

BETWEEN MONUMENT AND SEPULCHERE – SOME ASPECTS REGARDING THE LEGAL STATUS OF SARCOPHAGI IN ROMAN LAW

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Since the most ancient times man has sought to regulate his life through various sets of rules, from the most basic regulations passed from one generation to another through oral tradition, to the more complex legal systems written down for perpetuity. Roman law, throughout its evolution, has won a distinct place in history, as being complex in its simplicity and concise in its complexity. Moreover, as the ancient Romans had a tendency to regulate every aspect of their lives through the letter of the law, every citizen was relying on the state's legal system for his own physical preservation but also for safeguarding his property from every possible form of violence or theft.

This was the case with one of life's most important thresholds, the death of one member of any community triggering an elaborate succession of actions, all meant to ensure a safe spiritual passing into the afterlife, to establish the deceased and his family's place in society and least but not last, to secure his memory for eternity. Even so, in dealing with death and its aftermath, you always had to take into account the relation between everyday life and law, which was a concern for a great deal of people in ancient times and a meeting place of a number of concepts such as the Roman family and society, the dichotomy of sacred and secular law, the law and custom and so on¹. It also raises one of the oddest puzzles in Roman law, where on the axis between pontifical and civil regulations do we place Roman funerary law?

Cicero, in his treaty on the Laws offers a snapshot of the situation regarding our discussion during his time. He clearly states that the rights and sacrifices of the Manes, deities of the Underworld, meaning all that is related to the burial and funeral ceremony, are associated with both pontifical and civil law:

“A. You have given me a clear idea of these subjects; now the perpetual rites and the privileges of the gods of the lower world await your treatment.

M. What a remarkable memory is yours, Pomponius! I had forgotten these subjects.

A. No doubt; but my chief reason for remembering them and looking forward to your discussion of them was the fact that they are concerned both with the rules of the pontiffs and with the civil law.”²

¹ Crook 1967, p. 133.

² Cicero, *De leg.*, II, 45–46, English translation by Keyes 2006, p. 427–429.

Moreover, through the words of Quintus Mucius Scaevola, the ancient orator states that, in order to properly perform your duties of pontiff, you must also be familiar with the intricacies of the civil law:

“To take an example from this very branch of the law, how extensive do the Scaevolae (both of them pontiffs and also most learned in the law) make that very subject of which we have just been speaking! Scaevola, the son of Publius, says: “How often have I heard my father say that no one could be a good pontiff without a knowledge of the civil law!””³

Precisely in combining these two very different aspects of Roman law does our legal puzzle reside and has created within short time a multitude of situations and problems that needed further attention from the Roman state authorities in finding better solutions, from the Senatorial decrees to the imperial rescripts and legal interpretations gathered in legal treaties written by the most famous jurists at the time. In addition to these literary sources, archaeology and epigraphy come into their own, since actual tombs and their inscriptions survive in large numbers, thus creating a basis for analysing the legal status of specific types of funerary manifestations.

At the root of our discussion lies the conceptual duality of the tomb, which is both subjected to commercial and religious law⁴. The tomb in itself, according to Ulpianus, is constructed of two very distinct notions, the *sepulchrum*, the place where the human remains, either a corpse or the cremated remnants, are interred⁵, and the *monumentum*, which implies anything, rose with the sole purpose of protecting the tomb and keeping the memory of the deceased alive⁶. Moreover, the tomb becomes a *sepulchrum* only after the remains are buried and the proper religious rites are performed⁷. This causes the lot to become *res religiosa*, consecrated ground, outside the boundaries of commercial law⁸. Nonetheless, Celsus, through the words of Ulpianus, states that not the whole lot becomes religious, but only the portion where the body is buried⁹, point strengthen by the words of Cicero:

*“Our ancestors, indeed, decreed statues to many men; public sepulchres to few. But statues perish by weather, by violence, by lapse of time; but the sanctity of the sepulchres is in the soil itself, which can neither be moved nor destroyed by any violence; and while other things are extinguished, so sepulchres become holier by age.”*¹⁰

On the other hand, the *monumentum*, generally speaking, has the sole purpose of protecting and keeping the memory of the deceased alive for eternity¹¹. Florentius noted that if human

³ Cicero, *De leg.*, II, 47, trans. by Keyes 2006, p. 429.

⁴ Concerning this aspect see also De Visscher 1963, p. 42–82, Crook 1967, p. 133–138, Thomas 2004, p. 40–77, Kaser 1978, p. 15–92.

⁵ *Dig.*, XI, 7, 2, 5: “*Sepulchrum est, ubi corpus ossave hominis condita sunt*” (“A tomb is a place where a man’s body or bones have been interred”, English translation by Watson 1998, vol. I, 11, 7, 2, 5).

⁶ *Dig.*, XI, 7, 2, 6: “*Monumentum est, quod memoriae servandae gratia existat*” (“A monument is something which exists to preserve a memory”, trans. by Watson 1998, vol. I, 11, 7, 2, 6).

⁷ Cicero, *De leg.*, II, 57: “*Yet their places of burial do not really become graves until the proper rites are performed and the pig is slain. And the expression which has now come to be used in regard to all who are buried, namely, that they are ‘laid in the earth’, was then confined to those cases where earth was cast upon the bodies and covered them. The existence of this custom is confirmed by the rules of the pontiffs. For until turf is cast upon the bones, the place where a body is cremated does not have a sacred character; but after the turf is cast, [the burial is considered accomplished, and the spot is called a grave.]*” (trans. by Keyes 2006, 441–443).

⁸ See note 4.

⁹ Celsus apud Ulpianus, *Dig.*, XI, 7, 2, 5: “*Celsus autem ait: non totus qui sepulturae destinatus est, locus religiosus fit, sed quatenus corpus humatum est.*” (“Celsus, however, says: ‘Not all of the place chosen for burial becomes religious, but only as much of it as covers the body.’”, trans. by Watson 1998, vol. I, 11, 7, 2, 5).

¹⁰ Cicero, *Phil.*, IX, 14, trans. by Yonge 1903, *Cic. Phil.* 9.14.

¹¹ Macer, *Dig.*, XI, 37, 1: “*” (“The deified Hadrian said in a rescript that a funerary monument is something built as a monument, that is, as a protection for the place where the body is interred.”*, trans. by Watson 1998, vol. I, 11, 7, 37, 1).

remains are buried near a funeral monument, we are dealing with a *sepulchrum*, otherwise the tomb is void of remains, an empty sepulchre, thus the monument becomes a memorial, or what the Greeks called a *kenotaphion*¹². In addition, if there is only the monument and no tomb, it can be sold by any party; and if we are dealing with a cenotaph, the sale must be stated in the will, so it too can be sold. The two emperors Marcus Aurelius and Lucius Verus, through a rescript, state that this kind of structure is not religious¹³. In other words, if there are human remains associated with the funerary monument, the status of a *locus religiosus* that is earned by the *sepulchrum* is extended to the *monumentum*, and is protected by religious law. Otherwise, if you take away the object of sacrality which it's meant to be protected, the human bones, the monument returns to the profane, becoming *purus*, a non-religious object, subjected to commercial law. To further emphasize, the human remains are the decisive factor in granting the status of *res religiosa*, ensuring the tomb's inviolability, inalienability and immunity from seizing¹⁴.

Nevertheless, our question regarding this matter is related to a specific type of funerary monument, namely the sarcophagus, and our focus is to determine what its funerary purpose was, is it a tomb or a monument for the memory of the deceased.

The origin of this kind of sepulchral manifestation is traced to the ancient Egyptians, but also to the Minoans with their terracotta or limestone cases destined to hold the deceased body in crouching position. Genuine sarcophagi appeared in many parts of the Mediterranean region with slightly increasing frequency from the Archaic Age to the 1st century AD, from Phoenicia, ancient Greece, Asia Minor and Etruria. Around 110–120 AD, in the Roman world sarcophagus production began in its earnest as cremation gave way to interment, continuing into the early part of the 4th century AD. Registered by the thousands throughout the Roman Empire, the sarcophagus was one of the preferred funerary expressions of the 2nd and 3rd centuries AD¹⁵.

But the question still remains, were the sarcophagi sepulchers or monuments? By definition, they were both, protecting at the same time the deceased's remains and his memory. The jurist Marcianus sheds some light into this matter, when talking about an edict passed by the Divine Brothers Marcus Aurelius and Lucius Verus concerning the lawful interment of a body, stating that it is considered that a corpse has been buried when placed inside a sarcophagus, with the condition that it shall not be moved or removed from its place, unless special circumstances ask, and in that case the sarcophagus with the body within can be located in another place¹⁶. In

¹² Florentius, *Dig.*, XI, 7, 42: "*Monumentum generaliter res est memoriae causa in posterum prodita: in qua si corpus vel reliquiae inferantur, fiet sepulchrum, si vero nihil eorum inferatur, erit monumentum memoriae causa factum, quod graeci kenotafion appellant.*" ("In general, a monument is something left as a memorial for posterity; if a corpse or remains are placed in it, it becomes a tomb; otherwise, it is a memorial monument, which the Greeks call a cenotaph.", trans. by Watson 1998, vol. I, 11, 7, 42).

¹³ Ulpianus, *Dig.*, XI, 7, 6, 1: "*Si adhuc monumentum purum est, poterit quis hoc et vendere et donare. si cenotaphium fit, posse hoc venire dicendum est: nec enim esse hoc religiosum divi fratres rescripserunt.*" ("If a tomb is still ordinary ground, it can be sold or given away. If a cenotaph is built, one should rule that it can be sold; for a rescript of the deified brothers says that a cenotaph is not religious.", trans. by Watson 1998, vol. I, 11, 7, 6, 1).

¹⁴ Thomas 2004, p. 45.

¹⁵ Cancik/Schneider/Salazar 2008, col. 968–979.

¹⁶ Marcianus, *Dig.*, XI, 7, 39: "*Divi fratres edicto admonuerunt, ne iustae sepulturae traditum, id est terra conditum corpus inquietetur: videtur autem terra conditum et si in arcula conditum hoc animo sit, ut non alibi transferatur. sed arculam ipsam, si res exigat, in locum commodiorem licere transferre non est denegandum.*" ("The deified brothers issued an edict warning that a corpse which has received a lawful burial, that is, which has been interred, is not to be disturbed. A corpse is deemed to have been interred if it has been put in a sarcophagus with the intension that it should not be removed from it and transferred elsewhere. But there is no reason to deny that if circumstances demand, the sarcophagus itself may be transferred to a more suitable place.", trans. by Watson 1998, vol. I, 11, 7, 39).

other words, before interment, a sarcophagus is a *monumentum*, an object which can be freely sold and subjected to civil law, but after a body has been placed inside it, it is considered that the corpse has been interred, thus the sarcophagus becomes a *sepulchrum*, subjected to pontifical law, and the removal of the deceased from within is considered *violatio sepulchri*.

In his *Opinions*, the ancient jurist Julius Paulus, in the section referring to tombs and mourning, defines and explains in conformity with the laws that were effective at the time what was considered to be *violatio sepulchri*: the profanation of a sepulchre, removing any object from its interior¹⁷, breaking and opening the tomb with the purpose of interring a foreign corpse in it¹⁸ and the violations of the remains already interred, by stripping and exposing them to the rays of the sun¹⁹. Moreover, damages made on a funerary monument by erasing the inscription, overturning statuary elements or removing constructive parts are also considered to be violations of the sepulchre²⁰.

The penalties destined for those guilty of *violatio sepulchri* are clearly defined in the mentioned work of Julius Paulus, penalties granted in accordance with the social status of the accused, such as exile of an island for those of high rank (*honestiores*), while the lower rank (*humiliores*) was destined to forced labour in mines²¹. On the other hand, Ulpianus, referring to a rescript belonging to emperor Severus, adds the capital punishment for those guilty of tomb violation while armed (brigands), as opposed to those who plunder unarmed (simple theft), in the latter case the maximum penalty being work in the mines²².

Nevertheless, these sentences of penal nature are not the only course of action against *violatio sepulchri*. Macer clearly states that a pecuniary action against those guilty of tomb profanation is allowed²³, as a direct result of the large scope of the civil law that converges into pontifical matters, where the sums to be paid and the courses of action were settled by the local authorities in accordance with tomb owners²⁴.

¹⁷ Paul, I, 21, 5: “*Qui sepulchrum violaverint aut de sepulchro aliquid sustulerint, pro personarum qualitate aut in metallum dantur aut in insulam deportantur.*” (“Anyone who violates a tomb, or removes anything from it, shall either be sentenced to the mines, or deported to an island, according to his rank.”, English translation by Scott 1932, vol. I, p. 266).

¹⁸ Paul., I, 21, 6: “*Qui sepulchrum alienum effregerit vel aperuerit eoque mortuum suum alienumve intulerit, sepulchrum violasse videtur.*” (“Anyone who breaks or opens a sepulchre belonging to another, and places therein the body of a member of his own family, or that of a stranger, is considered to have violated the sepulchre.”, trans. by Scott 1932, vol. I, p. 266).

¹⁹ Paul, I, 21, 4: “*Qui corpus perpetuae sepulturae traditum vel ad tempus alicui loco commendatum nudaverit et solis radiis ostenderit, piaculum committit: atque ideo, si honestior sit, in insulam, si humilior in metallum dari solet.*” (“Anyone who strips a body permanently buried, or which has been deposited temporarily in some place, and exposes it to the rays of the sun, commits a crime, and therefore, if he is of superior station he is usually sentenced to deportation to an island, and if he is of inferior rank, he is condemned to the mines.”, trans. by Scott 1932, vol. I, p. 266).

²⁰ Paul, I, 21, 8: “*Qui monumento inscriptos titulos eraserit vel statuam everterit vel quid ex eodem traxerit, lapidem columnamve sustulerit, sepulchrum violasse videtur.*” (“Anyone who erases an inscription on a monument, or overturns a statue, or takes anything away which belongs to it, or removes a stone or a column therefrom, is considered to have violated the sepulchre.”, trans. by Scott 1932, vol. I, p. 266).

²¹ See note 19.

²² Dig., XLVII, 12, 3, 7: “*Adversus eos, qui cadavera spoliant, praesides severius intervenire, maxime si manu armata adgrediantur, ut, si armati more latronum id egerint, etiam capite plectantur, ut divus severus rescipsit, si sine armis, usque ad poenam metalli procedunt.*” (“As the deified Severus ruled in a rescript, provincial governors are to take severe action against those who despoil corpses, especially if they do so with armed force; if, in the manner of brigands, they do such things armed, they suffer the death penalty; if without arms, they are sentenced to the mines.”, trans. by Watson 1998, vol. IV, p. 300).

²³ Dig., XLVII, 12, 9: “*De sepulchro violato actio quoque pecuniaria datur.*” (“In respect of a violated tomb, an action for pecuniary damages is also given.”, trans. by Watson 1998, vol. IV, p. 301).

²⁴ Regarding tomb violation and its penalties see De Visscher 1963, p. 103–127 and p. 139–158, Sassu, Radulova 2014, p. 64–72, Rebillard 2009, p. 58–87.

Such situations are most evident in ancient Thessaloniki, from which come some epigraphic examples relevant to our present discussion²⁵. With 290 mostly local produced sarcophagi²⁶, Thessaloniki has an impressive number of recorded pecuniary penalties destined for those daring to desecrate sarcophagi, with approximately fifty cases stretching from the second half of the 2nd century to the end of the 3rd century AD, with various sums of money demanded, calculated, probably, in accordance to the value of the funerary monument employed and the Empire's inflation. These pecuniary actions, on a symbolic level, were not issued only to deter possible perpetrators but also to highlight the family's social and political status in their community on a local level²⁷.

Nevertheless there are some Thessalonian examples that prove that sometimes there is a difference between theory and reality, that there are some cases where people don't follow the letter of the law. Some local produced sarcophagi present on their fronts traces that the original epitaph has been erased by the latter owner, who orders for his own funerary inscription to be carved on it. This may be a sign of a funerary monument being used as a *sepulchrum* and changing its original owner at a certain time in the future.

One such example is a sarcophagus dating from the second half of the 3rd century AD²⁸. On its front there is a Greek epitaph, threatening whoever buries another in it with a fine of no more than 50.000 denarii. The traces of the first inscription that was erased to make way for the new one are easily identifiable (Fig. 2, a and b).

Another relevant example is the sarcophagus belonging to the Edessan Aurelius Lysmachus, whose wife Aurelia Epixeni has bought this monument after the death of her husband, destined to house the bodies of the whole family²⁹. The fine for opening this sarcophagus was fixed at no less than 500.000 denarii, a clear sign of the inflation that swept the Empire in the second half of the 3rd century AD (Fig. 3, a and b).

A most interesting example is the fragmented sarcophagus that was also bought by a wife for her deceased husband, to be used by the family, this time threatening the perpetrators that would dare to open the tomb with an action in court (ὑφέξει), dating from the first half of the 3rd century AD³⁰. The interesting aspect is that the original epitaph, at least the last line, is still visible today, not being properly hammered off in antiquity, stating another threat for those who will dare open the sarcophagi, obliged to pay a sum to “the most holy”³¹ (Fig. 1).

These three examples can be interpreted in three ways. The first theory is that the original owners were either not alive anymore or moved on in another city, so the tomb was left behind without anyone to protect it, thus being subjected to the possibility to become *res nullius* (an object without owner, which cannot be subjected to any right, religious or profane)³² and be again put on the market for sale. A second theory is linked to the possibility that we are looking at a transfer of *ius sepulchri*, the right of interment granted by the original owner, which he can grant by will to anyone he chooses³³. A third more drastic and maybe improbable theory implies that both the original and the secondary owner did not follow the law and that these threats are in fact empty and employed just to highlight the value of the monument. Also a not very

²⁵ See Stefanidou-Tiveriou 2012, p. 122–137.

²⁶ Stefanidou-Tiveriou 2010, p. 151.

²⁷ Nigdelis 2006, p. 401–405, Nigdelis 2012, p. 138–151.

²⁸ MΘ 5695, Adam-Veleni, Terzopoulou 2012, no. 56., p. 282.

²⁹ MΘ 8168, Nigdelis 2006, no. 14, p. 399–405, pl. 97 (p. 637).

³⁰ SEG 24, 1969, 569, Nigdelis 2006, no. 11, p. 387–390, pl. 94 (p. 634).

³¹ Original epitaph, now hammered out: [τι]ς· ἔτερος / το[λμήση ἀνὸ]ξε! δῶσ[ει], ἱερωτά[τω], Nigdelis 2006, p. 387.

³² Crook 1967, p. 133.

³³ See De Visscher 1963, p. 60 ff.

possible but nonetheless probable theory is that the sarcophagi in question were prepared for certain clients that were not pleased with the product, thus refusing to buy it, determining the manufacturer to erase the initial inscription and resell the product to another prospecting client.

Nevertheless, these literary and epigraphic examples insinuate that there is always a conflict between theory and practice, between the written law, applicable throughout the entire Roman world, and the actions of people, who rely on their own customs first, laws with local characteristics. And furthermore, this issue discussed here is another example that fuels the complexity not only of the law but also of the actions made by man to ensure that his memory will forever survive his generation.

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REGARDING THE LEGAL STATUS OF SARCOPHAGI IN ROMAN LAW
(Abstract)

Enjoying a wide popularity in the Roman world, especially in the 2nd and 3rd centuries A.D., the sarcophagi can be placed conceptually between sepulchres and funerary monuments. A thorough analysis on the ancient legal texts on the one hand, and of relevant epigraphic sources, on the other, will prove to be a basis for an attempt to clarify the legal status of these emblematic monuments, as they were seen by the ancient Romans. Not only have that, but epitaphs sometimes stood proof that there might be a notable difference between theory (the written law) and practice.

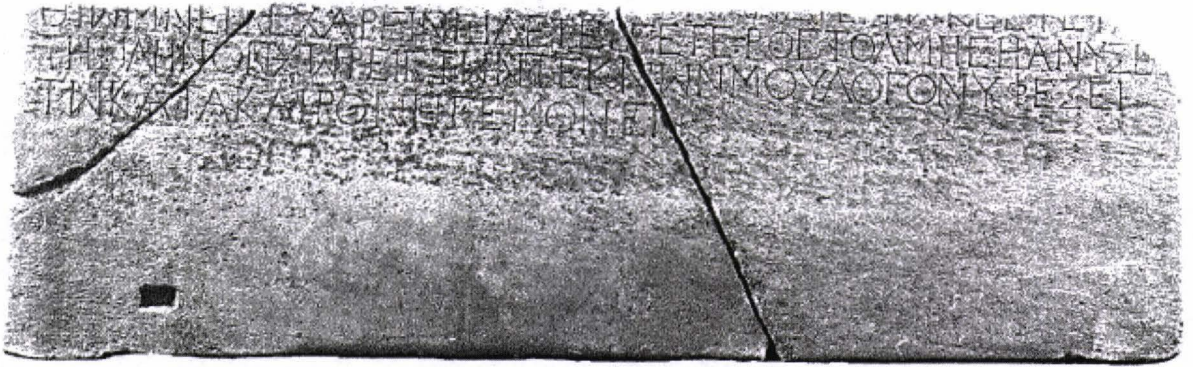


Fig. 1. Fragmented sarcophagus bought by a wife for her deceased husband, threatening possible perpetrators with an action in court (*ὑφ᾽ἐξεί*), dated at the end of the 3rd century AD, Thessalonika



Fig. 2. a. Sarcophagus dating from the second half of the 3rd century AD, Thessalonika

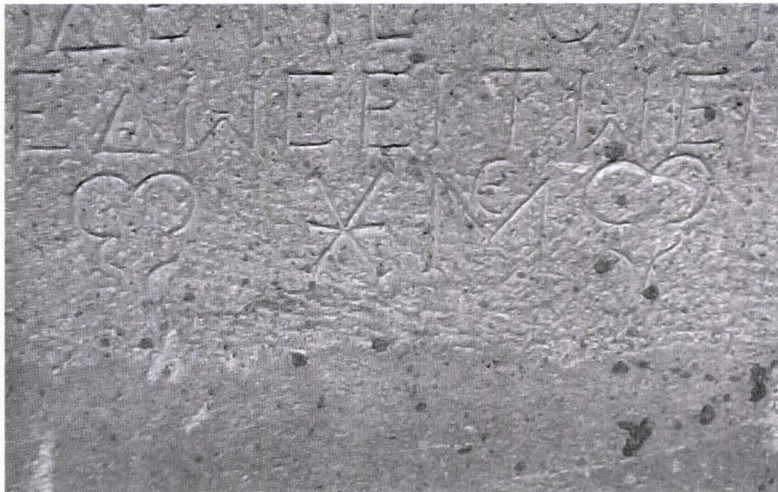


Fig. 2. b. Detail



Fig. 3. a. A “second-hand grave” – the sarcophagus of Aurelia Epixene for her husband, second half of the 3rd century AD, Thessalonika

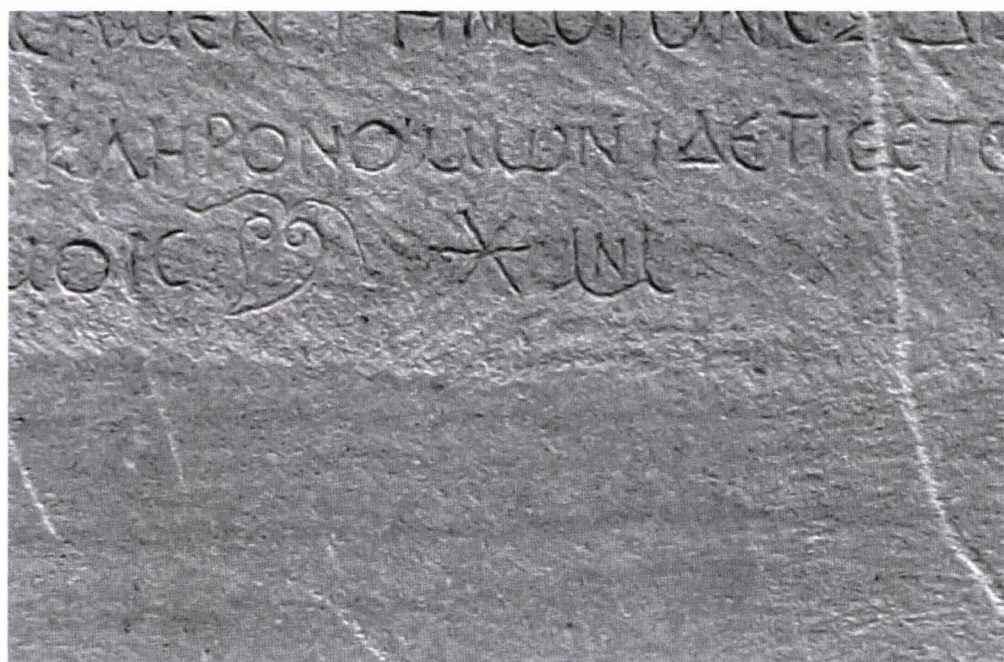


Fig. 3. b. Detail