JOHANNES VOET'S

COMMENTARY ON THE PANDECTS.

BOOKS XXX., XXXI., and XXXII.,
IN ONE TITLE,

DEALING WITH

LEGACIES AND FIDEICOMMISSA.

TRANSLATED BY

W. PORTER BUCHANAN, B.A., LL.B.,

ADVOCATE OF THE SUPREME COURT, CAPE COLONY.

J. C. JUTA & CO.,

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UNION OF SOUTH AFRICA

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BOOKS XXX., XXXI., AND XXXII.,

IN ONE TITLE.

ON LEGACIES AND FIDEICOMMISSA (TRUSTS).

SUMMARY.

1. Legacy variously defined: the reason of it. The definition of Justinian defended. If the testator makes a donation to a legatee of a thing left as a legacy or a part of it, it is doubtful whether it should be considered a *donatio mortis causâ* or a *donatio inter vivos*.
2. By later law the difference between legacies and *fideicommissa* (trusts) is swept away. So also that between legacies of condemnation (*damnationis*), vindication (*vindicationis*), etc.
3. Who have the power to bequeath a legacy? To whom can a legacy properly be given, and to whom not? Can a legacy be given to deceased persons? to those captured by the enemy? to the slave of a banished lord? to the lord of an instituted slave, or to the slave of an instituted lord? Refer back. Can a testator, after instituting a stranger, leave a legacy to his nearest blood-relations designating them by name, and for what portions? Refer back.
4. An heir cannot take from himself, and both by civil and by natural law a legacy to a sole heir is of no force and effect.

   What is the law if a thing is bequeathed as a legacy to a person instituted as sole heir, and to Titius as legatee?

   What part of the legacy does the heir take when he is instituted to half the estate, and the estate is left as a legacy to him and to two others?
5. What share each heir will take in a legacy if a testator has left one and the same thing as a simple legacy to all the heirs, who have been instituted to unequal shares in the estate, is explained according to the nature of the various deeds of legacy.
6. What part will each legatee take if a legacy is left to one or to a certain number of many heirs? Are these enactments of the Civil Law still to be followed in our modern law?
7. What is the law if a prelegacy and not a simple legacy be left to one or to several or to all the heirs? What parts will each take, and by virtue of what right? Also in a prelegacy can an heir take from himself?
8. Does the rule that no one can take from himself, also apply to cases of taking *mortis causâ* (on account of death)?
9. Can a testator leave a legacy to a person incapable of taking, in order that he should hand it over to one capable of taking? Can one spouse, in view of a statutory prohibition (*statutaria prohibitione*) of spouses enriching each

other (by testament), leave another a legacy of money to distribute among the poor?

10. Ought a legatee to be capable of taking the legacy at the time of the making of the testament, of the death of testator, and of the accepting of the legacy (*agnitionis*)? If the legacy is a conditional one, should a legatee be capable at the time the condition was made? Can an incapable person be left a legacy subject to the condition, "if at any time he shall be capable of taking;" and when in that case will he be so capable?

11. Who can be burthened with a legacy? Can heirs *ab intestato* be so charged? Can the legitimate heirs of a son who has not reached puberty be so charged by his father? Can substituted heirs be charged? Can the heir substituted to a minor son who has not reached puberty and who has been disinherited? When is an heir, substituted to an instituted heir who is charged with legacies and *fideicommissa*, deemed burthened by such; and when not?

12. Can one who has become heir by chance and not through the will, either express or tacit, of deceased, be burthened with a legacy? As, for instance, a son passed over in his father's will, if he should be some *suus heres*? Or if one who should succeed *ab intestato* in the first grade (of heirs) is burthened, and he does not succeed, but the degree (of heirs) following that succeeds, does the burthen also follow? How is it by our law?

13. A testator can burthen one of his many heirs with the whole legacy (*in solidum*); or he can burthen all of them, each being bound for an equal share or for his portion as heir. In case of doubt, is testator deemed to have burthened one heir with the whole legacy, when he orders that that one should pay over to the legatee a certain particular thing belonging to his estate?

    If one heir is burthened, can the legatee sue him for the whole legacy (*in solidum*)?

14. Can the burthen of a legacy be placed upon legatees, *fideicommissaries*, *mortis causâ* donees, and any others who take by reason of the death of the testator? Can a husband be charged with a legacy by his wife, who has given him a donation? Can the deceased testator's debtors be burthened, and if so, what is the effect of such burthen? Can *inter vivos* donees be burthened? See later.

15. Heirs who are charged with a legacy can deduct the Falcidian portion, but not legatees and others similar to them. Also by later law, heirs can be burthened with legacies beyond the capacity of their inheritance, but not so legatees, except in certain cases which are enumerated.

16. Cases are enumerated in which some persons are enriched by deceased, while others are burthened with legacies, as, for instance, when a town-corporate (*municipium*) is burthened, or a minor who has been enriched, or the person at the head of the *municipium* (town-corporate), or a tutor; and when the heir of a legatee or of an heir is burthened. No one can be burthened who is not enriched.

    In case there is statutory community of property, should a legacy left by one spouse or by both spouses together be paid out of the joint estate? If so, when?

17. What things can be left by legacy? Can goods in enemy's territory be so left? Can things be left *in genere* (as a class)? If a testator leaves as a legacy a *genus* (class) of things, such as his household goods, etc., and subjoins or prefixes certain *species* (particular articles) included under that *genus*, will the legacy in that case be restricted to those *species*, or will preferably everything in the *genus* the testator left as a legacy be due?

18. How is a legacy construed if the testator has bequeathed his movables generally, without mention of any definite place? Does it include merchandise for sale, and ready money (cash)? How if the money is placed out at interest or if land is purchased with it?

Are actions also included? What are included if movables in a certain place are left by legacy? Does it include money, and debts, the documents constituting which are found in that place? Does it include money placed there for safekeeping, and why? What general rule is to be observed in this matter?

19. There can be a legacy of a university (collection) of things, such as the inheritance left by a deceased testator; a certain share of the inheritance or a certain share of the goods of the deceased testator. What the effect of this is. What the difference is between a certain share of the inheritance being left to any one by title of institution and by title of legacy. What difference there is between a part of an inheritance and a part of the goods of the testator being left as a legacy. Is a legacy that leaves a shop (*taberna*), a chorus (*i.e.* of singers and dancers), a household of slaves, a flock, a herd of cattle, and such like, multiplex (or single)?

20. A debt or action can be the subject of a legacy: it must be ceded to the legatee; and extends even to the interest then due on the principal sum. Accessory actions by reason of suretyship or pledge must also be ceded, unless the testator has freed the persons from obligation. Is the heir bound to guarantee the solvency of the debtor? Is he not so bound at all events when the testator has expressly bequeathed some particular thing or quantity of things owed to him? How if he has bequeathed an action already before the court? The legatee can avail himself of a *utilis actio* without obtaining cession. Can he avail himself without cession of accessory *utiles actiones*, which were not competent to the deceased, but have only been rendered so by the heir?

21. What if the testator has bequeathed to Titius what he is owed by Maevius, when nothing is owed? What if he mentions a certain amount as due to him? What if he bequeathed what is owed him under a conditional contract or a conditional legacy?

22. What the law is, if the debt that formed the subject of the legacy has been extinguished by confusion, or acceptilation, or if the debtor has been released by legacy. What if the testator has himself during his lifetime actually exacted payment of the debt? From what signs it can be gathered that the testator, notwithstanding the fact that he has exacted payment of it, intended that the bequest of the debt should remain good. What if he has novated the debt? What if he has accepted a voluntary payment by the debtor? What the legatee should claim, when the debt bequeathed is extinguished in the modes above laid down, while the legacy is kept intact?

23. Is a bequest of a debt cancelled if the testator has commenced to exact payment of it; as, for instance, when the debtor has already had proceedings instituted against him, but the testator has died before actual payment has been made?

24. How if the testator is owed either Stichus or ten (thousand sesterces) at the option of the debtor, and makes a legatee a bequest of "Stichus, who is owed to him?" How if in the same case of an alternative debt owed him, the testator bequeaths Stichus to one legatee and ten (thousand sesterces) to another?

How if having Gaius and Lucius as co-principal debtors, or as debtor and surety, the testator bequeaths to Titius what Gaius owes him, and to Maevius the sum in which Lucius is indebted to him?

How if either Gaius or Lucius is subsequently freed from obligation by acceptilation, or agreement, or by his debt being remitted by legacy?

25. What is bequeathed when a testator leaves as a legacy a university (collection) of debts or a book of debts? Is money, payment of which has been exacted, due under such a legacy? Is such money due when it has again been included in the book of debts? Is money that has been removed from the book of debts due? If a testator has left as a legacy a certain number of the debts

in a book of debts, to be chosen by the legatee, must he make his selection from among those debts which were included in the book at the time the will was made or those existing at the date of the testator's decease?

26. A legacy can also include the goods of the heir and those known to be the property of third parties. For what price must the goods of third parties so bequeathed be purchased? The goods of the heir must under all circumstances be paid over to legatee, even though the testator thought they were his own. This holds as far as it is really the property of the heir. If it is the property of a third party the legacy or its value is only due from the heir, if the legatee proves that the testator knew it was the property of a third person, but not if he did not know it, except in a few cases which are enumerated. Is an heir released from the necessity of redeeming the legacy if the goods of such third party can only be purchased with difficulty?

27. Is the heir or the legatee bound to release the legacy from pledge, if the testator has bequeathed as a legacy a thing belonging to him but pledged to another? How if another has the usufruct of a thing belonging to a testator who has made a legacy of it? How if a thing belonging to a testator and left as a legacy, has such a burthen placed upon it, that a loss of ownership is to be feared? Should the heir free the legacy from such burthen? Should an heir upon whom is imposed the payment of a legacy of land, free the legacy from a praedial servitude upon it, or an irredeemable annuity (canon) charged upon it? If a lessee leaves the fruits of the lease to another as a legacy, who is to pay the rent of the thing leased?

28. If a person leaves as a legacy a thing belonging to himself in common with another, is the whole of it due under the legacy or only that part which belongs to him? If a person bequeathes as a legacy an estate he has hired in perpetuity from a state (*fundum vectigalem*), is he deemed to have left the direct or full ownership, or only a secondary or useful (*utile*) ownership? How, if the thing left by legacy is owned by the testator and the heir in common? How if the testator subsequently redeems the other part? How if a spouse bequeaths as a legacy a thing which is subject to the statutory community between the spouses?

29. A thing belonging to the legatee cannot be the subject of an unconditional legacy but can of a conditional one. How if a testator has a right of *superficies*, of *emphyteusis*, of usufruct, or of pledge over a thing belonging to the person, to whom he has bequeathed that thing as a legacy? How if a third party has any of these rights over the thing belonging to the legatee? How if a third party has a praedial servitude on the thing belonging to the legatee? If a testator leaves as a legacy a thing sold by a third party to the legatee and delivered to him, but for which the price has not been paid, must the heir pay the purchase price? The property of the legatee can validly be left him as a legacy when for a cause that has already arisen he can be deprived of his ownership in the thing, as is shown by various examples. Also the value of a thing belonging to a person can be validly left him as a legacy.

30. Things that cannot be the subjects of commerce cannot be the subjects of a legacy, whether it is a conditional or unconditional one. Neither the thing nor its value is due under such a legacy. How if the things can be dealt with commercially by the heir but not by the legatee, or *vice versâ*? Certain objections answered. If a legatee is burthened with a *fideicommissum*, the incapacity of the legatee to hold and deal with the legacy is no obstacle provided the fideicommissary is capable of doing so.

31. What the law on the matter is, if a testator has bequeathed his slave to a person, and has by legacy given that same slave his liberty, whether conditionally, unconditionally, or from a fixed time.

32. Whether and when, both according to Roman Law and by our customs, wood affixed to a house can be the subject of a conditional or unconditional legacy?

33. If there is an absolutely statutory prohibition of a legacy, or a prohibition of a legacy to certain persons, *e.g.* a legacy of immovable by a minor to his tutor, one spouse to the other, etc., is the value of the thing due under the legacy? What if the value of such things is expressly bequeathed? Is a thing which must by right of preference pass to a husband, wife, or their first-born child, deemed to be tacitly prohibited from being made the subject of a legacy?
34. If one and the same particular thing, or the same quantity of a thing is left as a legacy by one person to one and the same legatee, in the same or in different wills, is the legacy due once or more than once?
35. Legacies can also comprise deeds, to the performance of which the heir is constrained by will. If an heir is enjoined by the testator to sell a certain thing to two persons, and one of these refuses to purchase, can the heir be compelled to sell a part to the other?
36. Can it be left to the option of the heir to elect whether he will make good the legacy or not? Can it be left to him to choose to whom he will pay the legacy or the instalments in which he may elect to pay the legacy? Can a legacy be made dependent on the will of the legatee? Is such a legacy conditional or unconditional? Can a legacy be expressly or tacitly left subject to the will of a third person?
37. No one can claim a legacy before he has accepted it formally. A legatee cannot accept a legacy without the burthens attached. Can a legatee to whom one or more things are left by legacy accept part and repudiate part? How if there are more heirs than one to one and the same legatee? Can one of the owners of a slave accept while the other repudiates a legacy left to such slave? Can an heir repudiate an inheritance but accept a legacy?
38. What actions are competent for claiming a legacy? What is the action on the testament (*ex testamento*); in what legacies is it available and against whom must it be brought? It is an action *stricti juris* but in many respects resembles *bonae fidei* actions.
39. Against whom and on what principle is the vindicatory action competent to claim a legacy? When and in what sense is it true that the ownership in a thing left by legacy passes directly from the deceased testator to the legatee? What legacies cannot be claimed by vindicatory action?
40. The hypothecary action is treated of. If a testator has expressly left a pledge as a legacy under his will, is the hypothecary action divisible? Can the testator deprive the legatee of his right of legal hypothec? Does this right of legal hypothec also avail an heir who is instituted to a particular thing, or a legatee for an annual legacy bequeathed him?
41. Does the right of legal hypothec avail one who is not an heir but a legatee burthened with a legacy or *fideicommissum*? If so, against what goods is it available? What goods of the deceased testator are affected by this legal hypothec; to what extent are they affected when more heirs than one are burthened with the legacy; or when only one of many heirs is so burthened; or when one of many heirs so burthened has already made good the legacy?
42. Is this hypothecary action available only against heirs, or also against third parties who are possessors of the testator's goods?
43. Does the right of legal hypothec avail also for the fruits and the interest of the legacy? Does it avail for the costs of claiming and obtaining the legacy, when the heir has been cast in those costs in favour of the legatee?
44. What legacies can be claimed in a suit for the division of an inheritance (*familiae erciscundae*)?
45. Can a legatee of his own authority seize a thing bequeathed to him, against the will of the possessor? How if the testator has given the legatee this right? Can he acquire it by way of summary execution? How according to Dutch Law?
46. Each heir only bears the burthen of the legacy in proportion to the part to which he is instituted heir, and if he is in certain cases claimed against and condemned for the whole sum, he has a right of recourse against his co-heirs

for their *pro rata* shares. Unless the testator has burthened one heir with the whole legacy or each heir for an equal and not a hereditary portion. When he is considered to have so willed. Does the inability to pay of one heir burthen the others with respect to the legacy? Does the portion of the heir who fails accrue to the other heirs with burthen attached?

47. If one heir, as for instance a sole heir, is burthened with a legacy, and afterwards another is added as a co-heir, or, again, if a person at his death burthened one heir when he knew that two would succeed to him *ab intestato*, must the one burthened make good the whole legacy? How if a sole heir, who by virtue of some statute can take only movables, is burthened? If a testator thinking that only one heir will succeed to him burthens that one, and another heir succeeds to him as well as the one burthened, must the latter make good the whole legacy?

48. Together with the things left by legacy, their accessions can also be claimed. What are the accessions of a thing? See later. From what period of time are fruits and interest due under a legacy?

49. Can money be forced upon an unwilling legatee instead of the thing left by legacy, or some article or thing instead of the money left by legacy? How if the heir has a peculiar affection for the thing he is required to pay to the legatee? If the heir is given his choice as to whether he will make good the thing itself or its value, can he in that case pay over part of the thing, and the value of the remainder? Many cases are enumerated in which it is competent or compulsory for the heir to pay over the value of the things left by legacy.

50. What degree of fault will the person burthened with a legacy or a *fideicommissum* be liable for in making good the legacy or *fideicommissum*, in case he be an heir burthened with a particular legacy or *fideicommissum*, or be a particular legatee or *fideicommissary*? What degree of fault is an heir who is burthened with an universal *fideicommissum* liable for?

51. Should the fact that he has used in building, wood that was left as a legacy by the testator, or has consumed in connection with the testator's funeral a thing that is the subject of a legacy, be imputed as negligence to the heir? How if the heir has manumitted, either in the lifetime or after the death of the testator, his own slave which the testator has made the subject of a legacy? What should the heir do if it is doubtful whether the subject of the legacy is still in existence or not?

52. If part of the legacy is destroyed, is the remainder still to be paid over by the heir? Must the vacant site or ruins of a house be paid over, if the house is burnt down? Must the hide and horns of an ox be handed over if the ox itself has perished? If one of a team of four chariot horses left by legacy perishes, must the remaining three be handed over?

53. When is an heir liable to an action on the testament (*ex testamento*), and when to an action based on the *Lex Aquilia*, for fault committed in connection with a legacy?

54. If the subject of a legacy perishes or is injured by the act of a third person, for which the heir is not liable, how is the legatee safeguarded against loss by the injury to the legacy?

55. What the law is when only the nature or form of the thing left by legacy is changed; as, for instance, when clothing is made out of wool, a ship out of wood, etc., a drinking-cup out of gold, or when a drinking-cup is reduced to a mass of metal, or when a house is built upon a site which forms the subject of a legacy. How if a house that is left by legacy is destroyed and another is built on its site? How if a house is by degrees repaired and completely rebuilt?

56. Sometimes persons can claim a legacy who are either not mentioned at all in the bequest or are mentioned, but not as principal legatees. And, indeed, those mentioned and those who are not expressly mentioned can claim the legacy either alone or together with the others. Examples illustrative of this are

annexed. How should the heir be guaranteed and safe guarded by the one who is the first to take action in case the other should also bring an action for the legacy?

57. Can one and the same legatee claim a thing left him by legacy partly by action on the testament (*ex testamento*) and partly by vindicatory action? How if there are more heirs than one to the same legatee?

58. If a legatee wishes to claim the legacy by an action *in rem* (real action) or by an action *in personam* (personal action), when should he do so?

59. If to more legatees than one the same legacy is left, the right of accretion (*jus accrescendi*) obtains among them. In early law it did not obtain in the case of legacies of condemnation (*damnationis*), but only in legacies of vindication (*vindicationis*). The right of accretion (*jus accrescendi*) is often rather a right of non-decrease (*non decrescendi*). What is often meant in law by persons conjoined (*conjuncti*) and persons disjoined or separate (*disjuncti*)? Is there a right of accretion if to one person the testator has left the thing and to another its value? Does it obtain if separate particular things are left in one and the same clause of the bequest to different persons?

60. It is laid down that the right of accretion obtains among those who are conjoined as to the thing, and among those who are conjoined both as to the thing and by the words used. Several objections are answered.

61. It is shown that the right of accretion does not obtain among those who are only conjoined by the words used in the bequest. Certain doubtful objections are explained away.

62. Some persons prevail over others in regard to the right of accretion. The part bequeathed to the legatee failing to take accrues without burthen attached to those conjoined as to the thing, and that even against their wills. To those who are conjoined both as to the thing and by the words used it accrues only if they wish to take it, but then always with its burthen attached.

63. Does the right of accretion also hold good in a legacy of a certain quantity of things or of things "fungible"?

64. What the present-day law is with regard to the right of accretion among co-legatees.

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1. A legacy is a charge on an inheritance, by which the testator orders that some part of the whole estate descending to the heir shall be handed over to another (*l. legatum est* 116, *ff. de legatis* 1), so that he (testator) may have his wish carried out in preference to that of the legatee, and the legatee's wish, again, may prevail over that of the heir (*arg.* § 1, *in fine Instit. de donation*). Or according to the Emperor (Justinian) it is a kind of donation bequeathed by a deceased person to be made good by the heir (§ 1, *Instit. h. t.*). For since at one time legacies could only be left by testament, Modestinus defined a legacy as a donation left by testament (*l. legatum est* 36, *ff. de legatis* 2). But inasmuch as by later law legacies could, like *fideicommissa*, be left *ab intestato*, Justinian, with very good reason, has thought fit to define a legacy as a donation left by a *deceased person*, whether he died testate or intestate. And although the *dominium* (ownership) in the legacy passes directly from the deceased to the legatee (*l. a Titio*, 64, *in fine ff. de furtis*), it is not so with possession (*arg. l. cum heredes* 23, *ff. de acquir. vel amitt. possess.*), which for that purpose must be tendered by the heir and accepted by the legatee. Nor

should the fact that the deceased himself has at some time or other made good the legacy, influence any one's opinion (*l. Lucius Titius* 22, *ff. de legatis* 2), because then it is no longer a legacy, but rather degenerates into a donation, either *mortis causa* or *inter vivos*. For if a testator has left a legacy to Titius and thereafter has given the same thing by donation to Maevius, the legacy loses its effect, as appears from *l. rem legatam* 86, *ff. de adim. vel transfer. legatis*. Hence it follows that, if the testator has given by donation a part of the legacy to the legatee himself, the remaining portion is still due to him (*d. l.* 22, *ff. de legatis* 2), in the same way as this also holds good if part of the legacy has been given as a donation to a person other than the legatee (*l. legatum sub* 24, § 1, *ff. de adim. vel transferendis legatis*).

When, however, there is a doubt on the point, the testator is presumed rather to have given the legatee a *donatio mortis causa* than a *donatio inter vivos*, from the fact that he had first given the thing as a legacy, because the will of the testator is taken either not to have changed at all, or at all events to have changed as little as possible, so that he who affirms a change of will is held to the proof thereof (*Tyraquellus de constituto possessorio, p.* 2, *ampliat.* 24, *num.* 2). Unless greater favour is given to the distinction of Gomesius, who says that a simple *donatio inter vivos* has been made, if the testator has simply made a donation of the legacy, without any mention of a previous legacy; but that a *donatio mortis causa* has been made if the testator expressly declares that he has changed the preceding legacy into a donation (*variar. resolut. tom.* 1, *cap.* 12, *num.* 4). This definition of a legacy is very far from being overthrown by the fact that by the later law both a legatee and the heir's heir can be burdened with legacies (*l. si fuerit* 5, § 1, *l.* 6, *ff. de legatis* 3, together with § *sed non* 3, *Inst. h. t. l.* 2, *C. communia de legatis*). For the heir of an heir is included under the designation heir (*l. antiquitas* 14, *Code de usufructu*).

When a legatee is charged with a legacy, the first step in the carrying into effect of the legacy proceeds nevertheless from the heir, since the legatee is not constrained to the fulfilment of the legacy charged upon him unless the heir has previously, according to the intention of the deceased, paid over his legacy to him. It is, however, true that, before Justinian's time, legacies fell as a charge upon the heir only and not on a legatee, and that then legacies were distinguished from *fideicommissa*, because a legatee could be charged with a *fideicommissum*, but not with a legacy (*pr. Instit. de singulis reb. per fideicomm. relictis.*). This kind of *fideicommissum* is also treated of in *d. l.* 5, § 1, *l.* 6, *ff. de legat.* 3.

2. But in later law Justinian has done away with the difference between legacies and *fideicommissa* (which are left in language of entreaty), (§ 3, *Instit. h. t.*), just as also all differences between

legacies, of which there were previously four distinct kinds, were removed. They were previously left either by way of condemnation (*per damnationem*), by vindication (*vindicationem*), by permissive taking (*sinendi modo*), or by taking beforehand (*præceptionem*) (§ 2, *Instit. h. t. l.* 1, *C. commun. de legatis*). And I do not doubt that the answer of Ulpian, following the later law, which, as is set forth in *l.* 1, *ff. de legatis* 1, states that legacies are made similar in every way to *fideicommissa*, is an augmentation by Tribonian; in the same way as is said to have been the case where the differences between donations, *mortis causa*, and legacies are, in *tit. de mortis causa donation.*, stated to be removed.

What formerly were the differences between legacies of condemnation (*damnationis*) and of vindication (*vindicationis*), is shown by Gaius in his Institutes, *h. t. de legatis libr.* 2, *tit.* 5; Ulpian, *in fragm. tit.* 24; Theophilus, § 1, *Instit. h. t.*; and the learned doctors on § 2, *Instit. h. t.* Also the differences between legacies and *fideicommissa* are enumerated by Meyer, *collegio Argentorat. ad hunc tit. num.* 8, and the doctors on § 3, *Instit. h. t.* Of these there is scant mention in their proper place on account of the design and arrangement of the Institutes.

3. All who have the power to make a testament can bequeath a legacy (*l. sciendum est* 2, *ff. de legatis* 1). Who such are is explained in *tit. qui testament. facere possunt.* And a legacy may be left to all those who can validly be instituted as heirs, or who have *testamenti factio* (power to take under a will) (§ *legari autem* 24 *Instit. h. t.*). (This is dealt with in *tit. de hered. instit. & tit. de liberis et posthumis.*) But not to those who, at the time the legacy is left them, are already dead (*l. pen. ff. de his quae pro non scriptis. l. si duobus* 16, *ff. de legatis* 1); nor to those who at the time of the leaving of the legacy have been captured by the enemy, they being deemed dead (*d. l. pen.* § 1, *ff. de his quae pro non scriptis.*). But if they return from captivity the legacy is ratified *jure postliminii* (*l. si servo meo* 101, § 1, *ff. de legatis* 1), notwithstanding the commonly received tradition, that the *jus postliminii* does not obtain in regard to what is done while in the enemy's hands (*l. in bello* 12, § *codicilli* 5, *ff. de captivis & postlimin. junct. l.* 1; *C. eod. tit. de postlim. revers. et redempt.*) since nothing in this case is done while with the enemy, but a legacy is left in the city by one who has *testamenti factio.* And although there is a rule of civil law which says that the slaves of those to whom we can leave legacies, can also be appointed legatees by us (*l. si mihi et tibi* 12, § *regula* 2, *ff. de legatis* 1), yet it sometimes occurs that a legacy left to a slave is valid which, if left to the lord, would be of no force or effect. For by the law relating to legacies nothing but food and maintenance can be left to a banished man, except it be left by soldiers in accordance with a right peculiar to them, as appears from *l. idem est* 13, § *et deportati* 2, *ff. de testamento*

militis junct. *l. si in metallum* 3, *ff. de his quae pro non scriptis.* This, however, does not make a legacy to the slave of the banished man the less valid, because either the Fiscus takes it, in case the banishment is for life; or the banished man himself takes it, if he is restored by the clemency of the Emperor; or the new lord, if the slave is sold; or the slave himself, if manumitted by his lord (*l. si deportati* 7, *ff. de legatis* 3, junct. *l. si servus ejus* 82, *ff. de acquir. vel. omitt. hereditate*).

As to whether an unconditional legacy can validly be left to the lord of a slave instituted as heir, or to the slave of an instituted lord, or to the father of an instituted heir, must be gathered from § *an servo* 32 *&* 33, *Instit. h. t.* and from *l. quaesitum est.* 91, *ff. de legatis* 1, and the doctors thereon.

The law on the question to whom and in what proportion a legacy should pass, if the testator, after instituting a stranger, left a legacy to his nearest blood-relations designating them by name, must be collected from what is said in *tit. de hered. Instit. num.* 17, 18, 19, 20.

4. Whether a legacy may be left to an heir cannot be laid down in a few words, because it must first be seen whether he has a co-heir, or is sole heir to the whole estate. For if he is sole heir, a legacy to himself to be made good by himself is of no effect, both because by entering upon (*aditione*) the inheritance he has already been made owner of all the goods of the estate (*l. cum heredes* 23, *ff. de acquir. vel omitt. possess.*), and what already belongs to him cannot be made more so (§ *sed si rem* 10, *Inst. de legatis*); and because it is a rule of law based on natural reason, that no one can take from himself (*l. & quidem* 18, *l. plane, ubi* 34, § *si duobus* 11, *l. legatum est* 116, § *heredi* 1, *ff. de legatis* 1); that no one can be deemed his own debtor and creditor; that no one can be both plaintiff and defendant, since with regard to the legacy the heir is debtor, and when brought in to court, defendant, while the legatee is creditor and plaintiff. Therefore, when a legacy is left to the sole heirs and to Titius, the whole legacy falls to Titius by right of accrual (*ex jure accrescendi*), because the legacy to the heir is invalid, according to an answer (*responsum*) *in d. l.* 34, § 11, *de legatis* 1. Nor is *l. ult.* § *Sejo* 2, *ff. de legatis* 2, opposed to this. For in that law there is no question as to the portion of Marcella, who was the wife and co-legatee of the sole heir instituted, inasmuch as there was not the least doubt as to its being due to her; but rather as to the portion of Seius, the heir, which was left to him as a legacy conditionally on his not being testator's heir. And since he came to be heir he could not take his part of the legacy, not only for the reason that no one can take from himself, but also because the condition under which the legacy was given failed. The question, then, is whether the half assigned to Seius, now unallotted, should be paid to the co-legatee Marcella; and, this being affirmed, the

whole legacy was for that reason awarded to Marcella. Nor is the fundamental rule just laid down to be the less relied on from the fact that Florentinus has laid it down that, if an estate is left as a legacy to one who has been instituted heir to half the estate, and to two strangers, the heir who is made a legatee gets only a sixth part of the estate; because he cannot claim from himself, and from his co-heir who is instituted to the other half of the estate, he can claim no more than one-third portion, because the two strangers have concurrent claims. But the strangers can vindicate a half of the estate from the heir to whom also the legacy is left, and a third part from the other heir (*l. legatum est delibatio* 116, § *heredi* 1, *ff. de legatis* 1).

5. Now, if an heir to whom a legacy is left has one or more co-heirs, a simple legacy must be distinguished from a prelegacy. And again, in the case of a simple legacy it is of interest to see whether the testator has left it to all the heirs instituted, or to one or more of them. If to all, then each one takes a part of the legacy from his co-heir, the magnitude of which is to be determined according to the varying forms of the bequests. For if two heirs are instituted to unequal shares, as, for instance, one to one share (*uncia*) and the other to eleven shares, Ulpian has decided, following the principles above laid down, that the heir to one share (*unciarium*) should have eleven shares in the estate left as a legacy, and the co-heir to eleven shares should have but one share of the legacy; since the heir to eleven shares is also to that extent a debtor in regard to the legacy. This debt he cannot take from himself, but must make good to the other who is co-heir and is instituted to one share, and thus he can get but one share from the co-heir to one share (*l. plane, ubi* 34, § *inde dicitur* 12, *ff. de legatis* 1). But if three or more heirs are instituted, and to all of them the legacy is left, without any mention as to how they are to share, each would have a right to an equal share in the legacy, though they have been instituted to unequal shares; as, for example, one to half the estate and the remaining two to a fourth each. Because, as no shares are mentioned in the legacy, each of the co-legatees will have a concurrent right to a full share, so long as no other extraordinary principle of division stands in the way. In the present case there is no impediment to their sharing equally, as each one has the power to take a third part of the legacy from his co-heir (*arg. l. servus uni* 67, § 1, *ff. de legatis* 1, *l. cum pater* 2, *ff. de instruct. vel instrum. legat.*). And so it has been written by Julian, that it is clear that, when a legacy is left in the following terms: "Whoever is my heir, you are condemned to give my heir ten (thousand sesterces)," the shares of all the heirs are equal, so that each one appears to be condemned to allow himself and his co-heir *to be given* (*dari*) their shares (*l. ab omnibus* 104, § *denique* 5, *ff. de legatis* 1), not that each is condemned *to give to himself* (*dare*) and

thus to take from himself, but that he and his co-heir *should be given* (*dari*) their shares, and in this way each one gives not to himself but to the other.

It is a different case if, when a legacy is left to all the heirs instituted, one of them is left such a large proportion that he cannot obtain his full share from the others; for instance, if he gets eleven shares (*unciis*), while two others get one share. In such case what was above laid down, with regard to a legacy being left to two heirs, one being instituted to one share and the other to eleven, applies according to *d. l.* 34, § 12, *ff. de legatis* 1.

6. If the testator has not left the legacy to all the heirs instituted, we must then see if he has left it only to one, or indeed to any number of them less than the whole. For if to one only—for instance, if the testator has said, "Whoever shall be my heir, you are condemned to give ten (thousand sesterces) to my heir Attius;" then Attius will claim ten (thousand sesterces), less the share to which he was instituted heir, and so he will claim five, if he was heir to half the estate, or eight, if heir to a fifth part. Because, in this case, he can take such parts of the legacy from his co-heirs, but is unable to take from himself that part or proportion to which he himself was instituted heir (*l. ab omnibus*, 104, § *si Attio* 3, *ff. de legatis* 1). But if legacies are left to more than one of the many heirs instituted, they will have equal shares in the legacy, even though they are instituted heirs to unequal portions (*l. servus uni* 67, § 1, *ff. de legatis* 1), provided only the words are such as will enable each one to obtain his full share of the legacy from his co-heirs, whether they be co-legatees or others to whom no legacy is left. For if out of five heirs instituted, you put the case that two get the estate as a legacy, and of these one is instituted heir to two-thirds of the estate, he will only be able to take one-third of the estate from his co-heirs, the two-thirds going to his co-heir who is made co-legatee (*arg. d. l.* 34, § 12, *ff. de legatis* 1). And although Groenewegen, *ad l.* 116, *ff. de legatis* 1, is of opinion that, what has here been said as to the heir not being able to take a legacy from himself, is too much dependent on the subtlety of Roman Law, and is thus no longer to be considered, still, as has already been shown, the rule that no one can take from himself, springs not only from the reason of the civil law but from natural reason also; because naturally no one can be his own debtor and creditor.

So the better opinion is that the definitions of the civil law, above set forth, should not be departed from.

7. As regards prelegacies, the rule above laid down, that no one can take from himself, does not apply (*l. Titia cum testamento* 34, § *Lucius* 1, *ff. de legatis* 2), for the reason that the heir takes prelegacies partly by right of being heir, and partly by right of being legatee. By right of being legatee he takes that part to which others

are the heirs of the deceased; by right of being heir, he takes that part to which he himself is heir, which can be gathered from the fact that one who is requested to restore the inheritance is also held bound to hand over that part of the prelegacy to which he is heir, unless the testator has expressed a wish to the contrary; as appears from *l. in fideicommissaria* 18, § *ult. l. Lucius Titius intestato* 78, § *pluribus* 13, *ff. ad Senatusc. Trebell.* junct. § *si quis una* 9, *Instit. de fideicommiss. hered.*, and more fully explained in *tit, de Senatusc. Trebell.* Also because in reckoning the Falcidian Portion that part of the estate left to the heir as a prelegacy is included (*l. Titia testamento* 86, *in fine ff. ad leg. Falcid.*). For that purpose, however, only those parts are reckoned which the heir takes by virtue of being heir, and not those that come to him by right of legacy or *fideicommissum* (*l. in quartam hereditatis* 91, *pr. ff. ad leg. Falcid.*). And, finally, because in a prelegacy left to many heirs, each has an equal share in what they take by right of legacy from their co-heirs, but each retains his share of the inheritance as far as the prelegacy comes from himself as heir. That part is therefore expressly named the *hereditary* part (*l. cum pater* 2, *ff. de instruc. vel instrum. legato.*).

As a consequence of this, if an estate is left to one of many heirs to be taken beforehand (*per preeceptionem*), or, in other words, is left as a prelegacy, or even if it is left to individual heirs of any separate single estate, that whole estate left as a legacy will pass without any diminution or reduction to the one to whom it was left by way of prelegacy. So that he will not be compelled to pay to the other heirs the price of that part of the prelegacy to which he himself was heir (*d. l.* 34, § 1, *ff. de legatis* 2, *l. qui filiabus* 17, § *ult. l.* 18, *ff. de legatis* 1); in what way *l.* 17 & 18 treat of prelegacies appears from the fact that this legacy is said to be due to the heir by virtue of the offices of the judge appointed to subdivide the inheritance. And this is compatible only with prelegacies.

And so, also, when one is instituted heir to the estate in Italy, and another to that in the provinces, no co-heir being added, the heirs are deemed to have equal shares; but still, in a suit for division of inheritance, the judge will give the property in Italy as a prelegacy to one, and to the other that in the previnces (*l. ex facto* 35, *pr. & §§ seqq., ff. de hered. instit.*).

But if the testator has given a prelegacy to some of many heirs, and if these so favoured by prelegacy are instituted heirs to unequal shares, each will take as a prelegacy his part of the inheritance in the proportion in which he is instituted heir; but as to the remaining parts belonging to the co-heirs, each will have a full (equal) share, as has just been laid down above, following *l. cum pater* 2, *ff. de instruct. vel instrum. legato.* Of course, if the testator has given as a prelegacy any one thing or a definite portion of a thing to all the heirs he has instituted, no mention being made in the

prelegacy as to how it is to be divided, the better opinion is that such a prelegacy is of no force or effect; because by each one taking by prelegacy that part to which he is instituted heir, and which, as above laid down, he can take by virtue of being heir, the consequence is that there is no part remaining to divide among the co-heirs. It would be different if the testator, in leaving a prelegacy to all the heirs, should give certain portions to each heir, for then these would have passed to each according to the expressed wish of the testator. And for this reason, if the testator first instituted an heir to two-thirds of the Cornelian estate, and, secondly, to one-third of the same estate, no other co-heir being instituted, each will be heir to half the estate. But each will have his proper share awarded him by the judge, as if it were a prelegacy, and so one will get a third part and the other two-thirds (*l. quotiens* 9, *si duo* 13, junct. *l. ex facto* 35, *pr. & §§ seqq., ff. de hered. Instit.*).

8. Finally, I give here a few words of warning, that in taking gifts *mortis causâ* (which indeed are taken by one to whom a bequest is made under the condition of giving a legacy for the purpose of fulfilling the said condition), the rule that no one can take from himself, also applies. It is, therefore, of great importance whether the heir has been instituted under condition of *giving ten (thousand sesterces) to the heirs*, or, indeed, has been left a legacy. For if you take the case that he is instituted under such a condition, he will have to give the entire ten (thousand sesterces) to the others, whose co-heir he will be, and will not be able to deduct for himself, that part to which he will become heir after the giving. Since he is not heir before the giving or the fulfilment of the condition, so also he is not, until he has given the whole sum of ten (thousand sesterces) to the other heirs, and no law allows him, inasmuch as he is not yet heir, to deduct a part from what he must hand over to the heirs. Therefore, when a slave is manumitted by testament and instituted part-heir, under the condition of giving ten (thousand sesterces) to the heirs, it is agreed that he will not be made free or become heir until he has paid over the whole sum of ten (thousand sesterces) to the co-heirs (*l. qui heredi* 44 § *ult. ff. de condit. & demonstrat.*). The matter stands in a different light, if the testator has left an estate as a legacy to the instituted heir together with others, *under the condition that he gives ten (thousand sesterces) to the heirs.* Because, then, in giving the ten (thousand sesterces) he can deduct the portion thereof due to him as heir (*partem hereditariam*), and after paying the remaining portion to the heirs in their proper shares, he will have the whole estate to himself; for this reason that in such a case, when he fulfils the condition of giving to the heirs, he is already heir as much as the others are (*d. l.* 44 § *ult. ff. de condit. & demonstrat. l. ab omnibus* 104 § *item si* 4 *ff. de legatis* 1).

9. Although a legacy cannot be left to persons incapable of taking,

so that they may reap any advantage therefrom, still there is no obstacle to a testator making use of the services of incapable persons in order that the legacy may pass to persons capable of taking. And for this reason, if to a person capable of taking only a part, the whole legacy is left, to be handed over to another, he takes the whole for that other who is capable of taking (*l. cum ei, qui partem* 42 *ff. de legatis* 2; *l. si fidei* 28 *ff. de legatis* 3). And this to such an extent that such incapable persons can be compelled to enter upon the inheritance (adiate), and restore it, if they are not legatees but instituted as heirs (*l. cogi potuerit* 16 § *hi, qui solidum* 15 *ff. ad Senatusc. Trebell.*). This is also strengthened by what is written by Proculus, that if any one has ordered his heir to hand over an estate, with which the heir has not legal power to deal (*commercium non habet*), to another who has such power, the heir will be bound either to give the thing itself, if it is to be found among testator's property, or the value thereof (*l. mortuo bove* 49 § *par. ff. de legatis* 2). And so, as Ulpian has decided, if a thing with which the legatee has not power to deal is left as a *fideicommissum* to one who has no right to hold possession of it, the value of it will be due (*l. sed si res* 40 *ff. de legatis* 1). And the reason of all this is manifestly that no one who is bound to hand a thing over to another can be allowed to take it himself (*l. aliud est capere* 71 *ff. de verbor. signif.*). It follows from this that though the statutes of some places prohibit spouses from enriching each other by will, the husband nevertheless can leave as a valid legacy to his wife, and the wife to her husband, money to be distributed among the poor. As to this, cf. Peckius *de testam. conjug. libr.* 4, *cap.* 8; Rodenburch *de jure conjugum tit.* 2, *cap.* 4, *num.* 40.

10. Legatees indeed should be capable of taking (have *testamenti factio*), at the time of the making of the testament, and at the death of the testator, in the same way as is advised with regard to heirs in *tit. de hered. instit. num.* 21, 23, and finally also at the time they receive the legacy. And since an heir must have capacity to take at the time he enters upon the inheritance (*aditionis*), as by adiation (entering upon) the heir really acquires the whole estate (*universum jus*) of the deceased (*l. cum heredes* 23 *ff. de acquir. vel amitt. possess.*), so a legatee really obtains the legacy by consenting to receive it (*agnitione*). A legatee therefore has the same reason for consenting to receive (*agnitionis*) a legacy as an heir has for entering upon an inheritance (*aditionis*). Of course in a conditional legacy it is necessary that the legatees should be capable of taking at the time the condition was made (*arg. l. eum, qui post* 104 *ff. de condit. & demonstrat.*) just as that time is also looked to in regard to capacity to take, when any one is instituted as heir subject to a condition (§ *in extraneis* 4, *Instit. de hered. qualit. & different.*). Unless the condition has been fulfilled during the lifetime of the testator, since in that case only the time when the testament was made, the time of

testator's death and the time of receipt of the legacy must be looked to, just as if the legacy was originally an unconditional one (*arg. l. si pupillus* 26 *ff. de condition. institutionum*).

It is, however, beyond doubt that a legacy can validly be left to an incapable person subject to the condition, "if at any time he shall be capable of taking it" (*l. in tempus capiendae* 62, *ff. de hered. instit.*). In this case the law does not require the legatee to be capable either at the time the testament is made or when the testator dies, but the position is rather this that the legatee will take the legacy as soon as the law allows (*l. si ita quis* 51, *ff. de legatis* 2).

11. All those to whom something is left by the will of the deceased can be charged with a legacy. Such are principally heirs whether they succeed according to a testament (*ex testamento*), or by intestacy (*ab intestato*). For though an inheritance is regarded as passing to the lawful heirs by the disposition of the law, still there is no doubt that it is also obtained through the favour and tacit wish of the deceased. Because when a father (*paterfamilias*) dies intestate, he is deemed to have left his estate to his lawful heirs of his own free will, and he is also deemed to have tacitly given his estate, from the very fact that he did not make away with it when he had the power to do so (*l. conficiuntur* 8, § *sed ideo* 1, *ff. de jure codicill. l.* 1, § *sciendum* 6, *ff. de legatis* 3).

On this principle it has been decided that a father can in this way leave a legacy to persons other than the lawful heirs of his minor son, who has not reached the age of puberty, because doubtless by means of pupillary substitution made by virtue of his power as father (*patriae potestatis*), he could divert the legacy from them and transfer it to others. Although in this case the charge on the legacy does not extend beyond the time when the minor son reaches puberty in order that the pupillary substitution should not exceed its power and become *ultra vires*, and so also it will not hold good, if the father has disinherited his minor son before he reaches puberty (*l. si fundum* 92, § *ult. l.* 93, *l.* 94, *ff. de legatis* 1; junct. *l. cum quidam* 24, *C. h. t. de legatis*).

And it is of no importance whether they are instituted heirs, or heirs substituted, either directly or as fideicommissaries, except that no charge in respect of a legacy can be put upon the substituted heir of a minor son who has been disinherited, even though the father of the minor is a soldier, and wishes to leave the same thing as a legacy, or as a *fideicommissum* to the substituted heir as he had left as a legacy to his minor son whom he has disinherited (*l. cum quidam* 24, *C. h. t. de legatis*; *l. miles ita* 41, § *si miles* 3, *ff. de testam. milit.* Gothofredus *in notis*, following others, has shown that the first word of paragraph 4 belongs to, and should be connected with the end of this § 3). So that to such an extent does it hold that those substituted can be charged with a legacy that

in case of doubt those substituted are deemed to be tacitly charged with the legacy with which the deficient heirs were burdened (*l. licet Imperator* 74 *ff. de legatis* 1; *l. si Titio* 61, § 1, *l. cum pater* 77, § *ab instituto* 15, *ff. de legatis* 2, *l. si plures grados* 98, *ff. de legatis* 3; *l. non jostem* 4, *C. ad Senatusc. Trebell.*).

So if a testator instituted his son as heir, and prohibited him from alienating the property outside the family, and if the son were to die before his father, or otherwise has not wished to be his heir, and the testator has substituted his grandsons, there being no repetition of the prohibition against alienation, the grandsons will, nevertheless, not be able to alienate, just as if they were burdened with the same fideicommissum tacitly repeated (Neostadius, *Curiae supr. decis.* 13).

This is so provided there is no evidence of a different intention on the part of the testator. This different intention can be gathered from various circumstances, for instance, if he has left a different thing as a charge upon the substituted heir, to that with which the instituted heir was burthened; or if there were a definite cause for his leaving a charge on the instituted heir, which had ceased to apply to the substituted heir; or if he substituted a person who was fideicommissary, to the instituted heir whom he has charged with a fideicommissum (*d. l. licet Imperator* 74, *ff. de legatis* 1); or has expressly charged only one degree of heirs with the legacy (*l. si plures gradus* 98, *ff. de legatis* 3; *l. pater meus* 29, § 1, *ff. de legatis* 2). But if the testator institutes a first, second, and third heir, and leaves legacies on the following terms, viz. "If the first does not become my heir, the second must give Titius ten (thousand sesterces); if the second be not my heir, the first must give my estate at Tusculum to Seius." And the first and second do not enter upon the inheritance, the legacies are due from the person substituted to each, according to an answer (*responsum*) by Paul in *l. debitor decem* 82, § *si primo* 1, *ff. de legatis* 2.

12. But if an inheritance has come to any one by chance, and not by tacit or express wish of the testator, he cannot be burthened with a legacy or *fideicommissum*. And as has been advised by Paul, a fideicommissum cannot be given in the following terms: "If Stichus is made to enter upon the inheritance of Seius by his command, I ask him to give," since one who has obtained an inheritance or a legacy by chance, and not by the will of the testator, must not be charged with a burthen; nor should you be allowed to bind one to whom you have given nothing (*l. sed et si* 6, § 1, *ff. de legatis* 3). Hence, although a son who is not instituted as heir may become a *suus heres* of his father, yet the father cannot charge him with a legacy or fideicommissum (*l. ex filio* 2, *ff. de legatis* 3). So also if any one die intestate, and has left a fideicommissum as a charge against the person who should succeed him as heir in the first degree, and on that one repudiating the inheritance, the succession should

devolve on the heirs of the next degree, it has been decided by rescript that the latter should not be subject to the fideicommissum (*l.* 1, § *pen. & ult. ff. de legatis* 3). The same thing also takes place if the heir instituted by will and charged with a legacy repudiates the inheritance left by will, and so contrary to the intention of testator, another person succeeds as heir *ab intestato*. This seems, however, to have been changed by later law, and according to our customs, since even heirs *ab intestato* can be compelled to make good legacies left by testament (see *tit. injust. rupt. irrit. fact. test. num. ult.*).

13. But it depends entirely upon the will of the testator as to whether he wishes to charge one or more of the heirs, or all of them, with the whole legacy (§ 1 *Instit. de lege Falcid. l. in singulis* 77 *l.* 78, *ff. eod. tit. l. si plures gradus* 98 *ff. de legatis* 3), burthening each with a full share or with his "hereditary" portion (part he takes as heir) (*l. si heredes* 124 *ff. de legatis* 1).

Now, what I have said about one heir being charged with the whole of a legacy (*in solidum*) is true, when the testator has ordered a thing not in his estate, or a certain quantity of *res fungibles* to be made good by one heir. For if one of several heirs has been burthened with the handing over of any particular thing in the estate, he will not be deemed bound to pay the whole legacy, but only that part to which he is heir. Because, as there was a doubt, the testator was deemed, in burthening his heir, to have referred only to that part of the particular thing, which belongs to the heir, or would belong, after his entry upon the estate (*aditione*), (*l. si fundum sub conditione* 81, § *si libertus* 4, *ff. de legatis* 1, junct., *l. servi electione* 5 § *ult. ff. de legatis* 1. Gomezius *variar. resolut. tom.* 2, *cap.* 11, *num.* 15, *in fine*). But when only one heir is duly burthened with a legacy, the legatees can take action against none other but that one so charged. So that in this respect there is a difference between legacies and the debts of deceased, since the testator can by testament impose the payment of the whole of his debts as a duty upon one of his several heirs, but this does not prevent each heir being sued for his *pro ratâ* share as heir. Nor can the heir, whom the testator has charged with the payment of his debts, be sued by law for the whole sum of debts by the creditors, but this can be done by the remaining co-heirs, who are severally compelled to pay a *pro ratâ* share of the debt (*l. servo legato* 69, § *si testator* 2, *ff. de legatis* 1).

Though by our laws it has been further decided that the person whom the testator has by testament charged with the payment of the entire sum of his debts, can be compelled by the creditors to pay the whole amount, as is laid down in *tit. familiæ ercise. num.* 27.

14. Besides heirs, both those instituted and those substituted, others also who derive benefit from the will and by the death of the testator can be burthened with legacies, such as legatees, after the differences

between legacies and *fideicommissa* of single things had been swept away, (for at one time a legatee could be charged with a fideicommissum, but not with a legacy) (*pr. Inst. de singulis reb. per fideic. relictis.* junct. § *sed non usque* 3, *Instit. h. t., de legatis.*) Similar to these are those to whom is left a *donatio mortis causâ* (*l. ab eo* 9, *C. de fideicommissis, l. cum pater* 77, § *eorum* 1, *ff. de legatis* 2).

Such also is the case when a husband or wife is given a donation by their spouse, with the proviso that the donation should be confirmed by the death of the donor, and in this way perform the part of a fideicommissum (*l. si mulier dotem* 3, *ff. de legatis* 3, arg. *l. cum hic status* 32 § 1. *&* § *paenitentiam* 3 *ff. de donation. inter vir. et uxor. l. in donationibus* 12 *C. ad leg. Falcid.*).

Further, also those who take in order to fulfil the condition, which means a taking *mortis causâ*, when the deceased has either instituted some one as heir or left him a legacy, under the condition of giving another ten (thousand sesterces) *l. quidam testamento* 96 § *ult. ff. de legatis* 1).

Finally, also, all those who for one reason and another are debtors of deceased, in so far as the testator is deemed to have cancelled their debt as a legacy to them, and thus, as it were, charged the legatee with a legacy (*l. si pecunia* 77, *l. si servus legatus* 108 § *qui margarita* 13, *ff. de legatis* 1).

Whether donees, to whom by the generosity of some one a simple donation *inter vivos* is given, can be charged with a fideicommissum, will be set forth *in tit. ad Senatusc. Trebell. & tit. de donation.*

15. Between heirs, however, and the rest of the legatees not being heirs, who are burthened with legacies or fideicommissa, there is this difference—that the heirs only, and not the legatees, can deduct the Falcidian Fourth (portion) from the legacies with which they are charged (*l. lex Falcidia* 47, § 1, *ff. ad leg. Falcid.* junct. *pr. &* § 1, *Instit. eod. tit. l. ult.* § *& si præfatam* 4 *C. de jure deliber.*); and that heirs can by the later law be burthened with legacies to an extent beyond what they themselves receive as legacies, whenever they enter upon the inheritance without benefit of inventory, because they have not the power to deduct according to the Lex Falcidia (*d. l. ult* § *sin autem* 14, *circa fin. C. de jure deliber. Adde tit. de jure delib. num.* 27). But legatees and others similar to them cannot be further charged than to the extent to which they had been left legacies by the deceased, so that any further burthening will be deemed of no avail (§ 1, *Instit. de singulis reb. per fideic. relictis. l. Imperator Antoninus* 70, § *si centum* 1, *ff. de legatis* 2. Responsa Jurisc. Holl. *part* 2, *consil.* 134).

Although it is not to be denied that there are some cases given in the laws in which, on the first inspection, legatees seem to be burthened with more than they have received from the deceased. For, according to Julian, if either Stichus or Dama is left as a legacy to any one, the legatee having his election given him, and he is left

subject to a *fideicommissum* to hand over Stichus to another; then, if he prefers to vindicate Dama, he will, nevertheless, be compelled to hand over Stichus, although Stichus is of greater value than Dama, since it is due to his own choice that he did not have by right of testament what was now subject to the fideicommissum (*l. plane si filium* 94, § *si cui Stichus* 2, *ff. de legatis* 1).

So also if one hundred (thousand sestertii) be left as a legacy to some one, and he is requested to hand over two hundred after such a lapse of time as would allow of an additional hundred being gathered from the interest, he will be bound to give the two hundred, or otherwise only the added interest if the time were shorter. Nor will he be bound to give more, because after taking the legacy he happened to gain, by some business transaction or other, a large profit, which far exceeded the rate of interest, or has avoided the threatened stipulated penalty (*l. Imperator* 70, § *si centum* 1, *ff. de legatis* 2). Finally, if the legatee accepts money or a certain thing, and he is asked to restore a thing of his own of greater value, he will not be heard, if, after taking the legacy, he wishes to restore only the value of the legacy received * (*d. l.* 70, § 1, *in fine ff. de legatis* 2). For we follow this rule, that there is a great difference whether a person is requested to hand over his own property or that of another. Because if requested to hand over his own, he is bound to do so, even though he has received only a moderate legacy; but if asked to restore property of another, he will not be held bound unless he can redeem it for as much as he has obtained by the will of the testator. And this is so, because every one is probably ignorant of the value of property belonging to another, but should know that of his own (*l. quisquis major* 15, *C. de rescind. vendit.*), and is also presumed to know it and so not to value it at more than he has received from the legacy (*l. generaliter dicemus* 24, § *si quis alienum* 12, *ff. de fideicommiss. libert. l. sed si non servus* 36, *pr. &* § 1, *ff. ad leg. Falcid.*). Now this is the very reason that legatees are allowed the *jus deliberandi* (right to deliberate) by law; although in other respects the title to a legacy is naturally a beneficial (lucrative) one and not onerous (*l. quaedam sunt* 15, *ff. de reb. dubiis. l. si miles* 31, *ff. de testam. milit.*).

16. It must be noted further that sometimes some are enriched by will, while others are burthened with legacies or *fideicommissa;* but looking at the practical result of this we see that really none but those enriched by testament are burthened. For this reason, if a legacy is left to a town corporate (*municipium*), any *fideicommissum* must be paid by those who have the conduct of the state, since they are deemed burthened, inasmuch as they represent the town (*municipium*) over which they preside (*l. si fuerit* 5, *ff. de legatis* 3).

It has been decided, too, by Imperial Rescript that minors who

* *Si velit computare:* lit. if he wishes to commence a reckoning, *i.e.* between what he received and what he is asked to hand over.

have been instituted as heirs, or enriched by legacy, should make good *fideicommissa* imposed upon their tutors, just as if they were so enjoined upon the pupils (minors) themselves (*l. etiam* 20, *C. de fideicommissis*). Because tutors represent their pupils, and should be deemed owners of the minor's property, as far as concerns the making provision for the pupil (*l. tutor, qui tutelam* 27, *ff. de admin. & peric. tut.*). Also the acts of the tutors are taken to be the acts of the minors (*l. Titia cum* 34, § *si ea conditione* 4, *ff. de legatis* 2). But if any one has left a legacy or fideicommissum to be made good not by the heir or the legatee, but by the heir of the heir or legatee, Ulpian has decreed that this is a good disposition; because the heir, though by nature distinct, is nevertheless by fiction of civil law the same person (*persona*) as the deceased (*l. si fuerit* 5, § 1, *ff. de legatis* 3). So therefore, if I charge a fideicommissum on my heir in the following terms: "*I request you, Lucius Titius, to require your heir to give Maevius ten aurei*," this will, according to a *responsum* (answer) of Paul, following Julian, be a valid fideicommissum, and will enable Maevius to claim it, on the death of Titius, from his heir (*l. sed & si* 6, *ff. de legatis* 3).

Beyond these cases, those who are not enriched cannot be burthened with legacies. Therefore where there is a statutory community of all property between spouses, if the husband leaves a legacy, it must not be paid out of the common property, but forms a charge on the husband's heirs alone. Though in some places such a legacy would have to be paid from the joint property, if at the time of making the testament the other spouse had consented to the legacy. This, however, is disfavoured by our law, as advised by Abrah. à Wesel (*de connubial. societate tract.* 2, *cap.* 3, *num.* 76 *& seqq.*).

It is more in accord with our law that legacies should be paid out of the joint property when the spouses have left them by one joint will, and have mutually instituted each other heirs, ordering them to be paid by the survivor at the death of the first dying, and laying down, further, to whom the goods of each should pass at the death of the survivor of them. (*Responsa Jurisc. Holl. part.* 4, *consil.* 179.)

17. All things which are *in commercio* (*i.e.* which can legally be traded with) can be left as legacies; even those in the enemy's territory, provided there is a hope of their being brought back *jure postliminii* (according to the law of *postliminium*), but not if the *jus postliminii* is excluded (*l. id, quod apud* 9, *l. servus ab hostibus* 98, *l. ab omnibus* 104, § *etiam* 2, *ff. de legatis* 1). As regards such property of the enemy as never belonged to a Roman citizen, and so could not be brought back according to *postliminium*, we must follow *l. liber homo* 103, *ff. de verb. oblig.*

It is obvious that not only *species* (particular things), but also a *genus* (class of things), can be left by legacy, whether the testator leaves a legacy of a thing as a *genus* (*in genere*), with the intention

that one or more *species* (particular things) of that *genus* (class) should be paid over, which is treated of *ad. tit. de optione vel elect. legatâ;* or wishes the legatee to acquire all the *species* (particular things) comprised in that *genus* (class), to be found in his patrimony (among his property). Now if a testator has first written down the name of a class of things, and then has subjoined certain species (particular things) comprised in that class, if he has done so in ignorance or in doubt as to whether such *species* are comprised in that *genus*, everything comprised in that class, besides the *species* (particular things) enumerated, will be due to the legatee, and the *genus* will not be lessened, but the *species* will rather be deemed added over and above the genus, as Ulpian remarks in *l. quaesitum est.* 12, § *pen. ff. de instruct. vel instrum. leg. l. legata supellectili* 9, *ff. de supell. legatâ.*

But if he knew that the *species* subjoined to the *genus* are comprised in that *genus*, and there is no uncertainty in law as to the subjoined *species* belonging to that *genus*, the testator is rather deemed to have wished to restrict the legacy to the *species* enumerated, so that therefore, besides these, nothing else has to be paid over in a legacy of a *genus* (*l. Seiae ex parte* 20, *pr. ff. de instruct. vel instrum. leg. junct. d. l.* 9, *ff. de supell. legatâ*). But if certain *species* are first written down, and then a *genus* is subjoined, everything comprised in that *genus* will be deemed to be left as a legacy (*l. ult.* § *ult. ff. de tritico, vino, vel oleo legato*), unless from the circumstances of the case testator's intention can be shown to be different, as could be done in the case in *l.* 1, *ff. de auro arg. mundo, &c. legatis.* Compare Responsa Jurisc. Holl., *part.* 3, *vol.* 2, *consil* 110, *num.* 6 *& seqq.*; Ant. Faber, *Cod. libr.* 6, *tit.* 18, *defin.* 2; Bachovius *ad Treutler. vol.* 2, *disput.* 13, *th.* 4, *lit. D.*

18. But if a testator has made a general legacy of his movables, it is of importance to know whether in doing so he made mention of and referred to a certain place or not. For if he mentioned no determinate place, everything included in the term movables, wherever found, will be comprised in the legacy, even merchandise exposed for sale, and also ready money, though collected to be put out at interest, or for the purchase of land, since it is certain that from its nature money is a movable. Though in another consideration, from the favour shown to minors, money of theirs which is put aside for the purchase of land, is included among immovables (*l. quid ergo* 3, § *quid ergo* 6, *ff. de contrar. tut. & utili act.* Paulus Voet (my father of sacred memory) *de mobil. & immobil. cap.* 7, *num.* 7).

Actions (rights of action) are not considered included in a legacy of movables, since actions are properly speaking incorporeal, and so are by no means comprised in the term movables, which are a species of things corporeal. So also actions are not included in a legacy of movables and immovables for the same reason (Peckius, *de testam. conjugum. libr.* 5, *cap. ult. num.* 5; Sande, *decis. frisic. libr.* 4,

tit. 4, *defin.* 6; Berlichius, *conclus. pract. part.* 3, *conclus.* 3, *num.* 11; Menochius, *libr.* 4, *praesumt.* 142, *num.* 20, *& praesumt.* 129, *num.* 29, *& seqq.*; Wesel, *ad novellas constit. Ultraject. art.* 12, *num.* 2; Paulus Voet (my father of sacred memory) *de mobil. & immobil. cap.* 16, *num.* 5). But if, on the contrary, the movables in a certain place are left by legacy, for instance, those in a house, or on a certain estate, this will neither include ready money, nor debts, the deeds constituting which are found in that place (*l. uxorem & filium* 41, § *legaverat* 6, *l. si fundus legatus* 44, *l. quaestitum est* 78, § *Maevi* 1, *l. si mihi Maevia* 92, *ff. de legatis* 3), unless the testator has manifestly intended these to be included in the legacy (*d. l.* 78, § 1, *ff. de legatis* 3). Or unless it is money placed there for safe-keeping, *i.e.* hidden either in the land, in the walls, or in some other secret place, so that when the owner is robbed of everything else, he may have recourse to it. And the Jurisconsult (Proculus) mentions that this takes place specially in civil wars, adding that he has heard simple-minded old men say that "*money without personal control of it is a fragile possession*" (*pecuniam sine peculio rem fragilem esse*),* meaning by *peculium*, whatever is put away for the purpose of keeping it safe (*l. si chorus* 79, § *his verbis* 1, *ff. de legatis* 3). To a secret burial of this sort for safe-keeping do treasures, as the old deposits of money are thenceforward called, principally owe their origin (*l. nunquam nuda* 31, § 1, *ff. de acquir. rer. domin. junct. l. peregre profecturas* 44, *ff. de acquir. vel amit possess. l. a tutore* 67, *ff. de rei vindic.* Compare Raevardus, *libr.* 5, *varior. cap.* 17). As it is a difficult matter to enumerate everything included in a legacy of movables to be found in a definite place, the rule and means of distinguishing laid down by Labeo and Proculus should be followed. They write: "*It is not for the reason that a thing happens to be absent from the place, that it is deemed not included in the legacy, any more than the fact that a thing chances to be in that place makes that thing included in the legacy*" (*l. si ita legatum* 86, *ff. de legatis* 3. To the same purpose is *l. si fundus legatus* 44, *ff. de legatis* 3, *l. ex facto* 35, § *rerum* 3, *ff. de hered. instit.* Also Carpzovius, *defin. forens. part.* 1, *libr.* 3, *constit.* 13, *defin.* 28; Van Leeuwen, *cens. forens. part.* 1, *libr.* 3, *cap.* 5, *num.* 12; Peckius, *de testam. conjug. libr.* 5, *cap.* 27; Neostadius, *curiae supr. decis.* 19).

19. Further, as classes of things (*res in genere*) can be left by legacy, so also can universities of things (*universitates rerum*), such as an inheritance left to the deceased testator, and in this case all the burdens of the inheritance will fall upon the legatee (*arg. l. ex facto* 17, § *Julianus* 1, *ff. ad Senatusc. Trebell. l. si quis servum* 8, § *ult. l.* 9. *ff. de legatis* 2. *l. licet placeat* 15 *ff. de dote praelegatâ*). A certain portion of the property of the testator may be left, when the legatee is called a part legatee (*l. si quis bonorum* 23, *l. non amplius* 26, § *cum*

* Literally: the having money without having it as one's own (*i.e.* in safe-keeping) is a fragile thing.

bonorum 2, *ff. de legatis* 1, *l. cum autem* 9, *ff. de legatis* 2, § *sed quia heredes* 5 *&* 6, *Instit. de fideic. hered.*). Or else a portion, as, for instance, a half of an inheritance coming to the deceased testator himself may be left to the legatee (*l. cum ex filio* 39, *pr. ff. de vulg. & pupill. substit. l. si quis servum* 8, § *ult. ff. de legatis* 2, *l. mulier, quae* 22, § *ult. ff. ad Senatusc. Trebell.*). And when any one is burthened with a *fideicommissum*, it is of importance to know whether he has been instituted as part heir to the inheritance of deceased, or part of the inheritance has been left him as a legacy, because in the former case he can deduct the (Trebellian) fourth part, but in the latter he cannot (*d. l. mulier quae*, 22, § *ult. ff. ad Senatusc. Trebell. junct. l. lex Falcidia* 47, § 1, *ff. ad leg. Falcid.*).

Then it is also of interest to know whether a *part of the inheritance* or a *part of the estate* (*bonorum*) was left by the legacy. For when a *part of the estate* is left by the legacy, the debts, the price of the manumitted slaves, and such-like, must first be deducted; but this is not so when a *part of the inheritance* is left (*l. si quis servum* 8, § *ult. l.* 9, *ff. de legatis* 2). Although sometimes the *inheritance* and the *estate* (*bona*) are confounded, and the one is taken for the other by Ulpian *in fragm. tit.* 24, § *sicut singulae* 25. But whether a part of the *estate* or a part of the *inheritance* is left by legacy, we must look to the amount of the testator's patrimony at the time of his death (*arg. l. grege legato* 21, *& ll. seqq. ff. de legatis*, 1. *l. peculium* 65, *ff. de legatis* 2, *l. pen. ff. de instructo. vel. instrum leg.*; Ant. Matthaeus *select. disput.* 8, *ad l. ult. C quae res pignori num* 11.; *post* Peregrinum, Mantica, Menochius, *ibid. cit.*).

Further, in a legacy of a university of things can be left the following: viz. a shop (*taberna*), a company of singers (*chorus*, a troupe), a household of slaves, a two-horsed chariot, a three-horsed chariot, a four-horsed chariot, a flock of sheep, a herd of cattle, and many others. In the case of a legacy of a flock of sheep, a herd of cattle, and such-like, it is doubtful whether one thing or more than one is left. If you look at the law and the obligation it induces, there is only one thing left (*l. grege autem* 6, *ff. de legatis* 2, *arg. l. scire debemus* 29, *ff. de verb obligat.*); but if you consider the division into "heads" of cattle, etc., the legacy seems to embrace more things than one (*l. si chorus* 79, *ff. de legatis* 3; Cujacius *ad d. l.* 29 *de verbor oblig.*).

20. Among the things that can be left by legacy, and which are not treated of in special titles, are included also debts (*nomen*), and actions for them. In this case the heir gives the legatee cession of action (§ *tam autem* 21, *Instit. de legatis. l. si damnatus* 10, *ff. de liberat. legatâ l. servum filii* 44, § *sed & si* 6 *de legatis* 1). The action lies not only to obtain the principal sum due, but also the interest, because the legacy is deemed to embrace everything due in respect of the debt (*l. nomen debitoris* 34, *ff. de legatis* 3; Responsa Jurisc.

Holl. *part.* 4 *consil.* 211). (The action is available) not only against the debtor himself, but also against sureties and possessors of pledged things, if the creditor has been secured by the land, or by mortgage on the land, or by both together (*arg. l. emtori nominis* 6, *ff. de hered. vel. act vendit.*); unless the testator has by testament remitted the accessory obligation, giving the surety his release, or the pledgor his pledge as a legacy (*l. si damnatus* 10, *ff. de liberat. legatâ* junct. *l.* 1. § 1, *ff. eod. tit.*). The heir, moreover, performs his obligation by thus ceding the debts, and he is not bound to guarantee the solvency (the capacity to pay) of the debtors, or to specifically hand over the thing which was pledged (*l. Lucius Titius* 88, § *civibus meis* 8, *ff. de legatis* 2, arg. *l. si nomen* 4, *ff. de hered. vel. act. vend.*), whether testator has left as a legacy a debt itself, or a specific thing or definite quantity of a thing comprised in that debt. Provided if a definite thing such as one owed to himself, is given by legacy, inasmuch as he leaves as a legacy a thing owed to himself, he is deemed to give nothing but the action to enforce payment of the thing (arg. *l. cum servus legatus* 39, § *idem Julianus* 3, *l. legatum ita erat* 105, *ff. de legatis* 1. *d. l.* 88, § 8, *ff. de legatis* 2, § *tam autem* 21. *Instit. de legatis. l. si damnatus* 10, *ff. de liberat. legatâ*).

If the action left as a legacy has already been brought to trial by the deceased, nothing but the uncertain issue of the suit is deemed left by legacy; so that the legatee will have the risk of the heir losing his suit, and the advantage of it if he wins, and for that reason the legatee can assist in the suit to prevent collusion (*auth. nunc si C. de litigiosis*).

It has been decided, moreover, that a legatee can by *utilis* action obtain his debt from the debtors of the deceased, even without cession of the debt, and has also an accessory *utilis* action on account of the pledges or against the sureties (*l. ex legato* 18, *C. h. t. de legatis*), provided the accessory obligations have been acquired by the deceased himself. For if it is only the heir that has secured the debt left as a legacy by pledges or sureties, it is determined that the legatee cannot without cession claim the pledge or bring an action against the surety (arg. *l. si heres pecuniam* 73, *ff. ad Senatusc. Trebell.*).

21. To make a legacy of a debt of force and effect, it is always necessary that a debt should be due, or appear to be owed (*l. si sic legatum* 75, § *quod si* 2, *ff. de legatis* 1). Moreover a legacy is not valid, either because at the time it was left, there was no debt, or because though at that time there was debt, yet it had subsequently ceased to be owed. There is deemed to be no debt at the time the legacy is left if the testator has left by legacy, what Titius owed him, and Titius owed him nothing; whether he simply left the debt due by Titius, or named a certain sum, such as "*the hundred* (thousand sesterces) *which Titius owes me*;" because in either case

no debt seems ever to have been owed (*l. si sic legatum* 75, § 1, 2, *ff. de legatis* 1. Add *tit. de condit. & demonstrat.*). It is however sufficient for the validity of a legacy of a debt, that there is a conditional debt owing, since during the pendency of a condition in the obligation arising out of the contract, the stipulator (contractor) or other person in a similar position, has the expectancy of the obligation being performed, and transmits this to his heirs, meanwhile also remaining creditor (§ *sub conditione* 4, *Instit. de verbor. obligat. l. is, cui sub* 42, *ff. de oblig. & act.*).

It is different if the testator has the expectancy of a debt on account of a conditional legacy, for in that case he is not creditor during the pendency of the condition, and cannot transmit his expectancy in the legacy to his heirs, if he should die before the condition of the legacy is fulfilled (*d. l.* 42, *ff. de obligat. & act. l. in fraudem* 27, *ff. qui & à quibus manum. liberi non fiant.* junct. *l. si post* 5 § *sed si sub* 2, *ff. quando dies legat. ced. l. ab omnibus* 104, § *in testamento* 1, *ff. de legatis* 1).

Consequently a person cannot validly leave as a legacy what he hopes will become due to him from that very cause, in the same way as he cannot assign it (*l. legata sub conditione* 41, *ff. de condit. & demonstrat.*).

22. A legacy of a debt, which was originally valid, will be made of no force and effect *ex post facto*, if the testator becomes heir to the debtor whose debt he has left by legacy, and the debt is thus extinguished by *confusion* of goods (*l. si id, quod* 21, § *unde* 21, *ff. de liberat. legatâ*), or he frees the debtor by acceptilation (*l. non quocunque* 82, § *qui Gajum* 5, *ff. de legatis* 1), or if he has freed the debtor by legacy and has substituted no other debt for the prior one, from which the legatee could obtain his legacy (*l. Lucius Titius* 88, § *civibus* 8, *ff. de legatis* 2); or he has himself in his lifetime enforced payment of the debt left as a legacy (§ *tam autem* 21, *Instit. h. t. de legatis l. si sic legatum* 75, § *quod si* 2, *ff. de legatis* 1, arg. *l. non solum* 7, § *liberatio* 4, *ff. de liberat. legatâ*), both because by so exacting payment of the debt, he is presumed to have changed his intention, in the same way as happens in a voluntary alienation by the testator of the thing left as a legacy (*l. fideicommissa quocunque* 11, § *ergo & si* 13, junct. § 12, *ff. de legatis* 3), and also because after the debt has really been paid, its substance is gone and the very debt left as a legacy is non-existent (*d. l.* 11 *&* 13).

But just as upon the voluntary alienation by the testator of a thing left by legacy, the legatee must be heard if he wishes to prove that the intention of testator was not changed when he so alienated (*arg. d. l.* 11 *&* 12, *ff. de legatis* 3), so also in this case, where testator has exacted payment of a debt during his lifetime (*l. pen.* § *ult. ff. de adim. vel. transfer legatis*).

It is moreover a sign of no change of intention, if he shows that the testator has exacted payment of the debt left by legacy in order to have the money in his hands, even though he should afterwards happen to buy something else with the money so gathered, or a part of it (*d. l.* 11, § *ergo & si* 13, *in fine ff. de legatis* 3). So also if the money has been gathered in, but again lent to other debtors, that change of debtors, as it were, does neither nullify the legacy nor lessen it (*l. qui filium* 64, *ff. de legatis* 3). And generally, if payment of the money owed is exacted from the debtors, or money is collected for any reason whatsoever, the money will however continue to be designed for the same purpose of being lent to debtors (*arg. d. l.* 64, *in fine & l. Lucius Titius* 88, *pr. de legatis* 2; Mantica *de conject. ult. volunt. libr.* 12, *tit.* 2, *num.* 19).

And therefore a legacy of a debt is by no means extinguished by a mere novation of the debt, because though it has undergone some sort of change, yet it remains in substance the same debt (arg. *l. cum filius divisis* 76, § *heres meus* 3, *ff. de legatis* 2, junct. *l. Imperator Antoninus* 70, § *ult. l.* 71, *l.* 72, *ff. eod. tit.*). Now if the testator has not exacted payment of the debt, but has accepted it on the debtor of his own accord offering payment, as he could not refuse to accept the offer, the better opinion is that in case of doubt the intention of the testator is presumed to have remained unchanged (*d. l.* 11, § *ergo & si* 13, *ff. de legatis* 3). Nor does *l. si id, quod* 21, *ff. de liberat. legatâ*, oppose this view, because there it is not stated that the debt was offered and paid by the debtor of his own accord, and so it can be taken to refer to a debt paid on the creditor exacting payment, especially if you take § 2 of the same law as dealing with the exacting of payment by the heir, by which it is said the legacy is not cancelled. So that there a decision of opposite effect seems to be treated of, namely, that a legacy is extinguished if the payment of the debt is brought about by the demand of the testator himself, but not if by demand of the heir, inasmuch as this could not induce any presumption as to change of intention on the part of the testator when he is already dead. Of course in the case in which the legacy is not deemed extinguished by the fact that the debt has been collected or paid, the legatee cannot claim from the heir cession of action, since that has been avoided by payment, but what he can claim is rather the amount paid on account of the debt, as if it had by the intention of the deceased been substituted for the debt left by the legacy (arg. *l. qui filium* 64, *ff. de legatis* 3. Vinnius *ad* § 21, *Instit. h. t. de legatis num* 2 *&* 3).

23. But if the testator had in his lifetime commenced enforcing payment of the debt, but had not yet completed it, because he had died during the delay caused by the debtor, who has perhaps already been brought into Court to compel payment, or is already condemned in the amount, the legacy of the debt should be considered just as

much extinguished as if payment had really followed the demand. For in a case of doubt a testator is presumed to have changed his intention of leaving a legacy when he has instituted an action for the debt (arg. *d. l. fideicommissa* 11, § *ergo & si* 13, *ff. de legatis* 3). And the act or delay of the debtor who protracts payment contrary to the wish of the testator cannot and should not affect the case, since the presumption of change of intention continues, and a legatee should not be advantaged contrary to the presumed intention of the testator. For if an index of a change of intention can be obtained from an act of the testator, which is by force of law invalid, such as the giving a donation to the spouse, which is prohibited by the law, and the legacy will be deemed reduced or cancelled (*l. legatum sub conditione* 24, § 1, *ff. de adim. vel transferendis legatis*), much more must a change of intention be admitted where the testator performs some act which he is not restrained from doing by the law, but the consequences of which the other tries to avoid by excessive delay and in a manner contrary to law. Now, if the legacy is deemed to comprise the sum in which the debtor has, during the lifetime of the testator, been condemned to pay, just as if he had already paid it, when, however, as a matter of fact he has not in the lifetime of testator satisfied the judgment (*l. nepoti legaverat* 6, *ff. de instruct. vel instrum. legato.*), I do not see why, in the same manner, his claim for the debt should not suffice to cancel the legacy in the same way as if payment had followed close upon the demand, when, as a matter of fact, there had been, on account of the *mora* (delay) of the debtor, no payment during the lifetime of the testator. Nor does the fact that in a legacy of an estate, together with everything on it, when there is on it wine sold to another person but not yet delivered to the purchaser, this goes to the legatee, make to the contrary (*l. praedia maritima* 27, § *liberto* 3, *ff. de instructo vel instrum. legato.*), since, indeed, a voluntary alienation cancels a legacy if such alienation is completed by tradition (delivery), as is further treated of in *tit. de adim. legatis.* And therefore it holds good that, as in case of doubt, an inchoate, uncompleted alienation does not cancel a legacy, so also the attempted but unfinished exacting of a debt does not void a legacy of that debt. For the voluntary alienation of a thing left by legacy, as also the demand for or exacting of a debt argues a change of intention; but the mere sale of a thing not completed by delivery does not amount to an alienation, since a thing in the *dominium* (ownership) of the vendor remains subject to his will, until delivery takes place. And the reason of this is, as above advised, that tradition, although made by the testator on a consideration void by law, has this effect, that the testator's intention in regard to the legacy is deemed changed, since he, with the apparent intention of changing his mind, has, by wishing to dispose of the legacy to another, the appearance of repenting of the legacy,

and of having actually changed his mind in regard to it (*d. l.* 24, § 1, *ff. de adim. vel transfer. legatis;* Vininus, *ad d.* § 21, *Instit. h. t. de legatis num.* 4).

24. There are also other doubtful points in a legacy of a debt. For what takes place, if the testator is owed either Stichus or ten (thousand sesterces) according as the debtor wishes, and the testator leaves Stichus as a legacy? As in this case the validity of the legacy depends upon the debtor's will, so, Marcellus writes, the legacy is fulfilled by the payment of ten (thousand sesterces) (*l. ut heredibus* 50, § *si Titius* 1, *ff. de legatis* 2). There is in this species of legacy this singularity, that though the legatee of the debt can usually demand that the heir should give him cession of action, and he has at the same time a *utilis* action against the debtor without such cession, even in the case where there is a simple legacy of an alternative debt (*l. si sic legatum* 75, § *si quis ita* 3, *ff. de legatis* 1); yet neither of these courses is open to him here, but he has to bring an *actio incerti* (action for no definite thing) by which he compelled the heir, on his obtaining Stichus, to hand him over to him (the legatee); if he obtained the ten (thousand sesterces) to give up nothing (*l. si sic legatum* 75, § *ult. ff. de legatis* 1). The same principle obtains if, when in the same way there is an alternative debt, the testator has given by legacy to one person Stichus, who is owed him, and to another the ten (thousand sesterces) owed him. Here also the validity of the legacy depends upon which of the two is paid, and the legacy is due to one person only, and not to both legatees, as Marcellus also lays down in *d. l.* 50, § 1, *ff. de legatis* 2. Julian has, however, decided to the contrary, when he says, "*If any one, having stipulated for Stichus or Pamphilus,*" has left Stichus as a legacy to Sempronius, and Pamphilus to Maevius, the heir is deemed bound, as necessity may arise, to give one legatee cession of action and the other the value of Stichus or Pamphilus (*l. quod si quis* 76, *ff. de legatis* 1). Unless we take the given *l.* 76 as treating of an alternative debt, in which the creditor has his election. For it belongs to *l.* 75, the third paragraph of which treats of a legacy of an alternative debt, in which the person stipulating has expressly contracted for his right of choice.

Moreover the reason why in *l.* 76 the legacy is given to both parties, and the one received the action while the other was to be paid the value of Stichus or Pamphilus, is this, that the testator knowing that only one thing left as a legacy can be chosen, and that the legatee who is left by legacy one of two alternative debts, can claim only the one named, such as for instance Pamphilus, and not the other, viz. Stichus, and notwithstanding this leaves the other Pamphilus as a legacy, he is deemed to know and foresee that he is leaving another's property as a legacy, and in that case the value of the other's property must be paid over. (See § *non solum* 4, *Instit.*

h. t. de legatis). This reasoning and explanation are also not a little confirmed by the fact that Julian has also laid it down that a testator, who has Gaius and Lucius under an obligation to him for the same sum of money, and leaves a legacy in the following terms, "*Let my heir be condemned to give to Sempronius whatever Gaius owes me; what Lucius owes me, let my heir give to Maevius*," brings about the same condition of things, viz. that his heir is necessarily compelled to give one legatee his rights of action, and the other the value of the legacy claimed (*litis aestimatio*), unless the testator has during his lifetime credited Gaius with having paid the money, for in that case the legacy both to Maevius and to Sempronius will be cancelled (*l. non quocunque* 82, § *qui Gajum pen. ff. de legatis* 1). Because in this case the testator has also his choice as to which of the two debtors he will sue, and cannot be ignorant that upon the one debtor paying, the other will be absolved; but he notwithstanding this has left a separate legacy of what two people owed to two different persons, as if each was a debtor of a separate and distinct amount, and he is deemed to have intended that there should be two legacies.

As to the fact that when one debtor is freed by the testator by means of acceptilation, both legacies are cancelled, this is so because an acceptilation made to one benefits the other also, and the whole indebtedness of each of the debtors is in this way extinguished (*l. si rem aliquam* 31, *ff. de novation.*). And the same must be said also if any person having in respect of one and the same debt, a principal debtor and a surety bound by obligation to him, leaves what the principal debtor owes, as a legacy to one person, and what the surety owes, as a legacy to another, inasmuch as then also the one legatee must have the action ceded to him, and the other must be paid the value claimed in the suit (*litis aestimatio*). Because so far the surety and the principal debtor are, like two co-debtors, debtors of the same sum of money, and so the same principle applies in their case. So that by acceptilation made either with the principal debtor or the surety, the obligation on the remaining one is *ipso jure* removed, in the same way as when money is received from one of two co-principal-debtors (*l. & per jusjurandum* 13, § *si fidejussori* 7, *ff. de acceptilat.*, junct. *l. liberationem* 3, § *nunc de* 3, *l. si quis reum* 5, *pr. &* § 1, *ff. de liberat. legatâ*).

Now, if one of many co-principal debtors, or a surety or a principal debtor has been absolved from payment not by acceptilation but by a personal agreement not to claim the debt (*pactum de non petendo*), or when the debt due by two co-debtors, or by a debtor and his surety, is according to what is above laid down, made the subject of separate legacies to two different persons, and the creditor who is also testator, has by legacy absolved from payment one of the debtors, with the aim of having only one debtor under obligation for the debt, the better opinion is that both legacies are not cancelled,

but the debt will go to that legatee to whom that particular debt is apportioned by legacy, and which has not been cancelled by the agreement not to claim (*pactum de non petendo*), or by legacy, whether it be the debt due by the co-debtors, or by the principal debtor or the surety (arg. *d. l.* 3, § 3, *l.* 5, *pr. & §* 1, *ff. de liberat. legatâ*).

Of course if the heir is condemned "*to give to Mavieus what Titius owes, but not to claim it from his surety*," the heir should stipulate that the debt should not be claimed from the surety, and should make over to the legatee his rights of action against the principal debtor. In the same way, if the heir is condemned not to claim from the principal debtor, but to give (the legatee) what the surety owes, he will be compelled to absolve the principal debtor from payment, and to make good to the legatee the value claimed in the suit (*litis aestimatio*) (*l. si damnatus* 10, *ff. de liberat. legatâ*).

25. Not only single debts, but also universities (collections) of debts, as for example a book of debts, can be left as a legacy. This class of debts is, in case of doubt, neither extinguished nor lessened by payment of debts being enforced, but one debt is substituted for another, just as if there had been a changing of debtors' names. So that the very money which was exacted is included in the legacy, if it be again lent out and be included in the book of debts, just as also is that which is afterwards for the first time included in the book of debts (*l. qui filium* 64, *ff. de legatis* 3; *l. Lucius Titius* 88, *ff. de legatis* 2); but not those debts which have been transcribed and removed from the book of debts to other accounts (*l. Lucius Titius* 88, *ff. de legatis* 2; *l. nepoti legaverat* 6, *ff. de instructo vel instrum. legato*; arg. *l. Seja ab herede* 6, *pr. & §* 1, *ff. de auro & argento legato*). Now, if the testator has not left the whole book of debts as a legacy, but only a certain number of the debts contained in the book, giving the legatee his right of choice, in case of doubt the legatee will be allowed to exercise his right of choice from among the debts contained in the book at the time of testator's death, rather than from those so contained at the time of making the testament. This is so, both because usually when a legatee is left his option, he can exercise it as against all those things belonging to the testator at his death, and so generally all those things of that class, found in the estate of the testator at his death, should be shown to the legatee for the purpose of making his choice (*l. Scyphi electione* 4, *l.* 5, *l. ult. ff. de optione vel elect. leg.*), and because, according to what has above been laid down, under a general legacy of a book of debts, are included also those debts which have subsequently been included in the book. The consequence of this is that the legatee has his right of choosing from among the debts subsequently added also, since they constitute a part of the book debts. This is so when there is no fraud on the part of the legatee to bring about a different rule, for in that case

the particular circumstances of a case set forth by Scaevola would apply: A father has left as a legacy to his son the twenty debts, included in a book of debts, which his son shall choose, and has during his lifetime allowed that same son to administer all his property. The said son, after the making of the testament but for ten years before the death of his father, during which time he managed his father's business, and contrary to his father's old-established custom of dealing with his book of debts, made large advances to new debtors, and gave greater credit to former debtors whom his father had considered as men of scant fortune, so that almost the whole of the book debts was due from twenty debtors. And when the question arose whether such son should be allowed to choose such debts as he himself had constituted, it was answered, that the son should make his choice from among those debts which were included in the book of debts at the time the testator made his will (*l. nomen debitoris* 34, § *filio* 1, *ff. de legatis* 3. To the same purpose are *l. omnia, quae* 32, § *cum ita legatur* 3, *ff. de legatis* 2, *l. cum de lanionis* 18, § *Sabinus* 12, *in fine ff. de instr. vel instrum. leg. l. pen. in fine ff. de auro & arg. leg.*).

26. Not only the property of the testator and of his heir can be left by legacy, but also the property of another, and as a consequence the heir is compelled to purchase the thing so left at a fair and just valuation, and hand it over to the legatee, or if he is unable so to purchase it, then to make good to the legatee its value; but he must not be obliged to purchase it for an excessive or iniquitous price (§ *non solum* 4, *Instit. h. t.*; *l. non dubium est* 14, § *ult. ff. de legatis* 3). And therefore the matter must be brought up for the decision of a judge, if there is any disagreement as to the just price to be paid (*l. alieno servo* 31, § *ult. ff. de fideicommiss. libertat.*). Now, the testator's own property must at all times be given to the legatee by the heir, as also the heir's own property, whether the testator knew or did not know that it was his own property, or that of his heir, which he had left by legacy. And it is so also, whether he (testator) thought his own property belonged to another, since the validity of the legacy depends upon the real state of the case, and not upon what he thinks (§ *si quis rem suam* 11, *Instit. h. t.*); or has left his heir's property by legacy as if it were his own (*l. unum ex familiâ* 67, § *si rem tuam* 8, *ff. de legatis* 2). That is so in respect of that part of the legacy which is the property of the heir himself, and of the part to which he himself is heir; for as far as the heir is not himself owner of the thing left by legacy, and as far as he is not heir to the deceased testator in regard to the property so left by legacy, his position is the same as in the case of property belonging to another (*arg. l. cum a matre* 13, *C. de rei vindicatione*; Sande *decis. frisic., libr.* 4, *tit.* 9, *defin.* 4). But the heir need not purchase the property of another, or pay the legatee its value, unless the testator knew that it

was the property of another; and this knowledge must be proved by the legatee just as if he were a plaintiff affirming such knowledge in the testator (*d.* § 4, *Instit. h. t. l. cum alienam* 10. *C. h. t.*, junct. *l. qui accusare* 4, *C. de edendo. l. actor, quod.* 23, *C. de probation.*). Unless the testator has left the property of another as a legacy to a person related to himself (*d. l.* 10, *C. de legatis., l. Quintus Mucius* 10, *in fine ff. de auro argento, &c., legatis*), or has directed the heir to take for himself a certain estate, which belonged to another, and to hand over the rest of the inheritance to the legatee (*l. heres praecepto* 72, *ff. ad Senatuscons. Trebell.*), or, in dividing his property among his heirs, has assigned to one of them a thing not belonging to him (*l. cum pater* 77, § *evictis* 8, *ff. de legatis* 2). Or unless family affection or other favourable reason equitably bears out the validity of the legacy (arg. *l. Paulus respondit* 39, *ff. de fideicommiss. libert.*; Zoesius *ad Pand. h. t. num.* 22, and other authorities there cited). Now, in all these exceptional cases there appears the presumption that the testator, being influenced by the consideration of some reason for showing favour, either that the persons are related to him, or that he has chosen them as his instituted heirs, would have left the legacy to them, even if he had known that the thing left was the property of another. But beyond these cases, the heir is not compelled to hand over to the legatee the property of another, unless the testator knew that it was another's property, but is always bound to deliver up his own property, even though the testator has treated it as his, in the bequest. The reason for this is, according to Papinian, that heirs are relieved from being compelled to purchase a thing which the testator has left by legacy, thinking it to be his property, since last wills are easier of execution in regard to legacies of testator's own goods, than in respect of the purchase of those of other people, and the burthening of the heirs. And this has no place in that class of legacies by which the heir's property is left, since the ownership of the thing left is in the heir (*l. unum ex familia* 67, § *si rem tuam* 8, *ff. de legatis* 2). But it must be noted, that in those cases in which the property of another is legally left by legacy, the heir is not freed from the necessity of purchasing the thing left, merely because it can only be purchased with difficulty (*l. cum servas* 39, § *constat.* 7, *ff. de legatis* 1. *arg. l. continuus actus* 137, § *illud inspiciendum* 4, *ff. de verb. oblig.*).

27. Now, if a testator has left as a legacy a thing belonging to himself, but pledged to another, it is the heir's duty to free it from pledge, in case the testator knew that it was so bound; but the legatee will have to free it if the testator was ignorant of the pledge, or if he were not unaware of the pledge over the thing, but has left by legacy not a certain thing, but a university (collection) of things; as, for instance, a *dos* (dowry), under which the particular thing pledged is included (§ *sed & si rem.* 5, *Instit. h. t. l. licet placeat* 15, *ff.*

de dote praeleg. l. si res obligata 57, *ff. de legatis* 1, *l. praedia* 6, *C. de fideicommiss.*). Or if the testator has expressly said that he leaves by legacy "*lands which are bound to another*," or words to that effect. Since in that case he is deemed to have left the lands with burden attached, and on that account it is incumbent on the legatee and not the heir to free the legacy from pledge, according to Groenewegen, *ad. d. l.* 6, *C. de fideicom.* According to Roman law, the same rule, as in case of pledge, applies to the testator's own property, over which another person has a right of usufruct, being left by legacy. So that the heir has to free the legacy of the usufruct, or make good its value to the legatee (*l. Maevius fundum* 66, § *fundo* 6, *ff. de legatis* 2). Groenewegen states, *ad d. l.* 66, § 6, that this is different from our law, and that generally, if such a burden appears imposed on the thing left by legacy, that no loss of ownership can be feared thereby, the heir need not free the legacy of the burthen, and the heir is deemed bound to accept such thing, burthened as it is with servitude (*l. si servus Titii* 70, § *nam & si* 1, *ff. de legatis* 1. Hugo Grotius, *manud. ad jurisprud. Holl. libr.* 2, *cap.* 22, *num.* 11, 12. Wesel *ad novellas constit. Ultraject. art.* 20, *num.* 42), or with an irredeemable or purely real annuity. (Wesel, *d. loco;* Neostadius, *curia Holl. decis.* 11; Responsa Jurisc. Holl. *part.* 3, *vol.* 2, *consil.* 190, *num.* 1 *& seqq.*).

But if a lessee leave the fruits of the lease as a legacy to another, the legatee will take all the fruits of the thing hired, and the heir will have to pay the rent for the hire of the thing (*l. qui quatuor* 30, § *qui hortos* 1, *ff. de legatis* 3; Ant. Matthaeus, *de auction. libr.* 2, *caput.* 6, *num. ult.*).

28. When a thing, which is common to the testator and another, is left as a legacy to a third party, in case of doubt, only that part which belongs to the testator, and not the other, must be paid to the legatee, whether the testator knew or did not know that the thing he so left was common to himself and that other (*l. servi lectione* 5, § 1, 2, *ff. de legatis* 1, *l. qui quatuor* 30, § *qui fundum* 4, *ff. de legatis* 3). And in the same way where Pomponius writes: "If any one leaves *his* slaves as a legacy, those that he holds in common are also included" (*l. si quis suos* 74, *ff. de legatis* 3), must be taken as treating of that portion of the common slaves which is the property of the testator, and not of the portions belonging to his co-partners, since he there adds, that the slaves of the testator, over which another has the right of usufruct, are also included in a legacy, inasmuch as ownership in the slaves must be made good to the legatee, and not the usufruct which another has (arg. *l. recte dicimus* 25, *ff. de verbor. signif.* junct. § *si cui* 9, *Instit. de legatis*).

Nor is *l.* 66, § 6, *ff. de legatis* 2, opposed to this, for it is of importance to note whether the testator has left simply a certain estate or a certain slave as a legacy, or has added "mine," and said that he

leaves *his own* slave as a legacy. For in the former case both the usufruct and the ownership must be made good to the legatee, but not in the latter case, because when a right of usufruct rests in another, the testator cannot call the slave *his own*. So also if one who has *fundum vestigalem*,* and leaves it as a legacy, the full ownership in the estate will not pass, but only such rights as the testator had in it (*l. si domus alicui* 71, § *ult. ff. de legatis* 2). Nor is this opposed to what you say, that, if a thing belonging entirely to another is left by legacy, the whole thing is due under the legacy, and therefore much more is the whole thing due, when it does not entirely belong to another, but belongs in part to the testator himself. For a thing which is wholly another's property must be paid to the legatee in its entirety, to obviate the deceased testator's last will becoming altogether void and of no effect, because the legatee commonly takes the legacy, according to the rule of interpretation, which says that a legacy should rather be given effect to, than allowed to lapse (arg. *l. quotiens in* 12, *l. ubi est verborum* 21, *ff. de reb. dub. l. cogi poterit* 16, *in fine principii ff. ad Senatusc. Trebell.*). But when a thing common to the testator and another is left by legacy, the intention of the testator can be carried into effect, even if only that part of the common thing which belongs to the testator is paid to the legatee, and so there is no necessity that the part which belongs to another should be made good to the legatee for the purpose of giving effect to the testament of the deceased testator. To the same purpose is the rule that when a testator has left by legacy an estate which he has let out to another, together with its appurtenances, and a question is raised whether only those appurtenances belonging to the testator are left, or those belonging to the lessee are also included, it has been laid down that if appurtenances belonging to both testator and lessee are found on the estate, only those of the testator are due under the legacy. But if there are none belonging to the testator, and only those of the lessee are there found, then the legacy includes those of the lessee, for the reason that otherwise the will of the deceased testator would have no force and effect as far as concerns the appurtenances of the estate (*l. fundus qui locatus* 24, *ff. de instructo vel instrum. leg.*).

Of course, if the thing left by legacy is the common property of deceased and his heir, the whole of it is due under the legacy, as in that case the heir is not burdened with any necessity to purchase (arg. *d. l. unum ex familia* 67, § *si rem. tuam* 8, *ff. de legatis* 2, *l. cum filius divisis* 76, § *dominus* 2, *ff. de legatis* 3). So also if a testator has in his lifetime purchased the other part, and has not taken possession of each part as a separate estate, but has treated the two parts as one possession (arg. *l. si ex toto* 8, *l. quod in rerum* 24, § *si quis post* 2, *ff. de legatis* 1, *l. cum fundus* 10, *ff. de legatis* 2).

* An estate hired from a *municipium* in perpetuity at a fixed *canon* or rent, the *dominium* remaining in the *municipium*.—TR.

And further, according to the opinion of some, this is also the case when a spouse leaves as a legacy a thing which, by right of statutory community, is common to the spouses (Resp. Jurisc. Holl., *post.* 3, *vol.* 1, *consil.* 170, *in fine & part.* 5, *consil.* 180, *quaest.* 2. Compare Bronchorst, *cent.* 3, *assert.* 55; Zoesius, *ad Pand. h. t. num.* 31; Deckherus, *libr.* 1, *dissert.* 1, *num.* 12, *vers. tertius casus;* Mantica, *de conject. ult. volunt. libr.* 9, *tit.* 1, *num.* 12, 13; Vinnius, *select quaest. libr.* 2, *cap.* 26. Leeuwen, *cens. for. part.* 1, *libr.* 3, *cap.* 8, *num.* 25; Responsa Jurisc. Holl. *part.* 2, *consil.* 202, *in fine.* This, however, seems to be opposed by *l. alimenta & 16, § ult. de alim. & cib. legatis*).

29. Things, however, the property of the legatee cannot be left by legacy to him, and therefore if the legacy is unconditional, it does not acquire validity from the fact that the legatee has alienated it during the testator's lifetime, so that either the thing itself or its value should be due under the legacy. This is according to the rule of Cato (§ *sed si rem Instit. h. t.*), and is not opposed by *l.* 1, § *ult. ff. de reg. Caton.* For there mention is made of conditional and not of unconditional or pure legacies, and the words, "*if you have alienated it during the lifetime of the testator*," do not go to the decision of the question, but belong only to the form of the fact put forward, according to which the testator has left you an estate, which at the time of making the testament was your property, as a legacy under the condition of your having alienated the estate during the lifetime of the testator. Therefore there is a difference as to the points of punctuation, and the one usually found after the words "*tuus est*," must be transposed so as to come after the word "*alienaveris:*" and so not pure but conditional legacies are there treated of. That there can be a conditional legacy of the legatee's goods is undoubted, since Cato's rule does not extend to conditional legacies (*l. pen. ff. de reg. Caton. l. caetero igitur* 41, § *tractari* 2, *ff. de legatis* 1). Now, if a thing the property of the legatee be left to him unconditionally, but the testator has some available right over the thing, he by leaving such a thing as a legacy to the legatee, is deemed thereby to have remitted his right. Such is, for instance, the right of *superficies*, when any one having that right has left the buildings (*fundum superficiarium*) as a legacy to the owner of the soil (*l. si tibi homo.* 86, § *ult. ff. de legatis* 1); or *emphyteusis*, when the *emphyteuta* leaves the land let to him by *emphyteusis* to the state from whom he received his right of qualified ownership (*l. si domus alicui* 71, § *pen. ff. de legatis* 1); or *usufruct* (*l. Maevius fundum* 66, § *fundo legato* 6, *ff. de legatis* 2, at the end of which paragraph *praeter* must be read for *propter*, as Gothofredus points out in his notes on Cujacius); or *pledge* (*d. l.* 66, § 6, *l.* 1, § *ff. de liberat. legatâ*). On the same principle as Ulpian notes a person can also be left as a legacy to himself; for instance, if he has been redeemed from the enemy, and has not yet paid his ransom, for which he is bound by legal (tacit) hypothec, to his redeemer, who

frees him by legacy (*l. senatus enim* 43, § *ult. ff. de legatis* 1; junc. *l. qui testamento* 20, § *potestatis* 1, *ff. qui testam. suc. poss.*).

So also if a third person and not the testator has some right over property belonging to the legatee which is left to him as a legacy, the heir is bound to free the legacy from the burthen, as for instance in case of a right of *superficies*, or *emphyteusis* (arg. *d. l.* 71, § 5, *l.* 86, § *ult. ff. de legatis* 1). So also he must free the legacy from the bond of pledge, or the servitude of usufruct (*d. l.* 66, § 6, *ff. de legatis* 2, *l. si tibi homo* 86, *pr. ff. de legatis* 1). It has, however, been decided to the contrary, in the case where a third party has only a praedial servitude over a thing the property of the legatee and to him left as a legacy, since in that case the heir will not be compelled to free the legacy from the burthen (*d. l.* 66, § 6, *ff. de legatis* 2), because praedial servitudes do not, like usufruct, tend to diminish the ownership of the proprietor of the thing left. But, indeed, if the price of the thing bought by the legatee, and of which delivery has been made, has not yet been paid, and the testator has left such thing as a legacy to the purchaser, the better opinion is that the heir is deemed bound to pay the price for the legatee (arg. *l. plane ubi transferre* 34, § *quodsi rem.* 7, *l. hujus modi legatum* 84, § *qui servum* 5, *ff. de legatis* 1, junct. *l. Julianus* 13, § *offerri* 8, *ff. de act. emti.*). It must also be noted that a thing the property of the legatee can properly be left as a legacy to him, in the cases where it is possible for his ownership to pass away from him, on a cause that has already arisen (at the time of the legacy).

In this way a purchaser can effectively leave the thing bought as a legacy to the seller, even though it has not yet been delivered, and when it is clear the ownership is in the seller and not in the purchaser. The consequence is that the seller is freed from the necessity to make delivery of the thing, and in case he has subsequently delivered it, can vindicate (re-claim) it, and still retain the purchase money, or if that has not been paid him, can claim payment in an action on the sale (*l. cum servus* 39, § *si Titius* 2, *ff. de legatis* 1, junct. § *quum autem* 3, *Instit. de emt. vendit.*). In the same way also, if I have by usucapion gained ownership of a thing belonging to a minor, or a person absent on business of the state, that thing can properly be left me as a legacy by him, since it can be taken from me by a decree of *restitutio in integrum* (*l. non quocunque* 82, § *si ex bonis* 1, *ff. de legatis* 1). Finally, it is beyond doubt that the value of a thing belonging to the legatee can be left him by legacy (arg. *l. nemo rem suam* 82, *ff. de verbor. obligat.*).

30. As regards things exempted from being dealt in and traded with by men, if legacies of these are left, neither the thing itself nor its value will be due under the legacy. Such are free men, things sacred, hallowed, and religious (although the right to bury the dead in a sepulchre may validly be left as a legacy) (*l. monumenta* 14, *C.*

h. t.). Those things also belonging to the Republic or to the Emperor, which are not usually alienated, such as in former days the Salustian gardens of Augustus, the Alban estate reserved for the use of the Emperors, the Campus Martius, the Market-place at Rome, the lands of Cæsar, reduced to the form of a public estate under a procurator. To leave such by legacy is regarded as the bequest of a madman, and not of one in his senses (*l. cum servus legatus* 39, § *si vero* 8, 9, 10, *ff. de legatis* 1; Hugo Grotius, *Manud. ad Jurisprud. Holl. libr.* 2, *cap.* 22, *num.* 54, *& seqq.*; Paulus Voet (my father of sacred memory), *De statutis sect.* 7, *cap.* 3, *num.* 7). Nor is it of importance whether such things are left by conditional or unconditional legacy; because, though the rule of Cato does not apply to conditional legacies, and though, during the pendency of the condition, such things as aforesaid may become subject to trade and commerce, yet a legacy of them would be deemed void and valueless, since it is not permitted to anticipate and calculate upon such a contingency, nor must such conditions be deemed capable of fulfilment any more than those that are naturally impossible (arg. *l. continuos actus* 137, § *cum quis sub.* 6, *ff. de verbor. obligat.* § *idem juris est* 2; *Instit. de inutil. stipulat. l. si in emtione* 34, § *liberum* 2, *ff. de contrah. emt.*). Now, if the thing left by legacy cannot be traded with by the legatee (it being *extra commercium* to him), but can be so dealt with by the heir, then neither the thing itself nor its value will be due to the legatee under the legacy. But if the legatee has the right of trading with the thing left, the legacy is valid, even though the heir has not that right (*l. mortuo bove* 49, § *Labeo* 2 & 3, *ff. de legatis* 2; arg. *l. multum interest*, 34, *ff. de verbor. oblig.*; Grotius, *d. cap.* 22, *num.* 54, *et seqq.*). This is not opposed by those laws which seem to prove that where the thing left by legacy is *extra commercium* (not subject to trade and commerce), its value shall at all events be made good to the legatee. Such are *l. sed si res aliena.* 40; *l. filius-familias miles* 114, § *si quid* 5, *ff. de legatis* 1; *l. fideicommissa* 11, § *si servo* 16, *ff. de legatis* 3. For *l.* 114, § 5 *de legatis* 1 does not treat of a thing which is incapable of being traded with (*extra commercium*) by the legatee, but of a thing which the legatee himself, on account of some personal defect, or on account of the peculiar quality of the thing left, cannot take, though another person can. On account of personal defect, when a dumb man is left a military office, or a position as singer, or a blind man is left the office or position of reader, etc.

On account of the *quality of the thing*, when a slave whose transportation beyond the limits of the city (Rome) is prohibited, is left as a legacy to one who resides in the provinces, or a thing whose alienation has been forbidden by the law or the testator, as a prohibition in favour of certain persons, is left as a legacy. And therefore in *d.* § 5 it is laid down that such things can properly be left to a person, a declaration which cannot refer to things which are incap-

able of being traded with. Nor is the above very unlike what Marcian has laid down, when he says that "*if any one has left as a legacy the household slaves, without leaving the estate to which they belong, the legacy will be void and of no effect. Whether their value is due under the legacy is to be decided according to the testator's intention*" (*l. si quis inquilinos* 112, *ff. de legatis* 1). For slaves annexed to an estate are not incapable of being traded with, though only such persons as possess the estate to which they are annexed can own them, or have them in their possession. As regards *l.* 1, § 16, *ff. de legatis* 3, that treats of an office (*militia*) left as a legacy to the slave of another, and lays down that the value of the office is due to the slave's honour, if the testator knew that the legatee was a slave, but that the owner cannot claim the legacy if the testator was ignorant of the legatee being a slave. This is so for no other reason, in my opinion, than that the testator, knowing the legatee to be a slave, is deemed to have regarded, not so much the slave as the owner, in whose power the slave is, in making the legacy, and has therefore left the office as a legacy to one who has the power to deal with and trade in it, but who cannot hold, possess, or exercise any rights over it by means of his slave, and that therefore its value is legally due to him, as if it had been properly left to him by such legacy (arg. *d. l.* 114, § 5, *ff. de legatis* 1). On the other hand, if the testator was ignorant of his being a slave, nothing is due under the legacy, because a slave who is made a legatee by a testator in ignorance of his being a slave, cannot be considered a legatee so as to take on behalf of his owner. Nor can he be deemed to take on his own behalf, since he has not the power to trade with such office or any other thing. As a consequence of this, and according to what is laid down above, neither the office itself nor its value must in such a case be made good to the legatee. And what Ulpian says in *d. l.* 40, *ff. de legatis* 1, can also advantageously be interpreted according to the above. He says, "*If the property of another, with which the legatee has not the power to trade, is left as a fideicommissum to one who has no right of possession in it, I think its value is due under the legacy.*" Suppose a testator has left an office as a legacy to a slave whom he believes to be a free man, and who as far as he personally is concerned, has not the power to hold the office; and further asks this legatee to hand over the office to a person who can exercise it, but who on account of some personal defect cannot hold the office, or have it in his possession; or asks him to hand over the office to the slave of Titius, knowing him to be such, and therefore regarding him, not in his personal capacity, but as the slave of his lord, who indeed has the power to deal with the office, but who, as above laid down, cannot through his slave enter into possession or exercise his rights over it. It is therefore right and proper that the value of the office should be made good to such a fideicommissary heir, who has

indeed the power to trade with it, but not the power to enter into possession or to exercise his rights over it. Because the legatee who lacked the power to trade, was in the case here considered the one to be burthened, and the fideicommissary the one to be advantaged, and it is sufficient that the one advantaged should have the power to trade, even though the one burthened lacks that power (*d. l.* 49, § 2, 3; *ff. de legatis* 2; *d. l.* 34 *ff. de verbor. obligat.*). Since it obtains generally in all fideicommissa, that the incapacity of the one burthened does not affect the validity of the fideicommissum, as long as the fideicommissary is capable of taking, and so a capable fideicommissary acquires through an incapable fiduciary (*l. cum ei, qui* 42, *ff. de legatis* 2; *l. si fidei meae* 28, *ff. de legatis* 3; junct. *l. aliud est capere* 71, *ff. de verb. sign.*).

31. But what was laid down above, that a free man cannot be the subject of a legacy, must not be confused with the fact that a slave can properly be left by legacy, though such slave be also left his liberty. Therefore certain doubtful cases arising out of the civil law may be here briefly explained, though in their present connection they are not now in use. So if the same slave is left as a legacy, and is also left his liberty, the legacy in favour of liberty prevails; unless he is left as a legacy in the later will, which shows evidence of the legacy of liberty having been cancelled. But in case of doubt, a favourable answer has been given, that he is free, and that the heir is not bound to make good his value to the legatee (*l. si peculium* 10, § 1, *Julianus ait* 40, *ff. de manumiss. testam.*; *l. si idem servus* 14, *ff. de legatis* 2). But if the slave is left by unconditional legacy, while his liberty is left him conditionally, the heir is not bound to deliver him to the legatee, unless he undertakes to restore him to liberty on the happening of the condition, provided that it appears that the slave's liberty was given him conditionally for the purpose of cancelling the other legacy. For if the legatee can show that the testator intended to burthen the heir, on the condition giving the slave his liberty happening, his value must be made good to the legatee (*d. l.* 40, § 1, *ff. de manumiss. testam.*; junct. *l. si post mortem* 68, § *si pure ff. de legatis* 1). But if a slave is left by an unconditional legacy to another, and it is enjoined that he is to be free at a certain future time, *i.e.* a time that will certainly arrive, the legacy to the other is of no avail, because it is certain that the time fixed for his freedom being given will come (*d. l. si post mortem* 68, § *ult. ff. de legatis* 1), unless the testator appears to have intended that, until the day fixed for the slave's liberty comes, the legatee and not the heir shall enjoy the services of the slave. Perhaps *l. peculium legatum* 65, § *Titio* 2, *ff. de legatis* 2, must be taken as treating of such a case.

32. It is laid down in Roman Law that a legacy of wood which is attached to a house, is null and void, so that neither the wood

itself, even though it should become detached, nor its value, must be made good to the legatee. This is so because it cannot be the subject of commerce in point of fact, and not by intendment of law, since as long as it remains attached it is deemed merged in the house (*l. caetera igitur* 41, § *tractari* 2, *ff. de legatis* 1; junct. *l.* 1, *in fine & l.* 2, *ff. de tigno juncto*). But if the legacy was conditional, it must be made good in the cases where the wood, at the time the condition was fulfilled, was no longer attached to the house (*d. l.* 41, § 2, *ff. de legatis* 1). Now if a structure is illegally built, and wood is attached to it, a legacy of the wood so attached will be valid, because as the structure was illegally built it can be destroyed, and therefore the wood is deemed not to be attached (*l. fideicommissa* 11, § *si quis illicite* 14, *ff. de legatis* 3; junct. *l.* 2, § *si quis nemine* 17, *ff. ne quid in loco publ. fiat.; l. aedificia* 14, *C. de operib. publ.*). And since we are allowed by *Senatus-consultum* and by Imperial Constitutions to transfer wood from one of our houses to another of them (*d. l.* 41, § *item quaeri* 3, *ff. de legatis* 1), therefore if the testator has collected some wood as if he were about to transfer it to another house, and has left it as a legacy, together with that other house, the legacy will stand (*d. l.* 41, § *sed & si paravit* 14, *ff. de legatis* 1). It is otherwise if he has not yet collected any wood to be transferred (*d. l.* 41, § 3, *ff. h. t.*). Finally, if things which are attached to the house but can be separated therefrom, without destroying them and without injury to the house, are left as a legacy, they are due under that legacy. Such are enumerated in *d. l.* 41, § 9, 10, 11, 12, 13, 14; *l.* 43, § 1, *de legatis* 1; *l. nutu etiam* 21, § *ult. ff. de legatis* 3. And this is not changed by our laws, as is observed by Groenewegen, *ad d. l.* 43, *ff. de legatis* 1.

33. There are many things also which are by statute prohibited from being made the subject of legacies, some universally, others only to certain persons; such as immovables to the church, and to tutors and similar persons by pupils and minors; things of any sort by one spouse to another, etc.; all of which are expressly treated of elsewhere. Therefore, if such things are left by legacy to such persons contrary to the terms of the statute, the better opinion is that the value of things left by legacy contrary to the prohibiting statute is not to be made good to the legatee, since any adjudication of the value cannot but work a circumvention of the prohibition of the statute. (Sande, *decis. Frisic. libr.* 4, *tit.* 4, *defin.* 4; Zoesius, *ad Pand. h. t. num.* 27, 28; Perezius, *Tit. C. de incertis personis num.* 4, 5; Rodenburch, *de jure conjugum tract, praelimin. de statutor diversit. tit.* 2, *cap.* 5, *num.* 6; Paulus Voet (my father of sacred memory), *de statutis sect.* 7, *cap.* 3, *num.* 7. Of a contrary view is Peckius *de testamentis conjugum libr.* 4, *cap.* 32). If, however, the testator leaves as a legacy the value of immovable property which is prohibited from being the subject of a legacy, that will be due under

the legacy in case the legatee is capable of taking movables, and can consequently take the value so due. (Zoesius, *ad Pand. h. t. num.* 29. Responsa Jurisc. Holl. *part.* 5, *consil.* 54, *fere in med.*). Moreover, the statute seems by implication to have prohibited those things from being the subject of a legacy, which it has adjudged by right of preference to the husband, wife, or their first-born, because the right of leaving such things by legacy would subvert the advantage given by statute to those privileged persons (Schurpff, *cent.* 1, *consil.* 86. Schneydewinus *ad* § 4, *Instit. h. t. num.* 12). Among these also are such feuds as are not hereditary, or such as, according to our custom, the over-lord (*dominus directus*, original owner), does not usually grant us the right of bequeathing by testament. Whether in case of a feud being left by legacy without the consent of the original owner, its value is due to the legatee, will be treated of in the book dealing with feuds.

34. When anything which can be the subject of a legacy, is left as such to the same person more than once, if it is a single particular thing it is, in case of doubt, only due to the legatee once, because a single particular thing can only once be paid over to the legatee (*l. plane, ubi* 34, § *si eadem* 1, junct. § *sed si non* 3, *& arg. l. si servus legatus* 108, § *Stichum* 4, *ff. de legatis* 1); whether this happen in one and the same instrument, or in different ones. For a testator who has left the same thing as legacy by testament and codicils, and has thus made use of many forms of instrument to convey his last will, does not leave the same thing to the same person more than once, but rather uses language to that effect more than once (*l. Maevius fundum* 66, § *cum qui* 5, *ff. de legatis* 2). This is so unless the legatee shows that the testator intended that both the thing and its value shall be made good (arg. *l. nutu etiam* 21, § 1, *ff. de legatis* 3. *si alii usus* 42, § 1, *in fine ff. de usufruct & quemadm. quis utat*). But if the same quantity of a thing is left more than once to the same person, it must also be paid him more than once, provided it is left him in different instruments. For if left him in one and the same instrument, in case of doubt it is due only once. For if a man first brings an action based on one instrument, and afterwards institutes another on a different instrument, he cannot be met by the exception of *res judicata* (that the cause of action had already been decided), unless the heir shows that though the same thing is left by different instruments, yet the testator did not intend the legacy to be paid more than once (*d. l. plane ubi* 34, § *sed si non* 3, *ff. de legatis* 1, junct. *l. quingenta* 12, *ff. de probation.* Compare Cujacius, *libr.* 14, *observat.* 19; Menochius, *libr.* 4, *praesumt.* 128; Gomezius, *variar. resolut. tom.* 1, *cap.* 12, *num.* 38).

35. Besides things, there is nothing to prevent acts also being the subject of legacies, as for instance when an heir is charged by testament to repair the house of another, or to pay his debts (§ *tam autem*

21, *in fine Instit. h. t.*), to perform some duty in the state, or do some private work for another (*l. fideicommissa* 11, § *si in opere* 23, *§* § *ult. ff. de legatis* 3); to buy or sell something, in which case the testator is deemed to have intended that an equitable price be paid, unless he has expressly named another price, either more or less than the fair value (*l. si cui legetur* 49, § *pen. §* *ult. l. etsi aequo* 66, *ff. de legatis* 1. *l. qui quatuor* 30, § *si fundum* 3, *ff. de legatis* 3). And it is not an uncommon thing that from a purchase and sale, made even for a fair and equitable value, a considerable profit is obtained (*d. l.* 66, *ff. de legatis* 1). But if the testator has charged the heir to sell a certain thing to two persons, one of whom refuses to buy, the other can compel the heir to sell him his part (*l. uxorem et filium* 41, § *agri* 9, *ff. de legatis* 3).

36. There can be conditional and unconditional legacies, and legacies to take effect from a fixed time. The effect of such legacies in their various forms is treated of in *tit. quando dies legat. cedat.* The duty of making good the legacies, however, must not be left to the free will of the heir, because there being in that case no necessity to carry out the legacy, no effectual obligation is cast upon him to pay the legatee (*l. senatus enim* 43, § *pen. ff. de legatis* 1; *l. fideicommissa libertas* 46, *ff. de fideic. libert.* junct. *l. sub hac conditione* 8, *ff. de obligat. §* *act.*); with the exception that liberty, which is in many cases specially favoured, can be left by fideicommissum as follows: "*I commit it to the good faith of my heir, if he should wish so to do, to manumit Stichus*" (*d. l.* 46). It can always be left to the heir's free will to choose to which particular legatee he will give the legacy, as for instance, "*I leave and bequeath* (my farm, etc.) *to Titius or Maevius, whichever my heir shall choose,*" so that, as in the case of a stipulation, two persons can also be made joint creditors by legacy (*l. si Titio aut* 16, *ff. de legatis* 2). So also the instalments in which he wishes to pay the legacy may be left to his choice (*l. si legatum* 3, § *sed si adjectum* 2, *ff. de annuis legatis*). So also there is no impediment to a legacy being left to depend upon the will of the heir, as a good and reasonable man; as for instance if the following words were used: "*if it meets with your pleasure;*" "*if you deem fit;*" "*if you think it worthy;*" "*if it shall appear good to you.*" Because in that case the will does not give the heir full and free choice, but binds him to make good the inheritance, in case it should appear equitable to a just and reasonable man other than the heir, and therefore in this case the obligation is one of necessity (*l. si fideicommissa* 11, § *quanquam, ff. de legatis* 3). But the paying of a legacy can be committed to the will of the legatee himself, not only tacitly but also expressly, as for example, "*if the legatee wishes it.*" In this case the legacy is a conditional one, so that on the legatee dying before he has declared his intention of accepting the legacy, it will be of no force and effect, and will not be transmitted to the heirs of the legatee (*l. si ita*

legatum 65, § *illi, si volet* 1, *ff. de legatis* 1, *l. si ita expressum* 69, *ff. de condit & demonstr.*). A legacy cannot be expressly left to depend on the will of a third person, but can always be tacitly left, and for this reason a legacy to Titius, "*if Maevius wishes,*" is of no force and effect, and yet a legacy to Titius, "*if Maevius shall ascend to the Capitol,*" is a good legacy, because it depends upon Maevius as to whether he will ascend to the capitol, and so bring about the legacy being due to Titius. Hence it is said, to be express is to be disadvantageous; to be silent, advantageous (*l. nonnunquam* 52, *ff. de condit. & demonstrat. l. senatus enim* 43, § *pen. ff. de legatis* 1, arg. *l. si quis Sempronium* 68, *ff. de hered. instit.*). Nor is Ulpian opposed to this in *l.* 1, *ff. de legatis* 2, when he says, "*a legacy, like a condition, can be left to depend upon the will of a third person, for what difference does it make whether a legacy is left me,* 'if Titius shall ascend to the Capitol,' *or,* 'if he so wishes?" For he does not contend there that a legacy can expressly be made to depend upon the will of a third person; but tacitly only, as by way of condition, namely, *if a third person shall ascend to the Capitol.* But he shows there that it is in such a condition that the will of the third person comes out, and says that from the point of view of the words used, and the natural meaning, it does not matter whether the testator said, "*if Titius shall ascend to the Capitol,*" or "*if he so wishes.*" And this is brought out by Modestinus and Pomponius in *d. l.* 52, *ff. de condit. & demonstrat. & d. l.* 68, *ff. de hered. instit.* But at the same time they add that in testaments there are some things which, if mentioned expressly, have no force and effect, but which if covered by the words used have such force. Wills by which bequests are made with the object of securing a bequest from others, are condemned as strongly as are those by which heirs are instituted with a similar purpose (*voluntates captatoriae*).

37. To make a legacy claimable, there is, among other requisites, the chief necessity of the legatee accepting the legacy, to which end he is allowed the right of deliberating as to his acceptance, just as it is allowed the heir to deliberate as to entering upon the inheritance, and especially so if he is burthened with a fideicommissum, as was said in *tit. de jure deliberandi.* Nor can any one accept a legacy, unless he at the same time subjects himself to the burthens attached to the legacy by the testator (arg. § 1, *Instit. de singalis rebus per fideicommiss. relictis;* Hugo Grotius, *manud. ad jurisprud. Holl. libr.* 2, *cap.* 22, *num. ult.;* Responsa Jurisc. Holl. *part.* 2, *consil.* 210, *quaest.* 2). But whether a legacy can be accepted in part and refused in part, can only be answered by distinct cases being given. For if more than one legacy is left to the same person, he is not prohibited from refusing one and accepting the other, unless one legacy carries with it a burthen, in which case he will not be allowed to refuse the burthensome legacy and accept the other (*l. sed duobus* 5, *pr. &* § 1, *ff.*

de legatis 2. Respons. Jurisc. Holl., *part.* 2, *consil.* 210, *quaest.* 5). But if only one legacy is left, no one can accept one part of the same legacy and refuse the other (*l. neminem* 4, *ff. de legatis* 2; *l. legatarius pro parte* 38, *ff. de legatis* 1), so that one part of a thing left by legacy being accepted, the whole is acquired (*l. si cui res legata* 58, *ff. de legatis* 2), whether the one legacy includes only one particular thing, or a university of things, as for instance a flock, a son's or a slave's private property (*peculium*), gold, silver, garments, and such-like (*l. grege autem* 6, *ff. de legatis* 2). If, however, there are more heirs than one to a sole legatee, who has not yet accepted the legacy which has been offered for his acceptance, any one of such heirs can refuse his hereditary share of such legacy, while another accepts his share; because debts and actions capable of forming the subject of legacies must *ipso jure* be divided among the co-heirs (*d. l. legatarius pro parte* 38, *ff. de legatis* 1). But if a single thing is left as a legacy to a slave held in common, the one owner can accept the legacy, while the other refuses it, as in such a case the common slave stands as it were in the place of two slaves (*l. si fundum sub.* 81, § *si servo* 1, *ff. de legatis* 1). Finally, if any person is both instituted heir, and made legatee, he is not prohibited from refusing the inheritance and accepting the legacy, provided there is no evidence of a contrary intention on the part of the testator, as was said in *tit. de acquir. vel omitt. hered. num.* 38.

38. When a legatee has accepted the legacy, he has three actions by which he can claim it, namely, the vindication of the thing (asserting his ownership), the action on the testament, and the hypothecary action (§ *sed olim quidem.* 2, *Instit. h. t.*). The most general, and most favourable of these, and the one reaching all sorts of legacies of any and every kind of thing is the action on the testament; or, also, according to later law the action on the codicil, since it has been enacted that legacies can be left by codicils even in intestate succession. This action is applicable also to those legacies for the claiming of which the action vindicating ownership (*rei vindicatio*), and the hypothecary action cannot be utilized, and according to its principles it arises from a quasi-contract (§ *heres quoque* 5, *Instit. de oblig. quae quasi ex contractu.*) And so is available against those only whom the deceased testator has burthened in his will with a legacy or fideicommissum, and are bound by quasi contract, but not against third parties who are possessors of the things left by legacy, inasmuch as there has been no quasi-contract with them (arg. *d.* § 5, *Inst. de oblig. quae quasi ex contract;* junct. § 1, *Inst. de action*). There is no doubt that this action is one *stricti juris*, because the obligation is only on one side. Though it cannot be denied that on account of the favour shown to last wills, certain of the characteristics of *bonae fidei* actions have been incorporated in this action, for instance, that interest is due on account of *mora* (delay)

alone, notwithstanding the binding nature of the stipulation (*l. usurae vicem* 34, *ff. de usuris;* junct. *l. mora fieri* 32, § *in bonae* 2, *ff. eod. tit.*), and that pending the arrival of the due date of the legacy, or the fulfilment of a condition, the heir must give security for the legacies (*tot. tit. ff. ut legat. nomine caveatur;* junct. *l. in omnibus* 41, *ff. de judiciis; l. pen.* § 1, 2, *ff. quibus ex causis in possess. eatur.*). In other particulars, however, the natural characteristics and consequences of actions *stricti juris* are maintained, as for instance, in taking the oath with regard to a suit (*l. in actionibus* 5, *pr. & §§ seqq. l.* 6, *ff. de in litem jurando*); in an action concerning what was given at a certain place (*l. si heres* 5, *de eo quod certo loco*), and other similar cases.

39. The action of *rei vindicatio*, even when made use of to claim a legacy, has for its foundation the right of ownership, which in the case of a legacy passes directly from the deceased to the legatee, as Neratius lays down in *l. a Titio herede* 6, *in fine ff. de furtis.* And therefore, according to the ordinary character of a *rei vindicatio*, it is available not only against the heir who is burthened with the legacy, and others in a similar position, but also against any possessor of the legacy, in accordance with the commonly received principles. So if only one of many heirs possesses the whole legacy, the action lies against him alone for the whole legacy (arg. *l. si possessor fundi*, 55, *ff. de rei vindicat.*). Nor need there be any difficulty interposed here by the fact that, as laid down above, it is necessary to accept a legacy, and that by such acceptance only does the legatee acquire ownership. For just as the heir only acquires the rights belonging to deceased upon his entering upon the inheritance, and so when the inheritance is offered him for acceptance, but he has not yet entered upon it, none of the rights of deceased is deemed to belong to the heir, and yet on his entering upon the inheritance there is deemed to be an immediate transference of the rights of the deceased from the time of his death to his heir (*l. cum heredes* 23, *ff. de acquir. vel amitt. possess.* junct. *l. heres quandoque* 54, *ff. de acquir. vel omitt. heredit.*); so also, if the legatee does not wish the legacy to come to him, matters will stand as if there has been no legacy, and the repudiated legacy will be deemed by retrospective force always to have been the property of the heir, and never of the legatee. But if he accepts the legacy, such an acceptance has a retrospective effect, and the legacy is deemed to have been his from the time the inheritance was entered upon. And so, though the legacy is ours retrospectively, unless it is refused, yet when it is refused it is clear that it originally, and looking back to the time the inheritance was entered upon, did not belong to us, as is remarked by the Jurisconsults in *l.* 1, § *utrum* 6, *ff. si quid in fraud. patroni. l. legatarius pro* 38, § 1; *l. servum filii* 44, § *si quis rem* 1; *l. si tibi homo* 86, § *cum servus* 2, *ff. de legatis* 1. Moreover, what is said in *d. l.* 64, *ff. de furtis*, namely, "*those things which are left by direct legacy by the testator pass to him to whom the legacy is left,*"

does not disagree with what is said in *d. ll.*, that the thing left by legacy is deemed to have belonged to the legatee retrospectively from the time the inheritance was entered upon, since the time of entering upon the inheritance is by retroactive force the same as the time of testator's death, according to *d. l.* 54, *ff. de acquir. vel omittend. hereditat.* There are also many legacies which legatees can claim by an action on the testament (*actio ex testamento*), and not by a vindicatory action (*rei vindicatio*). For neither a legacy of a debt, nor one requiring the heir to perform some act, nor one by which freedom is left, nor one by which a quantity of anything is left, nor one by which one of a class of things is so left that the heir has the option as to which he pays over, is a meet subject for a vindicatory action. So also if a servitude is left as a legacy, it is rather the *actio confessoria* (action claiming the right to exercise the servitude) than the vindicatory action, which is available only as regards corporeal things, that is competent to the legatee.

40. The third action available in claiming a legacy is the hypothecary action, which is based upon the hypothec given by Justinian to legatees on the estate of the deceased testator; and the nature of this hypothec was to a large extent treated of in *tit. in quib. cons. pign. vel hypoth. tacite contrah. num.* 21, 22. And this is so in all cases where the testator has not taken this right of hypothec from the legatees. For just as in early times he could by testament constitute a right of pledge in his legatees, so that in that case the express right of pledge is inseparable, according to the usual character of pledges (*l.* 5, *C. de commun. de legatis; l. Lucius Titus* 12, *ff. de alim. & cib. legatis.* Arg. *l. non est mirum* 26, *ff. de pignorat. act.*; Ant. Faber, *Cod. libr.* 6, *tit.* 28, *defin.* 1), so also there is nothing inconsistent in the fact that the testator has the power to will that his goods which pass to his heir shall not be bound by pledge to the legatees, since he can always remit the security to be given by the heirs on account of the legacies, and to that extent disadvantage the legatees (*l. ipsis rerum* 2, *l. pen. C. ut in possess. legat.*; Hugo Grotius, *Manud. ad jurisprud. Holl. libr.* 2, *cap.* 23, *num.* 29, 30; Michaël Graffus, § *legatum quaest.* 76, *num.* 4; and Merenda, *Controvers. libr.* 3, *cap.* 49, *num.* 28 *& seqq.*, who appears to dissent). And it is beyond doubt that an heir instituted to a particular thing, and who has a co-heir not instituted to any particular thing, must also be allowed this legal hypothec, since he stands in the position of a legatee (*l. quoties* 13, *C. de hered. instituend.* Respons. Jurisc. Holl. *part.* 3, *vol.* 2, *consil.* 57). And it does not matter whether it is a number of things or one particular thing to be made good once for all that is given by legacy, or an annual or monthly legacy, of which the day of payment recurs at frequent intervals, or even a usufruct, for no distinction is drawn in *d. l.* 1 (Merenda, *Controvers. libr.* 3, *cap.* 49, *num.* 1 *& seqq.*).

41. But if the legatee and not the heir is burthened with a legacy

or fideicommissum, the fideicommissary has in that case the legal hypothec (*d. l.* 1, *C. commun. de legatis*), not on the whole estate of deceased, but on that part only which by the will of the deceased testator must be made good to the legatee by the heir. For if more heirs than one are burthened with a legacy, the property which each receives out of the estate is only so far bound by tacit hypothec for the legacies as each is deemed to have accepted and to be held bound by the burthen imposed by the will of the testator, and which has not yet been made good by them. Finally, if only one of many heirs is burthened with the payment of the entire legacy, no other goods of his are deemed affected by this legal hypothec than those which the heir so burthened has derived from the deceased testator, and therefore those which have gone to his co-heirs are not included. The principle underlying all these cases is that no one can be compelled by a personal action to make good a legacy or *fideicommissum*, except he has been so burthened by the testator, and then only for the proportion in which he has been burthened, and has not yet paid, in obedience to the will of the testator. The remaining co-heirs are not held bound for the non-payment of the legacies (*l. legatorum petitio* 33, *ff. de legatis* 2). But the hypothecary action, which is given by law to enforce the payment of legacies, has no further power than a personal action has in compelling the payment of legacies. Because the Emperor, in dealing with this right of legal hypothec for legacies, has laid down that "*in all these cases* (that is, in which the hypothecary action is given to compel payment of legacies) *the hypothecary action has only such force against a person as a personal action against him would have.*" Therefore, just as a personal action is not available in the above cases against heirs who are not burthened, either for the reason that they were not burthened by testator, or that they have already fulfilled their part under the will of the testator, *i.e.* either that an obligation had never been cast upon them, or that they had already performed their duty by payment of the legacy, so also a hypothecary action, which goes *pari passu*, and hand-in-hand with a personal action, is denied a legatee against such heirs.

42. But over and above the fact that the personal action to claim the legacy is still of force and effect, this hypothecary action is not only available against the heir, who is bound to make good the legacy, but also against any third party who is the possessor of such things as the heir, who is the debtor under the legacy, has received from the estate of the deceased testator; both because those things cannot pass to a third party except with burthen attached, in accordance with the ordinary character of pledges which does not appear to have been changed in this respect by Justinian, and because formerly, if a legatee was placed in possession by the praetor, he obtained a right of praetorian pledge over the goods of testator, so that they could not be transferred to anybody else except with burthen attached

(*l. si postquam* 3, *C. ut in possess. legat.*). But as Justinian advises, our legal hypothec has been introduced by him, so that legatees may be secured without the subtleties of the roundabout process of being placed in possession of the thing by the praetor (*d. l.* 1, *pr. C. commun. de legatis.*; Sande, *Decise. frisic. libr.* 3, *tit.* 12, *defin.* 23; Responsa, Jurisc. Holl. *part.* 1, *consil.* 38; Merenda, *Controv. libr.* 3, *cap.* 49, *num.* 31, 32).

43. This legal hypothec is available to legatees on the goods of the deceased testator, not only for the principal sum due, but also for interest and fruits, so that those bringing this hypothecary action have a right of preference just as much for the interest and fruits as for the principal sum or thing left by legacy. For since by personal action a legatee can claim not only the principal thing due under the legacy, but also interest and fruits, as will be explained later, it is reasonable that the hypothecary action should also avail for them, since it is competent to be brought against any one as far as a personal action against him would be available (*d. l.* 1, *in fine C. commun. de legatis*; Merenda, *controvers. libr.* 3, *cap.* 49, *num.* 12, *and seqq.*; Responsa Jurisc. Holl. *d. part.* 1, *consil.* 28; though Antonius Faber vainly dissents in *Cod. libr.* 6, *tit.* 23, *defin.* 11). For, though in other cases there is one principle with regard to the capital sum due and another with regard to interest, it is not so here, for the reason mentioned in *d. l.* 1. One would be inclined to admit with Faber, in *d. defin.* 11, that the legatee has not a legal hypothec giving him a preference on the goods of deceased for the expenses incurred in enforcing payment of his legacy, and which the heir was ordered to pay the legatee, but not for the same reason as Faber advances, viz. because it is unreasonable that the testator's estate should be burthened on account of the delay and neglect of the heir who has allowed action to be taken against him for the payment of the legacy; and because it is more equitable that the legatees should remain the losers, by reason of the costs of suit, than that the prior creditors of the deceased should for that reason be placed in a worse condition. For this rests on a false supposition that because the legatee has a legal hypothec for the costs of suit, the condition of the prior creditors of the deceased testator would be altered for the worse; whereas the legatees cannot claim for themselves any legal hypothec or right of preference either for the principal sum due or for interest, and much less for costs of suit on the goods of testator, until the creditors of deceased testator, not merely the hypothecary creditors, but the simple chirograph creditors also, are paid in full, and so the legatees are postponed as to payment to all the creditors of the deceased testator, as is laid down in *tit. in quib. caus. pign. vel hypoth. tacite contrah. num.* 21. But the reason is rather that a condemnation to pay the costs of suit is only a penalty on those who rashly run into litigation (*pr. & § 1, Instit. de poena temere litigant*), and for this penalty the

State (Fiscus) itself has no legal hypothec, and therefore much less have private persons (*l. quod placuit* 37, *ff. de jure fisco*; and this is more fully expounded in *tit. in quib. caus. pign. vel hypoth. tacite contrah. num.* 9). And although the granting of interest constitutes also in some measure a kind of penalty on one making default in payment for his neglect, for which also a legal hypothec is available, as was laid down above; yet in adjudging interest it is not deemed to be a penalty, but rather money due on a sort of contract, "*since it is agreed that in equitable suits* (*bonae fidei*)," (in which legacies are adjudged together with interest, *l. usurae vicem* 34, *ff. de usuris*), "*the judge has the same power as regards interest as he has in respect of the stipulation*," as is testified to by Papinian in *l. Lucius Titius* 24, *post. med. ff. depositi.*

44. Besides these three, there is a fourth action to enforce payment of a legacy, namely, the action to compel the division of an inheritance (*familiae excisundae*) in case a prelegacy has been left to an heir. Unless it is more correct for us to say that by such an action we do not so much claim the legacy as the division of the inheritance, and that in such case the judgment ensures payment of a thing left as a prelegacy to one of the heirs over and above the division of the inheritance, according to the Jurisconsults in *l. si ita legatum* 42, *ff. familiae ercisc.*; *l. qui filiabus* 17, § *ult. ff. de legatis* 1.

45. Further, no one can of his own authority seize and take possession of a thing left as a legacy to him but in the possession of a third party, without the permission of such possessor, whether he be the heir or a stranger (arg. *tot. tit. ff. quod legatorum. l. non est singulis* 176, *ff. de reg. jur. l. extat. enim* 13, *ff. quod met. causâ.* Carpzovius *defin. for. part.* 3, *constit.* 13, *defin.* 30). If, however, the testator has given the legatee this right, and the legatee is himself in possession of the legacy, or if it was in the possession of deceased testator, and is after his death in no one's possession, the legatee can of his own authority take possession of it, or consult his own interests by retaining possession of it (arg. *l. Titia cum* 34, § 1, *& ult. ff. de legatis* 2. Add also Grotius *manud. ad jurisprud. Holl. libr.* 2, *cap.* 23, *num.* 26 *&* 27. Joh. Papon. *libr.* 20, *tit.* 5, *arrest.* 1). But a legatee cannot obtain his legacy by way of (summary) execution, as it is called; that is, in such a manner that the judge proceeds to execution forthwith without observing the usual solemnities of judicial procedure. For when a creditor has many concurrent actions available for claiming a certain thing, he should at least try one of them (*l. nemo ex his* 43, § 1, *ff. de reg. jur. l. cum filius* 76, § *variis* 8, *ff. de legatis* 2).

Moreover, the ordinary actions enumerated above are the only actions that are available to legatees, and nowhere in our law is any such privilege found given to legacies. For in *novell.* 1, *cap. illud quoque* 4, it is only laid down that the heir shall carry out the

provisions of the testators' will within a year, to be computed from the time of his being compelled thereto by order of a judge, if he wishes to prevent his failing in his own rights and duties. (Fachineus *controvers. libr.* 5, *cap.* 31; Ant. Thesaurus *decis. Pedemont.* 26, *num.* 10.) By our law and the law of other states it is undoubted that in the case of legacies and in many other instances, a provisional payment under security can be decreed on a liquid document. (Compare Rebuffus *de sentent. provision. in praefat. num.* 122, 123; Carpzovius *defin. forens. part.* 3, *constit.* 13, *defin.* 35.)

46. There is, however, this difference between a vindicatory action claiming the legacy (*rei vindicatio*) and an action on the testament (*ex testamento*), that according to what has been laid down above, the legatee can bring the vindicatory action against any one of the many heirs for the whole legacy, if it is in his sole possession, whereas by the action on the testament he can claim against each heir only for his *pro ratâ* share, in proportion as he has been burthened by the testator; except in the case where the legacy is indivisible, and then even by the action on the testament each heir can be sued for and be condemned to pay the whole (*l. fideicommissa* 11, § *si in opere* 23, *ff. de legatis* 3. *l. si is, qui quadringenta* 80, § 1, *ff. ad leg. Falcid.* Groenewegen *ad Grotium manuduct. libr.* 3, *cap.* 26, *num.* 4, 5). Also as regards the effect of legacies being burthened, each heir is taken to have been burthened in the same proportion as he was instituted heir (*l. si heredes* 124, *ff. de legatis* 1). So that if a vindicatory action, or an action on a testament for a particular and indivisible thing, be brought as was laid down above, claiming the whole legacy from only one heir, he will be compelled to carry out the wishes of the deceased as regards the whole legacy, but will have recourse against the other heirs, compelling each one of them to indemnify him for a *pro ratâ* share (*d. l.* 11, § 23, *ff. de legatis* 3). Unless only one heir, or a certain number of the heirs have been burthened with the payment of the legacy, as was above noted in *num.* 13, or unless the testator has willed that each heir, though instituted to unequal shares, should be burthened for the whole legacy and not in proportion to their shares in the inheritance. He is deemed to have so directed by will if he has expressly named each heir in the legacy, because an enumeration of the heirs has the effect of making those who, if not named, would be liable for the legacy only in the proportion of their shares as heirs, each equally liable to make good the legacy (*l. si heredes nominatim* 124, *ff. de legatis* 1, *l. nonnumquam* 24, *ff. ad Senatusc. Trebell.*). Nor are *l. turpia legata* 54, § *ult. ff. de legatis* 1, *l. sive à certis* 17, *de duob. reis constit.* opposed to this view, for the words "*if all are named*," or "*if all are condemned to pay*," do not mean that the particular name of each heir is mentioned, but that all the heirs are burthened, as having been included under the general name "*heirs*," with the duty of paying the legacy. Because

"*naming*" (*nominare*) does not always mean the mentioning of the person's distinctive *name*, properly so called, but can take place either by giving the person's *proper name*, or by mentioning some *appellation* under which he is included, and each is a designation of the person (*l. posthumi* 3, § *nomination* 5, *ff. de injust. rupt. irrit. testam.*). Moreover, in these cases where more heirs than one are burthened with a legacy in proportion to their shares as heirs, or to their equal shares (*virili portione*), when one heir fails to pay, the others are not burthened with his share (*l. legatorum petitio* 33, *ff. de legatis* 2), unless a particular and indivisible thing is left by legacy, for which each heir is liable *in solidum*, saving his right of recourse against the others, as was laid down above (*l. fideicommissa* 11, § *si in opere* 23, *ff. de legatis* 3). If, however, one of the heirs dies, his share accrues to his co-heirs with the burthen of the legacy attached, and that according to later law whether they were heirs conjointly or disjunctively (*l. unic.* § *his ita definitis* 10, *C. de caducis toll.*). Although in early law there seems to have been a difference in this respect, since Gaius *in l. quod si alterutro* 78, *ff. ad leg. Falcid.*, and Ulpian in *l. si Titio et Maevio* 61, § 1, *ff. de legatis* 2, have decreed generally that such portion accrues to a co-heir with the burden of the legacy attached, and on the other hand Celsius denies this *in l. pater meus* 29, § 1, 2, *ff. de legatis* 2.

47. But if only one heir, such as an heir to the whole estate, is burthened in the early part of a testament, and in a later part another is joined as co-heir to him, the original heir will have to pay the entire legacy. The same must be said also, if any one, knowing that two persons will succeed to his estate *ab intestato*, or through the intervention of the praetor, has burthened only one of these with a fideicommissum (*l. post emancipationem* 40, *ff. de legatis* 3). So also as it is decreed by statute that a minor can only leave movables and not immovables to his tutor, if any minor makes his tutor his sole heir, and burthens him with legacies, the tutor must, if he adiates, pay all the legacies himself, even though the immovables are taken away from him by the heirs *ab intestato*. This is laid down in a long "*answer*" upon the law by Paul Voet (my father of sacred memory), in his work *de mobilibus & immobil. cap.* 18, *num.* 7, *& seqq.* It is different if any one believes that only one heir will succeed to his estate, and burthens that one with legacies. For if another succeeds, by praetorian intervention or any other mode, in conjunction with the heir so burthened, the latter will only be effectually burthened in the proportion in which he is heir, and must make good his share of the legacy. As a consequence, the remaining portion of the legacy lapses, and is paid neither by the burthened heir, nor by the other, since the testator, not knowing that he would succeed to him, cannot be taken to have wished him to be burthened with any part of the legacy. Particular and

indivisible legacies he need not pay, since they are not capable of division, and it is not credible that the testator has willed that indivisible legacies should be made good entirely by one heir, except in the case of a legacy of liberty to the slaves, which is specially favoured (*l. cum filius divisis* 76, *l. cum pater* 77, § *cum existimaret.* 29, *ff. de legatis* 2, *l. pen. ff. de jure codicill.* Also *tit. de inoff. testam. num.* 17, *circa fin.*).

48. By the actions above enumerated can be claimed not only the things left by the legacy, but also their accessions. What these are and to what things they belong can be gathered from what is laid down in *tit. de act. emti num.* 4, *& multis seqq.* Among other things, any accretion to land by alluvion, or an island formed, before the land was left as a legacy, can be claimed (*l. saepe legatum* 16, *ff. de legatis* 3). Also all fruit that was at the time of testator's death still hanging from and attached to the subject of the legacy, and which has subsequently been gathered in, can be claimed by the legatee because he is deemed owner of the legacy from the time of testator's death. So also interest, within due and proper limitation, can be claimed *a tempore morae* (*l. usurae vicem* 34, *ff. de usuris.* junct., *l. mora fieri* 32, § *in bonae* 2, *ff. de usuris.*, *l. si quis bonorum* 23, *ff. de legatis* 1; Responsa Jurisc. Holl. *part.* 2, *consil.* 111, *in fine*). For although in some laws it is simply laid down that it is manifest that both interest and fruits of the legacy can be claimed from the time of *litis contestatio* (action being taken), (*l.* 1, *l.* 2, *C. de usuris & fructib. legat.*), or from the time the heir has become aware of the legacy (*l. quaesitum est.* 40, *ff. de acquir. rerum domin.*), yet they do not exclude (interest and fruits being claimed for) time previous to this, and so what these laws lack must be supplied from other sources, viz. *d. l.* 34, *&* 32, § 2, *ff. de usuris.* And therefore fruits ripe for gathering and which the heir or the legatee could properly gather, must also be made good (*l. cum servus* 39, § *fructus* 1, *ff. de legatis* 1). And as to its being laid down in *l. ult. C. de usuris & fruct. legat.*, that "*in legacies and fideicommissa fruits can be claimed only after litis contestatio* (action brought), *and not from the date of testator's death,*" that, as Gothofredus notes, *ad d. l. ult.*, has been long since taken by commentators to refer to a legacy of the property of a third person (*rei alienae*). Also different commentators have different opinions as to the interest and fruits of legacies. (Compare the learned commentators (*doctores*) *ad tit. de usuris & fructib. legat.*; Ant. Faber, *Cod. libr.* 6, *tit.* 26, *defin.* 1, *& mult. seqq.*; Peregrinus, *de fideicommissis art.* 49; Carpzovius, *defin. for. part.* 2, *constit.* 30, *defin.* 20, 21, 22; Fachineus, *controvers. libr.* 12, *cap.* 68; Gomesius, *variar. resolut. Tom.* 1, *cap.* 12, *num.* 5 *&* 22; Gothofredus, *in notis ad d. l. ult. C. de usuris & fruct. legat.*).

49. Further, as it is laid down in general that one thing cannot be paid to a creditor instead of another without his consent, so also

in the case of legacies, money cannot be paid to a legatee instead of the thing left by legacy, unless he consents (*l. fideicommissa* 11, § *ex his apparet* 17, *ff. de legatis* 4). Nor, *vice versâ*, can other things be paid over instead of the money left by legacy, even though no money is found in the estate, for in that case the heir will be compelled to pay the legacy out of his own money, or with money obtained by the sale of things belonging to the estate, or with money obtained from any source the heir may wish (*l. si pecunia legata* 12, *ff. de legatis* 2). So that even if the heir has a peculiar affection for a thing which he acknowledges is due from him under a legacy, as, for instance, a drinking bowl, or an estate which has come to him from his ancestors, he will not be heard if he wishes to give the value instead of the thing (*l. si domus* 71, § *cum alicui* 4, *ff. de legatis* 1). It is different if the thing which is the subject of the legacy is at the same time a person also, as, for instance, if the heir denies that he is bound to make good a legacy of a slave belonging to the estate, who may chance to be his father, mother, or natural brothers. For it is most reasonable that in such a case he should be allowed, through the intervention of a judge, to make good the value of the legacy, since the condition of human beings is different to that of all other things, and so in their case the principle should be applied with a more liberal interpretation (*d. l.* 71, § *qui confitetur* 3, *&* § 4, *in fine ff. de legatis* 1). In the same way, also, the testator can in his will expressly leave it to the choice of the heir or of the legatee whether they will, respectively, make good the legacy by giving the thing left or its value, or accept as the legacy the thing left or its value. In that case, however, the one to whose option it is left cannot, without the consent of the other party, elect to give or take a portion only of the thing left by legacy, and the value of the remaining portion, even if many things are included in the same legacy, or many heirs are burthened with the same legacy (*l. si ex toto* 8, § *ult. ff. de legatis* 1, *l. si quis duobus* 15, *ff. de legatis* 2). So if a certain portion of an estate, as, for instance, a fourth part, or a sixth, is left by legacy, the heir has the power to choose whether he will make good the portions of the particular things belonging to the estate or their value. But in respect to the indivisible things in the estate, and those the division of which cannot be made without loss and damage, in those cases the proportionate value must of necessity be paid (*l. non amplius* 26, § *ult. ff. de legatis* 1). In like manner, also, it is indisputable that the value of the legacy must necessarily be paid, if a thing, the property of a third person, is left by legacy, and the owner refuses to sell it, or asks an unreasonably high price for it (*l. si domus* 71, § *qui confitetur* 3, *ff. de legatis* 1. Add also *num.* 26 *above quoted*); or if the legacy is one with which the legatee has indeed power to trade, but which, on account of some personal incapacity, or on account of some quality of the thing left, or other

similar cause, he cannot hold and possess, as was spoken of in paragraph 30 above; or if the legatee has during the lifetime of the testator acquired the subject of the legacy by an onerous title, whereby the legacy is rendered impossible of fulfilment (§ *si res aliena* 6, *Instit. h. t.*); or, finally, if the subject of the legacy is destroyed by such culpable act of the person burthened, that the law compels him to make good the loss.

50. As to what particular degree of culpability the person burthened with a legacy or *fideicommissum* is responsible and liable for, is a difficult matter, and requires strict examination. For the full explanation of it, three cases must be considered: because either an heir is burthened with a particular legacy or fideicommissum; or a particular legatee or fideicommissary is so burthened; or, lastly, the heir is burthened with a fideicommissum affecting the whole estate. If the heir is burthened with a particular legacy or fideicommissum, he is liable for every act of negligence, even the slightest (*levissimam*), or in other words he is bound to all diligence, as Ulpian lays down (*l. cum res legata* 47, § *pen. ff. de legatis* 1), but not for the reason there stated, that the heir should be regarded as a mandatory since by adiating he has accepted a mandate given him to pay and make good the legacies and fideicommissa, a mandatory being by law liable even for *culpa levissima* (slightest negligence) (*l. a procuratore* 13, *l. in re mandatâ* 21, *C. mandati*), because in that case both a legatee burthened with a particular fideicommissum, and an heir burthened with a fideicommissum affecting the whole estate, could equally well be made liable as mandatory and executor of testator's last will for *culpa levissima* (slightest negligence), whereas the contrary is true, as will shortly be shown. The reason is rather that the whole series of the acts which were done for the purpose of making the will, is deemed to have taken place between the testator and the heir (§ *sed neque* 10, *Instit. de testam. ordinandis*). And so in his disposition of his estate, the testator looked principally to the heir's advantage, who therefore is liable in respect of such of the goods belonging to the estate as were left by legacy to any one, for *culpa levissima* (slightest negligence), according to the general rule of law (arg. *l. si, ut certo* 5, § *nunc videndum* 2, *in fine ff. commodati*). But if a particular legatee or fideicommissary and not the heir is burthened with a legacy or fideicommissum, and he accepts under the testament only what he is required to pay over, and so derives no benefit from the will of the deceased, he is liable at least for *dolus malus* (fraud), and, in other cases, Africanus, following the opinion of others, says he is liable for *culpa levis* (slight negligence) just as in *bonae fidei* (equitable) contracts, if the contract is for the benefit of each of the contracting parties, each is liable for negligence (*culpa*), but if it is to the advantage of only one of them, the other is liable only for fraud (*dolus malus*) (*l. si servus legatus* 108, § *cum quid tibi*

12, *ff. de legatis* 1, junct. *d. l.* 5, § 2, *ff. commodati*). But if you take the case of an heir burthened with a universal, and not with a particular fideicommissum, the better opinion is that he will be liable for *dolus* (fraud), *culpa lata* (gross negligence), and also *culpa levis* (slight negligence) in connection with the goods of the estate. And this is what Ulpian lays down, when he says, "*For if any one be requested to hand over an inheritance to another, and slaves (included in that inheritance) die or things of other kinds perish, it is laid down that he will not be compelled to restore what is not in his possession, but will indeed be liable for culpa* (fault)," namely such *culpa* as is nearest in degree to *dolus* (fraud) (*l. mulier, quae* 22, § *sed enim* 3, *ff. ad Senatusc. Trebell.*), where by *culpa dolo proxima* (fault nearest in degree to fraud) is meant *culpa levis* (slight negligence or fault). For although in two places in the laws *culpa lata* (gross negligence or fault) is designated by *culpa dolo proxima* (fault nearest in degree to fraud), on account of similar peculiar circumstances in those laws, other words being there added, but where simply *culpa dolo proxima* (fault nearest in degree to fraud) is written, it must be understood to mean *culpa levis* (slight fault or negligence), and not *culpa lata* (grave fault), because *culpa lata* is not "nearest in degree to fraud," but is actually fraud, as is more fully explained in *tit. de fidejuss. & nominat. & hered. tut. num.* 5, *in fine*. Nor does *culpa dolo proxima* mean *culpa lata* (grave fault), even in *d. l.* 22, § 3, as it is said to do, because Ulpian goes on to say, "*But also if he does not sell when he ought to do so, he will be accountable in such case for culpa lata (grave fault) and not for mere culpa levis (slight fault), or for the negligence he usually shows in his own affairs.*" For although the common reading is *sed et si* (but also if), the reading of Haloander, who has *sed si* (but if), is better; and so these words do not connect the two sentences, but rather introduce an instance of the contrary nature, forming an exception to the rule. And so the meaning is: although a fiduciary heir is regularly held to be liable to a fideicommissary heir for *dolus* (fraud) and for *culpa levis* (slight fault) or *culpa dolo proxima* (fault nearest in degree to fraud), yet if he has neglected to sell when he should have done so, he will be liable only for *dolus* (fraud) and *culpa lata* (grave fault), and not for *culpa levis* (slight fault). In the same way also tutors, who are generally liable to their pupils for *culpa levis* (slight fault), are only held answerable for *dolus* (fraud) and *culpa lata* (grave fault), if they make an unprofitable purchase of landed property for their pupils (*l. tutor, qui* 7, § *competet* 2, *ff. de admin. & peric. tut.*). Moreover, the reason for the fiduciary heir being liable to the fideicommissary for *culpa levis* (slight fault) is the same as occurs in the case of contracts, viz. because both the fiduciary and the fideicommissary are universal heirs or successors, and the advantage of each is the chief concern of the testator; of the fideicommissary, inasmuch as he derives benefit from the restoration of

the inheritance by the fiduciary; of the fiduciary, inasmuch as he has the right of deducting the Trebellian Fourth. And, therefore, if in accordance with later law the testator has prohibited the deduction of the Trebellian portion, and has requested the heir forthwith to hand over the inheritance, so that he derives no benefit from it, he will not be wrong who in such a case holds that the fiduciary should only be made liable for *dolus* (fraud) and *culpa lata* (grave fault), and not for *culpa levis* (slight fault) (arg. *d. l. si servus legatus* 108, § *cum quid tibi* 12, *ff. de legatis* 1, junct. *d. l.* § 2, *ff. commodati.*).

51. Under the head of *culpa* (fault) to be made good by the heir, which includes an almost infinite number of cases, must be enumerated also the cases where wood left by the testator as a legacy, has been used by the heir for building houses, thus rendering the legacy ineffectual, and that too whether the heir knew or did not know that the wood had been so left by legacy (*l. cætera igitar* 41, § *ult. l.* 42, *l.* 43, *ff. de legatis* 1); or where the heir has consumed the thing left by the legacy, in connection with the funeral of the deceased testator (*l. si heres rem* 63, *ff. delegatis* 2). Also the case where the heir has manumitted his own slave, who happens to have been made the subject of a legacy by the testator (§ *si res legata* 16, *Instit. h. t. l. si quis inquilinos* 112, § *cum servum* 1, *ff. de legatis* 1; *l. quidam ita* 25, § *si quis* 2, *ff. ad Senatusc. Trebell*), provided the heir manumitted him after he had entered upon the inheritance. For if he has manumitted him after the testator's death and after the seals of the testament have been opened, but before he has entered upon the inheritance, he will only be held liable if he was not unaware of the wishes of the deceased testator (arg. *l. cum heres rogatur* 24, *ff. de liberat. legata*). Obviously, therefore, if during the life-time of the testator, the heir has granted his liberty to a slave of his, whom the testator has made the subject of a legacy, he will not be held liable to the legatee for the value of the slave, or for the value of the legacy, since no blame can be imputed to him for making use of his own property, and disposing of it as he thinks fit, or for not regarding the inheritance or last will of one who was still living, and not being solicitous for the due execution and fulfilment of his wishes (compare the learned doctors *ad* § 16, *Instit. h. t.*). If it is in doubt whether a thing left by legacy is already destroyed and made away with or still in existence, the heir must give security to follow it up at his own expense, and to restore it to the legatee if he finds it (*l. cum servus legatus* 39, *pr. l. cum res legata* 47, § *itaque* 2, *l. servo legato* 69, § *ult. ff. de legatis* 1).

52. But if part only of the legacy is destroyed or non-existent the same distinctions above laid down as referring to the case where the whole legacy is made away with, will also apply to the part of the legacy destroyed. The remaining part must still be paid over to the legatee, provided it is not accessory to the other; and, there-

fore, if a slave together with his *peculium* (private property) is left as a legacy, and the slave dies, or is manumitted or sold, the legacy of the *peculium* lapses (§ *si quis ancillas* 17, *Inst. h. t.*). Also if a horse which forms the subject of a legacy dies, neither his bridle nor harness is due under the legacy (Hugo Grotius *manuduct. ad Jurisprud. Holl. libr.* 2, *cap.* 22, *num.* 10). The vacant site or ruins of a house must not, however, be looked upon as an accessory part of a house left by legacy; nor must the flesh, or hide or horns of an ox be so deemed accessory, when the ox which is left by legacy has died. All these, therefore, must be paid over to the legatee (*l. si grege legato* 22, *ff. de legatis* 1, arg. *l. solum partem* 49, § 1, *ff. de rei vindicat.*). At one time, however, there was a difference in this respect between a legacy of condemnation (*damnationis*) and a legacy of vindication (*vindicationis*) (as shown in *tit. de rei vindic. num.* 28. Also Groenewegen *ad l.* 49, *ff. de legatis* 2). And although the Romans decreed that a legacy of a team of four horses should become totally void if one horse of the team died, and its place was not filled by another (*l. peculium legatum* 65, § *quadrigae* 1, *ff. de legatis* 2, *l. quid tamen* 10, § *ult. l.* 11, *ff. quib. mod. usufr. amitt.*), it is more in accord with the simplicity of our customs and with the wishes of the testator, that where four horses have been left by legacy and one has died, the remaining three should be handed over to the legatee, and therefore whatever part of the team of four horses is still in existence must be paid to the legatee under the legacy (Groenewegen *ad d. l.* 65, § 1, *ff. de legatis* 2).

53. Although the heir is liable to a legatee for the destruction or the damaging of the subject of the legacy, occasioned by his fault, yet he is not liable always in the same way. For if the destruction or damaging by the heir takes place before he has entered upon the inheritance, and before the legacy has been offered and accepted, the heir is liable to the legatee in an action on the testament, and the action on the Lex Aquilia is not available, because the damage was done before the legacy had passed by complete ownership to the legatee by acceptance (*l. & eleganter* 7, § *item si servum* 5, *ff. de dolo malo.*). But if done after the heir's entry, and after acceptance by the legatee, the latter would have available to him against the heir the action on the Lex Aquilia, as he had been made full owner of the legacy by his acceptance thereof (*l. liber homo* 13, § *ult. l.* 4, *ff. ad. leg. Aquil.*). This is the same as is laid down in the case of a restoration of an inheritance in accordance with the *Senatus consultum Trebellianum*, where if the heir destroys or damages the thing to be restored before he has actually restored the inheritance, he is liable to an action on the testament (*ex testamento*), but if after he has restored the inheritance, then he is liable to an action on the Lex Aquilia (*l. si heres institutus* 70, § *si heres* 1, *ff. ad Senatusc. Trebell.*).

54. Since as a general rule no one is liable for the acts, fraud, or

fault of a third person, neither is the heir so liable in the case of a legacy; and yet such damaging act of a third person does not leave the legatee without any remedy. For if any such act is committed after the heir's entry into the inheritance and the legatee's acceptance of the legacy, it is beyond doubt that the legatee, as being the owner of the legacy, has an action on the Lex Aquilia against the third person so damaging the legacy (*l. liber. homo* 13, § *ult. ff. ad leg. Aquil.*). But if the injury of the third person takes place before the heir's entry and the legatee's acceptance, a distinction must be drawn as to whether the subject of the legacy has been only damaged by the third person, or has been totally destroyed. For if it has only been injured and is still in existence, and therefore can and ought to be delivered to the legatee, together with the delivery of the damaged thing, should be ceded also the action on the Lex Aquilia, which the heir has as being owner of the thing, since the action is accessory to the thing which is due under the legacy (*l. huic scripturae* 15, *ff. ad leg. Aquil.*). But if the legacy is totally destroyed, and nothing remains of it, and therefore nothing can be paid over to the legatee, the action on the Lex Aquilia should not be ceded to the legatee, even though he wishes to accept the legacy; because in that case this action cannot pass as accessory to the thing to be paid over, inasmuch as by its destruction it cannot be paid over. Nor can it pass as being the legacy, since it is not the action, but the thing, which is the subject of the legacy. So that therefore the action on the Lex Aquilia being obtained with the inheritance remains with the heir (*d. l.* 15, *ff. ad leg. Aquil.*). We must not, however, imagine that the Roman Law is unfair and iniquitous in this respect, and that it makes the legatee lose the entire benefit of the legacy in consequence of the unlawful act of a third person, and so makes the heir the richer by the value of the subject of the legacy, for I think the position is the following: If the heir wishes to preserve for himself the action on the Lex Aquilia, by reason that the legacy has been entirely destroyed by a third person, he should make good to the legatee the true value of the legacy; and if he refuses to do this, the legatee must be accorded an action of fraud (*actio doli*) against such third person, the consequence of which is that thereafter the heir cannot bring his action based on the Lex Aquilia. This is according to the Jurisconsult Paul (*l. arbitrio* 18, § *ult. ff. de dolo malo.*), who says in clear and express terms, "*If another person kills a slave whom you have promised to me, an action of fraud* (doli mali actio) *must be given me against him, according to the opinion of many jurisconsults, and rightly so, because you have been liberated by me, and so you are denied an action on the Lex Aquilia.*" And though this passage speaks of a person making a promise, whereas we are now dealing with heirs and legatees, yet the principle is the same in regard to both persons, since each is the owner of the

thing due from him under the legacy or the promise, as the case may be.

55. If the form only of the subject of the legacy is changed, the legacy will still remain valid, unless it appears in other ways, or is at least probable that the testator has changed his mind. Therefore if a garment is made out of wool which has been left by legacy, or a drinking-cup is fashioned from a lump of gold which forms the subject of a legacy, both the garment and the drinking-cup must be handed over to the legatee (*l. lanâ legatâ* 88, § *ult. ff. de legatis* 3, *l. servum filii* 44, § *si pocula* 2 *&* 3, *ff. de legatis* 1). It has also been similarly laid down in the converse case where a drinking-cup is left by legacy, and is subsequently reduced to a mass of metal in its natural and unwrought state (*d. l.* 44, § 2). So also if a testator leaves a plate as a legacy, and it is reduced to the state of raw metal, and then made into a drinking-cup, according to an "answer" (*responsum*) the drinking-cup will be due under the legacy (*d. l.* 44, § *sed & si* 3). Also if a piece of land (*area*) is left by legacy, and a house is built on it, according to Ulpian the house also passes, under the legacy (*d. l.* 44, § *si areae* 4, *ff. de legatis* 1). Moreover, with regard to what Paul has written, that if wool is left by legacy, a garment made out of such wool is not due under the legacy; and that if material is left by legacy, a ship or cabinet made with it cannot be claimed under the legacy (*d. l. lanâ legatâ* 88, *pr. &* § 1, *ff. de legatis* 3); also with regard to what is laid down by Celsus (*in l. chorus* 79, § *pen. ff. de legatis* 3), that where a piece of land which has been left by legacy, has in the meantime been built upon, it cannot be claimed by the legatee; and finally with regard to the opinion of Gaius that if a house which is left has been destroyed by the testator, and he has built another in its place, the legacy is made null and void (*l. si ita legatum* 65, § *ult. ff. de legatis* 1), all these must be taken to refer to the case where it can be gathered from the surrounding circumstances that the testator has changed his mind. And therefore in *d. l.* 44, § 2, 3, 4, *ff. de legatis* 1, in laying down the rule in the particular cases of the wool, the material, and the plot of ground, Ulpian annexed the limitation following, or one similar to it, viz. "*so long as it still exists, and the will of the testator remains unchanged*," just as he does also in *d. l.* 65, § *ult. ff. de legatis* 1. So that in this it is rather a question of the testator's wish than a matter of law. It is also laid down that if a house, the subject of a legacy, is gradually repaired in such a way that no part of the original material remains, the legacy is none the less due (*l. si ita legatum* 65, § *ult. ff. de legatis* 1; arg. *l. quid tamen* 10, § *non tantum* 1, *ff. quib. mod. usufruct. amitt.*).

56. Further, it remains to be observed, with reference to these actions which are competent to enforce payment of a legacy, that sometimes one person's name is found written in the testament, and yet another has the right to claim the legacy, or fideicommissum (*l.*

fideicommissa 11, § *interdum* 22, *ff. de legatis* 3, *l. liberationem* 3, § *consequenter*, 4, *ff. de liberat. legatâ*), so that not only has the one expressly benefited the right to claim the legacy, but the other also as if he were legatee. For if what I owe Titius is left him as a legacy on my account, and to the end that I may be absolved, no one will deny that I also am legatee of that amount, and so the legacy will be mine as well as the creditor's, although it goes to pay my debt, since it is to the creditor's interest to have more persons than one indebted for the same amount (*l. liberationem* 3, § *ult. ff. de liberat. legatâ*). So also if a testator has ordered his heir to purchase a thing belonging to a third person at a certain price and hand it over to Titius, the owner of the thing, as well as Titius, can enforce the legacy by action, since it is to his interest to obtain, besides the true price of the thing, the excess of the sum the heir was ordered to pay over that true value (*l. sed si alienare* 32, § *invito* 1, *ff. de fideicomm. libertat.*). So also if one partner is freed from debt by legacy, his co-partner, even though not expressly named in the will, is also considered as a legatee, provided such is contemplated by the legacy, as is laid down by Ulpian (*l. liberationem* 3, § *nunc de* 3, *in fine & § 4, ff. de liberat. legat.*). Again, if a father-in-law leaves his son-in-law a legacy in the following terms: "*Let my heir give a hundred (thousand sestertii) to my son-in-law Lucius Titius, on behalf of my daughter,*" both the daughter and the son-in-law, as Julian and Papinian point out, can claim the legacy by action (*l. tali facta* 48, § 1, *ff. de jure dot. l. Titio centum* 71, § *Titio genero* 3, *ff. de condit. & demonstr.*). All this holds provided it appears that the intention of the testator was such that he contemplated including in the legacy a person whom he has not named, or has named, but not as principal legatee. This is so stated by the Juris-consults in most of the different cases and laws already adduced. For if such was not the intention of the testator, an action to enforce the legacy would only be available to the person whom the testator wished to benefit, even though another person was advantaged by it, and though such person's name were expressly mentioned in the testament. And, therefore, if a surety leaves as a legacy to a creditor a debt due by him to such creditor, only the principal debtor can sue for such legacy, and not the creditor, for the reason that no benefit accrues to him from the legacy as long as no more than the amount of the debt is left by such legacy (*l. si cui legatur* 49, § *Julianus* 6, *ff. de legatis* 1). So also if the testator orders one only of his heirs to pay the whole debt to his creditor, the co-heirs and not the creditor will have available an action on the testament to compel the heir to pay the whole debt, as their interests, and not those of the creditor, were consulted by the testator (*l. non solum* 7, § *sed si duobus* 3, *ff. de liberat. legatâ l. servo legato* 69, § *si testator* 2, *ff. de legatis* 1). Finally, if the heir is made subject to a fideicommissum to pay a public tax or tribute on behalf of Titius, to one who farms

the public taxes, this fideicommissum or legacy cannot, as Ulpian lays down, be claimed by the farmer of taxes, although it is left to him, but it can only be claimed by Titius, for whose benefit the legacy was left (*fideicommissa.* 11, § *interdum* 22, *ff. de legatis* 3). Since, it is argued following the above juris-consult *in d. l.* 11, § 32, it is improbable that the testator wished to shew any liberality to the farmers of public taxes (a hateful, masterful, bold, and inconsiderate class of men, *l. quantæ* 12, *ff. de publicanis*) (Ant. Matthæus, *de auction. lib.* 2, *cap.* 6, *num.* 38). Moreover, in such cases, where the testator's probable intention is followed, many persons can claim the same legacy, and although the heir is discharged by once paying the legacy, yet he should not be ordered to pay the legacy to the first claimant unless the latter gives security "*that the heir will be indemnified against other claimants,*" as is observed by Pomponius in *l. quid ergo est* 4, *ff. de liberat. legatâ*, arg. *l.* 1, § *Celsus* 9, *ff. de dote praelegatâ.*

57. Secondly, it must be noted also, in regard to the actions available for the claiming of legacies, that the legatee must choose one form of action only in claiming one thing, and cannot claim one part of the legacy by action on the testament and another by the vindicatory action, because the legacy given cannot be divided into parts (*l. cum filius* 76, § *pen. ff. de legatis*, 2). It is, however, different if the same thing is left as a legacy to more persons than one, for then each co-legatee has a concurrent right, and so one can claim his share by vindicatory action, while another is allowed to claim his by action on the testament (*l. si pluribus* 33, *l. duobus conjunction* 85, *ff. de legatis* 1). And although on the death of the legatee before he has determined what form of action he will use, his heirs, should there be more than one, and should they be desirous of together claiming the legacy left to the legatee, will not be allowed to do so one by real action and another by personal action, but will have, either of their own accord or by the intervention and order of a judge, to agree upon some one form of action; (*l. hujusmodi legatum* 84, § *ult. ff. de legatis* 1); yet if they wish to bring separate actions each for his share of the legacy (and this they can do since the actions available to the deceased legatee are *ipso jure* divided among his heirs), there is no reason why each shall not claim his share, the one by real and the other by personal action, seeing that this course is permitted to co-legatees, to whom one and the same legacy is left; especially as of the many heirs of one legatee, in the same way as of the many co-legatees, one can claim his share, while another has the right of not claiming or repudiating his (*l. legatarius pro.* 38, *ff. de legatis* 1).

58. If a question arises as to the place where legacies and *fideicommissa* should be claimed, we must see whether the legatee elects to bring a vindicatory action or one based upon the testament. For

if he choses a vindicatory action, there is no doubt that he can bring the action in those places where according to the general principles of law ownership both in movables and immovables can be claimed. This is fully discussed in *tit. de judiciis num.* 76, 77. But if he prefers a personal action based on the testament, the legatee should properly bring his action in the place of the heir's domicile (*l. si fideicommissum* 50, § *ult. ff. de judiciis*), or else where the whole or the larger part of the inheritance adiated by the heir is found (*d. l.* 50, *pr. ff. de judiciis*). Of course if it is proved that the testator wished the *fideicommissum* to be made good at some other place, the legatee has also the right to bring his action in that place (*d. l.* 50, *pr. ff. de judiciis.* arg. *l. si heres* 5, *ff. de eo quod certo loco.*). But if the subject of the legacy is found in a place other than where the heir has his domicile or is deemed to have entered upon the inheritance, and it is there claimed by the legatee, according to an "answer" of Ulpian, no objection should be made, and no exception be taken as to its not being the proper forum, as for instance that the greater part of the inheritance is situate elsewhere (*l. sed & si* 52, § *si ea res* 3, *ff. de judiciis*).

59. Moreover, just as the right of accretion (*jus accrescendi*) obtains in the case of co-heirs, when one of them is unable or unwilling to enter upon an inheritance (which is treated of *in tit. de acquir. vel omitt. hered. num. pen. & ult.*), so also it holds among co-legatees; but does not occur in every case, nor in the same way. For in the first place, according to ancient law, up to the time of the Lex Papia Poppea, which enacted that the part of the inheritance not taken by the legatee to whom it is left should be deemed vacant (*caduca*), the *jus accrescendi* was admitted only in vindicatory legacies (Ulpian *in fragment. tit.* 24, § 12). This, however, was not the case in legacies of condemnation (*damnationis*), because being ordered to give the legacy to two legatees conjointly, the heir was deemed to have been enjoined to give to each a divided share (*l. si Titio et ei* 7, *ff. de legatis* 2); but having been charged with giving the same legacy to two persons disjunctively, he is deemed bound to make good the whole legacy to each, by giving the thing left by the legacy to one and its value to the other (Gajus *in Instit. libr.* 2, *tit.* 5, § 6; Ulpian *in fragment. tit.* 24, § 13). Traces of this old law still remain in various parts of the Pandects. But since the differences between legacies have been swept away, the position is changed under the later law, as will be seen from the following, provided we remember that in some cases the right of accretion (*jus accrescendi*) can not unaptly and also more in accord with truth, be called the right of non-decrease (*jus non decrescendi*), especially with regard to those who are conjoined only as to the thing (*re conjuncti*), (*l. unic.*, § *ubi autem legatarii* 11, *in med. C. de caduc. tollend.*), although the laws themselves give such persons a right of accretion (*jus accrescendi*) (*l. Maevio fundi partem* 41, *ff. de legatis* 2). So also by *conjoined persons* (*con-*

junctos) are sometimes meant only those who are conjoined both by the words used and with regard to the thing (*re et verbis conjuncti*), and by separate persons (*disjunctos*), those who are only conjoined as to the thing (*re tantum conjuncti*), (§ *si eadem res* 8, *Instit. h. t. d. l. unic.*, § *ubi autem* 11, *C. de caducis toll.*), yet these *separate persons* (*disjuncti*) are, as far as concerns the *jus accrescendi*, deemed to be conjoined persons (*conjuncti*). And, therefore, the Jurisconsult Paul is correct when he wrote: "*To institute heirs conjointly, or to leave a legacy conjointly, means that the whole inheritance or the whole legacy is given to each* (*heir or legatee*), *but their shares are concurrent*" (*l. conjunctim* 80, *ff. de legatis* 3). From this it can be understood that no dispute can arise in respect of the *jus accrescendi*, where the testator has so conjoined two persons that he gives to one the subject of the legacy itself and to the other its value; for the shares in this case are not made concurrent, and the person who first brings his action has his choice whether he will claim the subject-matter itself or its value. In case of a doubt, however, the legacy is only due once, and the shares of the legatees are concurrent, and consequently it is only in case the testator has so disposed, in express and clear language, that the subject of the legacy is paid to one and its value to the other legatee (*l. si pluribus eadem.* 33, *ff. de legatis* 1, *d. l. unic.*, § *ubi autem* 11, *C. de caducis tollend.*). Similarly it flows as a consequence from this that it will be vain for any one to assert a right of accretion (*jus accrescendi*) in the case where each legatee is left a separate thing as a legacy by one and the same disposition, as, for instance, "*To Titius and Maevius I bequeath a slave each*," since there is no concurrence given to the two as to the same thing, and so the shares are not concurrent (*l. hujusmodi legatum* 84, § *pen.*, *ff. de legatis* 1; arg. *l. pen. ff. de usufructu accresc.*).

60. Since this is so, it only remains to treat of the three classes of conjoined persons, and to see whether the right of accretion (*jus accrescendi*) should be admitted as between them or not. As regards those conjoined only with respect to the thing (*re conjunctos*), sometimes also called separate (*disjuncti*) legatees, as was above shown, and who are described as being those persons to whom one and the same thing is bequeathed by separate formula of words, but without mention of any share being assigned, as for instance, "*To Titius I bequeath my Cornelian estate, and the same estate I bequeath to Maevius*" (§ *si eadem res* 8, *Instit. h. t.*), it can scarcely be doubted that as between them the right of accretion (*jus accrescendi*), or, rather, the right of non-decrease (*non decrescendi*) obtains. Because in conjoining them, the words of the testator seem *primâ facie* to assign the whole estate to each and all of the legatees, with the effect that, if only one of them comes forward to claim the legacy, and so takes the whole, it is not deemed that his legacy is increased, but that the whole legacy, undiminished by any concurrent share, belongs to

him by the will of the testator. On the other hand, if other legatees intervene, and take their shares from the former, his legacy will be diminished by the amount of the concurrent shares (*d. l. unic.* § *sin autem* 11, *C. de caducis tollend. d.* § 8, *Inst. h. t.*). So if the legatees are conjoined both by formula of words and as regards the thing (*re et verbis simul conjuncti*), which they are when one and the same thing is left them as legacy in one and the same formula of words; as, for instance, "*To Titius and Maevius I bequeath my Cornelian estate*," there can again be no hesitation in saying that, as between them also, the right of accretion obtains, since here again the whole legacy is deemed to have been given to each legatee in the first instance, and the single formula of words used by the testator gives the legatees the whole legacy without any share being mentioned, just as the double set of words used by the testator did, so that by their concurrent claim only is the legacy divided into parts, each getting his share (*d.* § 8, *Instit. h. t. d. l. unic.* § 11, *C. de caduc. toll.*). And, obviously, if the right of accretion obtains among such persons as are made legatees by separate formulae of words, or among those to whom the same thing is left by separate formula of words, without any share being assigned, so much the more should it be admitted to obtain among those to whom the same thing is without shares being assigned, left by one and the same formula of words, since it is a matter of common consent that, as regards the right of accretion, those legatees conjoined in the same formula of words, and in respect to the same thing, should be preferred to all others, and even to those only conjoined with respect to the thing (*l. re conjuncti* 89, *ff. de legatis* 3). Nor is *l. ult.* § *Seio* 2, *ff. de legatis* 2, opposed to this; for there the question is not whether Marcella's portion is due to her, because with regard to that there is not the smallest cause for doubt; but as to the portion of Seius, seeing that he, as heir, could not take a portion of a thing left him on the condition of his not being made heir. And it is answered that this portion, since it does not belong to Seius, who has no concurrent claim, is due to Marcella, according to the principles above laid down; and so this law rather approves of the principle that the right of accretion obtains between those legatees who are conjoined by the same formula of words with respect to the same thing. For it is not the case, as is suggested, that the testator has, in the first instance, instituted the legatees, conjoined in respect of the same thing by one formula of words, only to equal shares (*l. Lucius Titius* 88, § *Lucius Titius* 6, *ff. de legatis* 2). Because it is only as a contemplated consequence of all the legatees claiming their concurrent share of the legacy that equal shares are spoken of in that law (*lex*). For there the question is not, whether the whole of the legacy or a part of it was originally given to each legatee, but as to what share should go to each concurrent claimant, according to the probable intention of the testator, *i.e.* whether,

according to the will of the testator, Seia alone can claim a half share of the estate, and all the freedmen together the other half. And it is answered that the testator's intention is clearly that all should have equal or proportionate shares, and that therefore Seia alone has not a concurrent claim to half the estate. In the same way, it is more with regard to the effect produced by a concurrence of claims, than with a view to the original disposition of the legacy, that it is said that "*the usufruct should be divided in such a manner that, if there are two legatees, equal parts should* ipso jure *come to each*" (*l. sed usufructus* 81, *ff. ad legem Falcid.*), since it is otherwise clearly manifest, from the whole title, *de usufructu accrescendo*, that on the failure of one usufructuary, even though he had already claimed it, his share should accrue to the other legatee. Moreover, with regard to what is laid down by Julian (*in l. hujusmodi legatum* 84, § *si Titio & Maevio* 8, *ff. de legatis* 1), viz. "*If Stichus, who belongs to Titius, is left as a legacy to Titius and to Maevius, a share in Stichus will be due to Maevius, for although Titius is not admitted to the legacy, he nevertheless divides Stichus* (*with Maevius*)," refers to a legacy of condemnation (*damnationis*), in which the *jus accrescendi* (right of accretion), as above laid down, does not obtain. That Julian is treating of a legacy of condemnation (*damnationis*), can be seen both by the connection of paragraph 8 with paragraphs 7, 9, and 10, and especially by the fact that it is not his own, but another's, property, viz. Titius', that testator has left by legacy, which he can do only by way of legacy of condemnation, and not by the vindicatory form of legacy, as Gaius lays down in *Instit. libr.* 2, *tit.* 5, § 4, and Ulpian *in fragmentis tit.* 24, § 7 *&* 8. In the same way, what is laid down in *l. si duobus* 16 *pr. ff. de legatis* 1, must be taken as referring to a legacy of condemnation, for in § 1 of that same law (*lex*), a legacy of condemnation is spoken of in express terms. So also what occurs *in l. plane, ubi* 34, § *si conjunctim* 9, *ff. de legatis* 1 should be restricted to a legacy of condemnation, from the special fact that many of the preceding paragraphs also treat of legacies of the goods of third persons to which the vindicatory form of legacy cannot apply. Finally, in *l. mulieri et Titio* 74, *ff. de condit. & demonstrat*, a singular case is clearly treated of, there being a special and peculiar reason why a woman, conjoined to Titius both by the same formula of words, and with respect to the same thing (*re et verbis conjuncta*) should not receive the portion of Titius on his decease, by right of accretion, as appears from the law itself, and as Gothopredus lays down in his notes. I also treat of the same matter *in tit. de condit. Instit. num.* 12, *in med.*

61. There is a divergence of opinion among commentators as to the right of accretion obtaining among those legatees who are conjoined only by the formula of words used in the bequest, as when shares of one and the same thing are bequeathed to them by one

formula of words, as for instance, "*I give and bequeath my Cornelian estate to Titius and Maevius in equal shares,*" inasmuch as some admit of the right of accretion in this case, while others, taking a more proper view of the law, and having a stronger grasp of its principles, hold that this right does not obtain in such a case. For such persons as are conjoined only by being mentioned in one and the same formula of words are really not conjoined at all, if you consider that a legacy is only bequeathed conjointly in the case where the whole legacy is given to each legatee, and that it is divided into shares only in case they all claim their concurrent share (*d. l. conjunctim* 80, *ff. de legatis* 3) ; and that, moreover, by conjoining them only by the same formula of words, the testator has in the first instance allotted his share to each legatee (*l. re conjuncti* 89, *ff. de legatis* 3), so that they do not divide the legacy into parts by the mere fact of their claiming their concurrent shares, since they have already their shares given them in the first instance. Moreover, the right of accretion does not obtain among legatees except when, each of them claiming the legacy, it is divided amongst them (*d.* § 8, *Inst. h. t. arg. d. l.* 80, *ff. de legatis* 3). And the fact that formerly in a legacy of condemnation left to two persons conjointly, the right of accretion did not obtain, and that for no other reason than that an heir who is condemned to give a legacy to two persons is deemed to be originally ordered to give a share to each, goes to support this view (*l. si Titio & si* 7, *ff. de legatis* 2; Ulpian, *in fragment. tit.* 24, § 13). Further, Papinian, *in l. pen. ff. de usufr. accresc.*, expressly and unambiguously denies the right of accretion to those legatees conjoined only by being included in one and the same formula of words, when he writes, "*When to each of the several heirs the fruits of one and the same thing are left as a legacy, they are deemed to have separate portions of the fruits left them, just as in the case of the fruits of a thing being left as a legacy to two persons in equal shares, and therefore the right of accretion does not obtain among them.*" A comparison is in that enactment drawn between two classes of facts, the first of which is "*when to each of several heirs the fruits of one and the same thing are bequeathed,*" and the second, "*when the fruits of one and the same thing are bequeathed to two persons in equal shares,*" and it is asserted, and properly so, that in neither case are the legatees conjoined, but are rather treated as separate, and that therefore there is as between them no right of accretion, because, according to Celsus, Neratius, and Ulpian, "*the right of accretion obtains whenever the usufruct is divided by the concurrent claim of two persons, each of whom has the whole usufruct bequeathed to him*" (*l. idem Neratius* 3 *pr. ff. de usufructu accresc.*). Finally, in all these instances the law is in conformity with the manifested intention of the testator. For since it is by no necessity of law that the *jus accrescendi* obtains as between co-legatees (just as has already been laid down elsewhere * with reference to

* Bk. 29, tit. 2, §§ 39, 40.

co-heirs), but only in consequence of the probable intention of the testator, it can easily be imagined that a testator, by conjoining two or more legatees either as regards the thing only, or both as regards the thing and in one and the same formula of words, and so leaving the whole legacy to each, intended that each legatee should, if possible, take the whole legacy. Moreover, this is from the nature of things impossible when both claim the legacy, and therefore, by virtue of their concurrent claim, they by a natural consequence divide the legacy, since it is not possible that two separate persons can be absolute owners in the same degree of the whole of one and the same thing. But on the failure of one legatee, the other, since he is not impeded by any concurrent claim, can take the whole legacy for himself, according to what is understood from the intention of the testator in leaving him the whole legacy. On the other hand, where legatees are only conjoined as regards one and the same formula of words being used in the legacy, in which case each has his share assigned to him by the testator either in the first instance or all through the testament, if on one legatee failing, the other takes the whole legacy, this would be directly counter to the manifest intention of the testator, since he, by assigning to each his share in the first instance, must be taken to have intended that the whole legacy should not go to one legatee, even if the other did not take his share. *l. re conjuncti* 89, *ff. de legatis* 3 is opposed both to these laws and their reason when it asserts, as it does towards the end, that those who are conjoined by formula of language only are, as regards *jus accrescendi*, of more avail than those who are conjoined only in respect of the thing; because if this were true it would be absurd to deny the *jus accrescendi* to those who in respect of that right are preferred to others to whom the *jus accrescendi* is conceded. But we must note that legatees who are conjoined by one and the same formula of language being used in the bequest are in that class of case (mentioned in the above *lex*) of more force and effect than those conjoined as regards the thing; because in the first instance, and according to the express language of the testator, they are seen to be conjoined as regards the formula of words used, but not in respect to the thing, and yet subsequently and as a consequence of the testator's bequest they are found by legal interpretation to be conjoined as regards the thing also; and so on account of being conjoined in a twofold manner, that is both as regards the thing and the words used in the bequest, they prevail over those who are conjoined with respect to the thing only. For in the following formula of words (used at the end of the case set forth in *lex* 89): "*to the first and second I give and bequeath my Cornelian estate, in equal portions; to the third I bequeath the same estate,*" the first and second are by the testator conjoined only as regards the words used, but afterwards become conjoined also as to the thing, from the fact that the third is conjoined, as to the thing, to the two previous

legatees, inasmuch as he by a separate formula of words has bequeathed to him the whole of an estate which was bequeathed to each of the two previous legatees in one and the same formula of words. That the consequence of this addition of a third legatee conjoined as regards the thing to the two previous legatees is to render them also conjoined as regards the thing, though they were not so joined in the first instance, can be gathered from *l. Maevio fundi* 41, *ff. de legatis* 2, where Maevius and Seius were originally absolutely separate and not joined either as to the thing, since to each was left a half share in the estate, or in respect of the words used, since the bequest was made in two separate formulae of words, in the following manner: "*To Maevius (I bequeath) a half share of the estate, to Seius I bequeath a half share,*" where the former clause is elliptical and the word "*lego*" (I bequeath) must be understood (*arg. l.* 1, § *si autem* 5 *&* 6, *ff. de hered. instit. l. errore* 7, *C. de testamentis*). Subsequently to Maevius and Seius is added Titius, who is joined to them as regards the thing, in the manner following, viz.: "*I bequeath the same estate to Titius,*" and since Titius is joined to the two previous legatees with respect to the thing bequeathed, it follows as a consequence that the two original legatees, Maevius and Seius, also become conjoined in respect to the thing as between themselves, and consequently again Maevius who was originally in no way joined to Seius, will succeed together with Titius who is conjoined as to the thing, by *jus accrescendi* to the portion of Seius on his failing to take his legacy, just as if he (Maevius) had the same rights as Titius, and as if he also were conjoined to Seius as to the thing. And this is the principle the Jurisconsult goes upon in *d. l.* 41 when he says: "*It is necessary that the part which is not taken should accrue, in the proportion of their legacies, to each of those to whom the estate is separately left as a legacy,*" meaning by his assertion that the *legacy was separate*, nothing else than that there was a conjoining as to the thing when the whole estate was left as a legacy to each separately, *i.e.* by separate formula of words, just as, according to what was said above in *d. l. un.* § 11, *C. de caduc. toll.*, those legatees who are conjoined only as to the thing are called *disjuncti* (separate), and are said to have legacies left them *disjunctim* or *separatim* (separately). And this view is not opposed by *l. si duobus* 16, § *ult.*, *ff. de legatis* 1. For since there a legacy is left to Titius and the postumous offspring in equal portions, the very expression of shares being apportioned involves the tacit condition of there *being any postumous offspring born*, and this appears especially if you consider that many children can be born at one birth, and that on that account it is not possible that a certain fixed share can be assigned in the first instance. Therefore if no postumous child is born, Titius should have the whole legacy, as if the whole legacy and not a portion of it was left him in

the first instance (arg. *l. quidam relegatus* 5, § *ult. l.* 6, *l.* 7, *ff. de rebus dubiis*). So in *d. l.* 16, § *ult.* it is not stated generally that Titius should have the whole legacy, *should there be no concurrent claim by postumous offspring*, but *should no postumous offspring be born*, and consequently if there were any postumous offspring, Titius would have no more than an equal share, even if they do not accept the legacy, because the very fact of the birth of postumous offspring constitutes the condition which the testator imposed to regulate the giving of proportionate shares to the co-legatees, and therefore they are not conjoined as to the thing, but only as regards the words used. Moreover it is a plausible thing to say that the *jus accrescendi* obtains among those persons who are conjoined, and that those are conjoined who are conjoined by one and the same formula of words being used in the bequest (*l. triplici modo.* 142, *ff. de verb. signif. le re conjuncti* 89, *ff. de legatis* 3). For such persons are conjoined as regards the words used but not as to the thing, and so have no concurrent claim on the thing, and therefore do not apportion it by the fact of their concurrent claim. In a question then as to the *jus accrescendi*, such persons should not be deemed conjoined persons (arg. *l. conjunctim* 80, *ff. de legatis* 3). Vain is the argument advanced that those persons who are conjoined as to the words of the bequest seem, as far as the words show, to have shares assigned them in the first instance, but in reality have not, since no defined portions are allotted them; and that moreover those who are conjoined both as to the thing and by the formula of words used have also undivided shares assigned them in the first instance (*l. nomen filiarum* 164, § *partitionis* 1, *ff. de verb signif. l. legata inutiliter* 19, § *ult. ff. de legatis* 1). For between those persons conjoined only by the same formula of words and those conjoined both as to the thing and by the same formula of words there is this difference, that those conjoined only by the same formula of words have always undivided shares assigned them from the beginning by the express will of the testator, while those who are conjoined both as to the thing and by formula of words have not in the first instance undivided shares, since the whole legacy is available to each, until their concurrent claim effects a division of the legacy between them (*d. l.* 80, junct. *l.* 89, *ff. de legatis* 3, *d. l.* 3, *pr. ff. de usufructu accresc.*). So that those who are conjoined both as to the thing and by formula of words have at the commencement of their concurrent claim what those who are conjoined only as regards the words used have in the first instance and apart from any concurrent claim. Thereafter each will be able to obtain his portion of the common property by a judgment for the division of it, whereby each receives a divided share. As regards *d. l.* 164, § 1, *ff. de verbor. signif. & l.* 19, § *ult. ff. de legatis* 1, no assertion is there made that those who are conjoined both as to the thing and by the words used have shares assigned them originally, but only that, if two persons

have to receive shares and no defined portions are mentioned, each will be entitled to half, just as also if those who are conjoined both as to the thing and by the words used in the bequest, divide the legacy by their concurrent claim, each obtains an undivided half-share. But it is in no way asserted that where there is no concurrent claim each has a share assigned him from the beginning.

62. Moreover, although the person conjoined as to the thing only, and those conjoined both as to thing and by the words used, agree in the fact that the *jus accrescendi* applies to both, yet they differ in the fact that according to the varying wish of the testator one can prevail over the other as far as concerns the *jus accrescendi*, in the same way as was shown to be the case in many instances where there are more heirs than one (*tit. de acquir. vel omitt. hered. num.* 39). So, also, there is this difference between them that those who are conjoined only as to the thing, obtain the portion of the legacy, which is not accepted, by right of accretion whether they wish to or not, while it accrues to those who are conjoined both as to the thing and by the words used only with their consent; because it accrues to those conjoined only as to the thing without the burden or incumbrance imposed upon the legatee who failed to take; whereas to those conjoined both as regards the thing, and by the words used, it accrues always with burden attached, according to the principles laid down by the Emperor in *d. l. unic.* § *sin autem* 11, *C. de caducis toll.*

63. Further, this right of accretion obtains not only if one "*corpus*" (particular thing) is left to more legatees than one, but also in case a quantity of things, or things *fungible*, are so left, since the laws dealing with the right of accretion make no distinction in this respect as to whether single particular things, or quantities of things, are left by legacy, provided the testator has not intended that the whole quantity so left is to be paid to each concurrent claimant, and in this way intending the quantity to be paid over more than once, but has rather expressed it as his intention that the one quantity should be paid once for all to all the legatees, as it is in his power to do (arg. *l. plane ubi* 34, § *sed hoc ita* 4, *ff* § *proinde* 6, *ff. de legatis* 1). Nor is it to be inferred from *l. cui fundus* 56, *ff. de condit. & demonstrat.*, as some think, that the quantity is *ipso jure* divided among the co-legatees, and that, therefore, it is not by their concurrent claim that it is divided. For in that enactment the question is not as to the quantity left to the co-heirs, or to the right of accretion, but as to the fulfilment of the condition; and it is laid down that conditions are either divisible, and so can be fulfilled part by part, or indivisible, there being, therefore, no connection between this and the right of accretion. The better opinion is that the quantity of things left to many co-heirs is only divided among them if they make concurrent claim for the legacy, and then by their concurrence divide it between them. Nor is there anything to prevent the whole quantity being due to one

legatee, the heir then being able to discharge himself by making one final payment of the quantity left by legacy, just as is the case where there are two persons bound by the same stipulation, according to *pr. Instit. de duobus reis stip. l. reos promittendi* 11, § 1, 2, *ff. de duob. reis constituend.*

64. Since it was above laid down that according to the very principles of Roman Law this right of accretion obtains among many co-legatees rather in consequence of the probable intention of the testator than of any legal necessity, we have in our modern law departed less from the Roman Law in this respect, than in the case of those attributes of the right of accretion, which the Romans, often contrary to the testators' intention, approved of in the subtlety and over-scrupulousness of their law. (Compare Hug. Grotius, *manuduct. ad jurisprud. Holl. libr.* 2, *cap.* 23, *num.* 4, 5; Radelantius, *Curia Ultraject. decis.* 87, *num.* 2; Leeuwen, *cens. for. part.* 1, *libr.* 3, *cap.* 5, *num.* 20, *in fine & cap.* 8, *num.* 37. My father of sacred memory, Paul Voet, *ad* § 8, *Instit. h. t. num.* 3.)

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