

**THE ΟΡΟΣ ΗΤΟΙ ΕΤΥΜΟΛΟΓΙΑ ΟΥ ΤΕΣΤΑΜΕΝΤΟΥ  
ΑΝΔ ΤΗΝ ΠΡΟΒΛΗΜΑΤΙΝ ΤΩΝ ΠΗΓΩΝ ΕΝ ΤΗ ΠΑΡΑΦΡΑΣΕΙ ΤΟΥ ΘΕΟΦΙΛΟΥ**

**1.**

Among those scholars who have focused on the etymology and definitions of *testamentum* in the Roman sources, especially in jurisprudential writings,<sup>1</sup> the *principium* of Theoph. 2,10 (Περὶ διαθήκης καταστάσεως)<sup>2</sup> has attracted, in general, little interest.

The text is often mentioned, in fact, only to recall its correspondence to Inst. 2,10pr. I would say in advance that this symmetry between the two texts is, in truth, only partial. The *principium* of Theoph. 2,10, in fact, cannot be estimated, *sic et simpliciter*, as a

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1 As we will see, it is discussed in the literature whether the sources have handed down an ‘etymology’ or a ‘definition’ of *testamentum*: on this problem, see *infra*, esp. n. 23, and nn. 20, 30-32.

2 In the *Codex Messanensis*, now *Kilianus* – following its rediscovery in the library of the University of Kiel; on this point, in particular, J.H.A. Lokin, ‘Theophilus Antecessor. I. The Codex Messanensis, hodie Kilianus; II. Was Theophilus the Author of the Paraphrase?’, *TRG* 44 (1976), 337-344 (337-339) (repr. in: Id., *Analecta Groningana ad ius graeco-romanum pertinentia*, (ed. Th.E. van Bochove), Groningen 2010, 89-97 (89-91)) – the title is rubricated δὲ τεσταμεντῶν ὀρίανθῶν. Other manuscripts have also the aforementioned rubricated title (see in this regard the recent edition of the Paraphrase of Theophilus edited by J.H.A. Lokin, R. Meijering, B.H. Stolte, N. van der Wal, *Theophili antecessoris Paraphrasis Institutionum*. With a translation by A.F. Murison, Groningen 2010, 292). While I could not directly consult the *codex Messanensis*, I had the opportunity to see a microfilm of the printed edition, edited in 1638, by Fabrot of Theophilus’ Paraphrase, with on the margins the collation between Fabrot’s printed edition and the *codex Messanensis* by A.T. Cario. It is a text consulted at the beginning of the twentieth century by scholars as a result of the disappearance of the *Messanensis* (for further details see once again Lokin, ‘Theophilus Antecessor. I’ (aforementioned in this note), 337f.). Initially, it was preserved at the *Königliche Bibliothek* of Berlin (SPK, Mss. graec. qu. 28 a/b: see W. Studemund/L. Cohn, [eds.], *Die Handschriften-Verzeichnisse der Königlichen Bibliothek zu Berlin*. XI: *Verzeichniß der griechischen Handschriften*, 1, Berlin 1890, 185, nn. 330-331) and it, in turn, disappeared in the aftermath of World War II; see in this respect, among many, U. Robbe, ‘Una nuova ricerca su la Parafrasi di Teofilo’, in: *Studi in onore di Giuseppe Grosso*, I, Torino 1968, 149-157 (156-157); Lokin, ‘Theophilus Antecessor. I’ (aforementioned in this note), 338; information also confirmed in the most recent contribution by S. Corcoran, ‘Murison and Theophilus’, *BICS* 53/2 (2010), 85-124 (99-100). It should be noted that the collation (with a description of the *Messanensis* hand written by that philologist: *Beschreibung des Codex Messanensis der Institutionen des Theophilus antecessor von Aug. Theod. Cario*), is now preserved, as far as can be seen, in the *Biblioteka Jagiellońska* of Krakow (nn. inv. 18085, 18086).

duplicate of Inst. 2,10pr. This reason alone justifies at least a different consideration of its content.

To the above must be added that the *principium* in question provides, in my opinion, opportunities for investigation with regard to the problem of the sources used by the author of the Paraphrase, other than the Institutes of Justinian (and, more generally, also with regard to the activities and teaching methods of the *antecessor*,<sup>3</sup> being two inextricably linked aspects).

This question has always interested scholars of the Greek Paraphrase of the Institutes of Justinian.

A very common approach in the literature considers almost certain that, in processing the material, subsequently merged into the text of the Paraphrase,<sup>4</sup> Theophilus<sup>5</sup>

3 On the term *antecessor* (transliterated ἀντικήνωρ) ‘usato nelle costituzioni programmatiche riguardanti il *Corpus Iuris* e nella letteratura giuridica d’età giustiniana (...) per indicare gli insegnanti di diritto’, probably ‘mutuato dal lessico delle attività militari, con riferimento alle quali il termine allude a coloro che vanno in avanscoperta, che precedono le truppe (per la ricognizione dei luoghi)’ see, recently, G. Falcone, ‘Premessa per uno studio sulla produzione didattica degli *antecessores*’, in: J.H.A. Lokin/B.H. Stolte, [eds.], *Introduzione al diritto bizantino. Da Giustiniano ai Basilici*, Pavia 2011, 147-157 (147-149), with literature cited and discussed therein (esp. nn. 1-3, 7).

4 It is hardly necessary to mention that there has long been a question in the literature on the formation of the text of the Paraphrase, whether it can, directly or indirectly, be attributed to Theophilus or to one or more student-editors transcribing what was explained orally by the *antecessor* during lessons. Among scholars, this latter hypothesis seems to prevail, for which I refer, in the only recent literature, to G. Falcone, ‘La formazione del testo della Parafrasi di Teofilo’, *TRG* 67 (2000), 417-431 (further references are cited therein, p. 417 n. 1). In this contribution Falcone puts forward arguments to show that ‘i tasselli da cui è composta la trattazione della Parafrasi – traduzione del ῥητόν, eventuali προθεωρία, definizioni, esempi, *excursus* storici e dogmatici, ἐρωταποκρίσεις, prestiti del manuale gaiano – costituiscono elementi di un unico intreccio espositivo originario (pronunziato da Teofilo in sede di lezione)’ (Falcone, p. 431); in this respect, see also Lokin/Meijering/Stolte/Van der Wal, *Theophili antecessoris Paraphrasis* (note 2 above), XIV-XV; and 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 3 above), 99-146 (esp. 122 ff.). More recently, turning back to this topic, Falcone (‘Premessa’ (note 3 above), 147 ff.), moving from the exegesis of a passage (Theoph. 3,10,1), which contains a reference to the discussion which remains, in effect, ‘in sospeso’, unlike others in the Paraphrase (cf. p. 156 and n. 30), he suggests that it may be ‘un residuo di una precedente stesura scritta o almeno di un brogliaccio scritto di lezioni svolte anteriormente all’entrata in vigore della riforma degli studi (...) stesura integrale o brogliaccio che il docente avrebbe tenuto presente anche nello svolgimento della nuova didattica (riproponendo meccanicamente anche quel rinvio, che sarebbe poi rimasto, sulla falsariga del nuovo ῥητόν, privo di seguito)’ (p. 157). On the question concerning the drafting of Theophilus’ Paraphrase, see also C. Russo Ruggeri, ‘Theophilus and the student publisher: a resolved issue?’, published in the present volume.

5 It is known that in the past various doubts have been advanced by scholars about the attribution of the Greek Paraphrase of the Institutes of Justinian to the same Theophilus, professor in Constantinople,

also had access to Gaius' Institutes<sup>6</sup> (and probably to the *Res cottidianae*, a work which is, moreover, one of the sources of the ῥητόν).<sup>7</sup> It is my belief, however, that the study of the

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to whom Justinian entrusted the preparation of his Institutes. In this sense, Ferrini in particular has expressed himself – changing with respect to his initial orientation (cf. C. Ferrini, 'Intorno all'opportunità di una nuova edizione della Parafrasi di Teofilo e intorno alle fonti di questa, ai sussidi e al metodo', repr. in: *Opere di Contardo Ferrini*. I: Studi di diritto romano bizantino, Milano 1929, 1-14; Id., 'La Parafrasi di Teofilo ed i Commentari di Gaio', repr. in: *Opere*, I, 15-26) and returning on several occasions to the subject in many of his works: 'Note critiche al libro IV dello Pseudo-Teofilo', repr. in: *Opere*, I, 27-40; 'La Glossa torinese delle Istituzioni e la Parafrasi dello Pseudo-Teofilo', repr. in: *Opere*, I, 41-56 (esp. 51, 86); 'Prolegomena a "Institutionum graeca paraphrasis Theophilo antecessore vulgo tributa" pars prior (Berolini, MDCCCLXXXIII)', repr. in: *Opere*, I, 57-69 (58); and esp., 'Delle origini della Parafrasi greca delle Istituzioni', repr. in: *Opere*, I, 104-138 (esp. 112 ff.); 'Scolii inediti allo Pseudo-Teofilo contenuti nel manoscritto Gr. Par. 1364', repr. in: *Opere*, I, 139-224 (esp. 147 ff.). However, doubts as regard to the authorship of the Paraphrase seem to have been practically set aside by subsequent literature 'specie dopo l'individuazione di un paio di scolii che già verso la metà del VI secolo attribuiscono PT all'antecessore costantinopolitano'. Thus G. Falcone, 'Il metodo di compilazione delle Institutiones di Giustiniano', *AUPA* 45/1 (1998), 223-426 (278 n. 132 with bibliography, 305-306). In the most recent literature, see also Lokin/Meijering/Stolte/Van der Wal, *Theophili antecessoris Paraphrasis* (note 2 above), XVIII ff. and C. Russo Ruggeri, 'Teofilo e la spes generandi', *IVRA* 58 (2010), 169-195 (172 n. 12, with further bibliographical references).

6 It is Ferrini who first stated, on several occasions in his writings, the correspondence of some parts of Theophilus' Paraphrase with the Institutes of Gaius, reasoning on the basis that the author of the Paraphrase had used a Greek version of the Institutes of Gaius or a Greek commentary on it (among Ferrini's writings mentioned in n. 5, see esp. 'La Parafrasi di Teofilo ed i Commentari di Gaio'; 'La Glossa torinese delle Istituzioni e la Parafrasi dello Pseudo-Teofilo'; 'Delle origini della Parafrasi greca delle Istituzioni'; *cui adde* 'I commentari di Gaio e l'indice greco delle Istituzioni', repr. in: *Opere*, I, 81-104). Essential bibliography on the subject can be found in Falcone, 'Il metodo di compilazione' (note 5 above), 306 n. 236, *cui adde* that mentioned, more recently, by Russo Ruggeri, 'Teofilo' (note 5 above), 171 n. 2. It is hardly necessary to mention that in support of numerous contacts between the Paraphrase of Theophilus and the Institutes of Gaius, Ferrini has indicated several passages of the Paraphrase, classifying them according to whether they are 'a) Osservazioni che si leggono in Gaio e che furono omesse nelle Istituzioni imperiali, ma conservate in Teofilo', 'b) Osservazioni che si leggono in Teofilo e che non si ponno riferire che ad un commento di Gaio', 'c) Passi in cui Teofilo abbandona il testo delle Istituzioni imperiali per accostarsi a quello di Gaio'. In this sense Ferrini, 'La Parafrasi di Teofilo' (note 5 above), esp. 19 ff. After all, in general, it has been amply demonstrated in the literature that 'le tracce, appariscenti o più occulte, degli elementi pregiustiniani (...) nelle collezioni bizantine' of the *antecessores* 'coevi a Giustiniano' are 'piuttosto numerose': thus S. Riccobono, 'Il valore delle collezioni giuridiche bizantine per lo studio critico del "Corpus iuris civilis"', in: *Mélanges Fitting*, II, Montpellier 1908, 465-497 (= Id., *Scritti di diritto romano*. I: Studi sulle fonti, Palermo 1957, 365-392).

7 On this orientation, I refer mainly to V. Arangio-Ruiz, 'La compilazione giustiniana e i suoi commentatori bizantini (da Ferrini a noi)', in: G.G. Archi, [ed.], *Scritti di diritto romano in onore di Contardo Ferrini pubblicati dalla R. Università di Pavia*, Milano 1946, 83-117 (esp. 91ff.); P. De Francisci, 'Saggi di critica della Parafrasi greca, delle Istituzioni giustiniane', in: *Studi in onore di Biondo Biondi*, I, Milano 1965, 3-72 (esp. 6-7, and 71); B. Santalucia, 'Contributi allo studio della Parafrasi di Teofilo', *SDHI* XXXI (1965), 171-198 (with further references cited in n. 4); M.

problem of the sources used by the author of the Paraphrase may extend well beyond the search for possible correspondences and differences between the text of the Paraphrase and the Institutes, that of Justinian and of Gaius (in the version passed down in the Verona palimpsest).<sup>8</sup>

Interesting perspectives of research in this direction may be drawn from those parts of the text of the Paraphrase that do not find correspondence in either of the two above-cited students' textbooks, in which, for example, the antecessor makes his considerations, especially in the form of παραγραφαί.<sup>9</sup> Bringing me to this conviction it was precisely the study of certain paragraphs contained in the tenth title of the second book of Theophilus' Paraphrase, which incidentally I had already had reason to study in the area of my research on the development of *testamentum per aes et libram*.<sup>10</sup> Following on from that research, in a fortuitous manner, came my interest in the problem of sources in Theophilus' Paraphrase, unsurprising if we reflect on the opportunity to follow a clue, as suggested by several parties in the literature, according to which 'lo studio delle fonti, strettamente connesso con quello dei singoli istituti in esse trattati, dà maggiori e più sicuri risultati

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Amelotti, *Appunti su Giustiniano e la sua compilazione*, II<sup>2</sup>, (ed. M. Bianchini), Torino 1983, 112; more recently, Falcone, 'Il metodo di compilazione' (note 5 above) 311 and n. 244.

- 8 On the usefulness of the Greek Paraphrase of the Institutes of Justinian in the study of the Institutes of Gaius, see, among others, in particular C.A. Maschi, 'La Parafrasi greca delle Istituzioni attribuita a Teofilo e le glosse a Gaio', in: *Scritti di diritto romano in onore di Contardo Ferrini* (note 7 above), 321-342, who considers the Paraphrase 'là dove coincide alla lettera e forse di più (...) là dove risulta dalla sostanza un commento ampio al pensiero di Gaio, (...) un sussidio unico per la critica di Gaio e la ricostruzione del diritto classico' (322). However, it is clear that the employment of the Paraphrase for criticism of the *Gaii Institutiones* requires numerous precautions. On the one hand, it should be noted that even if Theophilus may have taken the Institutes of Gaius directly into account, there is no evidence that he used only the text surviving in Verona's palimpsest, since it is in fact contradicted by clues raised by some scholars (see, for example, among many, P. De Francisci, 'Saggi di critica' (note 7 above), 26). On the other hand, it should be noted that in the Greek Paraphrase '(a parte gli equivoci e le sviste) e pur ammesso che contenga un sostrato classico che qua e là affiora, prevalenti sono gli sviluppi e le stratificazioni dovute alla dottrina bizantina ed a successive elaborazioni collegate con l'insegnamento, e sempre probabili le alterazioni dipendenti dalla tradizione manoscritta' (72). In the literature, see also esp. H.L.W. Nelson, *Überlieferung, Aufbau und Stil von Gai Institutiones*, Leiden 1981, 267ff.
- 9 On this approach, according to which it can reasonably be envisaged that 'dietro la Parafrasi ci sia del materiale classico non confluito nelle *Institutiones*' and that it is a phenomenon 'forse più ricorrente di quanto si creda o di quanto appaia a primo acchitto, nel senso che, anche laddove Teofilo sembri avanzare una propria personale spiegazione o esprimere una personale opinione, non è affatto detto che l'interpretazione proposta non tragga origine da uno spunto classico, che il Parafraste avrebbe recepito e sviluppato'; see C. Russo Ruggeri, 'Teofilo' (note 5 above), *passim*, esp. 175ff.
- 10 F. Terranova, *Ricerche sul testamentum per aes et libram*. I: Il ruolo del *familiae emptor* (con particolare riguardo al formulario del testamento librato), Torino 2011.

dello studio delle fonti in generale, quasi completamente astratto da quello dei singoli istituti in esse trattati'.<sup>11</sup>

In the present investigation, dedicated to the exegesis of the ὄρος ἡτοι ἐτυμολογία of the term *testamentum* suggested by the author of the Paraphrase, special attention is given therefore to those parts of the text in which the *antecessor* would seem to develop ideas independently from both the ῥήτόν and the Institutes of Gaius. It is hardly necessary to point out that this present paper would never claim to exhaust the study of the possible sources consulted by Theophilus.<sup>12</sup> It contains rather a working hypothesis, which it is hoped will be a starting point for further investigation of this complex and controversial issue, to go deeper and develop, if I have the opportunity, in future work on this subject.

## 2.

I report immediately the text of this study, namely Theoph.<sup>13</sup> 2,10pr.:

Πρὸ τῶν ἄλλων ἀναγκαῖον εἰπεῖν τὸν τῆς διαθήκης ὄρον ἡτοι ἐτυμολογίαν. ἡ διαθήκη παρὰ Ῥωμαίους λέγεται TESTAMENTUM, ἐντεῦθεν δεξαμένη τὴν ἐτυμολογίαν QUOD TESTATIO MENTIS EST,<sup>14</sup> ἐπειδὴ μαρτυρίαν ἔχει τῆς τοῦ τελευτήσαντος διανοίας.

11 I quote from Robbe, 'Una nuova ricerca' (note 2 above), 156.

12 That the text of the Paraphrase could offer many further avenues of research had already been suggested in the past, for example, by Robbe, 'Una nuova ricerca' (note 2 above), 150-151, who had proposed studying 'i passi conformi delle Istituzioni di Gaio e di quelle di Giustiniano, dai quali diverge esplicitamente la Parafraresi greca'.

13 I here transcribe the passages of the Paraphrase of Theophilus according to the new edition (Lokin/Meijering/Stolte/Van der Wal, *Theophili antecessoris Paraphrasis* (note 2 above)), showing also the English translation made by Murison (on this translation, see the Prolegomena of the edition, § 5.2, XLIV-XLV; and also Corcoran, 'Murison and Theophilus' (note 2 above), 93ff.), which I have compared, where it was deemed necessary, both with the oldest Latin translations by C.A. Fabrot, *Theophili Antecessoris Institutionum libri IV*, (editio secunda), Parisiis 1657, who already in his *editio prima* proceeded to revise the previous Latin edition of Curtius, and by W.O. Reitz (*Theophili antecessoris Paraphrasis Graeca Institutionum Caesarearum*, I-II, Hagae Comitatus 1751), and that by C. Ferrini (*Institutionum graeca Paraphrasis Theophilo antecessoris vulgo tributa*, I, Berolini 1884, II, Berolini 1897; repr. Aalen 1967).

14 In the critical edition of Reitz (*Theophili antecessoris Paraphrasis*, I (note 13 above), 328) there is the presence of a scholium immediately after the words QUOD TESTATIO MENTIS EST, reported in square brackets. For this reason, reasonably, such terms are not reported in the most recent Dutch edition, on which I based my restitution of the text. However, they are indirectly mentioned in the above edition, in Murison's English translation (cf. Lokin/Meijering/Stolte/Van der Wal, *Theophili antecessoris Paraphrasis* (note 2 above), 293): 'Testamentum is so called *quod testatio mentis est* (because it is a solemn declaration of intention)'. In this regard see also *infra*, n. 41.

Murison: First of all, it is necessary to state the definition or etymology of *testamentum*, the Roman word for a will. *Testamentum* is so called *quod testatio mentis est* (because it is a solemn declaration of intention), for it contains a solemn declaration of the intention of the deceased.<sup>15</sup>

Famously this text is not modelled on the exposition of the *genera testamentorum* recognized by *jus civile*, reported in the Verona manuscript of the Institutes of Gaius, wherein Gaius does not ‘say what a testament is, but how one made and makes a testament’.<sup>16</sup> Furthermore it corresponds only partially, as already mentioned, to the correlated *principium* of the Institutes of Justinian:

Inst. 2,10pr.

*Testamentum ex eo appellatur, quod testatio mentis est.*<sup>17</sup>

It should be noted, in fact, that in the Institutes of Justinian there are neither the initial clarification of the *antecessor* on the opportunity, getting ready to treat the διαθήκη – that is according to Theophilus the ‘*testamentum* of the Romans’ (ἡ διαθήκη παρὰ Ῥωμαίους

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- 15 See also the Latin translations by Fabrot: ‘Necessarium est ante omnia testamenti dicere definitionem siue etymologiam. Testamentum autem Latinè dicitur, Graecè διαθήκη, inde notationem habens, quòd testatio mentis fit. Habet enim testationem mentis defuncti’; by Reitz: ‘Ante alia necesse est dicere testamenti definitionem sive notationem. testamentum autem, apud Romanos dicitur, quod Graecis διαθήκη, inde notationem sive veriloquium habens, quod testatio mentis fit: etenim testimonium habet mentis defuncti’; and by Ferrini: ‘In primis proponenda est definitio siue ἐτυμολογία. testamentum dicitur apud Romanos inde uocis originem ducens quod testatio mentis sit, testimonium enim defuncti uoluntatis in se continet’.
- 16 Thus P. Zannini, ‘Rappresentazione dinamica del fenomeno giuridico nelle Istituzioni di Gaio’, in: *Il modello di Gaio nella formazione del giurista. Atti del convegno torinese 4-5 Maggio 1978 in onore del Prof. Silvio Romano*, Milano 1981, 367-384 (373). In this sense, already, G. Scherillo, *Corso di diritto romano. Il testamento*, I, Milano 1967, 6: ‘(...) Gaio, come al solito non definisce, ma comincia subito con il ripartire in *genera*’.
- 17 The same etymology is reiterated in a gloss upon Inst. 2,10pr., contained in the so-called Turin Gloss on Justinian’s Institutes: see, among editions of the text, A. Alberti, *La “Glossa Torinese” e le altre glosse del Ms. D. III. 13 della biblioteca nazionale di Torino*, Torino 1933, 57 nr. 206<sup>a</sup>: *Nota testamentum dictum quod testatio mentis est*. Different, however, is the definition of *testamentum* reported in the Turin Gloss corresponding to Inst. 2,17pr. (cf. A. Alberti, *La “Glossa Torinese”*, 73 nr. 281), fairly faithful to Isid., *Orig.* 5,24,2-6. It seems to me that the Turin Gloss has not drawn inspiration from the Paraphrase of Theophilus in dealing with the definition of *testamentum*, as can be verified, on the contrary, in many other passages referred to in the Turin Gloss, especially ‘nello strato più antico dell’apparato di glosse, risalente, con ogni verosimiglianza, agli anni tra il 543 e il 546 d.C.’. See on this issue G. Falcone, ‘I prestiti dalla Parafraresi di Teofilo nella cd. Glossa Torinese alle Istituzioni’, *SDHI* LXII (1996), 255-286.

λέγεται TESTAMENTUM)<sup>18</sup> – to ‘discuss, before anything else, the definition or etymology’ of the word (Πρὸ τῶν ἄλλων ἀναγκαῖον εἰπεῖν τὸν τῆς διαθήκης ὄρον ἥτοι ἐτυμολογίαν)<sup>19</sup> – nor the explanation of the supposed<sup>20</sup> definition or etymology of *testamentum* given by the author of the Paraphrase at the conclusion of the *principium*, on which it is worth stopping for a moment, also because of the various translations of the terms μαρτυρία and διάνοια suggested by scholars (ἐπειδὴ μαρτυρίαν ἔχει τῆς τοῦ τελευτήσαντος διανοίας).

Therefore I focused my attention on these two portions of the *principium* in an attempt to find out whether, behind that which seems, on a first reading, mere personal explanation or clarification for teaching purposes by the *antecessor*, it is possible to track down the sources (legal or otherwise) which he could have used in addition to those already traditionally identified thus far by scholars of Theophilus’ Paraphrase.

It is important also to remember that this etymology of the term *testamentum* (from *testatio mentis*) is mentioned in Theophilus’ Paraphrase in another place as well, Theoph. 2,12,1, under the title Τίσιον οὐ συγκεχώρηται διαθήκας ποιεῖν (*Quibus non est permissum testamentum facere*):

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- 18 It is known, in truth, how profoundly different is the institute of the διαθήκη – in terms of origin and structure – to that of the *testamentum* and how a term is missing in the Greek language which can translate *testamentum* exactly. Thus P. Bonfante, ‘La διαθήκη ellenica e la “donatio mortis causa”’, repr. in: Id., *Scritti giuridici varii*. I: Famiglia e successione, Torino 1926, 417-429. For a first orientation, cf. L. Beauchet, ‘Testamentum (Droit grec)’, *DS* 5 (1919, repr. 1969), 136-138; B. Kübler, ‘Testament (juristisch)’, *PWRE* 5A (1934), coll. 966-1010 (966-985); U.E. Paoli, ‘Successioni (diritto greco)’, *NNDI* 18 (1971), 701-704 (702), with references; M. Amelotti, ‘Testamento (dir. rom.)’, *ED* 44 (1992), 459-470 (459); G. Schieman, ‘Testament (Griechenland)’, *Der Neue Pauly. Enzyklopädie der Antike* 12/1 (2001), col. 182.
- 19 It is particularly significant for the purposes of this study (in particular, in view of the comparison that I will make with D. 1,1,1pr.) that the expression ὄρος ἥτοι ἐτυμολογία occurs only in Theoph. 2,10pr. Other terms used in this *principium* are, however, characteristic of the expositional style of the Paraphrase (consider, for example, the joint use of the words ἀναγκαῖον and εἰπεῖν; read e.g. Theoph. 1,5,3; 1,14,1; 2,3pr.; 2,5,6; 2,6,7; 2,8,2; 2,14pr.; 2,20pr.; 2,22pr.; 3,3,5; 3,9,3; 3,20,1; 3,29,2; 4,1,14; 4,6,15; 4,7,4c; 4,7,7; 4,11pr.; 4,13,11; 4,15,3).
- 20 As we shall see, it is indeed an ‘instrumental’, as it were, etymology, not reliable from a philological point of view, but perfectly functional for the purposes of describing the essence of the institution. This can be seen in the use of many other etymologies suggested by the Roman jurists (consider, for instance, that of *ius* provided by Ulpian, and recorded in D. 1,1,1pr.). In this sense see, among the others, B. Biondi, ‘Valore delle etimologie dei giuristi romani’, in: *Synteleia Arangio-Ruiz*, Napoli 1964, 739-742 (739), according to whom the etymologies proposed by the Roman jurists ‘sono tutte sbagliate, ma i giuristi romani le ritenevano esatte non perchè ignari delle più elementari conoscenze filologiche, ma perchè si proponevano non, come potrebbe fare un filologo, un problema scientifico, ma intendevano ottenere uno scopo tecnico-giuridico, cioè quello di chiarire il concetto mediante una voluta, se si vuole, arbitraria derivazione verbale. Sotto tale aspetto sono tutte filologicamente errate ma giuridicamente esatte. Ciò spiega come sono invocate dai romanisti per la ricostruzione dell’istituto romano’. Other references on the subject of definitions and etymologies proposed by Roman jurists are cited *infra*, esp. n. 29.

## TERRANOVA

Ἐν δευτέρῃ τάξει οὐ δύνανται διατίθεσθαι οἱ ἄνηβοι· οἶδας γὰρ ὅτι TESTAMENTUM λέγεται TESTATIO MENTIS, ἐστέρηται δὲ διανοίας ὁ ἄνηβος. οὐ διατίθενται οὐδὲ οἱ μαινόμενοι, ἐπειδὴ χηρεύουσι λογισμοῦ. ὥστε οὖν οὔτε ἄνηβος οὔτε μαινόμενος διατίθενται, ἐπειδὴ τὸ φρονεῖν τῷ μὲν οὐ προσγέγονε, τὸν δὲ ἀπολέλοιπεν. (...).

Murison: In the second place, persons under puberty are incapable of making a will: for, as you are aware, *testamentum* means *testatio mentis* (declaration of one's mind),<sup>21</sup> and a person under puberty lacks mind. Nor can madmen make a will, because they want reason. Accordingly, neither a person under puberty nor a madman can make a will, because the former has not yet attained judgment and the latter has lost it. (...).<sup>22</sup>

### 3.

Firstly, the opening lines of the *principium* subject to investigation should, therefore, be taken into consideration. They seem to have the connotations of a real and true methodological declaration.

This circumstance certainly requires a preliminary review of the 'definitions' of *testamentum*,<sup>23</sup> handed down through Roman sources, first of all those contained in

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21 The explication indicated in parentheses in the translation of Murison, 'declaration of one's mind', translates the words ἥτοι μαρτυρία διανοίας reported in the Reitz edition of the Paraphrase.

22 Read also the Latin translations of this passage by Fabrot: 'Secundò testamentum facere non possunt impuberes. Nosti enim testamentum esse testationem mentis. At impuberes mente & sensu caret. Item non testantur furiosi, quia ratione carent. Neque igitur impubes, neque furiosus testantur. Prudentia enim & animi iudicium alteri nondum adfuit, alterum autem reliquit (...)'; by Reitz: 'Secundo loco testari non possunt impuberes: nosti enim, testamentum dici testationem mentis sive iudicii; atqui iudicii expertus est impubes. Neque testantur furiosi, quoniam ratione ac mente carent: itaque nec impubes nec furiosus testatur, quia iudicium illi necdum contigit, hunc autem defecit (...)'; and by Ferrini: 'Praeterea nequeunt testari impuberes. scis enim testamentum mentis dici testationem: iudicio autem impubes caret. neque furiosi testantur quia mente carent. itaque neque impubes neque furiosus testantur, cum alter iudicium nondum sit adeptus, alterum iam deseruerit (...)'.  
23 Discussed in the literature is whether that of *testamentum*, handed down in the sources, can be considered as a real 'definition' or, rather, as an 'etymology' of the word; the opinion of the scholars varies also depending on the source that has been handed down, since each text presents slight variations (to confine myself to a single example, different expressions occur in the sources: *contestatio mentis*, *testatio mentis* or *sententia voluntatis*: read Gell. 7,12,1-4; Tit. Ulp. 20,1; D. 28,1,1) and, at times, a more complete concept (read e.g. Tit. Ulp. 20,1 and D. 28,1,1). On this question see the bibliography cited in nn. 30-32. In the older literature, there is no lack of people who also speak, in this regard, of 'etymological allusion': I refer on this point to the bibliography cited by D. Manin, *Ricerche sopra li testamenti*, Venezia 1820<sup>2</sup>, 188 n. 4. Further, there is the different question concerning the accuracy of the referred definition of *testamentum*, reported in particular in Tit. Ulp. 20,1 and D. 28,1,1 (Mod. 2 *pand.*). In this regard see, for example, G. Vismara, 'Appunti intorno alla heredis institutio', repr. in: Id., *Scritti di storia giuridica*. VI: Le successioni ereditarie,



jurisprudential texts, in order to examine if in them we may recognize elements able to shed light on the sources from which the *antecessor* could have drawn inspiration in formulating the text in examination. To this end, fundamental for consideration are:

D. 28,1,1 (Mod. 2 pand.)

Testamentum est voluntatis nostrae iusta sententia de eo, quod quis post mortem suam fieri velit.<sup>24</sup>

Tit. Ulp.<sup>25</sup> 20,1

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- Milano 1988, 39-106 (100f.), with further references cited therein, who well highlights how some scholars have qualified these definitions as ‘inesatte’ and ‘erronee’, essentially for their vagueness ‘la quale poi si risolve in ciò, che non viene posto in luce il requisito essenziale della *heredis institutio*, ritenuto fondamentale per il diritto romano’. On this last point, see F. Terranova, ‘Sulla natura ‘testamentaria’ della cosiddetta *mancipatio familiae*’, *AUPA* 53 (2009), 299-335 (301ff., esp. 306 and n. 12 with references). I agree with the considerations made on this point by B. Biondi, *Successione testamentaria e donazioni*, Milano 1955<sup>2</sup>, 18f., who explains that these definitions of *testamentum* have been qualified in the literature imprecise, wrong and not responding to Roman ideas because ‘a noi moderni, abituati a costruire gli atti giuridici sotto il comune denominatore della volontà, possono sembrare singolari tali enunciazioni e la insistenza sulla *voluntas* come base giuridica dell’atto giacchè l’elemento della volontà non è caratteristico del testamento ma di qualsiasi atto giuridico. Alquanto remota dalla nostra mentalità appare anche la considerazione della *testatio* come essenza dell’atto, giacchè un giurista moderno difficilmente può intendere come nella affermazione della volontà dinanzi ai testimoni possa risiedere la essenza e la stessa denominazione dell’atto’.
- 24 Read also the corresponding B. 35,1,1 = D. 28,1,1 (rest.; BT 1559/6-7): Διαθήκη ἐστὶ δικαία βούλησις ὧν τις θέλει μετὰ θάνατον αὐτοῦ γενέσθαι. The διαθήκη is understood as δικαία βούλησις in many Byzantine and meta-Byzantine era’s sources, that nearly faithfully reiterate the definition of *testamentum* dating back to Modestinus. See, to limit myself to only a few examples, Proch. 21,1: Διαθήκη ἐστὶ δικαία βούλησις ὧν τις θέλει μετὰ θάνατον αὐτοῦ γενέσθαι; SBM Δ XIII,1: Διαθήκη ἐστὶ δικαία βούλησις ὧν τις θέλει μετὰ θάνατον αὐτοῦ γενέσθαι; Hex. 5,1,1: Διαθήκη ἐστὶ δικαία βούλησις, ὧν τις ἐθέλει μετὰ θάνατον αὐτοῦ γενέσθαι. Moreover, among authors of meta-Byzantine age see, for example, Theophilus, bishop of Campania in Macedonia and Michael Fotinoopoulos (18th. cent.); cf. Θεόφιλος, *Πρόχειρον Νομικόν*, Κωνσταντινουπόλις 1887, 137: Κατὰ γενικὸν ὄρισμὸν ἡ διαθήκη εἶναι πρᾶξις δι’ ἧς διατάττει τις τὰ περὶ τῶν ἑαυτοῦ, διὰ τὸν μετὰ θάνατον χρόνον. Κατὰ δὲ τοὺς Ῥωμαίους “διαθήκη ἐστὶ δικαία βούλησις, ὧν τις ἐθέλει μετὰ θάνατον αὐτοῦ γενέσθαι”; M. Φωτεινοπούλου, *Νομικὸν Πρόχειρον*, P.J. Zerou, [ed.], Athenai 1959, 90, I. 37,1: Διαθήκη ἐστὶ δικαία βούλησις καὶ θέλησις ἐκείνων, τὰ ὁποῖα θέλει τιναὶ νὰ γένου μετὰ θάνατον αὐτοῦ. Other authors of the meta-Byzantine era who give a similar definition of διαθήκη are indicated by A. D’Emilia, ‘Note esegetiche intorno ad alcune definizioni contenute nella Parafraresi greca delle Istituzioni giustiniane’, *ASD* 5-6 (1961-1962), 137-158 (150-151, and 150 n. 72).
- 25 For the restitution of texts from the *Tituli ex corpore Ulpiani* I have used the edition by E. Böcking, *Domitii Ulpiani quae vocantur fragmenta sive excerpta ex Ulpiani libro singulari regularum*, Lipsiae 1855<sup>4</sup>, which I compared from time to time with the recent editions carried out by, respectively, M. Avenarius, *Der pseudo-ulpanische “liber singularis regularum”. Entstehung, Eigenart und Überlieferung einer hochklassischen Juristenschrift*, Göttingen 2005 and G. Luchetti/E. Mattioli/I. Pontoriero, ‘Tituli ex corpore Ulpiani XXVIII qui Codice Vaticano Reginae 1128 traditi sunt’, in: G.

Testamentum est mentis nostrae iusta contestatio,<sup>26</sup> in id sollemniter facta, ut post mortem nostram ualeat;

Gell. 7,12,1-4<sup>27</sup>

1. Seruius Sulpicius iureconsultus, uir aetatis suae doctissimus, in libro de sacris detestandis secundo, qua ratione adductus ‘testamentum’ uerbum esse duplex scripserit, non reperio. 2. Nam compositum esse dixit a mentis contestatione. 3. Quid igitur ‘calciamento’, quid ‘paludamentum’, quid ‘pauimentum’, quid ‘uestimentum’, quid alia mille per huiusmodi formam producta, etiamne ista omnia composita dicemus? 4. Obrepsisse autem uidetur Seruio, uel si quis est, qui id prior dixit, falsa quidem, sed non abhorrens neque inconcinna quasi mentis quaedam in hoc uocabulo significatio (...).<sup>28</sup>

It is not appropriate here, of course, to enter into the debatable question of the value of the definitions and etymologies provided, in general, by the Roman jurists.<sup>29</sup> For the purpose

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Purpura, [ed.], *Revisione ed integrazione dei Fontes Iuris Romani Anteiusianiani (FIRA). Studi preparatori*. II. Auctores – Negotia, Torino 2012, 9-84.

- 26 The noun *testatio* recurs then in Tit. Ulp. 20,9: *In testamento quod per aes et libram fit, duae res aguntur, familiae mancipatio et nuncupatio testamenti. nuncupatur testamentum in hunc modum: tabulas testamenti testator tenens ita dicit HAEC VT IN HIS TABVLIS CERISVE SCRIPTA SVNT, ITA DO, ITA LEGO, ITA TESTOR; ITAQVE VOS QVIRITES TESTIMONIVM PRAEBITOTE. quae nuncupatio et testatio uocatur*. In reference to wills, in D. 28,1,20,8 (Ulp. 1 *ad Sab.*) there is further the expression *suprema contestatio: Et veteres putaverunt eos, qui propter sollemnia testamenti adhibentur, durare debere, donec suprema contestatio peragatur*.
- 27 I quote this passage from the teubnerian edition in two volumes by M. Hertz (Lipsiae 1861). Cf. also O. Lenel, *Palingenesia iuris civilis*, II, Lipsiae 1889 (repr. Rome 2000), col. 324 (Serv. 9), who limits himself referring only to § 1. The *summarium* to the chapter in question and the following §§ of the exposition (7,12,4-6) are reported *infra*, n. 53.
- 28 Among other sources which have handed down a ‘definition’ of the term *testamentum* read also Isid., *Orig.* 5,24,3: *Testamentum uocatum quia, nisi testator mortuus fuerit, nec confirmari potest nec sciri quid in eo scriptum sit, quia clausum et obsignatum est; et inde dictum testamentum, quia non ualet nisi post testatoris monumentum, unde et Apostolus (Hebr. 9,17), ‘Testamentum,’ inquit, ‘in mortuis confirmatur.’ Testamentum sane in Scripturis sanctis non hoc solum dicitur, quod non ualet nisi testatoribus mortuis, sed omne pactum placitum testamentum uocabant; Lact., *Inst.* 4,20: *Testamentum uocant; quia nisi testator mortuus fuerit, nec confirmari testamentum potest, nec sciri quid in eo scriptum sit, quia clausum et obsignatum est*. On this point, I refer also to Quint., *Decl.* 308.*
- 29 In this regard see, without any pretense of completeness, L. Ceci, *Le etimologie dei giureconsulti romani raccolte e illustrate con introduzione storico-critica*, Torino 1892 (repr. Roma 1966), esp. 3ff.; D. Behrens, ‘Begriff und Definition in den Quellen’, *SZ* 74 (1957), 352-363; S. Riccobono, ‘Iurisprudentia’, *NNDI* 9 (Torino 1963), 348-375 (365); Biondi, ‘Valore delle etimologie’ (note 20 above), 739ff.; R. Martini, *Le definizioni dei giuristi romani*, Milano 1966, *passim* (also Id., ‘Ancora in tema di definiciones’, *SS* 96 (1984), 146-168; ‘Di nuovo sulla “definitio” fra retorica e giurisprudenza’, *Labeo* 41 (1995), 169-180; “‘Definitio” come “delimitazione di fattispecie”?’’, *Labeo* 45 (1999), 463-464); A. Carcaterra, *Le definizioni dei giuristi romani. Metodo, mezzi e fini*, Napoli 1966, *passim*; B.

of this research it is sufficient to observe, for the moment, that in the above reported texts we do not find any preliminary consideration concerning the need for an etymological presentation of the word aimed at a more complete understanding of the testamentary succession, in the same manner as can be read in Theoph. 2,10pr.

From the comparison between the texts transcribed above may be inferred that the believed etymology, used for purposes of definition,<sup>30</sup> of *testamentum* (from *testatio mentis*) reported in Justinian's Institutes, and borrowed in the Greek Paraphrase of Theophilus, would seem essentially inspired – as it is almost unanimously considered in the literature – by that reported in *Tituli ex corpore Ulpiani (mentis nostrae iusta contestatio, in id sollemniter facta, ut post mortem nostram ualeat)*.<sup>31</sup>

According to many scholars, moreover, the latter would have its foundation, in turn, in the reflections (*testamentum (...) a mentis contestatione*) of a jurist of the Republican

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Albanese, “‘Definitio periculosa’: un singolare caso di “duplex interpretatio””, repr. in: Id., *Scritti giuridici*, I, Palermo 1991, 703-778; A. Guarino, ‘Giavoleno e le definizioni’, repr. in: Id., *Pagine di diritto romano*, V, Napoli 1994, 155-167; M. Miglietta, ‘Giurisprudenza romana tardorepubblicana e formazione della “regula iuris”’, *SCDR* 25 (2012), 187-243 (esp. 204 ff.).

30 It is, in fact, an ‘instrumental’ etymology, since its use is functional in defining the institution in its basic characteristics (in this regard, see *supra* n. 20). That the derivation of *testamentum* from *testatio mentis* is, in essence, ‘un’etimologia che coincide con la stessa definizione dell’istituto’ is supported by Biondi, *Successione* (note 23 above), 13, 18. For Martini, *Le definizioni* (note 29 above), 238 n. 276 only ‘una etimologia e non una definizione (neppure etimologica) è (...) quella di *testamentum* in I. 2.10 pr. (...) Diversamente *Tit. Ulp.*, 20.1’ (likewise already Vismara, *Appunti* (note 23 above), 100). This approach is far from new in the literature: see in this sense, for example, D. Gothofredus, *Institutiones Theophilo antecessore Graeco interprete, Imper. Iustiniani Institutionum libri III*, Lugduni 1609, 187: ‘ἐτυμολογία igitur est, cum dicitur testamentum esse mentis testatio, non definitio’. A different opinion is expressed by C. Ferrini, ‘Sulle fonti delle Istituzioni di Giustiniano’, in: *Opere di Contardo Ferrini*. II: Studi sulle fonti del diritto romano, Milano 1929, 307-419 (365), who asserts that the expression contained in Inst. 2,10pr. is a true ‘definizione etimologica’ (on the assumption of Ferrini’s regarding the possible sources of Inst. 2,10pr. see also *infra*, n. 31).

31 Among others, see Ferrini, ‘Sulle fonti’ (note 30 above), 365, who advances the doubt that the ‘etymological definition’ in question was borrowed from the Institutes of Florentinus, rather than from those of Ulpian, since the former would seem to allude to a similar definition in D. 28.1.24 (Flor. 10 *inst.*) wherein the terms *iudiciorum suorum testatio* occur. On this point, see also Scherillo, *Corso di diritto romano. Il testamento*, I (note 16 above), 6, who also hypothesizes that ‘i compilatori giustiniani desunsero il passo da qualche altro manuale di istituzioni, verosimilmente da quello di Fiorentino, dalle quali anche altrove i giustiniani desunsero le definizioni mancanti in Gaio’. It is appropriate, however, to emphasize that the fact that the etymology of *testamentum* mentioned in Inst. 2,10pr., and handed down also in Theoph. 2,10pr., was taken from the Institutes of Ulpian finds even more comforting clues also, I think, in what can be drawn from the exegesis of a passage in Theophilus’ Paraphrase earlier reproduced in the text and to which I shall return shortly (Theoph. 2,12,1).

era, Servius Sulpicius Rufus: which is apparent, in fact, in the text of the *Noctes Atticae* reported above (Gell. 7,12,1-4).<sup>32</sup>

#### 4.

If I were to rely, then, only on a comparison of the *principium* of Theoph. 2,10, and the other texts, which have passed on the etymology of the term *testamentum*, I would certainly reach the conclusion – although in a purely hypothetical vein – that the notation of methodological order contained in Theoph. 2,10pr. was without precedent in Roman jurisprudential writings and should rather be considered as the result of a personal reflection on behalf of the author of the Paraphrase.

However, extending this research also to jurisprudential texts not regarding the matter of wills, but which have passed on, more generally, other definitions and etymologies provided by jurists, there is one that has a certain similarity with the terminology and discussion of matter reported in Theoph. 2,10pr., even though the *sedes materiae* is completely different. It is a well-known passage by Ulpian, in which he discusses the etymology of *ius*, placed by the compilers in the opening fragment of the Digest:

D. 1,1,1pr. (Ulp. 1 inst.)

Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. est autem a iustitiam appellatum: nam, ut eleganter Celsus definit, ius est ars boni et aequi.<sup>33</sup>

32 In this regard, among many others, cf. P. Voci, *Diritto ereditario romano*. II: Successione ab intestato. Successione testamentaria, Milano 1963<sup>2</sup>, 83; Biondi, 'Valore delle etimologie' (note 20 above), 741; more recently, G.M. Facchetti, 'All'origine del "testamentum"', *Index* 30 (2002), 227-234 (230-231); Avenarius, *Der pseudo-ulpianische* (note 25 above), 381-382; Miglietta, 'Giurisprudenza romana' (note 29 above), 212 and n. 45; A. Spina, *Ricerche sulla successione testamentaria nei responsa di Cervidio Scevola*, Napoli 2012, 114 and n. 97. Incidentally, it should be noted that it is, in fact, uncertain, from what Gellius writes, whether the fault of such an inaccurate etymology of the word *testamentum* was Servius' or whether, rather, Servius had not borrowed it from other jurist too (*arg. ex Gell. 7,12,4: (...) Servio, uel si quis est, qui id prior dixit*).

33 The literature on the text is almost unlimited. On this issue, without any pretense of completeness, see the authors cited by M. Bretone, 'Note minime su Celsus filius', *Labeo* 9 (1963), 343 n. 42; Biondi, 'Valore delle etimologie' (note 20 above), 740; Carcaterra, *Le definizioni dei giuristi romani* (note 29 above), esp. 95ff., 124-125 (with others references to 124 n. 7), 179-180; Martini, *Le definizioni* (note 29 above), 182-183, and nn. 113, 114, 116, 117, 118 (with bibliography); P. Frezza, 'La cultura di Ulpiano', *SDHI* XXXIV (1968), 363-375 (367); G. Aricò Anselmo, 'Ius publicum - ius privatum in Ulpiano, Gaio e Cicerone', *AUPA* 37 (1983), 445-787 (esp. 453 with n. 12, 471 n. 48, 564, 566 with n. 19, 736); P. Cerami, *La concezione celsina del "ius"*. Presupposti culturali e implicazioni metodologiche. I: L'interpretazione degli atti autoritativi, Palermo 1985, *passim*, with literature cited and discussed in the notes; F. Gallo, 'Sulla definizione celsina del diritto', *SDHI* LIII (1987), 7-52 (repr.

What immediately stands out, in fact, is the similarity between the initial methodological warning of Theophilus (Πρὸ τῶν ἄλλων ἀναγκαῖον εἰπεῖν τὸν τῆς διαθήκης ὅρον ἵτου ἐτυμολογίαν) and the start of the Ulpian fragment in question (*Iuri operam daturum prius nosse oportet, unde nomen iuris descendat*).<sup>34</sup>

The symmetry between the two texts does not rest, however, only on a purely stylistic and terminological plane, but also, more specifically, methodologically and relating to the content. In other words, it is not coincidence at all, in my opinion, that in order to introduce the definition and etymology of *testamentum*, Theophilus drew inspiration from this very text by Ulpian.

I consider the similarities between the two passages numerous and unambiguous.

Of interest, first of all, is that in both passages two imprecise etymologies are referred to: *jus* from *justitia* and *testamentum* from *testatio mentis*.<sup>35</sup>

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in: Id., *Opuscula selecta*, Padova 1999, 551-604) ; F. Gallo, 'Diritto e giustizia nel titolo primo del Digesto', *SDHI* LIV (1988), 1-36 (7ff.) (repr. in: *Opuscula selecta*, 607-648 (613 ff.)); A. Carcaterra, 'Concezioni epistemiche dei giuristi romani', *SDHI* LIV (1988), 37-65 (esp. 47ff.); W. Waldstein, 'Zur Problem der vera philosophia bei Ulpian', in: R. Feenstra/ A.S. Hartkamp/J.E. Spruijt/P.J. Sijpesteijn/L.C. Winkel, [eds.], *Collatio iuris romani. Études dédiées à Hans Ankum à l'occasion de son 65<sup>e</sup> anniversaire*, II, Amsterdam 1995, 607-617; P. Voci, 'Ars boni et aequi', *Index* 27 (1999), 1-22. Among the most recent studies see, in particular, A. Schiavone, 'Giuristi e principe nelle Istituzioni di Ulpiano. Un'esegesi', *SDHI* LXIX (2003), 3-56; G. Falcone, 'La "vera philosophia" dei "sacerdotes iuris". Sulla raffigurazione ulpiana dei giuristi (D. 1.1.1.1)', *AUPA* 49/2 (2004), 41-148 (on the subject also Id., 'Iuris praecepta, vera philosophia, iuris prudentia', *SDHI* LXXIII (2007), 353-387); L. Garofalo, 'L'humanitas nel pensiero della giurisprudenza classica', *Diritto@Storia* 4 (2005), (<http://www.dirittoestoria.it/4/Tradizione-Romana/Garofalo-Humanitas.htm>), *passim*; V. Marotta, 'Iustitia, vera philosophia e natura: una nota sulle Institutiones di Ulpiano', *SCDR* 19 (2006), 285-334, with literature cited in the notes (esp. nn. 2 and 3); for further bibliography see also M. Miglietta, "Servius respondit". *Studi intorno a metodo e interpretazione nella scuola giuridica serviana – Prolegomena I*, Trento 2010, 80 n. 81.

34 This assonance has already been noted by ancient editions of the Paraphrase: in this regard, Fabrot, *Theophili Antecessoris Institutionum libri IV* (note 13 above), 233 b: 'Sic Ulp. in l. i. de iust. & i. prius nosse oportet, unde nomen iuris descendat', followed by Reitz, *Theophili antecessoris Paraphrasis*, I (note 13 above), 238, col. I, b.

35 Both the etymologies of the two words, *testamentum* and *ius*, are controversial in the literature. Concerning the first, the relationship of this word with the oscan *tristaamentud* is considered as uncertain by etymologists. Cf., among the others, Ceci, *Le etimologie* (note 29 above), 82-83 n. 2. There is no doubt, however, that it has the same root as the other terms, such as *testis* and *testatio*. On this issue I refer to the bibliography reported in F. Terranova, 'Osservazioni su Gai 2.108', *AUPA* 52 (2007-2008), 281-326 (293-294 n. 27). Concerning the origin of *ius*, cf. for example C. Gioffredi, 'Religione e diritto nella più antica esperienza romana', *SDHI* XX (1954), 259-302 (286); R. Santoro, 'Potere ed azione nell'antico diritto romano', *AUPA* 30 (1967), 103-566 (198 n. 1 with references); U. von Lübtow, 'Studien zum altrömischen Kaufrecht', in: *Festschrift Paul Koschaker*, II, Weimar 1939, 113-140 (125-126).

Also of note in this respect is that – as the literature has not failed to point out – the etymological indication provided by Ulpian, the very way in which it is presented advising ‘appositamente dell’opportunità di considerare la derivazione del vocabolo (*Iuri – descendat*)’ (instead of ‘(...) indicare direttamente (...) l’etimologia del termine’) è funzionale “ad un preciso disegno compositivo”: ‘riempire di sostanza il dato lessicale, al fine di instaurare tra i due elementi collegati, la *iustitia* e il *ius* (*et est a iustitia appellatum*)’, un rapporto che non è di mera provenienza terminologica, bensì anche di trasmissione di valori’ and this explains, among other things, how Ulpian can *descendere* ‘*jus*’ from ‘*justitia*’.<sup>36</sup>

Now, in my opinion, the same ‘compositional design’ seems to emerge even from the beginning of Theophilus’ treatment of the form of wills, wherein the author of the Paraphrase does not merely reproduce the definition of *testamentum* contained in the ῥητόν, but suggests the opportunity, in preparing to deal with the *genera testamentorum*, to firstly report the definition or etymology of *testamentum*, believing the latter preparatory for a full understanding of the structure and content of the testamentary institution.

That Theophilus may have drawn inspiration from the above fragment of Ulpian is then further confirmed, from my point of view, in the closing of the *principium*, where he attempts to clarify his etymological indication: ἐπειδὴ μαρτυρίαν ἔχει τῆς τοῦ τελευτήσαντος διανοίας.

Before dwelling on the value of this explanation, it is appropriate to reflect on the fact that also in D. 1,1,1 the *principium* closes with a ‘dato ulteriore che serve a confermare’ the origin of the term ‘e che attiene alla sostanza del concetto, ne caratterizza l’essenza: la definizione di Celso, che, appunto, si lega all’etimologia tramite un ‘*nam*’ (*ut nam eleganter Celsus definit, jus est ars boni et aequi*).<sup>37</sup> It is the conjunction ἐπειδὴ (ἐπειδὴ μαρτυρίαν ἔχει τῆς τοῦ τελευτήσαντος διανοίας)<sup>38</sup> in Theoph. 2,10pr. which, almost compliantly, performs the function of a link in relation to the origin of the term *testamentum* from *testatio mentis*, similar to that which *nam* plays in D. 1,1,1pr.

Finally, equally decisive seems to be the use by Theophilus of the expression ὄρος ἧτοι ἐτυμολογία, which occurs uniquely in this passage of the Paraphrase. It is known, in fact, that even the definition proposed by Ulpian and passed down through the *Digesta* is an ‘etymological definition’. Indeed, of all the various etymologies used in order to define an institution,<sup>39</sup> this must have certainly been among the best known, especially for

36 Thus Falcone, ‘La vera philosophia’ (note 33 above), 45.

37 See, once again, Falcone, ‘La vera philosophia’ (note 33 above), 45.

38 In other editions, which precede that of Fabrot, there reads: καὶ γὰρ (see in proposito *infra* n. 41).

39 On this point, *supra* nn. 20, 30.

someone, like Theophilus, who had also served on the committee responsible for the compilation of the *Digesta* (as well as, a few years earlier, the first Code and Institutes).<sup>40</sup> In the light of what I have just noted, one may reasonably assume that Theophilus could have had in mind the fragment, excerpt from Ulpian's Institutes, chosen by members of the commission to be placed at the beginning of the entire collection.

5.

Now, I shall look at this latter portion of the *principium*, wherein Theophilus pauses to explain why *testamentum* derives from *testatio mentis*.

It should be taken into consideration that this closing was, in effect, subject to different interpretations in the literature, due not so much (or, at least, not only) to the presence of certain words identified by many editors as a scholium (which has also resulted in partial differences in restitutions of the text),<sup>41</sup> but rather to a different translation of the terms μαρτυρία and διάνοια reported therein.

I shall focus on the latter angle. First, as regards the term διάνοια, in my opinion, the Latin word with which this noun is translated in some Latin editions of the Paraphrase, i.e. *voluntas*,<sup>42</sup> is to be rejected. From my perspective it is clear, in fact, that the Greek word in question is used to render as close as possible the noun *mens* reported in the ῥητόν.

This is so true that, in the Byzantine and meta-Byzantine sources that in reporting the definition of *testamentum* are inspired by D. 28,1,1 (Mod 2. *pand.*), precisely the fragment in which the word *voluntas* recurs, the Greek word βούλησις is always used.<sup>43</sup>

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40 Cf. *supra*, n. 5.

41 The restitution, proposed in the *editio princeps* of the Paraphrase by Viglius van Aytta van Zuichem (1534), based solely on the *codex Marcianus* – cf. on this point Lokin/Meijering/Stolte/Van der Wal, *Theophili antecessoris Paraphrasis* (note 2 above), XXXVII-XXXVIII – and also reiterated in the other editions – e.g., Gothofredus, *Institutiones Theophilo antecessore* (note 30 above), 187-188 –, is the following: (...) ἐπειδὴ μαρτυρία διανοίας ἐστὶ καὶ γὰρ μαρτυρίαν ἔχει τῆς τοῦ τελευτήσαντος διανοίας. It differs from that proposed in subsequent editions, in which the tract ἐπειδὴ μαρτυρία διανοίας ἐστὶ is identified as a scholium – cf., in this sense, Reitz, *Theophili antecessoris Paraphrasis*, I (note 13 above), 328, *sub* I and, more recently, Lokin/Meijering/Stolte/Van der Wal, *Theophili antecessoris Paraphrasis* (note 2 above), 292 – and which, alternatively, suggest a different restitution of the text. See Reitz: (...) [ἐπειδὴ μαρτυρία διανοίας ἐστὶ] καὶ γὰρ μαρτυρίαν ἔχει τῆς τοῦ τελευτήσαντος διανοίας; Ferrini: (...) ἐπειδὴ μαρτυρίαν ἔχει τῆς τοῦ τελευτήσαντος διανοίας; in accordance, more recently, Lokin/Meijering/Stolte/Van der Wal: (...) ἐπειδὴ μαρτυρίαν ἔχει τῆς τοῦ τελευτήσαντος διανοίας.

42 Ferrini offers this translation of the Greek word διάνοια: cf. *Institutionum graeca Paraphrasis*, I (note 13 above), 154: '(...) testimonium enim defuncti uoluntatis in se continet'. In this regard, see also *infra*, n. 45, with further references. Other editions of the Paraphrase translate, however, the Greek term διάνοια with the Latin word *mens*: cf. *supra*, n. 15.

43 Cf. *supra*, n. 24.

That, moreover, the Latin word *mens* (rather than *voluntas*) is more appropriate in translating in a technical sense the term *διάνοια* is confirmed by what can be read in Theoph. 2,12,1, another place in the Paraphrase where the etymology of *testamentum* is recorded:

Ἐν δευτέρᾳ τάξει οὐ δύνανται διατίθεσθαι οἱ ἄνηβοι· οἶδας γὰρ ὅτι TESTAMENTUM λέγεται TESTATIO MENTIS, ἐστέρηται δὲ διανοίας ὁ ἄνηβος. οὐ διατίθενται οὐδὲ οἱ μαινόμενοι, ἐπειδὴ χηρεύουσι λογισμοῦ. ὥστε οὐδ' οὔτε ἄνηβος οὔτε μαινόμενος διατίθενται, ἐπειδὴ τὸ φρονεῖν τῷ μὲν οὐ προσγέγονε, τὸν δὲ ἀπολέλοιπεν (...).

Murison: In the second place, persons under puberty are incapable of making a will: for, as you are aware, *testamentum* means *testatio mentis* (declaration of one's mind), and a person under puberty lacks mind. Nor can madmen make a will, because they want reason. Accordingly, neither a person under puberty nor a madman can make a will, because the former has not yet attained judgment and the latter has lost it (...).

Note, first, that in the Institutes of Gaius there is lacking a discussion of the subjects *quibus non est permissum testamenta facere* carried out in such terms.<sup>44</sup> Second, some differences may also be recognised by comparison with the corresponding passage from the Institutes of Justinian (Inst. 2,12,1). In the latter text, in fact, the definition or etymology of *testamentum* – recorded only in Inst. 2,10pr. – is not mentioned in the same context and we read instead that:

Praeterea testamentum facere non possunt impuberes, quia nullum eorum animi iudicium est: item furiosi, quia mente carent (...).

In Theoph. 2,12,1, indeed, the fact that Theophilus once again makes reference to the etymology of *testamentum* is aimed, in my opinion, at understanding the reasons that lead to the exclusion from the *testamenti factio activa* of certain subjects: namely *impuberes* and *furiosi*.

The reasoning of the *antecessor* is in fact the following: given that *testamentum* means *testatio mentis* (TESTAMENTUM λέγεται TESTATIO MENTIS), *impuberes* are excluded from the *testamenti factio activa*, as they are without *mens* (ἐστέρηται δὲ διανοίας ὁ ἄνηβος). The same consideration can be made for the *furiosi*, as devoid of reason (οὐ διατίθενται οὐδὲ οἱ μαινόμενοι, ἐπειδὴ χηρεύουσι λογισμοῦ). As regard to the existence of the requirement of *mens*, there is however a difference between *impuberes* and *furiosi*: for

44 On this point, read Gaius 2,112-113.



the *antecessor*, the first cannot validly testify because they have not yet acquired full intellectual faculty, the second because they are deprived of the same (ὥστε οὖν οὔτε ἄνηβος οὔτε μαινόμενος διατίθενται, ἐπειδὴ τὸ φρονεῖν τῷ μὲν οὐ προσγέγονε, τὸν δὲ ἀπολέλοιπεν).

The reading of Theoph. 2,12,1 further confirms, in my opinion, the appropriateness of translating the term διάνοια, also present in Theoph. 2,10pr., with the noun *mens*, as suggested by several editions of the Paraphrase and rendered in Murison's English translation with the word 'intention'.

Although for many scholars this question changes little the substantive meaning of the text,<sup>45</sup> it seems to me to be significant for a correct approach to the problem of the possible sources used in the Greek Paraphrase of Justinian's Institutes.

In fact, continuing my investigation, I realized that the reasoning behind Theoph. 2,12,1, could have been elaborated by Theophilus in light of having read of some of the

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45 In effect, according to some scholars, the difference between *mens* and *voluntas* did not stick out so much at the time of translation. Among the older editions of the Paraphrase, see, in this sense, Gothofredus, *Institutiones Theophilo antecessore* (note 30 above), 187 d: 'διάνοιαν posuit, pro mente, & pro voluntate'. Following this approach, moreover, even the difference between the use of the term *mens* in the etymological definition of *testamentum* reported in some sources (in particular those listed above: Gell. 7,12,1-4; Tit. Ulp. 20,1; Inst. 2,10pr.; and the text of present investigation, Theoph. 2,10 pr.) and the use of the noun *voluntas* found in D. 28,1,1 (Mod. 2 *pand.*) would not essentially be worth noting. Read in this sense, for example, Biondi, *Successione* (note 23 above), 18: 'L'elemento della *voluntas* come contenuto della *testatio* è collocato al primo piano. Su questo punto le definizioni coincidono: la *testatio mentis* dell'Epitome corrisponde alla *voluntatis sententia* di Modestino'; and Scherillo, *Corso di diritto romano. Il testamento*, I (note 16 above), 7-8, for whom this difference does not have 'un significato sostanziale, posto che *mens* e *voluntas* sono in buona sostanza (e con buona pace di chi ritiene il contrario) espressioni equivalenti, al punto che nei testi si trova con eguale frequenza tanto *mens testantis* quanto *voluntas testantis*' (p. 8). For a different opinion, however, see D'Emilia, 'Note esegetiche' (note 24 above), 150: 'In un altro passo (2, 10 pr.) per spiegare la creduta etimologia di testamento (da *testatio mentis*), il parafraste aggiunge ἐπειδὴ μαρτυρίαν ἔχει τῆς τοῦ τελευτήσαντος διανοίας, mettendo così in evidenza più l'elemento intellettuale (διάνοια), come già nella definizione dei cosiddetti *Tituli ex corpore Ulpiani (mentis nostra iusta testatio)*, anziché quello volitivo (βούλησις), come nella definizione di Modestino (*voluntatis nostrae iusta sententia*)'. In the literature there are also scholars who suggested the existence of an alleged modification by Justinian's compilers that would have replaced, precisely, *mentis (...)* *contestatio* with *voluntatis (...)* *sententia*. Cf., among others, Voci, *Diritto ereditario romano*. II (note 32 above), 83: 'La definizione di Modestino doveva essere, nell'originale, eguale a quella dell'Epitome: Modestino era discepolo di Ulpiano, e nulla di strano che la ripettesse. Ma le sue parole non potevano rimanere intatte nei Digesti: il venir meno delle solennità classiche indusse i compilatori a scolorire la definizione'. In almost analogous sense, also Scherillo, *op. cit.*, 8-9, followed by Facchetti, 'All'origine del "testamentum"' (note 32 above), 231. Differently, on the question, Avenarius, *Der pseudo-ulpianische* (note 25 above), 382-383: 'Bei Modestin bringt der Testator stattdessen einen Willen (*voluntas*) zum Ausdruck. Die *voluntas* bildet dabei den Schwerpunkt des Testamentsbegriffs. Darin zeigt sich wahrscheinlich der Einfluß Julians. Dessen willentheoretische Lehre hatte der vorklassischen Ansicht, der Wille stehe im Mittelpunkt des Testaments, zu neuem Einfluß verholfen'.

above-mentioned Roman jurisprudential texts, such as the introduction of the exposition of the *genera testamentorum* developed in the Institutes of Ulpian. I think this finds a foothold in Tit. Ulp. 20,12-13:

12. Inpubes, licet sui iuris sit, facere testamentum non potest, quoniam nondum plenum iudicium animi habet. 13. Mutus, surdus, furiosus, itemque prodigus cui lege bonis interdictum est, testamentum facere non possunt: mutus, quoniam uerba nuncupationis loqui non potest; surdus, quoniam uerba familiae emptoris exaudire non potest; furiosus, quoniam mentem non habet, ut testari de ea re possit;<sup>46</sup> prodigus, quoniam commercio illi interdictum est, et ob id familiam mancipare non potest.

Note that in this text the lack of *testamenti factio activa* of the *impubes* and *furiosus* are not correlated in the same way as to what can be inferred from Theoph. 2,12,1. However, the way in which the text is devised, and in particular, the reference to the exclusion of the possibility of *furiosus* testifying *quoniam mentem non habet, ut testari de ea re possit*, could have offered an opportunity for the author of the Paraphrase to elaborate the reasoning that we read in Theoph. 2,12,1.<sup>47</sup>

The above contributes, on the one hand, to further prove the conviction expressed by many authors, that the etymology of *testamentum* handed down in the Institutes of Justinian and the Greek Paraphrase was inspired by the Ulpian definition of *testamentum*

46 I accept the restitution *de ea re* proposed in the cited edition of the *Tituli ex corpore Ulpiani* – cf. Böcking, *Domitii Ulpiani quae vocantur fragmenta* (note 25 above), 60 –, and in the most recent edition of Luchetti/Mattioli/Pontoriero, ‘Tituli ex corpore Ulpiani’ (note 25 above), 58. Some editions however restate *de sua re*, or even *recte eam*, in place of *de ea re*. See, in that regard, Avenarius, *Der pseudo-ulpanische* (note 25 above), 392, c), who includes the restitution *de sua re*, and Luchetti/Mattioli/ Pontoriero, 58 n. 640.

47 On this point, among many scholars, Avenarius, *Der pseudo-ulpanische* (note 25 above), 392: ‘Der *furiosus* hat keine *mens*, und ist deswegen an der Manzipation gehindert, weil diese eine *contestatio mentis* erfordert (§ 1.)’. Although it is an interpretative hypothesis that forces the restitution of Tit. Ulp. 20,13 – *Mutus, surdus, furiosus, itemque prodigus, cui lege bonis interdictum est, testamentum facere non possunt (...) furiosus, quoniam mentem non habet, ut testari de ea re possit (...)* – and which, therefore, I do not consider plausible, it seems to me of a certain interest, for the purposes of this study some consideration about the restitution *de ea re*, mentioned in the critical edition of the *Tituli ex corpore Ulpiani* by Böcking, *Domitii Ulpiani quae vocantur fragmenta* (note 25 above), 60: ‘Zur-Neddenius coniecit verbum *re* eiciendum esse, ut pronomen *ea* ad *mentem* referatur. (...) Ulpianus testamentum mentis testationem esse definit (§ 1.); itaque qui mentem nullam habet, neque *de ea* cum effectu, i.e. *re*, testari potest. hoc enim modo verba *de ea re* malim interpretari quam familiam mancipandam iisdem significatam accipere, quod quidem totius loci structura vetare videtur’. In light of this interpretation, I wonder in fact – although I realize that mine is more like a suggestion – if the author of the Paraphrase, reading Ulpian’s exposition of wills, could not have fallen into the same interpretative misunderstanding, assuming that the terms *de ea* related to *mens*, rather than *familia*.

(*arg. ex Tit. Ulp. 20,1*), which in turn was probably suggested by that given by Servius (*arg. ex Gell. 7,12,1-4*). On the other hand, it constitutes a further indication to support the hypothesis that Theophilus made use of a much more complex and varied range of, primarily jurisprudential, sources. These were probably part of his cultural knowledge and experience, formed not only during his teaching activities but also years of participation in the commission appointed by Justinian to prepare the first *Codex*, the *Digesta* and the *Institutiones*.<sup>48</sup>

As to the value of *μαρτυρία*, once again it should be emphasized that, in my opinion, Theophilus specifically chose a noun which was as close as possible to the meaning which the Latin term *testatio* has in the *ρήτόν*. The ambiguity with which the latter term is used in the Latin sources<sup>49</sup> has rendered also the translation (and, as a consequence, its interpretation) given by scholars of the term *μαρτυρία* quite varied.<sup>50</sup> Of course, both terms contain in themselves an unambiguous reference to an element that had a fundamental importance in Roman civil wills (both in the two most ancient forms, *calatis comitiis* and *in procinctu*, and in the will of classical and republican ages, *per aes et libram*) to the point of integrating the structure *ad substantiam*: namely the presence of witnesses.<sup>51</sup> The terms *testatio* and *contestatio* present in the definitions of the word *testamentum* handed down in the sources, as well as the corresponding Greek term *μαρτυρία* used by

48 In this sense, in the most recent literature, C. Russo Ruggeri, ‘Teofilo e la spes generandi’ (note 5 above), esp. 175ff.

49 See on this point sources and bibliography cited and discussed in Terranova, ‘Sulla natura’ (note 23 above), 327ff.

50 Some editions of the Paraphrasis, in fact, render the Greek word *μαρτυρία* with the Latin word ‘testatio’. Cf. Fabrot, *Theophili Antecessoris Institutionum libri IV* (note 13 above), 233-234. Other scholars translate it with the Latin noun ‘testimonium’. I refer, for example, to Gothofredus, *Institutiones Theophilo antecessore* (note 30 above), 187f.; Reitz, *Theophili antecessoris Paraphrasis*, I (note 13 above), 528; Ferrini, *Institutionum graeca Paraphrasis*, I (note 13 above), 154. In the French edition of M.J.C. Frégier, *Paraphrase grecque des Instituts de Justinien*, Paris 1847, 257, the term ‘attestation’ recurs; in the German one of K. Wüstemann, *Paraphrase der Institutionen Justinian’s*, I, Berlin 1823, 357 we find ‘Zeugniß’; and finally, in the recent Dutch version of Lokin/ Meijering/Stolte/Van der Wal, *Theophili antecessoris Paraphrasis* (note 2 above), 293, Murison makes use of the expression ‘solemn declaration’.

51 Read, among the many, M. Amelotti, ‘Il testamento romano’, in: Id., *Scritti giuridici*, Torino 1996, 402-419 (402), who infers from the definitions of *testamentum*, handed down in the sources, ‘una caratteristica formale del testamento, quella di compiersi davanti ai testimoni. Più esattamente, sotto il profilo etimologico, *testamentum* va ricondotto allo stesso radicale di *testari*, nel senso appunto di ‘chiamare a testimoni’’. I may be permitted to refer to Terranova, *Ricerche sul testamentum*, I (note 10 above), 221ff., 341ff., with sources and bibliography cited and discussed in the notes (in particular, nn. 471, 474, 557, 558, 723, 751).

Theophilus indicate, therefore, in my view, ‘la volontà del disponente manifestata dinanzi ai testimoni’.<sup>52</sup>

## 6.

The considerations regarding the value of the two nouns δῖανοια and μαρτυρία lead me to propose, therefore, the following translation of the ending of the *principium*, where Theophilus is concerned with providing an explanation of the etymology of *testamentum*, clarifying that the word in question derives from *testatio mentis*:

(...) since it includes in itself (*scilicet*: in its meaning) the declaration in front of witnesses of the intentions of the deceased.

I already mentioned that, as is mostly believed in the literature, the definition or etymology of the term *testamentum* reported in the *Iustiniani Institutiones* (and, consequently, in its Greek Paraphrase) retrace in a concise form the broadest definition to be found in the *Tituli ex corpore Ulpiani*. As further confirmation of the hypothesis that Theophilus had drawn inspiration from the etymological definition of the term formulated by Ulpian, I have put forward, as we have seen, a further indication of the possible origin of the reasoning behind Theoph. 2,12,1 as can be read in Tit. Ulp. 20,13 regarding the exclusion from testifying of the *furiosi*. We have also briefly mentioned the hypothesis suggested by several parties in the literature that this definition of Ulpian was, in turn, based on that developed by the jurist Servius Sulpicius Rufus and recorded in the *Noctes Atticae* by Gellius.

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52 Cf. Biondi, *Successione* (note 23 above), 18, who adds: ‘La presenza dei *testes* non ha soltanto lo scopo di precostituire una documentazione, ma in certo modo ha carattere costitutivo, come dimostra l’inquadramento della incapacità dei testimoni nella cerchia della *testamentifatio*’. It should be noted also that regardless of the multiple values assumed in the sources of the term *testatio* takes, it is also present in the *Glossae graeco-latinae* as a true synonym for *testamentum* because both terms are used interchangeably to translate the Greek word διαθήκη. This may be seen in the *Corpus Glossariorum Latinorum: Corpus glossariorum latinorum a Gustavo Loewe inchoatum auspiciis Academiae litterarum saxonicae*. Vol. II: *Glossae latinograecae et graecolatinae*, ediderunt G. Goetz et G. Gundermann, Lipsiae 1888, 271/9: Διαθήκη *hoc testamentum testatio*. This is not the only source from which a near real assimilation between *testatio* and *testamentum* may be inferred. Moreover, it should not be neglected that in the classical age, the term *testatio* meant, as is known, also *testamentum*, understood as the real written document containing the provisions of the last will of the deceased. So G.G. Archi, ‘Oralità e scrittura nel “testamentum per aes et libram”’, repr. in: Id., *Scritti di diritto romano*. II: Studi di diritto privato, 2, Milano 1981, 735-770 (748), for whom *testatio* (specifically, in Tit. Ulp. 20,9) assumes in some instances the meaning of ‘*instrumentum* redatto davanti ai testimoni e da questi poi sigillato con i propri *signa*’.

Now, it is worth pausing once again to examine the passage of the *Noctes Atticae* in which the definition of the term is recorded (Gell. 7,12,1-4), since the latter is clearly formulated by Servius with an intent which is not merely etymological but – as with the definition of *jus* given by Ulpian – with the value of searching for a meaning which can illuminate the essence of the institution itself. I once again provide the text below for the convenience of the reader:

Gell. 7,12,1-4

1. Seruius Sulpicius iureconsultus, uir aetatis suae doctissimus, in libro de sacris detestandis secundo, qua ratione adductus ‘testamentum’ uerbum esse duplex scripserit, non reperio. 2. Nam compositum esse dixit a mentis contestatione. 3. Quid igitur ‘calciamentum’, quid ‘paludamentum’, quid ‘pauimentum’, quid ‘uestimentum’, quid alia mille per huiusmodi formam producta, etiamne ista omnia composita dicemus? 4. Obrepsisse autem uidetur Seruio, uel si quis est, qui id prior dixit, falsa quidem, sed non abhorrens neque inconcinna quasi mentis quaedam in hoc uocabulo significatio (...).<sup>53</sup>

Not without irony, Gellius begins by saying that he could not understand why on the basis of justification the jurist Servius Sulpicius, the most learned man of his time, wrote in his second book *De sacris detestandis* that the word *testamentum* is composed of two terms, having affirmed that it is made up of *mens* and *contestatio*. He adds, almost wanting to make the affirmation of the jurist even more incredible, what should we then make of terms such as *calciamentum*, or *paludamentum*, or *pauimentum*, or *uestimentum*, and an infinite number of other words formed with such a termination – that perhaps these too are all composite nouns? However, the antiquarian, in conclusion, although led to believe that the allusion to the *mens* within the word *testamentum* has misled Servius (or anyone else asserting this beforehand), does not consider the latter, albeit incorrect, out of place or inappropriate.

For the purposes of the investigation it is precisely such conclusive assessments that Gellius draws from inexact composition (*a mentis contestatione*) of the term *testamentum*. In spite of the premises from which he starts, he cannot help admitting that the idea that

53 Of certain interest is also the continuation of the source and the *summarius* to that chapter, respectively, Gell. 7,12,4-6: 4. (...) sicut hercle C. quoque Trebatius eadem concinnitas obrepsit. 5. Nam in libro de religionibus secundo: ‘sacellum’ est, inquit, locus paruus deo sacratus cum ara. Deinde addit uerba haec: ‘Sacellum’ ex duobus uerbis arbitror compositum ‘sacri’ et ‘cellae’, quasi ‘sacra cella’. 6. Hoc quidem scripsit Trebatius; sed quis ignorat, ‘sacellum’ et simplex uerbum esse et non ex ‘sacro’ et ‘cella’ copulatum, sed ex ‘sacro’ deminutum? and 7,12, summ.: Quod neque testamentum, sicuti Seruius Sulpicius existimauit, neque sacellum, sicuti C. Trebatius, duplicia uerba sunt, sed a testatione productum [alterum], alterum a sacro imminutum.

the word *testamentum* in some senses contains a reference to the *mens*, although etymologically incorrect,<sup>54</sup> it is nonetheless a consideration neither inappropriate nor devoid of merit. This definition, moreover, expresses fully what in fact happened in reality when a person ‘made a testament’, that is, in substance, declared the provisions of his last will in front of witnesses.

In light of the considerations of the antiquarian, following which there is *quasi mentis quaedam in hoc uocabulo significatio*, one also better understands and contextualises, in my opinion, the closing lines of the *principium* of Theoph. 2,10 in which the *antecessor* expresses the content value (and not only formal) of the derivation of *testamentum* from *testatio mentis*, and that surprisingly resembles, in a sense, the reflections of the antiquarian, almost as if the author of the Paraphrase could have known, in some way, the content.

It should be noted, moreover, that even in the Justinian era the idea that the will was nothing other than *testatio*,<sup>55</sup> i.e. a declaration before witnesses, effectively defined the essence of the institution, even more so if we pay attention to the fact that ‘(...) in tutte le forme di testamento, ordinarie e straordinarie, riconosciute in ogni tempo dai romani, mai si prescinde dalla presenza dei testimoni’.<sup>56</sup>

The explanation given by Theophilus about the meaning of the etymology of *testamentum*, in my view, far from being isolated, or the result of a personal reflection by the *antecessor*, unseen in the writings of other authors, lies within the jurisprudential evolution of the concept of *testamentum* that has its roots in the Republican era. And there remains an echo of this even in the Greek Paraphrase of the Institutes of Justinian, wherein it is even more obvious and pronounced than in the *Iustiniani Institutiones* themselves.<sup>57</sup>

## 7.

Pulling together the threads of the discussion thus far to conclude these few, brief pages, it may be too hasty to state with certainty that Theophilus had the chance to draw *prima manu* even from the *Noctes Atticae* of Aulus Gellius. In view, however, of what has so far

54 It is clear, in fact, that ‘*mentum* è una semplice terminale, che nulla ha a che fare con *mentis*’. Cf. Biondi, ‘Valore delle etimologie’ (note 20 above), 741. In this regard, also J. Perrot, *Les dérivés latins en “-men” et “-mentum”*, Paris 1961, 65ff., and, in the only more recent Roman literature, Miglietta, ‘Giurisprudenza romana’ (note 29 above), 212-213 with n. 47.

55 Cf., for example, Corpus glossarium latinorum, II, 271/9 (note 52 above): Διωθηκη *hoc testamentum testatio*.

56 I textually quote from Biondi, ‘Valore delle etimologie’ (note 20 above), 741.

57 Different is the fate of the other definition of *testamentum*, handed down by the *Digesta*, and dating back to the jurist Modestinus (D. 28,1,1pr.), reiterated, as mentioned above (n. 41), according to an almost verbatim wording, in many Byzantine and meta-Byzantine sources.

emerged, it seems to me to be a conjecture that cannot be wholly excluded, although it should certainly be examined further in a systematic manner throughout the entire work, starting firstly from an examination of all the etymologies referred to within the Paraphrase.<sup>58</sup> Furthermore, it implies the opportunity of considering the hypothesis that the *antecessor* used, more or less directly, sources in his teaching which were not strictly jurisprudential.<sup>59</sup>

There is no doubt however, that to emerge unambiguously from my path of investigation is, on the one hand, the complexity of the text of the Paraphrase, highlighting the existence of a varied source substrate, reducible not only to the Institutes of Gaius upon which Theophilus drew, since it appears more and more and is reiterated in recent studies<sup>60</sup> – as a *modus operandi* of the *antecessor*, anything but sporadic and isolated. Also emerging, almost as a consequence, is the usefulness and importance for Roman law scholar of the Byzantine sources, which, even with all due caution,<sup>61</sup> may provide the purpose for a more complete reconstruction of the historical evolution of the Roman institutions.

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58 This path of investigation was moreover considered in many ways worthy of being already by Ferrini, ‘Intorno all’opportunità’ (note 5 above), 3: ‘(...) le etimologie frequenti in Teofilo meritano qualche studio: la fallace dichiarazione di *aedilis ab adeundo* (1, 2, 7) è in Festo (Ep. p. 13), come gentilmente m’avverte il prof. Pernice’.

59 This hypothesis is also suggested by other passages contained within the title *Περὶ διαθήκης καταστάσεως* (*De testamentis ordinandis*) of the second book (in particular, Theoph. 2,10,1; 2,10,6), which I have not discussed in these pages considering it more appropriate to deal with it in an independent work.

60 Cf. in this sense C. Russo Ruggeri, ‘Teofilo e la spes generandi’ (note 5 above), *passim*, esp. 175ff., 194-195.

61 See, as noted, above in n. 8.

