Book VI.
Title L.

As to the Falcidian law.
(Ad legem Falcidiam.)

Bas. 41.1.95; D. 35.2; Inst. 2.22.

Headnote.

As already pointed out, the term "heir" in Roman law did not mean exactly what is now commonly understood by that term. It did not embrace legatees or beneficiaries of a trust, although one or more of several heirs might also be legatees or cestuis que trust. An heir was in fact, at times, more nearly what our word "executor"[1] means, and as such executor was entitled, under the Falcidian law, with some exceptions, to retain one-fourth of the estate after deduction of debts and funeral expenses, and the value of slaves manumitted, (Inst. 2.22.3) - this fourth being similar in nature to the fees which an executor ordinarily receives. He was the representative and successor, of the testator, G. 4.34, Nov. 48 pr.) and as such was charged with the collection of debts and the payment of all debts, legacies and trusts. It evidently often happened that testators burdened the estate with many legacies, so that men often died intestate, because, as already noted in Headnote to Code 6.49, the heirs named in the will refused to enter on inheritances which would become exhausted by the payment of legacies. To remedy this, the lex Ruria was passed in B.C. 183, and the lex Voconia in B.C. 169, both of which limited the amount which legatees might take. These laws were inadequate and in B.C. 40, the lex Falcidia was passed with provided that no one could lawfully leave more than three-fourths of his goods in legacies, and that the heir or heirs should be entitled to one-fourth. Inst. 2.22 pr. The law did not apply to soldiers - Const. 7 infra; nor to a legacy of a debt to a creditor; Dig. 35.2.14.1; D. 35.2.5; nor to several other special cases. Hunter 751. So a child, ascendants, and to a limited extent brothers and sisters, were entitled to his birthright portion, and an heir was compelled to pay that portion, even though his own fourth might thereby reduced. In other word, the former's right, as legatee, was superior to the right of an heir under the Falcidian law. C. 3.28.36. This legal, so-called birthright portion happened to be, to Justinian's time, a fourth of what he or she would have received, if the testator had died intestate, and must not be confused with the Falcidian fourth of an heir. The portion to which birth-right portionees [2]were entitled, in some form, either as heir, legatee or cestui que trust, was later increased. See C. 3.28.

The Falcidian law applied at first only to legacies in the technical, original sense of that term. The right under this law was later extended to apply also to trusts (Headnote to C. 6.49), and gifts in contemplation of death. D. 6.50.5 and 18. And while it was originally given only to the heir in a testament, the right was subsequently extended to a direct heir on intestacy, who was charged, in a codicil, with the payment of a trust. C. 3.36.16 and 26; D. 35.2.18 pr.; Mackeldy §772 note.

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[1] Blume penciled into the margin next to this "[illegible] idea not unknown. Mitteis 106; D. 36.1.80.1."

[2] "Children" has been lined-out and "birth-right portionees" penciled in.

In certain cases the Falcidian fourth did not apply. This was true in the case of a will made by a soldier in the field. Law 7 of this title. So it could be waived. Laws 1 and 19 of this title. In C. 6.30.22, it was provided that if an heir made an inventory of the property which he received, he should be entitled to the Falcidian fourth, but not otherwise. This provision was re-enacted and somewhat broadened by Novel 1, c. 2, appended to this title. In the same Novel, Justinian took a long step forward, and provided that if a testator specifically directed that property given anyone in trust should not be subject to the Falcidian fourth, the testator's wishes should be carried out. And in 544 A.D., by Novel 119, c. 11, appended to this title, he further provided, that if a testator left a legacy to a member of his family and forbade the alienation of the property, it should not be subject to the Falcidian fourth, thus clearing the path for perpetuities, referred to in headnote to C. 6.42, of all obstructions.

In the headnote just mentioned, we referred to the great importance of trust in the Roman law, and the laws, rescripts and constitutions already heretofore mentioned show that Justinian considered the wishes of a testator of paramount importance, and in Novel 1, aforesaid, he made some drastic provisions to enforce obedience to such wishes. See also Novel 131, cc. 11 and 12. C. 6.43; C. 6.47; and C. 6.54, provide for additional remedies of legatees and beneficiaries.

Appended to this title also is Novel 108, in which Justinian provided that where a trust was created of property which "might be left" at the time of the death of an heir, only a fourth of the property given the heir should be impressed with the trust, and even that might be spent for certain purposes. Special provisions were made in cases of trusts imposed upon property given as dowry or prenuptial gift, and are dealt with in book 5 of the Code.

6.50.1. Emperors Severus and Antoninus to Priscus.

You should know that when you failed to deduct the Falcidian fourth, thereby showing greater fidelity than required in turning property over to another as directed, this does not appear as a payment of a greater sum than you owed.
Promulgated May 13 (197).

Note.

All that this rescript means is that if the heir who was charged with legacies and trust, knowingly turned over, in payment thereof, more than three-fourths of the estate with he received as heir, and voluntarily made, as it were, a gift to the legatees or beneficiaries of a trust, he could not reclaim such gift, since what he paid was owing naturally - the testator having directed it to be paid. To the same effect, see law 19 of this title. As shown by law 9 of this title, if the heir paid more legacies and trust than necessary, thinking that the estate left him was larger than it actually was, and thing that there would be enough to pay his own Falcidian fourth, and this error was an error of fact, he was entitled to recover the excess that he paid. See also law 6 of this title and note and Novel 1, c. 3, there mentioned.

6.50.2. The same to Sanctianus.

The law is clear and certain that the rule of the Falcidian law applies against all, in proportion to their legacies and trusts.
Promulgated July 1 (197).

Note.

The Falcidian fourth was a charge upon all legacies and trusts, but not upon the birthright portion of children. C. 3.28.36. In order to satisfy this Falcidian fourth, the proper proportions was deducted, if necessary, from the legacies and trusts left by the testator.

6.50.3. Emperor Alexander to Hermagora.

Although it appears that an heir administers a secret-trust, there is no doubt that legacies, nevertheless, and (lawful) trusts left by testament, must be paid, in an amount, however, consistent with the Falcidian law, since it has been decided that that portion of the Falcidian fourth of which the heir, who accepted a trust, contrary to law, is deprived, does not benefit the legatees (but is forfeited to the fisc).
Promulgated October 15 (222).

Note.

Where a trustee, that is to say, a person charged with a trust, was required, secretly, to turn over property, pursuant to the trust, to a party who under the law was forbidden to take it, he acted in fraud of the law, and to the extent of the amount of the property covered by such trust, he was deprived of the benefit of the Falcidian fourth, such fourth being forfeited to the fisc. He was, however, entitled to such fourth as to other property which he was required to transfer to another an which was not covered by such secret, fraudulent trust. D. 34.9.10 and 11. But if a son had agreed to carry out such fraudulent trust, the penalty did not apply to him. D. 34.9.10; D. 35.2; see also D. 36.1.2.5; D. 49.14.3 and 49; Colquhoun §1185.

It is such secret, fraudulent trust mentioned at the beginning of the foregoing rescript, which further provides that while legacies and lawful trust directed to be paid in a testament must be paid. Yet they are subject to the Falcidian fourth, and that this fourth should go to the fisc, since the party charged with the secret trust was not entitled thereto. At the time of Justinian, however, there were comparatively few trusts which were prohibited.

6.50.4. The same to Philetianus.

The divine Hadrian justly ordered that the Falcidian law also applied to legacies left to the emperor.
Promulgated December 28 (222).

6.50.5. The same to Samosota.

If you can prove that you mother made immoderate gifts to your sister, in contemplation of death, you may, according to the constitution of the divine Severus, my grandfather, have the benefit of the provision of the Falcidian law.
Promulgated October 18 (223).

Note.

Not only legacies and trusts, strictly so-called, were subject to the Falcidian fourth, but also gifts in contemplation of death, if, as here stated, these gifts were immoderate. See law 18 of this title. The subject of immoderate gifts to children is dealt with in C. 3.29 and 30; and Novel 92, appended to the latter. As to gifts between husband and wife, see law 12 of this title.

6.50.6. The same to Secundina.

In computing amounts due (as legacies and trusts) in accordance with the Falcidian law, every debt is deducted, including one which, at the time of death, is owing to the heir himself, although his rights become merged by entering on the inheritance. 1. Moreover, the amounts of all legacies, though given to complete public works and statues, are to be considered when computing the three-fourths. 2. Not even if the heir voluntarily paid out or gave more than the value of the whole inheritance, may the legal computation be changed.

Subscribed December 28 (223).

Note.

When the calculation under the Falcidian law was made, the testator's debts, including the debts to the heir himself, and the funeral expenses, and the value of the slaves whom the testator had manumitted, were first deducted; the residue was then divided so as to leave the heir a clear fourth, the other three-fourths being distributed among the legatees and beneficiaries of a trust in proportion to the amount of the legacies and trust given them respectively in the testament. Inst. 2.22.3. The last sentence of the present rescript means that notwithstanding the fact that the heir paid some of the legacies or trusts in full, so as to amount to even more than the value of all the property which he received, still as to other legatees and beneficiaries, the deduction might be made according to the computation here stated. 9 Donellus 768. But this part of the law was repealed by Novel 1, c.3, appended hereto, wherein it is provided that if payment in full is made to some, with knowledge of the condition of the inheritance, payment in full must be made to the others. See also note to C. 6.30.22.

6.50.7. The same Emperor to Pomponius.

The right under the Falcidian law does not indeed apply to a soldier's testament. Moreover any property of yours which the deceased soldier held, cannot at all be considered as his, and hence you rightly ask it to be treated as a debt (not permitting any reduction therefrom by reason of the Falcidian law).

Promulgated May 1 (226).

Note.

In the present instance, the Falcidian law was not applicable, first, because that law did not apply to a testament left by a soldier in the field, and second, because the property of which a fourth was claimed by the heir of the soldier, in fact belonged to Pomponius, the petitioner. That the Falcidian law did not apply to a soldier's will is also stated in C. 6.21.12, where it is also shown that the heir could not be compelled to pay more than he received. For other cases in which the Falcidian law did not apply, see headnote.

6.50.8. The same to Aurelius.

The testament of your brother cannot indeed be considered invalid because he was obligated to turn the inheritance which he received from his father over to you as a trust, in case he should die without children. 1. But though he appointed you his heir, (still) in figuring up the legacies which you were required to pay, according to your statement, the trust owing to you should be deducted as a debt, and besides you have the benefit of the Falcidian law as to the remainder.

Promulgated September 13 (233).

Note.

Two brothers (one of them Aurelius) were appointed heirs, and the testator provided that the one who should die without children should leave the property to the other brother, thus creating a trust. One of them died, appointing Aurelius, his heir, but burdened him with many legacies. Aurelius claimed that the will was void, and the legacies were not, therefore, owing, as stated in headnote to C. 6.39. However, this claim was not allowed, since a man could make a will though he had no property, and further, the deceased brother had property in excess of what he was required to turn over - this trust-property in no event amounting to more than three-fourths of the inheritance received by the deceased from the testator, since he had a right to retain a fourth. This trust, accordingly, to the extent indicated, was held to be the same as a debt and was required to be deducted from what was left to Aurelius before he was required to pay any legacies, and he was entitled to retain a fourth of the remainder. See C. 6.49.6.

6.50.9. Emperor Gordian to Mestrianus.

An error of fact does not prevent reclaiming of the fourth, which was not retained in turning over a trust. But a person who turned over the whole property, knowing his right of retention, has no right of action to reclaim any part of it; neither has he such right of reclaiming it if he was ignorant of the law.[3]
Promulgated October 18 (238).

6.50.10. The same to Diogenius.

Although your father directed your brother to turn over a portion of the inheritance (received from the father) over to you in case he should die without children[4], still it is clear, that if he (the brother) died intestate, the amount which he had the right to retain by reason of the Falcidian law, belongs to his intestate successors, and hence it is clear that you sister, who is his intestate successor along with you, does not unjustly claim a portion of what your brother had the right to retain as aforesaid.
Promulgated November 9 (241).

6.50.11. The same to Maximia.

If, as you allege, your father ordered you to transfer to your brother the portion of the inheritance of which he appointed you his heir, and directed you to be content with certain goods in satisfaction of the Falcidian law, you are not prohibited from going before a judge having proper jurisdiction and asking under that law the aid which you implore.
Promulgated October 26 (243).

Note.

Until the enactment of Novel 1, c. 3, which permitted the testator to prohibit the deduction of the Falcidian fourth, a testator could not deprive an heir thereof. But where the testator gave any other property to the person charged with the legacy or trust, the value of that property was counted toward satisfying the fourth - but no farther than the

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[3] [Blume] See laws 1 and 6 of this title and notes thereto.
[4] [Blume] See C. 6.49.6.

value thereof. D. 35.2.91. In the present case, certain property was given in satisfaction of the Falcidian fourth, but, perhaps, the value thereof was not great enough to satisfy the claim for the fourth, and the judge, accordingly, had the right to adjust the claim. Again, in the present case, Maximia, the petitioner, was the daughter of the testator and she was in any even entitled to a birthright portion - one-fourth of the amount which she would have received had the testator died intestate - and she could not be deprived of that portion, and the extra property given might not satisfy this portion. Hence the judge had also in such case the right to adjust the matter.

6.50.12. Emperors Diocletian and Maximian to Justinus.

It is provided in several legal provisions that the Falcidian law applies to gifts between husband and wife (given in anticipation of death), since such gifts must be treated the same as trusts.[5]
Promulgated June 16 (290).

6.50.13. The same Emperors and the Caesars to Zethus.

If the woman who, according to your statement, owns your son as a slave, received something under the will of the decedent under which fiduciary liberty was left him, she is not unjustly compelled to make the manumission which she was directed to make. But the trust left to the slave can be claimed (from her as heir) only to the extent that, after deducting the price of the slave whom she was asked to manumit, the amount of the property left her permits (consistent with the Falcidian law).
Subscribed April 27 (293) at Heraclia.

Note.

The first part of this law is clear. If a person who received a benefit under a will, was charged to free his own slave, and he accepted the benefit, he was required to free the slave, even though the latter was worth more than the gift. D. 40.5.45.1; Buckland, Roman Law of Slavery 529. Hence under the present law, if the woman received something under the will and accepted the benefit, she was compelled to carry out the fiduciary liberty left the slave; that is to say, she was compelled to grant the liberty which she was, by the testator, asked to grant.

The second part of the law is difficult and has been interpreted in different ways. See Donellus 794-796; translation Otto, Schilling and Sentennis. It would seem clear that in this case the trust mentioned in this part of the law was left to the woman, to be turned over to the slave, for the law mentions deduction of price, which evidently refers to the price of the slave manumitted by the woman in accordance with what is stated in the first part of the law. This trust, in money or other property, could, accordingly, be claimed by the slave who was to be set free only after his own value was deducted, and, next, after the fourth of the remaining value also was deducted. See Buckland, supra 521.

6.50.14. The same to Faustina.

Although you entered on the inheritance from your father, and your right of action which you contend you had against him by reason of money owing you from him arising out of his management of your property as guardian, is merged to the extent that you

[5] [Blume] See note to law 5 of this title.

inherit property from him, you are not forbidden to sue your coheirs for the remainder, but you must deliver the farm left you to be surrendered to someone else, after deducting the fourth.[6]
Given at Viminacium, September 26 (293).

6.50.15. The same to Pomponius.

If your wife, by precatory words, in a testament or a codicil, directed that the documents pertaining to a dowry-estate legally remaining in your hands, should be turned over to you, her successors will be compelled to comply with her wish, since the Falcidian law does not apply where documents of lands are bequeathed to the owner.[7]
Subscribed at Sirmium January 17 (294).

6.50.16. The same to Diomedes.

Neither the Falcidian law, nor the Trebellian senate-decree[8] require payment of legacies or trusts by successors when the debts of the estate exhaust it.[9]
Subscribed at Sirmium January 17 (294).

6.50.17. The same to Gaius.

The law is certain that legacies ordered to be paid by coheirs may be claimed from them to the extent that the rule, fixed by the Falcidian law, permits.
Subscribed at Anchialis October 28 (294).

6.50.18. Emperor Justinian to Johannes, Praetorian Prefect.

If any one, having perchance 400 solidi, ordered that the heir should not enter upon the inheritance, unless he should first pay to another 380 solidi, or some other sum which would diminish the Falcidian fourth, we order that the heir, if he should enter, shall, sustained by the Falcidian law, be recompensed for whatever is lacking in the Falcidian fourth, and it (the difference) having first been given (paid) or retained--whether there is one payment which was directed to be made, or whether it is divided among many--he shall have the benefit of the aforesaid law unimpaired. 1. For if, when a gift in anticipation of death is made in excess of the amount allowable under the Falcidian law, the heir may, after entering on the inheritance, recover the money actually given in excess of the amount so allowable, but which amount under the law remains a part of the testator's inheritance[10], why should we not in the present case provide for both living and dying, preserving the latter's will without diminishing the advantages derived from the inheritance?[11]
Given at Constantinople November 1 (531).

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[6] [Blume] See note to C. 6.24.6, and to C. 4.16.5.
[7] [Blume] See C. 6.42.24.
[8] [Blume] See Headnote to C. 6.49.
[9] [Blume] See law 6 of this title.
[10] [Blume] i.e. is treated as not having been legally separated therefrom.
[11] [Blume] See law 5 of this title as to such gifts.

6.50.19. The same to Johannes, Praetorian Prefect.

Since it is certain that an heir, who shows complete fidelity toward the testator by paying all legacies in full, cannot afterwards, in reliance on the rule of the Falcidian law, recover anything so paid, because he simply complied with the testator's wish, we order that this shall in like manner be true if he has given a written promise to pay the legacy in full. This point was doubtful under the ancient laws. For whether he pays or gives a promise to pay, the rule of reason leads to the same conclusion[12] in both cases.
Given at Constantinople October 18 (532).

[12] [Blume] See to similar effect law 1of this title.