QUATRIÈME PARTIE

DROIT ROMAIN

Towards Additions to LENEL's *Palingenesia Iuris Civilis*

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This small paper (1) does not deserve the place of honour at the beginning of the 47th session of the *SIHDA*, which its excellent organizer, my dear friend Peter BIRKS, gave it. It is — as you will see — more the announcement of a new research project than a real lecture.

This paper will be divided into two parts. There will be a short general part in which I will stress the fundamental importance of LENEL's *Palingenesia* for the study of classical Roman law. It will be followed by a somewhat longer special part containing three paragraphs in which I will give examples of corrections which could be made on LENEL's work.

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1) This paper contains the text of the first lecture given during the 47th session of the *Société Internationale 'Fernand De Visscher' pour l'Histoire des Droits de l'Antiquité* held in Oxford in September 1993. I maintain the colloquial style of the lecture and only added some notes.

I. The Fundamental Importance of LENEL's *Palingenesia* for the Study of Classical Roman Law

For the study of classical Roman law the theme of *Palingenesia* is a fundamental one. Every day we are trying to make textual reconstructions (2) of the texts of the classical Roman lawyers. An indispensable help for these reconstructions is — as every Romanist knows — Otto LENEL's *Palingenesia Iuris Civilis*, published in two volumes in Leipzig in 1889 (3). To all members of the Amsterdam *schola Johanniana* (4) I often say: "Always check the studied fragment with LENEL's *Palingenesia* (5)". It gives us, for the large majority of the texts, an exact idea of the context of a fragment of a Roman jurist. This context very often provides us with the key to the interpretation of the text. I will give one example. When Eric POOL, Marjolijn VAN GESSEL and I studied the different meanings of the expression *rem in bonis alicuius esse / rem in bonis habere* (6),

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2) The title of the main theme of the congress was *Palingenesia* and its subtitle was "Textual Reconstruction".

3) Reprint Graz 1960.

4) I am convinced that the pupils of the *scholae Johannianae* in Barcelona and in Miskolc will hear from my friends Juan MIQUEL and János ZLINSZKY comparable words.

5) Also I add to that: "Always check the studied fragment with the text and the *scholia* of the *Basilika* and always study the Accursian Gloss and the *Casus* of Vivianus and Franciscus Accursii".

6) See H. ANKUM, M. VAN GESSEL-DE ROO and E. POOL, "Die verschiedenen Bedeutungen des Ausdrucks *in bonis alicuius esse / in bonis habere* im klassischen römischen Recht", in *SZ* 104 (1987), pp. 283-436; 105 (1988), pp. 334-435 and 107 (1990), pp. 155-215 and the *Quellenregister* of this study made by L.C. WINKEL, Amsterdam 1993.

we established that the palingenetical context frequently was decisive for the interpretation of a Digest text, examined as a source of classical law.

Many thousands of errors have been committed during our century by beginning — but also by advanced — romanists who wanted to make a reconstruction of a classical legal institution, because they omitted to consult LENEL's *Palingenesia*. I refrain from mentioning names, but I am convinced that all of you have found one way or another whole articles and parts of books in which the author used a text in relation to a legal institution of which the Roman jurist whose text was being studied himself never had thought.

As to the attendants of this congress, which has *Palingenesia* for its central theme, I need not stress the really capital importance of LENEL's *Palingenesia* for the reconstruction of classical Roman law as well as for the understanding of the reasoning and of the — often not explicitated — argumentation of the jurist.

There is however another danger that threatens the Romanist who uses as a matter of routine — as he ought to do — LENEL's *magnum opus*. The danger I have in mind is that of over-estimation, of a canonisation of the results of LENEL's work. LENEL's *Palingenesia* is a brilliant and outstanding work, as is his *Edictum Perpetuum*, but it contains mistakes and there are several cases, perhaps even numerous cases, in which another placing of a fragment is at least arguable and perhaps better. There are cases, in which LENEL proposes to attribute a text to

another lawyer (e.g. a fragment of Ulpian to Paul), where the attribution to another *liber* in the work of the same jurist would have been better. There are also cases in which the opposite holds true, i.e. where the *liber* is correct, but the name of the jurist ought to be corrected though LENEL does not propose so. Already CUIACIUS, who came nearer to the classical Roman lawyers than most of the romanists who worked since the last century, sometimes put forward another palingenetical attribution than LENEL did three centuries later. Since the end of the nineteenth century many scholars of Roman law, studying the texts with the historical and textcritical methods, suggested corrections on LENEL's *Palingenesia*, often with indifferent success because of LENEL's immense authority. Basing myself on an experience of many years I can state that it is my impression, that sometimes LENEL's solution still is to be considered as the best, but that in other cases it seems that the correction proposed by another romanist is justified or at least debatable. I have the intention to make a study of the suggestions and amendments made in this field since 1890 until now. I would like to bring together all the palingenetical propositions submitted during more than a century or at least those of them which can be found without a disproportional amount of work. I would like to discuss and evaluate them. It is of course impossible for one person, even if he has experience in the field of the research of Roman law, to have an overview of the romanistic production of more than hundred years. Therefore I would like to ask your help. Any colleague who has published or wants to make a suggestion for a different allocation of a jurist's fragment or for a

correction concerning the attribution of a fragment to a certain jurist or the work or *liber* from which a fragment has been taken or who found such suggestions in modern romanistic publications, can count on my great gratitude, if he will send them to me.

If such a study with critical *addenda* to LENEL's *Palingenesia* will be published in due time, in addition to the papers of this congress which will be incorporated in the next volume of the *RIDA* and other romanistic reviews, I think our President who organized this congress in such a perfect way and thus gave such an important stimulus to palingenetic research in the field of Roman law, can be happy about the lasting results of the 47th congress of the *SIHDA*, here in Oxford.

II. Examples of points on which LENEL's *Palingenesia* should be corrected

To give you some appetite for this kind of research (7), I will now give three examples of palingenetic amendments suggested by myself, which will be examined in my promised study at the side of the numerous suggestions made by other scholars. My first example discussed in § 1 concerns a text by Callistratus,

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7) I mention as interesting examples of recent palingenetical studies: A. RODGER, "The Palingenesia of Paul's Commentary on the *actio pluviae arcendae*", in *SZ* 105 (1988), pp. 726-728 and J. GARCÍA CAMIÑAS, *Ensayo de reconstrucción del título IX del edicto perpetuo: 'De calumniatoribus'*, Santiago de Compostela, 1994, which contains on pp. 123-124 proposals for a new *palingenesia* of Ulpian's *liber* 10 *ad Edictum De calumniatoribus*.

D. 6.1.50. In § 2 a couple of texts by Paul and Tryphoninus, D. 19.1.7 and 8, will be examined; here we will have to go into the allocation of fragment 7 to the 32nd book of Paul's commentary on the Edict. Finally in § 3, I would like to say some words about the last eight fragments of the tenth book of Papinian's *Quaestiones*, all systematized by LENEL under the heading *De iure dotium.*

§ 1. My first palingenetical suggestion is related to D. 6.1. 50, a text by Callistratus *l. secundo edicti monitorii*, incorporated by the compilers in the Digest title on the *rei vindicatio* (D. 6.1). This short text runs as follows:

> *Si ager ex emptionis causa ad aliquem pertineat, non recte hac actione agi poterit, antequam traditus sit ager tuncque possessio amissa sit.* 1. *Sed heres de eo quod hereditati obvenerit recte aget, etiamsi possessionem eius adhuc non habuerit.*
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> (If someone is entitled to a plot of land on the basis of a purchase, he will not be able to litigate according to the law with this action, before the possession of the land has been transferred to him and it has been lost by him thereafter. 1. The heir however will be able to bring an action (viz. the *hereditatis petitio*) to claim in accordance with the law what has fallen to the succession even if he did not yet acquire the possession of it).

LENEL (8) supposes that this text of Callistratus regards the *actio Publiciana.* This does not seem correct to me. Why should the jurist have restricted the quoted statement to an *ager* and why should the compilers have incorporated the text in title 6.1 (*De rei vindicatione*) and not in title 6.2 (*De Publiciana in rem actione*)? It is much more likely that this is a text which originally concerned the *actio in rem* related to the "ownership" of *fundi provinciales*, about which the compilers inserted several fragments in title 6.1 of the Digest. Further research will prove — as I see it — that LENEL put some of these fragments erroneously in relation with the *rei vindicatio.*

§ 2. My second palingenetical observation concerns the two well known texts D. 19.2.7 and D. 19.2.8 (9). In both texts the case is examined in which an *insula aliena* (an apartment house belonging to someone else) has been let out for hire by A to B for 50.000 sesterces and has been sublet out by B to Titius for 60.000 sesterces, whereas the real owner did not permit Titius to enter the apartment building. In the first text it is decided that Titius can claim from B the 60.000 sesterces which he had paid

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8) See *Palingenesia*, I, col. 96, nr. 68.

9) See recently on these texts: B. FRIER, *Landlords and Tenants in Imperial Rome*, Princeton 1980, pp. 78-82, G. CARDASCIA, "Sur une fonction de la sous-location en droit romain", in *Studi A. Biscardi*, II, Milano 1982, pp. 375-388 and I. REICHARD, *Die Frage des Drittschadensersatzes im klassischen römischen Recht*, Köln, usw. 1993, pp. 272-283. These three authors give also many previous works. The passages of FRIER, CARDASCIA and REICHARD will be mentioned hereafter merely by the names of the authors.

in advance and that B, who apparently had already paid the 50.000 sesterces to A, can claim from A the 60.000 he had to pay to Titius. In the second text Tryphoninus, who discusses the same case (10) and mentions exactly the same sums of money, comes to a comparable, though not identical result: B can claim from A (11) what he had to pay to Titius (12). A's duty to pay this sum is based by the jurist on the obligation of the *locator* to compensate for B's interest to enjoy the leasehold. B must therefore finally obtain the profit that he would have had, if the sublessee's use had not been disturbed (13).

As to the palingenetical context, for D. 19.2.8 there is no problem. It has been taken by the compilers from a part of the ninth book of Tryphoninus' *Disputationes*, in which this lawyer examines problems of *locatio conductio* (14). A palingenetical problem exists however as to the first fragment: D. 19.2.7. The manuscripts of the Digest and all modern editions have the following *inscriptio*: *Paulus libro trigesimo secundo ad edictum.* The 32nd book of Paul's commentary *ad edictum* contains

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10) The only difference is that in D. 19.2.7 the *conductor* B had already paid the rent of the apartment house to A, whereas in D. 19.2.8 he had still to pay it.

11) Of course A could deduct from this sum the *pensio* of 50.000 sesterces which B had promised but not yet paid to him.

12) This could be 60.000 sesterces or more. It is possible that the sublessee paid a sum of money for the temporary storage of his furniture. Then he could claim this sum together with the rent he had already paid to B.

13) An excellent exegesis of the Digest fragments 19.2.7 and 19.2.8 is given by REICHARD, pp. 272-283.

14) See LENEL, *Palingenesia*, II, col. 363, nr. 33.

passages on *societas* and on mandate (15). Problems of *locatio conductio*, to which fragment 7 is clearly dedicated, are discussed by Paul in the 34th book of his *libri ad edictum* (16). Ulpian examines questions related to *locatio conductio* in the 32nd book of his commentary on the Edict. LENEL therefore hesitantly proposed to change *Paulus* into *Ulpianus* as the jurist mentioned in the *inscriptio* (17). Several authoritative scholars followed him (18). This correction is however impossible. It is clear that Tryphoninus must have been acquainted with the case examined by the author of fragment 7, the numbers being totally identical. His *Disputationes* have been written in 211 and at the beginning of 212 A.D. (19). At that time Ulpian had not yet edited his commentary on the Edict (20), as KRELLER and CARDASCIA stressed in studies published in 1948 and 1982 (21). With this in mind, CARDASCIA, who unfortunately is no longer able to participate in our annual meetings, proposed to correct nothing and to keep thus the inscription as it stands: Paul in the 32nd

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15) Cf. LENEL, *Palingenesia*, I, cols. 1028-1033, nrs. 484-501.

16) See LENEL, *Palingenesia*, I, cols. 1037-1039, nrs. 517-521.

17) LENEL, *Palingenesia*, I, col. 1044, nr. 501, note 4 writes: "*Incertum, quo haec pertineant. Fortasse pro* Paulus *inscr.* Ulpianus".

18) See FRIER, p. 78 and the authors mentioned by CARDASCIA, p. 380, note 33.

19) See P. KRÜGER, *Geschichte der Quellen und Literatur des Römischen Rechts*[2], München und Leipzig 1912, p. 225.

20) Ulpian's commentary on the Edict has been published shortly after 212 A.D.; cf. KRÜGER (note19), p. 242.

21) Cf. H. KRELLER, "Kritische Digestenexegesen zur Frage des Drittschadensersatzes", in *SZ* 66 (1948), p. 77 and CARDASCIA, p. 382.

book *ad edictum*. According to our distinguished colleague from Paris fragment 7 belongs to the passage of the 32nd book in which Paul discusses problems concerning mandate. He supposes that A, the first *locator* of the apartment house, was a *procurator* of a principal to whom the building belonged and that the latter prohibited the sublessee to enter into the building. This suggestion has to be rejected on several grounds (22), the most essential of them being that the jurist obviously discusses the problem of the scope of the responsibility of the principal *locator* and not any problem related to the contract of mandate.

My own idea is the following: Paul wrote his commentary on the Edict at the beginning of the nineties of the second century A.D. (23). Tryphoninus, writing some twenty years later, certainly knew Paul's work. The text which became D. 19.2.7 is clearly related to a problem of the contract of lease. Paul dealt with problems regarding *locatio conductio* in the 34th book of his *libri ad edictum*. A mistake in the transcription of a Roman number (here XXXII in stead of XXXIV) can easily have been made, more easily than in the name of a jurist. I suggest therefore that the compilers took fragment 7 from the 34th book of Paul's

22) Another reason than the one mentioned in the text is that in Rome the exploitation of apartment houses was organized in this way that the owner leased the whole building out to a *conductor* who rented it and leased it in his turn to several *inquilini*. The (first) *conductor* had already a function comparable to that of a modern estate agent. Assuming a *procurator* alongside with the *conductor* does not make sense, as he has no function.

23) See KRÜGER (note 19), p. 230.

commentary on the Edict. To my joy, much later I found out, that this correction has already been put forward by CUIACIUS (24).

§ 3. To end this short paper I would like to say a few words about the palingenetical reconstruction of the second part of the tenth book of Papinian's *Quaestiones* (fragments nr. 178-185) (25). More details will be discussed later in the promised study. In book X of his *Quaestiones* Papinian starts by examining cases related to the contract of sale (*emptio venditio*) (26). Then he probably dealt with problems concerning *locatio conductio*, as all jurists did in works in which they followed the order of the Edict, but no fragments of that part of his *Quaestiones* has come to us. The Roman lawyers who not only in their commentaries on the Edict but also in casuistic works as *Quaestiones* and *Responsa* follow the order of the praetorian Edict, start, after having examined questions on *locatio conductio* (27), to discuss general problems of matrimonial law and matrimonial property law. In the case of Papinian we have eight fragments (28) which LENEL put together under the heading: "*De iure dotium*". A comparison of these fragments with the corresponding part of the *Digesta* of

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24) See CUIACIUS as quoted by CARDASCIA, p. 380, note 33.

25) Cf. LENEL, *Palingenesia*, I, cols. 833-834.

26) See *Palingenesia*, I, col. 832, nrs. 172-177.

27) LENEL recognizes in *Das Edictum Perpetuum*[3], Leipzig 1927, 112 (p. 301) that the existence of an *actio de aestimato* after the *formulae* of the *actiones locati* and *conducti* which he thought probable in the previous edition of *Das Edictum Perpetuum*, cannot be proved.

28) *Palingenesia*, I, cols. 833-834, nrs. 178-185.

Julian and of the *Libri ad edictum* by Gaius, Paul and Ulpian makes it possible to propose a slightly different and in my opinion better order of the fragments 178-184.

First of all we will have to eliminate from the tenth book of Papinian's *Quaestiones* the fragment nr. 185 (D. 46.1.48). It deals with a *mulier* who *frustra intercedit.* The topic examined in this text is the *senatusconsultum Velleianum.* Papinian discusses this senatusconsult in the ninth book of his *Quaestiones.* I do not hesitate for a moment to correct the *inscriptio* of D. 46.1.48 into *Papinianus l. IX Quaestionum.*

As to the remaining fragments some things are clear. The nrs. 182-184 concern the forbidden and therefore invalid donations between husband and wife (29). In their commentaries on the Edict and in other works that follow the Edict's order, all jurists write about the prohibition of donations between spouses just before they discuss the *actio rei uxoriae.* In fragment nr. 178 (D. 24.1.32.27) Papinian goes also into the problem of the invalidity or validity of a gift between persons who consider themselves as spouses, but who are not *uxor* and *maritus*, as they could not yet contract *iustae nuptiae*, *e.g.* because the girl had not yet reached the age of twelve years. Therefore the prohibition of gifts between husband and wife did not apply and the question arose whether the donation could be considered as a valid gift

29) See D. 24.1.7.8, D. 24.1.23 and D. 24.1.52. See on Pap. D. 24.1.52.1, my recent study "Donations in Contemplation of Death between Husband and Wife in Classical Roman Law", in *Index* 22 (1994), *Omaggio a Peter Stein*, pp. 649-650.

between *sponsus* and *sponsa*. If one considers as the main legal problem discussed in the text the question whether the prohibition of gifts between spouses had to be applied, the text would better be located in the neighbourhood of the fragments 182-184. One can however also consider as the main point examined by Papinian in D. 24.1.32.27 the invalidity of a "marriage" contracted with a girl who was still *impubes*. It is therefore possible that LENEL was right in locating this text as fragment 178 at the beginning of this part of the tenth book of Papinian's *Quaestiones* under a supposed heading *De nuptiis*. Other jurists too started the preliminary part on matrimonial and matrimonial property law which preceded the discussion of the *actio rei uxoriae* with an exposition of problems concerning the validity of marriage (30).

Just before the passage about the donation between husband and wife (nrs. 182-184 (31)) Papinian went in nr. 179 (D. 23.3. 5.12) into problems related to *constitutio dotis* and in nr. 180 (D. 23.3.68) into questions concerning *promissio dotis*, as the lawyers generally did on that place (32).

The text that remains, is nr. 181 (D. 13.1.17). At first sight it is not clear what a text about the *fur* who is *semper in mora* in the field of the *condictio furtiva* has to do in the context of matrimonial property law. One has to know that all jurists deal

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30) See *e.g.* Julian's *Digesta* (*Palingenesia*, I, nrs. 262-265) and Paul's commentary on the Edict (*Palingenesia*, I, nrs. 523-534).

31) Pap. D. 24.1.7.8, D. 24.1.23 and D. 24.1.52.

32) See *e.g.* Julian's *Digesta* (*Palingenesia*, I, nrs. 281-283) and Paul's commentary on the Edict (*Palingenesia*, I, nrs. 535-538).

rather extensively with problems of *mora debitoris* in the passages they dedicate to the *actio rei uxoriae* (33). We know from Ulpian, *Regulae*, 6,7, that *mora* of the husband in the restitution of the dowry after the dissolution of marriage is more important than it is for any other action. This explains why the lawyers made a large digression on the problem of *mora* in general when they dealt with the *actio rei uxoriae*. Ulpian writes in the mentioned text: "*Post divortium defuncta muliere heredi eius actio non aliter detur, quam si moram in dote mulieri reddenda maritus fecerit*". If the wife died after the divorce, the *actio rei uxoriae* was only given to her heir to demand the restitution of the dowry, if the husband was already in default. Here the possibility of bringing an action (the *actio rei uxoriae*) or of not bringing it, totally depends on the decision in the question whether the debtor (*viz.* the husband) was in default or not. This explains why a general discussion on the topic of *mora* was inserted in the commentary on the *actio rei uxoriae*. I consider it therefore as highly probable, that the *inscriptio* of D. 13.1.17 (nr. 181) contains an error and that the subject of *mora debitoris* was considered by Papinian in the context of the *actio rei uxoriae* in the XIth and not in the Xth book of his *Quaestiones*.

This may suffice to give you an idea of the contents of the projected "Additions to LENEL's *Palingenesia Iuris Civilis*".

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33) See *e.g.* Julian's *Digesta* (*Palingenesia*, I, nr. 28, D. 50.17.63), Paul's commentary on the Edict (*Palingenesia*, I, nrs. 546-550, D. 22.1.22, D. 22.1.24 pr., D. 45.1.49 pr., D. 22.1.24.1, D. 45.1.49.1-3, D. 22.1.24.2 and D. 24.3.26) and Ulpian's *libri ad edictum* (*Palingenesia*, II, nr. 967, D. 22.1.21 and D. 22.1.23).