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# Of the *nomophylax*: John Xiphilinos' scholia on the *Basilica*

**Abstract:** The aim of the present study is to focus exclusively on the *Basilica* scholia of John Xiphilinos: to collect and record a list of his scholia and to analyse and evaluate specific lengthy scholia of his in detail. Scholia attributed to Xiphilinos have the heading "of the *nomophylax*". We also encounter scholia under the heading "of Ioannes", and it remains doubtful whether they can also be attributed to Xiphilinos. Based on the evidence some of the scholia with the heading "of Ioannes" are certainly attributed to the *antecessor* Ioannes Kobidas. Xiphilinos takes into account older legal material including *antecessorian* writings (Stephanus, Cyril, Theophilus and *kata podas* translations), as well as works of Athanasius of Emesa and Theodorus of Hermoupolis. Xiphilinos' references to the *rheton* raise the question whether he had actually consulted manuscripts of the *Digest*. Arguments are brought in favour of this hypothesis.

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# 1. Introduction

In the middle of the eleventh century, presumably in 1047, a law school was founded in Constantinople by emperor Constantine IX Monomachos.<sup>1</sup> John Xi-

<sup>1</sup> There is too much literature to quote about this law school and the relevant Novel of Constantine IX. Monomachos. See, for example, W. Wolska-Conus, L'école de droit et l'enseignement du droit à Byzance au XIe siècle: Xiphilin et Psellos. *TM* 7 (1979), 1–107 and more recently Z. Chitwood, Byzantine legal culture and Roman legal tradition, 867–1056. Cambridge 2017, 150–183 with an English translation of the Novel in the appendix, 193–203. See also Th. E. Van Bochove, Tenth century Constantinople: centre of legal learning? Second thoughts concerning the addition of the older scholia to the Basilica text. *Fontes Minores* 12 (2014), 69–96 and footnote 3 with an extensive bibliography on the subject. On Xiphilinos, see also M. Kruse, The epitomator Ioannes Xiphilinos and the eleventh-century Xiphilinoi. *JÖB* 69 (2019), 257–274 and A.K. Wassiliou-Seibt, Die Familie Xiphilinos im 11. Jahrhundert: der Beitrag der Siegel, in B. Caseau (ed.), Les réseaux familiaux. Antiquité tardive et Moyen Âge: In memoriam A.

philinos was appointed as the *nomophylax* (νομοφύλαξ), the "guardian of the laws" of this school, John Xiphilinos was born at Trebizond in ca. 1010 and studied at the school of John Mauropous in Constantinople. A fellow student at that school was the polymath Michael Psellos who became a long-time friend of Xiphilinos.<sup>2</sup> In the late 1040s when Xiphilinos was accused by a fellow judge called Ophrydas, Psellos defended his friend. Following many controversies Xiphilinos was forced to abandon the Byzantine capital, and he joined the monastic life and retired to the monastery on Mount Olympus in Bithynia. In 1064, presumably after a recommendation from his good friend Psellos, he was recalled by Emperor Constantine X Doukas to Constantinople in order to become Patriarch. Xiphilinos served as Patriarch John XIII from 1064 until his death in 1075. As far as his legal career is concerned, we know that Xiphilinos had served first as an ordinary judge of the Hippodrome and later as its president.3 In the Novel of Constantine IX Monomachos, Xiphilinos is mentioned as "the most learned illoustrios John, by surname Xiphilinos, judge of the Hippodrome and exaktor" [τὸν λογιώτατον ἰλλούστριον κριτὴν ἐπὶ τοῦ ἱπποδρόμου καὶ ἐξάκτορα, τὸν Ξιφιλῖνον ἐπίκλην].4

The law school of Constantine IX Monomachos did not last long. Most scholars conclude that this law school was established in order to favour Xiphilinos. Our main source of information about this school is the Novel of Constantine IX Monomachos. Much has been written about the dating, the authorship, the aim

Laiou et É. Patlagean. Association des Amis du Centre d'Histoire et Civilisation de Byzance, Monographies, 37. Paris 2012, 307-324.

<sup>2</sup> A lot has been written about the intellectual circle of Mauropous and his students and especially Psellos. See, for example, M. Jeffreys/M.D. Lauxtermann (eds), The letters of Psellos: cultural networks and historical realities. Oxford/New York 2017 - published to Oxford Scholarship Online: January 2017 DOI: 10.1093/acprof:oso/9780198787228.001.0001 -, and in particular the contributions of F. Bernard, Educational networks in the letters of Michael Psellos and M. LAUXTERMANN, The intertwined lives of Michael Psellos and John Mauropous, where the authors also refer to events and information related to Xiphilinos.

<sup>3</sup> For the judges of the hippodrome (and the judges of the velon), see A. GKOUTZIOUKOSTAS, H απονομή δικαιοσύνης στο Βυζάντιο ( $9^{\circ \zeta}$ – $12^{\circ \zeta}$  αιώνες). Τα κοσμικά δικαιοδοτικά όργανα και δικαστήρια της πρωτεύουσας. Thessaloniki 2004, 138-59 and of the same author, Administrative structures of Byzantium during the 11th century: officials of the imperial secretariat and administration of justice. TM 21/2 (2017), 561-580.

<sup>4</sup> A. SALAČ, Novella constitutio saec. XI medii: quae est de schola iuris Constantinopoli constituenda et legum custode creando. Textus breves graeci et latini, 1. Prague 1954, chapter 8. About Xiphilinos, see the bibliography cited in footnote 1 above.

and contents of this Novel.<sup>5</sup> Most scholars agree that John Mauropous was the person who drafted up this text.<sup>6</sup> The Novel sketches the role of the *nomophylax* and gives some information on the law school but practically nothing is mentioned on the actual teaching material or the law curriculum.<sup>7</sup> The question arises, therefore, as to whether – besides this Novel – there are other sources that could shed some light on Byzantine legal teaching in this period. In a previous study I have already commented on the value of the so-called 'new' *Basilica* scholia and the fact that – strangely enough – they had been almost practically neglected in the past.<sup>8</sup>

In recent years I have started studying these 'new' *Basilica* scholia and more Byzantine legal sources of the eleventh and twelfth centuries. The results so far include a study on the scholia of Hagiotheodorites, who seems to be the most productive scholiast of this younger generation of *Basilica* scholiasts; a study on Nicaeus; and a study on the so-called *Ecloga Basilicorum*, which is a selection of the first ten *Basilica* books accompanied by a commentary dated in the middle of the twelfth century. Recently Zachary Chitwood has also remarked that, "Scholars have still barely scratched the surface of the *Basilika*, above all their rich scholia tradition, even though they have now been scrupulously

<sup>5</sup> See S. ΤROIANOS, Η Νεαρά Κωνσταντίνου του Μονομάχου ἐπὶ τῇ ἀναδείξει καὶ προβολῷ τοῦ διδασκάλου. *Byzantina Symmeikta* 22 (2012), 243-63. See also the bibliography mentioned above in footnote 1.

<sup>6</sup> Ibid., 244 and CHITWOOD, Byzantine legal culture (as footnote 1 above), 168. The name Xiphilinos mentioned in the beginning of footnote 84 of page 168 in the book by Chitwood must be a typing mistake, otherwise both sentences in the main text and in the footnote do not make sense; read Mauropous instead of Xiphilinos.

<sup>7</sup> CHITWOOD, Byzantine legal culture (as footnote 1 above), 173. TROIANOS, Neara (as footnote 5 above), 262.

**<sup>8</sup>** D. Penna, Hagiotheodorites: the last antecessor? Some remarks on one of the 'new' Basilica scholiasts. *Subseciva Groningana* 9 (2014), 399–427; available also online: <a href="https://ugp.rug.nl/sg/article/view/28779">https://ugp.rug.nl/sg/article/view/28779</a>, date of access 13/06/2021.

<sup>9</sup> Ibid., 399-427.

**<sup>10</sup>** D. Penna, The eleventh-century Byzantine jurist Nicaeus. His scholia on the Basilica laws and his connection to the Meditatio de nudis pactis, in W. Brandes, Fontes Minores XIII. *Forschungen zur byzantinischen Rechtsgeschichte, neue Folge*, 3. Berlin 2021, 111–131.

**<sup>11</sup>** D. Penna, A witness of Byzantine legal practice in the twelfth century. Some remarks on the construction of the Ecloga Basilicorum. *Subseciva Groningana* 10 (2019), 139–162 (available also online: <a href="https://doi.org/10.21827/SG.10.35588">https://doi.org/10.21827/SG.10.35588</a>, date of access 13/06/2021).

<sup>12</sup> It has been edited by L. Burgmann, Ecloga Basilicorum. Forschungen zur byzantinischen Rechtsgeschichte, 15. Frankfurt am Main 1998. On the Ecloga Basilicorum, see also S. Troianos, Oι Πηγές του Βυζαντινού Δικαίου, 3rd revised edition. Athens/Komotini 2011, 278–279; translated and updated into German: S. Troianos, Die Quellen des byzantinischen Rechts, übersetzt von D. Simon/S. Neye. Berlin 2017, 225.

edited. There are few studies of individual scholiasts, despite the abundance of material at hand." Hoping to further dig into the "rich tradition of the Basilica" scholia" and in line with my former studies related to the "younger" Basilica scholiasts, the present study will focus on another younger scholiast of the Basilica: the nomophylax John Xiphilinos.

I have to clarify that regarding the scholia of Xiphilinos there is one study published by Wanda Wolska-Conus in 1979. In that study the author focused on law teaching in eleventh-century Constantinople, and she referred in a part of this study to the scholia of Xiphilinos and presented some first remarks on these scholia.14 This significant study by Wolska-Conus is undoubtedly still valuable and, as will become clear in this paper, I do agree with most of her remarks. A main point of difference between her study and the present one is the actual material and her criterion of attributing scholia to Xiphilinos. Unlike WOLSKA-CONUS, I think that not all scholia having the heading "of Ioannes" can be definitely attributed to the group of scholia of John Xiphilinos. 15 The present study focuses exclusively on the scholia of Xiphilinos, collecting and making a list of all of them (or at least the ones that can be attributed to him by name), presents specific examples in detail and evaluates his scholia. This study is also part of a broader study of the younger generation of Basilica scholiasts, as explained above, and will follow roughly the same structure as the other studies I have published regarding Hagiotheodorites and Nicaeus. The scholia that can be attributed to Xiphilinos are worth studying because of the personality of this scholiast<sup>16</sup> and his connection to the law school of eleventh-century Constantinople.<sup>17</sup> The name of Xiphilinos is also associated with the so-called glossa ordinaria or catena, meaning a continuous commentary on the Basilica text. It has been suggested that during the eleventh century under the direction of Xiphilinos "old" and "new" scholia were added to the text of the Basilica, thus

<sup>13</sup> CHITWOOD, Byzantine legal culture (as footnote 1 above), 190 and in his relevant footnote 19 he adds the two exceptions of Kalokyros and Hagiotheodorites by Burgmann and Penna respectively. I here add Wolska-Conus and her study on Xiphilinos and the law school where she refers also to the scholia of Xiphilinos. See the following footnote.

<sup>14</sup> WOLSKA-CONUS, L'école de droit (as footnote 1 above), 1-107 and in pages 13-31 the author refers to the *Basilica* scholia that can be attributed to Xiphilinos.

<sup>15</sup> See further on in detail my arguments under section 4. Number and material scope of the scholia "of Ioannes".

<sup>16</sup> In contrast to both Hagiotheodorites and Nicaeus, of whom we do not know very much, there is a lot of documentation on the personality and life of John Xiphilinos. The present paper, however, focuses only on his scholia on the Basilica.

<sup>17</sup> CHITWOOD also points out the connection of the Basilica scholia of Xiphilinos with his "activity as the *nomophylax* didaskalos". See also the study by WOLSKA-CONUS mentioned above.

forming a continuous commentary on the *Basilica*. In a recent study, Th. E. VAN BOCHOVE has brought convincing arguments against this theory since, for example, he has provided evidence of at least one copy of the *Basilica* with older scholia which is prior to the foundation of the law school in the middle of the eleventh century.<sup>18</sup>

In the series of studies on the "younger" *Basilica* scholiasts (Hagiotheodorites and Nicaeus so far), I have tried for reasons of consistency to follow roughly the same structure. After a short introduction, a table follows with all the scholia that can be attributed to the examined scholiast based on the name mentioned, usually in the heading of the scholion. After this table of the scholia follow remarks on the style and characteristics of the scholiast accompanied by examples of these scholia and their English translation; finally, conclusions on the scholiast are drawn based on the material examined. The study of each individual scholiast undoubtedly presents its own difficulties; this becomes clear when one actually begins to study the relevant scholia attributable to a specific scholiast in detail.

In the case of Xiphilinos, one of the problems that arise refers to which scholia can be actually attributed to him. To begin with, the name Xiphilinos is not mentioned at all in the Basilica scholia. Instead, we encounter the word "nom-ophylax". We come across scholia with the heading "of the nomophylax" (τοῦ νομοφύλακος). In some scholia the word "nomophylax" is not inserted in the heading of the scholion but the scholiast refers to the opinion of the nomophylax. Hence, we read something like: "see the opinion of the nomophylax here..." or "as the nomophylax mentions..." or similar expressions. Sometimes we come across the heading "of Ioannes" and in one scholion we read "of the nomophylax Ioannes". The question that arises is whether the name Ioannes can always be identified with John Xiphilinos. The fact is that from the preserved sixty-eight scholia we have thirty-six scholia that contain the word nomophylax either in their heading or in their text, and thirty-two scholia with the name Ioannes.<sup>19</sup>

One way to find out whether the author of both these groups of scholia is actually the same is to compare them. For this reason, the structure of the present study is divided as follows: after this short introduction, a table is

**<sup>18</sup>** See VAN BOCHOVE, Tenth century Constantinople (as footnote 1 above), 69 – 96.

<sup>19</sup> There is also only one scholion with the heading "of the *nomophylax* Ioannes", as already mentioned, and there is also one scholion with the heading "of Ioannes Nicaeus". WOLSKA-CONUS counts sixty-three scholia by Xiphilinos because she attributes to Xiphilinos not only the scholia with the heading "of the *nomophylax*" but also the ones with the heading "of Ioannes"; see WOLSKA-CONUS, L'école de droit (as footnote 1 above), 13 including footnote 50 on that page.

given containing the scholia with the words "of the nomophylax". For these scholia there is no doubt that they are attributable to Xiphilinos. After this table, remarks are made about the style and characteristics of Xiphilinos based on these scholia, and some thoughts are expressed about his use of the word *rheton*, about his references to older material and in particular to antecessorian writings. Another table is then inserted including the scholia that contain the name John ("of Ioannes"), followed by a few remarks on these scholia. In the final section, both these groups of scholia are compared and general conclusions are drawn.

As a preliminary remark, let me note that when dealing with any kind of scholia, clearly the question always arises whether the actual author of the examined scholia is the person whose name is mentioned in the heading, or whether it is someone connected to that person, i.e. a student or an admirer who actually wrote down the scholia. For example, in our case, the scholia that have the heading "of the *nomophylax*" are definitely related to Xiphilinos. But who wrote them? Was it Xiphilinos himself or, for example, one of his students who admired his work, collected the scholia and wrote them down? This is a generic problem when dealing with scholia. In any case, the scholia that contain a name in their heading or in their text as a reference<sup>20</sup> form one group (i.e. the group of scholia of Hagiotheodorites, of Nicaeus, of the nomophylax, etc.), and remarks regarding the material scope and characteristics can be made for each one of these groups and, consequently, the style of scholiasts, but it remains open whether these scholiasts actually wrote the scholia down themselves or not.

A further problem that arises from scholia is whether every actual scholion derives from one person or whether it consists of more attached "scholia" added by further commentators. In other words, some scholia can consist of more layers: one first, "original" scholion and then additions made to it by later authors. This is something to bear in mind when reaching conclusions as to the style of an author because scholia that could be attributed to one author can in fact consist of more layers and can be related to more than one author. That is once again a generic problem when dealing with any scholia and, as far as Byzantine law is concerned, it is a problem that is encountered in more Byzantine legal sources or, as is said in Byzantine law, "things are not always what they seem".21

**<sup>20</sup>** For example, "see the opinion of the *nomophylax* here who writes...".

<sup>21</sup> See also the observations of Ludwig Burgmann and Marie Theres Fögen in L. BURGMANN/"M.TH. FÖGEN, Florilegium Lesbiacum, in D. Simon (ed.), Fontes Minores V. Forschungen zur Byzantinischen Rechtsgeschichte, 8. Frankfurt am Main 1982, 107 - 178, here especially 126 – 127.

# 2. Number and material scope of the scholia "of the *nomophylax*"

Thirty-six scholia have been preserved with the reference "of the *nomophylax*" either in the heading or in the text itself of the scholion on the following *Basilica* books:

Book 12, title 1

Περὶ κοινωνίας καὶ λύσεως αὐτῆς About partnership and its dissolution

Book 12, title 2

Περὶ κοινῶν πραγμάτων διαιρέσεως About the division of common property

Book 13, title 1

Περὶ τῆς ἐναγωγῆς τῆς κατὰ τοῦ κιχρωμένου καὶ τοῦ κιχρῶντος

About the action for and against the lender and the borrower in a loan for use only

Book 13, title 2

Περὶ παρακαταθήκης καὶ τῆς κινουμένης ἀγωγῆς κατὰ τοῦ παράθεσιν λαβόντος About deposit and the action brought against

Book 14, title 1

the depositee

Περὶ ἐντολῶν ἐπιτιθεμένων τισὶ καὶ τῶν ἀγωγῶν τῶν κινουμένων παρ' ἀμφοτέρων αὐτῶν κατ' ἀλλήλων

About mandates entrusted to certain persons and about the actions brought by both parties against each other

1 scholion

BS 478/1 – 4 (sch. Ca 1 ad B. 12,1,48a = D. 17,2,49)<sup>22</sup>

1 scholion

BS 556/6-7 (sch. Ca 5 ad. B. 12,2,4 = D.  $10,3,4)^{23}$ 

3 scholia

BS 613/20-22 (sch. Ca 46 ad B. 13.1.5 =

D. 13,6,5)

BS 621/5-8 (sch. Ca 7 ad B. 13.1.18 = D.

13,6,18)

BS 622/10 - 13 (sch. Ca 15 ad B. 13.1.18 =

D. 13,6,18)

2 scholia

BS 637/24 – 28 (sch. Ca 4 ad B. 13.2.1 = D.

16,3,1)

BS 660/19 – 661/3 (sch. Ca 1 ad B. 13,2,24

= D. 16,3,24)

9 scholia

BS 723/24 – 29 (sch. Ca 34 ad B. 14,1,10 =

D. 17,1,10)

BS 724/10-13 (sch. Ca 37 ad B. 14,1,10 =

D. 17,1,10)

BS 732/24-25 (sch. Ca 8 ad B. 14,1,12 =

D. 17,1,12)

BS 733/3 (sch. Ca 13 ad B. 14,1,12 = D.

17,1,12)

<sup>22</sup> Here as a reference within the text and not in the heading: "τὴν ἐκεῖ τοῦ Νομοφύλακος παραγραφὴν καὶ τὸ νέον σχόλιον".

<sup>23</sup> Here as a reference within the scholion and not in the heading: "... κατὰ τὸν Νομοφύλακα".

BS 753/20 - 21 (sch. Ca 38 ad B. 14,1,26 = D. 17.1.26) BS 755/21-22 (sch. Ca 13 ad B. 14,1,27 = D. 17.1.27) BS 757/4 - 6 (sch. Ca 24 ad B. 14,1,27 = D. BS 784/10 (sch. Ca 4 ad B. 14,1,51 = D. 17,1,51) BS 786/29 - 30 (sch. Ca 2 ad B. 14,1,54 = D. 17.1.54)<sup>24</sup>

## Book 21, title 1

Περὶ μαρτύρων εὐϋπολήπτων καὶ ἀτίμων About witnesses of a good reputation and dishonourable ones (= of the upper and of the lower class)

#### 5 scholia

BS 1229/23 - 24 (sch. Pa 31 ad B. 21,1,3 = D.  $22,5,3)^{25}$ BS 1253/1 - 8 (sch. Pa 4 ad B. 21,1,33 = C. 4,20,9) BS 1253/9 - 12 (sch. Pa 5 ad B. 21,1,33 =C. 4,20,9BS 1254/23-1255/5 (sch. Pa 4 ad B. 21,1,35 = C. 4,20,11BS 1274/22-1275/13 (sch. Pa 4 ad B. 21,1,51 = Nov. 90 c. 6

## Book 22, title 1

Περὶ ἀποδείξεων καὶ προλήψεων καὶ δικαιωμάτων καὶ πίστεως δικαιωμάτων καὶ διαβολῆς αὐτῶν

About proofs and presumptions and documentary evidence and their defraud

#### 1 scholion

BS 1328/5 - 7 (sch. Pa 3 ad B. 22,1,2 = D. 22,3,2)

## Book 22, title 5

Περὶ ὅρκου ὀμοτέου εἴτε προαιρετικοῦ (τουτέστιν ἐπακτοῦ) εἴτε ἀναγκαίου εἴτε δικαστικοῦ

#### 1 scholion

BS 1433/14-17 (sch. Pa 26 ad B. 22,5,13  $= D. 12,2,13)^{26}$ 

**<sup>24</sup>** After that scholion there is a scholion with the heading "Toῦ αὐτοῦ" meaning "of the same" which in principle could be attributed to Xiphilinos as well since it follows a scholion by him; according to the editors, however, this scholion is by the Anonymous, as they note in their critical apparatus: "αὐτοῦ: leg. Ἀνωνύμου".

**<sup>25</sup>** This is the only scholion with a heading of the *nomophylax* John: "Τοῦ Νομοφύλακος Ίωάννου".

**<sup>26</sup>** Here as a reference within the scholion and not in the heading: "...ὑς ὁ Νομοφύλαξ εἵπεν ...".

About the oath that has to be held, either the voluntary (namely the oath as tendered),<sup>27</sup> the compulsory or the judicial

Book 23, title 1

Περὶ πραγμάτων χρεωστουμένων, ἐάν ἐστι δῆλον καὶ ἀπαιτεῖται, καὶ περὶ ἐκδικήσεως αὐτῶν

About things credited, if it is certain and there is a *condictio* and about claims<sup>28</sup>

Book 23, title 2

Περὶ τοῦ τοὺς τελευτῶντας ἤγουν τὰ λείψανα αὐτῶν μὴ ἐνυβρίζεσθαι παρὰ τῶν δανειστῶν

About the fact that the deceased, namely their remains, should not be insulted by creditors

Book 23, title 4

Περὶ ἀργυροπρακτικῶν συναλλαγμάτων About contracts with bankers

1 scholion

BS 1611/1 – 11 (sch. Pa 13 ad B. 23,1,76 = C. 4,30,14)

1 scholion

BS 1620/8-15 (sch. Pa 7 ad B. 23,2,4 = Nov. 134 c. 8)<sup>29</sup>

2 scholia

BS 1709/29 - 1710/3 (sch. Pa 5 ad B. 23,4,1 = Nov. 136 c. 1) BS 1710/6 - 7 (sch. Pa 7 ad B. 23,4,1 = Nov. 136 c. 1)<sup>30</sup>

**<sup>27</sup>** The "τουτέστιν ἐπακτοῦ" does not make sense in explaining the voluntary oath. The "ἐπακτός" would have made sense in relation to the compulsory oath. See also here the critical apparatus in BT 1075 ad l. 3.

<sup>28</sup> It is rather difficult to translate in decent English this title. By examining the *Basilica* scholia for this rubric, it is understood that this title also refers to the *condictio*. The expression "ἐάν ἐστι δῆλον καὶ ἀπαιτεῖται", for example, refers to whether the sum of coins is certain and can be demanded with a *condictio*. See the relevant *Basilica scholia ad rubricam* in BS 1493 – 1495. The *condictio* was a remedy of the Romans by which a certain sum of money or a certain thing could be claimed. On the *condictio*, see for example, B. NICHOLAS, An introduction to Roman law. Oxford 1975, 229 – 231, R. ZIMMERMANN, The law of obligations. Roman foundations of the civilian tradition. Oxford/New York 1996, 834 – 873 and M. KASER/R. KNÜTEL/S. LOHSSE, Römisches Privatrecht, 22. Auflage. München 2021, 348 – 355.

**<sup>29</sup>** Here as a reference within the scholion and not in the heading: "Οὕτως ὁ Νομοφύλαξ…". **30** Here as a reference within the scholion and not in the heading: "...καὶ οὐχ ἡ τοῦ Νομοφύλακος γνώμη".

Book 25, title 1

Περὶ ἀγωγῆς τῆς χάριν ἐνεχύρων διδομένης About the action given because of pledges

Book 60, title 5

Περὶ ἀγωγῶν τῶν κινουμένων ἡνίκα δοῦλοι αμαρτάνοντες έκδίδονται η τετράποδα About actions that are brought when slaves or four-footed animals that have committed a delict are surrendered

Book 60, title 12 Περὶ κλοπῆς About theft

Book 60, title 29 Περὶ συλωθείσης κληρονομίας About despoiling an inheritance

Book 60, title 53

Περὶ πραγμάτων ἐκείνων οἵτινες τῆς ἀποφάσεως η θάνατον έαυτοῖς κατεγνωκότες η κατηγορίαν παρὰ τοῦ ἀντιδίκου αὐτῶν ύπεφθάρησαν

About the property of those who before the decision (before they are sentenced) either have committed suicide or are accused of corrupting their opponent

3 scholia

BS 1768/9 - 11 (sch. Pa 3 ad B. 25.1.3 = D. 13,7,3)

BS 1773/22 - 30 (sch. Pa 8 ad B. 25.1.9 = D.  $13,7,9)^{31}$ 

BS 1778/32 - 33 (sch. Pa 26 ad B. 25,1,11 = D. 13.7.11

3 scholia

BS 3184/3 - 8 (sch. Pe 11 ad B. 60.5.2 = D.  $9.4.2)^{32}$ 

BS 3211/1-5 (sch. Pe 15 ad B. 69,5,22 = D.  $9.4.22)^{33}$ 

BS 3215/6 - 25 (sch. Pe 9 ad B. 60,5,26 =D.  $9,4,26)^{34}$ 

1 scholion

BS 3349/19-20 (sch. Pe 53 ad B.  $60,12,14 = D. 47,2,14)^{35}$ 

1 scholion

BS 3612/6-7 (sch. Pe 7 ad B. 60,29,10 = $C 9,32,4)^{36}$ 

1 scholion

BS 3913/24-25 (sch. Pe 2 ad B. 60,53,2 = D. 48,21,2)37

<sup>31</sup> Here as a reference within the scholion and not in the heading: "Ὅπερ, λέγει ὁ Νομοφύλαξ...".

**<sup>32</sup>** Here as a reference within the scholion and not in the heading: "...φησίν ὁ νομοφύλαξ..." and some lines further on again the word nomophylax.

**<sup>33</sup>** Here as a reference within the scholion and not in the heading: "Φησὶν ὁ Νομοφύλαξ...".

**<sup>34</sup>** Here as a reference within the scholion and not in the heading: "... ως ὁ Νομοφύλαξ φησίν...".

<sup>35</sup> Here as a reference within the scholion and not in the heading: "...καὶ τὴν ἐν αὐτῷ τοῦ Νομοφύλακος...".

**<sup>36</sup>** Here as a reference within the scholion and not in the heading: "... ως φησιν ὁ Νομοφύλαξ...".

<sup>37</sup> Here as a reference within the scholion and not in the heading: "Οὕτως ὁ Νομοφύλαξ...".

The *scholia* with the word *nomophylax* are preserved in three manuscripts, as follows: sixteen scholia in the codex Coislinianus gr. 152 (= Ca), fourteen scholia in the codex Parisinus gr. 1348 (= Pa) and six scholia in the codex Parisinus gr. 1350 (= Pe). Manuscripts Ca and Pe are both dated to the twelfth century (the Ca in the second half of the twelfth century),<sup>38</sup> and manuscript Pa dates from the thirteenth century.<sup>39</sup> The preserved scholia are divided over more *Basilica* books, and refer to subjects such as partnership, deposit, mandate, witnesses and evidence, pledge and theft. Most of the preserved scholia deal with mandates (*Basilica* book 14) and witnesses (*Basilica* book 21).

# 3. Characteristics of Xiphilinos' scholia

# 3.1 General remarks

There are so few scholia preserved with the word "nomophylax" that it is not possible to draw general conclusions concerning the material scope and the preference of Xiphilinos for some subjects. We can nevertheless make the following observations concerning this group of scholia attributed to Xiphilinos. Most of these scholia are not too lengthy; each scholion covers in most of the cases approximately four lines. There are, however, a few scholia of Xiphilinos that are quite lengthy, and later in this section I will quote and analyse two characteristic examples. <sup>40</sup>

It is noteworthy that Xiphilinos often uses legal terms still in their Latin terminology but then transliterated in Greek letters or, better said, a combination of a Latin root of a word with a Greek ending, having all letters transliterated in Greek.<sup>41</sup> We read, for example, terms such as "μανδάτι" (for *mandati*), "βόνα φίδε" (for *bona fide*), "ἀκεπτιλατίονα" (for *acceptilatione*<sup>42</sup>), "πραεσκρίπτις

<sup>38</sup> According to the Groningen editors this manuscript dates from the thirteenth century.

**<sup>39</sup>** See L. Burgmann/M.-Th. Föge/A. Schminck/D. Simon, Repertorium der Handschriften des byzantinischen Rechts, Teil I. Die Handschriften des weltlichen Rechts (Nr. 1-327). Frankfurt am Main 1995, no 203, no 163 and no 161 on p. 230, p. 191 and p. 190, respectively. **40** BS 660/19-661/3 (sch. Ca 1 ad B. 13,2,24 = D. 16,3,24) and BS 1274/22-1275/13 (sch. Pa 4 ad B. 21,1,51 = Nov. 90 c. 6).

**<sup>41</sup>** WOLSKA-CONUS, L'école de droit (as footnote 1 above), 17 mentions that especially for actions he uses Latin terms.

**<sup>42</sup>** *Acceptilatio* in Roman law was a formal way of discharging an obligation by "verbal release". See, for example, KASER/KNÜTEL/LOHSSE, Römisches Privatrecht (as footnote above 28), 373.

βέρβις" (for praescriptis verbis<sup>43</sup>), "νεγοτιόρουμ γεστόρουμ" (for negotiorum gestorum<sup>44</sup>), "φινίου ῥεγανδόρουμ" (for finium regundorum<sup>45</sup>), etc. The majority of Xiphilinos' scholia are very short explanations on some legal problems; for example, he explains one word<sup>46</sup> or adds one comment to help the interpretation and to clarify a word.<sup>47</sup> In one scholion he describes that a specific situation has changed in his days ("σήμερον") because of a new law. 48 As Wolska-Conus notes, the "nowadays" of Xiphilinos in this case goes back to Justinian because the new law that Xiphilinos refers to is actually a Justinianic Novel (no 4) dated from 535.49 In another scholion Xiphilinos notes:50

Γίνωσκε δέ, ὅτι κατὰ τὸ παλαιὸν ἄκων οὐδεὶς ἠναγκάζετο μαρτυρεῖν ἐπὶ τῶν χρηματικῶν, άπὸ δὲ διατάξεως βασιλικῆς ὡρίσθη καὶ ἐπὶ χρηματικῶν καὶ ἐγκληματικῶν ἄκοντας τοὺς συνειδότας μαρτυρεῖν.

Take into account that in the old times no one was obliged to testify if he did not want to in civil cases, but by an imperial constitution it was ordered that in both civil and criminal cases the people who had known had to testify even if they did not want to.

Again, the expression "in the old times" in this scholion refers to the very long past, so not just before the Basilica but the time before Justinian.<sup>51</sup> I have not encountered any erotapokrises, the form of a question and answer in these scholia, something that we do encounter in other "new" Basilica scholia, of Hagiotheodorites, for example, and of Nicaeus. But again, we should keep in mind that the preserved material is very limited compared to other "younger" Basilica scholiasts.

<sup>43</sup> The action referring to innominate contracts. See, for example, KASER/KNÜTEL/LOHSSE, RÖmisches Privatrecht (as footnote 28 above), 340 – 342.

<sup>44</sup> That was the action which a man might have against another who had managed his affairs for him in his absence, without being commissioned to do so. See, for example, KASER/KNÜTEL/ LOHSSE, Römisches Privatrecht (as footnote 28 above), 337 – 340.

<sup>45</sup> That was the action at law for the definition of boundaries. See, for example, KASER/KNÜ-TEL/LOHSSE, Römisches Privatrecht (as footnote 28 above), 184-186.

**<sup>46</sup>** For example, BS 621/7 – 8 (sch. Ca 7 ad B. 13,1,18 = D. 13,6,18).

**<sup>47</sup>** For example, BS 1229/23 – 24 (sch. Pa 31 ad B. 21,1,3 = D. 22,5,3).

**<sup>48</sup>** BS 757/4-6 (sch. Ca 24 ad B. 14,1,17 = D. 17,1,27).

<sup>49</sup> WOLSKA-CONUS, L'école de droit (as footnote 1 above), 30.

**<sup>50</sup>** BS 1255/3 - 5 (sch. Pa 4 ad B. 21,1,35 = C. 4,20,11).

**<sup>51</sup>** See C. 4,20,16 and the Novel 90 c. 5 of Justinian.

# 3.2 Xiphilinos' references to the *rheton* and the explanation of *commodatum*

In two scholia attributed to Xiphilinos we encounter the term "rheton" ( $\dot{\rho}\eta\tau\dot{\sigma}v$ ), which at first sight seems strange since the word "rheton" is related to the teaching of the *antecessores*. The *antecessores*, the law professors at the time of Justinian, had to tackle a language problem as they had to teach the Latin legislation of Justinian to mostly Greek native speakers. As Scheltema has shown, the *antecessores* developed a special teaching method in order to tackle this language problem. This teaching method consisted of two stages. The first stage was dedicated to the Greek translation of the Latin texts, whereas in the second stage, the *antecessores* focused more on the actual legal problems, providing explanations on the examined legal issues and sometimes also explanations of linguistic nature. In their teaching method the word "*rheton*" was always used to refer to "the written text", that is, the original Latin text of Justinian's legislation.

The first scholion in which Xiphilinos mentions the word *rheton* refers to a loan for use only (*commodatum*) and the lender's liability that exists if the lent good is defective. In order to have a better understanding of Xiphilinos' comment, it makes sense to begin with the *Basilica* fragment to which Xiphilinos refers. It is as follows:<sup>33</sup>

Ο έν είδήσει χρήσας ὑπαίτια σκεύη τοῦ ἐν αὐτοῖς βληθέντος ἐκχυθέντος ἐνέχεται.

The person who knowingly lends defective vessels is liable when something is poured in and leaks out again.

According to the *Basilica*, the lender is liable if he has deliberately given a defective vessel and, as result of this defect, the liquid that was poured in has leaked out. In other words, the item was not suitable to be lent because it was defective. Xiphilinos explains that the case mentioned in the *Basilica* is not the only example of defect. The rule can be extended to all cases in which some kind of damage takes place. I quote in the following the relevant comment by Xiphilinos:<sup>54</sup>

**<sup>52</sup>** On the *antecessorian* teaching method, see the standard work by H.J. SCHELTEMA, L'enseignement du droit des antécesseurs. Leiden 1970 (repr. in N. VAN DER WAL/J.H.A. LOKIN/B.H. STOLTE/R. MEIJERING collegerunt, H.J. SCHELTEMA, Opera Minora ad iuris historiam pertinentia. Groningen 2004, A3, 58–110).

**<sup>53</sup>** B. 13,1,18,3 = D. 13,6,18,3 (BT 717/19 - 20).

<sup>54</sup> BS 622/10-13 (sch. Ca 15 ad B. 13.1.18 = D. 13,6,18). WOLSKA-CONUS, L'école de droit (as footnote 1 above), 20 refers also to this scholion.

Τοῦ Νομοφύλακος, "Η ἄλλως βλαβέντος δηλονότι τὸ γὰρ παρὸν ῥητὸν κορούπτουμ ἔχει, ὃ δηλοῖ τὴν φθοράν. Τούτω τῷ ἡητῷ συνάδει ὁ Στέφανος ἐν ταῖς παραγραφαῖς. Φησὶν γὰρ, ότι οὐκ ἐξεχύθη μὲν ὁ οἶνος ἢ τὸ ἔλαιον, μετεποιήθη δέ.

Of the nomophylax. Or damaged in another way; for the present rheton has the word "κορόπτουμ" ("corruptum"), which indicates the damage. And Stephanus agrees with this rheton in his paragraphai. Because he says that the wine or the olive oil did not leak out but it changed.

Xiphilinos makes a reference firstly to the *rheton*, the original *Digest* text, and secondly to the paragraphai of Stephanus.<sup>55</sup> The paragraphai are related to the antecessorian method of teaching.<sup>56</sup> Xiphilinos mentions that the good that is given for use can have another form of damage, other than the one mentioned in the Basilica text. He emphasizes the word "corruptum", which is included in the Digest but not in the Basilica. If we look in the corresponding Digest part here (from which the Basilica text derives), we see that the Latin word "corruptum" is indeed used, as Xiphilinos has remarked. Here is the relevant Digest fragment:57

Item qui sciens vasa vitiosa commodavit, si ibi infusum vinum vel oleum corruptum effusumve est, condemnandus eo nomine est.

Again, someone who knowingly lends defective containers must, if wine or oil poured in is spoiled or spilled, be condemned on that account.

When reading the *Basilica* scholion by Xiphilinos, the first impression is that he speaks as if he had actually read the *rheton*, but is that indeed the case? Another possibility is that Xiphilinos wants "to take credit", "to show off" this knowledge, whereas in reality he merely reproduced what he has read in the writings of Stephanus. Xiphilinos adds that Stephanus agrees in his paragraphai with the

<sup>55</sup> On Stephanus, see H. DE JONG, Stephanus en zijn digestenonderwijs (PhD, University of Groningen 2008). DE JONG has published many studies also in English on Stephanus' teaching. See the Online Bibliography by Th.E. VAN BOCHOVE: <a href="https://referenceworks.brillonline.com/">https://referenceworks.brillonline.com/</a> browse/basilica-online> (date of access: 13/06/2021), part VII. Legal education and antecessore / under Antecessores and σχολαστικοί / Stephanus.

<sup>56</sup> See Scheltema, L'enseignement (as footnote 52 above,) and in the Opera Minora see also the many articles by SCHELTEMA related to the subject, especially A3a-3r, 111-157. The paragraphai were Greek comments on legal and sometimes also linguistic aspects and were called paragraphai (παραγραφαί), meaning "side writings", because students probably wrote them down in the margins of their copies of the rheton.

<sup>57</sup> D. 13.6.18.3, Gaius, Provincial Edict, book 9. The translations of all *Digest* fragments in this paper are from A. WATSON (ed.), The Digest of Justinian (transl. MOMMSEN, ed. maior), 4 vols. Philadelphia, 1985.

*rheton* since Stephanus mentions another form of damage. According to Xiphilinos, Stephanus mentions that there is damage not only if something leaks out of the vessel but also if, for example, the oil or wine has changed.<sup>58</sup> In any case, as we read the scholion, it seems that Xiphilinos refers to the *rheton*, *i.e.* the *Digest* as if he himself has read it, but again we cannot be sure about this.

We encounter the word *rheton* for the second time in another scholion attributable to Xiphilinos. Before analysing this scholion it is better once again to have a look at the *Basilica* fragment to which the scholion refers. Here follows the relevant *Basilica* fragment:<sup>59</sup>

Γάϊος. Ἐπὶ τοῦ χρησθέντος πράγματος καὶ ἐπιμέλεια ζητεῖται, οἴαν τις ἐπιμελέστατος ἐν τοῖς οἰκείοις παρέχεται πράγμασιν, οὐ μὴν τὰς συμφορὰς αἶς οὐ δυνατὸν ἀντιστῆναι, ναυάγια τυχὸν ἢ καταπτώσεις ἢ θάνατον μὴ κατὰ δόλον αὐτοῦ ἢ ῥαθυμίαν συμβάντα, ἢ λῃστῶν ἢ πολεμίων ἐπιδρομήν, εἰ μὴ λαβὼν ἐπὶ τῷ χρήσασθαι ἐν τῷ οἴκῳ ἀπήγαγεν ἐπὶ ξένης· οὐδὲ τὴν φυγὴν τῶν μὴ εἰωθότων φυλάττεσθαι δούλων. Εἰ δὲ μέλλοντος ἐμοῦ καὶ σοῦ φίλους ἑστιᾶν παρὰ σοὶ δώσω ἄργυρον, χρεωστεῖς ἐπιμέλειαν οἵαν ἐπὶ τῶν ἐνεχύρων καὶ τοῖς προικιμαίοις.

Gaius. The care that is required for a thing that is lent for use is that which a very careful man has for his own things and not for disasters which are not possible to resist, for example, shipwrecks or collapses or death that has taken place without dolus or carelessness, or attacks of robbers or enemies, except if someone after having taken the thing to use it at home, he transferred it to a foreign land; nor (is there liability) of the escape of slaves who are not customarily guarded. If, however, I lend silver to you because you and I are planning to invite friends for dinner at your place, you should show the same care that is required for pledges and dowries.

This fragment deals with the care that the borrower has to show in case of a *commodatum*, a loan for use only. In Roman law there were different degrees of care and liability in contracts. Dolus was when someone was in bad faith or had conducted fraud. Culpa was when someone had made a fault or had shown negligence. Custodia, on the other hand, was a very strict form of care when keeping a good safe that caused a liability very fast; it applied to a few cases. The culpa was further distinguished in more degrees: first, culpa lata, meaning "gross fault", which was difficult to distinguish from dolus, and second, culpa levis, meaning "slight fault". The culpa levis was further divided into culpa levis in abstracto (judged by an abstract or objective standard), which is lacking the dili-

**<sup>58</sup>** This *paragraphe* of Stephanus seems not to be preserved. See also Wolska-Conus, L'école de droit (as footnote 1 above), 20.

**<sup>59</sup>** B. 13,1,18pr. = D. 13,6,18pr. (BT 717/6-13).

**<sup>60</sup>** See briefly, for example, Nicholas, Introduction (as footnote 28 above), 169-170. See also Kaser/Knütel/Lohsse, Römisches Privatrecht (as footnote 28 above), 266-277.

gence of a reasonable man (of a bonus paterfamilias), and culpa levis in concreto (judged by a concrete or subjective standard), which is lacking the diligence that one shows for his own affairs (diligentia quam in suis rebus).

In the above Basilica fragment, it is mentioned that the borrower in a commodatum has to show diligence that a very careful man (τις ἐπιμελέστατος) will show for his own affairs. He is not liable in events of vis major. In the last sentence a case is described in which two parties decide to organise a dinner and one person lends his silver to the other person at whose place the dinner shall take place; in this case we read in the Basilica that the liability is the same as in the case of pledges and dowries. The scholion of Xiphilinos concerns this very last sentence of the *Basilica*. But before we have a look at this scholion it is better to examine the Digest fragment from which the Basilica fragment derives:61

Gaius libro nono ad edictum provinciale. In rebus commodatis talis diligentia praestanda est, qualem quisque diligentissimus pater familias suis rebus adhibet, ita ut tantum eos casus non praestet, quibus resisti non possit, veluti mortes servorum quae sine dolo et culpa eius accidunt, latronum hostiumque incursus, piratarum insidias, naufragium, incendium, fugas servorum qui custodiri non solent, quod autem de latronibus et piratis et naufragio diximus, ita scilicet accipiemus, si in hoc commodata sit alicui res, ut eam rem peregre secum ferat: alioquin si cui ideo argentum commodaverim, quod is amicos ad cenam invitaturum se diceret, et id peregre secum portaverit, sine ulla dubitatione etiam piratarum et latronum et naufragii casum praestare debet, haec, ita, si dumtaxat accipientis gratia commodata sit res. at si utriusque, veluti si communem amicum ad cenam invitaverimus tuque eius rei curam suscepisses et ego tibi argentum commodaverim, scriptum quidem apud quosdam invenio, quasi dolum tantum praestare debeas; sed videndum est, ne et culpa praestanda sit, ut ita culpae fiat aestimatio, sicut in rebus pignori datis et dotalibus aestimari solet.

Gaius, Provincial Edict, book 9: The standard of care to be adhered to in relation to things lent for use is that which any very careful head of a family keeps in relation to his own affairs to the extent that the borrower is only not liable for those events which cannot be prevented, such as deaths of slaves occurring without fault on his part, attacks of robbers and enemies, sur-prises by pirates, shipwreck, fire, and escape of slaves not usually confined. What is said about robbers, pirates, and shipwreck is to be understood as applying only to the case in which something is actually lent to someone to take it to distant parts. It is different where I lent silver to someone because he says he is giving a dinner party for his friends, and he then takes it off on a journey. For in that case without a shadow of doubt, he must answer for disaster due even to pirates, robbers, or shipwreck. These conclusions apply when the loan is made only in the borrower's interest. But if it is made in the interest of both parties, for example when we (shall) have invited a common friend to dinner and

**<sup>61</sup>** D. 13,6,18, pr. The translation is based on that by WATSON, Digest (as footnote 57 above); in the last paragraph I provide a different translation than that of WATSON.

you take care of arranging the thing (= food), while I lend you silver, some writers say, as I found, that you only will be liable for wilful harm. However, we must ask ourselves whether you will not also be liable for fault, so that estimation will be made for culpability, just as it is usually estimated in the case of things given for pledges and dowries.

The *Digest* fragment from which the *Basilica* abstract derives is clearly more extensive and helps us better to understand the *Basilica* abstract and especially the last sentence of the *Basilica* fragment to which, as we will see, Xiphilinos appends his comments. As far as the degree of care is concerned, there is a difference according to the *Digest* based on whether the loan is made only in the borrower's interest or in the interest of both parties. According to the *Digest*, if I lend you my silver because we both have invited friends for a dinner party at your place, your liability stretches up to wilful harm (*dolus*), but according to Gaius the question is whether it can also extend to fault (*culpa*), just as things given in a pledge or a dowry.

There were different opinions formalised by the Roman jurists as to the actual degree of care required in particular contracts, and this is also obvious in the last sentence of Gaius here in the *Digest* fragment. In the relevant *Basilica* fragment in the same given example, we observe that there are no questions as far as the degree of care is concerned. We read in the *Basilica*: "If, however, I lend silver to you because we are planning to invite friends for dinner at your place you should show the same care which is required for pledges and dowries." In other words, in the *Basilica*, it is clearly stated that the care required in this example is the care that one should have in pledges and dowries. We do not know whether this clarity of degree of care in the *Basilica* is a conscious choice of the *Basilica* compilers. Perhaps it had to do with the summarised version that they had at their disposal when compiling the *Basilica*. The word that is used in the *Basilica* for "care" is " $\epsilon \pi \mu \epsilon \lambda \epsilon \nu$ ", which means "diligence" and is equivalent to the word "diligentia". Aiphilinos makes the following comment on the above *Basilica* fragment:

**<sup>62</sup>** On the compilation of the *Basilica*, see, for example, Th. E. VAN BOCHOVE, The Basilica between quellenforschung and textual criticism, in J. Signes Codoñer/I. Pérez Martín (eds.), Textual transmission in Byzantium: between textual criticism and quellenforschung. *Lectio. Studies in the transmission of texts* & *ideas*, 2. Turnhout 2014, 539–575.

**<sup>63</sup>** About the degrees of care in Byzantine law, see D. NÖRR, Die Fahrlässigkeit im byzantinischen Vertragsrecht. München 1960.

**<sup>64</sup>** BS 621/5-8 (sch. Ca 7 ad B. 13,1,18 = D. 13,6,18). WOLSKA-CONUS, L'école (as footnote 1 above), 19-20 refers also to this scholion.

Τοῦ Νομοφύλακος. Όσον ἀπὸ τῶν πάλαι ῥητῶν, ἄμεινον ἦν οὕτω μᾶλλον γεγράφθαι· χρεωστεῖς κούλπαν, ὤσπερ ἐπὶ τῶν ἐνεχύρων καὶ τῶν προικιμαίων. Μέμνησο δέ, ὅτι όμώνυμος φωνή έστιν ή κούλπα, τοῦτο μὲν τὴν ἄκραν ἐπιμέλειαν σημαίνουσα, τοῦτο δὲ τὴν μέσην ἐπιμέλειαν.

Of the nomophylax. As far as the old rheta (tell us), it would have been better that had been written, as follows: you are liable for culpa, just as for pledges and good given as dowries. Remember, however, that the word "culpa" can mean both "highest care" but also "medium care".

What is remarkable about this scholion by Xiphilinos is that he does not actually comment on the Basilica and that he is more concerned with the phraseology of the old *rheta*. He refers here to old *rheta* and points out that the word *culpa* can mean both the "highest care" that someone has to show but also "medium care". 65 Indeed, if we look into the aforementioned *Digest* fragment at the end, we see the word culpa and in particular "the culpa which is required also for pledges and dowries". In other words, Xiphilinos says here: the word culpa can refer to different degrees of care, so it is better - just as the old rheta tell us - to write "culpa which is required for pledges and dowries" because by doing so, you clearly define the degree of the *culpa*. In other words, by reading this scholion of Xiphilinos one has the impression that he has looked up the relevant Digest fragment here and he comments on the last sentence of this Digest fragment. In the Basilica fragment the word culpa is not used, only the word "ἐπιμέλεια", which means "diligence", and it is clarified that you should show such care (diligence) which is required for pledges and dowries. As NÖRR has already noticed, it is not clear what grade of diligence (exacta or quam in suis) is required for this case, i.e. for pledges and dowries, because there seems to be a difference between the diligence required for pledges and that for dowries based on more antecessorian writings.<sup>66</sup> What is remarkable at this point is that Xiphilinos finds it necessary to explain at this point to his students not so much the

<sup>65</sup> Nörr notes here that the nomophylax considers culpa a generic term for: i. diligentia exacta (ἄκραν ἐπιμέλειαν), that is, a higher form of care, a care that a prudent man should show, and ii. diligentia quam in suis (μέσην ἐπιμέλειαν), that is, the care that a person shows for his own affairs; see Nörr, Fahrlässigkeit (as footnote 63 above), 60.

<sup>66</sup> See Nörr, Fahrlässigkeit (as footnote 63 above), 60: "Während Theophilos culpa und diligentia q.s. gleichsetzt, bemerkt Stephanos, daß der Pfandgläubiger für diligentia exacta, der maritus aber nur für diligentia q.s. hafte. Die culpa des Digestenfragments dürfe also nicht auf beide Verhältnisse bezogen werden; auch Gaius habe Zweifel gehabt (sed videndum est ...). Steph. sieht also die Aporie, gibt aber keine Lösung," and in the relevant footnote NÖRR notes: "Auch die jüngeren Scholien suchen eine Lösung." He refers to this scholion by Xiphilinos and makes a comment on the use of *culpa* by Xiphilinos – see footnote 65 above.

terminology used in the *Basilica*, as one would expect, but the terminology used in the old *rheta*.

As a last remark concerning the two scholia of Xiphilinos in which he mentions word *rheton* or *rheta*, it is interesting to note that they are both preserved in the same title of the *Basilica*, that is both relating to B. 13,1,18 = D. 13,6,18 in the same manuscript (Ca) and that they both deal with the subject of *commodatum*, the loan for use only. Based on these two scholia, it seems that the scholiast has seen the *rheta*, the original Latin texts, or, in any case, he refers to them as if he has seen them. Again, on the basis of these testimonies we cannot reach definitive conclusions on whether Xiphilinos actually used the *Digest* or not. We cannot exclude the possibility that he has seen these references to the *rheton* indirectly in manuscripts that contain "old" scholia.

# 3.3. Did Xiphilinos use manuscripts of the Digest?

In the following I would like to present some arguments in favour of the hypothesis that Xiphilinos had in fact at his disposal manuscripts of the Digest and had consulted them. First of all, the two aforementioned Basilica scholia attributed to Xiphilinos in which he refers to *rheta* could indicate that he may have consulted the text of the *Digest* itself. Second, this scenario would fit in with the information mentioned in the Novel by Constantine IX Monomachos in which he appointed Xiphilinos as nomophylax of the law school. According to this Novel, the *nomophylax* should master both the Greek and the Latin language.<sup>67</sup> Third, there is also a testimony by Michael Psellos, which could be another indication in favour of the hypothesis that Xiphilinos had at his disposal the actual manuscript of the Digest. As mentioned at the beginning of this paper, Psellos was a good friend of Xiphilinos and knew him well. Psellos had written an epitaphius, a funeral oration, for Xiphilinos and there Psellos mentions that Xiphilinos knew much about the legal science, both the old and the new one: "... πλῆθος ἐγνώκει τῆς νομικῆς ἐπιστήμης, καὶ ὡς τὸ μὲν ἀρχαῖον, τὸ δὲ νεώτερον...". 68 Could this reference to old and new legal science mean the laws, namely the Justinianic legislation and in particular the Digest, on the one hand, and the Basilica on the other hand?

**<sup>67</sup>** See section 16 of the Novel: "... ἐκατέραν δὲ γλῶσσαν σὺν ἀκριβεία πάση προἵεται – τὴν ἑλληνικὴν λέγω ταύτην καὶ τὴν ὄση ῥωμαϊκή – ..." in the critical edition by SALAČ, Novella (as footnote 4 above).

**<sup>68</sup>** In J. Polemis, Michael Psellus Orationes funebres, 1. Berlin/Boston 2014, 1–244, Retrieved from: http://stephanus.tlg.uci.edu.proxy-ub.rug.nl/Iris/Cite?2702:050:280244.

A fourth argument in favour of the hypothesis of Xiphilinos having consulted the *Digest* directly could be the suggestion that *Digest* manuscripts may still have existed in eleventh-century Constantinople.<sup>69</sup> The actual transmission of the *Di*gest manuscripts has been and still is a subject of many studies.<sup>70</sup> It is not my intention to analyse this subject in this paper. I think it is fair to say that the earliest history of the Digest text remains uncertain. We know that the Codex Florentinus was kept in Pisa in the middle of the twelfth century and in 1406 it was transferred to Florence as war booty. However, we do not know how and when exactly the Digest manuscript reached Italy in the first place. 71 There is strong evidence that the Digest manuscript that reached Italy derived from Constantinople.<sup>72</sup> In any case, if the *Digest* manuscript had reached Pisa by the twelfth century, would it be so strange that in the middle of the eleventh century there were still Digest manuscripts preserved in Constantinople? Once again, the aforementioned Novel by Constantine IX Monomachos can perhaps shed some light here. In this Novel it is mentioned explicitly that the *nomophylax* had to guard the law books which were kept in the library and that he could receive them from the librarian for free and that he (= the nomophylax) could use them in a way that he considered right, especially the books that were the most necessary and useful for legal teaching, <sup>73</sup> Based on this testimony, we can con-

**<sup>69</sup>** After all, we know that they existed in the ninth and tenth century; see on this N.G. WILSON, A Greek palaeographer looks at the Florentine Pandects. Subseciva Groningana 5 (1992), 1-6. 70 See, for example, B. H. Stolte, The partes of the Digest in the Codex Florentinus. Subseciva Groningana 1 (1984), 69 – 91 and of the same author: Some thoughts on the early history of the Digest Text. Subseciva Groningana 6 (1999), 103-119 with the bibliography that the author

<sup>71</sup> According to some studies the Codex Florentinus was first kept in Amalfi and then it was taken by the Pisans. See J. HALLEBEEK, Structure of medieval Roman law: institutions, sources, and methods, in H. Pihlajamäki/M. D. Dubber/M. Godfrey (eds.), The Oxford handbook of European legal history. Oxford 2018 (date of access 13/06/2021), page 5 of 21 of the online edition. On the Codex Florentinus, see also, C.M. RADDING/A. CIARALLI, The Corpus Iuris Civilis in the Middle Ages. Manuscripts and transmission from the sixth century to the juristic revival. Brill's Studies in Intellectual History, 147. Leiden/Boston 2007; D. BALDI, Il Codex Florentinus del Digesto e il 'Fondo Pandette' della Biblioteca Laurenziana (con un' Appendice di documenti inediti), Segno e Testo 8 (2010), 99 - 186; W. KAISER, Zur Herkunft des Codex Florentinus. Zugleich zur Florentiner Digestenhandschrift als Erkenntnisquelle für die Redaktion der Digesten, in A. Schmidt-Recla/E. Schumann/F. Theisen (eds.), Sachsen im Spiegel des Rechts. Köln/Weimar 2001, 37-55.

<sup>72</sup> STOLTE, The partes of the Digest (as footnote 70 above), 69 – 91, especially 82 – 83.

<sup>73 &</sup>quot;... ὅτι φυλάξει καὶ τὰς βίβλους τῶν νόμων, ἃς ἐκ τῆς ἐκεῖσε βιβλιοθήκης παρὰ τοῦ εὐλαβεστάτου βιβλιοφύλακος εἰς έλευθέραν λήψεται χρῆσιν καὶ πρὸς τὸ δοκοῦν αὐτῷ μεταχειριεῖται,

clude that there was a library in Constantinople that consisted of important legal works, that the *nomophylax* had a duty to protect these works and that he received a kind of privilege to use them as he wanted. I am not suggesting that this testimony of this Novel proves the existence of the *Digest* in eleventh-century Constantinople. However, the information of this fragment, and especially the emphasis that is given to the protection of these books and their use as a way of privilege for the *nomophylax*, suggests that there were important legal works in this library and the *Digest* could have been one of them.<sup>74</sup>

Finally, there is another interesting testimony by the judge Eustathios Rhomaios that can shed some light on the issue of whether or not there were *Digest* manuscripts in eleventh-century Constantinople. The *Peira* is an eleventh-century collection of verdicts and statements of Eustathios Rhomaios, who served during this period as a high judge in the Byzantine capital. The *Peira* is a difficult text with many problems and the edition that is now in use is problematic for many reasons. All Byzantinists are eager to welcome the new edition of the *Peira* by Dieter Simon and Diether Roderich Reinsch, an edition which will also include a German translation and commentary. The *Peira* testimony that I would like to refer to is *Peira* 11,1, which is about stipulations. Before I quote the fragment and its translation, let me point out that this particular *Peira* testimony has on its own so many riddles to solve that it has recently become the basis of a study in progress by B.H. Stolte.

Τὸ λεγόμενον νόμιμον δύο ἐπερωτῶντας ἐνόχους γενέσθαι οὕτως ἡρμήνευσεν ὁ πατρίκιος λέγων· τὸ ῥωμαϊκὸν δύο προμιτένδο ἔχει καὶ δύο στιπουλάνδο καὶ δύο ῥέους ἐπερωτῶντας, τὸ οὖν δύο ῥέους οὐ τοὺς ἐναγομένους μόνον, ἀλλὰ καὶ τοὺς ἐνάγοντας σημαίνει, καὶ ὡς ἐρμηνεύεσθαι τὸ ῥωμαϊκὸν οὕτως δύο ἄνθρωποι κἄντε ἐνάγοντες κἄντε ἐναγόμενοι ἐπερωτῶντες ἔνοχοι γίνονται. οἱ δὲ ἐξελληνίσαντες τὰ νόμιμα, μὴ δυνηθέντες ἐκφράσαι τὸ ῥητὸν καὶ δηλῶσαι καὶ ἐναγομένους καὶ ἐνάγοντας, δύο ἐπερωτῶντας εἶπον, ὅπερ ἔχει ἐν ἑαυτῷ καὶ τὴν τοῦ ἐπερωτῶντος καὶ τὴν τοῦ ἐπερωτωμένου σημασίαν...

δηλαδή τὰς χρειωδεστέρας καὶ πρὸς τὴν διδασκαλίαν τῶν νόμων χρησιμοτέρας..." section 10a of the Novel in SALAČ, Novella (as footnote 4 above), 25.

**<sup>74</sup>** WOLSKA-CONUS, L'école de droit (as footnote 1 above), 30mentions that he must have used the *Paraphrasis Institutionum* by Theophilus; for this reference of Xiphilinos to the "Institutes" see further on.

**<sup>75</sup>** As I am informed, this edition is now at the very last stage and is expected any moment now. **76** The stipulation (*stipulatio*) was the most important verbal contract in classical Roman law. It consisted of a promise in a form of a question by the creditor and an answer by the debtor. There were particular strict formalities that had to be held for this verbal contract. Gradually, the classical stipulation was degenerated, oral formality became unnecessary and eventually the stipulation was converted into a written contract. On the classical stipulation and its development, see ZIMMERMANN, Obligations (as footnote 28 above), 68–94.

<sup>77</sup> I thank Prof. emer. B.H. Stolte for allowing me to use his current translation.

The legal expression that two persons who "ask the question" become liable has been interpreted by the patrikios as follows: the Latin passage has two "(reos) promitendo" and two "(reos) stipulando" and two "reos asking". The "δύο ῥέους/duo reos" does not only mean the defendants, but also the plaintiffs, and in explanation of the Latin term "reoi/ἐπερωτῶντες", whether they claim or defend, become liable/"engaged" (ἔνοχοι). But those who have exhellenised the legal terms (τὰ νόμιμα), unable to elucidate the [Latin] text (ἐκφράσαι τὸ ῥητὸν) and clarify both "defendants" and "plaintiffs", have spoken of "two persons who ask the question (δύο ἐπερωτῶντας)", which includes both the meaning of "the person who asks the question" and "the one who is asked the question"...

Eustathios refers here to the *stipulatio* and the wording in the law "δύο ἐπερωτῶντας ἐνόχους". Eustathios explains that the word *reos* in the Latin text can mean at this point both the defendants and the plaintiffs. <sup>78</sup> It is not my intention to present here an analysis of this *Peira* chapter.<sup>79</sup> The reason that I have quoted this *Peira* chapter is because, based on this testimony, it seems that Eustathios Rhomaios has seen the Latin original since he remarks that the persons who have exhellenised the legal terms at this part have not correctly expressed the rheton.80 Another explanation could be that Eustathios had not directly consulted the Digest but indirectly from manuscripts with "old" scholia that he had at his disposal.

<sup>78</sup> See also here a relevant comment by the commentator of the Ecloga Basilicorum on B.2.3.173.2 = D. 50.17.173.2 in L. BURGMANN, Ecloga Basilicorum. Forschungen zur byzantinischen Rechtsgeschichte, 15. Frankfurt am Main 1988, 154/11-17. BURGMANN refers here to Justinian's Institutes 3,16 and B. 43,2 (D. 45,2). In the Groningen Basilica edition in B.43,2 (BT 1958/6) in line 6 in the critical apparatus the editors note that: "6 (ἔνοχος ἐπερωτώμενος: [...] Anonymus enim scripserat Ὁ ἐπερωτῶν reos stipulandos λέγεται καὶ ὁ ἐπερωτώμενος reos promittendos." For an analysis of this particular chapter of the *Peira*, see the forthcoming study by B.H. Stolte, 'Questions'. An attempt at understanding Peira 11,1.

**<sup>79</sup>** For this, see the forthcoming study by B.H. STOLTE mentioned above.

<sup>80</sup> CHITWOOD also refers to this Peira fragment and remarks: "One of the reasons that Eustathios Rhomaios was such an accomplished judge was that he appears to have been able to consult the Latin originals when there was uncertainty regarding the meaning of exhellenismoi, an extraordinarily rare ability at the time", see CHITWOOD, Byzantine legal culture (as footnote 1 above), 160–61; Chitwood provides his own translation of this fragment.

# 3.4 Xiphilinos' references to older material: Stephanus, Cyril, *kata podas*, *Paraphrasis Institutionum* of Theophilus, Athanasius of Emesa, Theodorus of Hermoupolis

We have already mentioned that in one of his scholia Xiphilinos refers to the *paragraphai* of Stephanus. <sup>81</sup> In another *scholion*, which is rather lengthy, Xiphilinos refers again to a *paragraphe* by Stephanus. In fact, in that scholion Xiphilinos mentions the opinion of Cyril and advises the audience to read also the relevant *paragraphe* of Stephanus. The *Basilica* fragment that Xiphilinos explains at this point is about deposit. I quote first this *Basilica* fragment:

Έὰν συμφωνήσω τὰ παρατεθέντα μοι ἀποδοῦναι, χώρα τῇ περὶ παραθήκης ἀγωγῇ· καὶ πρὸ ὑπερθέσεως οὐκ ἀπαιτεῖται τόκος, εἰ μὴ ἐξ ἀρχῆς συνεφωνήθη δοθῆναι, εἰ καὶ τὰ μάλιστα ἐπὶ τῶν καλῇ πίστει ἀγωγῶν ἰσοδυναμεῖ τῇ ἐπερωτήσει τῶν τόκων τὸ ὀφφίκιον τοῦ δικαστοῦ. Εἰ δὲ μὴ τὰ αὐτά, ἀλλὰ τοσαῦτα συνεφώνησα δοῦναι, οὐκ ἐνάγομαι τῇ περὶ παραθήκης ἀγωγῇ. 82

If I agree to return what (the money that) has been deposited to me, the action for deposit takes place; and no interest can be asked before delay, unless it has been agreed on beforehand (that interest is) to be given, even if most certainly (demanding interest) in the bona fide actions is equivalent to the stipulation of interests (via) the office of the judge. If, however, I have agreed that it is not this particular (money) but an amount as such, then the action for deposit cannot be raised against me.

According to the case in the *Basilica* fragment there is a distinction between agreeing to give in deposit "some particular money" and agreeing to give (in deposit) "an amount of money". Only in the first case is it allowable to bring an action on the basis of deposit. In the first case, you are not allowed to ask for interest if there is no delay (mora). The case described in the Basilica fragment is not easy to understand because it is not explained in detail. For example, the word "money" ( $\chi p \acute{\eta} \mu \alpha \tau \alpha$ ) is missing, although obviously one must suppose it, and the sentence referring to the interest is not so clear. Xiphilinos finds it therefore necessary to explain this Basilica part in more detail. In fact, he adds in the end of his scholion that if you do not read Cyril and Stephanus at this point, this Basilica part seems to be absurd. Here is the relevant scholion by Xiphilinos: $^{83}$ 

**<sup>81</sup>** BS 622/10-13 (sch. Ca 15 ad B. 13,1,18 = D. 13,6,18). See above the discussion about Xiphilinos' reference to the *rheton* and the *paragraphai* by Stephanus.

**<sup>82</sup>** B. 13,2,24 = D. 16,3,24 (BT 729/5 – 10).

**<sup>83</sup>** BS 660/19 - 661/3 (sch. Ca 1 ad B. 13,2,24 = D. 16,3,24). See WOLSKA-CONUS, L'école de droit (as footnote 1 above), 23 - 25. The *Basilica* editors in their critical apparatus refer at

Τοῦ Νομοφύλακος. Εἰ βούλει ἀνεπισφαλῆ δοῦναι τὴν τοῦ παρόντος κεφαλαίου ἐξήγησιν, ούτως αὐτὸ σύνταξον καὶ ἀνάγνωθι. Ἐὰν συμφωνήσω τὰ παρατεθέντα μοι δοῦναι, χώρα τῆ περὶ παραθήκης ἀγωγῆ. Εἰ δὲ μὴ τὰ αὐτά, ἀλλὰ τοσαῦτα συνεφώνησα δοῦναι, οὐκ ἐνάγομαι τῆ περὶ παραθήκης ἀγωγῆ· καὶ πρὸ ὑπερθέσεως οὐκ ἀπαιτεῖται τόκος, εἰ μὴ ἐξ ἀρχῆς συνεφωνήθη δοθήναι, εί καὶ τὰ μάλιστα ἐπὶ τῶν βόνα φίδε ἀγωγῶν ἰσοδυναμεῖ τῆ ἐπερωτήσει τῶν τόκων τὸ ὀφφίκιον τοῦ δικαστοῦ. Οὕτως αὐτὸ ἀνάγνωθι, ἐπεὶ καὶ ὁ Κύριλλος κατὰ λέξιν οὕτως ἔχει· εἰ εἴπῃ ὁ δεποσιτάριος, ὅτι τὰ αὐτὰ χρήματα ἀποδίδωμι, δεπόσιτον έστι εί δὲ εἴπη, τοσαῦτα, παρεξέρχεται τὴν ἀκρίβειαν τοῦ δεποσίτου καὶ ἀπαιτεῖται τόκος άπὸ μόρας καὶ συμφώνου διὰ τῆς δεπόσιτι, οὐ μὴν ἀπὸ συγχρήσεως, εἰ καὶ ἐπὶ τῶν βόνα φίδε άγωγῶν τὸ τοῦ δικαστοῦ ὀφφίκιον ποιεῖ, ὄσα ἐπερώτησις. Ταῦτα δὴ καὶ ὁ Κύριλλος. Εἰ οὖν οὕτω συντάξεις, ὡς εἴρηται, τὸ κεφάλαιον, ἀναγνῶς δὲ καὶ τὴν παραγραφὴν τοῦ Στεφάνου, γνώση σαφῶς τὸν θεματισμόν. Εἰ δὲ ἀναγινώσκεις αὐτό, καθὼς κεῖται, ἀνόητόν έστιν παντελῶς καὶ τῷ Κυρίλλῳ καὶ τῷ Στεφάνῳ καὶ τῇ ἀκριβεῖ έξηγήσει ἐναντιούμενον.

Of the Nomophylax. If you wish to understand well the present chapter, formulate it in such a way and read the following. If I agree to give what (the money that) has been deposited to me, the action for deposit takes place; If I have agreed to give not this particular (money) but an amount as such, then the action for deposit cannot be raised against me; and no interest can be asked before delay, unless it has been agreed on beforehand (that interest is) to be given, even if most certainly (demanding interest) in the bona fide actions is equivalent to the stipulation of interests (via) the office of the judge. Read therefore this since Cyril has the following, as the phrase goes: "if the depositee84 said that 'I give back the same money' it is a deposit; if, however, he said (an amount) as such, then (this agreement) surpasses the notion of deposit and interest is demanded from delay and from an agreement because of the deposit and not because of shared use, even if in the bona fide actions the office of the judge has the same effect as the stipulation (when demanding interest)." This is what Cyril said. If therefore you formulated this chapter in such a way, as we have said, and you read the paragraphe by Stephanus you will better understand the case. For if you read this as it is, it looks completely absurd and contrary to the detailed explanation by Cyril and Stephanus.

Xiphilinos remarks at the end that there is a contradiction between on the one hand the Basilica fragment and on the other hand the explanations by Cyril and Stephanus. He implies that the Basilica text is short and difficult to understand, whereas the relevant explanations by Cyril and Stephanus are detailed

this point to two scholia handed down in another manuscript (the manuscript P) at the same book and title of the Basilica. The first scholion in P bears no heading with a name of a scholiast but is almost the same with the first eight lines of the present scholion 1 in the manuscript Ca; see BS 691/1-9 (sch. P 1 ad B. 13,2,24 = D. 16,3,24).

<sup>84</sup> In English literature sometimes also the term "depositary" is used instead of the word "depositee" for the *depositarius*, the person to whom the thing is given to keep safe. In this paper I use the term "depositee" in English following the terminology in, for example, NICHOLAS, Introduction (as footnote 28 above), 168.

and clear.<sup>85</sup> By reading this scholion of Xiphilinos the context of the *Basilica* fragment becomes indeed more clear. There is a difference when I agree to hand "these very coins" in deposit and when I agree to give "an equal amount of coins" in deposit. In the first case, I want to receive exactly the same coins that I have given you in deposit for me to keep safe, whereas in the second case, I want you to give back not exactly the same coins but the same amount of coins. The action on the basis of deposit is allowed only in the first case.

Deposit was in Roman law a bona fide contract, which meant that ancillary clauses were directly enforceable. If, for example, you had agreed and had incorporated an interest clause in a deposit contract, you could claim this interest on the basis and the terms of the deposit contract. It was not necessary to insert this clause in a separate contract, a stipulatio,86 something that was applicable in stricti iuris contracts. For example, in the case of a loan for consumption (mutuum), if you wanted to lend money and you wanted to claim interest you had to make a new contract, a stipulatio, for the interest separately. If you had incorporated the interest clause in the *mutuum* contract, it was not enforceable because mutuum was a strict iuris contract. The interest clause was, however, enforceable in a deposit contract because of the bona fide character of the deposit contract. There was nevertheless a problem when you deposited money. In the contract of deposit, you were obliged to give back exactly the same object. This was problematic with money. When you deposited money, your intention most of the time was to receive the same amount of money back after a while and not the same coins. This was practical also for the depositee. He could use the money and return to the depositor the same amount of money (and not the actual same coins) after the agreed lapse of time. That is why a special kind of deposit was gradually developed concerning money. The term that is used to describe this deposit is depositum irregulare because in such a deposit, the depositee is not obliged to return the same money, i.e. the actual same coins, but the same amount of money. 87 The advantage of the depositum irregulare is that you could add in such a contract an interest clause, which is directly enforceable because of the bona fide character of the depositum, as explained above. In other words, you could go to court and demand your interest on the basis of your one contract. The second relevant scholion in the manuscript P clarifies this point even better by mentioning: "... τουτέστιν, ὥσπερ

**<sup>85</sup>** On the explanations of Stephanus for this subject, see DE JONG, Stephanus (as footnote 55 above), 298–300.

**<sup>86</sup>** On the *stipulatio*, see footnote 76 above.

**<sup>87</sup>** On the beginnings of the *depositum irregulare* and the use of this term, see ZIMMERMANN, Obligations (as footnote 28 above), 217 – 219.

δυνάμεθα τόκον ἐπερωτῶντες ἀπαιτῆσαι, οὕτω καὶ κινοῦντες βόνα φίδε δικαστήριον διὰ τοῦ δικαστοῦ ληψόμεθα τόκον." [... that is, just as we can claim interest if we have made a stipulation (for the interest), in the same way we can also bring the bona fide action before the court and receive interest by the judge]. All this information now makes clear the above Basilica sentence about the interest in a deposit and in particular the sentence that demanding interests with bona fide actions was equivalent with demanding interests with the stipulation of interests via the office of the judge.88

We have seen two scholia in which Xiphilinos refers to Stephanus by name. I believe there could be more scholia of Xiphilinos that use Stephanus' teaching. For example, in a very short scholion with the heading "the nomophylax", we read: "... Γρατούιτον γὰρ εἶναι δεῖ τὸ μανδάτον"89, which means that the mandate is a gratuitous contract. As I have already mentioned, the use of technical legal terms in Latin transliterated in Greek letters is something that we encounter in eleventh- and twelfth-century Byzantine jurists. Hence, in this sentence it is not unusual that the word "μανδάτον" is used for the contract of mandate. $^{90}$ What I find unusual is the use of the word "γρατούιτον", which means gratuitous and is not a technical term. There is no need to use Latin for that word. It seems that Xiphilinos (if Xiphilinos is indeed the author of this scholion)<sup>91</sup> has taken this sentence from someone else, and in this case he must have taken it from Stephanus because we do find scholia of Stephanus with exactly this very sentence.92

In two scholia Xiphilinos refers to the works of both Theodorus of Hermoupolis and Athanasius of Emesa.<sup>93</sup> The first scholion, which is rather lengthy, comments on Basilica fragment 21,1,51 which corresponds with Novel 90 c. 6 about witnesses who are alleged to be slaves. I quote here the beginning of B. 21,1,51

**<sup>88</sup>** BS 691/11-13 (sch. P 2 ad B. 13,2,24 = D. 16,3,24); see footnote 83 above.

<sup>89</sup> BS 753/21-21 (sch. Ca 38 ad B. 14,1,26 = D. 17,1,126).

<sup>90</sup> On the contract of mandatum in the Basilica, see H. DE JONG, Έντολή (mandatum) in den Basiliken. Legal history library, 31. Leiden/Boston 2019.

**<sup>91</sup>** See the observations at the beginning of this paper about the problems of scholia in general.

**<sup>92</sup>** See, for example, BS 779/4-5 (sch. Ca 7 ad B. 14,1,48 = D. 17,1,48).

<sup>93</sup> BS 1274/22 - 1275/13 (sch. Pa 4 ad B. 21,1,51 = Nov. 90 c. 6) and BS 1611/1 - 11 (sch. Pa 13 ad B. 23,1,76 = C. 4,30,14). For the works of Athanasius of Emesa and Theodorus of Hermoupolis, see Troianos, Πηγές, 153 – 157 = Quellen, 112 – 116 (as footnote 12 above). See also the Online Bibliography by TH.E. VAN BOCHOVE, <a href="https://referenceworks.brillonline.com/">https://referenceworks.brillonline.com/</a> browse/basilica-online> (date of access: 13/06/2021), part VII. Legal education and antecessores / Antecessores and σχολαστικοί / Athanasius and Theodorus.

= N. 90 c. 6 because, as we will see, Xiphilinos begins with a problem that arises in the beginning of this fragment:<sup>94</sup>

Εἰ δὲ λέγοιτο δουλικῆς εἶναι τύχης ὁ βουλόμενος μαρτυρεῖν, ὁ δὲ ἐλεύθερος ἰσχυρίζεται καθεστάναι, εἰ μὲν ἐκ γενετῆς, πληρούσθω μὲν ἡ μαρτυρία, ταῖς δὲ παραγραφαῖς ὁ περὶ τύχης φυλαττέσθω λόγος, ὤστε εἰ φανείη τύχης οἰκετικῆς ὤν, τὴν αὐτοῦ μαρτυρίαν ἀντὶ μηδὲ γενομένης εἶναι·

If it is said that the person wishing to testify is of slave status, whereas he insists that he is free, if it is (free) birth, his evidence must be fully observed and the question about his status is to be reserved for the objections (= rejoinder), so that if it is proved that he is of a slave status, his evidence will be considered as not being made (= void).

# Let us examine now the relevant scholion by Xiphilinos:

Τοῦ Νομοφύλακος. Οὐ δεῖ προσέχειν ἐνταῦθα τῷ Ἑρμοπολίτη Θεοδώρῳ ἀλλὰ μᾶλλον τῷ Άθανασίω· πρῶτον μέν, ὅτι τὰ παρὰ τοῦ Ἀθανασίου λεγόμενα πρὸς σύστασίν ἐστι τοῦ ύποκειμένου [ἤτοι] τῆς νεαρᾶς. Καὶ γὰρ ἡ νεαρὰ προδήλως δοκεῖ λέγειν τὸ 'ἐκ γενετῆς' περὶ έλευθέρου. Εἰποῦσα γάρ 'εἰ δὲ λέγοιτο δουλικῆς εἶναι [τύχης] ὁ βουλόμενος μαρτυρεῖν, ὁ δὲ έλεύθερος ἰσχυρίζεται καθεστάναι' ἐπήγαγεν, ὅτι εἰ μὲν ἐκ γενετῆς, δεῖ δέχεσθαι τὰς τούτων μαρτυρίας, καὶ ἐν τῷ καιρῷ τῆς παραγραφῆς ἐξετάζειν καὶ τὰ περὶ τῆς τύχης εἰ δὲ γέγονε μὲν δοῦλος, ἠλευθέρωται δὲ, δεικνύειν εὐθὺς τὴν παραγραφὴν ἢ δι' ὅρκου ταύτην πιστοῦν, ἀκριβῶς εἰδυῖα, ὅτι δύο γένη τῶν ἐλευθέρων εἰσίν, ἤγουν εὐγενεῖς καὶ ἀπελεύθεροι. Συμβάλλεται γοῦν, ὡς εἴπομεν, τῇ συστάσει τῶν παρὰ τῆς νεαρᾶς ἀριδήλως ρηθέντων ή τοῦ Ἀθανασίου ἐξήγησις. Κατὰ πρῶτον οὖν, ὡς εἴπομεν, λόγον διὰ ταῦτα δεῖ προσδεχθηναι την τοῦ Άθανασίου ἐξήγησιν, ὅτι συμβάλλεται τῆ συστάσει τῆς ἐννοίας τῆς νεαρᾶς· δεύτερον δέ, ὅτι τὸ παρὰ τοῦ Ἑρμοπολίτου λεγόμενον παντελῶς ἐστιν ἄτοπον· ἐὰν γὰρ δεξώμεθα τὸ 'ἐκ γενετῆς' ἐπὶ δούλου, εὑρισκόμεθα διαίρεσιν τῆς δουλείας ποιοῦντες, ὅπερ οὐκ ἐστιν. Ἅτμητος γὰρ ἡ δουλεία, ὡς ἐν τοῖς Ἰνστιτούτοις ἐμάθομεν· πάντως γὰρ ἐκ γενετῆς δοῦλος ἐκεῖνός ἐστιν ὁ ἐν δουλεία γεννηθείς. Ώστε εὑρισκόμεθα λέγοντες, ὅτι οἱ μὲν ἀπὸ δούλων τεχθέντες μαρτυρήσουσιν ἐκ τοῦ παραχρῆμα, οἱ δὲ παρ' ἡμῶν ἀγορασθέντες οὐ μαρτυρήσουσιν, ὅπερ ἐστίν γελοιοτέρον. Οὐ δεῖ οὖν προσέχειν, ὡς εἴπομεν, τῆ τοιαύτη έξηγήσει. Πλὴν οἶμαι μήτε αὐτὸν τὸν Θεόδωρον τὸ τοιοῦτον ἄτοπον ἐννοῆσαι, μήτοιγε καὶ είπεῖν, ἀλλ' ἐκεῖνον μὲν φιλοσύντομον ὄντα οὕτω γράψαι, ὅτι ἐὰν ὁ μάρτυς λέγεται εἶναι δοῦλος, ἑαυτὸν δὲ φησιν εἶναι ἐλεύθερον, εἰ μὲν ἐκ γενετῆς, μαρτυροίη, έκβάλλεται δὲ διὰ παραγραφῆς· εἰ δὲ ἀπελεύθερος εἴη, δεικνύτω τὴν ἐλευθερίαν αὐτοῦ· παραγράψαι δὲ τινα τῶν ἀμαθῶν οἰόμενον νόμους γινώσκειν τὸ 'ἔστι δοῦλος'. ὅπερ καὶ παλλαχοῦ τῶν Βασιλικῶν εὑρίσκεται.95

Of the *nomophylax*. You should not take into account here (the words of) Theodorus of Hermoupolis but rather (those of) Athanasius; first of all, because what Athanasius has said helps to understand the content of the Novel. For the Novel obviously means to apply

<sup>94</sup> BT 1029/13-17.

<sup>95</sup> BS 1274/22-1275/13 (sch. Pa 4). WOLSKA-CONUS, L'école de droit (as footnote 1 above), 21-23 refers also to this scholion.

the phrase "from birth" to a free man (= that he is by birth a free man). By saying therefore "if it was alleged that the person who wants to testify is of slave status, while he claims to be free" is it brought forward that, if it is from (free) birth, we should accept their evidence and at the time of the objection (= rejoinder) we will examine his status; if, however, he was a slave but he has been freed, the objection can be pointed out directly or by an oath which certifies that you know exactly that there are two kinds of free men, namely the ones who are free by birth and the ones that are freed. Hence, the explanation by Athanasios helps, as we said, clarify the content of what is mentioned in the Novel. First, as we said, there is a reason to accept the explanation of Athanasius because it helps the meaning of the content of the Novel; second, because what is mentioned by Theodorus of Hermoupolis here is completely absurd; for if we accept that "from birth" applies to a slave, we find we are making a distinction of slavery, something that is not possible. Because we have learned in the *Institutes* that slavery is indivisible; for it is always the case that a slave born is that who is born in slavery. Otherwise, we find ourselves saying that those who have been born by a slave are allowed to be used as witnesses, while the ones who have been bought by us are not allowed to be used as witnesses, something that is even more ridiculous. We should not therefore take into account this explanation, as we said. I do suppose, however, that even Theodorus himself had not understood that in this absurd meaning, nor wanted to write is as such, but because he wanted to be brief he had written this as follows, (namely) that if the witness is said to be a slave but he himself claims to be a freeman, if it is (free) birth, he gives evidence but may be thrown out by the rejoinder (praescriptio);<sup>96</sup> if he is a freed man, let him bring forth his freedom; and one of the nitwits who thinks he knows the laws has annotated: "is a slave", which is to be found in more parts in the Basilica.

Xiphilinos begins his scholion by telling his pupils to be very cautious when reading Theodorus at this point and advises them to read Athanasius instead. Roughly at the beginning of his scholion, Xiphilinos mentions that obviously when reading the words of the Novel "ἐκ γενετῆς" one should imagine that this refers to the evidence of free birth, i.e. of having been born free. 97 He analyses this point and once again mentions that Athanasius explains this issue correctly, whereas if one would read Theodorus here the case would seem to be absurd. He does, however, excuse Theodorus and admits that the "absurdness" in Theodorus' explanation is due to the fact that Theodorus is very brief. Xiphilinos also refers to the *Institutes* and the *Basilica*. He mentions, "Because we have learned in the Institutes that slavery is indivisible", and by that he must mean the Paraphrasis Insitutionum of Theophilus. This reference of Xiphilinos could

<sup>96</sup> By the time of the cognitio process the term praescriptio could indicate any defence by the defendant against the claim of the plaintiff; see M. KASER/K. HACKL, Das Römische Zivilprozessrecht. München 1996, 487 - 488.

<sup>97 &</sup>quot;Καὶ γὰρ ἡ νεαρὰ προδήλως δοκεῖ λέγειν τὸ 'ἐκ γενετῆς' περὶ ἐλευθέρου."

be an indication that the *Institutes* were part of the law curriculum of the law school in eleventh-century Constantinople. Indeed, in the *Paraphrasis Institutionum* of Theophilus we read that slavery is indivisible:

Καὶ ἡ μὲν τῶν δούλων τύχη οὐδεμίαν ἐπιδέχεται διαίρεσιν· οὐ γάρ ἐστιν εἰπεῖν ἐπ' αὐτῶν ἦττον δοῦλος ἢ μᾶλλον δοῦλος, ἔστιν οὖν ἄτομον ἡ δουλεία. ἐπὶ δὲ τῶν ἐλευθέρων πολλὰς εὑρίσκομεν διαφοράς· ἢ γὰρ εὐγενεῖς εἰσιν ἢ ἀπελεύθεροι.98

The condition of slaves is not subject to division, for in their case it cannot be said that one is less a slave or more a slave. Slavery, accordingly, is indivisible. In the case of the free, on the other hand, we find many points of difference, for they are either freeborn or freed.

The second scholion attributed to Xiphilinos in which he refers to both Athanasius of Emesa and Theodorus of Hermoupolis is the following:<sup>99</sup>

Τοῦ Νομοφύλακος. Ἐκ τοῦ κατὰ πόδας, Κάκείναις δὲ ταῖς ἀμεριμνίαις, αἴτινες μετὰ τὴν συμπλήρωσιν τῶν προικιμαίων συμβολαίων περὶ τῆς καταβληθείσης προικὸς ἐκ μέρους ἢ εἰς ὁλόκληρον ἐκτίθενται, μηδεμίαν παραγραφὴν ἀναργυρίας παντελῶς ἀντιτίθεσθαι. Ταῦτα μὲν ἔχει τὸ κατὰ πόδας. Καὶ δῆλον ἐκ τούτου, ὅτι κἄν ἐγγέγραπται τοῖς γαμικοῖς συμβολαίοις, ὅτι ἐδόθη ἡ προίξ, μὴ γέγονε δὲ ἀποληπτικὴ ἰδιαζόντως παριστῶσα τὸν ἄνδρα τὴν προῖκα λαβεῖν, οὐδὲν ἦττον ἀντιτιθέναι δύναται τὴν ἀναργυρίαν τῆ μὴ ἀπαριθμηθείση προικὶ κατὰ τὴν ρ΄. νεαράν. Οὕτω γὰρ λέγοντες οὕτε τῷ Ἀθανασίῳ ἐναντιωθησόμεθα ἐν διαφόροις διατάξεσι ἐξηγησαμένῳ μὴ ὡφελεῖσθαι τὴν γυναῖκα ἐκ τοῦ περιέχεσθαι τῷ γαμικῷ συμβολαίῳ δοθῆναι τὴν προῖκα, εἰ μὴ καὶ τὴν ἀρίθμησιν δείξει, οὕτε τῷ Ἑρμοπολίτη Θεοδώρῳ.

Of the *Nomophylax*. From the *kata podas*. And against those receipts, the ones that are made after the execution of the dowry contracts about the dowry that is paid in part or completely no defence for non-delivery of money<sup>100</sup> can be opposed at any case. This is what the *kata podas* has. And it is clear from this that even if it is written in the marriage contracts that the dowry has been given but there was no apart receipt that the man has received the dowry, he can nonetheless oppose the defence on non-delivery of money for the non-paid dowry according to Novel 100. By saying this we shall not contradict either Athanasius who explains in various constitutions that is not to the benefit of the woman to include in the marriage contract that the dowry has been given, if she not also proves payment, nor (shall we contradict) Theodorus of Hermoupolis.

**<sup>98</sup>** Theophilus, *Paraphrasis Institutionum*, 1,3,5 from the edition J.H.A. Lokin/R. Meijering/B.H. Stolte/N. van der Wal, Theophili Antecessoris Paraphrasis Institutionum, with a translation by A.F. Murison. Groningen 2010.

<sup>99</sup> BS 1611/1-11 (sch. Pa 13 ad B. 23,1,76 = C. 4,30,14).

**<sup>100</sup>** The *exceptio non numeratae pecuniae*, i.e. the defence that money was not paid. See KASER/KNÜTEL/LOHSSE, Römisches Privatrecht (as footnote 28 above), 298 and M.R. CIMMA, De non numerata pecunia. *Pubblicazioni dell'Istituto di Diritto Romano e dei Diritti dell'Oriente Mediterraneo*, 61. Milano 1984.

The exceptio non-nummeratae pecuniae was an exception used by the defendant in which he claimed that the plaintiff had not paid the money to him. The most important result of this exception was that it put the burden of proof that the money had not paid upon the plaintiff. Justinian reduced the time of prescription of this exception from five to two years. According to the Codex (the part from which this Basilica fragment derives from), because some litigants tried to abuse this exception, the emperor considered it right and fair to abolish this exception in some cases and, in other cases, to reduce it to a very short time. One of the cases in which the emperor abolished this exception was the case of receipts from dowries, the case that Xiphilinos discusses at this point. 101

Xiphilinos quotes from the *kata podas*. The so-called *kata podas* translation (ἡ κατὰ πόδας ἑρμηνεία), meaning a word-by-word translation, is a term related to the teaching of the antecessores and in particular to Thalaeleus' teaching on the Codex. 102 As mentioned above, the antecessorian method of teaching has been examined in detail by H.J. SCHELTEMA in his classic monography and a series of articles. 103 The teaching method of the antecessores was divided into two stages. In the first stage, the antecessores made a more or less literal translation (index) of the original Latin text that had to be taught, and in the second stage, the antecessores would return to the original Latin text, the so-called rheton (ὑητὸν), and they would discuss the legal (and sometimes linguistic) questions by providing comments (παραγραφαί).

The Codex consisted of imperial constitutions, and it was a demanding text for the students because of the difficult Latin since the emperors often used a rhetorical style. It seems that even an *index* was not sufficient for the students when being taught the Codex. This explains why Thalelaeus in his courses

<sup>101</sup> See C. 4,30,14,1: "... We therefore ordain that absolutely no defence of money not paid be opposed to a document recording the deposit of specified things or a specified sum of money and to receipts for public charges (publicae functiones), whether they are recorded as paid for the whole amount or in part, nor also to those receipts, which are produced after the execution of dowry documents for the payment of the dowry for the whole amount or in part", the translation from B.W. FRIER (ed.), The Codex of Justinian. A new annotated translation, with parallel Latin and Greek text. Based on a translation by Justice Fred H. Blume. Cambridge 2016, 933. 102 "τὸ κατὰ πόδας" is short for "ἡ κατὰ πόδας ἑρμηνεία". On Thalelaeus see D. Simon, Aus dem Kodexunterricht des Thalelaios. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung 86 (1969), 338-383 and 87 (1970), 315-394, RIDA 16 (1969), 283-308 and 17 (1970), 273-311.

<sup>103</sup> SCHELTEMA, L'enseignement (as footnote 52 above); in the Opera Minora, see also the many articles of Scheltema related to the subject, especially, A3a-3r, 111-157. See also the Online Bibliography by Th. E. VAN BOCHOVE, <a href="https://referenceworks.brillonline.com/browse/basil-">https://referenceworks.brillonline.com/browse/basil-</a> ica-online> (date of access: 13/06/2021), part VII. Legal education and antecessores.

also provided a *kata podas*, *i.e.* a word-by-word translation that accompanied the Latin *Codex* text (*rheton*). Based on the manuscripts, it can be concluded that these Greek translations must have been written above the lines of the Latin manuscript of the *Codex*. Each Latin word had its exact Greek translation above it; in other words, it was something like an automatic, mechanical translation. Hence, Thalelaeus often used the *kata podas* in his lectures and quoted from it. We know that fragments of the *antecessores* were still circulating in the eleventh and twelfth centuries, and I think that this reference of Xiphilinos to the *kata podas* is further evidence in favour of this. It seems that even in the eleventh century Thalelaeus' work was still helpful in explaining law deriving from Justinianic legislation and in particular the *Codex*. Finally, there is another preserved scholion by Xiphilinos in which he refers to Theodorus and is very brief.<sup>104</sup>

# 4. Number and material scope of the scholia "of loannes"

To begin with, the name Ioannes is used in various examples and cases in the *Basilica* scholia, mostly together with names such as Peter and Paul. In this table I do not include the name John (Ioannes) when it is used in such a case, meaning an example in the *Basilica* scholia. I also do not include the name Ioannes when it refers clearly to a praetorian prefect who was called Ioannes. Aim of this table is to collect and record the *Basilica* scholia that have the heading "of Ioannes" and eventually compare these scholia with those of Xiphilinos and investigate whether we can identify this Ioannes with Xiphilinos. In the following, I provide a table with scholia including the name Ioannes either in their heading or in their text when it is obvious that they refer to an Ioannes who is a scholiast, *i.e.* someone who comments on legal issues.

Book 12, title 2 1 scholion BS 561/32 – 34 (sch. Ca 8 ad B. 12,2,7 = D. 10,3,7)

**104** BS 3612/6-7 (sch. Pe 7 ad B. 60,29,10 = C. 9,32,4). The *nomophylax* is not mentioned in the heading of this scholion but the text contains the phrase "as the Nomophylax says", as follows: "Τοῦτο, ὡς φησιν ὁ Νομοφύλαξ, καὶ ὡς ἔξεστιν ὑπονοεῖν καὶ ἀφ'ὧν φησιν ὁ Θεόδωρος, οὐ καθολικῶς νοητέον, ἀλλ' ἐπὶ κοινῶν πραγμάτων καὶ συναλλαγμάτων" [This, as the *Nomophylax* says, and as we can infer also from what Theodorus says, should be understood not to apply generally, but in commonly held goods and contracts (shared by man and wife)].

Book 13, title 2

Περὶ παρακαταθήκης καὶ τῆς κινουμένης άγωγῆς κατὰ τοῦ παράθεσιν λαβόντος About deposit and the action against the depositee

1 scholion

BS 639/30-32 (sch. Ca 18 ad B. 13,2,1=D. 16.3.1)

Book 18, title 2

Περὶ ἀγωγῆς τῆς κινουμένης κατὰ τοῦ δεσπότου ἢ τοῦ πατρὸς ἡνίκα γινωσκόντων αὐτῶν καὶ μὴ ἀντιλεγόντων πραγματευόμενος ὁ δοῦλος ἢ ὁ ὑπεξούσιος παῖς ἔνοχοι γίνονται τοῖς πρὸς αὐτοὺς συναλλάττουσιν About the action brought against the master or the father when, when they know but (nevertheless) do not speak against of this, (that) the slave who transacts or the son in potestate become liable to the parties with whom they have transacted

1 scholion

BS 1086/27 - 1087/5 (sch.  $\Pi$  3 ad B.  $18.2.7 = D. 14.4.7.8)^{105}$ 

Book 21, title 1

Περί μαρτύρων εὐϋπολήπτων καὶ ἀτίμων About witnesses of a good reputation and dishonourable ones (= of the upper and of the lower class)

3 scholia

BS 1234/23 - 28 (sch. Pa 3 ad B. 21,1,7 = BS 1238/32-1239/5 (sch. Pa 5 ad B. 21,1,13 = D. 22,5,14

BS 1243/6 - 8 (sch. Pa 3 ad B. 21,1,17 = D. 22,5,18)

Book 21, title 2

Περὶ τούτων οἵτινες σπιλοῦνται ἀτιμία About those who are marked by infamy<sup>106</sup> 1 scholion

BS 1300/6-8 (sch. Pa 3 ad B. 21,2,8 = D. 3,2,8)

Book 21, title 3

Περὶ αἰτιῶν δι' ὧν ἀτιμία τινὶ οὐ προσγίνεται About reasons for which infamy is not attributed to someone

1 scholion

BS 1319/27 - 33 (sch. Pa 3 ad B. 21,3,12 =C. 2,11,13)

<sup>105</sup> Here as a reference within the scholion and not in the heading: "... ὥσπερ καὶ Ἰωάννης ὁ σοφώτατος άντικήνσωρ...".

<sup>106</sup> Infamy (infamia) in Roman law was a penalty for wrong and disgraceful conduct and brought restriction of certain rights; see M. KASER, Infamia und ignominia in den römischen Rechtsquellen, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung 73 (1956), 220 - 278.

#### Book 23, title 3

Περὶ τόκων καὶ καρπῶν καὶ πραγμάτων καὶ πάσης προσθήκης καὶ ὑπερθέσεως

About interests and fruits and goods and every addition and delay

Book 23, title 4 Περὶ ἀργυροπρατικῶν συναλλαγμάτων About contracts of bankers

Book 29, title 1

Περὶ δικαίου προικὸς καὶ πρὸ γάμου δωρεᾶς About the law of dowry and donations before marriage

## Book 38, title 9

Περὶ πραγμάτων τούτων οἴτινες ὑπὸ ἐπιτροπὴν ἢ κουρατωρείαν εἰσι πρὸς τὸ χωρὶς ἀποφάσεως μὴ ἐκποιεῖσθαι ἢ ὑποτίθεσθαι καὶ πότε ψῆφος χρειώδης οὐκ ἔστιν

About things of those who are under a guardian or a curator in respect of the fact that these things cannot be sold or pledged without a decision, and about when a decision is not necessary

#### 9 scholia

BS 1623/5 – 7 (sch. Pa 14 ad B. 23,3,1 = D. 22,1,1)

BS 1632/18 – 23 (sch. Pa 17 ad B. 23,3,3 = D. 22,1,3)

BS 1679/8 – 9 (sch. Pa 3 ad B. 23,3,33 = D. 22,1.33)

BS 1679/17 – 18 (sch. Pa 7 ad B. 23,3,33 = D. 22,1,33)

BS 1679/19 – 21 (sch. Pa 8 ad B. 23,3,33 = D. 22,1,33)

BS 1684/10 – 12 (sch. Pa 21 ad B. 23,3,38 = D. 22,1,38)

BS 1684/13 – 15 (sch. Pa 22 ad B. 23,3,38 = D. 22,1,38)<sup>107</sup>

BS 1685/9 – 12 (sch. Pa 30 ad B. 23,3,38 =

D. 22,1,38)

BS 1688/14-15 (sch. Pa 3 ad B. 23,3,45 = D. 22,1,45)

#### 1 scholion

BS 1713/11 – 13 (sch. Pa 3 ad B. 23,4,4 = Nov. 136 c. 4)

#### 3 scholia

BS 2033/3-4 (sch. F Pa 3 ad B. 29,1,43 = D. 23,3,47)

BS 2104/28-29 (sch. F Pa 5 ad B. 29,1,118 = C 5, 12,31)

BS 2108/10-13 (sch. F Pa 8 ad B. 29,1,119 = C 5,13,1)

### 2 scholia

BS 2257/26 (sch. Pb 3 ad B. 38,9,27 = C 5, 37,13)

BS 2263/25 (sch. Pb 7§ ad B. 38, 9,41 = C 5,37,28)

<sup>107</sup> This scholion has as a heading "Τοῦ αὐτοῦ" (= of the same) and presumably it should be therefore attributed to Ioannes since it follows a scholion entitled "of Ioannes".

Book 39, title 1 Περὶ μέμψεως διαθήκης About the complaint because of a testament contrary to  $duty^{108}$ 

Book 40, title 3 Περὶ ἀγαθῆς διακατοχῆς καὶ ἐναντιώσεως

Book 40, title 5 Περὶ τοῦ Καρβωνιανείου παραγγέλματος, ἡνίκα ἀμφίβολός ἐστιν ἡ τοῦ ἀνήβου σπορά About the Carbonian edict, namely when there are doubts about the status of a child under the age of puberty<sup>110</sup>

About bonorum possessio and opposition109

Book 41, title 1 Περὶ τοῦ Φαλκιδίου About the *lex Falcidia*<sup>111</sup> 2 scholia
BS 2302/27 – 28 (sch. Pb 9 ad B. 29,1,6 =
D. 5,2,6)
BS 2337/23 (sch. Pb 2§ ad B. 39,1,41 = C. 3,28,12)

1 scholion
BS 2370/20-22 (sch. Pb 10 ad B. 40,3,3,
= D. 37,4,3)

1 scholion BS 2393/9 (sch. Pb 2 ad B. 40,5,17 = C 6,17,1)

2 scholia
BS 2405/31 (sch. Pb 46§ ad B. 41,1,1 = D. 35,2,1 pr. - § 18)
BS 2407/7 - 13 (sch. Pb 4 ad B. 41,1,3 = D. 35,2,3)

<sup>108</sup> The "κατὰ τῆς διαθήκης μέμψις" corresponds to the "querela inofficiosi testamenti", which was in Roman law the complaint that certain close relatives could bring if they had been disinherited or had been bequeathed less than one quarter of his legal share of the inheritance. See NICHOLAS, Introduction (as footnote 28 above), 261-264 and KASER/KNÜTEL/LOHSSE, Römisches Privatrecht (as footnote 28 above), 464-466.

**<sup>109</sup>** In Roman law of succession *bonorum possessio* was the praetorian counterpart of the civil law succession; see in detail NICHOLAS, Introduction (as footnote 28 above), 243–246 and KASER/KNÜTEL/LOHSSE, Römisches Privatrecht (as footnote 28 above), 440–444.

**<sup>110</sup>** The Carbonian edict was applicable when questions arose about the status of a minor heir, whether he was, for example, illegitimate or a slave. See D. 37.10.

<sup>111</sup> The *Lex Falcidia* (40 BC) was a Roman law protecting the heir from an extensive use of legacies by the testator. This law brought limitations to legacies for the testator securing thus a portion of his property for the heir. See Nicholas, Introduction (as footnote 28 above), 266 and Kaser/Knütel/Lohsse, Römisches Privatrecht (as footnote 28 above), 488–490. For the *Lex Falcidia* in Byzantine law, see K. Triantaphyllopoulos, Ὁ φαλκίδιος νόμος ἐν τῷ Βυζαντινῷ Δικαίῳ. Athens 1912 (repr. in K. Triantaphyllopoulos, Ἀπαντα, curated by P. Tsoukas, vol. A, Foundation of Gazes-Triantaphyllopoulos – Academy of Athens 2008, 169–274).

Book 60, title 3 Περὶ νόμου τοῦ Ἀκουϊλίου περὶ ζημίας About the  $lex\ Aquilla\ on\ damage^{112}$ 

2 scholia
BS 3110/31-3111/2 (sch. Pe 19 ad B. 60,3,15 = D. 9,2,15)
BS 3122/28-3123/3 (sch. Pe 10 ad B. 30,3,27 = D. 9,2,27)

Book 60, title 11 Περὶ ἰδιωτικῶν ἁμαρτημάτων About private delicts 1 scholion
BS 3333/6-16 (sch. Pe 8 ad B. 60,11,1 = D. 47,1,1)

There are in total thirty-two scholia that include the name Ioannes either in their text or in the heading. There is moreover one scholion that has the heading "of the *nomophylax* Ioannes", which can be clearly attributed to Xiphilinos, and that is why I have included this scholion in the first table with the scholia of Xiphilinos. There is also another scholion with the heading "of Ioannes Nicaeus". The scholia with the words "of Ioannes" are preserved in five manuscripts, as follows: two scholia in the codex Coislinianus gr. 152 (= Ca), one scholion in Zachariä's *apographum* of the Berlin manuscript codex rescr. Berolinensis fol. 28 (II)<sup>115</sup>, eighteen scholia in the codex Parisinus gr. 1348 (= Pa), eight scholia in the codex Parisinus gr. 1350 (= Pe). Manuscripts Ca and Pe are both dated to the twelfth century (the Ca in the second half of the twelfth century<sup>116</sup>), manuscript Pa dates from the thirteenth century and manuscript Pb dates from the fourteenth century. The Krakoviensis (lost Berlin manuscript that is now recovered and kept in Cra-

**<sup>112</sup>** Wrongful damage to property was regulated in Roman law by the *lex Aquilia*, a law issued in the third century BC. On the *lex Aquilia*, see ZIMMERMANN, Obligations (as footnote 28 above), 953–1049 and KASER/KNÜTEL/LOHSSE, Römisches Privatrecht (as footnote 28 above), 366–369.

<sup>113</sup> BS 1229/23-24 (sch. Pa 31 ad B. 21,1,12 = D. 22,5,3).

<sup>114</sup> BS 1244/18-20 (sch. Pa 6 ad B. 21,1,20 = D. 22,5,21).

<sup>115</sup> This manuscript has a long history of transmission. In short, during the compilation of the Groningen edition this manuscript was considered lost, and that is why the editors of the Groningen edition relied on the apographum that Zachariä had made on this manuscript. In the meantime, the Berlin manuscript has resurfaced and is now kept in Cracow, known as the Krakoviensis 28/266 rescr., and is olim Berlin, Preußische Staatsbibliothek, Cod.gr. 28. For an overview of the history of this manuscript, see B. H. Stolte, 'New Praefatio' to Basilica Online. Justinian's Corpus iuris in the Byzantine world. Leiden 2018, 3.1 <a href="https://referenceworks.brillonline.com/browse/basilica-online#\_ftn80">https://referenceworks.brillonline.com/browse/basilica-online#\_ftn80</a>, date of access: 13/06/2021>.

**<sup>116</sup>** According to the editors of the Groningen edition this manuscript is dated to the thirteenth century.

<sup>117</sup> See Repertorium I (as footnote 39 above), no 203, no 163, no 161 and no 158 on p. 230, p. 191, p. 190 and p. 186, respectively.

cow and was used for the apographum by Zachariä) dates from the twelfth or the thirteenth centuries. 118

The scholia with the words "of Ioannes" are spread throughout various Basilica books. In the third title of the twenty-third Basilica book we find nine scholia which this name is attached. Nearly all of the thirty-one scholia with the name "of Ioannes" are very short. I do not believe that we can attribute all these scholia to John Xiphilinos. First of all, the name Ioannes was a common name in Byzantium. It is therefore quite possible that there was another Ioannes who wrote scholia on the *Basilica*, other than Ioannes Xiphilinos. There is some evidence for that. There is one anonymous scholion (which according to Scheltema can be attributed to Stephanus<sup>119</sup>) that clearly refers to an antecessor named Ioannes. I quote from this scholion:<sup>120</sup>

Καὶ ἴσθι, ὅτι Δωρόθεος μὲν ὁ μακαρίτης τὴν τοιαύτην σημασίαν σωφρόνως ἰνδέκευσε άκολουθήσας τῷ ἡητῷ, ὤσπερ καὶ Ἰωάννης ὁ σοφώτατος ἀντικήνσωρ. Θαλέλαιος μέντοι ὁ τῆς εὐ[κλεοῦς] μνήμης οὐχ οὕτως ἐνόησεν ...

And know that the late Dorotheus has rendered this meaning prudently in his index121 following the rheton just as the Ioannes, the most wise antecessor. Thalelaeus, however, of glorious memory did not understand in this way...

The aforementioned scholion is clearly an old one. This can be confirmed, for example, from the way the scholiast refers to the deceased Dorotheus and Thalelaeus; especially regarding Dorotheus, the word "μακαρίτης" is used, which indicates that he had died rather recently. So there seems to be an Ioannes who lived in the sixth century and was an antecessor. Indeed, the Ioannes mentioned in this scholion must refer to Ioannes Kobidas, as Scheltema also suggests. 122 According to SCHELTEMA, the antecessor Kobidas must have held an important position amongst the antecessores. 123 This is proven from the above scholion

<sup>118</sup> See ibid., no 92 on p. 117.

<sup>119</sup> H.J. SCHELTEMA, Subseciva XV. Kobidas. Revue Internationale des Droits de l'Antiquité 3e s.t.13 (1966), 341-343 (repr. in SCHELTEMA, Opera Minora, as footnote52 above, A3o, 148-150, here 149). See also DE JONG, Stephanus (as footnote 55 above), 9-10 with references to Scheltema.

**<sup>120</sup>** BS 1086/29 - 1087/2 (sch.  $\Pi$  3 ad B. 18,2,7 = D. 14,4,7.8).

<sup>121</sup> The editors note in their critical apparatus about this notion: "... ETSEDATίονα: i.e. exaequationa | τουτέστι διατίμησην...".

<sup>122</sup> SCHELTEMA, Subsectiva XV. Kobidas (as footnote 119 above), 341-343 = Opera Minora,

<sup>123</sup> SCHELTEMA, Subsectiva XV. Kobidas (as footnote 119 above), 341-343 = Opera Minora, A30, 148-150.

in which Kobidas is referred to as "the wisest" and by a reference of an anonymous scholiast on Theophilus' *Paraphrasis* to the so-called Kobidianoi and Thylakianoi, which reminds one of the law schools of Proculians and Sabinians that existed in Roman times.<sup>124</sup>

In the following scholion, its author advises readers to also take into account the *paragraphe* of Ioannes:<sup>125</sup>

Σημείωσαι, ὅτι ἐπὶ τῆς ἐπερωτήσεως οὐκ ἀπὸ ὑπερθέσεως, ἀλλὰ ἀπὸ προκατάρξεως ἀπαιτοῦνται καρποί. Σημείωσαι δὲ καὶ τὴν ἑτέραν παραγραφὴν τοῦ Ἰωάννου παραδιδοῦσαν, πῶς αἱ βοναφίδε ἀγωγαὶ ἀπαιτοῦσι καρποὺς, καὶ πῶς αἱ στρίκται.

Note that in a stipulatio fruits can be claimed not from the delay but from the beginning of the trial. Take also into account the other paragraphe of Ioannes which explains how fruits are claimed in bona fide actions (contracts) and how in strict ones.

As explained already, the *paragraphai* are mainly relating to the *antecessores* and their teaching method. In other words it is possible that the Ioannes who wrote this *paragraphe* was the *antecessor* Ioannes Kobidas. However, in this case I cannot exclude the possibility that the name Ioannes can also refer to John Xiphilinos because we have seen that Xiphilinos had written a comment on this subject<sup>126</sup> and because I have also encountered the word *paragraphe* in relation to the *nomophylax* twice as "*paragraphe* of *Nomophylax*". Hence the word *paragraphe* can also relate to a comment by the *nomophylax* making it difficult to distinguish the particular comment into "new" or "old". I am, however, more inclined to label the above scholion as an "old" one and believe that the *paragraphe* refers to Ioannes the *antecessor* because until now when reference is made to a *paragraphe* of Xiphilinos it is mentioned as "*paragraphe* of the *nomophylax*".

To conclude, some of the thirty-two scholia with the name "of Ioannes" seem to date from the sixth century and presumably belong to the *antecessor* Ioannes Kobidas and therefore cannot be attributed to John Xiphilinos. From what I have examined, I think that the majority of the scholia with the name

**<sup>124</sup>** See SCHELTEMA, Subseciva XV. Kobidas (as footnote 119 above), 341-343 = Opera Minora, A3o, 148-150. The name Thylakianoi alludes to the assumption that there was an *antecessor* named Thylakas (Θυλακᾶς); see SCHELTEMA, ibid., 148.

**<sup>125</sup>** BS 1685/9 – 12 (sch. Pe 30 ad B. 23,3,38 = D. 22,1,38).

<sup>126</sup> See scholion BS 660/19-661/3 (sch. CA 1 ad B. 13,2,24 = D. 16,3,24), cited, translated and analysed above under 3.4 about the difference in a deposit between giving "these very coins" and giving "an amount of coins".

**<sup>127</sup>** In BS 478/3 (sch. Ca 1§. ad B. 12,1,48a = D. 17,2,49) and BS 3349/20 (sch. P 53 ad B. 60,12,14 = D. 47,2,14).

"of Ioannes" belong to the so-called "new" Basilica scholia because we see that most of them have references to the *Basilica* text. 128 It could be that these "new" scholia provided with the name of "Ioannes" can be added to the group of scholia by Xiphilinos. We cannot, however, be sure. If some of the "new" scholia with the heading "of Ioannes" can be added indeed to the group of scholia by John Xiphilinos, the question that arises is why scholia attributed to Xiphilinos have sometimes as a heading "of the *nomophylax*" and sometimes the heading "of Ioannes"? Could there be a reason for that? A possible explanation could be that this depends on the person who actually wrote them down. 129 Perhaps the scholia with the heading "of the nomophylax" were originally written down by persons who were contemporaries of Xiphilinos and characterise him with his function rather than with the name "Ioannes". To them Xiphilinos was known as the nomophylax. These "original" scholia were in the following decades copied down and have been preserved in the manuscripts we possess from the twelfth, thirteenth and fourteenth centuries. The "new" scholia under the heading "of Ioannes" could also be attributed to John Xiphilinos but they could derive from a later generation, *i.e.* later than the generation of Xiphilinos. In other words, the persons who wrote down these scholia did not know Xiphilinos anymore as the *nomophylax* of the school. Finally, it does remain difficult to distinguish most of the scholia with the name "Ioannes" with accuracy into "old" and "new" scholia.

# 5. Conclusions

We do not encounter the name Xiphilinos in the Basilica scholia but we do encounter his title, the *nomophylax*. There are thirty-six scholia preserved with the term nomophylax either in the heading of the scholion or in its main text, and these scholia can be safely attributed to Xiphilinos. The majority of these scholia are brief. What can these scholia tell us about law teaching in eleventh-century Constantinople and the way the *nomophylax* explained the law?

First of all, it is clear that older legal material is referred to by the nomophylax and is taken into consideration while he is interpreting the law. 130 We have examined some examples in which Xiphilinos explains the Basilica by taking

**<sup>128</sup>** For example, BS 1632/18-23 (sch. Pa 17 ad B. 23,3,3 = D. 22,1,3).

<sup>129</sup> See here the observations in the beginning of this paper on the difficulties of any scholia and in particular of the *Basilica* scholia.

<sup>130</sup> This is also confirmed by the study of WOLSKA-CONUS, L'école de droit (as footnote 1 above), 1-107, in particular the part that refers to the scholia of Xiphilinos, that is, 13-31.

into account also writings of Stephanus and Cyril, *kata podas* translations, works of Athanasius and Theodorus of Hermoupolis, the *Paraphrasis Institutionum* of Theophilus, and in two scholia the *nomophylax* even refers to the *rheton*, when explaining the *commodatum*, the loan only for use. The word *rheton* is a term closely related to the *antecessorian* method of teaching and refers to the original text, *i.e.* the Latin legislation of Justinian, which the *antecessores* taught to mainly Greek-speaking students. In one of the two scholia in which Xiphilinos refers to the *rheta* it is extraordinary that his comment refers actually to the *Digest* and not to the relevant *Basilica* fragment. His comment is about the terminology used in the old *rheta*. The two references to the *rheton* by Xiphilinos raise the question whether he actually had consulted the original Latin legislation, *i.e.* manuscripts of the *Digest*. Based on more arguments, my conclusion is that such a hypothesis is possible.<sup>131</sup>

Second, in many of his scholia, the nomophylax uses Latin legal terminology transliterated in Greek letters or, better said, a combination of a Latin root of a word with a Greek ending, transliterated all in Greek letters. This confirms once again the rule that legal terminology remained for a great part in Latin even in the eleventh-century Byzantine legal world. This can also be an indication that Byzantine jurists of the eleventh century used older material and referred to the legal terminology as the antecessores had done, namely in Latin and transliterating it in Greek letters. As far as the personal style of Xiphilinos is concerned, it is difficult to define because of the small number of preserved scholia and the fact that they are very short. In his two lengthy scholia that were analysed in detail, we do observe typical elements of a teacher, and perhaps these two scholia can give a clearer picture of his teaching. 132 In these two scholia the nomophylax advises his pupils to take into account older material, clarifying it and taking a critical stand when needed towards this material. In these two lengthy scholia his style is not elaborate but simple and it is clear that he tries to make the material as easy as possible for the students to understand it from expressions as "if you do not read this here then the case is absurd", "take into account this", etc.

**<sup>131</sup>** See in detail the argumentation under section 3.3. Did Xiphilinos use manuscripts of the Digest?

**<sup>132</sup>** These two scholia that I examined in detail are: BS 660/19 – 661/3 (sch. CA 1 ad B. 13,2,24 = D. 16,3,24) and BS 1274/22 – 1275/13 (sch. Pa 4 ad B. 21,1,51 = Nov. 90 c. 6). See above under section 3.4. Xiphilinos' references to older material: Stephanus, Cyril, kata podas, Paraphrasis Institutionum of Theophilus, Athanasius of Emesa, Theodorus of Hermoupolis.

In another scholion we see that he uses a contrario argumentation to make his point clear. 133

Except from the *Basilica* scholia with the words "of the *nomophylax*" there are also scholia with the words "of Ioannes". Unlike Wolska-Conus, I think that not all scholia under the name "of Ioannes" can be definitely added to the group-scholia of John Xiphilinos. In particular, there are thirty-two scholia preserved with the name "Ioannes" either in their heading or in their text. It remains difficult to say whether we can attribute the "new" Basilica scholia with the name "of Ioannes" to John Xiphilinos. In any case, there appears to be more than one scholiast with the name Ioannes. Based on the evidence, the "old" scholia with the name "of Ioannes" are presumably attributable to the antecessor Ioannes Kobidas. The fact that there must have been more scholiasts with the name Ioannes could also be confirmed by the one and only scholion which has the heading "of the nomophylax Ioannes". This could imply that there was another Ioannes who was not a *nomophylax*. Whether he can be always identified with the antecessor Ioannes is also not clear.

<sup>133</sup> BS 1709/29 (sch. Pa 5 ad B. 23,4,1 = Nov. 136 c. 1.): "Σημείωσαι, ὅτι ἐκ τῆς ἀντιδιαστολῆς, οί λοιποί πάντες...".