

## PARALIPOMENON

*Acta agimus, quod vetamur vetere proverbio*

(Cic. *Amic.* 22)

Looking through the second edition of my *Manuale Novellarum*, I came upon a footnote<sup>1</sup> explaining very summarily the new rules introduced by the emperor Justinian concerning the law of succession applying to the goods of the *curiales*. Rereading my text after twenty-two years, I felt that the question, though it is certainly not of world-shattering interest, might still be interesting enough to deserve more than a few lines in a footnote.

The law introducing those new rules was Justinian's Nov. 38, entitled Περὶ βουλευτῶν. The βουλευταί, called *curiales* or *decuriones* in Latin, were the members of the city council (*curia*, βουλή) in the cities of the later Roman empire. They were chosen from the freeborn Roman citizens among the city's inhabitants possessing some property; they could not refuse their appointment, which in early times was still considered an honourable position. At that time, the *curiales* liked spending money for building or restoring public buildings in their city or for organizing games and festivities. Later on, also because they were responsible for the local taxes and had to supply out of their own pocket the sums they could not extort from the taxpayers, what had been a freely chosen and honourable position gradually became a hereditary condition and a heavy and nearly intolerable burden<sup>2</sup> that most people tried to evade by all possible means – sometimes even by becoming a monk and entering into a monastery.

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1 N. van der Wal, *Manuale Novellarum Justiniani. Aperçu systématique du contenu des Nouvelles de Justinien*, Groningen 1998<sup>2</sup>, 57 note 28.

2 The change in their position is perhaps illustrated most clearly by measures like that of Nov. 6,7: priests who leave their post in the church and start living a dissipated life become *curiales* if they have some substance and are incorporated in the lowest ranks of the staff of the provincial governor if they are poor; so what originally had been the entry into a class of honoured citizens was now used as a form of punishment. An other symptom of this development was the introduction by Justinian, in the same Nov. 38, of a new way of legitimizing children born out of wedlock: besides the traditional *legitimatio per subsequens matrimonium*, he introduced the *legitimatio per oblationem curiae*. Clearly, he hoped to lessen the shortage of fit candidates by inviting decurions to offer the sons of their concubines to the *curia*. The emperor describes himself (Nov. 38 praef. (SK 247/11)) what he

In the meantime, the rule had been established that when a *curialis* died without leaving legitimate male children (who would have automatically become *curiales* themselves and would have inherited at least a fourth part of his goods), the city council could claim that fourth part of his inheritance. Later on, Justinian introduced the same rule for the case when a man belonging to this class of persons became a priest or a bishop; he would be liberated from the decurionate, but he had to transfer a fourth of his fortune to the *curia* of his city. In the year 536, Justinian applied a radical change to this rule by his already mentioned Nov. 38: the portion of the goods of a *curialis* that had to come to the *curia* was in any case augmented from one fourth to three quarters of his inheritance.

So, at first sight, the situation seems perfectly clear: in all laws dating from before the 17th of April 536, viz. the constitutions of the *Codex* title 10,35 *Quando et quibus debetur quarta pars ex bonis decurionum et de modo distributionis*<sup>3</sup> *eorum* and Justinian's Nov. 6 (c. 1§1), the legal portion of the *curia* is one fourth and in all later Novels issued after Nov. 38 it is three quarters of the decurion's inheritance. However, someone checking these data and coming upon the text of Nov. 123,1§1 might be led into confusion, if he did not feel too sure of his knowledge of Byzantine legal Greek, by the totally misleading remarks in the critical apparatus<sup>4</sup> of the edition, where the editor (Schöll or Kroll?) declares the passage οὐτω μέντοι ἵνα ἐλευθερωθεῖς τῆς βουλῆς τὸ τέταρτον μέρος τῆς ἰδίας περιουσίας ἐαυτῷ παρακατάσχη to be corrupt; it should say, in his opinion, '¼' instead of '¼'; this was also the opinion of Zachariä von Lingenthal, who in his edition<sup>5</sup> of the Novels printed the correction ¾ (τὸ ἕμισυ τέταρτον) in his text. Even more bizarre is the next remark<sup>6</sup> in the apparatus criticus of Schöll (or Kroll): according to him, ἕμισυ τέταρτον does not mean 'three quarters', but 'three and a half'. This is of course complete nonsense. Apparently, Kroll (or Schöll?) did not know how classical and later Greeks wrote compound fractions, viz. by splitting them up into simple fractions. In this way, what we write as ¾ becomes ½ (+) ¼, or in Greek ἕμισυ τέταρτον and, to quote one other example chosen at random, 'five twelfths' turn into 'one third plus one twelfth', so τρίτον δωδέκατον.

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calls the most impious practice of many decurions who did not marry the woman they lived with in order to keep their children free from the burden of the decurionate.

3 This alludes to the fact (mentioned also in other texts) that the inheritance of a *curialis* went partly to the *curia* of his city and partly to the imperial fisc. The details of this distribution were probably found in the constitutions C. 10,35,4 and 5, both Greek laws of which the text has got lost.

4 SK 594 app. crit. ad l. 34 νόμον.

5 C.E. Zachariae a Lingenthal, [ed.], *Imp. Iustiniani PP. A. Novellae quae vocantur sive Constitutiones quae extra Codicem supersunt ordine chronologico digestae*, Vol. II, Lipsiae 1881, 295.

6 SK 594 app. crit. ad l. 34 νόμον: '(...). Itaque pro τέταρτον v. 32 Zachariae ἕμισυ τέταρτον correxit: quo non dodrans (¾) significatur, sed tres partes et dimidia (3½); (...)'.

However, when I took up this problem for the second time, it turned out to be more complicated than it had seemed twenty-two years ago. First of all, the notes in the apparatus criticus on Nov. 123,1§1 in the edition Schöll/Kroll are (or seem to me) not very clear: one does not see why the editors preferred a text saying ‘¼’ to the words τὸ τέταρτον μέρος of the manuscript tradition. Zachariae, who printed this version (τὸ ἥμισυ τέταρτον μέρος) in his text, gave a clearer explanation, but at the time of writing my *Manuale Novellarum*, I did not<sup>7</sup> consult his edition of the Novels. The reason why Zachariae printed the correction τὸ ἥμισυ τέταρτον μέρος in Nov. 123,1§1 turns out to be the fact that (according to him) Athanasius in his summary of the Novels used such a text. At the time he wrote this, the only available edition of Athanasius’ work was the one published by Heimbach<sup>8</sup> in 1838 and based on one of the two manuscripts (cod. Paris. gr. 1381); it presents a summary of Nov. 123,1§1 that corresponds<sup>9</sup> to τὸ τέταρτον μέρος in the full text of the Novel: so Zachariae, though he does not say so, must have taken his reference from the other manuscript of Athanasius (cod. Athon. Μεγίστης Λαύρας Θ 65), which he had discovered himself a few years after Heimbach had published his edition.

Since the appearance of a new (and far more reliable) edition<sup>10</sup> of Athanasius it has become easy to trace and compare all testimonies of the disputed passage in Nov. 123,1§1. The complete Greek text reads τὸ τέταρτον μέρος in both manuscripts of the *Collectio CLXVIII Novellarum* and in the *Collectio LXXXVII capitulorum*; the *Authenticum* translates *quartam partem*. Among the summarized versions, Julianus<sup>11</sup> and Theodorus<sup>12</sup> have read the same text. As we have seen already, the case of Athanasius is rather more complicated: the relevant part of his summary (Athanas. 1,2,5) is presented by Simon and Troianos (p. 22/19-20 of their edition) as τὸ δ’ μέρος τῆς ἰδίας ὑποστάσεως παρέχων τῇ

7 One assumes (wrongly, as it turns out in this case) that the more recent work of Schöll and Kroll contains everything important of the older edition; besides, the lastnamed edition has one great drawback that explains why it is practically never used: Zachariae did not print the Novels in the order and with the numbers of the *Collectio CLXVIII Novellarum*, but put them in chronological order and numbered them accordingly, which seems logical, but makes the use of the older literature (and the later one, which went on using the old numbers) very difficult.

8 G.E. Heimbach, [ed.], *Ἀνέκδοτα*. Tomus I: Athanasii scholastici Emiseni de novellis constitutionibus imperatorum Iustiniani Iustinique commentarium ..., Lipsiae 1838 (repr. Aalen 1969), 1-184.

9 Heimbach, *Ἀνέκδοτα*, I (note 8 above), 4: Ὁ βουλευτῆς ἐπὶ τῆς μονάσας χειροτονεῖσθω ἐπίσκοπος καὶ τῆς τύχης ἐλευθεροῦσθω, τὸ ἥμισυ τέταρτον μέρος τῆς ἰδίας ὑποστάσεως παρέχων τῇ βουλῇ καὶ τῷ δημοσίῳ.

10 D. Simon/Sp. Troianos, [ed.], *Das Novellensyntagma des Athanasios von Emesa*, [Forschungen zur byzantinischen Rechtsgeschichte, Band 16], Frankfurt/M. 1989.

11 Julian. Const. 115 c. 428 (2): (...), sic tamen ut liberatus curia quartam portionem sui patrimonii sibi retineat, (...). Instead of the usual summary, Julian presents Nov. 123 in a nearly literal translation.

12 TheodBrev. 123 §4: Βουλευτῆς ἢ ταξιώτης ἐλευθεροῦται τῆς ἰδίας τύχης, δηλονότι ἐὰν τὰς θ’ οὐγκίας (= ¼) τῆς ἰδίας περιουσίας ἔδωκε τῇ βουλῇ ἢ τῷ δημοσίῳ.

βουλῆ καὶ τῷ δημοσίῳ. This (τὸ τέταρτον μέρος) is the reading of the Athonensis; the Parisian manuscript has here τὸ ἥμισυ τέταρτον μέρος, and this same reading is presented by the *Collectio tripartita* and the codex<sup>13</sup> Monacensis gr. 380. The same passage occurs twice in the ‘paratitla’ of Athanasius’ work: in those of the eighth title (8 P 2,2) the two manuscripts show the same discrepancy; in 18 P 1,1 they both have τὸ ἥμισυ τέταρτον μέρος.

So we see that nearly all witnesses to the relevant passage in Nov. 123,1§1 either present or are based on a text mentioning τὸ τέταρτον μέρος as the portion a *curialis* ordained bishop can retain of his worldly goods. The only exception is the Athos manuscript of Athanasius, which in two of the three places where it contains the summary of this passage (the summary itself and two references to it in the paratitla) reads τὸ τέταρτον μέρος τῆς ἰδίας ὑποστάσεως παρέχων τῇ βουλῆ καὶ τῷ δημοσίῳ, whereas the third one has τὸ ἥμισυ τέταρτον μέρος. It is difficult to see why Zachariä changed the text of Nov. 123 in his edition; he may have been moved by the version of Athanasius in the manuscript he had discovered himself on Mount Athos, which he judged (quite rightly) to be better than the Parisian manuscript. Still, he must have known (if only by having arranged the Novels chronologically in his edition) that the rules of succession for the goods of council members had been changed by Nov. 38 already ten years before Nov. 123. Schöll (or Kroll) did not change the text of the Novel, but he showed in his critical notes that he thought Zachariä’s correction justified. Subsequently, Simon and Troianos printed in their edition of Athanasius a text corresponding to the corrected version of Nov. 123 given by Zachariä, not so much, I suppose, because of the authority of the two most recent editions of the Novels, but because of the two complete texts of Athanasius still existing, the Athos manuscript is indeed the better one. Nevertheless, I believe they made the wrong choice. The difference in quality between Paris. gr. 1381 and Athon. Μεγίστης Λαύρας Θ 65 is certainly not so great that the last named manuscript must have the right text in every place where they differ. Besides, Athanasius was a sharp-sighted lawyer who carefully copied (and certainly understood) the Latin subscriptions of the Novels containing their dates: he must have known that Nov. 38 had raised the legal portion of the *curia* from  $\frac{1}{4}$  to  $\frac{3}{4}$  ten years before Nov. 123 was issued.

One of the causes of all this confusion may have been the fact that, while the Novel itself states that the person freed from the decurionate can keep the fourth part of his goods for himself, while the rest goes to the *curia*, the summaries written by Athanasius and Theodorus put it the other way round and say that the *curia* gets three quarters and the

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13 The third part of the *Collectio tripartita* contains the first three titles of Athanasius’ *Syntagma Novellarum*; the codex Monacensis is one of its manuscripts, but here this third part has been copied directly from a text of Athanasius.

newly ordained bishop the rest. This may have induced the copyist of the Athos manuscript (or of his exemplar) to change the text. However that may be, Kroll (or Schöll) and Zachariä seem to have believed that on May the 1<sup>st</sup> 546 (the date of Nov. 123), the legal portion of the *curia* was still one fourth, and they tried to ‘correct’ the text accordingly. In reality, it had been increased to three quarters already ten years earlier by Nov. 38, and it is this law that is quoted in the passage immediately following in Nov. 123, 1§1 (SK 594/33-595/1): (... *ἐαυτῷ παρακατάσχη*), τῶν ὑπολοίπων αὐτοῦ πραγμάτων κατὰ τὸν ἡμέτερον νόμον τῇ βουλῇ καὶ τῷ δημοσίῳ ἐκδικουμένων. The editor’s attempts to find an other law to fit this reference are based on his mistaken interpretation of the foregoing text. To recapitulate: the legal portion of the estate of a decurion due to the city council was until April 536 a fourth part; in that year, Nov. 38 raised it to three quarters, and all laws issued after Nov. 38 take this into account.

Those who might still think that great classical scholars like Karl Eduard Zachariä von Lingenthal, Rudolf Schöll and Wilhelm Kroll could not have made such a mistake, should take a look into the historian Procopius’ *Secret History*. As is well known, Procopius tries to prove in this book that Justinian was not only a thoroughly bad emperor (and Theodora an equally bad empress), but not even a human being; he is described as a demon in human shape possessed by the Devil. One of Justinian’s measures that, according to Procopius, was totally mistaken and highly damaging to the public finances, was precisely his law increasing the portion of the *curia* from  $\frac{1}{4}$  to  $\frac{3}{4}$  in Nov. 38. Throughout the *Secret History*, the emperor is described as a man who squandered the State’s money in all directions; he is supposed to have got through all the money carefully saved by the late emperor Anastasius even before he became emperor himself, during the reign of his uncle Justin. After that, according to Procopius, he extorted money from the senators and the rich citizens in all possible ways. One of those crooked and immoral means of squeezing money out of the subjects was precisely, in Procopius’ opinion, the measure of Nov. 38.

Procopius mentions<sup>14</sup> this law in his description of a series of cases where the emperor, according to his interpretation of the facts, had appropriated the inheritances of rich men by putting aside the lawful heirs; he is not very clear about the way how Justinian is supposed to have done this. The case in which he mentions Nov. 38 concerned the daughter of a man called Anatolius, president of the city council of Ascalon; she had married a certain Mamilianus, who belonged to a rich and distinguished family living in Caesarea and was a member of that town’s city council. Two things spring to the eye. Firstly, it seems that even at this late time, council members of the larger and prosperous cities (such as Ascalon and Caesarea in Palestine) could still support the burden of the

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14 Procop. *Arc.* 29,19.

decurionate and live in style and comfortably. Secondly, Procopius had been born in Caesarea and was a citizen of the town; so he probably knew these people and may have heard their story out of their own mouths. Nevertheless, one may be sure he coloured it in a way to paint the emperor as black as possible.

The daughter of Anatolius was his only child; so according to the old rules, as there were no male heirs, a fourth part of her father's inheritance should have gone to the city council and she would have inherited the rest. But, so says Procopius, the emperor had issued shortly before a law turning things upside down: from now on, the female heir got only a fourth part and the rest went to the fisc and to the city council. And yet, adds Procopius, quite overcome by his indignation, never since the creation of man has either the fisc or the emperor ever had the right to participate in the money of city councillors. This is of course arrant nonsense; at the time when Procopius wrote his Secret History, the legal portion due to the fisc and the *curia* had been current law since more than a century; the oldest known law mentioning it is C. 10,35,1 issued in 428.

Anyway, though Procopius seems to have written his Secret History around the year 550, with his description of the 'turning upside down' of the rules concerning the right of succession of the city councils he cannot have meant any other law than Justinian's Nov. 38 of the year 536. So I think we may safely conclude that the passage οὕτω μέντοι ἵνα ἐλευθερωθεῖς τῆς βουλῆς τὸ τέταρτον μέρος τῆς ἰδίας περιουσίας ἑαυτῷ παρακατάσχη, τῶν ὑπολοίπων αὐτοῦ πραγμάτων κατὰ τὸν ἡμέτερον νόμον τῇ βουλῇ καὶ τῷ δημοσίῳ ἐκδικουμένων from Nov. 123,1§1 is perfectly authentic and the νόμος quoted here is indeed Nov. 38.