

THEOPHILUS AND THE STUDENT PUBLISHER: A RESOLVED ISSUE?

The invitation I received from my colleagues in Groningen and from Giuseppe Falcone to take part in this research project was an opportunity to return to a topic, the Paraphrase of Theophilus, on which for some time I have been nurturing ‘unhealthy’ ideas, or at least, ideas which are against the general trend, starting with those regarding the *magna quaestio*, in other words the question of the origin and formation of the text of the Paraphrase. This is a problem whose definition is clearly preliminary to any other, because it is evident that any further assessment, such as for example that regarding the controversial relationship between the Paraphrase and the Institutes of Gaius, may be taken in different forms depending on whether we consider that it may be directly or indirectly attributed to that *vir illustris magister iurisque peritus*¹ to whom the Emperor had entrusted the teaching of law, mainly carried out in fact precisely on the Institutes of Gaius, and whom he then called to be a member of the commissions appointed to draft the first edition of the Code, the *Digesta* and the new institutional manual;² or if we instead think that this is an adaptation (implemented by an unknown hand) of the new Latin text of the Institutes of a work in Greek on Gaius deriving from the Berytus scholastic

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- 1 This is how Justinian referred to Theophilus in § 9 of const. *Tanta*. Const. *Haec* §1 referred to him as *vir clarissimus comes sacri nostri consistorii et iuris in hac alma urbe doctor*, with an allusion also to the honorary post of member of the *consistorium* held by the Master; while in const. *Summa* § 2 he is defined as *vir illustris ex magistro*, since he held the honorary post of *magister officiorum*. On the position of the *antecessor* as it emerges from the introductory constitutions of the *Corpus iuris*, cf. recently J.H.A. Lokin/Th.E. van Bochove, ‘Compilazione – educazione – purificazione. Dalla legislazione di Giustiniano ai Basilica cum scholiis’, in: J.H.A. Lokin/B.H. Stolte, [ed.] *Introduzione al diritto bizantino. Da Giustiniano ai Basilici*, Pavia 2011, 122ff.: but, more specifically, on the career of Theophilus, cf. J.H.A. Lokin, ‘Die Karriere des Theophilus Antecessor. Rang und Titel im Zeitalter Justinians’, *SG* 1 (1984), 43ff. (repr. in: Id., *Analecta Groningana ad ius graeco-romanum pertinentia*, (ed. Th.E. van Bochove), Groningen 2010, 99ff.) and, most recently, the preface to the new edition of the Paraphrase: J.H.A. Lokin/R. Meijering/B.H. Stolte/N. van der Wal, [edd.], *Theophili antecessoris Paraphrasis Institutionum*. With a translation by A.F. Murison, Groningen 2010, XXI, from which the work will henceforth be quoted.
- 2 According to Lokin/Van Bochove, ‘Compilazione – educazione – purificazione’, (note 1 above), 123, moreover, the fact that in the const. *Tanta*, in addition to stressing the titles with which he already qualified Theophilus in the other constitutions, Justinian has added *laudabiliter optimum legum gubernationem extendentem*, would demonstrate that the *antecessor* had then been appointed to be ‘responsabile dell’insegnamento giuridico a Costantinopoli’.

tradition, as Ferrini thought;³ or, for example, that it was the work of a successor of Theophilus who had continued the course in a different way, as suggested most recently for example by Gorla.⁴

Now, as is known, it was above all Ferrini who forcefully denied that the Greek Paraphrase of Justinian's Institutes could be attributed to Theophilus. Apart from the presence of some contradictions between the Paraphrase and the *Index* of the *Digesta* also attributed to Theophilus⁵ (contradictions that scholarship however over time has contributed to clarifying⁶), the many errors present in the work that would seem to be incompatible with the reputation and authority that surrounded the *antecessor*⁷ and the short time taken to complete the work, the main argument adopted by the famous Roman scholar for contesting Theophilus' authorship of the work, is that the codices of the Paraphrase which name Theophilus as the author of the text are all later than the 11th century, while the earlier references merely quote the Paraphrase without however ever naming its author.⁸ This is a conviction that Ferrini obstinately maintained even after the finding of two scholia to the Paris manuscript 1364 dating back to the mid-6th century,⁹ scholia which attributed without hesitation the Paraphrase to Theophilus, and in which,

3 Among the various contributions collected in *Opere di Contardo Ferrini*. I: Studi di diritto romano bizantino, Milano 1929, cf., in particular, C. Ferrini, 'Delle origini della Parafrasi greca delle Istituzioni', *AG* 37 (1886) 353ff. = *Opere*, I, 105ff.

4 Cf. F. Gorla, 'Contardo Ferrini e il diritto bizantino', in: D. Mantovani, [ed.], *Contardo Ferrini nel I centenario della morte*. Fede, vita universitaria e studio dei diritti antichi alla fine del XIX secolo, Milano 2003, 127.

5 On which, cf. Ferrini, 'Delle origini della Parafrasi greca delle Istituzioni', in: *Opere*, I (note 3 above), 118ff.

6 For example, regarding the inclusion of the *aurigae* among the infamous in the Paraphrase, contradicted by sch. ad 2,28,1, cf. G. Nocera, 'Saggi esegetici sulla Parafrasi di Teofilo', *RISG*, n.s. 12 (1937), 39f. and, more recently, J.H.A. Lokin, 'Theophilus Antecessor', *TRG* 44 (1976), 340 (= Id., *Analecta Groningana* (note 1 above), 92).

7 Cf. in particular Ferrini, 'Delle origini della Parafrasi greca delle Istituzioni', in: *Opere*, I (note 3 above), 117 and notes 2 and 3.

8 In particular, both the *antecessor* Stephanus and the *Epitome legum* (and the *Prochiron*, too) use passages from the Paraphrase without, however, quoting either the work or the author, but simply stating them to be excerpts from the *Institutiones*: see Ferrini, 'Delle origini della Parafrasi greca delle Istituzioni', in: *Opere*, I (note 3 above), 112ff.

9 This dating is acknowledged by Ferrini himself; cf. C. Ferrini, 'Scolii inediti allo Pseudo-Teofilo contenuti nel manoscritto Gr. Par. 1364', *Memorie Ist. Lomb.* III s. 9 (1886), 13ff. = *Opere*, I (note 3 above), 140ff., who however, at first, had instead maintained that they were much more recent and contemporary with the Basilica (cf. C. Ferrini, *Prolegomena a "Institutionum graeca paraphrasis Theophilo antecessori vulgo tributa"*, pars prior (Berolini 1884), in: *Opere*, I (note 3 above), 59).

moreover, the identification of Theophilus with the *antecessor* from Constantinople could not be in any way doubted, given the reference it contains to the *Index* of the *Digesta*.¹⁰

Moreover, apart from the sensational refutation that these scholia represented for the very premise of Ferrini's theory, also the circumstance whereby in the Byzantine tradition passages from the Paraphrase were quoted without indicating the author does not seem to me in itself to be a crucial argument for excluding the attribution of the work to Theophilus. The fact that contemporaries or in any case the Byzantine legal school referred mainly to the Greek *Institutiones* without mentioning the name of Theophilus could in fact be explained in my opinion by the fact that this must have been a unique work in its time and in its genre. This was therefore a work that, by virtue of this uniqueness, was so universally known among those working in the law that it was considered almost superfluous to specify its authorship. In other words, the situation was like that of the Divine Comedy for Italians, who are used to referring to it without necessarily specifying its author, since the link between the Divine Comedy and Dante is so strong that it does not require further specification: the Divine Comedy is and may not be other than Dante's. And in the same way, perhaps, Theophilus was in the Byzantine scholastic tradition equally identified with his work, in the sense that the Paraphrase was and could only be by Theophilus, whether his authorship was specified or not.¹¹ To this we can add that the consideration of the content of the scholia on which Ferrini bases his opinion makes the omission seem to be entirely natural, in the sense that it is not clear for example why Stephanus, or the Epitome legum and the Prochiron,¹² in quoting passages of the Paraphrase on the most varied topics, declaring them to be excerpts of the *Institutiones* (on some occasions even word for word, as in the case of Theoph. 4,4,8 on the *lex Cornelia de iniuriis*, in fact referred to literally by Stephanus¹³), should every time also have mentioned the author. And moreover, the very fact that, in citing *sic et simpliciter* the *Institutiones*, there was usually an allusion to the Paraphrase, shows the fame that this work must have achieved among the contemporaries, so much so as to have in fact

10 This is in particular sch. ad 2,1,8 ἐκπιοῦσι δὲ ταῦτα οἱ οἰκονόμοι καὶ οἱ ἐπίσκοποι, ὡς φησι Θεόφιλος; and, above all, sch. ad 2,18,1 οὐκ ἀκριβῶς ὁ Θεόφιλος τοῦς ἡνιόχους ἀτίμους ἔφη (...). καὶ αὐτὸς γὰρ ὁ Θεόφιλος ἐν τῷ οἰκείῳ ἰνδίκι τῶν πρώτων οὐ λέγει τοῦς ἡνιόχους αἰσχρὰ ἢ ἄτιμα πρόσωπα.

11 In this sense, cf. the observation already made in C. Russo Ruggeri, 'Teofilo e la spes generandi', *IURA* 58 (2010), 172 n. 12.

12 For the scholia of Stephanus, and for the passages from the Epitome legum and the Prochiron, quoted by way of example, cf. Ferrini, 'Delle origini della Parafrasi greca delle Istituzioni', in: *Opere*, I (note 3 above), 113ff.

13 Cf. sch. 6 ad B. 8,2,42 = D. 3,3,42 (BS 119/19-22) (Heimbach, Vol. I, 381); on this scholion (in the Heimbach edition), see Ferrini, 'Delle origini della Parafrasi greca delle Istituzioni', in: *Opere*, I (note 3 above), 114.

become the ‘prototype’ of the Institutes, even more than the Latin text. And in this perspective the supposition most recently stressed by Gorla is perhaps not unlikely, whereby the Greek scholia on the Paraphrase ‘potrebbero far concludere che già nel secolo VI il testo della Parafraasi fosse utilizzato didatticamente in sostituzione del dettato originale delle istituzioni’.¹⁴

Whatever the case, after the discovery of the scholia in the Paris manuscript and the scaling-down over time of the other arguments as a result of scholarship, we can say that today (apart from some rare, albeit authoritative, exceptions¹⁵) nobody in fact any longer believes in the existence of a Pseudo-Theophilus, who would have adapted to the imperial manual a comment in Greek of Gaius drafted in the school of Berytus, as hypothesised by Ferrini.¹⁶

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- 14 Cf. Gorla, ‘Contardo Ferrini e il diritto bizantino’ (note 4 above), 127; but that the Paraphrase had become ‘il referente di qualsiasi citazione’ of the Justinian text is underlined also by G. Cavallo, ‘La circolazione di testi giuridici in lingua greca nel mezzogiorno medioevale’, in: M. Bellomo, [ed.], *Scuole di diritto e società nel mezzogiorno medioevale d’Italia*, II, Catania 1987, 114 and by E. Gomez Royo, ‘Introducción al derecho bizantino’, *SCDR* 8 (1996), 172, who observes that the prestige of Theophilus as a teacher was such that ‘no sólo desplazó casi por completo las obras de los restantes *antecessores* en el campo docente, sino que también su obra relegó en oriente el texto original’. In this sense, cf., lastly, also G. Matino, ‘Problemi di natura letteraria e di struttura linguistica nella ‘Parafraasi’ delle Institutiones di Teofilo Antecessor’, in: *Τολαρίσκος. Studia graeca Antonio Garzya sexagenario a discipulis oblata*, Napoli 1987, 283f.
- 15 Cf., for example, A. D’Emilia, ‘Note esegetiche intorno ad alcune definizioni contenute nella Parafraasi greca delle Istituzioni giustiniane’, *ASD* 5-6 (1961-1962), 156f., which insists above all on the errors in the Paraphrase, and, more recently, C.A. Cannata, ‘Qualche considerazione sui ‘nomina transscripticia’, in: *Studi per Giovanni Nicosia*, II, Milano 2007, 171 n. 7.
- 16 In this direction, cf., amongst the many, G. Segrè, ‘Sulla questione se la Parafraasi greca alle Istituzioni giustiniane abbia avuto per fondamento il testo dei commentari di Gaio’, *Il Filangieri* 12/1 (1887), 735 n. 6 (repr. in: Id., *Scritti giuridici: raccolti per iniziativa di colleghi e discepoli in occasione del XL anno d’insegnamento dell’autore*, II, Roma 1938, 1 n. 6); K.E. Zachariä von Lingenthal, ‘Aus und zu den Quellen des römischen rechts. XVI. Der Antecessor Theophilus ist der Verfasser der griechischen Institutionen’, *SZ* 10 (1889), 257 (repr. in: Id., *Kleine Schriften zur römischen und byzantinischen Rechtsgeschichte*, II, Leipzig 1973, 386); C. Appleton, ‘Histoire de la compensation en droit romain’, *NRHD* 19 (1895) 500f.; H. Peters, *Die oströmischen Digestenkommentare und die Entstehung der Digesten*, Leipzig 1913, 46 n. 132; B. Kübler, *Geschichte des römischen Rechts*, Leipzig 1925, 434ff.; *PWRE* V, A 2, Stuttgart 1934, 2142ff., s.v. ‘Theophilus’; Nocera, ‘Saggi esegetici sulla parafraasi di Teofilo’ (note 6 above), 39ff.; L. Wenger, *Die Quellen des römischen Rechts*, Wien 1953 (repr. Goldbach 2000), 682ff.; B. Santalucia, ‘Contributi allo studio della Parafraasi di Teofilo’, *SDHI* 31 (1965), 173 nt. 5.; U. Robbe, ‘Su la Universitas’, in: L. de Rosa, [ed.], *Ricerche storiche ed economiche in memoria di C. Barbagallo*, I, Napoli 1967, (publ. 1970), 628 nt. 101; H.J. Scheltema, *L’enseignement de droit des Antécresseurs*, [Byzantina neerlandica. Series B: Studia, I], Leiden 1970, 18 (repr. in: Id., *Opera minora ad iuris historiam pertinentia*, (collegerunt N. van der Wal/J.H.A. Lokin/B.H. Stolte/ Roos Meijering), Groningen 2004, 71f.); Lokin, ‘Theophilus Antecessor’ (note 6 above), 339ff. (= Id., *Analecta Groningana* (note 1 above), 91ff.); H.L.W. Nelson, *Überlieferung, Aufbau und Stil von Gai*

Meanwhile, incredible success has been enjoyed in scholarship, to the point of making it an indisputable pillar, by the idea proposed by Reitz,¹⁷ but in fact dating back some time and still today unanimously and enthusiastically accepted, whereby the Paraphrase was not drafted personally by Theophilus, nor even conceived by him for publication, but derived from a collection of lessons held by the master on the imperial Institutes that a student is thought to have diligently transcribed and then published.¹⁸ Moreover, along these lines it has been further hypothesised, by Scheltema and other authoritative scholars of the Paraphrase (Simon, Pieler, Van der Wal, Lokin, and Troianos, to mention but a few¹⁹), that the work was the result of the combination, by the student publisher, of two different notebooks of lessons, corresponding to the two phases of teaching into which the course on the Institutes was organised: an initial phase corresponding to the translation of the Latin text and some *προθεωρία*, and a second phase containing instead the *παραγραφαί* of the translated text, based on exemplifications, questions and answers between the teacher and the students, historical and dogmatic *excursus* etc. According to this interpretation,

Institutiones, Leiden 1981, 271; Gomez Royo, 'Introducción al derecho bizantino' (note 14 above), 170f.; G. Falcone, 'Il metodo di compilazione delle Institutiones di Giustiniano', *AUPA* 45/1 (1998), 278 nt. 132; Gorla, 'Contardo Ferrini e il diritto bizantino' (note 4 above), 125f.; R. Lambertini, *Introduzione allo studio esegetico del diritto romano*, Bologna 2006³, 138; Lokin/Van Bochove, 'Compilazione – educazione – purificazione' (note 1 above), 124ff. On this question, see, most recently, also the observations contained in Lokin/Meijering/Stolte/Van der Wal, *Theophili Antecessoris Paraphrasis Institutionum* (note 1 above), XVIIIff.

17 W.O. Reitz, *Theophili Antecessoris Paraphrasis Graeca Institutionum Caesarearum*, 2 vols., Hagae Comitum 1751, I: XXVII; II: 1175, 1249.

18 For this opinion, cf., amongst others, P.B. Degen, *Bemerkungen über das Zeitalter und die Institutionen Paraphrase des griechischen Rechtslehrers Theophilus*, Luneburg 1809, 27ff.; 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*, I, Paris 1843 (repr. Osnabrück 1966), 123f.; K.E. Zachariä von Lingenthal, review of: Mortreuil, *Histoire*, in: *Kritische Jahrbücher für Deutsche Rechtswissenschaft* 8 (1844), 798; C. Appleton, 'Histoire de la compensation', (note 16 above), 505; Peters, *Die oströmischen Digestenkommentare* (note 16 above), 46 and nt. 132; Wenger, *Die Quellen des römischen Rechts* (note 16 above), 683; P. De Francisci, *Vita e studi a Berito tra la fine del V e gli inizi del VI secolo*, Roma 1912, 9f.; Id., 'Saggi di critica della Parafraresi greca delle Istituzioni giustiniane', in: *Studi in onore di Biondo Biondi*, I, Milano 1965, 1ff.; H.J. Scheltema, 'Subseciva. IV. Die Institutionenparaphrase Theophili', *TRG* 31 (1963), 92 (= Id., *Opera minora* (note 16 above), 119), and *L'enseignement de droit des Antécesseurs* (note 16 above), 17ff. (= *Opera minora* (note 16 above), 71ff.); D. Simon, review of: Scheltema, *L'enseignement de droit des Antécesseurs*, in: *TRG* 39 (1971), 483; Pieler, *Rechtswissenschaft*, 419f.; Martino, 'Problemi di natura letteraria' (note 14 above), 288; Van der Wal/Lokin, *Delineatio*, 41; Gomez Royo, 'Introducción al derecho bizantino' (note 14 above), 171; Sp. Troianos, *Οι πηγές του βυζαντινού δικαίου*, Αθήνα/Κομοτηνή 1999², 92; G. Falcone, 'La formazione del testo della Parafraresi di Teofilo', *TRG* 68 (2000), 417.

19 Cf. the works and passages quoted in the previous note. The proposal made by Scheltema and the other scholars mentioned above is also shared by Martino, 'Problemi di natura letteraria' (note 14 above), 288ff.

then, the student would have put together the lessons regarding a given topic that the Master had discussed at various times, moreover reworking in an impersonal form the dialogues taking place during the lessons between the master and the students, and from this combination and reworking would have created the single discourse that today we read in relation to the various titles of the work.

I will not linger on this last variation of the opinion considered here, since I believe that Giuseppe Falcone, in his fine work on the formation of the text of the Paraphrase, has already effectively and sufficiently demonstrated its weakness, providing perceptive observations on the arguments offered by Scheltema.²⁰ On the other hand, as I have already had an opportunity to observe, an objective and unbiased reading of the text of the Paraphrase is in my opinion sufficient to highlight the uniformity and linearity of the discussion, in which the presence of *προθεωρία* and of historical and dogmatic *excursus*, the repetitions of interpretive propositions (or of other similar stylistic forms) and the frequent recourse to exemplifications are simply the tools of the trade of the teacher, in other words the expedients with which the Master aimed to ensure that his discourse was complete and lively. They are, moreover, the same tools we still use today, when, introducing a concept, we collocate it dogmatically and run through its history; or when, to attract the attention of the students, we provocatively direct questions at them without expecting an answer; or when, to aid the memorisation of certain topics, we use common and meaningful examples.²¹

Even amended in this way, however, I have to confess that it is the very idea of the student taking shorthand notes from the lessons of the professor and then editing their publication – an idea, as mentioned, still today unanimously shared – which for some time has failed to fully convince me.

This conjecture, as is known, is fundamentally based on the observation whereby the overall progress of the treatment suggests an oral exposition of the topics as they are one by one dealt with by the teacher. Confirmation of this would seem to be given by the continuous recapitulations found in the text (*ἀνακόλυθα*), the frequent repetitions, the references to topics already completed or to be completed, the alternation of Greek and Latin technical expressions, the diversity of verb forms, the many lexical and stylistic irregularities, the continuous questions, etc. All these are clues which would in fact seem

20 Cf. Falcone, 'La formazione del testo della Parafrasi di Teofilo' (note 18 above), 418ff., whose arguments are also shown in detail in the Groningen edition: Lokin/Meijering/Stolte/Van der Wal, *Theophili antecessoris Paraphrasis Institutionum* (note 1 above), XVff.). The opinion of the scholar from Palermo, agreement with which I have already expressed in my study 'Teofilo e la spes generandi' (note 11 above), 173f., has recently also been accepted by Lokin/Van Bochove, 'Compilazione – educazione – purificazione' (note 1 above), 126.

21 On this, cf. Russo Ruggeri, 'Teofilo e la spes generandi' (note 11 above), 173f.

to betray the oral origin of the exposition, whose written version which has reached us is nothing other than a transcription made by a student at the lessons given by the teacher in the classroom.

However, this common reconstruction, which moreover, by depriving the Paraphrase of its academic pedigree, has also made it possible to reassess the importance of the numerous textual problems, by attributing many of the mistakes and, above all, the many lexical and stylistic irregularities found in the text, to the poor student,²² has, as I said, for some time left me somewhat perplexed.

In fact, let me start by saying that I find it hard to believe that a young Byzantine student, who certainly would not have owned, as modern-day students do, a recorder, would have been able to transcribe with such meticulous precision and in such a complete and detailed way, without ever missing a sentence, the extremely detailed and articulated exposition of the legal institutions made by the teacher in the lesson, and above all – I believe this should be particularly stressed – the extremely large number of technical Latin words and expressions of which the discourse was full,²³ words and expressions which surely could not have been familiar to a young Greek speaker with extremely limited knowledge of Latin²⁴ and who was moreover experiencing his first contact with law and legal language. What I would like to say, in other words, is that the theory of the transcription of the text of the Paraphrase, as it has been given to us, by a student, first of all does not seem to me compatible with the knowledge of an average Byzantine student just starting his legal studies, who certainly would not have had the familiarity with legal language or the adequate grasp of Latin that the Paraphrase presupposes. Unless, obviously, we imagine that the teacher dictated the text, something which in practice may actually have happened as far as the Latin text is concerned.²⁵ However, it is not reasonable to believe that this happened for the translation and comment of such texts,

22 Above all in the past, significant comments along these lines have been seen in Degen, *Bemerkungen* (note 18 above), 58ff. and De Francisci, *Vita e studi a Berito tra la fine del V e gli inizi del VI secolo* (note 18 above), 10 nt. 2.

23 On the massive use by Theophilus of technical terms in Latin or Latin with Greek roots, see recently G. Matino, 'Lingua e letteratura nella produzione giuridica bizantina', in: *Spirito e forme della letteratura bizantina*, (Quaderni dell'Accademia Pontaniana, 47), Napoli 2006, 80f. and C.M. Mazzucchi, 'Il contesto culturale e linguistico. Introduzione al lessico giuridico greco', in: Lokin/Stolte, *Introduzione al diritto bizantino. Da Giustiniano ai Basilici* (note 1 above), 76.

24 On the poor knowledge of Latin by Byzantine students, which moreover precisely in that period is thought to have reached its lowest level, cf., most recently, Lokin/Van Bochove, 'Compilazione – educazione – purificazione' (note 1 above), 121; but in the same place, cf. Mazzucchi, 'Il contesto culturale e linguistico' (note 23 above), 71ff.

25 On the practice of dictating texts by teachers, cf. D. Simon, 'Aus dem Kodexunterricht des Thalelaios. A. Methode', *SZ* 86 (1969), 336ff., who underlines amongst other things that the const. *Omnem* (§1) itself mentioned that *libros a voce magistra studiosi accipiebant*.

given that (apart from any other consideration) it would have taken an extremely long time.

Moreover, we should also consider that the system of writing used at the time, on papyrus or parchment, using a calamus or goose quills, continuously dipped in ink and substituted and which, to erase the inevitable mistakes, required the use of a damp sponge,²⁶ is unlikely to have made it possible to keep pace with such a detailed and technical oral exposition. This holds true even if we suppose that the student publisher made use of shorthand, taught in Rome from a primary school age.²⁷ Basically, we have all been students and know from personal experience how difficult it is, even with a good pen, to keep pace with the voice of the teacher; imagine how difficult it would have been with a calamus and inkpot! And if last of all we consider the teaching methods adopted in the period in question, in other words the fact that in Byzantine schools the students did not merely passively attend lessons, but performed an active role, asking questions, discussing and raising objections – as some testimonies, such as for example the account of the life of Severus written by Zacharias Scholasticus,²⁸ suggest –, the possibility that a student, actively engaged with the teacher and with his colleagues in discussing the interpretation of and comment on the text, could at the same time produce such a faithful and complete transcription of everything that was said during the lesson, becomes even more unlikely.²⁹ This does not however mean – I would like to stress – ruling out completely the possibility that Byzantine students may have taken notes, something that in fact is extremely likely to have happened. But it is one thing to maintain that they used to take notes in lessons on the fundamental concepts expressed by the master, to then revise them at home and rework them in their own words for the purposes of study, perhaps using for this purpose also notebooks that would subsequently be passed on to colleagues

26 On the systems of writing used, especially in schools, see, recently, F.-J. de Lasala, *Compendio di Storia della scrittura latina. Paleografia latina*, Roma 2010, 35ff.; but cf. also, among the others, A. Petrucci, *Breve storia della scrittura latina*, Roma 1992, 36ff.

27 For the various types of abbreviations widespread in Rome, starting with the Tironian notes, cf. the representative example of G. Cencetti, *Paleografia latina*, Roma 1978, 156ff.

28 In which it clearly emerges that the ‘corsi dovevano consistere non solamente in spiegazioni date dal maestro, ma in veri e propri esercizi degli studenti sulle fonti, tanto che Zaccaria usa la parola *πράξις* per designare appunto la partecipazione degli studenti alla lezione’; cf. De Francisci, *Vita e studi a Berito tra la fine del V e gli inizi del VI secolo* (note 18 above), 9.

29 Also Ferrini, ‘Delle origini della Parafrasi greca delle Istituzioni’, in: *Opere*, I (note 3 above), 108f., moreover, commenting on a manuscript note found in Treckell’s papers and reported by Reitz, *Theophili Antecessoris Paraphrasis Graeca*, I (note 17 above), XXVII, doubted that collecting the lessons of the teacher was a custom in line with the approach adopted in Byzantine schools, in which students in fact took part actively in the lesson. On the dialectic between teacher and students that distinguished the method of teaching in use in law schools in the 5th century, see P. Collinet, *Histoire de l’école de droit de Beyrouth*, Paris 1925, 248f.

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in the years below them (as we know Severus for example did³⁰); it is quite another to theorise a contextual, complete 'recording' of the teacher's words, then revised in an impersonal way for the purposes of publication, as in fact it is thought the student of Theophilus did. This theory, I repeat, at least in my opinion, is difficult to reconcile with what we know of the linguistic and cultural knowledge of the young Byzantines and of the contemporary systems of writing and methods of teaching.

Apart from all this, however, it is true that the style of the work is discursive, almost colloquial, with continuous recapitulations, interrogatives, and exemplifications, etc. However, we cannot fail to consider nor should we underestimate above all the circumstance that the Paraphrase is not a collection of academic discourses, but a work created in the school and for the school, conceived for students and aimed at students, students moreover of the first year, who needed to be taught the basic rudiments of law:³¹ and I believe that everyone can see how much difference there is, starting with style and approach, between the treatment of a topic in a scientific or academic work and the basic treatment aimed at a public of readers just starting to study law. For the latter, it is indispensable not only to use prose which is as simple and effective as possible, but also to have recourse, where necessary, to frequent recapitulations, in order to help the reader follow the thread of the discourse, and to useful repetitions, aimed at encouraging the learning and memorisation of the most important concepts, as well as to digressions, aimed at providing clarification and information, in addition to dogmatic and historical contextualisation.

Moreover, the agile, colloquial style, the presence of historical *excursus*, the unfolding of the discourse through *anacolutha*, repetitions and exemplifications, the use of antithesis and comparisons, digressions, classifications through dichotomies, trichotomies etc. and the instrumental use of rhetorical devices are not peculiarities of the Paraphrase, but characterise, albeit to a different extent, more or less all isagogic literature, starting with the Institutes of Gaius³² up to the Institutes of Justinian themselves,³³ which, albeit

30 According to the testimony of Zacharias, who expressly said that the young students, returning home, used to repeat the lessons of the Master and that Severus had also collected a large number of notebooks full of notes left as *ὑπομνήματα* to colleagues, cf. in particular De Francisci, *Vita e studi a Berito tra la fine del V e gli inizi del VI secolo* (note 18 above), 9f.

31 As has been stressed above all by Ferrini, 'Delle origini della Parafraresi greca delle Istituzioni', in: *Opere*, I (note 3 above), 109.

32 On the discursive style of Gaius' Institutes, of which the work conserves many traces, a fundamental work is H. Dernburg, *Die Institutionen des Gaius: ein Collegienheft aus dem Jahre 161 nach Christi Geburt*, Halle 1869, 33ff.; but cf. also F. Casavola, 'Gaio nel suo tempo', in: *Gaio nel suo tempo. Atti del simposio romanistico*, Napoli 1966, 7 (= *Labeo* 12 (1966), 13) and R. Quadrato, *Le Institutiones nell'insegnamento di Gaio. Omissioni e rinvii*, Napoli 1979, 1ff.

official in nature, in their stylistic simplicity and use of the first person plural clearly betray the purely didactic aims of the work and the preoccupation with attracting the still inexperienced minds of the students:³⁴ as moreover Justinian himself specifies in § 2 of title 1 of Book I, where he mentions the need for notions to be transmitted to first-year students in a light, simple way, so as not to induce them to abandon their studies or subject them to undue fatigue.³⁵ Nor is there any lack in the imperial manual of (albeit concise) frequent recapitulations,³⁶ continuous references to the past history of the Institutes (*olim*),³⁷ analogies and contrapositions (*item* and *ex diverso*),³⁸ the rhetorical use of questions,³⁹ references⁴⁰ etc.: all things which in this case originated, without any doubt, from a *scriptura reportata*!

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- 33 Along these lines, see also Lokin/Van Bochove, 'Compilazione – educazione – purificazione' (note 1 above), 125, who in fact show how these characteristics 'hanno contraddistinto lo stile tecnico del manuale classico in generale, un genere letterario che sostanzialmente ha le sue origini nel metodo educativo dei Sofisti'.
- 34 Moreover, we should not underestimate the fact that manuscripts were certainly not easy to read, especially if compared to our typographical models. This explains why 'nelle culture manoscritte (...) i testi scritti spesso mantenevano lo schema dell'oralità, che ne facilitava il recupero mnemonico'; cf., in particular, W.J. Ong, *Oralità e scrittura. Le tecnologie della parola*, Bologna 1986, 171f.; but on the relationship between orality and writing, see also M. Bellomo, 'Legere, ripetere, disputare', in: *Aspetti dell'insegnamento giuridico nelle università medievali. Le 'quaestiones disputatae'*, I, Reggio Calabria 1974, 13ff. (now in: Id., *Medioevo edito e inedito. I: Scholae, Universitates, Studia*, Roma 1997, 53ff.).
- 35 Cf. Inst. 1,1,2: *His generaliter cognitibus et incipientibus nobis exponere iura populi romani ita maxime videntur posse tradi commodissime, si primo levi ac simplici, post deinde diligentissima atque exactissima interpretatione singula tradantur. alioquin si statim ab initio rudem adhuc et infirmum animum studiosi multitudine ac varietate rerum oneraverimus, duorum alterum aut desertorem studiorum efficiemus aut cum magno labore eius, saepe etiam cum diffidentia, quae plerumque iuvenes avertit, serius ad id perducamus, ad quod leniore via ductus sine magno labore et sine ulla diffidentia maturius perducipotuisset.* Along the same lines, see also Inst. 2,20,3.
- 36 Cf., among many passages, Inst. 1,26,2; 2,5,6; 3,6,11.
- 37 Cf. merely by way of example, Inst. 1,5,3; 1,8,1; 1,11,1; 2,9,1; 2,10,1; 2,14pr.; 2,20,2; 2,20,25; 2,22pr.; 2,23,1; 2,25pr.; 3,2pr.-4; 3,7pr.-2; 3,15,1; 3,21pr.; 4,4,7; 4,8,7; 4,10pr.; 4,11pr.-1; 4,15,8; 4,18.
- 38 Cf., for example, Inst. 1,10,5; 1,11, 3 and 1,11,7.
- 39 Examples of the many questions found in the text include Inst. 1,4pr.: *ex his et illud quaesitum est, si ancilla praegnans manumissa sit, deinde ancilla postea facta peperit, liberum an servum pariat?* Inst. 1,6,7: *Cum enim antiquitas huiusmodi aetati et pro aliis postulare concessit, cur non etiam sui iudicii stabilitas ita eos adiuvere credatur, ut et ad libertates dandas servis suis possint pervenire?* Inst. 1,12,4: *quis enim patiatur patrem quidem posse per emancipationis modum suae potestatis nexibus filium relaxare, imperatoriam autem celsitudinem non valere eum quem sibi patrem elegit ab aliena eximere potestate?* Inst. 1,14,5: *Quid si nepotes sint, an appellatione filiorum et ipsis tutores dati sunt?* Inst. 1,26,2: *Quid si patronus?* Inst. 2,10,5: *quid enim, si septem anuli una sculptura fuerint?* Inst. 3,8,2: *unde quaerebatur, si eum cui adsignaverit postea emancipaverit, num evanescat adsignato? Sed placui evanescere, quod et Iuliano et aliis plerisque visum est.* Inst. 3,11,3: *Quid ergo si quis intestatus decedens codicillis libertates dederit neque adita sit ab intestato hereditas?*

Certainly, in the Paraphrase, the presence of the mentioned peculiarities is definitely more accentuated. This however does not seem to be entirely unnatural, if we consider that it was not only the translation of the official text,⁴¹ but also and above all a comment on it, unravelling and explaining it to the students in all its most recondite implications, in the simplest, most comprehensive and effective way possible. This in fact explains the need to make continuous digressions on themes outside the *sedes materiae*, the pro-theories, the recourse to effective exemplifications, the Master's insistence on summarising or repeating notions already explained, to help the reader keep track of the thread of the discourse and to facilitate its memorisation, the rhetorical use of the interrogative form to liven up the exposition and attract the attention of the students, etc.

Inst. 3,11,5: *Si is, qui in integrum restitui potest, abstinuit se ab hereditate, an, quamvis potest in integrum restitui, potest admitti constitutio et additio bonorum fieri? Quid ergo, si post additionem libertatum conservandarum causa factam in integrum sit restitutus?* Inst. 3,11,6: *quid ergo, si vivus dedit libertates vel mortis causa et, ne de hoc quaeretur, utrum in fraudem creditorum an non factum sit, idcirco velint addici sibi bona, an audiendi sunt?* Inst. 4,2pr.: *quis enim magis alienam rem invito domino contractat, quam qui vi rapit?* Inst. 4,8,7: (...) *quis enim patitur filium suum et maxime filiam in noxam alii dare, ut paene per corpus pater magis quam filius periclitetur, cum in filiabus etiam pudicitiae favor hoc bene excludit?*

40 See, for example, Inst. 1,12pr.; 1,12,8; 2,1,11; 2,5,6; 2,9,6; 2,13,7; 3,2,1; 3,6,11; 3,9pr.; 3,19,13; 3,24,1; 3,27,6; 4,1pr.; 4,8,5; 4,6,19; 4,6,23; 4,6,33e; 4,6,34; 4,6,39; 4,7pr.; 4,10,2; 4,15,64; 4,17,4.

41 The introduction of a new method of teaching, which envisaged the prior translation of the Latin text, should be dated, according to Lokin/Van Bochove, 'Compilazione – educazione – purificazione' (note 1 above), 121f., to 533 AD, and is justified by the fact that the knowledge of Latin by Greek-speaking students had reached its lowest level precisely at that time. However, we cannot fail to note that the poor mastery of Latin among young Byzantines was a phenomenon which had already existed for some time, a phenomenon which the eastern legal schools were bound to have realised, and which leads us to believe that the need to ensure the exact comprehension of the Latin sources to study would have been felt even before 533 AD, and that, therefore, the practice of proceeding with the prior translation of the texts was in fact already widespread among teachers of law in the 5th century. If this is true, it means that the *antecessores* may well have simply adopted and officialised a teaching method which had for some time been used in the eastern schools. Moreover, a confirmation, albeit indirect, of this can be found in my opinion in the existence of significant elementary isagogic literature in Greek in the pre-Justinian era (on which, for example, in the perspective considered here, see Matino, 'Lingua e letteratura nella produzione giuridica bizantina' (note 23 above), 66 f.), which in fact demonstrates how the use of Greek was considered an absolute necessity in practice and teaching. On the law schools operating in the East before Justinian, and on the language and teaching methods adopted by 5th-century masters of law, cf. in any case, more generally, among the many, Collinet, *Histoire de l'école de droit de Beyrouth* (note 29 above), 207ff.; Mortreuil, *Histoire du droit byzantin*, (note 18 above), 258 ff.; Peters, *Die oströmischen Digestenkommentare* (note 16 above), 60ff.; De Francisci, *Vita e studi a Berito tra la fine del V e gli inizi del VI secolo* (note 18 above), 3ff.; Scheltema, *L'enseignement de droit des Antécédents* (note 16 above), 11ff. (= Id., *Opera minora* (note 16 above), 66ff.); Pieler, *Rechtswissenschaft*, 404f.; Van der Wal/Lokin, *Delineatio*, 21f.; Gomez Royo, 'Introducción al derecho bizantino' (note 14 above), 159ff.

From a different perspective, we also need to take into account the fact that the institutional course from which the Paraphrase derived was held by Theophilus sometime between late 533 and the first half 534, that this was in other words the first course held on the new Imperial *Institutiones*, whose publication – as is known – took place on 21 November 533 with the constitution *Imperatoriam*.⁴² In fact, we know with certainty, that Theophilus, whom Justinian had called to take part in the commissions appointed to draw up the first edition of the Code, the *Digesta* and the *Institutiones*,⁴³ and who was certainly at work in December 533, as appears from § 9 of the const. *Tanta*,⁴⁴ did not collaborate on the drafting of the second edition of the Code, since he was not mentioned in the const. *Cordi*, with which the *repetita praelectio* of the Code was published on 17 November 534. This is a circumstance for which various explanations have been provided, for example that he may have been relieved of his duties due to the excessive independence of his works in relation to the prohibition on commentaries introduced in const. *Deo Auctore* and in const. *Tanta-Αέδοκεν*, as Amelotti thought;⁴⁵ or perhaps due to the onset of an illness, academic commitments or a change in fortunes, as proposed by Lenel,⁴⁶ or a voluntary return to teaching, according to the idea of De Francisci,⁴⁷ but which we should instead believe was due with all likelihood to the sudden death of the *antecessor*, as seems to be demonstrated above all by the fact that also the *Index* of the *Digesta* remained unfinished, interrupted at the books *de rebus*.⁴⁸ Moreover, that the course from which the Paraphrase

42 That the Paraphrase originates from the course of lessons held by the *antecessor* in 533-534 is today moreover commonly recognised among scholars. Among the most recent, cf. Scheltema, 'Subseciva. IV. Die Institutionenparaphrase Theophili' (note 18 above) 92 (= Id., *Opera minora* (note 16 above), 119), and *L'enseignement de droit des Antécresseurs* (note 16 above), 18 (= *Opera minora* (note 16 above), 71-72); Pieler, *Rechtswissenschaft*, 420; Van der Wal/Lokin, *Delineatio*, 41 and 125; Falcone, 'Il metodo di compilazione' (note 16 above), 312 nt. 246; Lokin/Van Bochove, 'Compilazione – educazione – purificazione' (note 1 above), 125.

43 As is seen clearly in the constitutions *Haec* (§1), *Summa* (§ 2), *Tanta* (§ 9) and *Imperatoriam* (§ 9).

44 See, in fact, what the Emperor states in const. *Tanta* § 9: *Quae omnia confecta sunt per (...) Theophilum virum illustrem magistrum iurisque peritum in hac splendidissima civitate laudabitur optimum legum gubernationem extendentem*. On the ideological value of the words used here by Justinian, that he would have entrusted to the *antecessores* the task of revealing with their activity the excellent government of the laws, cf., most recently, interesting notes of G. Falcone, 'Premessa per uno studio sulla produzione didattica degli antecessores', in: Lokin/Stolte, *Introduzione al diritto bizantino. Da Giustiniano ai Basilici* (note 1 above), 151.

45 Cf. M. Amelotti, 'Giustiniano interprete del diritto', in: Id., *Scritti giuridici*, (ed. L. Migliardi Zingale), Torino 1996, 691 nt. 12.

46 Cf. O. Lenel, 'Miscellen (Zur Entstehung der Digesten)', *SZ* 34 (1913), 376.

47 Cf. De Francisci, 'Saggi di critica della Parafraresi greca delle Istituzioni giustiniane' (note 18 above), 8f., for which precisely the drafting, together with the Paraphrase, of the *Index* of the *Digesta*, would lead us to think that Theophilus lived for at least some years after the compilation of the *iura* and that his death is not prior to 536.

was taken is the first and, as said, plausibly the last and only course held by Theophilus on the Imperial *Institutiones* in 533/534, is also confirmed by the observation that there is no trace in it of any law subsequent to the Institutes,⁴⁹ especially of that introduced by the *Novellae*,⁵⁰ nor is there any involuntary allusion of the *repetita praelectio* of the Code:⁵¹ a fact which is difficult to explain if not by the death of the teacher, or any case by an event that from that moment onwards prevented him from working. Otherwise, we imagine that he would have provided for updating his work, as well as completing the *Index* of the Digest.⁵²

Let us assume this, and also take into account the doubts raised by the fact that the linguistic and cultural knowledge of young Byzantine students and the systems of writing and the methods of teaching at the time seem incompatible with the idea that a student could have made a full, simultaneous transcription of the words of the teacher during the lessons. In addition, let us consider the purpose of the work, namely for elementary teaching, and compare its technical style with that of other institutional manuals. Let us also remember that the course of lessons on the recently finished text on which the Paraphrase was clearly based took place in the few months separating the publication of

48 And precisely at D. 17,2; on Theophilus' *Index* to the Digest, cf., by way of example, Scheltema, *L'enseignement de droit des Antécédents* (note 16 above), 30f. (= Id., *Opera minora* (note 16 above), 80).

49 Cf., for example, the constitution quoted in C. 6,23,31 from 534, not quoted in Theoph. 2,10, or the constitution referred to in C. 6,58,15, also from 534, of which there is no trace in Theoph. 3,2,4.

50 Merely by way of example, cf. Theoph. 2,22, which does not take account of Nov. 1 of 535; Theoph. 1,10,12, which does not consider the changes made by Nov. 12,1; Theoph. 1,16,1, which ignores Nov. 22,8; Theoph. 2,18,6, which does not envisage the increase of legitimacy introduced by Nov. 18,1; Theoph. 1,4 and 1,5, clearly not updated compared to Nov. 78 which declares all freedmen to be freeborn.

51 In § 2 of the Proem, containing the paraphrase of const. *Imperatoriam*, only the Code of 529 is in fact mentioned; moreover, in Theoph. 2,16,14, Theophilus mentions a constitution of 531 (C. 7,37,3) saying that it had been issued recently, and in Theoph. 3,19,14,5 he mentions a law that no longer appears in the second edition of the Code. On this, see recently Lokin/Van Bochove, 'Compilazione – educazione – purificazione' (note 1 above), 124 and notes 44 and 45.

52 Moreover, the circumstance that the text of the Paraphrase which has reached us through the manuscripts of the 11th century does not contain mentions of law subsequent to the *Digesta* leads us to believe that the common archetype from which such manuscripts surely derive (as would seem to demonstrate also the constant lack of title 1 of Book I) was a far earlier book, plausibly put aside after the compilations produced in the period of the Macedonian Renaissance and then rediscovered and divulged in the Constantinople school reopened by Constantine IX Monomachos (as perhaps not wrongly hypothesised by Ferrini, 'Delle origini della Parafraresi greca delle Istituzioni', in: *Opere*, I (note 3 above), 113ff.). On the rebirth and reorganisation of legal studies taking place in Constantinople in the course of the 11th century, cf., for all, P. Lemerle, *Cinq études sur le XI^e siècle byzantin*, [Le monde byzantin], Paris 1977, 193ff. and W. Wolska-Conus, 'Les écoles de Psellos et de Xiphilin sous Constantin IX Monomaque', *TM* 6 (1976), 238ff.; Ead., 'L'école de droit et l'enseignement du droit à Byzance au XI^e siècle: Xiphilin et Psellos', *TM* 7 (1979), 8ff.

the *Institutiones* from that of the second edition of the Code. In the light of all this, I believe the most plausible hypothesis is that the Paraphrase is nothing other than a collection of lessons prepared for the students in writing during the course. I am convinced, therefore, that the discursive tone, the language used, the recapitulations, the questions, the exemplifications and all the other particularities mentioned before which characterise the Paraphrase, derive in other words not from the transcription by one of the students of the lessons, but more simply from the fact that these were lecture notes, jottings, an outline – call it what you will – for the lessons, that the teacher prepared on a daily basis as part of his teaching activity, with their oral exposition to his students in mind. These are notes that Theophilus would then, at the end of the course, have rapidly connected and published with the aim of immediately providing his inexpert students with an initial, albeit hurried work of reference on which to study the recently finished Latin manual, perhaps with the intention (that his sudden death prevented him from realising) of revising and polishing everything subsequently or in a second edition, amending the text, also in light of the first course, to eliminate the numerous faults that it contained due to the lack of time available to rework and reorganise it. And precisely these faults, in fact, allow us in my opinion to discard another of the theories, although theoretically possible, namely that these were lecture notes taken by students that the teacher would then have ‘revised’, according to a custom not infrequent also in the modern age. If in fact Theophilus really merely limited himself to correcting the notes taken during lessons by students with a view to their publication, we should believe that he would certainly have provided (and this he would definitely have found time to do!) for eliminating the mistakes and the lexical and stylistic irregularities they contained. In fact, their presence can only be explained by virtue of the hurriedness with which they were probably organised and published. But we could also conjecture that this collection of notes was reorganised and published after the death of the *antecessor*, by one of his assistants, who thus intended to make this last inheritance of the Master available to the students.⁵³ And moreover, precisely the probable sudden death of Theophilus, which would have occurred before the publication of the second edition of the Code, and thus presumably in around mid-534, I believe allows us to rule out with a certain confidence the theory that the text may have been drafted once the lessons had finished. Instead, it is extremely likely that the *Paraphrase* comes from an outline of the lessons that the Master gradually wrote during the course.

53 We in fact know for certain that the official professors were helped by private teachers, mentioned, for example, in CTh. 14,9,3pr. regarding the ban on using public halls. On these assistants, cf. for all, F. Schulz, *Storia della giurisprudenza romana*, (transl. G. Nocera), Firenze 1968, 492.

On the other hand, I do not think there is anything scandalous in supposing that Theophilus may have prepared a written outline of the lessons that he was about to give to first-year students on the Imperial Institutes. And it seems that there have already been some signs of rethinking in recent scholarship: I am alluding in particular to Giuseppe Falcone, who, in his work on the formation of the text of the Paraphrase, imagined that Theophilus actually took into class the notes of the lessons held in previous years on Gaius;⁵⁴ and recently, in a contribution on the didactic production of the *antecessores*, he hypothesises even more clearly the use by Theophilus of a previous written draft of the lessons held on Gaius' manual, wondering moreover, albeit with some doubt, whether we could 'attribuire agli *antecessores* l'iniziativa di affidare i contenuti dell'insegnamento ad un testo scritto':⁵⁵ thus implicitly demonstrating that he believes at least in the abstract possibility that the *antecessores* used to write down their comments to use them during the course and then revise them with a view to publication. Moreover, as we know, the issue is not new or limited to Theophilus. It has also been suggested that the works of the other *antecessores*, as well as the *libri iuris civilis* by Sabinus,⁵⁶ the Institutes of Gaius,⁵⁷ and the Ulpian *regulae*,⁵⁸ were not published by their authors, but were transcriptions of lessons made by students or in any case notes reviewed and published after the death of the teacher. These are theories – for example in the case of Gaius, particularly supported by Schulz – which have had little following in scholarship⁵⁹ or which are now being superseded (such as those regarding, for example, Julian⁶⁰ and Stephanus⁶¹).

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- 54 Falcone, 'La formazione del testo della Parafrasi di Teofilo' (note 18 above), 430 nt. 36, who states in fact that 'sembra legittimo supporre che Teofilo avrà portato con sé a lezione anche gli appunti che gli erano serviti per i corsi precedenti (relativi, cioè, alle *Institutiones* gaiane) e – perché no? – magari anche una copia dello stesso manuale di Gaio'.
- 55 Cf. Falcone, 'Premessa per uno studio sulla produzione didattica degli *antecessores*' (note 44 above), 154. Moreover, we should also mention the fact (stressed by Falcone, p. 154) that also N. van der Wal, *Les commentaires grecs du Code de Justinien*, 's-Gravenhage 1953, 19, had not initially ruled out the idea that it had been the *antecessores* themselves who wrote the commentaries to use them as an outline for the course.
- 56 Cf. Schulz, *Storia della giurisprudenza romana* (note 53 above), 277f., who rules out that Sabinus could have published such a fragmentary work, which he sees as nothing other than a collection of lesson notes published after the death of the teacher.
- 57 Cf. Schulz, *Storia della giurisprudenza romana* (note 53 above), 286.
- 58 Along these lines, see the recent proposal by F. Mercogliano, 'Un'ipotesi sulla formazione dei "Tituli ex corpore Ulpiani"', *Index* 18 (1990), 185ff.; but see also Id., *Tituli ex corpore Ulpiani. Storia di un testo*, Napoli 1997 and 'Una ricognizione sui Tituli ex corpore Ulpiani', *AARC* 14 (2003), 407ff.
- 59 While agreeing on the fact that the work originates in oral teaching, scholarship in fact agrees that the *Institutiones* were the notes, or rather the course of lessons, that the master would later have summarised and published. For all, cf. Casavola, 'Gaio nel suo tempo' (note 32 above), 7.

Returning to Theophilus, I said that I do not believe there is anything scandalous in hypothesising a written draft of the lessons by the *antecessor*. Lessons, as we all know, cannot be improvised, and any conscientious teacher will carefully study the topics to be dealt with during the lessons, generally preparing notes or, according to preference, at least writing down an outline or list of main points. As far as I am concerned, I have no difficulty in admitting that when I was first asked to teach the course on the Institutes, I scrupulously prepared the lessons, trying to read as much as I could, above all on the themes furthest from my research interests, and to then set them down in writing, preparing notes which I still keep today and consult not infrequently. And these notes, also in their organisation and style, were conceived – even before they were written down – in function of their use by students. This meant filling them with examples, theoretical premises, historical and dogmatic excursuses, provocative questions, and references to topics that I perhaps had not had the time to deal with: just as I imagine Theophilus had done.⁶²

It is clear that one then lives off the revenue, in the sense that as the years pass, you end up making structural changes to the original lesson plans suggested by experience in the field and updating topics in the light of innovations or works you have read during your own research. But this ‘living off the revenue’ could hardly have applied in 534 to Theophilus, who, used for some time to holding the first-year course on the manual by Gaius, found himself that year suddenly having to teach on a new text, a text that he himself had admittedly contributed to drafting, but which displayed a large number of innovations, not only of a legislative nature, as compared to the book by Gaius. This new text, moreover, was written in Latin, and it was therefore as a preliminary measure necessary to produce an accurate translation of it to be presented to the Greek-speaking students. We may reasonably imagine the Master did not improvise this during the lesson, the more so if we consider that Greek did not possess correspondingly wide-ranging

60 See, for example, regarding the *Epitome Iuliani*, the recent position adopted by W. Kaiser, *Die Epitome Iuliani. Beiträge zum römischen Recht im frühen Mittelalter und zum byzantinischen Rechtsunterricht*, Frankfurt a.M. 2004, 179f., for whom the course of lessons held on Justinian’s *Novellae*, from which the work is thought to have originated, was published directly by the Master.

61 On the *Index* of the *Digesta* of Stephanus, cf., in this perspective the recent observations by Falcone, ‘Premessa per uno studio sulla produzione didattica degli antecessores’ (note 44 above), 154ff. regarding sch. 2 ad B. 28,1,8 = D. 23,1,10 (BS 1799/7-20) regarding the topic of the *sponsalia*.

62 Moreover, although it may seem questionable to apply modern experience to the ancient world, I frankly believe that, while considering the different contexts, from the point of view considered here no substantial differences have actually been introduced. In this direction, moreover, see already Dernburg, *Die Institutionen des Gaius* (note 32 above), 55ff., who, regarding Gaius’ commentary, and referring precisely to the situation in German universities, imagined lecture notes, a sort of *Collegienheft*.

technical language.⁶³ Moreover, we should not forget, this was a text that had also been given legislative value and came into force on 30 December 533 together with the *Digesta*.⁶⁴ This also involved the further, not insignificant problem of ensuring that the institutions were dealt with in the same way as they were in the *Digesta* (a not insignificant problem, if we think, for example, of the section regarding the distinction between *ius naturale*, *ius civile* and *ius gentium*,⁶⁵ in which Theophilus, who shows a clear tendency towards Gaius' dichotomy and the homologation between *ius naturale* and *ius gentium*,⁶⁶ on various occasions betrayed in the text, nevertheless moves cautiously, not being able in any case to ignore the Ulpian tripartition accepted in the *Digesta* and reproduced in the Institutes and in the Paraphrase itself⁶⁷).

Obviously, the long and tested experience gained over the years on the Institutes of Gaius and perhaps, as Falcone hypothesises, the use of material on Gaius which he had already prepared, definitely made the task easier. But the Imperial Institutes, although above all based on the same approach as the manual by Gaius, were in reality something completely different, not only because of the wide variety of sources used,⁶⁸ the changes in the system of many of the institutions dealt with and, last but not least, the massive work of updating performed by the compilers. This involved an immense number of legislative updates, including in particular, as is known, those springing from Justinian legislation,

63 On the difficulties encountered in this regard by the 'Justiniani' because of the lack of an equivalent technical lexicon in Greek and on the solutions adopted in this regard, cf. in particular Matino, 'Lingua e letteratura nella produzione giuridica bizantina' (note 23 above), 67 and Mazzucchi, 'Il contesto culturale e linguistico' (note 23 above), 74ff.

64 See const. *Tanta* § 23.

65 Cf. Theoph. 1,2.

66 See, for example, Theoph. 1,2,1: (...) ἢ γὰρ ἐθνικοὺς τίθησιν, οὗς καὶ φυσικοὺς καταχρηστικῶς ἀποκαλοῦμεν, (...); Theoph. 1,2,1 *in fine*: (...) ὅσα δὲ ὁ φυσικὸς ἦτοι ἐθνικὸς λόγος μεταξὺ πάντων ἀνθρώπων ἐφηῖρε, ταῦτα παρὰ πᾶσιν ἔθνεσι φυλάττεται καὶ IURISGENTIA προσαγορεύεται. (...); Theoph. 2,1,11: (...) τινῶν μὲν γὰρ πραγμάτων γινόμεθα δεσπότηι φυσικῶ νομίμῳ (ὅπερ, καθὰ εἶρηται, IURISGENTION προσαγορεύεται), (...). On the relations between *ius naturale* and *ius gentium* in the Paraphrase of Theophilus, a fundamental work remains C. Ferrini, 'Natura e diritto nella Parafrasi greca delle Istituzioni', *Rendiconti dell'Istituto Lombardo* II s. 18 (1885), 857ff. (= *Opere*, I (note 3 above), 71ff.); but see also De Francisci, 'Saggi di critica della Parafrasi greca delle Istituzioni giustiniane' (note 18 above), 15ff.

67 As pointed out by Falcone, 'Il metodo di compilazione' (note 16 above), 322 and nt. 275 (but see also 316ff.).

68 Apart from the Institutes of Gaius and the *Res Cottidianae*, there were in fact consulted, as is known, the Institutes of Ulpian, Florentinus, Marcian and Paulus, in addition to other various works. In this matter, see particularly C. Ferrini, 'Sulle fonti delle Istituzioni di Giustiniano', *BIDR* 13 (1901), 101ff. (also in *Opere di Contardo Ferrini*. II: Studi sulle fonti del diritto romano, Milano 1929, 307ff.). Also hypothesising the use of intermediary sources from the fifth-century school of Beirut we find P. Collinet, *La genèse du Digeste, du Code et des Institutes de Justinian*, Paris 1952, 279ff.

not only because this contributed in a crucial way to the renewal of the *vetus ius*, but also because of the clear propagandistic and ideological aspect of the text.⁶⁹ If, then, there is no doubt that his familiarity with Gaius certainly served Theophilus, in addition to helping him organise the historical and dogmatic *excursus*, also and above all, I believe, for the contribution it had given to his cultural formation, it is equally certain that the treatment of the new Institutes had in any case to be revised profoundly. If I can be permitted to make a comparison with events closer to our times, I believe that the experience gone through by Theophilus in late 533 can be in a certain sense equalled to that undergone by Italian scholars of criminal procedure in 1988, when the new Code replaced the old Rocco Code. Teachers of criminal procedure had been accustomed for years to teaching on the Rocco Code, and also for them there is no doubt that the cultural grounding acquired precisely on the procedural system previously in force and the old notes they had, presumably continued to represent the main core also of the new courses. But I challenge anyone to maintain that they did not have to reorganise from scratch the topics to be dealt with in the lessons, due to the many innovations introduced in the system of procedure, and plausibly had to prepare an outline on the basis of which to teach their new courses.

In my humble opinion, Theophilus acted in the same way. Therefore, during that first year teaching the new institutional text just published, he would have written down the content of the lessons to be held in class, preparing notes. These notes, I repeat, were conceived of, even before being committed to writing, in function of their didactic use and their oral exposition to the students, which explains the presence of questions, recapitulations, exemplifications and all those other expedients aimed at livening up the course and encouraging learning and memorisation. They would probably have been produced over time, we may even say on a daily basis, in other words as the course progressed, as the many references contained in the text to things already said or to be said lead us to believe. Lastly and above all, these were notes which, as I said above, Theophilus himself, while aware of the many shortcomings in the text due to the few months available to write it, would have in any case in my opinion rapidly revised, collected and published at the end of the course with the aim of providing his young, inexperienced students with an initial point of reference, albeit provisional and hurried, on which to base their study of the new Latin text. This would perhaps have been done in the hope (made vain by his sudden death or in any case by an event that prevented him from that moment onwards from working) that he would have the time, once the course was finished, to revise and harmonise the entire text and resolve its contradictions, lexical and stylistic irregularities and presumably also the inevitable mistakes resulting from its

69 As has been well clarified by G. Luchetti, *La legislazione imperiale nelle Istituzioni di Giustiniano*, Milano 1996, 575ff.

hurried composition, in a new edition of the work. But we cannot rule out, as I have said, that this outline of the lessons, following the sudden and unexpected death of the *antecessor*, may have been published by one of his assistants, with the intention of preserving the teachings of the Master, for the benefit of the students.

Of course, this conjecture, while it explains, by virtue of the speed with which the work came to light, the linguistic and stylistic faults and many irregularities attributed to the Paraphrase, only partly justifies the mistakes in the exegesis of the ῥητόν found in the text, which would not have been compatible with the image of *vir illustris ex magistro et iuris doctor in hac alma urbe* that Justinian gives us of Theophilus. Some of them were serious mistakes, such as for example that recently reported by Cannata in Theoph. 3,21 regarding the *transscriptio a re in personam*, constructed by Theophilus in a dialogue form inconceivable in an accounting code;⁷⁰ or that relative to the *servitus oneris ferendi* highlighted at length in Theoph. 2,3,1, in which Theophilus seems to have confused the mention of urban *servitus* contained in the ῥητόν with a reference to the *ratio* of *servitus* in general.⁷¹ But, apart from the fact that we need in my opinion to resist the temptation of measuring the Paraphrase with an abstract institutional model, postulated in its perfection and completeness, and not to forget that this was, as has been said, simply a grammar of law, it is above all true that, on reflection, not even the idea that the Paraphrase derives from transcription by a student of oral lessons held by the teacher would justify the aforementioned mistakes, since, while admitting this possibility, the authorship of the content, and therefore also of the errors it contains, is in any case to be attributed to Theophilus. Unless we think, obviously, that the student did not simply transcribe faithfully the words of the teacher as they were pronounced during the lesson, as we usually believe, but personally reworked them, sometimes encountering misunderstandings due to his imprecise perception of them.⁷² This, however, is not easy to believe or demonstrate, above all when, as happens for example regarding the *servitus oneris ferendi*, the mistake is repeated a number of times during the text.⁷³ This means that we should perhaps resign ourselves to the idea that those mistakes were effectively

70 Cf. Cannata, 'Qualche considerazione sui "nomina transscripticia"' (note 15 above), 171f., who underlines rightly that here 'l'autore è certamente fuori strada'.

71 On this confusion, already highlighted by the leading editors and ancient scholarship, see recently Falcone, 'Il metodo di compilazione' (note 16 above), 272ff. and Id., 'Note historique sur la définition législative de la servitude (art. 637 Code Napoléon – art. 1027 Code civ. it.)', *RHD* 79 (2001), 22ff., to whom I refer for a list of the previous literature.

72 Such as, for example, maintained by Degen in reference to Theoph. 2,3,1, in: *Bemerkungen* (note 18 above), 60f.

73 As pointed out by Falcone, 'Il metodo di compilazione' (note 16 above), 274, who, after observing that the mistake is also repeated in Theoph. 2,2,3 when defining urban *servitus*, concludes that 'l'errore di Teofilo, dunque, esiste ed è grave'.

committed by the *antecessor*. This however is not at all irreconcilable, at least in my humble opinion, with the reputation that the Master had earned himself, since, although he was a *magister clarissimus et iuris peritus*, Theophilus was nevertheless human, and like all men, could also be imprecise and misunderstand, especially when dealing with institutions by now fallen into disuse (as plausibly happened in fact with the *nomina transscripticia*, mentioned only in an historical reference in the ῥητόν⁷⁴ and of which there is no trace in the Digest⁷⁵) or those subjects somewhat unfamiliar to him. We should also in fact consider that in the months immediately prior to this, in particular with the publication of the *Digesta* and of the *Institutiones*, classical Roman law, on which – through Gaius and the works of other jurists – the cultural formation of the teacher and jurist was fundamentally based, had undergone profound changes. Although he was admittedly partly responsible for them, insofar as he was a member of the commissions that had drafted the first Code, the Digest and the Institutes, he had not necessarily worked personally on them, given the plausible division of the immense work among the members of the commissions. What I want to say, in other terms, is that many of the mistakes or equivocations the Paraphrase is full of, may in reality be justified due to at times inadequate in-depth study and organisation by Theophilus. This, in turn, can in all likelihood be explained by the fact that in the few months separating the publication of the *Digesta* and the *Institutiones* from the completion of the Paraphrase, the Master did not have sufficient time to analyse (especially in the light of the compilation of the *iura* which had just come into force) all the institutions dealt with. This is what we should believe took place, for example, precisely in the second of the cases I mentioned above, in other words the equivocations with regard to the institutional text and the many references contained in the Digest to the *servitus oneris ferendi* in title 2 of Book II, whose treatment in the Institutes – according to Falcone’s convincing theory – was dealt with by Dorotheus⁷⁶ and in commenting on which Theophilus would probably, again according to

74 Cf. Inst. 3,21: *Olim scriptura fiebat obligatio, quae nominibus fieri dicebatur, quae nomina hodie non sunt in usu. (...)*.

75 As is known, in fact, the compilers of the *Corpus Iuris* not only failed to insert into the collections all the texts relative to the *nomina transscripticia*, but also cancelled any further reference to the institution, except perhaps that contained in D. 34,3,31: on the issue, see, recently, Cannata, ‘Qualche considerazione sui “nomina transscripticia”’ (note 15 above), 171. The bizarre interpretation in terms of dialogue of the *transscriptio a re in personam* provided by Theophilus in Theoph. 3,21 may thus plausibly be explained by the fact that ‘i *nomina transscripticia* – insieme con l’uso di tenere i libri contabili familiari con i quali tali negozi erano connessi – erano desueti ormai da secoli, con ogni probabilità già dalla fine dell’epoca classica. Egli cercava dunque di interpretare quanto trovava in Gaio, arrivando così a costruire l’*expensilatio* come una specie particolare di *stipulatio* (novatoria) scritta’ (cf. Cannata, 172).

76 Cf., in fact, Falcone, ‘Il metodo di compilazione’ (note 16 above), 390ff., who, starting with an intuition of A.M. Honoré, *Tribonian*, London 1978, 189ff., hypothesises that Theophilus and

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Falcone, have been conditioned by the lack of any reference to the *servitus oneris ferendi* in the text of Gaius.⁷⁷

This is why I feel that the Paraphrase did not derive from the transcription of the lessons by a student who then dealt with its publication, but from the lessons given on the new institutional manual by Theophilus in 534, and commented on in writing and published by Theophilus himself. This, then, in conclusion, is my ‘unhealthy’ idea on the formation of the text of the Paraphrase that I mentioned in the foreword, an interpretation that I advance with great caution and modesty in the hope of being able to verify how plausible it is. Of course, I am aware that this is only a hypothesis which cannot be proved, but only supported by criteria of likelihood or, even better, that good sense, ‘virtù indispensabile a chi pratica le nostre discipline quanto scarsamente diffusa’, to which our sorely missed Maestro Mario Talamanca effectively used to appeal.⁷⁸ It is this good sense, perhaps more than anything else, that in fact makes it in my opinion difficult to believe, above all in the light of what we know of the level of knowledge of the Byzantine students and of the systems of writing and methods of teaching used at that time, that a young Byzantine student, still lacking legal notions and with a limited knowledge of Latin, could have taken shorthand notes with such precision and completeness on such a detailed, complex treatment in such technical legal language, moreover containing a plethora of Latin expressions and quotations, such as the Paraphrase is. What appears more reasonable – also considering the merely didactic purpose of the work, similar features in other similar institutional works and the chronological correspondence of the course held by Theophilus with the months when the work was conceived and finished – is the proposal advanced here, namely that it was the *antecessor* himself who outlined, albeit hurriedly, the contents of the new course he was teaching on the Imperial *Institutiones*, then publishing them at the end of the course with the aim of providing students with an initial basic text to help them study the Latin manual which had just been completed.

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Dorotheus dealt with the exposition of the classical material, while Tribonian would have provided for updating the text in the light of the postclassical and Justinian legislative innovations. As far as regards the division of the work between Theophilus and Dorotheus, this would have been organised by subject, with the former drafting the parts on persons and universal succession, the latter the parts regarding the *res*, obligations and inheritance. Adopting this interpretation, then, Theophilus would be attributed with Book I (except for title 7) and some titles of Books II and III (in particular, II,10-24 and III,1-11).

77 Cf. Falcone, ‘Il metodo di compilazione’ (note 16 above), 275 and nt. 124, and Id., ‘Note historique sur la définition législative de la servitude’ (note 71 above), 23 nt. 46.

78 M. Talamanca, ‘I clienti di Q. Cervidio Scevola’, *BIDR* 42-43 (2000/2001), 541.

