

CONJECTURES REGARDING THALELAIOS' COMMENTARY ON THE *NOVUS CODEX*

Ἐρμηνεύοντος γάρ ἐστιν τὸ λέγειν, ὅπερ νομίζει,
εἰ καὶ τινες μὴ πείθονται τῇ αὐτοῦ ἐρμηνείᾳ.
[Θαλαλαῖος, in sch. 3 ad B. 8,1,19 (BS 73/4-5)].

SUMMARY:

1. The merits of the arguments put forward in the literature to refute the proposition that Thalelaios' commentary on the *Codex repetitae praelectionis* was originally conceived for the *Novus Codex Iustinianus*, are ripe for a new investigation. 2. Sch. 1 ad B. 11,1,69 = C. 2,3,8 (BS 316/29-317/33) provides evidence of interpolation on behalf of the committee responsible for the preparation of the *Novus Codex*. Thalelaios probably commented on the constitution contained in the *Novus Codex*. 3. Referencing errors found in Thalelaios' commentary on the Code may be due to a lack of updating to the later edition of the Code and they tell much about the internal structure of the titles of the *Novus Codex*. 4. Other possible evidence of Thalelaios' *Novus Codex* commentary is represented by literal translations that correspond to intermediate textual levels between the pre-Justinian *codices* and the *Codex repetitae praelectionis*. 5. Conclusions: Thalelaios the *antecessor* commented on the constitutions contained in the *Novus Codex* and this was perhaps based on a preliminary version of the *Codex repetitae praelectionis* commentary.

1.

It is commonly thought that the only direct information on the content of the *Novus Codex Iustinianus* comes from two papyrus fragments: the P. Oxy. XV 1814 and P. Reinach Inv. 2219.¹

1 A recent critical edition of these papyri is contained in M. Amelotti/L. Migliardi Zingale, *Le costituzioni giustiniane nei papiri e nelle epigrafi*, [Legum Iustiniani imperatoris vocabularium. Subsidia, I], Milano 1985², 17-26. On P. Oxy. XV 1814, studied in relation to the *Codex repetitae praelectionis* in the perspective of the so-called law of citations, see most recently S. Corcoran, 'Justinian and his two Codes. Revisiting P. Oxy. 1814', *JJP* 38 (2008), 73-111 (75 n. 8), for an indication of the literature *adde*: R. Lambertini, *Introduzione allo studio esegetico del diritto romano*, Bologna 2006³, 104-105. On P. Reinach Inv. 2219 see G. Purpura, *Diritto, papiri e scrittura*, Torino

Yet we are convinced that our knowledge can progress further by accepting the thesis that the present work puts forward, that traces of the text of certain constitutions of the *Novus Codex* are preserved within Thalelaios' commentary² on the *Codex repetitae praelectionis*.³

We believe it is possible to adduce evidence to support the view that this *antecessor* commented on the *Novus Codex*, only adapting the commentary for the *repetita praelectio*.⁴

In any case, Thalelaios failed to update, in some cases, the commentary on the *Codex repetitae praelectionis*, probably due to a lack of time,⁵ so that in his work you can find traces of the internal structure of the titles of the *Novus Codex* and also a textual

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- 1999², 141-142. In the literature, it is well established, with a good foundation, a certain agreement about the point that in the papyri in question there are significant differences apparent between the two editions of the Code, in both the structure of the titles and in the constitutions. In this specific sense, it is useful to consult two recent works by S. Corcoran, 'After Krüger: observations on some additional or revised Justinian Code headings and subscripts', *SZ* 126 (2009), 423-439 (424-431) with further indication of literature; Id., 'The Novus Codex and the Codex Repetitae Praelectionis: Justinian and his Codes', in: *Figures d'empire, fragments de mémoire. Pouvoirs et identités dans le monde romain impérial (IIe s. av. n. è. – VIe s. de n. è.)*, Villeneuve d'Ascq 2011, 425-444 (433-444).
- 2 On the life and work of the *antecessor* Thalelaios, among the recipients of the const. *Omnem*, see: Heimbach, *Prolegomena*, 13 and 72-78; B. Kübler, s.v. 'Thalelaios', in: *PWRE*, Zweite Reihe. Neunter Halbband, Stuttgart 1934, 1208-1210 (1208-1209).
- 3 For significant results see G. Luchetti, *La legislazione imperiale nelle Istituzioni di Giustiniano*, Milano 1996, 575-621, which operates a reconnaissance of citations and references to the imperial legislation contained in the Justinian Institutes: since the code in force from 533 AD was the *Novus Codex*, these citations are deemed to be relevant to it. However, the scholar gleans a certain reticence of commissioners of Justinian to mention the first Code – perhaps because this collection of *leges* must have already been surpassed – and points out (587): 'la tendenza dei compilatori a non citare direttamente il *Novus Codex* allora ancora vigente, ma a far piuttosto riferimento anche a proposito di disposizioni che pur dovevano essere contenute nel primo Codice, alle singole costituzioni intese come semplici materiali estravaganti o, altrimenti, a seconda delle circostanze, alla attività normativa imperiale in generale o ancora, in termini espliciti, alle *constitutiones principum*, ma comunque sempre con formule generiche, senza fornire appunto in proposito alcuna indicazione specifica'.
- 4 Heimbach, *Prolegomena*, 73, refutes the idea for which Thalelaios' comment was already written on the *Novus Codex*. There are too many elements that lead the work of this *antecessor* to the *Codex repetitae praelectionis*: from the order of the titles and constitutions to the mention of the Justinian compilers (οἱ κωδικοῦντά), to the frequent reference to the contents of the Digest and the Institutes that, at the time of publication of the commentary on the Code, had already been the subject of a comment. This leads the scholar to believe that Thalelaios' commentary on the *Codex repetitae praelectionis* was published a few years after 536 AD.
- 5 We would like to refer to S. Sciortino, 'La relazione tra il κατὰ πόδας e le traduzioni di Taleleo dei rescritti latini del Codex', *AUPA* 66 (2013), 113-158 (151-158), a work in which was highlighted how urgency affected the work of Thalelaios, forcing him to abandon the project of personally translating *rescripta* in Latin of the Code and to make use of anonymous κατὰ πόδας.

structure of imperial constitutions intermediate between the pre-Justinian codes and the *Codex repetitae praelectionis*.

1.1.

The idea that Thalelaios' commentary was originally conceived for the *Novus Codex* is hardly new. It was endorsed for the first time with a wealth of arguments by K.E. Zachariä von Lingenthal.⁶ He believed in Thalelaios' parentage of *κατὰ πόδας* of imperial constitutions,⁷ and explained the existence of multiple differences between the text of the constitutions and the *κατὰ πόδας* or the commentary on it compiled by Thalelaios, attributing the translation or commentary to the *Novus Codex*.

However, P. Krüger in the preface to the *editio maior* of the *Codex*,⁸ refuted one by one the cases reported by K.E. Zachariä von Lingenthal and provided an alternative explanation for these differences.

Although the latter scholar subsequently confirmed his idea, enriching it with new findings,⁹ the proposition that in Thalelaios' commentary on the *Codex* there are traces of

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- 6 K.E. Zachariä von Lingenthal, 'Ueber die griechischen Bearbeitungen des Justinianischen Codex', *ZRG* 10 (1872), 48-69 (61-65) (= Id., *Kleine Schriften zur römischen und byzantinischen Rechtsgeschichte*, I, Leipzig 1973, 553-574 (566-570)). An assessment of the proposal of the German scholar is present in V. Arangio-Ruiz, 'La compilazione giustiniana e suoi commentatori (da Ferrini a noi)', in: *Scritti di diritto romano in onore di Contardo Ferrini*, Milano 1946, 83-117 (99-100) (= Id., *Scritti di diritto romano*, IV, Napoli 1977, 1-37 (19-20)). To the thesis of the German scholar are added: C. Ferrini, Prolegomena a "Institutionum graeca paraphrasis Theophilo antecessori vulgo tributa", pars prior, Berolini 1884 (repr. Aalen 1967), XXIV n. 1 (= *Opere di Contardo Ferrini*. I: Studi di diritto romano bizantino, [Fondazione Guglielmo Castelli, 5], Milano 1929, 63 n. 1); A. Berger, 'Thalelaeus and the To kata podas, once again', *IVRA* IV (1953), 227-234 (229).
- 7 On the anonymous *κατὰ πόδας* of imperial constitutions of the Code see, for all: A. Berger, 'Studies in the Basilica. I. To kata podas', *BIDR* 55-56 (1952), 65-184 (65-124); N. van der Wal, *Les commentaires grecs du code de Justinien*, 's-Gravenhage 1953, 49-63. On the relationship between *κατὰ πόδας* and Thalelaios' commentary see the debate that has developed between N. van der Wal, 'La relation entre le "κατὰ πόδας" et le commentaire du Code Justinien de Thalélée', *RHD* 30 (1952), 546-552 (546-552), in favour of the pre-existence of the *κατὰ πόδας* compared to the commentary by Thalelaios, and Berger, 'Thalelaeus' (note 6 above), 227-229, contrary to the existence of *κατὰ πόδας* of imperial constitutions at the time of preparation of Thalelaios' commentary on the constitutions of the second Code.
- 8 P. Krüger, *Editio maior*, XIII-XX, to which we refer also for the reflections excluding the possibility of finding traces of the *Novus Codex* in the *Summa Perusina* and in the manuscripts of the Code. This preface has recently been republished in German: G. Hillner, 'Die Praefatio zum Codex Iustinianus von Paul Krüger', *SZ* 127 (2010), 364-428 (378-388).
- 9 K.E. Zachariä von Lingenthal, 'Von den griechischen Bearbeitungen des Codex', *SZ* 8 (1887), 1-75 (5-49) (= Id., *Kleine Schriften zur römischen und byzantinischen Rechtsgeschichte*, II, Leipzig 1973, 264-338 (268-312)).

the *Novus Codex* came to the eyes of S. Riccobono,¹⁰ who rightly objected that the deviations could well be traced back to the three pre-Justinian codes.

Subsequently, the argument put forward by K.E. Zachariä von Lingenthal was deprived of a great part of its foundation by A. Berger,¹¹ who proved the attribution of *κατὰ πόδας* of the imperial constitutions to Thalelaios to be incorrect: it was attributed to an anonymous hand.

Of K.E. Zachariä von Lingenthal's reconstruction only limited evidence remained consisting of expressions used by the *antecessor* which – although not without some difficulty – would seem to refer to the *Novus Codex*. The doctrinal debate then focused on these, but ended up giving different interpretations to the texts: it also resulted in the inappropriateness of these sources to provide a textual base strong enough to support the theory that Thalelaios commented on the *Novus Codex*.

1.2.

The most cited testimony is certainly that of Thalelaios' *ἐρμηνεία* contained in sch. 1 ad B. 8,1,28 = C. 2,7,16 (BS 79/2-18) (Hb. I, 347),¹² a constitution of the emperors Leo and Zeno from the year 474 A.D. In this commentary the *antecessor* argues that since the enactment of the constitution a period of more than fifty years has elapsed (ll. 17-18): (...) *διὰ τὸ ἀνύεσθαι ἐκ τῶν χρόνων τῆς διατάξεως ὑπὲρ τοὺς πενήτηκοντα καὶ πλεόν ἐνιαυτούς.*

The older doctrine, especially, has interpreted this as a time reference relative to a maximum period of fifty-nine years, which, added to 474, the year of the constitution's enactment, gives us 533: it follows that Thalelaios would have dictated this comment the year prior to the enactment of the *Codex repetitae praelectionis* and therefore in the context of a course on the *Novus Codex*.¹³

10 S. Riccobono, 'Il valore delle collezioni giuridiche bizantine per lo studio critico del "Corpus Iuris Civilis"', in: *Mélanges Fitting*, II, Montpellier 1908, 465-497 (468-497) (= Id., *Scritti di diritto romano*. I: Studi sulle fonti, Palermo 1957, 365-392 (370-392)). In the adhesive sense see also P. Krüger, 'Über wirkliche und scheinbare Überlieferung vorjustinianischen Wortlauts im Kommentar des Thalelaeus zum Codex Iustinianus', *SZ* 36 (1915), 82-95 (83-88), who reiterates in this work the reservations previously expressed against K.E. Zachariä von Lingenthal's reconstruction.

11 Berger, 'Studies in the Basilica' (note 7 above), 118-156.

12 Regarding *θέματα* of the *Basilica* and the relevant *scholia* we preferred to keep the quotes from the two editions of Scheltema (*et all.*) and Heimbach, for the reasons stated by M. Miglietta, "'1 terzo capo della legge Aquilia è, ora, il secondo". Considerazioni sul testo del plebiscito aquiliano alla luce della tradizione giuridica bizantina', *AUPA LV* (2012), 403-442 (414 n. 25).

13 Some scholars demonstrate that they lend credence to this calculation: Heimbach, *Prolegomena*, 73, which raises the suspicion that Thalelaios' commentary also refers to the following constitution, C. 2,7,17, absent in the *Basilica*. Since the latter is a constitution of the year 486 AD, the account in question may be inconclusive; G. Rotondi, 'Studi sulle fonti del codice giustiniano.

However, it seems significant that the same K.E. Zachariä von Lingenthal,¹⁴ a staunch supporter of the *Novus Codex* origin of Thalelaios' commentary, has considered this argument of little evidential value because, in his view, the term may refer to a period of more than sixty years. And even after this, other scholars have expressed reservations. They, in fact, felt that the amount of more than fifty years could indicate either a period of more than sixty years,¹⁵ as a generic period of time, that is, more than half a century.¹⁶

Let us now examine two other proofs relied upon by K.E. Zachariä von Lingenthal.

The first consists of the expression οὗτος ὁ κώδιξ, which often appears in Thalelaios' commentary to distinguish the constitutions included in the pre-Justinian codes from those included in the *Codex*. According to K.E. Zachariä von Lingenthal¹⁷ it would refer to the *Novus Codex*, but G. Rotondi¹⁸ easily refuted this argument by showing how the phrase in question simply indicates the code currently in force, 'e non si può cavare nessun argomento né pro né contro il riferimento alla prima piuttosto che alla seconda edizione di esso (*scil.* of the *Codex*)'.

The second is reflected in the expression αἱ νεαραὶ διατάξεις which according to K.E. Zachariä von Lingenthal¹⁹ would be used by Thalelaios to indicate specifically the constitutions subsequent to the first and not to the second Code. But even in this case G.

Continuazione', *BIDR* XXIX (1916), 104-180 (154) (= Id., *Scritti giuridici*. I: Studi sulla storia delle fonti e sul diritto pubblico romano, (a cura di V. Arangio-Ruiz), Pavia 1922, 110-283 (238-239)); B. Kübler, *Geschichte des Römischen Rechts. Ein Lehrbuch*, Leipzig/Erlangen 1925, 438-439; Id., 'Thalelaios' (note 2 above), 1208-1209; F. Wieacker, 'Lateinische Kommentare zum Codex Theodosianus. Untersuchungen zum Aufbau und Überlieferungswert der Interpretationen zum Codex Theodosianus', in: *Symbolae Friburgenses in honorem Ottonis Lenel*, Leipzig 1931, 259-356 (320-321).

14 Zachariä von Lingenthal, 'Von den griechischen Bearbeitungen' (note 9 above), 42-43 (= *Kleine Schriften*, II (note 9 above), 305-306).

15 P. Krüger, *Geschichte der Quellen und Litteratur des Römischen Recht*, Leipzig 1912², 411 n. 86; Id., 'Über wirkliche und scheinbare Überlieferung' (note 10 above), 86-87. In the latter contribution P. Krüger also expresses his doubts about the correctness of the reference to C. 2,7,16 of the *scholium* attributed to Thalelaios. However, it seems that the critical edition of the *Basilica* by Scheltema (*et all.*) confirms this *scholium*'s reference to C. 2,7,16 = B. 8,1,28. Van der Wal, *Les commentaires grecs* (note 7 above), 79 n. 2, is also sceptical.

16 D. Simon, 'Aus dem Codexunterricht des Thalelaios. D. Divergenzen zwischen Thalelaios-Kommentar und Codexüberlieferung', *RIDA* 17 (1970), 273-311 (283).

17 Zachariä von Lingenthal, 'Von den griechischen Bearbeitungen' (note 9 above), 39 (= *Kleine Schriften*, II, (note 9 above), 302), with an indication of the sources in which the phrase occurs.

18 Rotondi, 'Studi sulle fonti' (note 13 above), 155 (= *Scritti giuridici*, I (note 13 above), 239).

19 Zachariä von Lingenthal, 'Ueber die griechischen Bearbeitungen' (note 6 above), 61-62 (= *Kleine Schriften*, I, (note 6 above), 324-325), with an indication of the sources in which the phrase occurs.

Rotondi²⁰ demonstrated that the expression is not technical and D. Simon²¹ clarified that the phrase is also used to indicate the *Novellae* issued after *Codex repetitae praelectionis*.²² For the benefit of doctrine, it seemed that the qualification of ‘new’ given by Thalelaios to a constitution does not guarantee that the *antecessor* considered it new in regard to the *Novus Codex*.

J. Partsch’s²³ attempt, finally, was equally unsuccessful: this scholar believed he could discover a trace of the text of C. 2,18(19),14 (Alexander, 234 AD) as stored in the *Novus Codex*, in a comment by Thalelaios,²⁴ in which he read a reference to an *actio utilis negotiorum gestorum* missing in the constitution preserved in the *Codex repetitae praelectionis*: the Justinian commissioners would have eliminated, according to the findings of J. Partsch, the useful qualification of the action. However, even in this case G. Rotondi²⁵ was correct to respond that Thalelaios could have taken account of the genuine textual content of the *Codex Gregorianus*.²⁶

20 Rotondi, ‘Studi sulle fonti’ (note 13 above), 155 (= *Scritti giuridici*, I (note 13 above), 239).

21 Simon, ‘Aus dem Codexunterricht des Thalelaios. D.’ (note 16 above), 284.

22 On the basis of these observations also falls the evidentiary scope of the following comment of Thalelaios in sch. 10 ad B. 8,1,15 = C. 2,6,6 (BS 67/19-20) (Hb. I, 337): Αὔτη μὲν ἡ διάταξις ἀπηγόρευσε τοῦτο γίνεσθαι, <ἡ δὲ> τοῦ εὐσεβεστάτου ἡμῶν βασιλέως νομοθεσία μετὰ τοῦτον ἐξενεχθεῖσα τὸν Κώδικα (...). First of all, it is not possible to determine whether the Justinian constitution referred to is either C. 3,1,13,9, issued in 530 AD – as assumed, though doubtfully, by Zachariä von Lingenthal, ‘Von den griechischen Bearbeitungen’, (note 9 above), 10-11 (= *Kleine Schriften*, II, (note 9 above), 273-274) – or a non-surviving Justinian *Novella*, as believed by: Heimbach, *Prolegomena*, 73 n. 20; Krüger, *Geschichte der Quellen und Litteratur* (note 15 above), 87 n. 1; Rotondi, ‘Studi sulle fonti’, (note 13 above), 154-155 (= *Scritti giuridici*, I, (note 13 above), 239); Simon, ‘Aus dem Codexunterricht des Thalelaios. D.’ (note 16 above), 283-284, who finds it difficult to prove that by the proposition in question Thalelaios wanted to refer to a *Novella* issued after the first or the second Code.

Only in the first case would Thalelaios’ comment have been dictated to the students prior to the publication of the *Codex repetitae praelectionis* and could it demonstrate that the comment was written on the *Novus Codex*; while in the second case the explanation fits in with a comment on the *Codex repetitae praelectionis*. In any case, van der Wal, *Les commentaires grecs* (note 7 above), 77-78, has put forward a further and perhaps decisive obstacle to the identification of the *Novella* referenced by Thalelaios with C. 3,1,13, that is, the different degree of penalty between the text of the constitution and that to which reference is made by Thalelaios in his commentary: the Dutch scholar concludes in favor of a reference made by the *antecessor* to a non-surviving Justinian *Novella*.

23 J. Partsch, *Studien zur Negotiorum Gestio*, I, Heidelberg 1913, 21-22.

24 Published in C.E. Zachariae a Lingenthal, *Supplementum editionis Basilicorum Heimbachianae, libros XV – XVIII Basilicorum cum scholiis antiquis integros nec non librum XIX Basilicorum novis auxiliis restitutum continens*, Lipsiae 846, 162 sch. 38 = sch. 1 ad B. 17,2,14 = C. 2,18,14 (BS 1056/12-17).

25 Rotondi, ‘Studi sulle fonti’ (note 13 above), 157 n. 2 (= *Scritti giuridici*, I (note 13 above), 241 n. 3).

26 Likewise, even another attempt by J. Partsch, ‘Die Lehre vom Scheingeschäfte im römischen Rechte’, *SZ* 42 (1921), 227-272 (260 n. 4) was unsuccessful, who thought it possible to apply to a comment by Thalelaios in sch. 5 ad B. 23,1,50 = C. 4,2,6 (BS 1590/23-24) (Hb. II, 648) the reference

1.3.

The rapid synthesis of doctrinal opinions set out above shows that none of the evidence so far uncovered has probative value to support the justification of the working hypothesis that Thalelaios originally commented on the *Novus Codex*.

G. Rotondi wrote in this regard:²⁷ 'come sarebbe quindi possibile dimostrare, nei casi singoli, se le divergenze fra Thalelaios e il *Cod. rep. prael.* dipendano dall' avere egli sotto mano la prima edizione, o non addirittura da reminiscenze della redazione classica dei testi? Un criterio discretivo si potrebbe avere solo quando nel testo greco si trovassero tracce di interpolazioni giustinianee già operate nella prima edizione del codice; ma di un' applicazione di questo io, nei casi discussi, non trovo la possibilità'.

However, we believe that we can cite just such a case²⁸ of interpolation made by the commissioners who were involved in drafting the *Novus Codex*, corresponding to the characteristics relied upon by G. Rotondi, followed by P. Collinet.²⁹ We believe that the case is compatible with a comment on a text of the *Novus Codex*.

We hope that this study will contribute to strengthening the belief of those who, even in recent times, have argued that traces of the *Novus Codex* can still be seen in Thalelaios' commentary on the *Codex repetitae praelectionis*.³⁰

interpolation criterion previously developed by F. Pringsheim, 'Προσθήκη, προστίθηναι, πρόσκειμαι in den Scholien der Basiliken', *SZ* 35 (1914), 329-331 (329-331), in order to conclude that in this case the *antecessor* would have commented on a constitution contained in the *Novus Codex*. In particular, both these scholars believed that the use of the verb προστίθηναι in the commentaries of the *antecessores* is a sign of intervention on the part of the Justinian commissioners. However, Berger, 'Studies in the Basilica' (note 7 above), 85-86 and 110-111, showed the fallacy of such criterion identified by F. Pringsheim – Berger, p. 86: 'those terms as such have nothing to do with interpolations (...)', and its inapplicability to B. 23,1,50 as proposed by J. Partsch (Berger, p. 111: 'The confusion of κείμενος (without προς!) with πρόσκειμαι as a passive to προστίθηναι is evident. Hence the erroneous conclusion that the sch. contains a "Hinweis auf eine neu interpolierte Rechtsregel"').

27 Rotondi, 'Studi sulle fonti' (note 13 above), 156-157 (= *Scritti giuridici*, I (note 13 above), 241).

28 The testimony to which we refer is represented by sch. 1 ad B. 11,1,69 = C. 2,3,8 (BS 316/29-317/33) (Hb. I, 649); cf. *infra*, § 2.

29 P. Collinet, *Le genèse du Digeste, du Code et des Institutes de Justinien*, Paris 1952, 266, believes that the decisive criterion could be found only when, in the Greek text, we can find traces of Justinian interpolations made in the first edition of the Code.

30 Van der Wal, *Les commentaires grecs* (note 7 above), 57-58 and 77, according to whom Thalelaios could have written individual comments, but not a commentary on the entire *Novus Codex*; Simon, 'Aus dem Codexunterricht des Thalelaios. D.' (note 16 above), 280-281, 290 and 309; F. Goria, 'Bona fides ed actio ex stipulatu per la restituzione della dote: legislazione giustiniana e precedenti classici', in: *Il ruolo della buona fede oggettiva nell' esperienza giuridica storica e contemporanea. Atti del Convegno internazionale di studi in onore di Alberto Burdese (Padova - Venezia - Treviso, 14-15-16 giugno 2001)*, Padova 2003, 241-263 (250-251), according to whom: 'se è fuor di dubbio che gli *scholia* giunti sotto il nome di Thalelaios provengono da un corso di lezioni

2.

Let us start with a constitution preserved both in the *Consultatio* (which states that the text was taken from the *Codex Gregorianus*)³¹ and in the *Codex repetitae praelectionis*:

tenuto sopra la seconda edizione del Codice, qualche indizio farebbe ritenere che l'autore abbia utilizzato materiali relativi all' insegnamento svolto sulla prima redazione di esso; più di una volta, inoltre, egli mostra di avere ben presente il testo che possedevano le costituzioni di precedenti imperatori prima che fossero inserite nel *Codex Iustinianus*"; Id., 'Azioni reali per la restituzione della dote in età giustiniana: profili processuali e sostanziali', in: *Diritto e processo nella esperienza romana. Atti del Seminario torinese (4-5 dicembre 1991) in memoria di Giuseppe Provera*, Napoli 1994, 205-301 (284 n. 148).

It seems difficult to share the analysis of Berger, 'Studies in the Basilica' (note 7 above), 113, who considers the absence of Thalelaios among the members of the committee responsible for the preparation of the *Codex repetitae praelectionis*, proof of the non-existence of his commentary on the *Novus Codex*: 'How can it be explained that a man, who according to the authorities mentioned before, had written a full translation of, and a commentary on, the first Code was not invited to collaborate on the *Codex repetitae praelectionis*?'. Indeed, having written a commentary on the first Code could not provide for Thalelaios any legitimate expectation to be appointed as a member of the commission appointed by Justinian in 534 AD, especially if one takes into account that it was a small committee of only five members. In addition, the policy that led Justinian in his choice of collaborators certainly favored the lawyers at the expense of the masters of law. In fact, of the five members mentioned in const. *Cordi* § 2 there is only one master of law, *Dorotheus*, while neither *Tribonianus* nor the other three members of the Committee (*Memma*, *Constantinus* and *Iohannes*) were: the latter were appointed as lawyers (*viri eloquentissimi togati fori amplissimae sedis*); cf. const. *Cordi* § 2: (...) *necessarium nobis visum est, per Tribonianum, virum excelsum, magistrum, ex quaestore et ex consule, legitimi operis nostri ministrum, nec non virum magnificentum, quaestorem et Berythi legum doctorem Dorotheum, Mennam insuper, et Constantinum, et Iohannem, viros eloquentissimos togatos fori amplissimae sedis* (...).

On the other hand, if the *repetita praelectio* is thought of as consisting of an update to the Justinian legislation of the content of the *Novus Codex*, the preference for practitioners of law is not surprising: who, in light of their experience, were the most familiar with Justinian legislation. It is, if anything, possible to ask why *Dorotheus* was chosen and not Thalelaios. It seems that the previous collaboration of *Dorotheus* with *Tribonianus* in drafting *Institutiones* and *Digesta*, may have played a decisive role by virtue of both their mutual knowledge and working methods, whereas Thalelaios had not participated in either of the two previous commissions. Clearly, this was the criterion preferred by Justinian in appointing *Tribonianus*, present in the preparatory committees of both Codes; for this, see: A.M. Giomaro, *Il codex Repetitae Praelectionis*, Roma 2001, 42-57, with indication of the literature. With particular reference to the composition of the committee charged with drafting the *Novus Codex*, cf. G. Purpura, 'Giovanni di Cappadocia e la composizione della commissione del primo codice di Giustiniano', *AUPA* 36 (1976), 49-67 (50-59).

31 There is debate in the literature whether the anonymous author of *Consultatio* has drawn on an edition of the *Codex Gregorianus* that was the same as or different from the one taken into account by the ἡρῶες in the fifth century and by the Justinian commissioners later, and also if the text in the *Consultatio* was original or had been glossed in the course of the fourth century: for the discussion of all these aspects the reader is referred to the balanced and clear analysis of M.U. Sperandio, *Codex*

C. 2,3,8(9) = *Cons. 9,11 ex corpore Gregoriani*: IMP. ALEXANDER A. (AURELIO) DIONYSIO. Cum, posteaquam adversarius matris tuae victus esset, matrem tuam circumvenerit, <ut pacisceretur> [ut ei caveret] nullam se controversiam de servis moturam, id pactum mala fide factum irritum est, et cum ex ea conventionione cum matre tua agi coeperit, iudex eam liberabit <quia de re iudicata pacisci nemo potest>. PP. pridie id. Sept. Alexandro A. cons. [a. 222].³²

Compared to the Justinian version, the original text has undergone two changes: the first, of lesser importance for us, consists in the replacement of the expression *ut pacisceretur* with *ut ei caveret* and the second is the cancelling of the clause at the end. It is, in particular, a matter of establishing whether it has been expunged in the preparation of the *Novus Codex* or its *repetita praelectio*.

Before analyzing Thalelaios' comment on this point, it is appropriate to reconstruct the case. The applicant, a certain *Aurelius Dionysius*, addresses the chancellery of the Emperor *Alexander Severus* wondering if an agreement between his mother and an opponent of hers could be considered valid, by virtue of which she had renounced all claims regarding certain slaves, on which a final court judgment had already been given between the parties. What happened was, in fact, that after a *controversia de servis* ended successfully for the woman, the (unsuccessful) opponent of this lady had misled her, making her promise by *pactum* (via *cautio* in the Justinian version) that she would not act in any future proceedings concerning the slaves, the contrary of what was previously established by *res iudicata* between the parties.

The constitution defines the pact *irritum* as concluded in bad faith and decides, therefore, that the judge ought to rule the woman free from any obligation, because – according to the then expunged final clause and which contains a second reason – a *pactio* on judgment is impermissible: *de re iudicata pacisci nemo potest*.

Gregorianus. Origini e vicende, Napoli 2005, 255-257, with indications and discussion of the literature.

32 On the text see: K.E. Zachariä von Lingenthal, 'Die Meinungsverschiedenheiten unter den Justinianischen Juristen', *SZ* 6 (1885), 1-55 (37-40) (= *Kleine Schriften*, II (note 9 above), 186-240 (222-225)); Krüger, 'Über wirkliche und scheinbare Überlieferung' (note 10 above), 86; M.E. Peterlongo, *La transazione nel diritto romano*, Milano 1936, 46-50; S. Solazzi, 'Glossemi nelle fonti giuridiche romane', *BIDR* XLVI (1939), 49-67 (59); Van der Wal, *Les commentaires grecs* (note 7 above), 77-78; W. Litewski, 'L'admissibilité de la transaction en cours d'appel dans la procédure civile romaine', *RIDA* 11 (1964), 233-253 (236-238); D. Simon, 'Aus dem Kodexunterricht des Thalelaios. B. Die Heroen', *SZ* 87 (1970), 315-394 (320-328); Sperandio, *Codex Gregorianus* (note 31 above), 254-265; A. Salomone, *Iudicati velut obligatio. Storia di un dovere giuridico*, Napoli 2007, 488-492; G. Zanon, *Indicazioni di metodo giuridico dalla Consultatio veteris cuiusdam iurisconsulti*, Napoli 2009, 11-13, 115 n. 22 and 205-207.

Thalelaios comments on the text³³ by comparing his own interpretation of the constitution with that provided by the Beirut masters of law from the fifth century (οἱ τῆς οἰκουμένης διδάσκαλοι) and in particular by Πατρίκιος (ὁ ἥρωος Πατρίκιος).³⁴ The *antecessor* disputes the point of view of the old masters, who found a *stipulatio (poenae)*, while Thalelaios believes that merely a naked pact between the mother of the applicant and his opponent had occurred, to the extent as to believe that she had acted the second time as the owner of the slaves, and not on the basis of a *pactum nudum* that, irrespective of being *irritum*, was, in any case, inoperable.³⁵

For our purposes we must emphasize that Thalelaios does not follow the version of the constitution contained in the Gregorian Code: although the *antecessor* recognizes a *nudum pactum*, it is certain that he does not read the phrase *ut pacisceretur* but *ut ei caveret*. This is shown by the fact that in the literal translation of the constitution in the text of *Basilica*, *caveo* is translated with the use of the verb ἀσφαλίζω.³⁶ We believe S.

33 In sch. 1 ad B. 11,1,69 = C. 2,3,8 (BS 316/29-317/33) (Hb. I, 649); on the assignation to Thalelaios, see *infra*, n. 40.

34 For which, see Heimbach, *Prolegomena*, 8-10 and 11 in reference to Πατρίκιος; Zachariä von Lingenthal, 'Die Meinungsverschiedenheiten' (note 32 above), 38 (= *Kleine Schriften*, II, (note 9 above), 223).

35 According to Thalelaios, the mother of the applicant the rescript would have brought the second case against his opponent, who would have opposed the *exceptio pacti conventi*. Now, the words *iudex eam liberabit* would refer, for the *antecessor*, to the activation of a *replicatio doli* opposed to the *exceptio* and that would have resulted in the victory of the woman in this second trial. Neither would the words *ex ea conventione cum matre tua agi coeperit* have created difficulties, because Thalelaios tells, the defendant may also be considered an actor when *exceptio* is used [D. 44.1.1 (Ulp. 4 ad ed.)]: sch. 1 ad B. 11,1,69 = C. 2,3,8 (BS 317/8-15) (Hb. I, 649): (...) Καὶ ἐπειδὴ εἰκὸς ἦν πάκτου παραγραφῆ χρήσασθαι κατ' αὐτῆς τὸν ἐναγόμενον, πρὸς ταύτην τὴν παραγραφὴν εἶπεν ἡ διάταξις: εἰ ἐκ ταύτης τῆς συμφωνήσεως <κατὰ> τῆς μητρὸς σου κινεῖσθαι ἄρξεται, τουτέστι, εἰ ἀντιτεθῆ αὐτῇ ἢ τοῦ πάκτου παραγραφῆ, ὁ δικαστὴς αὐτὴν ἐλευθερώσει, δηλονότι διὰ τῆς τοῦ δόλου βεπλικατίου. Καὶ οὐδὲ τὸ ἀγὶ <coeperit> ταράττει με: οὐδὲ γὰρ ἐνάγοντα πάντως σημειοῖ, ἀλλὰ καὶ ἐναγόμενον καὶ κεχρημένον παραγραφῆ καὶ κατὰ τὸν κανόνα τὸν λέγοντα: *vam reus in exertionibus actor esse liidetur*.

The reconstruction of Thalelaios is imposed by having configured the agreement as a nude pact, so it cannot be activated by the adversary of the mother of *Aurelius Dionysius*. But if a *cautio* or *stipulatio poenae* is to be found in such an agreement, it is possible to believe, with greater adherence to the text, that it was the mother who was sued by her opponent, under the stipulation concluded in bad faith. There is no lack of people who – justifiably for us – reconstructed the story of the case in these terms: Solazzi, 'Glossemi' (note 32 above), 59-60; Sperandio, *Codex Gregorianus*, (note 31 above), 254; Salomone, *Iudicati velut obligatio* (note 32 above), 492; Zanon, *Indicazioni di metodo giuridico* (note 32 above), 206.

36 B. 11,1,69(70) = C. 2,3,8 (BT 644/1-4) (Hb. I, 649): Καὶ ἀντιγράφει πρὸς τὸν υἱὸν αὐτῆς ὁ βασιλεὺς οὕτως: ὁπότε, μεθὸ ὁ ἀντίδικος τῆς σῆς μητρὸς ἠττηθεῖς τὴν μητέρα σου περιέγραψεν, ἵνα αὐτὸν ἀσφαλιστῆται μηδεμίαν αὐτὴν ἐναγωγὴν περὶ τῶν οἰκετῶν κινεῖν, (...). The following scholars believe that Thalelaios read *ut ei caveret*: Solazzi, 'Glossemi' (note 32 above), 59 n. 18; Van der Wal, *Les commentaires grecs* (note 7 above), 78; Simon, 'Aus dem Kodexunterricht des Thalelaios. B.' (note

Solazzi³⁷ to be right, who thinks that Thalelaios, while reading *ut ei caveret*, did not consider it sufficient in order to configure a *stipulatio poenae*.

Perhaps because, as noted by M.E. Peterlongo,³⁸ for the *antecessor* the *cautio* mentioned only the written form assumed by the agreement, so as to specify this condition during the translation of the following part of the constitution: περιέγραψεν, ἵνα αὐτὸν ἀσφαλίσῃται.

The issue involves the dubious original nature of the expression *ut pacisceretur*, or its derivation from a *scholium*, in the text of the Gregorian Code.³⁹ It is difficult to say whether the substitution of *ut ei caveret* has taken place during the preparation of the *Novus Codex* or in its *repetita praelectio*.

For our purposes we are more interested in the closing clause of the constitution. Thalelaios demonstrates that he does not follow the Gregorian Code version, and in addition, it is he himself who suggests that the deletion must be attributed to the intervention of the commissioners dealing with the preparation of the *Novus Codex*: it is the proof of an interpolation contained in the *Novus Codex*:

Sch. 1 ad B. 11,1,69 = C. 2,3,8 (BS 317/23-33) (Hb. I, 649): Ἐθαύμασα δέ, ὅτι τοῖς μνημονευθεῖσιν ἐπιφανέστατοις διδασκάλοις ἔδοξεν εἰπεῖν· διὰ τὸ μετὰ ἀπόφρασιν γεγονέαι τὸ πάκτον, διὰ τοῦτο ἀνυπόστατον αὐτὸ ἐκάλεσεν ἢ διάταξις. Καίτοι διαλύεσθαι μὲν πρὸς τὸν καταδικασθέντα οὐκ ἔξεστιν, ἐπειδὴ ἡ διάλυσις ἀμφιβαλλομένου χρέους ἔχει συμβιβασμὸν· πακτεύειν δὲ πρὸς τὸν ἡτηθέντα ἔξεστιν ὁμολογημένως. Διά τοι τοῦτο καὶ αὐτοὶ συμβιβασμὸν ἐκάλεσαν τοῦτο τὸ πάκτον, καίτοι τῆς διατάξεως φανερώς πάκτον αὐτὸ καλεσάσης. Τὸ οὖν ἀληθέστερον διότι, ciu muenerit, εἶπεν ἢ διάταξις, ἄχρηστον εἶναι τὸ πάκτον, οὐ διὰ τὸ μετὰ ἀπόφρασιν αὐτὸ γεγονέαι. Καὶ ὅτι οὐ χρὴ ἐν τῷ πάκτου θέματι διάλυσιν τρακταΐσαι, ἐμαρτύρησαν καὶ οἱ ἐπιφανέστατοι κωδικευταὶ τούτῳ τῷ δὲ πάκτις τιτ. τὴν διάταξιν ὑποβαλόντες καὶ μὴ φυλάξαντες τῷ ἐπομένῳ τιτ.⁴⁰

32 above), 322. However, according to Zachariä von Lingenthal, 'Die Meinungsverschiedenheiten' (note 32 above), 40 (= *Kleine Schriften*, II (note 9 above), 225)) Thalelaios would have read *ut pacisceretur*, having commented on the constitution as contained in the *Novus Codex*.

37 Solazzi, 'Glossemi' (note 32 above), 59-60.

38 Peterlongo, *La transazione* (note 32 above), 50 nt. 85.

39 On this point see Sperandio, *Codex Gregorianus* (note 31 above), 257-265.

40 We believe that we can not doubt the attribution of the *scholium* to Thalelaios. A close comparison with the opinion of the masters of law from the fifth century seems decisive in this sense. Even Heimbach, *Manuale*, 350, refers to the *scholium* as Thalelaios', and we seem to have to agree with this assignment, despite the caution that should be observed, in general, in consultation with the *Manuale* of Heimbach: Miglietta, "Il terzo capo della legge Aquilia è, ora, il secondo" (note 12 above), 412-413.

The ἐπιφανέστατοι διδάσκαλοι demonstrate a following of the version of the constitution contained in the Gregorian: they bring back the invalidity of the agreement between the mother of the *rescriptum* applicant and her opponent to the fact that it has intervened *post rem iudicatam*, as we read in the deleted closing formula. Thalelaios marvels at this solution because he does not read this formula, in which is expressed the principle of *de re iudicata pacisci nemo potest*: he argues that the invalidity of the covenant depends only on deception (*circumventio*) according to which it was concluded.⁴¹

From a Justinian-Byzantine perspective, from that with which Thalelaios scans the text, the *transactio* is distinguished from the *pactum*,⁴² which, apart from anything else, are the subject of two separate titles in the *Codex*:⁴³ 2.3 *De pactis* and 2.4 *De transactionibus*, whereas in classical law *transactio* was considered nothing more than a

41 It should be noted that it is much discussed in doctrine whether the final clause we read in the *Consultatio* is original or is a post-classical *glossa*, added to the text over the course of the fourth century AD. The issue does not directly affect our work, since for our purposes it is interesting to point out that Thalelaios does not know the text that has come to us via the *Consultatio*, regardless of whether it is genuine or glossed. In any case, we have found that the solution to the problem is closely related to the recognition of the classical principle of *de re iudicata pacisci nemo potest* expressed in the conclusion of C. 2,3,8(9) = *Cons.* 9,11. The following scholars, recognizing the classicism of that principle, have accordingly considered the conclusion genuine: Krüger, ‘Über wirkliche und scheinbare Überlieferung’ (note 10 above), 86; L. Chiazzese, *Confronti testuali. Contributo alla dottrina delle interpolazioni giustiniane*, Cortona 1931, 346 n. 1; Peterlongo, *La transazione* (note 32 above), 47-50; Sperandio, *Codex Gregorianus* (note 31 above), 260; Zanon, *Indicazioni di metodo giuridico* (note 32 above), 206.

Conversely, considering that the classical law would have banned *transactio de re iudicata* and admitted the *post rem iudicatam* pact, the following scholars have traced back the final part of *Cons.* 9,11 to a *glossa*: E. Levy, *Pauli Sententiae. A Palingenesia of the Opening Titles as a Specimen of Research in West Roman Vulgar Law*, New York 1945, 45-46, who considers that only in the post-classical age (as shown by Paul. Sent. 1,1,1) *pactum* and *transactio* would have been treated equally and would not have been able to intervene *post rem iudicatam* [in this vein, there is also A. Beck, ‘Überlegungen zum klassischen Vergleichsrecht’, in: *Studi in onore di Pietro De Francisci*, IV, Milano 1956, 3-16 (4)]; Simon, ‘Aus dem Kodexunterricht des Thalelaios. B.’ (note 32 above), 323. Also considering our final part as a *glossa* there is Solazzi, ‘Glossemi’ (note 32 above), 59 n. 18, even if the scholar recognizes that the classical law prohibits agreements and transactions on *res iudicata*. Perhaps, the author continues, the chancery based its decision on the fact that the ruling was unformed, nor would the word *victus* be perspicuous in this regard. Without taking a position on the classical principle of *de re iudicata pacisci nemo potest*, the following scholars are for the *glossa* theory: Zachariä von Lingenthal, ‘Die Meinungsverschiedenheiten’ (note 32 above), 39-40 (= *Kleine Schriften*, II, (note 9 above), 224-225); K.-H. Schindler, ‘“Consultatio veteris cuiusdam iurisconsulti”’, in: *Mnemeion Siro Solazzi*, Napoli 1964, 272-317 (286 n. 72); Litewski, ‘L’admissibilité de la transaction en cours d’appel’ (note 32 above), 236-238; Salomone, *Iudicati velut obligatio* (note 32 above), 492.

42 On this point see: Sperandio, *Codex Gregorianus* (note 31 above), 261-262, with information and discussion of the literature.

43 And also in the *Digesta*: D. 2,14 *De pactis* and D. 2,15 *De transactionibus*.

species of *pactum*.⁴⁴ This explains the prohibition imposed on both parties from taking action after a judgment, as shown by the genuine final clause of C. 2,3,8(9), whereas, in Justinian law, it was only the *transactio* to be banned *post rem iudicatam* and not the pact, since only the first presupposes a *res dubia*.

Having established that Thalelaios does not know the pre-Justinian version of the constitution, we need to understand if the *antecessor* may have originally commented on the text of the constitution contained in the *Novus Codex*. In this regard the *scholium* contains valuable information, so far not adequately emphasized in the literature, which allows us to report the comment originally dictated by the text of the *Novus Codex*.

Thalelaios, supporting the interpretation that bases the invalidity of the pact only on *circumventio* suffered by the mother of the applicant the *rescriptum*, and not according to the principle of *de re iudicata pacisci nemo potest*, recalls the work of the κωδικευτάί, which placed the constitution in the third title *De pactis* of the *Codex repetitae praelectionis*. This reinforces the opinion of Thalelaios, namely that the *conventio* is not a *transactio* but a *nudum pactum*, which could be concluded validly even after a final judgment.

So, if Thalelaios tells only of the placement of the constitution in the *De pactis* title of the Code, this *a contrario* leads us to believe that the Justinian commissioners did not cancel the closing in the preparation of the *Codex repetitae praelectionis*.

If they had done so Thalelaios would not have hesitated to report it, as in the numerous cases in which the *antecessor* gives details of the textual changes made by the κωδικευτάί.⁴⁵ Thalelaios was a jurist attentive to the original wording of the constitutions,

44 Sperandio, *Codex Gregorianus* (note 31 above), 259-260 nn. 80-81, for the indication of legal sources that attest to the classical equation of *pactum* and *transactio* and 260 n. 82-83, with an indication of the literature in favor of the renewal of the *transactio* within the broader *genus* of the *pactum* in classical law. Adde M.A. Fino, *Idee romane in tema di giurisdizione. Alle radici del diritto europeo oltre la tradizione romanistica. Transazione e giudicato. Analisi di un rapporto (forse) incompreso*, Napoli 2012, 167-175.

45 Here are the passages in which Thalelaios informs the work of the interpolation of the κωδικευτάί and also indicates the status of the previous text, thus making it possible to reconstruct the version of the constitution contained in the *Novus Codex*: sch. 4 ad B. 8,1,40 = C. 2,9,1 (BS 88/15-34) (Hb. I, 355); sch. 1 ad B. 8,2,79 = C. 2,12,6 (BS 144/31-145/10) (Hb. I, 403); sch. 4 ad B. 8,2,91 = C. 2,12,17 (BS 156/19-34) (Hb. I, 411); sch. 2 ad B. 17,2,10 = C. 2,18,10 (BS 1053/16-24) (Zachariae, *Supplementum* (note 24 above), 159 sch. 25).

We remember the following passages in which Thalelaios tells of an older version of the constitution: sch. 4 ad B. 17,2,1 = C. 2,18,1 (BS 1048/23-26) (Zachariae, *Supplementum*, 154 sch. 4); sch. 2 ad B. 28,3,5 = C. 5,3,5 (BS 1809/24-32) (Hb. III, 161); sch. 2 ad B. 39,1,36 = C. 3,28,3 (BS 2335/11-18) (Hb. IV, 32); sch. 3 ad B. 23,1,71 = C. 4,30,9 (BS 1605/10-21) (Hb. II, 660); sch. 1 ad B. 17,2,9 = C. 2,18,9 (BS 1052/22-1053/9) (Zachariae, *Supplementum*, 158 sch. 21). D. Simon, 'Aus dem Codexunterricht des Thalelaios. C. Interpolationsberichte', *RIDA* 16 (1969), 283-308 (283-304), has successfully used Thalelaios' commentary on the Code in order to identify the textual changes

as it is crucial to their correct interpretation. Neither does the commentary of Thalelaios lack a controversial position against the generality of the jurists who, however, did not pay adequate attention to the importance of textual changes undertaken by the imperial constitutions :

Sch. 3 ad B. 23,1,71 = C. 4,30,9 (BS 1605/10-11) (Hb. II, 660): Θαλελαίου. Θαυμάσιόν τι λέγει ἡ διάταξις ἐνταῦθα καὶ ἀγνοούμενον πᾶσι τοῖς μὴ τὸν παλαιὸν θεματισμὸν τῆς διατάξεως ἐπισταμένοις. (...).

So Thalelaios would have every incentive to report the interpolation of the final clause of C. 2,3,8(9) made by the κωδικευταί upon insertion of the constitution in the *Codex repetitae praelectionis*, since this would be the best confirmation of its interpretation, according to which the *pactum* subject of the constitution is not a *transactio*. If this does not happen it is because the closing formula must have been cancelled when the constitution was inserted in the *Novus Codex*.

Still, if the interpolation had been made by the κωδικευταί Thalelaios would not have shown any wonder about the interpretation of his teachers, since the closing would have brought him back to the point of view of the διδάσκαλοι.

Nor, finally, could it be objected that Thalelaios could not have been informed of the interpolation made by the κωδικευταί in that, on the other hand, he clearly appears to know their work which, in any case, consisted only in the placing of the constitution under the title *De pactis* 2.3.

In conclusion, we believe that cancellation of the closing formula of C. 2,3,8(9) was the work of the committee charged with drafting the *Novus Codex*. The comments of Thalelaios are compatible with the version of the constitution included in this Code and may have been dictated before the publication of the *Codex repetitae praelectionis*.

Having received the text in this Code without changes, the *antecessor* must have updated the comment of the *repetita praelectio*. The last part was added in which he develops his argument – in favor of the interpretation for which the constitution does not

performed on the texts of the imperial constitutions. In only one case (295-296 and 304) the scholar believes that an interpolation can be traced to the work of the committee that oversaw the drafting of the *Novus Codex*: that is C. 4,28,5 (Alexander, 230). However, the reconstruction is purely speculative and can not be supported in any way by the comment of Thalelaios (sch. 2 ad B. 18,4,25 = C. 4,28,5; BS 1108/7-8) (Zachariae, *Supplementum*, 203 sch. 67). On this point see also A. D'Emilia, *Appunti di diritto bizantino*. I. *Parte generale - Le fonti*, Roma 1946, 29-30.

consider a *transactio* – represented by the inclusion of the constitution under the title *De pactis* by the κωδικευταί.⁴⁶

3.

The comment analyzed above may also contain a clue about the original location of C. 2,3,8(9) in the *Novus Codex*. We transcribe again the final part of the *scholium*:

Sch. 1 ad B. 11,1,69 = C. 2,3,8 (BS 317/31-33) (Hb. I, 649): (...) Καὶ ὅτι οὐ χρῆ ἐν τῷ πάκτου θέματι διάλυσιν τρακταΐσαι, ἐμαρτύρησαν καὶ οἱ ἐπιφανέστατοι κωδικευταί τούτῳ τῷ δὲ πάκτις τιτ. τὴν διάταξιν ὑποβαλόντες καὶ μὴ φυλάξαντες τῷ ἐπομένῳ τιτ.

The κωδικευταί have placed our constitution under the title 2,3 *De pactis* and not under the following title. According to a first possible interpretation,⁴⁷ Thalelaios was describing to his students, in a simplified way, the process of progressive composition of the titles of the Code.

This reading, correct and credible, does not exclude an alternative. We must move from the observation according to which Thalelaios recalls the work of the κωδικευταί always and only to report their innovations in textual changes,⁴⁸ or in the composition of the titles of the *Codex repetitae praelectionis* compared to the first edition of the Code, as occurs in:

Sch. 8 ad B. 8,2,85 = C. 2,12,11 (BS 150/13-16) (Hb. I, 407): (...) Αὕτη δὲ ἡ διάταξις ἀτολεξεῖ κεῖται καὶ ἐν τῷ ε' βιβ. τιτ. ξά' ἢ α' τοῦ τίτλου τῶν περιφανεστάτων κωδικευτῶν εἰς συντομωτέραν ἀκρόασιν τοῦ νομίμου καὶ ἐν τούτῳ καὶ ἐν ἐκείνῳ τῷ τίτλῳ καλῶς βαλλόντων αὐτήν.

46 Zachariä von Lingenthal, 'Die Meinungsverschiedenheiten' (note 32 above), 40 (= *Kleine Schriften*, II, (note 9 above), 225), on the basis that Thalelaios' comment was on the *Novus Codex*, believes that the *antecessor* has read the word *pacisceretur* in the text of the constitution: the commissioners would have replaced it with *caveret* accepting the point of view of the *antecessor*. Without motivation, even Simon, 'Aus dem Kodexunterricht des Thalelaios. B.' (note 32 above), 322, believes that the deletion of the closing formula to be the work of the 'first' commission and Thalelaios did not read it (326).

47 Authoritatively supported and generously communicated by N. van der Wal during a meeting held in Groningen on 5th July 2013. In this sense it had already been expressed by Simon, 'Aus dem Kodexunterricht des Thalelaios. B.' (note 32 above), 328.

48 See the findings reported *supra*, n. 45.

Thalelaios⁴⁹ informs us that the *rescriptum* of *Alexander Severus* addressed to a certain Sebastian and contained in C. 2,12(13),11 was repeated also in C. 5,61,1 for the purpose of an easier *recitatio*,⁵⁰ thus changing the original layout of this title of the *Novus Codex*.

If – with reference to the constitution from which we started, viz. C. 2,3,8(9), Thalelaios wanted to point to an innovation made by the κωδικευτάι in relation to the previous placing of the text – we believe that the constitution has been inserted under title 2.3 *De pactis* without being kept by the Justinian commissioners (μη φυλάξαντες) under title 2.4 *De transactionibus*. This constitution was probably placed under the latter title in the *Novus Codex*.⁵¹ Probably the *antecessor* also wants to inform us of the fact that the Justinian commissioners decided not to repeat the text.

3.1.

Accepting the current reasoning, we obtain a key that could explain an apparent referencing mistake in Thalelaios' comment:

Sch. 2 ad B. 11,2,22 = C. 2,4,5 (BS 398/1-2) (Hb. I, 694): Σημείωσαι, ὅτι καὶ ἄγραφος διάλυσις ἔρρωται. Ὅμοία ἐν τούτῳ τῷ τιτ. ἢ κθ' διατ. (...).⁵²

49 The *scholium*, indeed, is anonymous, but the entire chain of *scholia* to this constitution seems to be attributed to Thalelaios, from the first explicitly referred to the *antecessor*. In this sense see Heimbach, *Manuale*, 354.

Similarly, the work of the κωδικευτάι to indicate the creation of a *lex gemina* is operated in sch. 4* ad B. 11,1,69 = C. 2,3,8 (BS 318/8-22) (Hb. I, 650). It is a new *scholium*, since the *Basilica* are mentioned as a work already written. However, on two occasions we are reminded that the work of the κωδικευτάι who repeated C. 2,3,10 inside C. 5,14,1, constitutions which have different *inscriptio* and dates.

50 However, the *lex gemina* which informs the *antecessor* does not appear in any manuscript of the *Codex repetitae praelectionis* and was rebuilt by modern editors precisely on the basis of the testimony of Thalelaios. The passage is considered by Simon, 'Aus dem Codexunterricht des Thalelaios. D.' (note 16 above), 286-287, who does not exclude that the *lex gemina* may be the work of the committee charged with drafting the *Novus Codex*, but cancelled only in the *repetita praelectio*.

51 The presence of C. 2,3,8(9) in the title *De transactionibus* of the *Novus Codex* could explain the reason for the heated debate aimed at highlighting the real nature of the pact we are discussing in the text. One may assume the following alternative: (1) C. 2,3,8(9) was placed in the *Novus Codex* under the titles *De pactis* and *De transactionibus* and the κωδικευτάι kept it only in the first. (2) C. 2,3,8(9) was only contained under the title *De transactionibus* of the *Novus Codex* and was placed under the title *De pactis* of the *Codex repetitae praelectionis*.

52 The anonymous *scholium* is attributed to Thalelaios by the same Byzantine jurists: Sch. 6 ad B. 22,1,76 = C. 4,21,17 (BS 1384/7-9) (Hb. II, 502): Ἀνάγνωθι καὶ βιβ. ια' τιτ. β' κεφ. κβ' καὶ τὴν ἐκεῖ β' παραγραφὴν τοῦ Θαλάλαιου ἔχουσαν οὕτως: σημείωσαι, ὅτι καὶ ἄγραφος διάλυσις ἔρρωται. On this point see Heimbach, *Manuale*, 351 n. w.

Thalelaios, supporting the validity of the oral transaction established by the constitution subject to comment, refers to a similar principle expressed by C. 2,4,29 (*Diocletianus* and *Maximianus*, 294). However, it is the previous constitution which affirms the validity of unwritten transaction:

C. 2,4,28pr. IMPP. DIOCL. ET MAX. AA. ET CC. SAPPARUTAE: Sive apud acta rectoris provinciae sive sine actis, scriptura intercedente vel non, transactio interposita est, hanc servari convenit. Dat. III non. Iul. Caess. Cons. [a. 294].

Now, to explain the difficulty one could blame an error of the manuscripts in which such inaccuracies are not uncommon.⁵³ We cannot however, rule out the need to find an alternative explanation, both because the letters used to indicate the numbers 28 (κη) and 29 (κθ') are difficult to confuse even for a careless scribe, and that the numbering of the constitutions of this title is uniform in the manuscripts.

As we surmised, Thalelaios, in the comment to C. 2,3,8(9),⁵⁴ informs us of the intervention of the κωδικευτάι, who eliminated the constitution that we read today in C. 2.3.8(9) from the fourth title of *De transactionibus* of the *Novus Codex*. Considering that this last constitution is by *Alexander Severus* in 222 AD, it was originally to be placed in the fourth title of the second book of the *Novus Codex* before the pair of constitutions by *Diocletianus* and *Maximianus* listed under the numbers 28 and 29 inside the *Codex repetitae praelectionis*.

If our reasoning is accepted, the intervention of the Justinian commissioners shortened the title 2,4 *De transactionibus* of the *Novus Codex*, which means that C. 4,2,28 in the *Novus Codex* appeared under the number 29. Thus Thalelaios' referencing mistake throws light on what happened: the *antecessor* did not make a mistake in giving the wrong number of the constitution that expresses the principle of the validity of unwritten *transactio*, but has referred to the numbering that this constitution had before the text was moved to C. 2,3,8(9).

Thalelaios could have been referring to the state of the title *De transactionibus* of the *Novus Codex*, considering as twenty-ninth (κθ') a constitution that in the *Codex repetitae praelectionis* became twenty-eighth (κη') within the title 2,4 *De transactionibus* because of the above-referenced shift.

53 As B.H. Stolte warned during the meeting held in Groningen on 5th July 2013 (*supra*, n. 47).

54 *Supra*, § 2.1.

3.2.

If we admit that Thalelaios' mistake was not a clerical error due to the poor state of the manuscripts, but rather an indicator as to the original structure of the titles of the *Novus Codex*, a pattern emerges within Thalelaios' comment to the *Codex repetitae praelectionis*, among whose links can be seen the fabric of the *Novus Codex*.

Indeed, giving credence to the idea that the referencing mistakes in Thalelaios' comments are not mere oversights, could yield a method of investigation capable of looking at and explaining other cases.

It is not inappropriate to recall that the internal changes to the titles of the Code must have been considerable, since the assignment given by Justinian with the const. *Cordi* consisted not only in the insertion of constitutions issued in the meantime, but also in a more rational distribution of constitutions within the titles of the *Codex repetitae praelectionis*. This was in order to eliminate repetitions, contradictions and measures made obsolete by innovations from the *quingenta decisiones*, from the other constitutions *ad commodum propositi operis pertinentes*, from the *Digesta*, and the *Institutiones*:⁵⁵

Const. *Cordi* § 3: Supra dictis itaque magnificis et prudentissimis viris permisimus haec omnia facere et, si qua emendatione opus fieret, hanc facerent non titubante animo, sed nostra auctoritate fretos, constitutiones vero superfluas, vel ex posterioribus sanctionibus nostris iam vacuatas, vel si quae similes vel contrariae invenirentur, circumducere et a prioris codicis congregatione separare et tam imperfectas replere quam nocte obscuritatis obductas nova elimationis luce retegere, ut undique non solum institutionum et digestorum via dilucida et aperta pateret, sed etiam constitutionum nostri codicis plenum iubar omnibus clareat nulla penitus nec simili nec diversa nec inusitata relicta, cum nemini venit in dubium, quod repetita praelectio probavit, hoc satis validum satisque esse formosum. (...).

This programmatic indication is supported by the sources. If the imperial constitutions in the *Novus Codex* and in the *Codex repetitae praelectionis* are compared in light of the list of titles of sections and *inscriptiones* of P. Oxy. XV, 1814, common differences can be deduced regarding the location of the constitutions within the titles.⁵⁶

55 On these issues, see: G. Ferrari dalle Spade, 'Diritto bizantino', *NNDI* 5 (1960), 791-796 (793). Recently, A. Schiavone-E. Stolfi, *Diritto privato romano. Un profilo storico. Nuova edizione*, Torino 2010, 5, hold that the two Codes would have had 'una struttura sensibilmente diversa'.

56 We note the following cases and identify with *NC* the *Novus Codex* and with *CJ* the *Codex repetitae praelectionis*. With reference to *NC* 1,11 = *CJ* 1,11, in the first edition there appears an extra constitution, so that *NC* 1,11,2 = *CJ* 1,11,1 and so on. In the *repetita praelectio* of the Code the titles

3.3.

Despite being fully aware of the conjectural limitations of our reconstruction, we decided nonetheless to look for further errors in the internal references in Thalelaios' commentary. This research has proved to be fruitful indeed, in fact we have identified four similar cases.

Starting with C. 2,6,3 = B. 8,1,12. Both the Scheltema and Heimbach editions contain a summary of the constitution in Greek.⁵⁷ It granted protection via action (*condictio*) and exception (*exceptio non numeratae pecuniae*) in cases in which the lawyer, for the payment of an *honorarium ultra modum*, has resorted to a *cautio*.⁵⁸

Herein, sch. 2 ad B. 8,1,12,⁵⁹ expressly attributed to Thalelaios, contains a literal translation and a brief comment not of C. 2,6,3, but of the subsequent constitution of the

1,12-13 are inserted from scratch, with the result that *NC* 1,12 = *CJ* 1,14; *NC* 1,13 = *CJ* 1,15; *NC* 1,14 = *CJ* 1,16; *NC* 1,15 = *CJ* 1,17; *NC* 1,16 = *CJ* 1,18. In the case of titles 1,15 and 1,17 the titles of sections change: the title *De auctoritate iuris prudentium* of the *Novus Codex* corresponds to the title *De veteri iure enucleando et auctoritate iuris prudentium qui in digestis referuntur* of the *Codex repetitae praelectionis*. On this point see Corcoran, 'Justinian and his two Codes' (note 1 above), 108-111. The scholar indicates additional internal changes to the titles of the two Codes (78-84 and 89-95). For more details see also Corcoran, 'After Krüger' (note 1 above), 424-431. It is appropriate to report also the thought of Simon, 'Aus dem Codexunterricht des Thalelaios. D.' (note 16 above), 296, which is to say that 'der ganze Codex neu zu schreiben war'.

57 C. 2,6,3 *IMP. GORDIANUS A. FLAVIANO. Si sub specie honorarii, quod advocato usque ad certum modum deberi potuisset, eam quantitatem, quam desiderio tuo complecteris, te daturum cavisti et, quasi mutuam pecuniam accepisses, eam te redditurum promissisti, nec temporis spatio gesto negotio consensum ac fidem accommodasti, competenti exceptione non numeratae pecuniae tutus es, et ex hac causa cautionem interpositam usitato more potes condicere. PP. v id. Iun. Sabino II et Venusto cons. [240].* On the constitution see: E. Rabel, 'Nachgeformte Rechtsgeschäfte. Mit Beiträgen zu den Lehren von der Injurrezession und vom Pfandrecht', *SZ* 28 (1907), 311-379 (328-329); G.G. Archi, 'Studi sulla "stipulatio". I. La "querella non numeratae pecuniae"'. I. Su l'origine della "querella non numeratae pecuniae", in: Id., *Scritti di diritto romano. I: Metodologia e giurisprudenza. Studi di diritto privato*, I, Milano 1981, 521-641 (574-580); E. Levy, 'Die querella non numeratae pecuniae. Ihr Aufkommen und Ausbau', *SZ* 70 (1953), 214-246 (217) (= Id., *Gesammelte Schriften*, I, Köln-Graz 1963, 425-445 (427)); K. Visky, *Geistige Arbeit und die "artes liberales" in den Quellen des römischen Rechts*, Budapest 1977, 64; M.R. Cimma, *De non numerata pecunia*, Milano 1984, 73-78; G. Sacconi, *Ricerche sulla stipulatio*, Napoli 1989, 61-62; F. Pastori, *Il negozio verbale in diritto romano*, Bologna 1994, 279-280; G. Coppola, *Cultura e potere. Il lavoro intellettuale nel mondo romano*, Milano 1994, 201-206, with further indication of the literature; W. Litewski, 'Non numerata pecunia im klassischen römischen Recht', *SDHI* LX (1994), 405-456 (431-433).

58 By virtue of which the promised sum is shown as a receipt to the client by way of loan and therefore to be given back.

59 Sch. 2 ad B. 8,1,12 = C. 2,6,3 (BS 63/6-15) (Hb. I, 334): Θαλελαίου. Ἐρμηνεία. Δικαζόμενός τις καὶ μετὰ συνήγορον λέγων τὴν δίκην αὐτοῦ ἀπολεφθέντων αὐτοῦ τῶν δικολόγων ἠτήθη, καὶ ταύτην προίχόμενος τὴν αἰτίαν ἠβόλετο τὴν κατ' αὐτοῦ ψήφον ἀνατρέψαι. Τοῦτο οὖν ἀπαγορευόν ὁ βασιλεὺς ἀντέγραψεν οὕτως: προκαλύμματι τῆς ἀπουσίας τοῦ δικολόγου ἄνωθεν πρὸς τὰς

title, that of C. 2,6,4. In fact, the *scholium* comments on the prohibition of an appeal against unfavorable rulings due to the absence of a lawyer.

A similar situation happens with reference to C. 2,6,4.⁶⁰ In fact, Thalelaios in the comment contained in sch. 4 ad B. 8,1,13,⁶¹ analyzes the next C. 2,6,5, a measure of Constantine in which is reiterated the prohibition of *pactum de quota litis* previously expressed by classical jurisprudence: D. 2,14,53 (Ulp. 4 *opinionum*).

Finally, but only in the edition of Heimbach, in the comment to B. 8,1,14 = C. 2,6,5,⁶² along with the constitution, there is a *scholium* expressly attributed to Thalelaios⁶³ that, once again, comments instead on the subsequent constitution of the title: C. 2,6,6. This latter constitution is a measure from the emperors *Valentinianus* and *Valens* in which

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- περαιωθείσας ζητήσεις ἐπανατρέχειν τις μηδὲν ἐπιχειρεῖτω. Καὶ τὸ μὲν κατὰ πόδας οὕτως. Εἰ καὶ ἐγὼ δὲ πρὸς τὸ πιθανώτερον ὑπεθέμην, ὅτι ἔσχε μὲν ἐν ἀρχῇ δικολόγον ὁ ἡτηθείς, μετὰ τοῦτο δὲ ἀπολειφθέντος αὐτοῦ κατεδικάσθη, ὅμως σὺ γενικῶς νόησον τὴν διάταξιν, ὅτι κἀν ἐξ ἀρχῆς πᾶσαν τὴν δίκην χωρὶς δικολόγου ἡγωνίσαστο, οὐ δύναται διὰ τοῦτο τὴν κατ' αὐτοῦ προσενεχθεῖσαν ἀπόφασιν ἀνατρέπειν. D. Simon, 'Aus dem Kodexunterricht des Thalelaios. A. Methode', *SZ* 86 (1969), 334-383 (339), significantly, and rightly invokes the *scholium* with reference to the content of C. 2,6,4, the text to which the *scholium* largely refers, but without realizing that, following the system of the *Basilica*, the *scholium* accompanies C. 2,6,3 and not C. 2,6,4.
- 60 C. 2,6,4 *IMP. DIOCLETIANUS ET MAXIMIANUS AA. ET CC. THEODOTIANO. Velamento absentiae patroni causae rursus ad finitas quaestiones redire quis frustra conatur. S. IV kal. Ianuar. Nicomediae, CC. cons.* [294]. Zachariä von Lingenthal, 'Von den griechischen Bearbeitungen' (note 9 above), 9 (= *Kleine Schriften*, II (note 9 above), 26) in a broader context to signal the presence of variances between the κατὰ πόδας and the imperial constitutions, with specific reference to *scholia* relating to C. 2,6,4, states that there are obvious alterations compared to the corresponding passages: we cannot know if the German master intended to refer implicitly to the deviation between the content of the *scholia*, and that of the commented constitutions; S. Solazzi, 'Sulle costituzioni del libro II del "Codex Iustinianus"', *SDHI* XXIII (1957), 43-60 (49) (= *Id.*, *Scritti di diritto romano*. VI: Ultimi scritti – Glosse a Gaio – "Note", Napoli 1972, 21-37 (26-27)), which reminds us how our constitution was part of a single constitution, the second part of which is now contained in C. 6,19,1.
- 61 Sch. 4 ad B. 8,1,13 = C. 2,6,4 (BS 63/29-64/3) (Hb. I, 334): Θαλελαίου. Ἡ διάταξις ἀπαγορεύει τοῖς συνηγόροις προφάσει τῶν ὄνοματιων συμφωνεῖν ἑαυτοῖς μέρος τοῦ πράγματος, περὶ οὗ λέγει γυμνάζεσθαι τὰ τῆς δίκης. Εἰ δὲ τις φανεῖται αὐτὸ τοῦτο ποιήσας, ἀποκινεῖσθαι αὐτὸν βούλεται τοῦ συνηγορεῖν, οὐκ ἐν αὐτῷ τῷ πράγματι μόνον, ἀλλὰ τῆς ἐν ὅλῳ τῷ βίῳ αὐτοῦ συνηγορίας.
- 62 C. 2,6,5 *IMP. CONSTANTINUS A. HELLADIO. Si qui advocatorum existimationi suae immensa atque illicita compendia praelulisse, sub nomine honorariorum ex ipsis negotiis, quae tuenda susceperint, emolumentum sibi certae partis cum gravi damno litigatoris et depraedatione poscentes fuerint inventi, placuit, ut omnes, qui in huiusmodi scaevitate permanserint, ab hac professione penitus arceantur. Dat. III kal. Apr. Paulino et Iuliano cons.* [325] On the text, see: K. Visky, *Geistige Arbeit und die "artes liberales"* (note 57 above), 64-65; Coppola, *Cultura e potere* (note 57 above), 199-200.
- 63 Sch. 3 ad B. 8,1,15 = C. 2,6,6 (BS 65/1-3) (=sch. Εἴ τις βούλεται ad B. 8,1,14 = C. 2,6,5; Hb. I, 335): Θαλελαίου. Εἴ τις βούλεται δικολόγος εἶναι, μὴ αὐτὸς ἐν τῇ ὑποθέσει καὶ δικολογεῖτω, καὶ δικαζέτω. Χρὴ γὰρ εἶναι διαφορὰν μεταξύ δικαζόντων καὶ τῶν προϊσταμένων τῶν δικῶν, τουτέστιν τῶν συνηγόρων. (...).

a person is prohibited from appearing as both an advocate and as a judge in the same case.⁶⁴

We must prefer the proposal of Heimbach for once, rather than that of Scheltema (*et all.*), who instead places our *scholium* at the comment C. 2,6,6, because it is the *antecessor* himself who indicates in this regard.

In fact, in the comment to B. 8,1,37 = C. 2,8(9),2 (BS 87) (Hb. I, 354) Thalelaios⁶⁵ refers to the fifth constitution (ε') of title 2,6 of the Code concerning the incompatibility incumbent on lawyers:

Sch. 4 ad B. 8,1,37 = C. 2,8,2 (BS 87/13-15) (Hb. I, 354): Σημείωσαι οὖν καὶ ἐντεῦθεν, ὅπερ ἀνωτέρω ἐν τῇ η' (?) [Heimbach: ε'] διατ. τοῦ ζ' τιτ. ἐσημειωσάμεθα, ὅτι ὁ πράγματινος θαρρηθεὶς οὐ δύναται ἐν αὐτῷ πράγματι κατὰ τοῦ θαρρήσαντος συνηγορήσαι.⁶⁶

In doing so, the *antecessor* reiterates the error, since that comment is really about the sixth constitution of our title. In fact, C. 2,6,5 is on the prohibition of the *pactum de quota lite*, while those questions of incompatibility are dealt with by C. 2,6,6; what is more important is that it confirms that the *antecessor* considers as the fifth constitution that which instead is placed sixth under title 2,6 *De postulando* of the *Codex repetitae praelectionis*.

We prefer the proposal of Heimbach to that of Scheltema based on *Codex Haenelianus* [leg. cod. Leid. Vossianus gr. Fol. 19], because the Dutch master, though he first connects Heimbach's original sch. Εἴ τις βούλεται ad B. 8,1,14 = C. 2,6,5⁶⁷ to comment B. 8,1,15 = C. 2,6,6, then paradoxically, he places – although doubtfully as evidenced by the question mark – the reference made by Thalelaios in sch. 4 ad B. 8,1,37 = C. 2,8,2 to the eighth constitution of the title (η').

It is not possible to report such a reference to C. 2,6,8 for reasons of content, in fact the theme of the prohibition against the same person holding the offices of judge and

64 C. 2,6,6pr. *IMPP. VALENTINIANUS ET VALENS AA. AD OLYBRIUM P.U. Quisquis vult esse causidicus, non idem in eodem negotio sit advocatus et iudex, quoniam aliquem inter arbitros et patronos oportet esse delectum.* [368]. F. Glück, *Commento alle Pandette*, III, Milano 1888, 10-11; Simon, 'Aus dem Codexunterricht des Thalelaios. D.' (note 16 above), 283-284.

65 The *scholium* is indeed anonymous. However, the last *scholium* previously assigned is by Thalelaios, which leads one to believe that even the *scholium* in consideration is part of the same sequence.

66 We think that an assignment of the *scholium* to Thalelaios should be considered, despite the silence of Heimbach, *Manuale Basilicorum* (note 2 above), 353, on the basis of the following clues: (1) the preceding *scholium* to ours is attributed to Thalelaios; (2) the expression Σημείωσαι οὖν occurs, typical of the language of Thalelaios; (3) the *scholium* contains a reference to the comment of another constitution, as frequently happens in Thalelaios' commentary on the Code.

67 Reported *supra*, in n. 63.

lawyer in the same case or being lawyer for both opposing parties is contained in the *scholia* to B. 8,1,14 = C. 2,6,5.⁶⁸

Ultimately, it seems that the reference made by Thalelaios in sch. 4 ad B. 8,1,37 = C. 2,8,2 is to be addressed to C. 2,6,5 as Heimbach had already noticed. Doing so reinforces the idea that Thalelaios considered as fifth a constitution which is placed sixth within title 2,6 of the Code.

The arrangement of the *scholia* that we have reported is characterized by there having been a ‘slippage’ of one text. We do not believe it is due to an error of the *Basilica* compilers, or rather, if there was an error, it must have been caused by the state of Thalelaios’ commentary on the Code, which takes into account an order in the succession of constitutions that does not match with that of the *Codex repetitae praelectionis*.

If we connect this case to what we observed with respect to C. 2,3,8(9) = B. 11,1,69(70) (BS 316-317) (Hb. I, 649),⁶⁹ it does not seem risky to contend that even these three *scholia*, commenting on B. 8,1,12 = C. 2,6,3, B. 8,1,13 = C. 2,6,4 and B. 8,1,14 = C. 2,6,5, match the comment that Thalelaios had made taking into account the numbering of constitutions in the *Novus Codex*.

Furthermore, these errors relate to the first constitutions of the title, while it would be easier to think of a mere clerical error for the final constitutions of the titles, especially the most numerous.

We tracked down another error of the same type within the work of Thalelaios.

It is contained in a *scholium*⁷⁰ of comment to C. 2,12(13),13 in which the *antecessor* remembers that the lawyer who stubbornly insists in opposing dilatory exceptions that have not been opposed on the occasion of the introductory acts of the case (*rectius, ante litis contestationem*) is fined one pound of gold, as we read in C. 8,36,13 (ὡς ἐν τῷ ἡ βιβ. τοῦ Κωδ. τούτου τιτ. λζ' ἢ ιγ').

However, this principle is not expressed by the thirteenth, but by the twelfth constitution (ιβ') of the title, i.e. C. 8,36,12.⁷¹ Even this reference error may be explained,

68 See, in particular, the sch. 3 and 4 ad B. 8,1,15 = C. 2,6,6 (BS 65/1-66/3) (Hb. I, 335-336), both expressly attributed to Thalelaios.

69 *Supra*, § 2.1.

70 Sch. 5 ad B. 8,2,87 = C. 2,12,13 (BS 153/15-18) (Hb. I, 409): (...) Ἀμέλει σήμερον ὁ δικολόγος παραλιπὼν δηλατορίαν παραγραφὴν καὶ μὴ ἐν προοιμίῳ τῆς δίκης ἀντιτεθεικὼς αὐτήν, ἐὰν ἐπιχειρήσῃ μετὰ ταῦτα χρήσασθαι αὐτῇ, καὶ λίτρον χρυσοῦ προστιμᾶται, ὡς ἐν τῷ ἡ βιβ. τοῦ Κωδ. τούτου τιτ. λζ' ἢ ιγ' (...).

71 C. 8,36,12 *IMP. IULIANUS A. AD IULIANUM COMITEM ORIENTIS. Si quis advocatus inter exordia litis praetermissam dilatoriam praescriptionem postea voluerit exercere, et ab huiusmodi opitulatione submotus nihilominus perseveret atque praeposterae defensionis institerit, unius librae auri condemnatione multetur. Dat. VII id. Mart. Antiochiae, Iuliano A. IV et Sallustio Cons. [363].* For questions of a procedural nature raised by the constitution, see: M. Sargenti, ‘Aspetti e problemi

in our opinion, thinking that Thalelaios took account of the numbering of the constitutions from title 8,36 *De exceptionibus seu praescriptionibus* present in the *Novus Codex*. Even in this case, in fact, it is not easy to blame the error of a scribe, considering the graphical difference between the letters used to indicate the numbers 2 and 3 (β' and γ').⁷²

3.4.

The evidence presented by the internal reference errors of Thalelaios' commentary on the Code seems highly significant. They, in fact, if not considered due to oversights or to the poor state of the manuscripts, may demonstrate that Thalelaios wrote a commentary not only on individual constitutions,⁷³ but on the *Novus Codex* in its entirety. In fact, the references allow us to make comparisons between constitutions from the second to the eighth book of the Code. Only the short time available⁷⁴ for updating the commentary on the *repetita praelectio* allowed the distorted origin of the commentary to come to light.

4.

Two translations of Thalelaios deriving from the text of the *Basilica* are still worthy of note. The *Basilica* text is, as is generally believed, in the part related to the imperial constitutions, taken from Thalelaios' commentary on the Code.⁷⁵ These are texts that,

dell'opera legislativa dell'Imperatore Giuliano', *AARC* III (1977) (Perugia 1979), 325-381 (367 n. 87); C.St. Tomulescu, 'Julien l'Apostat et le code de Justinien', *AARC* III (1977) (Perugia 1977), 413-422 (417-418), with particular reference to the concept of *exordium litis*.

72 The criterion that we propose, on the other hand, could not explain the referencing mistake Thalelaios made in a comment now contained in sch. 3 ad B. 11,2,35 = C. 2,4,18 (BS 409/10-19) (Hb. I, 704) in which the *antecessor* mistakenly refers to C. 9,9,30, whereas the correct reference should have been to C. 9,9,29. Indeed, in this title of the *Codex*, the numbering of the constitutions suffers, depending on the manuscripts, a variation equal to one unit, beginning from the twenty-fourth constitution. On this point see, for all Krüger, *Editio maior*, 825 n. 1 and Simon, 'Aus dem Kodexunterricht des Thalelaios. B.' (note 32 above), 341-342.

73 As believed, for example Berger, 'Studies in the Basilica' (note 7 above), 113: 'some scattered allusions to the first Code are, of course, not excluded in a few exceptional cases in Th.'s work, provided that his authorship is ascertained in each case. It would be nothing extraordinary with a professor who did not cease teaching after the publication of the first Code if he occasionally continued to use some of the remarks he had made on it'. *Adde* the literature indicated in n. 30.

74 On these issues, we would like to refer to Sciortino, 'La relazione tra il *κατὰ πόδας* e le traduzioni di Taleleo' (note 5 above), 151-158.

75 In the literature it is generally believed that in the putting together of the text of the *Basilica*, Thalelaios' commentary on the Code was used for the parts relating to the imperial constitutions, except for the eighth book, which was drawn from the *Summa of Anatolius*: J.H.A. Lokin, 'Anatolius antecessor', in: Id., *Analecta Groningana ad ius graeco-romanum pertinentia*, Groningen 2010, 81-

while they translate constitutions contained in the *Codex repetitae praelectionis*, contain passages from the Theodosian Code.

Now, although some may be readings diverging from those of the traditional manuscripts,⁷⁶ having tracked down no useful information in this regard in the apparatus criticus of the *Basilica* edition edited by Scheltema (*et all.*), we nonetheless consider it plausible to put forward an alternative interpretation.

In particular, we believe that these sources are able to certify how Thalelaios was aware of an intermediate textual level between the pre-Justinian Codes and the *Codex repetitae praelectionis*: this intermediate stage seems to go back to the *Novus Codex*.

Let's start with the translation of a constitution contained in both the Theodosian Code and the *Codex repetitae praelectionis*:

<p>C.Th. 3,1,4 IMPP. GRAT. VALENT. ET THEOD. AAA AD HYPATIUM PF. P. Quisquis maior aetate <u>atque administrandis</u> <u>familiarum suarum curis idoneus</u> <u>comprobatus</u> praedia, etiam procul posita, distraxerit, <u>etiamsi</u> <u>praedii forte totius quolibet casu</u> <u>minime facta distractio est</u>, repeti- tionis in reliquum, pretii nomine vilioris copiam minime conse- quatur rell. Dat. vi non. Mai. Mediolano, Merobaude II. et Saturnino Conss. [383]</p>	<p>C. 4,44,15 IMPP. GRAT. VALENT. ET THEOD. AAA AD HYPATIUM PF. P. Quisquis maior aetate praedia, etiam procul posita distraxerit paulo vilioris pretii nomine repetitionis rei venditae copiam minime consequatur rell. Dat. vi non. Mai. Mediolano, Merobaude II. et Saturnino Conss. [383]</p>	<p>B. 19,10,85(84) = C. 4,44,15 (BT 966/8-11) (Zachariae, <i>Supplementum</i> (note 24 above), 282): Εἴ τις ὡς μείζων τῶν κε' ἐνιαυτῶν <u>καὶ ἐπιτηδείως διοικήσαι</u> <u>τὴν ἰδίαν φαμίλιαν δοκιμασ-</u> <u>θεὶς κτήματα εἰ καὶ πόρρω</u> <u>διακεῖμενα πωλήσει, εὐτε-</u> <u>λεστέρου τιμήματος ὄνό-</u> <u>ματι ἀναλήψεως τοῦ πρα-</u> <u>θέντος πράγματος</u> εὐπορίαν μηδαμῶς ἐπικτάσθω, (...).⁷⁷</p>
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87 (81). The idea, long present in the literature – e.g. in Zachariä von Lingenthal, ‘Von den griechischen Bearbeitungen’ (note 9 above), 18 (= *Kleine Schriften*, II (note 9 above), 281) –, was confirmed recently by J.H.A. Lokin/Th.E. van Bochove, ‘Compilazione – educazione – purificazione. Dalla legislazione di Giustiniano ai Basilica cum scholiis’, in: J.H.A. Lokin/B.H. Stolte, [ed.], *Introduzione al diritto bizantino. Da Giustiniano ai Basilici*. Collegio di Diritto Romano 2009. Cedant, Pavia 2011, 99-146 (138-139).

76 As argued by N. van der Wal and B.H. Stolte at the meeting in Groningen mentioned *supra*, n. 47 and 53.

77 Indeed, B. 19,10 is contained in a *liber restitutus*, its text is in fact preceded in the Scheltema edition by an angle bracket (◁) indicating its absence from the manuscripts and the fact that it was reconstructed on the basis of other sources. Pertinent to our case is the Peira that contains a collection of decisions of the Byzantine jurist named Eustathios Rhomaios, who supports his decisions by quoting passages of the *Basilica*.

So Thalelaios translates the part *atque administrandis familiarum suarum curis idoneus comprobatus* that appears in the Theodosian Code, with the words καὶ ἐπιτηδείως διοικῆσαι τὴν ἰδίαν φαμίλιαν δοκιμασθεῖς. However, the passage does not occur in the version received in the *Codex repetitae praelectionis*: the *antecessor* thus appears to not know the version of the constitution contained in this Code.

Nor can it be said that Thalelaios has followed the Theodosian version, because the following passage *etiamsi praedii forte totius quolibet casu minime facta distractio est*, expunged by the Justinian commissioners, is not translated by the *antecessor*, evidently because it has not been read. Finally, the section from the Theodosian *repetitionis in reliquum, pretii nomine vilioris* is replaced in the Justinian Code with *paulo vilioris pretii nomine repetitionis rei venditae*, and it is this which is translated by Thalelaios with the words εὐτελεστέρου τιμήματος ὀνόματι ἀναλήψεως τοῦ παρθέντος πράγματος.

Ultimately Thalelaios translates a constitution that does not correspond neither to the original content of the Theodosian nor to the version from the *Codex repetitae praelectionis*.

Thalelaios is privy to an intermediate text, in our view corresponding to that contained in the *Novus Codex*, with the following wording: *Quisquis maior aetate [atque administrandis familiarum suarum curis idoneus comprobatus] praedia, etiam procul posita distraxerit, paulo vilioris pretii nomine repetitionis rei venditae copiam minime consequatur (...)*.⁷⁸

We have shown between brackets [] the passage excised during insertion of the constitution in the *Codex repetitae praelectionis*. It is likely that Thalelaios has not had time to adjust the commentary to the change in the text.

78 We do not share the concerns advanced by Simon, 'Aus dem Codexunterricht des Thalelaios. D.' (note 16 above), 307-308, on the possibility of tracing this text back to a draft of the commentary of Thalelaios prior to *repetita praelectio*. According to the scholar this would be precluded by 'die ungewöhnlich enge Anlehnung des griechischen Textes an die lateinische Fassung'. However, it is possible to prove that Thalelaios was a translator who was careful with the wording of the constitutions and we cannot be surprised that this Greek translation presents accurate correspondences to the original Latin, without having to think of a κατὰ πόδας. On this point allow us to refer to Sciortino, 'La relazione tra il κατὰ πόδας e le traduzioni di Taleleo' (note 5 above), 134-143. Neither does Simon believe that the manuscripts may have been responsible for the reported differences.

A similar reasoning applies to:

C.Th. 11,36,25 IMPPP. VALENS, GRATIANUS ET VALENTINIANUS AAA AD THALASSIUM PROC. AFRIC. POST ALIA: ab executione appellari non posse satis et iure et constitutionibus cautum est, ita ut appellan-tem etiam nostris sanctionibus statuta multa compescat ... Sci-ant autem se provocatores vel ab executione appellantes vel ab articulo ex his dumtaxat causis, ex quibus recipi iussimus provocationem, si eos perperam intentionem cognitoris suspendisse claruerit, quinquaginta librarum argenti animadversione multandos. Dat. iii kal. Febr. Treviris Valente vi et Valentiniano ii AA Cons. [378]

C. 7,65,5 IMPPP. VALENS, GRATIANUS ET VALENTINIANUS AAA AD THALASSIUM PROC. AFRIC. ab executione appellari non posse satis et iure et constitutionibus cautum est ... Sci-ant autem se provocatores vel ab articulo si eos perperam intentionem cognitoris suspendisse claruerit, quinquaginta librarum argenti animadversione multandos. Dat. iii kal. Febr. Treviris Valente vi et Valentiniano ii AA Cons. [378]

B. 9,1,146 = C. 7,65,5 (BT 462/9-23 *passim*) (Hb. I, 443): Κατὰ ἐκβιβασμοῦ ἐκκαλεῖσθαι μὴ δύνασθαι ἱκανῶς καὶ ἐπὶ τοῖς νόμοις καὶ ἐπὶ ταῖς διατάξεσι διηγόρευται, οὕτω μέντοι ὥστε καὶ τὸν ἐκκαλεσάμενον τὸ ταῖς ἡμετέραις διατάξεσιν ὀρισμέ-νον πρόστιμον ὑποσχεῖν (...) Ἰστοῦσαν δὲ αὐτοῦς οἱ ἐκκαλεσάμενοι κατὰ παρατήσεως ἢ κατὰ διαλαλιᾶς, ἐὰν προπε-τώς τὴν φωνὴν τοῦ διαγνώ-μονος ἀναρτήσαι ἀποδειχθῆ, πενήτηκοντα λιτρῶν ἀργύρου τιμωρητέους.

Also in this case Thalelaios translates an intermediate text. In fact, the following section is translated in Greek, which appears in the Theodosian Code, but not in the Justinian Code, *ita ut appellan-tem etiam nostris sanctionibus statuta multa compescat*: οὕτω μέντοι, ὥστε καὶ τὸν ἐκκαλεσάμενον τὸ ταῖς ἡμετέραις διατάξεσιν ὀρισμένον πρόστιμον ὑποσχεῖν. Conversely, Thalelaios does not translate the section *ex his dumtaxat-provocationem* that appeared in the Theodosian but that has been deleted by the Justinian commissioners.

Thalelaios, once again, shows knowledge of an intermediate stage of the constitution that was to be included in the *Novus Codex* as follows: *ab executione appellari non posse satis et iure et constitutionibus cautum est, [ita ut appellan-tem etiam nostris sanctionibus statuta multa compescat] ... Sci-ant autem se provocatores vel ab executione appellantes vel ab articulo, si eos perperam intentionem cognitoris suspendisse claruerit, quinquaginta librarum argenti animadversione mulctandos*. Only the commissioners who have dealt with the preparation of the *Codex repetitae praelectionis* would have further

shortened the text by deleting the section between *ita* and *compescat*, without Thalelaios having had time to update the translation for the *repetita praelectio*.⁷⁹

5.

This evidence seems compelling enough to lend support to the evidence already known in doctrine⁸⁰ and fragmentarily adopted in order to show that an earlier draft of Thalelaios'

79 Simon, 'Aus dem Codexunterricht des Thalelaios. D.' (note 16 above), 306-307, attributes the mentioned deviation of the translation of Thalelaios, to the reading by our *antecessor* of a manuscript that does not correspond to the version of the constitution contained in the *Codex repetitae praelectionis*.

80 The first textual evidence is B. 60,1,35 = C. 9,46,8 (BT 2745/1-3) (Hb. V, 255), a text which is commonly believed to be the work of Thalelaios. The source has already been reported in the literature – see E. Levy, 'Von den römische Anklägervergehen', *SZ* 53 (1933), 151-233 (176 n. 2) (= Id., *Gesammelte Schriften*, II, Köln-Graz 1963, 379-432 (395 n. 130), followed by J. Sontis, *Die Digestensumme des Anonymos. I. Zum Dotalrecht. (Ein Beitrag zur Frage der Entstehung des Basilikenextes)*, Heidelberg 1937, 10; R. Bonini, *Ricerche di diritto giustiniano*, Milano 1968, 147-149. In a critical sense however: Simon, 'Aus dem Codexunterricht des Thalelaios. D.' (note 16 above), 286-287. See also F. Botta, *Legittimazione, interesse ed incapacità all'accusa nei iudicia publica*, Cagliari 1996, 398-400, with an indication of further reading –, and corresponds to a constitution of the emperors *Gratianus*, *Valentinianus* and *Theodosius* received through the *Codex Theodosianus* (C.Th. 9,39,2) and the *Codex repetitae praelectionis* (C. 9,46,8). The penalty imposed by the constitution in the case of an accusation *alieno nomine* driven by a *delator* consists in *infamia* and *deportatio*; the Justinian commissioners replaced the *deportatio* with the *supplicium*, also applying to this particular case the penalty of retaliation generally imposed for *calumnia*. Thalelaios ignores the interpolation and in the summary of the constitution that we find in the *Basilica* mentions the *deportatio* through the use of the verb *περιπορίζω*. Nor can we believe that the *antecessor* wanted to turn to the pre-Justinian text because he considers the current constitution (Ἡ διάταξις βούλεται). The confirmation that Thalelaios was referring to a constitution contained in a Code official in the time of Justinian comes from sch. 1 ad B. 60,1,32 = C. 9,46,5 (BS 3077/21-26) (Hb. V, 253) attributed to *Theodorus*, in which this jurist refers to the eighth constitution of the title (C. 9,46,8) remembering that it imposes the penalty of *deportatio* (δεπορτατεύεται). Once again, we cannot believe that *Theodorus* wanted to refer to the *Codex Theodosianus* since he expressly declares to refer to the content of the eighth constitution of the forty-sixth title, subject of the commentary, while the constitution in *Theodosianus* is placed second in the thirty-ninth title *de calumniatoribus*. Now we do not know if *Theodorus* has been misled by Thalelaios as Levy thought, but we believe the German scholar to be right when he says that both the Byzantine jurists had to have referred to the state of C. 9,46,8 corresponding to the *Novus Codex*, in which the title 9,46 *de calumniatoribus* had to have an identical structure to that of the *Codex repetitae praelectionis*; in this sense, see A.M. Giomaro, 'La diversa collocazione del *de calumniatoribus*: scuola o pratica giudiziale?', *AARC XVI* (2003) (Napoli 2007), 491-549 (517-535). For a broad overview of the structure of the titles of the ninth book of the *Codex repetitae praelectionis*, compared to the *Codex Theodosianus* and the *Novus Codex*, see G.M. Asher, *Disquisitionum de fontibus juris romani historicarum. Fasciculus I. Disq. I. De vestigiis primae editionis Codicis Justiniani, quae in nono hujus Codicis libro inveniuntur*, Heidelbergae 1855, 1-16, who furthermore highlights the differences between the titles of the ninth

commentary on the Code was made in reference to the *Novus Codex*. In our view it can't have been occasional comments, but a work, probably unpublished, brought about by the *Novus Codex*, as we believe the convergence of the two following pieces of evidence demonstrate.

On the one hand, the internal reference errors of Thalelaios' commentary, if not due to the state of the manuscripts, reveal an older structure of the titles, which Thalelaios refers to between the second and the eighth book of the Code.⁸¹ On the other hand, translations of the imperial Code characterized by the presence of a textual level intermediate between the Theodosian Code and the *Codex repetitae praelectionis*⁸² may provide the clue to go back to a commentary created for constitutions contained in the

book of the *Codex repetitae praelectionis* and the ninth book of the *Codex Theodosianus*. Otherwise there would have been full correspondence between the *Theodosianus* and the *Novus Codex*, since the changes would be attributed to the novelty of criminal law introduced by the *Digesta*. On the ambiguity of the ancient concept of '(re)edition' see: F. Wieacker, *Textstufen klassischer Juristen*, Göttingen 1960, 72-92; Sperandio, *Codex Gregorianus* (note 31 above), 248-254, with a broad indication of the literature.

Perhaps because of an oversight Thalelaios has not adapted the comment to the textual amendment which occurred at the time of the *repetita praelectio*, so that in the synthetic translation into Greek of this constitution, present in the *Basilica*, you can find text from the *Novus Codex*, that imposed the sanction of *deportatio* and not of *supplicium* on the *delator/calumniator*.

Another textual proof previously reported in the literature – although assigned a different weight by: Zachariä von Lingenthal, 'Die Meinungsverschiedenheiten' (note 32 above), 37 (= *Kleine Schriften*, II, (note 9 above), 222); Van der Wal, *Les commentaires grecs* (note 7 above), 78; Simon, 'Aus dem Codexunterricht des Thalelaios. D.' (note 16 above), 282 – supporting the existence of a comment by Thalelaios on the *Novus Codex* consists of an ἐρωτησὶς in sch. 4 ad B. 8,1,19 = C. 2,7,4 (BS 73/7-31) (Hb. I, 342), where a student asks Thalelaios if the constitution subject to comment would still need to be considered since in the meantime a reforming Justinian constitution had been enacted. Now, the way in which the *antecessor* answers betrays the fact that – at a time when the question and answer were made – the *Codex repetitae praelectionis* had not yet been enacted, in fact, the collocation in the Code of the Justinian constitution to which reference is made (probably C. 6,61,6) is not provided, as Thalelaios usually does and as certainly would have happened if the *Codex repetitae praelectionis* had been published.

Still reveals sch. 1 ad B. 39,1,41 = C. 3,28,12 (BS 2337/15-22) (Hb. IV, 34) in which S. Solazzi, 'L'Indice di Taleleo e i glossemi delle costituzioni imperiali', *SDHI* V (1939), 218-221 (218-220), finds evidence that Thalelaios was commenting on the text of the constitution contained in the *Novus Codex*. But the *scholium* is anonymous and its origin being found in Thalelaios' commentary on the first Code, would have to be demonstrated.

Finally, see also the report by K.-H. Schindler, 'Zum Problem Byzantinischer Bearbeitungen des ersten Codex', in: *Studi in onore di Edoardo Volterra*, II, Milano 1971, 371-380, which according to the author, confirms the idea originally supported by Zachariae from an original reference to the *Novus Codex* commentaries of the Byzantine *antecessores* merged into the text of the *Basilica*. However, it seems that this isolated finding is not able to support the thesis of a generic reference to the work of the Byzantine *antecessores* to the *Novus Codex*.

81 *Supra*, § 3 ff.

82 *Supra*, § 4.

THALELAIOS' COMMENTARY ON THE NOVUS CODEX

Novus Codex. These texts, thanks to the support from Byzantine sources, can be reconstructed in their original version.

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