

**TOWARDS A PALINGENETIC STUDY OF BAS. 60,3**  
**The contribution of the Byzantine ἵνδικες\***  
**Part I\*\***

**1. A premise. Textual comparisons between D. 9,2 and Bas. 60,3 as a first study towards a palingenesis of Byzantine jurisprudence. Problems and perspectives.**

An essay about textual comparisons shows aspects of practical difficulty together with some uncertainty about the outcomes that can be obtained. If, from one side, it is easy to verify coincidences and divergences between texts, from another side the difficulty stays in the risk to find only, so to say, 'some' coincidences, so that we cannot be certain to find 'everything in the fragment', *i.e.* to propose constant answers with a basically general value.

Besides, the investigation that I am here to pursue refers to the title of the Digest concerning the *lex Aquilia*:<sup>1</sup> the reason for such choice is that my present interests are

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\* I would like to dedicate these pages, with an authentic as well as a deep affection, to Professor Filippo Gallo, who, in 1997, received me with great kindness into Turin's 'romanistic school'. Many are the reasons for my gratitude: I will only recall the esteem and the affection that He always showed to me. Now that He entered his ninetieth year of age, I reckon this is the most convenient circumstance to show 'publicly' my feelings to a Man who taught me much, with a lively and contagious passion, as a demonstration of the *ars boni et aequi*.

\*\* It should be noted that the present contribution constitutes the first part of a longer study which for reasons of space could not be published here in its entirety. The complete study will be published elsewhere, in Italian, as a monograph in its own right. In order to maintain consistency of style in Dr. Miglietta's two parts, we have refrained from editorial interventions in the part published here, other than its lay out in accordance with the template of the *Subseciva Groningana*.

1 In the Digest such issue fills the whole of Title 9.2, which is of «stampo eminentemente privatistico» (as Cerami said) and which, I would add, concerns the defence of *dominium*. In the *libri Basilicorum*, the issue fills the title 3 of the LXth and last book about delictal (*furtum*, robbery and *iniuria*) and criminal law: see Heimbach, *Prolegomena*, 44, and, for what concerns the structure of the Digest, P. Cerami, 'La responsabilità extracontrattuale dalla Compilazione di Giustiniano ad Ugo Grozio', in: L. Vacca [cur.], *La responsabilità civile da atto illecito nella prospettiva storico-comparatistica*, I *Congr. Aristec. Madrid*, 7-10 ottobre 1993, Torino 1995. Besides, the system order adopted in the Basilica influenced the following juridical Byzantine sources, and it still finds place in the text-book of Constantin Harmenopoulos, that represented the normative *corpus* in Grecia till the enforcement of

focused on the study of the well-known plebiscite in reference with the Byzantine sources.<sup>2</sup> This essay is, therefore, ‘functional’ to another.

This sort of ‘first experiment’, though, means to start to explore the boundless field of the Byzantine works commenting the *Corpus iuris civilis*: by such exploration, trying to verify if we can carry on some form of systematic reconstruction of the reflections elaborated by relevant jurists as Dorotheus,<sup>3</sup> Cyrillus,<sup>4</sup> Theodorus,<sup>5</sup> Thalelaius<sup>6</sup> and the

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the civil code (that was modelled on the German civil code): cf. Harmen., *Hexáb.* VI (whose title 1st regards the *lex Aquilia* and the *actio de pauperie*; whose titles IIInd-IVth regard criminal law about adultery, concubinage and incest; whose title Vth gets back to delictal law – *de furtis*; and whose titles VIth-XVth return to criminal matters – opening with homicide). It is to be remarked that, in the Italian law system, theft, robbery and *iniuria* – differently from *damnum iniuria datum* – are included within the limits of ‘penal’ (i.e. criminal) law, while only extracontractual (i.e. aquilian) liability had been kept – because of the aspect of ‘*culpa*’ in a strict meaning – inside the civil system, by such reflecting the model of the Digest. We can add that, in the same book IXth of the *Digesta*, there is also mention of such issues as: damages caused by animals (D. 9.1 - *actio de pauperie*), now mentioned, for what concerns Italian legislation, in art. 2052 cod. civ.; as throwing and pouring, respectively, of objects and liquids on the public way (D. 9.3 - *de his qui effuderint vel deiecerint*); and as *noxales actiones*, i.e. liability of a third party – sons and subordinates (D. 9.4), a matter that is now mentioned and disciplined by artt. 2043 and following (2048-2049, 2053) of the Italian cod. civ. The IXth book of *Pandectae*, besides, is set between the book VIIIth, that regards servitudes, and the Xth, which contains the jurisprudential reflections on the *actio finium regundorum* (D. 10.1), on the *actio familiae erciscundae* (D. 10.2), on the *actio communi dividundo* (D. 10.3) and, finally, on the *actio ad exhibendum* (D. 10.4). These are matters that maintained their ‘traditional’ location inside civil law. And, as Cerami observed, *ibid.*, 104, «*il damnum iniuria datum è inserito [...] nella parte de iudiciis, di stampo eminentemente privatistico e, precisamente, fra azioni reali (libro 7) ed azioni divisorie (libro 10)*». Cf. also O. Lenel, *Edictum Perpetuum*<sup>3</sup>, Leipzig 1927, xviii.

2 Cf. M. Miglietta, ‘Reflexiones en torno al título III, libro IV, de la Paráfrasis de Teófilo en materia de daño extracontractual – «lex Aquilia de damno iniuria dato» –’, *SCDR XXIII-XXIV* (2010-2011) 347-364 (347-348), for a general survey on the issue.

3 Quoted by Stephanus (see *infra*, nn. 8 and 18) as ‘blessed’ because of his recent death: Heimbach, *Prolegomena*, 12 and n. 12.

4 This is, as it is widely known by scholars, the second jurist known by such name (Heimbach, *Prolegomena*, 16, 56ss.). Together with Stephanus, he was called – expressly – as ὁ ἰνδικευτῆς (cf. the *adespotum* anonymous Sch. 7 ad Bas. 22.5.31 [BS 1457/-26 = Sch. 2, Hb. II, 558]: Ἐπὶ τούτου τοῦ ῥήματος ἡ ἐναντιοφάνεια τῶν ἰνδικευτῶν δηλοῦται τοῦ τε Κυρίλλου καὶ τοῦ Στεφάνου: ... κλπ.). The more ancient Cyrillos was the venerated master of the Vth century, called ἥρωος (or even ὁ κοινὸς τῆς οἰκουμένης διδάσκαλος: cf. Heimbach, *Prolegomena*, 9 and nn. 9-11, and see, respectively, Sch. 54 ad Bas. 18.5[.9] [*Steph. ad l. 9 §. 7*] *Suppl. Bas.* Hb. 211, and Sch. 1 ad Bas. 11.1.67 [BS 314/17 = Hb. I, 646], which is probably a παραγραφή di Taleleo): cf. J.-A.-B. Mortreuil, *Histoire du droit byzantin ou du droit romain dans l’empire d’Orient*, 1, Paris 1843, 137-138, 258-259, 301-302; P. Collinet, *Histoire de l’école de Beyrouth*, Paris 1925, 131-132, 275-276, and A. Schminck, ‘Cyril’, *ODB*, I, 573.

5 Heimbach, *Prolegomena*, 17: he was a scholar of the ‘Justinian’ Stephanus (Heimbach, *Prolegomena*, 11).

6 Cf. Heimbach, *Prolegomena*, 13; G. Gorla, ‘Il giurista nell’impero romano d’Oriente (da Giustiniano agli inizi del secolo XI)’, *FM XI* (2005), 147-211 (156-157 nn. 26-27).

Anonymous<sup>7</sup> – we are citing here only those identified by Heimbach with reference to Bas. 60.3 – and Stephen (whose presence – according to the remarkable and recent studies of de Jong – could be identified by the concise reference to his translation of the *Digesta*: ὁ Ἰνδιξ).<sup>8</sup>

But, to face the demanding palingenetic reconstruction of the works of the Byzantine jurists, we need to ask ourselves a further question about the same legitimacy – even before asking if such reconstruction can be done – of such ambitious project. An immediate answer could be uncertain, firstly because not all the manuscripts are published. Besides, there is no doubt that such investigation requires complex competences which cannot be found in only one scholar. Nonetheless, the objective difficulties that I have mentioned cannot ‘switch off’ the ‘needing feeling’ of a *corpus*, at least a conjectural *corpus*, of Byzantine jurisprudence: by such, we could begin to work ‘also’ on the intuition of Salvatore Riccobono – intuition which, though lately set apart and though still to be confirmed by evidence, can be shared as a matter of principle – about the possibility that the Byzantine comments can enlight Roman law science not only for what concerns the law applied in the Eastern Empire, but also for what concerns the same Roman classical law, because the Byzantine works could recall – at least in some parts – the texts of the Roman jurists in a version that could be nearer to the original one,

7 The texts of the Anonymous, because of their peculiarities, require a special investigation, which will be the subject of another study. Cf. Heimbach, Prolegomena, 15-16: the name of the Anonymous probably recalls both a jurist of the age of Justinian, author of the text that would be used as a base for the elaboration of *libri Basilicorum*, and a more recent jurist, to whose work we owe the comments from which the *scholia* were deriving. Between the many studies: K.E. Zachariä von Lingenthal, ‘Über den Verfasser und die Quellen des (Pseudo-Photianischen) Nomokanon in XIV Titeln’, *MPb XXXII* (1885), 1-41 (8-11) = Id., *Kleine Schriften zur römischen und byzantinischen Rechtsgeschichte*, 2, Leipzig 1973, 145-185 (152-155); F. Pringsheim, ‘Enantiophanes’, *Seminar IV* (1946), 21-44 = *BIDR LV-LVI* (1951), 302-322 = Id., *Gesammelte Schriften*, 1, Heidelberg 1961, 455-470; H.J. Scheltema, ‘Das Kommentarverbot Justinians’, *TRG XLV* (1977), 307-332 = Id., *Opera minora ad iuris historiam pertinentia*, Groningen 2004, 403-428; N. van der Wal, ‘Die Juristennamen in der Digestensumma des Anonymus’, *TRG XLVI* (1978), 147-150; Id., ‘Wer war der ‘Enantiophanes’?’, *TRG XLVIII* (1980), 125-136; B.H. Stolte, ‘The Digest Summa of the Anonymus and the Collectio Digestensumma Tripertita, or the Case of the Elusive Anonymi’, *SG II* (1985), 47-58; L. Burgmann, ‘Neue Zeugnisse der Digestensumma des Anonymos’, *FM VII*, 101-116 (with book references) and A. Schminck, ‘Anonymus, “Enantiophanes”’, *ODB I*, 107-108.

8 Cf. Scheltema, *L’enseignement de droit* (note 7 above), 24 = Id., *Opera minora* (note 7 above), 75; Id., ‘De antiquae iurisprudentiae reliquiis in libris Byzantinis oblectamentum’, *TRG XVII* (1941), 412-456 (416 n. 4) = Id., *Opera minora* (note 7 above), 203-232 (206 n. 4); H. de Jong, *Stephanus en zijn Digestenonderwijs*, Amsterdam 2008, 25: «de index van Cyrillus heet ὁ Κυρίλλος, de index van Stephanus ὁ Ἰνδιξ». As for what concerns the ‘Stephanos’ author of the Ἰνδιξ, this is the second jurist known under such name: Heimbach, Prolegomena, 13-15.

if compared to the version that Justinian's compilers saved.<sup>9</sup> For these reasons, I accepted the suggestion of my friend Giuseppe Falcone about putting neatly on paper part of the results of my work, which has been born with 'filing' the *σχόλια* referred to Bas. 60.3: a preparatory work that (though it appears, partly and by its own nature, somehow mechanical) seems to be, in any case, functional to wider researches about the study of the contents of the νόμος τοῦ Ἀκουιλίου περὶ ζημίας.<sup>10</sup>

## 2. Byzantine jurists who commented Bas. 60.3.

As for what concerns Bas. 60.3, a relevant number of jurists emerges, the names being recalled, sometimes even explicitly, of Dorotheus, Cyrillus and Stephanus, for the *indikes* to the Digest (D. 9.2) – and Theodorus and Thalelaius, for what concerns the version of the *Codex* (C. 35.5)<sup>11</sup> – the Anonymous, the Enantiophanes and, lastly, Johannes Xiphilinus (nomophylax), though this is mentioned only in two occurrences.<sup>12</sup>

For what concerns Dorotheus – jurists and compiler of the Justinian age,<sup>13</sup> known, as well as Theophilus,<sup>14</sup> as ὁ μακαρίτης,<sup>15</sup> whose *excerpta*, together with those of Cyrillus

9 S. Riccobono, 'Tracce di diritto romano classico nelle collezioni giuridiche bizantine', *BIDR* XVIII (1906), 197ff.; Id., 'Il valore delle collezioni giuridiche bizantine per lo studio critico del 'Corpus iuris civilis'', in: *Mélanges Fitting*, 2, Montpellier 1908, 463-497 = Id., *Scritti di diritto romano*, I. *Studi sulle fonti*, Palermo 1957, 367-392, and the fundamental V. Arangio-Ruiz, 'La compilazione giustinianea e i suoi commentatori bizantini (da Ferrini a noi)', in: *Scritti di diritto romano in on. C. Ferrini*, Milano 1946, 83-117 = Id., *Scritti di diritto romano*, 4, Napoli 1977, 1-37. Also: S. Riccobono, *Sull'importanza delle compilazioni giuridiche bizantine per l'indagine storico-critica*, Napoli 1946; V. Giuffrè, 'Scolii', *NNDI* XVI, Torino 1969, 765-774 (773-774), and now F. Goria, 'Contardo Ferrini and il diritto bizantino', in: D. Mantovani [ed.], *Contardo Ferrini nel I centenario della morte. Fede, vita universitaria e studio dei diritti antichi alla fine del XIX secolo*, Milano 2003, 111-128 (113 n. 5, 124 and n. 45): author who expresses his thought with a balanced critical caution. We cannot exclude – at least as a matter of hypothesis – that the text that sometimes seems to be, when we translate it, an explication of a Byzantine jurist, can derive, at least in part, from the use of a text that was different from the one that was edited by the Compilers and that came to us through their work. By this, we do not mean to assert that every variation and, mostly, every 'original' contribution in the *indikes* is the mirror of a more complete text, but the question is still open.

10 About the different literary genres of comment to the *corpus iuris civilis* see Heimbach, *Prolegomena*, 19-20; Scheltema, *L'enseignement de droit des antécédents*, Leiden 1970, passim = Id., *Opera minora* (note 7 above), 58-110 passim; Pieler, *Rechtsliteratur*, passim; Goria, 'Il giurista nell'impero romano d'Oriente' (note 6 above), 156; Sp. Troianos, *Oi πηγές του βυζαντινού δικαίου*<sup>3</sup>, Athena 2011, 104-108 (with many book references); G. Matino, *Lex et scientia iuris. Aspetti della letteratura giuridica in lingua greca*, Napoli 2012, 101-102; J. Signes, 'El léxico jurídico grieco desde Justiniano hasta hoy', *SCDR* XXVI (2013), 87.

11 Such texts will be the object of a different study.

12 Cf. Sch. 19\* ad Bas. 60.3.15 [BS 3110/31 = Sch. 8\*, III cpv., Hb. V, 279] and Sch. 10 ad Bas. 60.3.27 [BS 3122/28 = Sch. 13, Hb. V, 288-289].

13 See *supra*, n. 3.

and Stephanus, could be<sup>16</sup> the main issue of this work – the *punctum dolens* derives properly from the divergences of opinions among scholars whenever to attribute the *scholia adespota* of Bas. 60.3 to the same *antecessor*, and whenever the *scholia* – if such attribution should be accepted – could be considered as belonging to the genre of the ἴνδικες. Recently, scholars have doubted that Dorotheus composed a work of such nature. According to Zachariä von Lingenthal,<sup>17</sup> the comments to Bas. 60.3, in which the name of a jurist is not expressly mentioned,<sup>18</sup> should be preferably considered, for the biggest part, as belonging to the work of Stephanus.<sup>19</sup> On the contrary, Heimbach wrote: «Non nego, Stephanum etiam ad hunc Digestorum titulum indicem et adnotationes scripsisse, sed ex indole indicis, qui brevior esse solet, quam index Stephani, malim Dorotheum auctorem

14 Cf., e.g., Sch. 8 ad Bas. 23.1.31.1 [BS 1555/31 = Sch. 5, Hb. II, 625] and Sch. 27 ad Bas. *eod.* [BS 1558/28 = Sch. 15, Hb. II, 626-627], of Stephanus.

15 See *supra*, n. 3.

16 See under § 2.

17 C.E. Zachariä von Lingenthal, review of J.-A.-B. Montreuil, *Histoire du droit Byzantin* (note 4 above), *Kritische Jahrbücher für deutsche Rechtswissenschaft* VIII (1844), 825. Besides, the texts that are directly attributed to Stephanus (see the following note) do not seem to coincide, not by their language nor by their contents, with those attributed by Heimbach to Dorotheus: cf., in particular, under § 4, ‘Appendices’, I and III, ad D. 9.2.11.2 (a text which is present in both the Byzantine versions), and also ad D. 9.2.15 pr. (Steph.), though this text fills the missing part in the section belonging to the pseudo-Dorotheus.

18 This seems to me the solution that should be given to the ‘tables’ compiled by the eminent Byzantine law scholar: cf. Zachariä von Lingenthal, review (note 17 above), 825 (*ad* Bas. 60.3: «Steph. Cyr. Anon.»).

19 Actually, not much of the opinions of Stephanus about Bas. 60.3 ‘*ad legem Aquiliam*’ had been directly saved. Beyond the texts collected by De Jong, *Stephanus* (note 8 above), 116-117 and n. 315 (cf. ‘Lexicon’ a *Hexäbiblos aucta* [Cod. Par. 1355] D.61,1-11 [= M.Th. Fögen, ed., *FM* 10, 170], which seems to refer to D. 9.2.5.1 – and cf. Bas. 60.3.8 [= BS 3099/13], for the linguistic echoes), see, in small part, Sch. 1-2 ad Bas. 60.3.15 [BS 3108/23, 25 = Sch. 1, Hb. V, 277-278]: [...] Οὐλιπιανός καὶ Στέφανος φασὶ τοῦτο πρὸς ἀκρίβειας εἰρησθαι (De Jong, *Stephanus* [note 8 above], 17, and also 136; Heimbach, *Manuale*, 243 n. u, correctly affirms: «In Sch. Ἐπειδὴ Anonymus laudat Stephanum ad L. 15. pr D. IX. 2 eiusque sententiam vituperat»), but it is to be remarked that the Anonymous probably recalls Stephanus also in Sch. 3 ad Bas. 60.3.16 [BS 3111/21 = Sch. 2 cpv., Hb. V, 278-279]: see the mention of this point in De Jong, *Stephanus* (note 8 above), 354; Sch. 1 ad Bas. 60.3.42 [BS 3154/13 = Hb. V, 313], a text which, implicitly, is also taken into consideration in the essay of De Jong (cf. 354; see beyond, n. 309); Sch. 13\* ad Bas. 60.3.43 [BS 3156/14 = Sch. 7, Hb. V, 314] (cf. De Jong, *Stephanus* [note 8 above], 25, and n. 98, where it is specified that «De index van Cyrillus heet ὁ Κυρίλλος, de index van Stephanus ὁ Ἰνδιεξ»); Sch. 13 ad Bas. 60.3.45 [BS 3157/21 = Sch. 11, Hb. V, 316] (and cf. De Jong, *Stephanus* [note 8 above], 81 and n. 248); Sch. 1§ ad Bas. 60.3.52 [BS 3164/6 = Sch. 1, Hb. V, 321] (about which see De Jong, *Stephanus* [note 8 above], *loc. cit.*), and Sch. 4 ad Bas. 60.3.60 [BS 3167/31 = Hb. V, 324]: Ζήτει βιβ. κβ’ ττ. ε’ κεφ. λ’ καὶ θ’ θεμ. γ’ καὶ τὴν ἐν αὐτῷ τοῦ Στεφάνου παραγραφὴν περὶ τὰ τέλη. This last *scholium* – an *adnotatio* (cf. also De Jong, *Stephanus* [note 8 above], 354) – concerns C. 3.35.4.

eius habere»,<sup>20</sup> though a clue that could corroborate the solution proposed by Heimbach is in the fact that, as the same Heimbach remarked, «indicem Dorothei in Basilicorum scholiis ad tit. 2. lib. IX. Dig. excerptum fuisse, docent plurima eius fragmenta, inprimis ad L. 27. h. t. Dorothei nomine insignita».<sup>21</sup>

The second problem could be seen in the fact that, as the same Zachariä remarked «in *lib. 60 Bas.* sind die Scholien stark überarbeitet und interpolirt».<sup>22</sup> Actually, such opinion, which cannot be denied in a general sense, can be partially reconsidered for what concerns the texts that we are here examining, as we will try to demonstrate through the textual comparisons with the original fragments of D. 9.2.<sup>23</sup>

20 Heimbach, *Manuale*, 242 n. s. Such opinion of Heimbach does not assume, though, that the text of this jurist consists, in any case, in a verbatim translation of the texts of the Digest. As F. Brandsma, *Dorotheus and his Digest translation*, Groningen 1996, 278 ff., had correctly concluded: «the Dorotheus translation does produce a coherent Greek text; it is not a wordlist to the Digest; it does not render the original word for word, but tries to give a translation that may be independently consulted and is therefore clear in itself» (278). About the problem of the attribution of the texts and on the same writing of a ῥῶδιξ by the Byzantine jurist, see also the remarks in M. Miglietta, 'Il terzo capo della lex Aquilia è, ora, il secondo', *AUPA LV* (2012), 412-413 n. 23 (with book references).

21 Cf. *loc. cit.* This is Sch. 126\* ad Bas. 60.3.27 [BS 3133/24 = Sch. 40, Hb. V, 292]; Sch. 128\* [BS 3134/1 = Sch. 58\*, Hb. V, 293]; Sch. 132\* [BS 3135/3 = Sch. 69\*, Hb. V, 295]; Sch. 133\* [BS 3135/7 = Sch. 74\*, Hb. V, 296] (about the necessity to 'reduce' the text, as Heimbach, *Prolegomena*, 37 ad h.l. (nr. 6) proposed, to the only Sch. 133\* = Sch. 74\* [Hb.], cf. Brandsma, *Dorotheus* [note 20 above], 52 n. 38); Sch. 140\* [BS 3136/3 = Sch. 94\*, Hb. V, 298]; Sch. 146\* [BS 3136/30 = Sch. 110\*, Hb. V, 299]; Sch. 4\* ad Bas. 60.3.28 [BS 3138/18 = Sch. 1\*, Hb. V, 301]; Sch. 24\* [BS 3143/6 = Sch. 16\*, Hb. V, 304]; Sch. 25\* [BS 3143/13 = Sch. 18\*, Hb. V, 304]; Sch. 10\* [BS 3145/3 = Sch. 1\*, Hb. V, 306]; Sch. 12\* [BS 3145/19 = Sch. 6\*, Hb. V, 306]; Sch. 1 [BS 3146/2 = Hb. V, 306-307] (the *scholium* is expressly classified by Heimbach, *Prolegomena*, 39 (nr. 14) as a self-standing text, differently from Brandsma, *Dorotheus* [note 20 above], 58-59, who connects it to the previous *scholium* (nr. 13), for reasons of stylistic coincidence; such formal choice, though, does not change the authorship of the text as ascribed to Dorotheus); Sch. 1\* [BS 3147/14 = Sch. 1\*, Hb. V, 307-308]: cf. Heimbach, *Prolegomena*, 37-39, and now Brandsma, *Dorotheus* (note 20 above), 48 ff. (for what concerns the texts referring to D. 9.2, the remark of F. Gorla, review of Brandsma, *ibid.*, 508 [and cf. also T. Wallinga, review of Brandsma, *ibid.*, *TRG LXXVI* (1998), 406], that is correct in its substance, cannot be considered, because all the *σχόλια* explicitly attributed to Dorotheus, and individuated by Heimbach, are also considered by Brandsma). It is to be noticed that, in Scheltema's edition, the star «indicat scholia, quae in marginibus manu recentiore scripta sunt» (but this does not mean at all that the text is unreliable, or that it does not non riporti texts belonging to works of ancient jurists); otherwise «§ : hoc signum indicat scholia, quae litteris minutis inter lineas interscripta sunt»: cf. BS II, s.i.p. (*sed XI*) in 'uncini, signa'.

22 Zachariä von Lingenthal, review (note 17 above) 825 n. \*).

23 The reflections (that we are here about to propose) on the content of the fragments will be intended to clarify the object of our investigation, and as a demonstration of the fact that the study of the Byzantine jurisprudence is not an end to itself, but can be useful for a better knowledge of classical Roman law and of its 'practical applications': cf. M. Miglietta, 'Riflessioni intorno a Bas. 23.1.31.1: problemi testuali and prospettive di giuristi bizantini', in: L. Garofalo [ed.], *La compravendita e l'interdipendenza delle obbligazioni nel diritto romano*, 2, Padova 2007, 689-738 (692 and n. 3).

3. The title D. 9.2 ‘ad legem Aquiliam’ in the Byzantine ἵνδικες of Cyrillus, Stephanus and of the pseudo-Dorotheus. Correspondences, gaps, fillings, peculiarities.

‘*Prooemium*’<sup>24</sup>

D. 9.2.1, Ulp. 18 ad ed. [P. 612] = Bas. 60.3.1

pr. → Sch. 1<sup>25</sup> [BS 3090/7 = Hb. V, 263]:<sup>26</sup> Πολλῶν πρὸ τούτου νόμων περὶ ζημίας διαγορευόντων ὁ Ἀκουίλιος νόμος μετὰ πάντας τὰ περὶ ζημίας διατυπώσας πάντας ἀνεῖλε τοὺς πρὸ αὐτοῦ περὶ τούτου διαγορεύσαντας, καὶ τὸν δωδεκάδελτον καὶ ἄλλους τινάς, ὧν οὐκ ἀνάγκη νῦν μνημονεῦσαι, ἐπειδὴ ἀνήρηται ...<sup>27</sup>

§ 1. → [BS 3090/10] ... Οὗτος ὁ Ἀκουίλιος πλεβίσκιτόν ἐστιν, οὐχὶ νόμος. Ἀκουίλιος γὰρ ὁ δῆμαρχος ἠρώτησε περὶ τούτου τὸν δῆμον, καὶ οὕτως ὁ Ἀκουίλιος ἐτέθη. Καίτοι εἰ νόμος ἦν, ὑπὸ πατρικίου ἠρωτᾶτο ὁ δῆμος, ὡς ἐν τοῖς Ἰνστιτούτοις ἐμάθομεν ...

24 Such division of the fragments referring to the Aquilian plebiscite can be seen in Lenel, Palingenesia, 2, 522 ff. [Ulp. 18 ad ed.] as completed by M. Miglietta, ‘*Servus dolo occisus*’. *Contributo allo studio del concorso tra ‘actio legis Aquiliae’ e ‘iudicium ex lege Cornelia de sicariis*’, Napoli 2001, 64 ff., n. 145 and ‘Tab. 2’, 77-78 and ‘Tab. 3’ (in particular). The work of Lenel does not mention a title for what concerns D. 9.2.1 [P. Ulp. 612], or, in better words, mentions the ‘general’ title ‘*Ad legem Aquiliam* [E. 77]’, but it does not attribute a particular *thema* to the fragment. This, though, does not belong yet to the *caput primum* of the law – as the German author correctly excludes – but works as a real ‘*prooemium*’ of the whole discourse: Miglietta, *ibid.*, 65 n. 145.

25 In the present essay, the mention of the text of the Basilica, commented by the *σχόλιον*, will be done only when such text is assigned to a different place of the compilation of the Macedonian emperors. On the contrary, if the *σχόλιον* belongs to the text mentioned in the title, the reference is to be considered as implicit: in the present case, therefore, we have not written «Sch. 1 ad Bas. 60.3.1», but only «Sch. 1», followed by the mention of the place where the *scholium* is in the Dutch and German edition respectively.

26 Heimbach, *Manuale*, 242: «DOR. ind.: Πολλῶν ... ἰνστιτούτοις ἐμάθομεν V. 263»: after the annotation «ind[ex].», the annotations of *principium* and of §. 1 are missing (correct reference should be, therefore: DOR. ind. pr. §. 1.: Πολλῶν ... ἰνστιτούτοις ἐμάθομεν V. 263). Cf., besides, Mich. Psell., *Poem.* 8.494-510 (about the comparison with the *scholium* here reported see G. Weis, ‘Die ‘Synopsis legum’ des Michel Psellos’, *FM* II, 179, and M.Th. Fögen, ‘Das Lexikon zur Hexabiblos aucta’, *FM* VIII, 167 [A.110]).

27 From here on, we will use the ellipsis points to mean that the text of the *σχόλιον* goes on with a reference to a following fragment or paragraph of the Digest (or, if the points precede the Greek text, that such text is the continuation of the Byzantine version of a preceding fragment or paragraph).

The first text of title D. 9.2 is commented by a one *scholium* that was attributed by Heimbach to the (presumed) *index* of Dorotheus.<sup>28</sup> – *Pr.* If we compare the two texts, we can note that Ulpian examines the *lex Aquilia* that *derogavit* to the other *leges* that previously disciplined, in a disorganic way, the matter of damage; while the Byzantine text uses the verb ἀνεῖλε, and, at the end, the expression ἐπειδὴ ἀνήρηνται seems to be an added elucidation.<sup>29</sup> – § 1. The inserting of the expression πλεβίσκιτον as *plebiscitum*<sup>30</sup> shows the presence of a transliteration which is typical of the most ancient Byzantine law sources.<sup>31</sup> The remark καὶ οὕτως ὁ Ἀκουίλιος ἐτέθη, but, mostly, the final comment καίτοι εἰ – ἐν τοῖς Ἰνστιτούτοις ἐμάθομεν are interesting: the ‘historical’ elucidation’ – according

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- 28 We must clarify that, from now on, such attributions will be mentioned as belonging to ‘pseudo-Dorotheus’. See *supra*, § 2, about the different opinions, on the matter of attribution, of Zachariā and of Heimbach.
- 29 It belongs to the style of Dorotheus to add up some brief explanations to the (usually correct and faithful) translation of the texts from the Digest, as Brandsma, *Dorotheus* (note 20 above), 46 (*et passim*, in relation to the comments to single texts) seems to have demonstrated. But, in reference to the point at issue, a doubt arise about the real belonging of it to the same Dorotheus, because the presence of educational recommendations seems to exclude that the text belongs to such jurist: cf. Brandsma, *Dorotheus* (note 20 above), 47; G. Falcone, ‘Legum cunabula’ and ‘antiquae fabulae’ (cost. ‘Imperatoriam’ 3), in: C. Russo Ruggeri [ed.], *Studi in on. A. Metro*, 2, Milano 2010, 283 ff. (290 and n. 16, 295 ff., in particular); Miglietta, ‘Il terzo capo della lex Aquilia’ (note 20 above), 412-413 n. 23.
- 30 Such term is not recalled by Stephanus, Th.Gr.L., 7. We must add, though, that, at the beginning, such words were written in Latin letters, that someone subsequently transferred in Greek alphabeth: cf. Brandsma, *Dorotheus* (note 20 above), 285. It is probable, therefore, that the noun we are dealing with was written in the following way: PLEBÍSKITON.
- 31 Cf. also Mich. Psell., *Theol.* 10.117-118: notwithstanding his ‘purist’ intent (see the balanced opinion of O. Mazal, *Manuel d’études Byzantines*, Graz 1988, 123), Psellus could not avoid to use juridical Roman terms – even more in ποίημα VIII (widely quoted in the continuation of this work) – as transliterated in Greek. On the contrary, the translation in Greek of technical Latin terms (so-called ‘exhellenisms’) is a different phenomenon: see, in particular, N. van de Wal, ‘Der Basilikentext und die griechischen Kommentare des sechsten Jahrhunderts’, in: *Syntheseleia Arangio Ruiz*, 2, Napoli 1964, 1158 ff., and Id., ‘Die Schreibweise der dem lateinischen entlehnten Fachworte in der frühbyzantinischen Juristensprache’, *Scriptorium* XXXVII (1983), 38 ff. and 50 ff. (cf., for instance, Plut., *Numa* 13.7: ... ἀλλὰ οὐτέρημ μεμορίαμ, ὅπερ ἐστὶ παλαιὰν μνήμημ – where the Latin expression ‘*veterem memoriam*’ is firstly transliterated in οὐτέρημ μεμορίαμ and, then, exhellenized in παλαιὰν μνήμημ (cf. Stephanus, Th.G.L., 6, 765, Μεμόριον, that is for μνημεῖον). Lastly Sp. Troianos, ‘Römisches Recht und byzantinisches Recht. Juristische Kuriosa bei den ‘Exhellenismoi’’, in: Ch. Papastathis [ed.], *Byzantine Law. Proceedings of the International Symposium of Jurists. Thessaloniki 10-13 December 1998*, Thessaloniki 2001, 15-20, with reference to remarkable translation mistakes (made by some Byzantine jurists, authors of more recent *scholia*) that sometimes show a misunderstanding of the commented texts. Brandsma, *Dorotheus* (note 20 above), 284-285, clearly enlightens how, for instance, an expression as *pro derelicto* was converted in the form προδέλυκτον, with an evident misunderstanding (happened to some scholiast) of the term originally used by Dorotheus – and, as it must be observed, the scholiast was, by such, quite probably deceived by the *sedes materiae* ‘*de publicis iudiciis*’ (Sch. 6\* ad Bas. 60.33.9 [BS 3628/6 = Hb. V, 674]). Cf.

to which, if such rule had been a *lex* and not a *plebiscitum*, it would have required the *rogatio* of the patrician magistrates to the whole *populus*, i.e. in the centuriate assembly, ἐν τοῖς Ἰνστιτούτοις (as the text says) – refers to Inst. 1.2.4 (PT 1.2.4). This comment, which has no correspondence in the *Digesta*; the reference to the *institutiones* and the verb ἐμάθομεν (in the first person plural of the present indicative), and the section καίτοι – ἐμάθομεν have to be considered as remarks of the jurist to the rule that he passed down (and not to be considered as a part of a ἴνδιξ, as, on the contrary, it could be deduced by the syntethic remark of Heimbach).<sup>32</sup> Besides, we need to remember that the use of Latin technical terms gives, according to the opinion of Ferrini, serious, precise and concordant evidence of the old age of the texts where such translitteration is included<sup>33</sup> and, therefore, of the fact that such text was elaborated by the Byzantine jurists of the Justinian (or of the first post-Justinian) age.<sup>34</sup>

‘*Ad caput primum: infitatio, exaequatio servis quadrupedum*’<sup>35</sup>

D. 9.2.2, Gai 7 ad ed. prov. [P. 183] = Bas. 60.3.2

pr. → Sch. 1 ad Bas. 60.3.1 [BS 3090/13 = Hb. V, 263]:<sup>36</sup> ... Καὶ ἐν τῷ μὲν ἄ κεφαλαίῳ διαγορεύει ὁ νόμος: ἐάν τις οἰκέτην ἢ θεράπαιναν ἀλλοτρίους ἢ τετράποδον ἀγγελιδὸν βοσκομένον ἀδίκως ἀνέλη, ὅσου πλείονος ἄξιον ἦν τὸ ἀνααιρεθὲν ζῶον ἐν τῷ παρελθόντι ἐνιαυτῷ, εἰς τοσοῦτον καταδικαζέσθω ...

§ 1 → [BS 3090/16] ... Εἰ δὲ ἀρνήσεται ἐναγόμενος, διπλάσιον μετὰ τοὺς ἐλέγχους καταβαλλέτω ...

§ 2 → [BS 3090/17] ... Ἔδειξεν οὖν ὁ νόμος, ὅτι τοῖς οἰκέταις ἡμῶν ἀπεικάζει τὰ τετράποδα τὰ ἀγγελιδὸν βοσκομένα, οἷον πρόβατα, αἴγας, ἵππους, ἡμίονους. Εἰ δὲ ἄρα καὶ οἱ χοῖροι τῆ τοῦ πεκοῦνδῆς προσηγορία περιέχονται, ἐζητήθη. Καὶ ὀρθῶς ὁ Λαβεδὼν εἶπε πεκοῦνδας εἶναι καὶ τοὺς χοῖρους. Οὔτε δὲ κύνες οὔτε ἄγρια θηρία, οἷον ἄρκοι καὶ λέοντες

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also Matino, *Lex et scientia iuris* (note 10 above), 102-103. We can add also another interesting – and, maybe, even more meaningful – ‘exhellenism’ consisting in the *adespotum* Sch. 29 ad B. 60.3.23 [BS 3116/15 = Sch. 23, Hb. V, 284], that includes both the expression τὸν ἐξελληνισμόν and the translitterated Latin term (‘ἵμφας’) and even, as in the text of Plutarch, its transformation in Greek (τὸν ἕνα χρόνον ἐπταέτην) – with a reinforcing repetition (Ἴμφας δὲ λέγεται ἕως καὶ αὐτοῦ τοῦ ζ', καὶ εἶπεν ‘ἐπταέτης’ δηλῶν τὸν ἵμφαντα).

32 See *supra*, n. 29.

33 C. Ferrini, review of P. Krüger, *Geschichte der Quellen und Literatur des römischen Rechts*, BIDR I (1888-1889), 230-233 (232) = Id., *Opere*, 5, Milano 1930, 436-438 (438); J.H.A. Lokin, ‘From the Greek Basilica Tradition’, in: Id., *Analecta groningenana ad ius graeco-romanum pertinentia*, Amsterdam 2010, 219-224 (222 n. 12). See also the following note.

34 See Brandsma, *Dorotheus* (note 20 above), *passim*, and De Jong, *Stephanus* (note 8 above), *passim*.

35 Cf. Lenel, *Palingenesia*, 2, 522-526; Miglietta, *Servus dolo occisus* (note 24 above), 66 and 77.

36 Heimbach, *Manuale*, 242: «DOR. ind.: Πολλῶν α ν. ἐν τῷ μὲν ἄ κεφαλαίῳ u. a. f. V. 263».

ἢ πάνθηρες, περιέχονται τῆ τοῦ πεκοῦνδιδος προσηγορίᾳ. Κάμηλοι δὲ καὶ ἐλέφαντες, ἐπειδὴ ὡσπερ μεμιγμένης εἰσὶν ἐνεργείας καὶ ἐργάζονται ἡμῖν ὡς τὰ λοιπὰ νοτοφόρα, περιέχεται τῶ α΄ κεφαλαίῳ τοῦ νόμου, εἰ καὶ ἡ φύσις αὐτῶν ἀγρία ἐστίν.

It is to be remarked, in a preliminary way, that, in the continuation of Sch. 1 ad Bas. 60.3.1 [BS 3090/13 = Hb. V, 263] also the content referring to D. 9.2.2. – *Pr.* is examined. Each text mirrors the other: the expression ἀγελῆδὸν βοσκόμενον referring to a four-footed animal (τετράποδον), *i.e.* an animal that pastures in a herd (see D. 9.2.2.2). – § 1 is to be pointed out. For what concerns the text-structure of the plebiscite, it is particularly meaningful that, while Gaius' text has *et infra deinde cavetur* – a sentence that arose suspects, among scholars, about the presence of further *capita* (or about the presence, at least, of a fourth *caput*), beyond the main three *capita*<sup>37</sup> – in the Greek version the sanction regarding the *infinitio* seems to follow, with no interruptions, to the mention of the first *caput*.<sup>38</sup> – § 2. D. 9.2.2 mentions four-footed animals *quae pecudum numero sunt et gregatim habentur*, while Sch. 1 mentions only those that pastures in a herd (τὰ ἀγελῆδὸν βοσκόμενα: *ad principium* D. 9.2.2). The list of the same animals (which is composed by six elements in the Digest: sheep, goats, oxes, horses, mules and donkeys) is reduced to only 4 elements in the Greek text (sheep, goats, horses and mules); the transliterations πεκοῦνδιδος - πεκοῦνδας appear, with three occurrences,<sup>39</sup> in reference with the extension of the concept of '*pecudes*' to pigs (extension that Labeo, who is cited in both texts, considered favourably), extension which is excluded, on the contrary, for boars, lions and panthers (that appear in the same order both in the Digest and in the *scholium*), and admitted for elephants and camels (cited in the opposite sense in the Greek text) because such animals work and can carry a weight (*i.e.* the '*soma*'). Actually, the ending part of Sch. 1 (εἰ καὶ ἡ φύσις αὐτῶν ἀγρία ἐστίν) pushes back the parenthetical clause in D. 9.2.2.2, to justify the 'mixed' nature of such animals: wild animals that can be used for works done by *pecudes*.

37 See, among other scholars, C.A. Cannata, 'Delitto e obbligazione', in: F. Milazzo [cur.], *Illecito e pena privata in età repubblicana. Atti Copanello 1990*, Napoli 1992, 33 ff.; M.F. Cursi, *Iniuria cum damno. Antigiuridicità and colpevolezza nella storia del danno aquiliano*, Milano 2002, 212 ff. See, though, Miglietta, 'Il terzo capo della lex Aquilia' (note 20 above), 418 and n. 34 (with book references).

38 See also Miglietta, 'Reflexiones en torno al título III' (note 2 above), 356.

39 Stephanus, Th.G.L., 7, 683, s.v. Πέκος.

‘*Ad v. iniuria*’<sup>40</sup>

D. 9.2.3, Ulp. 18 ad ed. [P. 613; cf. Coll. 7.3.1]<sup>41</sup> = Bas. 60.3.3

→ Sch. 1 [BS 3092/7 = Hb. V, 264]:<sup>42</sup> Καλῶς δὲ ὁ νόμος προστέθεικε, εἰ ἀδίκως ἀνηρέθη οἰκέτης ἢ τετράποδον ζῶον· οὐδὲ γὰρ ἐκ τοῦ μόνον ἀνααιρεθῆναι ταῦτα τίκεται ὁ Ἀκούλιος, ἀλλ’ ὅτε ἀνααιρεθῆ ἀδίκως ...

The Ulpian text, which shows no difference between the version of the Digest and the (partial) version of the *Collatio*, reflects itself in the Sch. 1 cit., where, nonetheless, the mention of the ‘four-footed animal’ (τετράποδον ζῶον) is added. The expression *merito adicitur* is translated with καλῶς... προστέθεικε (where the subject is ὁ νόμος, which is, on the contrary, implicit in the Latin text).

40 Cf. Lenel, *Palingenesia*, 2, 522-526; Miglietta, *Servus dolo occisus* (note 24 above), 66 and 77; see also beyond, D. 9.2.5.

41 Ulp. 8 ad ed., *sub titulo ‘si quadrupes pauperiem dederit’*. *Rectius*: Ulp. 18 ad ed. (*ad legem Aquilianam*): Th. Mommsen, *Digesta* (ed. maior), 1, Berlin 1868, 278 n. 2, limits himself to underline «sub titulo ‘si quadrupes pauperiem dederit’ *adicit Coll.*». Cf. the different position of P.E. Huschke, *Iurisprudentiae anteiustinianae quae supersunt*<sup>5</sup>, 2, Leipzig, 1886, 554 (and n. 5); E. Seckel - B. Kübler, *Iurisprudentiae anteiustinianae reliquias*<sup>6</sup>, Leipzig, 1911, 356 (and n. 2); among the scholars, *ex multis*, see lastly Cursi, *Iniuria cum damno* (note 37 above), 86; C. PELLOSO, *Studi sul furto nell’antichità mediterranea*, Padova 2008, 184-185 n. 119. To this regard, I would like to emphasize that the mistake about the mention of the book and the title «was not noticed» from Lenel, *Palingenesia*, 2, 522, *ad frg.* 613, as I had already sustained in Miglietta, *Servus dolo occisus* (note 24 above), 60 n. 131, notwithstanding the critical remarks of E. Stolfi, “Citazioni and ‘dissenções prudentium’ nella tradizione dei testi giurisprudenziali in età tardoantica. Alcune riflessioni”, in: C. Russo Ruggeri [ed.], *Studi in on. A. Metro*, 6, Milano 2010, 201 n. 15. According to Stolfi, Lenel, «pur non correggendo espressamente la nostra *inscriptio*, provvede a collocare *Coll. 7.3.1-4* nella disamina ulpiana (libro XVIII) del primo *caput* della *lex Aquilia*». This is certainly true, but the fact (which is not contested, nor it could be) remains that Lenel ‘does not correct expressly the *inscriptio*’, and that, setting the text in book 18 ad ed., he makes the data ‘philologically’ misleading for the reader who does not see the two versions (*i.e.* the versions of the *lex Dei* and of the Digest) at the same time. My opinion – that I expressed at that time and that I here restate – is supported by the circumstance that, with reference to the title ‘*si quadrupes pauperiem dederit* (E. 75)’, which belongs equally to book 18 ad ed., Lenel, *ibid.*, 520 n. 2, writes only «v. *coll. 7, 3 rubr.*», while in other parts of his work – parts that I mentioned, for what concerned the research that I carried on at that time – the eminent author of the ‘Palingenesis’ corrected such mistakes: see, for instance, just before, Lenel, *ibid.*, 520 n. 1, *ad frg.* 602 = D. 19.2.44: «libro septimo (VII pro XVII) *inscr. F.*». The motivation mentioned by Lenel, *ibid.*, 137 n. 5, with reference to Pomp. 19 [*rectius*: 29] ad Sab. [P. 744] is even wider: «libro nono decimo (XVIII pro XXVIII) *inscr. F. Falsam esse inscriptionem apparet et verbis ‘de hac actione [quod vi aut clam]’*». As it can be seen, the mistake about the book number and about the subject matter – expressed in the title – is expressly and painstakingly explained by Lenel – and, in one case, about the same *damnum iniuria datum*.

42 Heimbach, *Manuale*, 242: «DOR. ind.: Καλῶς ... ἀνααιρεθῆ ἀδίκως V. 264».

‘*Servus latro insidians – fur noctu deprehensus*’<sup>43</sup>

D. 9.2.4, Gai 7 ad ed. prov. [P. 184] = Bas. 60.3.4

pr. → Sch. 1 ad Bas. 60.3.3 [BS 3092/9 = Hb. V, 264]:<sup>44</sup> ... Ἀμέλει ἐὰν δοῦλον σὸν ληστεύοντα ἢ ἐπιβουλεύοντά μοι περὶ τὴν ζῶην μὴ δυνηθεῖς ἄλλως φυλάξασθαι ἀνέλω, οὐκ ἐγκαλοῦμαι. Φυσικὸς γὰρ λόγος ἐπιτρέπει φυλάττειν ἕνα ἕκαστον ἑαυτὸν ἐκ τοῦ ἐμφορομένου κινδύνου ...

§ 1 → [BS 3092/11] ... Καὶ ὁ νόμος δὲ ὁ δωδεκάδελτος τὸν ἐν νυκτὶ καταλαμβανόμενον κλέπτην ἐκέλευσεν ἀναιρεῖν, ἵνα μέντοι πρῶτον τοῦτο αὐτὸ μετὰ κραυγῆς ἐπιμαρτύρηται. Τὸν δὲ ἐν ἡμέρᾳ καταληφθέντα κλέπτην τότε συγχωρεῖ ὁ νόμος ἀναιρεθῆναι, ὅτε ξίφος ἐπιφέρεται, ἵνα μέντοι καὶ τότε μετὰ κραυγῆς ἐπιμαρτύρηται πρότερον, ὡς συνέλαβεν αὐτὸν ἐπιφερόμενον ἀκόντιον, καὶ τότε αὐτὸν ἀναιρή ...

*Pr.* The text of the *scholium* seems to be a little wider, with some redundancies that does not seem to alter the substance of the discourse: it is literally clarified that who is a thief ‘and’ puts my life in a pitfall can be killed by me with impunity ‘if I have no other chance to defend myself’, and οὐκ ἐγκαλοῦμαι (this verbal form seems to recall *non tenetur* in the version of Coll. 7.3.1 [cont.]: *Proinde si quis servum latronem occiderit, lege Aquilia non tenetur, quia iniuria non occidit*).<sup>45</sup> Besides, the principle according to which *naturalis ratio permittit se defendere* is restated: φυσικὸς – κινδύνου. – § 1. Such principle is missing in Bas. 60.3.4,<sup>46</sup> but it is mentioned in the continuation of the same *scholium*.<sup>47</sup> We must underline the incidental clause ὅτε ξίφος ἐπιφέρεται, which has no match in the Latin text. Then, a second σχόλιον follows, which constitutes an *adnotatio*,<sup>48</sup> as it is shown by the classical introductive form σημείωσαι, which is functional to comment the rule just mentioned.<sup>49</sup>

43 Miglietta, *Servus dolo occisus* (note 24 above), 77-78.

44 Heimbach, *Manuale*, 242: «DOR. a) ind. pr. §. 1.: Καλῶς a v. ἀμέλει ἐὰν ... αὐτὸν ἀναιρή V. 264».

45 Stephanus, *Th.G.L.*, 4, 52-53, Ἐγκαλέω; for what concerns the juridical meaning of the passive form, see E.F. Leopold, *Lexicon graeco-latinum manuale*, Leipzig 1852, 238 *ad h.v.*

46 Heimbach, *Manuale*, 242: «§. 1. legis deest in Bas. textu» (cf. BT 2750/2 = Hb. V, 264-265).

47 I am here alluding to the wide part καὶ ὁ νόμος – αὐτὸν ἀναιρή (lin. 11-16).

48 Heimbach, *Manuale*, 242: «b) ad pr.: Καλῶς a v. σημείωσαι u. a. f. V. 265».

49 Heimbach, *Manuale*, 218 (‘Observanda’): «Praeterea monendum est vocabulum adnotatio omissum esse, ubi sequitur locus, ad quem illa adnotatio pertinet»; cf. also D. Simon, ‘Aus dem Kodexunterricht des Thalelaios’, *SZ LXXXVI* (1969), 345; Pieler, *Rechtswissenschaft*, 405-406; M. Miglietta, ‘Χρηματική – ἐγκληματική καταδίκη. Giudizio civile and giudizio criminale nel tentativo di organizzazione sistematica della giurisprudenza bizantina. I. Parte generale’, in: L. Garofalo [ed.], *Il giudice privato nel processo civile romano. Omaggio ad Alberto Burdese*, 2, Padova, 2012, 515 and n. 16. Cf. Sch. 2 ad Bas. 60.3.3 [BS 3092/22 = Sch. 1, Hb. V, 264-265]: Σημείωσαι, ὅτι φυσικῶς ἐφέτται τοῖς κινδυνεύουσιν ἑαυτοὺς διεκδικεῖν καὶ φονεῦν τὸν βιαζόμενον, ὅτε μὴ ἄλλως δύνανται

Cont.: ‘*Ad v. iniuria*’<sup>50</sup>D. 9.2.5, Ulp. 18 ad ed. [P. 613]<sup>51</sup> = Bas. 60.3.5

pr. → Sch. 1 ad Bas. 60.3.3 [BS 3092/16 = Hb. V, 264-265]:<sup>52</sup> Εἰ δὲ καὶ τὸν εἰτιναδῆποτε μετὰ σιδήρου μοι ἐπιόντα προφθάσας ἀνέλω, οὐ δοκῶ ἀδίκως ἀναιρεῖν αὐτόν. Εἰ δὲ καὶ φοβηθεῖς τὸν ἐκ τοῦ κλέπτου θάνατον ἀνέλω αὐτόν, οὐ κατέχομαι τῷ Ἀκουιλίῳ. Ἐὰν δὲ δυνάμενος κατασχεῖν ἀκινδύνως τὸν κλέπτην καὶ παραδοῦναι αὐτὸν ἠβουλήθην μᾶλλον ἀνελεῖν αὐτόν, ἐπειδὴ ἀδίκως αὐτὸν φονεύω, τῷ Κορνελίῳ περὶ ἀνδροφονίας κατέχομαι.<sup>53</sup>

§ 1 → Sch. 4 [BS 3093/11 = Hb. V, 265]:<sup>54</sup> Τὸ ἐν τῷ νόμῳ κείμενον ἸΝΙΟΥΡΙΑΟ νόησον μὴ ὡς ἐπὶ τῆς ἰνιουριάουμ πρὸς ὕβριν <ἀν>ηρησθαι, ἀλλὰ παρανόμως ἀνηρησθαι καὶ παρ’ αἰτίαν ἐμήν. Ὅθεν ἔσθ’ ὅτε συμβαίνει καὶ τὸν Ἀκουίλιον καὶ τὴν ἰνιουριαουμ ἐκ τοῦ αὐτοῦ φάκτου τίκτεσθαι καὶ δύο γίνεσθαι κατὰ τοῦ ζημιώσαντος διατιμήσεις ἦτοι καταδίκας, ἄλλην μὲν ὑπὲρ ζημίας, ἄλλην δὲ ὑπὲρ τῆς ὕβρεως.<sup>55</sup>

[See D. 9.2.5.1 *in fin.*]<sup>56</sup> → Sch. 10 ad Bas. 60.3.5 [BS. 3093/26 = Hb. V, 266]:<sup>57</sup> Ἰνιουριάουμ τοῖνυν ἐν τῷ Ἀκουιλίῳ νοοῦμεν τὴν ζημίαν τὴν παρ’ αἰτίαν τοῦ ἐναγομένου συμβᾶσαν, εἰ καὶ μὴ βουλόμενος ζημιῶσαι τοῦτο ἐποίησεν ...<sup>58</sup>

§ 2 → [BS 3093/27] ... Ὅθεν ἐζητήθη, εἰ κατὰ μαινομένου ζημιώσαντος κινεῖται ὁ Ἀκουίλιος. Καὶ ὁ Πήγασος ἠρνήσατο, ἐπειδὴ μὴ δύναται κούλπα εἶναι ἐν τῷ μαινομένῳ τῷ μὴ ἔχοντι λογισμὸν. Καὶ ἀληθὴς ἐστὶν ἡ τοῦτου γνώμη. Ἀργεῖ οὖν κατὰ τοῦ μαινομένου ὁ Ἀκουίλιος, ὥσπερ εἰ καὶ ἄλογον τετράποδον ζημιώσει, οὐ χώρα τῷ Ἀκουιλίῳ, ἀλλὰ μᾶλλον τῇ κουαδρουπεδαρία. Εἰ γὰρ καὶ κεραμὶς κατὰ τύχην πεσοῦσα

ἐαντοὺς διαφυλάττει. It must be noticed that the comment is attached to Bas. 60.3.3, but actually it is pertaining to Bas. 60.3.4.

50 See also *supra*, ad D. 9.2.3.

51 Coll. 7.3.2-3. In the version of the *lex Dei*, the ‘night’ – as objective datum – substitutes the *metus mortis* – as subjective datum (justification). The *scholium* follows the text of the Digest, at least with reference to this point.

52 Heimbach, Manuale, 242: «Dor. a) ind. pr.: Καλῶς a v. εἰ δὲ καὶ τὸν εἰτινα ... περὶ ἀνδροφονίας κατέχομαι V. 264 sq.»

53 A παραπομπή follows, and ends up the text: ὡς τίτ. ιβ’ κεφ. ve’ θεμ. ζ’ καὶ ζ’.

54 Heimbach, Manuale, 242: «§. 1.: Τὸ ἐν τῷ νόμῳ ... τῆς ὕβρεως V. 265».

55 The *scholium* continues and ends up with this reference: Ζῆται τίτ. κα’ κεφ. ιζ’ καὶ βιβ. νβ’ κεφ. λγ’. (which, as in the previous case – see the previous n. – comes from a later author: cf. H.J. Scheltema, ‘Subseciva III. Die Verweisungen bei den frühbyzantinischen Rechtsgelehrter’, TRG XXX (1962), 355 ff. (356) = Id., *Opera minora* (note 7 above), 116-118.

56 The first part of Sch. 10 cit., though, concerns again the end of D. 9.2.5.1.

57 Heimbach, Manuale, 242: «§. 2.: Iniuriam [= Ἰνιουριάουμ, BS] V. 266».

58 See *supra*, n. 56.

ζημιώσει με, οὐ χώρα τῷ Ἀκουιλίῳ. Εἰ δὲ καὶ ὁ ἵμφας ζημίας αἴτιος γένηται, ἀργεὶ πάλιν ὁ Ἀκουίλιος, οὐ μέντοι, εἰ ἄνηβος πρῶξιμος ὢν πουβέρτατι ζημιώσει. Κατέχεται γὰρ οὗτος τῷ Ἀκουιλίῳ, ἐπειδὴ καὶ τῇ φούρτι κατέχεται, ἐὰν ὅλως δεκτικὸς κακῆς ἐστὶ προαιρέσεως.

§ 3 → Sch. 17 [BS 3094/28 = Sch. 18, Hb. V, 267].<sup>59</sup> Καλιγάριος τις εὐγενὴ καὶ ὑπεξούσιον μαθητὴν μὴ καλῶς ἐκπληροῦντα τὸ ἐπιδειχθὲν ἔργον αὐτῷ σφοδρῶς οὕτως ἐτύπησεν ἐνὶ τῶν καλαποδίων κατὰ τοῦ ἀγένοϋ, ὡς τὸν ὀφθαλμὸν τοῦ παιδὸς ἐκραγῆναι. Καὶ λέγει Ἰουλιανὸς μὴ κατέχεσθαι τοῦτον τῇ ἰνριουριάρομ· ὡς γὰρ διδάξει βουλόμενος ἐτύπησε καὶ οὐχ ὡς ὑβρίσαι. Τὸν μέντοι Ἀκουίλιον ἀναμφιβόλως δέδωκεν εἰς ὅσον ἐργάζεται ὁ παῖς ἔλαττον διὰ τὸ βλαβῆναι τὸν ὀφθαλμὸν αὐτοῦ καὶ εἰς τὰ δαπανήματα τῆς θεραπείας τοῦ παιδὸς.

*Pr.* It is missing in Bas. 60.3.5,<sup>60</sup> but it is mentioned in the continuation of the Sch. 1 ad Bas. 60.3.3,<sup>61</sup> and it specifies the activities of ‘holding and bringing’ (δυνάμενος – παραδοῦναι αὐτόν), which seem to echo, to a certain extent, the expressions in Coll. 7.2.1 (*Paul.*): *qui eum comprehensum trasmittendum...* Furthermore, it is affirmed, for reasons of completeness (which is typical of the Byzantine sources), that the *lex Cornelia* concerns murder (τῷ Κορνελίῳ περὶ ἀνδροφονίας κατέχομαι). – § 1. We must point out the writing of ἸΝΙΟΥΡΙΑΟ in Latin letters – a sign of the truly old age of the source<sup>62</sup> – and the fact that the Greek text ends up with the terms ἄλλην μὲν ὑπὲρ ζημίας, ἄλλην δὲ ὑπὲρ τῆς ὕβρεως, coincident with *alia damni, alia contumeliae* in D. 9.2.5.1 (while this latter continues, and ends up, with a further remark: *igitur iniuriam hic damnum accipiemus culpa datum etiam ab eo, qui nocere noluit* – remark which is mentioned in the first part of Sch. 10 ad Bas. 60.3.5 [BS 3093/26 = Hb. V, 266])<sup>63</sup> – § 2. Sch. 10 starts with a first part that, as we have

59 Heimbach, *Manuale*, 242: «§. 3. Καλιγάριος V. 267». Cf. S. Schipani, *Responsabilità 'ex lege Aquilia'. Criteri di imputazione e problema della 'culpa'*, Torino 1969, 291 n. 46, according to whom the work of Dorotheus might be a κατὰ πόδας, and G. Valditara, *Superamento dell'aestimatio rei nella valutazione del danno aquiliano ed estensione ai non domini*, Torino 1992, 430 and n. 437, who attributes to Dorotheus – but wrongly – also the Sch. 14 ad Bas. 60.3.5.3 [BS 3094/13 = Sch. 16. V, 267].

60 Heimbach, *Manuale*, 242: «pr. legis deest in Bas. textu» (and cf. BT 2750/5 = Hb. V, 265).

61 I am alluding to section εἰ δὲ καὶ – περὶ ἀνδροφονίας κατέχομαι (lin. 16-21).

62 See *supra*, n. 30.

63 With reference (again) to § 1 of D. 9.2.5 = Bas. 60.3.5, Heimbach's edition points out the presence of an *adnotatio* (mentioning two symmetric texts, i.e. Dig. 44.7.34 pr. and Bas. 52.[1.33] of Dorotheus: Heimbach, *Manuale*, 242: «b) ad §. 1. v. interdum utraque actio concurrat: Τοῦτο νόει V. 265»). It seems difficult, though, that this *adnotatio* could be a text of Dorotheus, at least for what concerns the mention of the text of the *libri Basilicorum*, which could not be known to such jurist, and which was, evidently, added by some later author (for a similar phenomenon, cf. also Sch. 1 ad Bas. 60.3.33 pr. [BS 3146/2 = Hb. V, 306-307]: see *infra*, in the comment to *ad h.l.*, and cf. the

just remarked, finds a match in the final part of the previous § 1 of D. 9.2.5 (Ἰνιουριάρου τοῖνον – τοῦτο ἐποίησεν). Therefore, the *scholium* appears to be rich in transliterations (ἰνιουριάρου... κούλλα... τῆ κουαδρουπεδαρία... ὁ ἴμφας, and the interesting definition of *status* πρῶξιμος ὧν πουβέρτατι<sup>64</sup> As in the connected fragment of the *Digesta*, the jurist Pegasus is evoked (ὁ Πήγασος), but the name of Julian is omitted. – § 3. Even in this part, the quotation of Julian (which is present two times in D. 9.2.5.3) is omitted. There is again the transliteration τῆ ἰνιουριάρου (sott. ἀγωγῆ).<sup>65</sup> The text matching with D. 9.2.5.3 = Bas. 60.3.5.3 is eventually commented by another *scholium*, which is meant to clarify some doubtful points – each one of which is defined in the category of the ἀμφιβολία.<sup>66</sup>

D. 9.2.6, Paul. 22 ad ed. [P. 359] = Bas. 60.3.6

→ Sch. 29\* ad Bas. 60.3.7 [BS 3097/27 = Sch. 1\*, Hb. V, 267].<sup>67</sup> Ἡ γὰρ πολλὴ τοῦ διδασκάλου τραχύτης ὁμολογουμένη ἐστὶν ἀμέλεια ...

The elucidation that reinforces the principle expressed – ὁμολογουμένη – is remarkable and functional to point out a solution shared by the jurists as a *communis opinio*.

D. 9.2.7, Ulp. 18 ad ed. [P. 614] = Bas. 60.3.7

pr. → Sch. 29\* [BS 3097/28 = Sch. 1\*, Hb. V, 267].<sup>68</sup> ... Κινῶν δὲ ὁ πατὴρ τούτου τοῦ μαθητοῦ τὸν Ἀκουίλιον ὅσα ἐλάττω ἐργάζεται ὁ παῖς λαμβάνει καὶ τὰ δαπανήματα, ὅσα εἰς ἐπιμέλειαν καὶ θεραπείαν τοῦ παιδὸς δαπανῶνται.

§§ 1-2 → *Desunt*.

§ 3 → Sch. 32\* [BS 3098/5 = Sch. 8\*, Hb. V, 268].<sup>69</sup> Εἰ δὲ παρ' ἐτέρου ὠθηθεὶς ἀνεῖλεν ἀλλότριον δοῦλον, Πρόκουλος ἔλεγε μῆτε τὸν ὠθήσαντα κατέχεσθαι τῷ

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remarks of Brandsma, *Dorotheus* [note 20 above], 59). The text is, anyhow, Sch. 7 [BS 3093/20 = Sch. 6 cpv., Hb. V, 265].

64 None of these terms is registered by Stephanus, Th.G.L. See, on the contrary, with reference to the expressions λάτα κούλλα and ἴμφας, respectively, Mich. Psell., *Poem.* 8 (*Syn. legum*) 522 and 725.

65 Cf. Mich. Psell., *Poem.* 8.114 (moreover, see 8.115, which deals also with the *lex Aquilia*).

66 Heimbach, *Manuale*, 242: «ad §. 3. v. an ex locato, dubitat: *Toutéstin* V. 266»: the authorship of such should be attributed to Dorotheus, according to Schipani, *Responsabilità 'ex lege Aquilia'* (note 59 above), 283 n. 33, 291 n. 46, 416. Cf. Sch. 14 [BS 3094/13 = Sch. 16, Hb. V, 266-267], about which, once again, the transliterations κονδοῦκτι and λοκάτι seem to be not unworthy of interest: cf., lastly, Martino, *Lex et scientia iuris* (note 10 above) 69 and 73.

67 Heimbach, *Manuale*, 242: «6. = 6. DOR. ind.: *Ἡ γὰρ πολλή ... ἀμέλεια* V. 267»: cf. Schipani, *Responsabilità 'ex lege Aquilia'* (note 59 above), 417 n. 15.

68 Heimbach, *Manuale*, 242: «7. = 7. [...] DOR. ind. pr.: *Ἡ γὰρ πολλή* a v. κινῶν δὲ u. a. f. V. 267».

69 Heimbach, *Manuale*, 242: «§. 3.: *Εἰ δὲ* V. 268»: Schipani, *Responsabilità 'ex lege Aquilia'* (note 59 above), 319 and 468.

Ἀκουιλίῳ (οὐδὲ γὰρ αὐτὸς ἀνεῖλεν) μήτε τὸν ὠθήθεντα, ἐπειδὴ οὐ παρ' αὐτὸν ἐγένετο, ἀλλὰ παρὰ τὸν ὠθήσαντα αὐτόν. Ἰμφακτοῦμ δὲ ἕμωσ κατέχεται ὁ ὠθήσας ὡς αἷτιος τοῦ θανάτου γενόμενος.

§§ 4-5 → *Desunt*.

§ 6 → Sch. 33\* [BS 3098/9 = Sch. 23\*, Hb. V, 269]:<sup>70</sup> Ὅθεν εἴ τις ἀντὶ θεραπευτικῆς ἀντιδότου φάρμακον δέδωκέ τι, ἰμφακτοῦμ κατέχεται, ὥσπερ καὶ ὁ μεμνηνὸτι ζῖφος δεδωκώς. Ἐὰν γὰρ ὁ μεμνηνὸς ἕτερον ἀνέλη, ὁ δεδωκὼς αὐτῷ τὸ ζῖφος οὐ τῷ Ἀκουιλίῳ, ἀλλὰ τῇ ἰμφακτοῦμ κατέχεται.

§ 7 → Sch. 23 [BS 3097/15 = Sch. 25, Hb. V, 269]:<sup>71</sup> Εἰ δὲ ἀπὸ γεφύρας κατακρημνίσω τινά, εἴτε ἐξ αὐτῆς τῆς ὠθήσεως ἀπόληται καταβυθισθεὶς ἐν τῷ ποταμῷ εἴτε ἐπιζήσας ὀλίγον καὶ κοπωθῆναι δυναθεὶς καὶ κολυμβῆσαι ἠτητηθῆ τῇ βία τοῦ ποταμοῦ καὶ τελευτήσῃ, τῷ Ἀκουιλίῳ κατέχεται ὁ ὠθήσας αὐτόν, ὥσπερ ὅτε παιδίον προσέθλιψα κατὰ πέτρας.

§ 8 → *Deest*.

*Pr.* It is to be noticed the *incipit*, which is wider in the Greek part. – §§ 1-2. These are missing.<sup>72</sup> – § 3. The beginning of the paragraph declares that its subject is an *occisio* (ἀνεῖλεν ἀλλότριον δοῦλον). Besides, such concept returns also in the final part (ὁ ὠθήσας – γενόμενος), which widens again the content of the matching text of the Digest; then, the text says that the first person to act is not obliged by means of the *lex Aquilia* (τῷ Ἀκουιλίῳ). Furthermore, the mention of the opinion of Proculus occurs in both texts: the jurist, in the Byzantine text, *ἔλεγε*, while, in the Latin text, he *scripsit*. It must be noticed, to this end, that the Greek text shows, so to say, a major internal coherence in respect to D. 9.2.7.3, and a tighter connection to the first *caput* of the Aquilian plebiscite – which is its proper palinogenetic location: so the text correctly does not deal only with ‘causing damage’, but explicitly with the ‘*occisio*’ in every part of its structure. Eventually, the occurrence of the *actio in factum*, mentioned by the typical transliteration ἰμφακτοῦμ, coincides with the occurrence in the Latin text.<sup>73</sup> – §§ 4-5. Missing. – § 6. The first part of

70 Heimbach, *Manuale*, 242: «§. 6. a. v. Unde adfert ect.: Ὅθεν V. 269». The Byzantine text, though, finds its match in the second part of D. 9.2.7.6 (*Unde adfert – sed in factum*).

71 Heimbach, *Manuale*, 242: «§. 7.: Sch. 25. *Ei δὲ* V. 269».

72 Be it said here, for the continuation of this essay, that, when it is here affirmed that the *index* of one of the jurists (whom I am here investigating) ‘does not contain’, ‘does not recall’, *et similia*, texts matching with a text of D. 9.2, or when it is affirmed that the text is ‘missing’, this cannot be interpreted univocally as evidence for the ‘original absence’ of the Greek text. Such Greek text can, simply, not have been saved.

73 Term not registered by Stephanus, Th.G.L. See, though, Mich. Psell., *Poem*. 8.182 (ἰν φάκτουμ), 8.507, 8.574, 8.582 and 8.814 (and also ἰμφάκτουμ, in 8.354 and 8.568). Cf. also M. Miglietta,

the Greek paragraph, which should match with the Latin *Celsus autem multum interesse dicit – in factum actione teneatur*, is missing. Therefore, the text starts from *unde...*, in fin., and matches in its substance with Ulpian's text, with a redundancy *ἐὰν γὰρ ὁ μεμνῶς – τὸ ξίφος*. Furthermore, the same *actio in factum* is mentioned (two times) in the usual form ἱμφακτούμ. – § 7. There is no mention of the jurist Celsus, and the content – notwithstanding some small excess of language in the Greek version (καὶ κοπωθῆναι δυναθεὶς καὶ κολουμβῆσαι ἡττηθῆ) – coincides with the original text. – § 8. Missing.

D. 9.2.8, Gai 7 ad ed. prov. [P. 185] = Bas. 60.3.8

pr. → *Deest*.

§ 1 → Sch. 4 [BS 3099/12 = Sch. 5, Hb. V, 270]:<sup>74</sup> Εἰ δὲ καὶ μουλίων κατὰ ἀπειρίαν μὴ δυναθεὶς ἐπισχεῖν τὴν ὀρμὴν τῶν μουλῶν αἴτιος γένηται τοῦ συντριβῆναι δοῦλον ἐξ αὐτῶν, κατέχεται ὡς κούλπαν ἀμαρτήσας. Τὸ αὐτὸ ἐστίν, εἰ καὶ δι' ἀσθένειαν αὐτοῦ μὴ περιέγρονε τῶν μουλῶν. Καὶ μηδὲ νομιζέσθω ἄδικον τὸ διὰ τὴν τοῦ σώματος ἀσθένειαν ὡς αἴτιον τῆς βλάβης αὐτὸν κατέχεσθαι· ἐπιτήδευσιν γὰρ τις οὐκ ὀφείλει ποιεῖν, ἥνπερ οἶδε μὴ δύνασθαι ποιεῖν, ἢ εἰδέναι ὀφείλει, ὡς οὐ δύναται. Καὶ οὐδὲ χρὴ τὴν ἄλλου ἀσθένειαν ἄλλω ἐπιζήμιον γίνεσθαι. Εἰ δὲ καὶ ἵππου τις ὀρμὴν μὴ δυναθῆ ἔνεγκεῖν ἀπειρώς αὐτῷ καθελζόμενος ἢ ἐξ ἀσθενείας αἴτιος ἑτέρω ζημίας γένηται, καὶ οὗτος τῷ Ἀκουιλίῳ κατέχεται.

*Pr.* For what concerns the textual comparison, in the text attributed by Heimbach to Dorotheus the part referring to the *principium* of D. 9.2.8 is missing. – § 1. The Sch. 4 is, on the contrary, widely matching in its content (even in the words: *culpa[e]* mentioned through the transliteration κούλπα[v]) with the addition of an elucidation that cannot be found in the Digest version: ἐπιτήδευσιν – οὐ δύναται.<sup>75</sup> The end – implicit in D. 9.2.8.1 – is also matching – τῷ Ἀκουιλίῳ κατέχεται.

D. 9.2.9, Ulp. 18 ad ed. [P. 614] = Bas. 60.3.9

pr. → Sch. 1 [BS 3100/2 = Hb. V, 271]:<sup>76</sup> Ἐὰν ἰατρόμαια βοήθημα ἦτοι πόσιν ὑποβάλῃ γυναικί, ἢ δὲ τελευτήσῃ, διαστίζει ὁ Λαβεών, ἵνα εἰ μὲν ταῖς ἰδίαις χερσὶν ὑπέθηκε τὸ βοήθημα, δόξῃ αὐτῇ πεφονευκέναι τὴν γυναῖκα· εἰ δὲ τῇ γυναικὶ δέδωκεν, ἵνα

<sup>74</sup> 'Trasmissione del testo e giurisprudenza bizantina: la tutela pretoria da Dig. 9.2 a Bas. 60.3 - Profili lessicali', *SCDR XXVI* (2013), 273-326 (passim).

<sup>74</sup> Heimbach, *Manuale*, 242: «8. = 8. DOR. ind. §. 1.: *Εἰ δὲ καὶ μουλίων* V. 270».

<sup>75</sup> Besides, the whole section καὶ μηδὲ νομιζέσθω – ὡς οὐ δύναται is much wider than the matching text of the *Pandectae*. Such point could be worth further investigation.

<sup>76</sup> Heimbach, *Manuale*, 242 ad D. 9.2.9 pr.-1: «DOR. a) ind. pr. §. 1.: *Ἐὰν ἰατρόμαια* V. 271»: cf. Schipani, *Responsabilità 'ex lege Aquilia'* (note 59 above), 468.

ἐαυτῇ τοῦτο ὑποβάλλῃ, τῇ ἱμφακτοῦμ κατέχεται, ἐπειδὴ αἰτίαν θανάτου δεδωκέναι πιστεύεται, οὐ μὴν ἀνηρηκέναι.

§ 1 → Sch. 2 [BS 3100/7 = Sch. 1, Hb. V, 271, *cont.*]:<sup>77</sup> Ἐάν τις ἢ κατὰ βίαν ἢ παραινέσας ἐπιχέῃ κατὰ τινος φάρμακον ἢ τῶν διὰ στόματος καταπινομένων ἢ διὰ κακίστου φαρμάκου ἐπιβουλεύσῃ τινί, κατέχεται τῷ Ἀκουιλίῳ, ὡσπερ ἢ ὑποβαλοῦσα.

§ 2 → Sch. 4 [BS 3100/11 = Hb. V, 271] - [2, 3, -]:<sup>78</sup> Κυρίλλου. Ὁ λιμῶ φονεύσας καὶ ἐρεθίσας ἵππον καὶ ποιήσας εἰς ποταμὸν πεσεῖν, ὡς ἀπολέσθαι τὸν ἱπότιν, ἱμφακτοῦμ κατέχεται, καὶ ὁ ἐπιβουλεύσας τινί, ἴνα ἄλλος αὐτὸν ἀνέλῃ.

§ 3 → Sch. 8 [BS 3101/6 = Hb. V, 271]:<sup>79</sup> Ἐάν ἱπαζόμενον τὸν ἐμὸν οἰκέτιν σὺ τὸν ἵππον πλῆξας παρεσκευάσας κατακρημισθῆναι ἐν ποταμῷ, ἱμφακτος δίδοται κατὰ σοῦ. [Cf. Sch. 4 ad Bas. 60.3.9[2.]: Κυρίλλου. [...] καὶ ὁ ἐπιβουλεύσας τινί, ἴνα ἄλλος αὐτὸν ἀνέλῃ].

§ 4 → Sch. 11 [BS 3101/12 = Sch. 12, Hb. V, 272]:<sup>80</sup> Εἰ ἐν τῷ παίζειν ἀκοντίῳ ἀνέλης, χώρα τῷ Ἀκουιλίῳ, οὐ μὴν ὅτε ἐν κάμῳ τινῶν παιζόντων παριῶν τις ἀναيرهθῇ, εἰ μὴ κατὰ ἐπιτήδευσίν τις αὐτῷ δέδωκε: ...<sup>81</sup>

*Pr.* Variations regard, in the Greek text, the addition ἦτοι πόσιν ὑποβάλλῃ; the reference to the ‘potion’, added to the medicine; but, most of all, the position of the verb (in the form ὑποβάλλῃ), which – if we translate it with the Latin *supponere* – expresses immediately, but unproperly, one of the two elements of the *distinctio* set by Labeo. The (neutral) elucidation τὴν γυναικα of the sentence δόξῃ αὐτῇ πεφονευκέναι τὴν γυναικα, the quotation from Labeo (matching with the original Latin) and the granting of the *actio in factum* (also matching with the original Latin, and here, as usual, called ἱμφακτοῦμ) are also worthy of mention. – § 1. The general concept of other kind of medicine - (ἢ ... καταπινομένων) expresses, in a shorter way, the quotation *vel chystere vel si eum unxit*. The rest seems to be similar to the original. – § 2. D. 9.2.9.2, which the (pseudo) Dorotheus does not mention, is, on the contrary, re-elaborated by Cyrillus, in a brief but complex text, where we find the transliteration ἱμφάκτουμ: a transliteration similar to the other that we have seen many times in the writing of the jurist located by Heimbach in

77 Heimbach, Manuale, 242 ad D. 9.2.9 pr.-1: cf. the preceding n.

78 Heimbach, Manuale, 242: «CYR. ind. §. 2. 3.: Sch. 4. Κυρίλλου V. 271».

79 Heimbach, Manuale, 242: «§. 3.: Ἐάν ἱπαζόμενον V. 271». Cf. also Sch. 4 ad Bas. 60.3.9[2] [BS 3100/11 = Hb. V, 271], and see *supra* the preceding n.

80 Heimbach, Manuale, 242: «§. 4.: Εἰ ἐν τῷ παίζειν ... αὐτῷ δέδωκε V. 282»: cf. Schipani, *Responsabilità 'ex lege Aquilia'* (note 59 above), 419 n. 17, 458 n. 12, 471.

81 The following sentence (ἢ γὰρ βλαβερὰ παιγνία κούλπα ἔοικεν) refers to D. 9.2.10, and is here reported in its proper location. Heimbach, Manuale, 242, about D. 9.2.9.4, recalls the *index* of Dorotheus (*i.e.*, the *scholium*) only to the words αὐτῷ δέδωκε, and, about D. 9.2.10, refers: «DOR. ind.: Εἰ ἐν τῷ παίζειν v. ἢ γὰρ βλαβερὰ παιγνία κούλπα ἐστίν V. 272.».

Dorotheus, but here the accent is the same of the Latin pronunciation.<sup>82</sup> Regarding the same text – and this is an element of relevance – Cyrillus only mentions the final part of § 3 D. *eod. (quemadmodum si – ab alio esset occisus)*: καὶ ὁ ἐπιβουλεύσας – ἀνέλη. After this premise, it is necessary to underline that having defined as ‘complex’ the text of Cyrillus does not contradict the opinion of the scholars, according to which his ἴνδιξ was characterized by his aphoristic and icastic style, so that his writing was, sometimes, qualified as κατ’ ἐπιτομήν (*i.e. breviter scriptum*).<sup>83</sup> The point is, such text appears to be complex because it involves both § 2 and § 3 of D. 9.2.9, and because, though very synthetic, it does not omit any element of the original paragraphs.<sup>84</sup> – § 3. In the Greek version, the part referring to the sentence *atque ideo homo perierit* (where, *incidenter tantum*, we can remark the use of the term *homo* to mean the slave) is missing.<sup>85</sup> Besides, the Greek text ends up with the part matching with *in factum esse dandam actionem* (where the expression *in factum* is not translated with the usual ἱμφακτούμ, as in the previous occurrences,<sup>86</sup> but with ἱμφακτος); the whole quotation from Ofilius (*Ofilius scribit – ab alio esset occisus*) is missing.<sup>87</sup> – § 4. The text, in this part, seems relevantly compressed, though it includes the whole content of the matching text of the Digest. At the end of the σχόλιον, we find the sentence ἡ γὰρ βλαβερά πατηνία κούλπαι ἕοικεν (with

82 See also Mich. Psell., *Poem.* 8.354 and 8.568 (who uses both forms: ἱμφάκτουμ and ἱμφακτούμ).

83 Cf. Mortreuil, *Histoire du droit byzantin*, 1 (note 4 above), 137-138.

84 Cyrillus, together with Stephanus, is often meaningfully called by later jurists as ὁ ἰνδικευτής; Heimbach, *Prolegomena*, 16 (col. II).

85 The linguistic element – *i.e.* the use of the term *homo* instead of *servus*, where the latter precedes the first (*servum meum... homo perierit*) – being such questions connected with the discussion about the first *caput* of the *lex Aquilia*, confirms what I sustained in Miglietta, *Servus dolo occisus* (note 24 above), 20 ff. (31 ff., in particular), *i.e.* that the reflection of the Roman jurists about the *concursum legum* between the Aquilian plebiscite and the *lex Cornelia de sicariis* could be suggested by the coincident terms (*occisio hominis*) which are present, as a technical phrase, in both norms. Be it said, incidentally, that such point was evidently missed by A. Völkl, review of Miglietta, *ibid.*, *SZ CXXII* (2005), 318-319, who, because of such, enlarges upon issues which are actually not much relevant to the question I considered. I will have a further opportunity to return, widely, on the erroneous interpretation of Völkl and on his method – which, as Enzo Nardi (review of Völkl, *Die Verfolgung der Körperverletzung im frühen römischen Recht*, *SDHI LI* [1985], 533) already noticed with his authority, is characterized by «accantonamenti» and «reiezioni di altrui punti di vista [...] non di rado un po’ sommari e sbrigativi» – in M. Miglietta, *Servius respondit*, 2 [forthcoming].

86 Cf. D. 9.2.7.3, Sch. 32\* ad Bas. 60.3.7[.3] [BS 3098/5 = Sch. 8\*, Hb. V, 268]; D. 9.2.7.6, Sch. 33\* ad Bas. 60.3.7[.6] [BS 3098/9 = Sch. 23\*, Hb. V, 269]; D. 9.2.9 pr., Sch. 1 ad Bas. 60.3.9 [pr.] [BS 3100/2 = Hb. V, 271].

87 Lastly, about the palingenetic location of D. 9.2.9.3, with reference to the work of Ophilius, see P. Biavaschi, *Caesari familiarissimus. Ricerche su Aulo Ofilio e il diritto successorio tra repubblica e principato*, Milano 2011, 66 and n. 63 (about which see M. Miglietta, ‘Treatatus peritior Cascellio, Cascellius Trebatio eloquentior, Ofilius utroque doctor. A proposito di un recente studio dedicato ad Aulo Ofilio’, *Annaeus X* [2013] 118-140).

another translitteration, κούλπᾱ, near ἐν κάμπῳ),<sup>88</sup> that actually mirrors the following fragment from Paulus saved in D. 9.2.10 (= Bas. 60.3.10).<sup>89</sup> What should be considered as an *adnotatio* (which we owe again, according to Heimbach,<sup>90</sup> to Dorotheus) is finally ascribed to the text.<sup>91</sup>

D. 9.2.10, Paul. 22 ad ed. [P. 360] = Bas. 60.3.10

→ Sch. 11 ad Bas. 60.3.9 [BS 3101/12 = Sch. 12, Hb. V, 272]:<sup>92</sup> ... ἡ γὰρ βλαβερά παργία κούλπᾱ ἕοικεν.

Beyond what we have here observed with reference to D. 9.2.9.4, the frequency of another typical translitteration must be remarked, in the dative case, κούλπᾱ.<sup>93</sup>

D. 9.2.11, Ulp. 18 ad ed. [P. 614-615] = Bas. 60.3.11

pr. → *Deest*.

§ 1 → Sch. 42\* ad Bas. 60.3.11. 12 [BS 3105/14 = Sch. 4, Hb. V, 273]:<sup>94</sup> Ἐὰν ἄλλος μὲν κατάσχη τὸν ἐμὸν οἰκέτην, ἕτερος δὲ ἀνέλη αὐτόν, ὁ μὲν κατασχὼν αὐτὸν τῆ ἰμφοκτομῆ κατέχεται ὡς αἴτιος τοῦ θανάτου γενόμενος, ὁ δὲ ἀνελὼν τῷ Ἀκουίλιῳ ...

§ 2 → [BS 3105/16] ... Ἐὰν δὲ πολλοὶ τὸν ἐμὸν οἰκέτην ἐτύπησαν καὶ ἐτελεύτησεν, ἴδωμεν, εἰ πάντες ὡς ἀνελόντες αὐτὸν κατέχονται τῷ Ἀκουίλιῳ. Καὶ εἰ μὲν δείκνυται, ἐκ τῆς τίνος πληγῆς ἀνηρέθη, ἐκεῖνος ὡς φονεύσας κατέχεται· τούτου δὲ μὴ δεικνυμένου πάντας ὁμοίως ὡς ἀνελόντας εἶπε κατέχεσθαι ὁ Ἰουλιανός. → Sch. 11 [BS 3102/25 = Sch. 13, II *pars*, Hb. V, 273]:<sup>95</sup> Πρόσκειται ἐν τῷ Ἰνδικῆ οὐδεὶς γὰρ

88 The term κάμπος is registered by Stephanus, *Th. G.L.* V, 925 («Campus, oppidum»).

89 See beyond, Sch. 11 ad Bas. 60.3.9.

90 Heimbach, *Manuale*, 242: «B) ad §. 4.: *Ei ἐν τῷ παίζειν ... αὐτῷ δέδοκε V. 572*».

91 Sch. 12 [BS 3101/15 = Hb. V, 272, *cont.*]: Τοῦτο νόει κατὰ τὴν εἰρημένην διαίρεσιν ἰστίτ. δ' τιτ. γ', ὅτι ἐὰν ἀκοντίῳ παίζων ἢ γυμναζόμενος φονεύσῃ παριόντα δούλον, εἰ μὲν στρατιωτῆς εἰμί, καὶ ἐν τῷ συνήθει τοῦ γυμνασίου τόπῳ γέγονε τοῦτο, ἀνεύθυνός εἰμι· εἰ δὲ ἄλλαχού, ἢ ἰδιώτης ἤμην, ὑπόκειμαι· ἰδιώτην γὰρ ἐν ὄπλοις γυμνάζεσθαι οὐ νενόμισται. The text is here wholly reported to highlight that the didactical reference that it contains (ἰστίτ. δ' τιτ. γ') could be actually a reason to exclude that Dorotheus is its author: see *supra*, n. 29.

92 See *supra*, n. 81 (and see also the text to which it refers).

93 Lastly, see the wide and remarkable article of J.-D. Rodríguez Martín, 'El campo semántico de 'cvlpra' en las fuentes jurídicas bizantinas: cuestiones de lexicografía jurídica', *SCDR* XXVI (2013), 189-215.

94 Heimbach, *Manuale*, 242: «DOR. ind. §. 1. 2.: *Ἐὰν ἄλλος V. 273* et *Ἐπὶ ὁμοίῳ a v. οὐδεὶς γὰρ u. a. f. ibid.*» (cf. Schipani, *Responsabilität 'ex lege Aquilia'* (note 59 above), 469): the second reference, on the contrary (that corresponds, in Scheltema's edition, to Sch. 11 [BS 3102/25]), should not belong to (the pseudo-) Dorotheus, but to Stephanus: see *supra*, n. 8.

95 Cf. preceding n.

ἀπαλλάττεται τοῦ Ἀκουιλίου ἐξ ὧν ἕτερος ἡμαρτηκῶς καταδικάζεται, ἐπειδὴ ποιὴν ἔστι τὸ διδόμενον.

§§ 3-4 → *Desunt*.

§ 5 → Sch. 49\* [BS 3106/6 = Sch. 24, Hb. V, 274]:<sup>96</sup> Εἰ δὲ καὶ τις κύνα ἐρεθίσαι καὶ παρασκευάσαι αὐτὸν δακεῖν ἕτερον, εἰ καὶ μὴ αὐτὸς κατεῖχε τὸν κύνα, ὅμως ὁ Πρόκουλος δίδωσι τὸν Ἀκουίλιον κατ' αὐτοῦ· ὁ δὲ Ἰουλιανός, εἰ μὲν τις αὐτὸν κατέχων τὸν κύνα παρασκευάσει δηχθῆναί τινα ὑπ' αὐτοῦ, δίδωσι κατ' αὐτοῦ τὸν Ἀκουίλιον· εἰ δὲ μὴ κατασχὼν τὸν κύνα αἴτιος γένηται τοῦ βρώματος, τότε τὴν ἱμφακτοῦμ δίδωσι κατ' αὐτοῦ  
...

§ 6 → [BS 3106/10] ... Δεσπότη δὲ μόνῳ τοῦ βλαβέντος ἢ ἀναιρεθέντος πράγματος δίδονται ὁ Ἀκουίλιος ὁ δῖρεκτος· ὁ γὰρ οὐτίλιος καὶ ἄλλοις ἀρμόζει.

§ 7 → *Deest*.

§ 8 → Sch. 31 [BS 3103/28 = Sch. 30, Hb. V, 275]:<sup>97</sup> Ἐὰν ὁ βοναφίδε δουλεύων μοι οἰκέτης πληγῇ ἢ ζημιωθῇ, ἢ ἱμφακτος ἀγωγῇ ἀρμόζει μοι, οὐχ ὁ Ἀκουίλιος, ἐπειδὴ μὴ εἰμι δεσπότης αὐτοῦ.

§ 9 → *Deest*.

§ 10 → Sch. 40 [BS 3104/24 = Sch. 33 cpv., Hb. V, 276]: Κυρίλλου. Ὁ οὐσουργοκτουάριος καὶ ὁ <οὐ>σουάριος κινεῖ οὐτίλιον ...<sup>98</sup>

*Pr. Missing.* – § 1. As for what concerns the variations between the texts, the first difference does not seem to be of substance: we have an *actio in factum* (expressed in the usual form ἱμφακτοῦμ), and the Greek text specifies that the slave is ‘mine’ (τὸν ἐμὸν οἰκέτην... ἐμὸν...). But the Greek text is, in respect to the Latin version, expanded, because it specifies that he who held the victim must be considered as ‘who caused his death, and who really killed is subject to the *lex Aquilia*’.<sup>99</sup> – § 2. It is expressed through two *scholia* (i.e. the second part of Sch. 42\* and the Sch. 11 ad Bas. 60.3.11), the second of which begins with the mention of its origin: πρόσκειται ἐν τῷ Ἰνδικί. The first comment confirms the text from Ulpian to the words *teneri Iulianus ait*, and the second comment goes from the words *et si cum uno agatur* to the end. The variations do not seem to be of substance: in the case of *plures*, we have the elucidations ἐμὸν, for the slave, καὶ ἐτελεύτησεν, and, once again, τῷ Ἀκουιλίῳ. But the Sch. 11 [BS 3102/25 = Sch. 13, Hb. V, 273: Πρόσκειται – Ἰνδικί: κλπ.] does not belong to Dorotheus, because such text is to

96 Heimbach, Manuale, 242: «§. 5. 6.: Sch. 24 *Ei δὲ V. 274*».

97 Heimbach, Manuale, 242: «§. 8.: Sch. 30. *Ἐὰν βονα... αὐτοῦ V. 275*». Scheltema’s edition diverges from Heimbach’s edition in some (not meaningful) points.

98 See what I have observed beyond, in the comment to D. 9.2.12 = Bas. 60.3.11.

99 Such principle is coherent with the setting-out of the problem and seems even to fill a logical gap in the Latin text.

be considered as coming from the *indix* of Stephanus, as De Jong seems to have demonstrated.<sup>100</sup> – §§ 3-4. Missing. – § 5. This derives from the first part of the Sch. 49\* ad Bas. 60.3.11 [BS 3106/6 = Sch. 24, Hb. V, 274]. There, the textual chain between Proculus and Julian (in the same order) is saved, and the *actio in factum* (with the transliteration ἰμφοακτούμ that we have remarked many times) is also confirmed. – § 6. This is given by the final part of Sch. 49\*; but, with reference to such, it is to be said that the meaning of the original text is somewhat distorted. If, in D. 9.2.11.6, it is stated *legis autem Aquiliae actio ero competit, hoc est domino*, by such defining, with the word *herus*, the borders of the capacity to be made plaintiff, in the Greek version it is stated, instead, that the *actio directa* of the *lex Aquilia* (ὁ Ἀκουῖλιος ὁ δῖρεκτος) is granted only to the owner (mentioned with the general term δεσπότης) of the damaged or destroyed *res* (which is, literally, ‘killed’ – as this is the typical verb used in matter of *lex Aquilia* – and which becomes, by metaphore, ‘destroyed’: τοῦ ἀναιρεθέντος πράγματος), while the *actio utilis* (mentioned with the form ὁ οὐτίλιος) is granted to the others.<sup>101</sup> It is probable that, for the Byzantine jurist, the distinction between the archaic *herus* and *dominus* was not, for the purpose of his reasoning, interesting or understandable. However, it is certain that the whole problem of the extension of the Aquilian defences to the *non domini* is here generally exposed, by what concerns the solution of the case.<sup>102</sup> – § 7. It is not present in the *indikes*. – § 8. Two transliterations (βοναφίδε and also ἰμφοακτος<sup>103</sup>) are here to be remarked.<sup>104</sup> In the text it is specified that the *servus bona fides serviens* was ‘wounded or damaged’ (πληγῆ ἢ ζημιωθῆ). Though the subject of the sentence is changed, the text mirrors the solution of Ulpian. It can be noticed, though, the elucidation ἐπειδὴ μὴ εἶμι δεσπότης αὐτοῦ<sup>105</sup> that works as *ratio decisionis*, and that, to a certain extent, connects this part of the Byzantine work (matching with D. 9.2.11.8) to what is observed by the (pseudo-) Dorotheus with reference to § 6.<sup>106</sup> – § 9. Missing. – § 10. It is mentioned only in the *indix* of Cyrillus, which is also rich in transliterations (see the expressions

100 De Jong, *Stephanus* (note 8 above), 25. See also, for completeness, Sch. 10 [BS 3102/23 = Sch. 13, Hb. V, 273], which also alludes to the *indix* of Stephanus (which Heimbach, not without substantial reasons, considers as a part of the same Sch. 11 cit. [BS]).

101 Transliteration which is not registered by Stephanus, *Th.G.L.*, but it is present in DuCange, *Glossarium ad scriptores mediae et infimae graecitatis*, 1067, ad h.v. Mich. Psell., *Poem.* 8.503-505, 8.564 and also 8.686, talks about ‘*actio utilis*’ (οὐτίλιος) and ‘*directa*’ (δῖρεκτος).

102 Cf., in particular, Valditara, *Superamento dell’aestimatio rei* (note 59 above), 304 ff.

103 The term ἰμφοακτος appears here again: see *supra* Sch. 8 ad Bas. 60.3.9.3 [BS 3101/6 = Hb. V, 271]. Such term returns in many other *scholia*, which is a sign of the fact this was a term entered into the Byzantine current juridical language.

104 About the term βοναφίδε: see Mich. Psell., *Poem.* 8.235 and also 8.563.

105 Heimbach, *Manuale*, 242, does not mention such part as matching to D. 9.2.11.8.

106 See its comment just *supra*.

οὔσουφρουκτουάριος...<sup>107</sup> οὔσουάριος... οὔτίλιον,<sup>108</sup> for the part which we are here interested in, and προπριεταρίαν... οὔσουφρουκτος<sup>109</sup> for the other part, which refers to D. 9.2.12<sup>110</sup>). Moreover: the correspondance with D. 9.2.11.10 goes only from the beginning of the *scholium* to the word οὔτίλιον.<sup>111</sup> The continuation matches with the content of D. 9.2.12 (καὶ κατὰ τοῦ - ἀρμόσας ὁ οὔσουφρουκτος), to which the mention of corresponding texts (ζήτει βιβ. ἰ τιτ. γ' κεφ. ζ' θεμ. γ' δ' ε' καὶ βιβ. ιζ' τιτ. α' κεφ. ιζ' τὸ τέλος) is added. This latter addition, though, cannot but derive from a later author, because it refers to the Basilica (Bas. 10.3.7[.3-5],<sup>112</sup> and Bas. 16.1.17 *in fin.* [= § 3]), that Cyrillus certainly could not quote. Because of such, though the Fabrot edition corrected θεμ. γ' δ' ε' with θεμ. γ' διγ. ε',<sup>113</sup> such emendation, even if understandable, does not express the truth of the text.

D. 9.2.12, Paul. 10 ad Sab. [P. 1805] = Bas. 60.3.11<sup>114</sup>

→ Sch. 39 ad Bas. 60.3.11, 12 [BS 3104/19 = Sch. 33, Hb. V, 276]:<sup>115</sup> Εἰ δὲ καὶ αὐτὸς ὁ προπριετάριος ἢ τραυματίση ἢ ἀνέλη τὸν οἰκέτην, καθ' οὗ ἔχω τὸν οὔσουφρουκτον, δίδοται μοι ὁ οὔτίλιος Ἀκουίλιος κατ' αὐτοῦ πρὸς τὴν τοῦ οὔσουφρουκτου διατίμησιν καὶ ἀνακλῶ ἑμαυτὸν εἰς τοῦπίσω ἐνιαυτὸν ἀπὸ τῆς πληγῆς καὶ εἰς ἐκεῖνον τὸν χρόνον ἀναφέρω τὴν διατίμησιν, ἐν ᾧ μήπω ἤρμωξέ μοι ὁ οὔσουφρουκτος.

→ Sch. 40 ad Bas. 60.3.11, 12 in. [BS 3104/24 = Sch. 33 *cpv.*, Hb. V, 276]:<sup>116</sup> Κυρίλλου. ... καὶ κατὰ τοῦ τὴν προπριεταρίαν ἔχοντος. Ὁ δὲ ἐνιαυτὸς ἀνακλᾶται καὶ εἰς τὸν χρόνον, καθ' ὃν οὐπώ ἦν ἀρμόσας ὁ οὔσουφρουκτος.<sup>117</sup>

107 Idem as above-mentioned. About the form οὔσουφρουκτουάριος see again Mich. Psell., *Poem.* 8.234.

108 These terms do not appear in Stephanus, *Th.G.L.*

109 Cf. Mich. Psell., *Poem.* 8.177.

110 See just beyond.

111 Heimbach, *Manuale*, 242: «CYR. ind. §. 10.: *Κυρίλλου ... οὔτίλιον* V. 276».

112 As evidence that, also for what concerns βιβ. ἰ τιτ. γ' κεφ. ζ' θεμ. γ' δ' ε', we are dealing with the *libri Basilicorum*, see the text just following, which is matching with D. 9.2.12 = Bas. 60.3.11, and concerns similar issues. Therefore, a later author could have inserted the textual reference at the end of the text of Cyrillus.

113 Cf. Hb. V, 276 n. n: see C.A. Fabrot, *Tōn Βασιλικῶν Τεύχος Ζ'*, Paris, 1647, 76 B-C [Sch. *q-x*, CYRYLL].

114 Heimbach, *Manuale*, 242: «Cf. *Ai ροπαί* cap. XXIV. §. 1» (see, therefore, the final part of *Rhop.* 24.1 [ed. Sitzia, 127-128] which recalls D. 9.2.12 = Bas. 60.3.11).

115 Heimbach, *Manuale*, 242: «DOR. ind.: Sch. 33. *Ei δὲ καὶ* V. 276»; cf. C. Ferrini, 'La legittimazione attiva nell'actio legis Aquiliae', *RISG* XII (1891), 161-189 (177) = Id., *Opere*, 5 (note 33 above), 191-219 (207).

116 Heimbach, *Manuale*, 242: «CYR. ind.: *Κυρίλλου* a v. καὶ κατὰ ... οὔσουφρουκτος V. 276».

117 A *παραιομπή* ends up the text (*Ζήτει* βιβ. ἰ τιτ. γ' κεφ. ζ' θεμ. γ' δ' ε' καὶ βιβ. ιζ' τιτ. α' κεφ. ιζ' τὸ τέλος): see *supra* what I have already observed about D. 9.2.11.

The text, attributed by Heimbach to Dorotheus is, as already observed, rich in translitteration (in the following order: προπριετάριος... οὐσούφρουκτον... οὐτίλιος... οὐσούφρουκτου... οὐσούφρουκτος),<sup>118</sup> as well as the text of Cyrillus.<sup>119</sup>

D. 9.2.13, Ulp. 18 ad ed. [P. 615] = Bas. 60.3.13

pr. → *Deest.*

§ 1 → Sch. 8 [BS 3107/24 = Sch. 5, II cpvn., Hb. V, 276]:<sup>120</sup> Ἐάν τις ἐλεύθερος ὦν καὶ βοναφίδε δουλεύων μοι ζημιώση με, κατέχεται μοι τῷ Ἀκουίλιῳ διαγνωσθεὶς ἐν ὑστέροις ἐλεύθερος.

§ 2 → Sch. 13 [BS 3108/4 = Sch. 8, Hb. V, 277]:<sup>121</sup> Ἐὰν δοῦλος τῆς ἀπροσελεύστου κληρονομίας ἀναιρεθῆ, ἐπειδὴ δεσπότην οὐκ ἔχει, τίς κινήσει τὸν Ἀκουίλιον, ἐζητήθη. Καὶ λέγει ὁ Κέλσος: ἐπειδὴ ὁ νόμος ἠβουλήθη φυλάττεσθαι τῷ δεσπότη τὸ ἀζήμιον, ἀρμόζει τῇ κληρονομίᾳ ὁ Ἀκουίλιος, καὶ ἀδιτεύων μετὰ ταῦτα ὁ κληρονόμος κτᾶται αὐτὸν ἑαυτῷ.

§ 3 → *Deest.*

*Pr.* It is missing in the *indikes*.<sup>122</sup> – § 1. We find the translitteration βοναφίδε,<sup>123</sup> but, most of all, a first elucidation (by which the *liber homo b.f. serviens* ‘damaged me’: ζημιώση με), and a second and final elucidation, which is absent in the text of Ulpian (διαγνωσθεὶς ἐν ὑστέροις ἐλεύθερος) – of which text, moreover, the quotation from Julian is not recalled. – § 2. This further Greek text, attributed to Dorotheus, appears to wholly reflect the stylistic constants of the texts that we have analysed before: this includes the (quite) literal transcription of the sentence *et ait Celsus* with the symmetrically perfect transcription καὶ λέγει ὁ Κέλσος, and the use, in the final passage, of the (translitterated) verb form ἀδιτεύων.<sup>124</sup> Hence the text seems to be faithful to the original: τὸ ἀζήμιον correctly mirrors *damna*,<sup>125</sup> to which the αὐτὸν of the end κτᾶται αὐτὸν ἑαυτῷ is

118 As I have partly already observed, these terms are not registered by Stephanus, *Th.G.L.*, but some of them are contained, on the contrary, in the work of Psellus (see *supra*, nn. 107 and 109).

119 About this latter, see *supra* the comment to D. 9.2.11.10.

120 Heimbach, *Manuale*, 242: «DOR. ind. §. 1.: Ἐάν τις V. 276».

121 Heimbach, *Manuale*, 242: «[DOR.] §. 2.: Ἐὰν δοῦλος V. 277».

122 Nonetheless, a *παραπομπή* is ascribed to such *pr.*, which Heimbach attributes to the Anonymous (Heimbach, *Manuale*, 242: «ANON. ad pr.: Sch. 1. Ἀνάγνωθι ... ὕστερον V. 276»). Such *παραπομπή* is Sch. 1 ad Bas. 60.3.13 [pr.] [BS 3107/11 = Hb. V, 276]: «Ἀνάγνωθι τιτ. α' διγ. γ' [sed β', Hb.] καὶ βιβ. ιζ' τιτ. β' διγ. νβ' θεμ. ὕστερον».

123 As I have already observed, this is a translitteration not registered by Stephanus, *Th.G.L.*, but by Psellus (see *supra*, n. 104).

124 This is absent in Stephanus, *Th.G.L.*, but it is mentioned by DuCange, *Gl.Gr.*, 26, s.v. Ἀδιτεύειν. The same verb in the infinite form, ἀδιτεύειν, is present in Mich. Psell., *Poem.* 8.233.

125 Stephanus, *Th.G.L.* I, 782A, s.v. Ἀζήμιος: «Item τὸ ἀζήμιον», substantive, *Indemnitas*».

connected. It is to be remarked, though, that the *servus* is *hereditarius*, with regard to a ‘not yet accepted inheritance (δοῦλος τῆς ἀπροσελεύστου κληρονομίας)’, but this does not change the point, because such datum is implicit also in D. 9.2.13.2 (as it derives from the end *quare adita – poterit experiri*). – § 3. Missing.

D. 9.2.14, Paul. 22 ad ed. [P. 361] = Bas. 60.3.14  
→ *Deest*.

The text matching with D. 9.2.14 had not been saved. The similar absence of what matches the preceding § 3 of D. 9.2.13, which constitutes a logical premise to D. 9.2.14, could be considered as meaningful. In this respect, some palingenetic solutions had been proposed, according to which frg. 14 should be inserted after the word *adquisita* of D. 9.2.15 pr., Ulp. 18 ad ed.,<sup>126</sup> or after the whole *principium* of the same text.<sup>127</sup> Now, let alone the fact that, in this way, texts would be improperly forced,<sup>128</sup> even the structure of the *libri Basilicorum* – and the system of the various *scholia* connected to them<sup>129</sup> – seem but to repeat the systematic order adopted by the Compilers in D. 9.2, which is a sign that the same order was found in the works of Byzantine jurists used as a basis for the drafting of Bas. 60.3: Bas. 60.3.13[.3] = D. 9.2.13.3 → Bas. 60.3.14 = D. 9.2.14 → Bas. 60.3.15 [pr.] = D. 9.2.15 pr.<sup>130</sup>

126 See P. Krüger, CIC., *Digesta, ad h.l.*

127 Cf. again CIC., *Digesta, ad h.l.*, where such proposal is attributed to G. Segrè, ‘Note esegetiche sui legati’, in: *Studi in on. V. Scialoja*, 1, 253-254 n. 1, now in Segrè, *Scritti giuridici*, 2, Roma 1938, 442-443 n. 1. Actually, the suggestion of Mommsen-Krüger does not seem to be inferable from the article of the Italian Scholar. As further evidence of this, it can be noticed that Levy - Rabel, *Index inpl.*, 1, 114, *ad* D. 9.2.14, do not refer the opinion of Segrè (and *Iid.*, *Suppl.* 1, 148, do not even register D. 9.2.14). Segrè, actually, in a parenthetical clause, suggests to confront «fr. 13 § 3, fr. 14 D. 9, 2» (*l.c.*), in a way that seems to confirm both the order of the Digest, and what I have sustained here, *i.e.* that D. 9.2.13.3 is the logical premise of D. 9.2.14. Nonetheless, the presence of some textual corruption. Cf. Lenel, *Palingenesia*, 2, 525 n. 1 (*ad* D. 9.2.15 pr.).

128 See already M. Wlassak, ‘Vindikation und Vindikationslegat. Studien zur Erforschung des Sachenrechts des Römer’, *SZ XXXI* (1910), 196-321 (243 n. 1 and 284 n. 3), who observed, in substance and arguing with Krüger, that no compelling reason exists to change the position of Paulus’ fragment.

129 See, though, what is observed in the continuation of this work, with regard to D. 9.2.13.3 - D. 9.2.14 - D. 9.2.15 pr. and to their absence in the ἵνδικες which are here examined.

130 The *principium* of D. 9.2.15 is contained in the ἵνδικς of Stephanus (see just beyond): it is possible that the Macedonian compilers followed the drafting of this jurist.

D. 9.2.15, Ulp. 18 ad ed. [P. 615] = Bas. 60.3.15

pr. → Sch. 1-2 [BS 3108/23, 25 = Sch. 1, Hb. V, 277-278<sup>131</sup>].<sup>132</sup> 1. - Ἐπειδὴ γὰρ κτᾶται τὸν Ἀκουΐλιον ὁ κληρονόμος, εἰκότως μένει παρὰ τῷ κληρονόμῳ ἀδιτενοῦντι ὁ Ἀκουΐλιος. 2. - Οὐλπιανὸς καὶ Στέφανός φασι τοῦτο πρὸς ἀκρίβειαν εἰρησθαι, ἐπειδὴ καὶ ἐπὶ τοῦ ἀποθανόντος ὁ κληρονόμος ἐκχωρεῖ τῷ ληγαταρίῳ τὸν Ἀκουΐλιον, εἰ καὶ τὸ ρητὸν περὶ τοῦ τραυματισθέντος λέγει τὴν ἐκχώρησιν. Στέφανος δὲ λέγει τὴν ἐκχώρησιν ἀργεῖν ὡς τοῦ δούλου πρὸ ἀδιτίονος φονευθέντος καὶ μὴ ἀρμόσαντος τῷ ληγαταρίῳ. [Οὐ λέγει δὲ καλῶς. Τὰ γὰρ ποῦρα οὐκ ἄBADIPATE HEREDITATE, ἀλλὰ MORTEM TESTATORIS προχωροῦσιν, ὡς ἴνστιτ. β' τιτ. κ' καὶ βιβ. λζ' τιτ. β' ἦτοι βιβ. μδ' τιτ. κ'. Δυνατὸν δὲ λέγειν ἀκολούθως ἀργεῖν τὴν ἐκχώρησιν ὡς τοῦ Ἀκουΐλιου οὐκ ἐκ τῆς κληρονομίας, ἀλλὰ προφάσει τῆς κληρονομίας ἀρμόσαντος τῷ κληρονόμῳ· τοιαύτην γὰρ διαίρεσιν εὐρίσκεις κειμένην ἐπὶ τῆς νερεδιτάτις πετιτίονος βιβ. ε' τιτ. γ' διγ. κ' θεμ. γ' ἦτοι βιβ. μβ' τιτ. α' καὶ διγ. κδ' καὶ ἐπὶ τοῦ Τρεβελιανείου βιβ. λζ' τιτ. α' διγ. με' ἦτοι βιβ. λε' τιτ. α' καὶ βιβ. μζ' τιτ. ιβ' διγ. θ' ἦτοι βιβ. ζ' τιτ. κγ'.].

§ 1 → Sch. 8 [BS 3109/28 = Sch. 6, Hb. V, 278-279].<sup>133</sup> Ἐὰν οἰκέτης θανατηφόρον πληγὴν δεξάμενος μετὰ ταῦτα ἀπὸ σεισμοῦ ἢ ναυαγίου ἢ ἄλλως πληγῆς συντομώτερον τελευτήσῃ, οὐκ ἐνάγεται ὡς περὶ ἀναιρεθέντος αὐτοῦ ὁ πλῆξας αὐτόν, ἀλλ' ὡς τραυματίσας αὐτόν. Ἐὰν δὲ ἐλευθερωθεῖς ἢ ἐκπονηθεῖς ἑτέρῳ ὁ τὴν θανατηφόρον πληγὴν δεξάμενος τότε τελευτήσῃ, ὡς περὶ ἀναιρεθέντος αὐτοῦ κινεῖται ὁ Ἀκουΐλιος. Διὰ τί δὲ ποτε μὲν ὡς ὑπὲρ ἀναιρεθέντος, ἄλλοτε δὲ ὡς ὑπὲρ τραυματισθέντος κινεῖται ὁ Ἀκουΐλιος, πρόδηλός ἐστιν ὁ λογισμὸς. Ἐνθα μὲν γὰρ μηδεμιᾶς ἑτέρας ἐπενεχθείσης αὐτῷ πληγῆς τελευτῶ, πρόδηλόν ἐστιν, ὡς ἐκ τῆς πρώτης πληγῆς ἐτελεύτησε, καὶ διὰ τοῦτο ὡς περὶ ἀναιρεθέντος ἐνάγεται ὁ πλῆξας αὐτόν. Ἐνθα δὲ μετὰ τὴν πληγὴν ὁ σεισμός ἢ τὸ ναυάγιον ἀνεῖλε τὸν οἰκέτην, ἐπειδὴ οὐ συνεχώρησεν ἡμῖν αὐτὰ μαθεῖν, εἰ ἐκ τῆς πληγῆς ἀνηρέθη, διὰ τοῦτο ὡς περὶ τραυματισθέντος μόνον ἐνάγεται. Εἰ δὲ τὸν θανατηφόρως πληγέντα ἐλεύθερον γράψῃ καὶ κληρονόμον ὁ δεσπότης καὶ μετὰ τὸ ἀναφανῆναι τῷ δεσπότη κληρονόμον τελευτήσῃ, ὁ κληρονόμος αὐτοῦ τοῦ ἐλευθερωθέντος οὐκ ἔτι δύναται κινήσαι τὸν Ἀκουΐλιον, ἐπειδὴ εἰ δ' ἂν ἐλεύθερος ὢν ἐπλήγη, οὐχ ἥρμοζεν ὁ Ἀκουΐλιος. ...

131 Due to a mere oversight, Heimbach's edition mentions «p. 279», while it is 277-278.

132 Heimbach, Manuale, 243: «ANON. ad pr.: Ἐπειδὴ V. 279».

133 Heimbach, Manuale, 243: «DOR. ind. §. 1.: Ἐὰν οἰκέτης ... οὐχ ἥρμοζεν ὁ Ἀκουΐλιος V. 278 sq.», but cf. C. Ferrini, 'Postille esegetiche del commentario di Ulpiano alle formule edititali ad legem Aquiliam', *RIL* XIX (1886), 245-# (#) = Id., *Opere*, 2, Milano 1929, 95-111 (102 and n. 5): *index* of Stephanus.

*Pr.* The text is missing in the *indikes* (i.e. in the *indix* attributed to Dorotheus and in the one attributed to Cyrillus). Nonetheless, we have two *σχόλια*<sup>134</sup> – according to Heimbach, these belong to the Anonymous<sup>135</sup> – which *σχόλια* include a brief passage of the work of Stephanus<sup>136</sup> (Ὀὐλιανὸς καὶ Στέφανός φασι – ἀρμόσαντος τῷ ληγαταρίῳ)<sup>137</sup> and comment the *principium* of D. 9.2.15. It is to be added that also the Sch. 1, if we evaluate it as a premise to the whole discourse, can be considered as a (substantial) part of the thought of Stephanus. Interesting aspects are the many transliterations: τῷ ληγαταρίῳ<sup>138</sup> – which is present two times, in the same gender and number – ... ποῦρα ... ἐπὶ τῆς νερεδιτάτις πετιτίονος...<sup>139</sup> the technical terms which are even kept in Latin letters (‘ABADITATE HEREDITATE... MÓRTEM TESTATÓRIS),<sup>140</sup> and the many mentions of analogous texts which the *scholia* include. Correctly, Heimbach remarks that «in Sch. Ἐπειδὴ Anonymus<sup>141</sup> laudat Stephanum [in addition to Ulpian: Οὐλιανὸς καὶ Στέφανος] ad L. 15 pr. D. IX. 2. eiusque sententiam vituperat»,<sup>142</sup> and he refers, with these latter expressions, to the passage «Ὁὐ λέγει [i.e. Στέφανος] δὲ καλῶς» and to the contrary judgement that can be deduced from it (from τὰ γὰρ, *usque ad fin.*) – § 1. It must be observed, in a preliminary way, that the attribution of the Sch. 8, by Heimbach, to Dorotheus seems rather doubtful: the absence of transliterations; the loss of the name of the jurist Julian, and, most of all, the wordiness of the writing inspire more than one misgiving (most of all, if we consider that the German editor criticized the solution chosen by Zachariä – i.e. the attribution to Stephanus of the same *scholia adespota* – on the basis of the ‘terseness’ of

134 The division in two *scholia* is in the Dutch edition.

135 Heimbach, *Manuale*, 243: «ANON. ad pr.: Ἐπειδὴ V. 279». Scheltema’s edition, on the contrary, offers no information.

136 Whose thought is criticized very explicitly: Στέφανος δὲ λέγει ... οὐ λέγει δὲ καλῶς [!].

137 De Jong, *Stephanus* (note 8 above), 17, who recalls only the first quotation; the second, by reason of its literal style, must be considered as deriving from the *indix* of Stephanus: cf. also C. Ferrini, ‘Intorno all’indice de’ Digesti di Stefano’, *BIDR* III (1890), 61-71 (61-62) = Id., *Opere*, I, Milano 1929, 297-306 (207-298) and Lokin, ‘From the Greek Basilica Tradition’ (note 33 above), 223; see also beyond, n. 143.

138 Stephanus, *Th.G.L.* VI, 238D, s.v. Ληγάτον. Cf., on the contrary, Mich. Psell., *Poem.* 8.236 (ληγατάριος), 8.152, 8.289, 8.292, 8.480, 8.691 (ληγάτον), and also Const. Porf., *De cerim.* 718.5, 719.16, 738.10-11, 738.17, 750.8 and 753.3.

139 The nouns that compose the phrase ἐπὶ τῆς νερεδιτάτις πετιτίονος do not appear in Stephanus, *Th.G.L.*; in DuCange, *Gl.Gr.*, 1160: πεπιτεῦειν; see, though, Mich. Psell., *Poem.* 8.612 and 8.784 (νερεδιτάτις).

140 As they should have been written by the more ancient Byzantine Jurists: cf. Brandsma, *Dorotheus* (note 20 above), 285.

141 He is assuming, naturally, that the Anonymous is the author.

142 Heimbach, *Manuale*, 243 n. u.

Dorotheus' version).<sup>143</sup> The last part (τὰ δὲ εἰς – ἀνατρέπεται) concerns D. 9.2.16: we refer, therefore, to that text.<sup>144</sup>

D. 9.2.16, Marcian. 4 reg. [P. 258] = Bas. 60.3.16

→ Sch. 8 ad Bas. 60.3.15[.1] [BS 3110/7 = Sch. 6 ult. pars, Hb. V, 279]:<sup>145</sup> ... Τὰ δὲ εἰς ἐκεῖνον περιερχόμενα τὸν κάσον, εἰς ὃν οὐκ ἠδύνατο ἐξ ἀρχῆς συστήναι, ἀνατρέπεται.<sup>146</sup>

The text does not show particular differences in respect to D. 9.2.16: it is only to be noticed the end (ἀνατρέπεται), which is added in the Greek text, and the presence of the transliteration τὸν κάσον (that finds its match in *in eum casum* of the Latin text).

D. 9.2.17, Ulp. 18 ad ed. [P. 615] = Bas. 60.3.17

→ Sch. 5\* [BS 3112/6 = Sch. 1, Hb. V. 280]:<sup>147</sup> [Ἔσθ' ὅτε καὶ ὁ δεσπότης ἐνάγεται τῷ Ἀκουιλίῳ ἥτιοι τῇ ἰμφάκτῃ]. Ἐὰν γὰρ τις τὸν ἴδιον οἰκέτην ἀνέλη, δύναται ὁ βοναφίδε

143 It must be said, though, that the presence (or the absence) of such stylistic elements cannot have an absolute value. *I.e.*, if we analyse the *scholia* where Dorotheus is expressly mentioned as the author (*scholia* which offer, therefore, the most possible dependability, by the state of the sources), not all of them include transliterations or quotations of jurists (though this opens, in itself, new discussions about the way the texts of the most ancient Byzantine commentators came to us). See Sch. 1 ad Bas. 11.1.39 [BS 284/15 = Hb. I, 623]; Sch. 133\* ad Bas. 60.3.27[.25] [BS 3135/7 = Sch. 74\* Hb. V, 296]; Sch. 146\* ad Bas. 60.3.27[.33] [BS 3136/30 = Sch. 110, Hb. V, 299] (and see Scheltema, 'Das Kommentarverbot Justinians' [note 7 above], 315 = *Id.*, *Opera minora* [note 7 above], 411) and also Sch. 25\* ad Bas. 60.3.30[.4] [BS 3143/13 = Sch. 18\*, Hb. V, 304]. Thus, these are four texts out of nineteen (which are registered also by Brandsma, *Dorotheus* [note 20 above], 47 ff.), which is not a very high number, but it is not negligible either. Anyhow, we are dealing with versions of very short paragraphs, which reduce the frequency of such phenomenon. Cf. also Ferrini, 'Intorno all'indice de' Digesti di Stefano' (note 137 above), 63 = *Id.*, *Opere*, 1 (note 137 above) 299, but see, *contra*, Sch. 12\* ad Bas. 60.3.32 [BS 3145/22 = Sch. 6\*, Hb. V, 306].

144 Heimbach, *Manuale*, 243: «[ANON.] ad §. 1.: Sch. 10. *Ἀνάγνωθι* V. 279», and also «ad v. quasi de vulnerato: Ἐξ τοῦ V. 279». These are, in other words, two *scholia* ascribed to § 1 of the text at issue, *i.e.*: Sch. 23§ [BS 3111/14 = Sch. 10, Hb. V, 279] and Sch. 11 [BS 3110/14 = Sch. 8, Hb. V, 279].

145 Heimbach, *Manuale*, 243: «DOR. ind.: Sch. 6 in fin. a v. τὰ δὲ εἰς V. 279». The text is supplied with another *scholium* who mentions the name of Stephanus, but, as Heimbach remarks, probably with reason (*loc. ult. cit.*: «ANON. adn.: *Ἡλευθερώθη*»), we are in presence of an *adnotatio* of the Anonymous: Sch. 3 [BS 3111/21 = Sch. 2 cpv., Hb. V, 279-280].

146 See *supra*, with regard to D. 9.2.15.1, Sch. 8 ad Bas. 60.3.15[.1] [BS 3109/28 = Sch. 6, Hb. V, 278-279].

147 Heimbach, *Manuale*, 243: «DOR. ind.: Ἔσθ' ὅτε V. 280»; cf. Ferrini, 'La legittimazione attiva nell'actio legis Aquiliae' (note 115 above), 176 and n. 1 = *Id.*, *Opere*, 5 (note 33 above), 206 and n. 1.

νεμόμενος αὐτὸν ἢ ὁ ἔχων αὐτὸν εἰς ἐνέχυρον τὸν Ἀκουίλιον ἦτοι τὴν πιγνερατικίαν κινεῖν.

The text of Sch. 5\* shows some peculiarities, among which the terms ἰμφάκτη ... βοναφίδε ... πιγνερατικίαν<sup>148</sup> but, moreover, the non-conformity to the original stand out. There is a general premise, which is absent in the text of Ulpian, according to which ‘sometimes the same owner is sued with the *lex Aquilia* or with an *actio in factum*’ (ἔσθ’ ὅτε – τῆ ἰμφάκτη). Secondly, while the case is the same as in the Digest (*i.e.* the killing of one’s slave who is possessed *bona fide* by others, or who was given as a pledge), here the owner is liable, respectively, by reason of the *actio legis Aquiliae directa* or (ἦτοι) by reason of the *actio pigneraticia*. The text of the Digest considers, on the contrary, only the *actio in factum*.<sup>149</sup> Such problem finds some enlightenment if we compare D. 9.2.18, where both *actiones* are analysed, but with reference to a different defendant, *i.e.* respectively, the possessor or the *creditor pigneraticius*, who kills or wounds the slave.

D. 9.2.18, Paul 10 ad Sab. [P. 1806] = Bas. 60.3.18

→ *Secundum Hb. deest*,<sup>150</sup> but cf. Sch. 5\* ad Bas. 6.3.17 [BS 3112/6 = Sch. 1, Hb. V. 280]. See *supra*, ad D. 9.2.17.

The comparison between the comment to D. 9.2.17 attributed to Dorotheus and the text of D. 9.2.18 lead us to believe that the Sch. 5\* concerns both fragments of the Pandectae,<sup>151</sup> though with some not irrelevant content variations (the legitimation to be plaintiff or defendant in the *actio legis Aquiliae* and in the *pigneraticia* changes substantially).<sup>152</sup> As for what concerns the palingenetic profile, it is necessary to emend both the German and the Dutch edition, which means that the reference should be, in the edition of the 19<sup>th</sup> century, in the following terms: «18. = 18. DOR. ind.: ‘*Εσθ’ ὅτε a v. ἐὰν γάρ τις u. a. f. V. 280*». In Scheltema’s edition, for what concerns the Sch. 5\* ad Bas. 60.3.17 [BS 3112/6], the part ἔσθ’ ὅτε καὶ – τῆ ἰμφάκτη should also be mentioned. As for what concerns the

148 About the expression ἰμφάκτη, the same remark expressed *supra*, ad D. 9.2.9.2 = Bas. 60.3.9.2 (critical apparatus), can be repeated. Also the terms now recalled are not registered by Stephanus, *Th.G.L.*; for what concerns πιγνερατικία see, instead, Mich. Psell., *Poem.* 8.128.

149 Miglietta, ‘Trasmissione del testo e giurisprudenza bizantina’ (note 73 above), 294 and nn. 51-52.

150 Heimbach, *Manuale*, 243.

151 Also in BS 3112/6, Sch. 5\* is mentioned with reference only to Bas. 60.3.17 = D. 9.2.17, and not also to Bas. 60.3.18 = D. 9.2.18 (see also BT 2754, app. Scholia). The two editions must be corrected on this point.

152 It must be remarked, though, that also in another *scholium* (the pseudo-) Dorotheus seems to misunderstand the Latin text (Brandsma, *Dorotheus* [note 20 above], 251-252, 283 and n. 356 with reference to Sch. 3\* (Pe) ad Bas. 60.41.11 [BS 3774/12]).

contents, the circumstances in point are completely different. The Latin text considers the case of the slave, given as a pledge, who was killed by his pledgee, so as to solve the problem whenever, beyond the *actio legis Aquiliae*, the *dominus* could also sue the pledgee with the *actio pignoratitia*,<sup>153</sup> and which is the relationship between the two *actiones* (i.e. which one of them should be used as first, and if using one *actio* prevents one to use the other). The juridical problem is solved by granting to the *dominus* both types of defence, but with a limitation concerning the necessary choice that the *dominus* must make between one defence and the other: *lege Aquilia et pignoratitia... sed alterutra contentus esse debet actor*). In the Greek version, on the contrary, the right to sue is granted to the same pledgee, because of the killing of the slave (*pignus*) by the debtor-owner; moreover, the same right is granted to the *bona fide* possessor (ὁ βοναφίδε νεμόμενος).

D. 9.2.19, Ulp. 18 ad ed. [P. 615] = Bas. 60.3.19  
→ *Deest*.

The text does not appear in any of the *indikes* here considered. Nonetheless, there are two *scholia* of the Anonymous which ‘should’ concern D. 9.2.19.<sup>154</sup> These are Sch. 1 and 2 ad Bas. 60.3.19 e 20 [BS 3112/16-17 = Sch. 1, Hb. V, 280]: 1. Ζήτει περὶ τοῦ κοινοῦ δούλου διγ. κζ’ θεμ. κ’. 2. - Ζήτει κεφ. κζ’ καὶ βιβ. ιβ’ τιτ. β’ κεφ. κζ’. Ἐπεὶ καὶ πᾶς δεσπότης ὑπόκειται ᾧτινι διαφέρει.<sup>155</sup> Heimbach’s edition mentions also the Sch. 3 *ad h.l.* [BS 3112/19 = Hb. V, 280] as belonging again to the work of the Anonymous: Ἦγουν καθ’ ὅσον ἐδέσποζε τοῦ ἀναιρεθέντος.

D. 9.2.20, Ulp. 42 ad Sab. [P. 2893] = Bas. 60.3.20  
→ *Deest*.

Absent in the Byzantine versions.

153 This is, anyhow, an *actio in rem (praetoria)* with *formula in factum concepta*, and this could explain both the granting of such *actio* and the fact that it is alternative to the *actio legis Aquiliae*.

154 The conditional form is here needed, because the Dutch edition denies the second: cf. BS 3112 *ad h.l.*

155 In Heimbach’s edition, sch. 1 cit., covers the following text: «1. - Ζήτει περὶ - κεφ. κζ’.».

*‘Ad caput primum - id quod interest’*<sup>156</sup>

D. 9.2.21, Ulp. 18 ad ed. [P. 616] = Bas. 60.3.21

pr. → Sch. 1 ad Bas. 60.3.21 [pr.-1, 1 pars] [BS 3112/24 = Hb. V, 280]:<sup>157</sup> Εἰς τοσοῦτον καταδικάζει τὸν ἀνελόντα <ὁ> Ἀκουίλιος, ὅσου πλείονος ἄξιος ἦν ἐν τούτῳ τῷ ἐνιαυτῷ <ὁ> οἰκέτης· οὕτω γὰρ συνείδε τὴν συμβάσαν ζημίαν ὁ νόμος ἀποτιμᾶσθαι. ...

→ Sch. 2 ad Bas. 60.3.21 [pr.-1, 1 pars] [BS 3112/28 = Hb. V, 280]:<sup>158</sup> Κυρίλλου. Ἡ διατίμησις γίνεται ὅσου πλείονος ἄξιος ἦν ὁ οἰκέτης ἐν αὐτῷ τῷ ἐνιαυτῷ ἀνακλωμένῳ ἀφ’ οὗ ἐπλήγη, οὐκ ἀφ’ οὗ ἀπέθανεν.

§ 1 → Sch. 1 ad Bas. 60.3.21 [pr.-1, 1 pars] [BS 3112/26 = Hb. V, 280]:<sup>159</sup> ... Ὁ δὲ ἐνιαυτὸς ἀφ’ ἧς ἡμέρας ἀνηρέθη ὁ οἰκέτης εἰς τοῦπίσω ψηφίζεται. → Sch. 1 ad Bas. 60.3.21 [1.-2.]<sup>160</sup> [BS 3113-2 = Sch. 2, Hb. V, 281]: Εἰ δὲ πληγὴν δεξάμενος ὁ οἰκέτης μετὰ πολλὸν χρόνον ἐκ τῆς πληγῆς ἐτελεύτησεν, οὐκ ἐξότε ἐτελεύτησεν, ἀλλ’ ἐξότε τὴν πληγὴν ἔλαβε ψηφίζεται ὁ ἐνιαυτὸς. Cf. Sch. 2 ad Bas. 60.3.21 [pr.-1, 1 pars] [BS 3112/28 = Hb. V, 280]:<sup>161</sup> Κυρίλλου ... κλπ.

§ 2 → Sch. 1 ad Bas. 60.3.21 [1.-2.]<sup>162</sup> [BS 3113/4 = Sch. 2, Hb. V, 281]: ... Οὐ διατιμώμεθα δὲ μόνον τὸ σῶμα τοῦ ἀνααιρεθέντος οἰκέτου, ὅσου ἄξιον ἦν, ὅτε ἀνηρέτο, ἀλλ’ εἰς εἴτι διέφερον ἡμῖν μὴ ἀνααιρεθῆναι αὐτόν, εἰς τοσοῦτον ἡ καταδίκη γίνεται. ...

A previous remark: the Greek texts are a bit complex, because the texts of the ἴνδικες are overlapping, so to say, in respect to the various paragraphs of the texts from the Digest. – *Pr.- §1*. This passage is very interesting, also because it gives me the opportunity to repeat that the intuition of Heimbach’s edition are not always without value. For what concerns the two σχόλια – respectively of the pseudo-Dorotheus and of Cyrillus – that translate the text in Greek language – *i.e.* Sch. 1 and 2 ad Bas. 60.3.21 [pr.-1, 1 pars] [BS 3112-24, 28 = Hb. V, 280] – they both concern both the *principium* of D. 9.2.21 and the § 1. Such datum emerges with a major relevance in the Sch. 1, while the commixtion is veiled in Sch. 2, but in essence the point does not change. Heimbach correctly remarked such point, as he

156 Cf. Miglietta, *Servus dolo occisus* (note 24 above), 78 (and 79).

157 Heimbach, *Manuale*, 243: «DOR. ind. pr. §. 1. u. a. v. occisus est: Εἰς τοσοῦτον V. 280».

158 Heimbach, *Manuale*, 243: «CYR. ind. pr. §. 1.: Κυρίλλου V. 280».

159 See *supra*, n. 157.

160 Heimbach, *Manuale*, 243: «[DOR.] §. 1. a v. Quodsi et §. 2.: Εἰ δὲ πληγὴν ... καταδίκη γίνεται V. 281».

161 See *supra*, n. 158.

162 See *supra*, nn. 157 and 159.

avoided to attribute both the Sch. 1 and the Sch. 2 to the only *principium* of D. 9.2.21.<sup>163</sup> As to the stylistic peculiarities, in this case also, the writing of the Greek texts – in particular, of the text attributed to Dorotheus, – omits the recall of the quoted jurists (Celsus and Julian, in the *principium*), and no translitteration appears. – §§ 1-2. To this regard, the wide Sch. 1 ad Bas. 60.3.21 §§ 1. 2<sup>164</sup> concerns both paragraphs of the text of the Digest, as both the German and the Dutch edition highlighted. The text is once again interesting, because it does not stop at the only D. 9.2.21, but it also massively concerns the text from Paulus saved in D. 9.2.22 (pr. and § 1), which will be examined just beyond.

*‘Ad caput primum: aestimatio - causae corpori cohaerentes’*<sup>165</sup>

D. 9.2.22, Paul. 22 ad ed. [P. 362] = Bas. 60.3.22

pr. → Sch. 1 ad Bas. 60.3.21 [BS 3113/6 = Sch. 2, Hb. V, 281]:<sup>166</sup> ... Ὅθεν εἰ ἐπερωτηθεὶς ὑπὸ τινος, εἰ μὴ παραστήσω τοῦτον τὸν ἀναιρεθέντα οἰκέτην, πρόστιμον διδόναι, ἐπειδὴ σοῦ ἀνελόντος αὐτὸν μὴ δυνάμενος αὐτὸν παραστήσαι ὑποπίπτω τῷ προστίμῳ, καὶ τῷ τοῦ προστίμου διαφέροντι καταδικάζη μοι. ...

§ 1 → Sch. 1 ad Bas. 60.3.21 [BS 3113/9 = Sch. 2, Hb. V, 281]:<sup>167</sup> ... Καὶ ὅσα δὲ τῷ σώματι τοῦ ἀναιρεθέντος παρακολουθοῦσι καῦσαι, καὶ αὗται διατιμῶνται. Εἰ γὰρ ἐκ δύο κωμωδῶν ἢ ἐκ τοῦ χοροῦ τῶν ἄδόντων ἐν συμφωνίᾳ ἢ ἀπὸ διδύμων οἰκετῶν ἐοικότων ἀλλήλοις ἢ ἀπὸ τεθρίππου ἢ ἀπὸ ζυγῆς μουλῶν ἕνα ἢ μίαν ἀνέληξ, οὐ μόνον ἢ τοῦ ἀναιρεθέντος σώματος διατίμησις γίνεται, ἀλλὰ σκοπεῖται, εἰς πόσον καὶ τῶν ζώντων σωμάτων ἢ διατίμησις ἀπεμειώθη μηκέτι τοῦ περιόντος κωμωδοῦ ἢ τῆς συμφωνίας ἢ τοῦ περιόντος ἐκ τῶν διδύμων οἰκετῶν ἢ τῶν περιόντων ἐκ τοῦ τεθρίππου τριῶν ἵππων ἢ τῆς μιᾶς μούλης τὴν αὐτὴν διατίμησιν σωζόντων.

The vast Sch. 1 ad Bas. 60.3.21 [BS 3113-9 = Sch. 2, Hb. V, 281],<sup>168</sup> as I have already observed, covers a much wider field, because it reproduces both the text saved in D. 9.2.21 and the text contained in D. 9.2.22. – *Pr.* Much wider, with regard to the original, is the version attributed by Heimbach to Dorotheus, where we can remark the presence of a

163 Heimbach, Manuale, 243: «DOR. ind. pr. §. 1. u. a. v. occisus est: *Eἰς τοσοῦτον* V. 280» and also Heimbach, Manuale, 243: «CYR. ind. pr. §. 1.: *Κύριλλος* V. 280»; see, on the contrary, BS 3112 *ad hh.ll.*, which works in the opposite sense.

164 Cf. BS 3113/2.

165 Cf. Miglietta, *Servus dolo occisus* (note 24 above), 66.

166 Heimbach, Manuale, 243: «22. = 22. DOR. ind.: *Εἰ δὲ πληγὴν* a v. *ὅθεν εἰ ἐπερωτηθεὶς* u. a. f. V. 281».

167 See the preceding n.

168 See *supra* D. 9.2.21 = Bas. 60.3.21 and D. 9.2.22 = Bas. 60.3.22.

translitteration (καῦσαι).<sup>169</sup> – § 1. The second part of Sch. 1 touches a suggestive issue, *i.e.* the *aestimatio* of a unity composed by several animals or slaves bound by *causae corpori cohaerentes* (a phrase here very well translated with τῷ σώματι τοῦ ἀναιρεθέντος παρακολουθοῦσι καῦσαι).<sup>170</sup> In this case also, the Greek version develops widely the original content, following a scheme that – though it dates back to the thought of Paulus in D. 9.2.22.1 – shows some original reflections, which do not find a match even in PT 4.3.10. Eventually, the text has an interesting conclusion, that gives to the judge a ‘pragmatic’ criterion for the evaluation of damage. For what concerns the main issue, the Byzantine text examines, minutely, the killing of one between the ‘two’ slave actors, or of a chorister of a chorus, or of ‘one’ of ‘two’ twins resembling one to the other, or of an element of a *quadriga* (of horses, it is implied) or of a pair of female mules, by reason of which killing the owner will receive (beyond the value of the destroyed element) also the diminished value of the surviving *corpora*. The interesting elucidation μηκέτι τοῦ περιόντος – σωζόντων is added to this solution – which mirrors classical law. This means that the *aestimatio* of the survivors, which are bound to the *corpus peremptum*, cannot be higher (μηκέτι) than the value of the actor, or of the musician, or of the twin, or of the three horses of the *quadriga*, or of the female mule: this would confirm that the value of the whole unity could be reached (the killer would be sentenced, according to this source, to pay both the destroyed *corpus* and the *corpus* of the survivors, and the limit to such sentence would be the value of the unity of the survivors).<sup>171</sup>

169 This is not registered by Stephanus, *Th.G.L.* Cf., though, Mich. Psell., *Poem.* 8.224, 8.546-547 and 8.1234 (μόρτις καῦσα), 8.527 (καῦσα κόγνιτα), 8.605 (μέτους καῦσα); cf. also *Etymologicum magn.* 493.30.

170 Cf. M. Miglietta, ‘Logiche di giuristi romani e bizantini a confronto in materia di stima aquiliana delle ‘causae corpori cohaerentes’’, in: G. Ferrari - M. Manzin [ed.], *La retorica fra scienza e professione legale. Questioni di metodo*, Milano 2004, 221-288 (272-274). Be it said, incidentally, that the new Dutch edition of PT (*Theophili antecessoris Paraphrasis Institutionum*, J.H.A. Lokin - R. Meijering - B. Stolte - N. van der Wal [ed.], 766-769, ad PT 4.3.10) re-proposes the text (by such assuming the connected interpretation) of Ferrini (*lat.*): cf. *Institutionum graeca Paraphrasis Theophilo antecessori vulgo tributa*, E.C. Ferrini [ed.], 402.

171 This could be challenged by sustaining the such limit could be general and, mostly, that it could absorb the *aestimatio*, but such objection would be groundless: firstly, in this case the *regula* would be unuseful, because the sentence would, in fact, coincide with the value of the only destroyed *corpus* (hence, the loss of value of the other *corpora* would not be considered). But there is another reason: the text of D. 9.2.22.1 (hence, also of Sch. 1) examines the appraisal of the survivors, in addition to the appraisal of the *corpus peremptum*. See, for confirmations, Sch. 5§ ad Bas. 60.3.22 [BS 3113/27 = Sch 4†, Hb. V, 281] about which Miglietta, ‘Logiche di giuristi romani’ (note 170 above), 268-270.

D. 9.2.23, Ulp. 18 ad ed. [P. 616] = Bas. 60.3.23

pr. → *Deest.*

§ 1 → Sch. 47\* [BS 3118/12 = Hb. V, 282]:<sup>172</sup> Εἰ μέντοι σὺν ἐλευθερίᾳ γραφεῖς κληρονόμος ὑπὸ τοῦ ἰδίου δεσπότη ἀνηρέθη, οὔτε ὁ διδόμενος αὐτῷ σουβσιτιοῦτος οὔτε ὁ ἐξ ἀδιαθέτου γενόμενος τῷ δεσπότη κληρονόμος διὰ τοῦ Ἀκουιλίου δύναται τὸ διαφέρειν τῆς κληρονομίας ἀπαιτεῖν. Ἐὰν γὰρ ἐγκαλέσωσι τῇ ἀναιρέσει τοῦ οἰκέτου, ἀκούσονται, ὅτι εἰ μὴ ἀνηρέθη, ἐλεύθερος ἦν καὶ κληρονόμος καὶ ὑμεῖς οὐδὲ ἐκαλείσθε εἰς τὴν κληρονομίαν. Εἰς μόνον δὲ τὸ τίμημα τοῦ ἀναιρεθέντος οἰκέτου γίνεται κατὰ τὸν Ἰουλιανὸν ἢ διατίμησις. Ἐγὼ δὲ νομίζω μηδὲ εἰς τὴν διατίμησιν τοῦ σώματος αὐτοῦ κινεῖν καλῶς τὸν σουβσιτιοῦτον, ἐπειδὴ εἰ ἐγένετο κληρονόμος ὁ ἀναιρεθεὶς οἰκέτης, καὶ ἐλεύθερος ἐγένετο· ἐλευθέρου δὲ σώματος διατίμησις οὐ γίνεται.

§ 2 → Sch. 54\* [BS 3119/5 = Sch. 9 cpv., Hb. V, 282]:<sup>173</sup> Εἰ δὲ περιόντος ἔτι τοῦ γράψαντός με κληρονόμον ἀνηρέθη ὁ δοῦλος, οὐκέτι τῆς κληρονομίας τὸ διαφέρειν ἀπαιτῶ, ἐπειδὴ εἰς τοῦπίσω ὑποστρέφομεν τὸν πρὸ τῆς ἀναιρέσεως ἐνιαυτὸν σκοποῦντες, ἐν ᾧ χρόνῳ οὐκ ἠδυνάμην κληρονομεῖν ἔτι περιόντος τοῦ διαθεμένου. Χρῆ δὲ τοῦ ἀναιρεθέντος οἰκέτου τὴν διατίμησιν ἀνάγεσθαι εἰς ἐκείνον τὸν καιρὸν, ἐν ᾧ τιμιώτερος ἦν ὁ ἀναιρεθεὶς οἰκέτης. ... Cf.<sup>174</sup> Sch. 17 [BS 3115/27 = Sch. 16, Hb. V, 284]: Ἐπειδὴ εἰς τοῦπίσω ὑποστρέφομεν τὸν ἀπὸ τῆς ἀναιρέσεως ἐνιαυτὸν σκοποῦντες, ἐν ᾧ χρόνῳ οὐκ ἠδυνάμην κληρονομεῖν, ἔτι περιόντος τοῦ διαθεμένου. Χρῆ δὲ τὴν τοῦ ἀναιρεθέντος οἰκέτου διατίμησιν ἀνάγεσθαι εἰς ἐκείνον τὸν καιρὸν, ἐν ᾧ τιμιώτερος ἦν ὁ ἀναιρεθεὶς οἰκέτης. Ὅθεν ἐὰν πολυτίμου καὶ ἀκριβοῦς ζωγράφου καὶ τὰ ἐξῆς.<sup>175</sup>

§ 3 → Sch. 54\* [BS 3119/9 = Sch. 9 cpv., Hb. V, 282]:<sup>176</sup> ... Ὅθεν ἐὰν πολυτίμου καὶ ἀκριβοῦς ζωγράφου ὁ ἀντίχειρ ἀφαιρεθῆ καὶ ἐντὸς ἐνιαυτοῦ τοῦ τηθῆναι τὸν ἀντίχειρα αὐτοῦ ἐφόνευσεν αὐτὸν τις, ἢ διατίμησις αὐτοῦ γίνεται εἰς ἐκείνον τὸν χρόνον, οὗ ἄξιός ἦν πρὶν ἀπολέσαι αὐτὸν κατὰ ταυτὸν καὶ τὸν ἀντίχειρα καὶ τὴν τέχνην αὐτοῦ. Cf. also Sch. 17 cit.: [BS 3115/30] ... Ὅθεν ἐὰν πολυτίμου καὶ ἀκριβοῦς ζωγράφου καὶ τὰ ἐξῆς – and Sch. 19 [BS 3116/1]: Ἡ διατίμησις αὐτοῦ γίνεται εἰς ἐκείνον τὸν χρόνον, ἐν ᾧ

172 Heimbach, *Manuale*, 243: «DOR. ind. §. 1.: *Ei μέντοι V. 282*». Cf. also *Rhop.* 24.1 [ed. Sitzia, 128] and Ferrini, ‘La legittimazione attiva nell’actio legis Aquiliae’ (note 115 above), 166 = *Id.*, *Opere*, 5 (note 33 above), 196.

173 Heimbach, *Manuale*, 243: «[DOR. ind.] §. 2 a v. Quodsi etc. et §. 3: *Ei δὲ περιόντος V. 282*. Cf. *Ἐπειδὴ V. 284*»; «CYR. ind. §. 2. fin.: *Ἐπειδὴ v. Κυρίλλου. Καὶ γὰρ ὁ ἐνιαυτὸς εἰς τοῦπίσω ἀνακλᾶ ἐαυτὸν V. 284*».

174 See the preceding n.

175 To this regard, it must be said that the Sch. 17 ad Bas. *eod.* [BS 3115/27] matches with the only first part of Sch. 16 [Hb. V, 284], that Scheltema’s edition divides, on the contrary, in three texts: Sch. 17-19 [BS 3115/27, 32; 3116-1].

176 Heimbach, *Manuale*, 243: «[DOR. ind.] §. 2 a v. Quodsi etc. et §. 3: *Ei δὲ περιόντος V. 282*. Cf. *Ἐπειδὴ V. 284*».

πλείονος ἄξιος ἦν, πρὶν ἀπολέσαι αὐτὸν κατὰ ταῦτόν καὶ τὸν ἀντίχειρα καὶ τὴν τέχνην αὐτοῦ. Sch. 18 [BS 3115/32 = Sch. 16 π *pars*, Hb. V, 284]:<sup>177</sup> Κυρίλλου. Καὶ γὰρ ὁ ἐνιαυτὸς εἰς τοῦπίσω ἀνακλᾷ ἑαυτόν.

§§ 4-5 → *Desunt*.

§ 6 → Sch. 27 [BS 3116/12 = Sch. 25, Hb. V, 284]:<sup>178</sup> Ὡς ἐν κεφαλαίῳ γὰρ ὅσα τὸν οἰκέτην ἐντὸς ἐνιαυτοῦ ψηφίζομένου πρὸ τῆς ἀναιρέσεως αὐτοῦ τιμώτερον αὐτὸν ἐποίει, ταῦτα προστίθεται τῇ διατιμήσει αὐτοῦ. → Sch. 28 [BS 3116-14 = Sch. 25 *cpv.*, Hb. V, 284]:<sup>179</sup> Κυρίλλου. Ὅσα ἐντὸς ἐνιαυτοῦ τιμώτερον αὐτὸν ἐποίει διατιμάται.

§ 7 → Sch. 58\* [BS 3119/30 = sch. 26\*, Hb. V, 285]:<sup>180</sup> Ἐὰν νήπιον παιδίον μήπω ἐνιαυσιαῖον ἀνηρέθη, καὶ ὑπὲρ τούτου κινεῖται ὁ Ἄκουίλιος.

Cont.: *‘De actionibus, quae ex capite primo descendunt’*<sup>181</sup>

[P. Ulp. 617]

§§ 8-10 → *Desunt*.

Cont.: *‘Si fatebitur iniuria occisum esse. In simplum...’*<sup>182</sup>

[P. Ulp. 618]

§ 11 → Sch. 39 [BS 3117/8 = Sch. 36, Hb. V, 285-286]:<sup>183</sup> Ἐάν τις τὸν περιόντα οἰκέτην διαβεβαιῶται παρ’ ἐμοῦ ἀνηρησθαι, εἰ καὶ ὁμολογήσω πεφονευκέναι αὐτόν, δύναμαι δὲ δεῖξαι, ὅτι περίεστιν ὁ οἰκέτης, ἀργεὶ κατ’ ἐμοῦ ὁ Ἄκουίλιος, εἰ καὶ ὁμολόγησα: εἰ γὰρ καὶ ἡ ὁμολογία μου καὶ ἡ δι’ αὐτὴν κινουμένη κομφεσορία ἀγωγή εἰς τοῦτο συμβάλλεται τῷ ἐνάγοντι εἰς τὸ μὴ ἀναγκάζεσθαι αὐτὸν ἀποδεικνύνειν, ὅτι ἀνήρηται, χρηὶ ὅμως ἀνηρησθαι τῇ ἀληθείᾳ τὸν οἰκέτην. ... → Sch. 40 [BS 3117/18 = Sch. 36 *cpv.*, Hb. V, 286]:<sup>184</sup> Κυρίλλου. Ὁμολόγησα ἀνελεῖν τὸν οἰκέτην σου. Δεικνύων οὖν,

177 Cf. Heimbach, *Manuale*, 243: «Cyr. ind. §. 2 fin.: Ἐπειδὴ ν. Κυρίλλου. Καὶ γὰρ ὁ ἐνιαυτὸς εἰς τοῦπίσω ἀνακλᾷ ἑαυτόν V. 284».

178 Heimbach, *Manuale*, 243: «§. 6.: Ὡς ἐν κεφαλαίῳ V. 284».

179 Heimbach, *Manuale*, 243: «§. 6.: Κυρίλλου V. 284».

180 Heimbach, *Manuale*, 243: «[Cyr. ind.] §. 7.: Ἐὰν νήπιον V. 285».

181 Lenel, *Palingsenesia*, 2, 526; cf. Miglietta, *Servus dolo occisus* (note 24 above), 78.

182 Lenel, *Palingsenesia*, 2, 526.

183 Heimbach, *Manuale*, 243: «[DOR. ind.] §. 11.: Ἐάν τις ... τὸν οἰκέτην V. 285 sq.».

184 Heimbach, *Manuale*, 243: «[Cyr. ind.] §. 11.: Κυρίλλου u. a. ν. σκοπηθῆναι V. 286». Sch. 36 *cpv. cit.* [= Hb. V, 286], matches with Sch. 40-43 [= BS 3117/18-29], which go, respectively: the Sch. 40 from the beginning to the words ἀλλ’ ὅτι ἐφρονεύθη; the Sch. 41 from *περὶ ψευδοῦς* καὶ *θεμ. α’* τοῦ β’; the Sch. 42 from *σημείωσαι* ἐκ τούτου *τὸ ἐχούσης τῆς ἀληθείας*; and the Sch. 43 from *ἐνταῦθα διὰ τοῦτο* καὶ τὸν Θεόδωρον (with the relocation of the section *σημείωσαι* δὲ καὶ τοῦτο, ὅτι ἡ κατάθεσις οὐ βλάπτει, ἄλλως ἐχούσης τῆς ἀληθείας). Therefore, as Sch. 41 consists in a *παραπομπή*,

ὅτι ζῆ, ἀπολύομαι. Μόνον γὰρ σὺ οὐ καταναγκάζει δεῖξαι, ὅτι ἐφρόνευσα· εἰ δὲ ἐφρονεύθῃ, ὀφείλει σκοπηθῆναι, ...

*Pr.* Missing. – § 1. As for what concerns the formal characteristics, the *scholium* shows both a repeated transliteration (σουβσιτιοῦτος ... σουβσιτιοῦτον),<sup>185</sup> and the mention of the intervention of Julian (κατὰ τὸν Ἰουλιανόν), though the jurist is quoted in the final part of the text and not in the beginning as in D. 9.2.23.1. With regard to the content, some elucidations can be noticed, together with some digressions in respect to the text of Ulpian. Firstly, the following parts must be seen: the mention of the heir of the owner who dies without a testament (ὁ ἐξ ἀδιαθέτου γενόμενος τῷ δεσπότη κληρονόμος); likewise, the widening of the passage *quae servo competere non potuit: quae sententia vera est* through the whole sentence εἰδὼν γὰρ ἐγκαλέσῃσι – εἰς τὴν κληρονομίαν, and also, in particular, the final part, according to which the aquilian evaluation of the body of a freeman is not possible (ἐλευθέρου – οὐ γίνεται).<sup>186</sup> – § 2. To this regard, the problem of the authorship of the texts is quite delicate. We own two *scholia* – those transcribed – which could both come from the hand of the same jurist, identified by Heimbach with Dorotheus (most of all if we consider that the choice of the Dutch editors to separate the Sch. 17 from the Sch. 18 and 19, release the first *scholium* from the explicit quotation of the name of Cyrillus [Sch. 18]). The Sch. 54\*, actually, shows – as we have already seen for other comments – a quite complex writing, while semantic clues (which are typical of the σχόλια) of the jurist who was the author of it seem to be missing. The Sch. 17, on the contrary, seems terser. Both have the characteristic to describe the content of D. 9.2.23.2 and to recall, immediately and seamlessly, the issue of the *servus pictor* who has lost his thumb, an issue that is examined in § 3, which is immediately following, of D. *eod.* – § 3. Proceeding in my remarks connected to the previous paragraph, Sch. 17 must be attributed – in my opinion – to Cyrillus, because of the connection with the two following *scholia*, and, mostly, because of the relation between the part of Sch. 17 that concerns D. 9.2.23.3 and what is referred in Sch. 19 (*scholia* that are connected, also for what concerns the attribution, by Sch. 18: Κυρίλλου – ἀνακλᾷ ἑαυτόν). – §§ 4 and 5. Missing. – § 7. Present, on the contrary, in both authors. – §§ 8, 9 and 10. Missing. – § 11. The *scholium*

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and Sch. 42 consists in a *παραγραφή*, and Sch. 43 – so to say – consists in a ‘hybrid’ of the mentioned literary genres, the choice of the Dutch edition to consider the only part corresponding to the first of the analysed *scholia* as drawn from the *index* of Cyrillus seems to be correct.

185 Not registered by Stephanus, *Th.G.L.*

186 With regard to the paragraph in question, we have also a *παραπομπή* of the same (pseudo) Dorotheus: Heimbach, *Manuale*, 243: «[DOR.] b) ad §. 1.: v. neque legitimum – consecuturum: *Εὐχαριστεῖται* V. 282». This is Sch. 8 ad Bas. 60.3.23[.1] [BS 3114/8 = Sch. 6, Hb. V, 282] which is wider in the 19<sup>th</sup> century edition; the continuation in BS is, on the contrary, the Sch. 9 [BS 3114/10].

of the pseudo-Dorotheus has the interesting expression κομφορορία ἀγωγή. The content of the text of Cyrillus, who expands his reflection in respect to D. 9.2.23.11, is less conditioned by the original Latin.<sup>187</sup>

D. 9.2.24, Paul. 22 ad ed. [P. 363] = Bas. 60.3.24<sup>188</sup>

→ Sch. 39 ad Bas. 60.3.23[.11] [BS 3117/13 = Sch. 36, Hb. V, 285-286]:<sup>189</sup> ... Σαφέστερον δὲ τοῦτο ἐπὶ τοῦ τραυματισθέντος οἰκέτου τρακταίζεται. Εἰ γὰρ καὶ ὁμολογήσω τραυματίσαι τὸν μὴ τραυματισθέντα, ποίου τραύματος γίνεται διατίμησις, ἢ πρὸς ποῖον καιρὸν ἀναφέρεται; ... → Sch. 40 ad Bas. *eod.* [BS 3117/20 = Sch. 36 *cpv.*, Hb. V, 286]:<sup>190</sup> Κυρίλλου. ... ἐπεὶ εἰ ὁμολόγησα πληξὶ καὶ μὴ φαίνεται ὁ πληγείς, πῶς γίνεται διατίμησις; ...

The text attributed to Dorotheus matches with the original, while the text of Cyrillus shows – as we could anyhow expect from such jurist – an extreme terseness.

D. 9.2.25, Ulp. 18 ad ed. [P. 618] = Bas. 60.3.24-25 *pr.* §§ 1-2<sup>191</sup>

*pr.* → Sch. 39 ad Bas. 60.3.23[.11] [BS 3117/15 = Sch. 36, Hb. V, 285-286]:<sup>192</sup> ... Εἰ δὲ καὶ μὴ περίεστιν ὁ οἰκέτης, ἐτελεύτησε δὲ τὸν φυσικὸν θάνατον, οὐ κατέχεται ὁ εἰπὼν αὐτὸν ἀνηρηκέναι, εἴτε ὁμολόγησεν ἢ μὴ ὁμολόγησεν. → Sch. 40 ad Bas. *eod.* [BS 3117/21 = Sch. 36 *cpv.*, Hb. V, 286]:<sup>193</sup> Κυρίλλου. ... Οὐκ ἀρκεῖ δὲ δεῖξαι, ὅτι ἀπέθανεν, ἀλλ' ὅτι ἐφρονεύθη.

§ 1 → Sch. 1 [BS 3121/8 = Hb. V, 286-287]:<sup>194</sup> Ὅτε προκουράτωρ ἢ ἐπίτροπος ἢ κουράτωρ ἢ ἄλλος τις ὁμολογήσει, ὡς ἐτραυμάτισεν ὁ τοῦ προκουράτωρος δεσπότης τινὰ ἢ ὁ πούπιλλος ἢ ὁ κουρατωρευόμενος, ἢ κομφορορία οὐτιλίως δίδεται κατ' αὐτῶν, ἕως ὅτε εἰσὶν ἐπίτροποι ἢ κουράτωρες. ...

§ 2 → Sch. 1 [BS 3121/11 = Hb. V, 286-287]:<sup>195</sup> ... Ταύτης δὲ τῆς κομφορορίας κινουμένης οὐκ ἔτι κρίνει τὴν ὑπόθεσιν ὁ δικάζων, ἀλλὰ μόνον διατιμάται ποίας γὰρ ἐξετάσεως χρεῖα κατὰ τοῦ ὁμολογοῦντος; ...

187 Such *scholium*, though, covers also the reflection of D. 9.2 frg. 24-25.

188 Heimbach, Manuale, 243: «24 = 24. u. a. v. *τραυματικέναι*».

189 Heimbach, Manuale, 243: «DOR. ind.: *Ἐάν τις V. 285 sq. a v. Σαφέστερον δὲ ... ἀναφέρεται*». The conclusion of the *scholium* with the verbal form ἀναφέρεται is correct.

190 See *supra*, n. 184.

191 Cf. BS 3120-3121 *ad h.l.*

192 Heimbach, Manuale, 243: «DOR. ind. *pr.*: *Ἐάν τις V. 285 sq. a v. εἰ δὲ καὶ u.a.f.*».

193 See *supra*, nn. 184 and 190.

194 Heimbach, Manuale, 243: «§. 1. 2.: *Ὅτε προκουράτωρ ... κατὰ τοῦ ὁμολογοῦντος V. 286 sq.*»; BS 3121 *ad h.l.*

195 See the preceding note.

*Pr.* For what concerns the *scholium* to D. 9.2.25 pr., the informations given by Heimbach and by Scheltema can be explained by the fact that Bas. 60.3.24-25 do form a unity where frg. 24 and 25 pr. of D. 9.2 are merged together. For this reasons, the comment of the pseudo-Dorotheus covers a wider area than it can be synoptically represented. Of course the result of the division of the *scholium* and of the attribution of its parts to the symmetrical parts of D. 9.2.24-25 can be seen in §4 of this essay ('appendices') which regards the paligenetic reconstruction. – § 1. The part of the text that matches with D. 9.2.25.1 is rich in expressive transliterations: προκουράτωρ ... κουράτωρ, also προκουράτωρος ... πούπιλλος ... κουρατωρευόμενος ... κομφεσορία ούτιλίως ... κουράτωρες.<sup>196</sup> – § 2. To complete partially what the 19<sup>th</sup> century editor suggested (he rightly saw in the passage *ὅτε προκουράτωρ – κατὰ τοῦ ὁμολογούντος* the reflection of both §§ of D. 9.2.25, but he did not mention the exact 'borders' of such correspondence), I find it advisable to remark that the part of the Greek text matching with § 1 D. *eod.* goes from the beginning to the passage *ἕως ὅτε εἰσὶν ἐπίτροποι ἢ κουράτωρες*, while the part matching with § 2 D. *eod.* goes from the sentence *ταύτης δὲ τῆς κομφεσορίας* to the interrogative clause – as Heimbach implicitly reckoned – *κατὰ τοῦ ὁμολογούντος*; The part which follows, with its final *παραπομπή*, should probably not belong to the *index*, but it could be a digression of a later jurist, if we consider the absence of transliterations and, mostly, the mention of 'lib. 42.4. [κεφ.] 9.2', a reference to a symmetric text which certainly regards Bas. 42.2 = D. 11.1. Probably the Sch. 1 ad Bas. *eod.* should be divided in (at least) two different texts.<sup>197</sup>

D. 9.2.26, Paul. 22 ad ed. [P. 364] = Bas. 60.3.26

→ Sch. 1 ad Bas. 60.3.24-25 [BS 3121/13 = Hb. V, 286-287]:<sup>198</sup> ... Ἄλλ' ἕως ἔρεϊς· τίς οὖν χρεία δικαστηρίου, εἰ μηδὲν κρίνει; Ἀλλὰ λέγω σοι, ὅτι ἐὰν ὁ μὲν ἐναγόμενος

196 None of the many transliterations, here mentioned, is registered by Stephanus, *Th.G.L.*; cf. DuCange, *Gl.Gr.*, 735, s.v. Κουράτωρ; 1243, s.v. Προκουράτωρ. We find, though, and *e.g.*, the form προκουράτωρα in Herodian., *Partition*. 193.1; *Chronicon Pasch.* 694.9; Mich. Psell., *Poem.* 8.272; Joa. Malalas, *Chronogr.* 490.13; Const. Porph., *De cerim.* 715.19, 718.14; 729.8-9, 732.4-5, 768.21; Zonar., *Lexic.* 1242.5; Codinus, *Patria Costantin.* 3.101.3; Theophan. Conf., *Chronogr.* 237.2 and 238.8; Hesychius, *Lexic.* 3839.1; *Etymol. Gudianum* 341.49 (341.50 about the form πούπιλλου) and also *Etymol. Parvum* 30.1. Even the form κομφεσορία is present in Mich. Psell., *Poem.* 8.565, while κουράτωρ can be found in many occurrences, but not in the form κουρατωρευόμενος. For ούτιλιος, ούτιλία and ούτιλίω, see Mich. Psell., *Poem.* 8.503, 8.505, 8.564 and 8.686.

197 A division in four text could also be suggested (*ad* § 1, and *ad* § 2, of the pseudo Dorotheus; the comment and, finally, the reference to Bas. 42.4.9.2). Nonetheless, there are evident reasons to preserve the manuscript tradition which suggest us to distance ourselves as little as possible to the edition of BS 3121/8: Sch. 1 ad Bas. 60.3.25[1-2]: [Δωρόθ.?] Ὅτε προκουράτωρ ἢ – κατὰ τοῦ ὁμολογούντος; / Sch. 1-bis ad Bas. *eod.*: [?] Ἄλλ' ἕως ἔρεϊς· – Ζήτηι βιβ. μβ' ττ. δ' κεφ. θ' θεμ. β'.

198 Heimbach, *Manuale*, 243: «26 = 26. DOR., ind.: Ὅτε προκουράτωρ V. 286 sq. a v. Ἄλλ' ἕως ... ποιήσεται διατίμησιν».

ὁμολογῆ πεφονηκέναι καὶ ἔτοιμός ἐστι καταβαλεῖν τὴν διατίμησιν, χρεία πάντως τοῦ δικαστοῦ, ἵνα τὴν δικαίαν ποιήσῃται διατίμησιν. ... → Sch. 4 ad Bas. 60.3.25 [1-2] [BS 3121/21 = Sch. 7, Hb. V, 287].<sup>199</sup> [Ἐπὶ τοῦ ὁμολογοῦντος μόνον διατιμᾶται ὁ δικαστής, οὐ δικάζει δὲ] διὰ τὸ μὴ τὸν ἄκτορα αὔξειν τὸ διαφέρον.

The *scholium* attributed to Dorotheus is the continuation to the one connected to Bas. 60.3.24-25 pr. As for what concerns the Sch. 4, which should be of Cyrillus, I reckon, differently from Heimbach, that it should be wholly reported, because the issue is the same of D. 9.2.26, with some further development on the point.

D. 9.2.27, Ulp. 18 ad ed. [P. 621] = Bas. 60.3.27  
pr., §§ 1-3 → *Desunt*.

The text, for what concerns the *principium* and the first three paragraphs, is missing.

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199 Heimbach, *Manuale*, 243: «[26 = 26.] CYR. ind.: Sch. 7 Ἐπὶ τοῦ ν. διὰ τὸ μὴ τὸν ἄκτορα αὔξειν τὸ διαφέρον»: but cf. D. 9.2.25.2 and *supra* n. 191.

