

# A Hypothesis regarding Justinian’s *decisiones* and the Digest

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Abstract — It is frequently asserted that the Justinianic legal enactments that resolved ancient juristic disputes (the *quinquaginta decisiones* [“Fifty Decisions”] and so-called *constitutiones extravagantes*) were reflected within the Digest, the original constitutions ending up devoid of any practical purpose. It does indeed seem logical that these legislative acts were conceived so as to assist the *antecessores* in their daunting task of sifting through the classical-era writings. Because the legal controversies had now been resolved, it would be clear which side to take, and which texts to choose and which to discard; or failing the identification of relevant texts, how to ensure that the reforms were suitably represented through the infamous *interpolationes*. And even if helping the compilers had not been the original purpose behind these laws, it seems inevitable that their ready-made solutions were relied on as valuable guidance. This article seeks to examine such a standpoint in the context of the *decisiones*, after first considering how these very provisions should themselves be identified.

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## I. Introduction

After becoming emperor of the Eastern Roman Empire, Justinian undertook the gargantuan project of organizing the law that had underpinned Rome for over a thousand years. In early 528 he announced his plan to prepare a new law code, the *Novus Codex*, through which he systematized imperial pronouncements (*constitutiones*) from the second century AD up to and including laws issued under his own auspices; it was published just over a year later.<sup>1</sup> At the end of 530 he ordered that the *ius antiquum*, the renowned classical-era juristic commentaries on the law, be rescrutinized and collated into a legal Digest, under the direction of his new *quaestor* Tribonian;<sup>2</sup> assigned to the scheme were also six Commissioners, who included within their ranks four senior law professors from Beirut and Constantinople,<sup>3</sup> and eleven renowned practitioners,<sup>4</sup> so serious lawyers were considered indispensable to the work.<sup>5</sup> The Digest was published after three years of intensive perusal to identify the preferred juristic opin-

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<sup>1</sup> Justinian announced the *Novus Codex* project through *constitutio Haec* (13 Feb. 528), and its publication through *constitutio Summa* (7 Apr. 529).

<sup>2</sup> See c. Deo auctore (15 Dec. 530) regarding the start of the Digest compilation. See also T. Honoré, *Tribonian* (London 1978), 40–69, for a commentary on Tribonian's career.

<sup>3</sup> The so-called “antecessores” referred to in c. Tanta 9 and 11 (16 Dec. 533). Beirut had been the Empire's center of legal education for centuries; Honoré (note 2), 43–44.

<sup>4</sup> C. Tanta 9.

<sup>5</sup> Cf. S. Corcoran, “Justinian and his two Codes: Revisiting *P. Oxy.* 1814,” *J. Juristic Pap.*, 38 (2008), 98–99.

ions.<sup>6</sup> Around this time the law school curriculum was also comprehensively reworked,<sup>7</sup> and Tribonian oversaw two of the Digest commissioners in their task of drafting the *Institutiones*, a legal manual for students published around a month before the Digest.<sup>8</sup>

Once the *Novus Codex* had been completed, but before the official launch of the Digest operation, further constitutions known as the *quinquaginta decisiones* were promulgated, again under the aegis of Tribonian; these re-evaluated the more contentious issues upon which the jurists had not seen eye to eye.<sup>9</sup> Almost immediately after the final *decisio* was issued, if not before, Justinian also began promulgating further decisive constitutions, known in modern parlance as the (*constitutiones*) *extravagantes*.<sup>10</sup> Very shortly after all enactments of both types had been issued, and perhaps even before the publication of the *Institutiones* and Digest, many were subjected to *permutationes vel emendationes* after subsequent events caused them to be deemed needful of change through *melius consilium*,<sup>11</sup> the ensuing

<sup>6</sup> *Constitutio Tanta* and its Greek version *constitutio Δέδοκεν* describe how the project developed and culminated in the Digest's publication on 16 Dec. 533.

<sup>7</sup> C. Omnem (16 Dec. 533).

<sup>8</sup> C. Imperatorium maiestatem (21 Nov. 533).

<sup>9</sup> C. Cordi 1–2 (16 Nov. 534); J.1.5.3. Their chronology is discussed below.

<sup>10</sup> C. Cordi 1 refers to them as the *aliae ad commodum propositi operis pertinentes plurimae constitutiones*. For views on their likely purpose, see C. Russo Ruggeri, *Studi sulle quinquaginta decisiones* (Milan 1999), 120–25; J. Paricio, “Sobre las *quinquaginta decisiones*,” *Labeo*, 46 (2000), 508–509. Cf. G. L. Falchi, “Osservazioni sulle *L decisiones* di Giustiniano,” *Studi in onore di Arnaldo Biscardi*, 5 (Milan 1984), 146; G. Rotondi, “Studi sulle fonti del codice Giustiniano,” *Scritti giuridici*, 1 (Milan 1922), 235, 237; P. Pescani, “Quinquaginta Decisiones,” *Novissimo Digesto Italiano*, 14, 3rd ed. (Turin 1967), 707, and “Il piano del Digesto,” *BIDR*, 77 (1974), 225, where he refers to “extra vagantes.” Their role may need revisiting in light of the current enquiry but is not addressed here beyond the observations made below, in the text accompanying note 38.

<sup>11</sup> The editorial process is described in c. Cordi 2:

Sed cum novellae nostrae tam decisiones quam constitutiones, quae post nostri codicis confectionem latae sunt, extra corpus eiusdem codicis divagabantur et nostram providentiam nostrumque consilium exigere videbantur, quippe cum earum quaedam ex emersis postea factis aliquam meliore consilio permutationem vel emendationem desiderabant, necessarium nobis visum est . . . easdem constitutiones nostras [referring back to the *decisiones* and *extravagantes*] decerpere.

provisions potentially bearing scant resemblance to the originals. The Code itself was then revised and updated, incorporating the *decisiones* in this altered form;<sup>12</sup> when republished on 16 November 534 any reference to the constitutions in their original state was prohibited.<sup>13</sup>

The works of various modern scholars have contributed to the view that the *decisiones* were rendered otiose by the publication of the Digest, which absorbed the principles in question. In other words, the Digest functioned in part as a vehicle for the exposition of Justinian's resolute constitutions, thereby inevitably rendering those selfsame provisions redundant: they were simply of no use thereafter. Making the Digest compliant with these new Justinianic provisions would have been achieved by omitting contradictory opinions, or if the *decisio* ushered in reforms, these would be inserted into the Digest with no overt reference to the *decisio*, the texts being paraded as authentic with no acknowledgement within the Digest itself of any subterfuge — a process known overall as “interpolation.” The necessary corollary of the position as a whole is that if approved viewpoints could not be found within the extant texts, the same result would be attained by editing any somehow deficient classical-era excerpts so that they effectively contained the correct principle.<sup>14</sup> The orders to perpetrate such acts have seemingly been preserved, and are to be found in *c. Deo auctore* (mainly 4 and 7), confirmed retrospectively

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Ruggeri (note 10), 24–25, 52, suggests that the *decisiones* may furthermore have been subjected to the additional cuts wrought on the constitutions of the *Novus Codex* when the Code was reconstructed (see *c. Cordi 3*), further eroding their resemblance to the originals, although M. Varvaro, “Contributo allo studio delle *Quinquaginta Decisiones*,” *Annali del Seminario Giuridico di Palermo*, 46 (2000), 377–83, disagrees on the basis that no such powers were contained here (see also below with note 53).

<sup>12</sup> *C. Cordi 2: necessarium nobis visum est . . . easdem constitutiones nostras . . . in singula discretas capitula ad perfectarum constitutionum soliditatem competentibus supponere titulis et prioribus constitutionibus eas adgregare.*

<sup>13</sup> *C. Cordi 5: Repetita itaque iussione nemini in posterum concedimus vel ex decisionibus nostris vel ex aliis constitutionibus, quas antea fecimus, vel ex prima Iustiniani codicis editione aliquid recitare.* The second edition of the Code was named the “*Codex Repetitae Praelectionis*” (*c. Cordi 3*) but is referred to here as *CJ*<sup>2</sup>.

<sup>14</sup> The process of manipulating classical-era texts by inserting unattributed principles that had evolved at a later date is discussed by W. W. Buckland, *A Text-Book of Roman Law*, 3rd ed. P. Stein (Cambridge 1963), 40–45, and O. Robinson, *The Sources of Roman Law* (London and New York 1997), 105–13.

by *c. Tanta* (mainly 10–11 and 14). However, their full impact is far from clear and, even if some instances of Justinianic alterations may be indisputable, with whole new principles having possibly been inserted,<sup>15</sup> their extent has in recent years been hotly contested.<sup>16</sup>

The current paper seeks to explore these theories, which have inevitable repercussions on how we perceive the role of the *decisiones* within Justinian's compilation, raise questions about their eventual fate and re-open the issue of what functions were assumed by the Digest itself.

## II. Identifying the *decisiones*

### A. The formal criteria: "known *decisiones*"

We know then that the *decisiones* were included in CJ<sup>2</sup>, but rarely are they expressly identified as such, whether in the Code or elsewhere. However, it is difficult to criticize the current consensus that those constitutions qualified as *decisiones* by the provisions themselves or by external Justinianic sources, or that resolve disputes using variations of the verb *decidere*, are those most guaranteed to be *decisiones*,<sup>17</sup> particularly because only Justinian uses the term to settle legal arguments or to denote an actual constitution<sup>18</sup> as opposed to (for example) a court

<sup>15</sup> Cf. Buckland (note 14), 40–45, and Robinson (note 14), 105–13.

<sup>16</sup> Buckland (note 14), 40–45; Robinson (note 14), 105–13. It is also important to bear in mind that juristic works may have been altered during the post-classical era; however, the fifth- and sixth-century legislators were very preoccupied with authenticity and this extended to the Digest sources: C.Th. 1.4.3; *c. Deo auctore* 7. The whole concept of the Digest is based on the retrieval of original classical-era law even if it was contemplated that the Commissioners themselves would make amendments; see, e.g., Robinson (note 14), 107–108.

<sup>17</sup> Ruggeri (note 10), 12–14, 23–27; Honoré (note 2), 142–46; H. Scheltema, "Subsecivum XVIII: Les *Quinquaginta decisiones*," *Subseciva Groningana*, 1 (1984), 7; Falchi (note 10), 124–25 & n.13; G. Luchetti, "La raccolta di *iura*: Gestazione di un progetto. La legislazione imperiale fra il luglio del 530 e l'aprile del 531," *Koinonia*, 35 (2011), 168; Paricio (note 10), 504; Pescani, "Quinquaginta" (note 10), 707 (implicit). Varvaro (note 11), 377, 445, also acknowledges the greater level of certainty achieved through the formal criteria. Not to be included within this category are C.6.27.6 (30 July 531), which contains the word "decisio" but only insofar as it refers back to C.6.27.5, or C.6.51.1.10b (1 June 534), which similarly confirms the outcome of C.6.30.20.

<sup>18</sup> Honoré (note 2), 143; Scheltema (note 17), 3; J. Lokin, "Decisio as a terminus technicus," *Subseciva Groningana*, 5 (1992), 165.

judgment.<sup>19</sup> Such constitutions are designated here as “known *decisiones*,” and the identification method is commonly referred to as the “formal criteria.”

Carmela Russo Ruggeri lists those provisions containing such self-referential language,<sup>20</sup> and those picked out through contemporary works.<sup>21</sup> However, a few of her findings are queried here. Firstly, irrespective of scholarly concurrence,<sup>22</sup> there is insufficient reason to consider that C.6.2.22 consists of three separate *decisiones*, principally because *c. Cordi* 2 makes no reference to fusing individual laws. The position of Mario Varvaro<sup>23</sup> coincides with this objection, albeit on the basis of the editorial powers described in *c. Cordi* 3. Clearly, those responsible for the drafting of *c. Cordi* may never have intended for its wording to be a precise reflection of reality (see section VI below), so there is some room for conjecture. However, there are (retrospective) precedents in the *novellae* of constitutions addressing several different but roughly related points,<sup>24</sup> and as such, the existence of Justinianic enactments that each contain multiple dispute resolutions by no means necessarily connotes splicing, particularly if the issues addressed were not dissimilar. Secondly, because of the lack of certainty regarding its issue date, the *decisio* status of C.8.47.10 is here only accepted as a possibility rather than as definitive.<sup>25</sup> Further, Ruggeri's arguments surrounding the *glossa torinese* rely on evidence that is considered too fragile for present purposes.<sup>26</sup>

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<sup>19</sup> *Decisio* as a term is used in constitutions from Diocletian (e.g., C.2.4.23–24), Constantius (C.2.52.5), Leo (C.2.4.42) through to Justinian (e.g. C.1.14.12, 7.64.10, 8.10.14, *c. Haec* 3) to denote judicial settlements; see also A. Berger, *Encyclopaedic Dictionary of Roman Law* (Philadelphia 1953), s.v. “decidere,” and Honoré (note 2), 146 (although he omits reference to the earlier, pre-Justinianic use of the term).

<sup>20</sup> Ruggeri (note 10), 27–48.

<sup>21</sup> *Id.*, 48–62: C.7.5.1 is only referred to as a *decisio* by J.1.5.3, and C.4.27.2 by J.3.28.3 and Theophilus' *Paraphrasis Institutionum*.

<sup>22</sup> E.g., Honoré (note 2), 144 & n.40; Paricio (note 10), 504; Falchi (note 10), 128.

<sup>23</sup> Varvaro (note 11), 377–83.

<sup>24</sup> E.g., chapters 1–2 and 4 of Novel 2 (535) concern the ownership and use of dowries and *donationes ante nuptias* when a parent remarries; ch. 3 deals with a mother's succession where her son dies intestate; ch. 5 concerns a promised but undelivered dowry.

<sup>25</sup> “Possible *decisiones*” and contradictory dating evidence are discussed below, in section II.C.

<sup>26</sup> See section V.D.7 below.

The contenders, as adjudged here, number thirty-three.<sup>27</sup>

The first textual attestation of this particular use of *decidere* is found in C.4.28.7, dated by the manuscripts to 21 July 530. Following Paul Krüger, this constitution is customarily re-dated to 1 August 530.<sup>28</sup> The only reason given by Krüger for doubting the *subscriptio* date as transmitted in the manuscripts is his rather elliptical argument that it was not likely to have been issued the next day, on 22 July, on which date all the other constitutions were issued *ad senatum*. Elsewhere he asserts without further explanation that *decisiones* were (seemingly invariably) issued in groups (see also note 43 below). The next nine constitutions to be promulgated after C.4.28.7, and which contained the particular linguistic criteria, were all issued on 1 August, and whether Krüger's grounds for amending the date were based on either or both considerations, he magnifies his possibly tentative suggestion that "xii fortasse delendum est" (that is, from "D. XII K. Aug") into the assertion that the subscript probably should be changed; indeed in the appendix he swaps the dates entirely.<sup>29</sup> However, the commission of a considerable scribal error, necessitating additions rather than oversights, would be required for this claim to hold true, which inevitably begs the question: why not simply accept the date as transmitted through

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<sup>27</sup> C.4.28.7 (21 July 530); C.3.33.12, 4.5.10, 4.29.24, 4.38.15, 5.51.13, 6.2.20, 7.7.1, 8.21.2, 8.37.13 (1 Aug. 530); C.5.70.6, 6.22.9 (1 Sept. 530); C.3.33.13 (14 Sept. 530); C.3.33.14 (17 Sept. 530); C.3.33.15 (22 Sept. 530); C.3.33.16, 4.5.11, 5.4.25, 5.4.26, 6.57.6, 7.4.14 (1 Oct. 530); C.2.18.24, 4.27.2, 6.27.4, 6.29.3, 6.37.23, 6.2.22, (17 Nov. 530); C.6.29.4 (20 Nov. 530); C.7.5.1 (530); C.7.25.1 (530/31); C.6.27.5, 6.30.21 (29 Apr. 531, re-dated by Krüger to 30 Apr., regarding which see the relevant comments below in the text accompanying notes 29–30), 6.30.20 (30 Apr. 531).

<sup>28</sup> Paul Krüger, *Codex Iustinianus*, in *Corpus Iuris Civilis*, 2 (Berlin 1915) ("editio minor"), 509; and "Ueber die Zeitfolge der im Justinianischen Codex enthaltenen Constitutionen Justinians," in *Zeitschrift für Rechtsgeschichte*, 11 (1873), 178. Honoré (note 2), 144, accepts the re-allocation despite rejecting other reassignments, but does not set out his reasoning (id., 144 n.33); Schindler similarly does not question its positioning: H. Schindler, *Justinians Haltung zur Klassik* (Cologne 1966), 336 n.1. Ruggeri (note 10), 27 & n.58, and 64 & n.129, discusses Krüger's viewpoint, and its following, but she eventually rejects it (see note 30 below).

<sup>29</sup> Krüger, *Codex* (note 28), 167 n.17, 509, and Krüger, "Ueber die Zeitfolge" (note 28), 178, whereby as regards this and one other constitution, "werden wohl die beiden vereinzelt Subscriptionsen zu ändern sein." See also P. Krüger, *Codex Iustinianus* (Berlin 1877) ("editio maior"), 340 & n.3.

the manuscripts? Because no other specific criticism is offered, and no reason given requiring *decisiones* to have unfailingly been promulgated in clusters, the sources' testimony is accepted here.<sup>30</sup>

Forthwith, variations of the verb "decidere," or simply the noun "decisio," occur in the preponderance of constitutions promulgated up until 30 April 531 (the main exception being those of 20 February 531), but there is no trace of the term beyond the outer limits of these dates. There are however *decisiones* whose issue dates are evidenced far less precisely by the manuscripts, inferences being required based on the consulate year and/or the year when the recipient Praetorian Prefect held office: see C.7.5.1 (530); C.7.25.1 (530/1). It is generally assumed that these too hail from within the specific period of time identified here but there is no independent evidence to this effect.

When the "decidere" term is employed self-referentially it is almost invariably where ancient legal disputes are expressly referred to, as accords with J.1.5.3 and *c. Cordi* 1–2; however, not all constitutions of this type expressly delineate a controversy (see for example C.7.5.1, 7.25.1). Further, the issue is not even always described as ancient, as exemplified by C.2.18.24, 4.5.10–11, and 7.5.1, although individual jurists, known through other sources to be ancient, are named in the former two. So whilst being indicative, any reference to these substantive factors as such cannot be classed as a necessary defining factor to be used in conjunction with the formal identification criteria as referred to here.

#### B. "Probable *decisiones*"

There is also a not insignificant number of constitutions that settle debates mostly described as ancient, that were issued within the specific timeframe of known *decisiones*, but do not actually identify themselves as *decisiones* in the ways discussed above. It

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<sup>30</sup> Ruggeri (note 10), 66–67, 90 n.32, also dismisses Krüger's contention as unsubstantiated; cf. Paricio (note 10), 506. Out of interest, a significantly less egregious error would have led to a misdating from XII to XI K Aug, potentially bringing C.4.28.7 within Luchetti's "umbrella constitution" (see note 175 below); but because C.4.28.7 is not directed "ad senatum" there may be little mileage in this proposition, as indeed observed by Krüger, see above. As regards Krüger's re-dating to 30 April of those laws dated to 29 April in the manuscripts (see notes 27 and 46), for reasons which would appear to be the same as those which lay behind the date change in C.4.28.7, it should be noted that the alteration would require the errant scribe not only to have omitted "prid." but also to have inserted "II", which again lacks plausibility.

may be thought that these remaining enactments were necessarily *constitutiones extravagantes*, and indeed this in effect is how they are still being categorized: Ruggeri for example opines that the existence of such provisions is best explained by the number and subject matter of the actual *decisiones* having been agreed upon from the outset in order that particular topical issues clamoring for elucidation be addressed legislatively,<sup>31</sup> and accordingly whenever additional disputes surfaced during work that was “preliminary” to the Digest (that is, before the publication of *c. Deo auctore*), they by necessity took on an extraneous identity.<sup>32</sup>

This theory requires a certain leap of faith, not as regards the quantity having been predetermined, but in terms of its presupposition that already six months before *c. Deo auctore*, juristic works were being substantively perused for the specific purpose of extracting texts for the Digest. Because it is alleged elsewhere that the first works from which texts were taken for the Digest<sup>33</sup> can also be discerned as the instigation behind the *decisiones*,<sup>34</sup> the proposition could potentially be substantiated. But as pointed out by Dario Mantovani, for this latter theory to hold true the compilers would have had to have spent an inordinate length of time on Papinian’s *quaestiones*, and any number of juristic works dealing with the relevant topic, as perused at varying stages of the Digest compilation process, could equally have provided the necessary inspiration.<sup>35</sup> So although it is not disputed that basic practical preparations must have commenced months before the project’s announcement through *c. Deo auctore*,<sup>36</sup> sound evidence that actual excerption work had commenced by mid-530, supporting Ruggeri’s explanation for the existence of *extravagantes* during the period concerned, is manifestly lacking. The stance has

<sup>31</sup> C. Russo Ruggeri, “Sulle *quinquaginta decisiones* dieci anni dopo,” *SDHI*, 76 (2010), 455.

<sup>32</sup> *Id.*, 457–58.

<sup>33</sup> As ascertained through Bluhme’s “masses”: see Honoré (note 2), 150–52.

<sup>34</sup> G. L. Falchi, *Sulla codificazione del diritto romano nel V e VI secolo* [*Studia et Documenta*, 8] (Rome 1989), 113–18; Pescani, “Il piano” (note 10), 227–29.

<sup>35</sup> D. Mantovani, “Sulle consolidazioni giuridiche tardoantiche,” *Lab-*eo**, 41 (1995), 258–59 & n.65; see also note 33 above regarding the order of excerption.

<sup>36</sup> See Honoré (note 2), 140–41, 146; Ruggeri (note 10), 99–102. Cf. Pescani, “Il piano” (note 10), 226–29, who sees a longer and more nebulous gestation period that ultimately served as preparation.

elsewhere been dismissed as pure conjecture.<sup>37</sup>

How else does the proposal square with the evidence? It is generally accepted that the *extravagantes* were prompted by the additional debates being alighted upon as the juristic texts were being excerpted for the Digest,<sup>38</sup> and not before, so taking as our starting point that such excerption started after the promulgation of *c. Deo auctore* it cannot realistically be maintained that any constitutions issued before that date were *extravagantes*. The basic plausibility of drafting *extravagantes* before all the *decisiones* had been issued is also questionable on other levels: why, even though not all the *decisiones* had yet been enacted, and notwithstanding the significant gaps between the main dates when the *decisiones* were issued, and despite the subject matters for the individual *decisio* disputes having allegedly already been singled out, were further decisive constitutions promulgated that apparently were not themselves *decisiones*? And whether or not the *decisio* issues had already been identified, if they were so urgent (as is discussed below), why not finish the job before embarking on another?<sup>39</sup> Instead, the most obvious explanation for why decisive constitutions lacking the *decidere* form were produced whilst the *decisiones* were being issued is that they were indeed themselves also *decisiones*.

Perhaps a more solid explanation for the existence of these provisions lies in the manipulation resulting from the editorial process described in *c. Cordi* 2, as these changes were bound to leave some *decisiones*, or portions of them, without a qualifying term.<sup>40</sup> It is certainly striking how they all contain examples of

<sup>37</sup> Varvaro (note 11), 499–500.

<sup>38</sup> Rotondi (note 10), 235, echoed by Luchetti (note 17), 176–77; Ruggeri (note 10), 121–22; Falchi (note 10), 146–47; Varvaro (note 11), 476, 503–506; Paricio (note 10), 508. The view is not dissented from here, regardless of whether they too are reflected in the Digest.

<sup>39</sup> These doubts also put into question the additional assumption (for which see C. Longo, “Contributo alla storia della formazione delle Pandette,” *BIDR*, 19 (1907), 143–60; Luchetti (note 17), 170 & n.40) that *extravagantes* were already being issued in February 531, again before the final *decisiones* had been promulgated. In the majority of cases, there is also insufficient corroborative basis on which to conclude that they were *decisiones*: see section II.C, below.

<sup>40</sup> See Honoré (note 2), 145; Ruggeri (note 10), 19–20, 24–26; Varvaro (note 11), 438; Rotondi (note 10), 229, who concur that such losses may have been due to a reduction of the textual content as a consequence of editing. The lacunae may also have been the result of dividing texts up: see below.

specific vocabulary that was otherwise used almost uniquely, and repeatedly, in the *decisiones* themselves: for example “ambiguitates” / “altercationes” and “dubitationes” were addressed; these generally arose in the context of “veteris” / “antiqui iuris”; an issue would be “dubitabatur” or “quaerebatur.”<sup>41</sup> The one glaring omission was the actual “decidere” term, but instead the emperor would usually “resecare,” “dirimere,” “explodere,” or “tollere” the offending doctrines, each alternative being found also either in *decisiones* (eg. C.3.33.13, 6.2.22, 8.37.13) or titles containing single *decisiones* (C.7.5.1, 7.25.1), but all appearing to be used in this sense only by Justinian. So even this exception has mitigating circumstances. Leaving it aside, there is no difference to their form; and their ostensible function of resolving disputes (usually specified as ancient) was identical.

It must however be noted that many decisive constitutions containing this language were also issued outside the relevant timescale, both beforehand and afterwards; but for these also to be considered as “decisiones” would require us to accept that not a single one retained a “decidere” form whilst being edited for insertion into the revised Code, a distinctly improbable eventuality given the extent of the term’s survival elsewhere. As such, without a chronologically proximate linchpin supplied through constitutions that *do* meet the formal criteria, there is insufficient evidential basis on which to accept these enactments as *decisiones*. So although numerous constitutions reform the *vetera iura* and settle ancient doubts even before the start of Tribonian’s quaestorship in mid/late 529,<sup>42</sup> none of these could count as *decisiones* as there is no sign of the crucial term in any of them (quite apart from the fact that J.1.5.3 links the *decisiones* to Tribonian). It is also particularly notable that prior to the *decisiones* of 29–30 April 531 an interlude of around five months had passed since the previous “known *decisio*” had been promul-

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<sup>41</sup> See Honoré (note 2), 84–85 & nn.167–71, regarding the use of particular vocabulary in the *decisiones*; and regarding the identical usage (other than the *decidere* form) in presumed *extravagantes*, including those issued within the *decisio* timeframe, see again *id.* (Honoré’s lists); cf. Varvaro (note 11), 451–52 & nn.219–22; and Ruggeri (note 10), 17.

<sup>42</sup> E.g., C.1.2.19, 3.22.6, 3.28.30.1, 5.9.8.3, 6.41.1, 7.17.1, 7.39.8, 8.37.12, 8.53.33; both C.6.56.7 and 8.58.2 addressed Hadrian’s *SC Tertulianum*, for which see also J.3.3.1–4; C.7.3.1 abolished the *lex Fufia Caninia*, addressed also at J.1.7. See note 96 below regarding attempts to date Tribonian’s promotion more precisely.

gated;<sup>43</sup> and then after 30 April 531 another three months elapsed before resolute constitutions began to be issued again (i.e., C.6.25.8–10, 6.26.10–11 of the final week of July 531), this time none containing the formal terminology. The sudden flurry of the term's usage on 29–30 April 531, and its complete absence thereafter, is suggestive of an equally sudden decision to collate a round number of *decisiones* (i.e., *quingenta*) into a publication, or just to finish off an unfinished project,<sup>44</sup> and to not use this particular legislative device again. In either event it seems fairly clear that the *decisio* project was by now over, despite the ongoing recurrence of the distinctive *decisio*-style terminology (other than “decidere”) — which therefore was probably only indicative of being a *constitutio extravagans*.

But as regards those constitutions issued within the relevant timeframe and containing some remnant of the appropriate terminology, except a variant of *decidere*, the evidence considered as a whole is quite compelling: although their categorical identification as *decisiones* is elusive, logic seems to demand that this is indeed what they were initially, and alternative theories (if indeed these are ventured) are hard to sustain. As such, a combination of the chronological criteria with any manifestation of these linguistic phenomena, whilst lacking a probative force equal to that of a *decidere* form, should carry significant weight in the quest to identify the remaining *decisiones*,<sup>45</sup> particularly given

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<sup>43</sup> I.e., C.6.29.4 (20 Nov. 530), although it is possible that C.2.58.2, which dates to Feb. 531, and C.6.42.31, which may also do so, were *decisiones* as well: see notes 45 and 46 below. Krüger re-dates C.6.29.4 to 17 Nov. 530 (*Codex* (note 28), 262 n.10, 509; “Ueber die Zeitfolge” (note 28), 178), defying the manuscript attestations to match the date to that of h.t.3, and building on his own “unbedenklich” assumption that Justinian's own constitutions were all issued in groups on certain days. See also Krüger, *Codex* (note 29), 558 n.2; cf. Honore (note 2), 144 n.39; Schindler (note 28), 336 & n.1. But there is again no reason to doubt the textual evidence, regarding which see also Ruggeri (note 10), 66–67, and above, text accompanying notes 28–30.

<sup>44</sup> Paricio (note 10) 506–507, sees such a decision as being made at the end of spring 531 and Ruggeri (note 31), 454–55 considers that a collection had always formed part of the original plan; however, there is no need to determine the matter for the purposes of the current inquiry.

<sup>45</sup> Cf. Paricio (note 10), 505–506. Krüger, “Ueber die Zeitfolge” (note 28), 170, specifically accepts C.6.42.31 (28 Feb. 531, although he postdates this to *prid. k. Mai.*) and C.6.37.24 (29 Apr. 531) as *decisiones*. Despite neither containing any version of “decidere,” each is considered here to be a probable *decisio* as in both cases the issue was “quaerebatur” and “antiquitas” had differing approaches to the matter. However, Krüger

that not even all “known *decisiones*” contain a form of *decidere*, as seen above. Constitutions that meet these criteria<sup>46</sup> are therefore categorized here as “probable *decisiones*.”

Ruggeri recognizes that there is a “buona probabilità” of this hypothesis being correct<sup>47</sup> despite her misgivings and eventual preference for the alternative that is outlined, and strongly criticized, above. She eventually dismisses the theory as containing less probative force than that of the formal criteria. This is undoubtedly correct but in no way prevents the further criteria from being used in addition to the formal method (not instead of it) in order to identify further *decisiones*, because even though the results are not as reliable they are still demonstrated with cogency. Such considerations require that the premise not be side-lined quite so completely, but Ruggeri’s agnosticism transpires to have precisely this effect.

Not dissimilarly, Tony Honoré sees the difference in the criteria as “purely formal” and suggests that the editorial process may have something to answer for in omitting relevant terminology.<sup>48</sup> His musings are supportive and yet puzzling. Indeed, he asserts inexplicably time and again that decisive constitutions that were contemporaneous with the *decisiones* but did not contain a *decidere* form must simply have been disputes addition-

does not tell us directly which elements of the equation sufficed for his purposes.

<sup>46</sup> Although there may be more, those identified here are: C.8.41.8, 5.4.24 (22 July 530); 5.70.7 (1 Sept. 530); C.6.2.21 (1 Oct. 530); C.7.4.16, 7.4.17, 7.7.2 (17 Nov. 530); C.2.58.2 (at 8a) (20 Feb. 531; see note 54 below regarding Julian’s Prefecture dates); C.6.35.11, 6.37.24 (29 Apr. 531; see note 30 regarding the date), 6.38.4 (30 Apr. 531). C.6.42.31, which contains the requisite language, probably also qualifies, and on balance is accepted here. It was purportedly issued on “*prid. k. Mart. 531*” and addressed to John, so the *inscriptio* and *subscriptio* as attested in the manuscripts do not conflict with the other constitutions issued on 20 Feb. 531, all of which have Julian still as Prefect (see note 54), given that John could have taken up this position in late February. Yet Krüger redates the law to “*prid. k. Mai [531]*,” this time on the basis that such errors were among the most frequent in the manuscripts: Krüger, “*Ueber die Zeitfolge*” (note 28), 170; cf. *Codex* (note 28), 509. Either way, the provision would meet the criteria for “probable *decisio*,” as indeed it would had John been mistakenly substituted for Julian in the medieval manuscripts, another alternative. Greater uncertainty surrounds the promulgation year of several other constitutions that could otherwise have fallen within this subset: see below, text accompanying note 54.

<sup>47</sup> Ruggeri (note 10), 19; Ruggeri (note 31), 447.

<sup>48</sup> Honoré (note 2), 143–45.

al to the original 50 — that is, they had to be *extravagantes*.

Varvaro also discusses how resolute constitutions lacking the *decidere* form, including those issued within the identified timeframe, resolved disputes in a manner indistinguishable from that of the *decisiones*.<sup>49</sup> More promisingly, he concludes that some of these should be identified as *decisiones* given that, inter alia, they were issued on certain dates, used particular language (similar to that discussed here), and/or referred to the *antiqui*;<sup>50</sup> but he also acknowledges that their designation was not “assolutamente certo.”

It is interesting to note that these constitutions, together with the “known *decisiones*” identified above, number forty-five in total. However, no claim is made here to even being close to *quinquaginta*, firstly because manuscript errors may distort evidence on the date, as discussed below, and also because the editing of 534 may have eradicated from any number of them the all-important vocabulary, and even the reference to the ancients or indeed the dispute itself. Indeed, developing a theory advanced by Krüger, Honoré also argues that some constitutions may in their initial incarnation have consisted of several *decisiones* which addressed distinct points, before being sliced in two (or more) by the Code's editors as they were deemed at this later stage to need dividing. The constituent parts then survived in CJ<sup>2</sup> as separate enactments, with a percentage losing the requisite vocabulary, and other signs of their former role, when they were edited. Both scholars identify several such candidates.<sup>51</sup> Following this line of thought, the task of identifying fifty *decisiones* is rendered nigh on impossible, not least because the individual *decisiones* that were allegedly split into pieces may originally have resolved several individual disputes without necessarily classifying each one as a separate (sub-)*decisio*. After all, as noted above,<sup>52</sup> individual *Novellae* (which were not themselves subjected to the trimmings of *c. Cordi* 2 and so could not have suffered the same overall fate) contained several principles that were linked but could also stand alone, yet were contained in one single enactment.

In any event, Varvaro disagrees with the whole premise of imperial rulings being broken up, pointing out that *c. Cordi* 3

<sup>49</sup> Varvaro (note 11) 498, 502, 506.

<sup>50</sup> *Id.*, 445–69.

<sup>51</sup> Honoré (note 2), 144–45.

<sup>52</sup> See above, text accompanying note 24.

contained no such powers.<sup>53</sup> His argument may once more be sustainable (although *c. Cordi* 2 is probably the appropriate section): after all, neither “decerpere” nor “discernere” intrinsically denotes an actual cutting process. On the other hand, these terms strongly suggest a selection mechanism that naturally culminated in cutting texts up and redistributing them. Further, the emphasis of *c. Cordi* on putting the laws into their relevant titles could also favor the idea of splitting the enactments, whether or not each one contained single or multiple *decisiones*. But all in all, the issue is too speculative and is not determined here; and without doubt it adds to the general difficulties surrounding the identification process.

### C. “Possible *decisiones*”

It is also considered that where there is a confluence of defects, with an absence of a *decidere* form coupled with conflicting textual attestations as to the date, there will be an inadequate evidential basis upon which to certify the constitution as a *decisio*, despite the presence of alternative “qualifying” vocabulary and a reference to laws known through other sources to be ancient. There are in fact contradictory or unclear manuscript attestations as to the day or year of issue of several constitutions containing the requisite terminology, mostly where some manuscript sources, including the more dependable ones, name John the Cappadocian (Praetorian Prefect from 21? February 531 to 541, with a short break before the Code was updated) as addressee in the *inscriptions*, but this is apparently incompatible with the dates attested by the *subscriptions*, which have the consulship as that of Lampadius and Orestes (530), as opposed to their first and second post-consulship years of 531–32.<sup>54</sup>

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<sup>53</sup> Varvaro (note 11), 377–83.

<sup>54</sup> Those identified here from Krüger’s editions of CJ<sup>2</sup> (notes 28 and 29) are: C.3.28.34, 8.56.4, 8.47.10 (1 Sept. 530/1); C.8.47.11 (28 Oct. 530/1); C.6.49.7 (23 Oct. 530/1); C.4.27.3, 5.14.11 (1 Nov. 530/1); C.6.42.32 (27 Nov. 530/1); C.5.16.27 (1 Dec. 530/1); C.4.29.23 (which can only be dated generally to 530); and possibly C.4.37.6 (30 April, unknown consulship year: see Krüger, *Codex* (note 28), 177 n.5; *Codex* (note 29), 363 n.1). Haloander also appears to have had C.5.11.7 under the first consulship: Krüger, “Ueber die Zeitfolge” (note 28), 169 & n.9; *Codex* (note 29), 428 (apparatus to ln. 25). For relevant Prefecture incumbency dates, see J. Martindale, *The Prosopography of the Later Roman Empire A.D. 527–641*, 3A (Cambridge 1992), 729, s.v. “Julian 4” (whose tenure in 530 is uncontroversial but who is also the recipient Prefect in seventeen constitutions dating to 20 Feb. 531; cf. Krüger, *Codex* (note 28), 509), and Martindale

Krüger deals with these anomalies by re-dating the constitutions to 531 (i.e., *p. c. Lampadii et Orestis vv. cc. cons.*), on the basis that the *scriptio* attestations regarding the three consulship years of Lampadius and Orestes could very easily have been corrupted due to their similarity with each other.<sup>55</sup> To illustrate his argument he relies on the case of two contiguous Justinianic constitutions (C.4.27.2–3), which in *Codex* editions preceding his own began *Cum per liberam* and *Si duo vel* respectively. The manuscript evidence is divided on the sequence and addressees (Julian, John, or even Menas), but the surviving *subscriptions* are dated *k. Nov.* and *xv. kal. Dec., Lampadio et Oreste vv. cc. cons.* (1 and 17 November 530). Krüger considers that the *Cum per liberam* constitution must have been issued under the post-consulship in 531 because no other constitution was issued on the kalends of November 530, whereas others had been issued on that day in 531. Following the majority of witnesses, in his edition of CJ<sup>2</sup> he prefers John over Julian as the recipient and, as a consequence of his re-dating and following the slight minority of witnesses, places this as the second of the two constitutions, footnoting its *scriptio* with “d.k. Nov. post consulatum Lampadii et Orestis vv. cc. *scribendum est*,” and re-dating the constitution to 531 in the appendix.<sup>56</sup> In so doing he departs from

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(this note), 627–28, s.v. “Iohannes 7” (where nine constitutions issued from 29–30 Apr. 531 — but all dated by Krüger to 30 Apr. — are relied on as the first attestation of John’s consulship). However, C.6.42.31 is too easily dismissed as erroneous, and may reliably attest to John’s incumbency on “*prid. K. Mart [531]*” (see note 46). Addressing other particulars, it has been argued that C.8.47.11 did not profess to resolve a dispute, but rather simply to *corrigerere* the *inextricabiles circumductiones* of the *antiqui*, and so could not be a *decisio* in any event: Ruggeri (note 10), 61–62 & n.123, 63 n.128). For our purposes, the constitution contains a clear reference to “*tollentes*” the inadequacies of the *ius antiquum*, and the procedures being reformed are described as “*veteres*,” making the quibble appear minor; after all, the *antiqui* are mentioned (this would be sufficient were the timeframe reliable), and not even all “known *decisiones*” refer to an (ancient) dispute; see C.7.5.1 and 7.25.1. In terms of qualifying as a *decisio*, the dating is the more problematic issue.

<sup>55</sup> Krüger, “Ueber die Zeitfolge” (note 28), 167–70 & n.9, 176, 178; *Codex* (note 28), 509 (appendix I), where the constitutions are allocated to 531; the amendments are also suggested in the main text of the Code.

<sup>56</sup> Krüger, *Codex* (note 28), 166–67, 509 (appendix I). See also Krüger, *Codex* (note 29), 338–39. As regards the sequence, which is discussed at greater length below, Krüger sets out his thinking more fully in “Ueber die Zeitfolge” (note 28), 169 & nn.7–8; *Codex* (note 28), 166 n.15; and *Codex* (note 29), 338 (apparatus to line 9).

earlier Code editions, which as well as preferring the alternative sequence had identified Julian as the recipient in both. Krüger then asserts that by virtue of his reasoning, *all* those enactments where the *inscriptio* (that is, with John as Prefect) clashes with the first consulship year of Lampadius and Orestes were actually issued under the post-consulship.

The problems raised by Krüger's analysis are not insignificant. Firstly, that constitutions were necessarily issued in groups on the same day has already been queried here (see above, text accompanying notes 29–30, and note 43). Secondly, *Cum per liberam* and *Si duo vel* (in that order) were both attested as being addressed to John in the *Summa Perusina* (*S*), which relies on sources that largely pre-date the medieval scrambling of *inscriptiones* and *subscriptiones*, having as such a greater evidential weight than the later medieval testimony that derived from consolidation of the *Epitome* tradition.<sup>57</sup> Nevertheless, Krüger disregarded this evidence in the context of the addressee in *Si duo vel*. As noted above, a further consequence of his thinking was that *Si duo vel* became C.4.27.2 and *Cum per liberam* became C.4.27.3, despite contradictory evidence on the order found in *S* and half of the later medieval sources, which placed *Cum per liberam* before *Si duo vel*; and to keep the day dates in chronological sequence he retains the majority allocation of Julian as Praetorian Prefect in *Si duo vel*, again in the face of the contrary attestation in *S*. Against this element of his theory there are attestations of three *scholia* from the Basilica,<sup>58</sup> two of which are attributed to sixth-century sources, that specifically describe the legal scenario contained in *Cum per liberam* as being ὡς (ἀνήνεκται) βιβ. δ'. τοῦ κωδ. ττ. κζ'. διατ. β', effectively that is “as the second constitution of C.4.27 has reported.”<sup>59</sup> However,

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<sup>57</sup> See C. Radding and A. Ciaralli, *The Corpus Iuris Civilis in the Middle Ages* (Leiden 2007), 135–36; and S. Corcoran, *Summa Perusina*, UCL Volterra Project, University College London (website), regarding the abbreviations and even loss of *subscriptiones* and *inscriptiones* in the original medieval *Epitome*, and the consequential importance of the *Summa* for establishing addressees. See also Radding and Ciaralli (this note), 155–68, regarding the later supplementations to the *Epitome*. For *Summa* texts, see F. Patetta, *Adnotationes Codicum Domini Justiniani (Summa Perusina)*, 2nd ed. M. Pagliai (Florence 2008); and Corcoran, *Summa Perusina* (this note).

<sup>58</sup> See section IV (“Focus of the enquiry”) below for a brief discussion on the Basilica.

<sup>59</sup> Gustav and Karl Wilhelm Heimbach, *Basilicorum Libri LX*, 1 (Leipzig 1840), 397 (B.8.2.68 scholion 2 (unattributed) and 3 (“the Anony-

Krüger simply dismisses these as editorial changes — “vereor ne numeri ab editoribus mutati sint” — which may seem hasty given the evidential value of assertions originally made by Justinian's contemporaries, in addition moreover to the *Summa Perusina*.

Nevertheless, Krüger's conclusions on the sequence have real merit. Firstly, he alludes to alternative Western manuscripts from the eleventh and twelfth centuries that corroborate his stance. He then points to entries in the Basilica that contain or imply his suggested order, and these should be weighed against those considered above that contain the contrary attestation. Hence, as seen in Herman Scheltema's more reliable transcription,<sup>60</sup> scholion 3 to BS 8.2.68 links *Cum per liberam* with the third constitution of C.4.27; and indeed Heimbach acknowledges that Haenel also had this as “γ”.<sup>61</sup> Moreover, Krüger accredits this text to the sixth-century lawyer Thalelaeus, which would give it greater corroborative force. However, the attribution may not be definitive, as in the editions of both Scheltema and Heimbach it is an unascribed ἐρμηνεία (“interpretatio”), and although such glosses are largely accepted as originating from the sixth-century legal commentaries,<sup>62</sup> it may simply serve as a heading, without telling us anything about the provenance or age of the ensuing text. Nevertheless, the evidence seen thus far goes both ways and does not show Krüger to be wrong.

More cogently still, Scheltema's edition of the Basilica texts, as opposed to their scholia, places C.4.27.1–3 in Krüger's order.<sup>63</sup> Although it is not unknown for texts in the Basilica to contain a

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mous”); id., 2:599 (B.23.1.9 scholion 18 (Stephanus)). The latter two are corroborated in Scheltema's edition (H. Scheltema, et al., *Basilicorum libri 60* (Groningen 1953–88), *Series A. Textus* (hereafter cited BT) and *Series B. Scholia* (hereafter cited BS)), at BS 8.2.68.4 (Ser. B, 138) and BS 23.1.9.42 (Ser. B, 1517) respectively, although the latter is accredited to title 26. For a general summary of the Basilica's evidential characteristics, see section IV below.

<sup>60</sup> See note 59 above, and regarding the various merits of the Heimbach and Scheltema versions, see A. Schiller, *Roman Law: Mechanisms of Development* (The Hague 1978), 61–62 & nn.10, 14.

<sup>61</sup> Heimbach (note 59), 1:397 footnote v.

<sup>62</sup> Schiller (note 60), 60–61.

<sup>63</sup> Scheltema (note 59), Ser. A, 841–42 (BT 16.9.13–15). The Heimbach edition (note 59) 2:209, contains only the first then third constitutions of C.4.27, closing down any avenues of research; this is probably why Krüger only refers to this Basilica section in his *editio minor* and does not base any argumentation on it (see Krüger, *Codex* (note 28), 166 n.13, regarding C.4.27 generally).

different overall order to that of Justinian's compilation,<sup>64</sup> it is far from usual for this to happen. Furthermore, the fact that the Byzantine work appears to have been unconcerned with preserving any clues on dating entails that the deliberate, even if well-meant, shuffling of constitutions that took place in the medieval West (perhaps even in *S*), as the scholars attempted to reconcile their sources, simply did not take place in the East. The sequence of provisions is also immune from the trifling slips that had such egregious consequences on the reliability of the scholia's numerical references, evident from the clashes seen above.

So even if *Si duo vel* is seen as being issued in 531 and *Cum per liberam* in 532, making the Basilica's sequence compatible with the *inscriptiones* in *S*, this would still go against the order found in *S* itself. It therefore seems certain that no matter how it is viewed generally, even *S* is not altogether trustworthy as regards the Prefecture, whether because of an attempt to achieve reconcilability with the *subscriptio*, or through simple error. As such its testimony should be departed from.

Accordingly, although the evidence has ambiguities, on balance it seems that Krüger may have made the right call regarding the sequence. As a consequence, *Si duo vel*, dated to 530, fits within the timeframe of the *decisiones*, as would be expected (see notes 21 and 27 above), but there would not even be a possibility that *Cum per liberam* does.

However, even if Krüger is right in this particular re-ordering, it is questionable that it justifies the conclusion that John was the Praetorian Prefect in all those constitutions containing irreconcilable details on recipient and consulship (listed at note 54). The evidence relied on is very specific to C.4.27.2–3 and no Basilica evidence is alluded to by Krüger for the other constitutions. Of the enactments in question, *S* contains C.8.47.10, 6.49.7, and 4.37.6, and in each case has John as Prefect; however, the evidence viewed regarding *Si duo vel* points to John's Prefecture having been manipulated even in *S*, and indeed even on Krüger's own analysis it was wrong. So even if the manuscripts are all unreliable in their *subscriptiones* on Lampadius and Orestes, circumspection is also required regarding the *inscriptiones*. Krüger specifically called for reliance on "bet-

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<sup>64</sup> See eg. BT 53.1.59–65, in Scheltema (note 59), Ser. A, 2440, containing fragments from D.14, 17, and 19 in an unordered mixture when compared with the *Florentina*; cf. N. Van der Wal and J. H. A. Lokin, *Historiae Iuris Graeco-Romano Delineatio* (Groningen 1985), 85.

ter" Western manuscripts such as the sixth/seventh century *Veronensis*, which is sadly very incomplete, and *S*,<sup>65</sup> but this was in the face of his own observations on the Basilica that (rightly, it seems) led him to disregard these very documents. It is therefore very difficult to accept that John must have been the recipient in *all* constitutions containing the anomaly in question. Accordingly, any number of these provisions could be "probable *decisiones*." Yet Krüger's conclusion not only appears to have remained generally unchallenged, it has been positively embraced.<sup>66</sup>

Interestingly, in the context particularly of C.8.47.10 (but with no reason why his comments should not be applicable to the other constitutions under consideration), David Pugsley looks to an error having been made at inception, pointing out that the original clerk may have mistakenly named as Praetorian Prefect whoever was incumbent in that position when the second Code was compiled, rather than naming the office holder in 530 when the constitution was issued. He argues that to have erred in this respect would have required a scribal error of a magnitude similar to mistaking the consulate, implying that they were equally as likely.<sup>67</sup> Ruggeri for the same reason eventually actually prefers 530 over 531, having queried her original position; and Javier Paricio also favors 530.<sup>68</sup> Indeed, Renzo Lambertini sees an error in the *inscriptio* as "meno grave" (and consequently more likely) than the alternative,<sup>69</sup> which may indeed be correct. John's varied career (see above, text accompanying note 54) could have contributed to such obfuscation, just as is posited regarding the different consulships.

These arguments are persuasive. However, there is also independent evidence of frequent manuscript confusion between the consulship of Lampadius and Orestes and the consecutive

<sup>65</sup> Krüger, *Codex* (note 28), v; "Ueber die Zeitfolge" (note 28), 176.

<sup>66</sup> E.g., Ruggeri (note 10), 64–65 & n.132 (but she later retracts this position: see below); Varvaro (note 11), 476, 481; Luchetti (note 17), 174–75, 176. In the context of verifying *decisiones* Honoré (note 2), 145, is non-committal regarding some constitutions with this particular date incongruity but makes no mention of others, by implication accepting Krüger's calculation.

<sup>67</sup> See D. Pugsley, "Cordi and the Fifty Decisions," in F. Botta, ed., *Il diritto Giustiniano: tra tradizione classica e innovazione* (Turin 2003), 142 (regarding C.8.47.10).

<sup>68</sup> Ruggeri (note 31), 449; Paricio (note 10), 505, 506.

<sup>69</sup> R. Lambertini, "Se ci sia stato un *quingenta decisionum liber*," *Iura*, 57 (2008/2009), 143–44.

years dated after it,<sup>70</sup> so it can by no means be excluded that the error did indeed lie there. Further, Pugsley's position is based on errors being made very early on in the manuscript transmission history, which whilst possible is less likely than mistakes being made in later eras, as seen in the contradictory information contained in the various medieval manuscripts. Giovanni Luchetti is also sceptical regarding Pugsley's observation, although he wrongly seems to treat it as being reliant on other known *decisiones* having been issued on 1 September 530.<sup>71</sup> Disappointingly, he does not explain why he opts for Krüger's line despite seeing the two possibilities as "ugualmente plausibili."

All in all the jury is out on the matter, and the various factors militate against drawing definitive conclusions either way; and maybe the error was made in both ways in the various constitutions, and at widely differing moments. Nevertheless, the flaws deprive these provisions of the requisite greater degree of certainty surrounding their credentials, and they are not here categorized even as probable *decisiones*. Instead, they should all be brought within the realm of "possible *decisiones*" or conversely of "possible *extravagantes*."

However, their absorption by the Digest should also be expected by those who consider the *decisiones* to have been taken up as such, particularly because the *extravagantes* are seen as not only arising from the Digest compilation process but also as facilitating it by providing the compilers with the solution to the further controversies as they emerged,<sup>72</sup> just as the *decisiones* had. So either way they would remain of fundamental relevance to this inquiry.

It is also apparent that Varvaro does not consider particular language usage to be totally necessary for the positive identification of "probable" *decisiones*,<sup>73</sup> but it is here considered unwise to classify as such any constitution issued within the relevant timeframe that lacks all vestige of the necessary linguistic features, simply because the evidential base becomes too flimsy: the *decisiones* are our only comparator and the only *decisio* that is

<sup>70</sup> Corcoran (note 5), 80–81 & n.22.

<sup>71</sup> Luchetti (note 17), 174–75. In any event, two other *decisiones* were issued on this date: see note 27 above.

<sup>72</sup> Cf. e.g. Ruggeri (note 10), 120–25; Luchetti (note 17), 176–77; Varvaro (note 11), 476; Paricio (note 10), 508.

<sup>73</sup> Varvaro (note 11), 453–54, 457–58, 462 (regarding C.7.15.2, 7.4.15, 7.45.16).

bereft of any inkling of these traits (C.7.5.1) has the luxury of an alternative source of corroboration in J.1.5.3 — and something similar would quite simply also be required here. Accordingly, constitutions issued in the correct period that appear to refer to and resolve ancient debates (discernible for example through external evidence), but that retain no trace of the requisite vocabulary, can again at most only be considered as “possible” *decisiones*. Irrespective of this caveat however, there should be no requirement of a specific reference to the ancients or even to juristic wranglings; even though both are very likely to appear, not all *decisiones* in their final form retained such allusions (see above). Alongside the date range, the key defining factor is *any* usage of the distinctive vocabulary, which may or may not include a reference to the ancients.

Finally, it should also be noted that the *Institutiones* do not designate the “possible/probable *decisiones*” as “known *decisiones*”: for the purposes of this study, see J.2.7.1 regarding C.8.56.4; J.3.29.3a regarding C.8.41.8; and J.3.1.14 regarding C.8.47.10. However, the mere fact of not being named as such is not in itself damaging to the assertion that they are or may be *decisiones*, because there is concrete evidence that *decisiones* which did indeed identify themselves as such were not always called by their technical description in the *Institutiones*: see J.2.7.4 as regards C.7.7.1; J.2.4.3 and 3.10.1 as regards C.3.33.16; and neither J.2.19.1 nor J.2.14 pr. refers to C.6.27.5 as a *decisio*.

### III. The modern scholarly debate on the role of the *decisiones*

The academic arguments favoring the absorption of Justinian's *decisiones* within the Digest have generally taken place in the context of looking into their overall purpose, and so to correctly understand the different positions their full context should be considered. It is not however the aim of this study to reach a conclusion on the role of these provisions.

#### A. The *lex citandi*

Before undertaking any meaningful study of the legal purpose of the *decisiones* it will first be necessary to consider the ongoing validity of the canon of the *lex citandi*, which had hitherto assisted lawyers in determining which juristic views to follow in the event of a clash. Its rules were rigid and strictly hierarchical, the legal merit of each individual opinion seldom being relevant. Contained in C.Th. 1.4.3 (426) and promulgated under Valentinian III and Theodosius II, by virtue of its ruling five jurists

(Papinian, Paul, Gaius, Ulpian and Modestinus) could be cited in court, their opinions laying down the law authoritatively and incontrovertibly. Also permissible were earlier juristic opinions that had been specifically followed by this select group, although the older jurists themselves (as opposed to a particular individual viewpoint they had held) may have been directly and generally citable; the wording is ambiguous in this respect.<sup>74</sup> However, there is much to be said for the view that the canon would lose all sense if interpreted so as to give equal footing to such a large number of additional legal commentators.<sup>75</sup> As Fritz Pringsheim argued, interpreted in this way, judges would have still been required to choose between every conceivable nuance in the authorities, and “the pressing need for clarity, which after all in that time was the whole purpose of the law [of citations], would have remained unsatisfied.”<sup>76</sup>

The *lex citandi* operated such that in the event of a disagreement, the majority opinion won out, but if the numbers were even, Papinian carried the day (presuming he had formed a view on the matter). However, the *lex* acknowledged the flaws of its own mechanical calculation process, and required the judiciary to use its own judgement where it did not produce a definitive result itself (C.Th. 1.4.3.4).

The surviving fragment of the index to the first edition of Justinian’s Code (P. Oxy. 1814) provides cogent evidence that the *lex* had still been in force when the *Novus Codex* was prepared, being very probably contained at C<sup>1</sup>.1.15.1,<sup>77</sup> but the issue of whether it still formed the legislative backdrop when the *decisiones* were issued is more opaque. It may be objected that Justinian and his *consilium* would never have considered themselves bound by any legal strictures when issuing legislation. After all, the emperor could do exactly what he wanted, however he wanted to do it, and did not need to justify himself. Following this line of thought, the *lex citandi* had no relevance to Justinian’s legislation, and its impact would only have been felt in court.

<sup>74</sup> P. Bonfante, *Storia del diritto romano* (Milan 1959), 55.

<sup>75</sup> Cf. e.g. Lokin (note 18), 165.

<sup>76</sup> F. Pringsheim, “Zur Textgeschichte des Zitiergesetzes,” *SDHI*, 27 (1961), 237: “. . . so wäre das dringende Bedürfnis nach Klarheit, das doch damals das ganze Ziel des Gesetzes war, unbefriedigt geblieben.”

<sup>77</sup> B. P. Grenfell and A. S. Hunt, “Novus Codex index fragment (Papyrus Oxyrhynchus 1814),” *The Oxyrhynchus Papyri*, pt. XV (London 1922). For further bibliographic references see Ruggeri (note 10), 82–83 & nn.11 and 13. Varvaro, however, is skeptical: (note 11), 493–94.

However it is here maintained that in issuing the *decisiones* Justinian saw himself as the ultimate arbiter, the Supreme Court judge presiding over the disputes raging between the old jurists in order that the lower courts would know how to proceed. A *decisio* was after all a court judgement, as we have seen, and a court — even the highest court — would in principle need to be aware of the laws that governed its own decision-making process, even if the governing law itself was determined afresh, and unilaterally, by the emperor. Why else did Justinian bother resolving the old juristic disputes at all, saying which opinions he preferred, often even explaining why, as opposed to starting with a clean slate, disregarding without explanation the law that had preceded him and simply decreeing the new provision? Because this is not how Justinian operated, in my opinion the question of whether or not the *decisiones* obeyed the *lex citandi* is entirely legitimate.

Pietro Pescani suggests that the Digest project may have been underway well before the *decisiones* began to be issued and indeed that work had started on it immediately following the publication of the *Novus Codex*; and so even at this stage the canon was no longer adequate for the subtle analyses necessitated by Justinian's overhaul of the laws.<sup>78</sup> Whilst its abolition is not generally taken as far back as that, it is at least mostly accepted that it was either no longer in force by the time the first *decisio* was published,<sup>79</sup> or was not applied to the *decisiones* themselves despite this not being symptomatic of the *lex* having otherwise been abandoned.<sup>80</sup>

For our purposes it is necessary to reflect on several interesting observations. Firstly, Sabrina di Maria (note 79) points out not only the emphatic use in the *decisiones* of jurists who were not part of the five expressly endorsed by the canon, but also that their views appear to have been cited directly, rather

<sup>78</sup> Pescani, "Il piano" (note 10), 225–27.

<sup>79</sup> Ruggeri (note 10), 115–17; S. di Maria, "Brevi note sull'infungibilità dei giuristi classici nell'epoca giustiniana: l'esempio delle *decisiones*," *Rivista di Diritto Romano*, 10 (2010), 4–7; Corcoran (note 5), 95–97; Falchi (note 10), 123 n.8, 142–43 & nn.54–55, 148–49 (although his position is based on the view that the *lex* had never been applied in the Eastern empire).

<sup>80</sup> Lokin (note 18), 171–72. For the earlier opposing viewpoint, based largely on the discovery of P. Oxy. 1814, that the Law of Citations governed the *decisiones* with the exception of the main controversies, see P. Bonfante, "Un papiro di Ossirinco e le 'Quinquaginta *decisiones*,'" *BIDR*, 32 (1922), 278–79; P. de Francisci, *Storia del diritto romano* (Rome 1931), 256.

than through their endorsement by Papinian et al.; further, results are reached in apparent defiance of the Law of Citations without it being explained how the *lex* brought about such a result: e.g., in C.4.5.10 (1 August 530) Papinian and his source Julian outweigh the combined opinions of Ulpian and the two other jurists cited by him. Papinian also appears to have been toppled from his former position of pre-eminence and unassailability: e.g., C.6.2.22.3a (17 November 530) specifically highlights his inconsistent reasoning, and neither is he followed in C.8.47.10 pr. (1 September 530/31; however the insecure date may undermine the claim this latter provision has to be a *decisio*; see section II.C above on identification), and in some instances he seems to have been usurped by Julian in that he is secondary, or not mentioned (C.4.5.10, 3.33.15).

Taken together, these phenomena tend to point to the *lex citandi* not having been applied to the *decisiones*.<sup>81</sup> Indeed, in contrast to the *lex citandi* the new Justinianic *decisiones* contained the emperor's own resolution (in reality probably drafted by Tribonian) to each conundrum identified, replacing the slavish dogma of the *lex citandi* at least in these laws; *humanitas*, *favor libertatis*, and *benevolentia* now often purported to act as the determinative criteria,<sup>82</sup> in a distinct break with the old mantra of the *lex citandi*. Even so, it is often said that its general or total disapplication only really took place with the publication of the Digest in December 533, when the courts were given all the correct juristic views on a plate with no further discussion. This may be theoretically correct, but more shall be said on the point below. In the meantime, it is important to note its lack of practical effect on the *decisiones*.

#### B. The particular role and fate of the *decisiones*

The premise that the *decisiones* were in effect replaced by the Digest has been touched on sporadically by the academic community. Scheltema saw "decisio" as a new technical term legitimizing the excision from the Digest compilation of those juristic opinions that had been rejected by the decisive constitutions;<sup>83</sup> furthermore, the *disputationes et decisiones legitimae*

<sup>81</sup> Section III.B below, on the academic arguments, seeks to date its withdrawal more precisely, in the context of Justinianic legislation.

<sup>82</sup> See Honoré (note 2), 85–86; Ruggeri (note 10), 115–17 & nn.116–23; Varvaro (note 11), 496–99.

<sup>83</sup> Scheltema (note 17), 2–5.

were taken into account by the Digest, as confirmed by *c. Tanta* 1:<sup>84</sup> *Nomenque libris imposuimus Digestorum seu Pandectarum, quia omnes disputationes et decisiones in se habent legitimas.* Johannes Lokin argues along the same lines, specifically finding that by determining legal quandaries to which the *lex citandi* did not offer a solution due to its innate limitations, or that were resolved unsatisfactorily by it, the *decisiones* retrieved the dispute resolutions from judicial hands, enabling the compilers to select those juristic texts that accurately reflected the laws in question. They also legitimized the elimination of contradictions between the jurists. All this was for the purposes of facilitating the Digest compilation.<sup>85</sup> He surmises that the *decisiones* permitted the excision of outdated juridical institutions from the Digest, and the interpolation of laws that replaced them, and that the terms “*decisio*” and “*interpolatio*” were inextricably linked in this sense.<sup>86</sup> Accordingly, the principles contained in the *decisiones* were distributed and assimilated throughout the Digest, no reference being made to the original constitutions.<sup>87</sup> All in all, the *decisiones* are seen as intentionally paving the way for the Digest, and nothing more. Both scholars conclude that because the Digest absorbed the *decisiones*, there was no real need for them to be included in the final version of the Code; in fact their presence there was superfluous to requirements and appeared to defy logic, but ultimately was either for the sake of Tribonian's vanity or to commemorate Justinian's great judicial reforms.<sup>88</sup>

These arguments are attractive; they seem logical, feasible,

<sup>84</sup> Scheltema (note 17), 9: “Le Digeste tient compte des décisions.”

<sup>85</sup> Lokin (note 18), 167, 171–72. Cf. Scheltema (note 17), 4; Corcoran (note 5), 79.

<sup>86</sup> Lokin (note 18), 172–73.

<sup>87</sup> Id., 167–68.

<sup>88</sup> Scheltema (note 17), 9:

Après le 30<sup>me</sup> décembre 533 les décisions n'eurent plus qu'un intérêt purement historique qui ne semble pas justifier leur insertion dans la seconde version du Code . . . . [Elles] devaient conserver le souvenir de la grande réforme judiciaire [et] montrer à la postérité l'image d'un Justinien arbitrant les différences des célèbres jurisconsultes du passé et par conséquent l'emportant sur eux.

Lokin (note 18), 167–68: “For, in view of the fact that the decisions were meant to make possible the appearance of a consistent Digest, it is strange to discover them a year after its appearance in the second Codex . . . . Probably Tribonian was led in this way by his vanity, wishing to show off his ingenuity in cutting through various Gordian knots.”

and neat. *Constitutio Deo auctore* 10 after all prohibits the inclusion of laws in desuetude, and *c. Tanta* 10 tells us that contradictions were generally omitted. It is further of note that *c. Cordi* 1 also tells us that the entire *ius antiquum*, now clarified and free of unnecessary verbiage, had been set out in the Institutes and indeed the Digest:

Postea vero, cum vetus ius considerandum recepimus, tam quinquaginta decisiones fecimus quam alias ad commodum propositi operis pertinentes plurimas constitutiones promulgavimus, quibus maximus antiquarum rerum articulus emendatus et coartatus est omneque ius antiquum supervacua prolixitate liberum atque enucleatum in nostris institutionibus et digestis reddidimus.

However, there are problems. Firstly, *c. Tanta* 11 provides a significant counter-indication in confirming that the commissioners' instructions were to insert *nostrae constitutiones*, which were issued for the *emendatio iuris* and clarified past uncertainty, into the *Institutiones* alone, not the Digest:

Admonuimus autem eos, ut memores etiam nostrarum fiant constitutionum, quas pro emendatione iuris promulgavimus, et in confectione institutionum etiam eadem emendatione ponere non morentur: ut sit manifestum et quid antea vacillabat et quid postea in stabilitatem redactum est.

To add to the confusion, despite the claim in *c. Cordi* 1 regarding the *ius antiquum*, *c. Cordi* 2 simply directs the reader to the *Codex Repetitae Praelectionis* itself for the *decisiones* (note 12 above), and indeed this is where a significant number, if not all of them, can be found today (as explored above). The precise meaning of "ius antiquum," its relationship with the *decisiones*, and the question of where in Justinian's compilation it was placed, all become very unclear, despite *c. Tanta* 1.

Also of note is that Justinian directs strong disapproval at duplications generally,<sup>89</sup> but it is not a foregone conclusion from which work these were expunged. In fact, both *c. Deo auctore* 9 and *c. Tanta* 14 expressly prohibited the repetition of *constitutiones* or their principles within the Digest, unless logic and

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<sup>89</sup> See Honoré (note 2), 172 n.145(ii); *c. Haec* 2; *c. Summa* 1; *c. Deo auctore* 9; *c. Tanta* 14; *c. Cordi* 3.

expediency demanded otherwise.<sup>90</sup> Although there was no hint even in late 533 that plans were afoot to revise Justinian's Code and indeed to republish it complete with the *decisiones*, the individual dispute resolutions were indubitably also *constitutiones* and therefore, apparently, were not to be repeated within the Digest, which does not coincide with the views expressed above.

Furthermore, it is not at all certain that Theodosius' *lex citandi* actually still needed bypassing in July 530, at least in terms of Justinianic legislation on the *ius antiquum*. Indeed, there is a real likelihood that it had in fact already been sidelined, if not repealed, at least several months before the first of the *decisiones*: compellingly, although some constitutions predating the *decisiones* are still in obvious thrall to Papinian,<sup>91</sup> Paul had already been twice rejected without being trumped by any of the other jurists or combination thereof,<sup>92</sup> as would have been required under the canon; the substantive merit of his opinions must therefore have been weighed up and thrown out, which was inconceivable under the "Tribunal of the Dead."<sup>93</sup> Already on 30 October 529 Justinian proclaims through C.1.14.12 (later reiterated through c. *Tanta* 21) that the emperor is the sole interpreter of *leges* and resolver of ambiguities; he even refers to a

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<sup>90</sup> C. Deo auctore 9: [*E*]t ea, quae sacratissimis constitutionibus quas in codicem nostrum redeimus cauta sunt, iterum poni ex veteri iure non concedimus. C. *Tanta* 14: [*S*]i quid principalibus constitutionibus cautum est, hoc in digestorum volumine poni nullo concessimus modo. C. Deo auctore 9 and c. *Tanta* 13 explain when repetition of imperial constitutions was permitted.

<sup>91</sup> C.7.45.14, dated to the Praetorian Prefecture of Demosthenes, which probably ran from summer 529 (see Honoré (note 2), 235), ending before 18 Mar. 530 (see C.4.66.3); see also C.6.42.30 (30 Oct. 529).

<sup>92</sup> C.3.28.33.1 (17 Sept. 529); C.2.55.5 (27 Mar. 530).

<sup>93</sup> To employ Varvaro's worthy phrase, (note 11), 504. Di Maria (note 79), 3–4, considers the ramifications of Paul's opinion being rejected, concluding that taken with the clear-cut reverence with which Papinian is treated (id., 2–3), a two-pronged approach can be discerned, and that at the very least the views of ancient jurists were perhaps now being taken with a pinch of salt; however, she sees the watershed moment for the *lex* as coming with the *decisiones* (id., 7). Cf. Pescani, "Il piano" (note 10), 224; Luchetti (note 17), 167; Ruggeri (note 10), 94, all of whom consider these earlier constitutions as categorically establishing the ongoing respect held by Tribonian in mid-530 towards the old regime; but do not weigh up the implications of Paul's opinion being departed from without the requisite justification under that law. Arguably Ruggeri's standpoint is incompatible with her position (id., 102–103) that the Digest project had already entered an operational phase as of 17 Nov. 529, pursuant to a plan Tribonian had long held dear.

“*decisio*” being made in relation to doubts and ambiguities (4).<sup>94</sup> So in effect the emperor had already supplanted the jurists in this regard; and even though there is no mention of resolving those conflicts existing between the jurists themselves, it could be said that this inevitably should fall to the emperor too, at least if the quarrel revolved around the meaning of particular *leges*.

All these provisions followed hot on the heels of the persecution and ousting of alleged pagans from within the upper echelons of Justinian’s court, including even the then *quaestor* and Praetorian Prefect;<sup>95</sup> conceivably, in the wake of these seismic events, the ancient (and heathen) jurists may also have seen their inviolability questioned, with Justinian’s position as law-giver being reinforced specifically because he was God’s right-hand man — itself evident already in C.1.14.12, not to mention in the slightly later *c. Deo auctore*. The provisions also roughly coincide with Tribonian’s appointment as *quaestor*, which may equally have constituted the necessary impetus for withdrawing or disregarding the law in late summer to mid-Autumn 529,<sup>96</sup> just as he was later to instigate the *decisiones* themselves.<sup>97</sup> In conjunction with these observations, the fact that Papinian was still occasionally revered in 529 is not at all indicative of the old regime still being in force; after all, he is still accorded a special position under some *decisiones*,<sup>98</sup> despite these laws elsewhere declining to follow him.<sup>99</sup> The impression given is of a genuine attempt at substantive objectivity, the first tentative steps towards independent legal thinking, whether this ended up obtaining a new result or not, and even though the reasoning, as we have seen, was sometimes guided by the new considerations of

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<sup>94</sup> G. L. Falchi, “Studi sulle relazioni tra la legislazione degli anni 528–533 e la compilazione di *leges e iura*,” *SDHI*, 59 (1993), 27–28, refers to this law but does not suggest it had significance in the context of the canon; cf. Pescani, “Il piano” (note 10), 225.

<sup>95</sup> Honoré (note 2), 46–47.

<sup>96</sup> *Id.* (a new legislative style can allegedly be detected as from 17 Sept. 529, in the purge’s aftermath). However Ruggeri (note 10), 88–89, is more guarded and does not place his promotion before 17 Nov. 529, the date of the first concrete evidence linking Tribonian to that position (i.e., C.7.63.5, which is addressed to him). Such ambivalence is wise, and it remains debateable whether C.1.14.12 can be linked to his tenure, even if it is likely.

<sup>97</sup> J.1.5.3; Ruggeri (note 10), 88.

<sup>98</sup> C.4.5.10 (1 Oct. 530); C.6.2.22.3 (17 Nov. 530); cf. C.6.25.7 (22 July 530), although it lacks the necessary characteristics of a *decisio*.

<sup>99</sup> See section III.A, above, on the *lex citandi*.

(for example) humanity and equity (see note 82).

Certainly as of December 530 the *lex* appears to be defunct, as strongly implied by *c. Deo auctore* 5,<sup>100</sup> which, although still in awe of the *honorem splendidissimi Papiniani*, not only approves a much larger range of jurists than the core group of the *lex citandi* but also eschews a hierarchical approach to them, distinctly declaring that none shall automatically be considered superior, requiring instead that the individual opinions be scrutinized and compared, as if in direct rebuttal of Theodosius' strictures.<sup>101</sup> The text of *c. Tanta* 20 confirms the stance of *c. Deo auctore*,<sup>102</sup> with the added benefit of the Digest's completed dissection of (apparently) all relevant material and selection of the approved texts; and the absence from the final Code of the original Code's C.1.15.1–2<sup>103</sup> may provide the final nail in the coffin. Although it is unwise to draw firm conclusions from this later evidence as to Justinian's mindset in mid-530 (and earlier) towards the arguably antiquated rule, when read in conjunction with the 529–30 legislation it remains cogent: these provisions heralded the demise of the law of citations in the context of Justinian's own enactments, even before the first known *decisio*. So although imperial constitutions were now necessary to diffuse the new approach, it becomes problematic to argue, as does Lokin, that it was specifically the *decisiones* that had this role.

Finally, the role of the *extravagantes* is also perplexing. Their character was intrinsically the same as that of the *decisiones*, in that they too adjudicated upon ancient juristic *altercationes*, and it is not immediately clear how they fit with Lokin's arguments given that the key terminology is missing. Finally, the explana-

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<sup>100</sup> C. Deo auctore 5: *Omnibus auctoribus iuris aequa dignitate pol- lentibus et nemini quadam praerogativa servanda, quia non omnes in omnia, sed certi per certa vel meliores vel deteriores inveniuntur.*

<sup>101</sup> Interestingly, Buckland (note 14), 40, who doesn't discuss the matter in detail, sees the words of *c. Deo auctore* as actually reflecting the law of citations as regards those jurists (or their works?) cited by the five, but does not analyse the newly trumpeted meritocratic approach. Mantovani (note 35), 259–61, comprehensively and convincingly repudiates the reasoning offered by Falchi (note 34), 120–45, whereby the canon guided the professors in deciding which jurists' works were to be included in the Digest.

<sup>102</sup> C. Tanta 20: *Legis latores autem vel commentatores eos elegimus . . . omnibus uno dignitatis apice impertito nec sibi quodam aliquam praerogativam vindicante.* C. Tanta does not differentiate any particular jurist for "special mention."

<sup>103</sup> Corcoran (note 5), 95–99.

tions of both scholars as to why the provisions in question are retained in CJ<sup>2</sup> are inevitably only speculative, even if persuasive.

Offering a different angle, Ruggeri sees the *quingenta decisiones* as having been issued as a kind of transitional bridge pending the publication of the Digest. The *lex citandi* having been jettisoned, the *decisiones* provided lawyers with a new means of resolving ancient disputes based on principles of humanity and such like,<sup>104</sup> and the Digest absorbed these new solutions in full. This proposition is based primarily on the claim of *c. Tanta* 12 that at least ten years had originally been thought necessary to complete the Digest project, and therefore an interim solution was required to address practitioners' needs regarding the most pressing issues in their real-life dealings with the law:<sup>105</sup>

Omni igitur Romani iuris dispositione composita et in tribus voluminibus, id est institutionum et digestorum seu pandectarum nec non constitutionum, perfecta et in tribus annis consummata, quae ut primum separari coepit, neque in totum decennium compleri sperabatur.

Also inherent to this theory is an attempt to fend off the injustices and confusion of a baffling legal system, as indeed hinted at in *c. Deo auctore* 1.<sup>106</sup> The inevitable consequence of these arguments is principally that the *decisiones* lost their relevance upon the Digest's publication as they were in effect absorbed and replaced by it.<sup>107</sup> Indeed, basing her reasoning on that of Rotondi, Ruggeri

<sup>104</sup> Ruggeri (note 10), 115–20. G. Luchetti, *La legislazione imperiale nelle Istituzioni di Giustiniano* (Milan 1996), 19–20 & n.18, 593 & n.41, concurs but sees the difference in wording between *c. Cordi* 1 and *J.1.5.3* as evidencing a change of perspective, whereafter the *decisiones* were retrospectively allocated an ongoing role of providing clarity and brevity to the compilation. See also Falchi (note 10), 146–47, who considers the *decisiones* to be the emperor's (first) attempt at overcoming the *lex citandi*, but does not accept that they were originally directed at facilitating the Digest, the preparation of which had not yet been ordered.

<sup>105</sup> Ruggeri (note 10), 114–15; cf. Paricio (note 10), 507–508; Pescani, "Il piano" (note 10), 707.

<sup>106</sup> *C. Deo auctore* 1: *Repperimus autem omnem legum tramitem, ita esse confusum, ut in infinitum extendatur et nullius humanae naturae capacitate concludatur.*

<sup>107</sup> As implicit in Ruggeri's view of the *decisiones*' transitory force, but more particularly see Ruggeri (note 10), 118: "[L]e *decisiones* si collegherebbero sì ai *Digesta* . . . di fatto esse finirono anche per facilitarne il compito dei compilatori che relativamenete alle *dubitationes* risolte attraverso le *decisiones* imperiali, trovavano già predisposta la soluzione . . ."; and 119: "... [la] raccolta [delle *decisiones*] valesse in regime

considers that those *decisiones* whose principles had been absorbed by the Digest may not have been included in the *Codex Repetitae Praelectionis* at all.<sup>108</sup> She concludes that the only reason that the *decisiones* should not be considered of marginal importance requiring mere cursory acknowledgment was that they were the first sign of the newly humane imperial policy towards the *iura* that finally broke with the *lex citandi*,<sup>109</sup> the new approach subsequently being embodied in full by the Digest. In other words, the *decisiones* were a historically important and interesting stopgap solution, but nothing more; their legal life ended abruptly in December 533.

Again, these arguments seem convincing. However, it is not immediately apparent why only some *decisiones* were transfused into the Digest when almost all had a relevant title into which they could be inserted. There are also reasons to be circumspect over the reliability of *c. Tanta* 12 generally, primarily because the timeframe apparently envisaged therein was not simply for the completion of the Digest, but of *tria volumina*: indeed this expressly included not only the Digest, but books containing constitutions and institutes also.<sup>110</sup> It is therefore not simply a question of *c. Tanta* 12 claiming that the compilers took

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transitorio in attesa del passaggio al nuovo sistema di utilizzazione dei *iura*.” Although their views on the role of the *decisiones* differ, other scholars concur on this narrow point, see de Francisci (note 80), 257: “. . . la raccolta dei *iura* [i.e., il Digesto] . . . proseguì per la sua via finché la sua pubblicazione eliminò completamente la necessità delle *decisiones*.”; and Pescani, “Quinquaginta” (note 10), 707: “Il successivo piano del Digesto . . . certamente influenza una gran parte delle *quinquaginta decisiones* che vennero così ad armonizzarsi col lavoro intrapreso dalla commissione per il Digesto.”; and note 88 above. But see also Luchetti’s position, summarized at note 104.

<sup>108</sup> Ruggeri (note 10), 24: “[È] assai probabile che siano state omesse [dal Codice] quelle costituzioni che referivano principi già trasfusi nelle alterazioni che in base ad esse erano state apportate ai frammenti giurisprudenziali dai compilatori del Digesto . . .” See also Paricio (note 10), 504: “[T]ampoco es obligado pensar que todas ellas [i.e., *decisiones*] fueran incluidas en el *Codex repetitae praelectionis*, pues los compiladores pudieron excluir algunas cuyos principios ya se insertaban en el Digesto a través de alteraciones introducidas en los textos jurisprudenciales.” Cf. Ruggeri (note 31), 446; Rotondi (note 10), 229. Pescani also considers that not all the *decisiones* were put into CJ<sup>2</sup>: “Quinquaginta” (note 10), 707.

<sup>109</sup> Ruggeri (note 10), 120.

<sup>110</sup> *C. Tanta* 12: *Omni igitur Romani iuris dispositione composita et in tribus voluminibus, id est institutionum et digestorum seu pandectarum nec non constitutionum*. See also *c. Δέδοκεν* 12. The translation of S. Scott, *The Civil Law*, 2 (Cincinnati 1932) does not list the works.

considerably less time to prepare the Digest than had been predicted, an assertion that may avowedly be true; the provision makes the claim for Justinian's project in its entirety. Further, judging from the relevant introductory constitutions,<sup>111</sup> the three years averred for the time taken to complete all these three works is considerably less than the time almost certainly taken in reality: nearly six years were required, and even if breaks are disregarded, the total significantly surpasses three. Self-evidently, the three-year period referred to in *c. Tanta* 12 is the time taken for the Digest's completion; but this is not what it says. So the evidential force of its calculation as a whole is undermined. As a consequence, the inference that the *decisiones* were issued to plug the vacuum whilst the Digest was being prepared is placed in doubt, as it may never have been thought that it would take more than three years, or such time as would necessitate a temporary solution such as the *decisiones*, as conceptualized by Ruggeri.

Honoré considers that the *decisiones*' aim was to demonstrate the feasibility of the Digest undertaking, which was consequently shown to be achievable in merely three years; this tallies indirectly with his suggestion that they were "intended to have effect only until the Digest project was completed," a clear precursor of Ruggeri's theory.<sup>112</sup> Yet it is puzzling how just fifty resolute constitutions could be thought sufficient to demonstrate the timescale for organizing the entire body of Roman law that according to *c. Deo auctore* 1 was so vast and utterly confused.<sup>113</sup> Further, although we have just seen that *c. Tanta* 12 is not wholly dependable, and was talking about the time foreseen for the entire compilation, it can perhaps be inferred that the period required to complete the Digest was originally overestimated, rather than down-played as suggested here.

The supportive reasoning behind each of these arguments is not therefore invulnerable to criticism. However, this by no means entails that the *decisiones* were *not* made irrelevant through the publication of the Digest. The underlying premise may still be correct. After all, conceptually it makes sense: the Digest also sought to eliminate contradictions amongst the jurists

<sup>111</sup> *C. Haec* (13 Feb. 528); *c. Tanta* (16 Dec. 533). Cf. Honoré (note 2), 140–41, 148–49.

<sup>112</sup> Honoré (note 2), 140–41, 145. His basic premise is however incompatible with that of Ruggeri.

<sup>113</sup> See also Ruggeri (note 10), 108–109 & n.99.

(c. *Deo auctore* 4) —

Iubemus igitur vobis antiquorum prudentium . . . libros ad ius Romanum pertinentes et legere et elimare, ut ex his omnis materia colligatur, nulla (secundum quod possibile est) neque similitudine neque discordia derelicta . . .

— and had in the *decisiones* a ready-made means of doing so. Further, as seen above, Tribonian presided over each project or played a key role therein: indeed, *quaestores* in the sixth century controlled the legislative process, and as such the drafting of imperial enactments, much more closely than in the past; and Tribonian retained his central position in overseeing work on the Digest even after his dismissal following the Nika riots of January 532, so he was perfectly placed to achieve these ends.<sup>114</sup> What is clear though is that for the provisions to lose their force as posited, the Digest would need to contain fragments that were not only consistent with the constitutions in question, but that also positively stated the Justinianic rule newly in force. This would require either the retention of the juristic text favored by the relevant *decisio*, or of a fragment virtually identical to it; or the insertion of extended or adapted principles through textual interpolation, as construed generally. Furthermore, any laws replaced or repealed by the *decisiones* would also have to be absent from the Digest.

It is worth noting that Buckland questions the wisdom of unbridled interpolation hunting,<sup>115</sup> but to little effect it seems, given the prevailing academic line. In support he relies on c. *Deo auctore* 4–5; but it is hard to extract the real intent from these sections, and it must not be forgotten that the remit may in any event have changed over the course of the compilation.

#### IV. Focus of the enquiry

So it falls to be considered whether there is indeed more solid evidence of practices taking place as described, further to which these arguments can be dissected more fully. As stated above, the investigation shall not seek to reach conclusions as to the overall

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<sup>114</sup> Regarding Tribonian's role throughout the Digest preparation, see Honoré (note 2), 9, 53–56; c. *Deo auctore* (being addressed to Tribonian). For his role in the *decisiones*, see J.1.5.3, 2.8.2, 2.23.12. Regarding quaestors in the sixth century, see J. Harries, "The Roman Imperial quaestor from Constantine to Theodosius II," *JRS*, 78 (1988), 170.

<sup>115</sup> Buckland (note 14), 44 & n.6.

role and objectives of the *decisiones*, which is an enquiry for a later date, when the necessary research can be undertaken comprehensively; instead, the present aim is simply to establish whether individual provisions, classified as “known, probable, or possible *decisiones*” according to the criteria established here, find counterparts in the Digest; or, if the enactment repeals an institution, whether there is confirmation of such, or a corresponding void, in this same work. However, the exercise as a whole may invariably end up shedding light on the issue of purpose.

Before proceeding to compare individual *decisiones* with the Digest, it is necessary to confirm a few points that are intrinsic to the investigation. I shall concentrate here on a selection of those *decisiones* and probable/possible *decisiones* whose principles are directly in line with any counterpart passages in Justinian’s *Institutiones*, which identify them either as *decisiones* or *constitutiones nostrae*, and/or by implication confirm their identity through the dissection of the relevant principles. The focus will be on these laws because the similarities are testimony to their contents not being subjected to any substantive *permutationes vel emendationes* after the *Institutiones* were published.<sup>116</sup> Most probably, they would therefore also have been in their final form by the time the Digest itself was in its endmost editorial stages, but definitely before its publication.<sup>117</sup> So, if any *decisiones* had already undergone the amendments mentioned in *c. Cordi 2*

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<sup>116</sup> The amendments are referred to in *c. Cordi 2*. That they were made pursuant to *melius consilium* very strongly suggests that substantive alterations were made to the legal reasoning and conclusions. Corcoran (note 5), 77, describes the process of supplementary reforming legislation that must have been issued for the amendments to take place. We do not know when these alterations were made, whether they were made together or over a period of time, or which *decisiones* fell victim to the modifications. Ruggeri (note 10), 52, suggests that the additional amendments carried out when the provisions were inserted into the Code (i.e., not the *permutationes*) were directed, in part at least, at obliterating overt references to *decisiones*; however, it seems odd that such a poor job would have been made of this, in view of the extent of the term’s survival.

<sup>117</sup> In this context it is also relevant that Honoré, (note 2), 185–86, considered it likely that work was being carried out on excerpts from a final additional “mass” right up until the Digest’s final editorial stages, so amendments made at this stage could also have been contemplated. Mantovani does not accept that there was a later mass, D. Mantovani, *Digesto e masse Bluhmiane* (Milan 1987), 109, but all things being equal there is no reason to exclude the possibility of tardy updates. It should also be borne in mind that work on the *Institutiones* probably only commenced once the Digest had been completed: *c. Imperatoriam maiestatem 4*.

before the *Institutiones*' publication, practitioners and Commissioners alike could have ascertained the correct, updated principle by cross-referencing the amending legislation with the original constitution, would have known to disregard any fragments rendered unlawful by the changes, and as such the *Institutiones*' entries would still be recognizable today as being consonant with their parallel *decisiones*. Furthermore, if indeed the compilers' mission was to reflect the *decisiones* in the Digest, the publication timeframe is such that they could probably also have replicated the changes there, be it through the retention of genuine juristic fragments that were in keeping with the modification, through disguised interpolations, or indeed through the eradication of inconsistent texts, all of which will be discussed below through individual examples.

The *permutationes* may indeed have *all* been made in time to be reflected in the *Institutiones* and Digest. After all, no scholia to the Basilica appear to make a reference to a *decisio* trumping and retrospectively invalidating a corresponding entry. It does seem particularly unlikely that no such mentions would survive for posterity had the *decisiones* been altered later to the detriment of harmoniousness with the juristic extracts. Also, every account we have in Justinian's *Institutiones* of a "known" *decisio*<sup>118</sup> appears to coincide roughly with the version we know through the Code, even if there is simplification<sup>119</sup> (and necessarily so, for a student manual), and extra historical detail regarding the jurists.<sup>120</sup> It seems unlikely that this was due to a conscious effort by the CJ<sup>2</sup> editorial team not to amend those laws that had already been analysed in the *Institutiones*, given that the changes were deemed appropriate pursuant to the seemingly important *melius consilium*, and not some whim. A fuller perspective on the matter would be greatly assisted by an in-depth comparison of all the *decisiones* with the Digest and *Institutiones*, but given that this cannot be undertaken here, only those constitutions with the characteristics set out above will be considered.

Particular regard will be had of those sections of the Digest that correlate most closely to the CJ<sup>2</sup> titles where the *decisiones*

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<sup>118</sup> J.1.5.3 regarding C.7.5.1; J.1.10 pr. regarding C.5.4.25; J.2.5.5 regarding C.3.33.13; J.3.23.1 regarding C.4.38.15; J.3.28.3 regarding C.4.27.2; J.4.1.8 regarding C.6.2.20; J.4.1.16 regarding C.6.2.22; J.2.7.4 regarding C.7.7.1; J.2.4.3 and 3.10.1 regarding C.3.33.16.

<sup>119</sup> Luchetti (note 104), 606–607.

<sup>120</sup> *Id.*, 602.

are located, in terms of identifying texts reflective of them — or, as the case may be, texts contradictory of them, or indeed containing outright lacunae. Where a *decisio* mentions or cites individual jurists, the titles will be perused to find any repeated references. Pre-Justinianic material will also inform the inquiry in terms of establishing whether texts were omitted or amended; as regards works relevant to the investigation undertaken here, it is of note that both Gaius' *Institutes* and *Pauli Sententiae* feature in the Florentine Index of works from which the Digest was derived, and the (probably) post-classical *Regulae* of "Ulpian" is generally agreed to be an epitome of an earlier work,<sup>121</sup> so rules of the same ilk should have been available to the compilers.

Additionally, regard shall be had of the *Basilica*, a ninth/tenth century Byzantine compilation and partial reorganization of Justinian's codification. Consisting largely of Greek translations dating from the sixth century of texts from the Digest but also of some laws from CJ<sup>2</sup>, the *Institutiones*, and *Novellae*, it can act as an important comparator.<sup>122</sup> The creation in the *Basilica* of new titles that accommodated particular *decisiones* is also instructive. Furthermore, many *Basilica* texts were also accompanied by explanatory scholia, of particular interest here being those that are expressly attributed to the sixth-century jurists, as they may reliably illuminate contemporary interpretations of the juristic texts and Justinianic constitutions, and reveal any links made between them. They also serve as a possible contrast with the Digest in terms of the detail with which they discussed individual *decisiones*. Their authors were working from virtually unadulterated sources, in an environment where Latin was still highly prized, so the passages are highly esteemed in terms of evidencing the original meaning of the texts they analysed. Of these, scholia which purport to have been authored by Thalelaeus are of

<sup>121</sup> Robinson (note 14), 62–65.

<sup>122</sup> F. Brandsma, *Dorotheus and his Digest Translation* (Groningen 1996), 1–2; Schiller (note 60), 60–62. Cf. Berger (note 19), 371–72, s.v. "Basilica." Unless otherwise stated, the *Basilica* edition relied on here is that of Scheltema (note 59). The *Basilica* contains most of the (supposed) *decisiones* considered in this study: C.8.56.4 (BT 47.3.48, Series A, 2157); C.7.7.1 (BT 48.14.4, Series A, 2240-1); C.8.41.8 (BT 26.4.42, Series A, 1269); C.6.2.20 (BT 60.6.37, Series A, 2797); C.6.27.5.1b (BT 35.13.40, Series A, 1621-2). However, of these only BT 47.3.48, BT 48.14.4, and BT 60.6.37 have scholia, and only those of BT 48.14.4 can be linked with real certainty to sixth-century legal writings (see BS 48.14.4.1–9, Series B, 2970-1.)

particular interest as they would have been taken from his almost-contemporary commentary on Justinian's Code itself.<sup>123</sup> It is however necessary to be alert to the possibility that Thalelaeus may have referred to some *decisiones* in their pre-editorial form, despite the prohibition on doing so (c. *Cordi* 5: see note 13 above), and despite these already being obsolete when the Digest was published: for example, using the imperfect tense (ἔλεγεν ἢ διάταξις) he tells us about a clause that had existed in a particular *decisio* but is no longer expressly contained in the enactment known to us.<sup>124</sup>

Also important are the Basilica scholia attributed to Dorotheus. These were taken from his explanatory annotations to his own Digest translation, which he is likely to have prepared less than a decade after the Digest's publication.<sup>125</sup> As well as being one of the four *antecessores*, Dorotheus was a co-drafter of both the *Institutiones* and CJ<sup>2</sup>, and also took part in preparing the *emendationes vel permutationes* to the *decisiones*,<sup>126</sup> so his testimony is particularly valuable where it can be found.

Finally, Justinian's *Institutiones* are important not only for assisting in the choice of the enactments examined here, but also for providing a comparison with the Digest regarding the extent to which it reflected the individual laws. The *Paraphrasis Institutionum*, a Greek commentary on the same work drafted by Theophilus, another *antecessor* and also co-drafter of the *Institutiones*, is important for the same reasons, and again for its contemporaneity: it contains his comments on several *decisiones* as they stood when his work was published, probably around 533–34.<sup>127</sup>

<sup>123</sup> Schiller (note 60), 61–62. See note 154 below for solid evidence of Thalelaeus' direct cross-referencing with the Code.

<sup>124</sup> The scholion extract (BS 48.14.4.5) is set out at note 160 below. At least as regards the scholia of BS 48.14.4 as a whole (Scheltema (note 59), Series B, 2970-1), the aorist and present tenses are used when referring to the constitution under consideration, the imperfect seemingly being reserved for laws no longer in existence: when referring to Severus' enactments, scholion 2 uses ὑπόσκητο (l. 26) and ἐκέλευεν (l. 30). The present tense is however used regarding the "canon," in the subjunctive (εἴρηται, l. 24).

<sup>125</sup> Regarding the attribution of these texts to Dorotheus, see Brandsma (note 122), 46–47, 70–74, 149–52; regarding when the translation was prepared, see *id.*, 3–12.

<sup>126</sup> C. *Imperatoriam maiestatem* 3; c. *Tanta* 9, 11; c. *Cordi* 2.

<sup>127</sup> These dates are suggested because the work contains no references to the second Code or any constitutions issued after 533: J. Lokin, et al., eds., *Theophili Antecessoris Paraphrasis Institutionum* (Groningen

V. Assessing the impact of individual  
*decisiones* on the Digest

A. Where *decisiones* are replicated faithfully in the Digest

1. C.4.38.15 (1 Aug. 530, a “known *decisio*” placed under the title *De contrahenda emptione*) held that a sale or hire contract is valid where it was made at a price to be determined by a third party (who must be a *persona certa* rather than an undefined *vir bonus*; see C.4.38.15.2), on condition that he is willing and able to fix the price. J.3.23.1 portrays this rule accurately, as does Theophilus, the latter adding for clarification that the appointee who assesses the price may decline to do so if he has insufficient knowledge.<sup>128</sup>

More significantly for our purposes, D.19.2.25 pr. cites Gaius as unequivocally reaching the same conclusion, at least in the context of rentals (the Digest title is *Locati conducti*).<sup>129</sup> For Blume,<sup>130</sup> the Digest extract is indisputably an interpolation. Given that in his Institutes (G.3.140, 143), Gaius prevaricates on the issue regarding both sales and leases, merely setting out the conundrum or detailing the opposing viewpoints but not coming to any concluded view, Blume may well have a point: unlike in other disputes (for example G.3.145–146), Gaius does not tell us which view “magis placuit.” So the Digest compilers appear to have reacted to Justinian’s reform either by actively manipulating

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2010) (with edited translation by A. Murison), ix & n.2; Corcoran (note 5), 83 & n.29. The work seeks to clarify each section of Justinian’s *Institutiones* and so follows the same format. For Theophilus’ background see c. Imperatoriam maiestatem 3 and c. Tanta 9, 11.

<sup>128</sup> Theophil. *Para.* 3.23.1 (Lokin (note 127), 672, l. 14): Τυχὸν γὰρ ὑπερέβαινεν αὐτὸν ἢ γνώσας τῆς ποσότητος τοῦ τιμήματος.

<sup>129</sup> D.19.2.25 pr. (Gaius 10 ed. prov.):

Si merces promissa sit generaliter alieno arbitrio, locatio et conductio contrahi non videtur: sin autem quanti Titius aestimaverit, sub hac condicione stare locationem, ut, si quidem ipse qui nominatus est mercedem definierit, omnimodo secundum eius aestimationem et mercedem persolvi oporteat et conductionem ad effectum pervenire: sin autem ille vel noluerit vel non potuerit mercedem definire, tunc pro nihilo esse conductionem quasi nulla mercede statuta.

<sup>130</sup> The renowned scholar Justice Fred Blume of the Wyoming Supreme Court (see, e.g., L. Jones Hall, “Clyde Pharr, the Women of Vanderbilt and the Wyoming Judge,” *RLT*, 8 (2012), particularly 9–11) prepared an annotated translation of Justinian’s Code, now available online at the University of Wyoming website. On the instant point see his annotation to C.4.38.15.

Gaius' Institutes, or by choosing an older view from which he later resiled (his Institutes were probably finished after the completion of *Ad edictum provinciale*<sup>131</sup>). This is rendered more likely again by the fact that Justinian's *Institutiones* did not simply follow Gaius' Institutes in this case, despite generally following his structure and thinking,<sup>132</sup> but instead actively altered the outcome: so there must have been an awareness within the team of the *decisio*'s impact on juristic law. There remains the possibility that the compilers were working from texts that had been interpolated during the post-classical period and unwittingly selected an already altered section; but it seems unlikely that they did not have access to a copy untarnished by later modifications (see note 16). In any event, the fragment provides good evidence that at some level there was an intention for the Digest to reflect C.4.38.15.

There are caveats however. The *decisio* does not confirm the author of the selected opinion, so D.19.2.25 pr. is not repetitive in this respect. Also, D.19.2.25 pr. only deals with leases. Furthermore, Justinian's enactment contains a specific proviso that where the contract is in writing, it must obey Justinianic law relating to its completion and execution, but the Digest makes no mention of the new procedures in this particular context. Perhaps indeed this *decisio* should be deemed "partially replicated" in the Digest, but the blatancy of the interpolation needs to be singled out.

#### B. Where *decisiones* are only partially replicated in the Digest

2. We shall next consider C.8.56.4 (1 September 530/1<sup>133</sup>). This is here considered a "possible *decisio*" because it contains no *decidere* form, which is compounded by there being no specific reference to the ancient law (although as we have seen these are not imperative features of *decisiones*), and by the uncertainty surrounding the date (see section II.C, "Possible *decisiones*," above). However, these shortcomings are counter-balanced by the vocabulary used (particularly "dubitabatur"). Further, although the substantive content would not be enough in itself, in combination with the terminology it has weight. Thus the law on

<sup>131</sup> T. Honoré, *Gaius* (Oxford 1962), 46–69.

<sup>132</sup> P. Birks and G. MacLeod, eds., *Justinian's Institutes* (New York 1987) (Latin text of P. Krueger), 16.

<sup>133</sup> The manuscript attestation as to the year of issue is contradictory; see above, text accompanying note 54.

*donationes mortis causa* (the subject matter of C.8.56.4) was clearly in evolution between the classical and post-classical eras as regards revocability, and highly prone therefore to giving rise to a dispute; and even if there had not been a defined controversy in classical times, it is surely inconceivable that no juristic comments were relevant to the dispute, or laid its seed. And it appears that some *decisiones* may have referred to post-classical debates.<sup>134</sup> There is as such no clear reason to question the provision's categorization as a "possible *decisio*."

As a result of C.8.56.4, *donationes mortis causa* did not require registration to be valid, even if unwritten, if made in the presence of five witnesses. The implications of this provision are not stated very clearly, but are apparent from its introduction, which explains that the law resolved doubts that had existed as to whether such *donationes* were to be considered as legacies or gifts *inter vivos*. By holding that the *donationes* did not require registration, C.8.56.4 was effectively confirming that their nature was indeed akin to legacies, which did not require registration, rather than to gifts between the living which did when over a certain value;<sup>135</sup> and this much is clear also from its concluding remark, which says that such gifts *ultimae habent liberalitates* and should not be understood differently. Legacies were also revocable at any stage before death; therefore as an unspoken consequence of C.8.56.4, *donationes mortis causa* could similarly be withdrawn, whereas gifts *inter vivos* generally could not, absent ingratitude or failure to fulfil conditions.<sup>136</sup> However, again unlike gifts *inter vivos*, a further implied result of the new law was that these *donationes* were also susceptible as bequests to any reductions made by virtue of the *lex Falcidia*, whereby an heir was entitled to a minimum quarter share of the estate, to the possible detriment of legatees.<sup>137</sup>

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<sup>134</sup> See C. Tort-Martorell Llabrés, *La revocación de la donatio mortis causa en el derecho romano clásico* (Madrid 2003), 163–66, on the evolution of *donationes mortis causa*; and Ruggeri (note 10), 17–18, on the post-classical subject matter of some *decisiones*.

<sup>135</sup> Cf. Buckland (note 14), 254–56, regarding the registration of gifts *inter vivos*. Buckland, *id.*, 258, disputes that legacies and *donationes mortis causa* were on equal footing under Justinian, and sets out many lingering differences.

<sup>136</sup> Regarding revocability of legacies see J.2.21, and of gifts *inter vivos*, Buckland (note 14), 253–57; P. du Plessis, *Borkowski's Textbook on Roman Law*, 4th ed. (Oxford 2010), 203; J.2.7.2.

<sup>137</sup> See Buckland (note 14), 257–58, 342–43, for a fuller discussion of *donationes mortis causa*; and 342–43 regarding the *lex Falcidia*.

That *donationes mortis causa* were now to be treated like legacies is made directly clear in both J.2.7.1 and Theophilus' *Paraphrasis*, each also expressly confirming their revocability and referring by way of example to Piraeus' gift to Telemachus in Homer (*Od.* 17.78–83). Further, Theophilus graphically imagines the horrors that may beset a traveller, such as wild animals and thieves, thus accounting for the institution.<sup>138</sup> He also claims that although the two modes of giving are not entirely similar, the difference lies only in the fact that the gift was made between the living.<sup>139</sup> In reality many dissimilarities appear to have remained (see note 135 above); J.2.7.1 also saw a difference: *per omnia fere legatis connumeretur*, but does not clarify further. But the overriding principle is set out and elaborated upon, more clearly than in the *decisio*.

Further, the idea of allowing such gifts to be withdrawn is apparent throughout D.39.6 (*De mortis causa donationibus et capionibus*) both by implication and express confirmation. Thus Julian in his *Digesta* (books 17, 27, 29, and 47) confirms the revocability of *donationes mortis causa* (D.39.6.13, 15–17), as does Ulpian in *Ad edictum* book 21 (h.t.30); Papinian in his *Responsa* book 2 confirms that they were subject to the *lex Falcidia* (h.t.42 pr.–1); and finally, Ulpian in his *Ad legem Iuliam et Papiam* book 15 (h.t.37) lays down the law irrefutably: *donationes mortis causa* were comparable to legacies, and any rule applying to the latter will also encompass the former.

There is no particular reason to consider that these fragments were interpolated by the Digest Commissioners.<sup>140</sup> Both the *Institutiones* and C.8.56.4 refer to the different pre-existing classical views, so all that was required of the compilers was to choose those fragments that coincided with the current law rather than those by which the donor could not revoke the gift, and so on.

Taking the opposite perspective, the conflicting opinions alluded to in C.8.56.4, which viewed these *donationes* as being *inter vivos*, have undeniably been struck out of the Digest's pages. But there is also a pronounced absence of any mention of (non-)

<sup>138</sup> Theophil. *Para.* 2.7.1 (Lokin (note 127), 260, ll. 1–3): οἷον ἐάν τις δωρήσῃται τινι μέλλων πλείν επικίνδυνον πλοῦν ἢ ὀδεύειν ὀδὸν ἐνοχλουμένην ὑπὸ θηρίων ἢ ληστῶν ἢ πολεμίων.

<sup>139</sup> Theophil. *Para.* 2.7.1 (Lokin (note 127), 262, l. 14): τὸ δὲ σχεδὸν εἶπον, ἐπειδὴ ἀπὸ ζῶντος εἰς ζῶντα γίνεται.

<sup>140</sup> Contra, Buckland (note 14), 257 n.6 (contrary opinions are identified).

registration, which is after all the principal express tenet of C.8.56.4. The rule has to be read into the texts, even if it was the unavoidable consequence of *donationes* being equated with legacies and distanced from gifts *inter vivos*, only the latter after all requiring registration. Indeed, because the *Institutiones* are likewise silent on the subject, perhaps it was readily assumed for exactly this reason. Yet it seems that similarly in classical times there had been no requirement in law to register *donationes mortis causa*,<sup>141</sup> so there may well have been relevant texts that were ripe for selection, in their original form or adjusted to bring them up to date, so as to reflect the new rule — but none was chosen. This is difficult to reconcile with the notion of a Digest imbued with the new rules found in the *decisiones*.

It is interesting how the *decisio* bears responsibility for elevating registration to a position of primacy and for diminishing the centrality of what may well have been the real issue, namely the basic parity with legacies and its knock-on effects; and yet despite being relatively taciturn regarding the former, the Digest is quite verbose regarding the latter. It is notable that many sixth-century papyri evidence what were in effect *donationes mortis causa* masquerading as irreversible *donationes inter vivos*, securities, and prohibited succession agreements, so the reform appears to have collided with popular practice,<sup>142</sup> itself capable of

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<sup>141</sup> Buckland (note 14), 257 & n.11a regarding the probable non-applicability of the *lex Cincia* (the predecessor to registration) to *donationes mortis causa*.

<sup>142</sup> P. Cair. Masp. II.67151; P. Cair. Masp. II.67154; P. Cair. Masp. I.67096; P. Oxy. XX.2283; P. Lond. I.77. For detailed discussion of the possible interrelationship between these papyri and Justinian's legislation, see V. Arangio-Ruiz, "Applicazione del diritto Giustiniano in Egitto," in *Studi epigrafici e papirologici* (Naples 1974), 1–13; J. Beaucamp, "La transmission du patrimoine: législation de Justinien et pratiques observables dans les papyrus," *Subseciva Groningana*, 7 (Groningen 2001), 1–13. The same phenomenon can possibly be observed in another area of law, when C.3.28.36 (a *constitutio extravagans*) specifically confirms that the *pars legitima* took precedence over the Falcidian part: it too may have been reacting to societal trends, namely attempts to unlawfully limit the *pars legitima* as brought to light in various sixth-century papyri (for which see Beaucamp, "La transmission" (this note), 7–11; J. Urbanik, "Dioskoros and the Law (on Succession): *Lex Falcidia* Revisited," in J. L. Fournet, ed., *Les archives de Dioscore d'Aphrodité cent ans après leur découverte. Histoire et culture dans l'Égypte byzantine: études d'archéologie et d'histoire ancienne* (Paris 2008), 119–28; and J. Beaucamp, "Byzantine Egypt and Imperial Law," in R. Bagnall, ed., *Egypt in the Byzantine World* (Cambridge 2007), 273–74.

influencing law-making,<sup>143</sup> no doubt as much to its own detriment as advantage. As a consequence, perhaps Justinian saw the virtue in deliberately fudging this controversial law when it was issued publicly through an Imperial *edictum* or *mandatum*,<sup>144</sup> because its principles were more exposed than individual texts hidden in the huge, rambling Digest, and the more densely argued legal summaries of the *Institutiones*, both of which were, after all, directed at the legal profession rather than the general public. The constitution also had limited accompanying provisions to shelter behind.<sup>145</sup>

Additionally, there may have been a concerted effort to include in the Digest the consequences, unstated in C.8.56.4, of equating *donationes* with legacies simply in order to compensate for the *decisio*'s reticence; or alternatively, if as suggested below the compilers sought to avoid reiterating Justinian's dispute resolutions, the texts may have slipped in through error as they were not obviously repetitious. Or there may simply have been a reluctance to interpolate into the Digest any more obviously post-classical concepts such as the registration of gifts *inter vivos*,<sup>146</sup> even if only to deny its applicability to *donationes mortis causa*.

Whatever their reasoning and method, it appears that the Digest compilers did indeed intend for the Digest to reflect the central but unspoken aspect of this *decisio*, and indeed like the *Institutiones* to spell out its ramifications far more openly; the Digest texts therefore stand in harmony with C.8.56.4, even if in a rather roundabout way. Inconsistent views also appear effectively to have been skimmed off through the selection process. However, there is no obvious repetition, it is only implied; and no attempt is made to reflect the modern message that is the stated purpose of

<sup>143</sup> C. Humfress, *Orthodoxy and the Courts in Late Antiquity* (Oxford 2007), 86–92; P. Van Minnen, “Dioscorus and the Law,” in A. MacDonald, et al., eds., *Learned Antiquity: Scholarship and Society in the Near East, the Greco-Roman World, and the Early Medieval West* (Leuven 2003), 116.

<sup>144</sup> See G. Mousourakis, *A Legal History of Rome* (London 2007), 107–10, regarding the procedures that underlay imperial law-making.

<sup>145</sup> Only C.1.4.27, 6.22.9, 5.70.6–7, and 8.47.10 bear the same promulgation date, if 530 is the correct year. More appear definitely to have been issued on 1 Sept. 531, Krüger, *Codex* (note 28), 509, although there may originally have been less if particular constitutions were split up; see section II, “Identifying the *decisiones*,” above.

<sup>146</sup> Cf. Buckland (note 14), 255–56, who touches on the phasing out of the pre-existing regime in the fourth century, and the state of play under Justinian. C.8.54.25 (323) talks of the registration of gifts, and C.8.54.27 (333) does so in obligatory terms.

the *decisio*.

3. Where one co-owner wished to free a slave, be it through *donatio inter vivos* (effectively by direct manumission) or a will, C.7.7.1 (1 August 530, a “known *decisio*” included under *De servo communi manumisso*) required the other co-owners to sell their portions to the one wishing to grant liberty, or his heir, abolishing the ancient position whereby the share that the would-be manumittor owned was simply accrued by his recalcitrant partners.<sup>147</sup> Two Severan decrees are expressly relied on and followed: the first, found in a work by Marcian, requires a soldier’s heir in this position to buy out the testator’s partners, thereby effectively forcing the latter to sell their shares; and the other expressly requires such a sale in any context, a principle endorsed by Paul, Ulpian, Sextus Caecilius, and Marcellus (the latter in his annotation of a work by Julian). The *decisio* likewise extends this ruling to non-military situations, and to the scenario of simply gifting a co-owned slave his liberty. The enactment proceeds to give procedural details and also an extended valuation of different categories of slave.

J.2.7.4 and Theophilus confirm the basic particulars of Justinian’s enactment regarding manumission by both rod and will, the *Institutiones* unreservedly denigrating the former regime.<sup>148</sup> Theophilus is equally critical, telling us that the emperor was scandalized at the situation.<sup>149</sup> Replication of the *decisio* can also be seen in Basilica *scholia* that derive from sixth-century sources.<sup>150</sup> Although they do not comment on the moral rectitude

<sup>147</sup> Cf. W. W. Buckland, *Roman Law of Slavery* (Cambridge 1908), 575–78; Buckland (note 14), 252–53.

<sup>148</sup> J.2.7.4: *Sed cum pessimo fuerat exemplo et libertate servum defraudari et ex ea humanioribus quidem dominis damnum inferri, severioribus autem lucrum aderescere.*

<sup>149</sup> Theophil. *Para.* 2.7.4 (Lokin (note 127), 268, ll. 14–15): βασκανίας ἀνάμειστον τὸ τοιοῦτον κρίνας ὁ εὐσεβέστατος ἡμῶν βασιλεὺς.

<sup>150</sup> BS 48.14.4.1–8 (Scheltema (note 59), Series B, 2970-1) (Theodorus and Thalelaeus), particularly scholion 2 (id., 2970, ll. 30–33) which tells us that ἡρόθη δὲ καὶ ἄλλη διάταξις, ἥτις ἐκέλευεν ἀναγκάζεσθαι τὸν κοινῶν πιπράσκων τὸ ἴδιον μέρος ἐλευθερίας ἐπιτιθεμένης τῷ δούλῳ, τοῦ τιμῆματος ὀριζομένου παρὰ τοῦ πραέτωρος. Καὶ ταύτης τῆς γνώμης Οὐλπιανὸς καὶ Μάρκελλος ἦσαν. However, the same scholion (id., 2970, ll. 28–30) states in the previous clause that ὁ μὲν Μαρκανὸς ἀνίγαγε διάταξιν τὴν λέγουσαν, ἵνα μὴ ἀναγκάζηται ὁ τοῦ στρατιώτου κληρονόμος ἀγοράζειν τὸ ἕτερον μέρος καὶ τέλειον ἐλευθεροῦν τὸν οἰκέτην (“Marcian brought up the enactment saying that the heir of the soldier should *not* be compelled to buy the other share and completely free the slave”) (my emphasis), which is at odds with the *decisio*’s analysis of Severus’ approach. The use of the

of the reform, or disparage the earlier set-up, they do also elaborate on the *decisio*'s peripheral details. For example, it is confirmed that where a slave is instituted heir, he in effect becomes the co-owner of himself and as such must buy his partners' portions;<sup>151</sup> that the *peculium* is divided amongst the former masters according to their share of *dominium*,<sup>152</sup> although the manumittor may bequeath his share to the slave;<sup>153</sup> and that patrons' rights were divided equally amongst the owners.<sup>154</sup> As regards the latter point, there is no express acknowledgement in BS 48.14.4.8 that to qualify as patron an owner had to take part in the manumission, whereas this seems relatively clear from the *decisio*.<sup>155</sup> However, the scholion's apparent requirement that a

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negative entails that Thalelaeus understood the two Severan constitutions to have contradicted each other, a reading which is potentially corroborated by the presence of μὲν . . . δὲ introducing the two clauses. Therefore, despite μὴ being erroneous, its suggested deletion may also be inappropriate (see id., l. 28 and apparatus). However, as a whole, BS 48.14.4.2 clearly endorses the outcome of C.7.7.1.

<sup>151</sup> BS 48.14.4.6 (Scheltema (note 59), Series B, 2971, confirming C.7.7.1.1b: Καλῶς ἐπέλεξετο κληρονόμον εἰπὼν ἐπαγαγεῖν τοῦ οἰκέτου γραφέντος κληρονόμου μετὰ ἐλευθερίας. Ἐπει ἅπαξ εἰπὼν περὶ κοινωνοῦ ἠρώσκετο ἐκ περιττοῦ λέγων περὶ κληρονόμου· καὶ αὐτὸς γὰρ κοινωνός ἐστιν.

<sup>152</sup> BS 48.14.4.1 (Scheltema (note 59), Series B, 2970, ll. 16–17), confirming C.7.7.1.3, 6a: Τὸ πεκούλιον τοῦ ἐλευθερουμένου ἐπικοινωνοῦ δούλου σώζεται κατὰ ἀναλογίαν τοῖς αὐτοῦ δεσπόταις. Abiding by the wording of the *decisio*, the distribution is made regardless of the owner's participation in the manumission (Blume's translation is misleading in this respect, see note 155); although this is not expressly stated in the scholion, it is the necessary outcome of its wording.

<sup>153</sup> BS 48.14.4.1 (Scheltema (note 59), Series B, 2970, ll. 17–18), confirming C.7.7.1.3: πλὴν ἴσθι, ὅτι δύναται ὁ ἐλευθερῶν τὸν οἰκέτην συγχωρῆσαι αὐτῷ τὸ ἀρμόζον αὐτῷ μέρος ἐκ τοῦ πεκούλιου.

<sup>154</sup> BS 48.14.4.8 (Scheltema (note 59), Series B, 2971, ll. 14–15, 17), confirming C.7.7.1.6a: Σημείωσαι, ὅτι ἡ διάταξις ἠθέλησεν ἐξ ἴσου αὐτοὺς εἶναι πάτρωνας . . . τὸ δὲ *aequaliter* εἶπεν, ἡ διάταξις πρὸς τὸ πάντας γνωρίζεσθαι πάτρωνας. The replication of the *decisio*'s Latin term *aequaliter* neatly exemplifies how closely Thalelaeus worked with the original texts, which is more predictably visible in Theophilus' *Paraphrasis* (see below notes 177 and 181).

<sup>155</sup> According to the *decisio*, even though the patronage rights were divided equally, they went to *qui libertatem donavit* (C.7.7.1.3), or *omnibus qui libertatem imposuerunt* (h.t.1.6a, although Blume (note 130) wrongly translates the latter as pertaining to the *peculium*). There is a necessary differentiation between those who manumitted the slave, having paid their co-partner(s) for their share, and those who were merely compensated for this share; otherwise the specification would make no sense. Distinguishing between the roles of the various parties accords

patron be “recognized” as such may be a reference to the same. For the most part then, these scholia faithfully set out the terms of C.7.7.1, delving into its ramifications and providing pertinent legal commentary.

Before going on to consider whether the Digest plays a similar role, it is necessary to consider further details and observations in the scholia that illuminate the sixth-century reception of the *decisio* in ways not apparent from the enactment itself. In scholion 1, for example, Theodorus draws our attention to “τὴν β'. διατ. τοῦ παρόντος τυτ.,” and C.7.7.2 does indeed delve further into the law (see below, text accompanying note 171). He also apparently reminds us of C.7.23.1, by which there was an implied grant of *peculium* to the slave if manumitted by a living person; and of C.3.38.2, by which owners in common will own the proportion decided by a referee if they had consented to such a division. Even if the references have not remained faithful, there was a clear attempt to clarify the law further. Additionally, in scholion 2 we are seemingly told that soldiers were originally given the privilege of manumitting co-owned slaves in order that the number of Roman citizens be increased;<sup>156</sup> and are informed that the ancient jurists quibbled about this because it clashed with the concept of ownership.<sup>157</sup> Further, Thalelaeus elucidates C.7.7.1.5, explaining that the valuation of 30<sup>158</sup> is to be interpreted as ἕως τριάκοντα (which indeed is consonant with the Latin *usque ad*), in other words “up to 30,” with the result that lesser estimates were still valid.<sup>159</sup> Although strictly speaking this necessarily flows from C.7.7.1, the provision known to us does not say so directly.

Thalelaeus also appears to tell us that C.7.7.1 *used to* state that it was no impediment to an enforced sale of a partner’s share

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entirely with C.7.7.1.1b and Severus’ enactments, although it is obscured by h.t.1.5c, which requires those who received payment for their portion to also grant liberty.

<sup>156</sup> BS 48.14.4.2 (Scheltema (note 59), Series B, 2970, ll. 24–26): Προνόμιον εἶχον οἱ στρατιῶται τὴν οἰανδήποτε ἐλευθερίαν παρ’ αὐτῶν διδομένην πολίτας Ῥωμαίους ποιεῖν, ὥστε παντὸς γίνεσθαι τὴν προσαύξησιν.

<sup>157</sup> Id., ll. 26–27: ἠύρισκετο γὰρ τὸ ὑπὲρ αὐτῶν γινόμενον κατὰ τῆς αὐτῶν δεσποτείας, καὶ ἠμφέβαλον οἱ νομικοὶ περὶ τούτου.

<sup>158</sup> Namely 30 *solidi*, which was the prescribed worth of a slave who had learnt a trade: C.7.7.1.5.

<sup>159</sup> BS 48.14.4.7 (Scheltema (note 59), Series B, 2971): Σημείωσαι, ὅτι οὐκ εἶπε πάντως “τριάκοντα” ἀλλὰ “ἕως τριάκοντα,” ὥστε τὸ μὲν περιπτὸν ἀγέιλε, τὴν δὲ ἥπτονα ἀξίαν οὐκ ἀγέιλεν. Τοῦτο δὲ πανταχοῦ εἶπεν ἐπὶ τοῦ τιμήματος. “Usque ad” is not reflected in Blume’s translation (note 130).

in the slave if he derived no profit therefrom.<sup>160</sup> This may well be a reference to the unedited *decisio*,<sup>161</sup> and although it again seems to be the necessary consequence of the enactment in its final form, because J.2.7.4 tells us that the co-owner would not be left *indemnis*, it seems that selling the slave at a loss would not have been tolerated under the finalized reforms. Permitting a zero-profit sale and preventing loss through a sale are not mutually incompatible concepts, but perhaps the point made by the original *decisio* was dropped at the editorial stage because it hinted at, or could be used to achieve, the opposite result.

It is also intriguing to find in BS 48.14.4.8 a thinly disguised attack on the coherence of Justinian's approach to *patronatus*, Thalelaeus overtly considering it "more logical" that it be distributed in proportion to the share owned (by those partners who granted liberty), as opposed to being divided equally.<sup>162</sup>

Thalelaeus also tells us in this same scholion that patronage was "no longer" allocated in accordance with the share of *dominium* held.<sup>163</sup> This comment seems to suggest that manumitting a co-owned slave in the way endorsed by the *decisio* had already been standard practice for some time, even if patronage had been apportioned differently. Indeed, perhaps the longevity of such practices should not be surprising given Severus' rulings, and in view of the remarks of Ulpian and Paul no less, amongst others. In fact, accrual had not even been contemplated in the third-century fragment D.28.6.18 pr. (see below, also regarding the improbability of this text being interpolated). Justinian's Institutes 2.7.4, in saying that there used to be a time (*erat olim*) when the share was accrued, very strongly hints at this being an antiquated approach which had long since been replaced, corroborating the above reading of Thalelaeus' remark.<sup>164</sup> And indeed Theophilus elucidates further in his commentary: "searching in the more remote past one will find another mode of

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<sup>160</sup> BS 48.14.4.5 (Scheltema (note 59), Series B, 2971): Τὸ δὲ πλεόν ἔλεγεν ἡ διάταξις, ὅτι καὶ μὴ κερδάνας ἀναγκάζεται πωλῆσαι.

<sup>161</sup> See section IV, "Focus of the enquiry," above, with note 124.

<sup>162</sup> BS 48.14.4.8 (Scheltema (note 59), Series B, 2971, ll. 15–16): Μᾶλλον δὲ ἀκολουθότερόν ἐστιν εἰπεῖν, ὅτι τὰ πατρωνικά δίκαια πρὸς τὸ μέρος τῆς δεσποτείας ἔχουσι. See above, text accompanying note 154, for the new rule.

<sup>163</sup> Id., ll. 14–15: [. . . ἡ διάταξις ἠθέλησεν ἐξ ἴσου αὐτοὺς εἶναι πάτρωνας], καὶ οὐκέτι πρὸς τὸ μέρος τῆς δεσποτείας.

<sup>164</sup> For Buckland (note 14), 252, the old rule was already obsolete under Justinian.

accrual.”<sup>165</sup> Although an alternative translation possibly implies the older mode to still have been in existence, this version appears to be partly based on suspect manuscripts.<sup>166</sup> All in all, these considerations make it hard to accept that the *antecessores* could not call upon any of the appropriate views for the purposes of stating the principle clearly in the Digest, even if through interpolation. (As the *decisio* appears to address outdated institutions, further questions are also raised about its purpose, which once more will need to be explored at some point in the future; see also C.7.5.1 below.)

So the *Institutiones*, Theophilus’ *Paraphrasis*, and the commentaries by Theodorus and Thalelaeus all made it their business to analyse the ins and outs of C.7.7.1, allowing us to perceive indirectly the considerations which lay behind its enactment, and pointing out additional relevant laws. These texts may even permit reasonably well-founded inferences as to why the provision was amended subsequent to its initial promulgation; and Thalelaeus even appears to go as far as to criticize it. Furthermore, the fact that the different considerations covered by C.7.7.1 had been weighed up and thought through by its drafters and contemporary lawyers alike adds to the general aura of topicality. Although this does not require us to accept that the *antiqui* had written at length on the subject, it increases the feasibility of their having done so, and indeed one may suppose again that this would be reflected somehow in the Digest.

However, the provision’s reproduction within the Digest is very ambiguous. First and foremost, there is no title equivalent to C.7.7 in the Digest. Furthermore, the titles covering manumission generally (D.40.1), or specifically by rod (D.40.2) or by testament (D.40.4) do not compensate for the failure to create a new title by including the provision or any approximation of it, still less its specific juristic opinions. Gaius also informs us through his Institutes of a law that bore a strong resemblance to the new concept: a single *consors* could free a slave co-owned by a *consortium* of *sui heredes*, or by one created before the Praetor;<sup>167</sup>

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<sup>165</sup> Theophil. *Para.* 2.7.4 (Lokin (note 127), 266, ll. 2–3): ζητῶν δὲ τις παλαιότερα καὶ ἄλλον εὐρήσει τρόπον ἐννόμου κτήσεως.

<sup>166</sup> See Lokin (note 127), 266 n.37, regarding Murison’s translation of this section, based on manuscripts that have παλαιότερος governing τρόπος. Regarding the general reliability of the various manuscripts, see *id.*, xlv–xlvi.

<sup>167</sup> G.3.154a–b. Cf. Buckland (note 14), 252, 404.

but whether in its original form or interpolated, this rule likewise fails to make its way into the Digest, despite appropriate titles being available (D.17.2, *Pro socio*; D.40.3, *De manumissionibus quae servis ad universitatem pertinentibus imponuntur*).

But in a fragment authored by Julian from his *Digesta* book 42, included at D.40.5.47.1 under the Title *De fideicommissariis libertatibus*, it is confirmed that the law will come to the assistance of the freedom of a co-owned slave inherited under the charge that he be manumitted, thereby to some degree commensurate with C.7.7.1. However, the fragment is low on specifics, and the scenario is restricted to *fideicommissa libertatis*, which is too narrow, as C.7.7.1 is expressly not limited to freedom granted through testaments. The title does not appear to remedy these shortcomings, and, not surprisingly given its content, no other fragment here contains the remotest suggestion that slaves freed during a co-owner's lifetime could likewise take advantage of the law's generosity. It is also interesting that D.40.5.47.1 cites Julian's opinion despite C.7.7.1 not expressly attributing to him either view shared by his fellow jurists; his view is simply not elaborated upon in the *decisio*, and indeed because we know from it that Marcellus sets forth his own opinion on freeing co-owned slaves whilst annotating Julian's work, one may possibly infer that Julian's approach was partly at variance with his own, or at best non-committal, or indeed was restricted to inheritance and *fideicommissa*.

Despite the flaws however, it is important to acknowledge that D.40.5.47.1 may represent an instance of deliberate textual inclusion for the sake of reflecting the relevant aspect of the *decisio*, possibly designed to ensure that the Digest contained the principle in question without covering identical ground by using the same opinion of the same jurist. But whilst the proposition appears to ring true, it does not completely withstand scrutiny: why would the Commissioners have purposefully included or interpolated only one half of the *decisio*? It is hard to accept that they deliberately operated in such an arbitrary and piecemeal fashion. And whilst not shrouded in complete obscurity, the excerpt is hardly a whole-hearted endorsement even of the section it reflects. A variation of the suggestion is significantly more feasible: namely that the compilers were happy to retain fragments that they happened upon, which were consistent with subsections of C.7.7.1, particularly if there was no wholesale repetition; but there was no specific aim to locate such texts. On either view, excerpts authored by those jurists mentioned by the *decisio* in connection with the relevant principle were shunned.

Hence we have the views of Julian but not of Marcellus or Ulpian, for example.

Elsewhere we find reasoning that is similarly reminiscent of C.7.7.1 (in particular of 1(b), but BS 48.14.4.6 states the point far more clearly, see above, text accompanying note 151), this time by Ulpian, who held that by *aequitatis ratio* a part-owned slave substituted by will for an *impubes* may be allowed to purchase the remaining share of himself to secure his freedom (D.28.6.18 pr., from *Ad Sabinum* book 16 included under the Title *De vulgari et pupillari substitutio*). Buckland considered that the extract was reflective of Justinian's new rule and as such may have been interpolated;<sup>168</sup> but quite apart from the possibility that the text was genuine (C.7.7.2, in dealing more overtly with the principle (see below), refers to the *magnum certamen* that raged amongst the ancients on this point, so it is probably safe to infer that a healthy pool of supportive or adaptable opinions existed), it only accords in part with C.7.7.1, again reflecting no more than testimonial manumission, and even then it may be restricted to situations of substitution. Predictably again, no other texts in D.28.6 make reparation. Further, if a text was to be altered to reflect the *decisio*, it seems inconceivable that it would be placed in a title that had nothing to do with manumission; and why did the compilers not simply excise the reference to substitute heirs, which does not feature in C.7.7.1? Indeed Ulpian may feasibly have been reasoning that the *ratio aequitatis* specifically compensated the co-owned slave for the double misfortune of the other share not having been bought out<sup>169</sup> by either the *pater familias* or, after his death, by the *impubes* before *his* death, at which point the slave should have come into the inheritance. If read in this way the extract cannot be said to recreate the relevant aspect of C.7.7.1, which is not so confined, although it is not inconsistent.

As we have seen, D.28.6.18 pr. appears to find a more obvious counterpart in C.7.7.2<sup>170</sup> (17 November 530, a probable *decisio* given its vocabulary and issue date), which is described by the

<sup>168</sup> Buckland (note 147), 577–78.

<sup>169</sup> I.e., “redemptus”; the Watson translation of “bought / brought up” does not clearly reflect this.

<sup>170</sup> It may be the Justinianic provision Buckland had in mind; see note 168 above. Although the *Institutiones* do not address C.7.7.2, the apparent concordance of D.28.6.18 pr. with its premise may suggest that it was in its final form when the Digest was prepared.

sixth-century Theodorus as “reading similarly” to C.7.7.1.<sup>171</sup> It held that in the interests of humanity, where one co-owner bequeathed the part owned by him to the slave himself, the other owner would be required to sell his own portion to the slave; both envisage the third party being forced to sell up to the slave. However, the same caveat as considered above regarding substitution applies, as the particular facts of each are appreciably different. Even here therefore it is difficult to maintain that the *antecessores* sought purposefully to reproduce the contents of the *decisio*. But there are significant similarities, and once more the extract is not inconsistent.

It is also notable that the discrepant juristic texts referred to in C.7.7.1 have effectively been eliminated from the titles considered above, and we know of others that did not make it into the Digest pages.<sup>172</sup> These opinions either set out the law on accrual to the other co-owner(s), the ancient law now in effect repealed in this context by C.7.7.1,<sup>173</sup> or maintain that if the manumission was *inter amicos* it was merely a nullity. So comprehensive is their eradication that it is difficult to infer anything other than intentional exclusion.

Vice versa, given that the juristic views cited in the *decisio* were indisputably known to the Commissioners, it is particularly bemusing that the compilers did not select their clear and concise apposite texts for inclusion in the Digest so as to reflect the law in its entirety, as opposed to arbitrarily reflecting some aspects only. And even if these fragments could not be located in their original form (particularly, for example, if there was a frenzy to substitute the Digest entries following a last-minute adjustment of any particular provision), the principle could easily have been fully interpolated, but it is not. So although the textual omissions accord with the view of Scheltema and Lokin that the *decisiones* facilitated the side-lining of now abandoned practices, the Digest should have positively and indisputably stated the precepts contained in their replacement, had it indeed been the ambition of

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<sup>171</sup> BS 48.14.4.1 (Scheltema (note 59), Series B, 2970): ἀνάγνωθι τὴν β' διατ. τοῦ παρόντος ττ. ὁμοίως λέγουσαν. Indeed, it reflects C.7.7.1.1b; see also BS 48.14.4.6, 2971, at note 151 above.

<sup>172</sup> Pauli Sententia 4.12.1; Tituli ex corpore Ulpiani 1.18; Proculus in Fragmentum Dositheanum 10, in *FIRA*, 2, p. 620. Tituli ex corpore Ulpiani 22.10 seems to suggest that the slave became half-free, although this was prohibited, Buckland (note 147), 575, but the text is at any rate dissonant with Justinian's reform.

<sup>173</sup> Buckland (note 14), 252; Buckland (note 147), 578.

the *antecessores* to convey the Justinianic reforms through the Digest, as held by the current academic consensus; but this does not happen. The precise and detailed discussions seen in the scholia are in no sense replicated therein, and nor even are the summaries of the *Institutiones*. That the scholia do not cross-reference with any Digest entries may also suggest no link was made.

The absence from the Digest of the practicalities set out in C.7.7.1.3–6a, such as fixing the different slave prices, also accords with the above observations, and is to be contrasted with the information given by Thalelaeus.

It should further be noted that the whole concept of facilitating the manumission of a co-owned slave formed part of an actual Basilica title<sup>174</sup> despite its dearth in the Digest, the ramifications of which shall be discussed below.

4. By C.8.41.8 (22 July 530, a “probable *decisio*”<sup>175</sup> found under the title *De novationibus et delegationibus*), any changes to a promise relating to a pre-existing agreement for debt repayment would only operate so as to replace the prior arrangement (by *novatio*<sup>176</sup>), rather than existing in addition to it, if the parties had specifically released the original promise and agreed that it be replaced in this way by the subsequent one. If there was no such concurrence, the two promises for the same debt (with for example

<sup>174</sup> BT 48.14 (Scheltema (note 59), Series A, 2240): Περὶ . . . ἐλευθερίας κοινῶν δούλων.

<sup>175</sup> Issued the day after C.4.28.7, the first “known *decisio*” (see above, with notes 28–30), so the constitution falls within the correct *decisio* timeframe, but once more, although the vocabulary used and substantive content are typical of the *decisiones*, there is no *decidere* form in this constitution. It should be noted that Luchetti (note 17), 160–68, suggests that C.8.41.8 along with, inter alia, C.5.4.24 (both probable *decisiones*), originally formed part of one large constitution directed *ad senatum* through which the *decisio* project was announced; given the addressee, the suggestion appears not only plausible, but likely. Because any explanatory comments surrounding the intricacies of this hypothetical mega-constitution did not reach the Code through its dissected elements, it cannot be ascertained whether the proposition is inherently compatible or otherwise with the possibility that actual *decisiones* formed part of it. The idea does clash with Varvaro’s valid observation that nowhere does *constitutio Cordi* authorize the dismemberment of *decisiones*, but this is probably not the end of the story (see section II, “Identifying the decisions,” above).

<sup>176</sup> Buckland (note 14), 568–71; Blume (note 130), annotation to C.8.41.8. Their commentaries should be viewed in light of present observations. Cf. Luchetti (note 17), 162.

a change of promisor or differing repayment conditions) would be contemporaneously valid. Institutes J.3.29.3a confirms, as does Theophilus, that where there is no intention to novate, the second promise was added to the first. These works both imply that *novatio* had always in fact required an *animus novandi*, the disagreement being simply as to how such intent was shown;<sup>177</sup> and that the aim of *nostra constitutio* was to put an end to these doubts by holding that an express, specific declaration was necessary to this effect, in the absence of which the two obligations would simply co-exist. And as seen above, the *decisio* states precisely how to prove such intent, almost as an afterthought, its relevance being easy to miss although it is in fact fundamental.

Under the Digest title that shares its rubric with C.8.41, several excerpts from Ulpian's *Ad Sabinum* book 46 reflect the position of the *decisio* by confirming that two (varying) promises for the same debt could co-exist if there was no intention to novate (e.g., D.46.2.2, h.t.8.5), and all agreeing that, if it was so wished, the subsequent commitment would replace the earlier one (h.t.2, h.t.6, h.t.8.2, and h.t.8.5).

Indeed, dismantling the thinking behind many of the other juristic fragments in D.46.2, it is clear that they also proceeded on the basis of the tacit assumption that *animus* was a requirement for *novatio* to occur:<sup>178</sup> in addition to the Ulpianic extracts above we find Pomponius at D.46.2.24 (*Ex Plautio* book 5), Celsus at h.t.26 (*Digesta* book 3), Papinian at h.t.28 (*Definitiones* book 28), and Venuleius at h.t.31 pr. (*Stipulationes* book 3), all tacitly agreeing. However, precisely because the concept is not only secondary in the extracts identified, but also only alluded to indirectly, it seems very unlikely that their inclusion was the result of any conscious attempt at replication. In any event these texts stop short of proposing how *animus* should be evidenced; so no texts are included which replicate the main thrust of the

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<sup>177</sup> J.3.29.3a: *Sed cum hoc quidem inter veteres constabat, tunc fieri novationem cum novandi animo in secundam obligationem itum fuerat: per hoc autem dubium erat, quando novandi animo videretur hoc fieri.* Theophil. *Para.* 3.29.3a (Lokin (note 127), 726, ll. 1–4): Ἀλλ' ἐπειδὴ παρὰ τοῖς παλαιοῖς ὁμολογῆται τότε γίνεσθαι ΝΟΥΑΤΙΟΝΑ ἢ ΝΙΚΑ ΝΟΥΑΝΔΙ ΑΝΙΜΟ εἰς τὴν δευτέραν παρεγένοντο ἐπερώτησιν, τοῦτο δὲ ἦν ἐν ἀμφιβολίᾳ πότε ΝΟΥΑΝΔΙ ΑΝΙΜΟ ἐπὶ ταύτην ὀρθῶσιν οἱ συναλλάττοντες.

<sup>178</sup> Perhaps uncharacteristically, Ulpian appears to contradict himself in the very first title entry, dismissing consent as irrelevant to whether *novatio* occurs. It could perhaps be surmised that his phrasing was inadvertent and entered the Digest in error; after all, it is rather buried.

*decisio*. On the other hand, the contrast between this title and Gaius' Institutes at 3.176–179 is quite stark: the latter makes no reference whatsoever to intent, but the Digest fragments could even be described as redolent of the concept, despite it being subdued. Perhaps Gaius had simply assumed that *animus* was necessary, as the Digest fragments had. His text is not expressly inconsistent, but neither is it helpful; and perhaps for this reason it is kept well clear of the Digest.

It has been suspected that the compilers indulged in textual tampering as regards the extracts that explicitly allowed two promises for the same debt.<sup>179</sup> However, according to C.8.41.8, Justinian's chosen approach could have represented legitimately selected classical-era opinions. And neither J.3.29.3a nor Theophilus beat about the bush: the only contentious point amongst the ancients that we are told about was how intent was proven, not whether two different promises for the same thing were capable of co-existing. The most viable explanation for this is that it had generally been a foregone conclusion that there could be contemporaneous promises for the same thing, *in lieu* of *novatio*, if there was some change to the undertaking but *animus novandi* was not present or proven; and that it was precisely texts confirming this that were admitted to the Digest's pages, rather than interpolations. This reading is consistent with *animus* being an unstated assumption in many of the Digest texts, and with the wording of the *decisio*, which accordingly merely endorsed the state of play, at least as regards the co-existence of the two obligations.

The alternative is that *novatio* took place by operation of law as a result of the new promise, with the result that the two promises could not co-exist. Indeed, in light of G.3.176–179 it is tempting to believe that in the classical era any change would have brought about *novatio* regardless of intention, ensuring there was only ever one promise at any given moment. However, given the absolute dearth of any reference to such a law in C.8.41.8, the *Institutiones*, and *Paraphrasis*, it seems unlikely that such a stance had ever acquired a legal foothold; and if it had, the approach was quickly shelved. In neglecting to set out systematically any of the variables surrounding intent, Gaius' discussion may indeed have impliedly reflected such a dissenting view, but if so it was short-lived and doomed to irrelevance. In

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<sup>179</sup> Buckland (note 14), 569; Blume (note 130), annotation to C.8.41.8.

this sense, it was inconsistent with the *decisio*, a more cogent reason for being overlooked by the compilers.

It therefore also seems more likely that the *volumina nocentia* referred to in C.8.41.8 proposed tests for establishing intent that were deemed unacceptable by the *decisio*. However, perhaps more importantly for our purposes, and as observed above, if Ulpian or any other jurist had ever deigned to elucidate as to how intention was to be demonstrated, their view finding approval in the *decisio*, it is not visible in the title as a whole. The failure to opt for any position in this regard entails that the Digest once more manifestly did not do the job of the *decisio* in illuminating the final resolution to the controversy, such that it is hard not to perceive a deliberate pattern. The omission may alternatively suggest that no classical-era jurist had contemplated the desired solution (although both J.3.29.3a and Theophilus tell us that many different presumptions had been applied), and raises the distinctly likely prospect that despite having the volition and opportunity to change or add to the texts as they saw fit, the compilers opted not to interpolate Justinian's decision on how to prove intent. So the impulse to interfere textually at the compilation stage was not as strong as some would have it. That the compilers did not do so also stands in clear contrast to the changes they made in the *Institutiones* to Gaius' Institutes.

On the other hand, the absence of contradictory texts, which we know to have existed in the *volumina*, points to there having been a sustained effort to ensure there were no incongruities between the Digest title and C.8.41.8, to identify areas where the ancient law grated with the *decisio* and ensure they were given short shrift. But come what may, it cannot be argued that there was an attempt to include a full statement on Justinian's reform in D.46.2, notwithstanding the partial congruity.

C. Where the Digest appears to contain no reference to the principle in the *decisio*, but exhibits no inconsistent opinions either

5. The status of *dediticii*,<sup>180</sup> which *ex multis temporibus in desuetudinem abiit*,<sup>181</sup> was finally abolished through C.7.5.1 (530),

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<sup>180</sup> Freed slaves who by reason of some personal misdemeanor were denied citizenship: G.1.13–15; Buckland (note 14), 97–98.

<sup>181</sup> J.1.5.3; cf. Theophil. *Para.* (Lokin (note 127), 36, ll. 20–21): ἀλλ' οἱ μὲν DEDITICΙΟΙ ἐκ πλείστον ἤδη τῶν χρόνων εἰς ἀσυνήθειαν ἐχώρησαν. Lokin's translation seems to contemplate that the status was still used,

a “known *decisio*” confirmed through J.1.5.3. In true spirit of eradication of divergent views made invalid by Justinian’s reforms, and consonant with *c. Deo auctore* 10, no juristic passages that refer to the institution are found in the Digest.<sup>182</sup> Accordingly, Gaius’ detailed description of their status and lack of rights (G.1.13–15) is excluded in its entirety. The consistency, or lack of inconsistency with C.7.5.1 categorically cannot coincide with the view that the Digest replaced the *decisiones* hook, line and sinker. By way of contrast, and building on the reference in the *Institutiones*, Theophilus offers us reams of information regarding the status of the *dediticii* and how it was acquired; on related (but also obsolete) states of servitude; and on the abolition of each by Justinian. Perhaps the treatment of vanished practices should be taken out of the equation for the purposes of this study as they are appreciably different from those that were merely reformed or even replaced. However, as noted above it has been contended that legitimizing the omission of outdated institutions from the Digest’s pages was also a function of the *decisiones*,<sup>183</sup> and this indeed is substantiated here.

D. Where the Digest appears to contradict Justinian’s *decisiones*.

6. By C.6.2.20, (1 August 530, a “known *decisio*” contained under *De furtis et de servo corrupto*) a person who attempted to corrupt a slave by enticing him to steal from his master, but was then tricked by the slave with the connivance of the master himself into receiving the targeted property, was liable both for theft and for corrupting a slave. This was so even though the slave was not actually corrupted and no theft committed, the reasoning being that the plan of the miscreant was to destroy the slave’s integrity, his intentions were evil, and the punishment would prevent his corruption of other slaves.

The outlawing of slave corruption features in J.4.6.23, whereby a person is criminalized through his *hortatus consilione* that caused another person’s slave to escape, behave in contempt of his master, turn to luxurious living, or become worse in any way whatsoever.<sup>184</sup> However, the wording implies that the slave

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albeit rarely, but εἰς ἀσυνήθειαν ἐχρώησαν may equally suggest that it had fallen into obscurity.

<sup>182</sup> Scheltema (note 17), 9; Corcoran (note 5), 79 & n.15.

<sup>183</sup> See note 85, above.

<sup>184</sup> J.4.6.23: [*actio*] *servi corrupti . . . quae competit in eum, cuius hortatu consilione servus alienus fugerit aut contumax adversus dominum*

must have actually been corrupted and it could be argued that to this extent the passage is unsatisfactory, in that it fails to acknowledge the irrelevance of the outcome, at the very least in the context of theft from the master. Theophilus' discussion is similarly defective. It must however be acknowledged that the *decisio* is ostensibly limited to a very specific and quite convoluted scenario, its ramifications potentially lacking any breadth beyond the particular facts, and so its relevance should be limited accordingly. On the other hand, in effect it constitutes a clear-cut exception to the general rule that mere attempts at slave corruption did not attract censure; it is also possible that the exception had an implicit potential to be applied more extensively, and all thwarted attempts at corrupting a slave could now be penalized. So the presence of J.4.6.23 with no caveat in the vicinity had the potential to mislead lawyers and lay persons alike.

However, the full factual matrix of C.6.2.20 receives stellar treatment in J.4.1.8, which confirms that the mere attempt to persuade the slave to steal amounted to an offense of theft but also of slave corruption, in order that the corrupter's connivances be punished and to deter any such attempts where the slave may be more easily influenced.<sup>185</sup> In the cases of both theft and slave corruption the offenses in effect were inchoate, the concept of "attempted" crimes being necessarily implied in accordance with the *decisio*. The question of how the instigator accrued liability, despite no offense seeming to be committed, is also discussed at length in the *Paraphrasis*, so the divergent implications of the two passages in the Institutes are apparent here also.

As regards the approach of the Digest, it should firstly be pointed out that the word *persuadere* usually appears to imply successful persuasion, whereas *suadere* ("to urge, exhort") as used in the *decisio* generally does not, carrying with it instead the

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*factus est aut luxuriose vivere coeperit aut denique quolibet modo deterior factus sit.*

<sup>185</sup> J.4.1.8:

per nostram decisionem sanximus, non solum furti actionem, sed etiam servi corrupti contra eum dari: licet enim is servus deterior a sollicitatore minime factus est, et ideo non concurrant regulae quae servi corrupti actionem introducerent, tamen consilium corruptoris ad perniciem probitatis servi introductum est, ut sit ei poenalis actio imposita, tamquam re ipsa fuisset servus corruptus, ne ex huiusmodi impunitate et in alium servum, qui possit corrumpi, tale facinus a quibusdam pertentetur.

sense of a mere attempt to win someone over, the conclusion to which is not implied.<sup>186</sup> However, Ulpian in his *Ad edictum* book 23 unhelpfully uses the language of attempted incitement and successful persuasion interchangeably, or at the very least does not specify the required slant. For example in D.11.3.1.5, under the title “De servo corrupto,” *persuadere*, *suadere* and *sollicitare* all feature with apparently the same meaning; although (as we shall see) the wording must suppose that the incitement had been successful, the nuances have been blurred as a consequence of the ill-defined usage.<sup>187</sup> Ulpian himself recognizes that there is a need for an accurate definition (h.t.3), but his requirement of *dolo malo* does not resolve the problem in question.

This lack of linguistic precision may possibly explain the deficient nature of J.4.6.23, and the muddied waters created by its co-existence with J.4.1.8. It may also account for why we find Ulpian at D.11.3.1.3 (under the title “De servo corrupto”) being allowed to inform us that no offense is committed by the persuader unless the slave has actually been made worse,<sup>188</sup> and then in the next breath seemingly asserting that incitement is enough.<sup>189</sup> However, he inadvertently sheds light on his own imprecise vocabulary usage at h.t.1.4. At first sight he appears to assert here that a man is liable if he has simply shown a bad slave how he could commit an offense, apparently implying that the result of his attempt to corrupt the slave (again) is irrelevant. But this is probably an inaccurate reading, because Ulpian is simply confirming that already corrupted slaves should not be distinguished from hitherto honest slaves, the question of the instigator’s liability in the event of non-corruption being left hanging in the air; after all it had already been resolved in the first half of the preceding entry. So in the second half of h.t.1.3, the basic premise, which required the persuasion to have succeed-

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<sup>186</sup> See *OLD*, s.vv. “persuadere,” “suadere.” Indeed, Blume (note 130) translates *suaserit* here as “tried to persuade,” and *suasio* as “attempted persuasion.” On the limited occasions that *suadere* may bring with it a connotation of success, it is often in the (passive) past participle, and is not used as such in D.11.3.

<sup>187</sup> D.11.3.1.5 (Ulpian 23 ed.): *Is quoque deteriorem facit, qui servo persuadet, ut iniuriam faceret . . . vel alienum servum ut sollicitaret vel ut peculium intricaret . . . : vel si actori suasit verbis sive pretio ut . . .*

<sup>188</sup> D.11.3.1.3 (Ulpian 23 ed.): *neque enim delinquit, nisi qui tale aliquid servo persuadet, ex quo eum faciat deteriorem.*

<sup>189</sup> Id.: *Qui igitur servum sollicitat ad aliquid vel faciendum vel cogitandum improbe, hic videtur hoc edicto notari.*

ed, is not iterated but should be understood.

This view is borne out by D.11.3.5.1,<sup>190</sup> where Ulpian confirms liability for persuading a slave in the belief that he is a freeman, as the only thing that matters is whether the slave was “made worse,” *eum faciat deteriorem*. This underlying premise is also evident from his texts from the same work at h.t.1.3; h.t.3 pr.–1; h.t.9 pr.–1; h.t.11.2 (twice); and from Paul’s *Ad edictum* book 19, at h.t.14.6–7, 9; and no texts draw the *decisio*’s distinction regarding liability. It therefore cannot be doubted that the Digest’s starting point contravenes the fundamentals of C.6.2.20. Or perhaps more to the point, and as with J.4.6.23, the irregularity contained in the intricate factual basis of the *decisio* is not carried over into the Digest. Granted, Ulpian was reporting the Praetor’s words, but had the Commissioners wished to ensure that the alternative supplied by the *decisio* received due attention they could have achieved this through the briefest of interpolations.

It is highly inadvisable to read too much into the omission of a proviso from any individual Digest or CJ<sup>2</sup> text, as it may be contained elsewhere in the same title, or indeed work as a whole; after all, C.6.2.4 (222) (for example) needs to be read alongside the new law for the impact of the exception to become apparent. But D.11.3, and likewise seemingly the entire Digest, contain no hint of the new rule whatsoever, and implicitly even confirm an approach diametrically opposed to it. Put simply, the Digest texts do not say that the mere attempt should ever be punished and indeed strongly suggest that it should not be.

However, G.3.198, the Latin text which must have formed the basis of J.4.1.8 (other than its conclusion), is non-committal on guilt regarding the instant facts but cites opinions that the would-be corrupter did not incur liability in either sense; that the text or the opinions mentioned by it were not selected by the *antecessores*, despite it being inconceivable that they were not aware of them, given the replication of the basic conundrum, strongly suggests intentional exclusion due to incompatibility with the *decisio*. But conversely, neither was the fragment adapted to reflect the new rule.

The title *De extraordinariis criminibus* also mentions in passing the general action for corrupting a slave when dealing with the more precise offense of (successfully) inciting a slave to flee to the emperor’s statue in order to bring his master into dis-

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<sup>190</sup> Still from *Ad edictum* book 23.

repute (D.47.11.5).<sup>191</sup> The focus here is on a specific type of slave corruption, tangibly different to that addressed by the *decisio*, and it is perhaps unsurprising that the text, echoing D.11.3, is unconcerned with allowing for the eventuality of the slave not actually being led astray, or for the possibility that in some circumstances the perpetrator remained liable regardless, contrary to the existing regime.

However, curiously there are several factors that may suggest that Dorotheus had linked the *decisio* mentally with this Digest entry in his translation of it.<sup>192</sup> As we have seen, the *antecessor* did not confine himself to translation alone but sought additionally to expand and clarify, so although his rendition is not altogether faithful, the differences may tell a story: he added the words ὁ πείσας αὐτὸν [i.e., τὸν δοῦλον] τοῦτο ποιῆσαι [i.e., to perform the unlawful act], and this choice of phrase almost directly coincides with the words of the *decisio*, “quis servo suaserit aliquam rem . . . subripere” (albeit with the obvious exception of latching the persuasion onto an elaborately planned theft from the slave’s master); he uses the active verb πείθω rather than the middle/passive πείθομαι, as such not clearly specifying a positive outcome for the incitement, not unlike the *decisio*;<sup>193</sup> and he omitted the words “quae ex edicto perpetuo competit” — could it be that the hiatus was in recognition of C.6.2.20 now being the arbiter of the basic criminality of slave-corruption, as opposed to the Praetor’s edict? These points create a distinct possibility that C.6.2.20 at least influenced Dorotheus’ translation at BS 60.22.5.2, which serves to highlight further the disjuncture between D.11.3 and the *decisio*, given the *antecessor*’s likely role in both. The silence regarding the consequences of non-corruption becomes more deafening, and the failure to mention the potential exception to the rule more unsatisfactory.

This lack of completeness also raises the specter of an outright failure to think through the ramifications of the *decisio* and to consider how it may have impacted on the ancient juristic texts being perused, as possibly seen in J.4.6.23 as well. So al-

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<sup>191</sup> Ulpian, *De officio proconsulis*, book 5.

<sup>192</sup> Scholion 2 to BS 60.22.5 (Scheltema (note 59), Series B, 3584, l. 25); see Brandsma (note 122) 178–79; at id., 149–52, he explains the attribution. See also section IV, “Focus of the enquiry,” with notes 125–26, above.

<sup>193</sup> *LSJ*, s.v. “πείθω”; again, the past participial form (not used here) may more clearly suggest a successful outcome, as in the Latin.

though the omission of the impact of C.6.2.20 from the Digest's pages may have been down to the apparently conscious approach already observed, namely one that sought to avoid duplicating the terms of the *decisiones*, they may also have been down to simple legal fallibility, and even then only of certain individual compilers: after all, the drafter of J.4.1.8 was up to speed, G.3.198 was correctly excluded from the compilation, and Dorotheus was seemingly aware of the exception, but notwithstanding, D.11.3 gives an inaccurate picture of the law as it stood under the *decisio*.

7. C.8.47.10 (1 September 530/1;<sup>194</sup> a possible *decisio*<sup>195</sup> contained in *De adoptionibus*). There has been significant debate over the status of this provision and the arguments require mention here.

Firstly, the gloss to J.3.1.14 in the so-called Turin Institutes provides controversial attestation, apparently referring to the enactment's provenance from the *liber L constitutionum*: for this reference to constitute evidence that C.8.47.10 was a *decisio* it would be necessary to accept additionally not only that a collection of *decisiones* had been published, but also that the gloss referred to it.<sup>196</sup> In any event, the evidence is tenuous and can be read in different ways, particularly if the original glossator's sources were Greek (as seems likely), for which reason it is not relied on here as proof that C.8.47.10 was a *decisio*.

Ruggeri also points out that a word was probably lost from the Code manuscript and suggests that this may have been

<sup>194</sup> The manuscript attestation as to the year of issue is contradictory; see above, text accompanying note 54.

<sup>195</sup> Again, there is no *decidere* form despite the appropriate use of *decisio*-style terminology, and the date is too uncertain to enable a more definitive designation, see section II.C, "Possible *decisiones*," above. However, Ruggeri (note 31), 449, insists on the possibility that if the date was 531 the constitution could still be a known *decisio*, i.e., using the formal criteria alone (the Turin gloss providing the requisite corroboration; see as follows); but the pronounced absence of any self-referential use of the *decidere* form after 30.4.531 detracts considerably from the plausibility of this contention (see section II.C, "Possible *decisiones*," above, with notes 42–44). Cf. Luchetti (note 17), 174 & n.55.

<sup>196</sup> For the debate, see Lambertini (note 69), 135–44; Ruggeri (note 10), 52–62; Ruggeri (note 31), 447–51; contra, Scheltema (note 17), 6–7 n.12; Lokin (note 18), 168; Luchetti (note 17), 172–74; Varvaro (note 11), 476–80, 484–85; Falchi (note 10), 148 & n.63. Radding and Ciaralli (note 57), 112–18, also discuss the probable medieval origin of many glosses to the Turin Institutes that had hitherto been considered to have an ancient source, although the re-categorization does not necessarily include C.8.47.10.

*decidentes*.<sup>197</sup> The idea appears eminently plausible, but is not susceptible of proof; for which reason it is again rejected by Varvaro<sup>198</sup> and is not viewed here as at all conclusive.

Objecting on a different front, Luchetti points out that C.8.47.10 is described by the *Institutiones* as a “constitutio” on five separate occasions (J.1.11.2, 1.12.8, 2.13.5, 2.18.2, 3.1.14), rather than as a *decisio*.<sup>199</sup> However, this is not of itself fatal to the contrary argument, as known *decisiones* are given similar treatment, if not as often: see section II.C, “Possible *decisiones*,” above. Furthermore, Theophilus very frequently errs in his *Paraphrasis* by denominating *decisiones* as *constitutiones* even when named as *decisiones* in the *Institutiones*, CJ<sup>2</sup>, or both: see, e.g., his 1.10 pr. regarding C.5.4.25; 2.5.5 regarding C.3.33.13; 4.1.8 regarding C.6.2.20; 4.1.16 regarding C.6.2.22. As Theophilus was also one of the two principal drafters of the *Institutiones*, under the perhaps not so watchful eye of Tribonian (who after all also had the Digest project to contend with, as well as the aftermath of the Nika riots), he may have been the single culprit behind the initial error regarding C.8.47.10 and simply perpetuated it thereafter, particularly given that the work was probably divided by subject matter rather than book.<sup>200</sup> There is therefore no overriding reason to go the other way and reject out of hand even the simple possibility that C.8.47.10 was a *decisio*; but because of the anomalous indications on the date it can be no more than this.

Proceeding then to substantive issues, the *decisio* reformed the law on the rights of adoptees and their fathers, actual and adoptive. The bulk of the law is framed in terms of the adoptee’s inheritance rights, and holds that a person in the power of his father but given in non-ascendant adoption retained full succession rights to his natural father (pr., 1) and, if unemancipated, may succeed his adoptive father only on intestacy (1e, g). The constitution also directly confirms that the natural father had ownership rights over property acquired by such a son, who likewise received from the real father *naturalia debita* (1, 1d). In so doing it acknowledges the reciprocal nature of the rights, the inevitable consequence being that the non-ascendant adoptive

<sup>197</sup> Ruggeri (note 10), 61–62; Ruggeri (note 31), 448. See also Lambertini (note 69), 144–45 n.60.

<sup>198</sup> Varvaro (note 11), 479–80.

<sup>199</sup> Luchetti (note 17), 175–76.

<sup>200</sup> Brandsma (note 122), 23–24.

father acquired no parental power over the adoptive son,<sup>201</sup> even though there is no precise statement to this effect in the *decisio* itself.

That the natural father retained authority is expressly confirmed by J.1.11.2 and Theophilus, despite J.1.11 pr. retaining the words of G.1.97–107 and therefore saying the opposite,<sup>202</sup> J.1.11.2 clearly constituted an exception to the original rule, which now only applied to *adrogatio*, and its insertion shows that the drafters of the *Institutiones* were fully conscious of the reform. In every other respect we witness in this work and its Greek commentary a very faithful replication of the *decisio*. J.3.1.14 also reiterates both scenarios, as does the relevant passage in Theophilus, only in greater detail: he confirms particular *actiones* that were no longer available against the adoptive father's estate.<sup>203</sup> All three sources agree that the *senatus consultum Afinianum*, by which an adoptee who had two actual brothers was guaranteed a quarter part of his adoptive father's property, was no longer operable.

However, the Digest compilers inserted several provisions into D.1.7 (*De adoptionibus et emancipationibus*), including by Papinian, whose opinion is specifically rejected in C.8.47.10, and by Paul, despite his apparently equivocal stance as touched on in the *decisio*, all of which are formulated upon the at times heavily implied premise that adoptive fathers enjoyed *patria potestas* in the case of extra-familial adoptions, and the natural father did not: in confirming that an adopter's power over the adoptee is discontinued upon the ending of the adoption, D.1.7.13 implicitly asserts that he had hitherto enjoyed such power; h.t.7 and h.t.23 both confirm the agnatic ties resulting from the adoption; h.t.45 talks of the adoptive son's legal burdens being acquired by the adopter.<sup>204</sup> The only possible contender for replicating the *decisio*

<sup>201</sup> Buckland (note 14), 123. However, *adrogatio* (the adoption of sons *sui iuris*) conferred *potestas* on the adrogator: D.1.7.2.1 (Gaius 1 inst.) (= G.1.107); C.8.47.10.5.

<sup>202</sup> J.1.11 pr.: *Non solum tamen naturales liberi, secundum ea quae diximus, in potestate nostra sunt, verum etiam ii quos adoptamus.*

<sup>203</sup> I.e., *bonorum possessio contra tabulas* and *querela de inofficioso*: Theophil. *Para.* (Lokin (note 127), 500, ll. 22–23).

<sup>204</sup> D.1.7.13 (Pap. 26 quaest.): *patria dignitas quaesita per adoptionem finita ea deponitur*; h.t.7 (Celsus 39 dig.): *Cum adoptio fit, non est necessaria in eam rem auctoritas eorum, inter quos iura agnationis consequuntur*; h.t.23 (Paul 23 ed.): *adoptio enim non ius sanguinis, sed ius agnationis adfert*; h.t.45 (Paul 3 *lex Iul. et Pap.*): *Onera eius, qui in adoptionem datus est, ad patrem adoptivum transferuntur.*

appears to be h.t.40 pr.,<sup>205</sup> which confirms that the already-born children of a son later given in adoption remain in the power of the natural grandfather (the use of *retinentur* confirming their pre-existence); but Gaius confirms on a similar theme that children conceived before a son is emancipated but born afterwards also remain in the *potestas* of the grandfather,<sup>206</sup> impliedly treating them in accordance with those born before the emancipation, so the text is as much in line with the ancient law<sup>207</sup> as it is with the *decisio*, even if counter-intuitively so.

So this aspect of Justinian's C.8.47.10, namely that the adoptee's succession rights were still from his natural father, is simply not expressed in D.1.7. And as we have seen, several texts are notably discordant with it, even if this is not immediately obvious, simply because the adoptive father's acquisition of *potestas* is the necessary corollary of the extracts considered above, with the exception of D.1.7.40. These problems are again to be compared with the deliberate alterations to Gaius' Institutes when Justinian's *Institutiones* were prepared. But it remains the case that the contradictions are implied, not explicit.

Other features of the *decisio* do however find equivalents in the Digest. Firstly, C.8.47.10.1a addresses adoptions by ascendants, confirming that the adoptive maternal grandfather, or paternal grandfather had the father been emancipated, acquires full *potestas* over the adoptive son; J.3.1.14 informs us that the status quo was maintained in this regard, which is discussed in greater detail at J.1.11.2 and by Theophilus again. By D.1.7.11 (Paul, *Ad Sabinum* book 4) and h.t.41 (Modestinus, *Regulae* book 2), the offspring of an emancipated son adopted by the father (the child's grandfather) cannot disturb his natural father's succession after his grandfather's death (however, although the *decisio* attributes the standpoint to Papinian, perplexingly Paul and Modestinus authored the Digest texts); and although h.t.10 (Paul, *Ad Sabinum* book 2) talks of an adopted grandson not becoming the grandfather's *suus heres*, but reverting to the father's *potestas* upon the grandfather's death, this is only where the adoption took place on the fiction of the grandson having been born to a son-in-power. So the rights and obligations contingent on the transfer of *patria potestas* through ascendant adoption are in full force here, consistent with C.8.47.10.1a.

<sup>205</sup> Modestinus, *Differentiae*, Book 1.

<sup>206</sup> G.1.135; cf. Buckland (note 14), 122.

<sup>207</sup> As still in force under Justinian: J.1.12.9.

Secondly, C.8.47.10.1f confirms that the ancient law, by which maternal cognatic ties were not severed by an adoption, remained good; the provision finds a parallel of sorts in D.1.7.23 (Paul, *Ad edictum* book 35), through its confirmation that such a relationship is not acquired by the adopter's wife.

However, because neither C.8.47.10.1a nor h.t.1f refers to any controversy, and the existing state of the law remained undisturbed by the new developments, it is both unsurprising and evidentially irrelevant that the same Digest title is consistent; but it is important to be aware of the juristic texts because their consistency with C.8.47.10 pr.–1 may otherwise be misconstrued.

8. Under the title *De necessariis et servis heredibus instituendis*, C.6.27.5 (29 April 531, a “known *decisio*”) provides that the appointment of one's own slave as heir (as opposed to legatee) implies a grant of freedom. This expressly (and necessarily) included the situation when, in addition to instituting the slave as heir, a grant of liberty had been made in a codicil, which had been considered incapable of confirming an inheritance. The *decisio* further confirms that when the slave himself had also been given by way of legacy in the same will to a third party, his institution as heir and the implied grant of freedom remained good. Freedom was likewise to be implied where slaves were appointed substitute heirs, even if they had otherwise been bequeathed to another, their status being one of conditional freedom until the minor's attainment of puberty (when they would pass to the legatee), or, as the case may be, the minor's death (at which point they would inherit and be free).

In the context of discussing the *heres necessarius*, J.2.19.1 and Theophilus both confirm that instituting one's slave in this way automatically makes him free, and uncontroversially confirm that he is compulsory heir, being obligated to accept the will (including its debts). Neither mention any particular provision but this is of no consequence here. The text is replicated word-for-word from G.2.152–153, with the necessary, and very stark, omission of the words *cum libertate*,<sup>208</sup> so clearly in the context of Justinian's *Institutiones* the *antecessores* had rectified the resultant anomaly between the *decisio* and Gaius. In a slightly different context, namely that of appointing heirs, J.2.14 pr. also refers to the reform and confirms that it was carried out through a Justinianic constitution, again despite the Gaius passages

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<sup>208</sup> G.2.153: *Necessarius heres est servus cum libertate heres institutus*; J.2.19.1: *Necessarius heres est servus heres institutus*.

(G.2.185–187) stating the exact opposite, and at length. J.2.14.1 tells us that if a slave “in eadem causa *manserit*,” he is considered free by virtue of the will; and that although he is usually the compulsory heir, he can decline the inheritance if freed during the testator’s lifetime, which again was indisputable. Theophilus says much the same, adding that it is irrelevant if he is actually expressly instituted without freedom.<sup>209</sup>

Yet the most pertinent Digest titles (again there is no precise equivalent), D.28.5 (*De heredibus instituendis*), D.28.6 (*De vulgari et pupillari substitutio*) and D.28.7 (*De condicionibus institutionum*), contain no fragments that even begin to approach Justinian’s reform. Further, an underlying, albeit unstated assumption behind many of the D.28.5 and D.28.6 texts is that the institution of a slave was dependent on his having been contemporaneously granted liberty.<sup>210</sup> Although other texts talk of making one’s slave the heir with no mention of a grant of liberty,<sup>211</sup> the absence of any specific waiver therein, combined with the weight of the juristic suppositions just considered, militate strongly against

<sup>209</sup> Theophil. *Para.* 2.14.1 (Lokin (note 127), 336, ll. 1–2): Ἡνίκα δὲ τὸν ἐμὸν οἰκέτην γράφω κληρονόμον CUM LIBERTATE ἢ καὶ SINE LIBERTATE (ἀδιάφορον γάρ, καθὰ λέλεκται) . . .

<sup>210</sup> E.g., D.28.5.3.1 (Ulpian 3 Sab.); h.t.6.4 (Ulpian 4 Sab.) (although Ulpian concludes that a slave instituted as heir *a semet ipso libertatem accipit*, his reasoning is based on the slave having been granted freedom in the testament, which took precedence over a contradictory codicil); h.t.7 pr. (Julian 30 dig.); h.t.8 pr.–1 (Julian 2 Urs. Fer.); h.t.9.14, 9.16–20 (Ulpian 5 Sab.); h.t.38.1 (Julian 30 dig.); h.t.43 (Julian 64 dig.); h.t.49.2 (Marcian. 4 inst.); 50 pr.–1 (Flor. 10 inst.); h.t.51 pr.–1 (Ulpian 6 reg.); h.t.52 pr.–1 (Marcian. 3 reg.); h.t.54 (Marcell. l.s. resp.); h.t.55 (Ner. 1 membr.); h.t.56 (Paul 1 leg. Ael. Sent.); h.t.58 (Paul 57 ed.); h.t.77 (Papinian 15 quaest.); h.t.84 pr.–1 (Scaev. 18 quaest.); h.t.85 pr.–2 (Paul 23 quaest.); h.t.86 (Scaev. 2 resp.); h.t.89 (Gaius cas. sing.); h.t.90 (Paul 2 man.) (although Paul envisages that a co-owned slave may be instituted heir without a grant of freedom, his reasoning is premised on the co-owner being jointly instituted, which entails the slave’s lawful appointment as *servus alienus*); h.t.91 (Tryphon. 21 disp.); D.28.6.48.2 (Scaev. quaest. publ. tract. sing.). Regarding substitution, see D.28.6.18 pr.–1, (Ulpian 16 Sab.). The institution of slaves as heirs subject to any other independent factor is not in itself suspect, e.g. D.28.5.21 (Pomp. 1 Sab.); h.t.22 (Julian 30 dig.); h.t.91, as above.

<sup>211</sup> D.28.5.30 (Ulpian 21 ed.); h.t.31 (Gaius 17 ed. prov.); h.t.40 (Julian 30 dig.), read with 38.5 (Julian 30 dig.), the latter addressing in effect the appointment of *servus alienus*; h.t.53 (Paul 2 reg.); h.t.61 (Celsus 29 dig.); h.t.65 (Javol. 7 epist.). Regarding substitution, see D.28.6.10.1 (Ulpian 4 Sab.); h.t.36 pr. (Marcian. 4 inst.); h.t.48.2 (Scaev. quaest. publ. tract. sing.).

these passages implicitly recognizing freedom as the necessary accompaniment of appointing one's slave as heir. But it is important to note that the *decisio's* main precept is not the central theme of these extracts, and the compilers' oversights should be viewed in this context.

However, D.28.7.21 may be in more direct violation of the new rule: Celsus (*Digesta*, book 16) states cryptically that one's own slave cannot be instituted heir *cum liber erit*. It is not entirely clear whether it is the entire appointment that was nullified and rendered defective beyond repair, or simply the condition, which being unlawful (following Justinian's reform) could be remedied by being disregarded. The latter is the obvious consequence of C.6.27.5, which was after all enacted *humanius et favore libertatis*. Furthermore, the opening text of D.28.7 makes amply clear that the institution of heirs is not voided by impossible conditions (Ulpian, *Ad Sabinum*, book 5), in other words the latter were to be ignored as meaningless; and unlawful conditions were given the same treatment (D.28.7.7, Pomponius, *Ad Sabinum*, book 5; h.t.14, Marcian, *Institutiones*, book 4).

However, the *cum liber erit* condition does not appear to be interpreted in accordance with these rules. The adjacent Digest text (D.28.7.22, Gaius, *Ad edictum provinciale*, book 18) illuminates the fragment, but does so negatively: because the testator had legal capacity to liberate the slave, he should have done so, and *ratio suadet ipsum . . . nec habere facultatem in casum a quolibet obvenientis libertatis heredem instituere*. The wording seems to suggest that the appointment itself had no force, entailing that Justinian's new rule was simply not taken on board when the fragment was excerpted. In the analogous context of appointing a slave as guardian, which is confirmed in this very *decisio* as also bringing about immediate liberation,<sup>212</sup> an appointment using these very words (*cum liber erit*) was deemed to have been done *inutiliter* (J.1.14.1).

Here, Theophilus provides further insight, telling us that the

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<sup>212</sup> The law as it stood seems to have already accepted that freedom was a consequence of appointing one's slave as *tutor*, even where the requisite words of such grant were lacking. The will was either construed as containing a direct grant of freedom (D.26.2.10.4 (Ulpian 36 Sab.); h.t.32.2 (Paul 9 resp.)), or a *fideicommissum*; see Buckland (note 14), 74. Because such construction matches C.7.4.10 pr. (260), the congruity of the Digest with the *decisio* on this point seems not to reflect an innovation, and explains the absence of any mention in J.1.14.1 that C.6.27.5.1b reformed tutelage appointments as well.

reason for this redundancy was that we should not leave a person to chance if he or she is in our power,<sup>213</sup> which may once more implicitly acknowledge that it was the appointment that was entirely void: he cannot have been referring to the condition, as interpreted under Justinian, because chance no longer played any role in a slave becoming free after his institution as guardian, it took place by operation of law; and given the identical nature of the phrase used in D.28.7.21 it seems abundantly likely that the same reasoning was applied, based on the old law, even though both outcomes appear not only to have militated against the Justinianic preference for liberty but also to have clashed with C.6.27.5.1b. These Digest texts are therefore very probably incompatible with the concept of freedom flowing automatically from a slave's appointment as heir.<sup>214</sup> But even abiding by the contrary reading, as a consequence of which the condition would have had no adverse effect, it would have been a very obscure and indirect way of reflecting the *decisio* in the Digest.

And yet the compilers had ample opportunity not only to interpolate the relevant principle without mincing their words, but also to choose clearly stated supportive fragments: Dorotheus, Theophilus, and Tribonian were responsible for J.2.14 pr., which tells us that Paul twice cited Atilicinus in his approval of the positive sequelae to instituting one's slave as heir. And yet despite this, they did not seek to ensure that these views surfaced in the pages of the Digest; and one can also assume from C.6.27.5.1a, which informs us that *tanta inter veteres exorta est contentio*, that other jurists also held this view,<sup>215</sup> and that these were known to the compilers.

On the other hand, once more there is no obvious and unequivocal statement to the effect that a specific grant of freedom was required. Indeed, as partly noted above, we know of several juristic views that could have been included had this opposite position been taken,<sup>216</sup> but they are not present in D.28.5 or D.28.7. So the mishaps notwithstanding, steps seem to have

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<sup>213</sup> Theophil. *Para.* 1.14.1 (Lokin (note 127), 120, ll. 1–2): ὁ δὲ λογισμὸς πρόδηλος· ἐπειδὴ τὸν ἐν ἡμέτερα ὄντα ἐξουσία, τοῦτον εἰς τύχην ἀνάγειν οὐκ ὀφείλομεν.

<sup>214</sup> Buckland (note 147), 137, also proceeds on the basis that it is the entire appointment and not the condition that is a nullity, as it showed no intent to give.

<sup>215</sup> Cf. Buckland (note 14), 311.

<sup>216</sup> See particularly G.2.186–187 and Tituli ex corpore Ulpiani 22.12; but see also G.1.21, 2.152–154; Tituli ex corpore Ulpiani 22.7, 11.

been taken to secure a lack of explicit inconsistency between the Digest and the *decisio*, even if these attempts lacked rigor, and overlooked many assumptions that did not sit easily with the new law.

It is also of note that, although there is again no equivalent in the Digest to the relevant CJ<sup>2</sup> title, it is once more found in the Basilica,<sup>217</sup> as will be considered below.

## VI. Discussion and concluding remarks

It is accepted that this paper's fault-finding exercise has been quite exacting and gives prominence to some relatively slender mismatches in meaning. But accuracy was paramount, if a rule was to be properly reproduced, particularly if the *decisiones* (as opposed to their principles) were no longer to have a substantive role in the legal system. It is also clear that a more far-reaching study would be required before more definitive conclusions can be drawn as a whole. However, from the limited parameters of the above enquiry several different tendencies begin to emerge:

- a. Principles enunciated in the *decisiones* are often emulated in the Digest titles to some extent, but usually incompletely or indirectly and not systematically. Although some texts are consistent, positively and fully stated rules scarcely get a look-in, and the opportunity to include or interpolate obviously supportive texts is also passed over time and again. Justinian earmarked his *Institutiones* to explain modern reforms, and other works such as Theophilus' *Paraphrasis* and Thalelaeus' commentary on the Code gave even fuller detail. There may also be instances of the Digest compensating for (possibly deliberate) obfuscation in individual *decisiones*, so although strictly speaking repetitive, it is not at all obvious that they are covering the same ground.
- b. On those occasions where particular juristic opinions are expressly relied on by individual *decisiones*, they do not put in an appearance in the Digest as well. Thus far this approach appears pervasive, which may indicate that repetitive texts were not being accidentally left by the wayside but rather were deliberately discarded, their exclusion prioritized. Even if a portion of a *decisio* is found in the Digest, the texts are

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<sup>217</sup> BT 35.13 (Περὶ . . . δούλου ἐνοτάτου), in Scheltema (note 59), Ser. A, 1619.

not authored by the same jurists attached to the original principle identified by the *decisio*.

- c. If the approach to the *dediticii* in C.7.5.1 is representative, obsolete laws rooted out by the *decisiones* may indeed have also been systematically wiped off the face of the Digest. Indeed, where the Digest is silent regarding the rejected juristic viewpoints in the *decisiones*, or declines to include other conflicting texts, it may also be symptomatic of the selfsame tendency to extricate from the compilation laws that were no longer in force, thereby achieving a lack of inconsistency with the replacement constitutions.
- d. Some Digest entries appear to jar with *decisiones* but these mostly hinge on points that are implied relatively subtly, rather than being expressed clearly; or indeed that simply assume the basics in discussions revolving around related but not identical matters. Even though the Digest inconsistencies connected with C.6.2.20 are perhaps of a different order, there are in general no express and unambiguous contradictory statements. The perennial, time-honored obstacle of “pressure of work” seems to be at play here as much as anything else, leading to nuances being overlooked.
- e. The one *decisio* (in this sample) that is replicated more or less faithfully in the Digest is in a decided minority, offering only minimal support for the main contention examined here; so thus far we have seen that only rarely did the Commissioners’ approach extend to including an unadulterated statement on the solution to the ancient controversy, and even here, there is no systematic replication of Justinian’s innovations.

So it seems to be more a case of what was *not* included in the Digest, as opposed to what was, although clearly both are relevant to varying degrees; and the evidence militates against the Digest being the actual destination for the *decisiones*. The seemingly methodical ousting of the precise views of individual jurists seems to indicate a system that reacted to the Justinianic dispute resolutions by avoiding blatant repetitions, a policy that was robust and applied conscientiously. And again the extent of non-repetition of the full principles (even without the exact juristic excerpts) is quite far-reaching, such that this too seems to have been a deliberate tactic; the theory does not seem to be undermined by the replication of individual isolated elements, and indeed the haphazard nature of their inclusion suggests that when a fragment was perchance unearthed that corresponded in

some limited way to a *decisio*, it was permitted. The pattern of excluding inconsistent texts from the Digest is also striking, so perhaps, as Scheltema and Lokin argue, the *decisiones* gave the green light for eliminating laws in disuse and juristic opinions that were unwanted because they were contradictory — precisely those condemned in *c. Deo auctore* and *c. Tanta*, even if Justinian's ambitions were not always fulfilled. Neither can it be discounted that texts were changed to suppress discrepancies.

But it is acknowledged that on the basis of the evidence viewed to date, the compilers' *modus operandi* is not certain. It must also be borne in mind that the patterns discerned here and the resultant interpretations are no more than tentative hypotheses and observations that require a much fuller study before any meaningful conclusions can be reached. And as we have seen, the wording of *c. Cordi* 1 and *c. Tanta* 1 appears *prima facie* to be quite damning to the findings, suggesting instead that it was planned for the dispute resolutions to end up in the Digest.<sup>218</sup> So do the introductory constitutions demonstrate the consensus theory? Such a proposition starts to unravel in the face of other considerations. As a means of vaunting Justinian's supposedly inimitable greatness the introductory constitutions perhaps indulged in poetic licence, if not pure spin, and should not be taken literally. And again, as analysed above,<sup>219</sup> it should be recognized that like most evidence these constitutions can often be construed in more than one way, and that by reading more globally a more accurate picture may become apparent — the potential propaganda element being one of many factors to be weighed in the balance.

So although *c. Cordi* 1 talks of the *ius antiquum* being set out in the Digest and the Institutes, and makes no reference to the new Code, because the same constitution specifically goes on to tell us that the *decisiones* were (eventually) destined for CJ<sup>2</sup>,<sup>220</sup> perhaps the drafters did not perceive the *decisiones* (as opposed to the controversies they addressed) as forming part of the ancient law at all; after all, their solutions were modern even if the disputes were ancient. This reading is reinforced by considering *c. Cordi* 1 as a whole: the ancient law was inserted into the Digest

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<sup>218</sup> Section III.B, on the academic arguments, discusses the elements of the introductory constitutions reappraised here in the discussion section. See also notes 11–13 for relevant texts.

<sup>219</sup> See above notes 11–13 and accompanying text.

<sup>220</sup> C. Cordi 2–5.

and Institutes only after its prolixity and lack of clarity had been eradicated, impliedly by the *decisiones* themselves, which indeed are never classified as “ancient law.”

In any event, because this reference to the *ius* does not distinguish between the Digest compilation and the Institutes, *c. Cordi* 1 does not necessarily take us any further forward; it may simply confirm that the general juristic excerpts were included in the Digest, and the Institutes summarized the controversy resolutions — which is exactly what they tended to do, as indeed described by *c. Tanta* 11.

As regards *c. Tanta* 1, this may simply have been a reference to the intellectual decisions — as opposed to actual *decisiones* — that had to be made regarding which juristic views (again, to be differentiated from *decisiones*) were to be included in the Digest; they would not have required imperial sanction, probably because the compilers were permitted or felt able to solve them themselves.<sup>221</sup> Clearly the Latin word has this potential meaning also. And examining the evidence available through the substantive law such as the Digest fragments and the other components of Justinian’s *Corpus*, these alternatives make even more sense. Analogously, the order to remove discrepancies from the works of the ancients (*c. Deo Auctore* 4) may feasibly refer to extracting any unharmonious thinking which had not been deemed sufficiently serious to warrant a *decisio*.

Furthermore, one would struggle to interpret *c. Cordi* 2, and the strictures of *c. Deo auctore* 9 and *c. Tanta* 14, as being anything other than entirely supportive of the conclusions reached in this paper. CJ<sup>2</sup>, not the Digest, was the eventual destination for the fully-fledged principles contained in the *decisiones*, even though it must follow that originally, before it was decided to issue a revised edition of the Code, they had been intended to stand alone as the only legal source on juristic dispute resolutions, albeit supplementing CJ<sup>1</sup> generally. Additionally, the concern with repetition in the Digest would have encompassed not only the verbatim regurgitation of the jurists’ words summarized in

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<sup>221</sup> Honoré (note 2), 147, also sees the term “*decisio*” in *c. Tanta* 1 not as denoting an actual resolutive constitution, but rather a more general resolution of a controversy. Analogously, Ruggeri (note 10), 121–24, argues that whereas the *extravagantes* were prepared when the emperor’s final say on any particular dispute was deemed necessary, the compilers otherwise made the “*decisions*” themselves as to which fragments to include in the Digest. See also *id.*, 108–109.

any particular *decisio*, but also a comprehensive reproduction of the individual rule; and overlaps between the *decisiones* and Digest were to be stripped as far as possible from the latter.

This interpretation finds a further unexpected source of corroboration in *c. Deo auctore* 10, which specifically required that the only laws to be included in the Digest were those *quae vel iudiciorum frequentissimus ordo exercuit vel longa consuetudo huius almae urbis comprobavit*. This provision explains the omission from the Digest of particular titles that are present not only in CJ<sup>2</sup> but also in the Basilica,<sup>222</sup> which after all was the result of CJ<sup>2</sup>, the *Institutiones*, and the Digest being merged. This in itself leaves open the very real possibility that when the Digest was prepared, the *decisiones* broke so radically with the established legal categorizations, irrespective of the alleged plethora of dissenting classical-era views, that no title emanating from that time was thought suitable for the Digest, and more particularly, pursuant to *c. Deo auctore* 10 no new ones were created. It was only with the Basilica, which was not wedded to concepts from any particular era and was unfettered by Justinian's concerns relating particularly to the Digest, that fitting titles were devised in these cases. This again militates somewhat against the whole idea of Justinianic law being reflected as a matter of course in the Digest.

The introductory constitutions therefore may not be inconsistent with the findings reached by directly comparing the Digest with the *decisiones*, and may even directly corroborate them. So the main focus may well have been on purging the Digest of content that simply reproduced what had already been stated elsewhere in the codification, unless it fell within the exceptions envisaged by *c. Deo auctore* 9 and *c. Tanta* 14, and even if partial replications were tolerated. And even if the original principle intruded occasionally, it was at a level that scarcely interfered with this apparent design: only C.4.38.15 defies the trend but statistically it may be insignificant, possibly a rogue interpolation by a compiler whose understanding of his remit was at odds with that of his companions.

If the provisions studied here are representative, it becomes unsustainable to argue that the *decisiones* were meant simply to iron out juristic disputes for the purposes of smoothing the way for the Digest compilers, by facilitating the selection of the correct

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<sup>222</sup> C.6.27.5 = BT 35.13; C.7.7.1 = BT 48.14 (in both cases only in part).

legal texts; likewise, that they had only a transitory value until the Digest replaced them and rendered them of historic interest only is simply wrong. Rarely containing the positive Justinianic principle, the Digest could not have been designed to absorb the new rules, and accordingly the *decisiones* were not supplanted or made redundant by the Digest. Instead, Justinian's *Institutiones* performed the task of reflecting in summary form at least some of the *decisiones*, just as it commented on his legislation generally. Gaius' Institutes, so often the inspiration for the later work, which was sometimes even its carbon copy, were radically altered in order to ensure consistency with the *decisiones*. It may be deduced that this was indeed the intended role of the *Institutiones*, rather than that of the Digest, even if not systematically so.<sup>223</sup> Further, individual commentaries, such as those of Thalelaeus, Theodorus, and Theophilus, seem to have been the venue for evaluations that were more probing, to varying degrees; and even though these works were not part of Justinian's codification, the pattern suggests that Justinian catered for *them*, rather than the Digest, to function in this way.

Furthermore, those who argue that a whole tranche of *decisiones* were left out of CJ<sup>2</sup> because their content had been absorbed by the Digest appear to have got it the wrong way round. Thus far, the clues point tantalizingly away from the Digest being the ultimate destination for this legislation so the theory would require two mutually incompatible strategies, which is surely highly improbable and raises the question as to why absorption in the Digest was not on the cards for almost any of the *decisiones* considered here, yet fully implemented as regards those of which we have allegedly lost all trace. The argument also falters in the face of the evidence that deliberate attempts were made to ensure the Digest neither reproduced nor contradicted the *decisiones*: why go to these lengths if a plan was being put into effect to incorporate them anyway? Furthermore, it is intriguing that the one anomalous *decisio* that as of yet we know to have been reproduced in the Digest (C.4.38.15) also remained in the Code. Finally, it is not so certain that any *decisiones* have indeed gone missing: the evidence seen above potentially elevates the number of *decisio* candidates from just over thirty to just under fifty, with the possibility of other laws also qualifying.

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<sup>223</sup> They do not contain all the *decisiones* and provide only a cursory résumé. For this reason it would also be hard to argue that the plan was for the *Institutiones* themselves to supplant the *decisiones*.

Lokin specifically calls for a detailed study on the role of the *decisiones* and how they interacted with both CJ<sup>2</sup> and the Digest.<sup>224</sup> The findings in this study hopefully put the case again for such comprehensive research.

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<sup>224</sup> Lokin (note 18), 167: "Further detailed research into the well-known decisions is much needed, particularly concerning their interconnections, their date of issue, their place in the Codex and their effect on the Digest." Id., 172: "[I]t would be worthwhile systematically to investigate the connections between decisions and interpolations."