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MULTIPLE FORCED HEIRS AND THE ACTION FOR UNDUTIFUL WILL IN ROMAN LAW: CLASSICAL AND BYZANTINE TEXTS

Abstract

The *querela inofficiosi testamenti* (action for undutiful will) did not permit the joinder of parties. When there were several forced heirs, each heir brought the action independently with the intention of obtaining the distributive share that would have been due according to intestate succession. Each plaintiff normally acted only for his own share. Whether the plaintiff could benefit from an inheritance increase if it was known that one or more co-heirs had repudiated their claim is unclear. The passages from the *Digest* seem to give conflicting answers and modern scholars suspect that there might have been *ius controversum* on the subject. Based on two Byzantine *scholia*, the author demonstrates that the jurists' diverging conclusions referred to different cases. In the end, the exegesis of the texts offers some reflections about the work of the Justinianic Compilers.

1. Introduction[1].

In classical Roman law, the testator's children, parents, brothers and sisters that did not receive from him in his Last Will and Testament (herein "will") at least one fourth of the share of inheritance due to them based on intestate succession (*quarta debitae portionis* [2]) would have been able to file the action for undutiful will (*querela inofficiosi testamenti*) against the testamentary heirs. With this action they would have been able to obtain the entire share of inheritance due to them *ab intestato*. We must clarify that these heirs, which we can call "forced heirs", or "compulsory heirs", or "heirs with legal rights"[3], would have been able to file *querela* to obtain the entire share of inheritance due **1**

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1 This is the text of the conference presented at the Centre for Legal History of the University of Edinburgh on May 8th 2015. The fundamental footnotes have been added. The author thanks very warmly his colleague Dr. Paul J. du Plessis for the invitation and all the participants at the conference for their very useful comments. English translations of the passages of the *Digest* are by Tom Kinsey, published in *The Digest of Justinian*, Latin Text edited by T. MOMMSEN with the aid of P. KRUEGER, English Translation edited by A. WATSON, I, Philadelphia 1985. English translations of the *Basilicorum scholia* are by the author of this article. A slightly different Spanish version of this paper has been published in the *Seminarios Complutenses de Derecho Romano* 28 (2015), 381-396, with the title *Querela inofficiosi testamenti con pluralidad de herederos forzosos (derecho romano y bizantino)*.

2 Hereafter we will always call the "fourth of the share of inheritance due to a person based on intestate succession" *quarta debitae portionis* (using a technical Roman expression attested for example in Ulp. 14 *ad ed.* D. 5.2.8.8, commented herafter; the *quarta debitae portionis* is also called *portio debita*).

3 These English expressions cannot be found in rules of law of common law systems, where "legal rights" out of a deceased person's estate do not exist (as opposed to civil law systems). The expression "forced heirs" is found in the *Louisiana Constitution* (1974), art. 10, § 5 (Amended by Acts 1995, No. 1321, §1): "*The legislature shall provide for the classification of descendants, of the first degree, twenty-three years of age or younger as forced heirs. The legislature may also classify as forced heirs descendants of any age who, because of mental incapacity or physical infirmity, are incapable of taking care of their persons or administering their estates. The amount of the forced portion reserved to heirs and the grounds for disinherison shall also be provided by law. Trusts may be authorized by law and the forced portion may be placed in trust*". The art. 1493 (Forced heirs; representation of forced heirs) of the *Louisiana Civil Code* (1825, 1870 and following revisions) provides: "*Forced heirs are descendants of the first degree who, at the time of the death of the decedent, are twenty-three years of age or younger or descendants of the first degree of any age who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent*". And art. 1494 (Forced heir entitled to legitime; exception) explicitly states: "*A forced heir may not be deprived of the portion of the*

to them *ab intestato* whether they were completely disinherited or alloted a part of the estate inferior to the *quarta debitae portionis* by the decedent's will.

Justinian intervened in this complex of rules in 528 (C. 3.28.30), introducing the so-called *actio ad implendam legitimam*. He decided that the forced heir that was not completely disinherited, but that had received less than the *quarta debitae portionis*, could have contested the will not to obtain the intestate share due to him *ab intestato*, but only to obtain that which was missing from the *portio legitima*; only the heir that did not receive anything could have acted, as in the past, by means of *querela inofficiosi testamenti* to obtain the entire share due *ab intestato* [4]. **2**

The classical *querela* could be conducted either according to the procedure of *legis actiones* (and thus before a praetor during the *in iure* phase and before the *centumviri* in the *apud iudicem* phase), or according to *cognitio extra ordinem*. **3**

Having received less than the *quarta debitae portionis* did not bring automatic victory to the forced heirs in the lawsuits. On the contrary, each forced heir had to demonstrate in contrast to the testamentary heir that there were no subsistent valid reasons for his disinheritance[5]. If he was not able to demonstrate such, he lost. **4**

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decedent's estate reserved to him by law, called the legitime , unless the decedent has just cause to disinherit him". Before the Amendment Acts of 1995, No. 1321, all the descendants of the first degree had legal rights on the inheritance of the deceased person, without age limits. For the rich debate on the rules on forced heirs in Louisiana, especially after the Amendment Acts of 1995, see K.J. MILLER, *The New Forced Heirship Law, Its Implementing Legislation, and Major Substantive Policy Changes of the Louisiana State Law Institute's Proposed Comprehensive Revision of the Successions and Donations Laws*, in *Tulane Law Review* 71 (1996), 223 ff.; K. SHAW SPAHT, *Forced Heirship Changes: The Regrettable "Revolution" Completed*, in *Louisiana Law Review* 57 (1996), 55 ff.; K. VENTURATOS LORIO, *Forced Heirship: The Citadel Has Fallen -- Or Has It?*, in *Louisiana Bar Journal* 44 (1996), 16 ff.; T. YORK, *Protecting Minor Children from Parental Disinheritance: A Proposal for Awarding a Compulsory Share of the Parental Estate*, in *Law Review of Michigan State University - Detroit College of Law* (1997), 861 ff.; K. VENTURATOS LORIO, *The Louisiana Civil Law Tradition: Archaic or Prophetic in the Twenty-First Century?*, in *Louisiana Law Review* 63 (2002), 1 ff.; R.J. SCALISE JR., *Rethinking the Doctrine of Nullity*, in *Louisiana Law Review* 74 (2014), 663 ff. On the Louisiana Civil Codes, A.N. YIANNOPOULOS, *The Civil Codes of Louisiana* (1999), in *Civil Law Commentaries* 1 (2008), 1 ff.; A. PARISE, *Private Law in Louisiana: An Account of Civil Codes, Heritage, and Law Reform*, in J.C. RIVERA (ed.), *The Scope and Structure of Civil Codes*, Dordrecht 2013, 429 ff. The expression "compulsory heirs" can be found in *The Civil Code of the Philippines* (Republic Act No. 386, June 18, 1949), whose art. 886 provides: "*Legitime is that part of the testator's property which he cannot dispose of because the law has reserved it for certain heirs who are, therefore, called compulsory heirs*". And art. 887 states: "*The following are compulsory heirs: (1) Legitimate children and descendants, with respect to their legitimate parents and ascendants; (2) In default of the foregoing, legitimate parents and ascendants, with respect to their legitimate children and descendants; (3) The widow or widower; (4) Acknowledged natural children, and natural children by legal fiction; (5) Other illegitimate children referred to in Article 287. Compulsory heirs mentioned in Nos. 3, 4, and 5 are not excluded by those in Nos. 1 and 2; neither do they exclude one another. In all cases of illegitimate children, their filiation must be duly proved. The father or mother of illegitimate children of the three classes mentioned, shall inherit from them in the manner and to the extent established by this Code*". See E. PINEDA, *Succession and Prescription*, Quezon City 2009, 236 ff. Finally, the expression "heirs with legal rights" can be taken from the *Succession (Scotland) Act 1964*, 36: "*«legal rights» means* jus relicti, jus relictae, *and legitim*". The legal rights in force, which apply whether the estate is testate or intestate, are those which can be claimed only from the moveable estate of a deceased person. These are *jus relicti* (the right of the surviving husband), or *jus relictae* (right of the surviving wife) and legitim or bairn's part (the right of the children). For recent discussions about reform of these legal rights, see SCOTTISH LAW COMMISSION PROMOTING LAW REFORM, *Report on Succession Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965*, Edinburgh 2009.

4 Iust. C. 3.28.30 pr. a. 528 (and 31, for oral testament) and *Inst.* 2.18.3. In Justinianic law and language the *quarta debitae portionis* has become the *portio legitima* (fundamental, on this topic, A. SANGUINETTI, *Dalla querela alla portio legitima. Aspetti della successione necessaria nell'epoca tardo imperiale e giustinianea*, Milano 1996). In Byzantine Greek texts it is called τὸ νόμιμον.

5 In Nov. 18, Justinian would have given a complete list of cases in which the disinheritance of forefathers and descendants would have been valid.

When there was only one forced heir that had successfully brought *querela* against the sole extraneous testamentary heir, the will was completely rescinded and the entire intestate succession was opened[6]. **5**

There were different consequences when there were numerous testamentary heirs and/or numerous heirs with legal rights as the joinder of parties did not exist in these proceedings[7]. **6**

For that reason, when there was hypothetically one forced heir against various extraneous testamentary heirs (A versus B ^{n}), the petitioner could have achieved rescission of the entire will (and the opening of the intestate succession to his advantage) only if he had sued and defeated in court each of the various testamentary heirs. Otherwise (if, for example, he had sued and defeated one or two of various testamentary heirs), there would have been competition between intestate and testamentary succession (partial rescission of will). **7**

Greater problems were created if there were various heirs with legal rights and only one extraneous testamentary heir (A ^{n} versus B) and the problems multiplied even more so if there were also numerous extraneous testamentary heirs (A ^{n} versus B ^{n}). **8**

We will consider here the case A ^{n} versus B. In this circumstance each disinherited co-heir with legal rights would have had to act in court for the share due to him. If he asked for more (*pluris petitio*), he would be met with disadvantageous consequences, which meant losing the case in the regime of *legis actiones* [8] and in the *cognitio* until Justinian, and gave rise to compensatory obligations in the *cognitio* in Justinianic time[9]. **9**

We can imagine, for example, that two *sui* sons, A^1 and A^2, had been disinherited and that the extraneous B was constituted testamentary heir. **10**

Since A^1 and A^2 had to act separately against B, it was possible that A^1 could win and A^2 could lose. In that case the will would have been rescinded only *pro parte* and there would have been competition of intestate and testamentary succession. **11**

Each forced heir had five years from the time of acceptance of inheritance by the testamentary heir[10] to file *querela*. **12**

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6 It goes without saying that because the outcome was that described, the testamentary heir had to be extraneous. If it had been the other way around, with a forced heir of equal status to the petitioner, the petitioner would have had to claim just half of the estate in court with the *actio*.

7 As we have maintained in L. GAGLIARDI, *La divisione in consilia del collegio centumvirale e la basilica Iulia*, in *BIDR* 101-102 (1998-1999, publ. 2005), 385 ff.

8 The rule is documented in Gai 4.53-60 for the formulary procedure and it seems convincing that it could be valid also for the *legis actiones*.

9 *Consult*. 5.7; Zeno C. 3.10.1 (with Bas. 7.6.21); *Inst*. 4.6.24, 4.13.10; Iust. C. 3.10.2. Analytic treatise of this topic in G. PROVERA, *La pluris petitio nel processo romano*, II, *La cognitio extra ordinem*, Torino 1960, 87 ff.; U. ZILLETTI, *Studi sul processo civile giustinianeo*, Milano 1965, 152 ff.; F. SITZIA, *Su una costituzione di Giustiniano in tema di sportulae*, in *BIDR* 75 (1972), 221 ff.; G. PROVERA, *Lezioni sul processo civile giustinianeo*, Torino 1989, 225 f.; G. LUCHETTI, *La legislazione imperiale nelle Istituzioni di Giustiniano*, Milano 1996, 523 f.

10 This was the opinion of Ulp. 14 *ad ed*. D. 5.2.8.17. For Mod. *l.s. de inoff. testam*. D. 5.2.9 the term began from the time of the decedent's death. Ulpian's opinion is adopted by Iust. C. 3.28.36.2 a. 531.

Given that each forced heir could act autonomously, if the two hypothetical forced heirs did not agree to act in court simultaneously, it was possible that one co-heir could file *querela* while the other waited to file it at a later time. 13

It is to be believed that in this case the first brother that acted, had to limit himself to act for his own share of intestate inheritance (*querela pro parte*), bearing in mind the existence of the co-heir that could have acted in turn at a later time within the prescription period. 14

2. The problem of the *ius adcrescendi* ("inheritance increase"): ancient texts and modern theories.

It could also happen that a co-heir with legal rights (in our example, one of two brothers) vouched not to intend to ever file *querela*. 15

We ask ourselves if, in that case, the brother that acted could benefit from the *ius adcrescendi* (inheritance increase), claiming the share of his brother that had repudiated the *querela*. The intention to repudiate the *querela* is called *animus repudiantis* in the sources[11]. (Conclusive evidence was equivalent to an expressed testament, like, for example, to accept a bequest inferior to the *quarta debitae portionis*.[12]) 16

The disinherited co-heir petitioner had to know if he benefited from the inheritance increase, because he would be met with the disadvantageous consequences of the *pluris petitio* in the event he erroneously believed he benefited from it and acted in court with such a pretense. 17

The classical sources seem to give contradictory answers to the query posed. 18

According to Pasquale Voci[13], and adhered to by various scholars[14], there would have been a *controversia* on the subject between Paul on one side and Papinian (whose opinion is adhered to by Ulpian) on the other. Paul's opinion would be attested by Paul. *l.s. de inoff. testam.* D. 5.2.23.2 (and would be confirmed by Paul. 2 *quaest.* D. 5.2.17 pr.); Papinian and Ulpian's opinion would instead be attested by Ulp. 14 *ad ed.* D. 5.2.8.8. 19

According to Voci, the *animus repudiantis* would have been relevant for Paul, but not for Papinian (and for Ulpian). In his opinion, Papinian (and Ulpian) thought that if only one of the two disinherited sons had legally brought on *querela*, in any case he would only have been able to obtain the share of inheritance due to him *ab intestato*, even if the other disinherited son had repudiated 20

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11 See Paul. 2 *quaest.* D. 5.2.17 pr. In Byzantine Greek, the expression used is ῥεπουδιατεύοντος ψυχή: see the *Schol.* 1 ad Bas. 39.1.14.

12 See Marcell. 3 *dig.* D. 5.2.10.1, Mod. *l.s. de praescr.* D. 5.2.12 pr., Tryph. 17 *disp.* D. 5.2.22 pr., Paul. 1 *d. i. fisci* D. 34.9.5 pr. (and cf. also Paul. *l.s. de septemvir. iud.* D. 5.2.31.3-4). For other cases of conclusive evidence, see Paul. *l.s. de inoff. testam.* D. 5.2.23.1-2, *eod.* 32 pr., *Schol.* 5 Scheltema (= 2 Hb.) ad Bas. 39.1.19.

13 P. VOCI, *Diritto ereditario romano*, II[2], *Parte speciale. Successione ab intestato. Successione testamentaria*, Milano 1963, 693 ff. Before him already E. RENIER, *Étude sur l'histoire de la querela inofficiosi en droit romain*, Liège 1942, 120.

14 M. MARRONE, *Querela inofficiosi testamenti*, Palermo 1962, 91, 106 ff.; L. DI LELLA, *Querela inofficiosi testamenti. Contributo allo studio della successione necessaria*, Napoli 1972, 197 ff.; R. FERCIA, *Querela inofficiosi testamenti e iudicatum: problemi e prospettive tra II e III secolo*, in *Diritto@Storia. Rivista Internazionale di Scienze Giuridiche e Tradizione Romana* 11 (2013), 3 f., nt. 18 ff.

the *actio*. In other words, the *querela* could not have been anything other than *pro parte*. It seems Paul, instead, would have acknowledged the right to inheritance increase.

Other authors have held that all the classical jurists did admit the inheritance increase if a co-heir had repudiated the *querela* and that contrasts, that appear among the jurists, depend on Justinianic interpolations[15]. **21**

3. A different solution to the problem of inheritance increase and a new interpretation of the classical texts.

We intend here to offer a different interpretation. We too believe that Paul acknowledged the inheritance increase in the event a co-heir with legal rights repudiated the *querela*, but we do not share the notion that the other two jurists denied it. **22**

If one reads Ulpian's passage in which the right to inheritance increase is denied, one can note that it is not said that the brother that did not file *querela* had repudiated it[16]. We must interpret the passage in the sense that he did not file the lawsuit without repudiating it, and that he might have been waiting to possibly sue in the future. **23**

But there is more. This interpretation, which could only be speculative, indeed seems to find confirmation in two Byzantine *scholia* relative to the two *Basilica* passages corresponding to the cited *Digest* fragments. **24**

In the cases that we will consider, we are dealing with *scholia antiqua*, or *scholia* extrapolated from works of sixth-century Byzantine jurists, making it possible they might have commented on original works of the ancient *prudentes* from which the *Digest* fragments were taken. In our cases, we are dealing with reliable *scholia* that, following Heimbach[17], we can presume come from the Ἔνδιξ of Stephanos. **25**

4. Paul. *l.s . de inoff. testam*. D. 5.2.23.2 and a relevant Byzantine text.

First, let us read Paul. *l.s . de inoff. testam*. D. 5.2.23.2: **26**

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15 G. LA PIRA, *La successione ereditaria intestata e contro il testamento in diritto romano*, Firenze 1930, 453-458; J. RIBAS -ALBA, *Una pretendida controversia entre Papiniano-Ulpiano y Paulo: en torno a D.5.2.19 (Paulo 2 quaest .) y una hypótesis sobre la legítima*, in *Iura* 39 (1988), 75 ff.

16 This had in fact been observed in 1873 by Charles PARMENTIER, *Droit romain . De la querela inofficiosi testamenti . Droit français . De la réserve des ascendants*, thèse pour le doctorat, Paris 1873, 83, but his observation has not been taken into consideration by more recent authors.

17 C.G.E. HEIMBACH, *Manuale Basilicorum*, in ID., *Basilicorum Libri LX*, VI, *Prolegomena et Manuale Basilicorum continens* , Lipsiae 1870, 217 ff., part. 233.

Si duo sint filii exheredati et ambo de inofficioso testamento egerunt et unus postea constituit non agere , pars eius alteri adcrescit . idemque erit , et si tempore exclusus sit.	If two sons have been disinherited and both have brought an action for undutiful will and one later has decided not to proceed, his share is added to that of the other. It will be the same even if he has been barred because of a time limit.

This fragment considered two cases. **27**

The first was that of two brothers disinherited by their father. Both had begun *querela*, but one of the two had abandoned it (he had therefore repudiated it). The brother that continued the action could enforce the right to inheritance increase during the trial[18]. **28**

In the second case, one co-heir acted while the prescription period had already expired for the other. Even in this case there was inheritance increase[19]. It is interesting to consider how it is possible that the prescription period had expired only for one of the co-heirs and not for both. **29**

One *scholion* to Bas. 39.1.19, the Schol. 5 Scheltema[20] (= 2 Hb.) furnishes interesting information. I report the text, dividing it in two segments: **30**

Α - Προβαίνει καὶ τοῦτον εἰπεῖν τὸν θεματισμόν, ὅτι δύο παίδων ὄντων ἐξνερεδάτων οὐδέτερος αὐτῶν ἐκίνησε πενταετίας ἐντός·ἀλλ' ὁ μὲν ῥαθυμήσας, ὁ δὲ ῥεïpublícae caũsa ἢ καθ' ἑτέραν περίστασιν ἀπολιμπανόμενος, εἰ καὶ παρῆλθεν ἡ πενταετία κινεῖ· ἐx magna γὰρ et iusta caũsa καὶ μετὰ πενταετίαν ἡ δεϊνοφικίοσο κινεῖται.	A - He proceeds to describe also this case in which neither of the two disinherited brothers had brought the action in five years; but one because he did not want to do it, and the other because he was absent *reipublicae causa* or for some other reason. And even though the five years had passed, he sues in court; *ex magna et iusta causa*, indeed, the *actio de inofficioso* is exercised even after the fifth year.

18 Cf. also U. ZILLETTI, *Studi*, cit., 157.

19 The same solution, about inheritance increase, can be found in the other quoted passage by Paul, 2 *quaest.* D. 5.2.17 pr., which here it is not necessary to examinate.

20 *BS* 2325-20.

B - Τοῦτο δὲ σημείωσαι, ὅτι μόνον τότε ὁ ἐξνερεδάτος παῖς πάρτεμ ποιεῖ, ὅτε ἐφησυχάζει μέν, δύναται δέ, εἰ θελήσει, κινεῖν, οὐ μὴν ἔνθα ἰδικῶς ἀπετάξατο τῇ μέμψει ἢ ἐτελεύτησεν ἢ ἀπεκλείσθη τῷ χρόνῳ.	B - Observe that the disinherited son really only has to be considered when and namely he omits to bring about legal action – even if he can, if he wants – and certainly not when he has expressly renounced the action, or died, or was barred by the prescription.

This *scholion* relates to the second of the two cases in the passage by Paul D. 5.2.23.2 and explains how it is possible that the right to action might be barred for one of the two co-heirs with legal rights and not for the other whilst the prescription period was the same for both. **31**

It seems to belong to the *scholia antiqua* group, as can be gathered from the fact that it adds supplemental information to that inferable from the passage from the *Digest*, and precisely credits Paul ("He – i.e.: Paul – proceeds to describe also this case"), at least in segment A. **32**

The case was reconstructed like this: neither of the two disinherited sons had acted within the five years. However one of the two did not act by choice, and the other because he had been absent *reipublicae causa*. In this case, the second forced heir had the right to be reinstated in terms of action, even though the five-year prescription period had already passed, and he benefited from the inheritance increase. **33**

The *scholion* then closes with segment B, which contains a very significant normative recap. **34**

The author of the *scholion* wrote that, ultimately, in any case in which there were two disinherited children, one "counted" (πάρτεμ ποιεῖν is the expression used in Greek) with regard to the other that filed *querela*, if the first still had the possibility to file a lawsuit on his own in the future. "To count" means that he must be "considered," and thus there could not be an inheritance increase. Instead, this would not have happened if the first brother were no longer able to act, either because he had expressly renounced the action, or perhaps he had died, or maybe because the prescription period had expired. In that case he did not "count," and could therefore be excluded, meaning the inheritance increase could take place. **35**

We do not know if the content of segment B was also, like the content of segment A, in the original jurist's text, or if it was added by the author of the *scholion*. **36**

If the first hypothesis is true, it may be deduced that Paul's text said the inheritance increase had a place only if the *querela* had been renounced and not the other way around. **37**

5. Ulp. 14 *ad ed*. D. 5.2.8.8 and a relevant Byzantine text.

Now we will introduce the reading of Ulp. 14 *ad ed.* D. 5.2.8.8, dividing it into three segments: **38**

I - Quoniam autem quarta debitae portionis sufficit ad excludendam querellam ,	I – Since a quarter of the share due is enough to prevent a complaint,

II - videndum erit an exheredatus partem faciat qui non queritur : ut puta sumus duo filii exheredati . et utique faciet , ut Papinianus respondit , et si dicam inofficiosum , non totam hereditatem debeo , sed dimidiam petere .	II - we shall have to consider whether a disinherited person who does not complain counts, for example, if two sons have been disinherited. In fact, he certainly will count, as Papinian said in a reply; and if I bring an allegation of undutifulness, I should claim not the whole inheritance, but only half of it.
III - proinde si sint ex duobus filiis nepotes , ex uno plures , tres puta, ex uno unus : unicum sescuncia , unum ex illis semuncia querella excludit.	III – Accordingly, if there are grandchildren by two sons, several by one, let us say three, but only one from the other, a gift of an eighth prevents the only child from bringing a complaint and a gift of one twenty-fourth any one of the others.

The first segment comes from a principle: the forced heir that had received the *quarta debitae portionis* could not file *querela inofficiosi testamenti*. This is clear, we have no doubt about this. **39**

After the expression of this general rule, we would expect that the fragment would focus on a case surrounding the question of whether or not a certain subject had received the *quarta debitae portionis* and whether or not he could file *querela*. **40**

Surprisingly, however, the second segment considered a hypothesis that was totally independent from the principle: that is, that there were two sons, that we will call "Primo" and "Secondo", *totally disinherited* by their *pater*, and one testamentary heir[21]. Since the brother Secondo did not proceed with the *querela*, it was questioned whether or not Primo benefited from the inheritance increase. Papinian answered that Primo had to consider his brother, Secondo, who *partem facebat*, and did not benefit from the inheritance increase. **41**

In the end, the third and last segment considered that the testator's two sons had predeceased him and one son left one child and the other had left three children. It was asked what might be the minimum share of the inheritable estate (or *quarta debitae portionis*) that each of the four grandchildren would have had to receive per testament from the forebearer in order to exclude the action for undutiful will. The third segment connects well with the first. But the second does not. **42**

So, this passage poses two problems for us. **43**

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21 One might recognize a relationship between the first two segments if one believes that Secondo received the *quarta debitae portionis* (one eighth) and Primo asked if he could consider his brother as having disavowed his inheritance, and for that reason he would be able to hence deprive him of his share. However, believing that Secondo had repudiated for having accepted the *quarta debitae portionis* would be unreasonable and would have created a series of problems for Secondo, which the text does not suggest (he would have been excluded from his father's estate without being able to defend himself). It is impossible that Primo had received an eighth of the estate as, in that case, he would have had to, if anything, file (for the Justinianic law) the *actio ad implendam legitimam* and not the action for undutiful will, which is a matter of the fragment. I further develop some observations on this point later in the text.

The first problem is that it appears to give a solution in opposition to that of Paul on the subject of inheritance increase. In other words, it seems to validate Voci's theory on the jurisprudential *controversia*. **44**

Nevertheless we must note that it is never mentioned in this passage that the brother Secondo had repudiated the *querela*. One can therefore believe that this is the reason for which Primo had limited himself in court to claiming only his share of the inheritance. **45**

The second problem is that the second segment of the passage does not appear to be even minimally related to the first, while the third is. It also has some problems in grammar; the subjects change. So, it is clear that the hand of the Compilers has brought at least some changes. But which ones? **46**

We hold it to be true that the *scholion* 18 Scheltema[22] (= 16 Hb.) to Bas. 39.1.8[23] evidently preserves the segment of what ought to be the richest original Ulpianic passage while, on the one hand, allowing us to confirm the solution to the first problem posed from the latin passage that we have just now touched on, while, on the other hand, offering the solution to the second problem on a silver platter. **47**

Let us report the text of the *scholion*, dividing it in six segments: **48**

A - Ἐπειδὴ φθάσαντες εἴπομεν τὸ νόμιμον τῷ παιδὶ καταλιμπανόμενον ἀποκλείειν τοῦτον τῆς μέμψεως, ἄξιον ἐντεῦθεν ζητῆσαί τε καὶ μαθεῖν, εἰ ἄρα ὁ ἐξνεπεδάτος παῖς ἐφησυχάζων πάρτεμ ποιεῖ τῷ ἀδελφῷ.	A - After it is said above that the reserved share of the estate [...] (τὸ νόμιμον) left to a son excludes him from the *querela*, it is consequently opportune to examine and understand if the disinherited son, that cannot file *querela*, must be considered by his brother.

22 *BS* 2308-30.

23 On this *scholion* see also P. PESCANI, *Le Palingenesiae e gli antichi prudentes*, in *Studi in onore di Cesare Sanfilippo*, IV, Milano 1983, 581 ff., part. 590 f.

B - Τί δὲ τοῦτο ἔστι, μάθε σαφέστερον. Δύο τις ἔχων παῖδας ἐξωτικὸν μὲν ἐνεστήσατο κληρονόμον, ἐξνερεδάτους δὲ τοὺς παῖδας πεποίηκε, **καὶ θατέρῳ μὲν τῶν παίδων τὸ η΄. τῆς οἰκείας περιουσίας καταλέλοιπε μέρος, τῷ δὲ ἑτέρῳ τῶν παίδων οὐδέν**. Ἀλλ' ὁ μὲν παῖς, ᾧ μηδὲν καταλέλοιπεν ὁ πατήρ, ἐφησύχασεν, οὐ ῥεπουδιατεύων μέντοι τὴν μέμψιν· βούλεται δὲ ὁ ἕτερος τῶν παίδων ὁ τὸ η΄. μέρος ἔχων παρὰ γνώμην τοῦ τεστάτορος ἕτερον η΄. ἔχειν λέγων, ὅτι ὁ ἐξνερεδάτος μου ἀδελφὸς οἷα δὴ γεγονὼς ἐξνερεδάτος καὶ ἐφησυχάζων τετελευτηκέναι δοκεῖ, καὶ μόνος εἰμὶ τοῦ κατοιχομένου παῖς. Μόνον δέ με ὄντα δίκαιόν ἐστι, φησί, τὸ νόμιμον ἔχειν ποστημόριον.	B - What this might be, you learn more clearly. A fellow, that had two sons, constituted an extraneous heir and disinherited his sons, **leaving one son an eighth of his estate and the other nothing**. The son that was left nothing by his father kept quiet without, however, repudiating the *querela*. Rather the other son, that had received his eighth of the estate, against the will of the testator wants another eighth of the estate too, affirming: «my disinherited brother, given that he was disinherited and stays silent, appears dead, so I prove to be the decedent's only son.» And adds: « it's right that I have the reserved share of the estate that is due to me considering the fact that I am the only existing son.»
C - Ταῦτα λέγοντος αὐτοῦ καὶ δικαιολογουμένου φησὶν ὁ Παππιανὸς πάρτεμ ποιεῖν πἐκείνῳ τὸν ἐφησυχάζοντα, μὴ ῥεπουδιατεύοντος μέντοι ψυχῇ ἀδελφόν, τουτέστι μέρος ἔχειν σὺν ἐκείνῳ δοκεῖν, καὶ μὴ νομίζεσθαι μόνον εἶναι τὸν νῦν ἐπιφυόμενον παῖδα μηδὲ ὀφείλειν τέλειον κομίζεσθαι τὸ νόμιμον ποστημόριον·	C - In the matter of he who says such and affirms having this right, Papinian confirms that he must consider the brother that stays silent if he does not have *animus repudiantis*: that is to say, in other words, (Papinian confirms) that (the brother) appears to have a share with him (= other than him), and it is not possible to maintain that only that son exists, who has until now come forth, nor may he claim the entire reserved share of the estate;

D - pártem δὲ αὐτὸν ποιεῖν τῷ ἀδελφῷ **τοσοῦτον, ὅτι ἔνθα μηδὲν αὐτῷ κατὰ γνώμην τοῦ τεστάτορος καταλέλειπται,** καὶ ἁρμόττει δεϊνοφφικίοσο ἐπὶ καταλύσει τῆς διαθήκης, ἐφησυχάζει δὲ θάτερος τούτων, κινῶν ὁ ἕτερος οὐ πᾶσαν, ἀλλὰ κατὰ μέρος καταλύσει τὴν διαθήκην.	D – and (Papinian confirms again) that he (*i.e.* the brother who remains silent) must be considered by his brother, **so that if nothing has been left to the latter** (i.e. the brother that intends to act in court) for will of the testator and he is due the *querela de inofficioso* to contest the validity of the testament, if one of these two remains silent, the other one that acts may rescind the testament, not in its entirety but in part.
E - Συνελόντα τοίνυν εἰπεῖν ὁ ἐξνερεδάτος παῖς κἂν ἐφησυχάζῃ, μὴ ῥεπουδιατεύοντος μέντοι ψυχῇ, πάρτεμ δοκεῖ ποιεῖν ἐκείνοις, οἷς ἅμα αὐτῷ τὸ τῆς ἀναπληρώσεως ἁρμόττει δίκαιον ἢ ἐπὶ καταλύσει τῆς διαθήκης ἡ μέμψις. Ἀνάγνωθι τὸ ιζ΄. διγ. τοῦ παρόντος τιτ.	E - Simply put, the disinherited son, while silent, nevertheless without *animus repudiantis*, must be considered by those who, together with him, are due the right to either reinstate the reserved share of the estate or file *querela* to rescind the testament. See *lex* 17 of this Section.

F - Ταῦτα μὲν οὖν εἰ παῖδας ἔχων ἐξνερεδάτους ὁ τεστάτωρ ἐποίησεν αὐτοὺς κατὰ τὴν ἰδίαν διαθήκην. Τί δέ, ὅτι ἀπὸ δύο προτελευτησάντων παίδων ἔχων ἐγγόνους, ἀπὸ μὲν τοῦ ἑνὸς ἕνα καὶ μόνον, ἀπὸ δὲ τοῦ ἑτέρου δύο ἢ καὶ τρεῖς, βούλεται αὐτοὺς ἀποκλεῖσαι τῆς μέμψεως; Πόσον ἄρα τῆς αὐτοῦ περιουσίας τούτοις καταλιμπάνειν μέρος ὀφείλει; Τοῦτο δὲ ἡ ἐξ ἀδιαθέτου κανονίζει σοι κλῆσις. Εἰπὲ γάρ μοι, πῶς ἤμελλον οὗτοι κληρονομεῖν ἐξ ἀδιαθέτου καλούμενοι δηλονότι instiprés, τουτέστι κατὰ τὰς ῥίζας. Καὶ ὁ μὲν εἷς ἔγγονος, ὃς ἐξ ἑνὸς ἐτέχθη υἱοῦ, ἓξ ἐλάμβανεν οὐγκίας, οἱ δὲ ἐκ τοῦ ἑτέρου τεχθέντες, ὅσοι δ' ἂν εἶεν, τὰς ἑτέρας ἕξ. 'In<sti>près γάρ, ὡς εἶπον, κληρονομοῦσιν οἱ ἐκ διαφόρων παίδων τεχθέντες ἔγγονοι. Οὐκοῦν τῷ μὲν ἑνὶ ἐγγόνῳ μίαν ἥμισυ καταλιμπάνων ὁ πάππος οὐγκίαν, τοῖς δὲ ἄλλοις τρισὶν οὖσιν ἀπὸ ἡμιουγκίου (τοῦτο γάρ ἐστιν αὐτοῖς τῶν ἐξ ἀδιαθέτου τὸ δ΄.), τὴν οἰκείαν ἀσφαλίζεται διαθήκην.	F - What has been said holds for the case that the testator who has children and has dinsiherited them in his will. What can be said, instead, if, having grandchildren from the two predeceased sons – only one grandchild from one son; two or even three from the other son – the testator wants to exclude them from the *querela*? What share of his estate must he leave them? This is clarified by the laws on intestate succession. Tell me effectively in which way it was forseen that these subjects would be heirs in intestate succession: certainly *per stirpes*, or representation. And (so) the grandchild born from one son received six twelfths, while the grandchildren born from the other son the remaining six. Indeed, as I said, the grandchildren born from different sons inherit *per stirpes*. Consequently, if the grandfather left the first grandchild an eighth and the other three grandchildren a twenty-fourth (which would be, indeed, a fourth of what they would be due *ab intestato*), he would render the will valid.

Segment A also begins with the principle that receiving the *quarta debitae portionis* (*i.e.* – in Justinianic law – the reserved share of the estate, τὸ νόμιμον) blocks one from being able to file the action for undutiful will. **49**

But one ought to note: after this was said, segment B describes a case that has disappeared in the *Digest*. **50**

The case was this. A *paterfamilias* had constituted a heir who was an extraneous to the family, disinheriting his two sons, Primo and Secondo, and leaving (perhaps with *donatio mortis causa* or with bequest) an eighth of his estate, that is the equivalent of his *quarta debitae portionis*, to Primo (as the words written in bold in section B demonstrate). **51**

Primo had petitioned while Secondo had not, without however developing – the *scholion* specifies – *animus repudiantis* (οὐ ῥεπουδιατεύων μέντοι τὴν μέμψιν: see the underlined words of section B). **52**

The argument that Primo had presented to the court was that since Secondo had not acted, it **53**
was as if he did not exist in nature and therefore should not have to be considered. Hence, Primo asserted in court that it was not true that he was due only an eighth of the estate (or half of a fourth), but he sustained that he was due a fourth of the entire estate (claiming Secondo's eighth too). One must incidentally observe that the action that Primo brought, which is referred to in the *scholion*, was not the classical *querela inofficiosi testamenti* (to which it is to be believed it was actually referred to in Ulpian's original text), but rather the Justinianic *actio ad implendam legitimam*. An update of the classical action therefore intervened in time, updating it in the corresponding Byzantine law. But this particularity does not prevent the comprehension of what was the original content of the Ulpianic text.

It is well seen how it might be possible to put the examined case in relation with the underlying **54**
principle, that receipt of the *quarta debitae portionis* excluded possibility to bring the action for undutiful will: the relationship exists in the fact that Primo had not been totally disinherited by his father, but he had received an eighth of the estate. If that eighth of the estate had been for him the *quarta debitae portionis*, he would not have been able to file any petition to challenge the will's validity. But Primo claimed that his brother, Secondo, *partem non facebat*, and therefore believed to be able to file rightly the *actio ad implendam legitimam* to recognize his right to a fourth of the inheritable estate (two eighths).

The jurist's solution is reached in segment C. The *scholion* attributes Papinian with the response **55**
that, in a case like this one being examined, if Secondo stayed silent without *animus repudiantis*, he had to be considered by his brother, Primo (see the underlined words). And, therefore, Primo would not have been able to sue to obtain the distributive share due to his brother.

From this it can be deduced *a contrariis* that Papinian also held that if Secondo had instead **56**
manifested such *animus*, Primo could have rightfully claimed his brother's share in court. Ulpian shared Papinian's opinion.

This segment is important for our thesis as it proves that not just Paul – as believed by Voci – **57**
but also Papinian, followed by Ulpian, allowed *ius adcrescendi* if there was *animus repudiantis*. So, no *controversia* existed between jurists.

We come to examine segment D of the *scholion*. Compared to segment B, this one considered **58**
and confronted a *different* case: one in which both brothers (Primo and Secondo) had been *totally* disinherited by their *pater* (see the words in bold).

The difference between the case described in segment B and that considered in segment D is **59**
evident: in segment B, Primo had obtained an eighth of the estate; in segment D, he had not been alloted anything. Moreover, it ought to be noted that the question revolved around the fact that if, for Justinianic/Byzantine law, Primo could file not the simple *actio ad implendam legitimam*, but the *querela inofficiosi testamenti* to challenge the validity of the entire will.

Papinian's solution was that if, of the two disinherited brothers, Primo had filed *querela inofficiosi testamenti* while Secondo had remained silent (but evidently without *animus repudiantis* [24]), Primo would have been able to claim only his share (*querela pro parte*). **60**

Segment E of the *scholion* articulated the legal principle that was the basis of the solution given for the two *quaestiones* posed in fragments B and D. We note that Papinian's response was integrated with Justinianic law (with the reference to the *actio ad implendam legitimam*). **61**

The last segment, F, finally and more broadly corresponds to the third segment of Ulpian's passage. **62**

In drafting the text D. 5.2.8.8, the Justinianic Compilers, if what we have inferred from Sch. 18 is correct, perform a drastic reduction of the original text, eliminating an entire case (that of the brother that had received an eighth of the estate, which he believed did not represent his *quarta debitae portionis*) and leaving only the case of the two totally disinherited brothers. **63**

But in this way the second segment of D. 5.2.8.8 ceases to correspond with the first segment of the same passage. **64**

Why did the Compilers eliminate this case? Because dealing with it, in 533, would have meant having to talk about – as happened in the *scholion* 18[25] – the *actio ad implendam legitimam*, which, although it had already existed for five years by that time, Justinian and Tribonian chose never to mention it in the *Digest*. **65**

6. Conclusions.

The examination of the passages from the *Digest* and the *Basilicorum scholia*, which have been considered, allow us to draw two conclusions: one limited to a specific subject of Roman law and the other more general. **66**

First of all, thanks to the *scholia* we have been able to demonstrate that, contrary to what is held true by current mainstream doctrine on the subject of the *querela inofficiosi testamenti*, all jurists agreed on one point: if there were multiple forced heirs, the others benefited from an inheritance increase only if one of these repudiated the *querela*, otherwise there could be no increase. **67**

The second conclusion is broader. In relation to the texts specifically examined, we can generally reaffirm a fact that, while not shared by everyone, is well noted in the Romanistic doctrine: some *Basilicorum scholia* provide a wealth of information and allow scholars to make out the original texts of the classical authors upon which the Justinianic Compilers were based, permitting them to perceive in which way the compilers sometimes brutally worked on the texts that they found themselves handling. **68**

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24 As it has been clearly said before, describing the case in B and in C.

25 Instead, it is notable that the *Basilicorum scholia* do not consider neither Nov. 18 pr.-2 (which, in 536 brought the *portio legitima* to a third of the share *ab intestato* for up to four children and half if there were more than four children) nor Nov. 115 (which, in 542, rendered it necessary that descendants and parents be constituted heirs in wills). I indicate that the ancient *scholion* probabily originated prior to 536.