Book VI.
Title LI.

Concerning abolishing lapses (escheats.)
(De caducis tollendis.)

Bas. 44.30.1.

Headnote.

If a thing was left by will to a person, but such person did not, for some cause, take it, that thing was called caducum or lapse, as if it had fallen from him. Ulpian, Frag. 17.1. It might apply to a share in the inheritance, as well as to a legacy or trust. Justinian, in this title, speaks of lapses which arose from the fact that a gift was void from the beginning. Such gifts, as stated by the emperor, were considered as not given at all, as for instance where a person left a legacy to himself, to a person not inexistence, or to a person in captivity. C. 6.24.1; D. 36.8; D. 48[1] fr. 6, 10, 14, 15, 22. In all these cases, the portion, which the party to whom it was left could not take, because the gift was void from the beginning, simply was distributed, as though no such provision had been made, and it was never put in the same class with lapses proper. The failure of such a gift was not, properly speaking, a lapse, for a lapse implied that a valid devise or bequest had been made, which the party to whom it was made could not or was not willing to take. A lapse further implied that a will had come into operation, and a lapse in such case was spoken of as a lapse proper. However, some lapses occurred after the testament was made but before the death of the testator, and were stated to be the equivalent of lapses (in causa caduci). The two kinds seem to have been treated alike.

Justinian says that civil wars were the cause of the introduction of the former rule of lapses - presumably to enrich the treasury of the state, and, perhaps, also for purposes of revenge. How true this is, we do not know. Tac., Ann. 3.25 and 28, says that the Papian law, frequently mentioned by Justinian, was introduced by Augustus (A.D. 9) to strengthen the Julian law for punishing celibacy and enriching the treasury; that marriages and births of children were not, however, increased; that spies were appointed who were encouraged by the Papian law with rewards to watch such as neglected marriage "in order that the state, as the common parent, might obtain their vacant possessions." At first - in the absence of substitutes, who came to be appointed in order to evade the law - lapses went to children or parents of the testator; failing these, to such heirs or legatees (as the case might be) as had children; failing these; the lapses escheated to the treasury. Gaius 2.206 and 207, 286; D. 30.96.1. But, according to Ulpian 17.2, the emperor Caracalla provided that only children and parents of the testator were entitled to the lapses in such cases; on failure of these they became the property of the treasury. Under former laws, unconditional legacies vested at the death of the testator, but in order to increase the number of lapses, the Papian law provided that they should not vest until the time of the opening of the testament. Ulpian, Frag. 24, 31.

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[1] It appears as if this reference should be to D. 36, given that D. 48 concerns criminal proceedings, while D. 36 is relevant to present topic.

Under the Papian law property given to a person who was not a near kinsman of the testator and who, contrary to law, lived in celibacy, could not take the property unless he married within one hundred days. Gaius 2.111 and 286; Ulpian 17.1; 22.3. A celibate was an unmarried man between the age of twenty and sixty, or an unmarried woman between the age of twenty and fifty. Ulpian 16.1. So a childless person - a man between the ages of fifty and sixty - unless within the third degree of relationship, could, even though married, take only half of the property left him, the other half lapsing. Gaius 2.111 and 286. A celibate and childless person was at first enabled to take a trust, but that was early forbidden by the Pegasian law in 71 A.D. Gaius 2.286. Again, husband and wife could only give the usufruct and certain tenths of the fee of property to each other, unless the parties were not within the ages above mentioned, or unless they were cognate relatives within the sixth degree, and with certain other limitations. Ulpian 15 and 16. This was abolished in A.D. 410 (C. 8. 57. 2), and husband and wife might thereafter leave to each other what they wished, subject to the Falcidian law.

Under the Christian emperors lapses gradually ceased to exist. The law of Constantine, passed in 320 A.D., as amended by Justinian (C. 8.57.1), abolished the penalties for celibacy and childlessness and Honorius and Theodosius, in 410 A.D., abolished the limitation of leaving only certain tenths to husband or wife, though there were no children. C. 8.57.2. Hence by the time of Justinian the ancient lapses, as stated by him, had almost ceased to occur. Justinian, by the within constitution, gave a final blow to the old rules of lapses, reinstating the original law as to the time of vesting and regulating the succession of gifts that failed, in detail, applying the law of accretion to other heirs or legatees in such cases, which also had been in force under the law as it was before Augustus. When such right of accretion existed, the person taking the accruing portion was required to bear its burdens against it. C. 6.51.4 and 9c; also C. 6.49.4; D. 31.61.

The laws in C. 6.62 are related to the present title and should be read in connection therewith.

6.51.1. Emperor Justinian to the senate of the city of Constantinople and of Rome.

We have thought it necessary conscript fathers, to banish from the Roman empire, in the peaceful times of our reign, both the name of escheats,[2] as well as the grounds therefor, which arose from, and increased by, civil war which the Roman people carried on among themselves, so that what was introduced by the calamities of war may be banished by the blessings of peace. 1. And as the Papian law was, in many respects, corrected by former emperors and at last fell into desuetude, so, too, it shall lost its hateful vigor in its application to escheats (caduca) by us, inasmuch as it was displeasing even to the great jurists who found many ways to avoid the occurrence of lapses (caduca).

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[2] [Blume] Justinian did not abolish lapses, using that term as failures of inheritances, legacies or trusts, as is abundantly attested by this law. He abolished the ancient rules relating thereto, and substantially, but not entirely, abolished caduca, if understood in the sense of escheats to the State. Section 12 infra. Where an inheritance, legacy or trust lapsed, that is to say, failed, so far as the beneficiary designated by the testator was concerned, it went to substitutes, joint beneficiaries or other person designated by this law, and the property did not escheat to the State unless there was no one else to take it.

1a. And adherence to the rule of lapses was seen to be burdensome by testators themselves, and they introduced substitutes, so that no lapses would occur, and if they did, directed that the property should in such case go to other persons, thereby avoiding the conditions under which bequests were declared to be lapsed by the Papian law. And we permit that to be done. 1b. And since the Papian law surrounded the ancient law, which was applicable to all alike, with difficulties and artifices, but blushed to impose its yoke on the ascendants and descendants of the testator to the third degree, if they were appointed heirs, leaving the ancient law applicable to them, we do this for all our subjects without distinction.[3] 1c. Since, therefore, the Papian law found the material for, and the beginning of, lapses, in connection with entrance on inheritances, the senate decrees enacted in connection with the Papian law, not permitting the vesting of property as of the time of the testator's death, but as of the time of the opening of the will, so that property lapsed which the beneficiary thereof was in the meantime found to be unable to take, we, in correcting this and restoring the ancient law, ordain, that all heirs shall have the right to enter an inheritance at the time of the testator's death, and legacies and trusts, unconditional or payable at a future time, shall vest at the death of the testator. 2. And since bequests left in last wills were held to lapse in three different ways, it is proper to state the times and the names thereof, so that it may be known what is abolished and what is reformed. 2a. Now these bequests were made to those who, without the testator, perchance, knowing it, were not in existence at the time of the making of the last will. These bequests were, by the laws, considered as though not made. Again, a person who received something under a testament, while the testator was living, but died after the testament was made, or some bequest was defeated because some condition failed under which it was left. This was by the ancients considered the same as a lapse. Or a bequest terminated after the testator's death, which was more clearly called a lapse. 3. The rule as to the first class, namely when bequests, which had been left to persons already deceased at the time of the making of the testament, were considered as not made, was that such bequests remained the property of those who had been directed to pay them, unless a substitute for, or a joint beneficiary with, such deceased person, had been provided; for in such case no lapse took place, but the bequests went to such substitute or joint beneficiary, and the burden charged upon such gift, considered as not made, seldom went with it.[4] 3a. Our majesty directs that this rule shall remain in force and unimpaired for all

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[3] [Blume] Under the former laws, as already stated in the headnote and also stated below, legacies or inheritances left to persons lapsed in certain cases and became the property of the fisc. That was true, for instance, in case a part-heir died before the opening of the will. But, under the ancient law, if in such case an ascendant or descendant of the testator to the third degree was also appointed as heir, and was, therefore, a coheir of the person whose inheritance ordinarily lapsed, the lapsed portion did not go to the fisc, but went to the coheir. This is what is meant by Justinian, when he says that the yoke of the ancient laws was not imposed on them. Now the same right that was under the ancient laws extended to the ascendants and descendants aforesaid was by the present law extended to all heirs. Buckland 211.

[4] [Blume] If a legacy was given to a person who was unable to take it, it was considered as though not written - not given. But if a substitute had been provided or a joint beneficiary, the gift did not fail entirely, but went (1) to the substitute, (2) to a joint

future time, as it is in consonance with the spirit of ancient benevolence and is supported by natural justice. 4. But as to the second class to which belong all terminated bequests which are the equivalent of lapses, we correct the laws which led to such result, and ordain that such bequests, in like manner, shall remain the property of those who were directed to pay them, such as heirs or legatees, or others who may be burdened with a trust, unless in such case, too, a substitute or joint-beneficiary has the preference. But all persons who are benefited in this class of cases must bear the burden, which was annexed to the bequest from the beginning, whether that consists in giving or doing something, or is intended for a certain purpose, or to fulfill a condition, or is imposed for any other reason; for it would be intolerable that he who receives a benefit should be able to reject the burden annexed thereto.[5] 5. In the last class of cases, that of lapses proper, according to what we have previously said, the heirs, whether appointed for part or all of the inheritance, shall be considered as such while the will is still unopened, and may enter on the inheritance, at the time of the testator's death, and, as we have previously stated, the

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beneficiary. Otherwise it was treated as though entirely void, and remained the property of the person charged with the payment thereof. And though such legacy was charged with a burden, for instance with a trust to give something to or do something for another, this burden was ordinarily also void, or, as here expressed, but seldom went with such legacy. This point is again referred to below in 9e, where it is sated that sometimes the burden went with the legacy - that is to say, the person who would get it was charged with this burden. There were apparently only two of these cases. 9 Cujacius 825. If a legatee who was unable to take, was directed to make a manumission, the legacy carried its burden with it, whoever might get it. D. 40.5.26.6. So if a man gave a legacy to himself, directing that it be restored, that is to say, transferred to another, the legacy was considered as "though not written," and yet the heir was compelled to carry out the trust. D. 34.8.5.

[5] [Blume] Failure of legacies, etc. There were a number of ways in which a legacy or trust or inheritance might fail. Thus, as here stated, it might be invalid from its beginning, because the beneficiary was incapable of taking. Again, what had been bequeathed might not be the object of a gift. Mackeldy §776. Again, the gift might be revoked. C. 6.42.27. In these cases the gift was absolutely void except as mentioned in note (c) supra. Again, it might be taken from the donee because of unworthiness. C. 6.35; §12 infra. In such case it was forfeited to the fisc. Again, it might be taken away as a penalty for not complying with a condition prescribed by the testator. So, too, where the object of the gift ceased to exist or became so changed as to destroy the property in it, the gift failed and was void. Inst. 2.20.6. That was true also where the gift had lapsed - a subject dealt with in this title. This lapse might occur before or after the death of the testator. If an heir died before the testator, the inheritance given him could, or course, not vest in him at any time, and it therefore failed. If a substitute had been provided, the substitute took. If a legatee or beneficiary of a trust died before the testator, the gift failed, and it went (1) to a substitute; if there was none (2) to a joint beneficiary; if there was none (3) to the person who was directed to pay the legacy or trust. But whoever received such lapsed portion took it with whatever burdens rested upon it. Lapses occurring after the death of the testator are dealt with in the subsequent portion of this law.

legacies and trusts shall vest at the time of the decedent's death; but an inheritance, unless accepted, could not, according to the ancients, be transmitted (to heirs), nor do we permit such transmission, except, of course, in the case of descendants, as stated in the Theodosian law (C. 6.52.1), introduced for such cases, and (further) the provisions made by us (D. 6.30.19), concerning those who die while deliberating (whether to accept an inheritance or not), shall remain in full force.[6] 6. Manumissions, of course, which, on account of their nature, have to wait the acceptance of the inheritance by the heir, and bequests left to slaves manumitted in the will or to slaves bequeathed to others, vest from the time that the inheritance is accepted. 6a. A usufruct, too, which by reason of its nature cannot be transmitted to the heirs of a legatee, vests, so far as transmission is concerned, neither at the time of the testator's death, not when the inheritance is entered on. 6b. All these provisions apply, according to the specified terms, to bequests which are left unconditionally or are due at a definite time. 7. If any bequest is left on condition, which either depends on chance, or on the will of the donee, or is mixed, that is to say, the outcome of which depends on a chance-event of nature, on the wish of the person honored, or on both, or on the arrival of an uncertain day, the outcome of the condition under which it was left or the arrival of the uncertain day, must be awaited, so that it may vest when the condition is fulfilled or the uncertain day arrives. And if he too who receives a benefit under a testament dies in the meantime, or if the condition fails during his lifetime, such bequest which on that account did not remain in force, we direct, become the property of those who were directed to pay it, unless a substitute or joint beneficiary, whether that is an heir or legatee, has been appointed; for in such event, the latter will receive it, since the law is certain that a substitute may be appointed in instituting heirs, giving a trust, or making gifts in anticipation of death.[7] 8. But in order

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[6] [Blume] The foregoing provision treats of the time when an inheritance, trust or legacy would vest, so as to be transmissible to the heirs of the beneficiary. Now an inheritance did not vest until it was accepted, with three principal exceptions: (1) Where an unemancipated child or other self-successor was the heir; the inheritance vested in him without acceptance by operation of law, notwithstanding the fact that he had a right to refuse it. Note 6.30.3; (2) where a testator or testatrix left property to his or her issue - aside from the issue mentioned in the first exception. If such issue died before the opening of the will, so that there was no acceptance, the inheritance nevertheless passed to the heirs of such issue; C. 6.52.1; (3) where an heir, not a self-successor, died within a year after knowledge of the gift, or within the time granted for deliberation as to whether to accept or not, without having declared his determination. C. 6.30.19.

[7] [Blume] The foregoing provisions relate generally to the vesting of legacies and trusts. If they were unconditional, or given from a day certain, or simply under a resolutive or dissolving condition, they vested on the day of the testator's death, and were transmissible to heirs. Suit for the payment of the legacy could not, however, be instituted, till the heir had accepted, and if the legacy was to take effect from a certain day, till the day had arrived. If the legacy or trust was given upon a suspensive condition, or from an uncertain day, the vesting thereof depended on the performance of the condition or the arrival of the day, and if the condition was not performed or the day did not arrive, the gift failed. Mackeldy §767. Usufructs and manumissions were governed by special rules and vested only when the heir entered on the inheritance. Buckland 340.

that it may be made clear, in what proportion the bequest which failed shall become the property of those who are directed to pay it, we ordain that if the benefit accrues to the heirs, distribution shall be made according to the proportions inherited, since, had the bequest remained valid, it would have been paid in like manner - unless it was directed to be paid by one or more of the appointed heirs; for if one or more would have paid it, so they shall, in such case, also be the gainers. 8a. But if (the persons directed to pay it) are legatees, trustees, persons honored with a gift in anticipation of death, or other persons who may be burdened with a trust, and the trust fails, we ordain that it shall become the property of the enumerated persons, according to each one's proportion, that is, according to the number of persons. 9. In order, moreover, that we may not over what Ulpian, a man of the greatest genius, elegantly and with acumen stated in this connection, we shall make that plainer by this law. 9a. For since we have already decided, that a person who benefits by a bequest must take it with all its burdens, we ordain that if a condition or a burden directing something to be given is annexed thereto, all the parties who are benefited must bear the burden in proper proportion. 9b. If the burden consists of something to be done, even though this can be done by another, each beneficiary must, in like manner, do his part; as, for instance, where the person honored is ordered to construct a lodging house, monument or other structure, or the heir, legatee or some other person for whom the testator wished it to be constructed, or to purchase certain property from the heir of the testator or to make a lease or become a surety, or to do anything else similar to this; for it makes no difference in such case whether this is done by the person named by the testator or by another who succeeds to the bequest. 9c. But if the meaning of the direction given and the nature of the act to be done, are such that what was directed to be done cannot be done through another, then through the benefit accrues to such other, the burden, nevertheless, does not follow, since the nature of the act does not permit it and the testator did not wish it. For how could it be otherwise if the testator, for instance, had ordered a party to go to a certain place, or to devote himself to the liberal arts, or to build a house with his own hands, or to paint, or to marry? The testator must be considered to have intended all these things for the person only to whom he left his bounty in the first place. 9d. The general rule in all these cases is that all the parties who are benefited shall bear their proportionate burden, when the duties imposed are possible to be carried out. 9e. And this shall apply to situations which give rise to lapses proper an terminations equivalent to lapses, as stated above; but this shall apply to bequests (of the first class above mentioned) which are considered as not given at all only in certain cases. Some of them, though considered as not given at all (etsi talia sunt), are, nevertheless, taken over with the burdens annexed thereto. We have ordered such cases to be specially enumerated in our new compilation of laws, so that no one may reintroduce the prolixity of the ancient law as necessary on the subject or for the purpose of study thereof.[8] 10. Now this being settled, we find that in the preceding part of this constitution we made mention in several places of joint beneficiaries, and we have thought it necessary to consider this subject with greater care and treat it in greater detail, so that this subject, too, may be clear to all. 10a. Bequests are left not only jointly but also severally (disjunctivo). When coheirs have all been appointed or substituted jointly or all severally, a lapsed bequest consisting of a part or parts of an inheritance, belongs, subject

[8] [Blume] See [footnote 4] supra.

to all of its burdens, to the other coheirs in proportion to the parts inherited by them, even though some of them are already deceased. 10b. And this applies even to those who are unwilling to accept the lapsed portion, if they have accepted their portion for which they were originally appointed, since it is absurd to accept part and refuse part, as has also been provided by decisions of our majesty. C. 6.30.20. 10c. If the heirs and substitutes are mixed in kind, some having been appointed jointly and others severally, and the portion of one of those appointed jointly lapses, this portion, with its burden, shall go only to those who were appointed jointly with him, in proportion to the amount inherited by each. 10d. If, however, a portion of one of those who were appointed severally lapses, this portion, with its burden, goes not only to those who were appointed severally, but to all alike, those who are appointed jointly and severally, in proportion to their inheritance. 10e. The distinction is made because those who are appointed jointly constitute one person, as it were, on account of the unity in the appointment, and hold the portion of the joint heirs with them as their own, but heirs appointed severally have, by reason of the very words of the testator, been separated and have indeed their own, but cannot alone claim another's property, but receive it jointly with all their coheirs.[9] The foregoing provisions are made only for heirs. 11. When there are, perchance, two or more legatees or trust-beneficiaries, to whom anything was bequeathed, and this is left to them jointly and all accept, each one receives his proportion. 11a. And if the part of one of them lapses, it, with its burden, goes to all in proportion to their bequest, if all want to accept; if none want to accept, then it remains the property of the party directed to pay it in the first instance; if some want to accept and other not, then the whole goes to those who want to accept. 11b. If the property was left severally and all can and wish to accept, each receives his proportional share and they need not expect one of them to take the property, while the others should receive their proportion of the value thereof. When such avarice appeared, antiquity treated it variously, permitting it in connection with some legacies, but rejecting it in connection with others. But we do not permit it at all, and treat all legacies and trusts alike, creating harmony out of ancient discord. 11c. These provisions shall apply, if the testator has not clearly and expressly provided that the property shall go to one, and the proportionate value thereof to the others severally. 11d. If all the legatees, to whom property has been left severally, do not concur in accepting the lapsed portion, but one of them, perchance, accepts, the whole shall belong to him; because the provision of the testator appears, prima facie, to give all of it to each, but in also providing for and joining others, diminishes the portion of the first to that extent.[10] So if no one else accepts or can accept, no one's part lapses or accrues to anyone

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[9] [Blume] The right herein mentioned is called the right of accretion (jus accrescendi), and applied when the portion of a coheir who was required to accept, failed, and there was no substitute. If there was no such coheir, but only one heir, who was required to accept, then the property went to a substitute if there was one; and if not, to the intestate successors of the testator, and failing them, only as a last resort to the fisc. Section 13, infra. The right of accretion also applied to intestate succession. Mackeldy §753. It will be noted here, that a coheir who received a portion of the inheritance could not refuse it. That was not true in case of legacies and trusts, as is stated later on in this law.

[10] [Blume] When anything was left to one, and afterwards any part of it to another, the first legacy was held to be pro tanto reduced. C. 6.37.23. It may be here stated that a

else, so that the party first receiving a legacy would seem to be increased, but his legacy, all of which was given him in the first place, is simply not diminished by the addition of anyone else.[11] 11e. Thus, if a burden is imposed on the person, with whom the whole legacy so remains, he must bear such burden and obey the testator's wish. 11f. But if the burden was imposed on the person, whose right lapsed, it need not be borne by one who simply receives his own without being diminished by someone else. 11g. The reason for the distinction is not obscure, because the testator appears to have left the property severally, so that each might bear his own burden without being compelled to bear that of another, for if he had wanted the contrary, he might easily have given it jointly. 12. We also keep in force the ancient laws which provide that unworthy persons shall be deprived of the bequests made to them, some of the bequests, in such case, falling to the fisc, and others to other persons.[12] 13. Since, moreover, we have provided in a preceding portion of this law (§5), that an inheritance not accepted cannot, except in certain cases, be transmitted to heirs, it follows that if anyone fails to accept the whole inheritance, it falls to his substitute, if there is one, and he wishes to and can accept. If there is no substitute, it will fall to the intestate successors, or if there are none of these, or they are not willing to or cannot accept, or they for any reason do not take it, then it falls to our fisc. 14. All these provisions shall apply in (case of lapses arising out of) testaments, written or verbal, codicils, every last wish, every intestate succession, and gifts in anticipation of death. 14a. For so great is our clemency that we knowingly let our fisc be the very last to claim any lapses, and give it no advantage; nor do we exercise our imperial prerogatives, but believe that what is for the common benefit should have preference over our own private

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joint legacy was given in such words as these: "I give and bequeath my slave Stichus to Titius and Seius." A several legacy, thus: " I give and bequeath my slave Stichus to Titius; I give and bequeath Stichus to Seius." Even if the testator in the latter case said "the same slave Stichus," the legacy was still several. Inst. 2.20.8.

[11] [Blume] The reasoning which at first glance seems involved, is, upon consideration, clear. In a several legacy the whole was given to each legatee. If none of the several legatees signified their intention to claim the share of one of the several legatees who did not accept, there was no share, after all, of anyone that lapsed, for the reason that it all belonged to each of them anyway, hence the first receivers, that is to say, the several legatees who accepted their share, could not say that their share was increased because one of the several legatees did not accept. The refusal of one of them to accept meant, rather, that the share which each of them received in the first place, was not diminished by the portion which the non-accepting party did not accept.

It logically followed, as provided further on the law, that if a several legatee refused to accept, and his share alone was burdened with a trust - to do something for someone else or give something to someone else - the trust failed upon such refusal to accept.

[12] [Blume] In some cases a beneficiary was deprived of his advantage because of unworthiness, as already noted. The gift was not treated as void, and was not a lapse, but was forfeited. Thus a guardian who excused himself lost any benefit under a will. D. 34.9.5.2. So did anyone who attacked a will unsuccessfully. D. 34.9.5.1. So did everyone who accepted a secret trust in favor of one who could not take. D. 34.9.10. Buckland 317. See C. 6.35, which contains a number of illustrations.

interests, deeming any benefit to our subjects to be identical with that to the emperor. 15. This law is applicable only, however, to last wills made in the future; former wills must run the risk of the laws of the past. 16. We have thought best, conscript fathers, to bring these provisions to your attention, so that no one may remain ignorant of the labor of our Benevolence, but which shall, by edicts of magistrates, be made known to all in the usual manner.

Given at Constantinople June 1 (534).