

THE PERSONALITY OF THEOPHILUS AND THE SOURCES OF THE PARAPHRASE: A CONTRIBUTION.

SOMMARIO:

L'autrice, attraverso lo studio di Theoph. 3,19,10, dove la distinzione tra *infans*, *infanti proximus* e *pubertati proximus* viene chiarita con il richiamo ad elementi che non sono presenti né nelle Istituzioni di Gaio né nelle Istituzioni di Giustiniano, ha ipotizzato la derivazione di detti elementi da fonti letterarie, da riflessioni giurisprudenziali pregaiane e da testimonianze tardo classiche e postclassiche. Con analoga prospettiva, l'esegesi di Theoph. 3,19,14, riguardante la *stipulatio praepostera* – su cui tace il manuale gaiano e l'esempio di essa riportato da Teofilo diverge da quello offerto dal corrispondente luogo delle Istituzioni di Giustiniano – ha indotta la stessa a ritenere che il parafraste, diversamente dal ῥητόν, abbia attinto alla nozione classica di *stipulatio praepostera*, che ebbe modo di conoscere grazie alla consultazione di fonti classiche che, sia pur indirettamente, ad essa si riferiscono. Appare così messo in evidenza lo stretto rapporto che esiste tra la personalità dell'antecessor, compilatore ma soprattutto autorevole e colto professore di diritto, e le fonti che ne ispirarono l'opera.

ABSTRACT:

The author, through the study of Theoph. 3,19,10, where the distinction between *infans*, *infanti proximus* and *pubertati proximus* is clarified with reference to elements that are not present either in the Institutions of Gaius or in the Institutions of Justinian, has hypothesized that these elements derive from literary sources, from jurisprudential reflections preceding Gaius and from late classic and post-classic testimonies. With a similar perspective, the exegesis of Theoph. 3,19,14, concerning the *stipulatio praepostera* – on which the manual of Gaius is silent and the example of it reported by Theophilus differs from that offered in the corresponding place of the Institutes of Justinian – has induced the author to believe that Theophilus, unlike the ῥητόν, considered the classical notion of *stipulatio praepostera*, which he got to know by consulting the classic sources that, though indirectly, are connected to it. Thus, the close relationship that exists between the personality of the antecessor, a compiler but above all an authoritative and erudite professor of law, and the sources that inspired the work, is highlighted.

1.

Ferrini is responsible for¹ the idea, that had a widespread following in scholarship,² whereby Theophilus in drafting the Paraphrase of Justinian's Institutes is thought to have indirectly used the manual by Gaius, through a *κατὰ πόδα* or a comment in Greek on the Institutes of Gaius,³ that would justify the short time employed by the Paraphrast and the

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- 1 Of this author, see, in particular, 'La Parafrasi di Teofilo ed i Commentari di Gaio', *Rendiconti dell'Istituto Lombardo* II s. 16 (1883), 565ff. (repr. in: *Opere di Contardo Ferrini*. I: Studi di diritto romano bizantino, Milano 1929, 15ff.); 'La Glossa torinese delle Istituzioni e la Parafrasi dello Pseudo-Teofilo', *Rendiconti dell'Istituto Lombardo* II s. 17 (1884), 714ff. (repr. in: *Opere*, I, 51ff.); 'Delle origini della Parafrasi greca delle Istituzioni', *AG* 37 (1886), 353ff. (repr. in: *Opere*, I, 132ff.); 'I commentari di Gaio e l'indice greco delle Istituzioni', *BZ* 6 (1897), 734ff. (repr. in: *Opere*, I, 81ff.).
- 2 Cf., by way of example, G. Segrè, 'Sulla questione se la Parafrasi greca alle Istituzioni giustiniane abbia avuto per fondamento il testo dei commentari di Gaio', *Il Filangieri* 12/1 (1887), 735ff. (repr. in: Id., *Scritti giuridici: raccolti per iniziativa di colleghi e discepoli in occasione del XL anno d'insegnamento dell'autore*, II, Roma 1938, 1ff.); H. Siber, *Römisches Recht in Grundzügen für die Vorlesung*. I: Römische Rechtsgeschichte, Berlin 1925, 74; G. Scherillo, 'I cataloghi delle fonti del diritto e Inst. Graeca paraphr. 1, 2', *Rendiconti dell'Istituto Lombardo* 64 (1931), 1276ff.; P. De Francisci, *Storia del diritto romano*, III, 1, Milano 1943, 316f.; Id., 'Saggi di critica della Parafrasi greca delle Istituzioni giustiniane', in: *Studi in onore di Biondo Biondi*, I, Milano 1965, 1ff.; C.A. Maschi, 'La Parafrasi greca delle Istituzioni attribuita a Teofilo e le glosse a Gaio', in: G.G. Archi, [ed.], *Scritti di diritto romano in onore di Contardo Ferrini pubblicati dalla R. Università di Pavia*, Milano 1946, 321ff.; Id., 'Punti di vista per la costruzione del diritto classico (da Adriano ai Severi) attraverso una fonte bizantina', *AT* 16 (1947), 79ff.; V. Arangio-Ruiz, 'La compilazione giustiniana e i suoi commentatori bizantini (da Ferrini a noi)', in: *Scritti Ferrini*, 90ff. (repr. in: Id., *Scritti di diritto romano*, IV, Napoli 1977, 10ff.); Id., *Storia del diritto romano*, Napoli 1957⁷, 400; L. Chiazzese, *Introduzione allo studio del diritto romano*, Palermo 1948³, 463f.; S. Riccobono, *Lineamenti della storia delle fonti e del diritto romano*, Milano 1949, 233; P. Collinet, *La genèse du Digeste, du Code et des Institutes de Justinien*, Paris 1952, 295ff.; P. Bonfante, *Storia del diritto romano*, II, Milano 1959⁴, 68; G. Grosso, *Lezioni di storia del diritto romano*, Torino 1960⁴; A. Masi, 'Stipulatio praeposterata', *BIDR* 63 (1960), 187; A. D'Emilia, 'Note esegetiche intorno ad alcune definizioni contenute nella Parafrasi greca delle Istituzioni giustiniane', *ASD* 5-6 (1961-1962), 139 and nt. 12; B. Santalucia, 'Contributi allo studio della Parafrasi di Teofilo', *SDHI* 31 (1965), 171ff.; U. Robbe, 'Su la Universitas', in: L. de Rosa, [ed.], *Ricerche storiche ed economiche in memoria di C. Barbagallo*, I, Napoli 1967, (publ. 1970), 628ff.; D. Simon, review of: H.J. Scheltema, *L'enseignement de droit des Antécédents*, in: *TRG* 39 (1971), 483; F. Sitzia, *De actionibus. Edizione e commento*, Milano 1973, 100 nt. 103; H.L.W. Nelson, *Überlieferung, Aufbau und Stil von Gai Institutiones*, Leiden 1981, 272ff.; F. Bona, 'Contardo Ferrini tra storia e sistematica giuridica', *Nuovo Bollettino Borromeo* 20 (1982), 98f.; V. Giodice-Sabatelli, *La tutela giuridica dei fedecommessi fra Augusto e Vespasiano*, Bari 1993, 48; 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, 126 notes 49-51; R. Lambertini, *Introduzione allo studio esegetico del diritto romano*, Bologna 2006³, 138.
- 3 It is difficult to characterise with precision the method presumably used by *Theophilus*. Ferrini himself, while talking constantly of a pre-existing work, tried with various changes of perspective, to establish its nature: 'versione greca dei Commentari di Gaio' (cf. 'La Parafrasi di Teofilo ed i

many relations with the work of Gaius. This opinion has however recently been subject to extensive critical review.⁴ Interesting contributions on the topic have in fact, in my opinion, shown the direct use by Theophilus the teacher of the *Institutiones* of Gaius,⁵ on which the entire work of the Master is based, often inducing him to measure himself against them rather than the ῥητόν.⁶ This is of course without ruling out the probable consideration by the Paraphrast also of the interpretive activity of the schools of Berytus and Constantinople.⁷

Circumscribing the problem of the sources of the Paraphrase⁸ to the use of the manual by Gaius, or previous material on Gaius available to the *antecessor*, is however

Commentari di Gaio', in: *Opere*, I (note 1 above), 15); 'κατὰ πόδαζ greco di Gaio con le relative paragrafi' (cf. 'La Glossa torinese delle Istituzioni e la Parafrasi dello Pseudo-Teofilo', in: *Opere*, I (note 1 above), 51); 'vecchia spiegazione dei commentari gaiani' (cf. 'Natura e diritto nella Parafrasi greca delle Istituzioni', *Rendiconti dell'Istituto Lombardo* II s. 18 (1885), 562 (repr. in: *Opere*, I (note 1 above), 77). The expressions most recently used seem to be equally generic. A 'preesistente modello' is talked of by B. Santalucia, 'Contributi allo studio della Parafrasi di Teofilo' (note 2 above), 174 nt. 6; cf., moreover, G. Falcone, 'Il metodo di compilazione delle Institutiones di Giustiniano', *AUPA* 45/1 (1998), 307 and nt. 237, who, in contesting the idea of the existence of an intermediate reworking of the Institutes of Gaius, alludes to it with the generic indication 'scritto greco che commentava il manuale gaiano', revealing precisely 'l'impossibilità di precisare meglio la natura di questo (preteso) modello'.

4 See, on this topic, the recent works by Van der Wal/Lokin, *Delineatio*, 125; Falcone, 'Il metodo di compilazione delle Institutiones di Giustiniano' (note 3 above), 306ff.; Id., 'La formazione del testo della Parafrasi di Teofilo', *TRG* 68 (2000), 430 nt. 36; C. Russo Ruggeri, 'Teofilo e la spes generandi', *IURA* 58 (2010), 170ff.; Id., 'Gaio, la Parafrasi e le 'Tre anime' di Teofilo', *SDHI* 78 (2012), 197f. For the objections already made in the past against Ferrini, cf. Santalucia, 'Contributi allo studio della Parafrasi di Teofilo' (note 2 above), 172 nt. 3.

5 See above all Falcone, 'La formazione del testo della Parafrasi di Teofilo' (note 4 above), 430 nt. 36 and Russo Ruggeri, 'Gaio, la Parafrasi e le 'Tre anime' di Teofilo' (note 4 above), 198f.

6 See Van der Wal/Lokin, *Delineatio*, 125.

7 On the eastern law schools before Justinian, cf., for all, 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), 258ff.; H. Peters, *Die oströmischen Digestenkommentare und die Entstehung der Digesten*, Leipzig 1913, 60ff.; P. De Francisci, *Vita e studi a Berito tra la fine del V e gli inizi del VI secolo*, Roma 1912, 3ff.; H.J. Scheltema, *L'enseignement de droit des Antecessors*, [Byzantina neerlandica. Series B: Studia, I], Leiden 1970, 11ff. (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, 66ff.; Pieler, *Rechtswissenschaft*, 404f.; Van der Wal/Lokin, *Delineatio*, 21ff.; E. Gomez Royo, 'Introducción al derecho bizantino', *SCDR* 8 (1996), 159ff.

8 Cf., on this subject, Falcone, 'La formazione del testo della Parafrasi di Teofilo' (note 4 above), 430 nt. 36, according to whom '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'. The same author also talks of 'una precedente stesura scritta o almeno di un brogliaccio scritto di lezioni svolte anteriormente all'entrata in vigore della riforma degli studi (...) che il docente avrebbe tenuto presente anche nello svolgimento della nuova

reductive. It has for some time been widely accepted,⁹ that classical material not included in the *Institutiones* was used for the Greek Paraphrase of the Institutes of Justinian. Moreover, recently Russo Ruggeri¹⁰ hypothesised that Theophilus,¹¹ in commenting on the

didattica'; cf. G. Falcone, 'Premessa per uno studio sulla produzione didattica degli antecessores', in: J.H.A. Lokin/B.H. Stolte, [ed.], *Introduzione al diritto bizantino. Da Giustiniano ai Basilici*, Pavia 2011, 157.

- 9 See in this regard, for all, Maschi, 'Punti di vista per la costruzione del diritto classico (da Adriano ai Severi) attraverso una fonte bizantina' (note 2 above), 10 nt. 7, 79ff. and 109ff.
- 10 Cf. Russo Ruggeri, 'Teofilo e la spes generandi' (note 4 above), 175ff.; Id., 'Gaio, la Parafraresi e le "Tre anime" di Teofilo' (note 4 above), 198f.
- 11 The reference is evidently to that Theophilus, *magna pars* of the commissions of the first *Codex Iustinianus*, of the *Digesta* and of the Institutes, to whom also Ferrini had initially attributed the Paraphrase; cf. Ferrini, 'La Parafraresi di Teofilo ed i Commentari di Gaio' (note 1 above), 565ff. (= *Opere*, I (note 1 above), 15ff.). The subsequent idea of Ferrini regarding the existence of a 'pseudo-Theophilus' – cf. Ferrini, 'Note critiche al libro IV dello Pseudo-Teofilo', *Rendiconti dell'Istituto Lombardo* II s. 17 (1884), 891ff. (repr. in: *Opere*, I (note 1 above), 27ff.), and 'Delle origini della Parafraresi greca delle Istituzioni', in: *Opere*, I, 132ff. – can in fact be considered almost completely abandoned (the only discordant voices are those of A. D'Emilia, 'Note esoteriche intorno ad alcune definizioni contenute nella Parafraresi' (note 2 above), 156f., and C.A. Cannata, 'Qualche considerazione sui "nomina transscripticia"', in: *Studi per Giovanni Nicosia*, II, Milano 2007, 171 nt. 7).

The fact that before the 11th century in the codices of the Paraphrase there is no reference to the author, considered by Ferrini as an argument fundamental to his theory – see Ferrini, 'Delle origini della Parafraresi greca delle Istituzioni', in: *Opere*, I, 112ff. – in fact lost credibility after the findings of two scholia, datable to around the mid-sixth century, contained in the Paris manuscript 1364. Here, *Theophilus* is mentioned as the author of the Paraphrase and, at the same time, the index of the *Digesta* is mentioned and attributed to the *antecessor* of Constantinople (Sch. ad 2,1,8 and ad 2,18,1 in which respectively we read: ἐκποιοῦσι δὲ τὰτα οἱ οἰκονόμοι καὶ οἱ ἐπίσκοποι, ὡς φησι Θεόφιλος; οὐκ ἀκριβῶς ὁ Θεόφιλος τοὺς ἡνιόχους ἀτίμους ἔφη (...). καὶ αὐτὸς γὰρ ὁ Θεόφιλος ἐν τῷ οἰκείῳ ἰνδίκι τῶν πρώτων οὐ λέγει τοὺς ἡνιόχους αἰσχροὺ ἢ ἄτιμα πρόσωπα.). The same Ferrini, however, who had initially considered these scholia as dating back to around the 11th century – cf. Ferrini, Prolegomena a "Institutionum graeca paraphrasis Theophilo antecessori vulgo tributa", pars prior (Berolini 1884), in: *Opere*, I (note 1 above), 59, and 'Delle origini della Parafraresi greca delle Istituzioni', 112ff. –, and who, following further research, had placed them in the 6th century – cf. Ferrini, 'Scolii inediti allo Pseudo-Teofilo contenuti nel manoscritto Gr. Par. 1364', *Memorie Ist. Lomb.* III s. 9 (1886), 13ff. = *Opere*, I (note 1 above), 140ff. –, did not change his mind. On this issue, against Ferrini, see, for all, Robbe, 'Su la Universitas' (note 2 above), 625ff.; Gorla, 'Contardo Ferrini e il diritto bizantino' (note 2 above), 125ff.; Russo Ruggeri, 'Teofilo e la spes generandi' (note 4 above), 172 nt. 12. The latter, in particular, taking the same perspective as Gorla, 'Contardo Ferrini e il diritto bizantino', 127 (who on the basis of the Greek scholia of Paraphrase, even conjectured the didactic use in the 6th century of the Paraphrase in place of the Institutes), perceptively observed that the quotation of the Paraphrase without indicating its author could be explained 'con la considerazione che doveva trattarsi di un'opera unica nel suo tempo e nel suo genere (...) così universalmente nota tra gli operatori del diritto da non essere ritenuto necessario esternarne l'attribuzione (per intenderci, come sarebbe per noi, ad esempio, sul piano letterario, un'opera come *I promessi sposi*)'. On the diffusion of the Paraphrase in the 6th century, cf. G. Cavallo, 'La circolazione di testi giuridici in lingua greca nel mezzogiorno medioevale', in: M. Bellomo, [ed.]

Institutions of Justinian, abundantly borrowed not only from Gaius and the cultural heritage acquired in long years of study and teaching carried out on that and the other texts used for teaching purposes, ‘ma anche e soprattutto al bagaglio di conoscenze che gli era derivato appunto dalle esperienze appena concluse e, in maniera particolare, dalla partecipazione alla compilazione dei *Digesta*: che nella Parafrasi, cioè, convergono in realtà le tre “anime” di Teofilo, il docente, il *iuris peritus*, il compilatore, che essa sia cioè, in altri termini, la risultanza delle tre esperienze di vita e di lavoro vissute dall’*antecessor*’.¹²

The fact that, where Theophilus seems to want to provide detail or clarify the often stripped-down dictates of the Imperial manual, the interpretation proposed displays clear classical references, moreover not present in the Institutes of Gaius, and at times also references to postclassical sources, and the recurrence in the Paraphrase, greater than at

Scuole, diritto e società nel Mezzogiorno medievale d'Italia, II, Catania 1987, 114, and Gómez Royo, ‘Introducción al derecho bizantino’ (note 7 above), 172. Scholars have also scaled down the other arguments used by Ferrini: the contradictions between the Paraphrase and the index of the *Digesta*; the incompatibility between the authority and the reputation of *Theophilus* and the many errors encountered in the work; the short period of time used to draft it; see Ferrini, ‘Delle origini della Parafrasi greca delle Istituzioni’, in: *Opere*, I (note 1 above), 118ff. and against, for all, G. Nocera, ‘Saggi esegetici sulla Parafrasi di Teofilo’, *RISG* n.s. 12 (1937), 39f., and J.H.A. Lokin, ‘Theophilus Antecessor’, *TRG* 44 (1976), 340 (repr. in: Id., *Analecta Groningana ad ius graeco-romanum pertinentia*, (ed. Th.E. van Bochove), Groningen 2010, 92). *Theophilus*, compiler of the Imperial Institutes and *vir illustris magister iurisque peritus* (const. *Tanta* § 9) to whom Justinian had entrusted the teaching of law – on the career of *Theophilus*, see in general J.H.A. Lokin, ‘Die Karriere des Theophilus Antecessor. Rang und Titel im Zeitalter Justinians’, *SG* I (1984), 43ff. (repr. in: Id., *Analecta Groningana*, 99ff.), and, for the aspects specifically considered here, most recently, J.H.A. Lokin/Th.E. van Bochove, ‘Compilazione – educazione – purificazione. Dalla legislazione di Giustiniano ai Basilica cum scholiis’, in: Lokin/Stolte, *Introduzione al diritto bizantino* (note 8 above), 122 ff. –, is thus the same master to whom we owe the Paraphrase (cf., for all, Falcone, ‘Il metodo di compilazione delle Institutiones di Giustiniano’ (note 3 above), 278 and nt. 132, where other relevant literature is mentioned), or in any case its contents (again, Falcone, ‘Il metodo di compilazione delle Institutiones di Giustiniano’ (note 3 above), 312), if we adopt the theory, dating back to W.O. Reitz (*Theophili Antecessoris Paraphrasis Graeca Institutionum Caesararum*, 2 vols., Hagae Comitibus 1751, I: XXVII; II: 1175, 1249), and today widespread in scholarship, whereby it was not Theophilus who drafted personally the Paraphrase, but a student following his course on the Institutes, who would have collected and transcribed the lessons of the master and published them; see, for all, Falcone, ‘Il metodo di compilazione delle Institutiones di Giustiniano’ (note 3 above), 312 and literature in nt. 246; Id., ‘La formazione del testo della Parafrasi di Teofilo’ (note 4 above), 417 and nt. 1, and Russo Ruggeri, ‘Teofilo e la spes generandi’ (note 4 above), 172 ff. This latter opinion has moreover been recently revised by Russo Ruggeri who, in a contribution contained in the present volume (‘Theophilus and the student publisher: a resolved issue?’), has conjectured the hurried preparation in an outline, by Theophilus himself, of the contents of his course on the new Imperial Institutes, published at the end of the course to help the students in the study of the recently completed manual.

12 See also Russo Ruggeri, ‘Gaio, la Parafrasi e le “Tre anime” di Teofilo’ (note 4 above), 204.

first sight might seem, of precise mentions of the inspiration of the Paraphrast from works or single fragments of classical jurists, from literary sources¹³ and from Imperial constitutions which have not reached us through the *Codex repetitae praelectionis*, have induced me to ‘riprendere un discorso – quello sulle fonti della Pararasi di Teofilo’, following a suggestion by Santalucia,¹⁴ and to re-examine, as Russo Ruggeri already has done, the influence on this work of the author’s previous experience and, above all, of his involvement in compiling the main parts of the *Corpus iuris*, in an attempt to identify further indications of this.

2.

Two significant testimonies in this regard¹⁵ are contained in Title 19 of book III, dedicated to the *inutilis*¹⁶ *stipulatio*.

The first, in particular, is offered by:

Theoph. 3,19,10: Ἄλλ’ ὅπερ εἰρήκαμεν περὶ τῶν PUPILLON, περὶ τούτων δηλαδὴ ἀληθές ἐστὶν οἴτινες ἤδη τινὰ τῶν γενομένων αἰσθησὶν ἔχουσιν. ὁ γὰρ INFANS ἢ ὁ PROXIMOS INFANTI οὐ πολὺ τοῦ μεμνηότος ἀφεστήκασιν· οἱ γὰρ ταύτην ἄγοντες τὴν ἡλικίαν οὐδεμίαν αἰσθησὶν ἔχειν νομίζονται. ἐπειδὴ δὲ PUPILLON εἶπον, καθολικῶς μάνθανε ὅτι ἡ τοῦ PUPILLU εἰς τρία διαιρεῖται ἡλικία· τῶν γὰρ PUPILLON οἱ μὲν εἰσὶν INFANTES, οἷον οἱ ἐτι θηλάζοντες καὶ οἱ μικρῶ μείζονες, οἱ δὲ λέγονται PROXIMOI INFANTI, οἱ ἀρξάμενοι λαλεῖν καλῶς, οἱ δὲ PROXIMOI PUBERTATI. καὶ ὁ μὲν INFANS ἐπερωτᾶν οὐ δύναται διὰ τὸ μὴ δύνασθαι φεγγεσθαι· οὐ μὴν οὐδὲ ὁ PROXIMOS INFANTI, ὁποῖός ἐστιν ὁ ἔβδομον ἢ ὄγδοον

13 For example, Theoph. 1,5,4, in which Theophilus, with reference to the *manumissio vindicta*, mentions the etymology of the word *vindicta*, indicating as a possible derivation the name of *Vindicio*, a slave who had been publicly manumitted in Rome, as a reward for having reported the plot of 509 BC against the nascent republic. This information, as noted by De Francisci, ‘Saggi di critica della Parafraresi greca delle Istituzioni giustiniane’ (note 2 above), 1ff., was probably taken from Liv. 2,5,10: *Ille primum dicitur vindicta liberatus. Quidam vindictae quoque nomen tractum ab illo putant: Vindicio ipsi nomen fuisse. Post illud observatum, ut qui liberati essent, in civitate accepti viderentur.*

14 Santalucia, ‘Contributi allo studio della Parafraresi di Teofilo’ (note 2 above), 198.

15 Already my illustrious colleague Russo Ruggeri, ‘Teofilo e la spes generandi’ (note 4 above), 170ff., with reference to a passage of Theophilus regarding adoption, highlighted that here we can find knowledge probably acquired by the Paraphrast when drafting the *Digesta*. The same scholar later – Ead., ‘Gaio, la Parafraresi e le “Tre anime” di Teofilo’ (note 4 above), 197ff. –, furthermore hypothesised the derivation: from the books *de manumissionibus* of Gaius of the information contained in Theoph. 1,5,4 and from the *libri fideicommissorum* by Gaius and Pomponius of those provided by the Imperial Institutes and the Paraphrase on the origin of fideicommissa and codicils.

16 On the meaning of the term *inutilis* with reference to legal transactions, cf. A. Masi, ‘Il negozio utile o inutile in diritto romano’, *RISG* 10 (1959-1962), 21ff.

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ἄγων ἐνιαυτόν· οὗτος γάρ, εἰ καὶ ἐκφωνεῖν τὰ ῥήματα δύναται, ἀλλὰ διακρίνειν οὐ δύναται ὅτι ποτὲ νοεῖ τὰ λεγόμενα. ὁ δὲ PROXIMOS PUBERTATI (οἶον ὁ πλησιάζων τῇ ἡβῃ) ἰσχυρῶς ἐπερωτᾷ, ἐπειδὴ καὶ <τοῦ> ἐκφωνεῖν καὶ τοῦ αἰσθάνεσθαι τῶν λεγομένων ἐστὶ δεκτικός. ἤρесе δὲ οὐ κατὰ τὸ ἀκριβές, ἀλλὰ κατὰ φιλάγαθον λογισμόν, ὥστε καὶ τὸν PROXIMON INFANTI ἰσχυρῶς ἐπερωτᾷ, ὡσπερ καὶ τὸν τῇ ἡβῃ πλησιάζοντα. ὁ δὲ ὑπεξοσίσιος ἄνηβος οὐδὲ ἀθθεντοῦντος τοῦ πατρὸς ἔνοχος γίνεται.¹⁷

The Paraphrast translates and comments on the corresponding stripped-down lesson of Justinian's Institutes, in a section that, according to the authoritative theory of Falcone¹⁸ – regarding the distribution by subject of the work between Theophilus and Dorotheus – was drafted by Dorotheus.

Inst. 3,19,10: Sed quod diximus de pupillis, utique de his verum est, qui iam aliquem intellectum habent: nam infans et qui infanti proximus est non multum a furioso distant, quia huius aetatis pupilli nullum intellectum habent: sed in proximis infanti propter utilitatem eorum benignior iuris interpretatio facta est, ut idem iuris habeant, quod pubertati proximi. Sed qui in parentis potestate est impubes, ne auctore quidem patre obligatur.

17 The text is quoted from the new edition: 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, 642ff.

To facilitate reading, cf. also the Latin that can be found in C. Ferrini, [ed.], *Institutionum graeca paraphrasis Theophilo antecessori vulgo tributa ad fidem librorum manu scriptorum*. Pars posterior: Libros III et IV, stemmam cognationum, appendices continens, Berolini 1897 (repr. Aalen 1967), 338f.: 'Sed quod diximus de pupillis, de his utique verum est, qui iam aliquem intellectum eorum quae geruntur habent: infans enim et qui infanti proximus est, non a furioso distant. Qui enim hanc aetatem agunt, nullum intellectum habere intellegunt, cum vero multum 'pupillum' dixi, generatim admonendus est pupilli aetatem trifariam dividi; pupillorum enim alii infantes sunt, veluti lactantes paullove maiores nati, alii proximi infanti dicuntur, qui recte loqui incipiunt, alii denique proximi pubertati. Et infans quidem stipulari nequit, cum ne loqui quidem possit; et nihilo magis proximus infanti qui septimum vel octavum agit annum. Hic enim, licet exprimere verba possit, nequit intellegere quid dicta significant. Proximus vero pubertati valide stipulatur, cum et verba pronuntiare et quae dicit intellegere possit. Placuit vero non secundum iuris supilitatem, sed per benigniorem interpretationem proximum infanti valide stipulari, sicuti proximum pubertatis. Pupillus autem, qui in patris potestate est, patris quidem auctoritate obligatur'.

18 Falcone, 'Il metodo di compilazione delle Institutiones di Giustiniano' (note 3 above), in particular, 390ff. (the conclusive statement), following an intuition of A.M. Honoré, *Tribonian*, London 1978, 189ff., conjectured a division by subject of the Institutes between Theophilus and Dorotheus: the former would have drafted the parts regarding people and *successiones per universitatem* (Book I, except for title 7; Book II, titles 10-24; Book III, titles 1-11), and the latter those regarding the *res*, obligations and actions (Book II, titles 1-9 and 25, Book III, titles 13-29; Book IV). The role of Tribonian, meanwhile, would have been that of systematically updating the manual on the basis of post-classical and Justinian legislative innovations.

In § 10, Justinian, continuing the treatment on the situation of the pupil, i.e. of the impuberal child *sui iuris* under tutelage, who personally performed every legal act (*omne negotium*) – with the *auctoritas* of the tutor if the act led to a disadvantageous effect, on his own if the effect was advantageous¹⁹ – explicitly distinguishes pupils into three categories: *pubertati proximi, qui iam aliquem intellectum habent*, to which the system illustrated in the previous § refers, *infantes* and *infanti proximi*, who, on the basis of a frequent legal equalisation,²⁰ tend to be assimilated with the *furiosus, quia huius aetatis pupilli nullum intellectum habent*. There follows the specification that *infanti proximi*, even if like the *infans* have no *intellectum*, for reasons of convenience, are assimilated with the *pubertati proximi*.

The text of the Imperial manual takes up, in turn, Gaius' dictate in:

Gaius 3,109. Sed quod diximus de pupillo, utique de eo verum est, qui iam aliquem intellectum habet. Nam infans et qui infanti proximus est non multum a furioso differt, quia huius aetatis pupilli nullum intellectum habent; sed in his pupillis, p<ropt>er utilitatem benignior iuris interpretatio facta est.²¹

Also Gaius, after having highlighted, according to a precise system, the relevance of reaching puberty in the course of the section on tutelage and in connection also with the distinction between *tutela mulierum* and *tutela impuberum* (Gaius 3,105 and 108²²), at §

19 Inst. 3,19,7-9: *Mutum neque stipulari neque promittere posse palam est. Quod et in surdo receptum est: quia et is qui stipulatur verba promittentis et is qui promittit verba stipulantis audire debet. Unde apparet non de eo nos loqui, qui tardius exaudit, sed de eo, qui omnino non exaudit. 8. Furiosus nullum negotium gerere potest, quia non intellegit quid agit. 9. Pupillus omne negotium recte gerit, ut tamen, sicubi tutoris auctoritas necessaria sit, adhibeatur tutor, veluti si ipse obligetur; nam alium sibi obligare etiam sine tutoris auctoritate potest.*

20 Cf., in addition to the text that will be quoted *infra* § 3, for all, D. 6,1,60 (Pomp. 29 *ad Sab.*); D. 9,2,5,2 (Ulp. 18 *ad ed.*); D. 41,2,1,3 (Paul. 54 *ad ed.*); D. 48,8,12 (Modest. 8 *regul.*); D. 50,17,5 (Paul. 2 *ad Sab.*) and Paul. *Sent.* 5,4,2.

21 The final sentence is quoted here following the version from the Veronese manuscript. Among the editors of the Institutes of Gaius that accept this version, cf. F. Knipf, *Gai Institutionum Commentarius Tertius. §§ 88-225 Obligationenrecht. Text mit Erklärung und Anhängen*, Jena 1917, 11; P. Krüger/W. Studemund, *Gai Institutiones. Ad Codicis Veronensis apographum Studemundianum novis curis auctum*, Berolini 1923⁷, 126; P.F. Girard/F. Senn, *Textes de droit romain*, Paris 1967⁷, 144; H.L.W. Nelson/U. Manthe, *Gai Institutiones, III 88-181: die Kontraktobligationen. Text und Kommentar*, Berlin 1999, 37.

22 Gaius 3,105-108: *Mutum neque stipulari neque promittere posse palam est. Idem etiam in surdo receptum est; quia et is qui stipulatur verba promittentis, et qui promittit, verba stipulantis exaudire debet. 106. Furiosus nullum negotium gerere potest, quia non intellegit quid agit. 107. Pupillus omne negotium recte gerit, ut tamen, sicubi tutoris auctoritas necessaria sit, adhibeatur, veluti si ipse*

109 starts to take into consideration the impuberal child who he defines as a *pupillus qui iam aliquem intellectum habet* to then move on to focus on the *infans* and the *infanti proximus* who, like the *furiosus*, *nullum intellectum habent*. The ending which, in the version of the Veronensis shown here, in truth does not clarify to which pupils reference is being made, has aroused various perplexities amongst scholars. While some scholars have considered the reference in the text to the *infanti proximus* and the final period as being the result of glosses,²³ others have argued against this, in some cases favouring previous proposals to correct it,²⁴ and attributed the affirmations of the final phrase only to the *infanti proximi*.²⁵ Moreover, recently Coppola²⁶ referred the expression *in his pupillis* to all the *infantes* (*infans* and *infanti proximus*), playing on the use, in some contexts, for

obligetur: nam alium sibi obligare etiam sine tutoris auctoritate potest. 108. Idem iuris est in feminis, quae in tutela sunt.

- 23 Cf., for the expressions *qui infanti proximus est*, E. Albertario, review of C. Tumudei, *Distinzioni postclassiche riguardo all'età: "infanti proximus" e "pubertati proximus"*, in: *AG* 89 (1923), 252ff. (= E. Albertario, "Infanti proximus" e "pubertati proximus", in: Id., *Studi di diritto romano. I: Persone e famiglia*, Milano 1933, 81ff.), and S. Solazzi, 'Qui infanti proximi sunt', *Labeo* 1 (1955), 17ff. (= Id., *Scritti di diritto romano*, V, Napoli 1972, 579ff.). On the doubts of interpolation raised by the reference to *utilitas*, cf. C. Tumudei, *Distinzioni postclassiche riguardo all'età: "infanti proximus" e "pubertati proximus"*, Bologna 1922, 23. In favour of the classical nature of the criterion of the *benignior iuris interpretatio* referred to by Gaius, cf., for all, A. Palma, *Benignior interpretatio. Benignitas nella giurisprudenza e nella formazione da Adriano a Severi. Corso di lezioni*, Torino 1997, 87f. For B. Albanese, *Le persone nel diritto privato romano*, Palermo 1979, 434 nt. 14, then, 'la fine del paragrafo gaiano è guasta; ma è da interpretare nel senso del parallelo J. 3, 19, 10'.
- 24 In particular, that of Ph.E. Huschke, *Jurisprudentiae anteiustinianae quae supersunt*, Leipzig 1874³, 296 nt. 2.
- 25 Thus, recently, F. Lamberti, 'Su alcune distinzioni riguardo all'età dell'impubere nelle fonti giuridiche romane', in: S. Cagnazzi/M. Chelotti/A. Favuzzi/F. Ferrandini Troisi/D.P. Orsi/M. Silvestrini, [eds.], *Scritti di Storia per Mario Pani*, Bari 2011, 217ff., who, in the wake of Huschke, proposes the following reading: *sed in his pupillis, <qui infanti proximi sunt> p<ropt>er utilitatem benignior iuris interpretatione facta est*. A more articulated integration of the version of the Veronensis was proposed by A. Burdese, 'Sulla capacità intellettuale degli impuberes in diritto romano', *AG* 6^a s. 19 (1956), 57ff., and is as follows (p. 60): *Nam infans [et qui infanti proximus est] non multum a furioso differt, quia huius aetatis pupilli nullum intellectum habent; [sed in his] <et in ceteris> pupillis, <etiamsi nondum intellegant quid agant, tamen> propter utilitatem benignior iuris interpretatio facta est*. Without making or accepting any correction of the Veronese text, the end of the text has been taken to refer only to the *infanti proximi* also by H. Ankum, 'Les "infanti proximi" dans la jurisprudence classique', in: *Estudios en homenaje al profesor Francisco Hernandez-Tejero*, II, Madrid 1994, 56ff., and M. Navarra, *Ricerche sulla utilitas nel pensiero dei giuristi romani*, Torino 2002, 55f.
- 26 G. Coppola Bisazza, 'Annotatiunculae (II). Qualche puntualizzazione sull' "infanti proximus" ed il "pubertati proximus"', *RDR* 12 (2012) (http://www.ledonline.it/rivista_dirittoromano/), 1ff. and, above all 3 and 10.

infantes and *infantes proximi*, of a substitutive function of the *auctoritas tutoris*, justified with the recourse to *utilitas*.

The comparison between the sources quoted was above all aimed at highlighting and clarifying distinctions that are found in the various legal sources regarding the age of the impuberal child, that current scholarship distinguishes into *infantia* and *infantia maior*,²⁷ and the problems connected with it. This is a theme which, also recently, scholarship has specifically focused on.²⁸ In addition to rightly pointing out a presence in Roman sources of an initial distinction between *infantes* and impuberal children, which subsequently became a three-way division, attention has also been given to the texts mentioned above, highlighting the differences and explaining them either in terms of contradiction²⁹ or as the ‘espressione di una evoluzione storica connessa al recepimento di alcune istanze, forse già presenti nella giurisprudenza tardo classica, volte a fissare in modo esplicito la fine dell’infanzia al raggiungimento del settimo anno circa’.³⁰

Without going back to the conclusions, in many ways convincing, that have been reached by scholarship on these issues, the only aspect to which I would here like to draw attention is the different range of the version of the Paraphrase and the specifications it contains through the referenced elements that are not present either in the Institutes of Gaius or the Institutes of Justinian. In fact, I feel it is of fundamental importance for our purposes to clarify the reasons for the more articulated exposition of the *antecessor* and in particular to establish from where he took the details of his explanations, trying to establish, if they exist, references to literary sources, to reflections of pre-Gaian law and, why not, also to late classical and postclassical testimonies.³¹ Nor should we forget that, if

27 Cf. Lamberti, ‘Su alcune distinzioni riguardo all’età dell’impubere’ (note 25 above), 212 and literature cited in nt. 3, and, in textbooks, most recently M. Brutti, *Il diritto privato nell’antica Roma*, Torino 2009, 154.

28 I am referring to Lamberti, ‘Su alcune distinzioni riguardo all’età dell’impubere’ (note 25 above), 211 ff., and to Coppola Bisazza, ‘Annotatiunculae (II). Qualche puntualizzazione sull’ “infanti proximus” ed il “pubertati proximus”’ (note 26 above), 1ff.

29 Cf. Lamberti, ‘Su alcune distinzioni riguardo all’età dell’impubere’ (note 25 above), 218f. The scholar in fact affirms, with reference to Gaius’ text: ‘La chiusa, se si seguisse testualmente la lezione del Veronese, non avrebbe senso compiuto (...). La corruzione testuale potrebbe derivare dalla mancata trascrizione nel Veronese della relativa “qui infanti proximi sunt” dopo “in his pupillis”: il manoscritto disponibile dai Compilatori giustiniani (...) venne rielaborato da questi in modo coerente (...) tenendo conto anche del parallelo con le *Institutiones giustinianee*.’

30 See Coppola Bisazza, ‘Annotatiunculae (II). Qualche puntualizzazione sull’ “infanti proximus” ed il “pubertati proximus”’ (note 26 above), 2. On the genuineness of the text of Gaius, see, for all, S. Di Marzo, ‘In difesa del Gaio veronese’, in: *Studi di storia e diritto in onore di Enrico Besta*, I, Milano 1937, 111f., and S. Tondo, ‘Acquisto del possesso da parte del pupillo’, in: *Studi in onore di Emilio Betti*, IV, Milano 1962, 378f.

31 The fact that Theophilus in our passage of the Paraphrase drew on his legal and literary knowledge, acquired thanks to his stimulating professional experience which increased his expertise, has recently

we agree with the idea that Theophilus, as a member of the commission that dealt with drafting the Imperial Institutes, dealt with the parts regarding persons and universal succession,³² we must also consider that precisely in the parts attributed to him, various issues regarding tutelage,³³ closely linked to those regarding the reaching of puberty and the different phases in the life of the pupil,³⁴ the Paraphrast must surely have had an opportunity to read and select the many sources on the topic; sources, which he then took into consideration when he dealt with the *inutilis stipulatio* in the hypothesis of the incapacity to perform *stipulatio* depending on the general situation of incapacity/capacity of a *furiosus* and of a pupil.

3.

We need to start with the wording of the passage from the Paraphrase, where Theophilus, in the scope of his treatment of the *stipulatio*, referring back to the discourse of the previous §§,³⁵ along the lines of Inst. 3,19,10³⁶ and of Gaius 3,109,³⁷ begins by pointing out that the validity of transactions engaged in by pupils depends on their capacity to understand the significance of the transaction performed: *infantes* and *infanti proximi*, are therefore, also here, seen as similar to the *furiosus*, οἱ γὰρ ταύτην ἄγοντες τὴν ἡλικίαν οὐδεμίαν αἰσθησὶν ἔχειν νομίζονται.

The *antecessor* first of all focuses his attention on the subjective element of the agent, thus taking a snapshot of the issue dealt with in the mature phase of case-law discussion, in which precisely by making reference to legal competency, it was discussed whether transactions engaged in by pupils *nec intelligentes* should be considered as valid

also been referred to by Lamberti, ‘Su alcune distinzioni riguardo all’età dell’impubere’ (note 25 above), 221, and Coppola Bisazza, ‘Annotatiunculae (II). Qualche puntualizzazione sull’ “infanti proximus” ed il “pubertati proximus”’ (note 26 above), 11.

32 Cf., *supra*, nt. 18.

33 To which the titles 13-26 of Book I of the Imperial manual are dedicated.

34 See, in particular, Inst. 1,20-22.

35 Cf. Theoph. 3,19,7: Τὸν ἄλλον μὴδὲ ἐπερωτῶν μὴδὲ ἐπερωτᾶσθαι δύνασθαι τῶν ὁμολογημένων ἐστίν· ἄπερ καὶ ἐπὶ κωφοῦ ἐδέχθη, ἐπειδὴ καὶ τὸν ἐπερωτῶντα τῶν τοῦ ἐπερωτωμένου ῥημάτων καὶ τὸν ἐπερωτῶμενον τῶν τοῦ ἐπερωτῶντος ἀκούειν χρή. περὶ ἐκείνου δὲ ὁ λόγος τοῦ κωφοῦ, οὐχ ὡς βραδέως ἀκούει, ἀλλ’ ὡς παντελῶς οὐκ ἀκούει. 8. Ὁ μαινόμενος οὐδὲ ἐν συναλλάγμα ποιεῖν δύναται· οὐδὲ γὰρ αἰσθησὶν ἔχει τῶν γινομένων. ἐστέρηται γὰρ τῆς διαθέσεως· μήτηρ δὲ τῶν συναλλαγμάτων ἢ διάθεσις. 9. Ὁ ἄνηβος πᾶν συναλλάγμα ἰσχυρῶς συναλλάττει, ἵνα μὲντοι, εἴ ποτε χρεῖα τῆς τοῦ ἐπιτρόπου γένηται αὐθεντίας, προσληφθῆ ὁ ἐπιτρόπος, οἷον ἠνίκα αὐτὸς ἔνοχος γίνεται· ἄλλον γὰρ ἔνοχον ἑαυτῷ ὁ PUPILLOS ποιεῖν καὶ δίχα τοῦ ἐπιτρόπου δύναται. Lokin/Meijering/Stolte/Van der Wal, *Theophili antecessoris Paraphrasis Institutionum* (note 17 above), 642.

36 On which cf., *supra*, § 2.

37 On which cf., *supra*, § 2.

or not. This is a phase in which there were probably also the first moves to make that further distinction between *infantes* and *infanti proximi* – to which reference is clearly made in the Imperial Institutes and which is mentioned with further specifications in the Paraphrase – which had led case law to see *infanti proximi* and *pubertati proximi* as similar in some cases, on the basis of a benevolent interpretation.

Theophilus, *illustris iuris peritus*, certainly aware of the legislative framework offered in this field by the *Corpus iuris*³⁸ and of the case law debate underlying it, knows well that the indulgent *interpretatio* had regarded legal transactions in an oral form, in which the physical ability first of all taken into consideration had been the ability to speak. Thus, moving away from the ῥητόν and drawing on his literary knowledge, he begins to effect a triple subdivision of pupils, probably exploiting the literal meaning of *infantia*, as a phase of life in which the child has not yet begun to speak correctly, for which we in fact have various literary references. Varr. *L.L.* 6,7,52: (...) *fatur is qui primum homo significabilem ore mittit vocem. ab eo, ante quam ita faciant, pueri dicuntur infantes; cum id faciunt, iam fari (...)* and, later, Non. *De compend. doct.* 1,56 M (1,78 L): (...) *et est quod aut dici non debeat aut fari non possit: nam et infantes usque eo appellandi sunt, donec coeperint fari.*

For the Paraphrast, pupils are distinguished into: *infantes*, newborns, or nearly; *infanti proximi*, young children that are starting to talk correctly, and *pubertati proximi*.

Theophilus then concentrates on the Roman oral transaction par excellence, the *stipulatio*. When discussing it, he clearly takes into account the (to him well-known) reflection on case law which, as we will see, emerges from a number of *responsa* by jurists, on whether legal acts performed by children fully able to *fari*, but whose capacity to *intellegere* was uncertain are valid or not.

Going once more beyond the ῥητόν, he specifies that the *infans*, precisely because he is unable to speak, *stipulari nequit*, no differently from the *infanti proximus*, ‘quale è quello che compie il settimo o l’ottavo anno d’età’,³⁹ who, although able to speak, is not however in a condition to understand the meaning of the act he has performed. The *pubertati proximi*, meanwhile, would have been able to validly stipulate because not only did they know how to speak, but they were also able to understand the significance of the

38 This is a framework which has often been discussed since it is not simple to reconstruct. Cf. Solazzi, ‘Qui infanti proximi sunt’ (note 23 above), 17ff. (= *Scritti di diritto romano* (note 23 above), 579ff.); Id., ‘Saggi di critica romanistica. IV: L’età dell’ “infans”’, *BIDR* 49-50 (1947), 350ff. (= Id., *Scritti di diritto romano*, IV, Napoli 1963, 633ff.); A. Burdese, ‘Età (diritto romano)’, *ED* 16 (1967), 79f., and most recently, Lamberti, ‘Su alcune distinzioni riguardo all’età dell’impubere’ (note 25 above), 213f. and literature cited in nt. 7, and Coppola Bisazza, ‘Annotatiunculae (II). Qualche puntualizzazione sull’ “infanti proximus” ed il “pubertati proximus”’ (note 26 above), 2ff.

39 Cf. Lamberti, ‘Su alcune distinzioni riguardo all’età dell’impubere’ (note 25 above), 221.

acts they had performed. However, on the basis of a indulgent interpretation, *infanti proximi*, in the same way as *pubertati proximi*, were also allowed to stipulate validly.

It is evident that the testimony of Theophilus is different in two ways from those found in the manuals of Gaius and Justinian: the explicit attention placed on various occasions by the paraphrast on the ability to speak, and the identification of the *infanti proximus* with a child of seven or eight years. These are precise definitions which do not derive from personal positions of Theophilus, but, as I have already mentioned, from the attentive and deep knowledge that he had of case-law writings and imperial constitutions, used and updated for the realisation of new collections, as well as of literary sources. Let's check.

With reference to the consideration of acts performed by children able to *fari*, but not to comprehend the significance of the act performed, various sources mention debates on the subject.⁴⁰

For Gaius, when pupils started to speak, they would have been able to *recte stipulari*, in other words pronounce themselves the words of the purchasing *stipulatio*:

D. 45,1,141,2 (Gai. 2 *de verb. obl.*): Pupillus, licet ex quo fari coeperit, recte stipulari potest (...)

This statement is the conclusion of a 'dibattito (con ogni verosimiglianza ampiamente pregaiano)'⁴¹ that Gaius himself shows us in:

D. 46,6,6 (Gai. 27 *ad ed. prov.*):⁴² Servum pupilli stipulari ita necesse est, si pupillus abest aut fari non potest: nam si praesens sit et fari potest, etiamsi eius aetatis erit, ut non intellegat quid agat, tamen propter utilitatem receptum est recte eum stipulari.

Also this fragment,⁴³ in the context of the *satsidatio rem pupilli salvam fore*⁴⁴ – that was rendered by the tutor to the pupil, in the interest of the latter, before the magistrate –

40 In addition to the fragments that we will look at, see also D. 50,17,5 (Paul. 2 *ad Sab.*): *In negotiis contrahendis alia causa habita est furiosorum, alia eorum qui fari possunt, quamvis actum rei non intellegerent: nam furiosus nullum negotium contrahere potest, pupillus omnia tutore auctore agere potest.* On the text, cf. Lamberti, 'Su alcune distinzioni riguardo all'età dell'impubere' (note 25 above), 223 nt. 50.

41 See Lamberti, 'Su alcune distinzioni riguardo all'età dell'impubere' (note 25 above), 215.

42 On the discussion regarding the drafting by Gaius of a specific commentary *ad edictum provinciale*, cf., for all, A.M. Honoré, *Gaius. A Biography*, Oxford 1962, 67ff.; R. Martini, *Ricerche in tema di editto provinciale*, Milano 1969, 49ff., 103ff., and A. Guarino, 'Gaio e l'editto provinciale', *IURA* 20 (1969), 165ff.

stresses that if pupils are present and able to talk, they can *recte stipulari*. In this case it would have been an admission of the pupil to the *stipulatio rem pupilli salvam fore* even if not yet able to understand the consequences of the words pronounced, i.e. the possibility of having the responsibility of the tutor enforced in judgement. The latter could in fact not be at the same time *stipulator* and *promissor*, therefore for the validity of the *verba stipulationis, propter utilitatem*,⁴⁵ only the child's ability to speak was required,⁴⁶ if present and possessing this ability, or the intervention of the slave, if the pupil was absent or *fari non potest*.

Also with reference to the child's ability to *stipulari*, in a fragment of the *res cottidianae*,⁴⁷ even though Gaius begins with the consideration of the *furiosus*, as in the Institutes, where however he only mentions *intellegere*, attention is also focused on *loqui*.

43 On which cf., most recently, Ankum, 'Les infanti proximi dans la jurisprudence classique' (note 25 above), 53ff.; Navarra, *Ricerche sulla utilitas nel pensiero dei giuristi romani* (note 25 above), 52f.; Lamberti, 'Su alcune distinzioni riguardo all'età dell'impubere' (note 25 above), 215ff., and Coppola Bisazza, 'Annotatiunculae (II). Qualche puntualizzazione sull' "infanti proximus" ed il "pubertati proximus"' (note 26 above), 3f.

44 Cf. Lamberti, 'Su alcune distinzioni riguardo all'età dell'impubere' (note 25 above), 215 and nt. 14. This is an institution whose regulation was certainly known to Theophilus, who in the Justinian Institutes had dealt with its treatment (Inst. 1,24). Cf. *supra* nt. 18.

45 The same recourse to *utilitas* that we find in the Institutes of Gaius and in those of Justinian is evident. With reference to this, see Lamberti, 'Su alcune distinzioni riguardo all'età dell'impubere' (note 25 above), 219 nt. 36 and Coppola Bisazza, 'Annotatiunculae (II). Qualche puntualizzazione sull' "infanti proximus" ed il "pubertati proximus"' (note 26 above), 3 nt. 9: they are convinced by the idea of Navarra, *Ricerche sulla utilitas nel pensiero dei giuristi romani* (note 25 above), 56f., regarding a change of perspective in the discourse on *utilitas* between the two manuals: Gaius seems to have posed himself the problem of *utile negotium* and *benignior interpretatio* linked to an objective *utilitas* that should have ensured certainty in trade, while Justinian was concerned with the interest of the pupil and there was a *benignior iuris interpretatio* for the *utilitas* of the pupil. In the fragment under examination, taken from the *corpus* of Gaius, there above all seems to be shown the interest of the pupil, even if it should be observed that objective *utilitas* and *utilitas* of the pupil were probably merely two sides of the same coin: *utilitas* that justifies case law decisions which depart from general rules – on this aspect, see once more Navarra, *Ricerche* (note 25 above), 195ff. – in which, according to the cases, the two sides did not rule each other out but were taken into consideration in a more or less direct way.

46 This was a capacity whose ascertainment was linked to the fact that in ancient times only oral legal acts such as *stipulatio* were known. 'Fu anzi in causa di questa necessità di parlare per fare una stipulazione, una *in iure cessio*, una emancipazione, una *cretio*, ecc., che si ebbe riguardo alla capacità di parlare'. See S. Perozzi, *Istituzioni di diritto romano*. I: Introduzione, Diritto della persona, Le cose e i diritti sulle cose, Il possesso, Roma 1928, 462 nt. 2.

47 Gaius' authorship of the *Res cottidianae* is supported by the most recent scholarship, including, for all, Nelson, *Überlieferung, Aufbau und Stil von Gai Institutiones* (note 2 above), 294ff.; G. Melillo, *Il negozio bilaterale romano. "Contrahere" e "pacisci" tra il primo e il terzo secolo*. Lezioni, Napoli 1986², 40f., and, among textbooks, M. Talamanca, *Istituzioni di diritto romano*, Milano 1990, 508, 510; M. Marrone, *Istituzioni di diritto romano*, Palermo 1994², 451f.

THE PERSONALITY OF THEOPHILUS AND THE SOURCES OF THE PARAPHRASE

D. 44,7,1,12- 13 (Gai. 2 *aureor.*): Furiosum, sive stipulatur sive promittat, nihil agere natura manifestum est. Huic proximus est, qui eius aetatis est, ut nondum intellegat, qui agatur. Sed quod ad hunc benignus acceptum est: nam qui loqui potest, creditur et stipulari et promittere recte posse.

Children already able to speak, but not yet able to understand the consequences of their actions, thanks also here to the adoption of a more favourable criterion (*benignus acceptum est*), *creditur et stipulari et promittere recte posse*.⁴⁸

With reference to the *cretio* and the possibility to acquire the inheritance, through its correct performance, by the child, able to speak but not to comprehend the significance of the act, Paulus also seems to allude to previous case law disputes⁴⁹ in:

D. 29,2,9 (Paul. 2 *ad Sab.*): Pupillus si dari possit, licet huius aetatis sit, ut causam adquirendae hereditatis non intellegat, quamvis non videatur scire huiusmodi aetatis puer (neque enim scire neque decernere talis aetas potest, non magis quam furiosus), tamen cum tutoris auctoritate hereditatem acquirere potest: hoc enim favorabiliter eis praestatur.

Favorabiliter, cum tutoris auctoritate,⁵⁰ the child who has the sole capacity of *fari* is permitted to take possession of an inheritance. ‘Il saper già parlare avrebbe costituito,

48 For a more precise exegesis of the text, see, for all, Solazzi, ‘Qui infanti proximi sunt’ (note 23 above), 22f. and 25f. (= *Scritti di diritto romano* (note 23 above), 584f. and 587f.); Ankum, ‘Les infanti proximi dans la jurisprudence classique’ (note 25 above), 59, and, most recently, Coppola Bisazza, ‘Annotatiunculae (II). Qualche puntualizzazione sull’ “infanti proximus” ed il “pubertati proximus”’ (note 26 above), 5 and nt. 15, where other literature is referred to.

49 On this fragment, whose genuineness has in the past been subject to criticism, above all of a formal nature, and on the substantial classical nature of its content, see, for all, Burdese, ‘Sulla capacità intellettuale degli impuberes in diritto romano’ (note 25 above), 55f. and nt. 159; G. Coppola Bisazza, ‘D. 36.1.67(65).3 di Maecianus: un testo ingiustamente sospettato’, *IURA* 53 (2005), 207ff.; Id., ‘Annotatiunculae (II). Qualche puntualizzazione sull’ “infanti proximus” ed il “pubertati proximus”’ (note 26 above), 6 and nt. 19, and Lamberti, ‘Su alcune distinzioni riguardo all’età dell’impubere’ (note 25 above), 224f.

50 In my humble opinion, the intervention of the *auctor* in the text in consideration had a merely integrative function. Along the same lines, cf. Lamberti, ‘Su alcune distinzioni riguardo all’età dell’impubere’ (note 25 above), 224f., while Coppola Bisazza, ‘Annotatiunculae (II). Qualche puntualizzazione sull’ “infanti proximus” ed il “pubertati proximus”’ (note 26 above), 6, talks of substitutive function. If it is in fact true that in the case of the pupil who was not able to understand, the intervention of the tutor should have been substitutive, we need to consider that Paulus alludes to an *interpositio auctoritatis* of the tutor, necessary, in the case being considered, which was granted *favorabiliter*. On the need, due to *aditio hereditatis*, of *auctoritatis interpositio* cf. D. 26,8,9,3 (Gai 12 *ad ed. prov.*): *Hereditatem adire pupillus sine tutoris auctoritate non potest, quamvis lucrosa sit nec ullum habeat damnum*.

quindi, il presupposto di fatto necessario perché il fanciullo, pur non essendo ancora consapevole di ciò che diceva, non fosse escluso dall'accettazione dell'eredità formale'.⁵¹

At the time of Ulpian, the highlighted debate had already been superseded, so the jurist, without even mentioning the capacity of the pupil to *intelligere*,⁵² or a favourable *interpretatio*, considers the ability to speak as a necessary premise, sufficient for the validity of the *cautio rem pupilli salvam fore*.

D. 27,8,1,15 (Ulp. 36 *ad ed.*): Exigere autem cautionem magistratus sic oportet, ut pupilli servus aut ipse pupillus, si dari potest et in presentiarum est, stipuletur a tutoribus, item fideiussoribus eorum rem salvam fore: aut, si nemo est qui stipuletur, servus publicus stipulari debet rem salvam fore pupillo, aut certe ipse magistratus.

With regard to formal transactions (*stipulatio, cautio rem pupilli salvam fore, cretio...*) we may thus conjecture that, *propter utilitatem, benigne, favorabiliter...*, starting from a certain moment, the validity of an act performed by an *infans* was recognised as soon as they were able to *fari (infanti proximus)*, without any longer considering the problem of assessing their intellectual capacity.⁵³

This assessment instead continued to be necessary, to mark the passage from infancy to the impuberal period, when there was considered in general the capacity to *negotia gerere*.⁵⁴ This assessment was, however, evidently also extremely laborious as long as it remained linked to the ascertainment case-by-case,⁵⁵ therefore, probably already in the age of Severus, the tendency to link the end of infancy with the seventh year of age was affirmed.⁵⁶

51 See Coppola Bisazza, 'Annotatiunculae (II). Qualche puntualizzazione sull' "infanti proximus" ed il "pubertati proximus"' (note 26 above), 6.

52 Differently from D. 46,6,6 (Gai. 27 *ad ed. prov.*), on which cf., *supra*.

53 If the pupil was absent or *fari non possit*, recourse had to be made instead to a slave. D. 46,6,2 (Ulp. 79 *ad ed.*): *Si pupillus absens sit, vel fari non possit, servus eius stipulabitur: si servum non habeat, emendus ei servus est: sed si non sit unde ematur aut non sit expedita emptio, profecto dicemus servum publicum apud praetorem stipulari debere*.

54 Gaius himself, in his Institutes (3,106-109), where the 'discorso appare comunque ampliarsi, proprio in riferimento ai furiosi ed ai pupilli, a qualsiasi *negotium*' – cf. Coppola Bisazza, 'Annotatiunculae (II). Qualche puntualizzazione sull' "infanti proximus" ed il "pubertati proximus"' (note 26 above), 2 –, links the passage from infancy to the impuberal age, to the passage from a phase in which there is no *intellectum* to that in which a capacity to act, albeit limited, is acquired.

55 Cf. Burdese, 'Sulla capacità intellettuale degli impuberes in diritto romano' (note 25 above), 56.

56 Similarly, see Lamberti, 'Su alcune distinzioni riguardo all'età dell'impubere' (note 25 above), 223 and 229ff., and Coppola Bisazza, 'Annotatiunculae (II). Qualche puntualizzazione sull' "infanti proximus" ed il "pubertati proximus"' (note 26 above), 12ff., who however talk of the completion of the seventh year.

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It is easy to hypothesise that, faced with the picture offered by the *Corpus iuris*, the Paraphrast, perhaps only with a didactic purpose, had felt the need to establish precise limits of age for the ‘hybrid’ position of the impuberal child, who was no longer an *infans* yet however still close to infancy, and who – although lacking *aliquem intellectum*, and therefore strictly speaking equivalent to an *infans* – could, by means of an indulgent interpretation, be legitimised to stipulate valid contracts.

Theophilus, therefore, uses a figure, the seventh or eighth year, to which he relates the figure of the *infanti proximus*, adopting the aforementioned trend of establishing numerical limits for the acknowledgement of the validity of acts performed by a minor, which however on a legal level was not regulated even by Justinian.⁵⁷

The age of the children, and in particular the seventh year, had been, moreover, also the subject of debate in the educational field. Theophilus, as a good teacher, a status that required a solid rhetorical training,⁵⁸ must have well known what had been said by Quintilian, whose popularity with contemporaries and subsequent generations is well known.⁵⁹

Quint., *Inst.* 1,1,15-18: Quidam litteris instituendos qui minores septem annis essent non putaverunt, quod illa primum aetas et intellectum disciplinarum capere et laborem pati posset. In qua sententia Hesiodum esse plurimi tradunt qui ante grammaticum Aristophanen fuerunt (nam is primus, in quo libro scriptum hoc invenitur, negavit esse huius poetae). 16. Sed alii quoque auctores, inter quos Eratosthenes, idem praeceperunt. Melius autem qui nullum tempus vacare cura volunt, ut Chrysippus. Nam is, quamvis nutricibus triennium dederint, tamen ab illis quoque iam formandam quam optimis institutis mentem infantium iudicat. 17. Cur autem non pertineat ad litteras aetas quae ad mores iam pertinet? Neque ignoro toto illo de quo loquor tempore vix tantum effici quantum conferre unus postea possit annus; sed tamen mihi qui id senserunt videntur non tam discentibus in hac parte quam doctibus pepercisse. 18. Quid melius alioquin facient ex quo loqui poterunt (faciant enim aliquid necesse est)? Aut cur hoc quantulumcumque est usque ad septem annos lucrum fastidiamus? Nam certe quamlibet parvum sit quod contulerit aetas prior, maiora tamen aliqua discet puer ipso illo anno quo minora didicisset.

Quintilian gives an account of the discussion between literati and rhetors regarding the age in which it was opportune to start children on reading and writing, and the connection of

57 In this regard, see what will be said *infra*.

58 Cf., on this, for all, Gomez Royo, ‘Introducción al derecho bizantino’ (note 7 above), 160.

59 Cf., for all, P.V. Cova, ‘Plinio il Giovane contro Quintiliano’, in: L. Castagna/E. Lefèvre, [ed.], *Plinius der Jüngere und seine Zeit*, München/Leipzig 2003, 83ff.

this age with the initial development of an intellectual capacity adequate for learning. The grammarian Aristophanes and Eratosthenes, on the basis of a practice in use at the time, considered that the child could be introduced to reading from the age of seven years on. Quintilian meanwhile preferred the opinion of Chrysippus who, judging children to be more receptive of teaching in the first years of life, suggested it was best not to waste time, and to start studying before the age of seven.⁶⁰

The various positions we find among the rhetors and literati regarding the division of life on the basis of the number seven and its multiples (in particular, fourteen) and their adoption by jurists, widely documented also in the Institutes of Gaius (1,196 and 2,113), which had been until 533 ‘il costante oggetto di insegnamento da parte di Teofilo’,⁶¹ were moreover almost certainly at the basis of Inst. 1,22pr., in which the *antecessor*, who drafted it,⁶² tells of the *inspectio corporis*, the criterion for identifying passage to the age of majority, and definitively establishing at 14 years the beginning of puberty for males.

Lastly, the Paraphrast – who had been involved in compiling not only the first book of the Institutes, but also other important parts of the *Corpus iuris* – must have been equally aware of the reference to the seventh year, especially in the case law of Severus, for the resolution of disputes related to the minor’s capacity to act. On a systematic reading of the fragments of classical law he is unlikely to have missed two mentions of the unclear legal connection proposed between the age of the minor and their capacity.

One is that regarding the *sponsalia* of Modestinus:

D. 23,1,14 (Modest. 4 *diff.*): In sponsalibus contrahendis aetas contrahentium definita non est ut in matrimoniis. Qua propter et a primordio aetatis sponsalia effici possunt, si modo id fieri ab utraque persona intellegatur, id est si non sint minores quam septem annis.

For the jurist, it seems to be important to establish a minimum limit, seven years, above which the child could validly become betrothed, insofar as they were able to understand the consequences of the act,⁶³ probably in the sense that they were already able to express themselves with logical sense and to understand their actions. These claims may seem to

60 Regarding the acquisition of a sufficient degree of intellectual maturity by the child who had reached the seventh year, see also Plin. *Nat.* 11,37,65 (174); Juv. *Sat.* 5,14,10; Sen. *Ben.* 7,1,5; Isid. *Orig.* 11,2,2.

61 Falcone, ‘La formazione del testo della Parafrasi di Teofilo’ (note 4 above), 431.

62 Cf. *supra*, nt. 18.

63 On the text, cf., for all, C. Fayer, *La familia romana. Aspetti giuridici ed antiquari. Sponsalia. Matrimonio. Dote*, II, Roma 2005, 74ff.; Lamberti, ‘Su alcune distinzioni riguardo all’età dell’impubere’ (note 25 above), 231f., and C. Busacca, *Iustae nuptiae. L’evoluzione del matrimonio romano dalle fasi precittadine all’età classica*, Milano 2012, 66.

contradict the initial part of the fragment⁶⁴ but in fact become clear if we consider them dictated by a practice in the field which was somewhat confused, whereby children were sometimes betrothed at a very young age,⁶⁵ with illegitimate unions of impuberal girls, in various cases, aged ‘just over’ seven,⁶⁶ joined in early betrothals⁶⁷ and betrothals ‘with girls of 7-8 years’⁶⁸ to get around the provisions on *incapacitas* to inherit affecting the unmarried under the *lex Iulia*.⁶⁹

Supra septimum annum aetatis the validity, albeit limited, of a pupil’s actions was also recognised by Ulpian:

D. 26,7,1,2 (Ulp. 35 *ad ed.*): Sufficit tutoribus ad plenam defensionem sive ipsi iudicium suscipiant sive pupillus ipsi auctoribus, nec cogendi sunt tutores cavere, ut defensores solent. Licentia igitur erit, utrum malint ipsi suscipere iudicium an pupillum exhibere. Ut ipsis auctoribus iudicium suscipiatur: ita tamen, ut pro his, qui dari non possunt vel absint, ipsi tutores iudicium suscipiant, pro his autem, qui supra septimum annum aetatis sunt et praesto fuerint, auctoritatem praestent.

The fragment,⁷⁰ mentioning the case of a pupil sued, refers to the tutor’s right to personally assume the defence on behalf of pupils, *qui dari non possunt vel absint*, while a different procedure regarded pupils who were *praesentes* and *supra septimum annum aetatis*. It is

64 Supposing this contradiction, many scholars have considered the fragment to be an interpolation – cf., for all, S. Solazzi, ‘Le nozze della minorene’, *Atti dell’Accademia delle Scienze di Torino. Classe di Scienze storiche e filologiche* 51 (1916) = Id., *Scritti di diritto romano*, II, Napoli 1957, 155 nt. 25; Id., ‘Qui infanti proximi sunt’ (note 23 above), 23f. = *Scritti di diritto romano*, V (note 23 above), 585f. –, and in particular the last part. Cf., for all, B. Balestri Fumagalli, ‘Sponsali (diritto romano)’, *ED* 43 (1990), 505; R. Astolfi, *Il fidanzamento nel diritto romano*, Padova 1994³, 58f.; Fayer, *La familia romana* (note 63 above), 75 and nt. 219 where other literature is referred to. In favour of the authenticity of the text, support has instead come from H.G. Knothe, ‘Zur 7-Jahresgrenze der ‘infantia’ im antiken römischen Recht’, *SDHI* 48 (1982), 241f., and recently, Lamberti, ‘Su alcune distinzioni riguardo all’età dell’impubere’ (note 25 above), 231f.

65 Cf., for all, Fayer, *La familia romana* (note 63 above), 74ff.

66 Cf., for all, Fayer, *La familia romana* (note 63 above), 442.

67 Cf., for all, Fayer, *La familia romana* (note 63 above), 74ff., 440ff.

68 Cf. Busacca, *Iustae nuptiae* (note 63 above), 66.

69 On this subject, see recently the interesting reflections of I. Piro, *Spose bambine. Risaleza, diffusione e rilevanza giuridica del fenomeno in età romana. Dalle origini all’epoca classica*, Milano 2013, especially 89ff. The author analyses the phenomenon of early unions in general, not only marriages, also in terms of their legal regulation and, after having mentioned their emergence in comments on late Republican case law, illustrates their importance in Augustan legislation and their acknowledgement in the vision of classical case law.

70 On which, cf., for all, Astolfi, *Il fidanzamento nel diritto romano* (note 64 above), 60ff., and Lamberti, ‘Su alcune distinzioni riguardo all’età dell’impubere’ (note 25 above), 232ff.

interesting to note that the contrast is not, as in the fragments quoted above,⁷¹ between those who are absent or do not know how to speak, and who *nullum intellectum habent* (*infantes*), on one hand, and on the other those who are present and know how to speak but are not yet able to *intellegere* (*infanti proximi*). The pupils to whom there seems to be acknowledged an albeit limited ability to act and thus to *intellegere*, are identified using the criterion of having already passed the age of seven years. ‘Ne consegue che quando il pupillo è presente (...) mostrando di avere raggiunto con questa età, un sufficiente grado di maturazione intellettuale, si trova nella condizione di assumere il giudizio di persona. I tutori dovranno limitarsi ad autorizzarlo e non si sostituiranno a lui. A questo modo Ulpiano non toglie ai tutori la facoltà di sostituirsi al pupillo, facoltà che ha loro attribuito nella parte centrale del frammento’.⁷² Although the overall tone of the text does not allow us to talk of the introduction of a rule, the presence of a presumption is evident:⁷³ after the age of seven years, pupils are considered mature, but during the seventh year of life – when still *infanti proximus*, and as such able to pronounce words and understand their meaning, their intellectual capacity is in doubt, – if tutors maintain that pupils are not yet mature, they may decide to act in their place.⁷⁴

After completing⁷⁵ the seventh year of age, in the late Empire, at least with reference to the capacity to request the *bonorum possessio* or *aditio hereditatis*, it seems that the case law trend to consider the pupil, having left infancy behind, as having a *propria voluntas* was legally formalised. In this regard, Arcadius, Honorius and Theodosius, in 407, in fact establish a connection between completing the seventh year of life and the attribution of a certain intellectual capacity:

CTh. 8,18,8. Arcad. Honor. Theod. Anthemio p.p.: Certis annorum intervallis in bonorum possessione maternas hereditatis a patre poscenda aut successione amplectanda infantis filii aetatem nostra auctoritate praescribimus, ut sive maturius sive tardius filius fandi sumat auspacia intra septem annos aetatis eius pater aut bonorum possessionem impleret aut qualibet actis testatione successionem amplectatur hac vero aetate finita filius edicti beneficium petat vel de successione suscipienda suam exponat voluntatem, dum tamen intra

71 Cf. D. 46,6,6 (Gai. 27 *ad ed. prov.*) and D. 44,7,1,12-13 (Gai. 2 *auere.*).

72 See Astolfi, *Il fidanzamento nel diritto romano* (note 64 above), 61.

73 Cf. Astolfi, *Il fidanzamento nel diritto romano* (note 64 above), 62f., and along similar lines we find the mention of a ‘limite di carattere solo orientativo’ in Lamberti, ‘Su alcune distinzioni riguardo all’età dell’impubere’ (note 25 above), 233.

74 Along the same lines, see Astolfi, *Il fidanzamento nel diritto romano* (note 64 above), 63. Astolfi affirms that ‘(...) non si può escludere che venisse eccezionalmente approvata la decisione del tutore di assumere su di sé la difesa del pupillo ancora troppo immaturo, nonostante i suoi sette anni’.

75 And not simply reaching.

annum ad inpetrandam bonorum possessionem praescriptum uterque de possessione amplectenda suum prodat arbitrium. Cretionum autem scrupulosam sollemnitatem, sive materna filio familias sive alia quaedam deferatur hereditas, hac lege emendari penitus amputarique decernimus.

In the case of a *filius familias* set to inherit the *bona materna* and *materni generis*⁷⁶ the constitution intervenes to establish the age at which he becomes legitimised to request the *bonorum possessio* or take possession of the *hereditas*: it is not important whether he is already mature or will become so later, if his capacity to speak is evident⁷⁷ – in the course of the seventh year (*intra septem annos*), ‘between seven and eight years’⁷⁸ – only after the seventh year (*hac vero aetate finita*) the child, aged over seven, *edicti beneficium petat vel de successione suscipienda suam exponat voluntatem* (...). The emperors, in contrasting *infantes* to *pubertati proximi*, with reference to the former, show particular attention to specifying the upper limit of infancy, below which it was the *pater* who could request the

76 Or ‘a tutte le eredità deferite all’infante per testamento o *ab intestato*’ according to the extensive interpretation of G. Coppola, *Studi sulla pro herede gestio*. II: La valutazione dell’animum nel “gerere pro herede”, Milano 1999, 339f. nt. 93 and 346ff.

77 The specific reference to the ability to speak, which however does not rule out the father’s right to accept the inheritance deferred to his son, probably betrays the Imperial content to clarify that the son could not, before having completed the seventh year of life, express his own *voluntas*, possibly also through *cretio*, which is referred to in the final part of the constitution. It is in fact not unlikely that, precisely around the seventh year of age, misunderstandings could arise between father and son. The father in fact could have abused the right to *adire* ‘allegando che il figlio non poteva ancora “fari”, (...) generando inconvenienti e rendendo così necessario il preciso linguaggio della nostra costituzione, dove si prescinde dal fatto, se in effetti a 7 anni il figlio possa o no parlare (...)’. See G.G. Archi, ‘Contributo alla critica del Codice Teodosiano (Esegesi di c. 1 C.Th. 4, 1, De cretione et bonorum possessione)’, *SDHI* 1 (1936) (= Id., *Scritti di diritto romano*. III: Studi di diritto penale. Studi di diritto postclassico e giustiniano, Milano 1981, 1722). Also Lamberti, ‘Su alcune distinzioni riguardo all’età dell’impubere’ (note 25 above), 234, is induced by the dictates of our source to reflect on the capacity to speak. ‘La costituzione sembra dare conto di quelle situazioni in cui il bambino impari ad esprimersi correttamente in età avanzata (...). Nella costituzione in esame il superamento dei sette anni, oltre a fare reputare acclarata la capacità di *fari* appare presuntivamente ricollegato all’attribuzione al minore di una *voluntas* (...)’.

78 The inverted commas are mine. We saw above, with reference to D. 29,2,9 (Paul. 2 *ad Sab.*) that the *infanti proximus* (the child who already knows how to speak but is not yet able to understand the consequences of his/her actions), subjected to tutelage, is *favorabiliter* allowed to accept the inheritance through the intervention of the tutor. In our constitution it is the father who purchases for the *infanti proximus*, and with reference to the *pubertati proximus*, aged over seven, who can purchase for himself, we no longer speak of *iussum*. Cf., *infra*, in the text, with reference to nt. 79. The perspective, in the constitution in question, has by now been shifted towards the ability to understand, and the achievement of this is established at the passing of the seventh year. Reaching the seventh year, instead, is spoken of by Astolfi, *Il fidanzamento nel diritto romano* (note 64 above), 63, and Lamberti, ‘Su alcune distinzioni riguardo all’età dell’impubere’ (note 25 above), 234.

bonorum possessio or accept the inheritance instead of the child, clarifying that the latter was in the course of the seventh year. ‘Piuttosto, dato il modo di esprimersi degli imperatori: *Certis annorum intervallis (...) nostra auctoritate praescribimus*, sembrerebbe che siano stati essi i primi a fissare un termine oltre il quale il padre non abbia potuto più adire per il figlio⁷⁹ and, I would add, that they established it in such a way as to avoid any ambiguities that could arise with reference to certain intervals of time, such as that between the seventh and eighth year, or that between the sixth and the seventh year, to which Constantius seems to allude in CTh. 8,18,4.⁸⁰ It is moreover worth considering ‘la circostanza che l’imperatore prima dica il regime della *bonorum possessionis petitio* e poi lo estenda alla richiesta dell’eredità civile. Il punto di riferimento è per Arcadio la *bonorum possessio petitio*, che, per il suo aspetto procedurale, gli richiama, probabilmente, la decisione di Ulpiano sulla costituzione dell’infante in giudizio.’⁸¹ The emphasis placed on the wishes of the child by now *pubertati proximus*, having completed their seventh year, also emerges in the last part of the measure regarding *cretio*.⁸² Arcadius, in establishing that the child aged seven or over could request the *bonorum possessio* or accept an inheritance, does not mention the paternal *iussum* which ‘l’*infantia maior* aveva bisogno’ in these cases in the classical age.⁸³ ‘Ed è infatti presumibilmente all’eliminazione di questa autorizzazione preventiva all’atto di accettazione che la legge si riferisce con l’espressione *cretionum autem scrupulosam sollemnitatem (...) hac lege emendari penitus amputarique decernimus*, intendendo per l’appunto evidenziare che la *cretio* in sé non veniva eliminata, bensì piuttosto veniva emendata e amputata, cioè, a

79 See Archi, ‘Contributo alla critica del Codice Teodosiano (Esegesi di c. 1 C.Th. 4,1, De cretione vel bonorum possessione)’ (note 77 above), 1721f.

80 This would explain the reference to the plural in certain intervals of years. For the gaps in the legislative provisions of CTh. 8,18,4, refer to the various editions of Th. Mommsen and P.M. Meyer (*Theodosiani libri XVI cum constitutionibus sirmondianis*, I, Berolini 1954², 423), J. Gotofredo (*Codex Theodosianus*, II, repr. Hildesheim/New York 1975, 689f.) and P. Krüger, ‘Beiträge zum Codex Theodosianus’, *SZ* 37 (1916), 92ff. Here, I am only interested in highlighting that also in this constitution there are expressions alluding to intervals of time: *ut intra [s]extum annum, si quidem superstites [ultra eum annum fuerint, si vero] intra praefinitum tempus* (according to the edition of Gotofredo), *Post emensum vero sextum aetatis suae annum*. On the source under consideration, cf., for all, Archi, ‘Contributo alla critica del Codice Teodosiano (Esegesi di c. 1 C.Th. 4,1, De cretione vel bonorum possessione)’ (note 77 above), 1717ff.; B. Biondi, *Diritto ereditario romano*, Milano 1954, 247; P. Voci, *Diritto ereditario romano*, I, Milano 1967², 645ff.; Id., ‘Il diritto ereditario romano nell’età del tardo impero. I. Le costituzioni del IV secolo’, *IURA* 29 (1978) (= Id., *Studi di diritto romano*, II, Padova 1985, 129 ff.); Coppola, *Studi sulla pro herede gestio*, II (note 76 above), 337ff.

81 Cf. Astolfi, *Il fidanzamento nel diritto romano* (note 64 above), 64.

82 See Coppola, *Studi sulla pro herede gestio*, II (note 76 above), 347.

83 See Astolfi, *Il fidanzamento nel diritto romano* (note 64 above), 64.

nostro modo di vedere, limitata e ripulita a fondo (*penitus*) attraverso l'esclusione del preventivo *iussum* paterno, rimanendo pertanto un atto prettamente volontario del figlio'.⁸⁴

In 426, Valentinian III confirmed the provision of 407 with a constitution recorded in the *Codex Iustinianus*,⁸⁵ which at § 4 mentions la 'costituzione di Arcadio, Onorio e Teodosio, da noi sopra esaminata, per distinguere tra infante (...), e colui che ha superato questa età. Per i maggiori dei sette anni, gli imperatori non intendono innovare'.⁸⁶

C. 6,30,18,4. Impp. Theodosius et Valentinianus AA. ad Senatam: Sin autem septem annos aetatis pupillus excesserit et priore parente mortuo in pupillari aetate fati munus impleverit, ea obtinere praecipimus, quae veteribus legibus continentur, nulla dubitatione relicta, quin pupillus post impletos septem annos suae aetatis ipse adire hereditatem vel possessionem bonorum petere consentiente parente, si sub eius potestate sit, vel cum tutoris auctoritate, si sui iuris sit, poterit vel, si non habeat tutorem, adire praetorem et eius decreto hoc ius consequi (a. 426).

The emperor, after having legitimised the *pater*, to whose *potestas* the *infans* heir was subject, to acquire *eius nomine* an inheritance or to request the *bonorum possessio* with regard to the inheritance of the mother, maternal ascendants and those outside the family – and having envisaged, in the event of inactivity of the *pater* and death of the son, the

84 Cf. Coppola, *Studi sulla pro herede gestio*, II (note 76 above), 349.

85 C. 6,30,18pr.-3: Impp. Theodosius et Valentinianus AA. ad Senatam: Si infanti, id est minori septem annis, in potestate patris vel avi vel proavi constituto vel constitutae hereditas sit derelicta vel ab intestato delata a matre vel linea ex qua mater discendi vel alii quibuscumque personis, licebit parenti bus eius sub quorum potestate est adire eius nomine hereditatem vel bonorum possessionem petere. 1. Sed si hoc parens neglexerit et in memorata aetate infans decesserit, tunc parentem quidem superstitem omnia ex quacumque successione ad eundem infantem devoluta iure patrio quasi iam infanti quaesita capere. 2. Parente vero non subsistente, si quidem post eius obitum tutor infanti sit vel datus fuerit, posse eum etiam adhuc infante pupillo constituto nomine eius adire hereditatem sive vivo parente sive post mortem eius ad eum devolutam vel bonorum possessionem petere et eo modo eidem infanti hereditatem quaerere. 3. Sin vero vel non sit tutor vel, cum sit, ea facere neglexerit, tunc eodem infanti in ea aetate defuncto omnes hereditates ad eum devoluta sed non agnitas ita intellegi, quasi ab initio non essent ad eum delatae, et eo modo ad illas personas perveniant, quae vocabantur, si minime hereditas infanti fuisset delata. Ea vero, quae de infante in potestate parentium constituto statuimus. Locum habebunt et si quacumque causa sui iuris idem infans inveniatur. On the text, cf., for all, Solazzi, 'Qui infanti proximi sunt' (note 23 above), 17ff. = Id., *Scritti di diritto romano*, V (note 23 above), 579ff.; Archi, 'Contributo alla critica del Codice Teodosiano (Esegesi di c. 1 C.Th. 4,1, De cretione vel bonorum possessione)' (note 77 above), particularly 1726ff.; Voci, 'Il diritto ereditario romano nell'età del tardo impero. I. Le costituzioni del IV secolo' (note 80 above), 137ff.

86 See Archi, 'Contributo alla critica del Codice Teodosiano (Esegesi di c. 1 C.Th. 4,1, De cretione vel bonorum possessione)' (note 77 above), 1727.

possibility of taking possession of the inheritance for a *parens superstes* and, in the absence of the latter, the intervention of the tutor on behalf of the *infans* – by fixing officially a precise age, stresses exclusively in numerical terms,⁸⁷ *quae veteribus legibus continentur, nulla dubitatione relicta*, the limit beyond which the pupil may personally take possession of the inheritance or impetrate the *bonorum possessio*: *Sin autem septem annos aetatis pupillus excesserit (...) quin pupillus post impletos septem annos suae aetatis (...)*.

The insertion in the *Codex* of the constitution of Valentinian III does not however mean a generalisation by Justinian of the limit of seven years⁸⁸ in every case in which the *infans* was involved. And this, in my humble opinion, was not because there were doubts in considering someone who had not yet reached his seventh birthday as an *infans*⁸⁹ and did not have the capacity either to *facere* or *intelligere*, but because going over this limit, by attributing the pupil with the capacity to speak correctly and an albeit limited capacity to act, would have made the condition of *infanti proximus* and its differentiation from *pubertati proximus* even less clear.⁹⁰ In the Institutes, moreover, the compilers⁹¹ confirm

87 Without any mention of other elements.

88 Along the same lines, cf. Lamberti, ‘Su alcune distinzioni riguardo all’età dell’impubere’ (note 25 above), 235f., while Coppola Bisazza, ‘Annotatiunculae (II). Qualche puntualizzazione sull’ “infanti proximus” ed il “pubertati proximus”’ (note 26 above), 15, talks of ‘un’apertura verso la fissazione del limite dei sette anni per ogni fattispecie in cui fosse coinvolto un *infans*’. Against the generalisation of the limit of seven years, we find, for example, the provision of Justinian (C. 5,37,28, of 531) which seems to exclude that possibility granted by Ulpian (see the aforementioned D. 26,7,1) to the pupil, with an adequate degree of maturity, to personally appear as a party to legal action. In 531 an obligation was imposed on tutors to assume themselves the defence of pupils *vel adulti vel furiosi aliarumque personarum* and it is interesting to note how, with reference to mentally unstable persons, it is underlined, through the use in a disjunctive form of terms such as *demens* and *furiosus* (C. 5,37,28,1a), that there was no difference in legal treatment between those who were mentally deficient (*demens*) and lunatics (*furiosus*). Cf., on this subject, for all, Albanese, *Le persone nel diritto privato romano* (note 23 above), 538f. and nt. 589.

89 The Krüger edition of the *Codex Iustinianus* (cf. *supra*, nt. 85) reads *Id est minori septem annis* with reference to the *infans*. Conversely, Faber considers *id est (...) annis* to be compilatory. Cf. Archi, ‘Contributo alla critica del Codice Teodosiano (Esegesi di c. 1 C.Th. 4,1, De cretione vel bonorum possessione)’ (note 77 above), 1726 nt. 29. Well, if the opinion of Faber were reliable, we would be faced with an expression that does not aim at the general fixing of a numerical limit, but rather at indicating symmetrically the *infans* as opposed to a child more than seven years old.

90 See also Coppola Bisazza, ‘Annotatiunculae (II). Qualche puntualizzazione sull’ “infanti proximus” ed il “pubertati proximus”’ (note 26 above), 15. Although starting with a different idea of a possible interest, in C. 6,30,18, ‘verso la fissazione del limite dei sette anni per ogni fattispecie in cui fosse coinvolto un *infans*’, she seems to see the numerical limit as an element of confusion. The scholar in fact states that ‘Nel momento in cui l’*infans* era considerato ormai il bambino fino ai sette anni, l’*infanti proximus* non poteva essere infatti che il fanciullo che, avendo superato quella soglia di età, finiva coll’identificarsi con il *pubertati proximus*’.

the difference and justify bringing the *infanti proximus* closer to *pubertati proximus* due to the effect of an interpretation aimed at encouraging this.

Theophilus also maintains the distinction, but qualifies it, trying to transmit to the students the ideas he had developed thanks to his direct knowledge of the sources on the subject, and in particular literary, rhetorical and legal sources which he had studied in depth when drafting Book I of the Institutes,⁹² case-law that he had the chance to read when helping draft the *Digesta*,⁹³ and the pre-Justinian constitutions that he consulted when drafting the first edition of the Code.⁹⁴ For our *antecessor*, an *infanti proximus* is not in fact a pupil who has generically reached the age of seven years, but a pupil aged seven or eight. Between the seventh and the eighth year the pupil was no longer in infancy, but was not yet *pubertati proximus* and did not have legal capacity except by means of benevolent concession. Only when reaching their eighth year could pupils be considered *pubertati proximus*. Therefore, when the sources talk of pupils that have completed their seventh year, i.e. having, as I believe, already reached their eighth, in all likelihood the allusion is to *pubertati proximus*.

Moreover, if we return briefly to the expressions of the texts quoted, we see that, acknowledging social requests: Modestinus was perhaps referring to children who, having to be able to understand, had completed the seventh year, and were in their eighth; Ulpian referred to children *supra septimum annum aetatis*; Arcadius, Honorius and Theodosius attributed a *voluntas* to minors *hac vero aetate* (seven years, perhaps) *finita* and Valentinian III, after having said *Sin autem septem annos aetatis pupillus excesserit*, attributed to the *pupillus post impletos septem annos suae aetatis* the capacity to act with regard to *aditio hereditatis* and to the *adgnitio bonorum possessionis*.

91 And in particular, following the reconstruction of G. Falcone (on which cf., *supra*, nt. 18), Dorotheus. A different view can be found in Coppola Bisazza, ‘Annotatiunculae (II). Qualche puntualizzazione sull’ “infanti proximus” ed il “pubertati proximus”’ (note 26 above), 15. The scholar in fact states that ‘Nulla di strano quindi che i Compilatori delle *Istituzioni*, tra cui lo stesso Teofilo, non abbiano specificato in termini numerici questo limite, che in sostanza avrebbe dato per sottinteso’.

92 On which cf., *supra*, note 18.

93 On the topic, cf., most recently, Lokin/Van Bochove, ‘Compilazione – educazione – purificazione’ (note 11 above), 123.

94 On this subject, see also here, for all, Lokin/Van Bochove, ‘Compilazione – educazione – purificazione’ (note 11 above), 122. It is evident that, even though Theophilus does not seem to have taken part in the drafting of the *Codex repetitae praelectionis*, since he probably died in 534 (cf., for all, B. Albanese, *Premesse allo studio del diritto romano*, Palermo 1978, 64; Russo Ruggeri, ‘Teofilo e la spes generandi’ (note 4 above), 172f. nt. 17, and Lokin/Van Bochove, ‘Compilazione – educazione – purificazione’ (note 11 above), 123f.), while drafting the first edition of the Code, he also had an opportunity to consult constitutions that probably ended up in the second.

Theophilus moreover was probably aware also of reflections in the third century AD attested by the erudite Macrobius:

Somn. Scip. 1,6,70: Post annos septem dentes qui primi emerant aliis aptioribus ad cibum solidum nascentibus cedunt, eodemque anno (id est septimo), plene absolvitur integritas loquendi (...).

For Theophilus, as for Macrobius, the ability to speak correctly is achieved after the seventh birthday, during the seventh year, *eodemque anno, id est septimo*, between seven and eight, the Paraphrast in fact says, when the child is *infanti proximus*.

4.

Further significant support for the plausible hypothesis that the comment of the Institutes of Justinian reflects the personality of Theophilus, his previous learning and above all the knowledge that he had acquired taking part in the drafting of the *Digesta*, is seen in title 19 of book 3 of the Paraphrase, dedicated, as said, to *inutilis stipulatio*. We read:

Theoph. 3,19,14: Ἀρχηστος καὶ ἡ PRAEPOSTERA ἐπερώτησις, οἷον ἐάν τις ἐπερωτήσῃ: “ἐὰν ἡ ναὺς αὐριον ἔλθῃ ἀπὸ Ἀσίας, σήμερόν μοι δοῦναι ὁμολογεῖς;”. Ἀρχηστος δὲ ἐστὶν ἡ ἐπερώτησις, ἐπειδὴ οὐ δεῖ τὴν δόσιν πρεσβυτέραν εἶναι τῆς ἐκβάσεως τῆς αἰρέσεως, ἀλλὰ μεταγενέστεραν. ἀλλ’ ἐπεὶ Λέοντος διάταξις ἐστὶν ἐπὶ τῆς προικὸς τὴν PRAEPOSTERAN δεχομένη ἐπερώτησιν, διὰ τοῦτο ὁ ἡμέτερος βασιλεὺς δίκαιον ἐνόμισεν εἶναι, ὥστε ἐπὶ πάσης ἐπερωτήσεως τὸ τοῦ PRAEPOSTERU πάθος ἐπιγινόμενον μὴ ἀναιρεῖν τὴν ἐνοχίαν· PRAEPOSTERA γὰρ ἐπερώτησις καὶ οὕτω γίνεται, ἐὰν εἴπω: “ὁμολογῶ δώσειν σοι σήμερον δέκα νομίσματα, ἐὰν αὐριον Τίτιος γένηται ὑπατος”, ἤγουν ἐπὶ τῆς προικὸς, ἐὰν εἴπῃ ὁ ἀνὴρ τῇ γυναικί: “ὁμολογῶ μελλούσῃ σοι τελευτᾶν διδόναι τὴν προῖκα, ἐὰν ἄταις τελευτήσῃς”. ἡ μὲν γὰρ δόσις εἰς τὸν τῆς ζωῆς ἀνάγεται καιρόν· ἡ δὲ ἐκβασὶς τῆς αἰρέσεως, τουτέστι τῆς ἀπαιδίας (εἶπε γὰρ “ἐὰν ἄταις τελευτήσῃς”) εἰς τὸν μετὰ τελευτῆν ἀναφέρεται χρόνον. ἤρρεσεν οὖν οὐ μόνον ἐπὶ προικὸς, ἀλλὰ καὶ ἐπὶ ἄλλης οἰασθῆποτε ἐπερωτήσεως τὸ PRAEPOSTERON συμβαῖνον μὴ ἀκυροῦν τὴν ἐπερώτησιν.⁹⁵

95 Lokin/Meijering/Stolte/Van der Wal, *Theophili antecessoris Paraphrasis Institutionum* (note 17 above), 646ff. To facilitate reading, cf. also the Latin translation that can be found in Ferrini, *Institutionum graeca Paraphrasis Theophilo antecessori vulgo tributa* (note 17 above), 340f.: ‘Inutilis est praepostera quoque stipulatio, veluti si quis stipuletur: ‘si cras navis ex Asia venerit, hodie mihi dare spondes?’ inutilis autem est stipulatio, cum non oporteat dationem condicionis eventu antecedere, quin sequi debet. set cum Leonis sit constitutio, quae in dotibus praeposteram admittat stipulationem, ideo princeps noster aequum esse putavit in omnibus stipulationibus

The Paraphrast takes up and discusses in greater detail the corresponding passage of the imperial Institutes:

Inst. 3,19,14: Item si quis ita stipulatus erat: 'si navis ex Asia venerit, hodie dare spondes?' inutilis erat stipulatio, quia praepostere concepta est. sed cum Leo inclitae recordationis in dotibus eandem stipulationem quae praepostera nuncupatur non esse reiiciendam existimavit, nobis placuit et huic perfectum robur accommodare, ut non solum in dotibus, sed etiam in omnibus valeat huiusmodi conceptio stipulationis.

The passage, quoted according to the edition of the Institutes edited by Krüger,⁹⁶ opens with the statement that in the past, a *stipulatio*, which is *praepostera concepta*, with which a promisor commits to give now, *si navis ex Asia venerit*, was considered *inutilis*. Subsequently, however, a constitution of the Emperor Leo acknowledged its validity, if concluded *dotis causa*, and Justinian, generalising this provision, allowed in any case this type of *stipulatio*.

The example 'if the ship arrives from Asia, do you commit to giving now?' has led scholarship to define a *stipulatio* in which 'si voleva un pagamento immediato, sebbene l'obbligazione, per la sua natura condizionale, fosse esposta a non esistere' as *praepostera*.⁹⁷ This is a notion which was identical both in classical and Justinian law. 'Questa tesi' – as Masi perceptively showed⁹⁸ – 'non trova però conferma nelle fonti. Essa poggia sull'identificazione della nozione della *stipulatio praepostera* con l'esempio contenuto nel passo delle Istituzioni. E questa identificazione non si può condividere'. Masi however, in his reconstruction, does not eliminate the aforementioned definition, but

praeposterae adiectionis vitium obligationem non tollere. praepostera est enim stipulatio et si dicam: 'spondeo tibi decem aureos hodie dare, si cras Titius consul fiat': vel in dote si vir mulieri dicat: 'spondeo cum morieris tibi dotem dare si absque liberis decedas' datio enim ad vitae tempus refertur, condicionis autem eventus, h. e. orbitas (ait enim: si sine liberis morieris) ad tempus post mortem spectat. placuit igitur non solum in dote, set etiam in aliaqua cumque stipulatione praeposterae condicionis adiectio stipulationem non infirmare'.

96 Cf. *Iustiniani Institutiones*, ed. P. Krüger, Berolini 1872, 254. Along the same lines, see: *Imperatoris Iustiniani Institutionum libri quattuor*, ed. J.B. Moyle, Oxford 1903, 419; *Imperatoris Iustiniani libri quattuor*, ed. Ph.E. Huschke, Lipsiae 1911, 135; *The Institutes of Iustinian*, ed. J.A.C. Thomas, Amsterdam-Oxford 1975, 216.

97 See F. Vassalli, *Di talune clausole con riferimento al "dies mortis" nel legato e nella stipulazione*, Firenze 1910, 64f. (= Id., *Studi giuridici*. Vol. III, Tomo 1: Studi di diritto Romano (1906-1921), Milano 1960, 302f.). The immediate execution of the obligation, taking into account Inst. 3,19,14, is mentioned by C. Appleton, 'De la condition résolutoire dans les stipulations et de la stipulation prépostère', *NRHD* 3 (1879), 250ff. Cf., along the same lines, R. de Ruggiero, 'Il "dies impossibilis" nei contratti e nei testamenti: saggio sulla teoria del "dies" in diritto romano', *BIDR* 15 (1903), 54; and other literature quoted in A. Masi, 'Stipulatio praepostera', *BIDR* 63 (1960), 183 notes 5 and 8.

98 Cf. Masi, 'Stipulatio praepostera' (note 97 above), 184.

sees ‘un’evoluzione dell’istituto dal diritto classico al diritto giustiniano’.⁹⁹ Subsequently, Metro,¹⁰⁰ while agreeing with the critical observations made by Masi on previous scholarship, notes that the scholar should have abandoned the aforementioned notion ‘perché basata sull’equivoco scaturente da una cattiva lettura di I. 3.19.14’. The formulation of this passage, as quoted above, could even raise doubts that we are actually dealing with *stipulatio praepostera*.¹⁰¹ The adjective *praeposterus* is in fact found in various legal texts with the meaning of ‘early’ or ‘premature’.¹⁰² In the example of the imperial Institutes, since the ship could arrive the same day, there would not always have been a commitment on the part of the promisor to perform his obligation before the condition occurred.¹⁰³ Metro therefore suggests the theory of an *emendatio* of the text: ‘per rendere logico il discorso, non resta che inserire *cras* nella formula della *stipulatio*, che allora così suonerebbe: ‘*Si navis cras ex Asia venerit, hodie dare spondes?*’’. As the scholar points out,¹⁰⁴ ‘la parola *cras* non figura nei manoscritti’, but its insertion has already been, over the centuries, repeatedly proposed.¹⁰⁵ The scholar moreover is led in this direction¹⁰⁶ by the corresponding text of the Paraphrase. The consideration of both the sources¹⁰⁷ thus led him to conclude that ‘(...) ‘solo’ (...) quella stipulazione condizionale in cui fosse invertita la priorità cronologica che deve esistere fra il verificarsi della condizione e l’adempimento dell’obbligazione’ could be considered *praepostera*.

As I have tried to demonstrate in a work in print,¹⁰⁸ the sources in question seemed to confirm Masi’s idea regarding an evolution of the notion of *stipulatio praepostera*, even if in some aspects the reconstruction I propose is different. The definition of *stipulatio praepostera* given by Metro corresponds to the classical notion, while the example of the Justinian Institutes, without the insertion of *cras*, makes sense if we consider that it is

99 See also Masi, ‘*Stipulatio praepostera*’ (note 97 above), 183f.

100 Cf. A. Metro, ‘La nozione di *stipulatio praepostera* alla luce di una nuova lettura di I. 3.19.14’, *SDHI* 70 (2004), 11.

101 Again, Metro, ‘La nozione di *stipulatio praepostera*’ (note 100 above), 5.

102 Cf. Metro, ‘La nozione di *stipulatio praepostera*’ (note 100 above), 5 and notes 12 and 13. See also *Thesaurus linguae latinae* 10, 2, fasc. V, Leipzig 1987, c. 781: ‘*ea, quae posteriora habent priora, itaque adhibetur de eis, quae fiunt vel agunt ordine inverso, ratione commutata, aliter ac fieri debent vel solent*’, and F. Forcellini, *Lexicon totius latinitatis*, IV, Padova 1940, 812, where we read: ‘*inverso ordine facta, perversa, cum scilicet aliquid prius fit, quod post fieri debuit*’.

103 See, Metro, ‘La nozione di *stipulatio praepostera*’ (note 100 above), 5.

104 Cf. Metro, ‘La nozione di *stipulatio praepostera*’ (note 100 above), 6f.

105 For a schematic study on this point, cf. Metro, ‘La nozione di *stipulatio praepostera*’ (note 100 above), 7f.

106 The reference is once again to Metro, ‘La nozione di *stipulatio praepostera*’ (note 100 above), 6.

107 The text of the Institutes amended with the addition of *cras* and the corresponding text of the Paraphrase.

108 Cf. A.S. Scarcella, ‘Qualche puntualizzazione sulla evoluzione della nozione di *stipulatio praepostera* nel passaggio dall’*inutilitas* all’*utilitas*’, awaiting publication in *IURA*.

exemplificative of a new notion of *utilis praepostera stipulatio*, introduced by Leo I and accepted and generalised by Justinian, in which in order for there to be the *praeposteri reprehensio*, a *stipulatio* must have been concluded whose formulation established in a precise and immediate way the creation of an obligation *pendente condicione*.

Here, and in the perspective I proposed, it is important to highlight that in our text of the Paraphrase, which also shows some signs of the aforementioned evolution, the teacher Theophilus, unlike the ῥήτόν,¹⁰⁹ above all sheds light on the classical concept of *stipulatio praepostera* – well-known to him since he had directly read, in his capacity as a *iuris peritus* and compiler, the classical sources on the subject – which he intends to clarify to his students.

5.

Theoph. 3,19,14 starts with the statement, in the present, of the *inutilitas* of the so-called *stipulatio praepostera concepta* and the formulation of the example in which the promisor undertakes to give today if the ship arrives tomorrow, which clarifies the *ratio* of this *inutilitas*: in a conditioned *stipulatio*, performance must not precede, but rather follow the fulfilment of the condition.

There follows a mention of the constitutions of Leo¹¹⁰ and Justinian¹¹¹ which, reforming the classical system, admitted its validity.

The discourse is taken up in the γάρ with the concept of *stipulatio praepostera* set out at the beginning, of which two examples are given. The first is that of someone who has promised to give ten *aurei* today if tomorrow a certain person becomes consul, and the

109 Where the example shown instead fitted well with the new notion of *stipulatio praepostera*. On which, see Scarcella, ‘Qualche puntualizzazione sulla evoluzione della nozione di *stipulatio praepostera*’ (note 108 above).

110 The reference to the constitution of Leo I, who is thought to have admitted the validity of the *stipulatio praepostera* regarding dowries, was already present in the *Codex repetitae praelectionis* – C. 6,23,25: *Idem A.* (= Imp. Iustinianus) *Menae pp.: Praeposteri reprehensionem, quam novella constitutio in dotalibus instrumentis sustulisse noscitur (...)* – and in the imperial Institutes (3,19,14): *(...) sed cum Leo inclitae recordationis in dotibus eandem stipulationem quae praepostera nuncupatur non esse reiciendam existimavit (...)*. We do not however know the text in question, and ‘today’ is in fact not present in the Code, since it was ‘removed’ from it, we read in sch. διάταξις ad Theoph. 3,19,14: αὕτη οὐ κεῖται ἐν τῷ κώδικι σήμερον, ἀλλὰ πάντως ἀνηρέσθη καὶ ἐξελείφθη ἐκ τοῦ κώδικος. Cf. Ferrini, ‘Scolii inediti allo Pseudo-Teofilo’ (note 11 above), in: *Opere*, I (note 1 above), 199.

111 Specifically, C. 6,23,25: *Idem A.* (= Imp. Iustinianus) *Menae pp.: Praeposteri reprehensionem, quam novella constitutio in dotalibus instrumentis sustulisse noscitur, in aliis quoque omnibus tam contractibus quam testamentis tollimus, ut tali exceptione cessante et stipulatio et alii contractus et testatoris voluntas indubitate valeat, exactione videlicet post condicionem vel diem competente* (a. 528).

second regards dowries, subject to Leo's reform: the husband promises to give back the dowry to his wife, who is about to die, on condition that she dies without children.

The teacher then begins to clarify the *inutilitas* of the so-called *stipulatio praepostera concepta* of which he provides an example, in which 'è facile notare la differenza'¹¹² to that of the imperial Institutes,¹¹³ unamended: 'nell'esempio riportato dalla Parafraresi, infatti, il promittente si è impegnato a dare 'oggi' se la nave verrà 'domani' ed ha dunque inevitabilmente posto in essere le condizioni perché la sua *stipulatio* possa essere definita *praepostera*, prevedendo un adempimento sicuramente anticipato rispetto al verificarsi della condizione'. The reference to the reforms of Leo and Justinian, as has been rightly noted, is not at all integrated with the rest of the discussion:¹¹⁴ using the present tense, it talks firstly of nullity of the *stipulatio praepostera* as a current institution; there is subsequently a mention of the reforms of Leo and Justinian; the γάρ introduces two examples of *stipulatio praepostera* clarifying the concept of the institution expressed at the beginning of the passage, and it concludes with a further reference to Justinian's reform.¹¹⁵

'La spiegazione più plausibile di questa circostanza (...) è che la prima parte del testo riecheggia, più che l'opera parafrasata, un modello pregiustiniano'¹¹⁶ or, something which seemed to me¹¹⁷ much more likely, the classical notion of *stipulatio praepostera*, that the paraphrast had probably acquired from his knowledge of the classical texts, which discussed particular hypotheses of conditioned *stipulatio*, to prevent incurring *reprehensio praeposteri*. As a teacher, after having started with the definition, he tries to give an adequate explanation of this notion through appropriate examples in the second part of the passage. The first, I repeat, is that of someone who has promised 'today' to give ten *aurei* if 'tomorrow' a certain person becomes consul, and the second regards a husband who by means of *stipulatio* undertakes to give back the dowry to his wife about to die on condition that she dies without children. It is clear that the latter example, regarding the dowry, subject to reform by Leo, with which there was introduced a new notion of *stipulatio praepostera*,¹¹⁸ did not fit with the classical notion and could thus not be simply

112 See Metro, 'La nozione di stipulatio praepostera' (note 100 above), 6.

113 Moreover, he did not work on the part in question. Cf. *supra*, nt. 18.

114 See Masi, 'Stipulatio praepostera' (note 97 above), 187, and, along the same lines, Metro, 'La nozione di stipulatio praepostera' (note 100 above), 6.

115 Cf. Masi, 'Stipulatio praepostera' (note 97 above), 186 f.

116 See Metro, 'La nozione di stipulatio praepostera' (note 100 above), 6, but previously along the same lines Masi, 'Stipulatio praepostera' (note 97 above), 187.

117 Cf. Scarcella, 'Qualche puntualizzazione sulla evoluzione della nozione di stipulatio praepostera' (note 108 above).

118 That occurred every time the formulation of a *stipulatio* established the immediate creation of a conditional obligation. The transaction was valid, and performance, when and if the condition was

transcribed. Its use as an example of classic *stipulatio praepostera inutilis*, unlike the previous one, needed to be qualified. Theophilus thus adds: the dowry should be returned when the woman is still alive, while the condition may be fulfilled only after her death.¹¹⁹

At this point however, it is important to clarify what classical sources Theophilus, who had been unable to draw on any information from the manual of Gaius with regard to the notion of *inutilis praepostera stipulatio*, had taken into account when drafting the Paraphrase.

There is no trace in the compilation of sources that refer directly to cases of *stipulatio praepostera inutilis*, which perhaps existed and were known by the Paraphrast, and had perhaps been discarded by him when drafting the *Digesta*, since this was an institution that we know was subjected to specific reform. In it, however, I have identified¹²⁰ sources in which the jurists, when dealing with cases submitted to their attention, had posed the problem of whether these were or were not *stipulationes praeposterae*, providing elements for the definition of the classical notion of the institution in the solution. The reference is to two passages of the *Digesta*, both treated by *libri quaestionum*, which regard, albeit with different formulations, precisely the first example of *inutilis stipulatio praepostera* discussed by Theophilus.

The first fragment is:

D. 45,1,64 (Afr. 7 *quaest.*): Huiusmodi stipulatio interposita est: ‘si Titius consul factus fuerit, tum ex hac die in annos singulos dena dari spondes?’ post triennium condicio exstitit: an huius temporis nomine agi possit, non immerito dubitabitur. respondit eam stipulationem utilem esse ita, ut in ea eorum quoque annorum, qui ante impletam condicionem intercesserint, praestatio in id tempus collata intellegatur, ut sententia eius sit talis: tunc cum Titius consul factus fuerit, in annos singulos, etiam praeteriti temporis habita ratione, dena praestentur.

fulfilled, had to take into consideration the moment when the obligation arose. See, as above, Scarcella ‘Qualche puntualizzazione sulla evoluzione della nozione di stipulatio praepostera’ (note 108 above).

119 (...) ἡ μὲν γὰρ δόσις εἰς τὸν τῆς ζωῆς ἀνάγεται καιρόν· ἡ δὲ ἔκβασις τῆς αἰρέσεως, τοῦτέστι τῆς ἀπαιδίας (εἴτε γὰρ “ἐὰν ἀπαις τελευτήσῃς”) εἰς τὸν μετὰ τελευτὴν ἀναφέρεται χρόνον. (...). (Transl.: ‘datio enim ad vitae tempus refertur, condicionis autem eventus, h. e. orbitas (ait enim: si sine liberis morieris) ad tempus post mortem spectat’).

120 Cf. Scarcella, ‘Qualche puntualizzazione sulla evoluzione della nozione di stipulatio praepostera’ (note 108 above).

The same solution is formulated in:

D. 45,1,126 pr. (Paul. 3 *quaest.*): Si ita stipulatus fuero: ‘Si Titius consul factus fuerit, tunc ex hac die in annos singulos dena dare spondes?’, post triennium condicione existente triginta peti potuerunt.

The two texts,¹²¹ whose genuineness has been convincingly defended by various scholars,¹²² have been repeatedly discussed with reference to the issue of *stipulatio praepostera*¹²³ and also connected to it in my own studies.¹²⁴

I have already clarified¹²⁵ that the case referred to in the first passage is that of a *stipulatio* in which ‘If a given person becomes consul, *tum* or *tunc*, does the promisor today undertake to give ten for each year?’ The condition is fulfilled after three years. The immediate object of the answer of Africanus (or perhaps of Julian¹²⁶) is the *utilitas* or

121 On whose connection see also R. Reinoso-Barbero, ‘Geminaciones ocultas en el Digesto’, *Index* 25 (1977), 225.

122 Cf. O. Lenel, ‘Afrikans Quästionen’, *SZ* 51 (1931), 31 nt. 6, but above all the lucid, well-argued defence of Masi, ‘Stipulatio praepostera’ (note 97 above), 190ff. We also see support for the genuineness of the texts in Metro, ‘La nozione di stipulatio praepostera’ (note 100 above), 9ff. The scholar however maintains that at their basis there is the issue of the retroactive effectiveness of the condition, and that relating them to the *stipulatio praepostera* introduced ‘un elemento di estraneità nella problematica agitata dai due frammenti’. *Contra*, see however my observations in Scarcella, ‘Qualche puntualizzazione sulla evoluzione della nozione di stipulatio praepostera’ (note 108 above).

123 Cf., for all, A. De Medio, ‘Note su alcuni frammenti di Africano interpolati’, *AG* 68 (1902), 233f.; Vassalli, *Di talune clause con riferimento al “dies mortis” nel legato e nella stipulazione* (note 97 above), 302f.; G. Beseler, *Beiträge zur Kritik der römischen Rechtsquellen*, V, Leipzig 1931, 79; E. Betti, *Istituzioni di diritto romano*, I, Padova 1942², 198 nt. 25, and the fundamental study of Masi, ‘Stipulatio praepostera’ (note 97 above), 190ff. The latter, while affirming that in the cases proposed in the texts, there is not a *stipulatio praepostera*, discusses them in this regard to argue that the parties had established the *stipulatio* so as to avoid incurring *praeposteri reprehensio*.

124 Cf. Scarcella, ‘Qualche puntualizzazione sulla evoluzione della nozione di stipulatio praepostera’ (note 108 above).

125 See Scarcella, ‘Qualche puntualizzazione sulla evoluzione della nozione di stipulatio praepostera’ (note 108 above).

126 It is known that Africanus – on whom, cf., for all, in addition to the by now classic works of P. Krüger, *Geschichte der Quellen und Litteratur des römischen Rechts*, Leipzig 1888, 177 = Id., *Histoire des sources du droit romain*, French trans. by M. Brissaud, Paris 1894, 235; H. Fitting, *Alter und Folge der Schriften römischen Juristen von Hadrian bis Alexander*, Tübingen 1908 (repr. Osnabrück 1965), 31 and W. Kunkel, *Herkunft und soziale Stellung der römischen Juristen*, Graz/Wien/Köln 1967², 172, also P. Jörs, ‘Caecilius. 29’, *PWRE* 3. 1 (1897), 1193, and F. Casavola, *Giuristi adrianei*, Napoli 1980, 82ff. –, in the *libri quaestionum*, constantly refers to the opinions of his master Julian, preceding them with verbs such as *putavit*, *existimavit*, *inquit*, *respondit*, etc. Also in the fragment in question, we find the verb *respondere*, used in the third person, so it is likely that the opinion referred to is that of Julian. On the relations of dependence between the work of Africanus and that of

inutilitas of the *stipulatio* submitted to the attention of the jurist, in other words the consideration of the *stipulatio* as concluded or not concluded, and thus as enforceable or unenforceable. Only after the jurist *respondit eam stipulationem utilem esse* and as a consequence (*ita, ut*) of the answer, does he admit, basing his argument on the will expressed by the parties (*ex hac die (...) praestatio (...) collata intellegatur*), the validity of the transaction also for performance effected in the *triennium praeteritum*.¹²⁷

Faced with the case considered, *non immerito dubitabitur*. The promisor, in fact, being committed expressly to fulfil the obligation as from today, would surely have had to provide performance prior to the fulfilment of the condition, that *exstitit* after three years (performance ‘as from today’ with respect to the fulfilment of the condition ‘three years later’, thus *praeposteri reprehensio*). This requires an attentive *interpretatio*, which leads the jurist to give importance to the will of the parties in order to avoid incurring a *praeposteri reprehensio*. It is thus stressed in the fragment that the parties, to save the *stipulatio*, had subordinated, in an equally explicit, albeit contradictory manner,¹²⁸ through the use of the adverbs *tum* or *tunc*, the performance of the acts prior to the appointment of a given person to the position of consul, upon the fulfilment of the condition: *tunc cum Titius consul factus fuerit, in annos singulos, etiam praeteriti temporis habita ratione, dena praestentur*.

It is thus evident that the retroactive effectiveness of the *stipulatio* in the case at hand would not have been related to the occurrence of the uncertain future event if the parties had not specifically provided for envisaging it,¹²⁹ and that precisely by doing so, they had avoided concluding a *stipulatio inutilis* due to *praepostera concepta*.

From the passages quoted, then, we must deduce, in agreement with Masi,¹³⁰ that according to Africanus (or Julian) and, later, Paulus, who taking up again the same case, merely mentions briefly the solution, ‘if the *promittens* had not explicitly undertaken to effect performance relative to the *triennium praeteritum* only when the condition was fulfilled, with regard to such performance, the *stipulatio* would have been *inutilis* (evidently because it was *praepostere concepta*)’.

Julian, useful information can also be found in P. De Francisci, *Storia del diritto romano*, II, Milano 1943, 492, and P. Frezza, *Corso di storia del diritto romano*, Roma 1954, 387.

127 The validity of the *stipulatio* for the period subsequent to that in which the condition is verified does not seem to be in doubt. On this point, see Masi, ‘*Stipulatio praepostera*’ (note 97 above), 188.

128 In fact, the connection between *tum* and *ex hac die* seems forced and almost contradictory.

129 Along the same lines, see Masi, ‘*Stipulatio praepostera*’ (note 97 above), 191; Id., *Studi sulla condizione nel diritto romano*, Milano 1966, 154ff.

130 ‘*Stipulatio praepostera*’ (note 97 above), 189.

This must also have been clear to Theophilus who, moreover, also being a member of the commission appointed to draft the Justinian Code,¹³¹ must have had first-hand knowledge of the reforming constitution of Leo, and as an *illustris iuris peritus* must have been well aware of its exact significance and the new notion of *praeposteri reprehensio* it introduced, different from the classic notion and thus from the one he wished to clarify in the Paraphrase. Thus, perhaps taking into account only the two fragments quoted, or perhaps also other sources more directly regarding the *stipulatio praepostera*, which have not survived to this day, he tried to exemplify as best he could to his young students that the *stipulatio praepostera inutilis* was that in which the promisor had undertaken to effect the performance to which he was committed at a time definitely prior to that in which the condition could be fulfilled. The clear, simple way that the classical notion is explained by the Paraphrast, in a presentation that takes account of the development of the institute without being disorienting, reflects the depth of his personality and reveals the teacher's undoubted teaching abilities.

The two passages of the Paraphrase on which we have focused in this study are thus a clear example of how the personality of the authoritative professor of law is reflected in his commentary. And it was bound to be so, considering the words with which Justinian addresses the *antecessor* in the constitutions: *Haec* (§ 1), *Summa* (§ 2), *Tanta*/Δέδωκεν (§ 9) and in the inscription of the const. *Omnem*. These words are universally known, but we should stress their constant reference to the effective post held by Theophilus,¹³² that of professor of law which, in a process of continuous improvement, became a fundamental part of his personality. In 528, Theophilus is referred to as *Iuris in hac alma urbe doctor*.¹³³ This definition is confirmed in 529¹³⁴ and positively implemented in the following year in the const. *Tanta* where the words *Theophilum virum illustrem magistrum iurisque peritum in hac splendidissima civitate* have the addition of *laudabiliter optimam legum gubernationem extendentem*.¹³⁵ Even more eulogistic is the formula, partly different, of the const. Δέδωκεν (§ 9): καὶ πρὸς γε ΘΕΟΦΙΛΟΥ, τοῦ μεγαλοπρεπεστάτου μαγίστρου καὶ νόμους ἐπὶ τῆς βασιλίδος ταύτης πόλεως σεμνῶς τε καὶ ἀγρόπνως καὶ τῆς

131 On this topic, cf., for all, Lokin/Van Bochove, 'Compilazione – educazione – purificazione' (note 11 above), 122, and Russo Ruggeri, 'Gaio, la Parafrasi e le 'Tre anime' di Teofilo' (note 4 above), 201ff.

132 In Byzantium, senior state officials held at least two posts: one effective and one honorary. The more prestigious post, moreover, brought with it a title from among *clarissimus*, *spectabilis* and *illustris*.

133 This is the year, as is known, which saw the issue of the const. *Haec*, which contains this expression in § 1.

134 In § 2 of the const. *Summa*.

135 This expression has even led scholars to believe that he had 'un suo ruolo come sovrintendente dell'insegnamento giuridico a Costantinopoli'. See Lokin/Van Bochove, 'Compilazione – educazione – purificazione' (note 11 above), 123.

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διδασκαλικῆς ἐπιτηδεύσεως ἄξιως διδάσκοντος.¹³⁶ At the same time, the const. *Omnem*, which introduced a radical reform of the studies ‘che mirava in sostanza ad una utilizzazione anche didattica di tutte le compilazioni fino ad allora predisposte’,¹³⁷ in the *inscriptio*, addressed to eight *antecessores*, first of all in fact mentions Theophilus, who evidently must have been the most eminent among them.

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136 Latin transl.: ‘et praeterea a Theophilo magnificentissimo magistro et leges in Imperatoria hac civitate graviter et vigilanter et pro magistrali professione condigne docente’.

137 See R. Bonini, *Introduzione allo studio dell'età giustiniana*, Bologna 1977, 54.

