Some Remarks concerning the Legal Consequences of the *querela inofficiosæ donationis*

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I. — It is well known that in Roman Law a person could do considerable harm to his nearest blood relations by explicitly or tacitly disinheriting them. He could also harm their interests by giving away all or the greater part of his estate during his lifetime to one or to several other persons. Then after he died only very little remained to be divided among the closest blood relations. However, it made a great difference whether the harm was caused by disinheritance or by the bestowal of exorbitant gifts. Since the end of the Republic it had been possible for a person to contest and invalidate the harmful act of disinheritance by means of the *querela inofficiosi testamenti* and still receive his legitimate portion, but there was no such legal device to prevent a *testator* from making excessive gifts from his estate.

It was not until the end of the classical period that, by analogy with the *querela inofficiosi testamenti* (= qit.), the *querela inofficiosae donationis* (= qid.) was formulated for the purpose of contesting the validity of excessive gifts (1). The first time that the qid. is mentioned in legal sources is in a text by the lawyer Paul (2), which contains a constitution of the Emperor Alexander Severus, dating from the beginning of the

(1) This term is not used in the sources.
(2) D.31.87.3.

3rd century. The subject is also mentioned in three constitutions which date from the middle of the 3rd century (3). Most of the references to the qid. are in seven texts from the chancery of the Emperor Diocletian; two of them have come down to us via the *Fragmenta Vaticana* (4); two constitutions have come to us via the *Fragmenta Vaticana* and the *Codex* (5), whereas three have come to us solely via the *Codex* (6).

Now what was the *querela inofficiosae donationis*? According to current opinion (7) it was the legal device which, in the late classical period, was available to children or grandchildren of a person who had used up all or the greater part of his estate by bestowing gifts on one or several of them (8). If these (grand)children, as a result of such gifts, had not received one quarter of their intestate portion, i.e. their so-called *portio debita*, they could use this complaint to obtain their whole share. This minimum of a quarter introduced here had presumably been taken over from the *lex Falcidia*, a law which really had nothing to do with such matters. According to the *lex Falcidia*, the testamentary heirs were entitled to one quarter of the net inheritance, free from legacies.

(3) C.3.29.1, 2 and 3.

(4) F.V. 270 and 271.

(5) F.V. 280 = C.3.29.7; F.V. 282 = C.3.29.4.

(6) C.3.29.5, 6 and 8.

(7) G. Donatuti, *L'origine della "querela inofficiosae donationis"*, St. Riccobono III, Palermo 1936, 427 ff.; H. Krüger, *Die unmässige Schenkung*, SZ 60 (1940) 83 ff.; G.G. Archi, *"Condictio liberalitatis" e "restitutio in integrum"*, St. Solazzi, Naples 1948, 740 ff.; P. Simonius, *Die "donatio mortis causa" im klassischen römischen Recht*, Basle 1958, 58 ff.; P. Wesener, *v. Querela*, RE 24 (1963) 865 ff.; P. Voci, *Diritto ereditario romano* II, Milan 1963², 727 ff.; G. Cervenca, *"Querela inofficiosae donationis"*, NNDI 14 (1968) 668; F. Samper, *La disposición mortis causa en el derecho romano vulgar*, AHDE 38 (1968) 87 ff.; F. Samper, *"Pars debita" en el derecho romano vulgar*, SDHI 37 (1971) 74 ff.; M. Kaser, *Das römische Privatrecht* I, Munich 1971², 713; M. Kaser, *Das römische Privatrecht* II, Munich 1975², 521; M.G. Zoz di Biasio, *I rimedi contro gli atti in frode ai legittimari in diritto romano*, Milan 1978, 77 ff.

(8) The texts relating to the qid. concern only gifts to children or grandchildren of the donor, not gifts to other persons.

In the post-classical period there was an alteration in the amount to which legitimate heirs were entitled. In 361 the Emperor Constance declared that the *querela* could not be used to contest a will or a gift if a *bonus vir,* appointed by the *testator,* was of the opinion that the children of the *testator* had received less than a quarter of their intestate portion (9). In that case the amount they had received would be made up to a quarter by the heir (10). Justinian made this ruling generally applicable by creating a so-called *actio ad supplendam legitimam* for certain blood relations (11). In fact it hardly ever occurred that a legitimate heir received nothing from the *testator,* so the original *querela inofficiosi* practically fell into abeyance.

In Romanistic literature there are differences of opinion about when these changes occurred. According to current opinion (12), as expressed by Taubenschlag, Voci and Kaser,

(9) C.Th.2.19.4: Imp. Constantius A. et Iulianus Caesar Olybrio. *Cum scribit moriens, ut arbitratu boni viri, si quid minus filiis sit relictum, quam modus quartae, qui per successionem bonis tantum liberis debetur, efflagitat, id ipsum ab herede iisdem in pecunia compleatur, manifestum est nullam iam prorsus nec super testamento nec super donationibus querelam remanere, praesertim cum universam eandem repellat et reprimat, quae ad pecuniam redigit, iusta taxatio.*

Emperor Constantius A. and Iulianus C. to Olybrius. "When a dying man writes that, if in the opinion of a *bonus vir,* his children have been left less than the amount necessary to make up the fourth part of the estate to which deserving children alone are entitled by the right of succession, this amount must be made up in money to the children by the heir, it is manifest that there no longer remains any right of complaint concerning the will or the gifts, particularly because the fair judgement which settles the debt in terms of money will defeat and prevent all such complaints."

(10) M.G. Zoz di Biasio, *I rimedi contro gli atti in frode ai legittimari in diritto romano,* Milan 1978, 119 believes that the *testator* here charges the heir to make this sum up to the *portio debita* either through a legacy or an entail.

(11) C.3.28.30. pr.

(12) R. Taubenschlag, *Opera omnia* I, Warsaw 1959, 91 note 721; P. Voci, *Diritto ereditario romano* II, Milan 1963², 728 note 10; M. Kaser,

it appears from three of Diocletian's constitutions that even by the end of the 3rd century the post-classical interpretation prevailed, namely that a legitimate heir could obtain only one quarter of his intestate share by means of the *querela inofficiosi*. H. Krüger ([13]) and Simonius ([14]), on the other hand, on the basis of two of the same texts, think that in Diocletian's day the classical interpretation still prevailed and that there was no change until the reign of Justinian. Samper ([15]) takes up an intermediate position; he thinks that at the end of the 3rd century it was uncertain what result a successful *querela* could have; the sources from the period are often very unclear and are often contradictory. Samper explains this by pointing to the fact that it was at that time that confusion had arisen between the so-called *quarta Falcidia* and the *portio debita*. According to Samper the idea seems to have taken root in vulgar law that only legitimate heirs could be the real heirs, whereas the other testamentary heirs could be only a kind of legatee. When the *quarta Falcidia* and the *portio debita* could no longer be distinguished, it also became unclear whether the legitimate heir whose portion had been affected as a result of a testament or gifts had a right to receive the whole of his

Das römische Privatrecht II, Munich 1975², 521 note 60 with further literature references.

(13) On the basis of certain constitutions of Diocletian, H. Krüger believes that up to the time of Alexander Severus the donor and his descendants, by virtue of the *lex Cincia*, were entitled during a certain period of time to obtain *in integrum restitutio* in cases where a gift had been excessive. Understandably, this notion has been contested by G.G. Archi, *"Condictio liberalitatis" e "in integrum restitutio"*, St. Solazzi, Naples 1948, 740 ff. To me it seems just as unlikely that after that time the qid. would have led to *in integrum restitutio*; this legal device was made available in the *cognitio extraordinaria* by an imperial official: if he thought that the donor through this gift had in fact acted contrary to *pietas*, then he charged the donatory to pay back to the claimant the amount he had received in excess. See also P. Voci, *Diritto ereditario romano II*, Milan 1963², 729.

(14) P. Simonius, *Die "donatio mortis causa" im klassischen römischen Recht*, Basle 1958, 58 follows H. Krüger here.

(15) F. Samper, *"Pars debita" en el derecho romano vulgar*, SDHI 37 (1971) 76 ff.

intestate portion or only one quarter of it. According to Samper this uncertainty did not come to an end until the above-mentioned constitution of the Emperor Constance was proclaimed in 361. Samper's view seems to me to be very acceptable, apart from his point that at the time of Diocletian the legal effect of the *querela* was uncertain.

Recently Zoz di Biasio has written a book on " I rimedi contro gli atti in frode ai legittimari in diritto romano ", in which she devotes a whole chapter to the subject of the qid. She doesn't agree with current opinion that in Diocletian's time the legitimate heir could obtain only one quarter of his intestate share by means of the *querela inofficiosi* (16). She explains this by the fact that in the imperial constitutions dealing with the qid. often the analogy with the qit. is mentioned: this would not be possible if the results of the qit. and the qid. would be different. This may be an important argument, but it is not decisive.

II. — In the modern literature three of Diocletian's constitutions are often quoted in relation to the legal effects of the qid. I shall now try to ascertain by analysis of these three texts whether, as a result of the successful use of the *querela inofficiosi* against an excessive gift at the time of Diocletian the legitimate heir received the whole intestate share or only one quarter of it.

1. C.3.29.5

Impp. Diocletianus et Maximianus Cottabeo. *Si totas facultates tuas per donationes vacuefecisti, quas in emancipatos filios contulisti, id quod ad submovendas inofficiosi testamenti querellas non ingratis liberis relinqui necesse est, ex factis donationibus detractum,*

The Emperors Diocletian and Maximian to Cottabeus. "If you have used up the whole of your estate by making gifts to your emancipated sons, then the amount that has to be left to not ungrateful children to prevent the *querela inofficiosi testamenti* must be deducted

(16) M.G. Zoz di Biasio, *I rimedi contro gli atti in frode ai legittimari in diritto romano*, Milan 1978, 91 ff.

ut filii vel nepotes, qui postea ex quocumque legitimo matrimonio nati sunt, debitum bonorum subsidium consequantur, ad patrimonium tuum revertetur. (286)

from these gifts so that sons and grandsons already born to any subsequent lawful marriage will receive their legitimate share of your goods and that will revert to your estate".

This rescript is addressed to the otherwise unknown Cottabeus who had given his whole estate to his emancipated sons and now wanted to come back on his decision. His argument was that after he had made the gifts (*"postea"*) he had acquired other lawful offspring or grandchildren (perhaps he had re-married later). Because of the gifts these children were unlikely to receive anything as heirs. The only course open to them would be to take legal proceedings against the children who had received the gifts. Apparently Cottabeus wanted to avoid difficulties of this kind and therefore he turned to the imperial chancery for advice. In this rescript he is advised to see to it that he gets back part of the gifts he has given. This text, however, does not say anything about the manner in which this was to occur.

Unlike other rescripts concerning the qid. this rescript concerns a case where the *donor* himself wishes to revoke all or part of the gifts he has made. Naturally he could not do this with the help of the qid., as is suggested by many authors ([17]), because the *querela* was only available to certain legitimate heirs. Other legal procedures such as the *condictio ex lege* suggested by Vangerow ([18]) also appear to be impossible here because this action has not been introduced until the time of Justinian ([19]). Zoz di Biasio supposes that Diocletian has introduced a new type of legal action for cases of this kind ([20]). But as

(17) Recently also P. Voci, *Diritto creditario romano II*, Milan 1963², 728 note 10 and M. Kaser, *Das römische Privatrecht II*, Munich 1975², 521 note 60.

(18) K.A. von Vangerow, *Lehrbuch der Pandekten II*, Marburg 1854⁶, 330.

(19) Cf. M. Kaser, *Das römische Privatrecht II*, Munich 1975², 332.

(20) M.G. Zoz di Biasio, *I rimedi contro gli atti in frode ai legittimari in diritto romano*, Milan 1978, 131 ff.

she says herself, C.3.39.5 is the only text in which this action is mentioned. Therefore, as I shall try to show, it is not reasonable to conclude that there really was any new action of this kind.

Cottabeus may have wished in the first instance to persuade his emancipated sons to return the gifts by means of a lawsuit. However, the words: "*id quod ... necesse est ... revertetur*" do not refer to a legal action. How then can he achieve his aim ?

According to the classical interpretation, Cottabeus has only one very strong argument, which is as follows. If the children born subsequently were to bring the qid. against the emancipated children after the death of the *donor,* the result would be that the latter would lose their gifts to the extent that all children who were eligible for a share of the inheritance would then receive their intestate portion. If, on the other hand, the emancipated sons, of their own free will, returned enough to permit the children born subsequently to receive one quarter of their intestate portion, their *portio debita*, then the latter would not be able to use the qid. In the latter case the emancipated sons would therefore be able to retain considerably more than in the former case; in this way the donor might make it attractive for his emancipated sons to comply with his wishes. On the other hand, these sons could object that it was possible that the other children would not use the *querela* against these sons or that they would all have died already; in that case the sons would be able to keep the entire gift. Since the relationship betwee the privileged, emancipated sons and the underprivileged (grand-)children had probably deteriorated, it was very possible that these *filii* or *nepotes* would apply the *querela* after all. There was also a fairly good chance that on the death of Cottabeus at least one of the children born subsequently or one of the grandchildren would still be alive (21).

(21) Irrespective of the number of children born later who are still alive when Cottabeus dies, the *portio debita* continues to be one quarter of his inheritance.

This argument would not hold according to the view of the post-classical period. The legitimate heirs then received only a quarter of their intestate share, so it would make no difference whether they received their legitimate share immediately, or not until after they had asked for the deficiency to be made good.

Are we to understand from this text that the gifts were reduced to the intestate portion of the claimant or to one quarter of this? In the first instance the answer to this question must be in the negative, because Cottabeus did not use the *querela* and he was not entitled to use it either. However, one can deduce indirectly from this text to what extent the gifts were reduced when the *querela* would have been applied, namely to an amount that equalled the complete intestate portion of the legitimate heirs. There are two reasons for this.

Firstly, we have seen that Cottabeus had only an indirect means of exerting pressure at his disposal, i.e. he could point out to his emancipated sons the difference between the amount they would retain if they now gave to the children born subsequently only one quarter of their intestate portion and the amount they would retain after his death if these children were to get back the whole of their intestate portion by means of the qid.

Secondly, the obvious meaning of the word "*revertetur*", indicating that the sons would indeed be prepared to return part of the gifts they had received, points to the fact that this pressure device constituted a real threat to the gifts.

Because this argument holds only in the classical interpretation, namely that the legitimate heirs could get the whole of their intestate portion by using the qid., I think that C.3.29.5 must also be interpreted in this way.

2a. F.V. 280

Impp. Diocletianus et Maximianus Aur. Anniano *In dubium non venit adversus enormes donationes, quae tantum-*

The Emperors Diocletian and Maximian to Aurelius Annianus. There is no doubt that already a long time ago in the

modo in quosdam liberos, vacuefactis reliquorum facultatibus pernicie, conferuntur, iam dudum divorum principum statutis esse provisum. Si igitur mater tua ita patrimonium suum, profunda liberalitate in fratrem tuum evisceratis opibus suis, exhausit, ut quartae partis dimidiam, quam ad excludendum inofficiosi querellam adversum testamentum sufficere constat, his donatis datisque haud relictam tibi habeas, praeses provinciae, quod immoderate gestum est, revocabit. Sane aeris alieni solutionem, si ab intestato cum fratre tuo matri heres exstitisti, renovare non potest.

constitutions of the divine emperors measures were taken to prevent persons from making excessive gifts which only benefited certain children at the expense of the others when the whole estate had been used up. So if your mother has used up her whole estate by giving her goods very generously to your brother so that you in the end are not left one half of the fourth part which is said to be sufficient to prevent a *querela inofficiosi* being made against the will after these gifts have been bestowed, then the *praeses provinciae* will revoke what has been done to excess. But he cannot renew the payment of a debt if you and your brother become heirs of your mother on intestacy.

2b. C.3.29.7

Impp. Diocletianus et Maximianus AA. Ammiano. *Si mater tua ita patrimonium suum profunda liberalitate in fratrem tuum evisceratis opibus suis exhausit, ut quartae partis dimidium, quod ad excludendam inofficiosi testamenti querellam adversus te sufficeret, in his donationibus quas tibi largita est non habeas, quod immoderate gestum est revocabitur.* (286).

The Emperors Diocletian and Maximian A.A. to Aurelius Ammianus. If your mother has used up her estate by giving her goods so generously to your brother so that you do not have in those gifts that have been made to you one half of the fourth part which would be sufficient to prevent the *querela testamenti inofficiosi*, then what has been done to excess will be revoked.

What problem gave rise to the constitution of which these texts form part? A woman who had two sons, had given most of her estate to one son; the other son, by comparison, had been given very little (Codex) or nothing (F.V.). When the woman died there was not enough of the inheritance left to let the second son have one quarter of his intestate share. Thereupon this son made an attempt to lay his hands on the gifts made to his brother. According to the end of the F.V. text the brother defended himself by declaring that he had not received the goods as a gift but as payment for a debt and that the money could therefore not be touched. In my opinion the word "*renovare*" in this text should be read "*revocare*", as the combination "*renovare solutionem*" doesn't seem to make sense. Besides, according to Mommsen (22) one of the five manuscripts of the *Fragmenta Vaticana* has "*revocare*" instead of "*renovare*". Zoz di Biasio (23) leaves the word "*renovare*", and with this she develops rather a complicated and artificial argument, which differs greatly from my interpretation. People who are interested may like to read this in her book for themselves.

The Codex text differs markedly in two respects from the text of the F.V. Firstly, the F.V. text is much more detailed and contains more information. It is therefore probably closer to the original rescript than the Codex text (24). Secondly, in the 7th line of the F.V. text we read: *ut quartae partis dimidiam, ... his donatis datisque haud relictam tibi habeas,* "as a result of these gifts you have definitely not received the half of the fourth share left to you". The Codex text runs as follows: *ut quartae partis dimidium, ... in his donationibus quas tibi largita est non habeas,* "so that you do not have the half of the quarter in the gifts which she left to you".

(22) Th. Mommsen, *Iuris anteiustiniani fragmenta quae dicuntur Vaticana*, Berlin 1860, 355.

(23) M.G. Zoz di Biasio, *I rimedi contro gli atti in frode ai legittimari in diritto romano*, Milan 1978, 110 ff.

(24) See also E. Volterra, *Il problema del testo delle costituzioni imperiali*, in Atti II Congr. intern. d. soc. it. d. storia d. diritto "La critica del testo", Florence 1971, 1034.

From the F.V. text it is clear that Ammianus had not received one eigth and had in fact received nothing at all (*"haud"*), whereas the Codex suggests that the gifts which he received did not amount to an eighth part. One has the impression that the compilers of the Codex deliberately introduced this alteration. The reasons are to be found in the nature of the *actio ad supplendam legitimam* introduced by Justinian. In the year 528 Justinian declared that a will could only be contested with a *querela* if the testator had mentioned the legitimate heirs but had disinherited them (25). As soon as they had received something, however little, from the *testator* they could only receive a supplement to their legitimate share, i.e. up to one quarter of their intestate portion, by taking an action against the instituted heirs.

A few years later Justinian decreed that if a father had left his son less than his *portio debita* by means of a gift upon death or during his lifetime, the son could accept the gift and still be entitled to the supplement of his *portio debita* (26). Apparently the case as mentioned in the F.V. text, i.e. the son had received nothing at all, would have been solved differently according to Justinian law, so that the compilers had to change it into a case where the son had received something, but less than his *portio debita.*

Through this alteration Diocletians' constitution was adapted to fit Justinian law. This was fairly simple since the task of the *praeses provinciae* was to revoke *"quod immoderate gestum est"*: a somewhat vague phrase of this kind could refer to bringing the amount up to one quarter of the intestate share, as was the case in Justinian's day, or to increasing the amount up to the whole of the intestate portion.

How are the words: *"quartae partis dimidiam, quam ad excludendum inofficiosi querellam adversum testamentum sufficere constat"* in the F.V. text to be interpreted? Firstly we are rather surprised to find the words "the half of a quarter" instead of "the quarter of the half"; here the *portio debita* is

(25) C.3.28.30. pr. and 1.
(26) C.3.28.35.2.

calculated on the basis of the whole estate rather than the intestate portion, as is usually the case. Apparently the compilers did not think it necessary to change this wording. The expression "*quartae partis dimidiam*" may also be explained as an indication of the confusion between the *quarta Falcidia* and the *portio debita*, that has been described by Samper! Furthermore, it is striking that in the adjectival clause after "*dimidiam*" the qit. is mentioned, whereas there is no mention of succession by virtue of a will. This is not unique, but occurs in other texts such as C.3.29.5 and F.V. 270. In my opinion, this merely indicates that this expression is used in exactly the same way as in other texts, namely to show how much must be left to the (grand)children so that the *testator* cannot be accused of having offended against *pietas*. In short then, this constitution indicates simply how much would have to be left to Ammianus in order to prevent a *querela* and not how much he would have received if he had successfully used the *querela*. This text therefore is certainly not a decisive argument to prove that at the time of Diocletian the amount was only supplemented until it equalled one quarter of the intestate portion.

3. C.3.29.8

Impp. Diocletianus et Maximianus AA. Auxanoni. *Si liqueat matrem tuam interverten-dae quaestionis inofficiosi causa patrimonium suum donationibus in unum filium collatis exhausisse, cum adversus eorum cogitationes, qui consiliis supremum iudicium anticipare contendunt, et actiones filiorum exhauriunt, aditum querellae ratio deposcat, quod donatum est pro ratione quartae ad instar inofficiosi testamenti convicti deminuetur*

The Emperors Diocletian and Maximian A.A. to Auxanon. "If it is evident that your mother, in order to prevent the *quaestio inofficiosi*, had exhausted her estate by making gifts to one son, then — because a consistent application of the law requires that a *querela* be brought against the plots of those who by cunning means try to anticipate their last will and make their children's legal actions impossible — what has been given away

(294). will be reduced *pro ratione quartae* as happens with a will which has proved to be undutiful."

The person to whom this rescript was addressed, Auxanon, put the following problem to the imperial chancery. His mother, as a result of making gifts to his brother who was emancipated (27), had exhausted her whole estate, so that now she was dead there was nothing left for him as heir. According to the chancery, the qid. could be applied.

The verdict is a follows: *quod donatum est pro ratione quartae ad instar inofficiosi testamenti convicti deminuetur,* "then what has been given shall be reduced to the proportion of one quarter in accordance with the will, which has been declared to be *inofficiosum.*" C.3.29.8 is the only text from the time of Diocletian which states that the gifts will be reduced until the *portio debita* of the other heir has been restored. According to Zoz di Biasio (28), *pro ratione quartae* does not mean reduction to the *portio debita* but simply reduction to the intestate portion. She explains this by pointing to the analogy between the qid. and the qit., which in my opinion is not sufficient. The ruling of C.3.29.8 is in complete agreement with that of Justinian when he introduced the *actio ad supplendam legitimam.* One wonders whether the words "*pro ratione quartae*" are not simply another example of interpolation. There is nothing in the *Index Interpolationum* to indicate that this text was not regarded as original in the Romantistic literature up to 1936; of the Romanists writing after this date H. Krüger (29)

(27) C.3.29.8.1: *Nam quod uxor a marito in se matrimonii tempore donationis causa collatum emancipato filio communi consentiente domino donavit, rell.* "But if a woman has given away what was bestowed upon her by her husband, during her marriage, to their mutual emancipated son with the consent of her husband, rell."

(28) M.G. Zoz di Biasio, *I rimedi contro gli atti in frode ai legittimari in diritto romano*, Milan 1978, 115.

(29) H. Krüger, *Die unmässige Schenkung*, SZ 60 (1940) 89 says that it is uncertain whether this text reflects his view, namely that the gift is annulled and that the heir receives his whole intestate share; however,

was the only one to suppose that the words "*pro ratione quartae*" and "*deminuetur*" must have been interpolated, because not only were they at variance with the example given in the text of the will shown to be *inofficiosum*, but they were also at variance with two Diocletian texts from the *Fragmenta Vaticana*, which have certainly not been interpolated. On the basis of the words "*pro ratione quartae*" the other writers think that at the time of Diocletian a qid. could only lead to the gifts being reduced by one quarter, thus down to the *portio debita* (30). In my opinion neither of these assertions is tenable.

I agree with Krüger that the words "*pro ratione quartae*" could not have been in the original text. In addition to the arguments he puts forward it is worth noting that the word *ratio* occurs twice in this text with two different meanings. In the first case *ratio* is used with the fairly normal meaning of "consistent application of the law". In the second case the word occurs in the comparatively rare combination *pro ratione quartae*. An examination of the word *ratio* in the Vocabulary compiled by Mayr reveals that the expression is very unusual. The words *pro ratione* do occur in the Justinian constitutions but in combination with words such as *iustitiae, pietatis* and *aequitatis*; there they mean "by reason of". More comparable are two expressions "*sine Falcidiae ratione*" in C.1.3.48.6 and "*ut ratione Falcidiae minime illis personis derelicta, etc.*" in C.3.28.31, which are both constitutions of Justinian, where *ratio* has the meaning of "share". In the Digest *ratio* often occurs in combination with *Falcidiae*, but there it has the meaning of "calculation". Thus it seems likely that the words "*pro ratione quartae*" were interpolated by the compilers for the purpose of adapting the Diocletian text to fit the law of their times.

In my opinion it seems less likely that the word "*deminue-*

he thinks that in the light of the evidence found in the other texts this text should be interpreted in the same way.

(30) P. Voci, *Diritto ereditario romano II*, Milan 1963², 728 note 7; M. Kaser, *Das römische Privatrecht* II, Munich 1975², 521 note 60; F. Samper, *"Pars debita" en el derecho romano vulgar*, SDHI 37 (1971) 96.

tur" was interpolated, as Krüger maintains. Krüger assumes that the entire gift was annulled and thus reverted to the estate of the *testator,* whereupon the inheritance was divided up among the various heirs. Krüger bases his argument on F.V. 270 where it says that the gifts are annulled (31). Two arguments can be brought against this view. Firstly, one can equally well refer to another constitution, i.e. F.V. 280, which does not use the word "*rescindi*" as in F.V. 270 but the expression "*quod immoderate gestum est, revocabit*". Secondly, the gifts were not completely annulled, but only to the extent that they exceeded the fourth part.

It seems to me that "*deminuetur*" has not been interpolated: it fits better into the texts of the end of the 3rd century than into the texts from the time of Justinian. Can one therefore, on the basis of C.3.29.8, maintain that at the time of Diocletian a qid. led to the reduction of excessive gifts to the same amount as the share to which the legitimate heir was entitled on intestacy? This is in fact possible if it is true that the words "*pro ratone quartae*" were not in the original text. As I have just pointed out, these words were very probably interpolated.

There is a more general argument to support this interpretation. Not until the constitution of Constance was an exception to the rules allowed: a *testator* could appoint in his will a *bonus vir* to see to it that the children received one quarter of their intestate portion; if they did not, they could get a supplement up to the amount of one quarter of their intestate portion. If in Diocletian's time a supplement to a quarter of

(31) F.V. 270 Divi Diocletianus et Constantius Caeciliae Anagriamae. *Si donationibus in unam filiam conlatis quarta non retenta patrimonium exhaustum in fraudem ceterorum filiorum probetur, has rescindi ad instar inofficiosi testamenti sacris constitutionibus parentum nostrorum evidenter continetur. Rell.*

Divi Diocletianus and Constantius to Caecilia Anagriana. "If it has been proved that in order to deceive the other children the estate has been used up by gifts bestowed upon one daughter after not had been kept back one quarter, it is stated clearly in the sacred constitutions of our ancestors that these (gifts) are annulled after the example of the undutiful will. Rell."

the intestate portion had been generally accepted, then such a complicated juridical procedure would not have been necessary.

III. *Conclusion.*

Let us return to the question posed at the beginning of this paper. Are Romanists such as Taubenschlag, Voci and Kaser correct in assuming, on the basis of these three texts, that already in Diocletian's day a successful qid. could reduce excessive gifts to an amount which was one quarter of the intestate portion of the legitimate heirs?

From D.31.87.3 it can be deduced that at the time of Alexander Severus a legitimate heir who had been deprived of his fair share of an inheritance could obtain his full intestate portion by means of the *querela inofficiosi*. The reply of the Emperor Diocletian in C.3.29.5 is comprehensible only if the ruling made in D.31.87.3 also applies here: unless the father applied some pressure he had no chance of revoking the gifts he had made. In my opinion this text does not give the Romanists mentioned above any real support for their viewpoint. C.3.29.7, which has also come to us via the Fragmenta Vaticana, shows clearly that the compilers have made certain textual alterations. The parenthetical phrase: "*ut quartae partis dimidium, quod ad excludendam inofficiosi testamenti querellam adversus te sufficeret ... non habeas*" can be nothing else but a general indication about the minimum amount that must be left to legitimate heirs. So one cannot conclude on the basis of this text that this was to be reduced to one quarter of the intestate portion.

Only from the last text can it be firmly established that there was a reduction to one quarter of the intestate share. The words "*pro ratione quartae*" are so unusual in this context that it can only be assumed that they were added later. The changes introduced by the compilers can perhaps be explained by the fact that not a single constitution after that of the Emperor Constance on the same subject has been included in the title "*de inofficiosis donationibus*". Since it was probably

still current law the compilers probably adapted the older texts slightly to suit their own times.

Finally, everything becomes much clearer when the qid. is compared in this respect with the qit. In Diocletian's time the person who successfully used the qit. also received the entire intestate share (32). Not until the year 361 did Constance allow the *testator,* by means of a complicated juridical procedure, to reduce this portion to the *portio debita.* Justinian confirmed the legitimate heir's right to receive at least one quarter of his intestacy portion.

I think that I am justified in saying that in Diocletian's time the bringing of a successful qid. still led to the claimant receiving his complete intestate share.

(32) C.3.28.22.