

## University of Groningen

### Hagiotheodorites

Penna, D.

*Published in:*  
Subseciva Groningana

**IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.**

*Document Version*  
Publisher's PDF, also known as Version of record

*Publication date:*  
2014

[Link to publication in University of Groningen/UMCG research database](#)

*Citation for published version (APA):*

Penna, D. (2014). Hagiotheodorites: the last antecessor? Some remarks on one of the 'new' Basilica scholiasts. *Subseciva Groningana*, IX, 399-427. <http://ugp.rug.nl/sg/article/view/28779/26151>

#### Copyright

Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license. More information can be found on the University of Groningen website: <https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment>.

#### Take-down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

*Downloaded from the University of Groningen/UMCG research database (Pure): <http://www.rug.nl/research/portal>. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.*

## HAGIOTHEODORITES: THE LAST ANTECESSOR? Some remarks on one of the ‘new’ *Basilica* scholiasts

### 1. Opening Pandora’s Box\*

Once you start studying the *Basilica* you are confronted with all kinds of problems and difficult questions that seek an answer. And I am not just referring to the known basic questions of what the *Basilica* were, how they were created, by whom, on their dating and application.<sup>1</sup> There are more questions related to the whole tradition and understanding of the *Basilica*, text and *scholia*. The *Basilica* form a Pandora’s Box but it is worth opening it and for a legal historian it is challenging to try and address these problems. So, there are no regrets in this case. Because of the nature of the *Basilica* – and I refer here to both the text and the *scholia* – there are a lot of reasons to study them. Yet, the *Basilica* are still a rather neglected item in the field of legal history despite the last critical edition in Groningen, the monumental life work by H.J. Scheltema, D. Holwerda and N. van der Wal.<sup>2</sup> The *Basilica*, “the imperial [laws]”, were promulgated around 900 by emperor Leo VI the Wise. However, preparation for this work had begun earlier under emperor Basil I, founder of the Macedonian dynasty. The compilers of the *Basilica* used Greek summaries of and commentaries on Justinianic texts that they had at their disposal. Hence, the *Basilica* reflect Justinianic law, but in Greek.

At a later stage, comments – the so-called *scholia* – were added to the *Basilica* text. The *scholia* on the *Basilica* are divided into the ‘old’ ones dating mainly from the 6<sup>th</sup> century, and the ‘new’ ones dating from the 11<sup>th</sup> century and some from the 12<sup>th</sup> century. The ‘old’ ones were written mainly by the *antecessores*, the law professors at the time of

---

\* I would like to thank Roos Meijering for her suggestions regarding the translations of the passages examined in this paper.

1 See, for example, the two articles by H.J. Scheltema, ‘Probleme der Basiliken’, *TRG* 16 (1939), 320-346 and ‘Über die Natur der Basiliken’, *TRG* 23 (1955), 287-310 (repr. in: H.J. Scheltema, *Opera Minora ad iuris historiam pertinentia*, (collegerunt N. van der Wal/J.H.A. Lokin/B.H. Stolte/R. Meijering), Groningen 2004, B 2, 170-188 and B 11, 290-306 respectively). See also Van der Wal/Lokin, *Delineatio*, 81-87; Σπ. Τρωϊάνος, *Οι πηγές του βυζαντινού δικαίου*, Αθήνα/Κομοτηνή 2011<sup>3</sup> (henceforth abbreviated as Troianos, *Piges*), 252-263.

2 H.J. Scheltema/D. Holwerda/N. van der Wal, [ed.], *Basilicorum libri LX*, Groningen/Djakarta/s-Gravenhage 1953-1988: Series A (text), Vol. I-VIII, Series B (*scholia*), Vol. I-IX. Text and *scholia* have been edited separately in this edition.

Justinian who summarize, comment upon or translate parts of Justinian's legislation.<sup>3</sup> These are the *scholia* of Stephanus, Dorotheus, Cyrillus and of the Anonymous senior on the Digest and the *scholia* of Thalelaeus, Isidorus and Anatolius on the *Codex*.<sup>4</sup> There are also some *scholia* by two lawyers, the so-called *scholastikoi*, who lived at the end of the 6<sup>th</sup> century, namely of Athanasius of Emessa on the Novels and of Theodore of Hermoupolis on the Novels and the *Codex*. These 'old' *scholia* were presumably added to the text of the *Basilica* in the 10<sup>th</sup> century after an initiative of the scholar-emperor Constantine VII Porphyrogenetos.

In the 11<sup>th</sup> century, a law school was established in Constantinople by emperor Constantine IX Monomachos. John Xiphilinos was appointed the *nomophylax* of this school and Michael Psellos the *hypatos ton philosophon*. Xiphilinos and other Byzantine jurists commented upon the books of the *Basilica* and these comments are known as the 'new', the 'younger' *Basilica scholia*. If the *Basilica* remain a neglected item in the field of legal history, then these 'new' *Basilica scholia* form an almost unexplored subject. Except for some general references to these *scholia*, there is practically no single study devoted to this new generation of the *Basilica* scholiasts.<sup>5</sup> Until now, it has been generally accepted that the 'new' *Basilica scholia* were written by John Xiphilinos, Nicaeus, Kalokyros, Gregory Doxapatres and Hagiotheodorites.<sup>6</sup> Garidas and Patzes also appear to have written a few of these 'new' *Basilica scholia*.<sup>7</sup> Some 'new' *Basilica scholia* were also written by Eustathios Rhomaïos, author of the *Peira*, this unique work of Byzantine jurisprudence.<sup>8</sup>

It is not my intention to refer to all of these 'new' *Basilica* scholiasts. In fact, the aim of this paper is to make some first remarks concerning one of these 'new' *Basilica* scholiasts, the so-called Hagiotheodorites. Mortreuil, in his work entitled *Histoire du*

---

3 On the *antecessores*, see H.J. Scheltema, *L'enseignement de droit des antecessores*, Leiden 1970 (= Scheltema, *Opera Minora* (note 1 above, A 3), 58-110.

4 Troianos provides the bibliography related to every one of these *antecessores*; see Troianos, *Piges* (note 1 above), 134-139.

5 With the exception of Kalokyros; cf. L. Burgmann, 'Kalokyros "Sextos". Anmerkungen zu einem Basilikenscholiasten', *SG* III (1989), 11-21. On Xiphilinos, see the articles by W. Wolska-Conus, 'Les écoles de Psellos et de Xiphilin sous Constantin IX Monomaque', *TM* 6 (1976), 223-243, and 'L'école de droit et l'enseignement du droit à Byzance au XIe siècle: Xiphilin et Psellos', *TM* 7 (1979), 1-107.

6 See also Van der Wal/Lokin, *Delineatio*, 100-104; Troianos, *Piges* (note 1 above), 282.

7 Heimbach includes the name of Michael Choumnos among the younger scholiasts because Balsamon refers to a marginal note by Michael Choumnos in a *Basilica* fragment which is now lost. See Heimbach, *Prolegomena*, 203 with references to Balsamon and Mortreuil.

8 On the *Peira*, see for example N. Oikonomides, 'The "Peira" of Eustathios Rhomaïos. An Abortive Attempt to Innovate in Byzantine Law', *FM* VII (1986), 169-192 (repr. in: N. Oikonomides, *Byzantium from the Ninth Century to the Fourth Crusade*, Aldershot 1992, No. XII).

*Droit Byzantine*, provides a table with the number of the preserved ‘new’ *Basilica scholia* per manuscript.<sup>9</sup> He has not included the *scholia* of all the ‘new’ *Basilica* scholiasts but only of the four best known.<sup>10</sup> As he explains, he has not included in that table the *scholia* of Hagiotheodorites and of Patzes because he does not consider their *scholia* important enough.<sup>11</sup> Burgmann notes that Hagiotheodorites made a career in the discussion about the theory of the *glossa ordinaria* in Byzantine law.<sup>12</sup> This paper aims to create a new career for Hagiotheodorites, to give him a second chance – his first in reality – by focusing on his comments, his *scholia* on the *Basilica* books.

## 2. Who was the Hagiotheodorites of the *Basilica scholia*?

There has been some discussion in the past about the identification of the Hagiotheodorites of the *Basilica scholia* with one of the known Hagiotheodorites of that time. This is why I have purposely avoided referring to his first name until now. The family of Hagiotheodorites (Ἁγιοθεοδωρίτης) had produced a few functionaries in the secular and ecclesiastical field in the 12<sup>th</sup> century. There is no mention of the first name of Hagiotheodorites in the *Basilica scholia*. In most of the literature, Michael Hagiotheodorites is referred to as the author of these *scholia* but the names of Nicholas and of Constantine have also been supported by scholars.

Mortreuil speaks of Hagiotheodorita or Theodorita without mentioning a first name.<sup>13</sup> Zachariä von Lingenthal and Heimbach write that presumably the *scholia* belong to Michael Hagiotheodorites, the *logothetes*.<sup>14</sup> Troianos also makes reference to Michael

9 J.A.B. Mortreuil, *Histoire du droit Byzantin ou du droit Romain dans l’empire d’Orient, depuis la mort de Justinien jusqu’à la prise de Constantinople en 1453*, III, Paris 1847 (repr. Osnabrück 1966), 250-251. It concerns the codd. Coisl. gr. 152, Paris. gr. 1345, Paris. gr. 1348 and Paris. gr. 1350.

10 Mortreuil includes the *scholia* of John Xiphilinos, Kalokyros Sextus, Constantine Nicaeus and Gregory Doxapatres.

11 Cf. Mortreuil, *Histoire*, III (note 9 above), 249: ‘(...): nous n’avons pas cru devoir y faire figurer Patzus et Théodorita, dont les annotations ne sont pas assez importantes pour devoir occuper dans ce relevé une place special.’. Mortreuil (p. 242) believes that Theodorites and Hagiotheodorites must have been the same person.

12 Burgmann, ‘Kalokyros’ (note 5 above), 12. Zachariä (von Lingenthal) has suggested that a student of Hagiotheodorites had made something like a ‘*glossa ordinaria*’ of the *scholia* on the *Basilica*. See C.E. Zachariae, *Historiae juris graeco-romani delineatio. Cum appendice ineditorum*, Heidelbergae 1839, 63. About the discussion on this theory, see Troianos, *Piges* (note 1 above), 281-284 and Schminck, *Studien*, 45-52.

13 Mortreuil, *Histoire*, III (note 9 above), 242-245.

14 K.E. Zachariä von Lingenthal, *Geschichte des griechisch-römischen Rechts*, Berlin 1892<sup>3</sup> (repr. Aalen 1955), 37; Heimbach, *Prolegomena*, 202.

Hagiotheodorites as the author of the *scholia*.<sup>15</sup> Michael Hagiotheodorites had served as *logothetes tou dromou* presumably from 1158.<sup>16</sup> One of Michael's brothers was Nicholas Hagiotheodorites who had served as metropolitan of Athens in the 1160's and 1170's and had died in 1175. He was the eldest of three brothers; the other two were Michael, mentioned above, and John. Heimbach in his work *De Basilicorum origine* had suggested that the Hagiotheodorites who wrote the *Basilica scholia* was Nicholas Hagiotheodorites.<sup>17</sup> According to the sources Nicholas had been a law teacher and a judge. He was involved in the drafting of regulations related to marriage issues.<sup>18</sup> As Madariaga notes, Eustathios of Thessalonike writes that teaching the law was considered a kind of duty for Nicholas since his ancestors had also been law teachers.<sup>19</sup> Madariaga adds that one of these ancestors must have been Constantine Hagiotheodorites, who had been a jurist, but unfortunately the preserved sources do not provide information on what his actual relation was with the rest of the Hagiotheodorites family.<sup>20</sup> What we do know with certainty about Constantine is that he was a known jurist. In fact there are two important testimonies in which his legal talents are recorded.

The poet Theodore Prodromos wrote a monody about him praising his legal skills.<sup>21</sup> The Byzantine intellectual Michael Italikos who had taught rhetoric and philosophy in Constantinople had been a teacher of Constantine Hagiotheodorites. Presumably between 1130 and 1137 Italikos wrote a letter to his own brother on the occasion of the death of Constantine Hagiotheodorites.<sup>22</sup> Italikos felt very sad about this news and could not be consoled about the death of his dear friend,<sup>23</sup> this excellent jurist, as he described him.<sup>24</sup> He praised his rhetoric skills, his legal knowledge, even compared him to Tribonian and added that Constantine Hagiotheodorites could master not only the Novels but also the

---

15 Troianos, *Piges* (note 1 above), 282-283. It should be noted, however, that Troianos refers to the opinion of Triantaphyllopoulos and Schminck who both suggest that the author of these *scholia* was Constantine Hagiotheodorites; see further on.

16 *ODB*, 2, 899.

17 C.W.E. Heimbach, *De Basilicorum origine, fontibus, scholiis, atque nova editione adornanda*, Lipsiae 1825, 83.

18 E. Madariaga, 'Η Βυζαντινή Οικογένεια των Αγιοθεοδωριτών (I): Νικόλαος Αγιοθεοδωρίτης, Πανιερώτατος Μητροπολίτης Αθηνών και Υπέριτος', *ByzSym* 19 (2009), 147-181 (154).

19 Madariaga, 'Hagiotheodorites' (note 18 above), 159.

20 Madariaga, 'Hagiotheodorites' (note 18 above), 149.

21 PG, 133, 1059-1060.

22 The letter has been published in P. Gautier, [ed.], *Michel Italikos. Lettres et Discours*, Paris 1972, 89-91 (No. 4).

23 Gautier, *Michel Italikos* (note 22 above), 90/2: (...) ἀπαραμύθητός εἰμι (...).

24 Gautier, *Michel Italikos* (note 22 above), 90/13-14: (...) ἐν νόμοις εὐδοκιμώτατον, μᾶλλον δὲ, ἵνα τᾶληθὲς εἴπω, τῆς νομικῆς ἐπιστήμης ὅτιπερ κράτιστον (...).

*Codex* and the Digest and the other laws.<sup>25</sup> It is interesting that Italikos does not mention the *Basilica* which were closer to his time and, in any case, formed the last official law compilation, but that he refers to Justinianic texts. This is another testimony on how the Byzantines used and applied laws, connected to the whole discussion of the nature of the *Basilica*.<sup>26</sup> Justinianic legislation remained a work of reference and a legal tool for the Byzantine jurists, even after the promulgation of the *Basilica*. There were certainly some questions on the actual application of the *Basilica* during the period in which Constantine Hagiotheodorites lived. It is a well-known fact that the *Basilica* were promulgated around 900 but had not enjoyed from the beginning the status of a codification because they lacked the element of exclusivity. It was later on, in 1169, that by order of the emperor Manuel I Komnenos, the *Basilica* obtained exclusivity after the legal conflict, which occurred on the occasion of the appointment of the bishop of Amisoss.<sup>27</sup>

The fact that Constantine Hagiotheodorites was such a well-known jurist has led Triantaphyllopoulos and Schminck to believe that this is the Hagiotheodorites who wrote the *scholia* on the *Basilica* books.<sup>28</sup> I agree with these two scholars given the fact that the preserved Hagiotheodorites' *scholia*, as we will see further on, must have been written by someone with an excellent legal knowledge. Further, I think that the theory that the metropolitan Nicholas Hagiotheodorites was the author of these *scholia* is the less

25 Gautier, *Michel Italikos* (note 22 above), 90/22-25: (...) καὶ ῥητορικῆ στομώσας τὴν γλώτταν καὶ νομοθετικῆ πικάσας τὸν νοῦν, αὐτόχημα Τριβωνιανὸς ὁ πολυθρόνυλλητος ἦν, οὐ μόνον ἐν νεαραῖς, ἀλλὰ καὶ ἐν κώδιξι καὶ ἐν διγέστοις καὶ ἐν ἄλλοις ὁπόσοις τὰ πολιτικὰ συντετάχεται. Triantaphyllopoulos and Schminck also refer to this testimony; see K. Triantaphyllopoulos, 'Περιορισμός διαφέροντος καὶ Βυζαντινὰ ἀντιλήψεις', *Ἀρχαίων Ἰδιωτικοῦ Δικαίου* 13 (1946), 137-164 (161) (repr. in: Id., *Apanta* [*Ἀπαντα*], B 2, Αθήνα 2009, 721-746 (745); *Apanta* B is a collection of his articles published under the auspices of the Academy of Athens, consisting of two volumes), and Schminck, *Studien*, 49 note 206.

26 See the bibliography quoted in note 1 above. See also Sp. Troianos, 'Ἡ ἀλληλουχία συμμόρφωσης στὴν παράδοση καὶ ἀνανέωσης στα βυζαντινὰ νομοθετικὰ κείμενα ἀπὸ τὸν Ἰουστινιανὸ μὲχρι τοὺς Μακεδόνες' [= Die byzantinischen Gesetzestexte von Justinian bis zu den Makedonen: Festhalten an der Tradition und Erneuerung], *Επετηρίς τοῦ Κέντρου Ερεῖνης τῆς Ἱστορίας τοῦ Ἑλληνικοῦ Δικαίου* 43 (2011), 63-91.

27 In a few words, the legal question in this case was whether a Justinianic Novel was valid if it was not included in the *Basilica*. The fact that such a question arose proves that the *Basilica* had not until then the status of a codification, namely it was not an exclusive written legal collection promulgated by an authority. On this incident and the role that the canonist Balsamon played, see H.J. Scheltema, 'Byzantine law', *Cambridge Medieval History* IV,2,21, Cambridge 1967, 55-77 (65-66) (repr. in: Scheltema, *Opera Minora* (note 1 above), A 2, 38-57 (47)); Van der Wal/Lokin, *Delineatio*, 109-111; Troianos, *Piges* (note 1 above), 252-257.

28 Triantaphyllopoulos, 'Periorismos' (note 25 above), 160-161 (= Id., *Apanta* (note 25 above), 744-745); cf. also K. Triantaphyllopoulos, 'Ἱεραρχία Νόμων καὶ Βυζαντινὸν δίκαιον', in: *Σύμμεικτα εἰς μνήμην Ἀλεξάνδρου Σβώλου / Mélanges Alexandre Svolos*, Αθήνα 1961, 489 (= Id., *Apanta*, 995). See also A. Schminck, *Studien*, 48-50.

convincing, for two good reasons. Firstly, given that Nicholas had been involved, as already mentioned, in the drafting of provisions related to marriage, one would expect from him more *scholia* on issues dealing with family and marriage issues. The preserved Hagiotheodorites' *scholia* do not refer to this material scope. One could argue here that this could be explained by the lack of manuscripts. However, I do not believe that this is the case because, if Nicholas had been the author of the preserved *Basilica scholia*, even if these *scholia* were not directly related to his material scope, he would have tried to extend the commentary on marriage issues, or in any case give some hints on the legal issues which he had addressed and mastered. The second reason for which the metropolitan Nicholas Hagiotheodorites should not be identified as the author of the *Basilica scholia*, is the fact that the Hagiotheodorites of the *scholia* discusses and analyses some cases which do not fit in with the teaching of the clergy. An example of this can be found in the *scholion* in which Hagiotheodorites explains that it is different when you steal a female slave for pleasure, because you want to sleep with her; in that case, he adds, you only want to 'use' her and then return her to her legitimate owner and that is different from stealing a female slave and keeping her for good.<sup>29</sup> It is hard to imagine that this is the kind of example that a clergyman would use for his audience.

### 3. Number and material scope of Hagiotheodorites' *scholia*

In the last edition of the *Basilica scholia* there are 196 *scholia* which are linked to the name of Hagiotheodorites.<sup>30</sup> I include here all the comments that are attributed to him by name (Τοῦ Ἁγιοθεοδοῦριτου) and the ones that follow directly after the inscription of his name and are titled as being by the same author (Τοῦ αὐτοῦ).<sup>31</sup> Using his style and other arguments as criteria there are certainly more *scholia* that could be attributed to him, *scholia* for which the author's name is not given. However, for this paper, I will examine only the *scholia* that are linked directly to his name. The name "Theodorites" (in genitive: Θεοδοῦριτου) appears in only one *scholion*.<sup>32</sup> In the Groningen edition of the *Basilica* the

29 BS 3439/22-24 (sch. Pe 13 ad B. 60,12,83 = D. 47,2,83): (...) ὅτι ὁ κλέψας δούλην, εἰ μὲν διὰ τοῦτο μόνον ἔκλεψεν αὐτήν, ὥστε ἀπολαῦσαι τῆς ἐξ αὐτῆς ἡδονῆς καὶ μετὰ τὴν ἀπόλαυσιν ἀντιστρέψαι πάλιν αὐτήν τῷ δεσπότη, ἐνέγεται μὲν τῇ φούρτι, πλὴν οὐκ εἰς πᾶσαν τὴν δούλην, ἀλλ' εἰς ὃ ἔκλεψε δίκαιον. See also further on in this paper (§ 4. Characteristics of Hagiotheodorites' *scholia* and of his style – Some examples).

30 See the table further on.

31 I follow here the opinion of the last editors. If therefore the inscription τοῦ αὐτοῦ is under a *scholion* of Hagiotheodorites and is written by the same hand, it should be attributed to Hagiotheodorites.

32 BS 3378/1-14 (sch. Pe 4 ad B. 60,12,39 = D. 47,2,39).

editors suggest that presumably this person could have been Hagiotheodorites.<sup>33</sup> Mortreuil supposes the same and justifies his view by adding that it is not possible to accept that there is only one preserved *scholion* by Theodorites in the whole *Basilica*.<sup>34</sup> However, I do not think that this *scholion* could be attributed to Hagiotheodorites because this *scholion* is very different from the *scholia* of Hagiotheodorites.<sup>35</sup> This particular *scholion* which refers to adultery is full of biblical references. In fact, half of this *scholion* consists of biblical references and its whole style does not resemble the *scholia* of Hagiotheodorites at all. Schminck has suggested that this *scholion* could be linked to the writings of Theodoret of Cyrrihus (Θεοδώρητος Κύρρου, ca. 393 – ca. 466), bishop of Cyrrihus in Syria from 423, who left many writings on Christian issues; however, he adds this has not been proved.<sup>36</sup>

Two preliminary general observations are necessary regarding the *scholia* of Hagiotheodorites. Firstly, they are all preserved in only one manuscript, the codex Parisinus graecus 1350 (= Pe) which is dated to the 12<sup>th</sup> century.<sup>37</sup> Secondly, all *scholia* of Hagiotheodorites – at least the ones that have his name, as I have explained above – refer to the last book of the *Basilica*, the 60<sup>th</sup> book. This could be either a coincidence based on the preserved manuscripts, or, it could mean that Hagiotheodorites had a special interest in ‘criminal law’ since this is the subject of the 60<sup>th</sup> *Basilica* book.<sup>38</sup> The 60<sup>th</sup> book of the *Basilica* regulates in particular mainly issues related to delicts, issues dealing with wrongful damage to property, theft and robbery.<sup>39</sup> The fact that we have *scholia* of Hagiotheodorites only on one book remains a curious issue because one would have expected from such a law teacher – author of such thorough and well written *scholia* – to comment also on other issues, on other books of the *Basilica*.<sup>40</sup>

Triantaphyllopoulos has suggested that presumably Hagiotheodorites has also written *scholia* on other *Basilica* books and has supported this opinion by two arguments. His first argument is based on the fact that Hagiotheodorites often uses the expression ἐξ

33 BS 3378/1-14 (sch. Pe 4 ad B. 60,12,39 = D. 47,2,39), app. crit. ad l. 1 Θεοδώριτου: ‘i.e. Ἁγιοθεοδώριτου?’.

34 Mortreuil, *Histoire*, III (note 9 above), 243-244.

35 Schminck also believes that this *scholion* must not be of Hagiotheodorites. See Schminck, *Studien*, 49 note 201.

36 Schminck, *Studien*, 49 note 201.

37 Cf. RHBR, I, No. 163.

38 The term ‘criminal law’ could be misleading since criminal law, as it is understood today, is when the State prosecutes a person because of an offence; this is different from private action taken against the wrongdoer. However, in Roman and Byzantine law, the distinction between civil and criminal law was rather blurred.

39 See in detail further on the table.

40 About his style, see further on.



ὀρθοῦ.<sup>41</sup> He adds that this expression is included in a *scholion* on the 23<sup>rd</sup> *Basilica* book and that the name of the commentator of this *scholion* has not been included.<sup>42</sup> According to Triantaphyllopoulos, this *scholion* could very well be attributed to Hagiotheodorites given the expression used (ἐξ ὀρθοῦ) and some other words used in a way familiar to Hagiotheodorites (νομοθέτης in the sense of law and ἐνδύναμος in the sense of an issue related to property law).<sup>43</sup> I argue that the expression ἐξ ὀρθοῦ is not used exclusively by Hagiotheodorites. I have encountered this expression in the *scholia*, for example, of Gregory, Nicaeus and of Anonymus.<sup>44</sup> Further, the term ἐξ ὀρθοῦ appears in numerous *scholia* on other *Basilica* books and not only on the 60<sup>th</sup> book.<sup>45</sup> Triantaphyllopoulos' second argument is that Hagiotheodorites in one of his *scholia* refers to a *paragraphe* on the 58<sup>th</sup> *Basilica* book, as if it were his own *paragraphe*.<sup>46</sup> I do not think that we can say with certainty that he refers in this *scholion* to his own *paragraphe*. At the end of this *scholion*, Hagiotheodorites addresses his audience, his students, and notes that they know that in many cases one legislator accuses the other and amends his legislation.<sup>47</sup> He adds that they have learned this in the 58<sup>th</sup> book, in the 1<sup>st</sup> title, in the last chapter and the last *paragraphe* included there (= in that chapter): (...), ὡς ἔμαθες μὲν καὶ ἀπὸ τοῦ βιβ. νη΄ ττ. ἀ΄ κεφ. τελευτ. καὶ τῆς ἐν ἐκείνῳ παραγραφῆς τελευταίας, μάθης δὲ καὶ ἐνταῦθα. I believe that ἐν ἐκείνῳ refers to the chapter (κεφάλαιον). Hagiotheodorites does not write that he himself has written that *paragraphe*. This *paragraphe* has not been preserved. I note that Hagiotheodorites very often refers to other *paragrapheai* in his *scholia* and it is not always clear whether he has written them himself or not.<sup>48</sup> It could well be the case that

- 
- 41 Triantaphyllopoulos, 'Periorismos' (note 25 above), 159-160 (= Id., *Apanta* (note 25 above), 743-744). The expression ἐξ ὀρθοῦ can have more than one meaning. It could mean: 'at the beginning', 'certainly', 'especially'.
- 42 BS 1672/1-19 (sch. Pa 21 ad B. 23,3,25 = D. 22,1,25).
- 43 Triantaphyllopoulos, 'Periorismos' (note 25 above), 160 (= Id., *Apanta* (note 25 above), 744).
- 44 The *scholion* under the name of Gregory in BS 183/23-29 (sch. Ca 20 ad B. 11,1,4 = D. 2,14,4); the *scholion* of Anonymus in BS 1116/1-5 (sch. Π 9 ad B. 18,5,9 = D. 15,1,9); and the *scholion* of Nicaeus in BS 1349/25 – 1350/31 (sch. Pa 4 ad B. 22,1,26 = D. 22,3,26).
- 45 See, for example, BS 221/31-33 (sch. Ca 14 ad B. 11,1,10 = D. 2,14,10); BS 263/13-16 (sch. Ca 63 ad B. 11,1,27 = D. 2,14,27); BS 318/8-22 (sch. Ca 4 ad B. 11,1,69 = C. 2,3,8); BS 390/14-29 (sch. Ca 3 ad B. 11,2,14 = D. 2,15,14); BS 489/30-34 (sch. Ca 64 ad B. 12,1,50 = D. 17,2,52); BS 553/15-16 (sch. Ca 8 ad B. 12,2,1 = D. 10,3,1); BS 714/15-27 (sch. Ca 32 ad B. 14,1,6 = D. 17,1,6); BS 1714/11-13 (sch. Pa 6 ad B. 23,4,5 = Nov. 136 c. 5).
- 46 BS 3457/29 – 3458/7 (sch. Pe 2 ad B. 60,13,3 = D. 47,4,3). See Triantaphyllopoulos, 'Periorismos' (note 25 above), 160 (= Id., *Apanta* (note 25 above), 744).
- 47 BS 3458/4-5 (sch. Pe 2 ad B. 60,13,3 = D. 47,4,3): Σὺ δὲ γίνωσκε, ὅτι πολλάκις ἕτερος νομοθέτης τὸν ἕτερον μέμφοται καὶ τὴν ἐκείνου κατὰ τι μεταμείβει νομοθεσίαν αὐτίκα κατὰ πόδας ἐκείνου κείμενος, (...).
- 48 On the reference to *paragrapheai* by Hagiotheodorites, see further on under § 4. Characteristics of Hagiotheodorites' *scholia* and of his style – Some examples.

HAGIOTHEODORITES: THE LAST ANTECESSOR?

Hagiotheodorites did indeed write *scholia* on other *Basilica* books. However, the fact remains that *scholia* bearing his name have until now been found for one *Basilica* book only, namely the 60<sup>th</sup>.

The 196 *scholia* linked to the name of Hagiotheodorites are given in the following table. For a better understanding of the material scope of his *scholia*, I include in the first column the Greek rubric of the relevant title of the 60<sup>th</sup> *Basilica* book to which the *scholia* refer, followed by the translation of that rubric. In the second column, the number of his *scholia* on that title is mentioned, as well as their references.

Title of <i>Basilica</i> book	<i>Scholia</i> of Hagiotheodorites
Τίτλος α΄.	12 <i>scholia</i> :
Περὶ χρηματικῶν ποινῶν καὶ συκοφαντιῶν καὶ τίνες τῶν συκοφαντῶν τιμωροῦνται καὶ τίνες οὐ	-BS 3052/19-21 (sch. Pe 21 ad B. 60,1,7 = D. 3,6,7) -BS 3054/31 – 3055/2 (sch. Pe 10 ad B. 60,1,9 = D. 3,6,9) -BS 3060/17-27 (sch. Pe 62 ad B. 60,1,10 = D. 48,16,1) -BS 3061/4 (sch. Pe 64 ad B. 60,1,10 = D. 48,16,1) -BS 3061/18-20 (sch. Pe 70 ad B. 60,1,10 = D. 48,16,1) -BS 3061/26-29 (sch. Pe 73 ad B. 60,1,10 = D. 48,16,1)
1 <sup>st</sup> Title.	-BS 3061/30 – 3062/4 (sch. Pe 74 ad B. 60,1,10 = D. 48,16,1) -BS 3065/10-12 (sch. Pe 13 ad B. 60,1,15 = D. 48,16,6) -BS 3066/32-3067/2 (sch. Pe 11 ad B. 60,1,16 = D. 48,16,7) -BS 3076/20-3077/4 (sch. Pe 6 ad B. 60,1,29 = C. 9,46,2) -BS 3078/2-11 (sch. Pe 4 ad B. 60,1,32 = C. 9,46,5) -BS 3081/1-9 (sch. Pe 7 ad B. 60,1,36 = C. 9,46,9)
About civil penalties and false accusations and about which false accusators are punished and which are not	
Τίτλος β΄.	2 <i>scholia</i> :
Ἐὰν τετράποδον ζημίαν ποιῆσαι λέγηται	-BS 3086/23-31 (sch. Pe 52 ad B. 60,2,1 = D. 9,1,1) -BS 3088/30 - 3089-8 (sch. Pe 5 ad B. 60,2,3 = D. 9,1,3)
2 <sup>nd</sup> Title.	
If a four-footed animal is said to have brought damage	
Τίτλος γ΄.	23 <i>scholia</i> :
Περὶ νόμου τοῦ Ἀκουιλίου περὶ ζημίας	-BS 3091/21-28 (sch. Pe 6 ad B. 60,3,2 = D. 9,2,2) -BS 3095/21-24 (sch. Pe 22 ad B. 60,3,5 = D. 9,2,5§§1-3)

PENNA

- 3<sup>rd</sup> Title.  
About the *Aquiliana* law on  
damage
- BS 3098/12-14 (sch. Pe 34 ad B. 60,3,7 = D. 9,2,7)
  - BS 3098/15-29 (sch. Pe 35 ad B. 60,3,7 = D. 9,2,7)
  - BS 3104/28 – 3105/13 (sch. Pe 41 ad B. 60,3,11 = D. 9,2,11.12 init.)
  - BS 3134/10-18 (sch. Pe 129 ad B. 60,3,27 = D. 9,2,27)
  - BS 3134/19-34 (sch. Pe 130 ad B. 60,3,27 = D. 9,2,27)
  - BS 3135/26 – 3136/2 (sch. Pe 139 ad B. 60,3,27 = D. 9,2,27)
  - BS 3136/10-13 (sch. Pe 141 ad B. 60,3,27 = D. 9,2,27)
  - BS 3136/24-29 (sch. Pe 145 ad B. 60,3,27 = D. 9,2,27)
  - BS 3136/33-35 (sch. Pe 147 ad B. 60,3,27 = D. 9,2,27)
  - BS 3137/1-8 (sch. Pe 148 ad B. 60,3,27 = D. 9,2,27)
  - BS 3137/9-14 (sch. Pe 149 ad B. 60,3,27 = D. 9,2,27)
  - BS 3140/9-10 (sch. Pe 15 ad B. 60,3,29 = D. 9,2,29 §§ 6-8)
  - BS 3140/11-15 (sch. Pe 16 ad B. 60,3,29 = D. 9,2,29 §§ 6-8)
  - BS 3140/16-20 (sch. Pe 17 ad B. 60,3,29 = D. 9,2,29 §§ 6-8)
  - BS 3142/24 – 3143/5 (sch. Pe 23 ad B. 60,3,30 = D. 9,2,30)
  - BS 3150/21-28 (sch. Pe 13 ad B. 60,3,37 = D. 9,2,37)
  - BS 3158/1-7 (sch. Pe 15 ad B. 60,3,45 = D. 9,2,45 §§ 1-5)
  - BS 3162/12-14 (sch. Pe 20 ad B. 60,3,50 = D. 9,2,50.51)
  - BS 3162/15-30 (sch. Pe 21 ad B. 60,3,50 = D. 9,2,50.51)
  - BS 3164/17-25 (sch. Pe 6 ad B. 60,3,53 = D. 9,2,54)
  - BS 3165/30-39 (sch. Pe 4 ad B. 60,3,54 = D. 9,2,55)

Τίτλος δ'.  
Περὶ τούτων ὅστις τίποτε  
ἐκχέει ἢ ρίπτει

8 *scholia*:

4<sup>th</sup> Title.  
About those who pour or  
throw something

- BS 3172/24-25 (sch. Pe 38 ad B. 60,4,1 = D. 9,3,1.2.)
- BS 3172/26 – 3173/5 (sch. Pe 39 ad B. 60,4,1 = D. 9,3,1.2.)
- BS 3173/21 – 3174/2 (sch. Pe 42 ad B. 60,4,1 = D. 9,3,1.2.)
- BS 3177/24 – 3178/3 (sch. Pe 42 ad B. 60,4,5 = D. 9,3,5)
- BS 3178/4-31 (sch. Pe 43 ad B. 60,4,5 = D. 9,3,5)
- BS 3178/32 – 3179/12 (sch. Pe 44 ad B. 60,4,5 = D. 9,3,5)
- BS 3179/13-16 (sch. Pe 45 ad B. 60,4,5 = D. 9,3,5)
- BS 3179/17- 3180/2 (sch. Pe 46 ad B. 60,4,5 = D. 9,3,5)

Τίτλος ε'.  
Περὶ ἀγωγῶν τῶν  
κινουμένων ἠνίκα δοῦλοι  
ἀμαρτάνοντες ἐκδίδονται ἢ  
τετράποδα

23 *scholia*:

- BS 3186/1-5 (sch. Pe 25 ad B. 60,5,2 = D. 9,4,2)
- BS 3186/6-8 (sch. Pe 26 ad B. 60,5,2 = D. 9,4,2)
- BS 3186/9-24 (sch. Pe 27 ad B. 60,5,2 = D. 9,4,2)
- BS 3189/15-20 (sch. Pe 18 ad B. 60,5,4 = D. 9,4,3 fin. 4.)

HAGIOTHEODORITES: THE LAST ANTECESSOR?

	-BS 3190/22 – 3191/2 (sch. Pe 11 ad B.60,5,5 = D. 9,4,5)
	-BS 3193/7-18 (sch. Pe 13 ad B. 60,5,8 = D. 9,4,8)
5 <sup>th</sup> Title.	-BS 3195/27 – 3196/15 (sch. Pe 7 ad B. 60,5,11 = D. 9,4,11)
About actions that are	-BS 3198/11 – 3199/2 (sch. Pe 24 ad B. 60,5,14 = D. 9,4,14)
brought when slaves or	-BS 3208/22-35 (sch. Pe 38 ad B. 60,5,21 = D. 9,4,21)
four-footed animals that	-BS 3209/1-11 (sch. Pe 39 ad B. 60,5,21 = D. 9,4,21)
have committed a delict are	-BS 3209/12-24 (sch. Pe 40 ad B. 60,5,21 = D. 9,4,21)
surrendered	-BS 3211/7-25 (sch. Pe 18 ad B. 60,5,22 = D. 9,4,22)
	-BS 3211/26 – 3212/16 (sch. Pe 19 ad B. 60,5,22 = D. 9,4,22)
	-BS 3217/21-31 (sch. Pe 29 ad B. 60,5,26 = D. 9,4,26)
	-BS 3221/7-15 (sch. Pe 14 ad B. 60,5,28 = D. 9,4,28)
	-BS 3227/6-9 (sch. Pe 12 ad B. 60,5,36 = D. 9,4,36)
	-BS 3229/10-14 (sch. Pe 18 ad B. 60,5,38 = D. 9,4,37fin. 38.)
	-BS 3229/15-21 (sch. Pe 19 ad B. 60,5,38 = D. 9,4,37fin. 38.)
	-BS 3231/4-8 (sch. Pe 15 ad B. 60, 5,39 = D. 9,4,39)
	-BS 3231/9-11 (sch. Pe 16 ad B. 60, 5,39 = D. 9,4,39)
	-BS 3231/12-14 (sch. Pe 17 ad B. 60, 5,39 = D. 9,4,39)
	-BS 3237/2-8 (sch. Pe 7 ad B. 60,5,45 = C. 3,41,2)
	-BS 3238/18-23 (sch. Pe 10 ad B. 60,5,46 = C. 3,41,3)

Τίτλος ζ'.  
Περὶ δούλου  
ὑποφθαρέντος

13 *scholia*:

	-BS 3242/29-33 (sch. Pe 12 ad B. 60,6,1 = D. 11,3,1)
	-BS 3243/25-29 (sch. Pe 5 ad B. 60,6,3 = D. 11,3,3,4)
	-BS 3245/13-18 (sch. Pe 14 ad B. 60,6,5 = D. 11,3,5 §§ 1-4)
	-BS 3245/23- 3246/9 (sch. Pe 2 ad B. 60,6,7 = D. 11,3,7) <sup>50</sup>
6 <sup>th</sup> Title.	-BS 3249/11-15 (sch. Pe 13 ad B. 60,6,11 = D. 11,3,11 §§ 1.2.)
About corrupting a	-BS 3253/24-27 (sch. Pe 40 ad B. 60,6,14 = D. 11,3,13§1. 14)
slave <sup>49</sup>	-BS 3255/29 – 3256/22 (sch. Pe 7 ad B. 60,6,18 = C. 6,2,1)
	-BS 3258/17-21 (sch. Pe 5 ad B. 60,6,21 = C. 6,2,4)
	-BS 3259/16-27 (sch. Pe 4 ad B. 60,6,24 = C. 6,2,7)
	-BS 3260/12-18 (sch. Pe 7 ad B. 60,6,25 = C. 6,2,8)
	-BS 3271/7-11 (sch. Pe 15 ad B. 60,6,39 = C. 6,2,22)
	-BS 3271/12-14 (sch. Pe 16 ad B. 60,6,39 = C. 6,2,22)

49 Literally: a corrupted slave.

50 The *scholion* is inscribed τοῦ αὐτοῦ. Its position in the manuscript proves that the *scholion* originates from Hagiotheodorites. See BS 3245 app. crit. ad l. 23 τοῦ αὐτοῦ.

PENNA

-BS 3271/15 – 3272/14 (sch. Pe 17 ad B. 60,6,39 = C. 6,2,22)

Τίτλος ζ΄.

Περὶ δούλων φυγάδων  
καὶ τῶν ὑποδεχομένων  
αὐτοῦς καὶ κρυπτόντων

7<sup>th</sup> Title.

About runaway slaves  
and those who shelter and  
conceal them

3 *scholia*:

-BS 3273/15-19 (sch. Pe 3 ad B. 60,7 ad rubricam)

-BS 3280/16-28 (sch. Pe 16 ad B. 60,7,9 = C. 6,1,4)

-BS 3280/29 – 3281/3 (sch. Pe 17 ad B. 60,7,9 = C. 6,1,4)

Τίτλος η΄.

Περὶ κοττιστῶν ἦτοι  
κυβευτῶν

8<sup>th</sup> Title.

About gamblers, namely  
dice-players

5 *scholia*:

-BS 3284/1-3 (sch. Pe 13 ad B. 60,8,1 = D. 11,5,1)

-BS 3285/1-6 (sch. Pe 4 ad B. 60,8,3 = D. 11,5,3)

-BS 3286/10-15 (sch. Pe 10 ad B. 60,8,4 = D. 11,5,4)

-BS 3286/16-20 (sch. Pe 11 ad B. 60,8,4 = D. 11,5,4)

-BS 3286/21 – 3287/5 (sch. Pe 12 ad B. 60,8,4 = D. 11,5,4)

Τίτλος θ΄.

Ἐὰν μετρητῆς πλαστὸν  
τρόπον εἴπη

9<sup>th</sup> Title.

If a surveyor gives a false  
report

1 *scholion*:

-BS 3292/22 – 3293/4 (sch. Pe 15 ad B. 60, 9,3 = D. 11,6,3)

Τίτλος ι΄.

Περὶ ἀπαιτήσεως  
κλοπιμαίου πράγματος

10<sup>th</sup> Title.

About claiming a stolen  
good

10 *scholia*:

-BS 3300/10-31 (sch. Pe 21 ad B. 60,10,1 = D. 13,1,1,2.)

-BS 3303/32 – 3304/9 (sch. Pe 13 ad B. 60,10,4 = D. 13,1,4)

-BS 3309/6 – 3310/2 (sch. Pe 25 ad B. 60,10,7 = D. 13,1,7)

-BS 3314/31 – 3315/2 (sch. Pe 14 ad B. 60,10,10 = D. 13,1,10)

-BS 3318/30 – 3319/3 (sch. Pe 16 ad B. 60,10,12 = D. 13,1,12)

-BS 3319/4-16 (sch. Pe 17 ad B. 60,10,12 = D. 13,1,12)

-BS 3321/26 – 3322/21 (sch. Pe 13 ad B. 60 10,14 = D. 13,1,14)

-BS 3324/30-33 (sch. Pe 10 ad B. 60,10,16 = D. 13,1,16)

HAGIOTHEODORITES: THE LAST ANTECESSOR?

-BS 3329/24-28 (sch. Pe 8 ad B. 60,10,20 = D. 13,1,20)  
-BS 3330/22-27 (sch. Pe 9 ad B. 60,10,21 = C. 4,8,1)

Τίτλος ια΄.  
Περὶ ἰδιωτικῶν  
ἁμαρτημάτων

2 *scholia*:

-BS 3332/5-10 (sch. Pe 2 ad B. 60,11 ad rubricam)  
-BS 3334/29-33 (sch. Pe 18 ad B. 60,11,1 = D. 47,1,1)

11<sup>th</sup> Title.  
About private delicts

Τίτλος ιβ΄.  
Περὶ κλοπῆς

58 *scholia*:

12<sup>th</sup> Title.  
About theft

-BS 3338/1-16 (sch. Pe 9 ad B. 60,12,1 = D. 47,2,1)  
-BS 3339/17-31 (sch. Pe 2 ad B. 60,12,6 = D. 47,2,6)  
-BS 3343/20 – 3344/3 (sch. Pe 9 ad B. 60,12,12 = D. 47,2,12)  
-BS 3344/24 – 3345/8 (sch. Pe 4 ad B. 60,12,13 = D. 47,2,13)  
-BS 3351/26 – 3352/3 (sch. Pe 73 ad B. 60,12,14 = D. 47,2,14)  
-BS 3353/5-24 (sch. Pe 80 ad B. 60,12,14 = D. 47,2,14)  
-BS 3353/25-27 (sch. Pe 81 ad B. 60,12,14 = D. 47,2,14)  
-BS 3353/28-33 (sch. Pe 82 ad B. 60,12,14 = D. 47,2,14)  
-BS 3353/34 – 3354/4 (sch. Pe 83 ad B. 60,12,14 = D. 47,2,14)  
-BS 3354/13-15 (sch. Pe 85 ad B. 60,12,14 = D. 47,2,14)  
-BS 3355/20-32 (sch. Pe 8 ad B. 60,12,15 = D. 47,2,15)  
-BS 3358/20-29 (sch. Pe 21 ad B. 60,12,17 = D. 47,2,17)  
-BS 3360/13-21 (sch. Pe 8 ad B. 60,12,19 = D. 47,2,19)  
-BS 3364/13-18 (sch. Pe 27 ad B. 60, 12,21 = D. 47,2,21)  
-BS 3364/19 – 3365/18 (sch. Pe 28 ad B. 60, 12,21 = D. 47,2,21)  
-BS 3365/34 – 3366/2 (sch. Pe 31 ad B. 60, 12,21 = D. 47,2,21)  
-BS 3367/20-22 (sch. Pe 7 ad B. 60,12,24 = D. 47,2,23fin. 22§§ 1.2)  
-BS 3368/10-19 (sch. Pe 7 ad B. 60,12,25 = D. 47,2,25 )  
-BS 3370/5-21 (sch. Pe 12 ad B. 60,12,27 = D. 47,2,27)  
-BS 3370/32 – 3371/4 (sch. Pe 4 ad B. 60,12,28 = D. 47,2,28)  
-BS 3373/32-34 (sch. Pe 3 ad B. 60,12,34 = D. 47,2,34)  
-BS 3375/26-30 (sch. Pe 16 ad B. 60,12,36 = D. 47,2,36)  
-BS 3377/3-11 (sch. Pe 5 ad B. 60,12,38 = D. 47,2,38)  
-BS 3382/ 30 – 3383/19 (sch. Pe 25 ad B. 60,12,43 = D. 47,2,43)  
-BS 3383/20-24 (sch. Pe 26 ad B. 60,12,43 = D. 47,2,43)  
-BS 3391/27-32 (sch. Pe 34 ad B. 60,12,48 = D. 47,2,48)  
-BS 3392/16-24 (sch. Pe 38 ad B. 60,12,48 = D. 47,2,48)

PENNA

- BS 3401/1-7 (sch. Pe 81 ad B. 60,12,52 = D. 47,2,52)
- BS 3401/8-16 (sch. Pe 82 ad B. 60,12,52 = D. 47,2,52)
- BS 3401/17-21 (sch. Pe 83 ad B. 60,12,52 = D. 47,2,52)
- BS 3401/24-33 (sch. Pe 85 ad B. 60,12,52 = D. 47,2,52)
- BS 3402/5-8 (sch. Pe 89 ad B. 60,12,52 = D. 47,2,52)
- BS 3402/19-27 (sch. Pe 94 ad B. 60,12,52 = D. 47,2,52)
- BS 3402/32- 3403/3 (sch. Pe 97 ad B. 60,12,52 = D. 47,2,52)
- BS 3403/11-24 (sch. Pe 99 ad B. 60,12,52 = D. 47,2,52)
- BS 3403/31 – 3404/7 (sch. Pe 102 ad B. 60,12,52 = D. 47,2,52)
- BS 3404/8-13 (sch. Pe 103 ad B. 60,12,52 = D. 47,2,52)
- BS 3405/18-21 (sch. Pe 109 ad B. 60,12,52 = D. 47,2,52)
- BS 3407/3-5 (sch. Pe 4 ad B. 60,12,53 = D. 47,2,53)
- BS 3410/1-4 (sch. Pe 15 ad B. 60,12,55 = D. 47,2,55)
- BS 3410/5-7 (sch. Pe 16 ad B. 60,12,55 = D. 47,2,55)
- BS 3410/28 – 3411/13 (sch. Pe 5 ad B. 60,12,56 = D. 47,2,56)
- BS 3419/6-11 (sch. Pe 25 ad B. 60,12,62 = D. 47,2,62)
- BS 3420/12-15 (sch. Pe 7 ad B. 60,12,65 = D. 47,2,65)
- BS 3420/28-30 (sch. Pe 4 ad B. 60,12,66 = D. 47,2,66)
- BS 3422/19 – 3423/11 (sch. Pe 22 ad B. 60,12,67 = D. 47,2,67)
- BS 3423/15-23 (sch. Pe 24 ad B. 60,12,67 = D. 47,2,67)
- BS 3423/28-30 (sch. Pe 26 ad B. 60,12,67 = D. 47,2,67)
- BS 3425/34 – 3426/2 (sch. Pe 21 ad B. 60,12,68 = D. 47,2,68)
- BS 3427/25 – 3428/19 (sch. Pe 6 ad B. 60, 12,70 = D. 47,2,70)
- BS 3429/20-32 (sch. 12 ad B. 60, 12,72 = D. 47,2,72)
- BS 3432/25 – 3433/2 (sch. Pe 9 ad B. 60,12,77 = D. 47,2,77)
- BS 3436/22 – 3437/6 (sch. Pe 32 ad B. 60,12,81 = D. 47,2,81)
- BS 3437/9-14 (sch. Pe 34 ad B. 60,12,81 = D. 47,2,81)
- BS 3439/10-17 (sch. Pe 12 ad B. 60,12,83 = D. 47,2,83)
- BS 3439/18 – 3440/7 (sch. Pe 13 ad B. 60,12,83 = D. 47,2,83)
- BS 3444/4-28 (sch. Pe 5 ad B. 60,12,91 = D. 47,2,91)
- BS 3447/9-20 (sch. Pe 7 ad B. 60,12,94 = D. 47,3,1)

Τίτλος γγ'.  
Ἐάν τις ἐν διαθήκῃ  
ἐλεύθερος εἶναι κελευσθῆ  
καὶ μετὰ θάνατον τοῦ  
δεσπότη πρὸ τῆς  
ὑπεισελεύσεως τῆς  
κληρονομίας ὑφαρπάσαι ἢ

6 *scholia*:

- BS 3453/22-35 (sch. Pe 37 ad B. 60,13,1 = D. 47,4,1)
- BS 3454/1-7 (sch. Pe 38 ad B. 60,13,1 = D. 47,4,1)

HAGIOTHEODORITES: THE LAST ANTECESSOR?

διαφοθεῖραι τι λέγεται	-BS3454/8-32 (sch. Pe 39 ad B. 60,13,1 = D. 47,4,1) -BS 3454/33-35 (sch. Pe 40 ad B. 60,13,1 = D. 47,4,1)
13 <sup>th</sup> Title.	-BS 3455/23-33 (sch. Pe 43 ad B. 60,13,1 = D. 47,4,1)
If someone is directed to become free in a will and is alleged to have stolen or destroyed something after the death of his owner but before the inheritance has been accepted	-BS 3456/8-13 (sch. Pe 46 ad B. 60,13,1 = D. 47,4,1)
Τίτλος ιε΄.	2 <i>scholia</i> :
Ἐὰν φαμίλια κλοπήν πεποιηκέναι λέγεται	-BS 3464/1-13 (sch. Pe 6 ad B. 60,15,2 = D. 47,6,2 jo. Proch. 39,54 <sup>fin</sup> .)
15 <sup>th</sup> Title.	-BS 3468/7-15 (sch. Pe 3 ad B. 60,15,6 = D. 47,6,6 jo. Proch. 39,53)
If a family is said to have committed theft	
Τίτλος ις΄.	9 <i>scholia</i> :
Περὶ δένδρων τῶν φανερώς ἢ λάθρα τμηθέντων	-BS 3470/7-29 (sch. Pe 2 ad B. 60,16,2 = D. 47,7,2) -BS 3471/5-10 (sch. Pe 1 ad B. 60,16,4 = D. 47,7,4) <sup>51</sup> -BS 3471/25-30 (sch. Pe 8 ad B. 60,16,5 = D. 47,7,5) -BS 3472/1-15 (sch. Pe 9 ad B. 60,16,5 = D. 47,7,5)
16 <sup>th</sup> Title.	-BS 3473/ 4-10 (sch. Pe 5 ad B. 60,16,6 = D. 47,7,6)
About trees that have been openly or secretly felled	-BS 3473/26-31 (sch. Pe 7 ad B. 60,16,7 = D. 47,7,7) -BS 3474/11-15 (sch. Pe 5 ad B. 60,16,8 = D. 47,7,8) -BS 3475/12-19 (sch. Pe 5 ad B. 60,16,11 = D. 47,7,11) -BS 3476/18-25 (sch. Pe 6 ad B. 60,16,3 = D. 48,27,1)
Τίτλος ιζ΄.	16 <i>scholia</i> :
Περὶ βιαίως πραγμάτων ἀρπαγέντων καὶ περὶ ὀχλαγωγίας καὶ περὶ βίας	-BS 3477/6-17 (sch. Pe 2 ad B. 60,17 ad rubricam) -BS 3482/11-14 (sch. Pe 48 ad B. 60,17,2 = D. 47,8,2)

51 The *scholion* is inscribed τοῦ αὐτοῦ. Its position in the manuscript proves that the *scholion* originates from Hagiotheodorites. See BT 3471 app. crit. ad l. 5 τοῦ αὐτοῦ.



PENNA

ἐνόπλου	-BS 3483/11-18 (sch. Pe 53 ad B. 60,17,2 = D. 47,8,2) -BS 3483/19-25 (sch. Pe 54 ad B. 60,17,2 = D. 47,8,2) -BS 3483/31 – 3484/13 (sch. Pe 56 ad B. 60,17,2 = D. 47,8,2)
17 <sup>th</sup> Title.	-BS 3485/6-12 (sch. Pe 63 ad B. 60,17,2 = D. 47,8,2)
About goods taken by force and about uproar and about armed force	-BS 3485/13-16 (sch. Pe 64 ad B. 60,17,2 = D. 47,8,2) -BS 3489/3-9 (sch. Pe 17 ad B. 60,17,4 = D. 47,8,4) -BS 3489/10-19 (sch. Pe 18 ad B. 60,17,4 = D. 47,8,4) -BS 3489/25-28 (sch. Pe 20 ad B. 60,17,4 = D. 47,8,4) -BS 3498/3-9 (sch. Pe 86 ad B. 60,17,7 = D. 43,16,1) -BS 3499/14-18 (sch. Pe 92 ad B. 60,17,7 = D. 43,16,1) -BS 3504/6-17 (sch. Pe 4 ad B. 60,17,8 = D. 43,16,1 §48.2.) -BS 3507/26 – 3508/4 (sch. Pe 36 ad B. 17,9 = D. 43,16,3) -BS 3518/12-28 (sch. Pe 13 ad B. 60,17,28 = D. 43,33,1) -BS 3519/18-25 (sch. Pe 5 ad B. 60,17,30 = C. 8,6,1)
Τίτλος ιη΄.	3 <i>scholia</i> :
Ἐκ τοῦ νόμου τοῦ Ἰουλίου περὶ βίας δημοσίας καὶ ἰδιωτικῆς	-BS 3522/4-15 (sch. Pe 1 ad B. 60,18 ad rubricam) -BS 3525/14-23 (sch. Pe 3 ad B. 60,18,6 = D. 48,6,6) -BS 3525/27 – 3526/15 (sch. Pe 3 ad B. 60,18,7 = D. 48,6,7)
18 <sup>th</sup> Title.	
From the <i>Julian</i> law about public and private violence	

There are two more *scholia* which, although they do not derive from Hagiotheodorites, mention his name. In the first, the author mentions shortly that he does not agree with the opinion of Hagiotheodorites.<sup>52</sup> In the second *scholion* the author refers to the opinions of his teacher, Hagiotheodorites, and of Nicaeus on a matter concerning deadlines in bringing actions when adultery has been committed.<sup>53</sup> From the above table it is clear that

52 BS 3078/12-14 (sch. Pe 5 ad B. 60,1,32 = C. 9,46,5): Ζήτει τὸν μζ΄ τιτ. τοῦ παρόντος βιβ. καὶ ἐξ ἐκείνου καὶ τῶν ἐν αὐτῷ κεφαλαίων ἐρμήνευσον τὸ παρόν. Ἄ γὰρ ἀναπλάττεται ὁ Ἀγιοθεοδώριτης οὔ μοι δοκοῦσι καλῶς ἔχειν.

53 BS 3710/16-24 (sch. Pe 5 ad B. 60,37,29 = D. 48,5,30): Καὶ ἰδοὺ μανθάνεις, ὅτι τὸ περὶ μοιχείας ἐντὸς πενταετίας καὶ ἐντὸς ἑξ μηνῶν κινεῖται. Ὁ μὲν διδάσκαλός μου Ἀγιοθεοδώριτης ἔλεγεν ἐντὸς μὲν πενταετίας κινεῖσθαι παρὰ τοῦ πατρὸς καὶ τοῦ ἀνδρός, ἐντὸς δὲ ἑξαμήνου κινεῖν τοὺς ἄλλους τοὺς μετ' αὐτούς, ὡς κεφ. ζ΄ θεμ. α΄. Χρᾶται γὰρ αὐτῷ τάχα πρὸς κατασκευὴν. Ὁ δὲ Νικαεὺς λέγει, ὅτι ἐντὸς μὲν πενταετίας κινεῖται κατὰ τὸ μωιχοῦ, κατὰ δὲ τῆς μοιχαλίδος ἐντὸς ἑξαμήνου· (...).

Hagiotheodorites provided a detailed commentary on the first 18 titles of the 60<sup>th</sup> *Basilica* book. Some of the subjects that he deals with concern: civil penalties, liability including noxal liability and when more people have caused damage or have committed a crime, the *Aquilia* law on damage, actions and their distinctions, negative loss (*lucrum cessans*) and how to estimate it, protection of trees, theft, distinction of crimes, punishments, possession, deposit, the use of oaths, corruption of slaves and robbery. The title, on which Hagiotheodorites has commented by far the most, is the 12<sup>th</sup> title which refers to theft. There are 58 preserved *scholia* of his on this title, which corresponds to nearly 1/3 of all of the preserved *scholia* of Hagiotheodorites. In this title there are presumably even more *scholia* that could be attributed to him on the basis of his style and of other arguments.<sup>54</sup> However, as I have mentioned above, I have included in this paper only the *scholia* with his name. He has also devoted many of his *scholia*, 23 in total, to explaining the title on the *Aquilia* law on damage but he refers to the *Aquilia* law in many other *scholia* as well.<sup>55</sup> His 23 *scholia* on noxal liability also cover a rather considerable part of the material scope of his *scholia*.

#### 4. Characteristics of Hagiotheodorites' *scholia* and of his style – Some examples

Hagiotheodorites must have been a law teacher. This is first of all confirmed in one of the *Basilica scholia* whose author admits that Hagiotheodorites was his teacher: Ὁ μὲν διδάσκαλός μου Ἁγιοθεοδωρίτης ἔλεγεν (...).<sup>56</sup> The fact that Hagiotheodorites must have been a law teacher is also obvious from his preserved *scholia*. His aim is to explain the law to the students. Most of the *scholia* of Hagiotheodorites are rather long; the majority

54 For example, according to my opinion the following *scholia* of the 12<sup>th</sup> title of the 60<sup>th</sup> *Basilica* book could also be attributed to Hagiotheodorites: BS 3352/4-6 (sch. Pe 74 ad B. 60,12,14 = D. 47,2,14), BS 3352/9-23 (sch. Pe 76 ad B. 60,12,14 = D. 47,2,14), BS 3365/19-21 (sch. Pe 29 ad B. 60,12,21 = D. 47,2,21), BS 3365/22-33 (sch. Pe 30 ad B. 60,12,21 = D. 47,2,21), BS 3377/12-14 (sch. Pe 6 ad B. 60,12,38 = D. 47,2,38) and BS 3377/15-25 (sch. Pe 7 ad B. 60,12,38 = D. 47,2,38).

55 M. Miglietta discusses some comments of Hagiotheodorites related to the *lex Aquilia* in his study “Il terzo capo della lex Aquilia è, ora, il secondo”. Considerazioni sul testo del plebiscito aquiliano alla luce della tradizione giuridica bizantina”, *AUPA* LV (2012), 403-442 (427-430); cf. also Id., ‘Trasmissione del testo e giurisprudenza bizantina: la tutela pretoria da Dig. 9.2 a Bas. 60.3 – Profili lessicali’, *SCDR* XXVI (2013), 273-326 (301-306). E.G.D. Van Dongen, *Contributory Negligence. A Historical and Comparative Study*, (PhD of which a commercial edition is forthcoming), Maastricht 2013, 178-179 also refers shortly to a *scholion* by Hagiotheodorites relating to the well-known Digest fragment on the barber case and the issues of liability in case of a wrongful act. It concerns BS 3104/28-3105/13 (sch. Pe 41 ad B. 60,3,11 = D. 9,2,11.12 init.), a translation of which is to be found in F.H. Lawson/B.S. Markesinis, *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law*, II, Cambridge 1982, 45.

56 BS 3710/17 (sch. Pe 5 ad B. 60,37,29 = D. 48,5,30).

of them consists of at least ten lines. His *scholia* reflect a classroom teaching. Almost every *scholion* of his begins with some advice for the student, a piece of advice that would help the student through his reading and make him understand and master better the material taught. The following lines form a typical beginning of his *scholia*: ‘take into consideration (also) this (...)’ or ‘consider on beforehand (...)’,<sup>57</sup> ‘do not think that this is contrary to what is said there and there (...)’,<sup>58</sup> ‘do not be surprised that (...)’,<sup>59</sup> ‘do not make the mistake (...)’ or ‘do not get confused and think that (...)’,<sup>60</sup> and other similar expressions.<sup>61</sup> Following the teaching method of the *antecessores*, he often uses fictitious cases in order to explain his difficult material. Characteristic is the word *θεματισμός* used here as a noun meaning ‘an imaginary, fictitious case’ and, as a verb in the imperative form, namely *θεμάτισον* meaning ‘imagine’.<sup>62</sup>

What is also evident from the *scholia* is that the teacher Hagiotheodorites has before him an audience to whom he has taught before and that his *scholia* are part of the course that he has been teaching to them for a while now. This is obvious from some of the

- 
- 57 For example, see BS 3076/20 (sch. Pe 6 ad B. 60,1,29 = C. 9,46,2): ‘Ὅρα καὶ τοῦτο καὶ τὰ ἐν τῷ κβ’ κεφ. (...)’; BS 3086/26 (sch. Pe 52 ad B. 60,2,1 = D. 9,1,1): Προθεώρησον; BS 3186/9 (sch. Pe 27 ad B. 60,5,2 = D. 9,4,2): Προθεώρησον; BS 3217/21-22 (sch. Pe 29 ad B. 60,5,26 = D. 9,4,26): ‘Ἐχε καὶ τοῦτο τὸ θέμα προσθήκην εἰς τὰ παραγραφέντα σοὶ ἐν τῷ (...)’; BS 3286/16 (sch. Pe 11 ad B. 60,8,4 = D. 11,5,4): Σημείωσαι καὶ τοῦτο, ὅτι (...); BS 3292/22 (sch. Pe 15 ad B. 60,9,3 = D. 11,6,3): Προθεώρησον.
- 58 For example, see BS 3172/26 (sch. Pe 39 ad B. 60,4,1 = D. 9,3,1,2): Μὴ δόξῃ σοὶ ἐναντίον πρὸς τοῦτο τὸ μ’, μαί, μβ’ κεφ. τοῦ ι’ τιτ. τοῦ (...); BS 3195/27 (sch. Pe 7 ad B. 60,5,11 = D. 9,4,11): Μὴ δόξῃ σοὶ τὸ παρὸν κεφ. ἐναντίον πρὸς τὸ γ’ θεμ. τοῦ κζ’ κεφ. τοῦ γ’ τιτ. (...); BS 3198/11 (sch. Pe 24 ad B. 60,5,14 = D. 9,4,14): Μὴ δόξῃ σοὶ ἐναντίον πρὸς τὸ παρὸν τὴ νη’ κεφ. τοῦ α’ τιτ. (...); BS 3309/6 (sch. Pe 25 ad B. 60,10,7 = D. 13,1,7): Ζήτηί βιβ. ζ’ τιτ. ιζ’ κεφ. β’ καὶ μὴ σοὶ ἐναντιωθῇ; BS 3403/33-34 (sch. Pe 102 ad B. 60,12,52 = D. 47,2,52): ‘Ὅρα δέ, μὴ ἐναντιωθῇ σοὶ πρὸς τὸ ιβ’ θεμ. (...).
- 59 For example, see BS 3054/31 (sch. Pe 10 ad B. 60,1,9 = D. 3,6,9): Μὴ θαυμάσης, πῶς (...); BS 3483/34 (sch. Pe 56 ad B. 60, 17,2 = D. 47,8,2): Καὶ μὴ θαυμάσης, πῶς (...).
- 60 BS 3260/12 (sch. Pe 7 ad B. 60,6,25 = C. 6,2,8): Μὴ παραδράμῃς (...); BS 3238/18 (sch. Pe 10 ad B. 60,5,46 = C. 3,41,3): Μὴ πλανηθῆς καὶ νομίσης (...).
- 61 Such as, for example, BS 3258/17-18 (sch. Pe 5 ad B. 60,6,21 = C. 6,2,4): Μὴ δόξῃ σοὶ ἀπρόσφορον τὸ παρὸν κεφάλαιον εἰς τὸν παρόντα τίτλον (...); BS 3271/22-23 (sch. Pe 17 ad B. 60,6,39 = C. 6,2,22): σὺ δὲ ἴσθι διαφορὰν, (...); BS 3300/10 (sch. Pe 21 ad B. 60,10,1 = D. 13,1,1,2): Οὐ μάτην τοῦτο προσετέθη, ὡς (...); BS 3338/1 (sch. Pe 9 ad B. 60,12,1 = D. 47,2,1): Καὶ λοιπὸν δεῖ προσέχειν ἐπὶ (...).
- 62 For example, see BS 3209/12 (sch. Pe 40 ad B. 60,5,21 = D. 9,4,21): Ἐπὶ τοῦ αὐτοῦ θεματισμοῦ (...); BS 3211/26 (sch. Pe 19 ad B. 60,5,22 = D. 9,4,22): Ὁ θεματισμὸς τοῦ παρόντος (...); BS 3280/29 (sch. Pe 17 ad B. 60,7,9 = C. 6,1,4): Μετίλλαξεν ὁ νομοθέτης τὸν ἄνω θεματισμὸν (...); BS 3330/25-26 (sch. Pe 9 ad B. 60,10,21 = C. 4,8,1): (...) θεμάτισον καὶ πρὸς ἐν ἐκ τῶν δύο ἐκείνων τὸν τοῦ παρόντος κεφ. ἀπεύθυνον θεματισμὸν. (...); BS 3353/5 (sch. Pe 80 ad B. 60,12,14 = D. 47,2,14): Ἡ θεμάτισον, ὅτι ὁ δεσπότης (...); BS 3375/26 (sch. Pe 16 ad B. 60,12,36 = D. 47,2,36): Ἐν μὲν τῷ προτέρῳ θεματισμῷ (...).

opening words that I have mentioned above. For example, when he indicates that what he is now going to explain is not at all contrary to what he has already said there and there.<sup>63</sup> But there are many more examples in which it is evident that he has already taught part of this material. His words suggest that some subjects have been dealt with before. For example, when he mentions that ‘after pointing out the difference of this and this there and there, I now come to discuss (...)’ or, ‘it has been mentioned to you numerous times that (...)’ or, ‘you have already learned that (...)’ and similar expressions.<sup>64</sup> Often he refers to earlier explanations, the *paragraphai*, but it is not always clear whether these *paragraphai* were written by him. Usually he states something like: ‘read this and this *parapgraphe*’.<sup>65</sup> Sometimes it is clear that these *paragraphai* belong to the *antecessores* of the 6<sup>th</sup> century because he either mentions their name,<sup>66</sup> or uses an expression which indicates that the corresponding *parapgraphe* is an old one; for example, he mentions ‘in this old *parapgraphe*’ or something similar.<sup>67</sup>

He is also very keen in using another element of the teaching of the *antecessores*,<sup>68</sup> namely the form of *erotapokrisis* which consists of a question and an answer, an objection and a solution in order to explain a legal problem.<sup>69</sup> Some of these questions, as he mentions, are real questions posed to him: ‘I was asked (...)’ or ‘he asked (...)’ and then

63 See the examples mentioned in note 58 above.

64 To mention a few examples: BS 3211/7 (sch. Pe 18 ad B. 60,5,22 = D. 9,4,22): Πολλάκις σοι ἐλέγχθη, ὅτι (...); BS 3314/31 (sch. Pe 14 ad B. 60,10,10 = D. 13,1,10): Ἐμαθες ἐν κεφ. β' καὶ γ', ὅτι (...); BS 3319/5 (sch. Pe 17 ad B. 60,10,12 = D. 13,1,12): (...), καθὼς καὶ ἀνωτέρω μεμάθηκας (...); BS 3392/21 (sch. Pe 38 ad B. 60,12,48 = D. 47,2,48): (...). Πολλαχὸν γὰρ τοῦτο ἔμαθες (...); BS 3420/28-29 (sch. Pe 4 ad B. 60,12,66 = D. 47,2,66): (...), ὡς ἔμαθόμεν ἐν ττ. ι' (...); BS 3436/30 (sch. Pe 32 ad B. 60,12,81 = D. 47,2,81): (...). Ἐμαθες διαφόρως, ὅτι (...); BS 3455/23 (sch. Pe 43 ad B. 60,13,1 = D. 47,4,1): Πολλάκις ἔμαθες, ὅτι (...).

65 For example, see BS 3162/20 (sch. Pe 21 ad B. 60,3,50 = D. 9,2,50.51): (...). ἀνάγνωθι καὶ τὴν ἐκεῖ παραγραφὴν. (...); BS 3186/23-24 (sch. Pe 27 ad B. 60,5,2 = D. 9,4,2): Ὅμως ἀνάγνωθι τὸ β' θεμ. τοῦ δ' κεφ. καὶ τὰς ἐκεῖ παραγραφὰς (...); BS 3212/6-7 (sch. Pe 19 ad B. 60,5,22 = D. 9,4,22): (...). ἀνάγνωθι γὰρ καὶ τὴν ἐν τῇ ἐπιτιτλώσει τούτου τοῦ ττ. κειμένην παραγραφὴν (...); BS 3271/10-11 (sch. Pe 15 ad B. 60,6,39 = C. 6,2,22): (...). Ἀνάγνωθι δὲ καὶ τὰς ἐπομένους παραγραφὰς.

66 On the *antecessores* to whom he refers, see further on.

67 For example, BS 3259/23-26 (sch. Pe 4 ad B. 60,6,24 = C. 6,2,7): (...), ζητεῖ μὲν (...) καὶ τὰς ἐν ἐκείνῳ τοῦ παλαιοῦ παραγραφὰς (...); BS 3300/21-22 (sch. Pe 21 ad B. 60,10,1 = D. 13,1,1.2): (...). Ἀνάγνωθι (...) καὶ τὰς ἐκεῖ παραγραφὰς τοῦ παλαιοῦ (...); BS 3353/17-18 (sch. Pe 80 ad B. 60,12,14 = D. 47,2,14): (...). ἦν φησιν ἡ ἐν βιβ. κε' ττ. α' κεφ. κα' παλαιὰ παραγραφὴ, (...).

68 On the teaching method of the *antecessores*, see Scheltema's monograph quoted in note 3 above.

69 To mention a few examples: BS 3089/1-2 (sch. Pe 5 ad B. 60,2,3 = D. 9,1,3): (...). Πῶς οὖν τῆς ἀμορφίας ἐνταῦθα οὐ γίνεται λόγος; Λύσις. (...); BS 3098/16-17 (sch. Pe 35 ad B. 60,3,7 = D. 9,2,7): (...). Καὶ πῶς ταύτην τὴν διαστολὴν ἔστι παραδέξασθαι εἰπόντος τοῦ νομοθέτου ἀνωτέρω, ὅτι μόνου οἱ εὐγενεῖς ἀγωνίζονται δημοσίᾳ; Λύσις. (...); BS 3422/20 (sch. Pe 22 ad B. 60,12,67 = D. 47,2,67): “Πῶς οὐκ ἐψηλάφα, ἐπεὶ παρ' αὐτῷ ἦν; Λύσις. (...).

follows the answer, the *lysis*.<sup>70</sup> This is another indication that he was a teacher. These questions, which are posed by his students, arise from his teaching activity. And he, as a good teacher, is prepared to provide answers, to clarify difficult points and clear any misunderstandings. His preference for the names Peter and Paul in his examples remind us of the style of the author of the *Ecloga Basilicorum*, which is a work dating from the middle of the 12<sup>th</sup> century and consisting of the first ten *Basilica* books with their commentary.<sup>71</sup> Triantaphyllopoulos examines the question whether Hagiotheodorites could have been the author of the *Ecloga Basilicorum*.<sup>72</sup> He concludes that this must not have been the case. His arguments are mainly based on the comparison of the style of the author of the *Ecloga Basilicorum* on the one hand, and that of the *scholia* of Hagiotheodorites on the other. According to Triantaphyllopoulos, the style of Hagiotheodorites is more elaborate and shows a better legal knowledge. However, he adds that the author of the *Ecloga Basilicorum* seems to have been influenced by the teaching of Hagiotheodorites and suggests that presumably he could have been a pupil of his.<sup>73</sup>

Hagiotheodorites is interested in explaining the law of the *Basilica*. There have been some questions about the application of the *Basilica*, as stated at the beginning of this paper. In fact there is a whole discussion on whether laws in general were applied in Byzantium or not. It is interesting to see, whether Hagiotheodorites restricts himself to using only the text of the *Basilica*, or perhaps some contemporary sources in order to explain this law, or, whether he uses earlier sources, Justinianic texts or works of the *antecessores*. From the *antecessores*, he refers by name only to Stephanus in three of his *scholia*. In the first *scholion* he explains that the expression οὐκ εὐχερῶς is a synonym of οὐδ' ὅλως, as it is shown from the old times. And he refers to an example of Stephanus where the latter uses the term οὐκ εὐχερῶς in the sense of οὐδ' ὅλως, namely 'not at all'.<sup>74</sup> In the second *scholion* Hagiotheodorites writes that a thief who lends money from what he has stolen, has a *condictio*, τὸν ἀπὸ καλοῦ δαπανήματος κονδικτικίον, as in the 23<sup>rd</sup> book,

70 For example, BS 3178/32-33 (sch. Pe 44 ad B. 60,4,5 = D. 9,3,5): Ἡρώτησε: καὶ πῶς τῇ μὲν προτέρα ἱμφάκτω ὁ δεσπότης οὐκ ἐνέχεται, ὡς θεμ. γ' τοῦ α' κεφ., τῇ δὲ παρούσῃ ἐνέχεται; Λύσις. (...); BS 3255/29-31 (sch. Pe 7 ad B. 60,6,18 = C. 6,2,1): Ἡρωτήθη. Καὶ πῶς (...); Λύσις. (...); BS 3403/11-12 (sch. Pe 99 ad B. 60,12,52 = D. 47,2,52): Ἡρωτήθη. Καὶ πόθεν δυνήσομεθα καταλήψεσθαι τοῦτο; Λύσις. (...).

71 On the *Ecloga Basilicorum*, see Troianos, *Piges* (note 1 above), 278-279. Most recent edition: L. Burgmann, *Ecloga Basilicorum*, [Forschungen zur byzantinischen Rechtsgeschichte, Band 15], Frankfurt/M. 1988.

72 For this hypothesis of Triantaphyllopoulos to which I refer in the following, see Triantaphyllopoulos, 'Periorismos' (note 25 above), 159-162 (= Id., *Apanta* (note 25 above), 743-746).

73 Triantaphyllopoulos, 'Periorismos' (note 25 above), 162 (= Id., *Apanta* (note 25 above), 746).

74 BS 3253/24-27 (sch. Pe 40 ad B. 60,6,14 = D. 11,3,13§1.14).

1<sup>st</sup> title, 13<sup>th</sup> chapter and Stephanus *ad locum*.<sup>75</sup> Indeed, Stephanus has explained this *condictio* in detail, but it still remains doubtful whether he was the first to use the term ὁ ἀπὸ καλοῦ δαπανήματος κονδικτίκιος, mainly because there is also a *scholion* by Thalelaeus in which this *antecessor* refers to this *condictio* by the name ὁ ἀπὸ καλοῦ δαπανήματος κονδικτίκιος.<sup>76</sup> Brandsma refers also to a *scholion* by Stephanus in which the *antecessor* mentions that the late Dorotheus and the late Thalelaeus have given τὸν ἀπὸ καλοῦ δαπανήματος κονδικτίκιον to the thief.<sup>77</sup> In any case, Hagiotheodorites refers here to the teaching of Stephanus because this is the *antecessor* who has explained in detail this *condictio*, as the preserved *scholia* show.<sup>78</sup> Hagiotheodorites mentions the name of Stephanus once again when referring to the procedure of oaths in a trial: he advises his audience to read also the *parapgraphe* of Stephanus on this issue.<sup>79</sup>

When explaining the *Aquila* law on damage, he advises the students to look up the *parapgraphe* of the so-called Unknown Author, the Anonymous.<sup>80</sup> Sometimes, as I have already mentioned, he advises the students to read also ‘old paragraphai’.<sup>81</sup> In a very few cases he refers to Justinian’s legislation. When explaining the noxal actions he advises the reader to also read a part of the Institutes.<sup>82</sup> He mentions the Institutes in three other *scholia*<sup>83</sup> and only once does he refer to the Digest.<sup>84</sup> He also refers to the *leges Iuliae*

75 BS 3343/25-26 (sch. Pe 9 ad B. 60,12,12 = D. 47,2,12): (...), ὅτι ὁ μὲν κλέπτης δανείζων ἃ ἔκλεψε πράγματα ἔχει τὸν ἀπὸ καλοῦ δαπανήματος κονδικτίκιον, ὡς βιβ. κγ’ τιτ. α’ κεφ. ιγ’ καὶ ὁ ἐν αὐτῷ Στέφανος. (...). Hagiotheodorites mentions the name of Stephanus also in the beginning of this *scholion*, see BS 3343/21.

76 BS 1591/9-11 (sch. Pa 2 ad B. 23,1,51 = C. 4,2,7).

77 F. Brandsma, *Dorotheus and his Digest translation*, Groningen 1996, 83; the *scholion* is BS 1530/21-24 (sch. Pa 5 ad B. 23,1,13 = D. 12,1,13). Brandsma (p. 84) adds that ‘Stephanus calls the *condictio* involved here ὁ ἀπὸ καλοῦ δαπανήματος κονδικτίκιος’ and that ‘this term does not occur in the Latin texts’. See, for the whole discussion, H. de Jong, ‘Stephanus on the *condictio de bene depensis* (ὁ ἀπὸ καλοῦ δαπανήματος κονδικτίκιος)’, *TRG* 78 (2010), 15-35.

78 On Stephanus, see H. de Jong, *Stephanus en zijn Digestenonderwijs*, Den Haag 2008.

79 BS 3360/13-21 (sch. Pe 8 ad B. 60,12,19 = D. 47,2,19).

80 BS 3134/22-23 (sch. Pe 130 ad B. 60,3,27 = D. 9,2,27). There are two Anonymoi in Byzantine law. The Anonymous senior, a contemporary of the *antecessores*, whose *Summa* on the Digest was used in the *Basilica*. The *parapgraphai* to the *Summa* were made by another Anonymous, the Junior one, also known as Enantiophanes, who lived in the first quarter of the 7<sup>th</sup> century. The Byzantines had not made a distinction between the two Anonymoi: they thought it was one person who wrote the *Summa* and the *parapgraphai* on it, namely the Unknown Author, the Anonymous.

81 See the examples above in note 67.

82 BS 3186/9-24 (sch. Pe 27 ad B. 60,5,2 = D. 9,4,2).

83 BS 3186/11 (sch. 27 Pe ad B. 60,5,2 = D. 9,4,2); BS 3300/13 (sch. Pe 21 ad B. 60,10,1 = D. 13,1,1,2) and BS 3436/24 (sch. Pe 32 ad B. 60,12,81 = D. 47,2,81).

84 BS 3368/14 (sch. Pe 7 ad B. 60,12,25 = D. 47,2,25).

(Ἰούλιοι Νόμοι).<sup>85</sup> His main point of interest were the *Basilica* because this is the law that he wants to explain and teach to the students.

Triantaphyllopoulos has compared Hagiotheodorites' style with that of the *antecessor* Stephanus. Hagiotheodorites often uses some introductory information at the beginning of his *scholia*, some important piece of theory, the so-called 'protheory' (προθεωρία) to make the way easier for the student. According to Triantaphyllopoulos, Hagiotheodorites uses these protheories and the question-answer forms (ἐρωταποκρίσεις) imitating Stephanus.<sup>86</sup> It is obvious that Hagiotheodorites adopts methods of teaching used by the *antecessores*, as is evident from the aforementioned examples.<sup>87</sup> His style is elaborate but at the same time it remains simple. There is a clear structure in his thoughts. He deals with complicated legal concepts, uses Latin terms, makes classifications and sharp distinctions and tries to harmonise apparent contradictions. I believe that, despite the complexity of some of his topics, Hagiotheodorites successfully manages to convey the material over to the pupils in a pleasant way, by using vivid examples, a live language and the methods described above.

A good example of his vivid figure of speech is a *scholion* in which he asks the students to pay particular attention to the issue he is explaining and he makes a rather funny metaphor. He writes: 'But if you leave the surface and are willing to listen to what is said and not (just) to take a bath, but to anoint yourself, you will admire what has been explained in the margins of the 7<sup>th</sup> book; and the present text does not conflict with those cases in the 18<sup>th</sup> title of the 7<sup>th</sup> book, about which explanations have been given to you'.<sup>88</sup> In another *scholion* he emphasizes that stolen goods could in any case not be acquired by acquisitive prescription (*usucapio*). He observes in a characteristic way: 'You have learned this in many places. The stolen good, even if it comes to countless good faith possessors, is nevertheless a stolen good and cannot be acquired by *usucapio* (...)'.<sup>89</sup> By sentences like these, you can easily picture Hagiotheodorites talking before the class. He uses methods of legal argumentation. For example, in a certain *scholion* his conclusion

85 See his three comments on the 18<sup>th</sup> title of the 60<sup>th</sup> *Basilica* book which is about these laws, as well as the following *scholia* of his: BS 3477/15 (sch. Pe 2 ad B. 60,17 rubricam); BS 3485/14 (sch. Pe 64 ad B. 60,17,2 = D. 47,8,2); BS 3498/4 and 7 (sch. Pe 86 ad B. 60,17,7 = D. 43,16,1).

86 Triantaphyllopoulos, 'Periorismos' (note 25 above), 162 (= Id., *Apanta* (note 25 above), 746).

87 See also further on, the two examples that I include with their translation.

88 BS 3444/13-16 (sch. Pe 5 ad B. 60,12,91 = D. 47,2,91): (...). Εἰ δ' ἀφεῖς ἐπιπόλιον προσέγειν τοῖς λεγομένοις καὶ μὴ λούεσθαι, ἀλλ' ἀλείφεσθαι ἐθέλεις, καὶ τὰ ἐν τῷ ζ' βιβ. παραγραφέντα θανατώσεις καὶ τὸ παρὸν οὐ προσκρούσει πρὸς ἐκεῖνα τὰ τοῦ ιη' τίτ. τοῦ ζ' βιβ. θέματα, ἐφ' οἷς καὶ παρεγρᾶφη σοι (...). Cf. BS 3444 app. crit. ad l. 14 ἐθέλεις: 'malimus ἐθέλεις (omisso καὶ ante μὴ λούεσθαι)'.

89 BS 3392/21-22 (sch. Pe 38 ad B. 60,12,48 = D. 47,2,48): (...). Πολλαχοῦ γὰρ τοῦτο ἔμαθες. Τὸ γὰρ φούρτιβον, κἄν εἰς μυρίους καλῇ πίστει νομεῖς περιέλθῃ, φούρτιβον μὲν ἔστι καὶ <οὐκ> οὐσοκαπιτεύεται, (...).

derives, as he remarks, from an *argumentum a contrario* (ἐκ τῆς ἀντιδιαστολῆς).<sup>90</sup> Moreover, as any good teacher would do, he emphasizes on a general rule and repeats it so that the students will remember it for good. When he explains, for example, that a thief cannot bring an action for theft when someone steals from him a stolen good, he refers to the following general maxim, which the students have already been taught: ‘because no-one has an action at his disposal based on his own impudence’.<sup>91</sup> This is the well-known principle of *nemo turpitudinem suam allegans auditur* deriving from Roman law and meaning that no-one will be heard pleading his own turpitude. He has a critical approach to the texts and urges the students to think critically. For example, in his explanation of a legal question for which there are two different opinions, he gives both opinions and advises the students to consider both; he also adds in a discrete way his personal preference in the matter.<sup>92</sup>

Interesting is one of his *scholia* in which he clearly makes the distinction between *possessio* and *detentio*. He notes that in a deposit (*depositum*), a loan for consumption (*commodatum*) and a loan revocable at the will of the grantor (*precarium*), the person who holds the good does not have the possession (νομή) but the detention (κατοχή).<sup>93</sup> In these three cases, he writes, we do not speak of possession (νομή) but of a bare and faint detention (ψιλὴ καὶ ἀμυδρὰ κατοχή). This *scholion* and more *scholia* of his that deal with issues of possession, good faith, liability, classifications of actions, negative loss or prevented profit (*lucrum cessans*) and other subjects, show a rather sophisticated level of legal thought.

A method that he sometimes uses is the following. He begins with an example in order to explain a basic legal concept. He then uses the same example but changes it gradually and adjusts it to the legal concepts that he wants to address. In that way the student is not confused by numerous examples and Hagiotheodorites conveys the point he wants to make more effectively.

90 BS 3271/9-10 (sch. Pe 15 ad B. 60,6,39 = C. 6,2,22): (...). Καὶ σημείωσαι τοῦτο ἐκ τῆς ἀντιδιαστολῆς. (...).

91 BS 3425/35 – 3426/2 (sch. Pe 21 ad B. 60,12,68 = D. 47,2,68): (...). Ὅ γὰρ ἀπὸ κλέπτου κλέπτων οὐκ ἐνάγεται τῇ περὶ κλοπῆς ἀγωγῇ. Οὐδεὶς γὰρ ἐκ τῆς ἰδίας ἀναισχοντίας ἀγωγὴν κτάται, ὡς κεφ. ιβ' ἐν τέλει. (...).

92 BS 3472/11-12 (sch. Pe 9 ad B. 60,16,5 = D. 47,7,5): (...). Σκόπησον οὖν σὺ καὶ ἀμφοτέρα: πιθανὸν γὰρ ἐκάτερον, ἀλλὰ μᾶλλον μοι δοκεῖ τὸ δεύτερον. (...).

93 BS 3208/33-35 (sch. Pe 38 ad B. 60,5,21 = D. 9,4,21): (...). Ἐπὶ δὲ παραθηκαρίων καὶ κομμοδαρίων καὶ πραικαρίων οὐδὲ παρόντων τῶν δούλων νομὴν λέγομεν ὄλωσ, ἀλλὰ ψιλὴν καὶ ἀμυδρὰν κατοχήν. (...).



To best demonstrate his techniques and style, I include two characteristic *scholia* of Hagiotheodorites. In order to understand how elaborate his *scholia* are, I also provide the *Basilica* fragment which he comments upon and the Digest fragment from which this part of the *Basilica* originates.

Example I: About the *condictio furtiva*

D. 13,1,14,2:

Bove subrepto et occiso condictio et bovis et corii et carnis domino competit, scilicet si et corium et caro contrectata fuerunt: cornua quoque condicentur. sed si dominus conditione bovis pretium consecutus fuerit et postea aliquid eorum, de quibus supra dictum est, condicet, omnimodo exceptione summove-tur. contra si corium condixerit et pretium eius consecutus bovem condicet, offerente fure pretium bovis detracto pretio corii doli mali exceptione summovebitur.

If a cow is stolen and killed, the *condictio* lies to the owner for the cow and the hide and the meat, provided, that is, that both the hide and meat were theftuously handled. The *condictio* will go for the horns too. However, if the owner's *condictio* obtains for him the price of the cow, and then he later begins a *condictio* for one of those other things mentioned above, his claim must at all events be defeated by a defense. On the other hand, if after claiming the hide and obtaining its value, he brings a *condictio* for the cow itself he will be defeated by the defense of fraud if the thief tenders the value of the cow less the value of the hide.<sup>94</sup>

B. 60,10,14,2 = D. 13,1,14,2 (BT 2814/6-9):

Βοὸς κλαπέντος ἀρμόζει ἐπὶ τῷ κρέατι καὶ τῷ δέρματι καὶ τοῖς κέρασιν, εἴ γε ταῦτα ἐψηλαφήθη καὶ ἔνθα μὴ τὴν τιμὴν τοῦ βοὸς ἔλαβεν ὁ δεσπότης· εἰ δὲ καὶ λαβὼν τὴν τιμὴν τοῦ δέρματος κινεῖ περὶ τοῦ βοός, ὑπεξαίρει τὸ δοθέν.

If a cow is stolen, (the *condictio*) lies for the meat and the skin and the horns, if, at least, they have been taken and in the situation where the owner has not received the price for the cow; if, however, he has received the price for the skin and nevertheless brings (the *condictio*) for the cow, he deduces what has been given.

BS 3321/26, 29-3322/21 (sch. Pe 13 ad B. 60,10,14 = D. 13,1,14):

Τοῦ Ἀγιοθεοδώριτου. (...). Ἔκλεψα βοῦν· ἀπήγον αὐτόν, ἔνθα δὴ ἐβουλόμην· ὁ δὲ οὐκ ἠκολούθει μοι· ἀγανακτήσας ἐφόνευσα

Of Hagiotheodorites. (...). I stole a cow; I tried to lead it away to where I wanted it, but the cow did not follow me; I was annoyed and killed it. We ask therefore: seeing that the *condictio furtiva* is brought on the one hand for the body itself and

94 A. Watson, [ed.], *The Digest of Justinian*, (transl. of Mommsen, ed. maior), 4 vols., Philadelphia 1985, I, 392.

τοῦτον. Ζητοῦμεν οὖν τοῦ φουρτίβου κονδικτικίου κινουμένου μὲν καὶ ἐπ' αὐτῷ τῷ σώματι, κινουμένου δὲ καὶ ἐπὶ τῷ διαφέροντι, ὅτε τὸ σῶμα μὴ φαίνεται, ὡς κεφ. ι' ἐν τέλει, ἐνταῦθα πῶς κινήσεται καὶ δύναιται ὁ φούρτιβος ὡς φούρτιβον ἀπαιτεῖν κρέας καὶ δέρμα καὶ κέρατα; Καί φαμεν, ὅτι εἰ μὲν καὶ μετὰ τὸν φόνον ὁ κλέπτης ἐψηλάφησε ταῦτα καὶ οὐδὲ τὴν τιμὴν τοῦ βοῦς προέφρασε δοῦναι, ἔκλεψε λοιπὸν καὶ κρέας καὶ δέρμα καὶ κέρατα καὶ ἐνάγεται καὶ ἐπ' αὐτοῖς τῷ φουρτίβῳ. Ἀνάγνωθι γὰρ καὶ τιτ. ιβ' κεφ. νβ' θεμ. ι' καὶ τὴν ἐκεῖσε παραγραφὴν ἀναγκαίως. Καὶ ἴσως ὡς κέρατα καὶ ὡς δέρμα καὶ ἀπλῶς κατὰ μέρος διατιμώμενα πλείονος ἂν γένοιτο διατιμήσεως ἄξια. Εἰ δὲ φονεύσας οὐκ ἐψηλάφησεν, ἐπὶ βοῖ ἐνάγεται καὶ βοῦς ἀποτιμηθῆσονται. Καὶ σημείωσαι ταῦτα, ὅτι πολλὰκίς διαφόρως ἀποτιμᾶται ὁ βοῦς καὶ τὰ κατὰ μέρος τοῦ βοῦς. Ἐγὼ δὲ σοι καὶ ἄλλο φημί. Βοῦν ἀλλότριον ὑγῆ ἐὰν ἐν ὄρει πλανώμενον ἰδὼν κλέψω, κλέπτης εἰμί, κἂν ἠγνόουν τίνος ἐστίν. Ἀνάγνωθι γὰρ τιτ. ιβ' κεφ. μγ' θεμ. ε', ὅτι καὶ τοιαύτης ἤμην διαθέσεως, ὅτε τὸν τοιοῦτον ἐλάμβανον βοῦν. Τί γὰρ ἄλλο με νομίζειν ἐχρῆν ἢ ὅτι τινὰ ἀδικῶ; Ὅτε δὲ παρ' ἑτέρου κλαπέντα βοῦν εἶδον καὶ φονευθέντα καὶ κείμενον καὶ κυσὶν ἤδη βορὰν γινόμενον καὶ λάβω τὰ τούτου κέρατα ἴσως ἐμοὶ χρησιμεύοντα, οὔτε κλέπτης εἰμί πρωτοτύπως ἐγὼ οὐδὲ νοοῦμαι κέρατα κλέψαι οὔτε πάλιν ἀπὸ τοῦ παρ' ἑτέρου κλαπῆναι βοῦν ἐναχθήσομαι βοῦς γὰρ ἐκλάπη, οὐ μὴν κέρατα ὥστε λοιπὸν τὰ κέρατα, εἰ μὴ κλεπτικῶ ψηλαφηθῆ λογισμῶ, οὐ δοκοῦσι κλαπῆναι βοῦς κλαπέντος. Καὶ πότε δὲ δόξαίεν κακῆ ψηλαφηθῆναι ψυχῆ; Τί

that on the other hand it is also brought for the difference, when the body is not to be found, as it is said at the end of the 10<sup>th</sup> chapter, how will it be brought in the present case, and can the (*condictio*) *furtiva* claim the meat and skin and horns as being *furtiva* (things)? And we say that if, after the killing, the thief has taken them and he did not already give the price for the cow, he consequently also stole the meat and the skin and the horns, and he is liable also for them with the (*condictio*) *furtiva*. In this context you must definitely also read the 12<sup>th</sup> title, 52<sup>nd</sup> chapter, 10<sup>th</sup> section and the *paragraphe* there. And perhaps, if they had been valued as horns and as skin, in short: as separate parts, they could have been estimated as of greater value. If, however, he did not take them [the parts] after he had killed it, he is liable for the cow and he gives the value of the cow; the horns in this case will not be reckoned. And take notice of this, that the cow is often estimated in a different way from the parts of the cow. But I tell you also this. If I steal somebody else's healthy cow that I have seen wandering on a mountain, I am a thief even if I did not know to whom it belongs. Read about this the 12<sup>th</sup> title, 43<sup>rd</sup> chapter, 5<sup>th</sup> section: that this also was my intention when I took this cow. Because what else was I to think than that I damage someone? When, however, I saw a cow stolen and killed by someone else and lying and becoming already food for the dogs, and I took its horns, because they might be useful to me, I am neither a thief in the original sense, nor am I considered to have stolen the horns nor am I liable for the fact that the cow has been stolen by someone else; for it was a cow that was stolen, not horns; as a consequence, therefore, the horns, if they have not been taken with the intention of theft, are not considered as stolen, because it is a cow that has been stolen. And when are they

γάρ, ὅτι ἔσφαξεν ὁ δεσπότης τὸν βοῦν, εἶτα ἐσφαγμένος ἐκλάπη; Ὁ τοιοῦτον οὖν βοῦν κλέπτων οὐ λέγεται ποτε κλέπτειν βοῦν, ἀλλὰ δέρμα καὶ κρέας καὶ κέρατα. Ὅρᾳς, ἐν πόσοις θέμασι δύναιται ἔχειν διαφορὰς καὶ βοῦς κλεπτόμενος καὶ δέρμα βοῦς καὶ κρέας καὶ κέρατα.

considered as taken in bad faith? For what happens when the owner has killed the cow and afterwards the killed (cow) has been stolen? He who steals this cow is never said to steal the cow, but the skin, the meat and the horns. You see in how many cases it is possible to differentiate between a stolen cow and the skin of the cow and meat and horns.

### Example II: About theft

D. 47,2,83,2: Qui ancillam non meretricem libidinis causa subripuit, furti actione tenebitur et, si subpressit, poena legis Fabiae coercetur.

One who abducts a slave-woman, not a prostitute, out of lust will be liable to the action for theft and, if he conceals her, will be liable to the penalty of the *lex Fabia*.<sup>95</sup>

B. 60,12,83,2 = D. 47,2,83,2 (BT 2850/1-2): Ὁ διὰ ἡδονὴν δοῦλῃν μὴ οὖσαν πόρνην κλέψας ἐνέχεται τῇ περὶ κλοπῆς ἀγωγῇ· εἰ δὲ κρύψει, καὶ τῇ τῶν ἀνδραποδιστῶν ἀγωγῇ.

He who has stolen out of lust a female slave who is not a prostitute, is liable for the action for theft; if he conceals her (he is) also (liable) for the action for kidnapping.<sup>96</sup>

BS 3439/18-3440/7 (sch. Pe 13 ad B. 60,12,83 = D. 47,2,83):

Τοῦ αὐτοῦ.<sup>97</sup> Ἐμαθεῖς, ὅτι ὁ κλέψας πρᾶγμα, κἂν μὴ ἐπὶ τῷ κερδᾶναι ὄλον, ἀλλὰ μόνην τὴν νομὴν ἢ χρῆσιν αὐτοῦ, ἐνέχεται τῇ φούρτι, ὡς κεφ. α' θεμ. β', καὶ ἐπὶ τοῦ ἄλλως χρησαμένου τῷ πράγματι, ὃ κατὰ κίχρησιν ἔλαβεν, ὡς κεφ. μ' καὶ βιβ. ιγ' τιτ. α' κεφ. ε' θεμ. ζ'. Κατὰ ταύτην οὖν τὴν διδασκαλίαν καὶ ἐνταῦθα φησιν, ὅτι ὁ κλέψας δοῦλῃν, εἰ

Of the same person (Hagiotheodorites). You have learned that he who has stolen a good, even if he did not do so with the intention of enjoying it entirely, but only to enjoy its possession or its use, is liable for the *actio furti*, as in the 1<sup>st</sup> chapter, 2<sup>nd</sup> subject, and, about someone who has used the good that he has received for use in a different manner, as in the 40<sup>th</sup> chapter and the 13<sup>th</sup> book, 1<sup>st</sup> title, 5<sup>th</sup> chapter, 7<sup>th</sup> section. According therefore to this teaching he says here too, that he who stole a

95 Watson, *The Digest of Justinian* (note 94 above), IV, 757-758.

96 This action arises on the base of the *lex Fabia*. See also the *Basilica scholion* explaining this law, viz. BS 3842/6-8 (sch. Pe 1 ad B. 60,48,6 = D. 48,15,7): (...) DEPLAGIARIIS FÁBIOS. Ὁ Φάβιος νόμος κινεῖται κατὰ τῶν ἀνδραποδιστῶν καὶ κατὰ τῶν τοὺς φηγάδας οἰκέτας εἰδήσει ἢ δόλω ἀποκρυψάντων ἢ πωλησάντων, (...). Transl.: 'The *lex Fabia de plagiariis* is raised against the kidnapers and those who knowingly or maliciously hide or sell runaway slaves'.

97 Of Hagiotheodorites in this case, because the previous *scholion* is of him; see BS 3439/10 (sch. Pe 12 ad B. 60,12,83 = D. 47,2,83) and BS 3439/18 (sch. Pe 13 ad B. 60,12,83 = D. 47,2,83).

μὲν διὰ τοῦτο μόνον ἔκλεπεν αὐτήν, ὥστε ἀπολαῦσαι τῆς ἐξ αὐτῆς ἡδονῆς καὶ μετὰ τὴν ἀπόλαυσιν ἀντιστρέψαι πάλιν αὐτὴν τῷ δεσπότη, ἐνέχεται μὲν τῇ φούρτι, πλὴν οὐκ εἰς πᾶσαν τὴν δούλην, ἀλλ' εἰς ὃ ἔκλεψε δίκαιον. Ἐκλεψε δὲ τὴν αὐτῆς νομὴν ἢ χρησιν, ὡς καὶ ὁ ἐν τῷ μ' κεφ. Εἰ δὲ κρύψει ταύτην τελείως, τουτέστιν εἰ δὲ παρακρατήσῃ καὶ θελήσῃ κερδᾶναι τελείως τὴν δούλην, ἐνέχεται μὲν τῇ φούρτι καὶ εἰς ὀλόκληρον τὴν δούλην, ἐνέχεται δὲ πρὸς ταύτη καὶ τῇ κατὰ τῶν ἀνδραποδιστῶν ἀγωγῇ τῇ τε ἐγκληματικῇ, περὶ ἧς φησὶν ὁ μ' τίτ., καὶ τῇ χρηματικῇ ἥτοι τῇ σέρβι κοροῦπτι, περὶ ἧς φησὶ τίτ. ζ' κεφ. α' θεμ. δ' καὶ κεφ. δ' καὶ κ'. Ὅρα δέ, μὴ φανῆ σοι ἐναντίον πρὸς τὸ ῥήτον τοῦ παρόντος θέματος τὸ λέγον 'εἰ δὲ κρύψει' τὸ κ' κεφ. τούτου τοῦ τίτ. Ἐκεῖ μὲν γὰρ τελείως ἔκλεπεν ἐξ ἀρχῆς ὁ κλέψας τὸ δικαίωμα, ὥστε ὀλόκληρον κερδᾶναι, καὶ λοιπὸν οὐ σκοποῦμεν, πῶς μετὰ τοῦτο χρᾶται τῷ δικαίωματι, εἰ ἀπαλείφει αὐτὸ ἢ σχίζει ἢ ἄλλως ὀπωσδήποτε διαφθείρῃ. Ἄπαξ γὰρ τότε, ὅτε ἔκλεπεν, ἀπεστέρησε τὸν δεσπότην τοῦ δικαίωματος καὶ κατὰ τὸ ἀκέραιον ἐζημίωσε καὶ διὰ τοῦτο τὰ μετὰ ταῦτα παρ' αὐτοῦ εἰς τὸ αὐτὸ δικαίωμα πλημμελοῦμενα οὐ προστιθέασιν ἕτεραν ποινήν. Ἐνταῦθα δὲ πρότερον ἔκλεπεν ὁ κλέψας τὴν δούλην δι' ἡδονὴν μόνην, καὶ οὐχ ὥστε κερδᾶναι αὐτήν, ἀλλὰ μετὰ καιρὸν, ὡς ἄνωθεν εἴρηται, ἀντιστρέψαι πρὸς τὸν δεσπότην ὕστερον δὲ τελείως αὐτήν ἔκρυψε καὶ ἡβουλήθη κερδᾶναι. Τοῖνον καὶ πρόην

female-slave, if he has stolen her only for this purpose, to enjoy the pleasure that comes from her and after the enjoyment to return her to the owner, he is liable indeed for the *actio furti*, yet not for the whole of the female-slave, but for the right he has stolen. And what he stole was the possession or use of her, as also in the 40<sup>th</sup> chapter. If, however, he conceals her completely, namely if he holds her and wants to profit from the female-slave completely, he is liable on one hand with the *actio furti* and for the whole female-slave, and, on the other hand, he is also liable for her with the action against kidnapers, by a criminal action, which the 48<sup>th</sup> chapter speaks of, and by a civil action namely the *servi corrupti*,<sup>98</sup> which the 6<sup>th</sup> title, 1<sup>st</sup> chapter, 4<sup>th</sup> subject and 4<sup>th</sup> and 21<sup>st</sup> chapters speak of. Mind you, you should not get the impression that there is a contradiction between the text of the present subject, which says 'if he conceals', and the 28<sup>th</sup> chapter of this title. Because there, he who has stolen the right, has from the beginning stolen it completely, in order to profit from it completely, and therefore, we do not take into consideration how he uses the right afterwards: whether he deletes it, or tears it apart, or in any other way destroys it. Because when he stole it, he at once deprived its owner from the right and completely damaged (him) and because of this, the offences made by him in this right afterwards do not add another punishment. In the present case, however, he who has stolen the female-slave at first stole her only for the sake of lust and not in order to profit from her, but to return her after some time to her owner, as was mentioned above; later, however, he concealed her completely and wanted to profit

98 This is the *actio servi corrupti (de servo corrupto)*, the action that a slave's owner has against someone who corrupts his slave.

ἥττονα τὸν δεσπότην ἀδικῶν τε καὶ ζημιῶν ἐνέχετο καὶ ὀλίγη ποινῇ, ὕστερον δὲ ἀξήσας τὴν ἀδικίαν καὶ τὴν ζημίαν ἐνέχεται καὶ πλείοσιν ἀγωγαῖς καὶ μείζοσι ποιναῖς.

from her. So at first he did the owner less injustice and caused him less damage and for that reason was also held liable with for a light punishment, but because he later increased the injustice and the damage he now is also liable for more actions and more severe punishments.

It is clear that Hagiotheodorites is exhaustive on the subjects he wants to explain. Even by comparing the size of his two *scholia* with the relevant texts of the *Basilica* upon which he comments, and with the original passages from the Digest, it is obvious that his *scholia* are the most extensive. This is due to the nature of the *scholia* in general. It is logical that the *scholia* are longer than the actual fragments of the *Basilica* because the aim of all scholiasts is, after all, to explain the law. These two *scholia* sum up very nicely the characteristics of Hagiotheodorites' style and methods that I have described above: clear and lively language, use of Latin terms, methods of teaching also used by the *antecessores*, such as the question-answer form, references to other *paragraphai*, harmonization of apparent contradictions, etc.

## 5. Conclusions

Hagiotheodorites belongs to the generation of the 'new' *Basilica* scholiasts. He can be identified – mainly because his *scholia* are so elaborate – as the jurist Constantine Hagiotheodorites, who was known as being an excellent jurist. Hagiotheodorites was a law teacher. From the younger generation of scholiasts of the *Basilica* he is the only one referred to as a teacher by a student of his.<sup>99</sup> 196 *scholia* indicate Hagiotheodorites as their author, whereas two more *scholia* mention his name; all 198 *scholia* are preserved in one manuscript, viz. cod. Paris. gr. 1350, dating from the 12<sup>th</sup> century. All *scholia* refer to the 60<sup>th</sup> *Basilica* book which deals with 'criminal law'. The material scope of his *scholia* deals particularly with issues related to wrongful damage to property, theft, penalties, delicts, liability, etc. The great majority of his *scholia* refers to theft and to the *Aquilian* law on damage. Hagiotheodorites made broad use of elements of teaching already occurring in the days of the *antecessores*. In order to explain legal questions he often used, for example, fictitious cases (θεματισμοί), question and answer forms (ἐρωταποκρίσεις); he also referred to other explanations of the law (*paragraphai*), etc. In a very few cases he referred to Justinianic legislation. From the *antecessores* he referred three times only to Stephanus by name and in one *scholion* he advised his students to read the *paragraphe* of

99 See § 4. Characteristics of Hagiotheodorites' *scholia* and of his style – Some examples, with note 56.

## HAGIOTHEODORITES: THE LAST ANTECESSOR?

the so-called Unknown Author, the Anonymous. The law that he refers to and wants to explain is mainly the law of the *Basilica*. Hagiotheodorites explained in a clear way difficult legal problems, used methods already current in the days of Justinian's *antecessores*, and tried to make the student master the material in an efficient but also pleasant way. The material scope of his *scholia* and his approach altogether show a rather sophisticated level of legal knowledge. As I mentioned at the beginning of this paper, it has been stated in the past that Hagiotheodorites made a career in the discussion about the theory of the *glossa ordinaria* in Byzantine law.<sup>100</sup> I hope to have shown in this paper that Hagiotheodorites certainly deserves a second career in Byzantine legal literature.

University of Groningen

Daphne Penna

---

100 See § 1. Opening Pandora's Box, with note 12.

