

AN INAPPROPRIATE USE OF NOVELS?

On the date of the Digest translation of Dorotheus

'Lady Peabury was in the morning room reading a novel; early training gave a guilty spice to this recreation, for she had been brought up to believe that to read a novel before luncheon was one of the gravest sins it was possible for a gentlewoman to commit.'

E. Waugh, 'An Englishman's Home' in: *Work suspended and other stories* (1943; Penguin ed. 1982, p. 50).

A Justinianic Novel can be used in many ways. One can of course read its contents, but that would require some knowledge of the Greek language and since 1964 knowledge of the French language, too, in order to find one's way through these Novels with the help of Van der Wal's *Manuale Novellarum Justiniani*.¹ One can also just use its date and that is precisely what I intend to do in this little essay.

But why should anyone who is not out of his senses only use the dates of these Novels, the reader may ask. The answer may be briefly stated as follows: the Justinianic Novels can be and are being used to date the writings of the Justinianic lawyers. If, for instance, one of these lawyers quotes a Novel or makes use of its contents, one can be sure that he wrote after the promulgation of that particular Novel; in this way one finds a *terminus post quem*. If on the contrary this writer fails to mention a Novel that bears on his subject, one can be sure that he wrote before the promulgation of that particular Novel; this gives a *terminus ante quem*.

The method of using Justinianic Novels to date Justinianic lawyers was of course used by Heimbach in his *Prolegomena Basilicorum*.² He gathered passages in which these lawyers did or did not use certain Novels, from his edition of the Basilica,³ and thereby dated most of these lawyers more or less accurately. The Groningen edition of the Basilica⁴ however has made it necessary to revise and supplement these dates. Already in 1956, when only four volumes of the now completed eighteen-volume edition had been published,⁵ Scheltema made some of these revisions and supplements, partly from those volumes of his edition then

1 Groningen, 1964.

2 Leipzig, 1870.

3 C.G.E. Heimbach, with the help of his brother G.E. Heimbach, t. I-V, Leipzig 1833-1850; Supplementum by Zachariae, Leipzig 1846.

4 H.J. Scheltema, D. Holwerda, N. van der Wal (edd.), 1953 ff.

5 A I and II; B I and II.

already published and partly from his manuscript readings.⁶ It is therefore surprising not to see this article mentioned anywhere.⁷ Could the fact that the article is written in Dutch have anything to do with this?; in that case Scheltema's assessment of the literature on Byzantine law since Zachariae and Heimbach would have gone unnoticed:⁸ 'Op de latere litteratuur behoeft men geen acht te slaan; voorzover zij niet aan Zachariae en Heimbach ontleend is (waarbij veel misverstanden zijn binnengeslopen) bezitten haar resultaten weinig waarde. Dit geldt in het bijzonder voor H. Peters, *Die oströmische Digestenkommentare und die Entstehung der Digeste* [read: *Digesten*] (Berichte k. säch. Ges. d. W. 1913), een geschrift, dat grooten indruk heeft gemaakt en groote verwarring heeft gezaaid. De geschriften van Pringsheim op dit gebied berusten niet op eigen onderzoek, terwijl ik moet bekennen de chaotische en met geleerdheid overladen verhandelingen van A. Berger gemeenlijk niet te kunnen begrijpen.' Or is it perhaps the magazine, or collection,⁹ in which one would not expect to find this article? In any case the article deserves more attention than it has received until now.

Scheltema showed that Dorotheus, Thalelaeus, Stephanus, Kobidas and Cyrillus lived and wrote earlier than was generally believed. Whereas it was formerly supposed that these lawyers could be dated over a period ranging from 534 to 600, he proved that all of them lived (Dorotheus, Thalelaeus) or worked (Stephanus, Kobidas, Cyrillus) before (or in) 545; he also solved some chronological problems concerning the two Anonymi.

I would like to concentrate on the dates concerning Dorotheus and try to give a little more exact determination of the time when he wrote his Greek translation of Justinian's Digest.

Dorotheus was a so-called *antecessor*, that is a professor, who taught law in the famous law-school of Berytus, a town - if there is anything left of it - which is now called Beyrouth.¹⁰ He was summoned by Justinian to Constantinople in order to take part in the making of the Digest, the Institutes and the second Code. That means that he was in the Empire's capital from 530 until 534. After that he will probably have taken up teaching again in Berytus. He will then have written his translation of the Digest, several fragments of which have come down to us in the scholia on the Basilica.¹¹

6 'Over de tijdsbepaling der vroeg-Byzantijsche juristen', in: *Tijdschrift voor geschiedenis* 74 (1956), p. 277-284, an article that was published for the second time in: *Historische Avonden. Vierde bundel geschiedkundige opstellen, uitgegeven door het Historisch Genootschap te Groningen ter gelegenheid van zijn vijfenzeventigjarig bestaan*, Groningen 1961, p. 5-12.

7 See e.g. Pieler, *Rechtsliteratur*, cf. *infra* n. 23.

8 *Supra* n. 6: p. 278 n. 2 or p. 6 n. 2.

9 See n. 6 *supra*.

10 Const. *Omnem*, 2; *Tanta*/Δέδωκεν, 9; *Imperatoriam*, 3; *Cordi*, 2.

11 Cf. Heimbach, *Prolegomena*, p. 36-47.

An important factor in determining Dorotheus and his translation is another antecessor by the name of Stephanus. Stephanus held readings on the Digest, parts of which have also been preserved in the Basilica-scholia. In this Digest-commentary he quotes Dorotheus on a number of places and calls him ὁ μακαρίτης, that is one lately dead. Therefore Dorotheus must have died shortly before Stephanus wrote his Digest-commentary. So in order to find a *terminus ante quem* for Dorotheus' death it is necessary to try to date Stephanus' Digest-commentary.

Heimbach believed that Stephanus quoted Novel 134, which dates from the year 556.¹² But as Scheltema pointed out¹³ the quotation of Novel 134 is not in a Stephanus-scholion.¹⁴ First of all the scholion is not inscribed by the name of Stephanus - and was not so even in Heimbach's edition¹⁵ - and furthermore the scholion contains a quotation from the Basilica,¹⁶ so it cannot be dated earlier than the ninth century and is certainly not from a sixth-century law professor. So it turned out that the latest Novel Stephanus quotes is not from 556, but from 542.¹⁷ Stephanus therefore wrote his commentary shortly after 542 and the same year 542 can be taken as a *terminus ante quem* for Dorotheus' death.

This however seemed to be inconsistent with the view of Heimbach that the year 542 should be a *terminus post quem* for Dorotheus' Digest translation and death.¹⁸ For Heimbach thought that Dorotheus also quoted Novel 115 from 542.¹⁹ Again Scheltema proved Heimbach to be wrong, because the quotation of Novel 115 turned out to be not in the Dorotheus-scholion,²⁰ but in a separate scholion.²¹ This separate scholion containing the quotation of Novel 115 can in no way be attributed to Dorotheus, because it contains the clause 'τοῦ παρόντος κεφαλαίου', which points at the Basilica-text concerned, and it is therefore a 'new' scholion, not older than the ninth century.²² Scheltema therefore concluded that, while 542 was not a *terminus post quem* for Dorotheus' death²³ and he did not know of any other *terminus post quem*, the death of Dorotheus could well be placed earlier than 542:

12 *Prolegomena*, p. 14.

13 p. 280 and 8 (supra n. 6).

14 BS 509/5-6, 18.

15 I, 772 sch. Τυχὸν (read: Τουτέστῳ).

16 BS 509/19-20.

17 Nov. 115 in BS 2295/23-24; 2301/19; 2308/17, 25; 2328/26-27.

18 *Prolegomena*, p. 12, 36.

19 III, 773 sch. Ἐδὼ μαωομένῳ.

20 BS 2274/2-22.

21 BS 2275/5-7.

22 Scheltema, supra n. 6, p. 278 and 6.

23 Still Pieler, *Rechtsliteratur*, gives 542 as a *terminus post quem* (p. 422 and n. 155), as does e.g. Jolowicz-Nicholas, *Historical Introduction to the Study of Roman Law*, Cambridge 1972, p. 501 n. 8.

one just had to give Dorotheus enough time after the promulgation of the Digest (December 533) to make his Digest translation.

I believe that the date of the Digest translation of Dorotheus can even be determined a little more precisely. It seems possible to find a *terminus post quem* as well as a *terminus ante quem* with the help of two Novels.

The *terminus post quem* for Dorotheus' Digest translation can be found in his version of D. 24, 3, 56:

Si quis sic stipuletur a marito: 'si quo casu Titia tibi nupta esse desierit, dotem dabis'? hac generali commemoratione et ab hostibus capta ea committetur stipulatio vel etiam si deportata fuerit vel ancilla effecta ...

Here the husband of Titia has promised by way of *stipulatio* to someone, probably the father of Titia, to return the *dos* in case his marriage with Titia should end. It is then said that the promise takes effect for instance when Titia is taken prisoner of war or when she is deported or made a slave by way of punishment. In these cases Titia loses her Roman citizenship; one could speak of civil death. And since a legitimate Roman marriage can only exist between two Roman citizens, the marriage is ended by Titia losing her citizenship. Therefore the *dos* has to be given back by Titia's husband, according to his *stipulatio*.

In the text of this fragment the words '*vel ancilla effecta*' were expunged by the corrector of the *Codex Florentinus*. It is generally supposed that this deletion took place because of Novel 22 c. 8, which determined that slavery was not any longer an effect of the conviction of a criminal to work in the mines.²⁴ The words '*vel ancilla effecta*' therefore could be deleted, because the punishment of slavery as a way of ending a marriage did not exist anymore.²⁵ This correction of the *Codex Florentinus* would thus have taken place after Novel 22 was enacted in 536.²⁶

Dorotheus too has left out the clause '*vel ancilla effecta*' in his translation:

BS 1932-20

'Εάν τις ούτως έπερωτήση τον άνδρα 'εί καθ' οϊουδήποτε κάσσον Τιτία παύσεται εΐναι γαμετή σου, δώσεις μοι την προΐκα;' δια τούτων τών γενικών ρημάτων, εάν αιχμάλωτος γένηται ή γυνή ή δεπορτατευθῆ, κομμιτευεται τῷ έπερωτήσαντι ή εκστιπουλάτου ...

24 Cf. Mommsen, *Römisches Strafrecht*, Leipzig 1899 (repr. Darmstadt 1955) p. 947 n. 2; Van der Wal, *Manuale*, nr 375.

25 One could however still become a slave, if one, being free, sold oneself *pretii participandi causa* as a slave. Cf. Kaser, *Römisches Privatrecht (RP)* II, § 210 I 4 (p. 131).

26 Cf. Mommsen, ed. maior I, 728, 3 and *praefatio*, LX; Schulz, *Einführung in das Studium der Digesten*, Tübingen 1916, p. 5; another, less probable, explanation is given by Huschke, *Zur Pandektenkritik*, Leipzig 1895, p. 10 (particularly n. 6) ('dass der Besitzer einer Handschrift etwas ihm Auffälliges unterstrich oder ausstrich, was der Abschreiber dann als Ungültigkeitszeichen verstand'; 'So erkläre ich mir das Fehlen ... der Worte *vel ancilla effecta* ...').

It is therefore probable that Dorotheus also, just like the corrector of the *Codex Florentinus*, took account of the rule of Novel 22 and so he must have written his translation after 536.

A *terminus ante quem* is suggested by Novel 78, which Dorotheus does not take into account. Novel 78 makes an end to the granting of the *ius aureorum anulorum* governed by the *leges* of D. 40, 10: *de iure aureorum anulorum*.²⁷ Thus since 539 the *leges* of D. 40, 10 were no longer in effect. Their Greek versions - if any - therefore were omitted from the Basilica, but we do know that Dorotheus all the same translated them. The *Codex Vindobonensis iur. gr.* 2 (3) gives us the Greek translations of these Digest-texts by Dorotheus.²⁸ Under the inscription 'Ἐκ τοῦ μ'. βιβλίου τῶν διγέστων Δωροθέου ἀντικλήνωρος we find the translations of three *leges* from D. 40, 10: 3, 4 and 5. Would Dorotheus have known Novel 78 he would not have bothered to translate these texts which were made superfluous.²⁹

Dorotheus thus must have written his Digest translation between 536 (Novel 22) and 539 (Novel 78). He will have died before 542, probably even before 539.

After all this I feel I must apologize to professor Van der Wal, he who has spent most of his life reading Novels - even before luncheon, and not just Justinianic Novels -, that I have made such an inappropriate use of these Novels by not reading them, but only referring to their dates. But as he will understand I do not want to confess that I much rather read his *Manuale Novellarum* - or any novel for that matter - than the Justinianic Novels on which he spent so much of his very learned time.

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27 Henceforth every freedman automatically receives the *ius aurei anuli* and it is therefore no longer granted on request. Cf. Kaser, *RP II* § 212, IV; Van der Wal, *Manuale*, nr 400.

28 Heimbach, *Prolegomena*, p. 43.

29 Pace D. Simon, 'Vom Leid der Textkritik', in: *RJ* 1 (1982) p. 23-26 (esp. 25).

