Book VIII.
Title LVI.

Concerning gifts in contemplation of death.
(De mortis causa donationibus.)

Bas. 47.3.45, et seq; Dig. 39.6.[1]

Headnote.

Though not necessarily so, a gift in anticipation of death would usually be made at the time of sickness or danger, and subject to a condition precedent, so that title to the property would not pass unless death occurred, or under an agreement with or without the formal stipulation, that if the donor did not die, the property should be returned (D. 39.6.2), in which latter event the property could be recovered by the unjust enrichment action (condiction, C. 4.5 h.n.). Under Justinian, the agreement for return was, perhaps construed as a true condition subsequent, authorizing an action in rem (vindication) for its recovery. D. 39.6.35.3 and 6.29 (itp). Without reference, however, to such condition or agreement for return, the gift was, just as a legacy, revocable at the pleasure of the donor (D. 39.6.16 and 30), though probably not in all cases under classical law. 38 Z.S.S. 238. The gift gradually acquired the character of a legacy. Thus it was subject to debts (D. 35.2.66.1), and to the right of the heir to his fourth. Law 2 h.t. Justinian considered it in the nature of a legacy, not requiring registration, as some of the gifts; and while in classical law it was executed as other gifts, Justinian required five witnesses. Law 4 h.t.

8.56.1. Emperor Alexander to Dophena.

If a gift to two is so limited that if one should die first, his portion of the gift should go to the other, and the gift in anticipation of death was completed, an action on a trust arises when the condition comes into existence.
Promulgated September 29 (223).

8.56.2. Emperor Gordian to Zoilus.

If your former daughter-in-law has died intestate, your granddaughter, born to your daughter-in-law and your son, can at some time receive her mother's inheritance. 1. Your daughter-in-law, however, was not, after the death of your son, by whom she had the daughter, when she contracted another marriage and gave a dowry, forbidden to affix to such dowry whatever condition she wanted. 2. And if (at that time), with the intention to make a gift in contemplation of death to her brother, she permitted the latter to exact a stipulation, in his favor, for the return of the dowry, in case of her death, to him, (still), since in the constitution of the Divine Severus provision is made about mortis causa gifts (to make up the deficiency) if the heir does not, out of the remaining property have so much as the Falcidian Law gives, he (she) who will be the heir of your daughter-in-law is not prevented from invoking the benefit of that constitution.
Promulgated January 23 (239).

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[1] Blume penciled in at the top of this page: “Revised October 9/31.”

Note.

The daughter in law, upon her second marriage, gave a dowry to her husband, but by reason of a stipulation, that dowry was to go to her brother, in case of her death, made him a gift mortis causa. This gift was, however, in the nature of a legacy, and subject to the rights of the (Falcidian, C. 6.50) fourth to which an heir was entitled.

8.56.3. Emperors Diocletian and Maximian and the Caesars to Heredes.

A sister is not permitted to annul a gift of her brother, in contemplation of death, legally made.
Subscribed at Sirmium December 30 (293).

8.56.4. Emperor Justinian to Johannes, Praetorian Prefect.

Since there was a doubt as to a gift in contemplation of death, some considering it as a last wish, in the nature of a legacy, others, however, considering it more in the nature of a gift between the living, we settle their doubt and ordain that all gifts in contemplation of death, whether made just before the death of the giver or sometime before, with the thought of (subsequent) death, shall not require registration, nor await the presence of public officials nor anything else usually observed in connection with such documents (which require entry on the public records). But the matter may be done so that if a man wants to make a gift in contemplation of death, in the presence of five witnesses, either in writing or without writing, the transaction shall, without the accession of a (written) memorial[2] be fully valid and not subject to any attack. Nor shall it be considered inefficacious or useless because not entered on the public records, but it shall have the same effect as gifts under a last will, and shall not be considered different in any respect.
Given at Constantinople September 1 (530).

[2] [Blume] "Monumentorum" might refer to the records just as "gesta" in the next sentence.