imperial laws from this period which are known from other sources are not included.

However, I do not wish to conceal that your project itself raises some concern in me. It requires, in a way, a history of this epoch into which the dates of the enactments are embedded. Seeck’s work on Constantine shows where this road is leading. I am not talking about the individual results, but about the method itself which is required by the nature of this business. One has to ascertain the dates of, say, the struggles between Constantine and Licinius, [i.e.] to tackle historical problems of the greatest and most difficult sort, for which the subscriptions contribute but a frustrating portion of the evidence.

If you wish to get involved in such a task, I am willing to submit a corresponding proposal to the Academy. However, I could not request any remuneration for such supplementary work, and I would need to know your intent soon, as this matter is right now under review by the Academy.

Charlottenburg, 12 Feb 1903

Your Mommsen

It is not yet settled what will be included in the *novellae* volume; if you wish to make any suggestions, we will ponder them.

29. Letter by Krüger, February 13, 1903

Bonn 13/2 3

Hochverehrter Freund!

Über den von Ihnen angekündigten Index zum Theodosianus von Maas bin ich sehr erfreut; mich aber demselben durch Übernahme der Konstitutionen-Chronologie anzuschließen, bin ich außer Stande. Die Schwierigkeiten einer solchen waren mir bekannt,²⁹⁰ aber hätte ich die Ausgabe fortgeführt, so würde ich mich, soweit dieselbe dazu nöthigte, in dieselben

²⁹⁰ Note Krüger’s early article on the C.Th. chronology.

eingearbeitet haben, jetzt bin ich zu sehr herausgekommen und mag nicht wieder von vorne anfangen. Ich hätte auch mehr Gewicht gelegt auf die Wiederherstellung der Konstitutionen in ihrem ursprünglichen Zusammenhang und wollte sie auch so zum Abdruck bringen; letzteres liegt außerhalb Ihres Plans, paßt natürlich auch nicht zur Ergänzung der Ausgabe, wäre aber meines Erachtens als selbständiger Druck sehr nützlich, namentlich auch für Historiker. Er würde sich zur Ausgabe wie die *Palingenesia* zu den *Digesten* verhalten.²⁹¹ Ich habe keine Beziehungen zu jüngeren Gelehrten, denen ich eine solche Aufgabe an's Herz legen könnte, hoffe aber, daß Sie den geeigneten Mann finden werden, der mit Unterstützung der Akademie dieselbe übernimmt. Von den *Novellen* nahm ich an, daß die Ausgabe von dritter Seite längst in Angriff genommen sei.²⁹²

Mit bestem Gruß

Ihr Krüger

Highly esteemed friend!

I am very pleased about your announcement of an index to the *Theodosianus* by Maas; yet I am unable to join him by taking upon myself the chronology of the constitutions. The difficulties [involved in the reconstruction] of one have been known to me, yet if I had carried on with the edition, I would – as far as it [viz. the edition] compelled me to do so – have burrowed into these; now [however] I am no longer sufficiently familiar [with the whole topic] and I do not want to start all over. I would also have laid a greater emphasis on the reconstruction of the constitutions in their original context, and I also planned to have them printed this way; the latter does not conform to your plan, nor is it suitable, of course, as an addition to the edition, although in my opinion, as a separate publication it would be very useful, notably for historians, too. It would be related to the edition as the *Palingenesia* to the *Digest*. I do not have relations with younger scholars to whom I could suggest such an undertaking, but I hope that you will find the right man who will take this upon himself with the support of the Academy. Regarding the *novellae* I assumed that the [preparation of the] edition has been embarked upon by a third

²⁹¹ See note 261 above.

²⁹² Krüger misunderstood Mommsen's question.

party for a long while.

With best regards

Your Krüger

March 11, 1903. Mommsen tells Krüger that he has a Warsaw Breviary manuscript on loan²⁹³ which is of possible interest for Krüger's Paulus edition.

March 12, 1903. Krüger replies that he will check with his publisher whether a new edition of CLIA volume II (which includes his Paulus) is planned;²⁹⁴ he will depart in a few days for Florence and then for Rome (in order to attend the congress there during the period April 1–9).

March 13, 1903. Mommsen writes back that the manuscript will remain at his place until May 5, so Krüger should not waste any time.

²⁹³ Mommsen, "Prolegomena," XCIX: *Varsoviensis bibliothecae universitatis n. 480* . . . *Vidi eum, sero tamen, missum Berolinum.*

²⁹⁴ Volume II never received a new edition after the initial one of 1878.