

# **Review: Justinian's Digest 9.2.51. in the Western Legal Canon. Roman Legal Thought and Modern Causality Concepts. By Wolfgang Ernst.**

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***Justinian's Digest 9.2.51. in the Western Legal Canon. Roman Legal Thought and Modern Causality Concepts.* By Wolfgang Ernst [Intersentia, Cambridge, 2019. 177 pp. Paperback. ISBN 978-1-78068-832-9.]**

As any teacher of delict (or criminal law) is aware, the topic of causation often presents challenges to students' comprehension. The difficulties found in the search for a clear and unified approach to causation issues are not new, as Professor Ernst's cogent book investigates.

The book's central question (or *quaestio*) is the supposed controversy between two texts of the Roman Digest. The first text (Dig. 9.2.11.3), from the jurist Ulpian, following an earlier view taken by Celsus, notes that where a slave is mortally wounded by an offender, but, before drawing his last breath, is struck and killed by a second offender, the first offender is liable only for wounding, and the second offender for the killing. In the second text (Dig. 9.2.51.), an opinion of the jurist Julian, the reasoning differs. Here, it is proposed that in the same circumstances both attackers, first and second offender, are liable for the killing.

Professor Ernst outlines the impact and influence of this dispute, with a view to the vindication of the elegant legal reasoning exhibited by Julian in his appraisal of concepts of causality. Julian's position on the issue has often been discounted, either as erroneous or as an interpolation. The aim therefore is to revisit the original texts in order to address these misconceptions surrounding a statement of supreme legal reasoning.

The book is divided into four chapters with two appendices.

In the first chapter, the problem is laid bare. The *prima facie* conflict between the two texts raises an accusation of confused thinking against two parties: first, against the jurist Julian, whose logic leads to the disconcerting conclusion that the assault on the slave leads to two killers for two separate acts at different times resulting in one death; the second accusation is against the compilers of Justinian's Digest, who took no action to eradicate the discrepancy, but, instead, allowed for it to persist in the compilation of Roman law.

The second chapter, which sets out evidence of historical interaction with the controversy, is an ambitious feat of scholarship. The chapter charts a chronological analysis of the interpretation of the Roman controversy from the rediscovery of the Digest in the West to the modern age. The comprehensiveness of this examination is impressive, with accounts of engagement with the causation controversy ranging from the glossators, the Byzantine *Basilika*, and medieval, renaissance and early modern scholars, to the modern schools of Romanist thought, even the opinions of "minor poets", whose comments on the texts have had limited impact, are included. The approach taken is balanced and rigorous. The views of each scholar are given within the intellectual context of his time, followed by an appraisal of his interpretation of either or both sides of the controversy. Historical intellectual trends

which affect the treatment of one text or the other are appreciated by the careful contextualisation given to the methodological approach attached to the school and time of the scholar under discussion. A notable example of this is found in the discussion of the interpolationist approaches adopted in the nineteenth century. The force of this methodology, which arose from the critical historicism movement, is exemplified in the conjectures of Gerhard von Bessler, whose assignation of interpolation to the text of Julian's decision is radical. The extremity to which von Bessler is willing to attribute interpolation to the text not only evinces the incredulity of subsequent scholarship as to the possibility that Julian's text represents a legitimate view on the matter, but also reveals how the intellectual mode of thought of the day impacts on the interpretation afforded to original texts. Ernst's argument, which is highly persuasive, is that such approaches result in the development of an intellectual pattern recognition, which removes the interpreter from an understanding of the intention of the original text.

The culmination of the evidence reveals the distrust over the position assumed by Julian. While a limited number of scholars attempt to explain the reasoning taken up by the jurist, the more usual conclusion throughout history has been scepticism. This doubt manifested most clearly in the number of theories insisting upon interpolation to the original text.

The third chapter is a slight diversion in approach, but nonetheless one necessary to the subsequent analysis undertaken. A consideration is given to the sociological aspect of interaction with the texts. The nature of this study is quantitative (it is associated with an appendix charting the interaction in graphs and maps). Its purpose is worthwhile. The chapter argues that the nature of interaction with the texts, as indeed is the case for much of our study of Roman law, has been defined by the thinking of our own age, rather than an attempt to reconstruct the jurists' mindset in framing their logic.

In the fourth chapter, Professor Ernst evaluates the dispute from the evidence provided, offering his own analysis of the meaning of the original texts and the effect of scholarly reception upon contemporary comprehension of them. Of primary interest is why the compilers of the Digest would allow for such a controversy to persist, if, in fact, it damaged the clarity of juristic interpretation of causation in the *lex Aquilia*. The analysis then is one of interpretative methodology. How ought one to view the dispute in order to understand the legal purpose of the texts? The answer is to be wary of burdening oneself with a reliance on the oppositional narrative constructed around the texts. From Cujas, the tendency has been to view the opinions of Celsus and Julian in oppositional confrontation. Ernst is unconvinced of the efficacy of such an approach. He argues convincingly that the desire of subsequent scholars to apophenia, a willingness to "over-fit" juristic concepts into a recognisable pattern of thought, has led to an underappreciation of the extant distinction between the texts: "a long-lived red herring". This view of conflict has long led to an accusation against Julian of erring in his logic in his interpreting of the causal issue in the case of the mortally wounded slave.

The justification of Julian's reasoning is to be found in an investigation as to the interpretative nature of the *lex Aquilia* undertaken by the jurist, without presupposing a misunderstanding based on a direct confrontation with Celsus. Rather, by applying to the text of Julian the interpretative criteria by which the jurist himself abided, Professor Ernst is able to re-evaluate how Julian's logic may be read, without the limitation of scope composed from an assumption of confliction with Celsus's text.

The argumentation of Professor Ernst in this section is complex and subtle, yet it is ultimately persuasive and artful. Through his revisiting of the original text, offering an analysis of the meaning of the words within their Roman context, Ernst is able to show that the conflict between Celsus and Julian is not self-evident. In fact, no true tension exists. This approach highlights the missteps and misunderstandings which have plagued historical readings of Julian's reasoning. The method applied in displaying these confusions depends upon a technical interpretation of the Latin, read from the perspective of the mindset of the Roman jurist. A crucial point, for instance, is made around the scope to which Julian applies causal effect to the verb *occidere* (to kill). Ernst shows that a more appreciative interpretation of Julian's meaning of the word does not result in a decisive break with the logic put forward by Celsus and his followers. By re-assessing the means by which Julian ought to be interpreted, and by showing the model by which the compilers of the Digest interpreted his work, it becomes apparent that the views of Celsus and Julian are not incompatible with a consistent approach to interpretation or to the solution offered in the case of the mortally wounded slave. Moreover, Justinian's compilers do not err by the inclusion of both texts in their compendium. Far from adding another voice to a cacophonous "echo chamber" of a long-hummed tune, Ernst adds a new note of clarity to an ancient melody.

The first appendix to accompany the book provides a note of von Bessler's conjectures as to interpolation in Julian's text. The second is an interesting quantitative study of the geography and demographics of those who have written on the Celsus-Julian debate.

The general reader will be impressed by the depth and rigour of the scholarship presented here and will find interest in the wide-ranging explanation of views on the development of causation issues resulting from a Roman controversy. Far more is to be gained by the specialist in Roman law from a study of this book: not only does it offer an important and considered discussion of the vast historical discourse on concepts in causality resulting from the Celsus-Julian debate; but it also draws the reader's attention to the sophistication of reason applied by the Romans to their study of law. In particular, merit is conferred upon Julian's refined approach to causality problems, which Professor Ernst concludes should be regarded with the awe and reverence held by the viewer of an artistic masterwork, or the listener to a piece of transcendent music. Having read this book, it is difficult to disagree with his appraisal.

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