ABSTRACT. – The present paper, inspired by the article of Peter van Minnen, is devoted to the somewhat curious use of the term falkidion in three Dioskorean texts. In two deeds of disinheritation, P.Cair.Masp. III 67353 & I 67097 ν° D, the Aphrodite Lawyer seems to have confused two distinct legal terms: quarta Falcidia and the portio debita/legitima (νόµιµος µοῖρα). In the third case, a will (P.Cair.Masp. III 67312), the term falkidion was applied in its classically correct meaning. The scholarship usually deemed the Dioskorean misconception of falkidion to have resulted from the common error of the Byzantine jurisprudence which had apparently applied it wrongly to describe legitim. Peter van Minnen thought that the notary’s seeming imprecision was rather due to his up-to-date legal education, as the Justinianic jurisprudence would have implicitly equalled the two concepts. The research of the Byzantine juristic sources proves however, that the legal texts – especially these of the Justinian’s era – almost always keep a clear distinction between these two legal institutes. After an examination of the dubious cases, the postulated identification is only ascertained in case of two works of scholarly use, Epitomae Novellarum of Julian and of Athanasius of Emesa. Subsequently the confrontation of some pre-justinianic legal sources allows to formulate a hypothesis that the justinianic compilers tried to recover the original meaning of falkidion. This supposition, in turn, may not only provide for better understanding of Dioskoros’s juristic expertise and his practical activity, but also illustrate the apparent contradictions between the pure imperial law, the legal practice and the teaching of law, based – one may speculate – still after the codification upon the pre-codified version of the law.
falkidion venne utilizzato nel suo significato classicamente corretto. Secondo la dottrina anteriore, l’identificazione tra la portio legitima e la pars Falcidia è dovuto ad un’inesattezza di uso molto comune tra gli esperti giuristi bizantini. D’altro canto, Peter van Minnen sostenne che l’adozione di un termine apparentemente impreciso da parte del notaio fosse dovuta alla giurisprudenza del periodo giustinianeo che, avrebbe messo implicitamente col suo operato i due concetti in relazione. Dall’esame di affidabili fonti giuridiche bizantine viene provato che i testi legali – soprattutto dei tempi di Giustiniano – fanno quasi sempre una netta distinzione tra questi due concetti giuridici. In seguito, vengono chiariti alcuni casi dubbiosi: le Novellae 66 e 92 nonché due opere di carattere scolastico, gli Epitomi Novellarum di Giuliano e d’Athanasio di Emesa. Attraverso l’analisi di alcune fonti legali pre-giustiniane, si desume un possibile sforzo dei compilatori dell’età di Giustiniano volto a riformulare il contenuto del termine falkidion nella sua versione originaria. Ciò ci permette di descrivere la situazione relativamente all’esperienza giuridica di Dioscoro e alla sua attività pratica, ma anche rende evidenti le contraddizioni che si creavano sia tra la legge imperiale pura e la pratica legale, nonché tra la stessa legge e l’insegnamento del diritto, il quale – essendo lecita una speculazione a proposito – è probabilmente venisse basato sulla versione precodificata del diritto.

* * *

For my teacher, Maria Zabłocka

So bist du meine Tochter nimmermehr
Verstoßen sei auf ewig, verlassen sei auf ewig
Zertrümmert sei’n auf ewig alle Bande der Natur.

Aria “Der Hölle Rache” of Queen of Night in Die Zauberflöte

Before getting in medias res a short explanatory note would be appropriate. The present paper is by no means intended to present the reader with a complete review of all the legal problems arising from the Dioskoros’s Archives, or a comprehensive study on the relation and compatibility between our notary’s juristic skills and knowledge and the imperial law, or Reichsrecht, in Mitteis’s terminology. For some time I have intended to approach Dioskoros’s legal œuvre. This goal would of course require a thorough study of Dioskorean corpus as a whole, of both the Coptic and Greek documents. Considering what could be the starting point I have decided to choose a more or less homogenous group of texts, connected by some aspect. It seemed quite interesting to begin with the documents relating in one way or another to the law on succession. Dioskoros’s Archives preserve wills, a donation in case of death, division of inheritance agreements or compromises between co-heirs, two disownment documents and, most notably, petitions and imperial rescripts addressing this point.

In this abundance one had to find a starting point, and it was provided and greatly facilitated by Peter van Minnen’s superb article,2 in which some documents relating to the law of succession have been construed (and where the

2 VAN MINNEN 2003.
Dioskoros and the Law (on Succession): Lex Falcidia revisited

author, incidentally, has drastically remodelled Dioskoros’s family tree). In my paper I shall come back to some of the texts analysed by this author and address a seemingly minor problem which awakes our interest in three Dioskorean papyri, namely his sudden and curious use of the word falkidion. My scope is to scrutinize yet again these three instances and try to understand them in the context of imperial law. The title of my article has been obviously borrowed from van Minnen’s essay, but its origins actually date back to the time when Peter kindly offered me a draft of the future “Dioscorus and the Law” in 2002 in Leuven asking for a “lawyer’s” opinion on the texts he was discussing.

I. falkidion: Dioskoros’s evidence

There is something among these “inheritance” papyri which immediately catches attention of a person used to the dogmatic vision of Roman law – even in this era, deemed to be very late and not necessarily very classical by most of the Romanist scholarship. In an act of apokeryxis or disownment, P.Cair.Masp. III 67353 (= Sel. Pap. I 87), Dioskoros used the word φαλκίδιον having, prima facie, something else in mind. I think it is worth having a quick look at this singular document: 4

P.Cair.Masp. III 67353 ν° (569, Antinoopolis)

peł. βασιλείας καὶ ύπατείας τοῦ θεσπότου(υ) Φλαυίου Ἰουστίνου
τοῦ αἰωνίου(υ) αὐγούστου(υ) αὐτοκράτορος ἐπομένου, Ἀθύρ ἐκ θιο(α)ι-
δεκάτη τρίτης ἴνδικτινος(υ), ἐν Ἀντινόου πόλει τῇ λαμπροτάτῃ.

break

4 ............. πρόγραμμα ἀποκηρύξεως τε καὶ ἀπαγορεύσεως, ἀπαθεῖς ἔχον τὰς
φρένας καὶ διανοίας, ὀρθῷ καὶ ἀκριβεῖ λογισµῷ, δίχα παντὸς δόλου(υ) καὶ φοβο(υ) καὶ βίας καὶ ἀνάγκης καὶ ἀπάτης, ἐν δηµοσίῳ καὶ πρακτικῷ τόπῳ. καὶ τοῦτο
dιαπέµαι τοῖς πατρολώοις µο(υ) υἱοῖς ἕως ὀνόµατος καὶ µόνου, φηµὶ δὴ ∆ιονυσίᾳ καὶ

8 Ἰωάννῃ καὶ Παυλίνῃ καὶ Ἀνδρέᾳ τοῖς ἀποβολοµαίοις - - - - - - - - - -
break

οἶµενοι εὑρέτρικαν ὑµᾶς βοηθούσις ἐν ἀπασί καὶ γηροκόµοις καὶ ψυχοτραχικούς
[καὶ] υπήκους· ἐκ τοῦ τῶν ἐναντίων· ἐν ἡληκίᾳ γεγένησθε ἀντιπάλοι μοι ὡς καὶ µέγατοι ὡς ἐκ πέιρας ἐσχῶν τὴν ἀσπλ[α]χνον υµῶν πατροκτασίαν καὶ

3 Still the texts have made quite an impact, not only among the juristic papyrologists (see the following notes for the references) but they also strongly influenced very “classical” Romanists, cf. Kaser 1975, § 290 and n. 3, who illustrates the terminological change in describing of the legitim, Pflichtteil, using our P.Cair.Masp. I 67097 ν° D (see infra, p. 00-00).

4 On the context of the text see MacCoul 1988, p. 39-45.
ἀθετητικὴν γνώµην, ἐφ' ὅτι νοσοβαρὴς ἐγέναµην παρ' ὑµῶν μοίραν τοῦ ὑµῶν ἀκλήρου, καὶ σῶκ ἐξὸν ἔτι ὑµῖν τοῦ λοιποῦ ὀνοµάσα[ei me]

ἔως πατέρα, ὅσον κάγω ὑµᾶς ἀπεταξάµην καὶ ἐβδελαξάµην ἀπὸ τοῦ νῦν καὶ ἐπὶ τὸν αἱ ἐξῆς ἀπανταὶ[α] πα[ντὶ] ἠχόνων ὡς ἀποβολιµαίους καὶ νόθους καὶ δουλοχείρονας ---

κορακοβρωσίαν γενέσθαι καὶ ὀµµατωρυξίαν τοῦτοῦ τοῦ τρόπου ὑµᾶς παραχαράτω µηδὲν λήµψασθαι µήτε µὴν δοῦναι ὑπὲρ ἐµοῦ περιόντος τε ἢ καὶ θνήσκοντος, διὰ τὸ ἐµοὶ ὀρθῶς καὶ δικαίως δεδόχθαι. καὶ ἐξορκίζω πάντα κριτὴν καὶ δικαστὴν καὶ πάντα καὶ ἀρχὴν καὶ ἐξουσίαν ἀεὶ φυλάξαι τὰ ἐπὶ τοῖς τοιούτοις ἀπαιδεύτοις υἱῶιοι ......... ἀπαγορεύσεως καὶ ἀποκηρύξεως γρα...

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In the fifth year of the reign and consulship of our most godlike master Flavius Iustinus the eternal Augustus and Imperator, Hathyr 16, third indiction, in the most illustrious Antinoopolis. [frag. 2] [ - - - ] proclamation of disownment and rejection, having my mind and understanding unaffected, with true and unerring judgment, without any guile or fear or violence or compulsion or deceit, in a public place of business. And this I transmit to my parricidal children, through children in name only, Dionysia and Ioannes and Pauline and Andreas, the outcast ones [ - - - ] [frag. 3] [ - - - ] thinking to find you helpful in all things, a comfort to my old age, submissive and obedient, and on the contrary you in your prime have set yourselves against me like rancorous things, as I learnt through experience of your heartless
parricidal conduct and lawless disposition, seeing that I fell grievously ill through you [ - - - ] [frag. 4] [ - - - ] in every quality and quantity, from things costly down to one as or one obol, excepting only the Falcidia prescribed by law or the twelfth part of your intestate inheritance, and it is no longer lawful for you in future to call me father, insomuch as I reject and abhor you from now to the utter end of all succeeding time as outcasts and bastards and lower than slaves. [ - - - ] [frag. 5] [ - - - ] for ravens to devour the flesh and peck out the eyes, in this manner I debar you from receiving or giving anything on my behalf, whether I be alive or dead, because I have rightly and justly thus resolved. And I adjure every judge and arbiter and every tribunal and magistracy and authority to uphold always this deed of rejection and disownment executed on my behalf against these so ill-conducted children [ - - - ] [frag. 6] [ - - - ] place. And I also adjure the public scribe and the tabularius and the public defensor of this illustrious Antinoopolis, by God before all and by the victory and continuity of our universal rulers and sovereigns Flavius Iustinus and Aelia Sophia the eternal Imperators, to give the customary publicity to the decisions formulated by me and always to arbitrate and give judgment quite inflexibly, to the terror especially of such as are disposed to imitate the deeds of these impious ones. For whereas according to the divine law they ought to have most highly honoured their own parents, these most wicked ones have contrariwise reviled and contemned the parental ordinance. And this, along with the aforesaid Falcidia I have set forth in my will, and I have put up [this proclamation of disownment?] so that all men may know, being valid and guaranteed wherever produced.

The papyrus has unfortunately been preserved only in fragments, it is certain, however, that we do not have here the actual deed. The recto of it was used to put down an arbitration (mesiteia) in Coptic that – as it seems, as the much-abraded writing does not allow a certain reconstruction, Dioskoros had conducted between Anoup, Ioulios and Apa Papnoute in regards to some property handed over by Mesiane, mother of the formers’ to the latter.5

In the document dated to the 16th of Hathyr 569, a man whose name has not been preserved proclaims apokeryxis of his “parricidal” children Dionysia, Ioannes, Pauline and Andreas. Instead of the expected aid, the narrator experienced only ill-disposition towards him and accuses his children to have caused his severe illness by their insolent behaviour. And thus he disinherits his heinous offspring allowing them only to keep the “Faldicidian portion”, i.e. one-twelfth of the inheritance: ll. 13-15: ἀπὸ πολυ̣τ̣ελοῦς µέχρι ἀσσ̣̣α̣̣ρ̣[ίου ἑνὸς ἑνὸς ὀβολοῦ, εἰ µὴ τὸ ἀπὸ νόµω ̣ν τυπωθέν µόνον Φαλκίδιον ἢτοι δ[εκάτην] || 14 µοῖραν τοῦ ὑµῶν ἀκλήρων. “From things costly down to one as or one obol, excepting only Falkidion prescribed by laws, that is one-twelfth.” Finally the failed-father evokes authority of the judges, public officials and even the imperial couple so that his decision be safe-guarded. The last fragment contains information that this deed matches the last will of the speaker, in which the special provisions in regards to pars Falcidia had also been set forth.

This singular document has only one parallel in the papyri. It also comes from Dioskoros’s archives, its rhetoric evokes again the style of the Aria of Queen of

5 On the dispute between two-to-be monks and Papnoute see MacCoul 1988, p. 39-45.
the Night of Mozart’s Magic Flute (“So bist du meine Tochter nimmermehr. Il Verstoßen sei auf ewig, verlassen sei auf ewig”), and, more importantly, our notary used in its redaction again the subject-term of this paper: \( P.\text{Cair.Masp.} \) I 67097 \( v^o \) D (= \( \text{Jur. Pap.} \) 13 = \( \text{FIRA} \) III 15).\(^6\) Below I reproduce the part of the document directly dealing with apokeryxis and mentioning falkidion.

\( P.\text{Cair.Masp.} \) I 67097 \( v^o \) D (573/4, Aphrodite).

52 Ὄθεν εἰς ταύτην ἥκω πρὸς σὲ `τοίνυν´ τὴν ἀποβολῆας καὶ ἀνάξιον κλήσεως ὀνόματος \[κ(α)ὶ πρ]οσήγγοράς πατρωνυμικῆς θυγατέρα ἐγγράφως τὴν νόμιμον ἀποταγήν κ(α)ὶ ἀποκηρύξειν καθ’ ἥν ἢμολογῶν ὀμνύων τὸν φρικωδέστατον \[όρκον ἀπογορεύειν καὶ ἀποτετάχθαι \] σα ἡ ἀποκηρυκυκέναι σε ἐκ παντὸς νομίμου τρόπου ὑπὸ πάσαν διασ-

56 ταχήν ἡλίου σήμερον ἐπὶ πάσης ἁρχής κ(α)ὶ εξουσίας καὶ θρόνου καὶ κυριότητος, ὅπο τοῦ νυν ἐπὶ τὸν ἀπαντα ἀει καὶ παντελὴ χρόνων, ὡστε σε `τὴν δείνα´ μηδὲν τὸ καθάπας δουναι ὑπ’ ἡμου μήτε λήψασθαι, ζ’οντος \[κ(α)ὶ μετὰ τὴν ἐμὴν τελευτήν, ἀλλ’εἶναι \] σε ἡ σὲ δὲ παντα ἀκεχωρισμένην ἀεὶ τοῦ ἐμου αἵµατος καὶ γένους καὶ μετ’ οὐσίας

60 παντοῖος πραγμάτων μου ἑρ’ δ’ ἡ οὐκ ἀπαλλοτριοῦσθαί σε ὀρθῶς κ(α)ὶ δικαιωματικῶς ἐνοχής υ’π’(ερ) ἐμου καὶ ἠν’ἀγοιγῆς ύφ’ ἡλίων, καὶ ἀν’ ἐν’ἀριθμὸς ἢσσεθαί τοὺς ἐμοῖς υἱοῖς ἀπασιν εἰς κλήρον, εἰ[ν]αι τε σε μάλιστα ἀποβλήτων καὶ ἀπόκληρων καὶ ἄµοιρων παντελῶς

\(^6\) The exact dating of the text is impossible to determine, which is quite a problem if we want to establish chronological relation between \( P.\text{Cair.Masp.} \) I 67097 \( v^o \) D and III 67353. The creation of the poetic works on the verso of 67097, Fournet n° 10 (\( P.\text{Cair.Masp.} \) I 67097 \( v^o \) E & B-C): Encomion - petition to dux Athanasios; Fournet n° 39 (\( P.\text{Cair.Masp.} \) I 67097 \( v^o \) F 1-16): A song celebrating the new dux Athanasios; and Fournet n° 40 (\( P.\text{Cair.Masp.} \) I 67097 \( v^o \) F 17-29): Chairetismos of Justin II) is set by FOURNET 1999, p. 509-511, to 565/566 (see comm. to text 10). Two other texts on the same papyrus, a receipt (frag. A verso), and a contract (the entire recto), mention respectively the 7th/8th and the 5th indiction. Given the fact they both refer to Aphrodité, they could be plausibly dated either to the period before Dioskoros’s move to Antinoopolis or to the times after his return to the home-town (571 AD and 573/4 AD, cf. MACCOULL 1988, p. 39-40 and 112). – We have no indication how to position among them the frag. D: BEAUCAMP 1992, p. 79 and MACCOULL 1988, p. 39-40, date it tentatively to 567-570, i.e. still to the Antinoopolitan period of Dioskoros. Such a hypothesis could be strengthened by the suggestion of MASPERO to read the l. 80 of the text as referred to “the most illustrious” ekdikos \[?] of Antinoopolis] (the point missed by the \( \text{FIRA} \) editors). MIGLIORINI 2001, p. 320, n. 51 seems to have totally misunderstood the problem.
πά[σ]ης[σ]οις ανοικτο[ι] διὰ τὸ εἶναι πάντα τὰ τὸν ὄντα


[τοῖς] ἡ [μέν] [υἱοίς] μου κ[αὶ] μόνοις τοῖς [ἀei πεπεισμένοις ύποτα][κ] [του] [του][του]


Σοι δὲ μόνη τῇ αὐθάδει καὶ κακοτρόπῳ περιπετευόμενος 'κ[αὶ] ἀντιπάλῳ θυγατρὶ οὔτε τούτων ὤφειλεν οὔτε βουλομαίνει ὁμοφύλον µετ' εὐφυΐας κ[αὶ] εὐσπλαγχνείας.

Σοὶ δὲ περί τούτων, ὅπως καὶ ἐπειδὴ οὐκ εἶχον τὸ νόμον, ὅπως καὶ ἐπειδὴ τὸν νόμον τοῦ σου κλῆρου οὗ καὶ ἀνάξιος ἐπεστράφη ἀπὸ τοῦ σου συλλόγου καὶ διατάσσω διαθήκης ἐγγράφου βεβαίας, ὅστε σὲ μηδὲν τούτων πῶποτε 'δύνασθαι ἐπιζητεῖν περαίτερον, ἀλλ' ἀρκεσθαι αὐτῷ δι' ὅλου αἰωνίου καὶ ἀντιπαθείας υἱῶν ἀντιπαθῶν τοῦ[ν] ἀντιπάλων ὑιῶν[ν] ἀντιπαθείας αὐτοῦ.
of every material, of every quality and quantity, joint and separated, from things
espensive down to inexpensive, including things made of wood, clay, household
ceramics (?), cf. PREISIGKE, WB: “Sinn unklar, doch bezeichnet das Wort die
stoffliche Beschaffenheit von Hausgeräten” and MASPERO, ad loc.) and glass shall
belong to my [other] children and only to them forever, to those who have obeyed
being submissive to my will in everything, and having followed my orders, and
having fulfilled my aim. And they respect eternally the same paternal stock with
natural goodness and good-heartiness.

[ll. 70-76] I do want nothing of it to be owed to you on your own, contumacious and
mischievous and antagonistic daughter and I do not want it to become legally
(yours), but for the Falkidion predetermined according to the laws in lieu of your
share of inheritance, of which you have just been found unworthy. And so in the
time of my written and legally binding deed of last will I order and command, that
you may not claim anything more, but you shall be pleased with it eternally. As you
have given back bitterness, you shall receive back bitterness on the ground of the
laws, and upon the example that suffer all the antagonistic children.

The fact that this text is one of a few of absolutely heterogeneous nature
preserved on the same sheet of papyrus inclined the first commentators to believe
that it was a mere rhetoric exercise. This feeling was strengthened by many over-
line corrections, sophisticated vocabulary, and the use of ἡ δεῖνα, “the so-and-
so”, instead of the daughter’s name 7. The publication of the above-presented
P.Cair.Masp. III 67353, however, reinforced the idea – we have to admit not
without risking a vicious circle – that both were actual juridical texts: or at least
drafts of the future binding documents, especially as both are concluded by an
apostrophe to the officials, asking them to safe-guard the provisions.

Excurs: A Brief Note on apokeixys

The legal nature of the act recorded on both of the papyri notwithstanding the
attempts done by the legal historians remains unclear. 8 Most notably, even if we
admit that the texts are but the drafts of what was to become later a legal
document, their very core, the deed of apokeixys or abdicatio remains a juristic

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7 In that sense, for example originally MASPERO, comm. to line 31, and LEWALD 1914, p. 441-
445, the most important arguments being the rare vocabulary used and the lack of witnesses or
the parties, the autodefinite of the text as διήγηµα, apparently a typical expression of a rhetoric
style-exercise. ARANGIO-RUIZ 1920, p. 28-29, dismissed this piece of evidence treating it almost
as “legal-fiction”, which obviously influenced his commentary in FIRA III 16. – Contrarily, CUQ
1913, p. 63, and KOSCHAKER 1915, sp. 1503. KOSCHAKER, accepting CUQ’s interpretation,
expressed less skepticism as to the real nature of the text, seeing in it a draft or a project of
juridical document, similarly ALBERTONI 1923, p. 103-105, and BEAUCAMP 1992, p. 79. Of the
same opinion is also MACCOULL 1988, p. 39-40.

8 See for the most recent discussion with a summary of the earlier literature, SCIORTINO 2003,
esp. n. 3, and MIGLIORINI 2001, p. 279-350, as well as WURM 1972, p. 92-95. – On that point cf.
from the earlier scholarship: MITTEIS 1891, p. 212-213; further legal discussion see:
TAUBENSCHLAG 1955, p. 54 and 137, who sees it as a way of termination of patria potestas;
ALBERTONI 1923, passim; DULL 1943, p. 54-56; ARANGIO-RUIZ 1920, p. 27-33; ARANGIO-RUIZ
1930.
mystery, especially in the light of Diocletian’s apparent discordance with this practice. But this regulation may not be as incoherent with our documents as it seems at the first glance. And I think, following Paul Koschaker and more recently Mario Amelotti and Livia Migliardi Zingale, that Cuq’s proposition of some lost *pragmatica sanctio* introducing all of a sudden *abdicatio* in Egypt is unacceptable (one tried reading ὕποικοι νόμοι in the line 87 as an indirect reference to this forgotten imperial law). Just how unnecessary such an idea is, can be shown furthermore by Marco Migliorini’s sound reconstruction of the original propositions of the law. He is probably right in putting forward, on the footsteps of Cuq, that initially Diocletian did not forbid *apokeryxis* but only stressed its incompatibility with the Roman order. The actual prohibition may originally have been aimed at the apparent use of this legal form – “in the Greek way” – to circumvent the ban of alienation of children by means of sale, donation or pledge.

And this interpretation may have still been applied to the constitution in the Justinian’s times, as it is proven by the placement of the fragment in the *Code* title 8.46 de patria potestate. If we accept this reading of *CI. 8.46.6*, Dioskoros’s execution of deeds of *apokeryxis* will not surprise anymore. It becomes obvious that these acts do not come within the scope of the Diocletian’s prohibition. And

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9 *CI. 8.46.6*: (Diocletianus et Maximianus AA. Hermogeni) *Abdicatio, quae Graeco more ad alienandos liberos usurpabatur et apokeryxis dicebatur Romanis legibus non comprobatur* (pp. xvii k. dec. Maximiano A. II et Januario cons.: a. 287 or 288); see SCiortino 2003, n. 2, citing CONCRAN 1996, p. 84.

10 CUQ 1913 hypothesized that the legitim on the disinherited child was imposed by a lost novel of Emperor Justinian. KOSCHAKER 1915, however, doubts on that point (Sp. 1504-1505), recalling the provisions of *Novel* 115. – ὕποικοι νόμοι are to be most likely understood as suggested by AMELOTTI & MIGLIARDI ZINGALE 1985, p. 14 and esp. 81-82, who see in the “divine laws” a reference to the Decalogue fourth Commandment and not to any lost pragmatic sanction that would have reintroduced the “aberrant” custom of *apokeryxis*.

11 See MIGLIORINI 2001, p. 276-316, see esp. 314-315; contra however SCiortino 2003, passim, who thinks – to put briefly the thesis exposed in not so brief words – that the original scope of the constitution was prohibition of the Roman *abdicatio* and not the Greek *apokeryxis*. Hence there would nothing bizarre in Dioskoros’s double execution of this legal transaction.


13 I am more sceptical about the further going opinion of this author, that, contrary to what the former scholarship has sustained, Diocletian admitted this practice “entro certi limiti”. See Migliorini 2001, p. 315 and the n. 49. I do not think a mere single papyrus (moreover of a difficult reading), *P.Oxy* LIV 3758, AD 325 (see esp. l 169 for the apparent mention of *apokeryxis*), may be a reasonable ground for such an affirmation.

14 See *CI. 4.43.1*: Imperatores Diocletianus, Maximianus AA et CC. Aureliae Papinianae: *Liberos a parentibus neque venditionis neque donationis titulo neque pignoris iure aut quolibet alio modo, nec sub praetextu ignorantiae accipientes in alium transferri posse manifesti iuris est.* (a 294 d. xvi k. dec. Nicomediae cc. consns.). “*Manifesti iuris est*” stresses that the constitution does not introduce any novelty, but reminds of a long-standing principle, so I do not concur with objections concerning the date of this constitution in relation to the date of *CI. 8.46.6* advanced by SCiortino 2003 against the interpretation of Migliorini.

15 See Migliorini 2001, p. 289-290. Generally concurring with his point, I would not, however, discard as hastily as he does the observation of the earlier scholars, who postulated incoherency in the collocation of *CI. 8.46.6*. In fact, the title 8.46 of the *Code* embraces only
thus the only practical direct example of the “aberrant” – in somewhat weirdly hasty words of two Italian legal historians – practice, from which Diocletian took distance in 288, remains a much earlier, P.Oxy. XXII 2342 (Oxyrhynchos, 102 AD).

Our texts seem rather to have been drafts of some kind of complements to the last wills, strengthening the disinheritation clauses in them. The expelled children are actually considered as the “natural” successors of the disconsolated fathers and hence – somewhat mistakenly as we shall see subsequently – assigned falkidion – i.e. legitim – in lieu of their share of inheritance. This documentary invention appears quite comprehensive in the light of Justinian’s Novel 115 obliging parents to institute children as their heirs (and vice versa) unless very particular reasons for their disinheritation have occurred; and thus fathers in both 67097 and 67353 wanted to make sure that their children came under one of the allowed categories of ungrateful off-spring not admitted by the virtue of “natural law” – in Justinian’s own words – to succession. It is unlikely that Dionysia and Ioannes and Pauline and Andreas really tried to kill their father – the use of the epithets πατρολώος, πατροκτασία, perfect examples of Dioskoros’s inventive linguistics (P.Cair.Masp. III 67353.8 & 11), seems rather to be merely rhetoric, it brings the hyperbolic flavour to the text. More probably the “lawless disposition” and “falling ill” allude rather to the categories summed vaguely the traditional Roman concept of patria potestas. See, for instance, the norm 8.46.4 (a. 259, Valerianus et Galienus Galla) which refers to reverentia due to the mother by her children – as we well know, it has nothing to do with the classical concept of father’s power!

In both documents the fathers mention that the acts are conform with their wills: cf. P.Cair.Masp. I 67097 v° D II. 74-75 and P.Cair.Masp. III 6353.35-36. – See, similarly, WURM 1972, p. 92-95; ALBERTONI 1923, p. 117-118 and GIARO 1983, p. 203-204; MIGLIORINI 2001, p. 327-328; see these works and also for the question of the possible romanisation of apokeryxis.

The admitted causes for disinheritation are:

1. children who have acted violently against their parents;
2. who have grossly insulted them;
3. who have accused their parents of crimes which do not involve the emperor or the state;
4. who associate with poisoners in order to produce poisons (or perhaps with these who practice magic or generally wrong-doers: the Latin text uses a general term malefactor, whereas the Greek one has poison-maker, φάρµακος);
5. who have attempted against lives of their parents trying to poison them or in any other way;
6. who have had sexual intercourse with their step-mother or the father’s concubine;
7. sons, who have acted as delators against their parents, and by doing so have caused them much trouble;
8. sons who – being financially able to do so – have denied providing guarantee for their parents imprisoned for debts;
9. children who have been proven to have prevented their parents from making a will;
10. who against the will of their parents have associated with mimes and these who exhibit themselves on arenas;
11. if a daughter – provided with the parental consent to marriage and with a dowry – led a life of debaucheries instead marrying;
12. children who have not taken care of their insane or generally ailing parents and have not shown them enough respect;
13. who have not hasten to pay ransom for their parents held in captivity;
14. and finally these children who have left the catholic faith.
in *Novel* 115.3.4 & 12. The father’s reprimands in *P.Cair.Masp.* I 67097 v° D sound as if they were alluding to *Novel* 115.3.11, the disapproved sexual conduct of the daughter and perhaps her impious acts.\(^{18}\)

There is also a third occurrence in the whole papyrological corpus of φαλκίδιον. It is again Dioskoros who used it, this time in the will of Fl. Theodoros, *P.Cair.Masp.* III 67312. In the deed three heirs were instituted, the monastery of Apa Senouthes in the Panopolite nome, the congregation of Apa Mousaios in the Hermopolitane nome as well as the maternal grandmother of the testator, Herais. The first pious institution should get immovables of the testator located in Panopolite, Hermopolite and Antinoopolite nomes, the other all his movables and other things. *Falkidion* appears in a fragment which refers to the disposal for the granny:

*P.Cair.Masp.* III 67312 (567, Aphrodite)

βούλομαι δὲ καὶ ἀξιῶ τὴν προονομασθεῖσαν εὐγενεστάτην μου πρὸς μητρὸς μάμμην ἐχειν δικαίῳ κληρονομίας κτήμα καλούμενον ὑπὸ γεωργόν 90 διακείμενον ἐν μετὰ [πα]ντὸς αὐτοῦ τοῦ δικαίου καὶ μετὰ πάσης τῆς αὐτοῦ περιοχῆς, καὶ τούτῳ βούλομαι αὐτὴν ἀρκεσθῆναι, οὐδὲν ἕτερον δικαίῳ φαλκιδίου ἐπιζητοῦσαν πρὸς τὸ δίκαιον τῶν 94 προρηθέντων δῷ[ο] μόνοντερίων ἤτοι πρὸς τοὺς προ- μημονε[ν]θέντας Πέ[τρον καὶ Φοιβάμμων τοὺς εὐλαβε[σ]τάτους προεστῶτας τῶν εἰρήνων, τοὺς καὶ ἐμοὺς κληρονόμους

“And I want and deem worthy that my above-named noblest maternal grandmother shall have by the title of succession a plot of land named “Under Georgos” (?) [blank] situated in [blank] with all that justly belongs to it and in all its entity, and I want that it shall suffice her, that she shall not sue for anything else none of the two above-said monasteries or the above-mentioned Petros and Phoibammon, the most reverend priors of the said two monasteries and my heirs on the account of Falkidion.”

What is so striking in all three texts? First and foremost the very appearance of the word φαλκίδιον calls for our attention; it is only Dioskoros who used it in

\(^{18}\) *P.Cair.Masp.* I 67097 v° D. l. 44: μετὰ μοίχου ἄλλοφυλοῦ καὶ ἕναρμόστου Θεῷ. See MIGLORINI 2001, p. 325-326 and n. 57 with the literature therein cited. I have not been convinced by his interpretation of the co-offender as a non-Christian (adopted from CUQ 1913, p. 199-121), but rather by the reading advanced in BEAUCAMP 1992, p. 80, n. 65, who following J. DIELHART, comm. to CPR IX 77.2 & 6 (Hermopolis, 5th cent. AD), understands ἄλλοφυλος as “alien”. This epithet may be as well just a pun intended to contrast the good qualities of the other children whose proper disposal to paternal *homophylos* is stressed in the line 70.
the whole papyrological corpus. Was this fact due only to his inclination for rare and beautiful words, with literary and sophisticated flavour? Was he perhaps willing to impress his clients? At least in the last case, the last will of an official of the ducal court of Thebaid, a son of a scholastikos, this supposition seems rather dubious. Secondly, and this shall be the subject of the following part of my text, what is the meaning of this term in Dioskoros’s papers? Did he or did he not use it erroneously?

II. The Roman freedom of testamentary dispositions and its limitations

A few words of legal commentary may now come in handy. The Roman law of succession since the high pre-classical times (i.e. roughly speaking the mid-second-century BC) tended to restrict the absolute freedom of last-will disposals.

One of the troubles that the legislation sought to address was disposing of all the inheritance substance by the way of bequests, leaving the heir named in the will with nothing or almost nothing apart from the debts. After failed attempts to limit this practice in the second century BC by Lex Furia testamentaria and Lex Voconia, the Falcidian Law was passed in 40 BC. This statute allowed the testator to dispose up to three quarters of his substance by the way of bequests (legata), at least the quarter was reserved for the instituted heir or heirs. Should the testator transgress the provisions of Lex Falcidia, the bequests were to be proportionally diminished, so the heres institutus would always get his or her fourth (in terms of civil procedure, should the heir be sued by the legatees for the payment, he or she was condemned to pay only so much, as would result in his or her keeping the quarter share). And thus quarta Falcidia or ratio Falcidiae was coined. It is interesting to observe – and I shall come back to this point subsequently – that in the post-Justinian Byzantine law, all throughout the Basilics, the amount of ratio Falcidiae was set to third part of the estate most certainly under the influence of the Novel 18, rising the amount of legitim from a quarter to one third or half.

Another pain-striking problem with the absolute freedom of testaments was the growing custom of leaving extraneous persons as heirs and disinheriting one’s own children. The Romans deemed it as an offence to officium pietatis: the duty to leave something in the will to the natural successors, i.e. the closest relatives, especially children in paternal authority who had helped accumulating the father’s substance. And so a will excluding the children would be seen as inofficiosum, transgressing moral duty by the father would place him on a position equal to a spendthrift or insane, and thus incapable of making a will. This

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19 Cf., e.g., KASER 1971, § 188.
20 Cf. C. G. Heimbach, Basilica IV 89, note b. And as an example: Bas. 41.1.1. "Εξεστι ληγατεύειν μέχρι τοῦ ὀκταουγκίου· τὸ γὰρ τετραούγκιον τῷ γεγραµµένῳ κληρονύµῳ φυλάττεται. "It is allowed to bequeath up to eight twelfths. However four twelfths is secured for the written heir". The change becomes even more obvious if we compare the Greek paraphrase with the Latin original: D. 35.2.1 pr. (Paulus libro singulari ad legem Falcidiam). Lex Falcidia lata est, quae primo capite liberam legandi facultatem dedit usque ad dodrantem (...).
is why, probably already by the end of the Republic, one could institute proceedings to declare invalid such a testament in which the children of the testator had been disinherited and left even without a smallest portion. At some point a number of judicial decisions allowing procedure for invalidation of a will, set a rule making a will voidable if it secured to the entitled persons less than one fourth of what he or she would get in the case of intestate succession. It is quite probable that this quantity was fixed under the influence of already existing Falcidian fourth. And thus should the testator have one child, he had to leave it with at least one-fourth of his substance, either by instituting it as an heir in one-fourth or, should he have preferred to disinherit it, by bequeathing or entrusting him or her the same amount (per legatum or fideicommissum). The circle of the closest relatives entitled to the legitim varied. It certainly started with children, perhaps firstly those who were still under patria potestas at the moment of testator’s death, later also emancipated. In later classical times siblings were added in case of institution of a persona turpis as the main heir. Even later, parents were also joined in to this group. Under the Justinianic law, especially after the changes in the order of succession induced by Novels 118 and 127, the set of relatives entitled to the legitim included: children, siblings and parents (and not any other ascendants as it has been wrongly stated in the literature, probably because of a faulty reading of the Novel 115.4).21

It has become obvious, I hope, to the reader that these two legal figures are evidently distinctive. Legitim is meant to protect “natural successors”, the closest relatives entitled to take part in the succession but unreasonably left in the will with less than it is due to them. Against such will they can raise querella inofficiosi testamenti – claim of undutiful will. On the contrary, the Falcidian Quart was devised to protect the testamentary heir, no matter if he was a relative or not, against the testator too generous for the legatees. To observe the difference one more time, this time with an aid of the legal sources, let us read the passus attributed to classical jurist Paulus:

PSENT.4.5.5 Ex asse heres institutus inofficiosum dicere non potest: nec interest, exhausta nec ne sit hereditas, cum apud eum quarta aut legis Falcidiae aut senatus consulti Pegasiandi beneficio sit remansura.22

21 See VOCI 1963, vol. II, p. 738, who affirms that ascendants become the necessary heirs, and KASER 1975, § 290 who shares this opinion. However a more careful reading of the law does not confirm it. This wrong supposition has been born by the interpretation of the ch. 4 of the Novel 115 together with the chapter 5. But Justinian imposes on the children a duty to institute only the parents (parentes, γονεῖς) as their heirs, not the further ascendants. In proemium to the chapter five, a situation is described in which either children (ch. 3) or parents (ch. 4) would get less than their due part from the will. In such a case their part should be augmented according to “other our laws” – i.e. most probably provisions of Novel 18.

22 However the much post-classical, anonymous Visigothic interpretation of the same title of Pauli Sententiae does not keep the difference entirely. Even if the exactly corresponding commentary does not confuse these two legal figures (PSENT.INT. 4.5.5 Si pater filium ex asse heredem instituat et per fideicommissa aut legata hereditatem ipsam totam diversis distribuat,
A son instituted as an heir to the whole inheritance has no claim of undutiful will (querella inofficiosi testamenti) if his father-testator dissipates all hereditary substance by the means of bequests and trusts. He should use the legal aid provided by the Falcidian law and Senatusconsultum Pegasianum (the latter applied the benefits of the Falcidian Statute to the universal trustees – fideicommissores universales).

III. Dioskoros confused?

After this short legal excursus we may understand better the legal issue arising in all three texts of Dioskoros’s archive. In the two former, P.Cair.Masp. III 67353 vo D and P.Cair.Masp. III 67353, the “natural” successors are deprived of what – by the Roman moral standards – should be due to them, as they had been disinherited. In such a case they are entitled to the legitim and not to pars Falcidiae. So Dioskoros is clearly mistaken when he writes that the “parricidal children” and the “mischievous daughter” should only get falkidion (cf. Maspero comm. ad P.Cair.Masp. III 67353 vo D, l. 71).

This proposition is strengthened by the way their due part is calculated: one-twelveth of the inheritance mentioned in the lines 14-15 of the first text respects Justinian’s innovation augmenting in Novel 18 the quota of legitim to the third part of the intestate share (in case of more prolific testators the legitim was half the intestate share).23 One could just gloss over the problem assuming that Dioskoros was evidently mistaken, a fact that would not surprise in a simple village lawyer; such was, for example, the solution adopted in this case by Wurm in his monograph on apokeryxis.24

Other commentators, however, have strived to establish some reason for that lapse. The easiest and commonest explanation would be the one already suggested by Paul M. Meyer, who in his commentary to the line 71 of P.Cair.Masp. I 67097 vo D,25 observed that in the Byzantine law φαλκίδιον denoted νόµιµος µοῖρα, i.e., portio legitima. In doing so the German juristic papyrologist evoked the authority of no one else but Karl Eduard Zachariä von...
Lingenthal and the sources the latter had put forward. This idea has been pacifically accepted by the Romanist scholarship as well.

Before analyzing these four particular texts, let me first try to ascertain the veracity of this thesis throughout the Justinian’s legal corpus. Such an assumption seems though to be a bit far-fetched. Actually the postulated identification between the pars falcidia and pars legitima is not so common. Most importantly, none of the normative texts misses the clear distinction between the two legal figures. This assumption is provable throughout the title 41.1 of the Basilics entitled περὶ τοῦ φαλκιδίου. Also the Theophilus’ Paraphrasis of Justinian’s Institutions bears no ambiguity as to their distinction and, obviously, neither does its Latin original (cfr. Title 2.18 de inofficioso testamento and 2.22 de lege Falcidia of both). Almost the same could be said about Justinian’s later legislation: it strictly observes the classical meaning of Lex Falcidia except for two particular cases, Novels 66 & 92, which I shall discuss thereafter (infra, p. 00-00).

Back to the four sources quoted by Zachariä von Lingenthal. They are, epitomising the same Novel 92: Epitome Iuliani 85, Epitome Novellarum of Athanasius of Emesa 9.7, and two scholia to Basilica 39.1.8, reporting D. 5.2.8.7-9: schol. 18 by Stephanos and schol. 15 by Kalokyros.

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26 See ZACHARIA VON LINGENTHAL 1955, p. 167-168, where he states that in later Byzantine Law portio legitima (νόµιµος µοῖρα, νόµιµος ποστηµόριον) is called φαλκίδιος (see his n. 530 for the citations); cf. infra, p. 00-00, and notes 29-32 for my commentary. The most recent book regarding Lex Falcidia does not – for obvious thematic limitations – consider this problem at all: cf. SCHANBACHER 1995.

27 See e.g. VOCI 1963, vol. II, p. 677, n. 33, quoting the sources interpreted in this article, and KASER 1975, p. 515.

28 It begins with a quote in § 1 (Bas. 41.4.1, Heimbach IV 145-148) of Novel 1.1, where a reference made to portio legitima (1.1.1) only stresses the disposition of the statute, intended to punish heirs unwilling to pay off the bequests by depriving them of their share in succession but allowing them to keep the legitim.

29 See above all, Novel 1 de heredibus et Falcidia (a. 535), and the later ones: Novel 108.1 (a. 541); Novel 119.11 (a. 544) as well as Nov. 131.12 (a. 545).

30 Epit. Iul. 85: De immodicis et inofficiosis donationibus. 1. Si pater filios habuerit duos pluresve, et uni ex his donare suas res voluerit, non liceat ei ultra bessem substantiae suae donare, vel ultra dimidiam secundum numerum liberorum, ut ceteri liberi modis omnibus legitimam portionem, id est, Falcidiam accipiant, quam haberent, si tertiam partem vel dimidiam eo tempore acciperent, antequam donatio facta sit, scilicet nisi ingrati fuerint. Dat. Id. Octob. Indict. VII mens. mart. (?) (539?).

31 Athanasius Scholasticus of Emesa, Epitome Novellarum 9.2 [Heimbach, Anecdota I 102]: "Ἡδη τι περὶ τοῦ φαλκιδίου. Οἱ µετωρεῖν δωρεῖν εἰς την τινὰς τῶν παιδιῶν ποιησάµενοι ἀνέγκας ἐξειν τῇ διανοµῇ τοῦ οἰκείου κλήρου τοσοῦτον ἐκάστῳ παιδίων τὸ ἐκ τοῦ νόµου φιλάττειν µέρος, ὥσον ἠµοιτον πρὸ τοῦ αὐτὸν τὴν εἰρηµένην ποιήσασθαι δωρεάν, οὐ δυνάµεν τὸν τιµηθέντος παιδὸς τῇ τοιαύτῃ δωρεᾷ ταύτῃ µὲν ἀρκεῖσθαι, τοῦ δὲ πατρῴου κλῆρου ἀφίστασθαι, ἀλλ' ἀναγκαζόµενον ἢ τῶν δωρεῶν ἔξιστασθαι ἢ τὸν κλῆρον προίεσθαι καὶ τοῖς ἀδελφοῖς ἐξίσου τὸ νόµιµον µέρος. Μικρῇ τῇ παραυξήσει δύναται ὁ πατὴρ τοὺς ἰδίους προτιµᾶν παῖδας. Ἀναγκαζόµενον ὁ πατὴρ τοῦτο ἀνέγκατα παῖς τοῦτο, ὥσον ἠµοιτεν πρὸ τοῦ αὐτὸν τὴν εἰρηµένην ποιήσασθαι δωρεάν, οὐ δυνάµεν τὸν τιµηθέντος παιδὸς τῇ τοιαύτῃ δωρεᾷ ταύτῃ µὲν ἀρκεῖσθαι, τοῦ δὲ πατρῴου κλῆρου ἀφίστασθαι, ἀλλ' ἀναγκαζόµενον ἢ τῶν δωρεῶν ἔξιστασθαι ἢ τὸν κλῆρον προίεσθαι καὶ τοῖς ἀδελφοῖς ἐξίσου τὸ νόµιµον µέρος. Μικρῇ τῇ παραυξήσει δύναται ὁ πατὴρ τοὺς ἰδίους προτιµᾶν παῖδας. Σηµειώσα, ὅτι τοὺς κατὰ τὸν ἀχρίστον νόµον ἀκραιµῶς ἐφολεῖται, καὶ ὅτι ἐν ἀρκῇ τὸ νόµιµον µέρος φαλκιδίου ἐκάλεσεν. Ἀνέγκαθο βι. λα. τ. α'. διοτ. π.ε'. καὶ βι. γ'. τοῦ κωδ. τ. κη'. Διατ. η'. Εγγ/ γ'. ιδίων Ὀκταβρίων βασιλείας.
Let me first discuss the juridical commentaries of "Basilica". Kalokyros seems indeed to have been mistaken by conducting the duty of leaving a legitimate share to a child to the provisions of the Falcidian statute. His testimony, however, should not really induce us to believe in commonness of this identification already in the Justinianic times as Kalokyros lived in the late 11th century. Secondly, what the lawyer might have wanted to say in this passage may be not that the duty of legitim was created by "Lex Falcidia", but that its calculation -- originally one fourth -- was influenced by it.

A careful reading of "scholion 18" which Zachariä ascribed to Stephanus, more or less Justinian's contemporary, neither does prove the statement of the "Ὑπατείας Ἀπίωνος ῞Ιουστινιανοῦ τὸ ιγ´. ὑπακατέστησεν αὐτῷ ὑπ' ἐκείνων. Ποίας δὲ ἄρα περιουσίας τὸ δ´; καί φησιν ὁ Οὐλπιανός, τῆς οὐσίας χρῆναι τὸ δ´. καταλιµπάνεσθαι µέρος, ἥτις εὑρίσκεται µετὰ τὴν τῶν χρεῶν καὶ τῶν περὶ τὴν ταφὴν δαπανηθέντων ὑπεξαίρεσιν. ἄρα δὲ αἰ ἐλευθερία τοῦ δ´. ἢ οὐ µειοῦσιν, ἀξιόν ἐστιν ἐνταῦθα σκοπῆσαι. Εἰ γάρ, ὅτε τις ἐξ ὁλοκλήρου γέγραπται κληρονόµος, παῖς ὢν δηλονότι τοῦ τεστάτορος, ληγάτοις τῆς πάσης δαπανηθείσης οὐσίας, διὰ τοῦτο οὐ δύναται τὴν δείνοφικίοσο κινεῖν, επειδὴ φυλάττεται αὐτῷ παρὰ τῶν νόµων Φαλκίδος· ὁ δὲ Φαλκίδιος οὐ µειοῖ τὰς ἐλευθερίας, τοῦναντίον οὖν οὖν ὑπ' ἐκείνων μειοῦσι· δυνατὸν ἐστὶν εἰπεῖν καὶ ἐπὶ τῆς προκειµένης ζητήσεως, ὅτι κατὰ τὴν τῶν ἐλευθεριῶν υπερχώσεως τὴν καθαρὰν σκοπούμενον οὐσίαν, καὶ τῇ τοῦ κατὰ µόνης τοῦ δ´. φοίνι οὐ σώζεσθαι τῷ παιδί “and we say ‘the third’: it is obvious from the said (above) that if the fourth part of the portion due intestate is left to the child, he is barred from suing by claim of undutiful will. But the forth of what estate? and Ulpius says that the fourth of what is found after the debts and funeral expenses have been deducted should be left. But it is worth asking if the manumissions diminish the fourth or do they not. And if someone has been named heir to the entire estate, namely a child of the testate, and the bequests have extinguished the substance (of the inheritance), he may not on this account use de officioso, because he is protected by the Falcidian Law. And the Falcidian (part) does not diminish the manumissions, on the contrary, it is diminished by them; and so one may say the same in the proposed question, that we look at the pure substance having deducted the manumissions, and we shall say that only the fourth part of it shall be safe-guarded for the child.”
German law historian. The Byzantine jurist, quoting in fact the original Ulpian’s reasoning (D. 5.2.8.9), indeed mentions *Lex Falcidia* in the context of claim of an undutiful will, but by all means he does not confound it with the legitim. The legal issue discussed in the original *Digest* fragment concerned computation of the actual value of the inheritance, from which the legitim would be calculated, above all whether the costs of the possible manumissions should be deducted from it. The positive answer was based on the following reasoning: because *Lex Falcidia* does not interfere with manumissions (the heir cannot use its benefit not to perform them), so the real value of the estate is known after the manumissions have been made. And the same principle therefore should be applied in case of calculating of the legitim. Ulpian’s fragment and its Byzantine paraphrase proves to the best the close association of *Lex Falcidia* and the praetorian invention of legitim. Moreover, comparison does not amount to confusion of two legal institutes, but to its exclusion.

Zachariä is obviously right about the two *Epitome* texts. Both Athanasius and Julian cannot have been more clear. They write, respectively: καὶ ὅτι ἐν ἀρχῇ τὸ νόµιµον µέρος φαλκίδιον ἐκάλεσεν, *legitimam portionem, id est, Falcidiam*. Let us observe that these, closely related texts, are of scholarly nature and actually the clause “the legitim, that is *falcidia*” seems to be a gloss or a note, if you like, which illustrates better the very shortened text of the *Novel* 92. It is certainly due to the *praefatio* of the original *Novel*, where the legislator mentions the recent augment of *pars Falcidiae*, having probably in mind in fact the raise of legitim by *Novel* 18. We may observe in the Athanasius’s text how *Falcidia* may have entered the discourse. The *praefatio* in the abbreviated version makes for a heading of the fragment, loosing the reference valour to another law it had in the original. It was natural therefore to mention it again in the text proper.

Notwithstanding of this identification apparently present in *Novel* 92, I am apt to think that the original *praefatio* does not present the official legal doctrine on the subject, as the normative part of the statute, *caput* 1, that is the part epitomised by Julian and Athanasius, does not equate these two legal figures. I shall come back to this point further, discussing the case of the *Novel* 66 (infra, p. 00-00).

I hope to have been able to prove that, contrary to what has been suggested, the inaccuracy in Dioskoros’ papers may not be to imprecise Justinian’s jurisprudence that allegedly had equated the two concepts. By the same account

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34 D. 5.2.8.9 (Ulpianus 14 ad Edictum) *Quarta autem accipientur scilicet deducto aere alieno et funeris impensa: sed an et libertates quartam minuant, videndum est. Et nunquam minuant? Nam si, cum quis ex asse heres institutus est, ideo non potest dicere inofficiosum, quia habet Falcidiam, Falcidia autem libertates non minuit: potest dici deductis libertatibus quartam ineundam. Cum igitur placet quartam minui per libertates, eveniet ut, qui servos tantum habet in patrimonio suo, dando ets libertatem inofficiosi querebam excludit: nisi forte hic filius, si non fuit in potestate, a patre heres institutus merito omitit hereditatem et ad substitutum transmittens querebam inofficiosi instituet, vel ab intestato citra edicti poenam habeat hereditatem.*

35 *Dudum de Falcidia et illius parte decrevimus, augentes eam non ignobili incremento. Quo dum nimirum inaequale est, non videat placet nobis, sed oportere quidem praepone filios quos pater voluerit, non tamen in tantum inimicue alios, ut importabilis etsi sit diminuito.*
one has to remain sceptical as to the veracity of Peter van Minnen’s assumption, who dismissed the easy error theory and claimed that the identification and the calculation of the legitim with regard to the augment decreed by Novel 18 proved to the contrary: Dioskoros’s being “juridically up to date”.36 The piece of evidence presented, Justinian’s Novel 18 which reformed the system of Roman legitim, cannot be construed as even implicitly linking Falcidia with portio legitima. Before trying to offer another explanation of supposed Dioskoros’s mistake, let us have a closer look at the third piece of evidence, P.Cair.Masp. III 67312.

**IV. Falkidion and the Granny: P.Cair.Masp. III 67312**

The will of Fl. Theodoros presents the reader with much more complicated situation. Unlike the two earlier examples, the context – a will, in which there are obviously heirs named (the grandmother and two monasteries) – justifies the use of “falkidion”. Dioskoros, at the first glance, seems to have properly applied it, referring to the protection of the fair share of the inheritance pertaining to each heres institutus. However, ascertaining this proposition is not that easy. Let us remember that Lex Falcidia diminished testamentary dispositions which would overly encumber the heirs’ shares. Still, Theodoros did not burden any bequests or trusts his successors. In order to understand the sudden emergence of Lex Falcidia in this instance, we have to confront a complex problem of institution of heirs ex re certa, that is, of assigning to the heirs singular items from the hereditary substance, contrary to long-established Roman legal disposition requesting the heirs to be instituted ex quota of the complete estate.37

To cut a long story short, originally such a will was regarded as void, but at the latest in the later classical times, it was held to be valid. To preserve the concept of universality of succession, the classical jurists established that all the heirs named in such a will were treated as if they had been instituted in equal shares and the particular items originally assigned to them became the objects of specific bequests bestowed on the heirs (legata quasi per praecpectionem). And so Fl. Theodoros’s grandmother and the two monasteries became his heirs in equal shares, and legatees of, respectively: an unnamed field-plot (the space to was to be filled in the final version of the will), immovables and movables of the Theodoros’ substance.

Theoretically speaking, should it turn out that any of heirs, after deducting specific bequests for the others and the hereditary debts, would eventually

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36 VAN MINNEN 2003, p. 129.

37 The reader may find a more detailed study of the problem in the classical handbook VOCI 1963, vol. II, p. 151-159, where a development of the Roman scholarship has also been presented. Naming the heir to the particular items in the inheritance was contrary to the principle that inheriting caused universal succession; see, especially D. 28.5.55 pr.-2 (Ulpianus) and D. 28.5.79 pr. (Papinianus).
become the patron of less than one ninth of the estate, he or she may be allowed to use the aid of *Lex Falcidia* to prevent the others getting their bequests in full. Theodoros, however, aided by our notary, denies his grandmother this benefit. And not without reason, he was permitted to do so by the *Novel* 1.2.2 (a. 535) which allow exclusion of the benefit of *Lex Falcidia*. Furthermore, Justinian decreed that in case of bequests made to a certain *venerabilis domus* (which is exactly our case) *Lex Falcidia* would not apply:

*CI*. 1.3.48.7: Imperator Iustinianus: *Haec tamen omnia locum habere sancimus, quando non certi xenonis vel certi ptochii vel certae ecclesiae nominatio a testatore subsecuta est, sed incertus est eius sensus. sin autem in personam certam vel in certam venerabilem domum respetit, ei tantummodo hereditatem vel legatum competere sancimus, nulla falcidia nec in hac parte intercedente* (a. 531 d. x k. Sept. Constantinopoli post consulatum Lampadii et Orestis vv. cc.).

I suggest therefore Dioskoros correctly used *Falkidion* in the draft of Theodoros’ last will. My proposition may be strengthened by the fact that, contrary to what the scholarship that has dealt with the Justinian law on succession puts forward, the ascendants other than parents were not entitled to *pars legitima*, so possible confusion between the two terms is to be excluded (see *supra* n. 20 for the discussion of the sources).

**V. Towards explanation of the Dioskoros’s error**

How to explain, then, Dioskoros’s mixing-up *Falkidion* in one case, and apparently using it with a great skill (the reasoning I have tried reconstructing seems almost too elaborate for a village lawyer, and I must say does not entirely convince myself)? Perhaps the answer is to be looked for in a few legal texts found in *Corpus Iuris* and *Codex Theodosianus*. It is beyond doubt absolutely that these two distinct but similar legal realities were linked in the common perception, as well have already seen in *D*. 5.2.8.9 (*supra* p. 00-00 and n. 34). Suffice to recall the changes that the quota of both *pars Falcidia* and *portio legitima* underwent the large time-span from the pre-classical to the late Byzantine times. It has been put forward that *quarta Falcidia* influenced fixing the amount of the due portion to one fourth of the intestate share. Strangely enough, rising *portio legitima* by Justinian’s *Novel* 18 to one-third apparently

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38 As I recalled above, the Falcidian part was risen by the Byzantine jurisprudence to the third of the share nominally assigned to the heir by the will. In our case it is therefore 1/9.

39 The whole constitution deals with the problem what to do if the testate instituted as heirs either some unspecified poor, or prisoners of war, or some other indefinite pious cause. The general rule would be to assign the *hereditas* to the bishop or the church of his home town so that the hereditary substance may be used for the poor and prisoners of this town (but without their right to *Falcidia*). – The disposition of *CI*. 1.3.48.7 was later repeated by *Nov*. 131.12 (a. 545).

increased the amount of pars Falcidia to the same quota in post-Justinian Byzantine jurisprudence.

Probably due to this close association the so-called Western barbaric legal collections linked entirely Falcidia with legitima, loosing entirely the distinction. It is especially well visible in following fragment of Lex Romana Burgundiorum:

*LRB* 45.5: testamenta vero, quibus filiis aut nepotibus Falcidia non demittitur, nullo iure subsistunt. [...] 7. hoc est filius vel filia, sine filiis morientes, matrem sine Falcidia praeterire non possunt, ut valeat testamentum.41

There are also two texts authored by Justinian’s chancery, already mentioned, and partly discussed above (*supra* p. 00-00) which seem to include the same misconception as Dioskoros in the two *apokeryxis* papyri. As I have already exposed one of them, *Novel* 92, I shall concentrate here on the other, *Novel* 66 (a. 538). At any rate, I think that my clarifications hold for both of them. The goal of this enactment was to hold valid mortuary dispositions made already under the rule of a new law but in accordance to the older laws. The statute foresees that they would not be void as long as it could be proven that the new law had not yet been properly promulgated in the location in which the faulty dispositions were made. Let us read the preface, evoking two particular earlier laws by Justinian to which the regulation shall apply and then the chapter 5 of the same, dealing specifically with one them:

*Novel* 66 (a. 538)

| Praef. ᾿Αεὶ τῶν νόµων ἡµῖν ἀφορµὰς αἰ τῶν κινουµένων ὑποθέσεων παρέχουσιν αἰτίαι. Πολλῶν γὰρ ἡµῖν προσελεύσεων γινοµένων προφάσει τῶν ἡµετέρων διατάξεων, ὡς ἐπὶ ταῖς διοδοχίαις ἑγέρασθαι, ὅποιον δὴ τῷ περὶ τοῦ δεῖν οἰκείας χειρὶ τῶν διατιθέµενον τὸ τοῦ κληρονόµου γράφειν οἴνοµα, καὶ αὐθές ἐκ πόσον ὁµήκτων λογίζεσθαι χρὴ τῶν Φαλκίδιον, ὃν τοῖς παισὶν οἱ γονεῖς καταλιµπάνουσιν | Semper legum nobis occasiones motorum negotiorum praebuerunt causae. Plurimis enim obis additionibus factis occasione nostrarum constitutionum quas super successionibus scrivimus, quale est ut oporteat propria manu testatorem heredes scribere nomen, ex quantis unciis reputari oporteat Falcidiam quam filiis parentes relinquunt (...) |

41 These fragments of *LRB* probably sum up the content of *CTh*. 2.19.1-4 (note however that in the original constitutions promulgated by Constantine the Great, the proper and adequate term was used: *actio inofficiosi testamenti*), which only proves further that the equation *falcidia = legitima* is a product of the vulgarisation of Roman law. See also: *Lex Romana Burgundiorum* 31.2: relique vero cause in expressis metarum suarum terminis finiantur; id est de inofficiosis testamentis, de immoedicis donationibus, hoc est, ubi falcidae filii non reservantur, intra quinquennium debere et proponi et peragi de non numerata pecunia.

On these fragments see, but without further clarifications, BAUER-GERLAND 1995, p. 108 and 118. Other Western Vulgar law sources identifying *portio legitima* with pars Falcidia are *Inter. PSent* 3.11.3; 4.5.6 and *Inter. ad Cod. Greg.* 4.2; 8.2.
The preface mentions laws ordering holographic institution of the heir and another one augmenting “Falcidiam” (just like the Novel 92). If we read chapter five of the same novel, we may well track back the act referred to in the preface: Justinian thinks of his Novel 18 reforming the system of legitim. Does the “mistake” in the introduction to the constitution mean that Justinian assimilated falcidia with legitima? Just as I have not thought so in the case of Novel 92, neither do I think so here. An unknown chancery official preparing the text of this imperial promulgation must have simply introduced in the preamble a common association without giving it too much thought. This lapse does not really matter in the policy statement – the part of a law normally with a little or none normative content –, as the truly normative part of the law, chapter 5, keeps the distinction and uses proper classical terminology.

In view of the above we may simply assume that Dioskoros, a common lawyer after all, by using falkidion in P.Cair.Masp. I 67097 v° D and III 67353, adopts the same common juristic connection which was widespread among his peers.

Just before I finish this paper let me advance another, perhaps more feeble, hypothesis. Falcidia, in the non-classical meaning, appears four more

5. *Collective igitur dicendum percipient filii relicts sibi, si ita contigerit a patribus tres uncias ex testamentis ita factis aut ante legis positionem aut post positionem legis, antequam haec tamen apud iudices innotesceret. Si vero adiectum sit testamentis, oportere quod reliquum est eis impleri secundum quod tunc legibus deebatur, hoc percipiendum secundum antiquas leges, ut si deest tribus uncias, secundum illud supplementum fiat et non in quadriuncio, quod postea quidem sanctum est, nondum tamen tunc agnitum.*
times in the post-classical legal corpus. In CTh. 16.8.28, reporting a constitution of Theodosius II and Valentinianus,\(^{42}\) this term means again legitim. But in three other sources, it actually designates something totally different to the classical *quarta Falcidia* or *pars legitima*. The use of the term *falcidia* to denote the new legal institutes was certainly induced by the similar way of calculation of the part (one fourth) and its relation to the law of succession (see *infra. n. 00-00*).

In the Western *Novel 6* of Majoranus\(^ {43}\), it denotes a part of the inheritance due to the daughters forced by their parents to enter monastic life and left out in their wills. In *CTh* 9.8.5 (= *CTh* 9.14.3)\(^ {44}\) of Arcadius & Honorius promulgated 4 September 397, it was used to describe the part that daughters of men convicted of conspiracy against imperial officials would get as “a mere alimony’ from the estates of their mothers (that is wives of the culprits).

The most interesting is the last text *CTh* 5.1.4 pr.-2 (Valentinianus/Theodosius I/Arcadius: a. 25.02.389),\(^ {45}\) partially reported in *Codex Iustinianus* (6.55.9 pr.-1):

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\(^{42}\) *Palingenesia of Laws of the Theodosian Dynasty*: [http://www.iuscivile.com/materials/honore/leges/laws6.shtml#d389v](http://www.iuscivile.com/materials/honore/leges/laws6.shtml#d389v). It was apparently prepared by Western *quaestor* n° 2 whose tenure begins in 389, ends 390. HONORÉ 1994, p. 187, n. 101, thinks he was a lawyer by training and uses, among others, *CTh* 5.1.4 to demonstrate it. It is true that its language is decisively technical in flavour (use of *praeteritus*, *Lex Falcidia, de cuius bonis*, etc.).
First paragraph of this law (= CI. 6.55.9 pr.) changes in a revolutionary way the rules of the intestate succession among Romans allowing relatives on the distaff side (grandchildren of a deceased daughter) to inherit together with living maternal uncles and aunts. Grandchildren on the distaff side shall receive two thirds of the original portion of their mother; and the portion of the heredes legitimi shall increase by the remaining third. The second paragraph, omitted by the Justinianic compilers, describes a situation in which the de cuius left only grandchildren on the distaff side and his own agnatic relatives (brothers/sisters). In that case the grandchildren shall get three-quarters of the inheritance and the agnates, “on the likeness to Falcidia”,\(^{46}\) shall receive the rest. It is obvious the name falcidia, which is significantly omitted in the Interpretatio of the passage,\(^{47}\) has nothing to do with the original content of Lex Falcidia or the querella

\(^{46}\) Or if we accept the alternative reading: “the Falcidian quart”.

\(^{47}\) Inter. CTh. 5.1.4.1: Si vero quis moriatur intestatus et relinquat ex filia nepotes et filios non dimittat, sed fratum et sororum superstitis dereliquat, tres partes hereditatis avi materni sibi nepotes vel nepotes ex filia vindicabunt, quartam frater vel soror avi defuncti iuxta legis huius ordinem consequerent. It is yet another proof of how legally precise and “classical” is this legal work, traditionally and unjustly branded as “barbaric”.

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<table>
<thead>
<tr>
<th>CI. 6.55.9 pr. (CTh. 5.1.4 pr.)</th>
<th>CTh. 5.1.4.1 Quod si hic defunctus, de cuius bonis loquimur, habebit ex filia nepotes et praeterea filios non habebit, sed qui praefecerit nepotibus possint habebit agnatos, **in quandam Falcidiam** hi et in dodrantem nepotes iure succedant.</th>
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<tr>
<td>Si defunctus cuiuscumque sexus aut numeri reliquiert filios et ex filia diem functa cuiuscumque sexus aut numeri nepotes, eius partis, quam defuncta filia superstes patri inter frater suas suiisset habitura, duas partes consequantur nepotes ex eadem filia, tertia pars fratribus sororibusve eius quae defuncta est, id est fillis filiabusque eius, de cuius bonis agitur, avunculis scilicet sive materteris eorum, quorum commodo legem sancimus, adrescat. CI. 6.55.9.1 (CTh. 5.1.4.2) Haec eadem, quae de avi materni bonis constitutius, de aviae maternae sive etiam paternae similis aequitate sancimus: nisi forte avi ad elogia inurenda impiis nepotibus iusta se motos ratione dixerint et hoc fuerit legibus approbatum. ca. 389 Mediolani)</td>
<td>In quartam falcidiam: Codices Wallersteinensis/Gothanus (10th cent.) both conserving entire text.</td>
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inofficiosi testamenti. It is only associated with it;\textsuperscript{48} as it secures the rights of the heres legitimus ab intestato just as the Lex Falcidia originally secured the rights of the heres testamentarius against the testamentary beneficiaries. This difference seems to have been clear to a learnt copier of the text of the Code who might have substituted the original version of in quartam falcidiam still present in Codices Wallersteinensis and Gothanus to in quandam falcidiam. Moreover the difference between legitim and pars falcidia was perfectly obvious to the author of the constitution. In CTh. 5.1.4.2, while describing the mechanism of querella inofficiosi testamenti available to grandchildren against their grandparents’ wills, he diligently omits any reference to Falcidia.\textsuperscript{49}

I have shown above that the Justinianic jurisprudence was perfectly conscious of the distinction between falkidion and legitima. They may have thus consciously omitted § 1 of CTh. 5.1.4, just because for their classicising inclinations it assimilated too closely two distant legal realities. Where does this bring us? Since the publication of P.Cair.Masp. I 67028 to which Leo’s promulgation was attached in a version different from the one known from the Justinianic Code (it only roughly corresponds to CI. 5.9.6 + CI. 6.20.17 + CI. 6.61.4)\textsuperscript{50}, one suspected that Dioskoros was in possession of some other, pre-codification collection of imperial enactments. This could have also been the case with some regulations regarding Lex Falcidia. We have seen that pars legitima and Falcidia were closely associated and even perhaps equated in the general perception, especially in the West, at least before Justinian’s times when his classicizing codifiers tried – in vain – to purge Roman law from its post-classical alternations. Notwithstanding these efforts this identification, or a lapse, was certainly present in the works intended for scholarly and every day legal use (see Epitoma Novellarum of Athanasius and Julian, quoted and discussed above, p. 00-00). It may lead us to assumption that what Dioskoros studied was not the law as presented to the students by Justinian’s grace in his Institutiones but the pre-codified version. Our notary had certainly kept and used notes from the lectures he attended (we know well the practice of note-taking from late antique universities). And hence the legal expertise shown especially in the will of Theodoros or keeping up-to-date with the augment of the legitim introduced by Justinian in the Novel 18 should not surprise us so much. These were important

\textsuperscript{48} See also BAUER-GERLAND 1995, p. 110, who, however, does not notice the different version of the passage transmitted in Cod. Wallersteinensis/Gothanus. She also understand the passages as establishing yet another type of legitim, Pflichtteil, but this reading cannot be upheld, the technical meaning portio legitima is clearly restricted!

\textsuperscript{49} And the author of the constitution is perfectly conscious about it, cf. CTh. 5.1.4.2, where a very proper description is made of querella inofficiosi testamenti, without any reference: Non solum autem si intestatus avus aviave defecerit, haec nepotibus quae sancimus iura servamus, sed et si avus vel avia, quibus huiusmodi nepotes erunt, testatae obierint et praeterierint nepotes aut exheredaverint, easdem et de inusto avorum testamento et si quae filiae poterant vel de re vel de lite competere actiones nepotibus deferimus secundum iustum nostrae legis modum, quae de parentum inofficiosis testamentiis competunt filiis.

details for the legal productivity of the deeds Dioskoros prepared. On the contrary, he did not really have to bother with the tiny refinements re-introduced by Justinian: an imprecise, popular use of a technical term did not invalidate the documents.

I hope to have been able to prove that observations of even marginal problems such as Lex Falcidia in the Dioskorean corpus may contribute to the better understanding of his legal training and expertise. I also hope to have shown once more how useful the study of juristic papyri is for the conventional legal historians, re-reading of the legal texts provoked by the obscurities in the P.Cair.Masp. I 67097 νο D, 67353 and III 67312 makes us comprehend better the Byzantine jurisprudence and Justinian’s legislation.

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