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JULIUS KIRSHNER

## Baldus de Ubaldis on Disinheritance: Contexts, Controversies, *Consilia*

### *Taking Disinheritance Seriously*

Among the innumerable topics of medieval Italian jurisprudence awaiting systematic research is disinheritance (*exheredatio*).<sup>1</sup> The indifference of contemporary scholars to disinheritance law cannot be explained by lack of sources,<sup>2</sup> for the extant glosses, commentaries, and

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<sup>1</sup> For brief treatments of disinheritance law in the Middle Ages, see J. MERKL, *Die justinianischen Enterbungsgründe. Eine rezeptionsgeschichtliche Studie*, Breslau 1908, p. 30 ss.; E. BESTA, *Le successioni nella storia del diritto italiano*, Milan 1961, pp. 163–166; A. MARONGIU, *Diseredazione* (dir. interm.), in: *Enciclopedia del diritto*, Milan 1964, vol. 13, pp. 99–102; R. AUBENAS, *Le testament en Provence dans l'ancien droit*, Aix-en-Provence 1927, pp. 80–86. For postmedieval developments, see H. COING, *Zur Entwicklung des Pflichtteilsrechtes in der Zeit des 16. bis 18. Jahrhunderts*, in: *Gedächtnisschrift Wolfgang Kunkel*, ed. by D. NÖRR and D. SIMON, Frankfurt am Main 1984, pp. 25–35.

<sup>2</sup> Among the studies in which the topic of disinheritance is missing or mentioned in passing, see M. BELLOMO, *Problemi di diritto familiare nell'età dei comuni*, Milan 1968; IDEM, *Die Familie und ihre rechtliche Struktur in den italienischen Stadtkommunen des Mittelalters (12.–14. Jahrhundert)*, in: *Haus und Familie in der spätmittelalterlichen Stadt*, Cologne and Vienna 1984, pp. 99–135; IDEM, *Famiglia*, in: *Enciclopedia del diritto*, Milan 1967, vol. 16, pp. 744–779; G. VISMARA, *Scritti di storia giuridica*, vol. 5,

legal opinions (*consilia*) treating disinheritance are legion. Alone, the medieval jurisprudential analysis of the title, *De liberis praeteritis vel exhereditatis* (C. 6.28) could easily be the subject of a monograph. This lacuna may seem odd given the extensive research devoted to the disposition and devolution of family property via testaments, inheritance, and dowries. Yet, disinheritance evokes disturbing images of vindictive parents, disobedient children, and dysfunctional families that stand in stark contrast to the celebrated image of the endogamous, functional, and affective patrilinear families of late medieval Italy, whose histories have been charted in loving detail.<sup>3</sup> Research has generally focused on the ideologies, legal norms, and sociopolitical structures that served the medieval Italian family in its struggles to survive during periods of profound historical change.<sup>4</sup>

A grounding assumption of this research, traceable to an oft-quoted passage in Justinian's *Institutes* (2.18 pr.), is that in ancient Rome "parents often disinherit or silently omit their children without good reason." In contrast to the alleged punitive behavior of overbearing Roman patriarchs, medieval Italian fathers solicitous of the welfare of their children – leaving aside the exclusion from succession of daughters with dowries (*exclusio propter dotem*)<sup>5</sup> – did not resort to disin-

*La famiglia* and vol. 6, *Le successioni ereditarie*, Milan 1988; T. KUEHN, *Law, Family & Women. Toward a Legal Anthropology of Renaissance Italy*, Chicago 1991; A. ROMANO, *Famiglia, successioni e patrimonio familiare nell'Italia medievale e moderna*, Turin 1994.

<sup>3</sup> On "l'unità della famiglia nella storia del diritto in Italia," see G. VISMARA, *Famiglia e successioni nella storia del diritto*, Rome 1970, republished, in: G. VISMARA, *Scritti* (n. 2), vol. 5, pp. 3–44; M. BELLOMO, *Profili della famiglia italiana nell'età dei comuni*, Catania 1966; L. PANDIGMIGLIO, Giovanni di Pagolo Morelli e la ragion di famiglia, in: *Studi sul medioevo cristiano offerti a Raffaello Morghen*, Rome 1974, pp. 553–608; U. SANTARELLI, *Mercanti e società tra mercanti*, Turin 1989, pp. 121 ss.; D. HERLIHY, Family, in: *The American Historical Review* 96 (1991), pp. 1–15, republished, in: *idem*, *Women, Family and Society in Medieval Europe. Historical Essays, 1978–1991*, ed. by A. MOLHO, Providence 1995, pp. 113–134. For a convincing demonstration of family and class endogamy, see A. MOLHO, *Marriage Alliance in Late Medieval Florence*, Cambridge, Mass. 1994.

<sup>4</sup> Typical, in this respect, are D. O. HUGHES, *Strutture familiari e sistemi di successione ereditaria nei testamenti dell'Europa medievale*, in: *Quaderni storici* 33 (1976), pp. 929–952; *idem*, *Famiglia e parentela nell'Italia medievale*, ed. by G. DUBY and J. LE GOFF, Bologna 1977; D. HERLIHY, *Medieval Households*, Cambridge, Mass. 1985; J. GOODY, *The European Family*, Oxford 2000, pp. 86 ss.

<sup>5</sup> M. BELLOMO, *Ricerche sui rapporti patrimoniali fra coniugi*, Milan 1961, pp. 163–185; L. MAYALI, *Droit savant et coutumes. L'exclusion des filles dotées XIIème – XVème siècles*, (Ius Commune Sonderheft 33), Frankfurt am Main 1987. Viewing the *exclusio propter dotem* from an anthropological rather than a juridical perspective, Hughes and

heritance. The basis for this assumption is our knowledge that the medieval testators who reflexively appointed sons as heirs, or, in the absence of sons, daughters or other kin, overwhelmingly outnumber the testators who formally disinherited their children. In addition, while municipal statutes invariably set forth detailed regulations concerning testaments, succession, dowries, and repudiation of inheritance, they dealt with disinheritance sporadically.<sup>6</sup> For medievalists, the technique of disinheritance, like adoption,<sup>7</sup> divorce, and gladiatorial games, appears to rank as yet another example of the Roman legal legacy, piously discussed by medieval academic theorists and authors of notarial manuals, yet of meager consequence in the daily lives of the inhabitants of medieval Italy.

Baldus de Ubaldis of Perugia, who died 600 years ago in 1400, was a leading authority on the intricacies of succession; he would have been dismayed, I believe, by the scholarly indifference to disinheritance.<sup>8</sup> For disinheritance was the flip side of inheritance; the one term necessarily implied the other. Simply put, medieval fathers were compelled either to appoint as heirs or to disinherit sons alive at the time of, or born after (*postumi*), the making of the testament. Failure to comply with this solemnity resulted in an invalid testament and intestate succession. Baldus's commentaries and especially his *consilia*, thirteen of which I have edited for this essay, underscore that, far from being obsolete, the Roman law of disinheritance as transmitted by the *Corpus iuris* of Justinian and modified by medieval jurists, was

Klapisch-Zuber concur that the dotal system of medieval and Renaissance Italy served as a proxy for disinheritance. See D. O. HUGHES, From Brideprice to Dowry in Mediterranean Europe, in: *Journal of Family History* 3 (1978), pp. 263–296; CH. KLAPISCH-ZUBER, Le complexe de Griselda. Dot et dons de mariage, in: EADEM, *La maison et le nom. Stratégies et rituels dans l'Italie de la Renaissance*, Paris 1990, pp. 186–213.

<sup>6</sup> F. NICCOLAI, *La formazione del diritto negli statuti comunali del territorio lombardo-tosco*, Città di Castello 1940, pp. 295–297.

<sup>7</sup> But see now the comprehensive study by FRANCK ROUMY, *L'adoption dans le droit savant du XIIe au XVIe siècle*, Paris 1998.

<sup>8</sup> E. CORTESE provides an efficient biographical profile of Baldus in his *Il diritto nella storia medievale*, vol. 2, *Il basso medioevo*, Rome 1995, pp. 436–445. See also K. PENNINGTON, Baldus de Ubaldis, in: *Rivista internazionale di diritto comune* 8 (1997), pp. 35–62. For Baldus's views on succession, G. VISMARA, I patti successori nella dottrina di Baldo, in: *Scritti* (n. 2), vol. 6, pp. 305–390; A. PADOVANI, *Studi storici sulla dottrina delle sostituzioni*, Milan 1983, pp. 291–316; G. P. MASSETTO, Il lucro dotale nella dottrina e nella legislazione statutaria lombarda dei secoli XIV–XVI, in: *Ius mediolani. Studi di storia del diritto milanese offerti dagli allievi a Giulio Vismara*, Milan 1996, pp. 189–364.



routinely applied in courts of law. The same applies to the commentaries and *consilia* of his teacher, Bartolus of Sassoferrato. Recourse to the *Corpus iuris*, rather than to municipal statutes, is a salient feature of cases involving disinheritance.

Baldus's treatment indicates that the standards for a legally effective disinheritance were rigorous, which helps explain the paucity of testamentary declarations of disinheritance. A faultlessly executed testamentary declaration of disinheritance was necessary but not in itself sufficient: the testator was also required to have at least one legally valid reason for the disinheritance. We learn that disinheritance was also performed tacitly (*ex causa praeteritionis*), when testators failed to appoint someone entitled to be heir, even though that person was mentioned as a legatee. Pretermission (tacit disinheritance) sometimes deliberate, sometimes inadvertent, was hazardous, for the pretermitted party would likely bring an action to have the testament nullified. Of major concern was the threat to both legatees and heirs posed by a botched disinheritance. Disinheritance raised thorny questions about testamentary freedom, the share of a parental estate automatically reserved to legitimate children, and the mutual obligations arising from the natural affection assumed to bind parents and children. Finding answers to such questions required the expertise of jurists like Baldus.

### *Sui Heredes Instituendi Sunt Vel Exheredandi*

The composite of rules guiding Baldus and his fellow jurists derived from the *Corpus iuris*.<sup>9</sup> Under the *ius civile*, disinheritance was an act by which a *paterfamilias* revoked the right of his sons, daughters, and the son's descendants to become heirs (*sui heredes*) upon the father's predecease. According to *Inst.* 2.25.2, disinheritance, like the appointment of heirs, could never be accomplished by codicil, but only by testament. *Inst.* 2.13 (*De exheredatione liberorum*) established that the testator must either institute or disinherit *sui heredes* alive at, or born after (*postumi*), the making of the testament, otherwise the testament

<sup>9</sup> For a summary of the Roman law of disinheritance, see F. CANCELLI, *Diseredazione* (dir. rom.), in: *Enciclopedia del diritto*, Milan 1964, vol. 13, pp. 95–98. Detailed treatments in P. VOCI, *Diritto ereditario romano*, 2<sup>nd</sup> ed., Milan 1963, vol. 2, pp. 631 ss.; M. KASER, *Das römische Privatrecht*, 2<sup>nd</sup> ed., Munich 1971–75, vol. 1, pp. 703 ss.; vol. 2, pp. 510 ss.

is a nullity.<sup>10</sup> This irrefragable rule extended to *postumi* who predeceased their testator-fathers. Intentions could not be inferred from silence; rather, the testator was required to mention his son by name (*nominatim*). The declaration, "Let Titius my son be disinherited," satisfied the requirement. With only one son, the declaration, "Let my son be disinherited," sufficed. Before Justinian, daughters did not have to be mentioned by name; they could be disinherited by a general clause – "Let my daughters be disinherited" (D. 28.2.25 pr.). Another solemnity: the declaration of disinheritance must be inserted after the institution of all the heirs (C. 6.28.1). Without the affirmative distribution of the testator's estate through the institution of the heir, the testament was invalid, and the disinherited child, contrary to the testator's intention, would inherit on intestacy. The rule that disinheritance must be accompanied by a provision disposing of the entire estate remains current in the United States, where courts generally refuse to enforce so-called negative wills.<sup>11</sup>

D. 28.2 (*De liberis et postumis heredibus instituendis vel exheredandis*) featured convoluted discussions of posthumous children, adopted sons, grandchildren, sons in the military, and sons with the same father but different mothers. Here we find the rule that sons were to be disinherited unconditionally (D. 28.2.3.1). Disinheritance was invalid where a father instituted a son as heir under a condition that was illegal, immoral, or not in his power to perform (D. 28.2.28 pr.). Fathers who disinherited a son by name were allowed to change their minds and institute that son as heir (D. 28.2.21). If the testator gave a reason for disinheriting a son – for example, he maliciously accused him of not being of his own flesh and blood – and that reason was shown to be false, the disinheritance was invalid (D. 28.2.14.2).

In reality, the possible reasons impelling a parent to disinherit a child or nearest relative, then and now, are infinite. Before Justinian, disinheritance was justified on the grounds that the testator was impelled *iusta causa irascendi*. This was said to occur when the

<sup>10</sup> On the contested origins of this civil law rule, see A. SANGUINETTI, *Considerazioni sull'origine del principio "Sui heredes instituendi sunt vel exheredandi,"* in: *Studia et documenta historiae et iuris* 59 (1998), pp. 259–278.

<sup>11</sup> A. J. HEATON, *The Intestate Claims of Heirs Excluded by Will. Should "Negative Wills" be Enforced?*, in: *University of Chicago Law Review* 52 (1985), p. 177; F. S. SCHWARTZ, *Models of Wills and Negative Disinheritance*, in: *Mercer Law Review* 48 (1997), pp. 1137 ss., showing that U.S. courts have generally refused to enforce "negative wills."

undutiful behavior of the disinherited person violated the duty of respect (*pietas*) owed to the parent-testator. Such was the case, for instance, when a daughter breached her moral duty by refusing to marry a suitable man chosen by her parents to be her husband. By the same token, *paterna affectio erga filium* – this is, a father was morally and legally obliged to make adequate provision for his children in accordance with his resources and obliged to exercise his freedom to disinherit with discretion. Children and close relatives of the testator who were formally disinherited or simply pretermitted from the testament had recourse to the complaint called *querela inofficiosi testamenti*.<sup>12</sup> The *querela* was limited to relatives in a position to succeed to the decedent's estate should he have died intestate. The complainant alleged that the testator had acted irresponsibly, and that the testament should therefore be set aside. Typically, the complainant resorted to the legal fiction that the testator must have been insane or mistaken to unjustly exclude one from an inheritance to which he was morally and naturally entitled (D. 5.2.2–3). By definition, a testament made by a person who is incapable of producing legal effects was invalid *ab initio*.

A *querela inofficiosi testamenti* had to be made to a tribunal for settlement within five years after acceptance of the inheritance by the heir. Such time was necessary because heirs often delayed in accepting the estate. Attempting to overthrow a testament through the *querela* was expensive and somewhat risky. It was up to the complainant to demonstrate that he had steadfastly manifested a natural deference (*obsequium*) toward his parents (C. 3.28.28). A victorious complainant was entitled to what he would receive on intestacy – namely, one-fourth of the inheritance, or, where there was more than one heir *ab intestato*, an appropriate portion of the one-fourth. *Legitima portio* was used to designate the one-fourth, and *legitima* became the generic designation of the share of an estate reserved to one's children in later regimes of so-called forced heirship. Should the complainant fail, he stood to lose whatever legacies and benefits had been provided him under the testament (D. 5.2.8.14). At the same time, the law prohibited disin-

<sup>12</sup> VOCI, *Diritto ereditario romano* (n. 9), vol. 2, pp. 670 ss.; KASER, *Das römische Privatrecht* (n. 9), vol. 2, pp. 515 ss.; L. DI LELLA, *Querela inofficiosi testamenti. Contributi allo studio della successione necessaria*, Naples 1972; O. E. TELLEGEN-COUPERUS, *Testamentary Succession in the Constitutions of Diocletian*, Zutphen 1982, pp. 155 ss.; A. SANGUINETTI, *Dalla querela alla portio legitima*, Milan 1996.

herited persons who accepted a legacy under the testament from bringing the *querela inofficiosi testamenti* (D. 5.2.12). The prohibition applied equally to disinherited persons who acquiesced in the making of the testament and who had once submitted a complaint which they later abandoned. Finally, a complainant did not pass on his right to the *querela* to his own heirs.

With Justinian the rules on disinheritance were amended in far-reaching ways. Testators were required to mention by name *all* descendants they disinherited, including daughters and emancipated children (C. 6.28.4.6; AD 531). The pretermission of any child, *postumi* as well as living, invalidated the testament (Nov. 113). Above all, Nov. 115.3 (AD 542) established a canonical list of fourteen categories of serious misconduct and immoral behaviors justifying the disinheritance of children.<sup>13</sup> Deserving disinheritance were sons who physically and verbally assaulted their parents, attempted to murder them, brought criminal accusations against them, informed against them, habitually associated with criminals, had sexual relations with a stepmother or the father's concubine, prevented a parent from making a testament, or failed to redeem a parent from captivity. Also deemed reprobate were daughters or granddaughters who were said to prefer a life of debauchery (*eligit vitam luxuriosam*) rather than the husband and dowry provided by their parents.

Testators were now required to insert in the testamentary declaration of disinheritance at least one of the approved categories of undutifulness (*ingratitudeinis causas*) enumerated in Nov. 115.3, § *Aliud quoque capitulum*. After the testator's death, the appointed heirs were held liable to prove the specific reasons for disinheritance. Undutifulness could not be inferred from the alleged act itself; it must be pronounced in a judicial determination against the disinherited child. If the heirs failed to prove their case, the testament was declared void and all the children received the estate in equal shares on intestate succession. Another Justinianic enactment addressed the case in which a testator-father disinherits a son and institutes someone else (C. 3.28.34; AD 530). Before the disinherited son could initiate a *querela*, he died, and the question arose whether a grandson (the disinherited son's own son) might undertake a *querela* against the grandfather's testament. The remedy was granted to the grandson,

<sup>13</sup> N. VAN DER WAL, *Manuale Novellarum Justiniani. Aperçu systématique du contenu des Nouvelles de Justinien*, Groningen and Amsterdam 1964, pp. 116 ss.

although the appointed heirs could quash the *querela* if they showed with clear proof that the disinherited son had gravely offended his father.

Nov. 115.3 was designed to discourage disinheritance provoked by a parent's momentary rage at a disobedient child. Justinian sternly admonished parents to abstain from depriving children of their rightful inheritance through false accusations. In this regard, the *legitima* was increased to one-third from one-fourth when there were fewer than five children, and rose to one-half with five or more children (Nov. 18 pr., 1; AD 536). For the sake of fairness, the calculation of the *legitima* was required to take into account all gifts (*inter vivos* and *mortis causa*), trusts (*fideicommissa*), and individual legacies that had been already given or earmarked for the children sharing in the estate. This rule extended beyond fathers to mothers, grandfathers, and great-grandfathers (Nov. 18.3). While a successful *querela* secured for the complainant the *legitima* on intestacy, it also threatened to upset other testamentary provisions, such as legacies and *fideicommissa*. As Kaser observes, this consequence was avoidable had the testator simply left the complainant the *legitima* in the first place.<sup>14</sup> In remedy, the *actio ad implendam (supplendam) legitimam* was introduced in the late empire to enable persons – to whom the testator had left less than the *legitima* – to bring a suit against the appointed heirs for the requisite supplement.<sup>15</sup>

The *actio ad implendam legitimam* offered evident benefits to all parties. Above all, it left the testament intact (C. 3.28.30 pr.; AD 528), increasing the pressure on testators to leave a legacy to the nonappointed heirs. In fact, the testator could prevent a *querela* by leaving the complainant something, even a paltry sum. Where the testator leaves the complainant something and refrains from denouncing him as “undutiful,” the appointed heirs were prohibited from making this denunciation in order to obstruct the suit. A complainant who lost a *querela* bore the stigma of having behaved *contra officium pietatis* and stood a good chance of receiving less than the *legitima*. By resorting to a suit aimed at securing the *legitima*, the complainant averted these risks. Another plus for the complainant was that the mandatory five-year deadline for making a *querela* did not apply to the *actio ad implendam legitimam*. Such benefits, which made the *actio* an attrac-

<sup>14</sup> KASER, Das römische Privatrecht (n. 9), vol. 1, pp. 518–519.

<sup>15</sup> SANGUINETTI, Della *querela* (n. 12), pp. 78 ss., 104 ss.

tive option, apparently reduced the earlier reliance on the *querela*. The severe formalism of disinheritance rules was significantly mitigated by *Auth. Ex causa* (Nov. 115.4.9 = C. 6.28, post 4, *Maximum vitium*), which established that an ineffective disinheritance or the pretermission of heirs invalidated only the appointment of testamentary heirs, while the remainder of the testament, especially legacies and *fideicommissa*, remained valid. Justinian's legislation carried forward the trend to reduce the use of disinheritance to serious cases of misbehavior, to provide a path of least resistance for children in quest of the *legitima portio*, and to furnish testamentary beneficiaries with a cordon sanitaire against complaints made by the decedent's children that they were wrongfully disinherited.

There were situations, albeit remote owing to the tendency of parents to predecease their offspring, in which children might wish to disinherit their parents. Imagine a person without surviving children but with a surviving father and a full brother and sister. Under the rules of intestate succession, the father, brother and sister could each expect to receive one-third of the estate. Suppose that the same person made a testament and wished to disinherit his father. The testator was permitted to disinherit a parent, and in accordance with Nov. 115.4. he was bound to insert in the testamentary declaration of disinheritance at least one of eight approved reasons – for instance, a parent attempted to take his child's life, a father had sexual relations with his daughter-in-law or his son's concubine, or a parent prevented his child from rightfully disposing his own property in a testament. In the event of a *querela* made by the disinherited parent, the burden was on the appointed heir to prove that the testator had a just cause for offense.

Numerous passages in the *Corpus iuris* devoted to disinheritance have led scholars to infer that it was fairly common in Rome for parents to completely disinherit a child. This inference has been contested by Champlin in his instructive book on the emotions and sense of duty informing Roman wills.<sup>16</sup> He argues that parents and children, imbued with *pietas*, were enmeshed in a web of mutual obligations, so that

<sup>16</sup> E. CHAMPLIN, *Final Judgments, Duty and Emotion in Roman Wills, 200 B.C. – A.D. 250*, Berkeley, Los Angeles, Oxford 1991, pp. 103 ss. See also the critical reviews of J. CROOK, in: *Journal of Roman Studies* 89 (1992), pp. 231–234; H. STIEGLER, in: *ZRG RA* 115 (1998), pp. 584–588; and the reservations of D. CHERRY, *Intestacy and the Roman Poor*, in: *Revue d'histoire du droit* 64 (1996), pp. 155–172.

despite inevitable parent-child tensions, "the ultimate repudiation of disinheritance was not common" (p. 108). As evidence, Champlin cites Ulpian's avowal "that many testators disinherit their children not to disgrace or harm them, but to attend to their interests, as they do for children who have not reached the age of puberty, and they give them an inheritance through a trust" (D. 28.2.18). Here the testator names as fiduciary heir (*heres fiduciarius*) a surviving spouse, a friend, or close relative, who is then entrusted to leave the estate to the testator's children upon attaining a specified age or upon the fiduciary heir's predecease.<sup>17</sup> This was a benevolent strategy aimed at both the efficient allocation of family resources and the protection of the interests of young children. Roman disinheritance of children was not the result of subrational impulses, then, but was an act of "cool calculation" (p. 108) and "a sign of careful planning for the their future" (p. 110). Even the children who were actually disinherited received support and dowries via testamentary legacies.

Champlin's argument stands as a valuable corrective of the assumption that disinheritance of children by angry parents was a common Roman practice. Yet, there are several problems with his argument. First, it is almost exclusively based on passages culled from the *Digest*, although when it suits his purposes he cites later sources. His neglect to consider Justinian's *Inst.* 2.18, to the effect that disinheritance in Rome was common, a text pertinent to his argument, is puzzling. So, too, is his omission of the *Novellae* on disinheritance, enactments that clearly had bearing on practice. In any case, given the severely narrow range of Roman sources useful for statistical purposes, hand waving over the incidence of disinheritance with respect to time, place, and class is plainly fruitless.

Second, the reduction of Roman disinheritance to benign paternalism is exaggerated.<sup>18</sup> How does Champlin's argument square with Ulpian's statement that *querele inofficiosi testamenti* occurred fre-

<sup>17</sup> On *fideicommissa*, see D. JOHNSTON, *The Roman Law of Trusts*, Oxford 1988.

<sup>18</sup> CHAMPLIN, *Final Judgments* (n. 16), p. 111: "Disinheritance as a rejection of the child is rarely attested, then; and when we see the fact shorn of context particularly in the *Digest*, there is no need to assume an emotional repudiation. Rather the reverse is true: disinheritance is more often associated with a testator looking out for a child's interests while protecting the family fortune." I share J. F. GARDNER's sensible caution on the problematic nature of reconstructing the motives and intentions of testators largely on the basis of the theoretical examples presented in the *Digest*: see her *Family and 'Familia' in Roman Law and Life*, Oxford 1998, p. 94.

quently (D. 5.2.1)? Among the "many" complainants must have been children who had not received their *legitima portio*, or who had been disinherited unjustifiably, and who, in short, did not feel that their best interests were attended to by their testator-parents. It is unlikely that benign paternalism was the sole motive of parents who provided shameful legacies (*turpia legata*) for the children they disinherited. The use of shameful legacies as bait for the purpose of avoiding litigation was taken for granted. A disinherited child who accepted the testamentary legacy forfeited his right to the *querela inofficiosi testamenti* (D. 5.2.12). If the disinherited child refused the legacy and challenged the testament, the heirs could at least point to the legacy as evidence of the testator's benevolent intentions. The pragmatic desire to avoid litigation, as well as the duty to provide some support (*alimenta*), made disinheritance cushioned by legacies a conventional expedient not only in ancient Rome, but also in medieval Italy and in late twentieth-century Europe and the United States.

Third, I find it difficult to believe that that Champlin's Roman upper-class testators were the far-sighted estate planners, economic optimizers, and legal cognoscenti he makes them out to be. In medieval Italy, save Venice, virtually all testaments were prepared by public notaries—that is, legal experts who hammered the desires of testators into a citadel of boilerplate clauses promising to protect their estates from legal assaults.<sup>19</sup> Many of these testators were merchants who entered into multifarious contractual arrangements that required predictions about future outcomes. But few, if any, could foresee the rippling legal effects of their acts without the assistance of notaries and jurists. This was especially true in crafting substitutions and trusts, areas of the law that induced claustrophobia and were incomprehensible to lay persons. In the end, Champlin minimizes the reliance of Roman testators on legal experts, while he overstates their legal competency and equanimity.<sup>20</sup>

<sup>19</sup> In medieval Venice, priests customarily served as notaries. See G. CRACCO, "Relinquere laicis que laicorum sunt." Un intervento di Eugenio IV contro i preti-notai di Venezia, in: *Bollettino dell'istituto di storia della società e dello stato veneziano* 2 (1961), pp. 179–189.

<sup>20</sup> For an anthropological approach, treating the Roman testament as a network of social relations rather than an exclusive vehicle for the efficient distribution of property, see C. PAULUS, *Die Idee der postmortalen Persönlichkeit im römischen Testamentserbrecht. Zur gesellschaftlichen und rechtlichen Bedeutung einzelner Testamentsklauseln*, Berlin 1992.



### *Favor Liberorum*

In medieval Italy, the principal channels for the diffusion of Roman disinheritance rules were the theoretical works of jurists, notarial manuals, and, to a much lesser degree, local statutes. Disinheriting one's own children, these texts agreed, was a grave act only warranted in cases of provable extreme misbehavior. The same texts also insisted that the natural affection of parents toward their own children establishes a fundamental obligation to support and provide them with the *legitima portio*. By disrupting the natural devolution of patrimony, disinheritance menaced the continuity and permanence of the family, the very viability of social order.<sup>21</sup>

As early as the *Exceptiones Petri* of the late eleventh century, we read in the section entitled *On the Disinheritance of Children*: "If a father or mother has disinherited or pretermitted a child without legitimate reason and instituted as heir another, or if they give outside heirs the entire inheritance in legacies and trusts bequeathed in the testament, so that nothing remains for the child, the *heres legitimus* [who succeeds according to the order of succession established by civil law], that is, their child, may break the undutiful testament and recover all the goods of the father or mother who defrauded the son or daughter from the inheritance."<sup>22</sup> The list of legitimate reasons for disinheritance found in Nov. 115.3 was duly cited.<sup>23</sup> In addition, if the child was instituted heir, yet the entire inheritance was depleted through legacies, the child has a right to retain one-third of the estate. Where the child has already received a portion of the estate by way of *inter*

<sup>21</sup> M. BELLOMO, *Erede e eredità (diritto interm.)*, in: *Enciclopedia del diritto*, Milan 1965, p. 189: "La diseradazione dell'*heres suus* appariva come un fatto straordinario agli occhi di chi era abituato a vedere nella continuità della famiglia e del patrimonio familiare la prima garanzia di ogni ordine sociale e l'attuazione stessa di ordine naturale."

<sup>22</sup> *Exceptiones Petri*, in: *Scritti giuridici preirneriani*, ed. by C. G. MOR, Milan 1938, vol. 2, p. 65, lib. 1, cap. XVII (*De exheredatione filiorum*): "Si pater vel mater sine iusta causa filium exheredaverit vel preterierit et alium instituerit, vel si in legatis vel fideicommissis in testamento relictis totam hereditatem, ita quod nichil filio remaneat, extraneis distribuerit, heres legitimus, id est filius eius, potest rumpere testamentum inofficiosum et recuperare omnia bona patris vel matris, qui vel que ita defraudaverit filium vel filiam ab hereditate." In conformity with Nov. 18, the portion of the estate to which children were entitled was one-third, where there were fewer than five children; or one-half, where there were five or more children. See, pp. 62–63, lib. I, cap. XII (*De falcidia*). A guide to the contentious scholarship regarding the *Exceptiones Petri* is CORTESE, *Il diritto* (n. 8), vol. 2, pp. 45–55.

<sup>23</sup> *Exceptiones Petri* (n. 22), p. 64, lib. I, cap. XV (*De causis exheredationis*).

*vivos* gifts, dowries, legacies, or trusts, he or she may claim only an amount raising the child's portion of the estate to the required one-third.<sup>24</sup>

The paternalistic sentiments of the *Exceptiones Petri* shielding children from wrongful disinheritance was shared by all medieval jurists. I limit myself here to Bartolus's memorable commentary on the perplexing *lex In suis* in *De liberis et postumis heredibus instituendis vel exheredandis* (D. 28.2.11). The theoretical tenor of this *lex* is that *sui heredes*, so to speak, partake in the ownership, though not the administration, of the father's goods while they are alive; and their ownership (*dominium*) continues after the father's death. With the father's predecease, *sui heredes* have free administration of their goods (*liberam bonorum administrationem*). At stake was the "continuity" of the family grounded in the uninterrupted devolution of the ownership of the father's estate. If *sui heredes* were to acquire ownership through an operation of law – namely, the *ius civile* – continuity of the family would be interrupted. *Sui heredes*, therefore, cannot be said to inherit what they already own, even if they have been instituted as heirs. Yet, there is the implicit objection that continuity of ownership is disrupted when the father exercises his power to disinherit a son-in-power. The *lex* employs an analogy to defeat this objection. Just as the father's power to kill his child is obsolete (for at the time of the compilation of the *Digest* the power to kill belonged to the past (*occidere licebat*), so too was the power to disinherit the child. The analogy is puzzling because the power to disinherit for a legitimate reason remained legally valid.

The theory of co-ownership and disinheritance in *In suis* taxed the interpretive powers of medieval jurists. The impossibility of the father and his son-in-power sharing ownership (*domini in solidum*) was a standard objection against the son's ownership. Yet, medieval jurists also prized the principle of continuity of the family, a principle they sought to buttress with legal fictions. Following the lead of the *Glossa*, Bartolus relegated the notion of co-ownership to the realm of imagination and intellectual abstraction, which, as a matter of law, he declared, is not true. The son's co-ownership of his father's goods *vivo patre* is therefore fictional, much like the wife's ownership of her dowry *vivente viro*. Such fictions were legally proper and served to enlarge ordinary remedies for safeguarding the wife's dowry and the son's inheritance.

<sup>24</sup> Ibid., p. 65, cap. XVII.

For Bartolus, a crucial difference divided the two legal fictions. Under certain extraordinary circumstances, the wife's ownership of her dowry may be restored to her during marriage, yet her ownership is marked by discontinuity.<sup>25</sup> In contrast, the son's co-ownership of his father's goods is continuous.<sup>26</sup> Owing to the legal fiction of the son's uninterrupted ownership, it was impermissible for the father to pass over his son in favor of an outside heir. The son surrenders his ownership, however, when he is legitimately disinherited by his father.<sup>27</sup>

As for the analogy between the right to disinherit and the right to put one's children to death, Bartolus responded: "Formerly it was permitted to kill [one's children], today it is not, and thus the *patria potestas* is diminished in regard to persons and goods, because today it is not permissible to disinherit without a legitimate reason, while formerly it was permitted without qualification."<sup>28</sup> "Today" (*hodie*) referred to the time of Bartolus, and more important to Nov. 115.3, which had superseded all previous laws. In his commentary on Nov. 115.3, Bartolus made it perfectly clear that "it is not permissible for a parent to pretermite or disinherit children, even if a parent has left them the *legitima portio*, unless a parent left them something as heirs;

<sup>25</sup> J. KIRSHNER, *Wives' Claims against Insolvent Husbands in Late Medieval Italy*, in: *Women of the Medieval World. Essays in Honor of John H. Mundy*, ed. by J. KIRSHNER and S. WEMPLE, Oxford 1985, pp. 255–303.

<sup>26</sup> BARTOLUS ad D. 28.2.11, *In suis*, fol. 110r, nn. 3–4: "Sexto respondet cuidam obiectioni hoc modo: si filius est dominus vivo patre, ergo pater non potest eum exheredare, et sic contra totam istam litteram. Ad quod respondet: non est mirandum si patri licet eum exheredare et privare bonis, quia eum licebat etiam occidere; hic dicit. Opponitur quod duo non possunt esse domini in solidum, l. Si ut certo, § Si duobus vehiculum, supra, commodati (D. 13.6.5.15). Solutio: dicitur filius dominus improprie vivo patre, ut patet ex textu qui dicit quodammodo et hoc est quod dicit glossa, quod hoc dominium filii consistit in nudo et puro intellectu, quod dicit magis est in imaginatione quadam quam in veritate. Simile dicit glossa in viro et uxore, quia licet vir dicatur dominus, tamen uxor est domina, ut in l. In rebus, C. de iur. do. (C. 5.12.30). Sed ista equiparatio non est vera, quia in uxore dicitur retransire dominium, in filio dicitur continuari, ut hic." See Glossa *Quodammodo* ad D. 28.2.11, p. 263. Baldus, in turn, concluded that the son's ownership of the paternal estate *vivo patre* is ultimately a legal fiction. BALDUS ad D. 28.2.11, fols. 53r–54v, n. 5. See also BELLOMO's comments, *Erede* (n. 21), pp. 184–194.

<sup>27</sup> BARTOLUS, loc. cit., n. 7: "Quero, que est ratio quod filius suus preteritus rumpit testamentum ipso iure? Respondeo ad hoc facta est ista lex, quia suo heredi non dicitur hereditas obvenire de novo, sed dicitur continuari, ut hic. Cum ergo dominium continuatur in filium non potest pater in alium transferre dominium et alium heredem facere, nisi privetur eum, ut hic."

<sup>28</sup> *Ibid.*, n. 8: "Respondeo, olim licebat occidere, hodie non, et sic mitigata est potestas patris in persona et etiam in bonis, quia hodie non licet exheredare absque causa, olim simpliciter licebat, ut hic."

or unless they are proven to be undutiful with a specific reason of undutifulness appearing in the testament, and the reasons of undutifulness are herein enumerated in sequence."<sup>29</sup>

The canonists' contribution to the exegesis of disinheritance law was marginal. But canonists spoke eloquently on the legal and moral duty of parents to furnish their children the basic necessities of life (*alimenta*).<sup>30</sup> Of special significance on the right of children to the *legitima portio* were the twin decretals of Gregory IX, *c. Raynutius* (X. 3.26.16) and *c. Raynaldus* (X. 3.26.18). Both decretals, which anchored the right of heirs to the *legitima portio* in natural law, became the starting blocks for all subsequent discussions of the *legitima portio*. As Helmholz puts it, "The church in effect canonized the civilian principle that a child had a *de iure* share in the estate of his or her parent."<sup>31</sup> The church also "canonized" the rule that disinheritance *sine causa* was invalid.<sup>32</sup> The *Glossa ordinaria* to *Raynutius*, invoking *lex Omnimodo* (C. 3.28.30), warned that if a testator leaves nothing to his children, the testament is invalid, leaving the road open for a *querela*. If something less than the *legitima portio* is left, the children have the right to demand a supplement.<sup>33</sup> According to Hostiensis, parents were also prohibited from disinheriting a child for the purpose of appointing the church as heir.<sup>34</sup> The canonists endorsed the reasons for disinheritance enumerated in Nov. 115.3, including the disinheri-

<sup>29</sup> BARTOLUS ad Nov. 115.3, *Aliud quoque capitulum* (= Auth. 8.12.3), fol. 51v: "Parenti non licet liberos praeterire vel exheredare, etiam si legitimam eis portionem reliquerunt, nisi eis reliquerint institutionis iure (Ed: iuris), vel nisi ingrati probentur expressa ingratitudinis in testamento apparente, que cause ingratitudinis hic per ordinem numerantur." The issue under discussion was whether a testator may prevent a *querela inofficiosi testamenti* by leaving a legacy to *sui heredes*. Bartolus, again following the *Glossa*, answered negatively: the testator must leave something *iure institutionis*, which would then force the heir to employ the *actio ad supplendam legitimam*.

<sup>30</sup> G. S. PENE VIDARI, *Ricerche sul diritto agli alimenti*, Turin 1972, pp. 69 ss.

<sup>31</sup> R. HELMHOLZ, *Legitim in English Legal History*, in: R. HELMHOLZ, *Canon law and the Law of England*, London 1987, p. 248.

<sup>32</sup> HOSTIENSIS, *Summa aurea*, Venice 1574, III, rub. (*De testamentis et ultimis voluntatibus*), fol. 163r, n. 12, where he cited Nov. 15.3; ANTONIO DE BUTRIO ad X. 3.26.16, Venice 1578, fol. 105v, n. 20.

<sup>33</sup> *Glossa Reliquens* ad X. 3.26.16, p. 700.

<sup>34</sup> HOSTIENSIS ad X. 3.31.14, *Cum simis*, Venice 1581, fol. 111vb, n. 3. I have not found Italian examples of this practice. M. Mate reports that in late medieval Sussex "some tenants used the opportunity to disinherit their heirs – sons, daughters, nephews, nieces or more distant kin – by requesting that their land be sold and the proceeds used for the benefit of their souls." See M. MATE, *Daughters, Wives and Widows after the Black Death. Women in Sussex, 1350–1535*, Woodbridge 1998, p. 87.

tance of daughters who, without a well-founded reason, marry against the wishes the *pater familias*.<sup>35</sup> For some theorists, the endorsement of civil law clashed with the canon law principle that if the *pater familias* contracts marriage on behalf of a child-in-power, the marriage is not valid unless the child gives his or her consent.<sup>36</sup> Further, there was a consensus that children may be denied *alimenta* for the same reasons they may be legitimately disinherited.<sup>37</sup>

In his commentary on the *Decretales* of Gregory IX, Baldus discussed the analogy between excommunication and disinheritance. May the pope excommunicate someone by merely heaping curses on him? Baldus admitted that in the Old Testament a father's curse was equivalent to the disinheritance of a child. But disinheritance through curses was no longer lawful. The curses of the pope do not effect excommunication, just as the curses of the father-testator do not effect disinheritance. Similarly, a father who blesses his children does not on that account make them heirs. Baldus reasoned that in themselves words of honor and dishonor are not treated as dispositive acts capable

<sup>35</sup> HOSTIENSIS, loc. cit.; and his *Summa aurea*, IV, rub. (*De matrimoniis*), fol. 197r, n. 27, where again he cited Nov. 15.3. See also C. VALSECCHI, "Causa matrimonialis est gravis et ardua." *Consiliatores e matrimonio fino al Concilio di Trento*, in: *Studia di Storia del diritto* II, Milan 1999, pp. 526–543.

<sup>36</sup> See *De differentiis inter ius canonicum et ius civile*, in: *Tractatus universi iuris*, Venice 1584, vol. 1, f. 98ra, n. 98: "De iure civili filia familias in contrahendis nuptiis vel matrimonio non potest patri contradicere sine iusta causa, id est, nisi pater eligat indignum et turpem in omnibus, et filia eligit dignum ... quando pater eligit dignum, contrahitur causa ingratitudinis, ut fit in aliis causis, ut in auth. ut cum de ap. cog., § Si alicui (Nov. 115.3.11). De iure canonico, si pro filio vel filia familias pater contrahat nuptias vel sponsalia vel matrimonium, non valet, quod fit, nisi filius vel filia consentiant ..." This work, traditionally attributed to the Paduan jurist, Prosdocius de Comitibus (1370–1438), was probably authored in the late thirteenth century. See T. IZBIČKI, Problems of Attribution in the *Tractatus universi iuris* (Venice 1584), in: *Studi Senesi* 29 (1980), pp. 491–492.

<sup>37</sup> HOSTIENSIS ad X. 3.33.2, *Ex litteris*, fol. 124r, n. 7; G. DURANTIS, *Speculum iudicale*, Basel 1574, vol. 2, IV, IV (*Qui filii sint legitimi*), p. 463, n. 15: "Quid si filia tua peccat in corpus suum et sic potes eam exhaeredare, ut C. de inoffic. test., Si post XXV (Ed: Si pater), authen. ibi posita (C. 3.28.19), nunquid poteris ei negare alimenta? Et videtur, quod possis, ff. de lib. agnos., Si quis a liberis, § Si quis ex his (D. 25.3.5.10), de hoc C. de alen. lib., l. finali (C. 5.25.4)"; JOHANNES ANDREAE ad X. 4.7.5, *Cum haberet*, fol. 32r, n. 6, Venice 1581; ANTONIUS DE BUTRIO ad X. 4.7.5, *Cum haberet*, fol. 28rb, n. 13; BARTOLOMEUS FUMUS, *Summa*, Venice 1554, v. alimentum, fol. 29r, n. 8: "Et generaliter dic, quod omnes cause sufficientes ad exhaeredationem, sufficiunt ad privationem ab alimentis." Martinus de Fano's dissent represented a minority opinion. See U. NICOLINI, *Il trattato 'De alimentis' di Martino de Fano*, in: *Atti del Congresso internazionale di diritto romano e di storia del diritto* (Verona 27/29-IX-1948), vol. 1, Milan 1951, p. 369, n. 70. On these texts, PENE VIDARI, *Ricerche* (n. 30), pp. 126–143.

of extinguishing or creating legal relations. In point of law, a father may curse as well as appoint his child heir.<sup>38</sup> In the hurly-burly of real life, as we shall see below, father-testators who cursed disobedient children tended to disinherit them as well.

Local statutes seldom included a section exclusively devoted to disinheritance.<sup>39</sup> When disinheritance was treated, it was usually buried in the section devoted to inheritance.<sup>40</sup> A remarkable exception is found in the Venetian statutes of Jacopo Tiepolo of 1242 with a full apparatus of glosses. Venice's mythic reputation for subordinating Roman law to local customs and legislation is legendary. But its statute, "No parent may disinherit his child," together with its glosses, were thoroughly Roman in letter and spirit. Under this statute, a parent was prohibited from depriving his child of a portion of the inheritance. The reserved portion is understood as one-third of the testator's real property. Upon the testator's predecease, the one-third automatically passes to the child, unless the child had been disinherited by his father. For the disinheritance to be valid, a legitimate reason must be included in the testament, such as the son laid hands on his parents with the intention to cause harm.<sup>41</sup> The

<sup>38</sup> BALDUS ad X. prooem. v. *Gregorius*, Venice 1595, fol. 4r, nn. 48–49.

<sup>39</sup> For a comparable situation in medieval Castille, see H. DILLARD, *Daughters of the Reconquest. Women in Castillian Town Society, 1000–1300*, Cambridge 1984, pp. 29–30.

<sup>40</sup> As, e.g., *Lucensis civitatis statuta*, Lucca 1539, fol. 85r, lib. 2, cap. 4 (*De hereditibus instituendis*): "Concedimus tamen quod pater possit tam filium quam filiam exheredare ex causis a iure permissis." This concession was absent from the 1372 redaction of Lucca's statutes: see Archivio di Stato, Lucca, Statuti del Comune di Lucca, 6. This redaction, however, provided that a son may not receive *alimenta* during the period of his punishment for having laid hands on, wounded, or assaulted a parent, grandparent, or great-grandparent. See *Ibid.*, fol. 32r, lib. 2, rub. LXXVII (*De pena interficientis [sic] patrem vel matrem etc.*): "Qua correptione durante seu eius pena dictus pater, avus vel proavus non teneatur eidem filio, nepoti, vel pronepoti alimenta prestare."

<sup>41</sup> *Gli statuti Veneziani di Jacopo Tiepolo del 1242 e loro glosse*, ed. by R. CESSI, Venice 1938, p. 213–14, lib. V, rub. XXXV (*Nemo potest disheredare filium suum*). The glosses, dating from the second half of the thirteenth and early fourteenth centuries, were indebted to the teachings of both civilians and canonists. This rubric is discussed by LUJO MARGETIĆ, *Il diritto*, in: *Storia di Venezia*, ed. by L. CRACCO RUGGINI et alii, Rome 1992, p. 680, who holds that the unglossed statute of 1242 differed from Roman law by limiting disinheritance to the sole case of a son who laid hands on his father. The reason for the deviation from Roman law, he explains, is "ovvia: il diritto veneziano anche nel sistema dello Statuto tiepoliano era ancora sotto l'influenza dell'idea del patrimonio familiare, e perciò era restio ad ammettere la diseradazione, eccetto nel caso estremamente grave di maltrattamento del padre da parte del figlio." I offer an alternative reading of the statute. First, it is remarkable to find such an early statute, let alone in Venice, employing Justinianic language on disinheritance. Second, the statute does not

statutes of Veglia, issued in the late thirteenth century, moaned about the social havoc caused by disobedient young men driven by carnal desire to marry their lovers clandestinely. To suppress future clandestine marriages, any son who contracts marriage “without the knowledge, counsel, and consent of his father or mother” will be deprived of his inheritance. Just as “Adam, our first parent, because of his disobedience to God, was excluded from inheriting the pleasures of paradise.”<sup>42</sup>

No figure had more influence on the testator’s decision to disinherit a child than the professional notary. It was the notary who advised testators on both the validity and legal effects of testamentary disinheritance. It was the notary who was responsible for the formalities without which the testament itself was vulnerable to a *querela inofficiosi testamenti*. And it was the notary who reminded penny-pinching testators of the inviolability of the *legitima*. Even when testators sought legal advice from a jurist, a notary normally served

explicitly limit disinheritance to one case, but presents that case as a reason for disinheritance. This point was made by D. MANIN, *Della veneta giurispudenza civile, mercantile, e criminale*, Venice 1848, p. 41: “Così lo statuto; in practica tenevasi che il detto caso non fosse dalla legge indicato tassativamente, ma in via d’esempio, e quindi ammettevansi anche altri gravi motivi di diseradazione.” Third, writing in the spirit of Venetianists committed to the purity of Venetian institutions and the subordination of the *ius commune* to Venetian law and custom, Margetić neglects to mention that the glosses attached to the statute, such as gloss (n. 207) to the words, “iniecerit manus,” which supplied the fourteen Justinianic reasons for disinheritance of children, informed the application of the statute. See CESSI’s introduction, pp. iv ss.; and ENRICO BESTA, La glossa agli statuti veneziani di Iacopo Tiepolo, in: *Istituto lombardo Accademia di scienze e lettere, Reconditi*, ser. 3, vol. 3, (1938–1939), pp. 65–83. Fourth, the updating of the statute via glosses was, in my opinion, connected to developments in the *ius commune*, not to any observable change in the Venetian attitude toward the devolution of patrimony. The issue of whether a child could be deprived of his *legitima* through disinheritance was under discussion in Venice before 1242. See B. PITZORNO, Le consuetudini giudiziarie veneziane anteriori al 1229, in: *Miscellanea di storia veneta*, ser. 3, vol. 2, Venice 1910, pp. 319, 325, 340–41.

<sup>42</sup> *Statuti Veglae*, ed. by A. LUSARDI and E. BESTA, Milan 1945, pp. 160–167, cap. LXVIII (*De clandestinis desponsationibus et de primo casu perdendi haereditatem*). For the quote, p. 161: “Nam et Adam primus parens noster propter inobedientiam a Deo expulsus fuit de haereditate paradisi deliciarum.” Veglia, the northernmost island of the Adriatic, was under Venetian sway at various times during the Middle Ages, and a permanent fixture in the *Dominio* of Venice from 1480 to 1797. Today, Veglia has been rebaptized Krk and since 1991 has belonged to the independent Republic of Croatia. Comparing Besta’s irredentist introduction, in which the *statuti* represent “Italianità di Veglia,” to the latest Croatian tourism bulletins circulating the internet making Krk a venerable shrine of Croatian culture reminds us of the contemporaneity of history.

as an intermediary. Inheritance/disinheritance was a conventional topic of the notarial manuals, such as those produced by the great thirteenth-century masters of the Bolognese school, Rainerius Perusinus, Salatiele, Martinus de Fano, Rolandinus de Passageriis, and Petrus de Boatteriis;<sup>43</sup> it is also featured in the manuals produced by minor notaries for the local community in which they practiced their art.<sup>44</sup> The manuals stressed the dangers resulting from an illegitimate disinheritance. Rolandinus told his audience to "be mindful that there are certain persons on whom the inheritance is conferred by strict law, so that unless they are either instituted or solemnly disinherited, the testament is *ipso iure* invalid or annulled."<sup>45</sup> A mid-thirteenth-century Florentine manual admonished that the last will should be written so that the testator may avert disinheriting a son or daughter and thus violating laws and good customs.<sup>46</sup>

The clear-eyed treatment of illegitimate disinheritance by Petrus de Boatteriis must have been especially welcomed by practitioners. According to Petrus, fathers had to either institute or disinherit all of their legitimate children, female or male, in power or emancipated.

<sup>43</sup> Die *Ars notarie* des Rainerius Perusinus, ed. by L. WAHRMUND, in: *Quellen zur Geschichte des römisch-kanonischen Prozesses im Mittelalter*, vol. 3, 2, Innsbruck 1917, p. 179; SALATIELE, *Ars notarie*, ed. by G. ORLANDELLI, vol. 2, Milan 1961, pp. 202, 308; MARTINUS DE FANO, *Der Ordo iudiciorum* des Martinus de Fano, in: *Quellen*, ed. by L. WAHRMUND, vol. 1, p. 87; ROLANDINUS, *Summa totius artis notarie*, Venice 1546, fols. 237v–238r, II, 8, rub. (*De exhaeredationibus notule*); *Flos testamentorum*, fols. 245v–246r, rub. (*De his qui omnino institui vel exhaeredari debent*), fols. 259v–261v, rub. (*Quibus ex causis testamentum reddatur inutile*); fol. 263v, rub. (*Qualiter formentur exhaeredationes*); and in the same volume, PETRUS DE BOATTERIIS, *Expositio in Summam Rolandini*, fol. 54rv, II, 8, rub. (*Quomodo filii legitimi et naturales sint instituendi a patre et matre, quomodo exheredantur sive praeteruntur*). On Pietro Boattieri, see G. ORLANDELLI's profile, in: *Dizionario biografico degli italiani*, Rome 1968, vol. 10, pp. 803–805.

<sup>44</sup> *Un formulario notarile fiorentino*, ed. by S. P. P. SCALFATI, Florence 1997, pp. 92–33, rub. (*De testamentis et ordine testamenti et ultime voluntatis*); *Formularium [fiorentinum] diversorum contractuum*, Venice 1506, fol. 103, rub. (*Exheredatio*); *Il cartularium veronese del magister Ventura del secolo XIII*, ed. by G. MOSCHETTI, Naples 1990, p. 114, rub. (*Quid sit testamentum*): "Item oportet pater suos filios instituere sibi heredes vel exheredare, et si exheredaverit, oportet quod iusta causa interveniat, quod probari debet ab herede instituto."

<sup>45</sup> ROLANDINUS DE PASSAGERIIS, ed. cit., fol. 245v, II, 8, rub. (*De his qui omnino*): "Attende igitur quod quidam sunt ad quos ita stricto iure legitima spectat haereditas, ut nisi instituantur, vel rite exhaeredentur, aut testamentum est ipso iure nullum, aut rescinditur."

<sup>46</sup> *Un formulario notarile fiorentino*, p. 93: "Et sic est scribenda voluntas testatoris et ea que dixerit, prospiciendo et cavendo ne aliquem filium vel filiam exheredaret neque faciat aliquid contra leges et iura vel bonos mores."



This rule applied to daughters living at home, placed in a convent, and homeless wanderers. But suppose a father wishes to institute as heir his married daughter, leaving *iure institutionis* only the dowry he has already provided her. Does this tactic make the testament valid?<sup>47</sup> Petrus presented two opposing opinions.<sup>48</sup> Accursius believed the testament is valid, because the father may institute a daughter as heir to her dowry. For Azo the testament is invalid, because the dowry has passed to the daughter as patrimony, and should the father wish to take back her dowry, he may not. Since the married daughter, in effect, receives nothing beyond her dowry, she is said to have received nothing as heir, thus invalidating the father's testament.<sup>49</sup> Azo rejected the corollary that a father, to assure the validity of the testament, must disinherit a daughter with a dowry. Disinheritance was not called for today, he explained, because it is only necessary that the dowered daughter be left a small supplementary amount *iure institutionis*.<sup>50</sup>

Other jurists chimed in that Accursius's opinion holds where the dowry is *profecticia* – that is, provided by the father which, under Roman law rules, he may recover when his daughter, without surviving children, predeceases him. Azo's opinion holds where the dowry is *adventicia* – that is, provided by someone other than the father, or by

<sup>47</sup> *Expositio*, fol. 54v, II, 8, rub. (*Quomodo filii legitimi*): "Tenetur etiam pater facere mentionem de filiis tam masculis quam foeminis, eos instituendo, nulla sublata differentia inter masculum et foeminam. Nam ita tenetur facere mentionem de filia in domo existente, sicut de filio in potestate existente, et etiam de filia in monasterio constituta, et etiam de filia vagabunda, et etiam de filia emancipata et filia maritata et vidua, saltem in aliquo ultra dotem instituendo."

<sup>48</sup> *Ibid.*, "Sed ponamus quod quidam habet filiam maritatum, et facit testamentum et eam solum instituit in dote sua, queritur nunquid valet testamentum?"

<sup>49</sup> *Ibid.*, "Hic sunt opiniones. Dominus Accursius dicit quod valet testamentum, quia descendentes debent institui in testamento, vel omnino exhaereditari cum causa legitima. Modo instituit eam in dotibus suis, ergo si reperitur instituta, valet testamentum. Dominus Azo tenet quod non valet et haec est ratio: quia illa dos est patrimonium ipsius mulieris, et intantum quod si pater vellet dotem a filia auferre non posset, et filia nihil percipit ex testamento patris, et ideo testamentum non valet." For these opinions, see Azo ad C. 3.28.29, *Quoniam novellam, Lectura Azonis et magni apparatus ad singulas leges duodecim librorum Codicis Iustiniani*, Paris 1581, p. 205, n. 3; Azo, *Summa Codicis*, 6.28, *De liberis preteritis vel exhereditatis*, Pavia 1484 sf.; Glossa (*Casus*) ad C. 3.28.29, p. 377.

<sup>50</sup> Azo, *Summa*, loc. cit.: "Unde etiam quidam dicunt filia institui posset in dote cum et contemplatione dotis, filia possit exhereditari, ut supra, de rei ux. ac., § *Videamus* (C. 5.13.1.11). Sed non ita puto hodie quia necesse est ut habeat aliquid saltem modicum iure institutionis, ut in auten. ut cum de appell. co., § *Aliud* (N. 115. = Auth. 8.12.3)."

the daughter herself as *sui iuris*.<sup>51</sup> Niceties aside, the jurists following the *Glossa* were in general agreement that to prevent a challenge to the testament on the grounds that a daughter had been pretermitted, it was safer for fathers to leave something *iure institutionis* in addition to the dowry.<sup>52</sup> Petrus himself advised notaries to take care that the father always institute his daughter as heir to something beyond her dowry.<sup>53</sup> This tactic, Odofredus observed, was in fact the general custom throughout Italy.<sup>54</sup>

The tactic of making the daughter heir to her dowry, according to the *Glossa*, was not available to mothers, because a dowry given by the mother may be construed as a gift. A father is compelled *ex lege* to provide a dowry, making it analogous or equivalent to the *legitima*. A

<sup>51</sup> *Expositio*, loc. cit.: "Alii distinguunt: quia aut pater dedit dotem profecticiam, et valet testamentum et servatur opinio domini Accursii, aut pater dedit dotem adventiciam, et tunc non valet testamentum et servatur opinio domini Azonis."

<sup>52</sup> This was the position of the *Glossa Patrimonium est* ad D. 4.4.3.4, § *Sed utrum*, p. 337: "... cum cautela tamen instituat eam filiam in duodecim imperialibus una cum dote, ut secundum omnium opiniones valeat testamentum; in matre videatur secus, cum donasse videatur." See also JOHANNES ANDREAE ad X. 3.26.16, *Raynuntius*, fol. 113r, n. 6: "quod instituitur in 5 solidis ultra dotem, ut sic non agat nisi ad supplementum;" BARTOLUS ad D. 4.4.3.4, § *Sed utrum*, fol. 140r, n. 7: "Secundo, an filia possit institui in dote, et gl. tenet quod sic. Tamen dat consilium quod instituitur in .v. solidis et in dote sua, et ita observatur de facto;" ALBERICUS DE ROSATE ad D. 4.4.3.4, § *Sed utrum*, In *primam Digesti veteris partem commentaria*, Venice 1585, fol. 253v, n. 14: "dicemus communiter servatur consilium gl., ut instituitur in dote et in aliquo modico ultra;" ANGELUS DE UBALDIS ad D. 5.2.8.6, *Si quis mortis*, Lyon 1548, fol. 141rv: "Tutius tamen est ut saltem in uno denario instituitur, nec erit expugnabile testamentum, ut glo. sing. in l. iii, § *Sed utrum*;" RAPHAEL FULGOSIUS ad D. 4.4.3.4, § *Sed utrum*, Lyon 1554, fol. 148v, n. 10.

<sup>53</sup> *Expositio*, loc. cit.: "Tamen hic datur consilium, quod tu tabellio facias, quod semper pater vel testator instituit filiam suam in aliquo ultra dotes suas. Et haec vendicant sibi locum in patre."

<sup>54</sup> ODOFREDUS ad C. 3.28.29, *Quoniam novella*, *Lectura Codicis*, Lyon 1552, fol. 159r: "Ad tollendam dubitationem ita provisus est de consuetudine de huius civitatis et totius Italie, quod instituit quis filiam suam et in reliquo modico ultra." According to N. TAMASSIA this practice represents a synthesis of Roman and Lombard law. See N. TAMASSIA, Odofredo. Studio storico-giuridico, in: N. TAMASSIA, *Scritti di storia giuridica*, vol. 2, Padova 1967, p. 426, n. 34. There is extensive evidence supporting Odofredus's observation. For a perfect example of this practice, see the testament of the Roman *iudex*, Candalfus, redacted in 1306, edited by A. ESPOSITO, La documentazione degli archivi di ospedali e confraternite come fonte per la storia sociale di Roma, in: *Sources of Social History. Private Acts of the Late Middle Ages*, ed. by P. BREZZI and E. LEE, Toronto 1984, pp. 76-79. Some testators, of course, ignored conventional wisdom. See the testament of dominus Johanninus, redacted in Bologna in 1300, in which he left his daughters dowries *iure institutionis*, but nothing more. Bologneser Testamento, edited by M. BERTRAM, Zweiter Teil: Sondierungen in den *Libri Memoriali*, in: *Quellen und Forschungen aus italienischen Archiven und Bibliotheken* 71 (1991), p. 230.

mother, on the other hand, may be compelled to provide a dowry only in extraordinary circumstances, so that presumptively the dowry is constituted *ex voluntate*, and thus analogous to a gift.<sup>55</sup> Agreeing with the *Glossa*, Petrus posited that the testament is invalid where a mother provides a dowry for a daughter, but leaves nothing in addition to the dowry. The testament would be valid if the mother attaches a stipulation that the dowry immediately reverts to her.<sup>56</sup> Presumably, in the latter case, ownership of the dowry does not pass to the daughter. In practice, stipulations for the eventual reversion of property to the mother or her heirs were customarily attached to gifts of nondotal goods, with the intention of insulating them from the in-law's control, but almost never to the dowry. The prudent course for mothers as well as fathers who wanted to avoid a *querela inofficiosi testamenti* is to leave daughters something beyond the dowry in the testament.

To avoid illegitimate disinheritance, the notary must be vigilant in distinguishing between a legacy and the institution of the heir. Petrus presented the case of a testator who instead of instituting his child leaves him or her a legacy of half the inheritance. The testament is invalid, because the law demands that the child acquire paternal goods as heir, rather than as legatee.<sup>57</sup> It is also invalid for violating the fundamental rule that the testator must distribute his entire estate; he cannot die in part testate, in part intestate. What if the testator said, "I leave (*relinquo*) my son a hundred." Is the legacy now valid? Some answer yes, Petrus reported, because the word, "*relinquo*," refers to the institution of the heir as well as a legacy. Petrus cautioned that one must know whether the testator left (*relinquit*) money, part of his goods, or everything. If he left money, "*relinquit*" refers to a legacy alone, invalidating the testament. No rationale or controlling authority for this determination is offered, although I suspect that Petrus may have contemplated the case in which rather than disinheriting one's

<sup>55</sup> See ALBERICUS DE ROSATE ad D. 4.4.3.4, § *Sed utrum*, fol. 253v, n. 14.

<sup>56</sup> *Expositio*, loc. cit.: "Sed hic potest quaeri, quid iuris de matre, que dedit dotem pro filia condens testamentum et non instituens eam ultra dotes suas? Dicendum est quod non valet testamentum, quia non donasset illam dotem filiae suae, nisi ipsa mater stipulata fuisset incontinenti illam dotem sibi reddi, quia tunc valeret testamentum."

<sup>57</sup> *Expositio*, fol. 55r, II, 8 (rub. *Quid iuris, si quis non instituit descendentes, et quanta sit legitima, quae filiis debetur*): "Ponamus quod testator fecit testamentum, et non instituit filium, legavit solum medietatem haereditatis. Quaero, an valeat testamentum. Et videtur quod non valet, quia lex vult quod filius habeat bona paterna iure institutionis, et non iure legati, et descendentes omnino debent institui vel exhaereditari, et ideo testamentum non valet."

child outright, the testator left (*relinquit*) a token sum of money. Both the testament and the legacy stand, however, when the testator has left part or all of his goods.<sup>58</sup>

The majority of jurists accepted the *Glossa's* interpretation that the meaning of "relict" and its cognate "relinquo" extends to *institutio*.<sup>59</sup> By leaving a child even a minimum amount *iure institutionis*, the testator eliminates the threat of a *querela*.<sup>60</sup> The *Glossa's* opinion soon became orthodoxy and was translated into testamentary practice, but it was also predicated on the assumption that the child in question is the sole heir. In the eyes of some jurists, the *Glossa's* opinion fails where the testator solemnly appointed one child as universal heir, while he left certain specific things to another child (*heredis institutio ex re certa*),<sup>61</sup> who was also entitled to be instituted universal heir. Without doubt, in conformity with Justinian's constitution, *Quotiens* (C. 6.24.13), the heir *ex re certa* may exercise his right to sue for the full share of the inheritance to which he is entitled. Yet controversy erupted over whether the specific goods must be treated as a legacy solely. If so, then the child left the specific goods has, strictly speaking, been pretermitted, thus invalidating the testament.<sup>62</sup> In the end, a consensus emerged reflected in Petrus de Boatterii's resolution that, although the testament remains valid, the child instituted for less than his entitled share may always employ the *actio ad supplendam legitimam*.<sup>63</sup>

<sup>58</sup> Ibid., "Sed ponamus quod testator dixit 'relinquo filio meo centum,' valet nunc legatum? Quidam dicunt quod sic, quia istud verbum habet referri ad institutionem et ad legatum: ergo valet, quia refertur ad institutionem. Tamen litera distinguit, quia aut testator reliquit pecuniam, aut omnia bona reliquit vel partem bonorum. Si reliquit pecuniam, tunc trahitur ad legatum et viciatur testamentum. Si reliquit omnia bona vel partem bonorum, modo trahitur ad institutionem et valet legatum."

<sup>59</sup> On "relinquo" and for what follows, see *Glossa Relictis* ad Nov. 1.1.2, *Et haec quidem* (= Auth. 1.1), p. 6: "Nota, verbum relict adaptatur ad institutionem;" G. DURANTIS, *Speculum*, vol. 2, IV, III (*De testamentis*), p. 380, n. 13; BARTOLUS ad D. 28.5.49 (48), *His verbis Titius*, fol. 135r, n. 1; BALDUS ad D. 28.5.49 (48), fol. 85r.

<sup>60</sup> *Glossa Praeterire* ad N. 115.3 (= Auth. 8.12.3), p. 286: "sic ergo in minimo facta institutio excludit querelam."

<sup>61</sup> M. DAVID, *Studien zur heredis institutio ex re certa*, Leipzig 1930, pp. 42 ss.

<sup>62</sup> For the medieval controversy surrounding this point, see JACOBUS BUTRIGARIUS ad C. 6.24.13, *Quotiens, Lectura super Codice*, Paris 1516, fol. 15v; BARTOLUS ad D. 28.5.35, *Ex facto proponebatur*, fol. 133rv, nn. 1-2; and BALDUS ad D. 28.5.35, fol. 83r, nn. 4-5.

<sup>63</sup> *Expositio*, fol. 55r: "... quanta est legitima, quae debetur filiis et ante omnia, litera ponit, quod si quis instituit filium etiam in minime parte, quod valet testamentum, licet non habeat suam legitimam, tamen potest agere ad supplementum."

### Testamentary Disinheritance

In north and central Italy during the Middle Ages and Renaissance the practice of testamentary disinheritance was rare.<sup>64</sup> Lovere, an agricultural community in the province of Bergamo, appears to be the proverbial exception that proves the rule.<sup>65</sup> In Florence, and I suspect elsewhere, renunciations of inheritance by children far exceeded the disinheritance of children by parents.<sup>66</sup> Genoa represents an early and striking example of the avoidance of testamentary disinheritance. In examining extant wills drafted in Genoa between 1155 and 1253, Epstein finds that "not one Genoese will records a disinheritance," which, he believes, points to a gap between practice (testaments) and theory (notarial manuals). He considers his finding extraordinary, since one would expect at least some cases of disinheritance for the simple reason that the notarial manuals show that disinheritance was in certain cases permissible. Like other researchers who discount legal

<sup>64</sup> S. EPSTEIN, *Wills and Wealth in Medieval Genoa, 1150–1250*, Cambridge, Mass. 1984, p. 11; S. K. COHN, JR., *Death and Property in Siena, 1205–1800*, Baltimore 1988, pp. 136 ss.; IDEM, *The Cult of Remembrance and the Black Death. Six Renaissance Cities in Central Italy*, Baltimore 1992, pp. 178; on Siena, see also, G. LUMIA, *Morire a Siena: Devoluzione testamentaria, legami parentali e vincoli affettivi in età moderna*, in: *Bullettino senese di storia patria* 103 (1997), pp. 103–185; S. CAROCCI, *Baroni di Roma, Dominazioni signorili e lignaggi aristocratici nel Duecento e nel primo Trecento*, (Collection de L'École Française de Rome 181), Rome 1993, p. 165; M. L. LOMBARDO and M. MORELLI, *Donne e testamenti a Roma nel Quattrocento*, in: *Archivi e cultura* 25–26 (1992–93), pp. 23–130; S. FASOLI, *Indagine sui testamenti milanesi del primo Quattrocento (notaio Ambrogio Spanzotta)*, in: *Età dei Visconti. Il dominio di Milano fra XII e XV secolo*, ed. by L. CHIAPPA MAURI, L. DE ANGELIS CAPPABIANCA, and P. MAINONI, Milan 1993, pp. 331–354; L. GUZZETTI, *Le donne a Venezia nel XIV secolo: uno studio sulla presenza nella società e nella famiglia*, in: *Studi veneziani* 25 (1998), pp. 15–88, a summary of her dissertation, *Venezianische Vermächtnisse. Die soziale und wirtschaftliche Situation von Frauen im Spiegel spätmittelalterlicher Testamente*, Stuttgart, Weimar 1998; J. S. GRUBB, *Provincial Families of the Renaissance: Private and Public Life in the Veneto*, Baltimore 1996, pp. 100–101; S. M. STUART, *A State of Deference. Ragusa/Dubrovnik in the Medieval Centuries*, Philadelphia 1992, pp. 79 ss.; for additional bibliography, see M. BERTRAM, *Mittelalterliche Testamente. Zur Entdeckung einer Quellengattung in Italien*, in: *Quellen und Forschungen aus italienischen Archiven und Bibliotheken* 68 (1988), pp. 509–545.

<sup>65</sup> G. SILINI, *Famiglia, Società e Patrimonio a Lovere negli atti dotali e testamentari (secoli XV e XVI)*, in: *Archivio storico bergamasco* 21 (1991), pp. 68–126, esp. pp. 98–99, where he reports twenty-two cases of testamentary disinheritance in the years, 1453–1519.

<sup>66</sup> T. KUEHN, *Law, Death and Heirs in the Renaissance. Repudiation of Inheritance in Florence*, in: *Renaissance Quarterly* 45 (1992), pp. 484–516, who finds that annually in the 1480s over one hundred Florentines and other Tuscans repudiated the inheritance left to them by their fathers.

theory and academic law, Epstein neglects the *functional equivalent* of testamentary disinheritance: the pretermission of children entitled to be instituted heirs. Admittedly, unless one has a total picture of the testator's family, it is difficult to say whether the *sui heredes* were pretermitted from the testament. We typically learn about silent disinheritance from subsequent litigation. Pretermission is much easier to detect when testators resorted to the common expedient of leaving children paltry legacies as tokens of disgrace (*turpia legata*).<sup>67</sup>

The alleged gap between legal theory and testamentary practice is, I believe, an illusion created by modern historians. None of the leading medieval legal and notarial experts whom I have read advised that testators could or should optimize the future prospects of their families by disinheriting a child. On the contrary, their advice was reactive rather than proactive. The disinheritance of children was discouraged, save to punish children for provable reasons of serious misconduct, while notaries, and through them testators, were forewarned of the hazards surrounding testamentary disinheritance and the pretermis-sion of children. For Epstein, the choice of heirs, along with the absence of testamentary disinheritance, is largely explained by several variables: the natural desire to perpetuate the descent group, specific composition of each family, demographic patterns, levels of wealth, and the church's teachings on the family.<sup>68</sup> To these variables, I would

<sup>67</sup> EPSTEIN, *Wills and Wealth* (n. 64), p. 12 cites examples of "tiny bequests" left by testators to children and relatives who by law should have been appointed heirs. A concrete illustration of this practice is discussed by A. SORBELLI, *Il comune rurale dell'appennino emiliano nei secoli XIV e XV*, Bologna 1910, p. 174. Interestingly, although the Venetian statutes provided for testamentary disinheritance, Guzzetti, in her exhaustive examination of fourteenth-century Venetian testaments, has not found a single case. She has found, however, numerous instances of testators leaving only five soldi to children, while leaving the rest of the estate to someone else (personal communication, 4 Oct. 99). In seventeenth-century Bologna, five soldi was the conventional sum left to a disinherited child, according to A. PASTORE, *Rapporti familiari e pratica testamentaria nella Bologna del Seicento*, in: *Studi storici* 24 (1984), pp. 165 ss. Possible additional examples in table 7.1 in COHN, *Death and Property*, p. 135. But Cohn fails to specify the relationship between testators and legatees, making his data and discussion confusing and of limited value. Cohn also includes in-laws among those whom he claims were indirectly disinherited, which further vitiates his discussion, because in-laws did not hold the status of *sui heredes* and therefore could not be disinherited. For an incisive critique of Cohn's research methods and findings, see M. BERTRAM, *Renaissance Mentality in Italian Testaments?* in: *Journal of Modern History* 67 (1995), pp. 358–369.

<sup>68</sup> EPSTEIN, *Wills and Wealth* (n. 64) begins chapter 3, called "Family: The Principal Heirs," with a biblical quote: "In 1 Timothy 6: 8 we read, 'But if any provide not for his own son, and specifically for those of his own house, he hath denied the faith and is

add paternalism in the form of the *favor liberorum*, a steering assumption of testamentary practice.

The acts of disobedience alleged by testators disinheriting children fell within a narrow range: marrying against the parent's wishes, illicit sexual conduct, verbal and physical abuse, dissipation, and embezzlement. On advice of their notaries, testators customarily took the precaution of leaving the disinherited child a token sum *iure institutionis*.

Undutiful daughters were typically charged with immoral behavior. The Emilian rustic, Giovanni di Corso di Lotta, after instituting his sons as universal heirs and endowing several daughters, disinherited (*ab hereditate et bonis suis exheredavit*) another daughter, called Migliorina, for contracting marriage against his wishes and other acts that for the sake of honor were best left unmentioned. Giovanni left his daughter five soldi *iure institutionis*. He refrained from cursing his daughter, which according to Thomas Aquinas and a legion of professional moralists, he was entitled to do, but instead left her his parental blessings.<sup>69</sup> Angelo di Giovanni Cristofani of the village of S. Innocenza, near Buonconvento southeast of Siena, disinherited his daughter Armina, charging her with leading a dishonorable life and disobedience, as she had regularly withdrawn from his *potestas*. Admitting that Armina's disinheritance may prove to be legally invalid (*non valeret de iure et secundum formam statutorum*), he left her 40 soldi *iure institutionis*, and added that he did not wish Armina to have anything more from his goods.<sup>70</sup> Such a frank admission by the testator

worse than the infidel." The verse is actually 1 Timothy 5: 8. Even by the canons of liberal interpretation, "suorum" should not be rendered as "his own son."

<sup>69</sup> SORBELLI, *Il comune rurale* (n. 67), p. 174. Unfortunately, Sorbelli gives neither the place nor the date of the testament. According to THOMAS AQUINAS (*Summa theologiae*, 2a2e, q. 76 [*De maledictione*]), to curse one's children for reprehensible acts was permissible for their own good.

<sup>70</sup> This disinheritance was originally brought to light by S. COHN, *Death and Property* (n. 64), pp. 136, 284, n. 41. Cohn's comments about the disinheritance and his transcription of the disinheritance clause are clotted with errors. The testament in question is found in the Archivio di Stato di Siena, notarile antecosimiano, n. 2220, no. 223 (15 March 1543). The testator, Angelus olim Johannis de Cristofanis, was not an inhabitant of the "pieve of Sant'Anocrazio," as Cohn says. Nor was Armina "his only child." The testament refers to another, married daughter, Dominica, who had already been awarded her dowry. I give my transcription of the disinheritance clause, with variants from Cohn's transcription in parenthesis: "Et alia filia eius que vocatur (Cohn: vocata) Armina, eo quia (Cohn: quod) inoneste vixit et iam per plura tempora (Cohn: pro pluri tempore) effugit a potestate dicti testatoris patris (Cohn: presentatis), eam exheredat (Cohn: exheradat). Et quatenus exheredatio (Cohn: exheradatio) predicta

that the disinheritance of a child may have violated the law was highly unusual. The Vicentine painter Maestro Gerardo, who was employed in Ferrara, disinherited his daughter Margarita (called Malgarita in the testament), emphasizing that her disgraceful misconduct was common knowledge:

Moreover, Malgarita, his legitimate and natural daughter, against the wishes of her father and against good customs, while she was still unmarried, withdrew from his *potestas* and had sexual relations with a certain Tadeo del Cossa, causing grave injury and disgrace to the testator, as is well known in the city of Ferrara, and secretly carried off many things belonging to the testator against his wishes, on account of which the testator had disinherited and condemned the said Malgarita and deprived her altogether of his goods and estate, forbidding her altogether from ever having or acquiring whatever goods attached to his estate, and with respect to her entire *legitima* and portion of his estate that in whatever kind and howsoever is owed to the said Margarita, the testator has deprived her and wished to deprive her.<sup>71</sup>

Verbal and physical abuse and misappropriation of the parent's property were the primary reasons leading to the disinheritance of sons.

non valeret de iure et secundum (Cohn: suam) formam statutorum, reliquit dicte Armine et eam instituit in solidis (Cohn: solidos) quadriginta denariorum, nec amplius de bonis eius voluit habere." Cohn explains that the "parting gift of 40 soldi" was meant to "avoid a statutory infraction," but he neglects to address the reference to the *ius commune* (*non valeret de iure*) and the question of the identity the *statuta*. I have no idea either about which statutes were contemplated in the testament. Since neither the pieve of S. Innocenza nor Buonconvento issued statutes, perhaps the testator had contemplated the statutes of Siena. Although the Siennese statutes of 1545 were issued after the testament, they contain detailed regulations on inheritance, dowries, and even disinheritance: *L'ultimo statuto della Repubblica di Siena* (1545), ed. by M. ASCHERI, Siena 1993, p. 251, Distinctio II, cap. 150 (*De haeredibus instituendis*): "Et in dotibus, quae filiabus relinquerentur, non possit testator aliquod onus imponere vel sibi vel suis haeredibus aliquod ius reservare. Conceditur tamen quod pater possit, tam filium quam filiam, exheredare ex causis a iure permissis." Ultimately, the test of whether the disinheritance was valid would be based on the *ius commune*.

<sup>71</sup> Maestro Gerardo's testament is published in *Artisti a Ferrara in età umanistica e rinascimentale. Testimonianze archivistiche*, parte II, tomo I: *dal 1472 al 1492*, ed. by A. FRANCESCHINI, Ferrara 1995, p. 306, n. 440 (7 May 1483): "Insuper Malgarita eius filia legitima et naturalis contra voluntatem dicti sui patris et contra bonos mores dum esset domicella aufugit ab eo et se carnaliter cognosci fecit a quodam Tadeo del Cossa in grave damnum et ignominiam ipsius testatoris, ut notorium est in civitate Ferrarie, et cum furto asportavit plura bona ipsius testatoris contra eius voluntatem, propterea testator ipse dictam Malgaritam exheredavit, damnavit et omnino privavit bonis et hereditate sua, prohibens et omnino vetans ipsam unquam habere possit et consequi quicquid de bonis sue hereditatis, ac omni sua legitima et portione quomodocunque et qualitercunque ipsi Margarite debita privavit et privatam esse voluit ispe testator ex certa animi scientia ..."



Aloisio di Jacopo Branchi, a native of Venice and a resident of Florence, attested in his testament that his son, Marino, had caused him physical suffering and mental anguish. Beyond embezzling 500 florins from Aloisio, Marino beat his father repeatedly, and it was now around eight years since he had seriously wounded his father's head. Without hope of recovering the 500 florins, Aloisio left Marino this amount *iure institutionis*. He then disinherited Marino with regard to the rest of his estate, and denounced his son for treating his father as an enemy and outsider.<sup>72</sup>

The enmity between the wealthy Florentine merchant Simone di Rineri de' Peruzzi and his son, Benedetto, was volcanic. On 8 May 1380, Simone dictated his testament in the sacristy of the Franciscan church of Montepulciano in the presence of "seven solemn and devout friars." The testament is no longer extant, though we know from Simone's secret record book (*libro segreto*) that he left it in the custody of the Franciscan friars. With righteous indignation he hissed that the reason causing him to replace all previous testaments with the new one were the many acts of "disobedience, lies, fraud, betrayals, and dissipation" committed by Benedetto against his father and the Peruzzi clan. Benedetto was assailed for depleting his father's resources, which was galling, since he had hitherto been treated with preferential generosity. Simone did not explicitly state that he had disinherited Benedetto, but his outrage and the fact that he had inserted in his testament definite instances of Benedetto's disobedience gives every indication that he did. Soon after, Benedetto was exiled from Florence for plotting to overthrow the regime, inciting Simone to curse his son

<sup>72</sup> Archivio di Stato, Florence, Notarile antecosimiano 14720, fol. 53rv (30 Dec. 1481): "Item in verbo veritatis, volens ipse testator suam exhonere conscientiam et veritati semper locum esse, dixit et expresse affirmavit qualiter Marianus ipsius testatoris filius in pluribus vicibus per vim subtraxit dicto testatori florenos quingentos et ultra, et sic et clam occulte declaravit ad manus dicti Marini pervenisse de substantia bonis et pecunia dicti testatoris, quos eidem iure instituit et reliquit et nil ultra ponere possit, ac etiam dixit dictus testator qualiter dictus Marinus pluribus actionibus manus contra ipsum patrem inierit et plures eum verberavit, et quod iam sunt anni octo vel circha quibus ipse Marinus vulneravit ipsum testatorem in capite, prout omnino notorium est omnibus convicinis et ex causis predictis eum exheredatum esse voluit et sua hereditate privabit, et etiam plurimis iuribus actionibus ipsum suum parentem et genitorem affecit contra debitam pietatis, et quia etiam ipsum suum parentem potius me inimicem et extraneum tractavit." I owe this reference to Thomas Kuehn. For a similar case of filial embezzlement and rebellion that resulted in disinheritance, see M. BERENGO, *Nobili e mercanti nella Lucca del Cinquecento*, Turin 1965, p. 45.

and demand that God punish him as a wicked traitor, and to write yet another testament, in which Benedetto was apparently once again disinherited.<sup>73</sup>

The venomous relationship between the condottiere-prince Count Pier Maria Rossi of Parma, and his sons, Giovanni and Giacomo, has attracted considerable attention.<sup>74</sup> In his last will of 1464, Rossi left dowries for his daughters, provided for the restitution of his wife's dowry upon his predecease, and appointed two of his legitimate sons, Bernardo, bishop of Cremona, and Guido, as heirs. At the same time, he disinherited two other legitimate sons, Giovanni and Giacomo, whom he accused of consorting with criminals, attempting to undermine the count's relations with his lord, Filippo Maria Visconti, the duke of Milan, and threatening to kill their father. Giacomo was also castigated for having a liaison with a married woman, Ginevra Terzi (whose family were bitter enemies of the Rossi), and for murdering her husband. Giacomo may have been imitating his father, a "faithful" adulterer, who had a long-standing affair with Bianchina Pellegrini of Como while she was married to a Milanese aristocrat. To his *inamorata*, Rossi bequeathed major properties in his last will, as well as properties to Bianchina's children. In any event, Giacomo's criminal behavior and his liaison with Ginevra Terzi, Rossi charged, endangered the family's preeminent position in Parma. In a deposition of 1467 made before the Podestà, Giovanni and Giacomo confessed to twenty-two charges against them. They nonetheless contested their disinheritance, claiming procedural irregularities and that mere verbal abuse of a parent did not meet the standard for legitimate disinheritance. The

<sup>73</sup> Libro segreto di Simone di Rinieri Peruzzi, in: *I libri di commercio dei Peruzzi*, ed. by A. SAPORI, Milan 1934, p. 522. Partial translation in G. BRUCKER, *The Society of Renaissance Florence. A Documentary Study*, New York 1971, pp. 62–63.

<sup>74</sup> For what follows, see A. PEZZANA, *Storia della città di Parma*, Parma, 1837–59, vol. 4, pp. 307–312; G. MANFREDI, Considerazioni sul testamento del Conte Pier Maria Rossi di San Secondo, in: *Archivio storico per le provincie parmensi* 4<sup>th</sup> ser., 6 (1954), pp. 87–93 (a feeble piece in which the author fails to give the archival reference to the document he cites); J. WOODS-MARSDEN, Pictorial Legitimation of Territorial Gains in Emilia: The Iconography of the Camera Peregrina Aurea in the Castle of Torchiara, in: *Renaissance Studies in Honor of Craig Hugh Smyth*, Florence 1985, vol. 2, pp. 553–564. The "testamento del Conte Pietro Maria" (15 January 1464) is preserved in the Archivio di Stato of Parma, *Feudi e Comunità, Rossi Conti di Berceto, Corniglio, San Secondo*, busta 206, c. 2. I am grateful to Prof. Woods-Marsden for providing me with a transcription of the declaration of disinheritance covering fols. 4r–6v. This scrupulously worded and detailed disinheritance was intended to withstand the inevitable challenge from Rossi's sons.

jurist, Francesco of Reggio, a legal adviser to the duke of Milan apparently supported the complainants, but we do not know the arguments he may have presented, nor in what official capacity his opinion was rendered. While the circumstances surrounding this case remain murky, there is no question that under Nov.115.3, § *Aliud quoque capitulum*, Rossi was legally entitled to disinherit Giovanni and Giacomo.

It was customary for testators to request heirs to perform particular acts, such as payment of debts and legacies or performing good works for the benefit of the testator's salvation. But it was unusual for testators to threaten heirs with disinheritance for non-performance, though one imagines that parents frequently wielded threats of disinheritance to intimidate their children. Nor have I seen evidence in medieval Italian testaments of the no-contest clause employed by the late American singer Frank Sinatra, who left the bulk of his millions to his widow and children, but warned that any beneficiary contesting his will would be disinherited.<sup>75</sup> One testator who did threaten her children with disinheritance was the Perugian widow, Maddalena Narducci.<sup>76</sup> She was the daughter of a prominent merchant and the second wife of the Perugian noble, Mariotto di Nicolò Baglioni, with whom she had eight children. Mariotto, in his testament, had dutifully left his daughters property for their future dowries, his sons the greater part of his estate, and his widow her 1200 florin dowry, as he was required by law. Soon after, Maddalena was enmeshed in a relentless, bitter dispute with her sons and daughters over the disposition of her dowry.

According to an agreement, 600 florins of her dowry would be used to supplement the dowries of her daughters, the other 600 florins were to be divided by her sons, Marino and Valmario. But before Maddalena would actually cede the rights to the 600 florins for her daughter's dowries, she demanded the return of the other 600 from her husband's heirs (Mariano and Valmario). Having rejected her demand, the dispute ended up in the local tribunal. It ruled, in June 1470, that the agreement must be enforced and that Maddalena was entitled only to support. Maddalena refused to observe the ruling and the parties

<sup>75</sup> From the City News Service (<http://socalnews.com/L4286.html>), with the headline: "Sinatra's Threat from Grave: Disinheritance for Anyone Who Challenges Will."

<sup>76</sup> For what follows, see F. FRASCARELLI, *Nobilità minore e borghesia a Perugia nel XV. Ricerche sui Baglioni della Brigida e sui Narducci*, Perugia 1974, pp. 13-45.

now entrusted settlement of the dispute to Cardinal Bartolomeo Roverella, then governor of Perugia. His decision, issued in April 1471, granting Maddalena a significant portion of her own dowry, was rejected by Mariano and Valmario and their sisters, who claimed that the cardinal had exceeded his competency. Another son, Alberto, steadfastly stood by Maddalena throughout her travails and cared for her during periods of pestilence.

Maddalena's smoldering resentment toward her children erupted in her testament of 22 March 1476.<sup>77</sup> This testament, written in her own hand, in *volgare*, and in pungent, first-person discourse, evokes feelings of immediacy lacking in the formal testaments redacted by notaries. She assailed Mariano and Valmario for assorted acts of emotional and physical cruelty inflicted on their old, feeble mother. On several occasions, she recounted, Mariano's fury led him to strike his mother. One time, Candia, the wife of the jurist Giovanni Montesperelli, who from her window witnessed Mariano mistreating his mother, screamed at him to stop. Once, when Maddalena asked Valmario for a good cask, he insolently replied: "Not so much as a good cask and you have no hope whatsoever of having anything from me."<sup>78</sup> Maddalena expressed outrage at the false accusations her children had made against her in the litigation over her dowry, and feared that they would dishonor her corpse. She therefore instructed that her body be buried at the altar of S. Ivo in S. Domenico during the day with customary honors and that within one year after her death a stone incised with her father's coat of arms be placed over her tomb. She entrusted the friars of S. Domenico to carry out her instructions, for on two occasions, when she was near death, her heartless sons had terrorized her with the threat to bury their mother at night, secretly, dishonorably.

Despite these and other acts of cruelty Maddalena refrained from disinheriting Mariano and Valmario outright. In brief, she left her

<sup>77</sup> Maddalena's first testament redacted in 1467 is no longer extant. The testament of 1476 was first published by FRASCARELLI, *Nobilità* (n. 76), pp. 129–134; a critical edition of Maddalena's testament, with minute attention to its linguistic features and flavor, has been published by E. MATTESINI, *Scrittura femminile e riscrittura notarile nella Perugia del Quattrocento: le due redazioni del testamento di Maddalena Narducci* (1476), in: *Contributi di filologia dell'Italia mediana* 10 (1996), pp. 81–167, esp. 137–143. For the sake of convenience, I cite from Frascarelli's edition.

<sup>78</sup> FRASCARELLI, *Nobilità* (n. 76), p. 131: "Non tanto uno barile de maniere ma mai de niuna cosa de me tu poy avere speranza."

three sons Mariano, Valmario, and Alberto 700 florins of her dowry, to be divided equally, and named the Benedictine monastery, S. Pietro, as sole universal heir. To collect their legacies, Mariano and Valmario each had to use his own legacy to pay, within a year, a hundred florins to S. Pietro, and each had to pay two florins to their brother Baglione, who had taken the habit of the Franciscan Observants. If the brothers failed to satisfy this condition, each would receive one florin and be automatically disinherited. Maddalena then disinherited her "wicked" daughters, Brigida and Bonifatia, for numerous acts of cruelty, leaving each one just five soldi. Maddalena related that that she wrote her last will "cho bona memoria e con bona consocientia." She also related that she had received advice, in regard to an earlier testament, from Benedetto Capra (d. 1470), a Perugian jurist and expert on testaments and disinheritance.<sup>79</sup> He advised that canon law, which is guided by the Christian faith, requires that personal wrongs should be excused, though one is permitted to distinguish between a wicked son, who may be deprived of his inheritance, and a good son, who may be rewarded. Thus, "with reason and good conscience," Maddalena wrote with urgent self-awareness of her own agency, "I can disinherit such wicked children."<sup>80</sup>

In addition to being savvy about testamentary practice, Maddalena was also wily. From the beginning, it seems, she planned to have her holographic testament put into solemn form by a notary. What else explains her omission to have the original testament witnessed, which rendered her labors legally invalid? In fact, immediately after she wrote her own testament, a notary was commissioned to redraft it, in the sacristy of S. Pietro in the presence of eight monks, though she insisted that the testament remain in *volgare*, so that it would be better

<sup>79</sup> On Benedetto Benedetti (il Capra), see U. NICOLINI's profile, in *Dizionario biografico degli italiani*, Rome 1976, vol. 19, pp. 113–118. Capra authored *Consilia super materia ultimorum voluntarum* printed in Perugia in 1476 and a lengthy *Repetitio super capitulo Rainutius, De testamentis* printed around 1480.

<sup>80</sup> FRASCARELLI, Nobilità (n. 76), p. 131: "Item quisto io fo con bona consocientia perché ebbe consiglio da mesere Benedetto Capra quando io compuse huno testamento dicendo a mme: 'la fede cristiana tiene la legge calonica et la legge vole che se persona le ingiurie e de la robba el mal figliuolo ne sia privato el bono sia prem[i]lato'; et che me faceva grande cuniscie[n]tia che del mal fare io havesse a premaiore e cattive figliuoli he co la ragione e bona consocientia io posso deriditare e cattivi." Baldus, who advised "quod sapiens testator debet testari de consilio sapientum vivorum," would have approved of the advice-seeking Maddalena. See BALDUS ad D. 28.6.39, *Cum ex filio*, fol. 97v.

[illegible]

1. Et ita dicitur quod ego Baldus repulso utique iur. dator. ad fin. me.  
N. sigillo mei not. sigt.

Fig. 1: Holograph *consilium* of Baldus (Archivio di Stato, Florence, Corporazioni religiose soppressi dal governo francese, 98, n. 263, fol. 390r)

understood.<sup>81</sup> The testament of 1476 failed to resolve the dispute, as Maddalena, the monks of S. Pietro, and her sons continued to engage in tortuous legal maneuvers. Driven by fear of having her testament repudiated, and thus dying intestate, Maddalena had her final testament redacted in 10 March 1485.<sup>82</sup> The universal heirs, Mariano, Alberto, and the sons of the defunct Valmario would receive one-third of the inheritance. S. Pietro received the property it wanted. But Brigida, now married, and Bonifatia, now a nun, were left five soldi each *iure institutionis*. Maddalena died soon after, her estate in order, her daughters punished.

The act of disinheriting children, as Maddalena's holographic testament and Simone Peruzzi's testimony graphically reveal, was also an act of vengeance. Though their freedom of testation was constrained in many ways by the *ius commune* and statutory law, testators acting with *iusta causa* could reward or punish individual children. Retribution in the service of justice was morally justifiable and a popular literary topos in the trecento and quattrocento. Beyond law, "victims" like Maddalena and Simone, who turned the tables on their oppressors and thereby avenged the wrongs and dishonor they had suffered, were stock figures in the *novelle* of Boccaccio, Sacchetti, and Sercambi.<sup>83</sup> Maddalena's and Simone's experiences indicate that the emotional forces driving testamentary disinheritance were almost always concealed from view by impassive notarial formulae.

Maddalena's experience was also atypical. An elevated social position gave her exceptional access to Perugia's leading jurists; her ability to express her outrage in writing and in her own words was equally exceptional. "The impressionistic fluidity of speech"<sup>84</sup> that marks Maddalena's holographic testament and Simone's *ricordo* exudes a compelling authenticity that we best treat with caution. It is virtually impossible for historians to corroborate or contradict the reasons given by disinheritors over five and six hundred years ago. Anyone directly involved in a lawsuit or indirectly party to a suit via court dramas

<sup>81</sup> Published by FRASCARELLI, *Nobilità* (n. 76), pp. 134–142; and MATTESINI, *Scrittura* (n. 77), pp. 143–154.

<sup>82</sup> Published by FRASCARELLI, *Nobilità* (n. 76), pp. 143–148.

<sup>83</sup> C. NISSEN, *Ethics of Retribution in the Decameron and the Late Medieval Italian Novella*, Lewiston, New York 1993.

<sup>84</sup> The expression is JOYCE CAROL OATES's, in her review of RICHARD RHODES's *Why They Kill. The Discoveries of a Maverick Criminologist*, in: *New York Times*, 19 September 1999 (Book Review), p. 19.

depicted in film, TV, and mystery novels understands intuitively that a legal dispute is worthy of our attention precisely because it offers at a minimum two contentious versions of reality. What a lay person takes as consequential may have no legal relevance when inspected from the angle of legal rules and theory.

Fortunately, our understanding of the legal ramifications of testamentary disinheritance is enhanced by legal *consilia*. If testaments lull us into believing that disinheritance was a final act of retribution, *consilia* show that disinheritance often triggered suits subjecting an entire estate and several generations of a family to costly, bitter legal entanglements. The *consilia* of Baldus illuminate the issues jurists were asked to resolve, the defenses mounted by complainants, and the procedural and substantive rules that came into play. For the doctrinal context in which he crafted his *consilia*, I offer a brief summary of the core principles elaborated in Baldus's commentaries that guided his approach toward testamentary disinheritance. These principles, in turn, were derived from Justinian's *Corpus* and the *Glossa* and the exegeses of Dynus, Cynus, and Bartolus.

### *Core principles*

Baldus divided disinheritance (*exheredatio*) into three categories: proper, improper, and most improper. A proper disinheritance occurs when a father disinherits a son-in-power with the deliberate intention of damaging the child's interests. It is defined as "a solemn and effectual exclusion or barring, executed in a testament, of someone against his will from all the inheritable property due that person."<sup>85</sup> The disinherited person must be unwilling (*invitus*) to be disinherited, or, more positively, he wishes to be instituted heir to all the inheritable property to which he is entitled. If the disinherited person voluntarily accepts disinheritance, participating as it were in his own disinheritance, "one would not call it disinheritance, as it would not be the father who disinherits that person but that person who would be disinheriting himself." Thus even where a father and son concur on the latter's

<sup>85</sup> BALDUS ad D. 28.2.11, *In suis (repetitio)*, fol. 55vn. 19: "Iuxta predicta autem est sciendum quod habemus triplicem exheredationem: quedam est propria, quedam impropria, quedam improprissima. Propria est quando pater filium, qui est in potestate, exheredat male mente; et hec diffinitur sic: exheredatio est alicuius inviti a tota hereditate sibi debita in testamento legitime et effectualiter facta exclusio seu privatio."



exclusion from inheritance for a worthy reason – for example, because the father relies on his son's support – this exclusion, strictly speaking, may not be treated as an authentic disinheritance.<sup>86</sup> Disinheritance refers to all inheritable property (*tota hereditas*) due the son. Unlike *heredis institutio ex re certa*, it is impermissible to disinherit a person with regard to certain specific things or a part of the inheritable property.<sup>87</sup> The inheritance is due (*debita*) to those who qualify as the testator's heirs (*sui heredes*), including those born after the making of the testament (*postumi*), to whom the testator is bound to institute as heirs, his legitimate children and next-of-kin. Exclusion of persons standing outside the direct line of inheritance (*extranei*) – for example, collateral relatives – does not count as a proper disinheritance and is therefore ineffectual.<sup>88</sup> Disinheritance may not be performed by codicil or trust (*per fideicommissum*), but only by a solemnly redacted testament. Nor may disinheritance occur as a consequence of someone dying intestate.<sup>89</sup> Children of a father who dies without having made a last will may succeed at intestacy; they may not, however, be disinherited at intestacy.

A proper testamentary disinheritance observes all legal formalities: an unconditional declaration of disinheritance, the name of the disinherited person(s), the degree of relationship to the testator, the reason for disinheritance, which, even if ultimately proven untrue, must in the first instance correspond to one of the fourteen approved reasons in Nov. 115.3, § *Aliud quoque capitulum*.<sup>90</sup> With an improper and defective disinheritance, the testator observes all formalities, yet has no intention of excluding the disinherited person from the inheritance. Baldus's example comes from *lex Multi non notae* (D. 28.2.18), where a

<sup>86</sup> Ibid., "Et dicitur inviti, quoniam si esset volens, non diceretur exhereditatio, quoniam non pater ipsum sed ipse seipsum exheredaret. [...] Si etiam pater et filius in privatione concurrunt, quia pater adminiculo filii utitur, non dicitur exhereditatio stricto modo, ut not. C. de inoff. testamen., l. Si quando, § fi. (C. 3.28.35.3)."

<sup>87</sup> Ibid., "Item ideo dicitur a tota hereditate, quia a re certa vel a parte quota non potest fieri, ut infra, eo, l. Cum quidam (D. 28.2.29); secus in institutione."

<sup>88</sup> Ibid., "Item ideo dicitur debita, ut suos, quibus est hereditas debita, comprehendat, ut in l. Nostra <m> (C. 6.23.30), non extraneos, quia inepta res est in extraneos;" BALDUS ad *Auth. Ex causa* (Nov. 115.4.9 = C. 6.28.4 in c.), fol. 95r, n. 6: "Proprie autem transversales non dicuntur exhereditati, quia nemo tenetur eos instituere, nisi in uno casu, in quo solo debetur eis legitima."

<sup>89</sup> Ibid., fols. 55v–56r, n. 20: "Item ideo dicitur in testamento, quia in codicillis vel ab intestato non potest fieri exhereditatio, quia exhereditatio debet esse actus sollemnis, sicut institutio, C. de testam., l. Non codicillum (C. 6.23.14)."

<sup>90</sup> Ibid., fol. 56r, n. 20.

son under the age of puberty is formally disinherited not as a mark of disgrace, but to allow his father to provide for him by other means, such as a trust.<sup>91</sup> A "most improper" disinheritance fails not only to observe the formalities but is also ineffectual: e. g., where the testator lacks the legal capacity to disinherit because he is insane or has lost his civil status because he has been condemned to capital punishment; or where a son in his father's power has been pretermitted, or the heir refuses to accept the inheritance, or even where the testament itself is defective because the mandatory number of witnesses is incomplete.<sup>92</sup>

Pretermision is defined as silence on the part of the testator concerning both the beneficial act of instituting someone as heir and the act of disinheritance. Pretermitted persons include the testator's children alive (*iam nati*) at the making of the testament, even though they may have predeceased the testator (*praeterito nato et mortuo vivo testatore*). They also include children born after (*postumi*) the testament and within ten months after the father's death. Pretermitted children were not required to bring suit in court to have the testament nullified. It sufficed that they inform their neighbors or a lay person that the testament was invalid.<sup>93</sup> Pretermision automatically invalidates the institution of heirs, resulting in intestacy. On the basis of *Auth. Ex causa* (Nov. 115.4.9. = C. 6.28. post 4, *Maximum vitium*), as we have seen, the legacies, trusts, and other testamentary provisions, such as the appointment of guardians and the payment of debts, remain operative.<sup>94</sup> Totaling just thirty words, *Auth. Ex causa* was the single

<sup>91</sup> Ibid., n. 22: "Item reperitur quedam exheredatio impropria, que quo ad effectum non est exheredatio, licet habebat formam exheredationis, ut est quando fit ad filii provisionem, ut infra, eodem, <1.> Multi ...;" BALDUS ad *Auth. Ex causa*, fol. 97v, n. 52: "Abusiva vero et impropria dicitur exheredatio que vocem exclusionis continet, sed mens testatoris finaliter et realiter non tendit ad excludendum sed magis ad provisionem, ut ff. eo. l. Multi, secundum Oldradum."

<sup>92</sup> BALDUS ad D. 28.2.11, *In suis*, fol. 56r, n. 22: "Item est quedam improprissima, que nec quo ad effectum nec quo ad formam est exheredatio, ut quando extraneus exheredatur quia non habet effectum esse nec formam esse, cum sit inepta, de verb. obl., l. Quidam cum filium (D. 45.1.132)."

<sup>93</sup> BALDUS ad D. 28.3.17, *Filio preterito*, fol. 75r, n. 3: "Quaero hic, quando filius preteritus vult dicere testamentum nullum, utrum sit necesse quod coram iudice petat nullum declarari? Et breviter dico quod non est opus pro hoc adire iudicem, ut l. Sub conditione, de condi. insti. (D. 28.7.25). Hoc probro per rationem, quia in dependentibus ex animo non oportet iudicem adiri. Sufficit nam hoc declarari coram laicis vel vicinis, ut supra, de neg. gest., <1.> Nesennius (D. 3.5.33[34]), facit quod no."

<sup>94</sup> BALDUS ad D. 28.3.17, *Filio preterito*, fol. 75r, n. 23: "Preteritio est silentium circa institutionis beneficium et exheredationis actum, et aut preteritur iam natus aut posthumus. Et quo ad vim testamenti in institutione, dic, ut supra"; BALDUS ad

most influential Roman text on disinheritance in the Middle Ages. Its very brevity challenged the leading medieval jurists to compose multi-folio commentaries, first, to reconcile Justinian's pronouncement with the earlier rules in the *Digest* and *Codex* on defective disinheritance, pretermission, and the *querela inofficiosi testamenti*; and second, to work out the application of *Auth. Ex causa* to questions arising in response to live cases of pretermission.<sup>95</sup>

The medieval exegesis of *Auth. Ex causa* centered on the efficacy of the *clausula codicillaris*, originally a postclassical Roman technique<sup>96</sup> that notaries in Lombardy, Liguria, Pisa, and Ravenna routinely inserted in the testaments they redacted from the mid-twelfth century on. A century later, according to Rolandinus de Passageriis, the codicillary clause, also known as *clausula finalis*, had become "universal and customary."<sup>97</sup> Following the testator's declaration that he wants his last will to be valid under testamentary law, the codicillary clause declares that should it happen that the testament is invalid, it should be executed as a codicil (*quod si iure testamenti non valeret, valeat saltem iure codicillorum*). The entire parental estate is now treated as a trust on intestacy with the legacies charged on the named heirs who have become trustees. Children pretermitted as well as those specifically, though invalidly, disinherited were entitled to succeed on intestacy. They, along with the named heirs, share equally in the inheritance, which at a minimum could not be less than the one-third of the parent's estate. To accomplish this arrangement, the pretermitted child or one invalidly disinherited must make over to the trustees (named heirs) the share of the inheritance and legacies to which he was entitled. He was allowed, however, to deduct for himself an amount equivalent to the *legitima*. Translating this arrangement sanctioned by the authority of law (*ex lege*) into practical reality would in turn typically require the skills of arbitrators, who, with detailed knowledge of the father's estate, including any premortem donations

D. 28.2.7, *Si filius*, fol. 52r: "Nota hic quod testamentum, in quo filius in potestate est preteritus, est nullum ipso iure et in effectu."

<sup>95</sup> G. CHIODI, *L'interpretazione del testamento nel pensiero dei glossatori*, Milan 1997, pp. 348–361, who calls *Auth. Ex causa* "tormentatissima" (p. 351).

<sup>96</sup> G. NEGRI, *La clausola codicillare nel testamento inofficioso*, Milan 1975, p. 73 ss.; D. JOHNSTON, *The Roman Law of Trusts* (n. 17), pp. 142 ss., 118: "Trusts make it possible for someone to succeed on intestacy and at once be liable to a beneficiary's claim."

<sup>97</sup> G. VISMARA, *Il codicillo*, in: *Enciclopedia del diritto*, Milan 1960, vol. 7, pp. 290–295, republished in: G. VISMARA, *Scritti* (n. 2), vol. 6, pp. 435–446.

and dowries provided to his children, would be able to calculate the share due each child.

As Johnston observes, the transformation of the estate into a trust on intestacy is tantamount to "partial testacy."<sup>98</sup> Medieval jurists were aware that a chief effect of the codicillary clause was to blur the time-honored distinction between testamentary and intestate succession. The efficacy of the codicillary clause depended on several crucial distinctions. The *Glossa* maintained that the codicillary clause was effectual when the testament was invalid because of a defect in formality (*defectum solemnitatis*), such as an insufficient number of witnesses; ineffectual when the act of disinheritance itself was defective *ratione preteritionis* of those entitled to be appointed testamentary heirs (*sui*).<sup>99</sup> This especially applied to *postumi* who, the *Glossa* pronounced, were in reality incapable of acting undutifully.<sup>100</sup> Odofredus dissented, arguing that the codicillary clause operates even when the declaration of disinheritance itself is defective – for instance, when the testator institutes an outsider as heir and disinherits his son without giving a proper reason for the disinheritance.<sup>101</sup> The *Glossa's* opinion was nevertheless reaffirmed by the majority of jurists, including Jacobus de Arena and Oldradus, both of whom introduced a further distinction.<sup>102</sup> They argued that the codicillary clause operates in the case of children alive at the time (*iam nati*) the testament was drafted, but is inoperative in the case of *postumi*. Baldus acknowledged the equitableness of their distinction, yet he endorsed the argument, principally advanced by Jacobus Balduini and Dynus, that the codicillary clause operates in the case of *postumi*, provided it refers to the future as well as the present (*valet et valebit*). This advice was

<sup>98</sup> D. JOHNSTON, *The Roman Law of Trusts* (n. 17), p. 151.

<sup>99</sup> *Glossa Cetera ad Auth. Ex causa* (C. 6.28. post 4, *Maximum vitium*), pp. 930–931; and CHIODI, *L'interpretazione* (n. 95), p. 351, n. 216.

<sup>100</sup> *Glossa In posthumis* ad C. 6.28.4, *Maximum vitium*, ed. cit., p. 929.

<sup>101</sup> For the opinions of Odofredus and Johannes Balduinus, see CHIODI, *L'interpretazione* (n. 95), pp. 352 ss.

<sup>102</sup> For what follows, see BALDUS ad l. *Titia filiam* (D. 5.2.13), fols. 274v–275r, nn. 1–2; ad l. *Ex ea*, § *Ex his verbis* (D. 28.1.29.1), fol. 50v, nn. 1–2; ad *Codicillis autem* (Inst. 2.25.2), fols. 29v–30r, nn. 15–17. For Jacobus de Arena's and Oldradus's opinions on the codicillary clause, see JACOBUS DE ARENA ad *Ea quam frater* (C. 6.42.14), *Commentaria in universum ius civile*, Lyon 1541, fols. 247v–248r, n. 3; OLDRADUS, *Consilia*, Venice 1570, fol. 85v, cons. 171, n. 18; see also BARTOLUS ad l. *Saepissime rescriptum* (D. 29.7.1), fols. 200v–201v; ad *Postumus*, § *Si paganus* (D. 28.3.12.1), fol. 121v.

resolutely resisted by Rolandinus de Passageriis and other leading notaries and had no visible effect on testamentary practice.<sup>103</sup>

After reprising the imbroglio that erupted over the *vis verborum* of the codicillary clause, Baldus rejected the restrictions that the *Glossa* and its adherents had imposed on the applicability of *Auth. Ex causa*. He fully subscribed to the expansive position advocated by Dynus, Cynus, Jacobus Buttrigarius, and Bartolus ("et ego pedisecus eorum ita teneo")<sup>104</sup> – that the codicillary clause operates in the case of a defective disinheritance or pretermission. There were exceptions. The codicillary clause may operate only where the father deliberately pretermits a son. When he passes over a son of whose existence he is ignorant, the codicillary clause, and therefore the legacies, are inoperative. Here, as in the case of the insane testator, the father's intention (*voluntas*) is considered defective, incapable of producing legal effects. Baldus rejected the presumption that had the father known of his son's existence, he would have deliberately disinherited him.<sup>105</sup>

*Auth. Ex causa*, Baldus explained, allows a son who has been invalidly disinherited or pretermitted to claim legacies left him, even when the son contests the validity of the testament.<sup>106</sup> When a son is pretermitted but assigned *iure institutionis* a legacy less than the *legitima*, he is disentitled to the *querela inofficiosi testamenti*, but allowed to claim a supplement for the remainder of the *legitima*.<sup>107</sup> For the sake of fairness (*de equitate*), the son may not demand legacies plus the *legitima*, which would give him more than the appointed heirs.<sup>108</sup> At the same time, a father may not avert the claim for a supplement by inserting a testamentary clause prohibiting his son from demanding

<sup>103</sup> CHIODI, *L'interpretazione* (n. 95), pp. 356–358.

<sup>104</sup> See *consilium* 3 in appendix 1.

<sup>105</sup> BALDUS ad l. *In suis (repetitio)*, fol. 56r, n. 23: "Quo ad vim legatorum, dic ut in *auth. Ex causa*, quod intellige si pater consulto preterit filium. Si autem per ignorantiam non credens filium habere, tunc videtur quod legata non debeantur quia non est nulla vitio preteritionis tantum, sed defectu voluntatis quia non est verisimile quod si scivisset se habere filium sic gravasset ipsum;" and BALDUS ad *Auth. Ex causa*, fol. 97r, n. 57.

<sup>106</sup> BALDUS ad l. *Filius* (D. 5.2.22), fol. 277r (*additio*), n. 2; BALDUS ad l. *Si quando*, § *Et generaliter* (C. 3.28.35.2), fol. 203v, n. 1.

<sup>107</sup> BALDUS ad *Auth. Ex causa*, fol. 96r, n. 29.

<sup>108</sup> An oft-cited authority for this opinion was MARTINUS SILLIMANI. See his *quaestio* in MS Vatican, Arch. S. Pietro, A. 29, fol. 171rb–va, q. CCXXXV; and F. MIGLIORINO, "Dominus meus in legibus." The Search for a *Liber quaestionum* of Martinus Sillimani, in: *The Two Laws. Studies in Medieval Legal History Dedicated to Stephen Kuttner*, ed. by L. MAYALI and S. A. J. Tibbetts, Washington, D. C. 1990, pp. 121–153, esp. p. 144.

something beyond the legacy.<sup>109</sup> However, should a father disinherit his son without offering any reason and without leaving him anything, the testament is invalid and the son has recourse to the *querela*.<sup>110</sup> Leaving aside doctrinal differences, the overarching aim of Baldus and his predecessors was to limit the harm an improper disinheritance inflicted on both innocent children and legatees. This aim is equally evident in Baldus's *consilia*.

### *Consilia* of Baldus

The thirteen *consilia* edited in appendix 1 represent a tiny fraction of the three thousand Baldus is estimated to have authored between 1350 and 1400.<sup>111</sup> Hundreds of his *consilia* directly concern disputes over succession and inheritance, with many others indirectly touching on aspects of testamentary disinheritance and pretermission. For my paper, I have edited a subset of his *consilia* centering on the claims of the disinherited parties. Among these *consilia* is a rarity, a previously unknown holograph of Baldus preserved in the Archivio di Stato of Florence (fig. 1), which I came across in 1968 and which is published

<sup>109</sup> BALDUS ad l. *Omnimodo* (C. 3.28.30), fol. 200r, n. 6: "Quaero, pater instituit filium in minus legitima parte et prohibuit quod non plus possit vel habere. Modo, queritur utrum istud testamentum valeat? Et videtur quod non, quia filius debet habere iure institutionis propter ius accrescendi, sed ista verba prohibent ius accrescendi, ut ff. de her. inst., l. *Quotiens*, § *Si duo*, in fine (D. 28.5.9.13): ergo testamentum nullum. Veritas est in contrarium, quia in filio et quolibet alio, cui debetur legitima, ista verba nihil operantur, nec quo ad impediendum suppletionem nec quo ad testamenti impugnationem." For a similar opinion, see IACOBUS DE BELVISO ad Auth. 8.12.3, § *Aliud quoque capitulum*, *Lectura super IX collationibus Authenticorum*, Lyon 1511, fol. 65ra.

<sup>110</sup> BALDUS ad l. *Omnimodo*, fol. 200r, n. 1.

<sup>111</sup> On the dating, provenance, production, and collection of BALDUS's *libri consiliorum* in Barb. lat. 1399 through 1410, as well as the relationship between the manuscripts and the printed editions of BALDUS's *consilia*, see V. COLLI, Il C. 351 della Biblioteca Capitolare Feliniana di Lucca. Editori quattrocenteschi e *Libri consiliorum* di Baldo degli Ubaldi (1327–1400), in: *Scritti di storia del diritto offerti dagli allievi a Domenico Maffei*, ed. by M. Ascheri (Medioevo e umanesimo 78), Padua 1991, pp. 255–282. As Colli maintains, the *libri consiliorum* contained the personal copies (*minutari*) of the original *consilia* sent to the requesting parties. The *libri consiliorum* were prepared by Baldus's son, Francesco, and scribes operating under the jurist's direction. These *minutari* should be considered as the equivalent of autographs. See COLLI's *I Libri consiliorum*. Note sulla formazione e diffusione dell raccolte di consilia dei giuristi dei secoli XIV–XV, in: *Consilia im späten Mittelalter. Zum historischen Ausgangswert einer Quellengattung*, ed. by I. BAUMGÄRTNER, Sigmaringen 1995, pp. 225–236. On the Barberini manuscripts, see also G. VALLONE, La raccolta Barberini dei *consilia* originali di Baldo, in: *Rivista di storia del diritto italiano* 52 (1989), pp. 3–63.

here for the first time (cons. 1).<sup>112</sup> None of the thirteen *consilia* can be dated conclusively, but codicological evidence indicates that the majority were written in Perugia and Pavia/Piacenza toward the end of his career (1388–1400). I have indicated which *consilia*, in my opinion, were written at the request of individual clients (*pro parte*). At least five (cons. 9–13) were clearly *consilia sapientis*, requested by a presiding judge seeking clarification on points of law.<sup>113</sup> Our *consilia*, like the vast majority produced from the late thirteenth century on, give no indication of the outcome of the cases which they addressed.

### *Clausula Codicillaris*

Cons. 1. The efficacy of the codicillary clause loomed large in six of the *consilia* edited below. For Baldus the relevant facts in *consilium* 1 were straightforward. A certain Bardo di Pietro made a testament in which he instituted as heirs his sons Giovanni and Francesco, and without giving any reason he disinherited his other son, Angelo. Bardo's occupation, place of origin or residency, and the date of the testament are omitted, though other evidence (see below) suggests that the *consilium* was composed before Baldus began teaching at Padua in 1376. As was customary, the codicillary clause was inserted at the end of the testament. What is the law with regard to the validity of the testament and to the disposition of the inheritance? "It is certain," Baldus replied, "that Bardo's testament is invalid with regard to the institution of heirs, because he disinherited his son without inserting a

<sup>112</sup> Another *consilium* penned in Baldus's own hand has been published by J. RUMMER GOLDBERG, A Fourteenth-Century Legal Opinion, in: *Studi senesi* 100 (1988), pp. 522–534, revised version of her edition originally published in: *The Quarterly Journal of the Library of Congress* 25 (1968), pp. 179–189. For further examples of Baldus's autograph, see V. COLLI, Collezioni d'autore di Baldo degli Ubaldi nel MS Biblioteca Apostolica Vaticana, Barb. lat. 1398, in: *Ius Commune* 25 (1998), pp. 323–346; and his L'idiografo della *Lectura super primo, secundo et tertio libro Codicis* di Baldo degli Ubaldi, in: *Ius Commune* 26 (1999), pp. 91–122. See also H. KANTOROWICZ's La vita di Tommaso Diplovataccio, the introduction to Diplovataccio's *Liber de claris iuris consultis*, in: *Studia Gratiana* 10 (1968), pp. 43–44, 80, where he cites a manuscript originally in the possession of the jurist but now in the Biblioteca Oliveriana of Pesaro, which includes sealed *consilia* of Baldus.

<sup>113</sup> In addition to the classic studies of G. ROSSI, W. ENGELMANN, and L. LOMBARDI on the emergence and development of *consilia sapientis*, see *Consilia im späten Mittelalter* (n. 111); *Legal Consulting in the Civil Law Tradition*, ed. M. ASCHERI, I. BAUMGÄRTNER, and J. KIRSHNER, (Studies in Comparative Legal History, Publication of The Robbins Collection in Religious and Civil Law, University of California, Berkeley), Berkeley 1999; and *Ius Mediolani* (n. 8).

reason." Angelo with his brothers, therefore, are heirs on intestacy and take equal shares of the inheritance. Consistent with his commentaries, Baldus held with Dynus, Jacobus Buttrigarius, and Bartolus that the codicillary clause operates. The estate is therefore transformed into a trust on intestacy. To accomplish this, Angelo must restore (*restituere*) his share of the estate to his brothers, less an amount equal to the *legitima* which he retains. At a minimum the inheritance reserved to the heirs on intestacy could not be less than one-third of the father's estate. And Angelo's *legitima*, in theory, was equal to one-third of the reserved inheritance (*tertia tertiae*).

Cons. 2. The first *consilium* eerily reappears in another case, which concerns the testament of the Florentine wool merchant, Lando di Antonio degli Albizzi.<sup>114</sup> Lando and his brother Pepo opened a partnership in Venice in 1351, which prospered at least until the late 1360s, when Pepo, now active in Florentine politics, became an absentee partner. In the early 1370s, the partnership went into a tailspin, and the brothers had a falling-out and sued each other in the court of the *Mercanzia*. In April 1372, Pepo suffered political disabilities when the Florentine government condemned him and his kinsmen as magnates. A year later Lando suffered the same fate. He was forced to adopt a new family name (Antonii) and a new coat of arms. The last known reference to Lando in Florence was as a member of the *Operai* of the Cathedral of Florence in 1374. Soon after, he returned to Venice, residing in the contrada S. Cassian, where he made his testament and died. I have been unsuccessful in locating his testament in the Florentine archives, but there is remote chance that it remains buried in the Archivio di Stato of Venice.<sup>115</sup> It is probable that Lando's

<sup>114</sup> For the sparse information we have on Lando di Antonio Albizzi, I have relied on G. BRUCKER, *Florentine Politics and Society, 1343–1378*, Princeton 1962, pp. 255, 261; H. HOSHINO, *L'arte della lana in Firenze nel basso medioevo*, Florence 1980, pp. 312–326; C. KLAPISCH-ZUBER, Kinship and Politics in Fourteenth-Century Florence, in: *The Family in Italy from Antiquity to the Present*, New Haven 1991, pp. 224–226. The genealogy of Lando and his descendants is published by P. LITTA, *Famiglie celebri italiane*, Milan 1819–1880, tav. 8. According to Litta, Lando di Antonio had five children, including a son named Agnolo who died during the plague of 1400, but who was not mentioned in the summary of Lando's testament. Litta's data on Lando and his descendants is recapitulated by G. DUMON, *Les Albizzi. Histoire et généalogie d'une famille à Florence et en Provence du onzième siècle à nos jours*, Paris 1977, pp. 239–241.

<sup>115</sup> The Albizzi are not mentioned by R. MUELLER, *Mercanti e imprenditori fiorentini a Venezia nel tardo medioevo*, in: *Società e storia* 55 (1992), pp. 29–60.



testament and death coincided with Baldus's tenure at the University of Padua between 1376 and 1379. This conjecture is supported by codicological evidence, since one of the copies of the *consilium* concerning Lando is preserved in a manuscript containing *consilia* that Baldus rendered during his tenure at Padua.

The content of Lando's nuncupative testament, and therefore this disinheritance, derives from a summary (*casus, punctus*) preceding Baldus's *consilium*. Lando disinherited his son, Antonio, and a daughter, called Zula or Ssola, implausible names that appear to be the result of nomenclatural confusion on the part of the copyists. She may in fact be the "Bice" identified as Lando's daughter by the genealogist, Litta. It is curious that, unlike the *casus* preceding *consilium* 1, no reference is made to either the reason or absence of a reason for the disinheritance. I am assuming that a proper reason was also omitted from the testament. Lando instituted his sons, Lorenzo and Mariano, as his universal heirs. He declared that should his testament fail, he wanted it executed *iure codicillorum* and governed by the statutes and customs of Florence. Likewise, should a clause or formality be lacking, which might possibly invalidate his testament, he wanted the issue to be determined in accordance with Florentine law and customs.

The insertion of these jurisdictional clauses was encouraged by a primary rule of late medieval testamentary law: regarding the formalities of the testament (e.g., the mandatory number of witnesses) the statutes and customs of the place in which the testament is redacted (*actus*) generally has precedence over the statutes and customs of the place in which the testator is a citizen and has permanent domicile (*consuetudo terre testatoris*).<sup>116</sup> The clauses giving jurisdiction to Florentine law were intended as precaution to preempt challenges to the validity of the testament on the basis of Venetian law.<sup>117</sup> Without Lando's testament, however, it is impossible to tell if it was redacted

<sup>116</sup> BALDUS ad D. 27.1.45.3, *Titius filius meus*, § *Romae philosophantem cum salario*, fol. 36v; IDEM, *Repetitio ad l. Cunctos populos*, in: *Tractatus duo de vi et potestate statutorum*, ed. by E. M. MEIJERS, Haarlem 1939, p. 14 ss.; BARTOLUS ad D. 1.3.32, *De quibus*, fol. 21v, n. 28, where he analyzed the jurisdictional issues relating to the testaments of foreign merchants temporarily residing in Venice. On this point, see P. STEIN, *Roman Law in European History*, Cambridge 1999, p. 72.

<sup>117</sup> It was common for Florentine testators residing in a foreign locale to demand that the customs and laws of Florence should be observed regarding testamentary provisions. See, for example, Palla Stozzi's holographic testament of 1462 in *volgare*, written while in exile in Padua, and published in part by R. JONES, Palla Strozzi e la sagrestia di Santa Trinita, in: *Rivista d'arte* 37 (1984), pp. 100, 102.

*more veneto* or in accordance with the *ius commune* by a Venetian notary performing his craft *imperiali auctoritate*.<sup>118</sup>

The particular legal issues which the consultor must have been asked to address (*Quid iuris?*) were omitted, an indication that the *casus* transmitted by the extant manuscripts and printed editions is a truncated version of the original. The *consilium* following the *casus* is virtually identical to *consilium* 1, save that the scribe has replaced "dictum testamentum Bardi" with "dictum testamentum Landi." I believe that *consilium* 2 is a copy of *consilium* 1 and not vice versa. I also believe that *consilium* 2 was not the *consilium* Baldus actually wrote on the Albizzi case, for he definitely would have treated the applicability of Florentine law. While Baldus constantly recycled formulaic expressions as all prolific authors, especially jurists, reflexively do, it was not his method merely to reproduce his own previous opinions. Plausibly, the original Albizzi *consilium* was somehow detached from its *casus*, and a scribe, for the sake of completeness, appended *consilium* 1, which was at least relevant to the instant case. If my analysis is correct, then *consilium* 1 predates Baldus's tenure at Padua.

Cons. 3. Although *consilium* 3 has been transmitted without a *casus*, the essential facts surrounding are easily imagined. A father has pretermitted or wrongly disinherited his daughter. She contested the testament, which Baldus, without hesitation, declared invalid. In accordance with the testator's wishes that his testament be executed *iure codicillorum*, the daughter, after subtracting the *legitima*, must restore to the named heirs her share of the inheritance. A hitch, however, existed. Under *Inst.* 2.23.9, she is allowed to retain at least one-fourth of the estate (*quarta trebellianica*) or a greater amount, if the testator left her a legacy consisting of specific properties. Under the Trebellian scheme, it was therefore possible for the daughter to receive more or less than the *legitima*. Another hitch: If there were two daughters, could each claim a fourth? This question was entertained by the decretals, c. *Raynutius* (X. 3.26.16) and c. *Raynaldus* (X. 3.26.18) and their accompanying glosses and commentaries.<sup>119</sup> In the case at

<sup>118</sup> On the Venetian notariate, see A. BARTOLI LANGEI, *Documentazione e notariato*, in: *Storia di Venezia* (n. 41), vol. 1, pp. 847–864; L. GUZZETTI, *Venezianische Vermächtnisse* (n. 64), pp. 22 ss. Note that codicillary clauses were used sporadically in testaments redacted *more veneto*.

<sup>119</sup> See, for example, ANTONIUS DE BUTRIO ad c. *Raynutius* (X. 3.26.16), ed. cit., fols. 104v–108v, nn. 1, 5, 23, 71, 74.

hand, we are not told what the specific hitch was. But the *consilium* implies that the daughter has accepted or has been promised a dowry exceeding the *legitima*.

To undo the hitch, Baldus cited a *consilium* of Bartolus, which addressed a case in which a statute decreed that dowered daughters (*filie dotate*) may not succeed their father. Is the statute enforceable if the father fails to institute or disinherit his *filie dotate*, as in this case? Yes, when there is a surviving son or grandson, and either of whom has been instituted heir, the statute is enforceable against the daughters. But with no such male heirs surviving, which happened here, the statute is unenforceable and the testament void. The daughters are now understood to share the estate equally with the original, though deceased, male heirs. More specifically, may each daughter claim one-fourth of the estate under the Trebellian scheme? According to Bartolus, each takes the *legitima* only – that is, their share of one-third of the estate reserved to the heirs succeeding on intestacy. They may retain their dowries and any legacies left them, so long as the total amount does not exceed the *legitima*. Any excess must be restored to the substitute heirs, the trustees of the estate. The counterargument that the Trebellian scheme overrides the codicillary clause, *si non valet*, because the latter is understood to refer to the future invalidity of the testament, is rejected. For Bartolus, the codicillary clause is understood to operate in the present, because the testament is completely and immediately void.<sup>120</sup> “And therefore,” Baldus, following Bartolus, concluded, “the daughter in the instant case should be content with the *legitima* only, the remainder falling to the father’s heirs, to whom the trust (*fideicommissum*) is transferred.”

Cons. 4. Dating from the late 1390s, the following case deals with the multiple claims on the estate of Caterina Solaro, a member of a powerful noble clan in Asti.<sup>121</sup> She was survived by four sons: Bran-

<sup>120</sup> BARTOLUS, *Consilia, Quaestiones et Tractatus*, fol. 15r, cons. 44, nn. 1–2: “Et sic dicte filie cum filio masculino equaliter successerunt. Verumtamen quia in illo testamento sunt illa verba, ‘si non valet iure testamento’ etc., videntur rogare de restituendo ei qui fuit heres institutus. Unde totum debent restituere deducta eorum legitima, que est tertia totius eius quod habitare fuissent ab intestato in qua legitima computabitur eis, si dos pro eis fuit data et legata quam acceperant, ut l. Quoniam novella, C. de inoffi. testa. (C. 3.28.29). Trebellianicam autem dicte filie non possunt deducere, quia eodem tempore testamentum est nullum et rogantur de restituendo statim et non sub conditione: ergo non detrahuntur due quarte ...”

<sup>121</sup> On the Solaro, see R. BORDONE, *Progetti nobiliari del ceto dirigente astigiano al*

daccio from a first marriage, and three from a second marriage whom she instituted as universal heirs in her testament. In the event these three sons died without legitimate issue, Brandaccio would succeed as heir to one-half of her estate. Her brother, Martino, was instituted heir to the other half. With prescience, she provided that questions regarding the implementation of her testament be submitted to experts for determination. After Caterina's death, her husband and father of the three sons took possession of their inheritance. All three sons predeceased their father who, according to the *consilium*, remains in possession of the inheritance "to the present day." Later, Brandaccio died without having accepted his half of the inheritance and without surviving issue. He did leave a testament in which he instituted his agnatically related half-brothers (*agnatos germanos*) – apparently the surviving sons of his father from an earlier marriage. Baldus was asked to determine whether Caterina's estate passes to her husband as successor to her sons, or to the heirs of Brandaccio, or to her brother, or to anyone else.

Immediately, Baldus determined that the institution of Brandaccio as substitute heir on the predecease of her other sons constitutes an illegitimate disinheritance. Related to the testator in the first degree, Brandaccio was entitled under the *ius commune* to be instituted heir with his cognatically related half-brothers. His omission from the first-degree heirs renders Caterina's testament invalid. This determination holds, notwithstanding counterarguments pointing to Brandaccio's failure to have the testament pronounced invalid, his failure to transmit to his heirs his right to do so, and his failure to request that he be granted possession of the inheritance in accordance with praetorian law (*bonorum possessio*). Also cast aside are appeals to countervailing equity or to the countervailing continuity of the family under *lex In suis*. These counterarguments in no way alter the fact that none of the testamentary heirs formally accepted the inheritance, thus rendering Caterina's testament invalid. If any of the three sons were *infantes* at the time of death (i.e., died before completing their seventh year), Baldus conceded, the father may succeed on intestacy to the infant son's share of his mother's estate.<sup>122</sup> A father may also accept the

tramonto, in: *Bolletino storico-bibliografico subalpino* 90 (1992), pp. 437–494; L. CASTELLINA, *Gli uomini d'affari astigiani. Politica e denaro tra il Piemonte e l'Europa (1270–1312)*, Turin 1998.

<sup>122</sup> Baldus's pronouncements on the legal ability of the *infans* to transmit an *hereditatem non aditam* to his parents jibes with several of his other *consilia*, Venice

inheritance on behalf of a living son who has passed the legal age of infancy.

Baldus's self-avowed task was to employ expert interpretation for the purpose of implementing the testator's intentions. In this guise, he pronounced that under the codicillary clause the testator's estate is transformed into a *fideicommissum*, despite the pretermission of Brandaccio, who now succeeds on intestacy. By operation of the codicillary clause, Brandaccio's heirs, in turn, may demand the decedent's right to one-half of his mother's estate, while Caterina's brother may demand the other half. The *fideicommissum* carries a twofold condition: one present (the codicillary clause, *si non valet*) and the other future (*post mortem*) – that is, after the death of Caterina's three sons. By reason of the future condition, Caterina's second husband and father of three predeceased sons is legitimately entitled to deduct from the inheritance a share equaling the *legitima* and *quarta trebellianica*. An adroit solution that in principle grants each party an equal share of one-third, and as Baldus smugly concluded, a solution that is in conformity with "the solemnities and subtleties of the law."

Cons. 5. This case centers on the testament of another Caterina, in which she pretermitted her children and instituted her own mother as universal heir. In addition, she specifically left *iure institutionis* her mother all the goods (clothing and pearls) and monies beyond the dowry (*omnia ultra dotem*), which had been consigned to Caterina's husband. Nestled in her nuncupative testament was the customary codicillary clause. Baldus's *consilium*, rendered during his tenure at the University of Pavia (1390–1400), was almost certainly a *consilium pro parte* on behalf of the pretermitted children. Without mincing words, Baldus argued that the pretermission of the children nullifies the testament and therefore the institution of the mother as universal heir. That the children succeed on intestacy, entitling them to the *legitima*, is incontestable, for the "mother's silent disinheritance of her children is depraved and opposed to natural equity."<sup>123</sup> Yet, is Cater-

1575, vol. 2, fol. 22v, cons. 101, n. 2; vol. 4, fol. 115, cons. 492, n. 2. I have not cited the Milan and Brescian editions of these *consilia*, since they hardly vary from the Venetian edition. On the status of the *infans* in civil law, see U. GUALAZZINI, *Età (diritto interm.)*, in: *Enciclopedia del diritto*, Milan 1967, vol. 16, pp. 80ss.; in canon law, R. METZ, *L'Enfant dans le droit canonique médiéval*, in: *Recueils de la Société Jean Bodin*, Brussels 1976, vol. 36/2, pp. 60–61.

<sup>123</sup> On natural equity as a basis for the *favor liberorum*, see N. HORN, *Aequitas in den Lehren des Baldus*, Köln, Graz 1968, pp. 176–177.

ina's estate transformed into a trust, requiring the children to restore the inheritance to the appointed heir, their grandmother, as the codicillary clause would seem to demand?

The two major sides of the issue (*due oppyniones maiorum nostrorum*) were presented: the early authorities and advocates led by the *Glossa* pitted against the many modern authorities led by Dynus, Cynus, and Bartolus. As we have seen, Baldus had consistently championed the opinion of the *moderni* that the codicillary clause extends to cases where the testator has pretermitted her children. So it is somewhat startling in the case at hand that Baldus, wielding what he called the greater authority of the *Glossa*, denied that Caterina's estate is transformed into a trust. And this determination is not undermined by § *Aliud quoque capitulum*, he stated, because it does not treat the transformation of the inheritance into a *fideicommissum* by force of the codicillary clause. What explains Baldus's apparent about-face? In the absence of a tradition of case law and precedents, it was not incumbent on Baldus to cite the *consilia* that he had given on the same issue.<sup>124</sup> On inspection, *consilia* 1–4 were different from *consilium* 5 in one striking respect. In the previous cases there was no dispute about whether the appointed heirs deserved to be heirs. At issue was the pretermission of children who were entitled to be heirs. In the case at hand, the grandmother was not entitled to be heir, for that honor properly belonged to Caterina's surviving children. That is why Baldus called the institution of the grandmother "hateful." The grandmother may take any items specifically left her (*instituta in re certa*), for properly speaking they are not treated as part of the inheritance, but as legacies.

*Consilium* 5 is instructive on the use of authority. The authority of the *Glossa* for Bartolus and Baldus rivaled the authority of the Justinian's *Corpus iuris*. The procedures governing legal argument usually made it necessary to acknowledge the opinions of the *Glossa*, if only to correct or reject them outright. This procedure made the *Glossa* an enduring text generating a cornucopia of authoritative opinions. The invocation of the *Glossa* in *consilium* 5 offers a good illustration of the functional significance of apparently superseded opinions in forensic combat.

<sup>124</sup> On the absence of a system of case law in this period, see my *Consilia as Authority: The Case of Florence*, in: *Legal Consulting in the Civil Law Tradition* (n. 113).

Cons. 6. The central issue confronting Baldus is whether an inheritance should devolve indirectly through a *fideicommissum* or directly through a *substitutio pupillaris*: "The appointment of a substitute by the father for his child instituted as an heir in his testament. The substitute became heir if the child, after the acceptance of the inheritance, died before reaching puberty, i. e., before being able to make a testament."<sup>125</sup> In this case, dating from the late 1380s, ser Simone, a citizen and notary of Lucca, instituted the unborn children (*venter*) carried by his wife, Giovanna, on condition that she was pregnant and that she gave birth to one or more sons.<sup>126</sup> If she was not pregnant or if she gave birth to sons who died before they were legally capable of making a testament (i.e., under puberty or before completing their fourteenth year), the remainder of the testator's estate, after the disbursement of the legacies, would pass to the substitute heir, the *Opera* of S. Michele in Foro in Lucca. Ser Simone also provided that if Giovanna was pregnant and gave birth to a girl, the daughter upon marriage was to receive a dowry of 500 florins. The size of the dowry suggests that Ser Simone was wealthy. It happened that Giovanna gave birth to a girl who then predeceased her father. The couple tried again to produce an heir, but alas ser Simone died, possibly owing to plague,<sup>127</sup> and was survived by his pregnant wife. Later, in the eighth month of her pregnancy, Giovanna died. A male fetus was extracted by a postmortem Caesarian section,<sup>128</sup> but he died immediately after having uttered a sound (perhaps the sound, Ah!, that male babies were expected to cry).<sup>129</sup>

The streamlined *casus* leaves us with several questions that must be approached via *ars coniecturalis*. Did the individuals who assisted and attended the Caesarian section, typically experienced older women and

<sup>125</sup> Quote from A. BERGER, *Encyclopedic Dictionary of Roman Law*, Philadelphia 1953, pp. 721–722.

<sup>126</sup> For the husband's legal claims on wife's womb, in Roman law, see Y. THOMAS, *Le "Ventre". Corps maternel, droit paternel*, in: *Le Genre humain* 14 (1986), pp. 212–236.

<sup>127</sup> Our Ser Simone is not included in E. LAZZARESCHI's *Notari. L'Archivio dei Notai della Repubblica lucchese*, in: *Gli archivi italiani* 2 (1915). On plague at Lucca in the 1380s, see C. MEEK, *Lucca 1369–1400. Politics and Society in an Early Renaissance State*, Oxford 1978, pp. 91, 94.

<sup>128</sup> On this procedure, see R. BLUMENFELD-KOSINSKI, *Not of Woman Born. Representations of Caesarean birth in Medieval and Renaissance Culture*, Ithaca and London 1990.

<sup>129</sup> *Womens's Secrets. A Translation of Pseudo-Albertus Magnus' 'De secretis mulierum' with commentaries*, trans. H. R. LEMAY, Albany 1992, p. 107.

midwives, give sworn testimony that the son was born alive?<sup>130</sup> Caesarian sections were routinely performed to extract a dead child from a dead mother, while midwives were called to testify in cases involving sexual maladies, pregnancy, and birth. My question is not prompted by simple curiosity. The whole case pivoted on a single utterance serving as proof that the son was born alive, if only momentarily. Under the *ius commune* (D. 1.5.12, *Septimo mense*), his birth in the eighth month made him a lawful son.<sup>131</sup> Another question: Who was the plaintiff protesting the *Opera*'s right to inherit ser Simone's estate and presumably, too, Giovanna's estate? The obvious candidate was a relative or relatives of the posthumous son and daughter, claiming that the testament was invalid because the daughter was pretermitted, thus entitling the plaintiff to succeed on intestacy. At stake was a sizable inheritance. It is possible that the *Opera* hired Baldus to defend its claim, but the plaintiff's challenge was surely responsible for the three questions of law the jurist was asked to resolve: Is the *Opera* of S. Michele in Foro entitled as substitute heir to the paternal inheritance? Is the *Opera* equally entitled to the maternal inheritance, Giovanna's estate? And is the operation of the codicillary clause necessitated by the pretermittance of the testator's daughter?

Arguing *pro et contra*, Baldus first determined that since the testator left nothing *iure institutionis* to his daughter-in-power, she was pretermitted, rendering the testament invalid. This determination stands, even though she predeceased her father. If the pretermitted daughter had been born at the making of the testament and then predeceased her father, the testament would still be valid.<sup>132</sup> However,

<sup>130</sup> On the the testimony of midwives, see A. CHIAPELLI, Di un singolare procedimento medico-legale tenuto in Pistoia nell'anno 1375 per supposizione d'infante, in: *Rivista di storia delle scienze mediche e naturali* 10 (1919), pp. 120–135; and M. GREEN, Documenting Medieval Women's Medical Practice, in: *Practical Medicine from Salerno to the Black Death*, ed. by L. GARCÍA-BALLESTER et alii, Cambridge 1994, pp. 333–340.

<sup>131</sup> D. 1.5.12 refers to the opinion of Hippocrates that a fetus is fully formed in the seventh month; accordingly, the jurisconsult Paulus opined that a child is a lawful son if born in the seventh month and of lawfully married parents. On this issue, see H. KANTOROWICZ, Cino da Pistoia ed il primo trattato di medicina legale, in: *Rechtshistorische Schriften*, ed. by H. COING and G. IMMEL, Frankfurt 1970, pp. 287–298.

<sup>132</sup> BALDUS ad l. *Ex ea*, § *Ex his verbis* (D. 28.1.29.1), fol. 50v, n. 2: "Item adde quod dixi in l. ista in principio, an preterito nato et morto vivo testatore reconvalescat testamentum, dic quod non, quia fuit ipso iure nullum principio; secus si posthumo preterito, qui natus premoritur testatori, ut in l. Si hereditas, § Qui filium, supra de testa. tute. (D. 26.2.10.2), et est glo. in l. fin., infra de reg. Cato. (D. 34.7.5)."



the testament in question is nullified because the testator pretermitted a child born posthumously. Clearly, the testator had the daughter's welfare in mind when he left her a dotal legacy. Baldus suggested that the testament is saved where the local statutes exclude from the paternal inheritance a daughter dowered by her father. But he probably knew that the Statuti of Lucca redacted in 1372 omitted a rubric specifically dedicated to excluding from inheritance dowered daughters.<sup>133</sup> Even if such a statute existed, it is unlikely that it would have overdetermined the case. The reason, I believe, is that the *exclusio propter dotem* speaks to what the daughter may take as dowry and *legitima*, not to her pretermittance that, under the *ius commune*, invalidates the testament – an event that would activate the codicillary clause and transform ser Simone's estate into a trust. Instead, Baldus argued that the institution of the brother as heir defeats his sister's right to be heir. Yet, the effective institution of the son as heir in itself does not guarantee that the substitute heir takes the inheritance. It may be argued that the son was entitled to request *bonorum possessio* of the paternal inheritance, but his evident neglect to make the request means that *bonorum possessio* may not be transferred to the substitute heirs.

Baldus now asked whether the institution of the unborn child refers to only the unborn child in Giovanna's womb at the time the testament was redacted or as well to an unborn child conceived after the testament's redaction ("intelligitur solum de ventre, qui erat tempore testamenti, an vero etiam de ventre posteriori"). Baldus easily demonstrated that the testator had contemplated all the prospective unborn children that he and Giovanna together might conceive. He further demonstrated that the substitution was not ordinary (*vulgaris*). The contradistinction of *substitutio vulgaris* and *substitutio pupillaris* was crucial to his unfolding argument. A *substitutio vulgaris* is not operative where the testator has pretermitted a child, as was the daughter in this case. Nor is it operative when the institution of the

<sup>133</sup> I refer to the redaction of 1372 in the Archivio di Stato, Lucca, Statuti di Comuni di Lucca, 6. See, however, Ibid., fol. 117v, lib. 4, rub. CXLIIII. (*De eo quod frater et eius descendentes teneantur dotare sorores exclusas ex successione per eos*), providing remedies for non-dowered daughters excluded from succession. The preference accorded to sons and the *linea masculina* in succession is underscored in Ibid., fol. 118r, lib. 4, rub. CLXVI (*De legitima filiorum descendentium*). The 1539 statutes, however, did contain an exclusionary statute: *Lucensis civitatis statuta*, fol. 91r, lib. 2, cap. XVI (*De dote constituenda mulieribus, exclusis a successione per masculos*).

original heir is effective: also the case here. By contrast, the *substitutio pupillaris* takes effect on condition that the father's testament is valid, which it was. Furthermore, pretermisison does not invalidate a *substitutio pupillaris*, according to *lex Heredes aut* (D. 28.6.1), the *Glossa*, Bartolus, and Baldus himself.<sup>134</sup> Baldus added a reservation that was squarely at odds with *Heredes aut*, a law allowing a *substitutio pupillaris* to take effect when the minors were disinherited as well as instituted heirs. For Baldus, the *substitutio pupillaris* may not take effect when the minor has been pretermitted, but only after the minor has been instituted heir, as was the case here.

In conclusion, Baldus determined that the *Opera* takes the paternal inheritance which had completely and lawfully devolved on the posthumous son. As the pretermitted daughter had died while her father was still alive, she is excluded from the paternal inheritance. Having upheld the validity of both the testament and the *substitutio pupillaris*, Baldus concluded that the codicillary clause, which is triggered by intestacy, does not come into play. For the same reasons, the *Opera* also takes the maternal inheritance. Baldus did not explain the nature of the posthumous son's right to succeed his mother. She may have appointed him heir in her own testament. In any case, under *senatus consultum Orphitianum* and D. 38.8.1.9, *Haec bonorum*, § *Si qua pregnant*, a child in the womb at the time of his mother's death and born alive by Caesarian section must be treated as his mother's legitimate heir.<sup>135</sup>

### *Praeteritio Matris*

Cons. 7. A testator's pretermisison of his mother, intestacy, and succession *iure codicillari* are all threaded together in this *consilium*. Statutes in north and central Italy customarily prohibited mothers from succeeding their deceased children on intestacy, except where intestacy was caused by the absence of agnates from four to eight

<sup>134</sup> In addition to cons. 6 and the references therein, see BALDUS ad *Heredes aut*, fol. 90r, n. 7. On the intricate rules governing substitutions, see PADOVANI, *Studi storici* (n. 8), and M. PETITJEAN, *Essai sur l'histoire des substitutions*, Dijon 1975.

<sup>135</sup> See M. MEINHART, *Die Senatusconsulta Tertullianum und Orfitianum in ihrer Bedeutung für das klassische römische Recht*, Graz 1967, pp. 157–162; Y. THOMAS, *The Division of the Sexes in Roman Law*, in: *A History of Women in the West*, vol. 1, *From Ancient Goddesses to Christian Saints*, ed. by P. SCHMITT PANTEL, Cambridge, Mass. 1992, pp. 111–112.

degrees.<sup>136</sup> Debate erupted over the legitimacy of the ideologically-based statutory exclusion, which violated the *ius commune*, with many jurists, including Baldus, upholding the claims of mothers to the *legitima* and to the usufruct of the deceased child's property.<sup>137</sup> A related issue is raised by mothers surviving their deceased children but being pretermitted in the latter's testaments. Were these mothers, under the prevailing the statutory law, entitled to the *legitima*, just as their children would be if the circumstances were reversed? Baldus posited the common view that "the pretermisison of the mother does not invalidate the testament of a child who is a descendant with his [own] children, because in the matter of succession the first cause is the children."<sup>138</sup> In contrast, if the mother is pretermitted, with no grandchildren surviving, the child's testament is invalid, and she may lay claim to the *legitima*. Her claim is not absolute: it might be undermined if the widowed mother remarried or if a mother was charged with engaging in illicit sexual conduct (*stuprum*).<sup>139</sup> This contentious issue encouraged pragmatic testators to leave a small legacy to a surviving mother to prevent their testaments from being nullified. In that event, a mother is entitled to seek a supplement not exceeding her *legitima*.

<sup>136</sup> F. NICCOLAI, *La formazione del diritto successorio lombardo-tosco* (n. 6), pp. 124–146.

<sup>137</sup> BALDUS, *Consilia*, Venice 1575, vol. 3, fol. 19v, cons. 86, n. 2; fol. 84v, cons. 300; vol. 4, fol. 19, cons. 68; fol. 51r, cons. 219; fol. 51v, cons. 229; fol. 70r, cons. 314, n. 2; fol. 78, cons. 350, n. 2; vol. 5, fols. 126v–127r, cons. 473, n. 3.

<sup>138</sup> BALDUS, MS Vatican, Barb. lat. 1402, fol. 64r, collated with the Venetian edition (V) of his *consilia*, vol. 2, fol. 5r, cons. 17, n. 1: "Preteritio matris non vitiat testamentum filii descendentis cum filiis, quia in successione prima causa est filiorum, ut in auth. de here. ab intest., post prin. (N. 118.1. = Auth. 9.1.1). Et quia mater tempore mortis filii non obtinet primum locum, nec potest rumpere testamentum filii, ut auth. de here. que ab intesta., (deferuntur: add. V), et l. Si quis filio exheredato., in prin. de iniusto test. (D. 28.3.6pr.). Nec matri huic (huius V) debetur legitima, quia ab intestato non est successura, C. de inoff. testamento, l. Cum queritur (C. 3.28.6);" MS Vatican, Barb. lat. 1402, fol. 69r, collated with the Venetian edition, vol. 2, fol. 6v, cons. 28, n. 3: "Super tertio puncto dicendum est, quod matri testatoris nulla debetur legitima in bonis testatoris, quia testator decessit extantibus filiis, quorum prima causa fuit in successione. Et ideo per testamentum filii sui potuit totaliter preteriri (preteriri: om. V), in auth. de here. ab intest. § 1." These *consilia* were rendered sometime after September 1384. See also Bartolus, *Consilia*, ed. cit., fol. 8v, cons. 18, n. 1: "Primo videndum est, an tale testamentum est nullum, quia est preterita mater nulla causa inserta. Ad quod dicendum est, quod testamentum ex hoc non rumpitur, quia testator habet filios, quo instituit quorum filiorum prima est causa in successione, ut C. de legi. here. auc., In successione (C. 6.58.3, *Post fratres*, in c.) et non tenetur quis instituere ascendentes."

<sup>139</sup> BALDUS, vol. 3, fol. 84v, cons. 299; vol. 4, fol. 82rv, cons. 366. The enforceability of the remarried mother's claim depended on her age, the timing of her remarriage, and on whether she had been her deceased child's guardian.

Unfortunately, the *casus* to *consilium* 7 is missing, so information about the protagonists, testamentary particulars, and the statutes cited is virtually nil. We learn from the *consilium* itself that a son has neither instituted nor disinherited his mother, yet left her something in the testament. The testator is survived by Gabriele, who is named testamentary heir, yet his exact identity is not readily decipherable. He is mentioned as the "said brother," so conceivably he is the testator's brother. But the testator is mentioned as the "father," so Gabrielle may be his son. Baldus determined that the *ius commune* (N. 115.3. = Auth. 8.12.3) renders the son's testament invalid. That the testator has left his mother something does not alter the testament's invalidity. Since the institution of Gabriele is broken by the botched disinheritance, the codicillary clause goes into effect. The mother now succeeds on intestacy and must restore her share of the inheritance to the trustees, while she retains the *legitima* for herself. Baldus then gingerly negated the statutorily authorized exclusion of mothers, by reasoning that the applicable statute speaks of intestate succession, whereas in this case the father (*pater*), whom I take be mother's son and Gabriele's father, died *testatus*. And he referred to an another relevant statute which grants a mother a usufruct of the legacies left her by the children whom she has survived.

This *consilium*, likely written at the mother's request, seems at first glance inconsistent with Baldus's position that a mother has no claim to succeed a deceased child with surviving children. Yet in this case, as elsewhere, Baldus was consistent in his resolute defense of the *mater praeterita* against statutes excluding them from a share of their children's estates to which they were entitled by the *ius commune*. As far as I can ascertain from my examination of *consilia* collections of the fourteenth and fifteenth centuries, cases involving mothers pretermitted in their children's testaments were fairly common. There is need of a separate study of the principles and arguments which jurists wielded on behalf of the *mater praeterita*. Such principles and arguments were meant to mitigate the odious consequences attending the ideological preference for succession through male agnates (*favor agnationis, favor masculinitatis*).<sup>140</sup>

<sup>140</sup> T. KUEHN, Some Ambiguities of Female Inheritance Ideology in the Renaissance, in: *Law, Family & Women* (n. 2), pp. 248–250; MAYALI, *Droit savant et coutumes* (n. 5), pp. 86 ss.; E. MONGIANO, *Ricerche sulla successione intestata nei secoli XVI–XVIII. Il caso degli Stati sabaudi*, 2<sup>nd</sup> ed., Turin 1998, pp. 45 ss.

*Filia familias*

Cons. 8. The legal ability of a father to disinherit a daughter-in-power for debauchery (*eligit vitam luxuriosam*) was taken for granted.<sup>141</sup> But the *onus probandi* was on the heirs, otherwise the daughter would prevail in her complaint brought against the father's testament. With this bedrock law, Baldus opened his *consilium*, written between 1393 and 1396, likely at the request of the judge. The protagonist is a daughter-in-power, who, according to her father's testament, was disinherited because of debauchery. This case was somewhat unusual. As far as I can tell, daughters disinherited for debauchery tended not to seek relief in court. Perhaps they were isolated, fearing further reprisal; perhaps they believed the legal deck was stacked against them, making a quest for legal relief futile. As best as I can reconstruct the case from Baldus's formulations, the *petitrix*, in her complaint against her father's testament, acknowledged a youthful indiscretion of cruising the streets. Admittedly, she had not affected the *mens virginitatis*. Yet she objected to the accusation of debauchery, for, as she explained, vaginal tightness or constriction (*arta*) made her impenetrable, and thus incapable of completing the sexual act.<sup>142</sup> At worse, whatever wrong she may have committed does not rise to a wrongdoing for which she may be legally disinherited under § *Aliud quoque capitulum*.

Dismissing the daughter's definitional spin, Baldus dryly argued that the issue turns on legally accepted standards of proof. First, by

<sup>141</sup> On the polyvalent concept of *luxuria*, see ALBERICUS DE ROSATE, *Dictionarium*, Venice 1572, v. *luxuria*; for a modern study, C. BERRY, *The Idea of Luxury: A Conceptual and Historical Investigation*, Cambridge 1994.

<sup>142</sup> On *arctatio mulieris* as an impediment to fulfilling the function of a woman, and therefore marriage, and as a physical condition amenable to surgical intervention, see Innocent III's letter to the bishop of Auxerre: X. 4.15.6, *Fraternitatis tuae*, and its accompanying glosses and commentaries, and the *summae confessorum* treating matrimonial impediments. See also D. 21.1.14.7: "Mulierum ita artam, ut mulier fieri non possit, sanam non videri constat." On frigidity and impotence as marriage impediments and a causes for annulment in the canon law, see J. LÖFFLER, *Die Störungen des geschlechtlichen Vermögens in der Literatur der autoritativen Theologie des Mittelalters. Ein Beitrag zur Geschichte der Impotenz und des medizinischen Sachverständigenbeweises im kanonischen Impotenzprozess*, in: *Abhandlungen der Akademie der Wissenschaften und der Literatur in Mainz, Geistes- und Sozialwissenschaftlichen Klasse* 6 (1958), pp. 296–380, esp. p. 312 ss.; J. A. BRUNDAGE, *The Problem of Impotence*, in: *Sexual Practices & The Medieval Church*, ed. by V. L. BULLOUGH and J. BRUNDAGE, Buffalo 1982, pp. 135–140; R. WEIGAND, *Zur mittelalterlichen kirchlichen Ehegerichtsbarkeit*, in: *Liebe und Ehe im Mittelalter*, Goldbach 1993, pp. 328–331.

common repute (*fama*), the daughter is known to have led a life of debauchery.<sup>143</sup> Second, it makes no difference whether the daughter had experienced sexual penetration. Moral responsibility is not determined by anatomical (in)capacity. As a matter of law, debauchery and sexual corruption (*stuprum*) can, and does, occur without sexual penetration. For such immoral and dishonorable behavior covers proximately completed as well as perfectly completed acts. Baldus's point is that the daughter is culpable because she wanted, and sought, to have completed sex but could not because of her physical impediment. With the testamentary disinheritance validated, there remained the collateral question of the bequest the father left his daughter *iure institutionis*. May she demand a supplement, which, together with the bequest, would match her *legitima*? She may not, because upon being disinherited she loses her claim to the *legitima*. Indeed, doubt exists whether she may even claim the bequest, which was intended as a token of disgrace. Although a disinherited child may legitimately be denied *alimenta*, Baldus, moved more by his heart than his head, advised compassion. "But I think it is more humane that the bequest left her be enforced in consideration of human kindness, compassion, and paternal love. For these are the testator's justifiable reasons [for the bequest]."<sup>144</sup>

Cons. 9. The disinheritance of Tinuccia, daughter of Francesco Cencii of Orte, was altogether different. A local jurist, Francesco was a member of a notable *famiglia ortana*, many of whose members were notaries.<sup>145</sup> In the *casus* Francesco is identified as a vicar of Egidio Albornoz, legate general in Italy between 1353 and 1367. Independent confirmation of Francesco's vicarship in Orte or elsewhere in the papal state is lacking.<sup>146</sup> The only other extant reference to Francesco is as

<sup>143</sup> On the modes of proving a causal link between *voluntas feminae* and *stuprum*, see G. CAZZETTA's *Praesumitur seducta. Onestà e consenso femminile nella cultura giuridica moderna*, Milan 1999.

<sup>144</sup> On "paternal love" in Rome, see the suggestive pages of E. EYBEN, *Fathers and Sons*, in: *Marriage, Divorce, and Children in Ancient Rome*, ed. by B. RAWSON, Oxford 1991, pp. 114–143, which includes daughters as well. For a positive assessment of parental love and affection in Renaissance Florence, see P. GAVITT, *Charity and Children in Renaissance Florence. The Ospedale degli Innocenti, 1410–1536*, Ann Arbor 1990.

<sup>145</sup> For information on Francesco Cencii and his kinsmen, I am indebted to Dott.ssa Barbara Friale and Dott. Abbondio Zuppante, who generously responded to my request for help. On Orte, see B. FRIALE, *Orte 1303–1367. La città sul fiume*, Manziana 1995.

<sup>146</sup> In search of "vicarius" Francesco Cencii, but without success, I have scoured the well-known works of THEINER, GLENNISON and MOLLAT, and ANTONELLI. Francesco Cencii

witness in a document of 1352.<sup>147</sup> Nevertheless, Albornoz had close ties to Orte and its citizens, and he had appointed Nicola Roberteschi, bishop of Orte, as his vice legate. While doubts persist, the *casus* offers reliable testimony that Francesco's was Albornoz's vicar.

In the wake of Francesco's death, Tinuccia claimed that her father died intestate and that she therefore succeeds on intestacy. Giacomo di Giovanni Cencii, her first cousin and apparently a minor,<sup>148</sup> claimed that his uncle not only died testate, but instituted him testamentary heir and produced a copy of the testament to that effect. From a convoluted *casus* that was condensed by Baldus or his scribe, we learn that an arbiter was involved, apparently commissioned by the parties to settle differences over the division of Francesco's estate. As a matter of procedure and practice, it is fairly certain that a judge in Orte, rather than the arbiter, requested a *consilium sapientis* from Baldus on several points of law.<sup>149</sup> The court's notary sent Baldus a copy of Francesco's testament, relevant sections of Orte's statutes, official approval (*adprobatio*) of Orte's statutes by the rector of the province of Tuscia,<sup>150</sup> and the section of the provincial constitutions that dealt with the formalities for granting official approval,<sup>151</sup> and a certain *confessio* made by Giacomo di Giovanni with the consent of his curator in the presence of the arbiter.<sup>152</sup>

is not mentioned in *De Antiquitatibus Hortae coloniae Etruscorum* of GIUSTO FONTATINI, or in *Fabrica Ortana* of LANDO LEONCINI (according to Barbara Friale's personal communication, 9 Aug. 1999).

<sup>147</sup> *Le pergamene medievali di Orte (secoli X-XV)*, ed. by G. GIONTELLA, D. GIOACCHINI, and A. ZUPPANTE, Orte 1984, pp. 48-49, doc. 66 (13 Feb. 1352). The document was redacted by Francesco's nephew, Angelo di Vanni Cencii.

<sup>148</sup> Giacomo was the son of Vanni, Francesco's brother, and his *confessio consensu curatoris* indicates that he was under the age of twenty-five.

<sup>149</sup> T. KUEHN, *Law and Arbitration in Renaissance Florence*, in: *Law, Family & Women* (n. 2), pp. 19-74; L. MARTONE, *Arbiter - Arbitrator. Forme di giustizia privata nell'età del diritto comune*, Naples 1984.

<sup>150</sup> Of Orte's *trecento* statutes only fragments of the 1380 redaction are extant; they are published by B. FRIALE, *Alcune carte dagli statuti ortani del 1380*, in: *Rivista storica del Lazio* 3 (1995), pp. 41-66. The copies of the statutes sent to Baldus belonged to an earlier redaction.

<sup>151</sup> *Constituzioni Egidiane*, ed. by P. SELLA, Rome 1912, pp. 84-94, lib. 2, rub. 19 (*De statutis et ordinamentis terrarum*). On which, U. SANTARELLI, *Osservazioni sulla "potestas statuendi" dei Comuni dello Stato della Chiesa (a proposito di Const. Aeg., II, 19)*, in: *Annali della facoltà giuridica, Università di Macerata* 5, 2 (1968), pp. 245-262. The date of the first recorded approval of the statutes of Orte was 1343: D. GIOACCHINI, *La comunità ortana nei secoli XVe XVI con particolare riferimento agli Statuti del 1584*, Orte 1982, p. 25.

<sup>152</sup> Giacomo had likely acknowledged that he had received some goods (*confessio receptionis*) from Francesco's Cencii's estate.

Armed with these documents, Baldus addressed four points. First, assuming that Francesco left a testament but pretermitted Tinuccia, is the testament valid? In a word, no. As in the previous cases we have considered, the codicillary clause, in accordance with the *ius commune*, goes into operation, so that Tinuccia takes at a minimum her *legitima*. Second, the statutes of Orte exclude from succession *filie dotate* when the testator is survived by a son or nephew.<sup>153</sup> Assume that provision for Tinuccia's dowry was made in Francesco's testament. Even though Tinuccia is neither instituted nor disinherited, his testament under the statutes is valid. She is entitled to the dowry only, while the nephew is entitled to be instituted testamentary heir. But this issue is moot, because the statutorily prescribed *exclusio propter dotem* was not introduced and therefore its applicability in this case need not be proved. Third, without official approval of the provincial rector, which is the case here, the statutes of Orte are not enforceable. In the copy of the *adprobatio* furnished Baldus, the approval was not given by the rector but by his judges. Their approval is invalid, Baldus asserted, because no confirmation is provided that the judges were formally delegated by the rector to approve the statutes.

Finally, did the copy of the testament produced by Giacomo faithfully represent the contents (*veritas*) of the original testament? The authenticity of notarial instruments was of grave concern to jurists, and Baldus was no exception.<sup>154</sup> Here, "the copy of the testament" or "the copy of a copy" was based on an exemplar registered in the files of a notary now deceased. Unaware of the testament's existence, Tinuccia was deprived of the opportunity to inspect the contents of the copy and demand the production of the original testament. This opportunity remains available to her, Baldus opined, where the copy of the testament was made at the request of the court. Where the copy was not the result of a judicial act but required by statute, then it was not necessary for the parties to be summoned to court. The distinction between a court-ordered copy and a statutorily ordered copy is this: in the former the order directly affects the relevant parties and bears on

<sup>153</sup> For the *exclusio* in the redaction of 1584, see *Statuti della città di Orte*, ed. and trans. by D. GIOACCHINI, Orte 1981, pp. 100–101, lib. 2, cap. 22 (*Quod filie femine superstites masculo non succedant ab intestato et qualiter tunc dotentur*).

<sup>154</sup> V. VALENTINI, Il "tractatus de tabellionibus" di Baldo degli Ubaldi attribuito anche a Bartolo da Sassoferrato nonché a Gozzadino de' Gozzadini, in *Studi urbinati* 18 (1965–1966), pp. 3–169. See *quaestio* 14, pp. 129–132 (I cite an offprint with different pagination).



the contents of the testament that has to be implemented; in the latter the contents of the testament are irrelevant, for the copy is made for some administrative purpose.<sup>155</sup> In other words, at stake in this case was the authenticity of the contents, not the authenticity of the copy. Obviously, a copy of a testament that faithfully, yet unwittingly, reproduced the false contents of the original was also authentic. In the end, should unanswered questions about the testament's authenticity linger, it was incumbent on the judge to order the production of either the original testament (*matricis scriptura*) that the notary had supplied the testator or the register containing the notary's copy of that testament (*protocollum*). This advice jibed with the certainty that the production and examination of original instruments, rather than copies, is the best antidote to fraud.<sup>156</sup>

### *Filius familias*

Cons. 10a/b–13. The final four *consilia* date from 1388 to 1389, when Baldus was still teaching at Perugia. All five addressed a series of legal issues engendered by a single testamentary disinheritance at Norcia. In complex cases, it was common for a judge to request several opinions from the same jurist.<sup>157</sup> And while Baldus occasionally rendered several *consilia sapientis* at different stages of the same case, this is the only case, to my knowledge, when he produced as many as four *consilia sapientis*. *Consilia* 10a and 10b indicate that legal proceedings began with Bartolomeo, who, having been disinherited by his father, Iuciarelllo, made a formal complaint (*libellus*) to the Podestà. The complaint requested that the court allow the plaintiff to undertake a *querela inofficiosi testamenti* against his brother, Paolo, who had been appointed his father's heir. It was also requested that his father's testament, regarding the institution of the heir, should be revoked and declared undutiful (*inofficiosus*) for having neglected the duty of respect a parent owes a child (Bartolomeo). Once the testament has

<sup>155</sup> On these matters, see *Statuti della città di Orte*, ed. cit., pp. 92–94, lib. 2, cap. 15 (*De banca civilium causarum et secundis scripturis*), pp. 94–96, lib. 2, cap. 16 (*De instrumentis fictitis*).

<sup>156</sup> See BALDUS, Venice 1575, vol. 3, fols. 116v–117r, cons. 409.

<sup>157</sup> For instances of jurists rendering multiple *consilia* on different facets of the same case, see O. CAVALLAR, Francesco Guicciardini and the Pisan Crisis, in: *The Journal of Modern History* 65 (1992), pp. 245–285; IDEM, Il tiranno, i dubbia del giudice e i *consilia* dei giuristi, in: *Archivio storico italiano* 105 (1997), pp. 265–346.

been officially rescinded, the complaint continued, half the inheritance should be returned to Bartolomeo.

From *consilium* 12, we learn that Bartolomeo was assisted by a *defensor*, possibly a jurist, more likely a notary or someone with experience in litigation and in drafting *libelli*. Typically, the *defensor* assisted a party whose legal status (freeborn, legitimate, heir) was at issue. If we take at face value the criticisms that Baldus leveled against the *libellus* and Bartolomeo's own misgivings, the *defensor* seems have been an incompetent. We do not know who assisted in Paolo's defense.

The complaint was communicated to the defendant, Bartolomeo's brother, who predictably interposed a number of standard "exceptiones negatorie atque peremptorie" (*consilium* 10a). It was objected that the complaint, on technical grounds, was inappropriate and flawed (*libellus ineptus*), in contrast to the declaration of disinheritance, which was lawful and factually true. The request for a *querela inofficiosi testamenti* is said to be plainly unfounded, since the judge may not grant it until proof of the reasons for the disinheritance had been formally contested. However, the statutes of Norcia provided that such exceptions against the *libellum* may not impede the case from advancing to the next stage: the submission of the issue to the decision of the judge (*litis contestatio*).<sup>158</sup> In compliance with the statutes, the presiding judge issued an interlocutory sentence declaring that the issue may advance to *litis contestatio*. At this juncture, the judge, perhaps prompted by new exceptions interposed by the defendant, requested Baldus's advice on whether his sentence was in conformity with the law. Baldus agreed that the request for a *querela inofficiosi testamenti* was premature. Yet, after an analysis of Bartolomeo's flawed complaint, Baldus reaffirmed the interlocutory sentence and advised that the issue may proceed to *litis contestatio*.

*Consilium* 10b was certainly not a full-fledged, free-standing *consilium*. The texts transmitted in manuscript and in the printed editions represent a fragment that possibly belonged to a *consilium* no longer extant. A better hypothesis is that it belonged to an earlier draft of *consilium* 10a and that it was cut from the final version I have edited.

<sup>158</sup> Norcia's fourteenth-century statutes are no longer extant. The earliest extant edition was printed in 1526. See *Repertorio degli statuti comunali umbri*, ed. by P. BIANCIARDI and M. G. NICO OTTAVIANI, Spoleto 1992, pp. 204–205. Nothing bearing on our case in F. M. DE' REGUARDATI, *L'Umbria, Ducato di Spoleto e Norcia nel sec. XIV. Pagine inedite di storia umbra*, Perugia 1986.

In *consilium* 10b, Baldus argued that Bartolomeo's complaint is fatally flawed by a contradiction. It asked on the one hand that the testament be nullified because the disinheritance is invalid; on the other that a *querela inofficiosi testamenti* be granted to the plaintiff. Baldus argued that such a *querela* is possible where the testament is valid and after the heir accepts the inheritance. If Iuciarello's testament was declared null and void, as Bartolomeo demanded, the cause for the *querela inofficiosi testamenti* would be extinguished. The complaint is also flawed because Bartolomeo is acting contrary to law by demanding delivery of his share of the inheritance (*hereditatis petitio*) before he becomes heir. We can only guess why Baldus chose not to include this fragment in the final version of his *consilium*. Prolivity may have been one reason; in the final version the arguments in the fragment were considerably condensed. The fragment represented a powerful rejection of the Bartolomeo's complaint. That rejection was softened in the final version, giving Baldus room to reach the conclusion supporting the Podestà's decision to proceed to *litis contestatio*.

From *consilium* 11 we learn the reasons inciting Iuciarello to disinherit Bartolomeo. Iuciarello accused his son of being undutiful and unworthy to be instituted heir. More specifically, he accused Bartolomeo of physically assaulting, insulting, and abusing his father, as well as conspiring with Iuciarello's enemies against his father's life. Afterward Iuciarello died without having changed his testament. Now, Baldus was asked to address what I take to be Bartolomeo's charge that the disinheritance was defective and therefore invalid. It is argued that, having given the reasons, "maleficium et dolum," for Bartolomeo's disinheritance, the testator was obliged to specify the time, place, and exact nature of the accused's alleged wrongdoing and deliberate treachery. Baldus countered that the disinheritor is not legally required to add anything beyond the approved reasons for the disinheritance of a child. As it stands, the disinheritance was solemnly performed and the testament is unquestionably valid. Nevertheless, the heir must prove that the father's accusations against Bartolomeo are true. This means producing compelling evidence of the specific wrongdoings the accused is alleged to have performed. Should the heir fail to prove the accusations, Bartolomeo will prevail in a *querela inofficiosi testamenti*, if undertaken within five years after the heir accepts the inheritance.

Baldus was again enlisted (*consilium* 12), this time to answer ten questions arising from further objections interposed by Bartolomeo.

First, to the question of whether the disinheritation was duly performed, Baldus, citing *consilium* 11, repeated his previous opinion. Second and third, must each and every reason for the disinheritation be proven? If one is not proven, is the testament thereby rendered invalid? Baldus responded that the law does not require the reasons be proven jointly: "Where there is proof that either the son [alone] physically assaulted his father, or that, with others with whom he joined in friendship, physically assaulted his father or treacherously conspired against his father's life, it is sufficient to defeat the son." Fourth, before his father's death, Bartolomeo had been summoned by the Podestà to answer charges that he had struck and wounded (*percussisse*) Iuciarello. Bartolomeo's *defensor* acknowledged that Bartolomeo had indeed struck and wounded his father. Is acknowledgment of the *defensor* prejudicial to Bartolomeo's rights? No, Baldus replied, unless it is shown that Bartolomeo had authorized (*mandata*) his *defensor* to make the acknowledgement.<sup>159</sup>

Fifth, after the attack against his father, Bartolomeo and Iuciarello were reconciled and father and son lived together for a substantial period. Does their former reconciliation serve to extinguish the reasons given for the subsequent disinheritation? The reconciliation, Baldus explained, benefits the son with respect to his previous wrongdoings, but does not exonerate him for those he committed after the reconciliation. Sixth, was the father required to name his enemies with whom his son conspired against his life. He is not required, but their identities must be made known in the proof-taking stage of the dispute. Seventh, what degree of enmity warrants disinheritation under § *Aliud quoque capitulum*? The father's enemies, Baldus stated, must rank as mortal enemies. Eighth, is Bartolomeo's disinheritation validated by mere association and cohabitation with his father's enemies? Baldus said that it was.

Finally, when Iuciarello was sick, presumably just before his death, Bartolomeo sought to visit his father repeatedly, but Iuciarello would not permit him to visit. Does Iuciarello's refusal to see his son invalidate the disinheritation? No, according to Baldus, for whether or not Bartolomeo was able to visit his father is immaterial to his disinheritation, which was caused by the offences he committed before his father's sickness (but after the reconciliation) and for which he

<sup>159</sup> By statutory law and the rules of procedure, the court was required to ask for an instrument of mandate attesting the legitimacy of a party's legal representative.

continues to be liable. Likewise, Bartolomeo's allegation that Iuciarello refused to see his son is clouded in uncertainty. In conclusion, "the father is presumed to have continued resolutely in his hatred toward a son who was undutiful, since he is not presumed to have changed his mind." Poor Bartolomeo should have followed the commandment of his fellow-citizen, Saint Benedict, that sons must obey their abbot-father at all times, so "that he may never become the angry father who disinherits his sons."<sup>160</sup>

Gaps in the sources make it impossible to tell whether the case advanced beyond *litis contestatio* to the proof-taking stage and to the judge's sentence.<sup>161</sup> *Consilium* 13 addressed a different issue, Bartolomeo's petition for support (*alimenta*) from his brother, Paolo. Subject to summary procedure, a petition for support was made before a judge and did not require a *libellus*.<sup>162</sup> Paolo's obligation to provide support to a brother, whose poverty was caused by disinheritance, was hardly straightforward. While the *Corpus iuris* imposed a reciprocal support obligation on parents and their children and other ascendants and descendants, no such reciprocal obligation was imposed on brothers and other collaterals.<sup>163</sup> With the *Glossa*'s blessings, however, a reciprocal fraternal support obligation *ex lege* took hold in the *ius commune*. This fraternal obligation was approved with various qualifications by all the leading authorities. At best, Baldus's approval was lukewarm, and he insisted that the support obligation may be imposed only on a brother with abundant resources.<sup>164</sup>

Having taken what appears to be a substantial inheritance, Paolo formally qualified as a wealthy brother capable of fulfilling his support obligation. But his obligation was put into doubt because of a condition Iuciarello placed in his testament: "And if Paolo, the instituted heir, habitually associates with Bartolomeo at any time, or gives or hands over to Bartolomeo or his heirs something from the aforesaid goods left to him, he will lose the inheritance, which is to be consigned to the

<sup>160</sup> *The Rule of St. Benedict in English*, ed. by T. Fry, Collegeville, Minnesota 1982, p. 15 (1, 5).

<sup>161</sup> For a cogent description of civil proceedings in this period, see P. SELLA, *Il procedimento civile nella legislazione statutaria*, Milan 1927.

<sup>162</sup> UGO NICOLINI, *Il Trattato De alimentis* di Martini de Fano (n. 37), p. 368, q. 65.

<sup>163</sup> On the "obbligo diretto del fratello verso il fratello," in the *ius commune*, see PENE VIDARI, *Ricerche* (n. 30), pp. 405-436.

<sup>164</sup> PENE VIDARI, *Ricerche* (n. 30), pp. 432-433; Baldus's position echoed MARTINO DE FANO's, *De alimentis* (n. 37), p. 367, q. 63: "Questio. Quando petuntur iudicis officio alimenta? Dic quando unus est inops nec potest operari et alter est dives."

commune of Norcia (as was said, the goods are given for the love of God); and four hundred florins, which is to be consigned to the aforesaid Caterina, unless and insofar as Paolo was forced and held by law to give something to Bartolomeo from the said goods. But if he voluntarily gave, he loses the inheritance, as above." The condition was surely drafted by a notary conversant with the jurisprudence on support obligations. A disinherited child is not legally entitled to support from the father's estate, yet under the *ius commune* the heir can be compelled to support his brother. Furthermore, it is likely that Luciarello had originally appointed as substitute heirs the commune of Norcia and a certain Caterina, conceivably a relative, both of whom might still share the inheritance should the original heir violate the testamentary condition.

Baldus, from my reading of the *consilium*, was asked by the judge to settle the doubts arising from the conflict between the *ius commune* and the testamentary condition.<sup>165</sup> First, Baldus showed that the condition is not violated where the law required Paolo to provide support to Bartolomeo. Paolo is indeed required, since brothers born of the same father must support one another, regardless if one of them has inflicted harm on their father. Any attempt by a father to obstruct a brother's mandatory support obligation is against natural law and unlawful. The appeal to natural law was made in recognition that the support obligation is not predicated on the contingency of individual discretion, but is transpersonal, morally inviolable and immutable. The appeal was also an admission that the *Corpus iuris* lacked a proof-text authorizing the fraternal support obligation. On the authority of natural law, Baldus concluded that the judge appointed to decide the issue of *alimenta* should require the wealthy brother to provide goods yielding a return sufficient to maintain his impoverished sibling. *Consilium* 13 was the sole opinion Baldus devoted to the fraternal support obligation. It served as an authoritative affirmation of a disinherited sons's claim to support from his wealthy brother.<sup>166</sup>

<sup>165</sup> Since Baldus had already rendered *consilia sapientis* on the conflict between the brothers, it would have been a breach of professional ethics for him to have subsequently rendered a *consilium pro parte* defending either brother.

<sup>166</sup> See DOMENICO TOSCHI, *Practicae conclusiones*, Lyon 1634–70, vol. 1, p. 156. v. *Alimenta*, concl. 287, n. 102: "frater dives ... tenetur ex persona sua alere fratrem inopem etiam male merentem versus patrem; Baldus, cons. 103, *Premissis verbis*, lib. 5, ubi dat cautelam, quod licet filius sit prohibitus sub poena aliquid dare alteri filio exheredato, tamen poterit via iuris compelli ad dandum alimenta sine poena, quia prohibitio in hoc non valet."

## Conclusion

My paper is the first extended foray into the wilderness of disinheritance in medieval and Renaissance Italy. I am well aware that I have only skimmed the surface of a vast body of material and that further research is necessary to map in greater detail the regulative framework and practice of disinheritance. Yet, on the basis of the evidence I have presented, several conclusions emerge. First, deliberate testamentary disinheritance à la Romana in late medieval and Renaissance Italy was infrequent. Second, the universal heartfelt belief inherited from Roman law – that testamentary succession was a *sine qua non* for the continuity, indeed immortality, of the agnatial family – powerfully discouraged disinheritance. So did the sacrosanct character of the support obligation, and especially the *legitima*, which entitled legitimate children to a fixed, substantial portion of their parent's estate. Inaugurated in ancient Rome, the *legitima* remains an immovable keystone of contemporary family law in Italy and other civil law countries (e.g., Germany [*Pflichtteil*], France, Portugal, and Spain).<sup>167</sup> Third, risk-averse testators were reluctant to exercise their right to disinherit even when circumstances warranted this drastic action. Disinherited children were given an incentive to contest the testament of their parents, as the burden of proof was not on the disinherited, but on those who became the testator's heirs. Formal testamentary disinheritance, therefore, was often a trapdoor directly leading to litigation. Testamentary disinheritance also unavoidably aired family secrets and dirty laundry. For these reasons, pretermis-sion plus a small bequest was preferred as the legally safer and socially more acceptable means of disinheritance.

The thirteen *consilia* considered in this paper represent less than 1 percent of the opinions produced by Baldus. Generalizations based on this subset are obviously open to revision. These *consilia* nonetheless reveal that Baldus's approach to the family disputes he addressed was unsentimental, pragmatic, and humane. His approach was tempered by professional critical detachment, not by dogmatic advocacy for the litigants whom he probably did not meet face-to-face. He defended the right of parents to disinherit undutiful children; he crafted solutions

<sup>167</sup> *Family law in Europe*, ed. by C. HAMILTON, K. STANLEY and D. HODSON, London, Dublin, Edinburgh 1995, pp. 43–44, 137–138, 209, 279–280, 311, 387–388, 412–413, 454.

aimed at satisfying the legitimate claims of the contesting parties; yet he also responded with compassion to the plight of the disinherited child or mother. With few exceptions, the statutes were silent on the matter of disinheritance, and it was inevitable that jurists like Baldus would be asked to fill the void. Responding to ad hoc cases, Baldus did not strive for doctrinal originality; instead his mastery of the infrastructure of arcane legal rules, presumptions, and arguments underpinning the *ius commune* enabled him to fashion cogent solutions that stand as a major contribution to the civil law of succession and disinheritance in early modern Europe.



## Appendix

### Edition of Baldus's *Consilia*

In preparing my edition, I have relied on manuscript copies in Florence, Chicago, Lucca, and the Vatican, as well as on the editions printed at Brescia in five volumes between 1490 and 1491; at Milan in five volumes between 1491 and 1493; and at Venice in five volume in 1575. My edition is based on the manuscripts, for they clearly provide better texts than the printed editions which are contaminated by errors. As Vincenzo Colli has convincingly shown, Baldus's *libri consiliorum*, preserved in the Barberini manuscripts (1399, 1401–1410, 1412) in the Biblioteca Apostolica Vaticana, should be treated as autographs. The *libri consiliorum* produced before Baldus began teaching at Pavia in 1390 were prepared by his son, Francesco, while the later *libri* were prepared by scribes under Baldus's direction. Similarly, numerous *consilia* in C. 351 in the Biblioteca Capitolare of Lucca, which reflect Baldus's activity at Padua between 1376 and 1379, should be treated as authoritative copies of the *consilia* that originally formed part of the Barberini manuscripts. See Colli's *Il C. 351 della Biblioteca Capitolare Feliniana di Lucca: Editori quattrocenteschi e Libri consiliorum di Baldo degli Ubaldi (1327–1400)*, in: *Scritti di storia del diritto offerti dagli allievi a Domenico Maffei*, ed. M. Ascheri (Medioevo e umanesimo 78), Padua 1991, pp. 255–282. The collection of *consilia* in MS 6 in the Regenstein Library of the University Chicago, though not always as reliable as the Barberini manuscripts and C. 351, often provides better readings than the printed editions. Still, I have had no compunction about using the printed editions to correct various errors in the manuscripts.

In general, I have followed the recommendations on editorial practice presented by S. Kuttner, *Notes on the Presentation of Text and Apparatus in Editing Works of Decretists and Decretalists*, in: *Traditio* 15 (1959), pp. 452–464. In order to produce readable texts, I have ignored the punctuation and subdivisions of the MSS and have introduced modern punctuation and have divided the texts into manageable paragraphs. With the exception of minor orthographic variants and obvious *lapsus calami* (e.g., nihil/nichil, Landus/Lau-

dus, contenta/contempta, adire/adhire, et/est, tenet/tenent, illico/ille, qui/quo), all variants and emendations have been noted in the apparatus. I have also indicated the approximate date of each *consilium* on the basis of Colli's Il C. 351, p. 260 and internal evidence.

### Abbreviations:

**B3**, n. 164 (= Brescian edition, vol. 3, *consilium* 164)

**BL** 1401, n. 121 (= MSS Barberini latini, 1401, *consilium* 121)

**C** (= MS 6, Regenstein Library, University of Chicago)

**L** (= C. 351, Biblioteca Capitolare di Lucca)

**M1**, 286 (= Milan edition, vol. 1, *consilium* 286)

**V5**, n. 89 (= Venetian edition, vol. 5, *consilium* 89)

### *Consilium* 1

Archivio di Stato, Florence, Corporazioni religiose soppressi dal governo francese, 98, n. 263, fol. 390r<sup>1</sup> (fig. 1)

Date: before 1376

Punctus talis est. Quidam Bardus Petri<sup>2</sup> fecit testamentum, in quo sibi heredes instituit Iohannem et Francischum; Angelum autem filium suum exheredavit a<b>sque a<di>tione cause. Et in fine sui testamenti adposuit clausulam consuetam: "et si non valet iure testamenti, valeat iure codicillorum" etc. Queritur, quid iuris de dicto testamento et de hereditate dicti testatoris?

In Christi nomine, amen. Certum est quod dictum testamentum Bardi fuit ipso iure nullum, quantum ad institutionem heredum, quia filium nulla inserta causa exheredavit, ut in auten. ut cum de appellatione cognoscitur, § Aliud quoque capitulum (N. 115.3. = Auth. 8.12.3). Et ideo filii ab intestato sunt heredes equis portionibus. Sed dubitatur, quia testator voluit valere iure codicillorum, an dictus Angelus teneatur<sup>3</sup> virilem partem suam restituere fratribus suis, legitima deducta,

<sup>1</sup> This volume, which originally belonged to the Bonsi family of jurists, contains *consilia* mainly from the first half of the sixteenth century. BALDUS's *consilium* is found in a little portfolio bound into the codex at fols. 383r–392r. Also included in this portfolio are signed and sealed *consilia* by NELLUS DE SANCTO GEMINIANO, PAULUS DE CASTRO, BARTOLOMEUS DE VULPIS, and IOHANNES DE RUGGERO DE RICHIS. I am grateful to Lawrin Armstrong for providing me with a description of this codex.

<sup>2</sup> Bardus Petri *suprascr.*

<sup>3</sup> teneatur *repet. Cod.*

an non teneatur. Et sumus nunc in passu difficili, nam glo. in auten. Ex causa (N. 115.4.9. = C. 6.28, post 4, *Maximum vitium*) tenet quod illa clausula nichil operetur, nisi quando testamentum non valet ex defectu solempnitatis, secus si non valet ex defectu exheredationis. Creditur enim pater insanisse, qui naturalem obmisit erga filium karitatem, ff. de inoffit. te., l. Titia (D. 5.2.13). Item, ex quo exheredabat eum, non poterat ipsum per fideicommissum gravare, ff. de le. iii., <l.> Ex filio preterito (D. 32.[1].2). Et hanc equam oppinionem glose tenebant quasi omnes antiqui doctores, et ex modernis tenent eam Oldr. de Laude et Riz. Mal.<sup>4</sup> Item tenet eam Guill. de Cuneo in l. prima,<sup>5</sup> C. de codicill. (C. 6.36.1),<sup>6</sup> cum enim lex notet vitium in testatore parum distans a furore, illud quod est testatori una via denegatum, alia via permicti non debet, cum in effectum succederet loco vie prohibite, ff. quod cum eo, l. Si filius (D. 14.5.5). Set dominus Dy., Ia. Bu. et Bar.<sup>7</sup> dicunt talem clausulam valere, et exheredatum ab intestato succedentem statim debere ex causa fideicommissi restituere fratribus portionem suam, legitima deducta, et hoc per legem, ff. de iniusto te., l. Postumus, § Si paganus (D. 28.3.12.1), de testamentis, <l.> Ex ea (D. 28.1.29), et quod no. C. de fideicom., <l.> Eam quam (C. 6.42.14), et l. Ex testamento (C. 6.42.29), et ar. si quis ob. ca. testamenti, l. Quia<sup>8</sup> autem (D. 29.4.6), et est expressum secundum unam lecturam, ff. ad Treb., l. Si patroni,<sup>9</sup> in fine (D. 36.1.57[55].5), ad hoc etiam specialiter allegatur, ff. de fideicom. li., <l.> Generaliter, § Ex testamento (D. 40.5.24.11). Et hec <est>veritas: et ita tenendum est.

Et ita dico et consulo, ego Baldus de Perusio utriusque iuris doctor, et ad fidem me subscripsi et sigillo mei nominis signavi.

SEAL

<sup>4</sup> OLDRADUS, *Consilia*, Venice 1570, fol. 85v, cons. 171, n. 18. I have been unable to locate the opinion attributed Ricardus Malumbra either in E. BESTA, *Riccardo Malombra professore nello studio di Padova, consultore di stato in Venezia*, Venice 1894, or in the *casus* and *additiones* in MS Vatican, Arch. S. Pietro A. 34, Barb. lat. 1462, Vat. lat. 1428, 1429, and 1430.

<sup>5</sup> ultima Cod.

<sup>6</sup> GUILDELMUS DE CUNEO ad C. 6.36.1, *Rupto, Lectura super Codice*, Lyon 1512, fol. 74v.

<sup>7</sup> DYNUS ad D. 31.[1].76, *Cum filius divisus, Super infortiato*, Lyon 1513, sf.; JACOBUS BUTRIGARIUS ad Auth. Ex causa (C. 6.28, post 4, *Maximum vitium*), *Lectura super Codice*, Paris 1516, fol. 30rv; BARTOLUS ad D. 28.3.12.1, *Postumus, § Si paganus, Commentaria*, Venice 1528, fol. 121v, n. 2; IDEM ad D. 29.7.1, *Saepissime rescriptum*, fol. 201r, n. 7; IDEM ad Auth. Ex causa, ed. cit., fol. 28rv, nn. 22-24.

<sup>8</sup> qui Cod.

<sup>9</sup> Si duo patroni Cod.

*Consilium 2*

B5, n. 27

C, fol. 97rv

L351, n. 168, fols. 116vb–117ra

M1, n. 395

V1, n. 395, fols. 251vb–252ra

Date: ca. 1376–1379

Nobilis<sup>10</sup> et sapiens vir Landus filius quondam domini Antonii de Albizis<sup>11</sup> de Florentia et tunc habitator<sup>12</sup> Venetiarum in contrata Sancti Cassiani licet eger corpore, tamen sanus mente, considerans casum humane fragilitatis et rerum et bonorum suorum dispensationem per presens nuncupativum testamentum, quod dicitur sine scriptis in hunc modum facere procuravit. In primis eligit suam sepulturam et cetera. Item inter alia disposuit in hunc modum, videlicet. Item iussit et voluit quod Antonius eius filius et Mona Zula<sup>13</sup> eius filia nihil omnino habere debeant simul vel divisim de hereditate et bonis hereditatis<sup>14</sup> dicti testatoris, sed eos et quemlibet eorum exheredavit et eius hereditate privavit.<sup>15</sup> In omnibus autem aliis suis bonis mobilibus et immobilibus, iuribus, actionibus<sup>16</sup> quibuscumque presentibus et futuris, Laurentium et Marianum dicti testatoris filios legitimos et naturales sibi heredes universales instituit. Et hoc<sup>17</sup> voluit dictus testator esse suum testamentum ultimum et suam ultimam voluntatem quod valeat et valere iure testamenti; et si non posset iure testamenti valere, valeat iure codicillorum; et si iure codicillorum non valeat vel valeret, valeat iure donationis causa mortis et omni alio iure, modo et forma, quibus melius secundum consuetudinem et mores et statuta<sup>18</sup> ac ordinamenta civitatis Florentie, poterit valere<sup>19</sup> et tenere. Volens et declarans ex nunc, quod si in testamento presenti esset aliquid contra<sup>20</sup> formam statutorum vel consuetudinem civitatis Florentie, vel aliqua clausula seu solemnitas foret omissa, que habe-

<sup>10</sup> In nomine Domini, amen. Nobilis **L M V**<sup>11</sup> de Albizis *om.* **B C**<sup>12</sup> nunc habitator **L V**<sup>13</sup> ssola **B C M V**<sup>14</sup> dicte hereditatis **M V**<sup>15</sup> et – privavit *om.* **B**<sup>16</sup> rationibus **M V**<sup>17</sup> hoc *om.* **M V**<sup>18</sup> morem statutorum **B**<sup>19</sup> valere poterit **L**<sup>20</sup> in **M V**

rent hoc testamentum infringere, voluit et mandavit quod reducatur ad formam dictorum statutorum et consuetudinem. Et suppleatur omnis defectus per me notarium infrascriptum, ita quod presens testamentum et ultima voluntas valeat et teneat non mutando substantiam eorum, que in presenti testamento ordinavit.

In Christi nomine, amen. Certum est quod dictum testamentum Landi fuit ipso iure nullum, quantum ad institutionem heredum, quia filium nulla inserta causa exheredavit, ut in auten. ut cum de appellatione cognoscitur, § Aliud quoque capitulum (N. 115.3. = Auth. 8.12.3). Et ideo filii ab intestato sunt heredes equis portionibus. Sed dubitatur, quia testator voluit valere iure codicillorum, an dictus Antonius teneatur virilem partem suam<sup>21</sup> restituere fratribus suis, legitima deducta, an non teneatur. Et sumus nunc in passu difficili, nam glo. in auten. Ex causa (N. 115.4.9. = C. 6.28. post 4, *Maximum vitium*), tenet quod illa clausula nihil operetur, nisi quando testamentum non valet ex defectu solemnitatis, secus si non valet ex defectu exheredationis. Creditur enim pater insanisse, qui naturalem obmisit erga filium caritatem, ff. de inoffit. te., l. Titia (D. 5.2.13). Item, ex quo exheredabat eum, non poterat ipsum per fideicommissum gravare,<sup>22</sup> ff. de le. iii., l. Ex filio preterito (D. 5.32.[I].2). Et hanc equam opinionem glose tenebant quasi omnes antiqui doctores, et ex modernis tenent eam Oldradus de Laude et Richardus Malumbra.<sup>23</sup> Item tenet eam Guil. de Cuneo in l. prima,<sup>24</sup> C. de codicill. (C. 6.36.1),<sup>25</sup> cum enim lex notet<sup>26</sup> vitium in testatore<sup>27</sup> parum distans a furore, illud quod est testatori una via denegatum, alia via permitti non debet, cum in effectu<sup>28</sup> succederet loco<sup>29</sup> vie prohibite, ff. quod cum eo, l. Si filius (D. 14.5.5). Set dominus Dy., Ia. Bu. et Bar.<sup>30</sup> dicunt talem clausulam valere, et exheredatum<sup>31</sup> ab intestato succedentem statim debere ex causa fideicommissi restituere fratribus portionem suam, legitima deducta,

<sup>21</sup> suam om. C, eius M V

<sup>22</sup> ff. — gravare om. M V

<sup>23</sup> OLDRADUS, *Consilia*, ed. cit., fol. 85v, cons. 171, n. 18.

<sup>24</sup> ubi C, ultima B L M, ultra M V

<sup>25</sup> GUILIELMUS DE CUNEO ad C. 6.36.1, ed. cit., fol. 74v.

<sup>26</sup> vocet V

<sup>27</sup> testatorem M V

<sup>28</sup> in effectu: effectus V

<sup>29</sup> in locum M V

<sup>30</sup> DYNUS ad D. 31.[1].76, ed. cit.; JACOBUS BUTRIGARIUS ad Auth. *Ex causa* (C. 6.28, post 4), fol. 20va; BARTOLUS ad D. 28.3.12.1, ed. cit., fol. 121v.

<sup>31</sup> exheredatos M V

et hoc per legem, ff. de iniusto te., l. Postumus, § Si paganus<sup>32</sup> (D. 28.3.12.1), de testamentis, l. Ex ea (D. 28.1.29), et<sup>33</sup> quod no. C. de fideicom., l. Eam quam (C. 6.42.14), et l. Ex testamento (C. 6.42.29), et ar. si quis ob. ca. testamenti, l. Quia<sup>34</sup> autem (D. 29.4.6), et est expressum secundum unam lecturam, ff. ad Treb., l. Si patroni,<sup>35</sup> in fine (D. 36.1.57[55].5), ad hoc etiam specialiter allegatur, ff. de fideicom. li., l. Generaliter, § Ex testamento (D. 40.5.24.11). Et hec est veritas: et ita tenendum est. Et ita dico, ego Baldus.<sup>36</sup>

### *Consilium 3*

C, fol. 18rb

M3, n. 431

V3, n. 431, fol. 122v

In Christi nomine, amen.<sup>37</sup> Glossa in authen.<sup>38</sup> Ex causa (N. 115.4.9. = C. 6.28, post 4, *Maximum vitium*)<sup>39</sup> tenet quod<sup>40</sup> illa clausula, "et si non valet" etc.,<sup>41</sup> non habet locum quando testamentum deficit vitio testatoris, ut quia exheredavit vel<sup>42</sup> preterit filium. Sed quando testamentum non habet vitium intrinsecum preteritionis vel exheredationis rationis<sup>43</sup> sed habet defectum extrinsecum testamenti numeri testium,<sup>44</sup> tunc clausula operetur. Et ex modernis doctoribus unus<sup>45</sup> tenet cum glossa, scilicet Guil. de Cu. in l. prima,<sup>46</sup> C. de codicill.<sup>47</sup> (C. 6.36.1).<sup>48</sup> Tamen dominus<sup>49</sup> Dy. et omnes alii moderni tenent contrarium et omnes secundum Dy. in l. Postumus, § Si paganus, ff.

<sup>32</sup> Postumus, § Si paganus, ff. de iniusto te. V

<sup>33</sup> et om. L

<sup>34</sup> Qui B C M V

<sup>35</sup> Si duo patroni B C L M, Si quo patroni V

<sup>36</sup> Et – Baldus: om. M V

<sup>37</sup> In – amen om. M V

<sup>38</sup> anno M

<sup>39</sup> Glossa *Casus* ad C. 6.28, post 4, Venice 1591, p. 930.

<sup>40</sup> pro M V

<sup>41</sup> etc. om. C

<sup>42</sup> aut pater preterit M V

<sup>43</sup> rationis om. M V

<sup>44</sup> numeri testium om. M V

<sup>45</sup> unus doctor M V

<sup>46</sup> finali C M V

<sup>47</sup> de colla. M V

<sup>48</sup> GUILIELMUS DE CUNEO ad C. 6.36.1, ed. cit., fol. 74v.

<sup>49</sup> dominus om. C

de iniust. testamento (D. 28.3.12.1), et idem tenet Cy., Bar.<sup>50</sup> et quasi omnes.<sup>51</sup> Et ego pedisecus<sup>52</sup> eorum ita teneo. Oportet ergo, quod ista filia, que dicit nullum,<sup>53</sup> restituat hereditatem et non est dubium quod debet detrahare legitimam. Sed de trebellianica vero<sup>54</sup> est dubium est per c.<sup>55</sup> Raynutius (X. 3.26.16) et Raynaldus (X. 3.26.18).<sup>56</sup> Sed dominus Bartolus consuluit<sup>57</sup> quod cessat trebellianica, quia illa conditio, "si non valet," est vera de presenti et sic non habet naturam conditionis, quia statim testamentum fuit nullum. Idem et<sup>58</sup> ego teneo. Et ideo dicta filia hoc casu debet esse contenta sola legitima, reliquum pertinet ad heredes patris,<sup>59</sup> ad quos fideicommissum transmittitur, ut l. Cum filio, de le. i (D. 30.[1].11), C. de fideicom., l. Si<sup>60</sup> in persona (C. 6.42.21). Et ita dico ego Baldus.

#### *Consilium 4*

BL 1406, fol. 24v–25r

V5, n. 504, fol. 134v

Date: ca. 1396–1400

In Christi nomine, amen. Casus talis est. Quedam domina Caterina habebat<sup>61</sup> quattuor filios, unum Brandachum<sup>62</sup> ex primo matrimonio, alios tres ex secundo marito, condit testamentum in quo instituit tres filios secundi mariti sibi heredes universales, quos invicem substituit. Item ordinavit et disposuit dicta testatrix, quod si contingat ipsos liberos filios suos decedere ab humanis absque filiis legitimis ex<sup>63</sup> suis corporibus procreatis constituit et ordinat sibi heredem pro medietate

<sup>50</sup> DYNUS ad D. 31.[1].76, ed. cit., fol. 30rv; CYNUS ad Auth. *Ex causa* (C. 6.28, post 4), Frankfurt am Main 1578, fols. 383v–384r, nn. 6–7; BARTOLUS ad D. 28.3.12.1, ed. cit., fol. 121v.

<sup>51</sup> Tamen dominus Dy. in l. Postumus, § Si paganus, ff. de iniust. testamento, et idem tenet Cy., Bar. et quasi omnes. **M V**

<sup>52</sup> pedissequus **M V**

<sup>53</sup> nullam **V**

<sup>54</sup> vero *om.* **M V**

<sup>55</sup> propter dictum **M V**

<sup>56</sup> Raynutii et Francisci **M V**

<sup>57</sup> BARTOLUS, *Consilia, Quaestiones et Tractatus*, ed. cit., fol. 15r, cons. 44, n. 2; BARTOLUS ad D. 29.7.1, *Saepissime rescriptum*, ed. cit., fol. 201rv, nn. 10 and 14.

<sup>58</sup> et idem **M V**

<sup>59</sup> partium **M V**

<sup>60</sup> Si *om.* **C**

<sup>61</sup> habens **V**

<sup>62</sup> unum *praem.* Brandachum **V**

<sup>63</sup> ex *om.* **BL**

in omnibus suis bonis dictum Brandachum filium suum.<sup>64</sup> Item legavit iure testamenti, et aliis iuribus quibus melius ipsa potest, aliam medietatem dictorum bonorum suorum Martino de Solario fratri suo. Item iuxit predicta valere iure testamenti, et alterius cuiuslibet ultime voluntatis, et inde fieri publicum instrumentum, si necesse fuerit ad dictamen<sup>65</sup> peritorum, facti substantia tamen non mutata. Deinde decessit dicta testatrix, relictis omnibus dictis filiis. Pater trium filiorum tenuit hereditatem et adhuc tenet. Decesserunt omnes tres filii sine liberis. Demum post aliquod temporis spatium decessit Brandachus natus ex primo marito sine liberis, non adita hereditate matris sue vel<sup>66</sup> parte sibi pertinente.<sup>67</sup> Dictus Brandachus fecit testamentum, in quo instituit sibi agnatos germanos. Queritur, quibus pertineat hereditas istius bone domine, an marito suo ex persona filiorum suorum? an institutis per Brandachum filium ipsius textatoris? an fratri ipsius textatricis? an cui?

Et ad evidentiam est premictendum, quod testamentum dicte mulieris fuit ipso iure nullum, quia Brandachus eius filius fuit a primo gradu preteritus,<sup>68</sup> ut in auth. ut cum de appellatio. cogn., § Aliud quoque capitulum (N. 115.3. = Auth. 8.12.3). Non obstat si dicatur quod dictus Brandachus fuit sub conditione institutus, que conditio debet de medio removeri, ut no. ff. de herede. insti., l. Suus<sup>69</sup> quoque (D. 28.5.4), et C. de inoffi. te., l. Quoniam in prioribus<sup>70</sup> (C. 3.28.32), et l. Scimus, § Cum autem (C. 3.28.36.1c), quia posito quod illud esset verum intelligitur quando filius est institutus in primo gradu, ut ff. de lib. et postu., l. iii, § fi. (D. 28.2.3.6), quod hic non fuit, quia in primo gradu fuerunt tantum tres filii instituti. Non obstat quod testatrix dixit, instituo heredem Brandachum in dimidia, quia verbum, "instituo", appositum post primum gradum, ponitur pro verbo, "substituo", ut C. de here. insti., l. fi. (C. 6.24.16), et ff. ad Treb., l. Recusare, § Titius (D. 36.1.6.5). Et licet Brandachus non dixerit testamentum nullum, et decesserit non transmissa hereditate, et sic nullus extat qui ex persona Brandachi possit nullum dicere, tamen testamentum non convaluit, in quo iuris

<sup>64</sup> procreatis – suum: dictum Brandachum filium suum heredem in dimidia instituit V

<sup>65</sup> dictum V

<sup>66</sup> in V

<sup>67</sup> tangente V

<sup>68</sup> pretitus BL

<sup>69</sup> Servus V

<sup>70</sup> Si quis filiam *del.* Quoniam in prioribus *add.* BL



observantia deficit, nisi petita fuisset bonorum possessio<sup>71</sup> secundum communem et veriore opinyonem in l. Filio preterito (D. 28.3.17), et C. de contra tabu., l. Postumo (C. 6.12.2). Licet antiqui doctores curantes de equitate, et non de ista subtilitate et<sup>72</sup> nimia iuris scrupulositate, dicerent quod de equitate civili testamentum convalescit, in quo alius filius institutus est, ut l. Si duo, ff.<sup>73</sup> de lega. prestandis<sup>74</sup> (D. 37.5.16), ex quo preteritus vel expresse confirmat vel ius dicendi nullum transmittit. Que opynio est satis equa, salvo quam in suo filio<sup>75</sup> preterito, ubi rigor et equitas, id est, dominii continuatio efficit testamento, ut C. de postu. heredi. insti., l. ii (C. 6.29.2), et ff. de libe. et postu.,<sup>76</sup> l. In suis (D. 28.2.11), et not. C. unde legitimi, l. Certum (C. 6.15.5). Sed quicquid sit de hoc<sup>77</sup> puncto nihil ad rumbum, quia hic prius decesserunt instituti quam preteritus, materno testamento nullatenus confirmato, et sic nunquam habuit initium subsistentie.

Secundo est<sup>78</sup> premictendum quod pater predictorum trium filiorum, siquidem aliquis eorum erat infans, potuit gerere pro herede ab intestato et hoc<sup>79</sup> per l. Si infanti, C. de iure deli. (C. 6.30.18), et l. Cum non solum, § Ubi autem puerilis, de bonis que libe. (C. 6.61.8.6). Si autem essent maiores infantie, potuit eis viventibus gerere pro herede, et hoc per novam constitutionem dicte l. Cum non solum, in principio (C. 6.61.8 pr.).

Tertio est premictendum quod dicta verba valeant iure testamenti et cuiuscumque ultime voluntatis, hanc interpretationem recipiunt, id est, si non valet iure testamenti, valeat iure codicillorum, ut C. de codicillis, l. fi (C. 6.36.8), et maxime quia textatrix voluit aptari ad sensum sapientis, qui potest sane declarare sed non addere, ut no. Ia. de Are. in l. Illa institutio, ff. de heredi. instituen. (D. 28.5.32).<sup>80</sup> Sed dubium est, an dicta clausula codicillaris operetur quando testamentum est nullo vitio preteritionis<sup>81</sup> et sic vitio testatoris, et maxime in preteritione materna, que habetur loco exheredationis iniuste, cum

<sup>71</sup> in l. f post possessio del. BL

<sup>72</sup> et om. V

<sup>73</sup> C. V

<sup>74</sup> in quo – prestandis in marg. BL

<sup>75</sup> filio om. BL

<sup>76</sup> heredi – postu. om. V

<sup>77</sup> hoc om. V

<sup>78</sup> est om. V

<sup>79</sup> hoc om. V

<sup>80</sup> JACOBUS DE ARENA ad D. 28.5.32, Lyon 1541, fol. 103r.

<sup>81</sup> preteritionis maculatum V

non contineat causam, et textus expresse dicit quod non operatur, ff. de inoffi. testa., l. Titia (D. 5.2.13). Nec obstat authen. Ex Causa (N. 115.4.9. = C. 6.28. post 4, *Maximum vitium*), quia nos loquimur hic de clausula codicillari et eius effectu, circa quam nichil invenitur correctum de iure veteris statutis. Hoc tenet glo. in autentica Ex causa, Gui. de Cuneo et Speculator,<sup>82</sup> sed Dy., Cy. et Bar.<sup>83</sup> tenent quod dicta clausula valet, quia<sup>84</sup> in causa intestati non consideratur preteritio, et hec vera.

Modo restat aliud premittendum, videlicet quod dictus Brandacchus non transmisit<sup>85</sup> hereditatem maternam<sup>86</sup> non aditam, ut C. ad Orfici-  
cianum, l. Non pro numero (C. 6.57.2). Sed dubium est, utrum ex virtute clausule codicillaris transmiserit ius fideicommissi universalis pro sua dimidia, et glo. in l. Cum filio, ff. de leg. primo (D. 30.[1].11)<sup>87</sup> dicit quod non, sed contrarium est verius, ut ibi not. per Dy. et alios, et C. de fideicom., l. Cum secundum (C. 6.42.3), et l. Si in persona (C. 6.42.21), cum similibus.

Et ideo est concludendum quod dicti agnati germani ex persona Brandachi possent petere dimidiam dictorum bonorum, et frater dicte testatricis aliam dimidiam, detracta legitima et trebellianica, quia fideicommissum fuit conditionale sub duplici conditione, si non valet et post mortem,<sup>88</sup> et inspecta conditione de post mortem, que est de futuro, potest detrachere pater legitimam et trebellianicam, ut in c. Raynutius (X. 3.26.16) et c. Raynaldus (X. 3.26.18), cum similibus. Et ista sunt subtilia et de apicibus iuris.

### Consilium 5

B3, n. 164

BL 1408, fols. 99v–100r

M1, n. 179

M<sup>2</sup> 5, n. 387

<sup>82</sup> Glossa *Casus* ad Auth. *Ex causa* (C. 6.28. post 4), ed. cit., p. 930; GUILIEMUS DE CUNEO ad C. 6.36.8, ed. cit., fol. 74v; GULIELMUS DURANTIS, *Speculum iudicale*, Vol. 1, II, 36 (*De instrumentorum editione*), Basel 1574, p. 686.

<sup>83</sup> DYNUS ad D. 31.[1].76, ed. cit., 1513; CYNUS ad Auth. *Ex causa*, ed. cit., fols. 383vb–384rb, nn. 6–7; BARTOLUS ad D. 28.3.12.1, ed. cit., fol. 121v.

<sup>84</sup> quia om. V

<sup>85</sup> transmittit V

<sup>86</sup> paternam del. maternam interlin. BL

<sup>87</sup> Glossa *Casus* ad D. 30.[1].11, ed. cit., pp. 515–16.

<sup>88</sup> sub – mortem: sub conditione et non post mortem V

V1, n. 179, fol. 52r

V<sup>2</sup> 5, n. 387, fol. 100r

Date: ca. 1396–1400

In Christi nomine, amen. Quedam domina Caterina condidit testamentum, in quo filios suos preteriit matremque suam dominam Richardonam sibi in dicto testamento heredem universalem instituit per hec verba: "In omnibus autem aliis suis bonis et rebus mobilibus et immobilibus presentibus atque futuris iuribus et nominibus debitoris<sup>89</sup> et maxime ac specialiter in bonis suis parafrenalibus, vestibus, perlis<sup>90</sup> et denariis convertendis in vestibus ad suam portare et per eam ad maritum portatis et que sibi quocunque modo et causa debentur, et hic omnia ultra dotem ad maritum portatam instituit sibi heredem universalem dominam Richardonam, matrem suam et relictam condam domini Francisci etc." Et apposuit dicta testatrix in dicto testamento clausulam codicillarem in forma que sequitur, videlicet: "Et<sup>91</sup> hanc autem suam voluntatem asserit dicta testatrix esse velle, quam valere voluit et iussit ac vult valere debere iure testamenti nuncupativi; et si iure testamenti nuncupativi non valeret, vult quod valeat et teneat iure codicillorum; et si iure codicillorum valere non posset, vult quod valeat et teneat iure cuiuslibet ultime voluntatis et omnino via, iure et forma, quibus melius potest etc." Modo queritur, quid iuris de testamento predicto?<sup>92</sup>

In Christi nomine, amen. Sciendum<sup>93</sup> est quod preteritio matris habetur pro exheredatione, et olim valebat testamentum matris pretereuntis filium, sed erat necessaria querela, ut insti., de exherda. lib.,<sup>94</sup> § Mater (Inst. 2.18.7) et prelata querela<sup>95</sup> rescindebantur omnia legata et fideicommissa, et etiam rescindebantur clausula codicillaris per quecunque verba facta tamquam facta a demente, ut ff. de inoffi. testa., l. Titia (D. 5.2.13). Hodie autem secundum ius novissimum autenticorum testamentum, in quo mater preterit filium sine causa, est ipso iure nullum, ut plenissime not. in auten. de heredi. et fal.,

<sup>89</sup> debitorum V

<sup>90</sup> partis V

<sup>91</sup> et om. B M V

<sup>92</sup> Quedam domina Caterina – predicto: Quedam domina fecit testamentum, in quo filios suos praeteriit, matrem haeredem universalem instituit, et in testamento clausulam codicillarem apposuit, scilicet si non valeret iure testamenti, valeat iure codicillorum, et si iure codicillorum non valeret, valeret iure cuiuslibet ultime voluntatis et omni modo, iure et forma, quibus melius valere potest. Quaeritur, quid iuris? M<sup>2</sup> V<sup>2</sup>

<sup>93</sup> Respondeo, sciendum M<sup>2</sup> V<sup>2</sup>

<sup>94</sup> de inoffi. testa. B BL M V

<sup>95</sup> querela om. V

Exheredatos (N. 1. = Auth. 1.1.4), et per Dy. in l. Gallus (D. 28.2.29), in magna distinctione.<sup>96</sup> Unde absque dubio testamentum, de quo queritur, quo ad institutionem heredis est ipso iure nullum. Et ideo dicta mater a sua<sup>97</sup> filia instituta heres universalis non est heres universalis, sed filii testatricis ab intestato.

Sed dubium est, an filii testatricis teneantur restituere hereditatem avie sue? Et oritur dubium propter clausulam codicillarem, et in hoc sunt due oppyniones maiorum nostrorum. Nam glo. or. in autentica *Ex causa*, C. de libe. preteritiis vel exhereda. (C. 6.28. post 4, *Maximum vitium*)<sup>98</sup> tenet quod dicta clausula nichil valet, si heredis institutio est nulla ex causa preteritionis vel exheredationis, quia iudicium textatoris est iniustum. Sed ubi esset institutio invalida propter defectum alterius sollempnitatis, tunc bene valeret dicta clausula. Et in hoc se firmat glossa dicte autentice *Ex causa*,<sup>99</sup> et ita tenebant omnes antiqui doctores et advocati, et de modernioribus hoc tenet Gui. de Cuneo in l. ultima, C. de codicillis (C. 6.36.8).<sup>100</sup>

Sed<sup>101</sup> dominus Dy. tenet contrarium, videlicet quod possit peti restitutio hereditatis ex causa fideicommissi, ut plene referet Cy. in dicta autentica,<sup>102</sup> de hoc notatur in l. ii, ff. de legatis, 3<sup>o</sup> (D. 31.[1].76).<sup>103</sup> Nec obstat l. Titia superius allegata, quia illa lex est correcta quo ad legata et fideicommissa etiam universalialia, ut ff. ad Trebel., l. Ita tamen, § Quotiens (D. 36.1.28[27].6), per Dy. et alios. Et hoc apparet ex eo, quia ratio dicte l. Titia est correcta, videlicet: illa ratio quod testamentum fingatur factum a demente, et correcta ratione legis est correcta legis substantia. Hanc opinionem tenent Bar.<sup>104</sup> et multi moderni, et ideo ista questio est multum dubia.

Ego considero quod tacita exhereditatio matris est vitiosa<sup>105</sup> et contra equitatem naturalem, et ideo quod una via est denegatum non debet alia via concedi. Item dico quod nullo iure cavetur quod illa lex sit correcta in suo casu et legum correctio est vitanda.<sup>106</sup> Non obstat

<sup>96</sup> DYNUS ad Dig 28.2.29, ed. cit., prima pars.

<sup>97</sup> sua om. **M<sup>2</sup> V<sup>2</sup>**

<sup>98</sup> Glossa *Casus* ad C. 6.28. post 4, ed. cit., p. 930.

<sup>99</sup> Glossa *Caetera* ad loc., pp. 930–931.

<sup>100</sup> GUILLELMUS DE CUNEO ad C. 6.36.8, ed. cit., fol. 74v.

<sup>101</sup> licet **V**

<sup>102</sup> CYNUS ad Auth *Ex causa* (C. 6.28. post 4), ed. cit., fols. 383v–384r, nn. 6–7.

<sup>103</sup> DYNUS ad D. 31.[1].76, ed. cit.

<sup>104</sup> BARTOLUS ad 5.2.13, ed. cit., fol. 169ra; ad D. 36.1.28[27].6, *Ita Tamen*, § *Quotiens*, fol. 168r.

<sup>105</sup> est post vitiosa del. **BL**

<sup>106</sup> Secunda post vitanda del. **BL**

§ Aliud quoque capitulum, in autentica ut cum de appell. cogno. (N. 115.3. = Auth. 8.12.3), quia ibi loquitur in aliis capitulis testamenti, non in capitulo institutionis transferende in fideicommissum universalem per codicillarem clausulam. Item quia illa clausula est interpretata a glosatoribus quando est defectus extrinsece sollempnitatis, puta testium, vel quando ex testamento non aditur hereditas ex alia causa, quam ex causa preteritionis vel exheredationis. Nam cum dicta institutio fuerit odiosa, non est interpretatione iuvanda. Quamcunque oppinionem teneas, habes<sup>107</sup> multos patrocinales viros eximios. Sed si auctoritatem consideras,<sup>108</sup> maior est auctoritas glosatoris. In tanto discrimine oppinionum bona esset concordia partium, ar. extra, de probat. c. fi. (X. 2.19.15).

Quid si dicta mater esset instituta in re certa? Respondeo, dicta institutio non potest trahi ad universum propter viciū preteritionis, et ideo haberetur loco simplicis legatarie, et valeret in illa re tantum, ut not. in l. Liberis, ff. de excep. doli. (D. 44.4.13). Illud non est dubium quod<sup>109</sup> filii debent habere legitimam, quicquid sit de codicillari clausula, ut C. de inoffi. testa., l. Omnimodo (C. 3.28.30), et l. Sancimus<sup>110</sup> (C. 3.28.36), et in autentica de trien. et se., § i, col. iii<sup>a</sup> (N. 18. = Auth. 3.5), et extra, de test. c. Raynutius (X. 3.26.16), Raynaldus (X. 3.26.18), et c. Si pater, libro vi<sup>o</sup> (VI 3.11.1). Bal.<sup>111</sup>

### Consilium 6

B2, n. 407

BL 1401, n. 121, fols. 78v–79r

V5, n. 113, fol. 28rv

Date: ca: 1388–1389

In Christi nomine, amen.<sup>112</sup> Proponitur quod quidam ser Simon civis lucanus uxore pregnante in hac forma condidit testamentum, videlicet

<sup>107</sup> habet **M<sup>2</sup> V<sup>2</sup>**

<sup>108</sup> consideramus **B M V**

<sup>109</sup> quam **M**

<sup>110</sup> Sancimus **BL V**

<sup>111</sup> Illud – Bal. in marg. **BL** Quid si dicta – Bal.: Illud non est dubium quod filii debent habere legitimam, quicquid sit de codicillari clausula, ut C. de inoffi. testa., l. Omnimodo, et l. Sancimus, et in autentica de trien. et se., § i, col. iii<sup>a</sup>. Quid si dicta mater esset instituta in re certa? Respondeo, dicta institutio non potest trahi ad universum propter viciū preteritionis, et ideo haberetur loco simplicis legatarie, et valet in illa re tantum, ut not. in l. Liberis, ff. de excep. doli. excep. Ego Bal. **M<sup>2</sup> V<sup>2</sup>**

<sup>112</sup> In-amen om. V amen om. B

quia<sup>113</sup> instituit ventrem domine Johanne uxoris sue, si gravida esset et filium masculinum pareret unum vel plures. Verum si gravida seu pregnans non esset, vel si pareret ut prefertur<sup>114</sup> et contingeret eos mori ante legitimam etatem testandi et ad ipsam etatem non pervenerent, fecit quedam legata particularia et subiunxit sub hac forma. Residuum vero omnium suorum aliorum bonorum in dicto casu iudicavit et reliquid Opere Sancti Michelis in Foro etc. Iste etiam testator dixit, voluit, et mandavit, quod si dicta domina Johanna eius uxor pregnans esset et pareret filiam feminam et perveniret ad etatem nubilem et viro traderetur, dotavit eadam filiam in florenis V<sup>c</sup> etc. Accidit casus quod dicta domina Johanna erat pregnans et perperit filiam feminam que vivo testatore decessit. Subsequenter dicta uxor ex dicto testatore pregnans efficitur, et ea pregnantie dictus ser Simon testator decessit. Demum moritur uxor octavo mense pregnationis sue et sic partu nondum maturo. Tamen exsecto ventre extractus est quidam filius et vocem emisit et immediate decessit.

Est questio inter Operam Sancti Michelis et subcedentes ab intestato cui hereditas dicti testatoris deferatur. Secundo queritur, an ei fuerit delata hereditas materna. Tertio queritur, quia in dicto testamento est clausula codicillaris, si iure testamenti valere non posset etc., utrum dicta clausula aliquid operetur. Ad intelligentiam quorum dubiorum est premittenda, quod dictum testamentum fuit nullum, quia filia in potestate testatoris posita fuit preterita, cui nichil fuerit ei relictum iure institutionis, ut in auten. ut cum de appellatione cogno., § Aliud quoque capitulum (N. 115.3. = Auth. 8.12.3), nisi statutum loci disponeret quod sufficeret quoque relictus titulo, sicut erat de iure Codicis, ut C. de inofficiosi testamento, l. Omnimodo (C. 3.28.30), et licet filia decesserit vivo patre, tamen videtur quod testamentum non convalescat, ut ff. de libe. et postu., l. Si<sup>115</sup> filius qui in potestate (D. 28.2.7), et inst. de exheredatione libe., in principio (Inst. 2.13). Sed tamen contrarium est verum hoc casu, quando filius testatoris fuit heres institutus, ut ff. de iniusto. testamento, l. Postumus, verisculum "idem et circa." (D. 28.3.12. pr). Nam tunc convalescit de iure pretorio quo ad primum gradum institutionis. Tamen quia filius illico decessit, et bonorum possessionem secundum tabulas non petiit, institutio filii videtur esse in causa caduci, cum bonorum possessio non transmittatur ad heredes,

<sup>113</sup> quod V

<sup>114</sup> et prefereretur B V

<sup>115</sup> Qui B BL V

si non est agnita,<sup>116</sup> ut ff. de bo. pos., l. iii, § Et acquirere (D. 37.1.3.7). De iure vero civili testamentum non conualescit, ut ff. si tab. testamenti nulle extabunt, l. i, in fine (D. 38.6.1.2.), et not. ff. de iniusto testamento, <l.> Cum in secundo (D. 28.3.16), et C. de contra tabulas, <l.> Postumo (C. 6.12.2).

Sequitur ergo quod si testamentum est nullum propter preteritionem postume, vulgaris substitutio facta filio masculo non teneat. Est enim vulgaris, quia testator dixit, si non nascetur, ut ff. de ventre inspiciendo, l. Qui ventri (D. 25.4.3). Sed dubium restat, utrum substitutio facta ventri si masculum pepererit<sup>117</sup> et ante legitimam etatem testandi decesserit habeat locum. Et antequam veniam ad hoc, oportet premictere talem questionem, videlicet: an testamentum predictum intelligatur solum de ventre, qui erat tempore testamenti, an vero etiam de ventre posteriori. Et videtur quod intelligatur solum de ventre,<sup>118</sup> qui erat tempore testamenti, ut ff. de leg. ii, l. Si ita scripsisset (D. 31.1.46). Contrarium est verum,<sup>119</sup> quia testator non dixit si-pregnans est, sed dixit si pregnans esset, quod intelligitur quandocunque ex<sup>120</sup> dicto testatore esset pregnans, ar. C. de postu. herede. insti., l. fi. (C. 6.29.4), et ff. de libe. et postu., l. Placet (D. 28.2.4). Nam in dubio debemus interpretari quod testamentum valeat et quod testator senserit de casibus necessariis, ut no. ff. de libe. et postu., l. Gallus,<sup>121</sup> § Videndum (D. 28.2.29.14). Unde natis diversis pregnationibus filia et filio, intelligitur<sup>122</sup> testatorem de utroque sensisse, videlicet de filia legando et de filio masculo instituendo, ut ff. de libe. et postu., l. Si ita scriptum (D. 28.2.13).

Sed modo videamus, que substitutio fuit ista. Et dico quod pupillaris, quia illa verba, "si decesserit ante legitimam etatem testandi," hunc sensum exprimunt, id est, si decesserit in pupillari etate,<sup>123</sup> quia illa est etas non testandi, ut ff. de test., l. Qua etate<sup>124</sup> (D. 28.1.5). Unde fuit expressa conditio, si decesserit in pupillari etate.<sup>125</sup> Quapropter<sup>126</sup>

<sup>116</sup> ut. C. qui ad post agnita *del.* BL

<sup>117</sup> pareret B petet V

<sup>118</sup> institutus venter V

<sup>119</sup> modo B V

<sup>120</sup> de B V

<sup>121</sup> Gallus *ex* Gallum *corr.* BL

<sup>122</sup> intelligo BL

<sup>123</sup> in pubertate B V

<sup>124</sup> Qui aetatis V

<sup>125</sup> Unde – etate *om.* B V

<sup>126</sup> Quapropter: forte *post* qua *del.* BL

substitutio est formaliter et singulariter pupillaris. Sed tunc statim queritur, an dicta substitutio evanescat propter preteritionem dicte femine, et glo. dicit quod pupillaris substitutio non vitiatur ratione preteritionis, ut no. ff. de vul. sub., l. i (D. 28.6.1),<sup>127</sup> et idem tenet Bar.,<sup>128</sup> licet Dy. contra. Oppynionem glo.<sup>129</sup> Puto veram, quando substitutio pupillaris sit institutio et non preteritio, sicut in casu nostro.<sup>130</sup> Si autem fieret impuberi preterito, tunc esset vera oppynio Dy., ar. ff. de leg. iii, l. Ex filio (D. 32.1.2), et C. de fideicom., l. penultima (C. 6.42.31). Et ideo in questione proposita per Opera sentio, tam in hereditate paterna que tota erat devoluta ad postumum, quia soror decesserat in vita patris, quam etiam<sup>131</sup> in materna, quia solus supererat masculus, et licet natus fuerit octavo mense, qui non potest vivere secundum fisicos,<sup>132</sup> tamen sufficit momento visisse, ut C. de postu. here. insti., l. Uxoris abortu (C. 6.29.2). Et ita sentio de hiis punctis; de clausula codicillari non expedit tractari, cum substitutio pupillaris valeat iure directo.<sup>133</sup>

Et ita dico et consulo ego Baldus etc.

### *Consilium 7*

B2, n. 81

BL 1403, n. 80, fol. 73v

M4, n. 84

V4, n. 86, fol. 2r

Date: before August 1384

In Christi nomine, amen.<sup>134</sup> Veritas est quod filius matrem preterit,<sup>135</sup> non instituendo nec exheredando eam, testamentum eius est nullum.<sup>136</sup> Nec sufficit matri<sup>137</sup> relinquere quoquo relictis titulo, ut in auten. ut cum de apell. cogno., § Aliud quoque capitulum (N. 115.3. =

<sup>127</sup> Glossa *institutione* ad D. 26.8.1, *Heredes aut*, ed. cit., p. 354.

<sup>128</sup> BARTOLUS ad D. 26.8.1.2, *Heredes aut*, § *Substituere*, ed. cit., fol. 142r, n. 3.

<sup>129</sup> DYNUS ad D. 26.8.1, *Heredes aut*, § *Substituere*, ed. cit.

<sup>130</sup> nostro om. **B V**

<sup>131</sup> etiam om. **B V**

<sup>132</sup> See, for example, *Womens's Secrets. A Translation of Pseudo-Albertus Magnus' 'De secretis mulierum' with commentaries*, trans. by H. R. LEMAY, Albany 1992, p. 106.

<sup>133</sup> inter directos **B V**

<sup>134</sup> An sufficiat necnon reliquit quoquo relictis titulo *add. in marg.* **BL**

<sup>135</sup> praeteriendo **V**

<sup>136</sup> est nullum eius **M V**

<sup>137</sup> tantum **M V**



Auth. 8.12.3), et ibi hoc plenarie disputatur et determinatur per Iac. de Bel.,<sup>138</sup> licet Bar. dicat contrarium et male in l. Sive, de iure patronatus (D. 37.14.21).<sup>139</sup> Succedit ergo ista mater ab intestato, rupta institutione dicti fratris Gabriellis. Et hoc de iure communi tenetur autem restituere hereditatem, ex clausula<sup>140</sup> codicillari retenta legiptima, que est tertia,<sup>141</sup> ut in auten. de triente et semisse, § i (Nov. 18. = Auth. 3.5.1). Et ita est de iure communi, ius municipale non obstat, quia non loquitur in casu nostro, cum pater<sup>142</sup> dicti filii decesserit testatus. Ad hoc facit<sup>143</sup> ultimum capitulum statuti de materia loquentis usufructus, etiam debet habere mater ex vi relictæ presertim propter clausulam codicillarem. Hoc dico per<sup>144</sup> no. per glo. et doc. in l. Maximum vitium, in fine, de liberis preteritis (C. 6.28.4).<sup>145</sup> Ego Bal.

### *Consilium 8*

B1, n. 121

BL 1404, n. 253, fol. 112r

M4, n. 253

V2, n. 253, fol. 72rv

Date: March, 1393–1396

In Christi nomine, amen. Filia familias que eligit luxuriosam vitam potest a patre exheredari, ut in auten. ut<sup>146</sup> cum de appellatione cognoscitur, § Aliud quoque capitulum versi. si alicui de predictis (N. 115.3. = Auth. 8.12.3). Tamen heredes<sup>147</sup> hoc debent probare contra filiam exheredatam, et si non probant, filia vincit in querela inofficiosi intentata contra patris testamentum, ut C. de inof. test., l. Omnimodo (C. 3.28.30). Quod autem luxuriosam vitam elegerit, probatur per locum a communiter accidentibus, qui in casibus dubiis maximus est in iure, ut legitur et no. C. de proba., l. Neque natales (C. 4.19.10); per hunc autem locum a communiter accidentibus probatur,<sup>148</sup> quia pas-

<sup>138</sup> IACOBUS DE BELVISO ad Auth. 8.12.3, *Lectura super IX collationibus Authenticorum*, Lyon 1511, fol. 65r.

<sup>139</sup> BARTOLUS ad D. 37.14.21.1, § *Excluditur*, ed. cit., fol. 202r.

<sup>140</sup> exclusa **M BL V**

<sup>141</sup> est *post* tertia **B M**

<sup>142</sup> pater *ex* patre *corr.* **BL**

<sup>143</sup> fuit **V**

<sup>144</sup> propter **B M V**

<sup>145</sup> Glossa *Totius substantie* ad Auth. *Ex causa* (C. 6.28, post 4), ed. cit., p. 929.

<sup>146</sup> ut *om.* **BL**

<sup>147</sup> heredes *post* probare **BL**

<sup>148</sup> probatur *om.* **BL**

sim iuvenis accedebat ad invinculam, cum publica fama satis probatur vita luxuriosa. Nec excusatur propterea quod dicat se non potuisse cognosci, quia erat arta. Nam licet stuprum non sit consummatum, tamen sufficit quod sit deventum ad actum proximum, sive ad conatum, ut C. de epi. et cle., l. Si quis non dicam rapere (C. 1.3.5), cum sua materia, ad quod optime facit, c. 1, § Item si fidelis, in verbo “concubere se exercuerit,” quibus mo. feu. admictatur<sup>149</sup> (L. F. 1.5.1). Item et sine contractu corporalis commistionis potest vita luxuriosa,<sup>150</sup> indecens et inhonesta intervenire, ut ff. de contra tab. l. Non tantum, § Si emancipatus (D. 37.4.3.6). Hoc apparet in eo, quia<sup>151</sup> lenocinium facit, ff. de hiis qui not. infamia, l. Athletas, § Pomponius (D. 3.2.4.3).

Concludo ergo quod si probetur de tam turpi et degeneri vita, quod dicta filia legitime potuit exheredari, et cum exheredato non debeatur legitima, que alias debetur iure naturali, cum exheredatus habeatur pro mortuo, ut ff. de con. cum eman. liberis, l. 1, § Si pater emancipatus (D. 37.8.1.4),<sup>152</sup> et notari consuevit, ff. de vul. sub., l. Cum ex filio, in principio (D. 28.6.39), sequitur quod dicta filia<sup>153</sup> legitime exheredata non potest petere supplementum legitime; et hec de iure communi sunt vera, nec obstat quod pater postea reliquerit ei iure institutionis,<sup>154</sup> quia illa institutio censetur iure legati,<sup>155</sup> cum ponamus eam expresse exheredatam,<sup>156</sup> ad hoc C. de heredibus insti., l. Quotiens (C. 6.24.13); et per hoc respondetur ad glo. que est in auten. novissima, C. de inof. test. (C. 3.28.6) et C. ad treb., l. Si quis priore<sup>157</sup> (C. 6.1.29). Non enim presumitur testator correxisse se, ut ff. de condi. et demon., l. Non ad ea (D. 35.1.89). De uno posset dubitari contra dictam filiam, utrum valeat relictum, cum fuerit factum cum convitio et infamia ipsius, ut not. in l. iii, C. quemadmodum test. aperiantur (C. 6.32.3), et ff. de leg. i, l. Turpia (D. 30.[1].54), et ff. de heredibus insti., l. Quotiens, § Si quis nomen (D. 28.5.9.8). Sed humanius puto valere quod ei relictum fuit humanitatis intuitu et compassione et amore paternali. Nam ista sunt iusta motiva testatoris, ar ff. de infamibus, l. Furti, § Pactus

<sup>149</sup> coll. x<sup>a</sup> *post* admictatur *add.* **B M BL**, col. 10 V

<sup>150</sup> luxio *post* vita *del.* **BL**

<sup>151</sup> quia *ex* que *corr.* **BL**

<sup>152</sup> “exheredatus ... pro morto habetur” in D. 37.8.1.5.

<sup>153</sup> S *del.* *post* dicta **BL**

<sup>154</sup> institutionis *ex* substitutionis *corr.* **BL**

<sup>155</sup> compe – *post* legati *del.* **BL**

<sup>156</sup> eum expresse exheredatum **BL**

<sup>157</sup> precio **B M V**

(D.3.2.6.3), et quod ibi not. et C. qui accusare non possunt, l. Propter insidias (C.9.1.14.). Ego Baldus<sup>158</sup>

### *Consilium 9*

**BL** 1405, fols. 46v–47r

**M1**, n. 286

**V1**, n. 286, fol. 86vr

Date: ca. 1353–1367

Factum super quo consilium petitur tale est. Compromissum generale est factum inter dominam Tinutiam<sup>159</sup> filiam domini Francisci Centii de Orto vicarii domini Egidii ex parte una, et Iacobum Iohannis ex parte altera, in dominum Oliverium arbitrum, qui potest cognoscere de iure et facto<sup>160</sup> et similiter de iure tantum. Que domina Tinutia dicit se heredem patris sui ab intestato. Iacobus dicit se heredem ex testamento, producit simpliciter quandam copiam cuiusdam testamenti, que vobis domino consultori mittitur<sup>161</sup> et quedam statuta civitatis Ortane que etiam vobis mittuntur<sup>162</sup> cum adprobatione<sup>163</sup> ipsorum, particula<sup>164</sup> constitutionis provincie patrimonii de approbatione loquentis,<sup>165</sup> et quedam confessio facta per dictum Iacobum cum<sup>166</sup> consensu curatoris coram arbitrio predicto.

Modo visis predictis scripturis, queritur per ordinem infrascriptam: in primis, an dictum testamentum sit nullum ratione preteritionis istius filie domine Tinutie in potestate posite.

Secundo, an dictum testamentum validetur per aliquod statutum quod vobis mitto, cum dicta statuta reperiantur ad filie exclusionem, existente filio testatoris vel nepote<sup>167</sup> ex filio. Et hic neuter sit et non sit nedum deductum et probatum, sed nec deductum et termini sunt decursi.

<sup>158</sup> Ego Baldus *om.* **BL**

<sup>159</sup> Tunitiam **M V**

<sup>160</sup> de facto **M V**

<sup>161</sup> mittit **V**

<sup>162</sup> mittitur **BL**

<sup>163</sup> ad probationes **M V**

<sup>164</sup> Orticula **M V**

<sup>165</sup> loquatur **V**

<sup>166</sup> cum *om.* **M V**

<sup>167</sup> existere filium testatoris vel nepotem **BL M**

Tertio, an dicta statuta valeant sine<sup>168</sup> confirmatione et approbatione<sup>169</sup> ipsorum statutorum, pro constanti posito quod statuta non valeant absque confirmatione et approbatione<sup>170</sup> rectoris provincie, vel suorum iudicum quibus commissum, et de commissione non apparet, nisi eo modo quo in approbatione,<sup>171</sup> que vobis mittitur, fit mentio. Et sic videtur quod illi iudices non potuerunt approbare, cum non constet de commissione. Preterea<sup>172</sup> verba approbationis manifeste ostendunt statuta, que<sup>173</sup> vobis mitto, infirmata potius quam approbata.

Quarto, an dicta copia testamenti, an copia copie, que vobis mittitur, producta contra dictam dominam Tinutiam probet, posito pro constanti quod sit extracta<sup>174</sup> de libris sive protocollis cuiusdam notarii iam mortui, dicta domina Tinutia non<sup>175</sup> monita, nec citata etc.

In Christ nomine amen. Non videtur mihi dubium quod testamentum, in quo filia non est instituta nec exheredata, est nullum ipso iure, ut C. de libe. prete., l. Maximum vitium (C. 6.28.4), insti. de exhereda. libe., in principio (Inst. 2.13.), in auten. ut cum de appellatione cognoscitur, § Aliud quoque capitulum (N. 115.3. = Auth. 8.12.3), et hoc quo ad institutionem heredis. Sed quo ad clausulam codicillarem, si non valet etc., Glo. in auten. Ex causa (N. 115.4.9. = C. 6.28, post 4) tenet quod nil operatur. Idem Guill. de C<uneo>, de codicillis, l. fi. (C. 6.36.8). Dy. dicit contrarium et Iac. de Arena, in l. Generaliter, § Ex<sup>176</sup> testamento, de fidecommis. libe. (D. 40.5.24.11), ubi videtur casus. Et cum iste casus sit a statuto obmisus, remanet in dispositione iuris communis, ff. sol. ma., l. Si cum dotem (D. 24.3.22). Et per hoc non expedit disputare si statuta valent quia non locum habent<sup>177</sup> in casu nostro. Quo ad ultimum punctum, dico quod<sup>178</sup> in dicta exemplatione, si sit auctoritate iudicis, debet pars citari, ut not. doc. in auten. Si quis in aliquo (N. 119.3. = C. 2.1, post 7, *Procurator privatae*). Sed si auctoritate iuris,<sup>179</sup> puta quia per statutum esset commissa alteri notario

<sup>168</sup> visa **BL**

<sup>169</sup> ad probationem **M V**

<sup>170</sup> ad probationem **M V**

<sup>171</sup> quo ad probationem **M V**

<sup>172</sup> cum – Preterea: ex quo non apparet de commissione, id est **M V**

<sup>173</sup> statuta – approbata: statutum, quem vobis mitto, infirmatum potius quam ad probatum **M V**

<sup>174</sup> excepta **M** excerpta **V**

<sup>175</sup> absque non **BL** ad hoc non **M V**

<sup>176</sup> de **M V**

<sup>177</sup> habent om. **BL**

<sup>178</sup> si post quod *del.* **BL**

<sup>179</sup> Sed – iuris: et si auth. iure **M V**

exemplatio, tunc non est opus partem citari, quia non est actus iudiciarius. Tamen quod fit per eum non preiudicat veritate, et<sup>180</sup> si de veritate dubitetur, debet produci matricis<sup>181</sup> scriptura sive protocolum, facit C. de fide instr., l. finali (C. 4.21.22), et quod not. de bonorum po., l. iii, § penultimum (D. 37.4.3.8), ff. de eden., l. Quedam, § i. (D. 2.13.9.1), extra, de fide instr. c. Cum P. tabellio (X. 2.22.15). Ego Baldus.

### Consilium 10a

B2, n. 463

BL 1401, n. 175, fol. 136rv

M5, n. 169

V5, n. 169, fol. 45v

Date: ca. 1388–1389

In Christi nomine, amen. Bartolomeus a patre exheredatus appositis causis, que si vere<sup>182</sup> essent, iuste et legitime forent, non competeret sibi querela.<sup>183</sup> Egit<sup>184</sup> querela inofficiosi testamenti contra fratrem, et in libello suo fecit talem conclusionem: quia petiit dictum testamentum quantum ad institutionem heredis rumpi, et inofficiosum et factum contra debitum officium pietatis sententialiter declarari; et<sup>185</sup> dicto testamento rupto et rescisso, hereditatem paternam pro medietate ipsi exheredato restitui, et declarari ad dictum querelantem hereditatem sui patris pro dimidia pertinere.

Erant enim duo filii, unus istitutus, alter exheredatus. Contra ipsum libellum opponitur exceptio ineptitudinis, et alie exceptiones negatorie atque peremptorie, quia opponitur, quod iuste et vere fuit exheredatus. Nam hec obiectio<sup>186</sup> dicitur in exceptione, licet veniat simpliciter ad negandum quod petitur, quia ipsius exceptionis probatio incumbit opponenti, ut C. de inofficioso testamento, l. Omnimodo (C. 3.28.30). Proponitur etiam<sup>187</sup> quod statuto cavetur, quod non obstantibus aliquibus exceptionibus cuiuscunque generis, que contra ipsum libellum opponerentur, debeat fieri litis contestatio. Sed ipse exceptiones

<sup>180</sup> et om. **M V**

<sup>181</sup> matrix **M V**

<sup>182</sup> si vere om. **B M V**

<sup>183</sup> non – querela om. **BL**

<sup>184</sup> formavit **B M V**

<sup>185</sup> tes post et del. **BL**

<sup>186</sup> obiecto ideo **BL**

<sup>187</sup> tamen **V**

reserventur probande post litis contestationem.<sup>188</sup> Item quod statutum iudex cause secutus pronunciavit litem esse contestationem super dicto libello. Demum petitum est consilium sapientis, an<sup>189</sup> dicta interlocutoria, in<sup>190</sup> toto vel in parte debeat revocari, et quid iuris.

Super dicto puncto breviter dicendum est, quod dictus libellus habet duas partes: unam, qua petitur testamentum rescindi, et quo ad istam partem iudex recte pronuptiavit, quia quantum ad hanc partem libellus est apte conceptus, et iustitia tam actoris quam rei post litis contestationem debet examinari, tam statuto quam iure communi in hoc consonantibus, ut C. de probat., l. Exceptionem (C. 4.19.19).

Secunda pars dicti libelli continet, rupto testamento hereditatem restitui, et declarari ad dictum querelantem hereditatem paternam pro dimidia pertinere et spectare, et quod hanc particulam libelli videtur aliquibus, ut Guil. de Cu., in l. i, C. de inofficioso testamento (C. 3.28.1), quod<sup>191</sup> libellus sit ineptus.<sup>192</sup> Nam in hac particula exheredatus intentat<sup>193</sup> petitionem hereditatis, que sibi non competit, quia non est heres, nisi lata sententia super querela, ut plene loquitur et notatur ff. de inofficioso testamento, l. Qui<sup>194</sup> de inofficioso (D. 5.2.20); et ideo premature agit et inepte agere videtur quantum ad hanc particulam. Unde iudex super hoc debuit pronumptiare pendente querela procedendi non esse.<sup>195</sup> Non obstat statutum de exceptionibus reservandis, quia statutum loquitur de exceptionibus, que indigent probari. Sed ista exceptio cum<sup>196</sup> consistat in iure scripto, quod determinat<sup>197</sup> non posse cumulari querelam inofficiosi, et petitio hereditatis non indiget probatione, quia legum dispositiones inquisitione non indigent.<sup>198</sup> Item, et ipsa lectio<sup>199</sup> libelli ineptitudinem ostendit, quantum ad hanc pri-

<sup>188</sup> contestationem *om.* **BL**

<sup>189</sup> in **B M V**

<sup>190</sup> an in **V**

<sup>191</sup> videtur – quod *in marg.* **BL**

<sup>192</sup> et in hac particula libellus videtur aliquibus (aliqualis dubius **V**), ut Guil. de Cu., l. i, C. de inoffi. test., quia libellus ineptus **B M V**

<sup>193</sup> petit *post* exheredatus *del.* **BL**

<sup>194</sup> Cui **V**

<sup>195</sup> et ideo – esse: et ideo cum premature (permutare **V**), et inepte agi videtur quantum ad hanc particulam, querela procedi non posset **B M V**

<sup>196</sup> est **M**

<sup>197</sup> determinet **B BL M V**

<sup>198</sup> quia legum disponens inquisitione non indigent **B M**; quia lex disponens inquisitione non indiget **V**

<sup>199</sup> forma **B M V**

mam<sup>200</sup> particulam, et ideo talis libellus non habetur pro libello in hac parte, ut l. i, de ff. de offic. assessorum (D. 1.22.1), et ff. de accusation.,<sup>201</sup> <l>. Lib <ellorum>, § Quod si libelli (D. 48.2.3.1), et in l. i, § ii, Si messor falsum disserit<sup>202</sup> (D. 11.6.1.2).

Tertio,<sup>203</sup> super ista particula lix<sup>204</sup> contestari non debet, et si esset contestata, posset in qualibet parte litis<sup>205</sup> opponi exceptio ineptitudinis libelli,<sup>206</sup> ut extra. de iudiciis c. Examina (X. 1.2.15), et hoc secundum opinionem istorum tenentium, quod petitio hereditatis non possit proponi, nisi lata sententia super querela, cum exheredatus ante non sit heres, nec possit adhire.

Sed tamen glo. ordinaria tenet quod iste libellus procedat, si intentatur querela simpliciter, petitio<sup>207</sup> hereditatis proponitur conditionaliter: quia ista non est cumulatio, sed est quidam ordo agendi per prius et posterius, ita eleganter notat<sup>208</sup> gl. in dicta l. Qui de inofficioso. Nam quando ex uno iudicio origo alterius iudicis proficiscitur, primum potest proponi<sup>209</sup> pure et secundum conditionaliter, et non simpliciter causa breviandarum litium, sicut dicimus in actione ad exhibendum, et rei vindicationem, et quidam hoc tenent in restitutione in integrum et<sup>210</sup> rescissoria, per l. Si sine herede, § interposito, ff. de admi. tuto. (D. 26.7.32). Alii tenent contrarium, quia diversa iudicia sunt, et simul oriri non possunt, et per posterum est prius actionem intentare quam oriat, ut ff. de iudiciis in l. Non<sup>211</sup> quemadmodum (D. 5.1.35).

Sed quia in iudicio<sup>212</sup> non est tutum recedere a glosis ordinariis, dico dictum libellum quo ad utramque partem procedere, et iudicem fuisse recte interlocutum, per textum dicte<sup>213</sup> l. i, C. de inofficioso testamento (C. 3.28.1), et hoc de equitate potius quam de rigore iuris. Sed contra hoc videtur, quia si quis petit iuramentum sibi relaxari, et eo relaxato

<sup>200</sup> primam om. V

<sup>201</sup> de excu. liber B M V

<sup>202</sup> l. i, Si messor falsum modum dixerit V

<sup>203</sup> Tertio: et etiam B V

<sup>204</sup> lix (praem. Tertio) ex lex corr. BL lis B M V

<sup>205</sup> litis om. B M V

<sup>206</sup> exceptio – libelli in marg. BL

<sup>207</sup> competitio B M V

<sup>208</sup> ita intelligatur B M V

<sup>209</sup> poni V

<sup>210</sup> et om. B M V

<sup>211</sup> nunquam post l. del. BL

<sup>212</sup> iudicando M V

<sup>213</sup> dicte om. B M V

contractum<sup>214</sup> usurarium pronumptiari, et petit hoc in eodem<sup>215</sup> libello, talis libellus non procedit, et ita sepe pronumptiatum est, ergo ita in proposito. Respondeo:<sup>216</sup> ista non sunt similia, quia periurium respicit personam. Unde hec exceptio non potest agere, quia periurium<sup>217</sup> est exceptio contra<sup>218</sup> personam, ut C.<sup>219</sup> si adversus venditionem, l. i (C. 2.27[28].1). Et ideo aliquando sit<sup>220</sup> absolutus a iuramento<sup>221</sup> tanquam periurus debet repelli, ab usurarum repetitione,<sup>222</sup> ut notatur extra. de iureiur. c. Debitores (X. 2.24.6). Sed in casu nostro exceptiones non sunt contra personam, sed contra causam, et ideo contra contestationem litis non impediunt.<sup>223</sup> Et ita dico et consulo etc.

### Consilium 10b

B4, n. 293bis

BL 1412, fol. 5v

M5, n. 18bis

V5, n. 18bis, fol. 6r

Date: ca. 1389

Et primo,<sup>224</sup> quia querela inofficiosi testamenti non potest proponi, quotiens dicitur testamentum esse nullum quia ista sunt contraria in origine. Nam si testamentum est nullum, ex eo<sup>225</sup> non potest adiri hereditas; et si non potest adiri hereditas, querela inofficiosi non nascitur quia ad hoc ut nascatur, querela inofficiosi requiritur aditionem hereditatis.<sup>226</sup> Sed ex testamento<sup>227</sup> nullo non potest adiri hereditas. Sed ex narratione<sup>228</sup> in dicta petitione concluditur testamentum nullum et inofficiosum.<sup>229</sup> Ergo petitio est inepta, sibi ipsa con-

<sup>214</sup> contracto **V**

<sup>215</sup> incidi **B**; incidi in **M V**

<sup>216</sup> respondeo *om.* **B M V**

<sup>217</sup> periurium *scripsi*: periurus **B BL M V**

<sup>218</sup> per **V**

<sup>219</sup> contra *post C. add.* **BL**

<sup>220</sup> sit *om.* **B M V**

<sup>221</sup> de *post* iuramento *del.* **BL**

<sup>222</sup> ab usurario repetitur **B M V**

<sup>223</sup> procedunt **B M V**

<sup>224</sup> Et allegatio primo **V**

<sup>225</sup> ex eo *om.* **B V**

<sup>226</sup> querela inofficiosi non nascitur – hereditatis: querela inofficiosi requiritur hereditas **B V**

<sup>227</sup> sed *post* testamento *del.* **BL**

<sup>228</sup> narratis **BL**

<sup>229</sup> Sed ex testamento – inofficiosum: Sed in dicta petitione concluditur nullum testamentum **B V**



traria et<sup>230</sup> incompatibilis quod sic declaratur. Nam in dicta exheredatione dicitur quod cause non sunt sufficientes ad exheredationem et ex hoc concluditur testamentum nullum. Item, agitur<sup>231</sup> querela inofficiosi testamenti et<sup>232</sup> ex hoc concluditur quod testamentum valet et quod est adita hereditas ex testamento. Et ista sunt omnino contraria. Quare dicta<sup>233</sup> petitio est nulla ipso iure et inepta, quia qui contrario proponit, sibi ipsi obstat, ut iura dicunt. Item dicta petitio est inepta alia ratione, quia dictus Bartolomeus agit petitionem hereditatis antequam sit vel possit esse heres. Etiam si cause exheredationis non essent vere, que<sup>234</sup> tamen sunt vere et solemnes. Ultimo proponitur et cet. Et ad probationem<sup>235</sup> predictorum formentur articuli narrantes causas<sup>236</sup> ingratitudinis cum loco et tempore precedente testamento, ita quod cause concludant ex materia et tempore.

### *Consilium 11*

B2, n. 383

BL 1401, n. 98, fol. 65v

M5, n. 89

V5, n. 89, fol. 29v

Date: ca: 1388–1389

In nomine Christi, amen.<sup>237</sup> Proponitur quod Iuciarellus in suo<sup>238</sup> testamento exheredavit Bartolomeum suum filium sub hac forma, videlicet: "Item dictus testator dicens,<sup>239</sup> sciens et cognoscens Bartolomeum suum filium esse indignum de successione<sup>240</sup> et herede<sup>241</sup> ipsius testatoris predicti, eo quod in personam eius atroces manus impie ingessit,<sup>242</sup> ipsum Iuciarellum verberando, et iniuriam et obrobrium sibi faciendo contra voluntatem dicti Iuciarelli, insidias persone<sup>243</sup>

<sup>230</sup> ideo B V

<sup>231</sup> ex quo agitur B V

<sup>232</sup> et om. B V

<sup>233</sup> que deberi B V

<sup>234</sup> non cessent, non que B V

<sup>235</sup> quod datum B quod do. V

<sup>236</sup> narrantes causas: tam B V

<sup>237</sup> In – amen om. M V

<sup>238</sup> secundo post in del. BL

<sup>239</sup> dicens om. B M V

<sup>240</sup> cess – post de del. BL

<sup>241</sup> et herede: herede B, heredi M V

<sup>242</sup> ineicit V

<sup>243</sup> persona BL

ipsius faciendo etc.," prout in testamento dicti Iuciarelli continetur etc. Et quod postea dictus testator decesserit perseverans in eadem ultima<sup>244</sup> voluntate.

Modo queritur, utrum dictum testamentum valeat, ita quod exheredatio sit rite facta. Constat enim quod nisi exheredatio rite fiat, filius exheredatus<sup>245</sup> tanquam preteritus dicit nullum, ut ff. de contra tabulas, l. Non putavit, § Non quevis (D. 37.4.8.2). Et videtur quod dicta exheredatio non sit rite facta, nam cum dicte cause exheredationis contineant maleficium et dolum, debuit inferi locus et tempus, specificari qualitas malleficii et doli, ut ff. de dolo, l. Item exigit (D. 4.3.16), et ff. de accu., l. Libellorum (D. 48.2.3), et in c. Pia, de exceptionibus,<sup>246</sup> li. 6 (VI 2.12.1), et in c. Presentium, de testibus, eodem libro (VI 2.10.2), sicut si exheredaret cum ratione adulterii<sup>247</sup> commissi cum noverca, ut l. Libellorum. Item debuit dicere cum quibus inimicis patris conversatus est, ut persona demonstretur, ut<sup>248</sup> C. de pena iudi. qui male iudi. auten. novo iure (C. 7.49.1), et ff. naute caupones stabularii, l. Licet, § Possumus (D. 4.9.6). Non enim debet in tanto crimine, quod obicit, vagari, ut ff. de iniuriis, l. Pretor, in principio (D. 47.10.7), et ff. de testibus, l. iii, § Idem divus (D. 22.5.33), in illo verbo, que<sup>249</sup> crimina obiecerit.

Item, etiam<sup>250</sup> in contrarium videtur, nam nullo iure cavetur quod pater teneatur exprimere locum et tempus, sed solummodo quod teneatur exprimere causas ingratitudinis, ut in auten. ut cum de appellatione cognoscitur, § Aliud quoque capitulum (N. 115.3. = Auth. 8.12.3). Sed bene concedo, quod heres ad hoc, ut probatio sit certa et non dubia, tenebitur hoc probare, ut not. in simili, ut<sup>251</sup> ff. deposi., l. 1, § Si quis argentum (D. 16.3.1.40), quod verum credo, quia lex non obstringit<sup>252</sup> patrem ad inserendum<sup>253</sup> locum et tempus, sed solum causas<sup>254</sup> ingratitudinis, que sunt hic expresse in ea forma, in qua requirit lex, que tradit hanc formam. Nam quecunque lex tradit formam, tali forme

<sup>244</sup> ultima om. **B M V**

<sup>245</sup> exheredatus ex exherehantus corr., -n- expunc. **BL**

<sup>246</sup> accep. **B M V**

<sup>247</sup> adversarii **M V**

<sup>248</sup> de post ut del. **BL**

<sup>249</sup> vero qui **V**

<sup>250</sup> etiam om. **B M V**

<sup>251</sup> ut om. **BL** de post ut del. **BL**

<sup>252</sup> abstringit **BL** astringit **B M V**

<sup>253</sup> dicendum **B M V**

<sup>254</sup> et ingratitudines **M V**

non est necesse aliquid adieci,<sup>255</sup> ut ff. de verbo. obli., l. In conventionibus (D. 45.1.52).

Concludo<sup>256</sup> ergo dictum testamentum valere et exheredationem esse rite factam. Tamen heres debebit probare causas ingratitudinis esse veras, et locum et tempus in quo filius patrem verberaveret, vel eum verberari fecerit, alias filius exheredatus obtinet in querela inofficiosi testamenti, quam proponere<sup>257</sup> debet infra quinquennium post additionem hereditatis, ut C. de inof. testa., l. Omnimodo (C. 3.28.30), et l. Si quis filium, § finali (C. 3.28.30.3). Et ita dico et consulo, ego Baldus etc.

## Consilium 12

B2, n. 406

BL 1401, fol. 77rv

M5, n. 102

V5, n. 102, fol. 28r

Date: ca. 1388–1389

Punctus: Queritur primo, numquid testamentum exheredationis univ-  
erse filii subsistat de iure apponendo et inferendo causas eo modo, quo  
instituit et apposuit, et eum semper per gerundium locutus est.

Secundo queritur, posito sed non concesso, quod dictum testamen-  
tum subsistat de iure, nunquid omnes cause in dicto testamento inserte  
sint efficaces ad<sup>258</sup> exheredationem dicti Bartolomei, et si non omnes  
sunt efficaces, que sint de ipsis.

Tertio, nunquid debeant omnes cause copulative probari per dictum  
Paulum heredem predictum, an sufficiat unus cause probatio ad  
exheredationem dicti Bartolomei.

Quarto queritur, quod cum contra dictum Bartolomeum procedere-  
tur per potestatem terre Nursie,<sup>259</sup> eo quia dicebatur dictum Bartolo-  
meum percussisse dictum Iumarellum. Quidam defensor<sup>260</sup> nomine  
dicti Bartolomei comparavit coram dicto potestate et confessus fuit  
dictum Bartolomeum percussisse dictum Iumarellum,<sup>261</sup> numquid  
dicta confessio habeat dicto Bartolomeo preiudicare.

<sup>255</sup> adiungere **B M V**

<sup>256</sup> ideo *praem.* Concludo *del.* **BL**

<sup>257</sup> proponere *ex* preponere *corr.* **BL**

<sup>258</sup> h – *pōst* ad *del.* **BL**

<sup>259</sup> immisit **B M V**

<sup>260</sup> defensorio **B BL M V**

<sup>261</sup> Bartolomeum **BL**

Quinto queritur, quia postquam dictum fuit, dictum Bartolomeum percussisse dictum Iumarellum, dictus Iumarellus et Bartolomeus fuerint reconciliati, cum insimul habitaverint per spatium magni temporis, nunquid dicta reconciliatio habuit et habet dictam causam enervare.

Sexto queritur, nunquid necessarium fuit ipsi Iumarello nominare inimicos suos in dicto testamento.

Septimo, quales debent esse inimici capitales vel alii.

Octavo, nunquid sola conversatio et habitatio cum inimicis suis sit efficax causa ad exheredationem.

Nono, quod dictus Bartolomeus tempore infirmitatis dicti Iumarelli pluries visitare eum voluit, et dictus Bartolomeus non potuit, cum dictus Iumarellus non permittebat dictum Bartolomeum ad eum ire nec eum visitare, nunquid exheredare de iure potuit, quia per dictum Bartolomeum non stetit, etc.

In Christi nomine, amen.<sup>262</sup> Ego alias consului et consulo, quod dicta exhereditatio valuit et valet propter causas insertas in exheredatione et maxime propter illam causam, quod filius patrem verberavit, et quod cum inimicis eius conversatus fuit nolente patre etc., prout in testamento continetur. Sed si exheredatus scit causas non esse veras, vel non possit probari per heredem, agat querelam inofficiosi testamenti et ottinebit, ut C. de inoffi. testa., l. Omnimodo (C. 3.28.30), et not. ff. de inoffi. testa., l. quinta (D. 5.2.5), et in auten. ut cum de appellatione cognoscitur, § Aliud quoque capitulum (N. 115.3. = Auth. 8.12), et in auten. de heredi. et fal., § Exheredatos<sup>263</sup> (N. 1 = Auth. 1.1.4), et hoc super primo puncto.

Super ii et iii dico quod sufficit una ex dictis causis probari, quia lex non requirit quod probentur copulative. Unde sive probetur, quod filius patrem verberavit, sive quod cum alii<sup>264</sup> verberassent patrem, cum eis commisit<sup>265</sup> amicitiam, vel quod insidias posuerit contra vitam patris, satis est contra ipsum filium, C. de inoffi. testa., l. Liberi, § fi. (C. 3.28.30.2).

Super quarto<sup>266</sup> dico quod talis confessio non preiudicat filio, nisi esset facta eius mandato, ut C. res inter alios acta., per totum (C. 7.60).

<sup>262</sup> In – amen om. **B M V**

<sup>263</sup> con. *praem.* exheredatus *del.* **BL**

<sup>264</sup> aliis **M**

<sup>265</sup> cum eis commisit: commiserit **BL**

<sup>266</sup> Insuper **B M V**

Quinto dico quod reconciliatio prodest filio ex iniuriis precedentibus non in sequentibus, ut not. insti. de iniuriis., § fi. (Inst. 4.4.12), C. fami. her., l. <sup>267</sup> In ipsius (C. 3.36.5), ff. adimen. lega., l. quarta (D. 34.4.4).

Super sexto dico quod non est necesse in testamento exprimere nomina inimicorum. Sed venit hoc in probationibus, que debent esse certiores, ut. not. ff. de deposi., l. i, § Si quis argentum (D. 16.3.1.40).

Super septimo dico quod inimicitie debent esse graves et capitales vel quasi, ut ff. de arbi., l. Licet (D. 4.8.15).

Super octavo dico quod convictus<sup>268</sup> et cohabitatio cum inimicis patris et associatio eorum<sup>269</sup> sufficit ad exheredandum filium, ut ff. de offi. prefec. urbi., l. i, § Cum patronus (D. 1.12.1.10).

Super ultimo<sup>270</sup> dico, quod nihil prodest exheredato voluisse loqui cum patre, et non potuisse quia culpa precessit casum, et quia sumus incerti, an<sup>271</sup> pater ei pepercisset, necne. Unde sibi imputet filius qui deliquit. Nam pater in eodem hodio presumitur perseverasse erga filium ingratum qui fuit cum exheredavit eum: cum non presumatur voluntas mutata, ut arg., ff. de proba., l. Cum tacitum (D. 22.3.3).

Et ita dico et consulo, ego Baldus etc.

### *Consilium 13*

B2, n. 397

BL 1401, n. 111, fol. 72v

M5, n. 103

V5, n. 103, fol. 26r

Date: ca. 1388–1389

In Christi nomine, amen.<sup>272</sup> Premissis verbis testamenti disponentis in modo, qui sequitur, videlicet: "Et si prefatus Paulus heres institutus conversatur cum dicto Bartolomeo ullo tempore, vel aliquid daret vel concederet de supradictis bonis relictis sibi dicto Bartolomeo vel suis heredibus, quod cadat a dicta hereditate omnino applicanda dicto communi Nursie,<sup>273</sup> ut dictum est, scilicet, quod dicta bona dentur amore Dei, et iiii<sup>c</sup> florenos Caterine<sup>274</sup> predicte, nisi et inquantum

<sup>267</sup> l. om. BL

<sup>268</sup> conversatio V convictis B M

<sup>269</sup> eorum B M V

<sup>270</sup> ultimo puncto M V

<sup>271</sup> an corr. ex ante BL

<sup>272</sup> In – amen om. M V

<sup>273</sup> Nursio B M V

<sup>274</sup> Chateline M V

dictus Paulus de iure esset coactus et de iure teneretur aliquid dans<sup>275</sup> de dictis bonis dicto Bartolomeo. Sed si voluntarie dederit, cadat ab hereditate predicta modo et forma predictis etc.”

Considerandum est primo testatoris indignitatem<sup>276</sup> contra filium duplex prohibitio:<sup>277</sup> una, que respicit alienationem, et alia, que respicit quemlibet concesset.<sup>278</sup> Unde nec alienari potest impune, nec etiam locari posset ad tempus etiam breve. Et sic cessat remedium, quod ponit glo. in l. Codicillis, § Istituto, ff. de leg. ii (D. 31.1.88.15), quia verbum, concedo, est actum<sup>279</sup> comprehendere generaliter omnia, magis quam verbum, alienare, ut no. ff. de alienatione, l. penultima<sup>280</sup> (D. 4.7.11). Videndum est ergo, an aliquod sit remedium per quod impune possit frater aliquid concedere fratri. Et hic considerata est particula permittens. Nam testator permisit alienationem necessariam, et dico quod tale est remedium adhibendum, quod filius exheredatus a patre suo petat alimenta coram iudice. Nam frater tenetur alere fratrem eodem patre natum quantumcunque<sup>281</sup> male merentem respectu patris. Ad hoc enim tenetur ex sua persona, ut ff. de admi. tu., l. Cum in plures, § Cum tutor (D. 26.7.12.3), et l. Tutor secundum dignitatem, § fi. (D. 26.7.13.2), ubi est expressum, et not. C. de admi. tu., l. Non omni (C. 5.37.16). Nec potest pater hoc interdicere, quia talis patris prohibitio esset contra ius naturale, quod est incommutabile, ut inst. de iure naturali, § Sed naturalia quidem (Inst. 1.2.11). Et iudex aditus super alimentis debet condemnare fratrem locupletem pauperi semper prestationem<sup>282</sup> alimentorum et assignare aliquam possessionem ad alimenta, que adfferat<sup>283</sup> redditum sufficientem<sup>284</sup> ad ipsa, ut<sup>285</sup> C. de dona., l. Si quis argentum (C. 8.53[54].35). Et ista erit alienatio necessaria, que non prohibetur, ut ff. fa. her., l. Alienationes (D. 10.2.13), et ff. de leg. ii, l. Peto, § Praedium<sup>286</sup> (D. 31.1.69.1).

Et ita dico et consulo, ego Baldus etc.

<sup>275</sup> dare **B M V**

<sup>276</sup> indignati **BL**

<sup>277</sup> duplicem prohibitionem **B M V**

<sup>278</sup> et cesset **B M V**

<sup>279</sup> aptum **V**

<sup>280</sup> Plene **B M V**

<sup>281</sup> quicumque **B** quemcumque **M V**

<sup>282</sup> prestatorem **B M V**

<sup>283</sup> defferat **B M V**

<sup>284</sup> redditus sufficientes **B M V**

<sup>285</sup> eo *post ut del.* **BL**

<sup>286</sup> pretium **B M V**