TRACES OF BYZANTINE LEGAL LITERATURE IN THEOPHILUS SCHOLIA

In comparison with the Basilica and their scholia, the first sources that readily come to mind when speaking about the transmission of Byzantine legal literature, relatively little is known about the scholia on the *Paraphrasis Institutionum* of Theophilus.[1] The scholia were already paid attention to by Fabrot.[2] Footnotes to his edition of the Paraphrase occasionally point out that 'scholiastes heic notat (...)' followed by a Latin summary in indirect speech. He does not specify in which of his three Paris manuscripts he has read such scholia.

After him, Alexander Falconer embarked on the same project. Murison was clearly more ambitious in this field and shows himself well equipped to the task. The three Paris manuscripts that he had also collated for his intended edition of the Paraphrase gave him access to the majority of scholia and to the best, but not to all. Moreover, he felt understandably uncertain about how to present them. In the end, he never published any of his extensive work on Theophilus, but trusted his material to London University College.[3] Thanks to the efforts of Professor Lokin, I acquired a complete set of his photocopied collation.

A few decades before Murison, Contardo Ferrini[4] had already published an edition of the scholia almost exclusively limited to the Parisinus 1364 (Pa).[5] Ferrini did realise that other manuscripts also had much to offer. Indeed he planned to publish those as well and to supplement and correct his work on Pa on that occasion. Lack of time and, as he

1 I refer to the edition by J.H.A. Lokin/Roos Meijering/B.H. Stolte/N. van der Wal, *Theophili antecessoris Paraphrasis Institutionum. With a translation by A.F. Murison*, Groningen 2010. On Theophilus as the author of the Paraphrase see there, pp. xviii-xx.

2 Carolus Annibal Fabrot, Θεοφίλου τοῦ ἀντικήνσορος Ἰνστιτούτων βιβλία δ΄: Theophili antecessoris Institvtionvm Libri IV… ex tribus mss. codd. Biblioth. Regia recensuit, & scholiis Graecis auxit, Paris 1638.

3 On these, see A.F. Murison, *Memoirs of 88 Years* (1847-1934), being the autobiography of Alexander Falconer Murison, ed. A.L. and Sir J.W. Murison, Aberdeen 1935, 183, 204f., 229. Discussed by S. Corcoran, 'Murison and Theophilus', *BICS* 53/2 (2010) 85-124, especially 103-104.

4 C. Ferrini, 'Scolii inediti allo Pseudo-Teofilo contenuti nel manoscritto Gr. Par. 1364', *Memorie del Reale Istituto Lombardo*, 3ª Serie 9, Milano 1886, 13-68 (= *Opere di Contardo Ferrini*. I: Studi di diritto romano bizantino, Milano 1929, 139-224).

5 He used the Parisinus 1366 (Pc) for the first half of book 1, which is missing from Pa. Footnotes to 1,1-16 refer to places where the Laurentianus 80.2 (Lc) has incorporated related scholia in the text.

frankly admits, inability to decipher everything, prevented him from making a full collation and, indeed, from publishing even the scholia in Pa completely. His selection was further limited by the ambition to support his hypothesis that Pa represented the traces of a continuous, 6th century commentary of an unknown author, who was well acquainted with the *Corpus Iuris Civilis*, with the *partes* of the Digest, probably with the Collection of 168 Novels, with Stephanus and Kobidas. Ferrini also believed that occasionally bits of this commentary landed as scholia in e.g. Vb and La, but he fails to specify which and where.[6]

Now it is my turn to at least make a start with a collation of the manuscripts. Like Ferrini's, my possibilities are limited by time and by problems of legibility, especially, it seems, where a marginal note looks promising. Yet the least I can do is offer a wider impression of what we have got.

The majority of marginal notes[7] are legal glosses of the type τουτέστιν, ἤγουν, or ἤτοι + Greek translation of a Latin technical term in the text. Others briefly inform the reader what information he can expect in a passage, often introduced by ὅτι, περὶ, or indirect questions like e.g. κατὰ ποῖον τρόπον, τί, etc., or they merely draw the reader's interest by pointing out that a certain passage is noteworthy: σημείωσαι ὡραῖον περὶ (...), or only ση(μείωσαι) or ὡρ(αῖον).

For the purpose of the current research project, scholia become more interesting where they provide references to specific constitutions alluded to by Theophilus or highlight parallels in other sources. Even the oldest manuscripts we have got, Pa and Pc, date from the end of the 10th or 11th century,[8] when the Basilica had superseded the *Corpus Iuris Civilis* as reference books for all practical puroposes. Nevertheless, as Ferrini said, scholia in Pa and Pc normally refer to the *Corpus Iuris Civilis* or to parts of the Digest rather than to the Basilica. The same is true of Lc:[9] scholia in this manuscript never refer to the Basilica. In the other manuscripts[10] they do just that, as also a later hand in Pa.

6 The only reference I find to other manuscripts is ad 1,2pr.: the well known note about animals that do not live in conformity with natural law.

7 Or, particularly in Lc, incorporated in the main text; see our edition, p. xxxii. Lc also has quite a few more substantial marginal scholia, either identical to e.g. Pc, or even unique. To give an example of the latter, Lc explains at 1,2,1 l. 14 μισθώσεις ἐκμισθώσεις: μίσθωσις καὶ ἐκμίσθωσις διαφέρει. καὶ μίσθωσις μὲν λέγεται τὸ ἐπὶ μισθῷ διδόναι τὸ ἴδιον, ἐκμίσθωσις δὲ τὸ ἐπὶ μισθῷ λαμβάνειν τὸ ἀλλότριον. ἡ γὰρ ἐξ πρόθεσις ὥσπερ σχέσιν καὶ ἐγγύτητα σημαίνει. οἷον πρὸς ἐμαυτῷ τὴν μίσθωσιν ἐποιησάμην.

8 Lokin/Meijering/Stolte/Van der Wal, *Theophili Paraphrasis* (note 1 above), xxviii-xxxvi.

9 E.g. ad 1,6,2 l. 2 διάταξεως, though inserted in the text after l. 2 γενικῶς: κεῖται ἐν τῇ διατάξει τῇ ε΄ τοῦ κζ΄ τιτ. τοῦ ς΄ καὶ ζ΄ βι. τοῦ κώδ. This note is not in Pc, and Pa is unavailable here.

10 So far, I have found examples in Ma, La, Vb, Le, Pb and A.

La features examples of both systems. A reference to Novel 26 of Leo VI is found in Lb ad 1,11,9 l. 20 πάλαι μὲν ἠδύνατο: τοῦτο ἀνῃρέθη ἀπὸ τῆς εἰκοστῆς ς΄ νεαρᾶς τοῦ φιλοσόφου Λέοντος ὁμοίως καὶ περὶ τῶν εὐνούχων. Nov. Leon. 112 is implied by a scholion in Vb at 3,1,2a l. 3 γενόμενοι. It warns the reader that what Theophilus says about an alternative way to become a *suus* is no longer valid, because the formal ἱερολογία is needed to make a child lawful: σήμειον. ἤργησε τὸ κεφ(άλαιον)· χωρὶς γὰρ ἱερολογίας παῖς νόμιμος οὐ γίνεται (Vb).[11]

In some respects, then, the scholia in the manuscripts of the Paraphrase are reminiscent of the so-called old[12] and new scholia on the Basilica, the former predominantly in Pa, Pc and Lc, the latter in the other manuscripts. In this context, it remains to be seen whether they were specially made to explain Theophilus's Paraphrase or, perhaps, originated as παραγραφαί to a different version of the Institutes or the Latin text itself.[13] Sometimes scholia do suggest a different text than Theophilus's, particularly where they pretend to quote. Thus e.g. Pa and Pc at 4,6,3 l. 5 ἔσθ' ὅτε (Inst. *plerumque*): "ὡς ἐπὶ πάντων"[14] εἶπε διὰ τὰ BITIOSA κτλ. At 4,1,7 ll. 5-6 ἐκτὸς (...) τούτου τοῦ τῆς κλοπῆς ἁμαρτήματος (Inst. *extra crimen*): καλῶς τὸ ἔγκλημα ἐπὶ τῆς FURTI. On the other hand, at 4,6,12 l. 7 τὸ μὴ δύνασθαι a scholion in Pa and Pc infers from the fact that the text forbids to summon one's father (Inst. *parentem*) to court without asking permission, that this is not true for summoning one's mother: ῥητῶς γὰρ περὶ τῶν πατέρων εἶπε καὶ οὐκ εἶπε περὶ γονέων ἢ ἀνιόντων, ἵνα νοηθῇ ὅτι καὶ περὶ τῆς μητρὸς τὴν συγγνώμην δίδοσθαι λέγει. This note does not do justice to the Latin text, but it is true that Theophilus speaks of fathers only (l. 5 πατρᾶσιν, l. 9 πατέρα).

1. Roman iurisconsulti

As we have got Theophilus scholia from different periods of time, we come across in them the names of successive generations of legal experts. Theophilus himself, following the Institutes, faithfully mentions all the well-known Roman individuals: Celsus, Papinianus, Gaius and the others. Occasionally, reference is made to the schools of the Proculiani and Sabiniani, to their most famous representatives, or to 'the old jurists' collectively (3,26,6; cf. in Inst. *ut quaesitum sit* with the *opinio* of Cassius). The Theophilus scholiasts show no special interest in them. Where the Paraphrase refers to an opinion of Sabinus and Cassius

11 Cf. Ecl.B. 2,3,30.

12 Cf. a scholion in Vb and the second hand of Pa ad 2,20,2 l. 30 διάταξις: τὸ τοιοῦτον ῥητὸν (...) οὐχ οὕτως χρὴ (Pa, om. Vb) νοεῖν ὡς τὸ παλαιὸν σχόλιον περιέχει, ἵνα (...), ἀλλὰ τοῦτο λέγει ἵνα (...) κτλ. The 'old scholion' must be that in Pa and Pc (Ferrini p. 190 τυχὸν ἐὰν κτλ.), which is not in Vb.

13 Van der Wal/Lokin, *Delineatio*, 41.

14 In a later stage somebody realized the discrepancy and corrected ἔσθ' ὅτε (Pa^2).

(3,23,2/5), that is what they point out: περὶ SABINU καὶ CASIU (Pa Pc). The plural Προκουλιανοὶ (3,23,2/18) invites the explanation οὗτοι δὲ πάντες νομοθέται (Pa Pc). The fact that they were followers of different schools is suggested in a scholion on 2,1,25/9 τῶν SABINIANON καὶ τῶν PROCULIANON: ὡς ἂν εἴποι ὅτι Κωβιδιανοὶ καὶ Θυλακιανοί (Pa Pc): 'as if he said "the followers of Kobidas and Thylakas"'. We do not know of any contemporary of the antecessor Kobidas called Thylakas.[15] Kobidas himself is present in two scholia, both of them found in Pa and Pc, hence in the edition of Ferrini.[16]

2. Stephanus

The antecessor Stephanus also features in a couple of scholia. Hylkje de Jong discusses two of them, viz. those published by Ferrini. She concludes that they very probably refer to Stephanus's commentary on the Digest.[17]

A third reference to Stephanus seems to have remained unnoticed, because this scholion is in the less famous manuscript Lb. Theophilus, faithfully following his Emperor's Institutes, explains in 3,9pr. that Justinian has made it possible to appoint an *alienus postumus* as one's heir.[18] A scholion adds the warning that this is true only for such *alieni postumi* whose mother the testator might have married, not if they are the product of an unlawful alliance. This warning, it further says, is also to be found in a commentary of Stephanus 'in the 20th title of the imperial book, which is *de legatis*':

> οὐ πάντα ποστοῦμον ἀλλότριον δυνάμεθα γράφειν κληρονόμον, ἀλλὰ τὸν ἀπὸ τοιαύτης κυοφορούμενον γυναικὸς ἣν κατὰ νόμους ἐφεῖται λαβεῖν, εἰ μὴ ἐξ ἀθεμιτογαμίας συνελήφθη. οὕτω γὰρ ὁ Στέφανος ἐξηγήσεται ἐν τῷ κ΄ τι. τοῦ βασιλικ(οῦ) βιβλίου ὅς ἐστι DE LEGATIS (Lb).

This is confusing in several respects. Supposing that 'the Imperial book', in singular, 'About Legacies' stands for the particular book of the Basilica that could be said to bear that title, one might start looking in Basilica book 44, which at least has the advantage of

15 H.J. Scheltema, 'Subseciva. XV. Kobidas', *RIDA* 3e s. 13 (1966), 341-343 (= Id., *Opera minora ad iuris historiam pertinentia*, (coll. N. van der Wal/J.H.A. Lokin/B.H. Stolte/Roos Meijering), Groningen 2004, 148-150). The Thylakas referred to in Peira 16,9 probably was Leon Thylakas, hypatos and judge in Thessalonica in the 11th century; cf. N. Oikonomides, 'The "Peira" of Eustathios Romaios: an Abortive Attempt to Innovate in Byzantine Law', *FM* VII (1986), 169-192 (175).

16 Ad 2,7,1/14 γίνεται and 3,25,1/14 ἐναντιουμένη.

17 H. de Jong, *Stephanus en zijn Digestenonderwijs*, Groningen 2008, 63-72.

18 See C. 6,48,1.

counting a title 20. We know that Basilica 44,20 included the equivalent of Digest 36,2, so an explanation of Stephanus might be expected among the, unfortunately lost, scholia to B. 44,20[19] – except that Digest 36 is one of the βιβλία ἐξτραόρδινα. The solution to this problem is to emend the text of the scholion to ἐν τῷ κ΄ τι. τοῦ β΄ βιβλίου ὅς ἐστι DE LEGATIS: 'in book 2 title 20 *de legatis*', more precisely, in Inst. 2,20,28, which, in the version of Theophilus, reads: Ὁ ἀλλότριος POSTUMOS κληρονόμος γράφεσθαι ἠδύνατο καὶ πάλαι καὶ νῦν ἀκωλύτως γραφήσεται, εἰ μὴ ἄρα συμβῇ αὐτὸν ἐκείνης ἐν γαστρὶ τῆς γυναικὸς εἶναι, ἣν ἐννόμως γαμετὴν ἔχειν οὐ δύναμαι. The Paris manuscripts Pa and Pc explain: λέγει δὲ διὰ τοὺς ἐξ ἀθεμιτογαμίας ὄντας, 'he says this because of those who are the product of unlawful alliances'. Unfortunately 2,20 comes before 3,9, so the future tense ἐξηγήσεται instead of ἐξηγήσατο remains dubious.[20] More importantly: are we to infer the existence of a commentary to the Institutes by the antecessor Stephanus from this single scholion in this single, late manuscript? And why would anyone commenting upon Theophilus refer to Stephanus if exactly the same information is available in the same Theophilus work? It is much more probable that the person who wrote this confused Stephanus and Theophilus.[21]

3. Theoph. 2,20,6

The scholion that I want to delve into a little deeper is a note on 2,20,6. The long title 2,20 of the Institutes deals with legacies in general, embarking in § 4 on the possibility that the thing left is not in the testator's or heir's ownership. In principle, the heir must attempt to purchase such a thing; if unsuccessful, he must provide its value. An additional complication is added in § 6: what if the thing left by legacy already is in the ownership of the legatee? This depends on the situation. If the legatee has bought it during the testator's lifetime or acquired it in any other onerous way, the heir is to pay its value. If, however, he has already acquired it *ex causa lucrativa*, without cost, e.g. by donation or by an earlier legacy, the legacy loses its force. This is due to the fact that, as the Institutes put it, traditionally *duas lucrativas causas in eundem hominem et in eandem rem concurrere non posse*. The Paraphrase provides an appropriate Greek translation: δύο (γὰρ) ἐπικερδεῖς

19 The most likely candidates would have been D. 36,2,7 § 2 and 36,2,18.

20 Unless we are willing to make another emendation, we must assume that the author of this scholion wished to convey that Stephanus worked after Theophilus. This seems to me too sophisticated.

21 More references to Theophilus as the author of the Paraphrase in La ad 4,13,1 l. 7 ἄτοπον: ἐνταῦθα διδάσκει σαφῶς ὁ Θεόφιλος τί μέν ἐστι κτλ.; cf. Pa Pc Vb ad 2,18,1 l. 5 ἡνίοχοι: σημείωσαι ὅτι οὐκ ἀκριβῶς ὁ Θεόφιλος τοὺς ἡνιόχους ἀτίμους ἔφη κτλ. (see Ferrini, *Opere*, I (note 4 above), 188) and Pa Pb Pc ad 2,1,8 l. 5 (Ferrini, *Opere*, I (note 4 above), 168).

αἰτίας εἰς τὸ αὐτὸ πρόσωπον ἢ[22] εἰς τὸ αὐτὸ πρᾶγμα συντρέχειν οὐ δυνατόν, 'it is not possible for two lucrative causes to concur in the same person and concerning the same thing'. However, this translation is preceded by the Latin words *ex duabus lucrativis causis eadem res saepius adquiri non potest*, 'the same thing cannot be acquired more than once on the ground of two lucrative causes'. So, the Greek phrase δύο (...) οὐ δυνατόν superficially looks like a translation of the Latin words immediately before them, but in fact it translates the Institutes rather than its own alternative.[23] I cannot think of a good way to explain this discrepancy. The same principle is discussed elsewhere in the *Corpus Iuris Civilis*, but I have not found it formulated as a standard rule or κανών.[24]

Anyway, the owner-legatee either claims the value of the legacy or nothing at all, depending on how he acquired the ownership. But what if two different testators leave the same thing to the same person and die? Again, the Institutes and Paraphrase distinguish two possibilities. If the legatee already obtained the thing, he is back in the situation of having acquired *ex causa lucrativa*, so that the second legacy is of no avail whatsoever. If, by contrast, he first obtained the value of the thing, he can still claim the thing itself under the will of the next testator:

> τούτῳ τῷ λόγῳ ἐὰν ὁ PRIMOS καὶ ὁ SECUNDOS ληγατεύσωσί μοι τὸ αὐτὸ πρᾶγμα, εἶτα τελευτήσωσι, ζητοῦμεν εἰ τῶν δύο τοὺς κληρονόμους δύναμαι ἀπαιτεῖν τὸ ληγάτον. καὶ λέγομεν οὕτως· εἰ μὲν ἐκ τῆς τοῦ ἑνὸς διαθήκης ἔτυχον λαβὼν τὸ πρᾶγμα, ἐκ τῆς ἑτέρας διαθήκης οὐ λήψομαι, οὐδὲ αὐτὸ τὸ πρᾶγμα (πῶς γάρ, ὁπότε τελεῖ ὑπὸ τὴν ἐμὴν δεσποτείαν;) οὐδὲ τὴν διατίμησιν· ἔτυχον γὰρ τὸ πρᾶγμα ἐξ ἐπικερδοῦς αἰτίας κτησάμενος. εἰ δὲ πρότερον ἐκ τῆς μιᾶς διαθήκης ἔλαβον τὴν διατίμησιν, ἐκ τῆς
>
> On this principle, if Primus and Secundus leave as a legacy to me the same thing, and then die, we ask whether I can claim the legacy from the heirs of each of the two. And our answer is: if it so be that I have obtained the thing under the will of the one, I shall not obtain under the other will either the thing itself (for how could I, when it is in my own ownership?), or the value either; for it so happened that I obtained for nothing. If, however, I first obtained the value under the one will, there will be no obstacle to my

22 We should have mentioned in our edition that Reitz emended ἢ to καὶ in conformity with Institutes *et*.

23 The whole formula is omitted in Ma and Vb, which explains that Viglius, Reitz and Murison substitute the standard version of the Institutes. Le contaminates to ἐξ δούαβους λουκρατίβις κάουσις in eundem omine et in eandem re κονκούρρερε νὸν πότεστ.

24 See e.g. D. 30,108,4; 44,7,17; 30,34,2; S. di Marzo, 'Appunti sulla dottrina della causa lucrativa', *BIDR* 15 (1903), 103-122 and 17 (1907), 91-126. Cf. however the wording of Bartolomeo Chesio in *De differentiis juris*, Pisa 1662, cap. LIX,2: 'idem Stichus ex duabus causis lucrativis eidem acquiri non potest' and cap. LX,2: 'Caeterum eadem res ex duabus et pluribus causis lucrativis saepius mihi acquiri potest, dummodo causae non concurrant eodem tempore'. (i.e. if the ownership should have got lost between the occurrence of the first and second lucrative cause).

ἑτέρας ἀκωλύτως ἀπαιτήσω τὸ πρᾶγμα (2,20,6 ll. 11-18).	claiming the thing under the other will.

So far Theophilus. In fact, to be quite complete, we might distinguish a fourth possibility, where the legatee fails to acquire the thing even under the second will. This is dealt with in a scholion in Pa and Pc at ll. 17-18 ἐκ τῆς ἑτέρας, which runs:

σημείωσαι ὡς ἐκ τούτου ὅτι εἰ μὴ δυνηθῇ λαβεῖν τὸ πρᾶγμα, λαμβάνει καὶ ἐκ τῆς δευτέρας διαθήκης τὴν τούτου διατίμησιν.	Note that we may infer from this[25] that if he cannot take the thing, he takes its value from the second will as well.

4. Dorotheus

Another scholion on 2,20,6 is more intriguing. It is only found in Pa, and written in the later hand that also wrote about the famous *unus casus*.[26] Ferrini justified his omission of this scholion by its apparently recent date. As a result he missed a reference to Dorotheus that would have interested him. Murison tried, but could not completely decipher it. Nor can I. What I read, at l. 9 EX DUABUS, is:

καὶ ση(μείωσαι) ὅτι οὐ δύναταί τις τὸ αὐτὸ πρᾶγμα κατὰ τὸν κανόνα κτᾶσθαι[27] καὶ τὴν τούτου διατίμησιν [ἐξ ἐπικερδῶν?] αἰτιῶν δύο, τυχὸν ἐκ δύο ληγάτων ἢ ἀπὸ ληγάτου καὶ δωρεᾶς· πλὴν ἴσθι ὅτι εἰ καὶ πρόδηλός ἐστιν ὁ [κανὼν] ὁ κωλύων ἐκ δύο λ[ο]κρατιβῶν αἰτιῶν [εἰς] τὸν αὐτὸν περιστάναι[28], ἀλλ' [εἰ μὴ? ἐν τῇ	Note that one cannot, according to the rule, obtain the same thing as well as its value on the basis of two (lucrative?) causes, e.g. from two legacies or one legacy and a gift. Yet you should know that, however clear the rule is which forbids that it (the thing) should fall to the same person from two lucrative causes, there is an

25 I take the expression σημείωσαι ὡς ἐκ τούτου ὅτι, for which I have not found any parallel, as a contamination of σημείωσαι ὅτι and ὡς ἐκ τούτου δῆλον εἶναι ὅτι. For the latter phrase, see e.g. Dorotheus in BS 2175/28.

26 On this, cf. J.H.A. Lokin, 'Scholion in Theophili Paraphrasin 4,6,2', in: W.J. Aerts/J.H.A. Lokin/S.L. Radt/N. van der Wal, [edd.], *ΣΧΟΛΙΑ. Studia ad criticam interpretationemque textuum Graecorum et ad historiam iuris Graeco-Romani pertinentia viro doctissimo D. Holwerda oblata*, Groningen 1985, 75-89 (= Id., *Analecta Groningana ad ius graeco-romanum pertinentia*, (ed. Th.E. van Bochove), Groningen 2010, 115-129); see also J.H.A. Lokin, 'Sane uno casu', in: J.A. Ankum/J.E. Spruit/F.B.J. Wubbe, [edd.], *Satura Roberto Feenstra sexagesimum quintum annum aetatis complenti ab alumnis collegis amicis oblata*, Fribourg – Freiburg 1985, 251-271 (= Id., *Analecta Groningana*, 131-149).

27 κατάγεσθαι Murison.

28 Cf. BS 2897/23-24 τὸ κέρδος (...) εἰς τὸν πατέρα περιίσταται, ≈ D. 40,7,6 § 4 *ad patrem (...) emolumentum pervenit*.

???] καὶ οὗτος [τὴν] τῆς ἀληθ(είας) ἀπαίτησιν ἕξει[29]. ἐὰν γὰρ ἀποδ(είξῃ) ὁ ληγατ(άριος) ὡς ἐθέλει ὁ τεστάτωρ ἐξ ἐπικερδ(οῦς) αἰτί(ας) κτησάμενον αὐτὸν τὸ πρᾶγμα λαβεῖν καὶ τὴν διατίμησιν, τοῦτο παραχωρεῖ ὁ κανών, ὡς βι. μδ΄ τι. γ΄ κεφ. [κα΄] θεμ. β΄ οὗ ἡ ἀρχή· σβέννυται τὸ ληγάτον. τοῦτο δὲ καὶ Δωρόθεός[30] φησιν ἐν τῷ δεπροβατιονιβ(ους) συντάγματι· ἔστι δὲ [ξε΄??]

exception [.....?] and he will be required to provide proof. If the legatee proves that it was the testator's wish that he, though already having obtained the thing from a lucrative cause, would receive its value as well, then the rule allows this, as is said in 44,3,21 § 2, which starts with the words 'the legacy becomes void'. This is also said by Dorotheus in the collection *de probationibus*, and it is [...??]

The opening words of Bas. 44,3,21 § 1 (= D. 32,21 § 1) have been restituted on the basis of the Synopsis Basilicorum Maior and the Tipucitus, and indeed they run (BT 1999/21-23):

σβέννυται τὸ ληγάτον τοῦ πράγματος ἐξ ἐπικερδοῦς αἰτίας εὑρισκομένου παρὰ τῷ ληγαταρίῳ, εἰ μὴ τὴν τιμὴν ἠθέλησεν αὐτὸν λαβεῖν ὁ διαθέμενος.

The corresponding Digest text says (32,21,1):

Fideicommissum relictum et apud eum, cui relictum est, ex causa lucrativa inventum extingui placuit, nisi defunctus aestimationem quoque eius praestari voluit.

So far the scholion seems clear enough. It then continues with an unfortunately not very precise reference to what the antecessor Dorotheus said in confirmation of the matter. He did so in 'the collection *de probationibus*', which is slightly puzzling in itself. Where a Basilica scholion refers to a text in a σύνταγμα, the normal construction is either 'book x of syntagma y' or 'title x of syntagma y'.[31] Now there is no such σύνταγμα *de probationibus*, but there is a title *de probationibus* in D. 22, the third book of the *Antipapiniani*. So, I assume that our scholion in Pa^2 intended to refer to some place 'in the title *de probationibus* in the σύνταγμα of the *libri singulares*',[32] which is D. 22,3. Which place would that be, and can we still consult it?

29 Cf. Bas. 23,1,36 Ἀπαιτείσθω τοὺς οἰκείους λόγους προφέρειν ὁ δανειστὴς εἰς τὴν τῆς ἀληθείας ἀπόδειξιν.

30 δορόθεος ms.

31 E.g. BS 474/1 (D. 17) ἐν τῷ η΄ βιβλίῳ τοῦ παρόντος συντάγματος, Stephanus in BS 1488/17 (D. 12) ἐν τῷ ε΄ διγ. τῆς δεποσίτι τοῦδέ φησι τοῦ συντάγματος: i.e. of the pars *de rebus*.

32 Cf. e.g. Stephanus in BS 1570/36-37 ἐν τῷ ὅ΄ καὶ λζ΄ τοῦ DESACTIANÍBUS τῶν ἀντιπαππιανῶν μονοβιβ. <διγ.> = in D. 21,2.

5. D. 22,3,12 and Bas. 22,1,12

As far as I see, the most likely place for Dorotheus to have spoken of this matter is in the context of D. 22,3,12, which discusses the situation where a legacy in a will seems to coincide with a codicil. This is not quite the same case as that of Inst. 2,20,6. In the first place, the legacy and codicil have been written by the same testator. This makes a huge difference, as can be seen e.g. from D. 30,34,1-2:

> Si eadem res saepius legetur in eodem testamento, amplius quam semel peti non potest sufficitque vel rem consequi vel rei aestimationem. (2) Sed si duorum testamentis mihi eadem res legata sit, bis petere potero, ut ex altero testamento rem consequar, ex altero aestimationem.[33]
>
> If the same thing is bequeathed several times in the same will, it cannot be claimed more than once and it suffices either to claim the thing or its value. (2) But if the same thing is bequeathed to me in two wills, I will be able to claim it twice, in such a way that I claim the thing on the basis of one will, its value on the basis of the other.

In the second place, D. 22,3,12 does not speak of the same specific thing, but of the same amount of money. This is governed by different rules, according to e.g. D. 30,34,3:

> Sed si non corpus sit legatum, sed quantitas eadem in eodem testamento saepius, divus Pius rescripsit tunc saepius praestandam summam, si evidentissimis probationibus ostendatur testatorem multiplicasse legatum voluisse (...). Eiusque rei ratio evidens est, quod eadem res saepius praestari non potest, eadem summa volente testatore multiplicari potest.[34]
>
> But if it is not a thing that is bequeathed several times in the same will, but the same sum, the divine Pius replied that this sum must be paid more than once only if it is established by perfectly conclusive proofs that the testator intended to multiply the legacy. (...). The reason of this is evident, because the same thing cannot be delivered more than once, but the same sum can be multiplied, if this is what the testator intended.

33 The text ignores the importance of claiming first the thing's value and then the thing itself.

34 Cf. Bas. 44,1,34 §§ 1-6 (BT 1972/9-14, restitutus): § 1 Ἐὰν τὸ αὐτὸ πρᾶγμα πολλάκις μοι ἐν τῇ αὐτῇ διαθήκῃ ληγατευθῇ, ἅπαξ μόνον ἢ τὸ πρᾶγμα ἢ τὴν ἀποτίμησιν λαμβάνω· (§ 2) εἰ δὲ ἐν διαφόροις διαθήκαις, ἀπὸ μὲν τῆς μιᾶς τὸ πρᾶγμα, ἀπὸ δὲ τῆς ἄλλης τὸ τίμημα λαμβάνω. (§§ 3,5,6) Εἰ δέ τι τῶν σταθμωμένων ἀριθμουμένων μετρουμένων ἐν τῇ αὐτῇ διαθήκῃ ληγατευθῇ μοι πολλάκις, λήψομαι αὐτὸ πολλάκις, εἰ ὁ διαθέμενος τοῦτο ἠθέλησεν, (...).

Despite these differences between D. 22,3,12 and Inst. 2,20,6, Dorotheus may well have pointed out something in the context of the former which our Theophilus scholiast deemed relevant to the subject matter of the latter. What the Digest text and the scholion have in common, of course, is that they take into consideration the necessity to provide proof. If one testator left the same generic things twice to the same person, the legal consequences depend on his intention. But is it up to the heir to prove that the testator wanted to bequeath some specific thing and forgot that he had already seen to it, or to the legatee to prove that the testator truly intended to leave it twice?

The question who carries the burden of proof has also been dealt with by Theophilus, following the Institutes, in 2,20,4. A legacy of a thing belonging to someone else than the testator is valid only if the testator was aware of the fact. In such a situation it is up to the legatee to prove that the testator did realize he was leaving a thing not in his ownership, which would indicate that he really intended to do this (ll. 23-27):

> τίς ἆρα βαρύνεται τῇ ἀποδείξει, ὁ κληρονόμος λέγων ἠγνοηκέναι τὸν TESTATORA, ἢ ὁ ληγατάριος ἐπίστασθαι φάσκων αὐτόν; καὶ λέγομεν τὸν ληγατάριον βαρύνεσθαι τῇ ἀποδείξει, οὐ μὴν τὸν κληρονόμον ἀποδεικνύειν ἀναγκάζεσθαι· ὁ γὰρ ληγατάριος ACTOR ὢν εἰκότως βαρύνεται τῇ ἀποδείξει.[35]
>
> Who is it that the burden of proof lies on: the heir, who alleges that the testator did not know, or the legatee, who affirms that he did know? We say that the burden of proof lies on the legatee, not that the heir is obliged to proof his contention; for the legatee, being plaintiff, is properly burdened with the proof.

The aspect of proof is not dealt with in Inst. 2,20,6, or in D. 30,34, in the context of legacies, but in D. 22,3,12:

> Quingenta testamento tibi legata sunt: idem scriptum est in codicillis postea scriptis: refert, duplicare legatum voluerit an repetere et oblitus se in testamento legasse id fecerit: ab utro ergo probatio eius rei exigenda est? Prima fronte aequius videtur, ut petitor probet quod intendit: sed nimirum probationes quaedam a reo exiguntur: nam si creditum petam, ille respondeat solutam esse pecuniam, ipse hoc probare cogendus est. Et hic igitur cum petitor duas scripturas ostendit, heres posteriorem inanem esse, ipse heres id adprobare iudici debet.

The corresponding Basilica version 22,1,12 runs (BT 1045/17-21):

35 This passage of the Institutes originates in the Institutes of Marcianus and has a parallel in the Digest title *De probationibus et praesumptionibus* (D. 22,3,21; cf. Bas. 22,1,21). Scholia to Bas. 22,1,21 lead us back to Inst. 2,20 and D. 22,3,12, among other references.

᾽Εὰν τὸ αὐτὸ ποσὸν ληγατευθῇ μοι ἐν διαθήκῃ καὶ κωδικέλλοις, ἑκάτερον λαμβάνω, εἰ μὴ δείξει ὁ κληρονόμος τὸ δεύτερον ἄκυρον ὡς τοῦ διαθεμένου ἐν λήθῃ τοῦ πρώτου καταλιπόντος αὐτό· ἔσθ᾽ ὅτε γὰρ ὁ ἐναγόμενος δείκνυσιν, ὡς ἐπὶ τοῦ συνομολογοῦντος μὲν δανείσασθαι, λέγοντος δὲ καταβεβληκέναι.	If the same sum is left to me in a will and in a codicil, I receive both amounts, unless the testator proves that the latter (the codicil) is void, seeing that the testator bequeathed it because he had forgotten that the former (the will) already bequeathed it. It is not unparallelled that it is up to the claimant to provide proof, such as in the case of somebody who admits a loan, but says that he has paid off.

So, although at first sight one might have expected that it was up to the legatee, as the claimant, to provide proof, just as in Inst. 2,20,4, it suffices in this case to show the two documents (*duas scripturas*). All the heir can do is try to prove that the most recent one is due to an error, hence void. In this respect his position is like that of a debtor who, rather than deny the obligation, insists that he has already solved the debt and is requested to prove this.

6. Bas. 22,1,12: Scholion 2

If there is any chance to find what Dorotheus said about this subject, we must consult the Basilica scholia. There are six scholia to this fragment. Four of them are 'new', two at least partly[36] 'old'. At first sight, the second scholion on Bas. 22,1,12 seems most promising, because it actually refers to Inst. 2,20. It starts by reminding the student that a specified collection of coins is considered a specific thing and that, on the other hand, the rule about unspecified money is also valid for all other things that can be weighed and counted. In other words (BS 1335/30-31): ἐὰν ληγατευθῶσί μοι πολλάκις, λήψομαι αὐτὰ πολλάκις, ὡς τὸ αὐτὸ θέμα, εἴπερ μέντοι ὁ διαθέμενος τοῦτο ἠθέλησε. The scholion refers to Bas. 44,1,34 § 3 for all this information, but in fact it is a summary of §§ 4-6 (D. 30,34,4-6).

So the crux of the matter is, that we need to know what the testator intended. That may not have been very easy in practice, but the somewhat muddled scholion gives an indication (BS 1335/31-36):

Πῶς δὲ δοκεῖ τοῦτο θελῆσαι, διδάξει σε τὸ β′	In what way we conclude that he wished it,

36 Both of them contain references to both the *Corpus Iuris Civilis* and the Basilica.

κεφ. τοῦ γ΄ τιτ. τοῦ μβ΄ βιβ. Ζήτει καὶ τὸν κ΄ τιτ. τῆς β΄ τῶν ᾽Ινστιτ. καὶ μάθῃς ἑτέραν διάστιξιν. Εἰ δὲ ἐν διαφόροις διαθήκαις τὸ αὐτὸ πρᾶγμα ληγατευθῇ μοι, ἀπὸ μὲν τῆς μιᾶς τὸ πρᾶγμα, ἀπὸ δὲ τῆς ἑτέρας τὸ τίμημα λαμβάνω. Πλὴν τοῦτο νόησον, ὡς ὁ Στέφανός φησιν, κατὰ τὴν κειμένην διάστιξιν ἐν δελεγάτις τιτ. ἤτοι τῷ κ΄ τιτ. τῆς β΄ ἰνστιτ.

can be learnt from paragraph 2 of title 3 of book 42. Consult also Inst. 2,20 [§ 6] and there learn another distinction: if the same thing is bequeathed to me in different wills, then I receive the thing on the basis of one, its value on the basis of the other. However, you must interpret this, as Stephanus says, in accordance with the distinction in the title *de legatis*, i.e. in Inst. 2,20.

We may safely ignore the first reference to the Institutes, which would merely bring us back to where we started. The second reference looks like little more than a repetition, except that it is attributed to Stephanus and pretends to comment on 'this', τοῦτο. I believe, however, that 'this' is not the immediately preceding sentence, which would imply that Stephanus explained the distinction in Inst. 2,20,6 by a different distinction elsewhere in the same title, but the wider subject of D. 22,3,12 (= Bas. 22,1,12).[37] In any case it is not about proof, nor are the following references to the Basilica.[38] What is left is the reference to either Bas. 42,3,2 (= D. 10,2,2) or perhaps D. 42,3,2. Neither of these options makes sense in the present context. The least drastic conjecture to repair this is to assume that the scholiast meant to refer to Bas. 44,3,22 (τὸ **κβ΄** κεφ. τοῦ γ΄ τιτ. τοῦ **μδ΄** βιβ.). This Basilica text has not been preserved. The corresponding Digest text says (D. 32,22pr.):

Si quis in principio testamenti adscripserit: "cui bis legavero, semel deberi volo", postea eodem testamento vel codicillis sciens saepe eidem legaverit, suprema voluntas potior habetur: nemo enim eam sibi potest legem dicere, ut a priore ei recedere non liceat. Sed hoc ita locum habebit, si specialiter dixerit prioris voluntatis sibi paenituisse et voluisse, ut legatarius plura legata accipiat.

If somebody has inserted a note in the beginning of his will saying 'to whom I leave a legacy twice,[39] I want it to be due once', then goes on to knowingly bequeath more than once to the same person in the same will or codicils, his last wish should be given preference, for nobody can impose on himself a law forbidding him to abandon a previous wish. This, however, will only apply if he has expressly stated that he

37 As a consequence, I consider this Stephanus fragment as a commentary on the Digest rather than on the Institutes. Cf. De Jong, *Stephanus* (note 17 above), 35.

38 Bas. 52,1,16 and 18 (= D. 44,7,17 and 19), which discuss other aspects of *causa lucrativa*.

39 Not, in this case, necessarily twice the same thing or amount. Cf. D. 30,14pr.-1 (Bas. 44,1,14 has not been preserved or restituted).

regretted his previous intention and wished that the legatee would receive more than one legacy.

So if the Basilica scholion really referred to this text, the somewhat anticlimactic conclusion would be that one proves the testator's wish by referring to an express statement about it on his part. Indeed, I find little else in the sources. In discussions about what exactly the testator meant and wished, the keywords are *manifestum* and *evidens*.[40] If the wording leaves no doubt as to what the testator intended, it is not debatable in the first place (D. 32,25,1): *Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio*. If his intention is not immediately evident, it is permitted to make an intelligent guess (D. 31,64, Basilica not available): *etenim in causa fideicommissi utcumque precaria voluntas quaereretur, coniectura potuit admitti.*

A variety of possible indications on which to base one's conjecture, none of them applicable in the case of double legacies, is given in D. 30,74.[41] Also, in the 11th century Constantinus Nicaeus gives an example in his commentary on Bas. 22,1,12 (scholion 6, BS 1336/17-21):

> Ἀνάγνωθι καὶ τὸ ιη΄ κεφ. τοῦ ιδ΄ τιτ. τοῦ αὐτοῦ βιβ., [ὅ φησι]· τοῖς ἐλευθερωθεῖσιν ἐν τῇ διαθήκῃ μου εἶπον δίδοσθαι μηνιαίας διατροφὰς ι΄ νομίσματα, ἐν δὲ τοῖς κωδικέλλοις πᾶσι τοῖς [ἀπελευθέροις ἑπτὰ] μηνιαῖα καὶ ὑπὲρ ἐσθῆτος δέκα ἐνιαυσιαῖα. Τῶν ἐν τῇ διαθήκῃ ἀναχωρεῖν ἔδοξα καὶ μόνα τὰ τῶν κωδικέλλων δίδοται.
>
> Read also Bas. 44,14,18[42] (= D. 34,1,18), which says: 'I have said to give to those manumitted in my will ten *solidi* monthly for their support, and in my codicil to give all my freedmen seven monthly and for the purpose of clothing ten annually. I am supposed to have revoked what was in my will, and only what is in the codicil is given'.

Apparently the interpretation of the intention is based on the greater degree of elaboration in the codicil, which, perhaps, suggests more careful consideration. This hardly guides us

40 D. 32,69pr.: *Non aliter a significatione verborum recedi oportet, quam cum manifestum est aliud sensisse testatorem* (BT 2004/19-20: Οὐκ ἄλλως ἀναχωροῦμεν τῆς σημασίας τῶν λέξεων, εἰ μὴ πρόδηλόν ἐστιν ἕτερον ἐνθυμηθῆναι τὸν διαθέμενον); D. 30,74: *si non fuit evidens diversa voluntas*; D. 31,85: *si voluntas testatoris compensare volentis evidenter non ostenderetur*; see also *evidentissimis probationibus* in D. 30,34,3, quoted above.

41 Cf. also C. 6,37,10: *(...) nisi (...) tali personae datum sit, cui legaturus esset et si scisset rem alienam esse.* All we have left of Bas. 44,1,74 is BT 1977/11 κατὰ πρόληψιν.

42 Bas. 44,14,18 has been restituted precisely on the basis of this scholion of Nicaeus.

towards the missing Dorotheus fragment. What we expect to find there, is information not so much about the method of proof, as about who carries the burden of proof.

7. Bas. 22,1,12: Scholion 1

Scholion 1 (BS 1335/6-26) starts with an impeccable translation of the Digest text, which may well be Dorotheus's. It then continues (1335/19-23):

> Σημείωσαι οὖν, ὅτι κατὰ πρόληψιν ὁ ἄκτωρ βαρεῖται ταῖς ἀποδείξεσιν· ἔστι δὲ ὅτε καὶ ὁ ῥέος, ὅταν ὑπεναντίον τῶν εἰρημένων ὑπὸ τοῦ ἄκτωρος διαβεβαιώσεται. Πρὸς τούτοις δὲ κἀκεῖνο σημείωσαι, ὅτι ὁ ἐγγράφῳ προλήψει μαχόμενος βαρεῖται ταῖς ἀποδείξεσιν. Εἴρηται βιβ. δ΄ τοῦ Κωδ. τιτ. ιε΄ διατ. α΄. Ἀνάγνωθι καὶ βιβ. β΄ τιτ. α΄ κεφ. ε΄, ς΄.
>
> Note that in principle the *actor* carries the burden of proof, but sometimes it is the *reus*, when he is to refute what has been said by the *actor*. Moreover, note also that someone who fights a written receipt carries the burden of proof. This is said in C. 4,15,1. Read also Bas. 2,1,5-6.[43]

This part of the scholion is not quite in its right order. In my opinion, C. 4,15,1 is meant to be 4,19,1 and its right place is after διαβεβαιώσεται, while Bas. 2,1,5-6 is inaccurate instead of Bas. 22,1,15-16 (= D. 22,3,15-16). The latter reference in its present state is obviously not attributable to Dorotheus. Nor is the remainder of the scholion, which goes on to explain the difference between the same amount and the same specific thing, referring to Bas. 44,1,34 § 3 (= D. 30,34,3), which we looked at above, and other Basilica fragments (BS 1335/23-26). The words Σημείωσαι (...) ἀποδείξεσιν, however, say exactly what we wanted. Moreover, they beautifully follow the translation (ll. 6-18). In short, I believe that we here have the Dorotheus fragment referred to by Pa^2 in the scholion to Theoph. 2,20,6.

8. Theoph. 2,20,12

There is another Theophilus scholion, written in the same late hand Pa^2 and at the same title 2,20, also about proving the testator's intention. Inst. 2,20,12 and Theophilus deal

43 What the current scholion as well as BS 1327/8-9 and 23-24, and 1339/2-3 call πρόληψις ἔγγραφος is the *praesumptio* contained in the *manus* or *cautio* of D. 22,1,15; cf. BS 1338/22 χειρογράφου. The words κατὰ πρόληψιν, by contrast, seem to render *prima fronte* in the Digest fragment. Cf. BS 1335/11 κατὰ (...) πρώτην ὄψιν.

with the situation where a testator alienated a thing which he had left to a legatee. What happens depends on the reason why he alienated it:

> ᾿Ελεγάτευσάς μοι τὸ σὸν πρᾶγμα ἐπιζήσας ἐξεποίησας τοῦτο. φησὶν ὁ CELSOS εἰ μὲν ὡς ADEMPTEUON καὶ τῆς πρὸς ἐμὲ φιλοτιμίας ἀφιστάμενος ἐξεποίησας τοῦτο, οὐκ ἐποφληθήσεταί μοι τὸ ληγάτον· εἰ δὲ οὐ τοιαύτην ἐσχηκὼς προαίρεσιν ἠλλοτρίωσας αὐτὸ (τυχὸν γὰρ ἀνάγκη σοι ἐπετέθη δημοσίων χρεῶν ἢ ἰδιωτικῶν καὶ ἀπορῶν χρυσίου πέπρακας τοῦτο), ἀπαιτήσω τὸν σὸν κληρονόμον τὸ ληγάτον. καὶ τοῦτο Σεβῆρος καὶ Ἀντωνῖνος ἀντέγραψαν.
>
> You bequeathed to me a thing belonging to yourself; but subsequently in your life-time you alienated it. According to Celsus, if it was with the intention of revoking it and of renouncing your friendship for me that you alienated the thing, the legacy will not be due to me; but if it was not with any such purpose that you alienated it (say, you had to meet public or private obligations, and sold it because you were in straits for money), I shall recover the legacy from your heir. This Severus and Antoninus decided by resript (cf. C. 6,37,3).

Again we need to know the intention, the *animus* or προαίρεσις,[44] of the testator. Again the Institutes and Theophilus leave it to the scholiast to specify which party is to prove what, and again it is difficult to read:[45]

> ad l. 4 τοιαύτην: χρ[εί]α [δὲ] τὸν κληρονόμον ἀποδεῖξαι τὴν τοῦ [τελευ]τήσαντος[46] προαίρεσιν [ὅτι οὐκ] ἠθέλη(σε) τὸ ληγάτον ἐρρῶσθαι.[47] [ἡ δὲ] ἀνάγκης πρόλ(ηψις) ὑπὲρ τοῦ ληγαταρίου ἐστὶ καὶ ἐπιτρέπει αὐτῷ τὴν ἀπαίτ(ησιν). καὶ ζήτει βι. μδ΄ τι. γ΄ θεμ. [12], οὗ ἡ ἀρχή· "ἐὰν τὸ ληγατεῦθεν πρᾶγμα πωλήσῃ ἐξ ἀνάγκης ὁ διαθέμενος" (Pa^2).
>
> And it is up to the heir to prove the intention of the deceased, that he did not wish the legacy to be valid. The presumption of necessity is in favour of the legatee and allows him to claim. See 44,3,12, whose opening words are: 'If the testator sold the object of the legacy because he had no choice'.[48]

44 Cf. ibid. l. 9 ψυχῇ ἀφαιρουμένου τὸ ληγάτον.
45 Ferrini ignored this scholion; Murison could not quite decipher it.
46 ληγατεύσαντος Murison.
47 ἐπιρρεῦσθαι ('an ἐπιρρύεσθαι?') Murison.
48 Cf. D. 32,11,12: *Si rem suam testator legaverit eamque necessitate urguente alienaverit, fideicommissum peti posse, nisi probetur adimere ei testatorem voluisse: probationem autem mutatae voluntatis ab heredibus exigendam*; Bas. 44,3,12 has not been restituted.

9. Psellos

So, having started with the very few places where Theophilus scholia mention the old Roman jurists and looked at what information they might provide us with on the antecessors, we finally arrive at traces of the last stages of Byzantine law. Somebody who had access to manuscript Va of the Paraphrase was clearly relieved to have discovered in 3,19,19 a clue to an enigmatic line (308) in the *Synopsis legum* of Michael Psellos: αὕτη ἐστὶν ἡ ἑρμηνεία τοῦ στίχου τοῦ Ψελλοῦ· "ποινὴ ὀφείλει τίθεσθαι εἰς τὰς ἐπερωτήσεις". Similarly, at 3,3,6 l. 6 δέδωκε δὲ αὐτῇ: ὅρα· αὕτη ἐστὶν ἡ ἑρμηνεία τοῦ στίχου τοῦ Ψελλοῦ "ἀτελὴς συγγινώσκεται μήτηρ μὴ ἀπαιτοῦσα ἐπίτροπον τοῖς τέκνοις τοῦ ἀνδρὸς αὐτῆς τελευτήσαντος" (Va).[49]

10. Conclusion

It would be misleading to suggest that the Theophilus scholia are a rich source of information about Byzantine legal literature. The overwhelming majority consists of very basic material. On the other hand, it does contain valuable references and quotations that may help to complement the knowledge we mainly owe to the more fertile Basilica scholia. In making this source more accessible, it is clearly not sufficient to only look at the most promising manuscripts. It also turns out that the project would deserve access to more sophisticated tools than merely old microfilms.

University of Groningen Roos Meijering

49 Cf. Michael Psellos, *Synopsis legum*, 262-263 (ed. G. Weiß, 'Die "Synopsis legum" des Michael Psellos', *FM* II (1977), 147-214 (169)): ἀτελὴς συγγινώσκεται μήτηρ μὴ ἀπαιτοῦσα/τοῦ ἀνδρὸς τελευτήσαντος ἐπίτροπον τοῖς τέκνοις. Actually, the text does not deal with the age of widowed mothers but with that of their children: was Psellos confused by ἀνήβοις οὖσι τοῖς παισὶ in l. 3?