

Book VI.
Title XXXIX.

If a testament is disregarded.
(Si omissa sit causa testamenti.)

Bas. 44.26; D. 29.4.

Headnote.

Defeat of legacies and trusts.

An inheritance under the Roman law was not always a benefit. It might be so burdened with debts, legacies and trusts that it would be a distinct disadvantage. And an appointed heir was not ordinarily compelled to accept (except in the one case where an undivided portion or a whole inheritance was to be transferred by the heir as a trust (Headnote to 6. 49), and if he did not, the will failed for that reason. So a will might be completely defeated by reason of its invalidity. In these cases all the legacies and trusts left in this will would, of course, also fall with it, and the heir or heirs who then took the property on intestacy, were not, generally, compelled to pay the legacies and trusts. C. 3.28.13; C. 6.39.2; C. 6.42.29, D. 29.4.17; D. 40.5.24.11; D. 40.5.47.4; D. 32.1.9; C. 6.23.3; Inst. 2.17.2. There were, however, several exceptions, among them the following:

1. The testator might provide that even if his will should for any reason fail as a testament, that it should, nevertheless be valid as a codicil (informal will), and that he wished his intestate heirs to carry out the trusts left by him. In other words, he could charge any of his heirs, whoever they might be, including those on intestacy, to give or do something. In such case the heir on intestacy was compelled to carry out the testator's wish. C. 6.42.29; D. 40.5.47.4; see C. 6.36.8.

2. Instead of one heir, two or more might be appointed by the testator. It did not matter in such case that one or more of the heirs refused to accept, provided someone or more of the heirs did in fact accept. Their share was increased proportionately by the share or shares of those who failed to accept (C. 6.51), but this additional share, which they could not refuse, was burdened with the legacies and trusts against it and they, as substitutes, were compelled to pay them or carry them out. C. 6.49.4; C. 6.51.4.10; D. 31.61.

3. Again, an heir appointed under a valid will, who was charged with the payment of a legacy or trust, could not, as shown by the within law, defeat the payment of legacies or trusts by fraudulent means, as by renouncing his rights under the will and claiming the inheritance as on intestacy, or by making a fraudulent agreement with a substitute, or with an heir on intestacy, or by other ways. To the same effect see C. 7.2.12; C. 7.4.1; D. 29.4.1 and 6; 1 Roby 302-303; 9 Cujacius 775, 778. Both the heir as well as the party, if any, who through collusion with him would obtain the property, were, in such case, liable for the payment of the legacies and trusts left in the will, subject to the Falcidian fourth. D. 29.4.2; 4; 10; Roby, supra.

4. If a will disinherited descendants unjustly, and the will was set aside as unjust, legacies and trusts and manumissions were required to be carried out, subject, as to legacies and trusts, to the legal portion which the law allowed such descendants. C. 3.28.4 and 13; Nov. 115, c. 3, sub. 15, appended to C. 3.28.

5. If the will failed in effect because the right of possession of the inheritance contrary to the will was granted, as mentioned in note to C. 6.12.2, legacies to certain relatives were required to be paid. See that note.¹

6.39.1. Emperors Severus and Antoninus to Januaria.

If you can prove that the inheritance was (not accepted by the first heir) but was passed on to the substitute to defeat the legacies, you have an analogous action (*utilis*) against such substitute, as a participant in the fraud. And if the heir neglected to accept the inheritance in consideration of a compensation, he also is clearly liable for all legacies and trusts.

Received October 1 (196).

6.39.2. Emperor Philip and Caesar Philip to Victoria.

It was decided long ago, that if a person who could obtain an inheritance under a will, preferred to receive it as on intestacy, he could not thereby prejudice any manumissions provided for in the testament. 1. But if the will of the deceased should be disregarded because an inheritance could neither be accepted nor the rights of possession thereof claimed by reason of it, and the testament is invalid under a rule of law, bequests cannot be claimed thereunder. And if the rights of the appointed heir under a legally executed will cease (and he is guilty of no fraud), and someone else accepts the inheritance on intestacy, it is clear that neither manumissions nor legacies given by the testament can be claimed.

Promulgated January 1 (245).

6. 39. 3. Emperors Diocletian and Maximian and the Caesars to Aper and Pia.

If Proculina left a legacy in her will to your father, whose heirs you are, and the legally appointed heirs inherited his property either pursuant to the will, or, upon disregarding the will, as heirs on intestacy, you may go before the proper judge and he will order the bequests left to you to be turned over to you, in so far as the Falcidian law permits.²

Given at Sirmium December 18 (293).

¹ Blume has penciled in here: “Was not this also finally controlled by Nov. 115,c. 3 [illegible] 15?”

² [Blume] I.e. the heirs being permitted to retain a fourth.