Book VI.
Title XXXVII.

Concerning legacies.
(De legatis.)

Bas. 44.4.26; D. 30.32; Inst. 2.20.

Headnote.

An ordinary will at Rome, after the appointment of an heir or heirs, would contain the appointment of a guardian for infant children, if any, and such legacies and trusts as the testator wanted to leave. The appointment of an heir was for the whole of an inheritance, or for some undivided portion of it (as a rule); a legacy, on the other hand, was usually for specific things, such as a horse or furniture or a specific piece of land. Formerly there were four principal kinds of legacy, namely legacy by vindication, by condemnation, by permission and by preception, to each of which a definite form of words was appropriated by which it was known, and which served to distinguish it from legacies of the other kind. Inst. 2.20.2. As distinguished from trusts, they were required to be in imperative form: "To Lucius Titus, I give and leave as a legacy the slave Stichus;" a legacy by vindication; a legacy by condemnation: "Let my heir be condemned to give Stichus, my slave, to Lucius Titus;" a legacy by permission: "Let my heir be condemned to allow Lucius Titus to take and have for himself the slave Stichus;" a legacy by preception (taking beforehand): "Let Lucius Titus pick out first the slave Stichus." A trust, on the other hand could be created by precatory words as the following: I beg, or request, or ask my heir to give the slave Stichus to Lucius Titus. If a gift was not in the imperative, but only in the precative form, it was only a trust and not a legacy. The latter, a legacy, could only be charged on an appointed heir in a will; it could not be left in a codicil, unless the latter was confirmed by a will. A trust could be left in a will, or in a codicil in the absence of a will, and could be charged not only on the appointed heir in the will, but on anyone else who received a benefit under the will, or a codicil. In brief, the chief differences between legacies and trusts under the law before Justinian were as follows:

1. A legacy was required to be given in a formal manner; but any informal declaration of intention, even a nod, might be enough to constitute a trust. C. 6.42.22.

2. A legacy could not be created except by a will or by a codicil confirmed by a will; a trust could be imposed not only by will but by a codicil without a will, and might be charged upon any intestate heir.

3. A legacy could be claimed in an action at law; equity only had cognizance of trusts, and they were enforced even in the formulary period by the praetor or judge under the extraordinary procedure (the procedure without the intervention of a separate trior of facts).

4. Anyone might be the beneficiary of a trust; while a legatee might be disqualified as not legally capable of taking. The differences in this respect, however, diminished under regulations of the emperors. See Leage, Roman Private Law 225-6.

It is beyond the scope of this note to deal at greater length with the special rules which governed legacies as distinct from trusts, for the reason that Justinian by a

sweeping enactment, shown in C. 6.43.1 and 2, and in Inst. 2.20.3, declared that henceforth there should be no difference in the nature of legacies and trusts of single things, but that each kind of gift should have all the advantages of the other. This enactment made it necessary, or at least advisable, to refer to trusts at this time, though they are more fully and specially treated at C. 6.42. At Inst. 2.23.10, it is stated that "legacies have no validity unless given by a will," and in Inst. 2.24. pr., it is stated that "a legatee cannot be charged with a legacy," although he could be charged with a trust. But it would seem that these statements were made simply in accordance with that stated in C. 2.20.3, that legacies and trusts would first be treated separately, so that the reader might thereafter " be able easily to comprehend their treatment in combination." And it seems to be accepted by authors that "under Justinian there was but one kind of bequest, and it was called indifferently legacy or trust." Sohm, Institutes 598; Mackenzie 288, 289; Girard 973. In some respects, however, the distinction between legacies and trusts was maintained. Another man's slave, e.g. could be freed by a trust, but not by direct gift, and trusts of liberty to slaves of the testator, whereby they were required to be manumitted by someone other than the testator, were preserved, though logically these ought to have been construed as direct gifts. Buckland 354.

It must be borne in mind, accordingly, that the laws of the foregoing title generally apply to trusts as well as legacies, which, in fact, is indicated in many of the laws. That is true as well with most of the laws in the succeeding titles dealing with either legacies or trusts, and the word "legacy" ordinarily will include trust and vice versa.

6.37.1. Emperor Antoninus Pius to the freedmen of Sextia Basilia.

Although sustenance and clothing were bequeathed to you for as long as you should live with Claudius Justus, I interpret the intention of the deceased to have been that he wanted to leave you sustenance and clothing even after the death of Justus. Without day or consul.

Note.

The term "as long as" or "in so far as," (quoad) was construed as creating a condition; that is to say, the sustenance and clothing was required to be furnished upon the condition that the freedman would live with Claudius Justus. If this condition was fulfilled, so far as the freedman was concerned, and he was not responsible for its non-fulfillment, he was entitled to the enjoyment of the grant. He was not responsible for the death of Claudius Justus, so the non-fulfillment thereafter did not depend on him, and hence the condition being fulfilled so far as he could do so, he was not deprived of any rights. 9 Cujacius 761. A legacy might, as this law shows, be granted upon condition.

6.37.2. Emperors Severus and Antoninus to Sabinianus.

Although the instituted heirs sells the inheritance, the legacies and trusts can nevertheless be claimed from him, and the vendor can recover from the purchaser or his sureties what was given on that account.[1]

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[1] This reflects Blume's penciled corrections. His typewritten original reads "...or his sureties the amounts of such legacies and trusts." Scott reads the relevant segment as: "or his surities, whatever he has obtained in this way." 6 [14] Scott 33.

Promulgated August 23 (199).

Note.

An heir was always an heir. He was responsible for the payment of the legacies and trusts and could not shift the responsibility by selling the inheritance. C. 4.39.2. In fact, under C. 4.39.2, though the purchaser of an inheritance had agreed to pay such legacies and trusts, and though he was ultimately liable for them and for all debts, he could not, against his wish, be sued by the legatees or beneficiaries of a trust, because of the personal nature of obligations. The purchaser, of course, had the right to have recourse over against such purchaser, when the latter violated his contract. To protect themselves against any unwise or fraudulent sale by the heir, legatees and cestuisque trust had a right to demand security from the heir or to be put in possession of the property. C. 6.54. And under C. 6.43.1, they had the right to bring a hypothecary action, that is to say, they were given a lien on the inheritance, so that, after all, the purchaser of the inheritance, was, after the enactment of that law, in a measure, responsible to the legatees and beneficiaries of a trust. See also C. 2.3.2.

6.37.3. The same Emperors to Victorinus.

A testator who after the making of his testament pledged or hypothecated the lands which he had given as legacies, is not considered as having changed his wish in reference to the legatees. And the opinion is correct that even though the legatees chose to bring a personal action (against the heir to recover the legacies), the lien against the lands must be paid by the heir.

Promulgated April 26 (211).

Note.[2]

Inst. 2.20.12, states, as does this law, that a testator would not be considered as having revoked a legacy by mortgaging it, and the legatee had the right to enforce by action the heir's obligation to redeem. This obligation could also, as is indicated in the present law, be enforced in a personal action brought by the legatee against the heir to recover the legacy. The personal action is here mentioned evidently on the theory that some other action, namely one in rem, might have been brought in this case. This, as 9 Cujacius 762, points out, evidently shows that the legacy in this case was of that species called "by vindication," which might be recovered in an action in rem, whereas some other kinds of legacies could be recovered only by a personal action. Whatever action, in other words was brought, redemption of the lien which had been created on the property by the testator, could be forced to be redeemed by the heir.

6.37.4. Emperor Antoninus to Sulpicius.

A legacy or trust left to slaves is invalid when freedom was not given them in the testament of the master, and cannot become valid even though they acquire their freedom in some manner after the death of the testator.[3]

Promulgated June 27 (213).

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[2] Blume penciled in here: "As to selling—see Inst. 2.20.2 and 45 Z.S.S. 578; G. 2.198; 2 Mélanges Cornil 353 f.

[3] [Blume] See C. 6.27.5 and note; also C. 6.42.28.

6.37.5. The same Emperor to Donatus.

It is not doubtful that an action to recover a legacy will be denied a legatee to the extent that he has purloined property from the inheritance.

Promulgated September 9 (213).

6.37.6. The same Emperor to Julius.

If the primary legatee has accepted the legacies left him, the right of substitution, given at Pontiana, vanished.

Promulgated at Rome April 24 (215).

Note.

In this case the testator had not directed the primary legatee to turn the legacy over to someone else, as he might have done by way of creation of a trust. The gift was a simple legacy, with the only provision that if the legatee should not accept it, it should then belong to another. But the legatee accepted, and the substitute did not, accordingly, get anything.

6.37.7. The same Emperor to Faustus.

If your father bequeathed the Fortidianian farm, as a prelegacy (per praeceptionem) to your brothers and later on also bequeathed it to you, ownership thereof, by reason of both of these bequests being made, is also acquired by you jointly.

1. An error of names, moreover, occurring in the writing does not diminish the right arising out of legacies if no doubt exists as to what slaves or what possessions are bequeathed.

Promulgated July 11 (215).

Note.

A legacy by preception (a taking before) is a legacy which was to be paid before the division of an inheritance. It was also called praelegatum-prelegacy. If there was only one heir, who got all the inheritance, it could, of course, have no application. But if an inheritance was given to two or more, and the testator provided that one of them should have a prelegacy, this legacy was paid first, and the remainder only was divided.

In this case the same property was given first to the brothers, and later also to the suppliant in this rescript. The first gift had not been revoked, and hence was only modified by the subsequent gift, so that all the parties took ratably. Law 23 of this title.

6.37.8. The same Emperor to Demetrius.

His oath as a soldier (religio sacramenti) deprived Marcellus, whom you state to have been appointed as your guardian by your father, in his testament, of the right to manage the guardianship. But that does not prevent him from acquiring a legacy (given to him as compensation); nor is he justly barred from claiming it, since he is forbidden to manage such guardianship even should he wish to do so.

Promulgated at Rome March 8 (216).

Note.

A soldier could not act as guardian. C. 5.34.4. In the ordinary case if a legacy was left to a person to compensate him for acting as guardian, and he did not act, he lost his legacy. Law 25 of this title. But, as provided in the present rescript, that was not true in the case of a soldier.

6.37.9. Emperor Alexander to Antiochus.

If, in defeat of legacies left in a testament, an accuser has arisen who claimed that the testament is forged, the president of the province will, according to the rule governing his jurisdiction, order the legacies to be paid upon the giving of a bond for their return in case the heir is evicted from the inheritance (under such testament), although a bond is otherwise (also sometimes) provided for in cases when the legacies are paid without litigation.

Promulgated February 7 (223).

Note.

It was the policy of the law that legacies and trusts should be paid promptly. C. 3.31.12; C. 6.47.2. But the heir might suffer thereby, for all sorts of disputes might arise against him in relation to the inheritance, so that he ultimately would get nothing, or not as much as the law allowed him, if he should pay out legacies and trusts. To protect him against this, he was permitted to require indemnity. C. 3.31.12; D. 35.3.4 pr.; 9 Cujacius 738. That was true even in some cases where there was no pending controversy. And the present law means to state in the latter part thereof, that although bonds are sometimes required in cases where there is no controversy, still that does not prevent a bond from being given and required in cases where there is a controversy. Cujacius, supra.

6.37.10. The same Emperor to Ingenua.

If anyone has knowingly bequeathed another's property, either as a legacy or trust, it may be claimed by the legatee or cestui que trust. But if the giver thought the property his own, the bequest is not valid, unless given to a person in close relationship with him, as, for instance, to a wife or other like person to whom he would have made the bequest even had he known that the property did not belong to him.

Promulgated January 28 (227).

Note.

Another's property might be given as a legacy. In such event, the heir was compelled to purchase the property and deliver it, or pay the legatee the value thereof. Donellus 503-508.

6.37.11. The same Emperor to Albinianus.

A daughter has no right of action to recover a legacy, if the father afterwards, during his life, gave her the property bequeathed to her in his testament, as a dowry.

Promulgated March 3 (231).

6.37.12. The same Emperor to Mucianus.

Since in the response of the wise Papinian, which is copied in your petition, it is declared that a prelegacy may be claimed (by the legatee), though the inheritance (also given to the legatee) is not accepted, you can see that your wishes are according to the rule of law. 1. The words of the response are as follows: "A mother bequeathed an estate to her daughter thus: Let her take it as a special legacy outside of her portion of the inheritance." And though the daughter had renounced the inheritance from her mother, nevertheless it was deemed best that she should be able to claim the legacy.

Promulgated July 11 (240).

Note.

In C. 6.30.20, it is stated that an inheritance cannot be accepted in part and refused in part. But that did not, as shown by the present law, apply where a legacy was given to one who was also appointed as heir. As to prelegacy, see note to law 7 of this title.

6.37.13. Emperors Diocletian and Maximian to Severa.

It is clear that your own property could not be bequeathed to you or given to you as a trust.

Promulgated April 17 (286).

6.37.14. The same Emperors to Tatianus.

It is clear that sepulchers cannot be bequeathed; but no one is forbidden to bequeath the right of burying a dead person therein.

Promulgated August 31 (286).

6.37.15. The same Emperors to Terentius.

If all of the property which your father left is consumed by fiscal or private debts, the provisions in the testament have no force. 1. But if there is property left after payment of debts, the law does not permit manumissions to be impeded, since even legacies and trusts must be paid, reserving (to the heir) the right under the Falcidian law (to retain one-fourth of the inheritance).

Promulgated September 29 (290).

Note.

Debts under the Roman law, as with us, too precedence over all other claims against the inheritance. D. 36.1.1.17. In fact the heir was responsible for all of the debts, though the estate did not suffice, unless he made an inventory as stated in C. 6.30.22, in which even he was not responsible for more than the amount of the estate. If something was left after the payment of the debts, manumissions were entitled to the first claim. Whatever was left after that was divided in the proportion of three-fourths to the legatees and beneficiaries of a trust and one-fourth to the heir under the Falcidian law mentioned in C. 6.50.

6.37.16. The same Emperors and the Caesars to Scylla.

If a creditor contends that a property, which he had held as a pledge, was bequeathed to him by his debtor, he may defend a suit against restitution, though his debt is paid by the heirs.

Subscribed at Sirmium January 15 (294).

Note.

Doubtless in this case, the legacy was not given in payment of the debt. D. 31.85, states that where such legacy was made the creditor was not forbidden to collect the debt, unless it clearly appeared that the legacy was made in payment of the debt.

6.37.17. The same Emperors and the Caesars to Eutychianus.

It is agreed that a legacy, bequeathed either unconditionally or conditionally, may be revoked, not only when bequeathed to freedmen but also when bequeathed to free-born men.

Given March 4 (294).

6.37.18. The same Emperors and the Caesars to Justinus.

A legatee can have no direct actions on a bequeathed account, when they[4] were not assigned by the heirs, but he has the right to analogous actions in his own name.

Given December 8 (294).

Note.

C. 4.15.5 states that the "direct" action would be that which would be brought in the name of the heirs. See C. 4.39.5 note.

6.37.19. The same Emperors and the Caesars to Niconis.

A husband who has been such for only two months and even a shorter time, succeeds to the property of his wife if he has been appointed her heir. Nor does the briefness of such time forbid him to receive legacies, trusts or gifts.

Given at Nicomedia December 9 (294).

6.37.20. The same to Eutychianus.

The wife of your uncle could not bequeath your property, in which she had only a usufruct, by making a testament.

Given December 26 (294).

6.37.21. Emperor Constantine to the people.

Formality or words is not necessary to leave legacies or trusts, so that it makes no difference what case (of a noun) or what manner of speaking a man uses in expressing his wishes in that respect.

Given February 1 (339).

6.37.22. Emperor Justinian to Mena, Praetorian Prefect.

We direct that annuities, provided by legacies or trusts, which the testator wanted paid not only to a certain person, but also to his heirs, shall be so paid according to the wish of the testator to all heirs and to the heirs of the heirs.

Given at Constantinople December 11 (528).

Note.

The full import of this law cannot be understood unless read in connection with C. 3.33.14, which deals with a legacy of a usufruct to an "heir." In that case the term "Heir" was limited to the person of the first heir and hot to heirs of heirs, even though, in a sense, a man's heirs might include second, third, fourth and subsequent generations just

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[4] Blume penciled in “the actions” above they, without crossing out “they.” Scott translates this law as: “A legatee is not entitled to direct actions to collect his legacy, when he has not been authorized to do so by the heirs, but he can bring praetorian action in his own name.” 6 [14] Scott 35.

as much as the first generation. And the term was so limited in the case of a usufruct because otherwise such usufruct would be the equivalent of ownership. But such limitation was construed not to apply to a grant of an annuity, but the term "heirs" was held to include all subsequent generations of heirs, so that the annuity was held to be payable forever to any subsequent heirs, just as in the case of a grant of an annuity to a church and other institutions and to clergymen and other similar persons dealt with in C. 1.33.46. The same principle is expressed in D. 33.1.20.1.

It may not be uninteresting to point out that the Romans had worked out a table of expectancy of life, which was as follows: From 0 to 20 years - expectancy, 30 years; from 20-25, expectancy 28 years; from 25-30, expectancy, 25 years; from 30-35, expectancy 22 years; from 35-40, expectancy 20 years; from 40-50, expectancy 59 years less actual age; from 50-55, expectancy 9 years; from 55-60, expectancy 7 years; from 60 onwards, expectancy 6 years. D. 35.2.68.

6.37.23. The same Emperor to Julianus, Praetorian Prefect.

A doubt disturbed the minds of the ancients as to the meaning of words, if a testator left to someone the whole of a farm, for example the Cornelian or any other farm, and then gave the half thereof to someone else, (and the question arose) what part the first legatee took and what part the second legatee took. The doubt was the same whether it was given as an inheritance or as a trust. And since many computations were made, and may methods of reckoning were necessary, we deem it advisable to put all such computations at rest as entirely superfluous and contrary to the wish of the testator. 1. For since it is very clear that a testator who left all of the property to someone in the first place, but thereafter gave half of it to someone else must have wanted to modify his first gift and diminish it by half, since he gave such half to another. The solution of such case is, therefore, easy. 1a. Hence, if a testator, therefore, leaves a farm or an inheritance to someone, the whole of it to the first and half of it to the second, each of them is owner or heir of half. 1b. And if a testator leaves the whole of it to the first and the third of it to the second, the first has, according to such rule, two-thirds of the farm or the inheritance, but the third of it or four-twelfths, belongs to the second. 1c. And this rule must be applied in all gifts, that is to say, in connection with inheritances, legacies and trusts; for the intention of the testator cannot be explained except in this way. 2. And it appeared proper to us to decide another, no dissimilar, dispute in the ancient law. The doubt arose in case a testator, for instance, left the Cornelian farm or some other farm, or any other thing, to someone, afterwards (by other words in the same testament) again, or often, gave him the same thing as a legacy or trust, but, following these words in the testament, bequeathed the same farm or other property to Sempronius, so that Titius was mentioned frequently but Sempronius only once. What was to be decided in such case? And what was the law, if it was left jointly or separately, either as a legacy or as an inheritance? Settling such ancient controversy, we ordain that an inheritance or a farm left jointly or separately or often, in the cases mentioned, such inheritance or farm or other property, must be divided equally, half thereof belonging to each, unless the testator has specifically stated that he wants a specific portion to go to the one and another portion to the other. For we want the wish of the testator to control, if consistent with law.[5]

[5] [Blume] See C. 6.51.1.11d.

Given November 17 (530).

6.37.24. The same Emperor to Johannes, Praetorian Prefect.

A testator disinherited his son, under the age of puberty, instituting others as heirs. But he appointed a substitute for the same minor, thus showing little affection for his son to whom he left no property, and he, in addition to the injury of disinherison, provided for a substitute, and ordered such substitute to pay someone else a legacy. It was questioned whether such a legacy or trust was valid. 1. And if the testator, though disinheriting his son, left him a legacy, and substituted a stranger for him, it was again disputed whether he could leave (order the substitute to pay) a trust, at least in this manner. 2. Since antiquity differed in treating this matter, but such disputes appear to us to be vain, we ordain that a substitute, appointed for a disinherited minor, can not be burdened by any legacy or trust, even though the testator wants the substitute to pay such legacy or trust out of property which he himself bequeathed to such minor.
Given April 30 (531).

Note.

The father made a pupillary substitution. This was in effect making a will for the minor, providing that should the minor die before the age of puberty, some other person should be his heir, so as to inherit all the property which such minor might have. This as we have seen was permissible. But the further question arose whether the testator could also provide that such substitute (if the minor died) should pay a legacy or trust to someone else. This right was denied under the rule that he could not provide for a legacy or trust out of property which he did not give himself. Code 6.42.9. And the same rule is here applied even incase the testator gave a legacy to the son, because disinherisons were not favored or aided in any way, although such requirement might have been made in case of a legacy left to a stranger. 9 Don., Comm. 537-42; 9 Cujacius 769.

6.37.25. The same Emperor to Johannes, Praetorian Prefect.

If a legatee conceals a testament but it was thereafter brought to light, it was doubted whether the person guilty of such concealment could claim the legacy left him therein. 1. We think that this should not be permitted. Such legatee who wanted to defraud an heir out of his inheritance, shall not receive the fruits of his cunning. But such legacy shall be taken from him, and it shall become the property of the heir, as if it had not been given at all; so that he, who wanted to injure another, may himself feel the loss; just as in the case of a legatee to whom a legacy is left for managing a guardianship, and who if he fails to do so will be deprived of such legacy, and it will be assigned to the minor to whom such legatee refused to be useful.
Given at Constantinople November 1 (531).

6.37.26. The same Emperor to Johannes, Praetorian Prefect.

We deed it best to correct the holding of the founders of the law, in considering a temporary legacy or (vel) trust as void, and ordain that such legacy and trust shall be valid. 1. For since it has already been determined that temporary gifts and contracts may be made, it follows that legacies and trusts which are left for a limited time, should likewise be considered valid. After the time fixed, these legacies and trusts shall be returned to the heir, and it will be necessary for the legatee or cestui que trust to give a

bond to the heir that when the time fixed has elapsed the property will be restored without having been deteriorated in condition by his fault.
Given at Constantinople October 18 (531).

Note.

A stipulation: "Do you promise to pay me ten gold pieces a year as long as I live?" was deemed to be absolute, and the liability perpetual, for a debt could not be owned till a certain time only. If, however, the obligee sued on the obligation, the defense that the agreement was to the contrary was permitted. Inst. 3.15.3. A gift could be made to be in force for a time certain or uncertain. C. 8.54.2. So an annuity for life had always been valid - it was construed as a number of separate bequests, the payments after the first being considered as under the suspensive condition of the legatee living to the day on which they respectively fell due. D. 38.1.4 and 8; D. 36.2.10; Moyle, Inst. 390.

In Gaius 2.271, it is stated: A legatee cannot be charged with a legacy, but can be charged with a trust, and the beneficiary of a trust may himself be charged with a further trust. What is said here as to invalidity of legacies, if temporary, must be understood in the light of these other principles, and it would seem what was forbidden to be done directly in this connection could, frequently at least, even before the enactment of the present law, be accomplished indirectly. As to the rules in connection with the appointment of heirs, see Note C. 6.21.8. See also 9 Cujacius 768; 9 Donellus 543-546; Buckland, 335-337.