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Penna, Daphne

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Daphne Penna

The eleventh-century Byzantine jurist Nicaeus. His scholia on the *Basilica* laws and his connection to the *Meditatio de nudis pactis*

Introduction

In the middle of the eleventh century, Constantine IX Monomachos established a law school in Constantinople and appointed John Xiphilinos as *nomophylax* (νομοφύλαξ) of this school. Xiphilinos¹ and other Byzantine jurists commented upon the books of the *Basilica* and these comments are known as the ‘new’ or ‘younger’ *Basilica* scholia, to distinguish them from the ‘old’ scholia that were written at the time of Justinian.² To the generation of the ‘new’ *Basilica* scholiasts belong, for example, Kalo-kyros³, Hagiotheodorites,⁴ Patzes, Garidas, Doxapatres, Eustathios Rhomaios, and Nicaeus. The aim of this paper is to register, classify, and make some preliminary observations on the scholia of Nicaeus. This study is part of a broader research program that I have begun on the ‘new’ *Basilica* scholia, a fascinating yet still largely unex-

A major part of this study was made during my one-month stay in February 2014 at the Dumbarton Oaks Centre in Washington D.C. I would like to express my gratitude to Dumbarton Oaks for offering me the one-month postdoctoral research stipend in order to conduct my research on Byzantine law at their institute. I would also like to thank the director of the Byzantine Studies Program at that time, Professor M. Mullet and all of the members of this program then for their support during my stay there. I am also grateful to Professor B.H. Stolte for his comments on the manuscript and Dr. R. Meiering for helping me with the translations of the Greek passages.

1 On Xiphilinos, see M. KRUSE, “The Epitomator Ioannes Xiphilinos and the Eleventh-Century Xiphilinoi”, *JÖB* 69 (2019), pp. 257–274, and the articles by W. WOLSKA-CONUS, Les écoles de Psellos et de Xiphilin sous Constantin IX Monomaque, *TM* 6 (1976) pp. 219–243 and L’école de droit et l’enseignement du droit à Byzance au XIe siècle: Xiphilin et Psellos, *TM* 7 (1979) pp. 1–107. On the law school of Constantinople see also Z.R. CHITWOOD, *Byzantine Legal Culture and the Roman Legal Tradition, 867–1056*. Cambridge 2017, pp. 150–83, especially pp. 167–78 with bibliographical references; on pp. 193–203 Chitwood provides as an appendix an English translation of the *Novella Constitutio*, the *Novel* by which Monomachos founded the law school in Constantinople.

2 These ‘old’ scholia were presumably added to the text of the *Basilica* in the tenth century after an initiative of the scholar emperor Constantine VII Porphyrogennetos in order to help the interpretation of the *Basilica*.

3 On Kalokyros, see L. BURGMANN, Kalokyros “Sextos”. Anmerkungen zu einem Basilikenscholiasten, *SG* III (1989) pp. 11–21.

4 On Hagiotheodorites see D. PENNA, Hagiotheodorites: The last *antecessor*? Some remarks on one of the “new” *Basilica* scholiasts, *SG* IX (2014) pp. 399–427.

plored area of Byzantine legal history. The present study is divided into three parts. The first includes a table in which I register the scholia of Nicaeus. For a better understanding of his material scope, I include the corresponding titles of the *Basilica* books upon which he comments, as well as their translations. I have taken into account only those scholia that include his name or that follow directly after another scholion with his name and are credited to the same author (Τοῦ αὐτοῦ).⁵ Presumably, more scholia could be attributed to him on the basis of their style and other criteria, but for this paper I have included only those that can be directly linked to Nicaeus' name. In the second part, I discuss some issues related to Nicaeus and his scholia, in particular, the style and characteristics of his scholia. The third part deals with the question whether Nicaeus was the author of the treatise on mere agreements, the *Μελέτη περὶ ψιλῶν συμφώνων* (*Meditatio de nudis pactis*).

1 Number and material scope of the scholia of Nicaeus

<i>Basilica</i> book and title	Scholia of Nicaeus
Book 11, title 1 Περὶ πάκτων ἤτοι συμφώνων About <i>pacta</i> , i.e. agreements	3 scholia: – BS 219/1–12 (sch. CA 9 ad B. 11,1,10 = D. 2,14,10) – BS 259/26–261/17 (sch. CA 51 ad B. 11,1,27 = D. 2,14,27) ⁶ – BS 333/28–35 (sch. CA 6 ad B. 11,1,85 = C. 2,3,24)
Book 11, title 2 Περὶ διαλύσεως καὶ πεπλανημένης ψήφου καὶ διατροφῶν About compromise and mistaken judgment and maintenance	1 scholion: – BS 414/8–29 (sch. CA 1 ad B. 11,2,41 = C. 2,4,24)
Book 12, title 1 Περὶ κοινωνίας καὶ λύσεως αὐτῆς About partnership and its dissolution	1 scholion: – BS 505/16–24 (sch. CA 21 ad B. 12,1,61 = D. 17,2,63)
Book 14, title 1 Περὶ ἐντολῶν ἐπιτιθεμένων τισὶ καὶ τῶν ἀγωγῶν τῶν κινουμένων παρ' ἀμφοτέρων	1 scholion: – BS 714/31–715/15 (sch. CA 34 ad B. 14,1,6 = D. 17,1,6)

⁵ If therefore the 'τοῦ αὐτοῦ' is under a scholion of Nicaeus and is written by the same hand, it should be attributed to Nicaeus. I follow here the opinion of the last editors H.J. SCHELTEMA/D. HOLWERDA/N. VAN DER WAL. This edition has been published online by Brill, see <http://referenceworks.brillonline.com/browse/basilica-online> (date of access: 14/01/2021) accompanied by a comprehensive and updated introduction, *Praefatio* by Bernard Stolte and a complete bibliography by Thomas van Bochove.

⁶ This is not a scholion of Nicaeus himself but the author refers to him: 'Τοιαύτην ἐνταῦθα ποεῖται τὴν διαίρεσιν ὁ Δοξάπατρος κύριος Νικαεὺς καὶ φησιν...' [This is the distinction that Doxapatres Nicaeus makes here and says...].

Continued

<i>Basilica</i> book and title	Scholia of Nicaeus
αὐτῶν κατ' ἀλλήλων About mandates placed on someone else and about actions that are brought by both these parties against each other	
Book 21, title 1 Περὶ μαρτύρων εὐὐπολήπτων καὶ ἀτίμων About witnesses of the upper and of the lower class	2 scholia: – BS 1234/29–37 (sch. Pa 4 ad B. 21,1,7 = D. 22,5,8) – BS 1244/18–20 (sch. Pa 6 ad B. 21,1,20 = D. 22,5,21)
Book 21, title 2 Περὶ τούτων οἵτινες σπιλοῦνται ἀτιμία About those who incur <i>infamia</i>	10 scholia: – BS 1294/32–1295/14 (sch. Pa 12 ad B. 21,2,6 = D. 3,2,6) – BS 1295/15–24 (sch. Pa 13 sch. ad B. 21,2,6 = D. 3,2,6) – BS 1295/25–28 (sch. Pa 14 sch. ad B. 21,2,6 = D. 3,2,6) – BS 1297/30–1298/13 (sch. Pa 27 ad B. 21,2,6 = D. 3,2,6) – BS 1301/34–1302/5 (sch. Pa 5 ad B. 21,2,11 = D. 3,2,11) – BS 1302/15–32 (sch. Pa 7 ad B. 21,2,11 = D. 3,2,11) – BS 1304/29–1305/3 (sch. Pa 15 ad B. 21,2,13 = D. 3,2,13) – BS 1306/13–25 (sch. Pa 22 ad B. 21,2,13 = D. 3,2,13) – BS 1309/15–27 (sch. Pa 1 ad B. 21,2,19 = D. 3,2,19) – BS 1310/11–18 (sch. Pa 3 ad B. 21,2,20 = D. 3,2,20)
Book 21, title 3 Περὶ αἰτιῶν δι' ὧν ἀτιμία τινὶ οὐ προσγίνεται About reasons for which <i>infamia</i> is not attributed to someone	5 scholia: – BS 1321/33–1322/5 (sch. Pa 1 ad B. 21,3,17 = C. 2,11,18) – BS 1322/6–16 (sch. Pa 2 ad B. 21,3,17 = C. 2,11,18) – BS 1322/31–1323/25 (sch. Pa 5 ad B. 21,3,17 = C. 2,11,18) – BS 1324/13–1325/9 (sch. Pa 3 ad B. 21,3,19 = C. 2,11,20) – BS 1326/11–14 (sch. Pa 4 ad B. 21,3,21 = C. 2,11,22)
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	21 scholia: – BS 1329/20–31 (sch. Pa 11 ad B. 22,1,3 = D. 22,3,3) – BS 1334/31–1335/4 (sch. Pa 4 ad B. 22,1,11 = D. 22,3,11) – BS 1336/5–10 (sch. Pa 4 ad B. 22,1,12 = D. 22,3,12) – BS 1336/13–30 (sch. Pa 6 ad B. 22,1,12 = D. 22,3,12) – BS 1337/4–13 (sch. Pa 4 ad B. 22,1,13 = D. 22,3,13) – BS 1340/15–17 (sch. Pa 5 ad B. 22,1,18 = D. 22,3,18) – BS 1340/18–25 (sch. Pa 6 ad B. 22,1,18 = D. 22,3,18) – BS 1341/16–18 (sch. Pa 9 ad B. 22,1,18 = D. 22,3,18) – BS 1342/23–26 (sch. Pa 6 ad B. 22,1,19 = D. 22,3,19)

Continued

<i>Basilica</i> book and title	Scholia of Nicaeus
	– BS 1349/15–24 (sch. Pa 3 ad B. 22,1,26 = D. 22,3,26) – BS 1349/25–1350/31 (sch. Pa 4 ad B. 22,1,26 = D. 22,3,26) – BS 1352/24–27 (sch. Pa 4 ad B. 22,1,28 = D. 22,3,28) – BS 1354/1–3 (sch. Pa 8 ad B. 22,1,29 = D. 22,3,29) – BS 1356/3–26 (sch. Pa 2 ad B. 22,1,32 = D. 22,4,3) – BS 1357/27–1358/15 (sch. Pa 7 ad B. 22,1,33 = D. 22,4,4,5) – BS 1365/26–1366/7 (sch. Pa 5 ad B. 22,1,44 = C. 4,19,10) – BS 1368/24–28 (sch. Pa 3 ad B. 22,1,49 = C. 4,19,15) – BS 1370/20–30 (sch. Pa 4 ad B. 22,1,52 = C. 4,19,18) – BS 1374/15–34 (sch. Pa 6 ad B. 22,1,58 = C. 4,19,24) – BS 1376/11–23 (sch. Pa 2 ad B. 22,1,61 = C. 4,21,2) – BS 1386/4–18 (sch. Pa 2 ad B. 22,1,79 = C. 4,21,21)
Book 22, title 3 Περὶ ἰδιοχειρῶν προσκομιζομένων ὑπὸ τοῦ ἐναγομένου About documents put forward by the defendant written by himself	1 scholion: – BS 1399/4–35 (sch. Pa 8 ad B. 22,3,1 = Nov. 49 c. 2.)
Book 22, title 4 Περὶ τοῦ πῶς χρὴ ἐπιτίθεσθαι τὸ πιστὸν τοῖς παρὰ δικασταῖς ἐμφανιζομένοις συμβολαίοις About how to assure the genuineness of contracts shown to the judges	1 scholion: – BS 1404/14–1405/5 (sch. Pa 1 ad B. 22,4,2 = Nov. 73 c. 1. 2.)
Book 22, title 5 Περὶ ὅρκου ὁμοτέου εἴτε προαιρετικοῦ (τουτέστιν ἐπακτοῦ) εἴτε ἀναγκαίου εἴτε δικαστικοῦ About the oath that has to be held, either the voluntary (namely the oath as tendered) or the compulsory or the judicial	17 scholia: – BS 1413/3–13 (sch. Pa 5 ad B. 22,5,1 = D. 12,2,1) – BS 1414/7–11 (sch. Pa 4 ad B. 22,5,2 = D. 12,2,2) – BS 1416/29–31 (sch. Pa 9 ad B. 22,5,5 = D. 12,2,5) – BS 1422/13–15 (sch. Pa 22 ad B. 22,5,9 = D. 12,2,9) – BS 1425/32–1426/36 (sch. Pa 5 ad B. 22,5,11 = D. 12,2,11) – BS 1428/32–1429/8 (sch. Pa 17 ad B. 22,5,11 = D. 12,2,11) – BS 1445/1–5 (sch. Pa 2 ad B. 22,5,28 = D. 12,2,28) – BS 1446/17–22 (sch. Pa 10 ad B. 22,5,28 = D. 12,2,28) – BS 1447/24–29 (sch. Pa 15 ad B. 22,5,28 = D. 12,2,28) – BS 1447/30–1448/4 (sch. Pa 16 ad B. 22,5,28 = D. 12,2,28) – BS 1448/24–26 (sch. Pa 21 ad B. 22,5,28 = D. 12,2,28) – BS 1448/27–1449/5 (sch. Pa 22 ad B. 22,5,28 = D. 12,2,28)

Continued

<i>Basilica</i> book and title	Scholia of Nicaeus
	– BS 1460/11–18 (sch. Pa 15 ad B. 22,5,34 = D. 12,2,34) – BS 1469/17–23 (sch. Pa 4 ad B. 22,5,44 = C. 4,1,2) – BS 1469/24–1470/7 (sch. Pa 5 ad B. 22,5,44 = C. 4,1,2) – BS 1478/20–22 (sch. Pa 10 ad B. 22,5,54 = C. 4,1,12) – BS 1479/24–25 (sch. Pa 2 ad B. 22,5,55 = C. 4,1,13)
Book 22, title 6 Περὶ τοῦ ἐνδίκου ὄρκου About oaths as to the value in issue ⁷	5 scholia: – BS 1481/7–1482/6 (sch. Pa 6 ad B. 22,6,1 = D. 12,3,1) – BS 1483/9–11 (sch. Pa 7 ad B. 22,6,2 = D. 12,3,2) – BS 1487/1–4 (sch. Pa 8 ad B. 22,6,4 = D. 12,3,4) – BS 1488/28–1489/4 (sch. Pa 5 ad B. 22,6,5 = D. 12,3,5) – BS 1491/8–22 (sch. Pa 5 ad B. 22,6,9 = D. 12,3,9)
Book 23, title 1 Περὶ πραγμάτων χρεωστούμενων, ἐάν ἔστι δῆλον καὶ ἀπαιτεῖται, καὶ περὶ ἐκδι- κήσεως αὐτῶν About goods credited, if this is proved and they are demanded, and about claiming them	9 scholia: – BS 1501/28–34 (sch. Pa 37 ad B. 23,1,2 = D. 12,1,2) – BS 1510/1–5 (sch. Pa 5 ad B. 23,1,8 = D. 12,1,8) – BS 1528/27–32 (sch. Pa 8 ad B. 23,1,12 = D. 12,1,12) – BS 1529/30–31 (sch. Pa 14 ad B. 23,1,12 = D. 12,1,12) – BS 1537/21–28 (sch. Pa 4 ad B. 23,1,16 = D. 12,1,16) – BS 1539/26–1540/8 (sch. Pa 4 ad B. 23,1,18 = D. 12,1,18) – BS 1551/13–20 (sch. Pa 3 ad B. 23,1,25 = D. 12,1,25) – BS 1556/12–19 (sch. Pa 9 ad B. 23,1,31 = D. 12,1,31) – BS 1606/35–1607/11 (sch. Pa 6 ad B. 23,1,72 = C. 4,30,10)
Book 23, title 2 Περὶ τοῦ τοῦς τελευτῶντας ἡγουν τὰ λείψανα αὐτῶν μὴ ἐνυβρίζεσθαι παρὰ τῶν δανειστῶν About the fact that the deceased, or more properly their relicts, should not be in- sulted by creditors	1 scholion: – BS 1619/24–32 (sch. Pa 4 ad B. 23,2,4 = Nov. 134 c. 8)
Book 23, title 3 Περὶ τόκων καὶ καρπῶν καὶ πραγμάτων καὶ πάσης προσθήκης καὶ ὑπερθέσεως About interests and fruits and goods and any addition and delay	3 scholia: – BS 1646/13–15 (sch. Pa 3 ad B. 23,3,8 = D. 22,1,8) – BS 1660/1–11 (sch. Pa 11 ad B. 23,3,17 = D. 22,1,17) – BS 1702/19–29 (sch. Pa 3 ad B. 23,3,72 = C. 4,32,24)
Book 28, title 4 Περὶ γάμων	1 scholion: – BS 1832/6–10 (sch. Pa 5 ad B. 28,4,24 = D. 23,2,67)

⁷ D. 12,3 *De in litem iurando*.

Continued

<i>Basilica</i> book and title	Scholia of Nicaeus
About marriage[s]	
Book 60, title 10 Περὶ ἀπαιτήσεως κλοπιμαίου πράγματος About claiming a stolen good	1 scholion: – BS 3329/20–23 (sch. Pe 7 ad B. 60,10,20 = D. 13,1,20)
Book 60, title 11 Περὶ ἰδιωτικῶν ἀμαρτημάτων About private delicts	1 scholion: – BS 3333/17–30 (sch. Pe 9 ad B. 60,11,1 = D. 47,1,1)
Book 60, title 37 Νόμος Ἰουλίου περὶ τῶν ἐν μοιχείᾳ ἐνε- χομένων καὶ περὶ φθορᾶς παρθένων καὶ χρηρῶν <i>Lex Iulia</i> about those who are accused of adultery and about corruption of virgins and widows	1 scholion: – BS 3710/16–24 (sch. Pe 5 ad B. 60,37,29 = D. 48,5,30) ⁸

There are eighty-three scholia under the name of Nicaeus and two in which his name is mentioned. His comments are spread throughout the following *Basilica* books: 11, 12, 14, 21, 22, 23, 28, and 60. The preserved scholia show that Nicaeus has an interest in the law of procedure. Twenty-one of his scholia on the B. 22,1 deal with proofs and seventeen scholia under his name on the *Basilica* title B. 22,5 concern different oaths in court. Nicaeus's scholia and the two scholia in which his name is mentioned are preserved in three manuscripts. There are six scholia in the codex Coislinianus gr. 152 (= CA), seventy-six in the codex Parisinus gr. 1348 (= Pa), and three in the codex Parisinus gr. 1350 (= Pe). Manuscripts CA and Pe both date to the twelfth century (the CA in the second half of the twelfth century) and Pa dates from the thirteenth century.⁹

⁸ This scholion is not by Nicaeus but its author mentions the name of Nicaeus twice. The author refers to the deadlines in the case of adultery and advises his audience to read also the explanation of Nicaeus.

⁹ See RHBR I, No. 203, No. 161 and No. 163 on pp. 230, 190, and 191, respectively. According to the Groningen editors the CA is dated from the thirteenth century.

2 Characteristics of Nicaeus's scholia and style: examples

Most of Nicaeus's scholia are not very long, but there are a few exceptions.¹⁰ He uses a lot of material in explaining the law and his comments are full of references to other legal sources. He refers to the *Codex*,¹¹ the *Digest*,¹² the *Institutes*,¹³ the *Novels* of different emperors,¹⁴ the writings of the *antecessors*,¹⁵ and the canons of St. Basil.¹⁶ In some cases, as Scheltema has already noted, when Nicaeus refers to the *Digest*, he does not refer to the books of the *Digest* but to the *partes*, just as the *antecessors* did.¹⁷ And in some cases he does not limit himself to referring to passages from the *Digest*, but also mentions the name of the Roman jurist whose work has been cited in that *Digest* text.¹⁸

All these references to Justinianic legislation raise the question whether Nicaeus had at his possession the actual Justinianic parts which he refers to, or, whether he refers to Justinianic parts indirectly through the writings of the *antecessors*. It seems most probable that he came to this information by using *antecessorian* writings, especially the 'old' scholia, which in their original form were mostly *paragraphai*. This is clearly the case, for example, in the following Basilica scholion:

10 For example, BS 1322/31–1323/25 (sch. Pa 5 ad B. 21,3,17 = C. 2,11,18), BS 1349/25–1350/31 (sch. Pa 4 ad B. 22,1,26 = D. 22,3,26), BS 1399/4–35 (sch. Pa 8 ad B. 22,3,1 = Nov. 49 c. 2.), BS 1425/32–1426/36 (sch. Pa 5 ad B. 22,5,11 = D. 12,2,11), BS 1481/7–1482/6 (sch. Pa 6 ad B. 22,6,1 = D. 12,3,1).

11 Five times: BS 1302/3 (sch. Pa 5 ad B. 21,2,11 = D. 3,2,11), BS 1374/25 and in line 26 (sch. Pa 6 ad B. 22,1,58 = C. 4,19,24), BS 1399/4 (sch. Pa 8 ad B. 22,3,1 = Nov. 49 c. 2.) and BS 1404/9 (sch. Pa 8 ad B. 22,3,1 = Nov. 49 c. 2.).

12 Four times: BS 505/19 and in line 24 (sch. CA 21 ad B. 12,1,61 = D. 17,2,63), BS 1298/11 (sch. Pa 27 ad B. 21,2,6 = D. 3,2,6) and BS 1321/34 (sch. Pa 1 ad B. 21,3,17 = C. 2,11,18).

13 Six times: BS 1295/9 (sch. Pa 12 ad B. 21,2,6 = D. 3,2,6), BS 1295/17 (sch. Pa 13 sch. ad B. 21,2,6 = D. 3,2,6), BS 1322/12 (sch. Pa 2 ad B. 21,3,17 = C. 2,11,18), BS 1323/5 and in line 9 (sch. Pa 5 ad B. 21,3,17 = C. 2,11,18) and BS 1340/17 (sch. Pa 5 ad B. 22,1,18 = D. 22,3,18).

14 BS 1302/25 (sch. Pa 7 ad B. 21,2,11 = D. 3,2,11), 1358/4 and in lines 7 and 14 (sch. Pa 7 ad B. 22,1,33 = D. 22,4,4,5), BS 1365/26 (sch. Pa 5 ad B. 22,1,44 = C. 4,19,10), 1404/14 and in line 25 (sch. Pa 1 ad B. 22,4,2 = Nov. 73 c.1 2.), BS 1460/11 (sch. Pa 15 ad B. 22,5,28 = D. 12,2,28): here by name, Novel 99 of the emperor Leo VI the Wise ('νεαρά τοῦ βασιλέως κυροῦ Λέοντος τοῦ φιλοσόφου...'), BS 1469/20 (sch. Pa 4 ad B. 22,5,44 = C. 4,1,2), BS 1481/21 (sch. Pa 6 ad B. 22,6,1 = D. 12,3,1) and BS 1619/28 (sch. Pa 4 ad B. 23,2,4 = Nov. 134 c. 8).

15 See further on in detail on their names.

16 BS 1416/29 (sch. Pa 9 ad B. 22,5,5 = D. 12,2,5) and BS 1469/24–25 (sch. Pa 5 ad B. 22,5,44 = C. 4,1,2).

17 BS 1298/11 (sch. Pa 27 ad B. 21,2,6 = D. 3,2,6): "ὡς ἐν τῷ γ'. βιβ. τῶν Πρώτων τίτ. β'. διγ. ζ'..."; BS 1321/2 (sch. Pa 1 ad B. 21,3,17 = C. 2,11,18): "ἐν τῷ ε' βιβ. τῶν Πρώτων...". See H.J. SCHELTEMA, L'auteur de la meditation "de nudis pactis", in: *Études Jean Macqueron*. Aix-en-Provence 1970, pp. 595–597 (repr. in: H.J. SCHELTEMA, *Opera Minora ad iuris historiam pertinentia*, ed. N. VAN DER WAL/J.H.A. LOKIN/B.H. STOLTE/R. MEIJERING. Groningen 2004, B 2, pp. 365–368, here p. 366).

18 For example, BS 505/19 (the name of Gaius) and 24 (the name of Paul) (sch. CA 21 ad B. 12,1,61 = D. 17,2,63); BS 1298/11 (the name of Ulpian) (sch. Pa 27 ad B. 21,2,6 = D. 3,2,6).

Τοῦ Νικαέως. [...] Εἰ δὲ ὡς κοινωνοὶ τι πράξουσιν οἱ τῶν κοινωνῶν κληρονόμοι, ὡς ἀπὸ νέας συναιρέσεως χώρα τῇ περὶ κοινωνίας ἀγωγῇ. Ἀνάγνωθι καὶ τὴν ἐν τῷ λζ'. κεφ. παραγραφὴν λέγουσαν· ἐν ᾧ μὴ μετὰ πίστεως ἀγαθῆς ἀνεστράφη περὶ τὰ ἐπίκοινα πράγματα. Τίς οὖν ἡ διαφορά; Ὅτι ὁ μὲν κοινωνὸς ἐναχθεὶς ἀτιμοῦται, ὁ δὲ κληρονόμος τῇ προσοκίῳ καταδικασθεὶς οὐκ ἀτιμοῦται, καθὼ μὴ σουονόμινε ἀλλὰ γερμιταριονόμινε ὁ τοῦ κοινωνοῦ κληρονόμος ἐνάγεται, ὡς ἐν τῷ γ'. βιβ. τῶν Πρώτων τιτ. β'. διγ. ζ'. φησὶν ὁ Οὐλπιανός, οὐπὲρ ἐστὶ τὸ προκείμενον θέμα.¹⁹

Of Nicaeos. [...] If however, the heirs of the partners will act as partners the action of partnership is available upon a new consent. Read also the *paragraphe* in the 37th chapter, which mentions: if he has not behaved with good faith with respect to the common goods. Now what is the difference? That the partner on one hand becomes infamous when he is sued, whereas the heir on the other hand does not become infamous when he is condemned because of the *prosocio* because the heir of the partner is sued not in his own name but in his capacity of heir, as Ulpian mentions in the third book of the *Prota*, second title, sixth fragment, where this subject is dealt with.

The *paragraphe* to which Nicaeus refers here has been preserved. It derives from Stephanus and is preserved in the BS 468/11–15 (sch. CA 6 ad B. 12,1,35 = D. 17,2,35) as follows: “Στεφάνου. Ἐν ᾧ μὴ μετὰ πίστεως ἀγαθῆς ἀνεστράφη περὶ τὰ ἐπίκοινα πράγματα. Τίς οὖν ἡ διαφορά; Ὅτι ὁ μὲν κοινωνὸς ἐναχθεὶς ἀτιμοῦται, ὁ δὲ κληρονόμος αὐτοῦ τῇ πρὸ σόκιο καταδικασθεὶς οὐκ ἀτιμοῦται, καθὼ μὴ σοῦο νόμινε, ἀλλὰ νερεδιταρίῳ ὁ τοῦ κοινωνοῦ κληρονόμος ἐνάγεται, ὡς ὁ Οὐλπιανός ἐν τῷ γ'. βιβ. τῶν πρώτων τιτ. ζ'. διγ. β'. φησὶν (3, 2, 6)²⁰.” By comparing the underlined text of Nicaeus’s scholion to the *paragraphe* of Stephanus it is clear that Nicaeus quotes Stephanus’ *paragraphe*. Hence in this scholion it is clear that it is Stephanus who refers to the *Digest* and uses the term “Πρώτα”, as expected,²¹ and Nicaeus quotes Stephanus’ words.

When Nicaeus refers to the writings of the *antecessors*, he sometimes advises his audience to search for a *paragraphe* (παραγραφὴ) of the ‘old’ one, or to read the ‘old’ one or similar expressions.²² According to Heimbach, he is the first of the ‘new’ *Basilica* scholiasts to refer to the *antecessors* as ‘palaioi’ (παλαιοί).²³ In some cases, he mentions the *antecessor*’s name. He refers to Thalelaeus ten times,²⁴ to Stephanus six

¹⁹ BS 1298/5–12 (sch. Pa 27 ad B. 21,2,6 = D. 3,2,6).

²⁰ 3,2,6 is the correct reference, added by the editors, but in fact the text says D. 3,6,2.

²¹ The word “Πρώτα” was used by the *antecessors* to refer to the first four books of the *Digest*.

²² For example, BS 1295/25–26 (sch. Pa 14 sch. ad B. 21,2,6 = D. 3,2,6), BS 1301/35 (sch. Pa 5 ad B. 21,2,11 = D. 3,2,11) and BS 1337/12 (sch. Pa 4 ad B. 22,1,13 = D. 22,3,13).

²³ C.W.E. HEIMBACH, *Basilicorum libri LX*, VI: *Prolegomena et Manuale Basilicorum continens*. Leipzig 1870 (partial repr. Amsterdam 1962), p. 200. See also 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), p. 238, and SCHELTEMA, L’auteur de la meditation “de nudis pactis” (see note 17 above), p. 367.

²⁴ BS 715/2 and in lines 3 and 12 (sch. CA 34 ad B. 14,1,6 = D. 17,1,6), BS 1302/4 (sch. Pa 5 ad B. 21,2,11 = D. 3,2,11), BS 1306/24 (sch. Pa 22 ad B. 21,2,13 = D. 3,2,13), BS 1374/34 (sch. Pa 6 ad B. 22,1,58 = C. 4,19,24), BS 1405/5 (sch. Pa 1 ad B. 22,4,2 = Nov. 73 c.1 2.), BS 1413/7 and in line 8 (sch. Pa 5 ad B. 22,5,1 = D. 12,2,1), BS 1660/10 (sch. Pa 11 ad B. 23,3,17 = D. 22,1,17).

times,²⁵ to Cyrillus twice,²⁶ and to the Anonymous also two times.²⁷ In addition, he refers to the *scholastikos* Theodorus of Hermoupolis, a lawyer who had lived in the end of the sixth century.²⁸ From the more contemporary sources to his own time, he refers to a legal work by Garidas about actions, which is arranged in alphabetical order (βιβλίον περὶ ἀγωγῶν κατὰ στοιχεῖον).²⁹ Nicaeus characterizes Stephanus as ‘our teacher’ (ὁ διδάσκαλος ἡμῶν Στέφανος),³⁰ and in fact his admiration of Stephanus has led scholars to believe that Nicaeus must have also written the treatise on mere agreements.³¹ It is in any case interesting to see that Nicaeus thinks of a jurist who lived five centuries before him as his teacher. Similarly, in a vivid scholion Nicaeus addresses the *scholastikos* lawyer Theodorus as if he were a contemporary: ‘My dear Theodorus, you have not at all understood this provision; for this is its meaning...’ (Καλὲ Θεόδωρε, οὐδ’ ὅλως ἐνόησας τὴν διάταξιν τοιαύτης γὰρ ἐστὶν ἐννοίας...).³² These testimonies show the affinity the eleventh-century Byzantine jurist Nicaeus felt for the jurists of the sixth century, and how seriously he evaluated their writings.

In many cases, the style of Nicaeus reminds one of that of an *antecessor*. He makes references to other legal sources, as we have seen above, he encourages his audience to search more parts of the legislation (here the *Basilica* books),³³ he

25 BS 714/31 and 715/13 (sch. CA 34 ad B. 14,1,6 = D. 17,1,6), BS 1413/6 and in line 8 (sch. Pa 5 ad B. 22,5,1 = D. 12,2,1), BS 1481/28 and in line 36 (sch. Pa 6 ad B. 22,6,1 = D. 12,3,1).

26 BS 1322/9 (sch. Pa 2 ad B. 21,3,17 = C. 2,11,18) and BS 1413/6 (sch. Pa 5 ad B. 22,5,1 = D. 12,2,1).

27 BS 1322/14 (sch. Pa 2 ad B. 21,3,17 = C. 2,11,18) and BS 1426/36 (sch. Pa 5 ad B. 22,5,11 = D. 12,2,11). There are two Anonymous in Byzantine law. *Anonymous Senior* was a contemporary of the *antecessors* whose *summa* on the *Digest* was used in the *Basilica*. The *paragraphai* to the *summa* were made by another Anonymous Junior, also known as Enantiophanes, who is dated to the first quarter of the seventh century. The Byzantines did not distinguish between the two; they thought the person who made the *summa* and the *paragraphai* on it were one and the same Anonymous.

28 BS 1606/31 and in 1607/1 (sch. Pa 6 ad B. 23,1,72 = C. 4,30,10) and BS 1619/31 (sch. Pa 4 ad B. 23,2,4 = Nov. 134 c. 8).

29 BS 1323/10 and in line 15 (sch. Pa 5 ad B. 21,3,17 = C. 2,11,18): “Ζήτει ... καὶ τὸ ἰ στοιχεῖον τοῦ Γαριδᾶ”. On Garidas, see SCHELTEMA, ‘L’auteur de la meditation “de nudis pactis”’, (note 17 above), 366–367, and SP. TROIANOS, *Οἱ πηγές του Βυζαντινοῦ Δικαίου*. Αθήνα/Κομοτηνὴ 2011³, pp. 290–291, which has been translated into Italian, see SP. TROIANOS, *Le fonti del diritto Bizantino*, traduzione a cura di P. BUONGIORNO. Torino 2015, pp. 192–193 [This book henceforth abbreviated as *Piges* (= *Fonti*). In the meantime this monography has also been translated into German, see SP. TROIANOS, *Die Quellen des byzantinischen Rechts*, übersetzt von D. SIMON /S. NEYE. Berlin 2017.

30 BS 1481/28 (sch. Pa 6 ad B. 22,6,1 = D. 12,3,1).

31 See below, 3. Nicaeus: author of the “Μελέτη περὶ ψιλῶν συμφώνων” (*Meditatio de nudis pactis*)?

32 BS 1606/35–1607/1 (sch. Pa 6 ad B. 23,1,72 = C. 4,30,10). This scholion is also mentioned by SCHELTEMA, ‘L’auteur de la meditation “de nudis pactis”’ (note 17 above), 356 and by D. SIMON, *Untersuchungen zum Justinianischen Zivilprozess* (Münchener Beiträge zur Papyrusforschung und Antiken Rechtsgeschichte, 54). München 1969, p. 162. See also below.

33 For example, BS 219/8 and lines 11–12 (sch. CA 9 ad B. 11,1,10 = D. 2,14,10), 714/33 (sch. CA 34 ad B. 14,1,6 = D. 17,1,6), and BS 1234/36–37 (sch. Pa 4 ad B. 21,1,7 = D. 22,5,8).

uses Latin terms, and he tries to harmonize apparent contradictions.³⁴ In a very few cases he poses questions and then gives the answer following the form of the *erotapokriseis* (ἐρωταποκρίσεις, ‘questions-and-answers’) of the *antecessors*.³⁵ However, I have not encountered in his scholia the noun ‘λύσις’ (answer), which sometimes follows after an *antecessor* poses a question.³⁶ Often he also describes hypothetical cases in order to explain his material by using expressions such as ‘thematison’ (θεμάτισον, ‘imagine’) or the noun ‘thematismos’ (θεματισμός, ‘imaginery’ (or ‘fictitious’) case).³⁷ Sometimes he has a very vivid way of approaching his audience. When warning for apparent contradictions, one of his favourite opening lines is ‘and do not tell me that’ (Καὶ μὴ μοι εἴπῃς).³⁸ He begins another scholion by saying ‘I believe that you are wrong in saying this’ (Κακῶς, οἶμαι, τοῦτο λέγεις).³⁹ Based on this scholion and the one addressed to Theodorus, which I mentioned above, Scheltema writes ‘Ce qui frappe encore est le ton violent de Constantin de Nicée’.⁴⁰ It is true that the above two scholia of Nicaeus are very vivid and that the expressions he uses to harmonise contradictions reflect a direct way of talking. However, on the whole, Nicaeus’s scholia are short, to the point and dry.

Mortreuil refers to Heimbach’s observation that Nicaeus must have been the most learned of all the ‘new’ *Basilica* scholiasts, and Mortreuil adds that a thorough study of the scholia of Nicaeus confirms this observation.⁴¹ It could be that Heimbach

³⁴ For example, BS 414/22 (sch. CA 1 ad B. 11,2,41 = C. 2,4,24), BS 1310/11 (sch. Pa 3 ad B. 21,2,20 = D. 3,2,20), and BS 1350/3 (sch. Pa 4 ad B. 22,1,26 = D. 22,3,26).

³⁵ I have encountered 5 questions in all his preserved scholia: BS 1298/8 (sch. Pa 27 ad B. 21,2,6 = D. 3,2,6); BS 1376/15 (sch. Pa 2 ad B. 22,1,61 = C. 4,21,2); BS 1448/28–29 (sch. Pa 22 ad B. 22,5,28 = D. 12,2,28); BS 1488/33 (sch. Pa 5 ad B. 22,6,5 = D. 12,3,5), and BS 1702/27 (sch. Pa 3 ad B. 23,3,72 = C. 4,32,24).

³⁶ Another ‘new’ *Basilica* scholiast, Hagiotheodorites, on the other hand, often uses this term; see PENNA, Hagiotheodorites: The last *antecessor*? (see note 4 above).

³⁷ For example, in BS 1329/22 (sch. Pa 11 ad B. 22,1,3 = D. 22,3,3), BS 1448/1 (sch. Pa 22 ad B. 22,5,28 = D. 12,2,28), BS 1491/15 (sch. Pa 5 ad B. 22,6,9 = D. 12,3,9), and BS 1702/24 (sch. Pa 3 ad B. 23,3,72 = C. 4,32,24).

³⁸ BS 1297/36 (sch. Pa 27 ad B. 21,2,6 = D. 3,2,6); BS 1302/2 (sch. Pa 7 ad B. 21,2,11 = D. 3,2,11); BS 1310/1 (sch. Pa 3 ad B. 21,2,20 = D. 3,2,20); BS 1323/1 (sch. Pa 5 ad B. 21,3,17 = C. 2,11,18); BS 1349/15 (sch. Pa 3 ad B. 22,1,26 = D. 22,3,26), BS 1349/25 (sch. Pa 4 ad B. 22,1,26 = D. 22,3,26); BS 1483/9 (sch. Pa 7 ad B. 22,6,2 = D. 12,3,2); BS 1488/28 (sch. Pa 5 ad B. 22,6,5 = D. 12,3,5); BS 1539/26 (sch. Pa 4 ad B. 23,1,18 = D. 12,1,18).

³⁹ BS 333/28 (sch. CA 6 ad B. 11,1,85 = C. 2,3,24). See also the scholion by which he addresses Theodorus mentioned above. See also the relevant observation of SCHELTEMA, L’auteur de la meditation “de nudis pactis” (see note 17 above), p. 367.

⁴⁰ Ibid., p. 367.

⁴¹ MORTREUIL (see note 20 above), p. 237: “M. Heimbach a remarqué depuis long-temps qu’on pouvait dire de Constantin de Nicée qu’il a été le plus savant de tous les scholiastes des Basiliques. Une etude attentive des annotations de ce scholiaste confirme ce jugement”. Mortreuil refers to C. W. E. HEIMBACH, *De Basilicorum origine, fontibus, scholiis, atque nova edition adornanda*. Lipsiae 1825, p. 76. Indeed, there Heimbach notes, “Nicaeus autem noster inter seriores Basilicorum Scholiastas doctissimus haberi iure potest.”

and Mortreuil are correct, although I think that they both have underestimated the scholia of Hagiotheodorites, who also belongs to this younger generation of the *Basilica* scholiasts. Hagiotheodorites clearly explains difficult legal problems, and the material scope of his scholia and his approach together show a sophisticated level of legal knowledge.⁴² Nicaeus seems to know the material⁴³ and is very familiar with the works of the *antecessors*. He has a clear way of explaining the material and he makes cross-references to help the audience. Nicaeus refers more often to Justinianic legislation and to the writings of the *antecessors* than does Hagiotheodorites. Yet, my impression is that Hagiotheodorites conveys the material to his students in a more pleasing way, using examples that are more vivid and a more lively language. This observation is of course based on the preserved scholia and their material scope. To begin with, many more scholia of Hagiotheodorites⁴⁴ have been preserved than of Nicaeus, so we have a better idea of the former's style than the latter's. Moreover, most of Nicaeus's scholia refer to procedural law, whereas Hagiotheodorites's scholia refer to 'criminal law'.

The following are some characteristic examples of the scholia of Nicaeus. For a better understanding of the *Basilica* scholia, I also provide the *Basilica* fragment that Nicaeus comments upon and the *Digest* fragment from which this part of the *Basilica* originates.

Example I: About a debt in the form of a *fideicommissum*

From the *Digest*: D. 22,3,26

Papinianus libro vicesimo quaestionum.
Procula magnae quantitatis fideicommissum a fratre sibi debitum post mortem eius in ratione cum heredibus compensare vellet, ex diverso autem allegaretur numquam id a fratre quamdiu vixit desideratum, cum variis ex causis saepe rationi fratris pecunias ratio Proculae solvisset: divus Commodus cum super eo negotio cognosceret, non admisit compensationem, quasi tacite fratri fideicommissum fuisset remissum.

Papinian, *Questions*, book 20:
Procula's brother owed her a large sum by way of *fideicommissum*. On his death, she wished to bring this into account with his heirs. However, it was alleged that she had never asked her brother to pay during his life-time, though her accountant had for various causes often paid money to her brother's accountant; the deified Commodus heard the case and refused a set-off, since she had impliedly released her brother from the *fideicommissum*.⁴⁵

⁴² See in detail, PENNA, Hagiotheodorites: The last *antecessor*? (see note 4 above).

⁴³ See however footnote no 47.

⁴⁴ 196 scholia are under his name and 2 more scholia refer to him.

⁴⁵ The translation by A. WATSON, et al., *The Digest of Justinian*, transl. of Mommsen, ed. maior, 4 vols. Philadelphia 1985 (repr. 1998).

From the *Basilica*: B. 22,1,26

Ἐὰν χρεωστούμενος παρὰ σοῦ ληγάτον καὶ δια-
φόρως ἀντιχρεωστήσας σοι καταβάλω μὴ ἀντελ-
λογισάμενος, κατὰ χάριν αὐτὸ δοκῶ συγχωρεῖν.

If you owe me by way of a *fideicommissum* and I
pay you what I owe you for different reasons with-
out deducting in compensation, I am considered to
have released you from this (the *fideicommis-*
sum).⁴⁶

From the *Basilica scholia*: BS 1349/15–24 (sch. Pa 3 ad B. 22,1,26 = D. 22,3,26)

Τοῦ Νικαέως. Μὴ ἐναντιωθῇ σοι τὸ τρίτον θεμ.
τοῦ ζ'. κεφ. τοῦ δ'. τιτ. τοῦ ν'. βιβ., οὗ ἡ ἀρχή·
εἰ κατ' ἐπιτροπὴν δούλου μου ἀγρὸν αὐτῷ ἀγο-
ράσεις. Κάκει γὰρ καλῶς τὸ δοκεῖν δωρεῖσθαι
πρόσκειται, διότι προῦπῃν αἰτία ἐνοχῆς, ἢ τῆς
πράσεως δηλαδὴ καὶ καθὼς ὁ παραδιδούς τὸν
ἀγρὸν τῷ ἐλευθερωθέντι δούλῳ ἤδει, ὅτι ἀφι-
ρέθη ὁ ἐλευθερωθεὶς τὸ πεκούλιον, καὶ παρέδωκε
πρὸς ἐκεῖνον τὸν ἀγρὸν μὴδὲν ἔχοντα δίκαιον ἐπὶ
τῇ παραλήψει τοῦ ἀγροῦ, κατὰ τοῦτο ὁ βασιλικὸς
προσέθετο τὸ δοκεῖν δωρεῖσθαι. Ἔστι γὰρ ἐνδε-
χόμενον, ἐπεὶ προῦπῃρχεν αἰτία ἐνοχῆς ἐπὶ τῇ
παραδόσει, τὸν παραδιδούντα παραδοῦναι τὸν
ἀγρὸν σκοπῷ τοῦ δοῦναι τοῦτο πρὸς τὸν δεσπότ-
ην τὸν παραλαμβάνοντα καὶ ἐξ ἀρχῆς προτρε-
ψάμενον τὴν ἐξώνησιν.

Of Nicaeus. Do not think that it is contrary to the
3rd paragraph of the 6th chapter of the 4th title of
the 50th book, which begins:⁴⁷ 'if, on the mandate
of my slave, you buy a field for him'. Because in
that provision, too, it is rightly added that a dona-
tion is taking place because a cause of the obli-
gation pre-existed, i.e. the sale; and as the person
who delivered the field to the freed slave knew
that the freedman had lost the *peculium* and de-
livered the field to him although he (the freed-
man) did not have any right to have it delivered
to him, the *Basilica* added that it is considered
as being given as a gift. For it is possible, because
there was a pre-existing cause of the obligation
for the delivery, that he who delivered, delivered
the field with the aim to give this to the owner,
who received it and from the beginning urged
the sale.

⁴⁶ Literally: I am considered to release it (the *fideicommissum*) as a favour.

⁴⁷ The copyist has made a mistake here. The correct reference is to B. 50,4,7,2, which corresponds to D. 41,4,7,2. The case that Nicaeus describes here is as follows: my slave has given you a mandate to buy a field for him. The slave is freed and has therefore no *peculium* and despite the fact that you know this, you nevertheless deliver the field to him. The delivered property in this case is considered having been given as a gift. What is problematic is that according to Nicaeus the donation was valid because there was a pre-existing cause of obligation (αἰτία ἐνοχῆς), the sale. The pre-existing cause of obligation is not relevant here. The donation is valid because the person who delivered the field knew that the slave was freed and despite that he delivered to the freed slave.

Example II: About oaths in law of procedure

From the *Digest*: D. 12,2,1

Gaius libro quinto ad edictum provinciale.
Maximum remedium expediendarum litium in
usum venit iurisiurandi religio, qua vel ex pac-
tione ipsorum litigatorum vel ex auctoritate iudi-
cis deciduntur controversiae.

Gaius, *Provincial Edict*, book 5:
Conscientious oath taking is relied on as an im-
portant means of shortening litigation. Disputes
are settled in this way by virtue of agreement be-
tween litigants or on the authority of the judge.⁴⁸

From the *Basilica*: B. 22,5,1

Ὁ ὄρκος ἐπιφερόμενος ἢ παρὰ τοῦ ἀντιδίκου ἢ παρὰ τοῦ The oath imposed by the litigant or by the
δικαστοῦ τέμνει τὴν ἀμφισβήτησιν. judge solves the dispute.

From the *Basilica* scholia: BS 1413/3–13 (sch. Pa 5 ad B. 22,5,1 = D. 12,2,1)

Τοῦ Νικαέως. Ὁ βουλευμπτάριος οὐδέποτε ἀνα-
ψηλαφᾶται, ὡς ἐπὶ τοῦ τελευταίου κεφ. τοῦ
παρόντος τιτ. φησὶν ἡ διάταξις. Πλὴν ἐπ' ἐκείνου
καὶ μόνου τοῦ θέματος ὁ νεκεσάριος ἀναψηλα-
φᾶται. Ζήτει περὶ τούτων τὸ λα'. κεφ. τοῦ παρόν-
τος τιτ. καὶ τὸν ἐκεῖσε Κύριλλον καὶ τὸν Στέφανον
καὶ κεφ. μγ' καὶ τὸν Θαλέλαιον, οὗ ἡ ἀρχή' ἔγνωσ
ἐν τῷ δερέβους, ὅτι ἐὰν ἐπαγάγῃ ὄρκον τις καὶ
μᾶλλον πρόσσχεσ τῷ Θαλελαίῳ ἀκριβῶς λεγόντι.
Ὁ γὰρ Στέφανος, ἐν οἷς πειρᾶται κατασκευάζειν
ἐν τῷ λα'. κεφ., ὡς καθόλου ὁ νεσκεσάριος ἀνα-
ψηλαφᾶται, προφανῶς τῷ κειμένῳ ἐναντιοῦται.
Ὁ δὲ ἱλίτεμ ὄρκος ἀναψηλαφᾶται. Καὶ ζήτει τιτ.
ς'. κεφ. δ'. θεμ. β'. Δύναται γάρ, φησὶν, ὁ δικαστὴς
καὶ μετὰ τὸν ὄρκον ἦτοι τὸν ἱλίτεμ ἐν μέρει ἢ εἰς
τὸ παντελὲς κουφίσαι τὸν ἐναγόμενον ἐκ μεγάλης
αἰτίας ἢ ἀποδείξων ὕστερον εὐρευθεισῶν.

Of Nicaeus. The voluntary (oath) is never re-
versed, as the constitution in the last chapter of
the present title mentions. Except that in this sin-
gle case, the necessary oath is reversed. About
these [issues] see the 31st chapter of the present
title and [the notes] to that of Cyril and Stepha-
nus, and the 43rd chapter, and Thalelaeus,
whose opening words are: 'you learned in the
de rebus that if someone brings on an oath'.
And take particular notice of Thalelaeus, who is
speaking accurately here. Because Stephanus,
where he tries in the 31st chapter to argue that
the necessary oath is in general reversed, obvi-
ously contradicts the text.⁴⁹ The *in litem* oath is
reversed. And look at the 6th title, 4th chapter,
2nd paragraph. Because, it says, after the oath,
namely the *in litem*, the judge can partly or com-
pletely absolve the defendant because for a
strong reason or evidence later found.

⁴⁸ The translation by WATSON (see note 45 above).

⁴⁹ The meaning of this must be that Stephanus speaks of the reversal of necessary oaths as if it was a general rule rather than a possibility.

3 Nicaeus: author of the Μελέτη περὶ ψιλῶν συμφώνων (*Meditatio de nudis pactis*)?

The first question that arises is ‘Who was Nicaeus?’ We are certain sure that he wrote some of the scholia on the *Basilica*. As the table shows, eight-five scholia are directly linked to Nicaeus. Most of the scholia are mentioned as being ‘*του Νικαεος*’ (τοῦ Νικαέως) without a first name. In four of them, the first name Constantine is given;⁵⁰ in one, the name Doxapatres;⁵¹ and in another, the name John.⁵² Most scholars speak of Constantine Nicaeus. Schminck puts a question mark to the name Constantine and points out that it is uncertain whether the name Nicaeus was used as a family name, or whether it was used to imply the place of origin of this Byzantine author.⁵³ He notes that in the manuscripts the abbreviations of the name Nicaeus could also be explained as ‘Νικαίας’, meaning ‘of Nicaea’. Schminck also adds that if the name Nicaeus refers indeed to the place of origin of the Byzantine jurist, then Constantine Nicaeus could also be identified with one of the known jurists of that time; perhaps Ophrydas or Constantine (?) Garidas.⁵⁴ Data from the prosopography of the Byzantine world reveal that one Georgios Nicaeus was a judge, a *krites* of the *velon* (κριτής τοῦ βήλου), at the end of the twelfth century.⁵⁵

50 BS 414/8 (sch. CA 1 ad B. 11,2,41 = C. 2,4,24), BS 505/16 (sch. CA 21 ad. B. 12,1,61 = D. 17,2,63), BS 1606/35 (sch. Pa 6 ad B. 23,1,72 = C. 4,30,10) and BS 1619/24 (sch. Pa 4 ad B. 23,2,4 = Nov. 134 c. 8).

51 BS 259/26 (sch. CA 51 ad B. 11,1,27 = D. 2,14,27).

52 BS 1244/18 (sch. Pa ad B. 21,1,20 = D. 22,5,21).

53 A. SCHMINCK, *Studien zu mittelbyzantinischen Rechtsbüchern* (FBR 13). Frankfurt/M. 1986, pp. 41–42.

54 SCHMINCK, *Studien* (see note 53 above), p. 42; the question mark next to the name Constantine was added by Schminck. Burgmann discusses a comment (Ἐρμηνεία) preserved in two manuscripts, the cod. Leid. Periz. F 35 and the cod. Taur. B. I. 20. In the Perizonianus (and its source) the comment bears the inscription “Γρηγορίου Νικαίας” and in the Taurinensis “τοῦ Νικαίας”. In the Taurinensis, the comment is transmitted as an indirect Basilica scholion, viz. as a scholion ad SBM E,10,5 = B. 5,2,14; it deals with the ecclesiastical privilege regarding the term of prescription. The heading in the Perizonianus – “Γρηγορίου Νικαίας” – sheds light on the issue concerning Mortreuil’s and C.W.E. Heimbach’s distinction between the ‘new scholiasts’ Gregorius Doxapatres and Constantine Nicaeus. However, Burgmann refrained from discussing this issue, because the comment shows hardly similarities as regards method and style with the scholia bearing the name of G. Doxapatres and Const. Nicaeus. For practical reasons, Burgmann referred to the author of this comment as Nicaenus. For all the details, see L. BURGMANN, Eine byzantinische Juristenkontroverse zum kirchlichen Verjährungsprivileg, in: in *ΣΧΟΛΙΑ. Studia ad criticam interpretationemque textuum graecorum et ad historiam iuris graeco-romani pertinentia viro doctissimo D. Holwerda oblata*, edd. W.J. AERTS/J.H.A. LOKIN/S.L. RADT/N. VAN DER WAL. Groningen 1985, pp. 11–27 (here esp. pp. 12–13). I would like to thank Dr. Th.E. van Bochove for pointing me out this article by Burgmann and helping me understand the transmission issues of this comment discussed by Burgmann.

55 Georgios Nicaeus confirms the authenticity of the will of Symbatios Pakourianos in 1090. See the data in The Prosopography of the Byzantine World, which is online: <http://blog.pbw.cch.kcl.ac.uk/>.

The name of Nicaeus has been connected to another legal text, namely the treatise about mere agreements—*Μελέτη περὶ ψιλῶν συμφώνων* or, in Latin, *Meditatio de nudis pactis*.⁵⁶ A mere agreement (*pactum nudum*) in Roman law was a simple agreement that raised no civil obligation, so that no action was available. Heimbach, Scheltema, and Schminck have suggested that Nicaeus could have been the author of this treatise.⁵⁷ Monnier and Platon, who edited the most recent edition of the treatise a century ago, consider John Xiphilinos as the most plausible author,⁵⁸ and Wolska-Conus concurs with their opinion.⁵⁹ Whereas in the past, scholars believed that the person to whom the treatise was addressed, the author's opponent, could have been Michael Psellos, Schminck has suggested it was John Xiphilinos.⁶⁰

A few words about this treatise are necessary. First of all, this treatise, a rather neglected text of the Byzantine legal literature, is one of the few texts that offer information on the actual legal practice in the eleventh century.⁶¹ In any case, the treatise was presumably written when Xiphilinos was still a *nomophylax* (νομοφύλαξ) in the law school (until 1054).⁶² It was written by a judge of the imperial court who addresses his fellow judges, refers to a case, and tries to convince them on a point of dispute that has arisen. From the whole text, it seems that its author is writing in order to convince one judge in particular with his argument. Although in his introduction the author addresses his fellow judges (ὧ φίλοι συνδικασταί), in the third title he addresses one person in particular and writes: 'Here is what I said to you yesterday, my dear friend...' (Ἰδού τὸ παρ' ἐμοῦ σοι χθὲς εἰρημένον, ὧ καλὲ κάγαθὲ...).⁶³ From that point until the end, the author of the treatise addresses his words to just one person. It is clear that the judge whom the author addresses had a different opinion from the author himself. In fact, at some point the author mentions that this judge not only disagreed with what the author had said, but also made fun of him (Σὺ δὲ οὐ μόνον οὐκ ἡνείχων τῶν εἰρημένων, ἀλλὰ καὶ κατεγέλας φεῦ).⁶⁴ Further

56 Troianos provides the necessary bibliography here and sketches out the different opinions. See, TROIANOS, *Piges* (see note 29 above), pp. 292–293 (= *Fonti*, pp. 194–1955 and *Quellen*, pp. 237–39).

57 See HEIMBACH (see note 23 above), p. 142; SCHELTEMA, L'auteur de la meditation "de nudis pactis" (see note 17 above), pp. 367–68, and SCHMINCK, *Studien* (see note 53 above), pp. 39ff.

58 H. MONNIER/G. PLATON, *La Meditatio de nudis pactis*. Paris 1915, reprinted in H. MONNIER, *Études de droit byzantine*. London 1974 (Variorum Reprints), no. III, pp. 5–246, see especially pp. 186–236; the edition is found on pp. 28–64, divided into titles and paragraphs. The editors provide a French translation and a commentary.

59 WOLSKA-CONUS, L'École de droit (see note 1 above), p. 106.

60 See SCHMINCK, *Studien* (see note 53 above), pp. 40ff with his arguments and references to the opinions of earlier scholars. See also the observation of SCHELTEMA, L'auteur de la meditation "de nudis pactis" (see note 17 above), p. 366.

61 Stolte has discussed this text in B.H. STOLTE, The Byzantine Law of Obligations, in: *Obligations in Roman Law*, ed. by TH.A.J. MCGINN. Ann Arbor 2013, pp. 320–333.

62 TROIANOS, *Piges* (see note 29 above), p. 293 (= *Fonti*, p. 194 and *Quellen*, p. 238).

63 *Meditatio* (see note 58 above), title 3, preface. See also STOLTE, The Byzantine Law of Obligations (see note 61 above), pp. 327–328.

64 *Meditatio* (see note 58 above), title 3, paragraph 2.

on, the author of the treatise points out again that while he is trying to explain a difficult part of the *pacta*, he will be laughed at by those who do not examine these subjects with precision.⁶⁵

Stolte has referred to the legal questions of this case.⁶⁶ In short, the case was about a Byzantine with the title of *protospatharios* (πρωτοσπαθάριος) who had made agreements with a monastery but did not fulfil all his obligations. It seems that the *protospatharios* was fond of monastic life but at the same time did not want to become a monk. He therefore agreed to pay an amount to the monastery in order to be accepted there as if he was a monk. There seems to have been a second agreement by which the *protospatharios* was to pay more money, something that he did not do, which is why the monastery was claiming this payment. As Stolte notes, the author of the treatise acknowledges that it is important to understand the nature of the agreement and that is why he proceeds, firstly, to explain the theory of mere agreements (*pacta nuda*) and then to discuss the specific case of the *protospatharios*.⁶⁷

The legal subject being discussed is a difficult one.⁶⁸ Already in his introduction, the author reassures his colleagues that what he is about to explain is based on the doctrine of the greatest and most famous law teacher and legislator, Stephanus: ‘ἀλλὰ ταῖς τοῦ μεγίστου καὶ διασημοτάτου διδασκάλου καὶ νομοθέτου Στεφάνου μεθόδοις κατακολουθῶν, καὶ νομοθεσίαις...’ [but following the methods of the greatest and most famous teacher and legislator Stephanus and the laws...].⁶⁹ In the fourth title, the author again praises Stephanus. This *antecessor* is characterized as being ‘the famous law teacher and legislator of the whole world’ (ὁ περιβόητος τῆς οἰκουμένης διδάσκαλος καὶ νομοθέτης Στέφανος).⁷⁰ According to many scholars, all these references show the *Meditatio* author’s deep admiration for the *antecessor* Stephanus.⁷¹ I have a different opinion here. My impression is that the author of the *Meditatio* refers to Stephanus not so much out of admiration but because the writings of Stephanus supported his own arguments. It could be that the author of the *Meditatio* truly admired Stephanus. However, I think the author refers to Stephanus in such an exaggerated way simply as a rhetorical ploy to bolster his own arguments and to make the other judges, and especially the one opposing him, to feel bad that they doubt Stephanus. He uses the name of Stephanus to make *his* own point sound

⁶⁵ *Meditatio* (see note 58 above), title 4, preface: ‘οὐ καταγελασθήσομαι μόνον, ἀλλὰ καὶ κατακισθήσομαι παρὰ τῶν μὴ ταῦτα ἐξακριβωσαμένων’.

⁶⁶ See STOLTE, *The Byzantine Law of Obligations* (see note 61 above), pp. 320–333.

⁶⁷ See STOLTE, *The Byzantine Law of Obligations* (see note 61 above), p. 328.

⁶⁸ See also the observations of STOLTE, *The Byzantine Law of Obligations* (see note 61 above), p. 328, and especially p. 330.

⁶⁹ *Meditatio* (see note 58 above), preface, paragraph 2.

⁷⁰ *Meditatio* (see note 58 above), title 4, paragraph 3 and in *Meditatio*, title 2, paragraph 4: ‘ὁ διδάσκαλος’.

⁷¹ See for example, *Meditatio* (see note 58 above), p. 66 with note 4.

right: If the judges doubt him, then they doubt the great Stephanus. In a similar way, I think, the author begins his treatise by saying that he will explain the theory of the *pacta* to those who are ignorant as a way of embarrassing the judge who opposes him by suggesting that he is not as well versed in the law as he should be. If only one judge opposed the author of the *Meditatio*, then the words ‘for those who are ignorant’ would have been a rather barbed attack.

Since Nicaeus is considered the author of this treatise, it would be interesting to examine whether any of the preserved scholia by Nicaeus deal with the subject discussed in the treatise. The author of the *Meditatio* begins by discussing the *pacta* and their division. The theory about the *pacta* is to be found in the *Basilica* title B. 11,1 (Περὶ πάκτων ἥτοι συμφώνων), which corresponds to the *Digest* title D. 2,14 (*De Pactis*).⁷² The fact that so many scholia have been preserved for this title of the *Basilica* shows, as Stolte has already observed, that there must have been an interest in this subject not only among sixth-century jurists but also by jurists of the eleventh and twelfth centuries.⁷³ Three preserved scholia on title B. 11,1 are directly linked to Nicaeus.⁷⁴ These do not, however, refer to the explanation of the mere agreements in particular. The *Meditatio* is a rather long text and its author supports his arguments in a very enthusiastic way. If Nicaeus had indeed written the *Meditatio*, I think he would have been more interested in explaining the subject of mere agreements to a broader audience. In other words, we should have expected scholia by him on the subject. We should not assume that he never wrote such scholia, but if he did, they have not been preserved.

One argument by scholars who attribute the *Meditatio* to Nicaeus is that, just as the author of the *Meditatio* admires the work of Stephanus,⁷⁵ so does Nicaeus. But is that so? Does Nicaeus admire the writings of Stephanus more than those of the other *antecessors*? It is true that Nicaeus refers in one of his scholia to Stephanus as ‘our teacher’ (ὁ διδάσκαλος ἡμῶν Στέφανος),⁷⁶ but for the rest—at least in the preserved scholia that can be securely linked to his name—he refers more frequently to the writings of another *antecessor*, namely Thalelaeus.⁷⁷ Moreover, in one of his scholia,

⁷² See also STOLTE, *The Byzantine Law of Obligations* (see note 61 above), p. 326.

⁷³ See STOLTE, *The Byzantine Law of Obligations* (see note 61 above), p. 326 and the explanation that the author gives on this rich tradition of scholia for this title.

⁷⁴ BS 219/1–12 (sch. CA 9 ad B. 11,1,10 = D. 2,14,10); BS 259/26–261/17 (sch. CA 51 ad B. 11,1,27 = D. 2,14,27) and BS 333/28–35 (sch. CA 6 ad B. 11,1,85 = C. 2,3,24).

⁷⁵ I have already expressed my thoughts on why the author of the *meditatio* speaks with words of admiration for Stephanus. On Stephanus, see H. DE JONG, *Stephanus en zijn Digestenonderwijs*, (PhD), Den Haag 2008.

⁷⁶ BS 1481/28 (sch. Pa 6 ad B. 22,6,1 = D. 12,3,1).

⁷⁷ See above, section 2. *Characteristics of Nicaeus's scholia and style: examples*. The fact that Nicaeus refers more often to Thalelaeus than Stephanus could be related to the material that he discusses. If the *Basilica* part which Nicaeus comments upon derives from the *Codex*, it is logical that Nicaeus would have used writings of Thalelaeus since most of the *antecessorian* material with respect to the *Codex* derives from Thalelaeus.

which I have included as a second example in this paper (see above Example II: About oaths in law of procedure), Nicaeus points out that what Stephanus has said on that subject clearly contradicts the law.⁷⁸ An admirer of Stephanus would not emphasize this. In fact, based on the way this particular scholion is phrased, it is clear that Nicaeus praises Thalelaeus on this subject for being accurate in his writings on oaths, and accuses Stephanus of speaking about the reversal of necessary oaths as if it was a general rule rather than a possibility.⁷⁹ These observations are not themselves adequate grounds to reject the theory that Nicaeus was the author of the *Meditatio*. Perhaps a better way to confirm or reject this suggestion would be to compare the style of Nicaeus's scholia with that of the author of the *Meditatio*. Scheltema has suggested that the intense style of the author of the *Meditatio* reminds one of that of Nicaeus, and he refers to two scholia of Nicaeus.⁸⁰ As I have explained above, I have my reservations about the characterization of Nicaeus's style in general as 'intense' ('le ton violent').⁸¹

I will point out in the following some differences between the *Meditatio* and the scholia of Nicaeus. The author of the *Meditatio* is very keen on using questions. His questions are sometimes addressed directly to the dissenting judge⁸² and sometimes his questions are obviously made in order to explain his material.⁸³ Nicaeus on the other hand scarcely uses questions in his scholia. As I have mentioned above, there are only five questions in all of the preserved scholia linked to the name of Nicaeus.⁸⁴ Moreover, my impression is that the style of the author of the treatise is more rhetorical at some points than that of Nicaeus,⁸⁵ whose style is drier and more down to earth. In general, the whole text of the *Meditatio* is rather lengthy and the author uses repetitions. The scholia of Nicaeus are short and to the point. I suggest that if Nicaeus had written such a treatise, his arguments would have been shorter. Moreover, the author of the *Meditatio* has a preference for certain words that we do not come across in the scholia of Nicaeus. For example, the author of the *Meditatio* uses the word *thaumasion* (θαυμάσιον) as follows: 'Δευτέρα δὲ ἦδε' ἀλλὰ προσεκτέον. Θαυμάσιον γάρ τι καὶ παράδοξον ὁ λόγος ἔρχεται λέξων' (A second [division] is this,

⁷⁸ See above, section 2. *Characteristics of Nicaeus's scholia and style: examples*, the second example of the scholia of Nicaeus.

⁷⁹ See the relevant scholion and its translation above, in 2. *Characteristics of Nicaeus's scholia and style: examples*, the second example of the scholia of Nicaeus. See also SIMON, *Untersuchungen* (see note 32 above), p. 348.

⁸⁰ SCHELTEMA, L'auteur de la meditation "de nudis pactis" (see note 17 above), p. 367: "on trouve dans la Meditatio aussi le ton violent".

⁸¹ See above, section 2. *Characteristics of Nicaeus's scholia and style: examples*. SCHELTEMA, L'auteur de la meditation "de nudis pactis" (see note 17 above), p. 367.

⁸² For example, *Meditatio* (see note 58 above), title 6, preface and paragraphs 3, 18, and 24.

⁸³ For example, *Meditatio* (see note 58 above), title 5, paragraph 10, title 6, paragraphs 9, 10, and 21, and title 7, paragraphs 17 and 18.

⁸⁴ See above, note 35.

⁸⁵ See especially the preface or for example, title 6 from the preface up to paragraph 6.

but you should pay attention. Because there comes a development that contains something beautiful but also paradoxical). I think that the sentence used by the author of the treatise here would have been too ‘fancy’ for Nicaeus. When Nicaeus describes in his scholia something that might seem contradictory, he does not use such an expression. As I explained above, Nicaeus has some favourite lines in opening sentences in which an apparent contradiction might be found. For example, his standard line is ‘Καὶ μή μοι εἴπηρ’ or something similar.⁸⁶ Again, the author of the treatise uses twice in close succession the word ‘θαυμαστόν’⁸⁷, a word not found in any of Nicaeus’s preserved scholia. Some other words that the author of the *Meditatio* likes to use in the sense of ‘note’ or ‘take into account’ are ‘ἄκουε’ (listen)⁸⁸ and ‘ὄρα’ (see),⁸⁹ neither of which are encountered in the scholia of Nicaeus, who prefers other expressions such as ‘σημείωσαι’ (note)⁹⁰ or ‘πρόσχε’ (heed).⁹¹ All these observations do not completely exclude Nicaeus from being the author of the treatise. I am suggesting that there are grounds for questioning Nicaeus’s authorship of the treatise.

It is interesting to consider that apart from the treatise on mere agreements, there exist two more extensive treatises on legal issues dating to this period,⁹² the treatise on *peculia* (*Περὶ πεκουλίων*, or *Tractatus de peculiis*) and the treatise on loans (*Περὶ δανείου πλατύτερον*, or *Tractatus de creditis*). Strangely enough, these texts are still neglected despite the fact that both have been recently edited⁹³ and provide valuable information on legal practice in the eleventh century. There are sufficient arguments to support the opinion that Eustathios Rhomaios is the author of the treatise on *peculia*.⁹⁴ The author of the treatise on loans (*Tractatus de creditis*) still remains a mystery. There have been some efforts in the past to connect this text to Xiphilinos or Psellos, but no sufficient arguments were brought to support either of the two as au-

⁸⁶ See above, section 2. *Characteristics of Nicaeus’s scholia and style: examples*, especially note 35.

⁸⁷ *Meditatio* (note 58 above), title 5, paragraph 29: “Καὶ τοῦτο οὐ θαυμαστόν, εἰ...” and paragraph 30: “Θαυμαστόν δὲ...”

⁸⁸ *Meditatio* (see note 58 above), title 5, paragraph 2; title 6, paragraph 8.

⁸⁹ *Meditatio* (see note 58 above), title 6, paragraph 19; title 7, paragraph 20.

⁹⁰ For example, BS 714/31 (sch. CA 34 ad B. 14,1,6 = D. 17,1,6), BS 1324/23 (sch. Pa 3 ad B. 21,3,19 = C. 2,11,20) and BS 1356/3 (sch. Pa 2 ad B. 22,1,32 = D. 22,4,3)

⁹¹ For example, BS1322/10 (sch. Pa 2 ad B. 21,3,17 = C. 2,11,18), BS 1324/33 (sch. Pa 3 ad B. 21,3,19 = C. 2,11,20), BS 1334/31 (sch. Pa 4 ad B. 22,1,11 = D. 22,3,11) and BS 1374/35 (sch. Pa 6 ad B. 22,1,58 = C. 4,19,24). However, I have to note that the author of the *meditatio* uses also the “πρόσχε” once in title 6, paragraph 11.

⁹² For a general overview of these treatises, see TROIANOS, *Piges* (see note 29 above), pp. 294–295 (= *Fonti*, pp. 194–195 and *Quellen*, pp. 238–239).

⁹³ M. TH. FÖGEN/D. SIMON, *Tractatus de peculiis*, *FM X* (1998) pp. 261–318, and L. BURGMANN, *Tractatus de creditis et de teste uno*, *FM IX* (1993) pp., 35–80.

⁹⁴ In short, see TROIANOS, *Piges* (see note 29 above), p. 294 (= *Fonti*, p. 195 and *Quellen*, p. 238). In detail see FÖGEN/SIMON, ‘*Tractatus de peculiis*’ (see note 93 above), pp. 261–318, and BURGMANN, *Tractatus de creditis* (see note 93 above), pp. 294–318, especially pp. 294–296.

thor of this treatise.⁹⁵ The treatise on loans deals actually with two subjects: categories of loans in relation to security rights and cases in which one witness suffices. As Troianos notes: because both issues are not so related to each other, it seems that this treatise was written on the occasion of a case pending in court.⁹⁶

One should also consider the possibility that Eustathios Rhomaïos wrote the *Meditatio de nudis pactis* as well. In the *Peira*, we read that the judge Rhomaïos has discussed the mere agreement,⁹⁷ and Rhomaïos refers also to the writings of the *antecessors*. In the title about guardianship (περὶ ἐπιτρόπων), the author of the *Peira* emphasizes that *magistros* Rhomaïos also studied the writings of Stephanus on this subject.⁹⁸

I have the impression that the author of the *Tractatus de creditis* could also be the author of the *Meditatio de nudis pactis*. It would seem that both texts have their origins the courtroom, and both deal with difficult legal issues. The style of the two texts is also rather similar, both displaying a preference for clear structure and a distinction of different categories, of loans and of *pacta* respectively. In both texts, the author likes to repeat himself after a while before he proceeds to the following subject. Both authors cite not only the *Basilica* but also the writings of the *antecessors*.⁹⁹ Moreover, the author of the *Tractatus de creditis* is keen on using questions, just as the author of the *Meditatio* does. The tone of both texts is similar and sometimes they share a preference for certain verbs and expressions. For example, the author of the *Tractatus de creditis* mentions: ‘Ὅρᾳς, ὅπερ ἀνωτέρω εἴρηται παράδοξόν τι, ὃ καὶ κύκλον ἔφαμεν’¹⁰⁰ (You have seen, what is mentioned above as a paradox, which ‘brings us back to where we started’). The use of words ‘ὁράω’ and ‘παράδοξον’, and the formulation of the question reminds one strongly the wording and style of the author of the *Meditatio*.¹⁰¹ A difference between both texts is that the author of the *Meditatio* has sometimes a more rhetorical style, especially in the preface, but this is perhaps related to the fact that he wants to convince the opposing judge.

⁹⁵ TROIANOS, *Piges* (see note 29 above), p. 294 (= *Fonti*, p. 195 and *Quellen*, pp. 238–239). In detail, BURGMANN, *Tractatus de creditis* (see note 93 above), pp. 78–80.

⁹⁶ TROIANOS, *Piges* (see note 29 above), p. 294 (= *Fonti*, p. 195 and *Quellen*, p. 238).

⁹⁷ *Peira*, 45, 11 in JGR IV, pp. 189–190.

⁹⁸ *Peira*, 16, 9 in JGR IV, p. 56: ‘ὁ μάγιστρος ἐρευνήσας ἀκριβῶς καὶ τὸν ἐρμηνευτὴν στέφανον ἀνάγνους οὕτως ἡρμήνευσεν ἐπόμενος τῇ ἐρμηνείᾳ τοῦ στεφάνου’.

⁹⁹ The author of the *meditatio* however, refers only to Stephanus, whereas the author of the *tractatus de creditis* refers to the writings of Dorotheus, Thalelaeus, and of the lawyer Theodorus Hermopolites.

¹⁰⁰ BURGMANN, *Tractatus de creditis* (see note 93 above), p. 56, line 109.

¹⁰¹ On the use of ‘ὁράω’ by the author of mere agreements, see note 86. The author of the *Tractatus de creditis* uses the ‘ὁράω’ also in BURGMANN, *Tractatus de creditis* (see note 93 above), p. 58, line 147 and on p. 66, line 266 the synonym ‘βλέπε’.

Conclusions

Nicaeus belongs to the generation of the ‘new’ *Basilica* scholiasts. There are eighty-five scholia linked to his name. Most of his scholia have been preserved in the codex Parisinus graecus 1348, which dates to the thirteenth century. A few scholia have been preserved in the codex Coislinianus graecus 152 (second half of the twelfth century) and the codex Parisinus graecus 1350 (twelfth century). Nicaeus has commented on different books of the *Basilica*, but the majority of his scholia deal with the law of procedure. The majority of his scholia are brief. Nicaeus has, on the whole, an accurate and unadorned way of explaining the law. After comparing his style with that of another ‘new’ *Basilica* scholiast, Hagiotheodorites, my impression is that the latter has a more vivid approach to explaining the material and more originality in his thoughts. However, Nicaeus makes a broader use of the legal writings from the time of Justinian than Hagiotheodorites does. Nicaeus uses *antecessorian* methods, such as *thematismoi* (hypothetical cases) and often tries to harmonize apparent contradictions. Yet, he is not so keen on the use of the *erotapokriseis*, the form of a question and an answer, which characterizes the writings of the *antecessors*. Based on this observation and other internal characteristics of his scholia and a comparison of their style to that of the treatise about mere agreements [*Μελέτη περὶ ψιλῶν συμφώνων*, or *Meditatio de nudis pactis*], I conclude that Nicaeus was probably not the author of this treatise. It seems more plausible that the author of the *Meditatio* was also the author of the *Tractatus de creditis*, a treatise on loans that dates to the same period as the *Meditatio*. The question of who that jurist actually was remains open. The possibility that Eustathios Rhomaïos wrote the *Meditatio* is a question that still needs to be examined.