

Graeca leguntur?

KONINKLIJKE NEDERLANDSE AKADEMIE VAN WETENSCHAPPEN

Mededelingen van de Afdeling Letterkunde, Nieuwe Reeks, Deel 70 no. 2

Deze Mededeling werd in verkorte vorm uitgesproken in de vergadering van de Afdeling Letterkunde, gehouden op 10 januari 2005.

J.H.A. LOKIN

Graeca leguntur?


The significance of Justinian's Novel 159 in the
Württemberg v. William of Orange case (1544-1666)

Koninklijke Nederlandse Akademie van Wetenschappen, Amsterdam, 2007

Koninklijke Nederlandse Akademie van Wetenschappen
Postbus 19121, 1000 GC Amsterdam **T** 020-551 07 00
F 020-620 49 41 **E** knaw@bureau.knaw.nl www.knaw.nl

Voor het bestellen van publicaties:
T 020-551 07 80 **E** edita@bureau.knaw.nl

ISBN 978-90-6984-527-2

Het papier van deze uitgave voldoet aan  iso-norm 9706 (1994) voor permanent houdbaar papier.

© 2007 Koninklijke Nederlandse Akademie van Wetenschappen (KNAW). Niets uit deze uitgave mag worden verveelvuldigd en/of openbaar gemaakt door middel van druk, fotokopie, via internet of op welke wijze dan ook, zonder voorafgaande schriftelijke toestemming van de rechthebbende, behoudens de uitzonderingen bij de wet gesteld.

On 15 July 1544 René de Chalon was fatally injured by a cannon ball at the siege of Saint-Dizier in the Champagne region. Emperor Charles v, who was taking part in the battle against François I, hurried to his faithful servant's deathbed and 'en lui disant adieu le baisa en la joue et se retira la larme à l'œil', according to Brantôme.¹ As every historian knows, René de Chalon's death the next day had a decisive influence on the history of the Low Countries, because he had stipulated in his will that his full cousin William of Nassau,² son of his uncle William known as William the Rich, was to be his sole heir if he were to die without issue. Since this was in fact the case, a rich inheritance, including the principality of Orange, fell into William's lap. As a result, the fairly obscure eleven-year-old count suddenly became a sovereign, on the same footing as other sovereign rulers.³

I will not discuss the history of the principality and the title of Prince of Orange here, except with regard to one curious point. In 1702 the King-Stattholder William III died without child, so that his line became extinct. The only surviving line was that of Frederick Henry, the last son of William the Silent, who had two daughters. By virtue of his will the principality fell to the son of his eldest daughter, the later king of Prussia, and by virtue of William III's own will to the hereditary stadtholder of Friesland, Count Johan Willem Friso of Nassau-Dietz, a descendant of Frederick Henry's second daughter. But in 1702 the principality of Orange was in fact occupied by king Louis XIV. He without further ado granted it to Prince Conti, a relative of the Chalon family. The

¹ Pierre de Bourdeilles, seigneur de Brantôme, *Œuvres complètes*, ed. L. Lalanne, Paris, 1864-1882, I, p. 246.

² René de Chalon was born Rhenatus of Nassau, son of Henry III of Nassau and Claude or Claudina of Chalon. He took his mother's name, since she belonged to the highest nobility.

³ William was under the guardianship of a board consisting of Adolf von Holstein-Schaumburg, Johan van Merode and Claude de Bouton. His father William was not allowed to be a guardian because of his 'heretical' beliefs.

outcome of this interesting constitutional case was that all three got something. Under the treaty of Utrecht in 1713 Prince Conti was awarded the principality, but under the sovereignty of the king of France, and the title and the arms were awarded to the king of Prussia. Due to a treaty with Prussia in 1732 the Frisian Nassaus also won the title and the arms, so that there were two legitimate heirs to the title Prince of Orange. In the Netherlands, since the establishment of the Kingdom the title-bearer has been the eldest son of the head of state; in Germany the title-bearer is the head of the house of Hohenzollern. It is strange to realize that between 1918 and 1941 the only legitimate Prince of Orange in the Netherlands lived in Doorn; he was the former German emperor Wilhelm II.⁴

The inheritance of René de Chalon included not only the principality of Orange, but also various properties in Burgundy which derived from the estate of Etienne (Stephan) de Montfaucon, Count of Montbéliard (in German Mömpelgard). On 31 October 1397 this count had made a will leaving all his property – most of which was situated in Burgundy – to his son Henry, who was fighting against the Turks in East Hungary. He did not know that at that point Henry had already been killed. However, as a prudent testator he had included substitutions in the will; if his son were to predecease him, his four granddaughters were to inherit. On 31 October they were still minors. Should one of them die without issue, her property was to fall to the others. This did in fact happen: his granddaughter Margareta *obiit sine liberis*. This meant there were three heirs left, as is shown in the family tree on the next page.⁵

Stephan made one particular provision which is relevant to my story: he stipulated that the heirs of the granddaughters should not be allowed to dispose of the properties, neither through a disposition during life, for example by sale or gift, nor through a disposition upon death, for example by means of a will or a specific legacy. If a branch died out, the properties were to revert to the descendants of another line, that closest to the branch which had died out. In short, Stephan issued a general prohibition of alienation and he did this with the legal help of a family fideicommissum obliging each generation to pass on the estate to the next generation intact. On 2 November 1397 Etienne de Montfaucon died. Apparently he

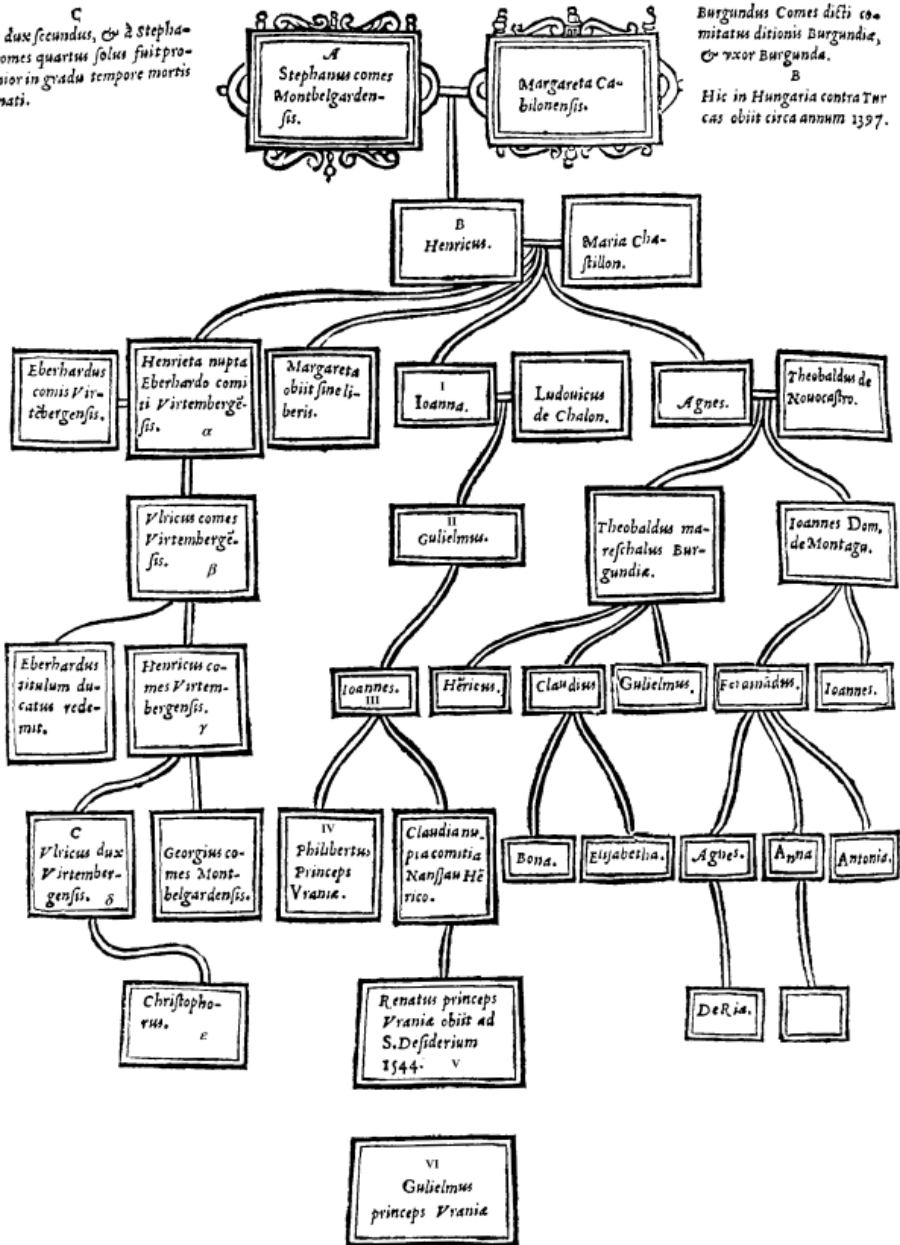
⁴ From 1918 to 1920 the emperor lived at Amerongen Castle. For the title Prince of Orange see Reinildis van Ditzhuyzen, *Oranje-Nassau, een biografisch woordenboek*, third impression, Haarlem 2003. See also C. Fasseur, *Wilhelmina, De jonge koningin*, 1998, 21.

⁵ Taken from Carolus Molinaeus, *Opera omnia*, tomus III, 1612, 2219/2220, thema abbreviatum consilii IIII.

C
Hic dux secundus, et à stephano comes quartus solus fuit proximior in gradua tempore mortis Renati.

A
Burgundus Comes dicti comitatus ditionis Burgundiae, et uxor Burgundae.

B
Hic in Hungaria contra Turcas obiit circa annum 1397.



had made the will on his deathbed. After news of Henry's death reached his children, Stephan's four granddaughters accepted the inheritance through their guardians. They had become wealthy heiresses and soon had many suitors. It is impossible to describe what happened to the entire inheritance in the scope of this paper. I will limit myself to the two eldest daughters: Henriëtte, who married Eberhard of Württemberg, and Jeanne who married Louis de Chalon. They had a series of descendants until Jeanne's branch did in fact die out in 1544, when, as we have seen, René de Chalon died at St. Dizier and the eleven-year-old William of Nassau became the heir. He had not a drop of Montfaucon blood in his veins, and this fact moved Ulrich, Duke of Württemberg and heir of the oldest branch, to take legal steps. In 1544, before the Parlement (court) of Dôle, under whose jurisdiction the Burgundian properties fell, he immediately demanded that the Montfaucon properties should be placed in his possession because in his opinion he was their rightful owner. That they should be placed in his possession was important because according to the laws of evidence the person in possession was deemed to be the owner, freed from the burden of proof and thus referred to as *beatus possessor*. The court's decision was different. On 17 April 1545 the Parlement of Dôle awarded the possession of properties including Montfaucon and Réaumont to William of Orange. Therefore Ulrich had to prove that his rights were stronger. He based his case on the general prohibition against alienation dating from 1397. This was not all. Because he had realized that in the course of time properties had also been alienated in his own branch, he began a series of cases against the various acquirers to regain the property. Because the case had to do with the law of testamentary succession, it had to be judged according to Roman law; it was Roman law which had introduced the will into the Germanic countries through canon law. Ulrich did not take any chances. He sought advice, firstly of course at 'his own' university in Tübingen, which had been founded not so long before, in 1477. He had the good fortune that from 1553 onwards one of the greatest and also one of the most colourful legal experts of the time worked there: Charles Dumoulin, or Carolus Molinaeus (1500-1566), who did in fact give him an opinion relating to the Montfaucon proceedings, though not in the Orange case.⁶ Then he asked Bonifacius Amerbach (1495-1561), the famous humanist legal scholar from Basel, for a *Rechtsgutachten* specifically pertaining to the Orange case. Amerbach examined the opinion given by the Tübingen faculty on 30 November 1544. First he gave a provisional

⁶ Carolus Molinaeus, *Opera Omnia*, tomus III, 1612, consilia III-VIII and XXVI.

opinion in German and then an official opinion in Latin.⁷ These opinions are much too long to discuss in detail, but that is not necessary since I am concerned only with one point.

The reason why Amerbach did not immediately write his opinion in an official Latin version was that in his provisional conclusion he was pessimistic about Württemberg's chances. While he was able to remove many objections to the validity of the terms of the will and concluded that the prohibition against alienation was legally valid, there was one obstacle which irrevocably stood in his way – and in Württemberg's: Novel 159.⁸ This Novel had been issued almost a thousand years previously, on 1 June 555, by Emperor Justinian and was part of 'received' Roman law, i.e. that part of Roman law which was legally valid. At first sight this seems strange for in most of the editions of the *Glossa* the Novel is printed without any glosses and consequently without legal strength, according to the rule: *quidquid non agnoscit glossa non agnoscit curia*. However in the manuscript some glosses are found and so Novel 159 was universally considered to be 'glossed' and part of 'received' Roman law.⁹

What were the provisions of Novel 159? It had been issued in response to a concrete case in 555 which also involved a prohibition against the alienation of houses and land in Constantinople. The case is rather complicated but the rule of law is quite simple and that is what concerns me now. Justinian ruled that a prohibition against alienation remained legally valid until the fourth generation, *usque ad quartum gradum*. For the generations succeeding the fourth it lost its validity. At the end of the Novel the emperor stipulated that the rule of law specified here was universally valid and that in future similar cases should be judged according to this statute. So much for the contents; now for something about the way the Novel has been passed down.

⁷ The German version is included in A. Hartmann – B.R. Jenny, *Die Amerbachkorrespondenz* Vol. VI, 1967, no. 2687. The Latin version is located in the Öffentliche Bibliothek Universität Basel, Manuscript C. Vla Band 56, 543-591. For more on this whole topic, see the excellent work by H.R. Hagemann, *Die Rechtsgutachten des Bonifacius Amerbach*, Basel 1997, 196 ff.

⁸ For the Novels, see the indispensable manual by N. van der Wal, *Manuale Novellarum Justiniani*, 2nd Volume, Groningen 1998. For Novel 159 in particular, see J.H.A. Lokin, Ad Novellam 159, in *Novella Constitutio, Studies in honour of Nicolaas van der Wal*, Subseciva Groningana IV, Groningen 1990, 131-150.

⁹ See also Von Savigny: *Beitrag zur Geschichte des lateinischen Novellentextes, nebst einigen ungedruckten Novellen*, in: *Zeitschrift für geschichtliche Rechtswissenschaft* II, 1816, p. 121: 'Nov. 159 Glossirt.'

The Novel was written in Greek, but because Greek was not read in the Middle Ages – *graeca non leguntur* – it was received in the form of a curious Latin ‘translation’ which is known as the Authenticum.

Over the centuries many different theories have been put forward about the nature of the Authenticum. The most widely accepted was that fragments of the Authenticum had been written in Antiquity and that in the course of the centuries vulgate Latin additions had more or less made it into a whole. This was thought to explain the barbaric style and the incomprehensible passages. Every great legal scholar wrote about the Authenticum, from Irnerius, who discovered the Authenticum and initially took it to be a forgery by some monk, to Von Savigny, Zachariae von Lingenthal, Heimbach, Krüger and Wenger, who regarded it as a text which had gradually fused together. Its true nature was first revealed by my predecessor and teacher H.J. Scheltema in 1963 in an article of just a few pages.¹⁰ He showed that the Authenticum is actually not a translation at all, at least not a translation of sentences in the ordinary sense, but notes to help teach Latin-speaking students studying the Greek Novels, with Latin equivalents not for the sentences but for each separate Greek word. This word-for-word translation, known as *kata podas*, was written between the lines above each Greek word. The Authenticum helped the Latin-speaking students to understand the inaccessible Greek of the Novels. Sometimes there are two Latin translations for one Greek word to make it even clearer: for example, Auth. 72 translates ἀνομοθέτητα in Novel 70 as *absque lege sine legislatione*; Nov. 6 reads ἐπιστήμονας, Auth. 6 translates *scientes eruditos*; Nov. 105: ὡς, Auth. 34: *quoniam quod*. Not long after the death of Justinian (565)¹¹ the Latin text was separated from the Greek and in the process of separation all sorts of things must have gone wrong; for instance, the copyist of the Latin text above the Greek sometimes copied some of the Greek text below it as well.¹² Novel 159 and its Latin rendering in Authenticum 126 are good examples of this, as the following fragment shows.

¹⁰ H.J. Scheltema, ‘Das Authenticum, Subseciva xi’, in *Tijdschrift voor Rechtsgeschiedenis* 31, 1963, 275-279, included in *Opera minora*, Groningen 2004, 133-137.

¹¹ At least by the early 7th century, since Pope Gregory quotes from the Authenticum; see H.J. Scheltema, ‘Antecesseurs’, in *Opera minora*, Groningen 2004, 95 note 126.

¹² See D. Holwerda’s lucid article ‘Fouten in het Authenticum’ in *Flores legum H.J. Scheltema antecessori Groningano oblata*, ed. R. Feenstra, J.H.A. Lokin, N. van der Wal, Groningen 1971, 115-119.

Novel 159 caput II principium

- Κατασχεψάμενοι δὲ τὴν ὅλην ἡμεῖς μεθ' ὅσης ἐχρῆν ἀκριβείας ὑπόθεσιν ἐπὶ μὲν τοῖς ἄλλοις πράγμασιν, ὧν δὴπου Κωνσταντῖνος ὁ τῆς ἐνδόξου μνήμης ὁ Ἱερίου τοῦ πρεσβυτέρου παῖς ἐκ τῶν τοῦ πατρὸς διαθηκῶν γέγονε κύριος, οὐδὲ τὴν τυχοῦσαν ᾤθημεν καλῶς ἐνίστασθαι ζήτησιν, εἶργεσθαι δὲ τῆς ἐπὶ τούτοις ἐναγωγῆς οὐκ Ἀλέξανδρον μόνον τὸν ἐνδοξότατον, ἀλλὰ καὶ τὴν λοιπὴν πᾶσαν φαμίλιαν, τῶν τε τῆς διαθήκης ῥημάτων μέχρι μόνων παίδων ἰστώντων τὴν κώλυσιν καὶ αὐτῶν τῶν Ἱερίου τοῦ τῆς ἐνδόξου μνήμης υἱῶν, δι' ὧν εἰσποιοῦσι σφᾶς αὐτοὺς τοῖς Ἱερίου δικαίους οἱ μετ' ἐκείνους
- V
- X
- XV
- τῆς φαμίλιας ὑπάρχοντες μέρος, ἐκποιησάντων τινὰ τῶν παρ' αὐτοῖς καὶ ὅλως ὡςπερὲ τὴν ὑποκατάστασιν ἐκ γνώμης ἀπαγορευσάντων μιᾶς. ἐπὶ δὲ γε τῷ προαστείῳ, οὗ δὴ κύριον ὁ κωδίκιλλος Ἱέριον δείκνυσι τὸν ἐνδοξὸν τῆ μνήμῃ, πολλῆς ἡμῖν ἔδοξεν ἀνάμεστον εἶναι περιεργίας τέτρασιν ὕστερον γενεαῖς τὴν τοιαύτην εἰς μέσον ἄγεσθαι ζήτησιν. νῦν μὲν γὰρ Μαρίας καὶ Μαρίας τῶν ἐνδοξοτάτων ἔτι περιουσῶν, ἃς δὴπου καὶ αὐτὰς ἐν τῇ φαμίλιᾳ θετέον, τῶν ἡμετέρων νόμων καὶ τὰς νύμφας τούτου τοῦ προσρήματος ἀξιούντων,

Authenticum 126 caput II principium

- considerantes oportere subtilitatis cognitionem in aliis quidem rebus, quae Constantinus gloriosae memoriae Hierio seniori, de quibus ex testamento factus est dominus, nihil accipere existimavimus
- 5 bene surgere quaestionem, vacare vero in istis actione non Alexandrum solum virum gloriosum, sed et reliquam omnem familiam, ex testamenti verbis usque ad filios solum stare prohibitionem, et ipsum Hierii gloriosae memoriae filium, per quos facientes [εἰσποιοῦσιν σφᾶς αὐτοὺς] eos Hierii iura qui post eos familiae substitu-
10 stuentes partem alienaverunt quae apud eos, tamquam in substitutionem ex voluntate interdictorum unius. In proastio vero neque si dominum codicilli Hierium ostendant gloriosae
15 memoriae, multae nobis visum est plenum esse περιεργίας quattuor postea generationes' huiusmodi in medium deduci quaestionem. Nunc igitur gloriosissimis feminis Maria et Maria adhuc superstites, quas et ipsas in familia iacendo, nostris legibus et nurus huiusmodi verbis

7 stare] set et stare *R^a* || 8 Hierii *Beck*] hierium *libri* || 9 *facientes
 εἰσποιοῦσιν σφᾶς ἀπτοῦς eos] eis facientes *τιοςchCΦλCAYPοςεος T*
 ei facientes *νοιοςGNCaKYPOZeοΓ (ἀκυρώσεως m. rec. in marg.) R* eis
 facientes *cum spatio vacuo^{3/4} vs. (nihil deficit nisi grecum V³ in marg.)*
V. Graeca verba εἰσποιοῦσιν σφᾶς ἀπτοῦς interpretationi facientes
 eos *adscripta seclusi* || familia *V* || 10 alienaueruntque apud *V* ||
 substitutione *T* || 11 unus *T* || 13 visum est] insumere *V* || esse] est
R || περιερισσᾶς (περιεργίας *m. rec. in marg.) R nepi cum spatio 5 litt.*
(s.v. Grecum m.²) T om. in spat. vac. 5-6 litt. V (Grecum deficit V³
in marg.) || 14 postea] eius postea *V* || generatetiones *R^a* || 15 glorio-
 sissimis *RT*] gloriosis *V vulg.* || 16 in] a *V* || et nurus *scr. V³ in spat.*
vac. ||

In line 9 of the Latin text some Greek words are placed in square brackets between the words *per quos facientes* and *eos*. The apparatus criticus indicates exactly what was written in the manuscripts at this point. In the thirteenth-century codex Monacensis lit. 3509 (T), *τιοςchCΦλCAYPοςεος* is added after the words *eis facientes*; the Berlin manuscript R (codex Berolinensis 271, 13th century) has the addition *νοιοςGNCaKYPOZeοΓ* after the words *ei facientes*. In the margin, a more recent hand has deciphered from this incomprehensible hodgepodge the words *ἀκυρώσεως*, which literally means *deletion, cancellation* and makes no sense. The somewhat later codex Vindobonensis lat. iur. cir. 19 (V) does not even attempt to decipher the words, leaving three-quarters of the line blank, although a much later hand (V₃) has added in the margin: nothing is missing except Greek, *nihil deficit nisi grecum*. Finally, the publishers Schoell & Kroll indicate that they have added in square brackets the Greek words of Novel 159, line ix, *εἰσποιοῦσι σφᾶς ἀπτοῦς*, which serve as a clarification of the words *facientes eos*. In reality it was the other way round: the Latin words served to clarify the Greek.

The same thing happens in line 13 of the passage cited above. When the Latin and Greek texts were separated the word *περιεργίας* from line xiv of the Novel accidentally remained in the Latin text. This word was written in the margin of the Berlin codex in a more recent hand; the writer of the manuscript had written *περιερισσᾶς*. The Munich codex began with the letters *nepi* and failed to fill in the next five letters. Above the line a second hand has written ‘Greek’: *Grecum*. Again, the Vienna codex (V) made no attempt to produce a text but left the space of 5-6 letters open. And again, the most recent hand (V₃) has added in the margin: ‘some Greek is missing’: *grecum deficit*.

At more points in the Authenticum Greek texts have accidentally ended up in the Latin text, but these examples from 'our' Novel 159 should be sufficient.

Clearly, for centuries readers of the Authenticum have had the impression that it was an extremely corrupt text, especially since the Latin words which were legible often made no sense. Publisher Kroll of the standard edition writes in his preface:

Therefore the intention of this edition is to restore the old form both of the Greek Novels and of the Authenticum. There are very great obstacles in both cases. In one case [the Greek Novels] often one does not know if the words quoted are those of Justinian himself or of a compiler of some collection, or of a more recent interpolator; in the other [the Authenticum] it is usually very difficult to make out which text this apparently very stupid man has seen in the Greek version, what he has understood.¹³

In this light it is not surprising that editors took many liberties and thought it justifiable to emend the text not on the basis of philological considerations but of substantive or dogmatic criteria. This activity resembles that of the twentieth-century interpolation critics who also thought – on unsound grounds – that they could change entire Justinian texts into so-called classical Roman law texts.¹⁴ However, the text emendations of the sixteenth-century editors are more forgivable than those of the twentieth century, because in the sixteenth-century the first printed texts had not yet been established according to modern philological standards and new manuscripts were still being found frequently. This makes interfering with the text more understandable, especially in the case of a 'corrupt' text like the Authenticum. This is illustrated clearly by the heading of Authenticum 126 (Novel 159). The headings of Novel 159 and Authenticum 126, which were probably added somewhat later, differ considerably. That of Auth. 126 reads: *De restitutione fideicommissi et nomine familiae usque ad quotum gradum locum habet.* (About the restitution of the fideicommiss and

¹³ R. Schoell, W. Kroll, 'Novellen', in *Corpus Iuris Civilis* III 1894/1972, praefatio, XVIII: Huius igitur editionis consilium est et novellarum graecarum et Authentici pristinam restituere formam. Ab utraque parte summae obstant difficultates; illic saepe nescis utrum ipsius Iustiniani an redactoris sylloges alicuius an interpolatoris recentioris verba recuperes; hic plerumque difficillimum est diindicare, quid in exemplari graeco scriptum viderit, quid intellexerit qui vertit homo perquam stultus.

¹⁴ See J.H.A. Lokin, 'The End of an Epoch: Epilegomena to a Century of Interpolation Criticism', in *Collatio Iuris Romani, Etudes dédiées à Hans Ankum*, Amsterdam 1995, 261-274.

the family estate until which degree it is valid.) Even in most of the oldest printed editions we find that without further explanation the word *quotum* has been replaced by *quartum* because the publishers thought this corresponded with the content of the Novel.¹⁵ When however the Greek text of Novel 159 first appeared in print in Haloander's incomplete edition of 1531 the text read: ὥστε τὰς ὑποκαταστάσεις μέχρι ἐνὸς βαθμοῦ ἴστασθαι. (About the validity of the substitutions until the first degree.) In order to make the Greek title correspond to the previously emended title of the Authenticum, in 1543 Andreas Alciatus (1492-1550) added a bold conjecture: he emended the word ἐνὸς into ἐν δ'. In turn, Amerbach omitted the word ἐν as being corrupt Greek, so that the text then read: ὥστε τὰς ὑποκαταστάσεις μέχρι δ' βαθμοῦ ἴστασθαι.

Cujas (1522-1590) later made it clear in one of his *Observationes* dating from 1559 that he thought all these groundless conjectures interfered with the text.¹⁶ In the printed texts of the Authenticum, *in libris excusis*, he said, he found the word *quartum*, but all the manuscripts, *omnes scripti*, had *quotum*. He also disagreed with Alciatus's conjecture. In the first place, he said, the Greeks do not speak like that: *sic Graeci non loquuntur, μέχρι ἐν δ'*; it should be *μέχρι δ'*; but what was more important was that the heading was not about fideicommissa but about substitutions which were in force only to the first degree: only children could act as substitute heirs.

So much for the way the text was passed down; now for something about the legal implications of the proceedings with specific regard to the prohibition against alienation. The opinion given by the Tübingen faculty was based on that of Jacobus de Belvisio or Belviso (...??-1338),¹⁷ teacher of the great Bartolus de Saxoferrato (1314-1357). Belvisio was of the opinion that a prohibition against alienation remained in force forever, *in infinitum*, so that descendants could claim the property to which the prohibition pertained at any time. He got rid of the obstacle of Novel 159 by arguing that it had been issued only for one concrete case and was therefore not universally valid. So many lawyers had followed Belvisio's opinion that according to the Tübingen advisers it had become a *communis opinio*, and a universally shared opinion carried a great deal of weight. In the Middle Ages the maxim prevailed that *in iudicando et consulendo ab opinione communi minime recedendum est*. However, Bonifacius Amerbach disagreed

¹⁵ See H.E. Troje, *Graeca leguntur*, Cologne 1971, 212 ff.

¹⁶ *Observationes* 4.38 in Jacobi Cuiacii, *Operum tomus tertius*, Naples, 1758, 111.

¹⁷ Jacobus de Belvisio, *Aurea lectura summam Autenticorum consuetudines et usus Feudorum elucidans*. Lyon 1511, facsimile reprint Bologna, 1971, 72 recto.

fundamentally with the scholars of Tübingen. According to him, *communis opinio* is established not by counting opinions but by weighing them. The primacy of the sources was the most important factor, and Novel 159, as a legally valid source, was not merely an opinion, but the law. The interpretations of later legal scholars had to yield to it. Amerbach's answer to the objection that the Novel was valid only for one specific case was that this was incorrect, firstly because Justinian himself had stated at the end of the Novel that in future all cases were to be decided in this way, and secondly because the rule was included in the heading of the Novel, and usually the gist of the provision is stated in the heading. This was why Amerbach was so keen to show that the Greek heading also stated that fideicommissa were valid only to the fourth degree, ὥστε τὰς ὑποκαταστάσεις μέχρι δ' βαθμοῦ ἴστασθαι. As we have seen, he had the wrong end of the stick, but he sincerely believed he should follow Alciatus's emended conjecture. In short, Novel 159 was universally valid, which meant that the prohibition against alienation was in force only to the fourth degree and no further. This was very unfortunate for the Württembergers' case, since René de Chalon, who had made the testamentary disposition in favour of William of Orange, was related to the testator in the fifth degree or actually in the sixth degree. But the legal scholars of Tübingen were not to be caught out that easily. In their written opinion they had also taken into account the unfavourable fact that Novel 159 was universally valid and that the prohibition against alienation was therefore in force until the fourth generation. In case the validity of the prohibition did in fact prove to be limited, they had another argument up their sleeves, namely, from which generation were the degrees to be counted? Should counting begin with the testator, or with his heir, or perhaps only with the heir's heir, who after all was the first to bear the burden of the fideicommissum? The opinion of Charles Dumoulin is interesting in this connection, even though he was not an adviser in the case against Orange but in other, similar proceedings initiated by the Württembergers on account of the same will. Thus Dumoulin also had to deal with Novel 159. In the opinion he prepared for Georg von Württemberg against the bishop, chapter and church of Basel with regard to the restoration of the Seigneurie de Porrentruy, which Württemberg claimed had been alienated in violation of the testamentary prohibition, he discussed the provision in some detail.¹⁸ He described Haloander's heading, μέχρι ἐνός βαθμοῦ, as a *rhapsodia corrupta cuiusdam scholastici*. Let us stick to the text of the Authenticum, he said;

¹⁸ Carolus Molinaeus, *Opera omnia*, III, 1612, cons. xxvi, no. 13.

after all, it is authentic and was partly issued by Justinian himself, *partim etiam Latinae ab ipso Justiniano editae*. Let us stick to the *literae vulgatae et communi et in usum receptae*. And what does the Latin text say? *Usque ad quartum gradum*. Well, if we start to count, then Georgius is of the third degree, *tertius ab illa*, so that he is even ‘within’ that degree – *infra tertium gradum* – because he is the third from the person designated by the testator, who was the first for whom the prohibition was in force, and she herself was not to be counted, *quae non debet computari*. Here Dumoulin refers to the same Jacobus de Belvisio and to Alexander de Imola who had argued along the same lines. In their recommendation against Orange, the Tübingen faculty proposed the same method of counting, thus regarding René de Chalon as the fourth generation to violate the prohibition against alienation, which was thus still in force. Amerbach also disagreed with them on this point and, citing the antecessor Julianus, showed that counting had to begin with the original heir.¹⁹ Julianus was a professor, *antecessor*, in Justinian’s time and thus also a primary source. A Latin course by him about the Novels has been passed down. This course, the so called Epitome, was written around 556.²⁰ When Julianus gets to Novel 159 – in his Epitome const. 117 – he says explicitly in cap. 499: *primo herede inter quatuor successiones reputato*.²¹

One last argument put forward by Dumoulin in several of his opinions was an appeal to the unwritten law of Burgundy – *consuetudo regionis* – which prohibited the alienation of properties which served to uphold the honour and dignity of the family – *ad decus et conservationem antiquae nobilitatis et dignitatis familiae spectabant*. Dumoulin was a great expert on customary law and had written an authoritative commentary on the Coutume de Paris in 1539. In the case against Orange the Tübingen faculty also referred to customary law, but Amerbach dismissed this without further ado because the case involved testamentary succession, which was judged according to Roman testamentary succession law. Wills were unknown in Germanic law and, as we have seen, the will was received in the northern regions through canon law, according to the rules of Roman law.

¹⁹ Troje op.cit. 215 says that Amerbach did not use the Epitome Juliani, but Hagemann op.cit. 202 note 901 shows that Amerbach did in fact have a copy of the Epitome.

²⁰ See H.J. Scheltema, *Opera minora*, Groningen 2004, 91 ff. Novel 159 is the most recent Novel mentioned by Julianus. Wolfgang Kaiser, *Die Epitome Juliani, Beiträge zum römischen Recht in frühen Mittelalter und zum byzantinischen Rechtsunterricht*, Frankfurt am Main, 2004, 179, suggests that the composition of the Epitome may have begun a little earlier, but certainly after 548.

²¹ Iuliani Epitome Latina Novellarum Iustiniani, instruxit Gustavus Haenel, Lipsiae 1873, 164.

Finally the outcome. In the *Württemberg v. Orange* case Novel 159 proved to be a severe obstacle to the Württembergers' chances and after proceedings which lasted over a century their claim was in fact dismissed.²² On 14 April 1666 the Parlement of Dôle gave its final verdict, in favour of Orange. The verdict is written in German, and, as always, no grounds are given.²³ Therefore we do not know on what grounds the Parlement of Dôle's decision was based. Probably they were not very different from Amerbach's arguments.

The Württembergers still did not give up. In 1683 they asked for a review of the 1666 verdict, but this request was also dismissed in 1685.²⁴ One hundred and fifty years after the proceedings had begun, the House of Orange, in the person of Stadtholder William III, finally emerged as winner. However, it may be clear that my reason for speaking about this fascinating case is not so much its outcome as to show the historical significance of Roman and in particular of Byzantine law.

²² The proceedings are located in the Landesarchiv Baden-Württemberg, in the Hauptstaatsarchiv of Stuttgart. They can be found under no. A266, Büschel 764-784.

²³ Hauptstaatsarchiv Stuttgart A266 Bü 777. It is only since the French revolution that grounds have been given for verdicts.

²⁴ Hauptstaatsarchiv Stuttgart A3 Bü 140 and A 266 Bü 782-784. and A 266 Bü 782-784.

