TOWARDS A PALINGENETIC STUDY OF BAS. 60,3
The contribution of the Byzantine ἰδικής∗
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:† the reason for such choice is that my present interests are

* 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 teached 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be noted that the present contribution constitutes the first part of a longer study which for reasons of space could not be published here in its entirety.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.

† In the Digest such issue fills the whole of Title 9.2, which is of «stampos 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. 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,3 Cyrilus,4 Theodorus,5 Thalelaius6 and the civil code (that was modelled on the German civil code): cf. Harmen., Hexáb. VI (whose title lst regards the lex Aquilia and the actio de pauperie; whose titles llnd-IVth regard criminal law about adultery, concubinage and incest; whose title Vth gets back to delictal 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 - de 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 Perpetuum3, Leipzig 1927, Xviii.


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 ἱνδικευτής (cf. the adespotum anonymous Sch. 7 ad Bas. 22.5.31 [BS 1457]-26 = Sch. 2, Hb. II, 558): Ἐπὶ τούτου τού δήματος ἢ ἐναντιοφάνεια τῶν ἱνδικευτῶν δηλοῦται τοῦ τέ Κυρίλλου καὶ τοῦ Στεφάνου... κλπ.). The more ancient Cyrillos was the venerated master of the Vth century, called ἱρὸς (or even ὁ κοινός τῆς οἰκουμενῆς διδάσκαλος); cf. Heimbach, Prolegomena, 9 and nn. 9-11, and see, respectively, Sch. 54 ad Bas. 18.5[9] [Steph. ad l. I 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. Morteuil, 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).

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Anonymous\(^7\) – 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).\(^8\)

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 enlighten 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,

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\(^8\) Cf. Scheltema, *L’enseignement de droit* (note 7 above), 24 = Id., *Opera minora* (note 7 above), 75; Id, ‘De antiquae iurisprudentialiae reliquis 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 Cyrilus heet ὁ Κύριλλος, 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. 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 περί ζημίας.

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 índikes
to the Digest (D. 9.2) – and Theodorus and Thalelaius, for what concerns the version of the
Codex (C. 35.5) – the Anonymous, the Enantiophanes and, lastly, Johannes
Xiphilinus (nomophylax), though this is mentioned only in two occurrences.

For what concerns Dorotheus – jurists and compiler of the Justinian age, known, as
well as Theophilus, ὁ μακαρίτης, whose excerpta, together with those of Cyrillus

iuris civilis’’, in: Mélanges Fitting, 2, Montpellier 1908, 463-497 = Id., Scritti di diritto romano, I.
giustiniana e i suoi commentatori bizantini (da Ferrini a noi)’, in: Scritti di diritto romano in on. C.
Riccobono, Sull’importanza delle compilazioni giuridiche bizantine per l’indagine storico-critica,
Napoli 1946; V. Giuffrè, ‘Scoli’, 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 índikes 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 anciens, 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, Οἱ πηγές του βυζαντινοῦ δικαίου,
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 griego

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*, itt 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 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 ἱνδικες. Recently, scholars have doubted that Dorotheus composed a work of such nature. According to Zachariä von Lingenthal, the comments to Bas. 60.3, in which the name of a jurist is not espressly mentioned, should be preferably considered, for the biggest part, as belonging to the work of Stephanus. 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

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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 *Hexábiblos 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]: [...] ἱνδικον καὶ ἱνδικος φασι τοῦτο πρὸς ἀκρίβειας εἰρῆσθαι (De Jong, *Stephanus* [note 8 above], 17, and also 136; Heimbach, *Manuale*, 243 n. u, correctly affirms: «In Sch. *Ἐπειδὴ Ανων. 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 Cyrilus heet ὁ Κυριλλος, de index van Stephanus ὁ Ἱνδικες»); 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]: Ζήτηται μὲν καὶ τί πρὸς τιτ. καὶ καὶ τὴν ἐν αὐτῷ τοῦ Στεφάνου παραγραφήν περὶ τὰ τέλη. This last *scholium* – an *adnotatio* (cf. also De Jong, *Stephanus* [note 8 above], 354) – concerns C. 3.35.4.
eius habere», 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».

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». 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.

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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 ἴνδιξ 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. 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. Goria, review of Brandsma, ibid., 508 [and cf. also T. Wallinga, review of Brandsma, ibid., TRG LXVI (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 recentiori scripta sunt» 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).

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 e 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).

‘Prooemium’

D. 9.2.1, Ulp. 18 ad ed. [P. 612] = Bas. 60.3.1
pro. → Sch. 1
Πολλῶν πρὸ τοῦτο νόμων περὶ ζημίας διαγορεύοντον ὁ Ἀκουΐλιος νόμος μετὰ πάντας τὰ περὶ ζημίας διατυπώσας πάντας ἀνέβη τοὺς πρὸ αὐτοῦ περὶ τοῦτο οὖν μνημονεύσας, ἐπειδὴ ἀνήργητα...

§ 1. → [BS 3090/10] ... Οὗτος ὁ Ἀκουΐλιος πλεβίσκιτόν ἔστιν, οὐχὶ νόμος. Ἀκουΐλιος γὰρ ὁ δήμαρχος ἠρώτησε περὶ τούτων τὸν δῆμον, καὶ οὕτως ὁ Ἀκουΐλιος ἐτέθη. Καίτοι εἰ νόμος ἦν, ὡσπερ πατρικίου ἠρωτάτο ὁ δῆμος, ὡς ἐν τοῖς Ἰνστιτούτοις ἐμάθομεν ...
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. 28 − 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 ἀνέιλε, and, at the end, the expression ἐπειδὴ ἀνῄρηται seems to be an added elucidation. 29 − § 1. The inserting of the expression πλεβίσκιτον as plebiscitum shows the presence of a transliteration which is typical of the most ancient Byzantine law sources. 30 The remark καὶ οὕτως ὁ Ἀκουίλιος ἐτέθη, but, mostly, the final comment καίτοι εἰ ἐν τοῖς ἱστοτούτοις ἐμάθομεν are interesting: the ‘historical’ elucidation – according

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 Zachariä 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 reccomandations seems to exclude that the text belongs to such jurist: cf. Brandsma, Dorotheus (note 20 above), 47; G. Falcone, ‘*Legum cunabula*’ and *antiqueae 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: PLEBΙSKΙΤΟΝ.

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: *Synteleia 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: ... ἄλλα οἰκεῖρα μεμορία, ὑπερ ἐςτι, παλαιάν μνήμην – where the Latin expression *veterem memoriam* is firstly transliterated in οἰκεῖρα μεμορία and, then, exhellenized in παλαιάν μνήμην (cf. Stephanus, Th.G.L., 6, 765, Μημόριον, that is for μνημέον). Lastly Sp. Troianos, ‘Römisches Recht und byzantinisches Recht. Juristische Kurioba 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 enlights how, for instance, an expression as *pro derelicto* was converted in the form προδέλικτον, 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 iudicis* (Sch. 6* ad Bas. 60.33.9 [BS 3628/6 = Hb. V, 674]). Cf.
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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 centurionate 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 ἱνδιξ, as, on the contrary, it could be deduced by the syntethic remark of Heimbach). 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 and, therefore, of the fact that such text was elaborated by the Byzantine jurists of the Justinian (or of the first post-Justinian) age.

‘Ad caput primum: infitiatio, exaequatio servis quadrupedum’

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]. ...

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

§ 2 → [BS 3090/17] ... "Εδείξεν οὖν ὁ νόμος, ὅτι τοῖς οἰκέταις ἴμφας ἀπαικάζει τὰ τετράποδα τὰ ἀγεληδὸν βοσκόμενον, ὅπως πλεῖον άξιον ἄρα τοῦ παρελθόντι ἐνιαυτῷ, εἰς τοσοῦτον καταδικαζέσθω...

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 adespotaion 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 (‘ἴμφας’) and even, as in the text of Plutarch, its transformation in Greek (τὸν ἤμαντα), – with a reinforcing repetition (‘ἴμφας δὲ λέγεται ἕως καὶ αὐτοῦ τοῦ ζ’, καὶ εἶπεν ‘ἐπαντείς ὅτι τὸν ἤμαντα

See supra, n. 29.


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

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

35 Heimbach, Manuale, 242: ‘Doric. ind.: Πολλὸν α. ν. ἐν τῷ μὲν α’ κεφαλαίῳ ὡ. a. f. V. 263’.

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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 ἀγεληδὸν 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 capita37 – in the Greek version the sanction regarding the infitiatio seems to follow, with no interruptions, to the mention of the first caput.38 – § 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 ἀγεληδὸν 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 πεκοῦνδις - πεκοῦνδας appear, with three occurrences,39 in reference with the extention 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 ἁγρία ἔστιν) 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.

38 See also Miglietta, ‘Reflexiones en torno al título III’ (note 2 above), 356.
39 Stephanus, Th.G.L., 7, 683, s.v. Πέκος.
Towards a palingenetetic study of Bas. 60.3

‘Ad v. iniuria’

D. 9.2.3, Ulp. 18 ad ed. [P. 613; cf. Coll. 7.3.1] = Bas. 60.3.3

→ Sch. 1 [BS 3092/7 = Hb. V, 264].

Καλῶς δὲ ὁ νόμος προστέθεικε, εἰ ἀδίκος ἀναρέθη οἰκέτης ἢ τετράποδον ζῶον· οὐδὲ γάρ ἐκ τοῦ μόνον ἀναρέθηναι ταῦτα τίκτεται ὁ Ἀκουίλιος, ἀλλ' ὅτε ἀναρέθη ἀδίκος ...

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...

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 Aquilium): 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 anteJustinianae quae supersunt, 2, Leipzig, 1886, 554 (and n. 5); E. Seckel - B. Kübler, Iurisprudentiae anteJustinianae reliquiae, 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’anticità 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 e ‘dissensiones 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 Aquiliana. 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. Falsam esse iscriptionem 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: «Domin. ind.: Καλῶς ... ἀναρέθη ἀδίκος V. 264».

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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].43 ‘Servus latro insidians – fur noctu deprehensus’ 44

§ 1 → [BS 3092/11] … Καὶ ὁ νόμος δὲ ὁ δυωδεκάδελτος τὸν ἐν νυκτὶ καταλαμβάνομεν κλέπτην ἐκέλευσεν ὁμαίρειν, ἵνα μέντοι τὸτε κραυγῆς ἐπιμαρτύρηται. Τὸν δὲ ἐν ἡμέρᾳ καταληφθέντα κλέπτην τότε συγχωρεῖ ὁ νόμος ἀναιρεθῇ. ὧς συνέλαβεν αὐτὸν ἐπιφερόμενον ἁκόντιον, καὶ τότε αὐτὸν ἀναιρῇ …

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).45 Besides, the principle according to which naturalis ratio permittit se defendere is restated: φυσικὸς – κινδύνου. – § 1. Such principle is missing in Bas. 60.3.4,46 but it is mentioned in the continuation of the same scholium.47 We must underline the incidental clause ὅτε ξίφος ἐπιφέρεται, which has no match in the Latin text. Then, a second scholiario follows, which constitutes an adnotatio,48 as it is shown by the classical introductive form σημείωσα, which is functional to comment the rule just mentioned.49

43 Miglietta, Serva dolo occissus (note 24 above), 77-78.
44 Heimbach, Manuale, 242: « Doctr. a. ind. pr. §. 1.: Καλῶς α v. ἀμέλει ἐὰν … αὐτὸν ἁναιρῇ V. 264».45
45 Stephanus, Th.G.L., 4, 52-53, Ἐγκαλεῖ: for what concerns the juridical meaning of the passive form, see E.F. Leopold, Lexicon graeco-latinum manuale, Leipzig 1852, 238 ad h.v.
47 I am here alluding to the wide part καὶ ὁ νόμος – αὐτὸν ἁναιρῇ (lin. 11-16).
48 Heimbach, Manuale, 242: «b) ad pr.: Καλῶς a v. σημείωσα u. a. f. V. 265».
D. 9.2.5. Ulp. 18 ad ed. [P. 613] = Bas. 60.3.5

pr. → Sch. 1 ad Bas. 60.3.3 [BS 3092/16 = Hb. V, 264-265]:

Ei δὲ καὶ τὸν εἰτιναδήποτε μετὰ σιδήρου μοι ἐπίντα προφθάσας ἀνέλω, οὐ δοκῶ ἀδίκως ἀναφερέν αὐτὸν. Εἰ δὲ καὶ φοβηθεὶς τὸν ἐκ τοῦ θάνατον ἀνέλω αὐτὸν, οὐ κατέχομα τῷ Ἀκουίλῳ. 'Εἰ δὲ δυνάμενος καταστείχην ἀκινδύνως τὸν κλέπτην καὶ παραδοῦναι αὐτὸν ἢβουλήθην μᾶλλον ἀνελών αὐτὸν, ἐπειδὴ ἀδίκως αὐτὸν φονεύω, τῷ Κορνελίῳ περὶ ἀνδροφονίας κατέχομαι.

§ 1 → Sch. 4 [BS 3093/11 = Hb. V, 265]:

Τὸ ἐν τῷ νόμῳ κείμενον 'INIURIAO νόησον μὴ ὡς ἐπὶ τῆς ἤνιουριαροῦ μετὰ ὕβριν <ἀν>·ηρῆσθαι, ἀλλὰ παρανόμως ἀνῃρῆσθαι καὶ παρ᾿ αἰτίαν ἐμήν. Οὕτων ἔσθ᾿ ὅταν συμβαίνει καὶ τὸν Ἀκουίλιον καὶ τὴν ἴνιουριαροὺμ ἐκ τοῦ αὐτοῦ φάκτου τίκτεσθαι καὶ δύο γίνεσθαι κατὰ τοῦ ζημιώσαντος διατιμήσει ἤτοι καταδίκας, ἄλλην μὲν ὑπὲρ ζημίας, ἄλλην δὲ ὑπὲρ τῆς ὑβρίδος.

§ 2 → [BS 3093/27] … "ΟTHON ἐξητήθη, εἰ κατὰ μαινομένου ἴνιουριαροῦ κινεῖται ὁ Ἀκουίλιος. Καὶ ὁ Πήγασος ἀρνήσατο, ἐπεὶ δὴ δύναται κούλπα εἶναι ἐν τῷ μαινομένῳ τῷ μὴ ἔχοντι λογισμόν. Καὶ ἀληθῆς ἐστιν ὧ τοῦτον γνώμη. Ἀργεῖ οὖν κατὰ τοῦ μαινομένου ὁ Ἀκουίλιος, ὡσπερ ἐκαὶ ἄλογον τετράποδον ἐποίησεν…"
§ 3 → Sch. 17 [BS 3094/28 = Sch. 18, Hb. V, 267]:

Pr. It is missing in Bas. 60.3.5,60 but it is mentioned in the continuation of the Sch. 1 ad Bas. 60.3.3,61 and it specifies the activities of ‘holding and bringing’ (δυνάμενος – παραδοῦναι αὐτὸν), 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 (tὸ Κορνελίῳ περὶ ἀνδροφονίας κατέχομαι). – § 1. We must point out the writing of ‘INIURIĀO in Latin letters – a sign of the truly old age of the source 62 – and the fact that the Greek text ends up with the terms ἄλλην μὲν ὑπὲρ ζημίας, ἄλλην δὲ ὑπὲρ τῆς ὑβρεως, 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]) 63 – § 2. Sch. 10 starts with a first part that, as we have

59 Heimbach, Manuale, 242: «§. 3. Καλιγάριος Β. 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 al 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.[1.1.33]) of Dorotheus: Heimbach, Manuale, 242: «b) ad §. 1. v. interdum utraque actio concurrit: 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
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just remarked, finds a match in the final part of the previous § 1 of D. 9.2.5 (Ἰνιουριάρουμ τούν – τοῦτο ἐποίησεν). Therefore, the scholium appears to be rich in transliterations (ἰνιουριάρουμ... κούλπα... τῇ κουαδρουπεδαρίᾳ... ὁ ἰμφας, and the interesting definition of status πρόξιμος δὲν πουβέρται). 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 τῇ ἰνιουριάρουμ (sott. ἀγωγῇ). 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 ἀμφιβολίαι.

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].

The elucidation that reinforces the principle expressed – ὀμολογουμένη – 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].

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

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

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

Heimbach, Manuale, 242: «ad §, 3. v. an ex locato, dubitat: Tousistou V, 266w; 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, Matino, Lex et scientia iuris (note 10 above) 69 and 73.


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

Heimbach, Manuale, 242: «§. 3.: Ei δὲ V, 268»: Schipani, Responsabilità ‘ex lege Aquilia’ (note 59 above), 319 and 468.
Pr. It is to be noticed the incipit, which is wider in the Greek part. – §§ 1-2. These are missing. – § 3. The beginning of the paragraph declares that its subject is an occisio (ἀνείλεν ἀλλότριον δοῦλον). Besides, such concept returns also in the final part (ὁ ὀθήσας – 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 Ἀκουἰλίῳ). 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 palingenetic 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 ἰμφακτούμ, coincides with the occurrence in the Latin text. – §§ 4-5. Missing. – § 6. The first part of

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70 Heimbach, Manuale, 242: «§. 6. a v. Unde adfert ec.: 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. Εἰ 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 (ἐν φάκτουμ), 8.507, 8.574, 8.582 and 8.814 (and also ἱμφάκτουμ, 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 *ēdō γὰρ ὁ μεμηνὼς – τὸ ξίφος*. Furthermore, the same *actio in factum* is mentioned (two times) in the usual form ἐὰν... δυνηθεὶς καὶ ἔμαθησαί ἡττηθη). – § 7. There is no mention of the jurist Celsus, and the content – notwithstanding some small excess of language in the Greek version (καὶ κοπωθῆναι καὶ κολυμβῆσαι ἡττηθη) – 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]:

Εἰ δὲ καὶ μουλίων κατὰ ἀπειρίαν μὴ δύνηθες ἔπισχειν τὴν ὀρμήν τῶν μουλών αἴτιος γένηται τοῦ συντριβῆναι δοῦλον εἴς αὐτόν, κατέχεται ὡς κούλπαν ἡττηθη. Τὸ αὐτὸ ἐστὶ, εἰ καὶ δι’ ἀσθένειας αὐτοῦ μὴ περιγέγονε τῶν μουλών. Καὶ μὴ δομεζέσθω ἀδικον τὸ διὰ τὴν τοῦ σώματος ἀσθένειαν ὡς αἴτιον τῆς βλάβης αὐτοῦ κατέχεσθαι ἐπιτήδειουσι γὰρ τις τὰς τις οὐκ ὀφείλει ποιεῖν, ἤν τις τοῦ μη δύναις ποιεῖν, ἢ εἴδεναι ἐφοβείται, ὡς οὐ δύναται. Καὶ οὐδὲ χρὴ τὴν ἄλλω ἄσθενειαν ἄλλω ἐπιζήμιον γίνεσθαι. Εἰ δὲ καὶ ὑπὸ τις τῆς ὀρμῆν μὴ δύνηθη ἕνεκα τῆς ἀπειρίας αὐτοῦ καθεξόμενος ἢ εἰς ἀσθένειας αἴτιος ἐπέρ ἐξ αἴτιος γένηται, καὶ οὗτος τῷ Ἀκουῖλῳ κατέχειται.

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* [v]) with the addition of an elucidation that cannot be found in the Digest version: ἐπιτήδειουσι – οὐ δύναται.75 The end – implicit in D. 9.2.8.1 – is also matching – τῷ Ἀκουῖλῳ κατέχεται.

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

pr. → Sch. 1 [BS 3100/2 = Hb. V, 271]: ‘Εὰν ἰατρόμαια βοήθημα ἓτοι πόσιν ὑποβάζῃ γυναῖκι, ἢ δὲ τελευτήσῃ διαστίζει ο Λαβεών, ἵνα μὲν ταῖς ιδίαις χερσὶν ὑπέθηκε τὸ βοήθημα, δόξῃ αὐτὴ πεφονευκέναι τὴν γυναίκα· εἰ δὲ τῇ γυναικὶ δέδωκεν, ἵνα

74 Heimbach, Manuale, 242: «8. = 8. D OR. ind. §. 1.: Eἰ δὲ καὶ μουλίων V. 270».

75 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.


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‘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).
ἙΑΥΤῸ ΤῸΝ ὙΠΟΒΆΛΕΙ, ΤῊ ἩΜΦΑΚΤΟΥΜ ΚΑΤΕΧΕΤΑΙ, ἘΠΕΙΔῊ ΑὐΤῊΝ ΘΕΑΝΤΟΥ ΔΕΔΟΚΕΝΑΙ ΠΙΣΤΕΥΕΤΑΙ, ΟΥ ΜῊΝ ἈΝΗΡΗΚΕΝΑΙ.

§ 1 → Sch. 2 [BS 3100/7 = Sch. 1, Hb. V, 271, cont.]:77 ΕἼΑΝ ΤῊΣ ὩΝ ὩΝ ΠΑΡΑΙΝΕΣΑΣ ἘΠΙΖΗ ΤΙΝΟΣ ΦΑΡΜΑΚΟΝ ὩΝ ΔΙΑ ΣΤΟΜΑΤΟΣ ΚΑΤΑΠΙΝΟΜΕΝΟΝ ὩΝ ΔΙΑ ΚΑΚΙΣΤΟΥ ΦΑΡΜΑΚΟΥ ἘΠΙΒΟΥΛΕΥΣΑ ΤΙΝΙ, ΚΑΤΕΧΕΤΑΙ ΤῸ ἈΚΟΥΪΛΙΟ, ὍΣΕΡ ὩΝ ὙΠΟΒΑΛΟΥΣΑ.

§ 2 → Sch. 4 [BS 3100/11 = Hb. V, 271] - [2, 3. -]:78 ΚΥΡΙΛΛΟΥ. Ὁ ΛΙΜῸΣ ΦΟΝΕΥΣΑΣ ΚΑΙ ἘΡΕΘΙΣΑΣ ἘΡΕΘΙΣΑΣ ΚΑΙ ΠΟΙΗΜΑΣ ΕΙΣ ΠΟΤΑΜΟΝ ΠΕΣΕΙΝ, ΟΣ ἈΠΟΛΙΣΘΑΙ ΤΙΝ ΠΡΟΣ ΠΕΤΩΝ, ΗΜΦΑΚΤΟΥΜ ΚΑΤΕΧΕΤΑΙ, ΚΑΙ ὩΝ ἘΠΙΒΟΥΛΕΥΣΑΣ ΤΙΝΙ, ΙΝΑ ἈΛΛΟΣ ΑὐΤΟΝ ἈΝΕΛῊ.

§ 3 → Sch. 8 [BS 3101/6 = Hb. V, 271]:79 ἘΑΝ ἸΠΠΑΖΟΜΕΝΟΝ ΤῊΝ ἘΜΟΝ ΟΙΚΕΤῊΝ ΣΥΤῊΝ ΤῊΝ ὩΠΟΝ ΠΛΗΞΑΣ ΠΑΡΕΣΚΕΥΑΣΑΣ ΚΑΤΑΚΡΙΜΙΝΟΘῊΝ ΕΙΝ ΠΟΤΑΜῊ, ΗΜΦΑΚΤΟΣ ΔΙΔΟΣΑΙ ΚΑΤᾹ ΣΟῦ. [Cf. Sch. 4 ad Bas. 60.3.9[2.]: ΚΥΡΙΛΛΟΥ. [. . .] ΚΑΙ ὩΝ ΕΠΙΒΟΥΛΕΥΣΑΣ ΤΙΝΙ, ΙΝΑ ἈΛΛΟΣ ΑὐΤΟΝ ἈΝΕΛῊ]

§ 4 → Sch. 11 [BS 3101/12 = Sch. 12, Hb. V, 272]:80 ΕΙ ἘΝ ΤῊΝ ΠΑΙΖΟΜΕΝΟΝ ΤῊΝ ἘΜΟΝ ΟΙΚΕΤῊΝ, ΣΥΤῊΝ ΤῊΝ ΠΑΙΖΟΜΕΝΟΝ ΠΑΙΖΟΜΕΝΟΝ ΠΑΙΖΟΜΕΝΟΝ ΚΑΤΑΚΡΙΜΙΝΟΘῊΝ ΕΙΝ ΠΟΤΑΜῊ, ΙΝΑ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ ΜῊΝ Μ四是

Pr. Variations regard, in the Greek text, the addition ᾧτον πόσῖν ὑποβάλει; the reference to the ‘potion’, added to the medicine; but, most of all, the position of the verb (in the form ὑποβάλει), which – if we translate it with the Latin supponere – expresses immediately, but improperly, one of the two elements of the distinctio set by Labeo. The (neutral) elucidation τὴν γυναῖκα of the sentence δόξῃ αὐτῇ πεφονευκέναι τὴν γυναῖκα, 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 ἧμφακτομ). are also worthy of mention. – § 1. The general concept of other kind of medicine - (ἢ . . . καταπινομένων) expresses, in a shorter way, the quotation vel clystere 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 translitteration ἡμφακτομ: 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: «Cyb. ind. §. 2. 3.: Sch. 4. ΚΥΡΙΛΛΟΥ Β. 271»
79 Heimbach, Manuale, 242: «§. 3.: ΕἼΑΝ ἸΠΠΑΖΟΜΕΝΟΝ Β. 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.: ΕΙ ἘΝ ΤῊΝ ΠΑΙΖpherd. Aquila» (note 59 above), 419 n. 17, 458 n. 12, 471.
81 The following sentence (ἡ γὰρ βλαβερὰ παιγνία κούλπᾳ ἔοικε) 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 δέδοκε, and, about D. 9.2.10, refers: «DOR. ind.: ΕΙ ἘΝ ΤῊΝ ΠΑΙΖῊΝ Η. ΓΑΡ ΒΛΑΒΕΡΑ ΠΑΙΓΝΙΑ ΚΟUAGE ΕΣΤΙΝ Β. 272.».
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Dorotheus, but here the accent is the same of the Latin pronunciation.\(^{82}\) 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 occissus): καὶ ὁ ἐπιβουλεύσας – ἀνέλῃ. 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 ἱνδικτός was characterized by his aphoristic and icastic style, so that his writing was, sometimes, qualified as καὶ ἐπιτομή (i.e. breviter scriptum).\(^{83}\) 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.\(^{84}\) – § 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.\(^{85}\) 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,\(^{86}\) but with ἱμφακτος); the whole quotation from Ofilius (Ofilius scribit – ab alio esset occissus) is missing.\(^{87}\) – § 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 γάρ βλαβερὰ παιγνία κούλπᾳ ἔοικεν (with

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


\(^{84}\) Cyrillus, together with Stephanus, is often meaningfully called by later jurists as ὁ ἱνδικευτής; 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 concursus 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 CXVII (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 paligenetic location of D. 9.2.9.3, with reference to the work of Ofilius, 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, ‘Trebatus peritior Cascellio, Cascellius Trebatio eloquentior, Ofilius utroque doctio r. A proposito di un recente studio dedicato ad Aulo Ofilio’, Annaeus X [2013] 118-140).
another transliteration, κούλπα, near ἐν κάμπω),88 that actually mirrors the following fragment from Paulus saved in D. 9.2.10 (= Bas. 60.3.10).89 What should be considered as an adnotatio (which we owe again, according to Heimbach,90 to Dorotheus) is finally ascribed to the text.91

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].82 … ἡ γὰρ βλαβερὰ παιγνία κούλπα ἔδεικεν.

Beyond what we have here observed with reference to D. 9.2.9.4, the frequency of another typical transliteration must be remarked, in the dative case, κούλπα.93

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]:94 Ἐὰν ἄλλος μὲν κατάσχῃ τὸν ἐμὸν οἰκέτην, ἕτερος δὲ ἀνέλῃ αὐτόν, ὁ μὲν κατασχὼν αὐτὸν τῇ ἱμφακτοὐ κατέχεται ως αἴτιος τοῦ θανάτου γενόμενος, ὁ δὲ ἀνελὼν τῷ Ἀκουϊλίῳ …

§ 2 → [BS 3105/16] … Ἐὰν δὲ πολλοὶ τὸν ἐμὸν οἰκέτην ἐτύπτησαν καὶ ἐτελεύτησεν, ἰδόμεν, εἰ πάντες ὡς ἀνελόντες αὐτόν κατέχονται τῷ Ἀκουϊλίῳ. Καὶ εἰ μὲν δεῖκνυται, ἐκ τῆς τίνος πληγῆς ἀνῃρέθη, ἐκείνος ως φονεύσας κατέχεται; τούτῳ δὲ μὴ δεικνυμένου πάντας ὡς ἀνελόντας εἶπε κατέχεσθαι ὁ Ἰουλιανός. → Sch. 11 [BS 3102/25 = Sch. 13, II pars, Hb. V, 273].95 Πρόσκειται ἐν τῷ Ἰνδικῇ οὐδεῖς 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.: Εἰ ἐν τῷ παίζειν … αὐτῷ δέδωκε V. 572».
91 Sch. 12 [BS 3101/15 = Hb. V, 272, cont.]: Τοῦτο νόει κατὰ τὴν εἰρημένην ἱνστ. δ’ τιτ. γ’, ὅτι ἐὰν ἀκοντίῳ παίζων ἢ γυμναζόμενος φονεύσω παρίσταται δοῦλον, εἰ μὲν στρατιώτης εἰμί, καὶ ἐν τῷ συνήθει τοῦ γυμνασίου τόπῳ γέγονε τούτο, ἀνεύθυνός εἰμι· εἰ δὲ ἄλλορο, ἢ ἱδιώτης ἢ μη, ἵππορκεμαίρα ἵππον γὰρ ἐν δάλας γυμναζόσαβι συνεῖσθαι. The text is here wholly reported to highlight that the didactical reference that it contains (ἱνστ. 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).
94 Heimbach, Manuale, 242: «Dor. ind. §. 1. 2.: Ἐὰν ἄλλος V. 273 et Ἐπὶ οἰκεῖο ἀ v. οὐδεῖς γὰρ u. a. f. ibid.» (cf. Schipani, Responsabilità ‘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.
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ἀπαλλάττεται τοῦ Ἀκουίλιου ἐξ ὧν ἐτερος ἡμαρτηκὼς καταδικάζεται, ἐπειδὴ ποινὴ ἐστὶ τὸ διδόμενον.

§§ 3-4 — Devent.

§ 5 — Sch. 49* [BS 3106/6 = Sch. 24, Hb. V, 274]: Ἐἰ δὲ καὶ τις κόνα ἐρεθίσει καὶ παρασκευάσει αὐτὸν δικαίως ἐτερον, εἰ καὶ μὴ αὐτὸς κατεῖχε τὸν κόνα, ὅμως ὁ Πρόκουλος δίδωσι τὸν Ἀκουίλιον κατ’ αὐτοῦ· ὁ δὲ Ἰουλιανός, εἰ μὲν τις αὐτὸν κατέχειν τὸν κόνα παρασκευάσει δηχῆται τινα ὑπ’ αὐτοῦ, δίδωσις κατ’ αὐτοῦ τὸν Ἀκουίλιον· ἐπεὶ δὲ μὴ κατασχὼν τὸν κόνα αἴτιος γένηται τοῦ βρώματος, τότε τὴν ἱμφακτοῦμ δίδωσι κατ’ αὐτοῦ…

§ 6 — [BS 3106/10] … Δεσπότῃ δὲ μόνῳ τοῦ βλαβέντος ή ἀναιρεθέντος πράγματος δίδοται ὁ Ἀκουίλιος ὁ δίρεκτος· ὁ γὰρ οὐτίλιος καὶ ἄλλοις ἀρμόζει.

§ 7 — Deest.

§ 8 — Sch. 31 [BS 3103/28 = Sch. 30, Hb. V, 275]: Ἐὰν ὁ βοναφίδε δουλεύων μοι οἰκέτης πληγῇ ἢ ζημιωθῇ, ἡ ἱμφακτοῦμ ἀγωγὴ ἀρμόζει μοι, οὐχ ὁ Ἀκουίλιος, ἐπειδὴ μὴ εἰμί δεσπότης αὐτοῦ.

§ 9 — Deest.

§ 10 — Sch. 40 [BS 3104/24 = Sch. 33 cpv., Hb. V, 276]: Κυρίλλου. Ὁ οὐσουφρουκτουάριος καὶ ὁ <ὁ> σουάριος κινεῖ οὐτίλιον…

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'. — § 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: πρόσκεπται 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 Ἀκουίλιῳ. But the Sch. 11 [BS 3102/25 = Sch. 13, Hb. V, 273: Πρόσκεπται — Ἰνδικί: κλπ.] does not belong to Dorotheus, because such text is to

96 Heimbach, Manuale, 242: «§. 5. 6.: Sch. 24 Εἰ 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.

79

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be considered as coming from the *índix* of Stephanus, as De Jong seems to have demonstrated.\(^{100}\) – §§ 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 ἰμφακτοῦμ 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 Ἀκουΐλιος ὁ δίρεκτος) 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 metaphor, ‘destroyed’: τοῦ ἀναιρεθέντος πράγματος), while the *actio utilis* (mentioned with the form ὁ οὐτίλιος) is granted to the others.\(^{101}\) 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 extention of the Aquilian defences to the *non domini* is here generally exposed, by what concerns the solution of the case.\(^{102}\) – § 7. It is not present in the *índikes*. – § 8. Two transliterations (βοναφίδε and also ἰμφακτος\(^{103}\)) are here to be remarked.\(^{104}\) In the text it is specified that the *servus bona fides serviens* was ‘wounded or damaged’ (πληγῇ ἢ ζημιωθῇ). Though the subject of the sentence is changed, the text mirrors the solution of Ulpian. It can be noticed, though, the elucidation ἐπειδὴ μή εἰμι δεσπότης αὐτοῦ\(^{105}\) 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.\(^{106}\) – § 9. Missing. – § 10. It is mentioned only in the *índix* of Cyrillus, which is also rich in transliterations (see the expressions...

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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 *índix* 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’ (διρέκτος).

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

103 The term ἰμφακτος 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.
οὐσούφρουκτον,107 οὐσουφρουκτούριος... οὐτίλιον,108 for the part which we are here interested in, and προπριεταρίαν... οὐσούφρουκτος109 for the other part, which refers to D. 9.2.12. Moreover: the correspondance with D. 9.2.11.10 goes only from the beginning of the scholium to the word οὐτίλιον.111 The continuation matches with the content of D. 9.2.12 (καὶ κατὰ τοῦ – ἀρμόσας ὁ οὐσουφρουκτος), to which the mention of corresponding texts (ζήτει βιβ. ί τιτ. γ’ κεφ. ζ’ θεμ. γ’ δ’ ε’ καὶ βιβ. ις’ τιτ. α’ κεφ. ις’ 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],112 and Bas. 16.1.17 in fin. [= § 3]), that Cyrillus certainly could not quote. Because of such, though the Fabrot edition corrected θεμ. γ’ δε’ ε’ with θεμ. γ’ διγ. ε’,113 such emendation, even if understandable, does not express the truth of the text.

D. 9.2.12, Paul. 10 ad Sab. [P. 1805] = Bas. 60.3.11114

→ Sch. 39 ad Bas. 60.3.11, 12 [BS 3104/19 = Sch. 33, Hb. V, 276].115 Εἰ δὲ καὶ αὐτὸς ὁ προπριετάριος ἢ τραυματίσῃ ἢ ἀνέλῃ τὸν οἰκέτην, καθ’ οὗ ἔχω τὸν οὐσουφρουκτον, διότι ἤμου κατ’ αὐτοῦ πρὸς τὴν τοῦ οὐσουφρουκτοῦ διατίμησιν καὶ ἀνάκλω τὸν ἑαυτὸν ἐνιαυτόν καὶ ἐν τῷ τοῦ οὐσουφρούκτου διατίμημα.116 Κυρίλλου… καὶ κατὰ τῷ τὴν προπριεταρίαν ἔχοντος. 


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


110 See just beyond.

111 Heimbach, Manuale, 242: «Cyr. ind. §. 10: Кυρίλλου… οὐτίλιον V. 276».

112 As evidence that, also for what concerns βιβ. ί 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 Cyrilus.

113 Cf. Hb. V., 276 p. π: see C.A. Fabrot, Τῶν Βασιλικών Τεῦχος Ζ’, Paris, 1647, 76 b-c [Sch. q-x, Cyryll].

114 Heimbach, Manuale, 242: «Cf. Αἰ ἰδιαίτερα 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).


116 Heimbach, Manuale, 242: «Cyr. ind.: Кυρίλλου α ν. καὶ κατὰ … οὐσουφρουκτος V. 276».

117 Α παρασκευή ends up the text (Ζήτει βιβ. ί τιτ. γ’ κεφ. ζ’ θεμ. γ’ δ’ ε’ καὶ βιβ. ις’ τιτ. α’ κεφ. ις’ 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... οὐσούφροικτον... ούτίλος... οὐσουφροίκτου... οὐσούφροικτος), as well as the text of Cyrillus.

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

pr. → Deest.

§ 1 → Sch. 8 [BS 3107/24 = Sch. 5, Ἱ. ed., Hb. V, 276]:¹¹² 'Εάν τις ἔλευθερος ὁν καὶ βοναφίδε δουλεύων μοι ζημιώσῃ με, κατέχετα μοι τῷ Ἀκουίλιῳ διαγνωσθεὶς ἐν ύστερος ἔλευθερος.

§ 2 → Sch. 13 [BS 3108/4 = Sch. 8, Hb. V, 277]:¹¹² 'Εάν δούλος τῆς ἄπροσελεύστου κληρονομίας ἀναμεθῆ, ἐπειδή δεσπότην ὡκ έχει, τίς κινήσει τὸν Ἀκουίλιον, ἐξητήθη. Καὶ λέγει ο Κέλσος: ἐπειδή ο νόμος ἡμουλήθη φυλάττεσθα τῷ δεσποτῇ τὸ άζήμιον, ἁρμοδίῳ τῇ κληρονομίᾳ ο Ἀκουίλιος, καὶ ἀδιτεύων μετὰ ταῦτα ο κληρονόμος κτάται αὐτόν ἕκατο.

§ 3 → Deest.

Pr. It is missing in the indikes.¹²² – § 1. We find the transliteration βοναφίδε,¹²³ but, most of all, a first elucidation (by which the liber homo b.f. serviens ‘damaged me’: ζημιώσῃ με), and a second and final elucidation, which is absent in the text of Ulpian (διαγνωσθείς ἐν ύστερος ἔλευθερος) – 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 simmetrically perfect transcription καὶ λέγει ο Κέλσος, and the use, in the final passage, of the (translitterated) verb form ἀδιτεύων.¹²⁴ Hence the text seems to be faithful to the original: τὸ άζήμιον correctly mirrors damna,¹²⁵ to which the αὐτόν of the end κτάται αὐτόν ἕκατο is

¹¹² 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).
¹¹³ About this latter, see supra the comment to D. 9.2.11.10.
¹¹⁴ Heimbach, Manuale, 242: «[DOR.] § 2: ’Εάν δούλος V. 277».
¹¹² Nonetheless, a parașkouphê is ascribed to such pr., which Heimbach attributes to the Anonymous (Heimbach, Manuale, 242: «ΑΝΟΝ. ad pr. Sch. 1. Αὐγαναθή... ὑστερον V. 276»). Such parașkouphê is Sch. 1 ad Bas. 60.3.13 [pr.] [BS 3107/11 = Hb. V, 276]: «Ἀνάγνωθι τιτ. α’ δι. γ’ [sed β’, Ἱβ.] καὶ βιβ. ιζ’ τιτ. β’ δι. νβ’ θεμ. ὑστερον».
¹¹⁵ As I have already observed, this is a transliteration not registered by Stephanus, Th.G.L., but by Psellus (see supra, n. 104).
¹²² This is absent in Stephanus, Th.G.L., but it is mentioned by DuCange, Gl.Gr., 26, s.v. ἄδιτεύων. The same verb in the infinite form, ἄδιτεύειν, is present in Mich. Psell., Poem. 8.233.
¹²³ Stephanus, Th.G.L. I, 782A, s.v. άζήμιον: ‘Item τὸ άζήμιον’, 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.,\(^{126}\) or after the whole *principium* of the same text.\(^{127}\) Now, let alone the fact that, in this way, texts would be unproperly forced,\(^{128}\) even the structure of the *libri Basilicorum* – and the system of the various *scholia* connected to them\(^{129}\) – 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.\(^{130}\)

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\(^{126}\) See P. Krüger, 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, *Scrivi giuridici*, 2, Roma 1938, 442-443 n. 1. Actually, the suggestion of Mommsen-Krüger does not seem to be ineritable from the article of the Italian Scholar. As further evidence of this, it can be noticed that Levy - Rabel, Index intpl., 1, 114, ad D. 9.2.14, do not refer the opinion of Segrè (and id., 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» (i.e.), 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.*).

\(^{127}\) 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, *Scrivi giuridici*, 2, Roma 1938, 442-443 n. 1. Actually, the suggestion of Mommsen-Krüger does not seem to be ineritable from the article of the Italian Scholar. As further evidence of this, it can be noticed that Levy - Rabel, Index intpl., 1, 114, ad D. 9.2.14, do not refer the opinion of Segrè (and id., 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» (i.e.), 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 ἴνδιξι ὃς which are here examined.

\(^{130}\) The *principium* of D. 9.2.15 is contained in the ἴνδιξι of Stephanus (see just beyond): it is possible that the Macedonian compilers followed the drafting of this jurist.
Ἀκουΐλιος
κατὰ τὸν Ἀκουΐλιον ὁ κληρονόμος, εἰκότος μὲνε παρὰ τῷ κληρονόμῳ ἀδιεξοχάτω ὁ Ἀκουΐλιος. 2. - Ὁ Οὐλπιάνος καὶ Στέφανος φαντάζοντας τὸ τούτο πρὸς ἀκρίβειαν εἰρήνηθαι, ἐπειδὴ καὶ ἐπὶ τοῦ ἀποθανόντος ὁ κληρονόμος ἐκχώρει τῷ ληγαταρίῳ τὸν Ἀκουΐλιον, εἰ καὶ τῷ ἤθελον περὶ τοῦ τραματοθενόντος λέγει τὴν ἐκχώρησιν. Στέφανος δὲ λέγει τὴν ἐκχώρησιν ἀργείν ὡς τοῦ δούλου πρὸς ἀδιεξοχάτω φανεράντος καὶ μὴ ἀρμόσαντος τοῦ ληγαταρίῳ. [Ὅ] λέγει δὲ καλῶς. Τὰ γὰρ ποῦρα οὐκ ἂν ἀποδόθη τῇ ἐρευνήσει, ἀλλὰ πρὸς τὴν ἀποθεμάτητον τοῦτον εἰς τὴν ἐρευνήσειν καὶ τὴν ἀναλογίαν ἀργείην τὴν ἐκχώρησιν ὡς τοῦ Ἀκουΐλιον οὐκ ἠγαπητόντος τῆς κληρονομίας, ἀλλὰ προφέρεται τῆς κληρονομίας ἀρμόσαντος τῷ κληρονόμῳ· τοιαύτην γὰρ διόρισεν εὐρύς, ἐπὶ καὶ ἐξ ἀργείας τῆς κληρονομίας ἀρμόσαντος τῷ κληρονόμῳ· τοιαύτην γὰρ διόρισεν εὐρύς καὶ καλῶς. Τὸ δέ γὰρ ποῦρα οὐκ ἂν ἀποδόθη τῇ ἐρευνήσει, ἀλλὰ πρὸς τὴν ἀποθεμάτητον τοῦτον εἰς τὴν ἐρευνήσειν καὶ τὴν ἀναλογίαν ἀργείην τὴν ἐκχώρησιν ὡς τοῦ Ἀκουΐλιον οὐκ ἠγαπητόντος τῆς κληρονομίας, ἀλλὰ προφέρεται τῆς κληρονομίας ἀρμόσαντος τῷ κληρονόμῳ· τοιαύτην γὰρ διόρισεν εὐρύς καὶ καλῶς. Τὸ δέ γὰρ ποῦρα οὐκ ἂν ἀποδόθη τῇ ἐρευνήσει, ἀλλὰ πρὸς τὴν ἀποθεμάτητον τοῦτον εἰς τὴν ἐρευνήσειν καὶ τὴν ἀναλογίαν ἀργείην τὴν ἐκχώρησιν ὡς τοῦ Ἀκου.intValue = 84
Pr. The text is missing in the indikes (i.e. in the index attributed to Dorotheus and in the one attributed to Cyrillus). Nonetheless, we have two σχόλια – according to Heimbach, these belong to the Anonymous – which σχόλια include a brief passage of the work of Stephanus (Οὐλπιανός καὶ Στέφανός φασι – ἀρμόσαντος τῷ ληγαταρίῳ) 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 – which is present two times, in the same gender and number – ποῦρα ... ἐπὶ τῆς νερεδιτάτης πετιτίονος ...; the technical terms which are even kept in Latin letters ('ABADITATE HEREDITATE... MÖRTEM TESTATÓRIS), and the many mentions of analogous texts which the scholia include. Correctly, Heimbach remarks that «in Sch. Ἐπειδὴ Anonymus laudat Stephanum [in addition to Ulpian: Οὐλπιανός καὶ Στέφανος] ad L. 15 pr. D. IX. 2. eiusque sententiam vituperat», and he refers, with these latter expressions, to the passage «Οὐ 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 choosen 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 ... οὕ 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 index of Stephanus: cf. also C. Ferrini, ‘Intorno all’indice de’ Digesti di Stefano’, BIDR III (1890), 61-71 (61-62) = Id., Opere, 1, 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, 2380, 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.
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.
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Dorotheus’ version). The last part (τὰ δὲ εἰς – ἀνατρέπεται) concerns D. 9.2.16: we refer, therefore, to that text.144

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]: … Τὰ δὲ εἰς ἀκείνον περιερχόμενα τὸν κάσον, εἰς ὑπὸ οὐκ ἡδύνατο εξ ἀρχῆς συστῆναι, ἀνατρέπεται.146

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 translitteration 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]: [=Ἔσθ᾿ ὅτε καὶ ὁ δεσπότης ἐνάγεται τῷ Ἀκουϊλίῳ ἤτοι τῇ ἱμφάκτῃ. Ἐὰν γάρ τις τὸν ἰδίον οἰκέτην ἀνέλῃ, δύναται ὁ βοναφίδε

143 It must be said, though, that the presence (or the absence) of such stilistic 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. Ἀνώγειθ V. 279}, and also {ad v. quasi de vulnerato: Ἐξ τοῦ οὗ Τ. 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 *scholion* who mentions the name of Stephanus, but, as Heimbach remarks, probably with reason (loc. ult. cit.: {[ANON. adn.: Ἡξώσωθηποῆν}), we are in presence of an *adnotatio* of the Anonymous: Sch. 3 [BS 3111/21 = Sch. 2 cpv., Hb. V, 279-280].

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].

neumómenos atóon ἢ ὁ ἔχων αὐτόν εἰς ἐνέχυρον τὸν Ἀκουήλιον ἴτου τὴν πιγνερατικάν κινεῖν.

The text of Sch. 5* shows some peculiarities, among which the terms ἰμφάκτῃ … βοναφίδε … πιγνερατικάν 148 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 – τῇ ἰμφάκτῃ). 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 (ητοί) by reason of the actio pigneraticia. The text of the Digest considers, on the contrary, only the actio in factum. 149 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, 150 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, 151 though with some not unrelvant content variations (the legitimation to be plaintiff or defendant in the actio legis Aquiliae and in the pigneraticia changes substantially). 152 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 19th century, in the following terms: «18. = 18. D OR. índ. : ἔσθ᾽ 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 – τῇ ἰμφάκτῃ should also be mentioned. As for what concerns the

148 About the expression ἰμφάκτῃ, 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 πιγνερατικα 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 pigneraticia*, 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 pigneraticia... sed alterutra contentus esse debeat 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. 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´ κζεμ. κ´. 2. - Ζήτει κεφ. κζ´ καὶ βιβ. ψ´ τττ. β´ κεφ. κζ´. Επεὶ καὶ πᾶς δεσπότης υπόκειται ὑπνοί λεγόμενος.*

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

→ Deest.

Absent in the Byzantine versions.

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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 hh.ll.*

155 In Heimbach’s edition, sch. 1 cit., covers the following text: «1. - Ζήτει περὶ καθενορ. κζ´.». 
TOWARDS A PALINGENETIC STUDY OF BAS. 60.3

‘Ad caput primum - id quod interest’

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

pr. → Sch. 1 ad Bas. 60.3.21 [pr.-1. I pars] [BS 3112/24 = Hb. V, 280]:

Εἰς τοσοῦτον καταδικάζει τὸν ἀνελόντα ὁ Ἀκουΐλιος, ὅσου πλείονος ἡμῖν ἐν τούτῳ τῷ ἐνιαυτῷ ὁ οἰκέτης· οὗτο γὰρ συνείδε τὴν συμβᾶσαν ζημίαν ὁ νόμος ἀποτιμᾶσθαι. …

→ Sch. 2 ad Bas. 60.3.21 [pr.-1. I pars] [BS 3112/28 = Hb. V, 280]:

Κυρίλλου Ἑνὶ τοσοῦτον διατίμησις γίνεται ὁ οἰκέτης ἐν αὐτῷ τῷ ἐνιαυτῷ ἀνακλωμένῳ ἀφ᾿ ὧν ἐπλήγη, οὐκ ἀφ᾿ ὧν ἀπέθανεν.

§ 1 → Sch. 1 ad Bas. 60.3.21 [pr.-1. I pars] [BS 3112/26 = Hb. V, 280]:

Εἰ δὲ πληγὴν δεξάμενος ὁ οἰκέτης εἰς τοὐπίσω ψηφίζεται. → Sch. 1 ad Bas. 60.3.21 [1.2.]:

Εἰ δὲ πληγὴν δεξάμενος ὁ οἰκέτης μετὰ πολὺν χρόνον ἐκ τῆς πληγῆς ἐτελεύτησεν, οὐκ ἐξότε ἐτελεύτησεν, ἀλλ᾿ ἐξότε τὴν πληγήν ἐξαφῄει τὴν καταδίκην. Cf. Sch. 2 ad Bas. 60.3.21 [pr.-1. I pars] [BS 3112/28 = Hb. V, 280]:

Κυρίλλου κλπ.

§ 2 → Sch. 1 ad Bas. 60.3.21 [1.2.]:

Οὐ διατιμώμεθα δὲ μόνον τὸ σῶμα τοῦ ἀναιρεθέντος οἰκέτου, ὅσου ἡμῖν ἦν, ἀλλ᾿ εἰς εἴτε διέφερεν ἡμῖν μὴ ἀναιρεθῆναι αὐτὸν, εἰς τοσοῦτον ἡ καταδίκη γίνεται. …

A previous remark: the Greek texts are a bit complex, because the texts of the ἰνδικεῖς 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. I 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: Eīs 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.: Eī δὲ πληγην ... 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.\textsuperscript{163} 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 transliteration appears. – §§ 1-2. To this regard, the wide Sch. 1 ad Bas. 60.3.21 §§ 1-2\textsuperscript{164} 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.

\textit{Ad caput primum: aestimatio - causae corpori cohaerentes}\textsuperscript{165}

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

pr. \textemdash\ Sch. 1 ad Bas. 60.3.21 [BS 3113/6 = Sch. 2, Hb. V, 281]:\textsuperscript{166} \ldots \textquoteright\text{Θεν εἰ \varepsilonπερωτηθεῖς υπὸ τινος, εἰ μὴ παραστήσαν \varepsilonπειδὴ σοῦ αὐτὸν μὴ δυνάμενας αὐτὸν παραστήσας \varepsilonποιήσατο τῷ προστίμῳ, καὶ τῷ τοῦ προστίμου διαφέροντι καταδικάζῃ μοι.}

§ 1 \textemdash\ Sch. 1 ad Bas. 60.3.21 [BS 3113/9 = Sch. 2, Hb. V, 281]::\textsuperscript{167} \ldots \text{Καὶ δέσα \δέ τῷ σώματι τοῦ αὐτοποίητου παρακασφοδύτου καῦσαι, καὶ αὐτὰ διατίμησει. Εἰ γὰρ \δέ τῷ τοῦ \varepsilonπερωτηθεῖς υπὸ τινος, ἀλλὰ \φαντάζομαι διατίμησιν ποσοῦν \καὶ τῶν \ζώντων \simeq τοῦ \περιόντος \προστίμου \διατίμησιν.}

The vast Sch. 1 ad Bas. 60.3.21 [BS 3113-9 = Sch. 2, Hb. V, 281],\textsuperscript{168} 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

\begin{thebibliography}{9}
\bibitem{163} Heimbach, Manuale, 243: \textquoteleft\textit{DOR. ind. pr. \S. 1. u. a. v. occisus est: Εἰς τοσοῦτον V. 280}\textquoteright and also Heimbach, Manuale, 243: \textquoteleft\textit{Cyr. ind. pr. \S. 1.: Κύριλλος V. 280}\textquoteright; see, on the contrary, BS 3112 \textit{ad h.b.l.}, which works in the opposite sense.
\bibitem{164} Cf. BS 3113/2.
\bibitem{165} Cf. Miglietta, \textit{Servus dolo occisus} (note 24 above), 66.
\bibitem{166} Heimbach, Manuale, 243: \textquoteleft\textit{22. = 22. DOR. ind.: Eἰ δὲ πληγῆν a v. \varethetai εἰ \varepsilonπερωτηθεῖς u. a. f. V. 281}\textquoteright.
\bibitem{167} See the preceding n.
\bibitem{168} See \textit{supra} D. 9.2.21 = Bas. 60.3.21 and D. 9.2.22 = Bas. 60.3.22.
\end{thebibliography}
transliteration (καῦσαι).\textsuperscript{169} – § 1. The second part of Sch. 1 touches a suggestive issue, \textit{i.e.} the \textit{aestimatio} of a unity composed by several animals or slaves bound by \textit{causae corpori cohaerentes} (a phrase here very well translated with τῷ σῶματι τοῦ ἀναρθέντος παρακολουθοῦσι καῦσαι).\textsuperscript{170} 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 \textit{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 \textit{corpora}. The interesting elucidation \textit{μηκέτι τοῦ περιόντος – σωζόντων} is added to this solution – which mirrors classical law. This means that the \textit{aestimatio} of the survivors, which are bound to the \textit{corpus peremptum}, cannot be higher (\textit{μηκέτι}) than the value of the actor, or of the musician, or of the twin, or of the three horses of the \textit{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 \textit{corpus} and the \textit{corpus} of the survivors, and the limit to such sentence would be the value of the unity of the survivors).\textsuperscript{171}

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


\textsuperscript{171} This could be challenged by sustaining the such limit could be general and, mostly, that it could absorb the \textit{aestimatio}, but such objection would be groundless: firstly, in this case the \textit{regula} would be useless, because the sentence would, in fact, coincide with the value of the only destroyed \textit{corpus} (hence, the loss of value of the other \textit{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 addiction to the appraisal of the \textit{corpus peremptum}. See, for confirmations, Sch. §§ 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.
To this regard, it must be said that the Sch. 17 ad Bas. 23.

Heimbach, Manuale, 243: «D OR. ind. § 1.»: 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]. 172 Ei μέντοι σὲν ἐλευθερία γραφεῖς κληρονόμος ὑπὸ τοῦ ἱδίου δεσπότου ἀνηρέθη, οὔτε ὁ διδόμενος αὐτῷ σουβστιτοῦτος οὔτε ὁ ἐξ ἀδιαθέτου γενόμενος τὸ δεσπότης κληρονόμος διὰ τοῦ Ἀκουιλίου δύναται τὸ διαφέρον τῆς κληρονομίας ἀπαιτεῖν. Ἐὰν γὰρ ἑγαίλεσοι τῇ ἀναιρέσει τοῦ οἰκέτου, ἀκούσοντα, ὅτι εἰ μὴ ἀνηρέθη, ἐλευθερὸς ἦν καὶ κληρονόμος καὶ ύπαιθε οὐδὲ ἐκατέσθη εἰς τὴν κληρονομίαν. Ἐὰς μόνον δὲ τὸ τίμημα τοῦ ἀναιρεθέντος οἰκέτου γίνεται κατὰ τὸν Ἰουλιανὸν ἢ διατίμησιν. Ἔγῳ δὲ νομίζω μηδὲ εἰς τὴν διατίμησιν τοῦ σώματος αὐτοῦ κινεῖν καλὸς τὸν σουβστιτοῦτον, ἐπείδη εἰ ἐγένετο κληρονόμος ὁ ἀναιρεθέντος οἰκέτης, καὶ ἐλευθερὸς ἐγένετο· ἐλευθερὸς δὲ σώματος διατίμησις οὐ γίνεται.

§ 2 → Sch. 54*: [BS 3119/5 = Sch. 9 cprv., Hb. V, 282]. 173 Ei δὲ περίοντος ἐτί τοῦ γράφαντος με κληρονόμον ἀνηρέθη ὁ δοῦλος, οὐκέτι τῆς κληρονομίας τὸ διαφέρον ἀπαιτῶ, ἐπείδη εἰς τούπισο ύποστρέφομεν τὸν πρὸ τῆς ἀναιρέσεως ἑναυτῶν σκοποῦντες, ἐν οὗ ἰχόνε τὴν ἡμινύμην κληρονομεῖν ἑτί περίοντος τῷ διαθεμένῳ. Χρῆ δὲ τοῦ ἀναιρεθέντος οἰκέτου τὴν διατίμησιν ἀνάγεσθαι εἰς εἴκεν ἑκατόν τοῦ καρποῦ, ἐν ὁ ἤμισυτος ἢν ὁ ἀναιρεθέντος οἰκέτης. … Cf. 174 Sch. 17 [BS 3115/27 = Sch. 16, Hb. V, 284]: Ἐπείδη εἰς τούπισο ύποστρέφομεν τὸν ἀπὸ τῆς ἀναιρέσεως ἑναυτῶν σκοποῦντες, ἐν ὁ ἰχόνε οὗ ἡμινύμη κληρονομεῖν, ἑτί περίοντος τῷ διαθεμένῳ. Χρῆ δὲ τῆς τοῦ ἀναιρεθέντος οἰκέτου τὴν διατίμησιν ἀνάγεσθαι εἰς εἴκεν ἑκατόν τοῦ καρποῦ, ἐν ὁ ἤμισυτος ἢν ὁ ἀναιρεθέντος οἰκέτης. Ὡθεν ἐὰν πολυτίμου καὶ ἀκριβίδος χοιράρφου καὶ τὰ ἐξής. 175

§ 3 → Sch. 54*: [BS 3119/9 = Sch. 9 cprv., Hb. V, 282]. … Ὡθεν ἐὰν πολυτίμου καὶ ἀκριβίδος χοιράρφου ὁ ἀντίχερο ἄφαρεθή καὶ ἐντὸς ἑναυτοῦ τῷ τιμῆθη τὸν ἀντίχερο αὐτοῦ ἐφόνεσθαι αὐτὸν τὸς ἡ διατίμησις αὐτοῦ γίνεται εἰς εἴκεν ἑκατόν τὸν χρόνον, σο σὺ ἐπὶ πρὶν ἀπολοίαν αὐτὸν κατὰ ταῦτά καὶ τὸν ἀντίχερα καὶ τὴν τέχνην αὐτοῦ. Cf. also Sch. 17 cit.: [BS 3115/30] … Ὡθεν ἐὰν πολυτίμου καὶ ἀκριβίδος χοιράρφου καὶ τὰ ἐξής – and Sch. 19 [BS 3116/1]: Ἡ διατίμησις αὐτοῦ γίνεται εἰς εἴκεν τὸν χρόνον, ἐν ὁ


173 Heimbach, Manuale, 243: «DOR. ind. § 2 a v. Qquodsi etc. et § 3: Ei δὲ περίοντος V. 282. Cf. Ἐπειδὴ V. 284»; «Cyr. ind. § 2. fin.: Ἐπειδὴ v. Κυρίλλου. Καὶ γὰρ ὁ ἐνιαυτὸς εἰς τούπισο ἀνακλῆ ἑκατόν 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. Qquodsi etc. et § 3: Ei δὲ περίοντος V. 282. Cf. Ἐπειδὴ V. 284».

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πλείονος άξιος ἦν, πρὶν ἀπολέσαι αὐτὸν κατὰ ταύτον καὶ τὸν ἄντισχερα καὶ τὴν τέχνην αὐτοῦ. Sch. 18 [BS 3115/32 = Sch. 16 pars, Hb. V, 284].177 Κυρίλλου. Καὶ γὰρ ὁ ἐνιαυτὸς εἰς τούτῃ ἀνακλῆ ἕαυτον.

§§ 4-5 → Desunt.

§ 6 → Sch. 27 [BS 3116/12 = Sch. 25, Hb. V, 284]:178 'Ὡς ἐν κεφαλαίῳ γὰρ ὁ σα τὸν οἰκέτην ἐντὸς ἐνιαυτοῦ ὑψιστομένου πρὸ τῆς ἀναίρεσεως αὐτοῦ τιμιότερον αὐτόν ἐποίει, ταῦτα προστίθεται τῇ διατιμήσει αὐτοῦ. → Sch. 28 [BS 3116-14 = Sch. 25 cpv., Hb. V, 284]:179 Κυρίλλου. Ὅσα ἐντὸς ἐνιαυτοῦ τιμιότερον αὐτὸν ἐποίει διατίμονται.

§ 7 → Sch. 58* [BS 3119/30 = sch. 26*, Hb. V, 285]:180 'Εὰν νήπιον παιδίον μήπω ἐνιαυσιαῖον ἀνῃρέθη, καὶ ὑπὲρ τοῦτο κινεῖται ὁ Ἀκουῖλιος.

Cont.: 'De actionibus, quae ex capite primo descendunt'181 [P. Ulp. 617]

§§ 8-10 → Desunt.

Cont.: 'Si fatebitur injuria occisum esse. In simplum...'182 [P. Ulp. 618]

§ 11 → Sch. 39 [BS 3117/8 = Sch. 36, Hb. V, 285-286]:183 'Εὰν τις τὸν περιόντα οἰκέτην διαβεβαιώσαται παρ᾽ ἐμοῦ ἀνηρεθένεται, εἰ καὶ ὁμολογήσοι πεφονεύκεναι αὐτὸν, δύναμαι δὲ δεῖξαι, ὅτι ἐφονεύθη ἑαυτῷ. Οἱ δὲ ἐνταῦθα διὰ τοῦτο καὶ τὸν Θεόδωρον (with the relocation of the section σημείωσαι δὲ καὶ τοῦτο, ὥστε ἡ κατάθεσις οὐ βλάπτει, ἄλλος ἱκτικὴς τῆς ἀληθείας). Therefore, as Sch. 41 consists in a paraposthē, 177 Cf. Heimbach, Manuale, 243: «Cyri. ind. §. 2 fin.: Ἐπειδὴ v. Κυρίλλου. Καὶ γὰρ ὁ ἐνιαυτὸς εἰς τούπισω ἀνακλῆ ἕαυτον V. 284.

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

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

180 Heimbach, Manuale, 243: «[Cyri. ind.] §. 7.: Ἐὰν νῆπιον V. 285».

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

182 Lenel, Palingenesia, 2, 526.

183 Heimbach, Manuale, 243: «[Dor. ind.] §. 11.: Ἐὰν τὶς... τὸν οἰκέτην V. 285 sq.».

184 Heimbach, Manuale, 243: «[Cyri. ind.] §. 11.: Κυρίλλου u. a. v. σκοπηθῆσαι 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 ἐφονεύθη; the Sch. 41 from περὶ γευσόδους τοί θεοῦ. α´ τοῦ β´; the Sch. 42 from σημεῖωσαι ἐκ τοῦτο το ἐχούσης τῆς ἀληθείας.; and the Sch. 43 from ἐνταῦθα διὰ τοῦτο το καὶ τὸν Θεόδωρον (with the relocation of the section σημείωσαι δὲ καὶ τοῦτο, ὥστε ἡ κατάθεσις οὐ βλάπτει, ἄλλος ἱκτικής τῆς ἀληθείας). Therefore, as Sch. 41 consists in a paraposthē, 93
ὅτι ζῇ, ἀπολύομαι. Μόνον γὰρ σὺ οὐ καταναγκάζει δείξαι, ὅτι ἐφόνευσα· εἰ δὲ ἐφονεύθη, ὄφειλε σκοπηθῆναι, …

Pr. Missing. – § 1. As for what concerns the formal characteristics, the scholium shows both a repeated transliteration (σουβστιτοῦτος … σουβστιτοῦτον),185 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 δεσπότῃ κληρονόμος); likewise, the widening of the passage quae servo competere non potuit: quae sententia vera est through the whole sentence ἐὰν γὰρ ἐγκαλέσωσι – 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).186 – § 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 Cyrilus, 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 – ἀνακλῶ ἐκαυτόν). – §§ 4 and 5. Missing. – § 7. Present, on the contrary, in both authors. – §§ 8, 9 and 10. Missing. – § 11. The scholium

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 Cyrilus 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. 60.5.23[.1] [BS 3114/8 = Sch. 6, Hb. V. 282] which is wider in the 19th century edition; the continuation in BS is, on the contrary, the Sch. 9 [BS 3114/10].
of the pseudo-Dorotheus has the interesting expression κομψορία ἀγωγή. The content of the text of Cyrilus, who expands his reflection in respect to D. 9.2.23.11, is less conditioned by the original Latin.187

D. 9.2.24, Paul. 22 ad ed. [P. 363] = Bas. 60.3.24188
→ Sch. 39 ad Bas. 60.3.23[.11] [BS 3117/13 = Sch. 36, Hb. V, 285-286]:189 … Σαφέστερον δὲ τούτο ἐπὶ τοῦ τραυματισθέντος οἰκέτου τρακταίζεται. Εἰ γὰρ καὶ ὀμολογήσω τραμμετάσθηντα, ποίου τραύματος γίνεται διατίμησις, ἢ πρὸς ποῖν καιρόν ἀναφέρεται; … → Sch. 40 ad Bas. eod. [BS 3117/20 = Sch. 36 cpv., Hb. V, 286]: 190 Κυρίλλου. … ἄλλο ὅτι ὁμολογήσα ἀκριβότερον αὐτὸν ἀνῃρηκέναι, εἴτε ὀμολογήσα ἀρκεῖ δεῖξαι, ἢτο ἀναφέρεται …

The text attributed to Dorotheus matches with the original, while the text of Cyrilus 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. §§ 1-2191
pr. → Sch. 39 ad Bas. 60.3.23[.11] [BS 3117/15 = Sch. 36, Hb. V, 285-286]:192 … Εἰ δὲ καὶ μὴ περίεστιν ὁ οἰκέτης, ἐτελεύτησε δὲ τὸν φυσικὸν θάνατον, ὡς ἐπάθως λέγεται ὁ ἡγούμενος, ἢ τὸν τραυματισθέντα, ὥς ὁμολογήσει, ἢ καὶ τὸν ἀκριβές ὁμολογήσει; … → Sch. 40 ad Bas. eod. [BS 3117/21 = Sch. 36 cpv., Hb. V, 286]: 193 Κυρίλλου. … Όὐκ ἄρκει δὲ δεῖξαι, ὡς ἀνεύθυνεν, ὅπι πρὸς τὸν ἀρχηγόν; …

§ 1 → Sch. 1 [BS 3121/8 = Hb. V, 286-287]:194 "Ὅτε προκουράτωρ ἢ ἐπίτροπος ἢ κουράτωρ ἢ ἄλλος τις ὁμολογήσει, ὡς ἐτραμμετῆσαν τὸν προκουράτωρος δεσπότης τινὰ ἢ τὸν τραυματουργούμενον, ἢ τὴν κομψορίαν οὐτίλως δίδοται κατ᾽ αὐτῶν, ἢ τὸν ἐπειδὴ κατὰ τοῦ ὁμολογοῦντος; …

§ 2 → Sch. 1 [BS 3121/11 = Hb. V, 286-287]:195 … Ταύτης δὲ τῆς κομψορίας κινομηνίας τούτη εἶ πρὸς τὴν ὑπόθεσιν ὁ δικάξων, ἄλλα μόνον διατιμάται ποίας γὰρ ἐξετάσεως χρεία 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. πτευραιματικάν». 
189 Heimbach, Manuale, 243: «DOR. ind.: Εάν 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.: Εάν 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.
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 palingenetic 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 … κουρατωρευόμενος … κουρατωρευόμενος.196

– § 2. To complete partially what the 19th century editor suggested (he rightly saw in the passage ὅτε προκουράτωρ … κατὰ τοῦ ὁμολογοῦντος 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 ή κουράτωρες, while the part matching with § 2 D. eod. goes from the sentence ταύτης δὲ τῆς κομφεσορίας to the interrogative clause – as Heimbach implicity reckoned – κατὰ τοῦ ὁμολογοῦντος; The part which follows, with its final παραπομπή, should probably not belong to the Ìndix, 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.197

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]:198 … Ἄλλ᾿ ἵσως ἔρεις· τίς οὖν χρεία δικαστηρίου, εἰ μηδὲν κρίνει; Ἄλλα 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. 3859.1; Etymol. Gudianum 341.49 (341.50 about the form πουπίλλου) and also Etymol. Parvum 30.1. Even the form κουρατωρευόμενος is present in 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]: [Δορόθ.] ὅτε προκουράτωρ ή – κατά τοῦ ὁμολογοῦντος; / Sch. 1-bis ad Bas. eod.: [?] Ἄλλ᾿ ἵσως ἔρεις – Ζήτει βιβ. μβ′ ττ. δ′ κεφ. θ′ θεμ. β′. Heimbach, Manuale, 243: «26 = 26. DOR., ind.: ὅτε προκουράτωρ V. 286 sq. a ν. Ἄλλα ἵσως … ποιήσατε διατίμησαι». 

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TOWARDS A PALINGENETIC STUDY OF BAS. 60.3

ὁμολογῇ πεφονηκέναι καὶ ἑτοιμός ἐστι καταβαλεῖν τὴν διατίμησιν, χρεία πάντως τοῦ δικαστοῦ, ἵνα τὴν δικαίαν ποιήσῃ ται διατίμησιν. … → Sch. 4 ad Bas. 60.3.25 [1-2] [BS 3121/21 = Sch. 7, Hb. V, 287].199 [Ἐπὶ τοῦ ὤμολογοῦντος μόνον διατιμᾶται ὁ δικαστής, οὐ δικάζει δὲ] διὰ τὸ μὴ τὸν ἀκτόρα 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.

University of Trento

Massimo Miglietta

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