Book VI.
Title XLIII.

Common rules concerning legacies and trusts and concerning abolishing the granting of the right to enter on an inheritance.
(Communia de legatis et fideicommissis et de in rem missione tollenda.)

Bas. 44.27.

6.43.1. Emperor Justinian to Demosthenes, Praetorian Prefect.

Since those who were honored by legacies or trusts, generally have the right of a personal action, who cares to know about the technicality of legacies per vindicationem or sinendi modo[1] or of other kinds of legacies, which the people of the later age did not for good reason readily tolerate and the extreme intricacies of which was not approved by them? Who has recourse to the right to go into possession, with its dubious circuities?[2]

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[1] The legacy per vindicationem (by giving a claim to the thing), and sinendi modo (by allowing the legatee to take), were two of the former technical forms of legacies, no longer in force in Justinian's time, and of no particular interest here. A legacy in this form: "To Titius I give and leave as a legacy the slave Stichus," was a legacy of the former kind; one in this form: "Let my heir be condemned to allow Titius to take and have for himself the slave Stichus," was a legacy of the latter kind. The former belonged to the legatee upon the death of the testator by operation of law, without any necessary action on the part of the heir; the later remained the property of the heir till delivery to the legatee. Gaius 2.193,209,213 and 214. The various forms of legacies were abolished by this constitution and legacies and trusts are treated as substantially the same thing. See headnote to C. 6.37, where the present law and some forms of legacies are mentioned.

[2] In certain cases the beneficiary of a bequest was entitled to be put in possession of property to preserve the bequest. This subject is fully dealt with at C. 6.54. That sort of possession is not what is referred to in the present law, and the rights granted under C. 6.54, were not taken away by the present law. The missio in rem (putting in possession of property) here referred to was little used. Without going into details, reference is simply made to Novel 39 pr., where the mission in rem here referred to is mentioned, and to Buckland 720-721; 9 Cujacius 701; C. 6.43.2.

Justinian, by the present law, not only abolished the distinctions between the various kinds of legacy known to the former law, but he also provided that there should be no difference between legacies and trusts of single things. Trusts of a whole inheritance would, naturally be somewhat different, and these are referred to in C. 6.49. There was henceforth no difference in the manner of giving legacies and trusts and in the manner of enforcing them. Headnote to C. 6.37. A legacy in the form "after my heir's death, I give and bequeath" the property given, would formerly have been void. Not so after the present enactment. Inst. 2.20.35. A request that the property given should be turned over after the death of the heir - and indirect way of leaving it to the later beneficiary - would have been good as a trust. Leaving the property directly, was good from this time on.

Three remedies existed for the enforcement of bequests:

1. We think it better to entirely abolish the right of putting (a party) into possession of property, but declare rights of legatees and beneficiaries of a trust to be of the same nature, and to give them not only a personal action but also one in rem, so as to enable them to recover the property by whatever form of legacy or trust it is left, in a real action, and to give in addition thereto the quasi Servian action - that is hypothecary action - in reference to the property left them by the decedent. 2. For since it has already become customary under our law to permit a testator to give a lien on his property in his testament, to whom he wishes, and recent constitutions, in turn, have introduced implied liens in many cases, it is not improper that we should give the right to the hypothecary action (a lien and the right to enforce it) in the present instance, since that right may be granted by operation of law without a grant thereof by individuals. 3. For if a testator leaves legacies or trusts, in order that persons honored by him may receive them, it is clear that the right to the aforesaid actions in connection with the property is in accord with his wish, so that such wish may be fully carried out, and this is particularly true when the legacies and trusts are designed to further pious acts. 4. And these provisions shall apply, not only when a legacy or trust is directed to be paid by an heir but also when a trust is left to anyone and is directed to be paid by a legatee, cestue que trust or other person upon whom the burden of the payment of a trust may be imposed, and since that burden cannot be imposed unless the person on whom it is imposed receives some benefit, it is not improper to also give not only a personal action against him but also a hypothecary action as to the property which was derived from the testator. 5. But in all such cases we want no one to be sued in a hypothecary action except to the extent that a personal action also lies against him[3] and the lien is fastened, not on the property of the heir or of other persons burdened with the trust, but only on the property which he received from the testator.
Given at Chalcedon September 17 (529).

6.43.2. The same to Julianus, Praetorian Prefect.

The use of every word which clearly states the intention of a testator in giving a legacy or trust shall be considered proper and effectual, whether the testator uses direct words, as, for instance, "I order" or precatory words, as "I ask," "I wish," " I enjoin," "I entrust," or whether he employs an oath - since we know from our own experience that where the testator used the words "I adjure," the parties distorted these words in every

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1) by a personal action;
2) by an ordinary action in rem to recover the property left as a bequest;
3) by a hypothecary action.

The giving of the last action meant that a lien was given on the property given by the bequest, and it could, accordingly, be pursued in the hands of third persons, and the right of the ordinary action in rem, which under the older law was limited to but few cases, was virtually extended to all classes of legacies and trusts. The lien given was limited, however, to the property given by the bequest and embraced no other property.

[3] [Blume] This was literally true only when the person charged with the bequest was sued; it could not be, where property was followed in the hands of third persons, pursuant to the lien. In such case, the amount recoverable could not, of course, exceed the amount for which the party charged with the bequest would have been liable in a personal action.

way. 1. According to what we have said, therefore, whatever words are used, the wish shall be valid in accordance with the tenor of the words of the party giving a legacy and trust, and everything that is naturally inherent in legacies, shall be understood as inhering in trusts, and conversely, whatever is given as a trust shall be understood as a legacy, and if there is anything in trusts that does not belong to the nature of legacies, shall be considered imparted to the latter by the former. All alike shall be enforceable and real actions (vindicatio), hypothecary actions and personal actions shall apply to all. 2. If anything contradictory appears in legacies or trusts, it shall be considered in the light of a trust, as of juster scope, and construed according to the nature thereof. 3. No dying person needs to think that his last wish will be rejected; he shall, on the contrary, always receive our assistance, and as we have cared for the living, so, also, have we consulted the interests of the dying. And if the testator makes mention only of a legacy, this shall be understood as a legacy and trust, and if anything is entrusted to the good faith of an heir or legatee, such provision shall be considered as creating a legacy. For laws are made to apply, not to words, but to things and acts.[4]
Given at Constantinople February 20 (531).

6.43.3. The same to Johannes, Praetorian Prefect.

If an option to pick out a slave or other property was left to one, two or more persons, or if the option to pick out a slave or other property was left to one person, but that person died leaving several heirs, it was doubted by the ancients what the legal situation was, if the legatees or the heirs of the legatee should disagree, and each should want to choose a different slave or different property. 1. We ordain, accordingly, that in all such cases chance shall be the judge, lots shall be drawn and whoever is favored by fate shall have the right to chose and pay to the others their proportions of the value of the property; that is to say, a slave, male or female, more than ten years old, shall, if without a trade, be valued at 20 solidi; if less than ten years old, at ten solidi; if he (or she) has a trade, however, the value shall be fixed up to 30 solidi, whether male or female, except as to scribes (notarii) or physicians of either sex, since we want scribes to be valued at 50 solidi, physicians or mid-wives at 60 solidi; eunuchs less than 10 years old, up to 30 solidi, if older, up to 40 solidi, and if they have a trade, up to 70 solidi. 1a. Where anyone left the right to choose a slave or other property, not to the legatee thereof, but left the choice to be made by Titius, for instance, but Titius either refused to choose or was prevented by death - in this case, too, the ancients doubted as to what the legal situation was, whether the legacy expired or whether some person of honor should make the selection. 1b. We, therefore, order that if he who was directed to choose should fail to do so within a year, or he could not do so, or should die, the right of selection shall be considered as given to the legatee himself, but he shall not select the best slave or the best property, but that of medium value, lest we defraud the heir by favoring the legatee. 2. And while our majesty has heretofore in many cases looked after the interests of legatees and beneficiaries of a trust, as we have given them the right to a personal action, an action in rem (vindicatio) and a hypothecary action, and have abandoned the dark error of putting in possession of property (missio in rem)[5], we now come to the present law. 2a.

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[4] [Blume] See headnote to C. 6.37.
[5] [Blume] See [footnote 2] to law one of this title.

Therefore, let no heir hereafter think that, according to the former law, he may alienate or pledge or mortgage property left as a legacy, either unconditionally or for a certain time, or property which he has been ordered to transfer to others, or for which substitution in his place has been provided, or that me may manumit a slave in the same situation, but he must know that he may not make a grant of someone else's property, as though it were his own, to another, because it is absurd and irrational that property which a party does not own unconditionally might be transferred, pledged, mortgaged, or manumitted by him, thus disappointing another's hope. 3. And if, moreover, a legacy, universal[6] or specific, is left upon condition or for an uncertain period, or if a provision for substitution or restitution is attached thereto, the heir would do better even in these cases to refrain from selling or mortgaging the property covered thereby,[7] lest he undergo the graver burden of eviction. 3a. But if he should proceed to make a sale or give a hypothecation through avarice, and in the hope that the condition would not be fulfilled, he may know that when such condition is (in fact) fulfilled, his transaction will be void as from the beginning and will be considered as if not made at all, and no usucaption nor the prescriptive period of a long time shall be any defense against the legatee or beneficiary of a trust. 3b. We direct that this shall, similarly, apply to cases when legacies are bequeathed unconditionally or for a certain time, or conditionally or for an uncertain time, and in all these cases the legatee or beneficiary of a trust shall have every right to claim the property and have it assigned to himself; and no obstacle shall be put in his way by those who have the property. 4. A purchaser, moreover, who knows of the burden on the property, shall merely have the right (in case of eviction) to recover from the vendor the price which he paid, and any stipulation for payment to him of double the amount shall be invalid; nor shall he have any claim for improvements which he may have made, and all that is necessary is to return to him simply the price which he knowingly paid for someone else's property; but a creditor shall have the right to sue the pledgor for his loss in an action on the pledge, in order that what we what to accomplish will be zealously complied with in every respect and in order that the last wishes of decedents will be performed in a legal way. The rights of purchasers in good faith against vendors remain, of course, unaffected and are not in manner impaired by this constitution.[8]
Given at Constantinople September 1 (531).

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[6] [Blume] Where the trust consists of the whole of an inheritance.
[7] [Blume] See [footnote 2] to law 1 of this title.
[8] [Blume] See note to C. 8.44.27. The present law was modified in some particulars as to alienations for dowry and prenuptial gifts made from property left as a trust to children, in Novel 39, c.1. As to effect of [illegible] alienation being void—C. 4.51.7.