CHAPTER V

THE LAW OF INHERITANCE AND LEGACY

SECTION I—TESTAMENTARY SUCCESSION

The Will

THE subject we now approach may be regarded as at once the most interesting and the most tedious branch of Roman Law. In its broader aspects, it supplies a fascinating chapter in the history of thought; but to enter into all the detail that we find even in the Institutes would not be very instructive, and would certainly be dull. The great central fact is that the idea of a testamentary disposition of property, which, but for the plain teaching of history, we should consider of the very essence of ownership, was reached by slow and tortuous steps.

Contrast of Ancient and Modern Will

Sir Henry Maine has drawn attention to the sharp contrast between a modern will and the ancient Roman mancipatory will. The modern will is a secret document; it is revocable during life, until the termination of which it has no effect. The old will of the Roman Law was a conveyance *inter vivos*, made openly in the presence of a number of witnesses; it took effect at once, and it was irrevocable. But that is not all. The purpose of a modern will is to divide property; the testator stands face to face with the legatees; an executor is appointed merely for convenience in winding up the estate. The primary purpose of a Roman will (even in the time of Justinian)

was to appoint an heir (*heres*)—in other words, a universal successor to the deceased; if it failed in that, it was wholly worthless. From the legal standpoint, the nomination of the heir was the whole object of the will. That which in the real purpose of the modern testator is the first and paramount object—the distribution of his property—was in the eyes of the ancient Roman law a secondary and quite subsidiary point. Nothing can be more puzzling to a student than the wholly inverted manner in which, according to modern ideas, even the most recent productions of the Roman intellect deal with the subject of wills and legacies. To understand how this came about is to master nearly everything that is of interest in this department of Roman Law.

Hindu Heirs

The earliest notions of succession to deceased persons are connected with duties rather than with rights, with sacrifices rather than with property. In the Hindu Law, the heir or successor is the person bound to perform the funeral rites required for the comfort of the deceased's soul; and even in the Roman Law there are not wanting indications of the same fact. The property of the deceased was the natural fund to provide the expenses, in some systems of religion by no means inconsiderable, of the necessary religious ceremonies. In the Roman Law, until the change, presently to be stated, made by Justinian, the heir was considered to stand in relation to third parties as more than a representative of the deceased—indeed, as actually continuing his legal personality. The heir succeeded to all the rights and all the liabilities (*in universum jus*) of the deceased; and,

Universal Succession

just as a person is not excused from paying his debts because he has insufficient means, so it was no answer to a creditor, when suing an heir for money due by the deceased, that the deceased had not left him funds wherewith to discharge his debts. Up to the alteration of the law by Justinian, *the heir was bound to pay all the debts of the deceased, even if he obtained no property from him whatever.* An insolvent inheritance was thus a veritable *damnosa hereditas.*

Intestate Succession most Ancient

The history, not of Rome alone, but of other nations, shows that in the earliest times the heir was the person designated by nature to perform the duties of filial piety to the deceased. The children, or, failing them, the more distant kindred, were the only successors dreamt of by the men who made the institutions of the Indo-European family. But children and kin sometimes fail. To persons actuated by the ideas and feelings of a modern European such a circumstance would not be considered as an evil of a grave order. Far otherwise was it with men who devoutly practised the worship of ancestors, who believed that the spirits of their fathers (*manes*) hovered around the household hearth, and required such nourishment as could be derived from the food sacrificed to them. To die childless was to leave the perturbed spirit of the father without rest or food: from being the natural protector of his house he became a malignant ghoul. The records of ancient law show many traces of the absolute horror with which the fathers of our race contemplated their disconsolate state if they died without children, and by consequence without heirs.

Adoption

The ingenuity of men first provided in the fiction of adoption a remedy for this emergency. A man that had no child was allowed to select a son. When in the course of nature he died, this artifice provided him with an heir. It is a disputed question whether the Hindus ever advanced nearer to a law of testamentary succession than this rude device; and it is a significant fact that the ancient forms of adoption of the Roman Law correspond point for point with the earliest forms of true testamentary succession. Accordingly, to the Roman Law we must turn for the development of this idea.

Testamentary Succession

Testamentary succession did not make a real beginning until men accepted the idea of the direct appointment of an heir, without going through the intermediate stage of sonship. The first testamentary heir is he that succeeds, not by natural succession, but by the will of his predecessor, directly to the deceased without being first his son. This stage is exemplified by the Roman Law. During the thousand years through which we trace the evolution of Roman genius in the region of law, one grand central idea dominates the whole law of wills. It is that the function of the Will is to name an heir. The Legacy —the gift by the deceased of a specific part of his property to a legatee—came into being when first the law permitted the testator to enjoin commands upon the heir as to what he should do with this or that article of property, and when the heir was compelled to execute those commands. But legacies were not of the essence of a will. Failure to institute an heir made a will null and void. A will instituting an heir

was valid, even if it contained no legacies at all. However, it is easy to make too much of this principle, for legacies might eat up the greater part of the estate, and so the effect of the principle was mainly to provide that there should be a universal successor to the deceased, who should carry on his personality. In fact, had it not been for certain opposing tendencies, Roman Law would have reached a point scarcely to be distinguished from the modern view, bringing the testator into direct relation with the legatee, and reducing the ancient heir to a mere official for distributing property.

Liability of Heir

The principle of the Roman Law until the introduction of inventories by Justinian was that the heir, as regards third parties, stood exactly in the shoes of the deceased, and was bound to pay all his debts, even if he obtained no property from him whatever. By the provisions of the XII Tables the testator, after his debts were paid, could bequeath the whole surplus of his estate to legatees. This freedom defeated itself. No inducement was left to the heir to accept the inheritance, and the heir, accordingly, by refusing to act, nullified the testament, and deprived the legatees of everything. After two ineffectual attempts to deal with this question by legislation, in the year 40 B.C. a statute (*Lex Falcidia*) was passed providing that in every case the heir should have one-fourth of the clear proceeds of the estate. In estimating the clear proceeds, all the debts were deducted, and the funeral expenses and the price of slaves ordered to be manumitted by the will.

Justinian introduced a profounder change in this than in any other branch of law. He broke up an association of ideas riveted by the practice of more than a thousand years. The ideas of "heir" and of "unlimited liability" were indissolubly associated for ages. Justinian, at one bold stroke, converted the heir into a mere official appointed by the testator for the purpose of winding up his affairs and distributing his property. The heir now differed in nothing from a modern executor, except that he was continued in the heir's right to a fourth (*quarta Falcidia*), unless the testator expressly forbade it, and he was entitled to the property left by the testator in so far as it was not swallowed up in legacies. This result was accomplished by a process of gentle compulsion. If the heir did not make an inventory—setting forth all the property of the deceased—he not merely continued liable for the debts of the deceased, but, in addition, was compelled to pay all the legacies, even should the assets prove insufficient. On the other hand, if the heir made a full inventory in compliance with the terms of the law, he was released from all personal liability for the debts of the deceased, and was not bound to pay beyond the assets that came into his hands. Inventories

The essence of a Roman will, as has been already stated, was the nomination of a universal successor to a deceased person; if a will failed in that point, it was wholly and absolutely worthless; if it accomplished that object, it could, but it need not, effect other purposes, such as the gift of legacies or the appointment of tutors. So fastidious was the Roman Law in keeping up this relation between the heir and Nature of Roman Will

the legatee that, until Justinian altered the law, a legacy occurring in the will before the appointment of the heir was void. In respect of its juridical essence and validity, a will was nothing but a lawful mode of nominating an heir. Even after the profound change introduced by Justinian, the essence of the *Testamentum* continued to be the valid and successful appointment of an heir. If none of the heirs named in the will could or would accept the inheritance, the will was void, and the legacies failed of effect. The further progress of the Roman Law was not accomplished by an extension of the *testamentum*, but by practically superseding it, through a new mode of declaring a last will by *codicilli* and *fideicommissa*, which will be explained hereafter.

Essentials of Roman Will

The making of a *testamentum*, as we might infer from its history, was an extremely complex affair. In order that it should operate effectually, it must comply with five sets of conditions. (1) Certain forms must be observed; (2) certain persons, if not made heirs, must be formally disinherited; (3) to certain persons a definite portion of the testator's property must be left; (4) an heir must be properly instituted; and (5) the testator, the witnesses, and the heir must be severally capable by law of taking the part assigned to them. Even when a will complied with all these conditions, it might ultimately fail, owing to circumstances arising beyond the testator's control. Nay, the will might remain perfectly good, and yet, if the heir named for any reason refused to accept, the whole fell to the ground. A few words upon each of these points will suffice.

Forms of Will

1. In the earliest times wills were made in the Comitia Calata assembled under the presidency of the Chief Pontiff. A will, being a departure from the rule of intestate succession, required the assent of the *gentes*, whose eventual interest was involved; and, since the *sacra* might be affected, it required the sanction of the College of Pontiffs. It was oral; and it was completely public. Till the XII Tables enacted that a man's last dispositions should be observed as law, it was probably an ordinary legislative act. This form had become practically obsolete by the time of Cicero. There was also a will made on the eve of battle (*in procinctu*), when the army was ready to fight (*Procinctus est expeditus et armatus exercitus*). Three or four comrades sufficed as witnesses. This form seems not to be mentioned in the surviving literature later than 143 B.C.

Comitiis Calatis

In procinctu

The next will—the old will of Republican Rome—was originally a conveyance *inter vivos* (*per aes et libram*). The maker of the will summoned five witnesses, Roman citizens over puberty, and a balance-holder (*libripens*). He then conveyed his whole estate to a nominal purchaser (*familiae emptor*). At first this person was the heir, upon whom after the death of the testator devolved the duty of paying the legacies. At this stage the transaction differed in little from an ordinary conveyance. The next step was to employ a *familiae emptor* merely for form's sake, the name of the heir being contained in a written document, which was not opened till the testator's death. Up to this point, the development of the will was carried on by the jurisconsults. The

Per aes et libram

Praetorian Will

next step was taken by the Praetor. He set forth in his edict that when a written will was sealed with the seals of seven witnesses (a number made up by adding the *libripens* and the *familiae emptor* to the five witnesses required for an ordinary *mancipatio*), he would give the person named as heir in the will the possession of the inheritance, even although no formal sale took place. This did not make him heir, but he gradually came to be protected in his possession as effectually as if he had been instituted in a valid will.

Imperial (Written) Will

By subsequent imperial legislation the signatures of the testator and of the witnesses were required. The written will, as it existed in the time of Justinian, had thus a threefold origin (*jus tripertitum*). The making of the will (*uno contextu*), and the presence of the witnesses all together at the ceremony, were a reminiscence of the will by *mancipatio*. The seals and the number of the witnesses came from the Praetor's edict. The signatures of the testator and of the witnesses at the foot of the will form the contribution of imperial legislation.

Disherison

2. The next condition of a valid will was that if certain persons were not named heirs they should be expressly disinherited. At first this applied only to such persons as were under the *potestas* of the deceased and became independent (*sui juris*) by his death. These heirs were called *sui heredes*. In the time of Justinian the law stood thus. On pain of invalidating his will, a testator must appoint as heirs, or else disinherit by name, not merely *sui heredes* but all his descendants through males, whether born at the testator's death or then in the womb. Inasmuch as

the testator was perfectly free to disinherit all his children, it might have been assumed that, if he did not name them as heirs, he intended to exclude them from the inheritance. The true reason for this technical rule, so eminently calculated to be fatal to wills, was that the old theory of the family implied a species of copartnership in the family estate. The children were regarded as owners even during the life of the *paterfamilias*, who was sole administrator, and, when he died, they were conceived as having obtained free administration of their estate, not as having obtained such estate by succession. The law therefore regarded them as being owners unless something had been done to turn them out. The father had the power to do so, but, unless he exercised that power, there was no vacancy to which he could nominate strangers as heirs. This conception of a family copartnership must have had its roots deep in the Roman mind before it could have maintained so long an arbitrary rule that even the all-devouring zeal of Justinian did not remove.

Joint-Family

3. When the testamentary power was conclusively sanctioned in the Twelve Tables, it was recognised as in its nature exceptional, and as an invasion of the rights of the family; but no hard-and-fast line was adopted to prevent the testator from leaving his children destitute. A remedy, however, was introduced on the plea that the testator's will was contrary to his duty (*testamentum inofficiosum*), and that consequently he had acted as if not of sound mind when he drew up the will. The meaning was, not that the father was really mad, but only that his will ought to

Legitim

be treated as if he had been mad. In considering this limitation of a testator's freedom, and the necessity of making some provision (*legitima portio*) for his nearest relatives, we must not forget that the children of the Roman *paterfamilias* had no rights of property, and that what they acquired in virtue of their own exertions or of the liberality of others was the property of their father. Thus to disable them, and at the same time to permit the father to give what was in morals although not in law their own property to strangers, would have been to sanction a species of injustice which it is not in the power of any father in modern times to commit. After some fluctuation, the doctrine of the Roman Law came to be that the testator should leave not less than a fourth of the amount that would have fallen in case of intestacy to his children. Children were required in the same way to remember their parents in their wills, and even brothers and sisters were forbidden to exclude brothers and sisters in favour of strangers of doubtful reputation.

Institution of Heir

4. The next point requiring the attention of a testator was the formal nomination of an heir. In early times stated language was employed, as *Lucius Titius mihi heres esto*, but at length it was sufficient if the testator's intention was shown. The appointment must, however, be in express language; it could not be inferred from the testator's throwing upon a person duties appropriate to an heir. In case the person first named might die or decline to act, it was usual to add another to take in such an event. This was called Substitution, and could be carried to

Substitution

any extent, usually ending with the name of a slave of the testator, who obtained his freedom, but could not refuse the inheritance. This substitution (*substitutio vulgaris*) took effect only if the person instituted heir declined; if he once accepted, the substitution was at an end. In one case, however, the Roman Law permitted a substitute to come in even after a person instituted had accepted. A testator might say, "Let Titius my son be my heir. If my son shall not be my heir, or if he shall become my heir and die before he comes to puberty, then let Seius be heir." A son could make a will after puberty, but not before, so that in effect such a substitution (*substitutio pupillaris*) was an appointment of an heir to the son until he arrived at the age when he could name one for himself. Justinian extended this indulgence to parents of insane children, enabling them to name substitute heirs to such children, even if over the age of puberty, until their death or the recovery of their reason. This was called *substitutio exemplaris*.

Incapacity

5. The grounds of incapacity to make a will or to be a witness or an heir are not of sufficient interest to require detailed statement.

Defects in Wills

If a will did not comply with the proper forms, or did not name an heir, or if the testator, the heir, or any of the witnesses were incapable of acting their several parts, or if the testator did not expressly disinherit his children, the will was said to be *injustum*, or *non jure factum*, or *nullius momenti*. If it was right in those points, but did not make provision for the legitim (*legitima portio*) of children, it was *inofficiosum*. If the will was originally good, but no

one took as heir under the will, or the testator lost his capacity before his death, it was said to be *irritum*: if no one took as heir, it was also sometimes said to be *destitutum* or *desertum*. If the testator made a new will, or his will became invalidated by the subsequent birth of a person requiring to be disinherited, but not disinherited, the original will was *ruptum*.

Non-formal Will

From this brief sketch, it may be understood how perilous was the act of testation, even in the latest times. We may well ask why a people with the practical genius of the Romans for law continued to submit to a form of will that must constantly have frustrated the intentions of testators and the expectations of legatees. The explanation is found in the fact that in the time of Augustus a new mode of testation was introduced, which successfully enabled testators to avoid the snares and pitfalls of the *testamentum*. The mountain was too great to remove, but a way was found of simply walking round it. The device invented for this purpose was the non-formal will of the Roman Law—*Codicilli*. In their origin and essence, *codicilli* present a complete contrast to the *testamentum*. They were in the nature of requests to persons who, independently of the *codicilli*, were heirs, to give to others either some specific articles or a fraction or even the whole of the inheritance. By *codicilli* a legal heir could not be appointed. Originally they were free from all formalities; in A.D. 424, however, Theodosius required the presence of five witnesses, but Justinian enacted that, even if this testimony were wanting, a person claiming under a trust could compel the heir to tell upon oath what

Codicilli

instructions he had received. By *codicilli* no person could be disinherited, nor did their validity depend upon providing legitim. If there was no *testamentum*, *codicilli* operated by way of trust on the heirs *ab intestato*; but if there was a *testamentum*, they were considered a charge upon the testamentary heirs, and were made to stand or fall with the will. If *codicilli* were made before a *testamentum*, the *codicilli* were presumed to be cancelled, unless the contrary was proved. It was usual, therefore, in a will to confirm *codicilli* previously made, if the testator wished them to be carried out.

Trusts

We are informed by Justinian that the Romans owed the introduction of *codicilli* to the Emperor Augustus. They became exceedingly popular on account of their convenience when the Romans were away from home, and soon a special judge was appointed to take charge of trusts (*fideicommissa*). These trusts were charges on the legal heir, whether he were appointed by will or succeeded to an intestate. However, although closely connected with *codicilli*, and introduced about the same time, they were not necessarily imposed by *codicilli*. They might be contained in the will itself. From the first, great latitude was allowed in trusts. Thus aliens and Latins could take by way of trust, although not under a will. Women could take an inheritance by trust, free from the restrictions of the *Lex Voconia*. And, although trusts were gradually subjected to many of the restrictions which applied to wills, they always retained some advantages. Thus by means of trusts much greater flexibility was introduced in the settlement

of property. A testator by way of trust could give his inheritance to A for life, then to B for life, and then to divide it between C, D, and E. Again, A and B might be heirs on trust that, if one died without children, his share should go to the survivor, and, if both died without children, the whole should go to C. Such limitations were impossible by way of direct gift or institution in a *testamentum*.

Heres and *Fideicommissarius*

In one respect *fideicommissa* were slow in attaining maturity. When a testator—to take a simple case—charged his heir to give up one-half of the inheritance to another, it was no easy task rightly to adjust the relations of the two persons. The maxim of the Roman Law was: "Once an heir, always an heir." An heir could part with the goods he received, but he could not divest himself of his liabilities or transfer his rights of action to the beneficiary. The first plan adopted was to sell the portion of the inheritance subject to the trust to the person named for a nominal sum, and require him to guarantee the heir against a corresponding amount of the debts, the heir for his part undertaking to pass on to him a corresponding proportion of the proceeds of actions brought by him on behalf of the estate. In the time of Nero (probably A.D. 56), the *Senatusconsultum Trebellianum* was made, providing that, in the case of inheritances wholly or partially given up under a trust, the actions heretofore given to or against the heir should be given, wholly or partially, to and against those to whom under the will the property was required to be surrendered. This statute was perfect, except in one point: it did not compel the legal heir to enter

pro forma and transfer the inheritance. In a mature law of trusts it is an elementary maxim that a trust shall not fail from want of a trustee; but in this early stage of their growth the maxim was that the trust must fail unless there was a trustee.

Pegasian Fourth

The next step was characteristic. In the reign of Vespasian (A.D. 69–79), by the *Senatusconsultum Pegasianum*, a bribe was offered to the heir to enter; he was allowed to retain a clear fourth. This, by analogy to the Falcidian fourth, was known as the *quarta Pegasiana*. If, then, a legal heir was left by the will a fourth, or upwards, he entered, and the *Senatusconsultum Trebellianum* divided the liabilities in proportion to the shares of the inheritance. But if less than a fourth was left by will, the heir claimed the benefit of the *quarta Pegasiana*, and in this case the other statute did not apply, and at law the heir was saddled with the whole debts. Accordingly, in this case again, the old plan of a nominal sale of a portion of the inheritance was gone through, and mutual guarantees given by the heir and the beneficiary. Finally, Justinian put the law on a clear footing. He enacted that in every case the heir should enter, with the benefit of the *Senatusconsultum Trebellianum*, but that he should, nevertheless, have the benefit of the Pegasian fourth.

Codicillary Clause

One step alone remained to complete the development of the law of testation. It became usual to insert in wills a clause to the effect that, if for any reason the instrument failed as a will, it should be regarded as *codicilli*, and so bind the heirs *ab intestato*. This clause (*clausula codicillaris*) healed every defect

in a will; for the beneficiaries, if they could not sue under the will, could compel the heirs *ab intestato* to execute the provisions of the instrument as trusts.

Section II—Intestate Succession

Three Periods

The law of intestate succession is most conveniently considered in three periods. The first takes the law as it stood at the time of the XII Tables; the third deals with the law as finally settled by Justinian, after the publication of the Institutes; and the second covers the space intervening. The first and the third periods are characterised by logical rigour and simplicity; the middle period is one of confusing transition. At the time of the XII Tables the inheritance descended to the family as based on the *potestas*. A father and an emancipated son were in law absolute strangers for the purpose of succession. By Justinian's latest enactments, the *potestas* is disregarded, and relationship is based on the tie of blood. In the language of the jurists agnation is superseded by cognation. In the interval between the XII Tables and the final legislation of Justinian, we trace the successive steps by which the natural came finally to supersede the artificial tie.

Succession according to the XII Tables

Order of Succession

The classes that took an inheritance were as follows: (1) *sui heredes*; (2) in default of these, *adgnati*; and (3) in default of these, *gentiles*.

Sui heredes were all such persons under the *potestas* or *manus* of the deceased as became independent on his death. Hence emancipated children, and daughters, if married and in the *manus* of their husbands, could not succeed to their father. On the other hand adopted children did succeed. *Sui heredes* took equal shares, without distinction of sex or age. If some were children and others descendants of children, those descendants took only the share that their parent would have taken if he had been alive. *Sui Heredes*

Adgnati formed a wider group, having the same centre, but a larger circumference. Persons are *adgnati* when they are so related to a common ancestor that if they had been alive together with him they would have been under his *potestas*. The constitution of a Roman family under the *potestas* has already been considered (pp. 30, *sq.*). The agnates in the nearest degree of kinship excluded the more remote and those in an equal degree of propinquity took equal shares. Failing *adgnati*, the members of the *gens* to which the deceased belonged took the inheritance. Who these were, is a problem too difficult to consider here. By the time of Gaius the succession of the *gentiles* had fallen into disuse. *Adgnati* *Gentiles*

Succession from the XII Tables to Justinian

It would be wearisome and uninstructive to trace the changes from the XII Tables to Justinian in detail. But the broader features may be indicated. The Praetor introduced two great innovations. First, he allowed emancipated children to succeed along with Changes by Praetor

sui heredes; and he allowed more distant blood relations, whether the relationship was traced through males or females (*cognati*) to come in after the *adgnati*. Thus according to the Praetor the order of succession was: (1) children (*unde liberi*), whether under *potestas* or not; (2) statutory heirs (*unde legitimi*), consisting principally of *adgnati*; (3) *cognati*, including blood relations not included in the previous classes; and (4) the surviving spouse.

Statutory Changes

Again, by the *Senatusconsultum Tertullianum* (A.D. 158), freeborn women having three children, or freedwomen having four, were enabled to succeed as statutory heirs to their children; and by the *Senatusconsultum Orphitianum* (A.D. 178), children were permitted to succeed to their mothers.

Justinian's Final Legislation
Novels 118 and 127

Order of Succession

Justinian regulated succession in three classes: (1) Descendants; (2) Ascendants, along with brothers and sisters; and (3) Collaterals.

First. Descendants excluded all others. Children take equal shares; grandchildren take the share their parent would have taken if alive.

Secondly. Failing descendants, ascendants came in along with brothers and sisters of the whole blood. Children of a deceased sister or brother took that person's share.

Thirdly. Failing those, the succession went to brothers and sisters of the half-blood and their descendants in the first degree.

Fourthly. Failing those, the next of kin succeed, the nearer excluding the more remote, and those in the same degree taking equal shares.

Fifthly. In the last resort, the surviving spouse still took the inheritance.

We may ask why a widow should be thus excluded in favour of perhaps remote blood relations. The answer is probably that the institutions of *dos* and *donatio propter nuptias* provided sufficiently for her.

Vesting of an Inheritance

For the purpose of vesting, heirs are divisible into three classes: (1) *Necessarii heredes*; (2) *Sui et necessarii heredes*; and (3) *Extranei heredes.*

Necessarius Heres

A necessary (or compulsory) heir is a slave of the deceased declared free and appointed heir by his master's will. He could not refuse the inheritance. Hence, as a last resort, a slave was named heir to prevent his master's inheritance, in case he died insolvent, from being sold in his master's name, and thereby bringing upon him posthumous ignominy.

Sui Heredes

The *sui et necessarii heredes* were those under the *potestas* of deceased. At first they could not, any more than slaves, decline the inheritance; and they succeeded without the necessity of any actual acceptance (*ipso jure*). The Practor gave them the privilege of refusal (*beneficium abstinendi*) if they did not interfere with the inheritance.

Other Heirs

Extranei heredes embraced all other persons. They did not become heirs until they accepted (*aditio*

hereditatis), either expressly and formally, or by acts of interference with the property of deceased.

Section III—Legacy

Basis of Law of Legacy

The law of bequest was founded on a single principle, namely, the intention of the testator. The rights of the legatee, and all the incidents connected with the legacy, have no other origin than the will of the testator. The law of bequest is therefore simply the interpretation of legacies. But the will of a testator is limited by two circumstances, one permanent, the other local and temporary. Everywhere the will of a testator is circumscribed by the general laws of his country. The State defines what property can be bequeathed, who may be legatees, and subject to what restrictions testation will be allowed. But in Rome, beyond these general limits, narrower restraints were imposed by the spirit of legal formalism that pervaded every branch of the law. It was the universal tendency of the old Roman Law to prefer the form to the spirit; and thus, in the law of legacy, the intention of the testator was not respected unless it was expressed in one or other of certain precise forms.

Old Forms of Bequest

During the Republic a legacy must be made in one of four forms. The first was said to be *per vindicationem*, because it transferred the ownership of the thing bequeathed to the legatee immediately when the heir entered. The object of bequest accordingly must be in the ownership (*ex jure Quiritium*) of the testator. The form was this:—"To Lucius Titius

I give and bequeath (*do lego*) the slave Stichus." The second was *per damnationem*. It imposed a duty on the heir: "Let my heir be condemned (*damnas esto*) to give the slave Stichus to Lucius Titius." Here the slave Stichus may or may not belong to the testator: if he does not, the heir must buy him from his owner and deliver him to the legatee, or, failing which, he must pay the value of Stichus. These were the chief forms; the others were mere variations. The third, called *sinendi modo*, ran thus: "Let my heir be condemned to allow (*sinere*) Lucius Titius to take and have for himself the slave Stichus." The fourth, *per praeceptionem*, was to this effect:—"Let Lucius Titius pick out first (*praecipito*) the slave Stichus," that is, before the division of the inheritance, Titius being here taken to be a co-heir.

Trusts and Legacies

The introduction of trusts (*fideicommissa*) in the time of Augustus afforded a means of escape from the narrow pedantry of the old forms of legacy. During the Empire, the two systems continued side by side. A testator might rely upon the old rules, or, if they did not suit his purpose, he could take advantage of trusts. The inconvenience arising from bequests made in a wrong form—as a bequest of a thing not belonging to the testator *per vindicationem*—was remedied by the *Senatusconsultum Neronianum*, passed at the instance of Nero (A.D. 64), which enacted that a legacy left in an unsuitable form should take effect just as if it had been left in the form most favourable to the legatee (*optimum jus legati*): this is, *per damnationem*. Legacies thus acquired some of the flexibility of trusts, which in their turn were

gradually subjected to many of the express rules limiting the applicability of legacies; aliens and Latins, for example, becoming incapable of benefiting by either mode of bequest. Justinian fused the old law with the newer equity, and enacted that legacies should be construed with all the liberality of trusts, and that trusts should be enforced by all the remedies applicable to legacies. The law was thus placed on a simple and right foundation. It rested upon the intention of the testator, and it was carried out by direct and appropriate actions.

Fusion of Law and Equity

Donatio Mortis Causa

A gift in anticipation of death (*donatio mortis causa*) was made subject to nearly all the rules of legacies. Such a gift was made to the donee, or to anyone on his behalf, on condition that it should be his property if the donor died, but that, if the donor should survive the anticipated peril, he should have his property back. Justinian required such a gift to be attested by five witnesses.

Legacy of Mortgaged Property

Legacy of Debts

The law of legacy is a law of detail, and cannot well be summarised. It will be sufficient in this place to advert to a few points. When the property bequeathed was mortgaged, the heir was bound to pay off the mortgage, unless he could prove either that the testator was not aware of the mortgage, or that the testator expressly charged the legatee to pay it off. Again, money due to a testator might be the object of a legacy, and if it were not paid in the testator's lifetime (in which case the legacy was extinguished), the heir was bound to permit the legatee to sue the debtor in his name. If the testator bequeathed to a debtor the amount due to him, the

debtor could demand a formal release from the heir. A legacy of a sum due by the testator to his creditor was inept, unless it differed in some respect from the debt.

Specific Legacies

The chief distinction in legacies was between specific and general legacies. When a testator bequeathed a determinate, specific thing, then upon the entry of the heir the legatee became owner. If a quantity of anything was bequeathed, the legatee was simply a creditor of the heir for the amount. By a legacy of 20 *aurei*, the relation merely of debtor and creditor was established; but a legacy of all the *aurei* in a chest made the legatee owner of the particular coins.

Mistake

Error in names was harmless. So a false description did not annul a legacy (*falsa demonstratio non nocet*). When a part of the description is sufficient to identify the object or person, and the remainder of the description is unnecessary for that purpose, the falsehood of this superfluous addition is immaterial. But if the whole of the description is necessary and part of it is erroneous, the legacy fails. A testator had two slaves, Philonicus, a baker, and Flaccus, a fuller. He bequeathed to his wife Flaccus the baker. If the testator knew the names of the slaves, Flaccus will be the legacy; if he knew them by their occupations and not by their names, Philonicus will be given. On the contrary, if A bequeaths to B the sum Titius owes to A, and Titius owes nothing, the legacy must fail, as there is nothing to determine the legacy except the amount due by Titius.

Falsa Demonstratio

Falsa Causa

Akin to this is the rule that a mistaken inducement (*falsa causa*) does not vitiate a legacy; as when one

says "To Titius, because in my absence he looked after my business, I give and leave Stichus," or "To Titius, because by his advocacy I was cleared of a capital charge, I give and leave Stichus." For, although Titius never managed any business for the testator, and although his advocacy never cleared him, yet the legacy takes effect. But if the heir could prove that the testator would not have left the legacy but for his erroneous belief, he could defeat the legatee on the ground that his claim was against good conscience (*exceptio doli mali*).

Restraints on Alienation

Among the restraints on testation only two call here for special notice. A testator could not bequeath property and forbid the legatee to alienate it; but according to a rescript of Seuerus and Antoninus, although a general prohibition to alienate was void, yet, if the restriction was made in the interest of a limited class (as children, freedmen, heirs, or any specified person), it was upheld, of course without prejudice to the creditors of the testator. In this way a very strict entail might be established. A similar rule applied to conditions in restraint of marriage. If the legatee or heir were forbidden to marry anybody at all, the legacy or will was perfectly good, and the restriction was null and void. But a condition that the heir or legatee should not marry a particular person or persons was good.

Restraints on Marriage

Revocation of Legacies

A legacy might be revoked by express language, or if the thing bequeathed perished. A revocation was implied from a serious quarrel arising between the testator and the legatee after the making of the legacy. A testator gave his freedman a legacy, and in a sub-

sequent will described him as ungrateful: this was held to be an implied revocation. A subsequent mortgage of the thing bequeathed did not revoke the legacy; on the contrary, the presumption was that the testator intended the heir to pay off the mortgage. If the testator alienated the property, the presumption was that he meant to revoke the legacy, and it was for the legatee, if he could, to prove the contrary. If, however, the alienation was prompted by necessity, the burden of proving an intention to revoke lay on the heir.

CHAPTER VI

THE LAW OF PROCEDURE

Historical Interest of Roman Procedure

THE interest attaching to the Roman Law of Procedure is mainly historical. From the pages of Gaius we can trace, in outline at least, the steps by which civil procedure was brought to a satisfactory condition. The history of Procedure is, in one word, the history of the efforts of the State to control the transactions of men. It is the history of the growth of jurisdiction. At first the right of the State to interfere in private quarrels is not recognised; but later on, the Roman magistrate appears in the guise of a voluntary arbitrator, a character that insensibly changed into a compulsory arbitrator. For the sake of clearness, it will be convenient to illustrate this proposition by examining the history of procedure under four heads. These shall be, in order, the successive steps in a lawsuit: (1) the summons to court; (2) proceedings from the appearance of the parties in court till judgment; (3) execution of judgments; and (4) appeals.

Jurisdiction springs from Arbitration

Summons

THE SUMMONS.—The process of summoning a defendant to court exhibits, in a marked manner, the early characteristics of civil jurisdiction. By the law of the XII Tables a complainant personally summoned a defendant. If the defendant refused, he

could call witnesses to his refusal, and thereupon drag him before the court. The law did not impose a legal duty upon the defendant to obey, and, if he did not go, no further proceedings could be taken; all that the XII Tables authorised was that, on proof of a refusal, the complainant might use force without incurring any liability. The Praetor, however, carried the law a step further. He made it an offence to refuse obedience to a summons, or to rescue a person summoned, or in any way to aid his escape. Thus by the action of the Praetor, the Roman magistrate assumed a right to hear all disputes, and the first step in civil jurisdiction was established. Later on, under the Empire, the summons was served by a public officer, and it was made in writing (*libellus conventionis*), containing a precise statement of the demands of the complainant.

Reference to Arbitration

FROM APPEARANCE TILL JUDGMENT.—Until A.D. 294 (with a few exceptions not requiring notice in this place) a true civil court did not exist in Rome. To those who read warm eulogies on the civil procedure of Republican Rome, this statement may appear a strange paradox. It admits, however, of a simple demonstration. Down to the third century A.D., the ordinary civil trial in Rome consisted in a reference to arbitration. What happened was exactly the same as if in an English suit, at the close of the pleadings, a case, instead of being tried by a judge and jury, or by a judge alone, was immediately referred to one or more arbitrators selected by the parties themselves, these arbitrators being laymen, and not lawyers.

Judex Arbiter

The arbitrator, if only one was chosen, was called *judex* or *arbiter*, the distinction between which is as old as the XII Tables. Originally, it would seem, the *judex* dealt with regular hostile suits (*lites*), the *arbiter* with amicable arrangements of disputes (*jurgia*); but, when the Praetor introduced new "arbitria" without reference to this distinction, the terms naturally became confused (by about the time of Cicero), *arbiter*, however, always suggesting wider equitable considerations. ("Arbiter dicitur judex," says Festus, "quod totius rei habeat arbitrium et facultatem"). The *judex* or *arbiter* was not a lawyer; he was not paid; he was compelled to act, if duly selected; and he was called in for a single case only. The parties might agree in their choice; if not, they must choose from a panel, consisting at first of senators, but varying in later times with political changes. The patrician institution of the *judices* was balanced by the *Centumviri*, who might be plebeians. These were most probably elected three from each of the thirty-five tribes, making in all 105. If so, the institution would date, in that form at least, not earlier than 241 B.C.; but some scholars carry it back to the early Republic, if not to the foundation of the City. At any rate, it was closely identified with the old institutions of Rome, and asserted a special care of the *jus Quiritium*, notably in the cases for inheritance. Both *judices* and *centumviri* were for Roman citizens. When aliens were admitted to the protection of the civil law, the *judex* or *centumviri* could not be compelled to act; but the spirit of the Roman institution was observed, and the cause

Centumviri

was referred to three or five persons (*recuperatores*) selected by the parties, either one or two by each party, with an umpire, from a panel drawn by lot by the magistrate. *Recuperatores*

When an action is referred to arbitration, two stages are to be noticed. There is first the reference or selection of the arbitrator, and the determination of the question to be referred to him; and secondly, the arbitration itself or the hearing. These two stages are distinguished in Roman Law by terms that have become classical in legal literature, *jus* and *judicium*. The selection of the arbitrator and the settlement of the question to be decided took place under the authority of the Praetor (*in jure*); the hearing (*in judicio*) was before the *judex*, *arbiter*, *centumviri*, or *recuperatores*. The procedure *in judicio* does not call for any remark in this connection; but the procedure *in jure* will repay some consideration. *Jus* *Judicium*

The mode of reference was at first ORAL, afterwards *in writing*. The written reference was called a *formula*; the oral reference had no distinctive name, but it followed the form of one or other of the so-called *Legis Actiones*—forms of procedure, if not prescribed by, at all events strictly based upon, a *Lex* (the XII Tables or some other early statute). The *legis actiones* could not be used by aliens (hence the introduction of *formulae* may possibly mark the admission of aliens to civil rights); and, like all the ancient formal proceedings of the Roman Law, they could not be employed by an agent or representative of the parties. Every step in the *legis actio* must be taken by the parties themselves. Oral Reference *Legis Actiones*

Sacramentum

Of these forms of process, *sacramentum* alone calls for notice. It was based on a mock combat, with a pretended voluntary reference to arbitration, and the wager of a sum that was to go to the State. The moveable in dispute, say a slave, was brought before the Praetor. The claimant held a rod (representing a spear, the symbol of Quiritarian ownership), and, grasping the slave, said: "This slave I say is mine *ex jure Quiritium*, in accordance with the fitting ground therefor, as I have stated; and so upon thee I have laid this wand," and at the same time laid the rod on the slave. The opposing party repeated the same words and the same acts. Then the Praetor said: "Both let go the slave"; they let him go. The first claimant then said; "I demand that you tell me on what ground you have claimed him"; and he answered: "I fully told my right as I laid on the wand." The first claimant retorted: "Since you have claimed him wrongfully, I challenge you to wager 500 *asses*" (the *as* was a small piece of copper, later a coin); and the opposing party: "In like manner I challenge thee." After this ceremony the Praetor adjudicated the *interim* possession to one of the parties; the other party then appeared as plaintiff before the *judex*, to whom the question was referred in this singular form—not which of the parties was the owner, but which of them was right in his wager. In this short drama, which for many years formed the regular prelude to a Roman action, we cannot fail to perceive the true origin of civil jurisdiction—the submission of disputants to the award of an arbitrator to prevent the effusion of blood.

Formulae

The system of *legis actiones* was superseded by the use of *formulae*. When the Praetors first determined to administer justice in cases where one of the parties was an alien, they dispensed with the ceremonies exclusively appertaining to the old customs of Rome. The Praetor allowed the parties to put in writing the issue to be decided by the arbitrators, and then, if the resulting *formula* met with his approval, he authorised the arbitrators to condemn or acquit the defendant according to his discretion. Moreover, in his edict, he announced beforehand what *formulae* would win his approval. The great superiority of this method recommended it in disputes between citizens, to whom the rigorous and narrow pedantry of the *legis actio* became odious. By the *lex Aebutia* (149–126 B.C., if not earlier), and the *leges Juliae* (? 17 B.C.), the *legis actio* was almost wholly superseded by the *formula*.

Formula in jus Concepta

A *formula* was a hypothetical command to a *judex*, to condemn the defendant to pay a sum of money to the plaintiff, if the latter established a right or proved an allegation of fact. Thus, in a *vindicatio* brought against a possessor of land by a plaintiff claiming to be owner, the *formula* would run as follows: "*Let Lucius Titius be* judex. *If it appears that the Cornelian farm belongs to A. A. by Quiritarian right, and that farm is not restored to A. A. in accordance with your decision, whatever turns out to be the value of the thing, that sum of money*, judex, *condemn N. N. to pay to A. A. If it does not so appear, acquit him.*" Such a *formula* was said to be *in jus concepta*, because it was framed upon an allegation of legal right. If

the allegation was one of fact, the *formula* was said to be *in factum concepta*. Thus, in the case of deposit, the *formula in factum* ran: "*Let Lucius Titius be* judex. *If it appears that A. A. deposited with N. N. a silver table, and that, by the fraud of N. N., it has not been given back to A. A., whatever turns out to be the value of the article, that sum of money*, judex, *condemn N. N. to pay A. A. If it does not so appear, acquit him.*"

Formula in Factum Concepta

Intentio

The clause which states the allegation of right or fact in hypothetical form was called the *intentio*. It was necessary in most *formulae*, though it might, whilst remaining hypothetical in substance, be in the form "*Whatever N. N. ought to pay.*" Such an *intentio* would not sufficiently define the issue to be tried, and so it had to be introduced by another clause called a *demonstratio*, which was equally hypothetical in substance, though not in form. Thus, in an action of sale brought by a vendor, the *formula* would run: "*Let Lucius Titius be* judex. *Whereas A. A. sold the slave Stichus to N. N., whatever N. N. ought to pay to A. A. on that account in accordance with the requirements of good faith*, judex, *condemn N. N. to pay to A. A. If it does not so appear, acquit him.*" Here the plaintiff would of course have to prove the contract of sale, if it was disputed, in addition to proving the breach and the amount of his claim. The order to condemn was called the *condemnatio*. In all the three examples given, no fixed sum is inserted in it. The *judex* is to assess the amount at his discretion. But the amount might be inserted in the *condemnatio* as follows: "*Let Lucius Titius be* judex. *If it appears*

Demonstratio

Condemnatio

that N. N. ought to pay 10,000 sestertii *to A. A.*, judex, *condemn N. N. to pay* 10,000 sestertii *to A. A. If it does not so appear, acquit him.*" When, as in actions for division of property, an authority was given to assign different parts to the various claimants, the place of the *condemnatio* was taken by the *adjudicatio*. Sometimes another part, called the *exceptio*, was introduced. In formal contracts or formal transactions generally, the Roman Law did not originally allow the defence of fraud; and although the plaintiff had induced the defendant to bind himself by the grossest fraud, that was not a question into which the *judex* could enter. But at length Aquilius Gallus introduced such a defence, and, accordingly, after his time, the *formula* might embrace a proviso, "*If in that matter nothing has been done, or is being done, by bad faith on the part of the plaintiff.*" Many similar provisions were allowed; as, in cases of violence, intimidation, etc. As the *exceptio* was based on equity, any countervailing facts could be brought forward in reply by the plaintiff. This answer to the *exceptio* was called *replicatio*.

Adjudicatio

Exceptio

Replicatio

It thus appears that, viewed as a system of pleading, the formulary system was rude and imperfect. It conveyed the slightest possible information to the defendant, and scarcely took more than the first step in eliminating what was admitted and eliciting the real issues between the parties. This—the true end of all pleading—was thus most inadequately accomplished during the golden era of Roman Jurisprudence.

Defects of *Formulae*

An interdict was a form of process created by the Praetor, and resting upon his authority as a

Interdicts

magistrate. Interdicts were employed mainly to protect rights in the nature of property introduced in his edict; the proceedings were modelled on the ordinary forms of *actio*. The main interest of the interdicts for the private lawyer rests in the fact that they were used to protect possession. In the time of Justinian no formal interdict was granted, and there was nothing to distinguish *interdictum* from *actio* as forms of civil process.

Changes in the later Empire

The distinction between *jus* and *judicium* disappeared some time before A.D. 294, when Diocletian enacted that all causes should be heard from beginning to end by one and the same judicial officer. The *formula* was no longer used, and its place was occupied by a preliminary discussion to elicit the points in dispute. Hence came the characteristic of the later Roman procedure, that the process which we may not inaptly call pleading took place before the court itself. Causes were now heard by trained lawyers, instead of private arbitrators, and at last, it may be said, the Romans obtained a true civil court.

Execution against the Person

EXECUTION OF JUDGMENTS.—The natural way of compelling payment of a judgment debt, as it would seem to us, is to take a portion of the debtor's property, if he has any, and sell it to satisfy the judgment creditor. If the debtor has no goods, then we may think of his person and imprison him. This mode of thought shows how far we have advanced from the ideas of the men who built up the fabric of civil jurisdiction. That which we think of as first was last, and what we regard as last was first. Execution

directly against the property of a judgment debtor was not introduced in Rome until the last century of the Republic. The ancient mode of compelling the payment of debts is described to us by Aulus Gellius. The XII Tables provided that a debtor was to have thirty days after the judgment debt was proved in order to pay. After that the creditor might arrest him and take him before the Praetor; if the debtor did not find a substitute (*vindex*) to answer for the debt, he was removed by the creditor and put in chains. On three successive market days the creditor was required to bring the debtor before the Praetor and proclaim the amount of his debt. If at the end of sixty days the debt was not paid, the debtor was reduced to slavery. In these proceedings, it is worthy of remark, the initiative is taken, not by the State, but by the creditor. The law interfered only to take precautions in the interest of the debtor, so that no man might unlawfully seize another on the pretext of a debt. These proceedings were essentially a private act of force legalised and subjected to legal restraints. Just as the summons, in its first shape, was purely a private act, in which the law simply made the exercise of force lawful, so in the execution of judgments, the law went no further than a refusal to shield a debtor from his creditor.

Law of XII Tables

Manus Injectio

The next method of execution adopted was to make the judgment debtor bankrupt, and divide his entire property amongst his creditors (*bonorum venditio*). This again was a rather clumsy way of putting pressure on a judgment debtor, unless he was actually insolvent. And as in the later Empire officers of the

Execution against Property

State took so much of his property as would satisfy the judgment debt.

Appeals during Republic

APPEALS.—During the Republic, no appeal, properly so called, in a civil cause, existed. But a partial substitute for appeals was found in the right enjoyed by each of the higher magistrates of putting a veto on the acts of any other magistrate. Such a veto was called *intercessio*. The effect of the veto was purely negative; it stopped for the time the act forbidden, but it could substitute nothing in its place. The

Appeals under Empire

concentration of all magisterial power in the hands of the Emperor soon led to the subordination of the tribunals, and the establishment of a final court of appeal. The Emperor was the highest judge, and sometimes heard causes himself; but they were more usually determined by delegates appointed by him.