Section 6. CLASSICAL MARRIAGE AND FAMILY PROPERTY

A. PRIMARY SOURCES

1. Gaius, *Institutes* 1.108–115b

(see above, pp. 138–139)

2. Justinian, *Institutes* 1.10

(see above, pp. 188–189)

3. *Digest* 23.2

(see above, pp. 18–29)

4. *Code* 5.4

(see above, pp. 29–34)

5. The *Laudatio Turiae*

in Erik Wistrand, *The So-Called Laudatio Turiae*, Studia Graeca et Latina Gothoburgensia, 34 ([Goteborg]: Acta Universitatis Gothoburgensis, 1976) pp. 19–31 (odd nos.)[†]

NOTE: This is the fragmentary text of an inscription erected by an upper-class Roman to his wife some time in the last years B.C. The identification of the man as Q. Lucretius Vespillo, consul in 19 B.C., whose wife *was* named Turia, gives the inscription its name, but the identification is far from certain. The wars referred to in the early part of the inscription are almost certainly those between Caesar and Pompey, 49–46 B.C.

(Heading)

……OF MY WIFE

Left-hand Column

(Line 1) … through the honesty of your character … .

(2) … you remained …

(3) You became an orphan suddenly before the day of our wedding, when both your parents were murdered together in the solitude of the countryside. It was mainly due to your efforts that the death of your parents was not left unavenged. For I had left for Macedonia, and your sister's husband Cluvius had gone to the Province of Africa.

(7) So strenuously did you perform your filial duty by your insistent demands and your pursuit of justice that we could not have done more if we had been present. But these merits you have in common with that most virtuous lady your sister.

(10) While you were engaged in these things, having secured the punishment of the guilty, you immediately left your own house in order to guard your modesty and you came to my mother's house, where you awaited my return.

(13) Then pressure was brought to bear on you and your sister to accept the view that your father's will, by which you and I were heirs, had been invalidated by his having contracted a *coemptio* with his wife. If that was the case, then you together with all your father's property would necessarily come under the guardianship of those who pursued the matter; your sister would be left without any share at all of that

[†]

inheritance, since she had been transferred to the *potestas* of Cluvius. How you reacted to this, with what presence of mind you offered resistance, I know full well, although I was absent.

(18) You defended our common cause by asserting the truth, namely, that the will had not in fact been broken, so that we should both keep the property, instead of your getting all of it alone. It was your firm decision that you would defend your father's written word; you would do this anyhow, you declared, by sharing your inheritance with your sister, if you were unable to uphold the validity of the will. And you maintained that you would not come under the state of legal guardianship, since there was no such right against you in law, for there was no proof that your family belonged to any *gens* that could by law compel you to do this. For even assuming that your father's will had become void, those who prosecuted had no such right, since they did not belong to the same *gens.*

(25) They gave way before your firm resolution and did not pursue the matter any further. Thus you on your own brought to a successful conclusion the defence you took up of your duty to your father, your devotion to your sister, and your faithfulness towards me.

(27) Marriages as long as ours are rare, marriages that are ended by death and not broken by divorce . For we were fortunate to see our marriage last without disharmony for fully forty years. I wish that our long union had come to its final end through something that had befallen me instead of you; it would have been more just if I as the older partner had had to yield to fate through such an event.

(30) Why should I mention your domestic virtues: your loyalty, obedience, affability, reasonableness, industry in working wool, religion without superstition, sobriety of attire, modesty of appearance? Why dwell on your love for your relatives, your devotion to your family? You have shown the same attention to my mother as you did to your own parents, and have taken care to secure an equally peaceful life for her as you did for your own people, and you have innumerable other merits in common with all married women who care for their good name. It is your very own virtues that I am asserting, and very few women have encountered comparable circumstances to make them endure such sufferings and perform such deeds. Providentially Fate has made such hard tests rare for women.

(37) We have preserved all the property you inherited from your parents under common custody, for you were not concerned to make your own what you had given to me without any restriction. We divided our duties in such a way that I had the guardianship of your property and you had the care of mine. Concerning this side of our relationship I pass over much, in case I should take a share myself in what is properly yours. May it be enough for me to have said this much to indicate how you felt and thought.

(42) Your generosity you have manifested to many friends and particularly to your beloved relatives. On this point someone might mention with praise other women, but the only equal you have had has been your sister. For you brought up your female relations who deserved such kindness in your own houses with us. You also prepared marriage-portions for them so that they could obtain marriages worthy of your family. The dowries you had decided upon Cluvius and I by common accord took upon ourselves to pay, and since we approved of your generosity we did not wish that you should let your own patrimony suffer diminution but substituted our own money and gave our own estates as dowries. I have mentioned this not from a wish to commend ourselves but to make clear that is was a point of honour for us to execute with our means what you had conceived in a spirit of generous family affection.

(52) A number of other benefits of yours I have preferred not to mention. **…**

(Several lines missing)

Right-hand column

(2a) You provided abundantly for my needs during my flight and gave me the means for a dignified manner of living, when you took all the gold and jewellery from your own body and sent it to me and over and over again enriched me in my absence with servants, money and provisions, showing great ingenuity in deceiving the guards posted by our adversaries.

(6a) You begged for my life when I was abroad (alternatively; you resorted to supplications which were the expression of your devotion)—it was your courage that urged you to this step—and because of

your entreaties I was shielded by the clemency of those against whom you marshalled your words. But whatever you said was always said with undaunted courage.

(9a) Meanwhile when a troop of men collected by Milo, whose house I had acquired through purchase when he was in exile, tried to profit by the opportunities provided by the civil war and break into our house to plunder, you beat them back successfully and were able to defend our home.

(About 12 lines missing)

(0) **…** exist **…** that I was brought back to my country by him (Caesar Augustus), for if you had not, by taking care for my safety, provided what he could save, he would have promised his support in vain. Thus I owe my life no less to your devotion than to Caesar.

(4) Why should I now hold up to view our intimate and secret plans and private conversations: how I was saved by your good advice when I was roused by startling reports to meet sudden and imminent dangers; how you did not allow me imprudently to tempt providence by an overbold step but prepared a safe hiding-place for me, when I had given up my ambitious designs, choosing as partners in your plans to save me your sister and her husband Cluvius, all of you taking the same risk? There would be no end, if I tried to go into all this. It is enough for me and for you that I was hidden and my life was saved.

(11) But I must say that the bitterest thing that happened to me in my life befell me through what happened to you. When thanks to the kindness and judgement of the absent Caesar Augustus I had been restored to my country as a citizen, Marcus Lepidus, his colleague, who was present, was confronted with your request concerning my recall, and you lay prostrate at his feet, and you were not only not raised up but were dragged away and carried off brutally like a slave. But although your body was full of bruises, your spirit was unbroken and you kept reminding him of Caesar's edict with its expression of pleasure at my reinstatement, and although you had to listen to insulting words and suffer cruel wounds, you pronounced the words of the edict in a loud voice, so that it should be known who was the cause of my deadly perils. This matter was soon to prove harmful for him.

(19) What could have been more effective than the virtue you displayed? You managed to give Caesar an opportunity to display his clemency and not only to preserve my life but also to brand Lepidus' insolent cruelty by your admirable endurance.

(22) But why go on? Let me cut my speech short. My words should and can be brief, lest by dwelling on your great deeds I treat them unworthily. In gratitude for your great services towards me let me display before the eyes of all men my public acknowledgement that you saved my life.

(25) When peace had been restored throughout the world and the lawful political order reestablished, we began to enjoy quiet and happy times. It is true that we did wish to have children, who had for a long time been denied to us by an envious fate. If it had pleased Fortune to continue to be favourable to us as she was wont to be, what would have been lacking for either of us? But Fortune took a different course, and our hopes were sinking. The courses you considered and the steps you attempted to take because of this would perhaps be remarkable and praiseworthy in some other women, but in you they are nothing to wonder at when compared to your other great qualities and I will not go into them.

(31) When you despaired of your ability to bear children and grieved over my childlessness, you became anxious lest by retaining you in marriage I might lose all hope of having children and be distressed for that reason. So you proposed a divorce outright and offered to yield our house free to another woman's fertility. Your intention was in fact that you yourself, relying on our well-known conformity of sentiment, would search out and provide for me a wife who was worthy and suitable for me, and you declared that you would regard future children as joint and as though your own, and that you would not effect a separation of our property which had hitherto been held in common, but that it would still be under my control and, if I wished so, under your administration: nothing would be kept apart by you, nothing separate, and you would thereafter take upon yourself the duties and the loyalty of a sister and a mother-in-law.

(40) I must admit that I flared up so that I almost lost control of myself; so horrified was I by what you tried to do that I found it difficult to retrieve my composure. To think that separation should be

considered between us before fate had so ordained, to think that you had been able to conceive in your mind the idea that you might cease to be my wife while I was still alive, although you had been utterly faithful to me when I was exiled and practically dead!

(44) What desire, what need to have children could I have had that was so great that I should have broken faith for that reason and changed certainty for uncertainty? But no more about this! You remained with me as my wife. For I could not have given in to you without disgrace for me and unhappiness for both of us.

(48) But on your part, what could have been more worthy of commemoration and praise than your efforts in devotion to my interests: when I could not have children from yourself, you wanted me to have them through your good offices and, since you despaired of bearing children, to provide me with offspring by my marriage to another woman.

(51) Would that the life-span of each of us had allowed our marriage to continue until I, as the older partner, had been borne to the grave—that would have been juster—and you had performed for me the last rites, and that I had died leaving you still alive and that I had had you as a daughter to myself in place of my childlessness.

(54) Fate decreed that you should precede me. You bequeathed me sorrow through my longing for you and left me a miserable man without children to comfort me. I on my part will, however, bend my way of thinking and feeling to your judgements and be guided by your admonitions.

(56) But all your opinions and instructions should give precedence to the praise you have won so that this praise will be consolation for me and I will not feel too much the loss of what I have consecrated to immortality to be remembered for ever.

(58) What you have achieved in your life will not be lost to me. The thought of your fame gives me strength of mind and from your actions I draw instruction so that I shall be able to resist Fortune. Fortune did not rob me of everything since it permitted your memory to be glorified by praise. But along with you I have lost the tranquillity of my existence. When I recall how you used to foresee and ward off the dangers that threatened me, I break down under my calamity and cannot hold steadfastly by my promise.

(63) Natural sorrow wrests away my power of self-control and I am overwhelmed by sorrow. I am tormented by two emotions: grief and fear—and I do not stand firm against either. When I go back in thought to my previous misfortunes and when I envisage what the future may have in store for me, fixing my eyes on your glory does not give my strength to bear my sorrow with patience. Rather I seem to be destined to longing and mourning.

(67) The conclusion of my speech will be that you deserved everything but that it did not fall to my lot to give you everything as I ought. Your last wishes I have regarded as law; whatever it will be in my power to do in addition, I shall do.

(69) I pray that your Di Manes will grant you rest and protection.

6. Formation of Marriage[1]

[Omitted in this year's Materials. The basics are given in the Crook extract that follows:\

[12] *Comparison of the Mosaic and Roman laws*, also known from its manuscript title as *Lex Dei*, a fourth century work, probably by a Jewish Roman.

7. The *Lex Julia de adulteris coercendis*

Mosaicarum et romanorum legum collatio, ed. G. Baviera
in *Fontes iurs romani anteiustiniani* 2d ed. vol. 1 (Florence, 1968), pp. 552–57 [CD trans.][12]

Title 4. Concerning adulteries

I. MOSES said:

1 "Whoever commits adultery [*moechatus fuerit*, not the classical word for "adultery" but one derived from the Greek word for adultery] with the wife of his neighbor, let both he who has committed adultery and she who has committed adultery die the death. **2** But if someone [case problem here] seduces a virgin who is not espoused and commits fornication with her [*stupravit eam*], let him endow her to himself as wife. **3** If her father refuses and does not want to give her to him as wife, let him give money to the father, as much as is the dowry of a virgin." [This is a paraphrase of Deuteronomy 22:22 and 22:28.]

II. PAUL in the monograph under the title "Concerning adulterers":

1 In order to do a brief explanation of the Julian statute concerning punishing adulterers I have preferred to go through the very chapters, preserving the order of the statute. **2** And, indeed, the first chapter of the statute abrogates many previous statutes. **3** In the second chapter the father is permitted, if he catches in adultery in his house or in that of his son-in-law his daughter whom he has in his power or whom by his authority while she in his power he gave in *manus* to her husband or if he joins the father-in-law with him in the matter,[13] that the father kill the adulterer without liability (*sine fraude*) in such a way that he immediately kills his daughter. **4** Marcellus in book 21 *Of Digests* writes that where the father killed the adulterer and immediately the daughter caught in adultery who was *sui iuris*, this was done licitly according to law (*iure*).[14] **5** In the same book Marcellus proves that by authority also of the statute a father can kill a man of consular rank or his patron whom he catches in adultery with his daughter. **6** But if he does not kill the daughter but only the adulterer, he is guilty of homicide. **7** And if he kills the daughter after the passage of time, it is the same thing [i.e., he is guilty of homicide of the adulterer?],

[12] *Comparison of the Mosaic and Roman laws*, also known from its manuscript title as *Lex Dei*, a fourth century work, probably by a Jewish Roman.

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[13] An obscure phrase. It may mean that even if the daughter is not in his power or had been given to her husband *in manum* while she was in his power, he may do the killing if joins with him the father-in-law of the daughter, i.e., the son-in-law's father.

[14] It is perhaps significant that Marcellus says here that this was done *iure*, whereas in the next passage he says that it was done "by authority of the statute (*legis*)."

unless he killed her after pursuing her; for by authority of the statute he seems to have made continuation of his intent [*continuationem animi*].

III. PAUL in the same monograph under the same title:

1 Certain persons are enumerated whom the husband man kill when he catches them in adultery with his wife, although he may not [kill] his wife. **2** Hence according to the statutes[15] a husband, even if he is a son in power, is permitted to kill an adulterer who is caught in his house if he is a slave, or one who is called by contract to the sword [i.e., a gladiator], or one who hires himself out to fight with beasts. **3** It is also permitted kill if caught in adultery one who has been condemned in a public [criminal] trial, or one's freedman or one's paternal freedman, whether he a be a Roman citizen or a Latin. **4** It is also permitted to kill the freedman of one's father and mother or son and daughter,[16] and a *dediticius* falls in this category as well. **5** He must, however, notify the person who has jurisdiction in the place where he did the killing and dismiss his wife. If he does not do this, he does not kill with impunity (*inpune*). **6** It should be known that the divine Marcus and Commodus wrote in rescript that he who unlawfully killed an adulterer should be punished with a lighter penalty. And the great Antoninius [Pius] spared those who killed adulterers with thoughtless wrath (*inconsulto calore*). Etc.

IV. PAUL in the same monograph under the same title:

1 Whoever accuses [in a criminal proceeding] in the right of the husband or the father can be defeated without the penalty for calumny; if [someone] accuses by the right of a third party, he can be punished with the penalty for calumny. **2** If someone comes to law [*expertus*] after two months and within four months of law-days, although he is such a person who otherwise cannot accuse, such as a freedman or under twenty-five years of age or *infamis*, he is admitted to the accusation, as Papinian also writes in the 15th book.

V. PAPINIAN in fifteenth book of responses under the title "On the Julian statute on adulterers":

1 A Roman citizen who has a female Roman citizen in matrimony without *conubium*[17] or a peregrine cannot prosecute her for adultery in the right of a husband, but it cannot be opposed against him that he is *infamis* or that he is a freedman not having a property worth 30,000 sesterces or a son, since he is pursuing a wrong that belongs to him (*propriam iniuriam*).

VI. PAUL in the monograph and title as above:

1 Adultery is vindicated by the right of the husband against a wife, not against a fiancée. Severus and also Antoninus so wrote in rescripts.

VII. PAPINIAN in the monograph on adulterers:

1 It was asked whether a father could accuse an emancipated daughter in the right of a father. I replied: the statute grants the privilege of killing the daughter whom he had in power or whom by his authority made a *conventio in manum*, but to accuse in the right of the father an emancipated daughter is prohibited.

VIII. PAPINIAN in the same monograph [and title]:

1 Since the royal statute [the imaginary Romulan statute on paternal power] gave the power of life and death over the son, I wish that you would write back to me what boon [*bonum*, literally "good thing"] was encompassed in that statute, whether there is the power also of killing a daughter, for I desire to know. He [i.e., Papinian] replied: Does not this addition [to the *lex Julia*] provide us with an argument *ex contrario*, when it does not seem that the statute gave [a power] to someone who didn't have it, but it ordered her to be killed along with the adulterer, so that it might seem that lead by greater equity he killed the adulterer, when he did not spare his daughter?

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[15] The plural is odd here.

[16] The editors suspect that this is a later gloss on "paternal" in the preceding section.

[17] This could happen in certain cross-class marriages, e.g., a senator with an actress.

IX. THE SAME.

1 If a father kills the adulterer and spares his daughter, I ask what is laid down [in the statute] against him. He replied: without doubt this father is a homicide; therefore he is held under the *lex Cornelia* on assassins [a statute that was expanded to include most types of murder]. Clearly if the daughter is saved not by the will of the father but by accident, the father has the complete defense that the daughter fled by chance. For the statute punishes homicide if it was done with evil intent [*dolo malo*]. Here, however, the father did not save the daughter because he wanted to, but because he could not kill her.

X. THE SAME.

1 If a husband kills his daughter caught in adultery, I ask if it falls under the statute about assassins. He replied: in no part of the statute is it granted to the husband to kill the wife; wherefore there is not doubt that he clearly acted contrary to the statute. But if you are concerned with the penalty, not wrongly is something granted to his most righteous anger, so that he is not punished as a homicide by execution (*capite*) or deportation, but his penalty is established up to exile.

XI. THE SAME.

1 It is clear that if the accuser is the husband or the father, the slaves of either party can be tortured [literally, "questioned"]; I ask if the same is permitted to a third-party accuser. He replied: it can be seen that the reason for permitting these persons to have the slaves tortured was that they might more diligently prosecute the grief of their spirits and the wrong done to their injured ancestral house. But because it is believed that such a crime cannot easily be committed without the ministry of slaves, the reason [of the statute] goes so far that even in the situation of a third-party accuser the slaves can be made to undergo questioning under torture by the judges.

XII. PAUL in the second book of opinions under the title "Concerning adulterers."[18]

1 <In the second chapter of the Lex Julia concerning adultery,> either an adoptive or a natural father is permitted to kill with his own hand an adulterer caught in the act with his daughter in his own house or in that of his son-in-law, no matter what his rank may be. **2**. If a son under paternal control, who is the father, should surprise his daughter in the act of adultery, while it is inferred from the terms of the law that he cannot kill her, still, he ought to be permitted to do so. **3.**[19] A husband cannot kill any one taken in adultery except persons who are infamous, and those who sell their bodies for gain, as well as slaves, and the freedmen of his wife, and those of his parents and children; his wife, however, is excepted, and he is forbidden to kill her. **4.** It has been decided that a husband who kills his wife when caught with an adulterer, should be punished more leniently, for the reason that he committed the act through impatience caused by just suffering. **5.** After having killed the adulterer, the husband should at once dismiss his wife, and publicly declare within the next three days with what adulterer, and in what place he found his wife. **6.** A husband[20] who surprises his wife in adultery can only kill the adulterer, when he finds him in his own house. **7.** It has been decided that a husband who does not at once dismiss his wife whom he has taken in adultery, can be prosecuted for bawdry (*lenocinium*). **8.** Slaves, moreover, both of the husband and of the wife can be tortured, nor can liberty be given to them under the guise of making them immune [from torture].[21]

Title 5. Concerning those who commit *stuprum*

I. MOSES says:

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[18] This is the *Opinions of Paul*, book 2, title 21 (PS 2.21). I have adapted, with some alterations, the translation of S. P. Scott's, *The Civil Law*, 1.281–282, placing in diamond brackets those phrases that the *Collatio* omits and noting major differences in the footnotes. Unlike Scott, I have used the text in FIRA for both the PS and the *Collatio*. CD.

[19] This is PS 2.21.4. The Collatio omits 2.21.3: "Again, it is provided in the fifth chapter of the Lex Julia that it is permitted to detain witnesses for twenty hours, in order to convict an adulterer taken in the act." Subsequent numbers in the *Collatio* are one less than those in PS. CD.

[20] Scott translates 'an angry husband' without, so far as I can tell, any warrant in the PS text. CD.

[21] SPS omits. Restored and translated from FIRA. CD.]

1. Who stays with a man in female night-quarters, is someone to be despised. Both shall die. They are guilty.[22]

II. PAUL in the second book of opinions under the title "Concerning adulterers."[23]

1. Anyone who debauches (*stupraverit*) a male who is free, against his will, shall be punished capitally. **2.** Whoever of his own will suffers *stuprum* or an impure disgraceful act (*flagitum impurum*) shall be fined half of his goods and shall not be allowed to make a testament of more than a half.[24]

Title 6. Concerning incestuous marriages

I. MOSES says:

1. Whoever lies with a woman, the wife of his father, uncovers his father's genitals. They both shall die. They are guilty.[25] **2.** Whoever lies with his daughter-in-law, they both shall die. They are guilty.[26]

. . .

III. PAUL in the second book of opinions under the title "Concerning marriages."[27]

1. By the civil law marriages cannot be contracted between parents and children [i.e., descendants], nor can we take as wife the daughter or granddaughter of our sister; reason of age prohibits the great-granddaughter. **2**. Adoptive relationship impedes marriage between parents and children in all circumstances, between siblings (*fratres*) only so long as *capitis deminutio* does not intervene. **3**. It is not at any time permitted to take as wife a mother-in-law, nor a daughter-in-law, nor a step-daughter, nor a step-mother without incurring the penalty for incest, as also not a father's sister or a mother's sister. But whoever takes his relative [to wife] against the interdict, the error of law having been forgiven for the woman, he shall suffer the penalty of adultery by the lex Julia, but not the woman whom he took.

[22] "Qui manserit cum masculo mansione muliebri, aspernamentum est; ambo moriantur, rei sunt." The reference is clearly to Lev. 20:13 (Vulgate):"Qui dormierit cum masculo coitu femineo, uterque operatus est nefas : morte moriantur : sit sanguis eorum super eos." The wording is, however, certainly not that of the Vulgate or of any other Latin translation of the Bible known to me. It is probably euphemistic. CD.

[23] Omitting PS 2.26.10 ("It should be noted that two adulterers can be accused at the same time with the wife, but more than that number cannot be.") and PS 2.26.11 ("It has been decided that adultery cannot be committed with women who have charge of any business or shop."), the *Collatio* continues in the new title with PS 2.26.12 and 2.26.13.

[24] SPS omits; restored and translated from FIRA. *Collatio* omits PS 2.26.14–17, which follow: "14. It has been held that women convicted of adultery shall be punished with the loss of half of their dowry and the third of their estates, and by relegation to an island. The adulterer, however, shall be deprived of half his property, and shall also be punished by relegation to an island; provided the parties are exiled to different islands. 15. It has been decided that the penalty for incest, which in case of a man is deportation to an island, shall not be inflicted upon the woman; that is to say when she has not been convicted under the Lex Julia concerning adultery. 16. Fornication (*stuprum*) committed with female slaves, unless they are deteriorated in value or an attempt is made against their mistress through them, is not considered an injury (*citra noxiam habetur*). 17. If a delay is demanded in a case of adultery it cannot be obtained."

[25] "Quicumque concuberit cum muliere uxore patris sui, pudenda patris sui detexit, mortem moriantur ambo; rei sunt." Leviticus 20:11 (Vulgate): "Qui dormierit cum noverca sua [step-mother], et revelaverit ignominiam patris sui, morte moriantur ambo: sanguis eorum sit super eos."

[26] "Et quicumque concuberit cum nuru sua, mortem moriantur ambo; rei sunt." Leviticus 20:12 (Vulgate): "Si quis dormierit cum nuru sua, uterque moriatur, quia scelus operati sunt: sanguis eorum sit super eos."

[27] = PS 2.19.3–5. SPS omits; restored and translated from FIRA.

8. The *Lex Falcidia*

a. D.35.2, 3[1]

(Watson trans.)

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THE *LEX FALCIDIA*

[1] There is also a title in the Codex (C.6.50) devoted to this topic.

1. PAUL, *Lex Falcidia, sole book:* There was promulgated the *lex Falcidia* which, in its first chapter, granted free power of disposition by bequest up to "three quarters" of one's substance. The wording of that chapter is this: "Any Roman citizen who, after the promulgation of this statute, wishes to make a will, giving his money and possessions to whom he choose, shall have the right and power so to do, so far as this ensuing enactment permits." The second chapter imposes a limitation on legacies in the following terms: "Any Roman citizen who, after the promulgation of this statute, makes his will shall have the right and power, under the general law, to give and bequeath money to any Roman citizen so long as the legacy [or legacies] be such that the heirs take not less than a quarter of the estate under the will; those to whom anything be so given or bequeathed may lawfully take the money, and the heir charged to give that money will have to give the sum with which he is charged." 1. The *lex Falcidia* is held applicable also to those who die in enemy hands by reason of the *lex Cornelia;* for this latter enactment confirms their testamentary dispositions as if they had died citizens. By virtue of this fiction, the *lex Falcidia* and all other testamentary enactments which may be relevant are applicable. 2. The *lex Falcidia* has no application to those who possess an inheritance in the absence of a will; but the import of the statute is introduced through the praetor's edict. 3. The same holds good whether a condition of an oath has been waived. 4. Even if a testator, having granted his slave his freedom, leave him a legacy, since that bequest is deferred until such time as he is free, as also if the bequest be to a prisoner of war or to a person yet unborn, this statute is operative. 5. So also with legacies to townships or even to the gods. 6. The statute governs legacies not only of the testator's own property but also of that of third parties. 7. Everything emanating from the deceased's estate is regulated by this enactment, be it corporeally specific or nonspecific, dependent upon weight, enumeration, or measurement or even a right (say, usufruct) or consisting in debts. 8. Again, suppose a legacy: "Let my heir provision Seius; if he does not do so, let him give him ten"; there are those who think that there is simply a legacy of ten, that the provisions are taken in contemplation of death, and thus that the heir cannot impute them to the statute. My teaching, however, has been that if the heir furnishes the provisions forthwith, they are to be regarded as bequeathed and so subject to the *lex Falcidia;* my saying "forthwith" must be taken to imply a certain time lapse. But if the heir, after culpable delay, make over the provisions, [Seius] does not accept them as a legacy and the *lex Falcidia* will not apply; for, in such a case, the legacy has been transformed, and the ten are due. So also if the legacy were from the outset: "If he does not provision him, let him give ten"; for such provisions do not constitute a legacy, and if the provisions are given, they are taken by reason of the death, the condition of the legacy having failed. 9. Suppose a legacy of a usufruct (which can even be divided; other servitudes are indivisible); the older jurists were of the view that the usufruct as a whole should be valued and the amount of the legacy thus determined. Aristo, however, diverged from the earlier opinion; he maintained that a quarter could be retained out of it as from corporeal things; and Julian correctly endorses this. But with a legacy of the services of a slave, neither use nor usufruct being comprised in such a legacy, the older view is essential for us to quantify the legacy; fora part can be removed from anything which is made up but one cannot envisage a part of a day's service. Indeed, even if the question arise over a usufruct how much the fructuary takes and how much is the valuation of the other legacies-and even of the usufruct itself so that the legacy does not exceed three quarters, one must necessarily have recourse to the opinion of the older jurists. 10. When a man bequeaths to his creditor what he owes him, either the legacy is pointless, if the creditor derives no benefit from it, or it may be beneficial (say, through the advantage of representation); in which case, that advantage will attract the *lex Falcidia.* 11. Should a legatee acquire possession and the thing cannot be taken away from him, he having acquired possession with the agreement of the heir who was in error, the heir will be given an action to recover the excess over three quarters. 12. Sometimes, it will perforce be necessary to make delivery in full to the legatee but with a stipulation that he will repay the excess which he takes beyond the *lex Falcidia;* let us take the case that legacies away from a *pupillus* do not exceed the Falcidian limit, but there is apprehension that should he die before puberty, there may be found other legacies which, when contribution is made, exceed three quarters. The same is to be said if, in the principal will, conditional legacies are made and it is uncertain whether they will be due. Accordingly, should the heir be willing to pay, without recourse to litigation, he should safeguard himself by this stipulation. 13. What comes to a co-heir through his substitution to his co-heir benefits the legatees; his case is akin to that of the

heir instituted partly without qualification, partly with a conditionally appointed heir. Legacies bequeathed away from him, however, will not be increased, should he not take the inheritance, assuming that they are left away from him by name and not from "whoever shall be my heir." 14. Should the share of my coheir be exhausted while mine remains intact and I claim mine, Cassius thinks that the shares are merged; but not so Proculus; in this case, Julian adheres to Proculus, and I too think his the more plausible view. But the deified Antoninus is reported to have ruled that the two shares are to be merged for the Falcidian computation. 15. Were I to adrogate my co-heir after the acceptance of the inheritance, there is no doubt that our shares are to be treated separately, just as would happen if I became heir to my coheir. 16. Put the case of a legacy over several years to Titius; the legacies being both several and conditional, there will be scope for the edictal undertaking, "to restore the excess received." 17. What is due by reason of the nature of the inheritance and yet cannot, as such, be claimed is not recoverable if it has been made over, and so there are those who think that it is not to be counted in the inheritance. Julian, though, holds that such items do or do not increase the inheritance, according to the event, and so they are taken by right of inheritance and come into the restoration of the inheritance. 18. When a debtor becomes his creditor's heir, although the confusion of the claims releases him [as debtor], he still is held to take a more lucrative inheritance so that, despite the merging consequent upon his acceptance of the inheritance, the debt is to be taken into account. 19. The question has been posed whether the costs of erecting a monument can be deducted [for Falcidian purposes]. Sabinus holds them deductible if the erection had to be made. When consulted on the issue whether the costs of the funeral and of the monument, as directed by the testator, might be attributed to the debts [of the estate], Marcellus expressed the view that no more could be deducted than the funeral expenses; the case of the expenditure on the erection of the monument was different; for its erection was not essential for there to be a funeral and burial; it followed that a person to whom money was bequeathed to erect a monument would fall under the *Falcidia.*

2 MARCELLUS, *Digest, book 22:* No more is to be allowed than is adrogate for a modest form of memorial.

3 PAUL, *Lex Falcidia, sole book:* An instituted heir sells the estate which was insolvent; can it be credited that an insolvent estate would find a purchaser? Right thinking directs that nothing is due to the legatees; for the instituted heir is to be held to have what he has through the purchaser's stupidity rather than from the substance of the deceased. Conversely, if the heir made an injudicious sale of hereditary assets, that would not detrimentally affect the legatees. In short, the heir derives the benefit of his prudent administration. 1. Again, if an insolvent bestowed legacies and his heir made a composition with his creditors to make less than payment in full, in consequence of which he salvaged something [from the estate], none of this would be due to legatees for the heir would have that money by reason of the composition, not by virtue of the inheritance. 2. Further, when Falcidian issues are raised in respect of a legacy from year to year to a community, Marcellus opines that the capital of the legacy is to be held to be the amount sufficient for the collection of interest amounting to one third of the sum bequeathed.

4 PAPINIAN, *Questions, book 16:* Land was bequeathed tome subject to a condition, and while the condition was pending, the heir instituted me as his heir; subsequently, the condition was realized. For Falcidian accounting, the land is attributed to my legacy, not to the right of inheritance.

5 PAPINIAN, *Replies, book 8:* There is not necessarily left to a city, by words of legacy or of *fideicommissum,* what has to be performed by reason of a solemn promise. Hence, if the testator has exceeded in his will the amount due, the surplus alone will be diminished under the *Falcidia;* it cannot, therefore, be a charge on the honor of the legatee. But if a time clause or a condition will activate the legacy, the whole is claimable which has been given, not an assessment of its utility. Even if the day arrives or the condition is satisfied while the testator still lives, what has once become effective will not be nullified.

6 VENULEIUS, *Stipulations, book 13:* A husband who becomes his wife's heir and incurs expenses on her obsequies will not be seen to incur the whole outlay as heir; there will be a deduction of what he should contribute in respect of the dowry by which he profited.

7 PAPINIAN, *Questions, book 7:* Should the *lex Falcidia* come in the way, a servitude bequeathed, being indivisible, will be due in full, only if an assessment of the appropriate portion be tendered [by the beneficiary].

8 PAPINIAN, *Questions, book 14:* For Falcidian purposes, a debt left in the inheritance which one of the heirs is specifically charged to pay will be counted only in respect of that heir.

9 PAPINIAN, *Questions, book 19:* In respect of the *Falcidia,* the rule has commended itself that where crops are gathered subsequently which were mature at the deceased's death, they increase the valuation of the inheritance so far as concerns the land which appears to have been thereby the more valuable at the time of the death. 1. Where a slave-woman is *enceinte,* no distinctions of time are taken and rightly; issue yet unborn cannot be rightly said to be a slave.

10 PAPINIAN, *Questions, book 20:* What may come from other sources to the heir in excess of three quarters does not work to the heir's disadvantage where more than three quarters of the estate has been left in legacies; an example would be the inheritance of a *pupillus* who was substituted to a disinherited person who was the heir of the father of the *pupillus.*

11 PAPINIAN, *Questions, book 29:* For computations under the *lex Falcidia,* retentions of any period are attributed to the heir's quarter. 1. A slave, conditionally granted his liberty in the will, died; if, indeed, the condition were by then satisfied, the slave will not be held to have died to the heir's loss; should the condition have failed, however, reason points to the opposite conclusion, but he will be regarded as having died a *statuliber.* 2. The Emperor Marcus Aurelius ruled that heirs deprived of part of the estate will be chargeable for legacies only in respect of what they retain. 3. Someone was relegated with the loss of half his property; he appealed and, having made a will, died; after his death, his appeal was dismissed. The question was whether half had been removed as a debt so that only the residue constituted his estate or did it appear right to give relief to his heir. The latter course commends itself; for the aspirations of a litigant seeking a favorable decision authorize this view. 4. A slave manumitted by will who dies before the acceptance of the inheritance is certainly regarded as dying to the heir's loss. Should there not be, however, an assessment of his value as if he lived? For it has been held that those also who, at the master's death, are in such bad health that they surely cannot survive, subsequently die to the diminution of the inheritance. The case is no different from that of those who are under the same roof when a master is murdered by his household. 5. Let us examine the widespread dictum that where a father has made one will for himself and his son, a single Falcidian computation is to be made. For even though the substitute, if the son had become heir, owes what comes to him from the *pupillus* like any other debt, still, in respect of the second will [the substitute's own institution], there is scope for contribution. It can, in consequence, be the case that the substitute retains nothing or, conversely, that he has far more than a quarter of the father's substance. Now what if the son's inheritance does not meet the legacies when the father's would have done so? The substitute will have to give out of his own purse because the father made the legacies out of his own wealth. It is irrelevant that under no will is performance due beyond the resources of the estate because in this branch of the law, legacies bequeathed under the second will are regarded as having been left conditionally in the first will. 6. It is a common topic of consideration whether, when a testator substitutes two [heirs] to his son and burdens the share of one of them, that substitute can invoke in his own right the *Falcidia* which would not avail the *pupillus* himself or the other substitute. It might glibly be said, following what appears above concerning the patrimony, that the *Falcidia* is not applicable and that the second substitute may be charged in excess of his share. The truer view, however, is the opposite one, that is, that of those who hold that a quarter must be left to this substitute just as if he had been heir to the father. For in the same way that the substance of the father and the contribution of the legacies take their form and origin from the father's will, so a plurality of substitutes, on the demise of the *pupillus,* are brought in as though instituted heirs. But what say we of the unburdened substitute? Suppose that the *pupillus* has not yet discharged the legacies bequeathed away from him, that, overall, more than three quarters of the estate has been disposed of, can he himself [the substitute] invoke the *Falcidia?* The fact is that he has his quarter, and a comparison with the instituted heir is not apposite. Indeed, were we to say otherwise, the reply

would be manifestly at variance with the general view. There is thus scope for diversity; a person burdened in his own name may, like an instituted heir, claim a quarter; the other who is not burdened, will, as a substitute, not be liable in full, even though his share is enlarged, in consequence of the merger of the calculation. It follows that if security were given to the *pupillus* over the *Falcidia,* the stipulation is operative for both, obviously in respect of that share which each is entitled to retain for himself. 7. The following question has been put: If his co-heir be substituted to a *pupillus,* how is the spirit of the *lex Falcidia* to be interpreted and what of the common assertion of the separate accounting of legacies? My answer was that in respect of legacies bequeathed away from either the *pupillus* or the substitute by the testator father, no separation is to be made; they are subject to an overall calculation and import reciprocal contribution. Legacies bequeathed away from an instituted heir who is not one of the family, however, should not be mingled with other legacies; accordingly, a substitute will get a quarter of the share of the *pupillus,* even though he has his own quarter as though an instituted heir. The case is different from that of an heir appointed to differing shares; for then there is a general accounting of the legacies no less than if he had been named, once and for all, for the resultant total of the several shares left to him; and it is of no consequence whether he be instituted heir repeatedly or under a diversity of conditions. 8. Should someone substitute the instituted heir to his disinherited son and make legacies away from him also by the second will, the account will of necessity be merged; for Julian says that the legacies left away from the substitute are valid because he stands as heir to the father.

12 PAPINIAN, *Questions, book 30:* Suppose a debtor, having instituted his creditor as heir, request of him that for the purposes of the *lex Falcidia,* he should not account his debt against the legatees, there is no doubt that before the Falcidian arbitrator, the wishes of the deceased will be respected by virtue of the defense of bad faith.

13 PAPINIAN, *Questions, book 37:*It has been ruled that a slave, taking a tacit *fideicommissum* at his master's behest, will have the benefit of the *lex Falcidia,* since it was his duty to obey his master; the same was accepted in the case of a son in his father's power.

14 PAPINIAN, *Replies, book 9:* A head of household instituted as part-heiress his daughter who had divorced her husband and requested of her that she should make over her share to her brother and co-heir, having deducted one sixth in the Falcidian computation as compensation for her dowry. I gave the opinion that if, with the daughter's consent, the father had not claimed the dowry, the daughter would have her Falcidian entitlement by the law of succession and a claim to the dowry in her own right, since the dowry is not found among the assets of the father's inheritance. 1. Having instituted her grandsons as heirs, a grandmother charged them by *fideicommissum* that they should forego their Falcidian retention under another will and should pay their legacies in full to their brothers and coheirs. I said that the *fideicommissum* was valid, but its burden was one to be shared among them. 2. It is accepted that where a person substituted to two *impuberes* becomes heir to each of them, he cannot invoke the *lex Falcidia* in respect of the estate of one, if he can, from the assets of the other, retain the quarter of the father's estate which should come to the sons. 3. But if one brother succeeds the other as heir at law and then the substitute succeeds the one dying later, the share of the father's assets which the intestate youth receives is not merged in the Falcidian account; the substitute will retain only that quarter received by the boy to whom he is in fact a substitute.

15 PAPINIAN, *Replies, book 13:* In the event that there should contribute to the estate under the *lex Falcidia* a debtor whose debt was waived by a pact in contemplation of death, what he should give will be retained through a replication framed on the facts of the case. 1. A brother, appointing as heiress his sister, provided that a third person should stipulate from his intended beneficiary that she would not invoke the *lex Falcidia* [against him] and that should she do so, she should pay a specified sum. It is established that statutes of general application cannot be flouted by private arrangements; the sister will thus have her right of retention under the general law, and no action on the stipulation will be granted. 2. Suppose that a legacy over a period of years had been paid, without deduction, to the legatee in the first and second years; the Falcidian reckoning is not deemed to be excluded thereby for the years still to pass. 3. The application of the Falcidian

rationale will be that if his grandson be sole heir to his grandfather, anything that the latter owed the former as a result of his guardianship of him will, I gave as my opinion, be deducted as a debt from the [grandfather's] estate. It matters not that the grandfather-tutor asked his heir that should the latter die without issue before reaching a stated age, he should make over by *fideicommissum* both what he inherited and his own property; the inheritance is not thereby regarded as compensated for the debt, not least because it is expressly stated that there is no compensation or set-off, the deceased making clear that his heir has his own estate. Of course, where the condition of the *fideicommissum* was honored, fruits of the estate gathered after the grandfather's death would, no less than money, be a set-off to the guardianship debt. The grandson's heir, though, will still retain for himself a quarter of the assets which his grandfather left at his death. 4. A *fideicommissum* was due under the [deceased] mother's will on the death of the father; the father wished a set-off thereto to be made from his own inheritance which he left to his son; should Falcidian accounting be instituted, there will be a set-off against the debt to the son of a quarter of what he realizes from the father's estate and so only the balance of the debt, if any, will be deducted from the three quarters. 5. Whatever a woman's heir is obliged to give to her husband out of gifts made to her is not regarded as part of her assets. To the extent that he is enriched, she is deemed to have been the poorer. Any expenditure made by her heir, however, from her property will not be a detriment to the husband. 6. Where the produce of land, left conditionally by words of *fideicommissum,* is concerned, it is not brought within the concept of the *fideicommissum* in that for Falcidian purposes, the heir must be content to take a quarter of the estate at the time of the death and a quarter of the fruits as from then. This is inapplicable where the *lex Falcidia* is involved. For even granted its pertinence once the condition of the *fideicommissum* has been satisfied, the heir must still have his quarter of the produce as from the day of death. 7. A *fideicommissum,* granted to his mother to supplement the share to which her son has instituted her heiress, will go to the mother with the Falcidian reduction, and she will take it in addition to the quarter of her instituted share. 8. The quarter retainable under the *lex Falcidia* can be no more reduced than eliminated by the testator's assessment.

16 SCAEVOLA, *Questions, book 3:* Suppose that an heir duly hand over some of the numerous legacies; by the defense of the *lex Falcidia,* he can make retentions in respect of the remainder even on account of what he has already disposed of. 1. Again, should there be a single legacy, part of which has been discharged, full Falcidian retention may be made from the remainder.

17 SCAEVOLA, *Questions, book 6:* Let us imagine a soldier who makes codicils after his discharge from service and dies within the year; it is said that legacies in his will, made on service under military law, are to be paid in full, those in the codicils, subject to the Falcidian deduction. However, the matter works out as follows: Suppose that having four hundred, our soldier dispose of four hundred by will and then a further hundred in codicils; from the codicilliary fifth, that is, eighty, which, but for the *lex Falcidia,* would go to the legatee, the heir will retain twenty, that is, a quarter.

18 PAUL, *Questions, book 11:* A son-in-power on military service on his death charged his head of household by codicil with a *fideicommissum* to make over to Titius his [the son's] *peculium castrense.* The question was whether the heir could deduct a quarter. My answer was that the deified Pius had extended the *lex Falcidia* on account of .*fideicommissa* even to the succession to intestates; in the present context, however, there was no inheritance, although I would have agreed that had an heir outside the family been instituted, his acceptance would have created an inheritance. Since, though our deceased remained with his head of household, the erstwhile state continued and the property was *peculium.* This in no way conflicts with the fact that the *lex Falcidia* regulates the will of one who dies a prisoner of war; for the fiction of the *lex Cornelia* at once creates both inheritance and heir. I said further, however, that I had no doubt that the sprit of the statute should [and would] be honored, if the father were indeed required to transfer the assets as though they were those of a head of household and he were sued in respect of legacies, on the pattern of the edict, as though he were an instituted heir who did not make acceptance under the will. 1. Further to this, if the father in the interim had a quarter of the produce and the produce of a quarter, we could also invoke the

senatus consultum Trebellianum, and *actiones utiles* would lie and the inheritance exist after its making over.

19 SCAEVOLA, *Questions, book 8:* Should an heir be charged to sell for five an estate worth ten, he can certainly set five against the *lex Falcidia.*

20 SCAEVOLA, *Questions, book 9:* My slave having been instituted heir and a legacy left to me, Maecian says that on my acquiring the inheritance, the legacy does not come into the Falcidian computation because it is not a claimable debt.

21 PAUL, *Questions, book 12:* Suppose that a *pupillus* to whom ten were lent without his tutor's authority be given a legacy by his creditor under the condition that he repay to the creditor's heir the ten which he received, the youth, by the single payment, both satisfies the condition and discharges his natural obligation so that it is imputed to the heir for Falcidian purposes. There would be no such imputation if the payment were simply to discharge the condition. So far, indeed, is the youth regarded as having paid his debt that even if he repudiate the legacy or if Stichus, its object, should die, he can recover nothing. 1. My slave and I are instituted heirs to different shares; three quarters are not charged on the slave; the legacies bequeathed away from me will count against the *Falcidia* in respect of what comes to me from his share beyond the Falcidian quota thereof. Conversely, if a slave were bequeathed to my slave and ten to me, the slave's Falcidian assessment is not affected by my legacy of ten on the very pattern of the Falcidian itself. For I retain a quarter through the person of my slave although nothing be expended from my share.

22 PAUL, *Questions, book 17:* Nesennius Apollinaris to Julius Paul. Sir, this case actually happened. Titia instituted her three daughters as heiresses in equal shares and appointed legacies from each to other; from one, however, she bequeathed away both to her co-heiresses and to nonmembers of the family so that the *Falcidia* carne into play. My query is this: Can that daughter invoke against her co-heiresses, as against whom she herself receives legacies, the *lex Falcidia,* and if she either cannot or can be countered with the defense of bad faith, how will the Falcidian calculation be set in process against the nonmember of the family? I replied as follows: What is acquired from a co-heir by way of legacy does not avail the legatee for Falcidian relief in the normal course of events; when the person to provide a legacy claims something from the intended beneficiary under the will, he is certainly not to be heard in an attempt to invoke the *Falcidia* against that beneficiary, if what he is to take by the testator's wish makes up for what he seeks to offset. Naturally, he cannot set against the other legatees the whole of what he has to give to his co-heir but only what he would have had to give, if he received nothing from the latter. 1. Where a slave is instituted heir *and fideicommissa* are bequeathed away from his master, legacies away from the slave, the legacies are first to be taken into reckoning and then, from the residue, the *fideicommissa.* For the master is liable in respect of what comes to him; but what comes to him is what is left after the legacies. Of course, he may exercise his Falcidian entitlement. 2. Even if the master, waiving acceptance of the inheritance for himself, bade the slave accept as his substitute, account would first be taken of what had been disposed of away from the master himself and then of what was left away from the slave, if the *Falcidia* applied. 3. Should a debtor receive a legacy of release from his debt, the whole legacy will come into account, even though he be insolvent, although the debt will not automatically increase the size of the inheritance. Hence, if the *Falcidia* be applicable, there will be deemed to be a legacy also of what is left to the debtor; the other legacies are reduced by it and it also by the others; for he is treated as receiving something by the fact of his release. 4. But were the debt bequeathed to someone else, there would be no legacy and no contribution to the others.

23 SCAEVOLA, *Questions, book 15:* Where land is left to me and also a right of way, then, in the Falcidian computation, if the right of way be worth as much as the excess over the Falcidian entitlement, the land will be taken in full and the right of way will not exist. Again, should a right of way be devised but the estate be insolvent, the servitude will not be due. Let us now consider the case when the land and the right of passage are left and less is required [by the *Falcidia]* from each devise than the value of the servitude. One may say by strained reasoning not only that the land is

taken as a whole but also that the defense of bad faith exacts only any deficit so that [the heir] may not retain more than the *Falcidia* requires. Consequently, the servitude will fail only when more is demanded under the statute than the value of it.

24 PAUL, *Replies, book 14:* His answer was that if an account has to be taken under the *lex Falcidia,* it should be on the basis that the items taken away from the heir did not form part of the inheritance. 1. He gave the further opinion that the issue of slave-women born before the date of the *fideicommissum* belong to the heirs of the man charged with the trust and that they are to be included in the quarter and the produce thereof if any question of the *lex Falcidia* should arise. 2. The same jurist replied that produce of something belonging to the heir himself, which is collected before the *fideicommissum* becomes operative, should not be included in the heir's quarter even though it does not have to be made over to the fideicommissary.

25 SCAEVOLA, *Replies, book 4:* A woman instituted her husband and their son as heirs in equal parts; the question was raised: In a Falcidian account, is there to be counted against the husband what he acquires also from the same inheritance through his son? The reply was that if the husband receives from the institution of the son as much as will satisfy the *lex Falcidia,* no deduction should be made in respect of the quarter. 1. A testator left away from his freedman to whom he had devised an estate a *fideicommissum* of ten per year to Seia; the problem: If the *lex Falcidia* reduces the freedman's legacy, is the annual *fideicommissum* of ten to Seia also held to be reduced since the income of the land would provide the payments? He replied that on the case as stated, there appeared no such reduction, unless it be shown that the testator was of a different mind.

26 SCAEVOLA, *Replies, book 5:* A testator bequeathed a string of thirty-five pearls which was, at the time of his death, in the hands of the legatee; my question is whether the *lex Falcidia* requires the return of the necklace to the heir. The reply was that the heir can achieve its return or, if he so prefer, vindicate the share of the necklace which should remain his by reason of accounting under the *lex Falcidia.* 1. Question: Does the *lex Falcidia* include the value of statues? Answer: It does.

27 SCAEVOLA, *Replies, book 6:* "If, within a month of my death, Seius and Agerius undertake to our state that, forgoing the protection of the *lex Falcidia,* they will be content with so many gold pieces, Jet them be my heirs. I substitute them, each to the other. If they do not comply with my wishes, be they disinherited." The issue was this: Can the instituted heirs accept the inheritance if they do not wish to honor the condition, since each has a substitute under the condition set out? The reply was that Seius and Agerius can accept, as instituted heirs of the first rank, as though the condition, added in circumvention of the statute did not exist.

28 MAECIAN, *Fideicommissa, book 1:* Where a son bequeaths legacies to his father, having instituted a different heir, the father is subject to a Falcidian account.

29 PAUL, *Fideicommissa, book 2:* If a .*fideicommissum* or legacy be left away from me to you and you are charged to restore it to me after a certain time, I do not think this accountable under the *lex Falcidia;* for I subsequently begin to bold it as a fideicommissary.

30 MAECIAN, *Fideicommissa, book 8:* For the purposes of the *lex Falcidia,* the deaths of slaves or of animals, thefts, robberies, fires, collapse of buildings, shipwrecks, incursions of the enemy, brigands or footpads, bad debts, in short any loss, fall on the heir, if the legatee be without fault. By the same token, there accrue to the heir's benefit, fruits, the issue of slave-women, acquisitions through slaves such as stipulations, tings delivered to them, legacies or inheritances which are given to them and other gifts, as also servitudes releasing, or enhancing the value of, land, and actions acquired through them, for example, for theft, damage wrongfully caused, and so forth-none of these calls for reckoning under the *lex Falcidia.* 1. Where someone is directed to sell or to buy at a stated price some land or any other item for the purposes of the *lex Falcidia,* when as much is obtained under that bead as the legacy requires, any excess or deficiency in the thing in relation to the amount which the testator directed to be given or received is to be brought in; but so that a greater deduction be made in that share which will be created when the legacies have been excluded; for what we are deemed to take for ourselves is not that value as such but a legacy of the balance after it bas been deducted. 2. It bas further to be carefully observed that the dictum that losses occurring after the testator's death fall only on the heir is not to be accepted

absolutely and without any qualification. What would be the full entitlement without the *lex Falcidia* will be the same entitlement in the share created by the *lex Falcidia.* This ensures that subsequent losses will not be taken into account, so that the portion lost will not diminish legacies or *fideicommissa.* 3. The truth is that a deduction is made only from those tings which exist by weight, number, or measurement; subsequent incidental loss from the share established in the assessment of items existing at the testator's death produces no reduction. 4. In the case, however, of specified items and of those left in any of the following terms, "the money which I have in that chest," "the wine in those containers," "the weight of silver which I have in that warehouse," then, assuming that the items be lost or deteriorate without fault on the heir's part, it is beyond doubt either that noting is due or that a share will be due of the items as they now stand, following the valuation of the items which existed at the time of the testator's death, in accordance wit the *lex Falcidia.* 5. Nonspecific bequests, however, admit of distinctions; suppose that the testator leave something unidentified from his assets, for example, "the silver which be may caboose," and all the testator's silver bas been destroyed without fault on the heir's part, nothing will be due. Had a weight of silver, however, been unreservedly bequeathed, then, even though none of the testator's silver survived, a share thereof is, subject to the *lex Falcidia,* to be taken as it existed in the testator's possession at his death; subsequent causal losses do not avail to minimize the quantity in any way. 6. Where things have ceased to exist, neither they nor even their valuation will be due, any more than if each item bad been bequeathed under a specific description. 7. Now, granted that items given to the heir for the fulfillment of a condition do not come into account under the *lex Falcidia,* nonetheless, anything that a person is charged to take, not by way of condition, from the person to whom be is directed to transfer the estate, it pleased the worthy Celsus and Julian to bold accountable; tbc case would be like that of the heir directed to sell those things at that figure, the situation being that no fulfillment of a condition is prescribed, but in a way, a price for the items is introduced. In this context, it bas been further asked whether in these circumstances the fideicommissary would, even against his will, be compelled to give the sum and to accept the inheritance, as though the charge were to his honor. This is improbable since the formulation would appear intended to favor him rather than to redound to his disadvantage. 8. Where the *lex Falcidia* applies, legacies or *fideicommissa* left to the heir himself or to his slave, away from the heir, do not come into contribution. Different is the case of benefactions granted with liberty for a specific date; once the date of freedom begins to run, such benefactions will be due to him and will come into reckoning. No more do ineffective bequests or *fideicommissa* to one's slave, but without his liberty, fall within the statute. 9. A thing which, beyond doubt, cannot be left, even by *fideicommissum,* to one's slaves, does not come within the assessment of the *lex Falcidia.*

31 POMPONIUS, *Fideicommissa, book 2:* The recipient of a *fideicommissum,* as also of a legacy, will have to give an undertaking to return anything which he receives in excess of what the *lex Falcidia* permits; such would be the case where the Falcidian problem is pending because of conditions attached to other legacies or *fideicommissa.* Indeed, according to Cassius and the earlier jurists, the recipient of *fideicommissa* from a *pupillus* will have to give security in respect of what may be left away from the youth's substitute. Even though there may be recovery of what is not due by way of *fideicommissum,* still, the person from whom the money comes, should have security that he will feel no loss through the failure of the payee.

32 MAECIAN, *Fideicommissa, book 9:* Penal actions, whether direct or praetorian, other than popular actions, are not the less to be included among the potential plaintiff's assets, because they may fall in through the death of the potential defendant. Conversely, these very actions in no way reduce the assets of the said defendant in the event of his death. But the action for affront cannot be included in the assets of even the plaintiff on his death; the action vanishes at the same time as his own demise, as would a usufruct or what is due to a person, daily, monthly, or yearly while he lives. Moreover, a possible defendant's assets will be reduced also by a right of action which passes to the plaintiff's heir. It in no way conflicts with this that, even in the defendant's life, the claim was not included in his estate; even had he stipulated that so long as he delayed the bringing of it, it should still be open to him, the estate [of the defendant] would be enlarged just as, if the latter himself had made a promise to the same effect, it would be diminished by his death. 1. Again, *actiones honorariae,* which the praetor propounds within a given period of time furnish with the plaintiff's assets an increase in the defendant's substance with the plaintiff's death, or a diminution, if the actions be such as are transmissible to heirs. 2. Julian writes that should the share of each heir

be exhausted by legacies and one of them received a praetorian undertaking from the legatees, he will have a Falcidian account and action on the stipulation not on a basis of parity but in respect of his share. For all praetorian stipulations admit of the same interpretation; take the stipulation that a judgment will be honored; it is settled that be it the plaintiff or the defendant who leaves a plurality of heirs, the action is not to all and against all but only to those successfully suing against their defeated adversaries; equally, to those whose claim was undefended against those who made no defense. 3. Legacies are left annually, biennially, and triennially of a hundred gold pieces; it has been settled that a Falcidian deduction is to be made from the overall total, not that for the years to come. 4. Suppose that Titius's share is reduced in a legacy of twenty through the *lex Falcidia,* Titius himself being charged to give five to Seius; our friend Vindius says that a proportional reduction is to be made in Seius's five comparable to that in Titius's twenty. This view is both fair and logical; for the legatee is to be liable on *fideicommissa* on the pattern of the heir; he is to be allowed to offset the burden on himself even though, as legatee, he cannot invoke the *lex Falcidia* directly; this, unless the testator specifically make the *fideicommissum* one of "everything which [Titius] takes under the will." 5. If, however, a man be put under a *fideicommissum* to manumit a slave, whether his own or another's, he has an unqualified obligation to bring him to liberty. This does not conflict with what has just been said for the favoring of liberty often finds other benevolent expression.

33 PAUL, *Fideicommissa, book 3:* The senate has ruled that the *lex Falcidia* does not apply where a slave has been bequeathed to you with a *fideicommissum* to manumit him and you receive nothing else under the will from which the Falcidian fourth could be retained.

34 MARCELLUS, *Digest, book 42:* JULIAN notes: The *lex Falcidia* does not apply to the testator's slave; it will, though, if the legacy be of money or something else and a *fideicommissum* be imposed upon the legatee to manumit his own slave or one of someone else.

35 ULPIAN, *Disputations, book 6:* Naturally, the *lex Falcidia* will be applicable to any legacy further left to the slave himself, the senate has ruled. In consequence, Scaevola says that deduction may be made from the additional legacy also in respect of the slave.

36 PAUL, *Fideicommissa, book 3:* lf, however, it be not the slave himself who is bequeathed but money, the legatee then being charged to manumit his own slave, the *lex Falcidia* is operative and the legatee will be perforce obliged to effect the manumission, being treated as having assessed his slave at the relevant amount. 1. Suppose that the slave in issue belong to another; the legatee will be required to spend no more on his purchase than the amount of his legacy. 2. Should an heir, though, be charged with a *.fideicommissum* to manumit his own slave, it is accepted that the slave's value is a chargeable debt. 3. lf a single slave be bequeathed with a *.fideicommissum* of his liberty, he can be claimed and sued for in full through the *lex Falcidia;* should the legatee receive· anything else, however, the whole slave can be claimed, subject to that being offset; the reduction of a quarter in respect of each bequest, though, is to be made from the other legacy so that there may be no impediment to the slave's freedom. 4. Now it could be the case that doubt exists whether liberty will be due, the legacy is conditional, for instance, or to be implemented after some time; since the slave might die or the condition fail, should it not be during the period of uncertainty that the *Falcidia* be provisionally operative, and, then, when liberty become operative or due, that the legatee then recover what the *Falcidia* took from him? For Caecilius, anything which the heir acquired from the slave's services during the period of uncertainty should be attributable to his value in Falcidian reckoning.

37 VALENS, *Fideicommissa, book 6:* Such slave should be valued on the basis of being a *statuliber.* 1. Even if an heir were subject to a *.fideicommissum* to manumit another's slave, the view prevailed that this slave's value should be deducted from the valuation of the inheritance.

38 HERMOGENIAN, *Epitome of Law, book 1:* 1. A *statuliber* is not an addition to the heir's servile household. Slaves owned in common count in the individual patrimony of each owner. 2. A slave in whom another has a usufruct is treated as part of his owner's property, one in pledge as the debtor's, one sold with a forfeiture clause or an *in diem addictio* as the vendor's.

39 PAUL, *Views, book 3:* There count as deductible debts not only the value of slaves given their freedom or under capital sentence but also that of one who has been granted his freedom by the praetor for exposing a murder plan or conspiracy.

40 HERMOGENIAN, *Epitome of Law, book 4:* The *lex Falcidia* applies to the will of an ex-soldier, be he head of household or son-in-power, even though he die within a year of his discharge. 1. An estate worth twenty has been devised to a legatee, if he give ten; he is considered legatee of the land in its fullness.

41 PAUL, *Edict, book 9:* A person cannot be regarded as lacking bad faith who, when a dispute has already arisen over the inheritance, pays legacies without taking any security.

42 ULPIAN, *Edict, book 14:* The Falcidian valuation of assets is to be made on their true worth.

43 ULPIAN, *Edict, book 19:* For Falcidian purposes, slaves returning from war captivity after the testator's death swell the value of the estate.

44 ULPIAN, *Edict, book 21:* There can be no place for the *lex Falcidia,* when a *statuliber* makes a payment from the funds of another, not of the deceased or again if a person already free satisfy the condition.

45 PAUL, *Edict, book 60:* Under the *lex Falcidia,* that which is bequeathed fora period is not regarded as unqualifiedly given; a computation is made of its interim benefit. 1. It was the view of Proculus that where the *lex Falcidia* comes up in relation to conditional legacies, their value is the price that they could fetch as such; this being so, a deduction is possible so that as much is due as the price for which the debt can be sold. That opinion has not found favor; it is preferable to resort to the giving and taking of security.

46 ULPIAN, *Edict, book 76:* A person who, honoring the testator's wishes, solemnly promises to give what the *lex Falcidia* would allow him to retain is bound to pay.

47 ULPIAN, *Edict, book 79:* Where it is operative, the *lex Falcidia* is applicable to all payments; circumstances will make this apparent. Let us take a legacy from year to year; so long as the *Falcidia* does not yet come into play, the annual payments will be given in full; should the year come, however, when anything be due in excess of the three quarters of the *lex Falcidia,* the result will be that, retrospectively, all the annual legacies will be reduced. 1. A legatee or fideicommissary never receives the benefit of the *lex Falcidia,* even though the inheritance be made over to him under the *senatus consultum Trebellianum.*

48 PAUL, *Curule Aediles' Edict, book 2:* When a purchaser becomes his vendor's heir or vice versa, is twofold or only the simple price to be deducted as a debt if the slave, the object of their contract, be evicted? It would be twofold, were the heir a third party. The more lenient view in our case is that the simple price be offset.

49 PAUL, *Plautius, book 12:* PLAUTIUS: I devised land to the slave whom I bequeathed to you. Atilicinus, Nerva, and Sabinus all say that first a Falcidian valuation is to be made in respect of the slave and the deduction in respect of him will be reflected in the legacy of the land; then, from the remainder of the land, a further Falcidian deduction will follow as with other legacies. Cassius says that since the slave loses part by the *lex Falcidia,* he becomes the joint slave of heir and legatee; but, when a legacy is made to a slave owned in common, the whole belongs to the [legatee] partner because only in that person can the legacy inhere. PAUL: We follow the view of Cassius; the deified Pius also, in a rescript, ruled that a *fideicommissum* bequeathed to a common slave went wholly to the co-owner. 1. It sometimes happens that by reason of the Falcidian account, a subsequent legacy is extinguished; for example, land is devised together with a right of passage to it through other land; if part of the land remain in the inheritance, the legacy of passage cannot be realized, since one cannot acquire a servitude as to part.

50 CELSUS, *Digest, book 14:* Without question, legacies from which the heir can bar the claimant by a defense are attributed to his quarter and do not affect the bequests of others.

51 JULIAN, *Digest, book 61: It* is of no consequence whether the legacy was inoperative from the outset or subsequent chance circumstances resulted in its nonactionability.

52 MARCELLUS, *Digest, book 9:* A freedman, having a total of two hundred and fifty, instituted his patron as sole heir, left one hundred and twenty to his son and the residue to a third party; the patron's making over to the outsider half of what was left to him will avail the son for acquiring his

whole bequest. 1. Whatever the reason for the nonpayment of legacies, those legacies will be reckoned in the quarter which should remain to the heir under the *lex Falcidia.*

53 CELSUS, *Digest, book 17:* If a Falcidian account be pending in respect of conditional legacies, they will not, being presently given, be claimable in full.

54 MARCELLUS, *Digest, book 15:* A father instituted as heir the son by whom be had three grandsons and charged him with a *fideicommissum* not to alienate the estate and himself to devise it within the family; the son, on his death, left his three sons as instituted heirs. We must investigate whether, in the manner of creditor, each can deduct something in a reckoning under the *lex Falcidia,* since it had been in the father's power to show to which among them be preferred to leave his substance. That reasoning would give none a deduction for Falcidian purposes. Let us consider whether this is not a harsh ruling; the father had the land like a debt since he was necessarily constrained to leave it to his sons. ·

55 MARCELLUS, *Digest, book 20:* Ten per annum are bequeathed to Titius and a judge is taking a Falcidian account between the heir and the other legacies; Titius being alive, be will have to make an assessment of what the legacy could amount to, granted that no one knows how long Titius will live; but, with Titius dead, the only consideration is the extent of the heir's obligation under that head.

56 MARCELLUS, *Digest, book 22:* A person against whom the *actio de peculio* was possible became heir to his creditor; your question is: As at what time is the *peculium* to be assessed for Falcidian purposes? Many hold that one should look to the state of the *peculium* when the inheritance is accepted. I have my reservations, since the time of death should be looked to in starting on an account under the *lex Falcidia;* what relevance, after all, can it have whether the slave's *peculium* be reduced after the creditor's death or the debtor suffer financial loss? 1. Someone may say: "Yes, but what if the slave acquire something before the inheritance is accepted?" My rejoinder: What if the finances have improved of a debtor who at that time, the death, was not solvent? And since, in that case, it be accepted that the inheritance has been subsequently enriched, as when a condition attached to the claim be realized after the death, so also an addition to the *peculium* increases the value of the inheritance. 2. SCAEVOLA notes: What, then, if the one slave owed ten each to the deceased and someone else and be had only the one ten? Clearly, the inheritance will be increased by the remaining part of the ten which were the object of the slave's natural obligation to the deceased. 3. The owner of a single slave bequeathed him to Titius on whom be laid a *fideicommissum* to manumit the slave after three years; a quarter of what Titius may obtain through the slave's services during that period will be due to remain the heir's, just as if the deceased had given the slave his freedom directly after a three years' delay and bequeathed the usufruct of him or left ownership of him to Titius by *fideicommissum.* 4. The testator left Stichus to you and ten to your slave or, conversely, ten to you and Stichus to your slave with a *jìdeicommissum* of his freedom. The *lex Falcidia* reduces the legacies; you will have to claim from the heir a share as though both legacies had been to yourself. 5. It is not uncommon for the heir to derive no benefit from the statute; suppose that their owner give one hundred and twenty-five gold pieces to someone, then institute that person as heir and make legacies of three quarters of his assets, nothing more will be forthcoming under the *lex Falcidia* because the testator is seen to provide during his life for his prospective heir.

57 MARCELLUS, *Digest, book 26:* When a man bequeaths her dowry to someone to transfer on to his wife, it must be said that there is no place for the *lex Falcidia.* Indeed, there are many instances in which dispositions are observed without reference to the person of the intermediary.

58 MODESTINUS, *Rules, book 9:* Nothing binders the heir's claiming his entitlement under the *lex Falcidia* long after the testator's death.

59 MODESTINUS, *Encyclopaedia, book 9:* He is unworthy of Falcidian relief whose invocation of it would destroy a *fideicommissum.* 1. Again, one charged to restore the inheritance to a nontaker is not granted retention of a quarter by the *senatus consultum Plancianum;* the quarter which be is not allowed to retain belongs to the imperial treasury under a rescript of the deified Pius.

1. JAVOLENUS, *From Cassius, book 14:* A father substituted an heir to his daughter, still below puberty; what be received by way of legacy from the father does not come into the computation of the *lex Falcidia,* when the substitution becomes operative. 1. Where a sworn valuation is made in a claim for a legacy, the *lex Falcidia* takes account not of the sum to which the legatee bas sworn but of the true value of the thing claimed; accretions by way of penalty have no place in Falcidian reckoning.

60 JAVOLENUS, *Letters, book 4:* A testator made you a legacy of land belonging to someone else; the heir being unable to purchase the land save at an inflated price bought at such an overvaluation that the legatees were called to an account under the *lex Falcidia.* Here is my question: Since, if the land bad been purchased at its true worth, the legacies would not have gone beyond the limit of the *lex Falcidia,* does the present position entitle the instituted heir to claim a share from the legatees on the ground that the deceased's wish caused him to pay more than the land was worth? Answer: The overpayment by the heir cannot be charged against the *lex Falcidia;* his remiss behavior should not constitute a detriment to the legatees, especially since, by revealing the position, be could have obtained a true valuation.

61 ULPIAN, *Lex Julia et Papia, book 1:* Julian says that in the matter of the *lex Falcidia,* this is the practice to follow: Where there are two persons liable on a promise or two creditors of a promise, assuming the obligation to be their joint venture, it is to be divided between them as though each bad asked for or promised part of the money; if, though, they were not partners, there remains in suspense what is to be attributed to or deducted from the property of each. 1. Tangible property in the deceased's estate is to be valued at its true worth, that is, the price which it would presently command, be it known that no such item is to be given a nominal valuation.

62 PAUL, *Lex Julia et Papia, book 2:* Things acquire their value from their general usefulness not from the particular approach or utility of individuals. A man who possesses as a slave his own natural son is not thereby the richer because, did another bold the slave, be himself would pay a large ransom for him. Equally, a person who possesses the son of someone else does not have the value for which be can sell that son to his father nor the amount for which be might hope to sell him but his present value as a slave not as somebody's son. The case is the same with someone whose slave commits a delict; for no one becomes more valuable by wrongdoing. No more is the slave, instituted heir on the testator's death, worth any more than the higher price which be may realize, says Pedius; indeed, it would be absurd that being myself instituted heir, I should not be richer until I accepted the inheritance but that my wealth should be increased forthwith, were my slave instituted; many things could happen to prevent his accepting the estate at my behest. Of course, be acquires for me when be enters; but to say that I am richer before I have acquired would literally be preposterous. 1. One whose debtor is insolvent bas as property what be can exact from him. 2. Sometimes place or time brings a variation in value; oil will not be equally valued at Rome and in Spain nor given the same assessment in periods of lasting scarcity as when there are crops; in the latter case, prices are not determined by vicissitudes and chance events.

64 ULPIAN, *Lex Julia et Papia, book 13:* A will has the provision: "Let my heir be charged to give Lucius Titius ten and as much more as he would take less through the *lex Falcidia."* The testator's view is to be upheld.

65 PAUL, *Lex Julia et Papia, book 6:* Suppose that land worth fifty be bequeathed subject to the condition that the legatee give fifty to the heir; there are many who think the legacy effective because the giving will be to realize the condition; for it is settled that the *lex Falcidia* is applicable. But if there be a legacy of fifty gold pieces, if the legatee give fifty, it must be said that the legacy is without point, indeed ridiculous.

66 ULPIAN, *Lex Julia et Papia, book 18:* There is this to be noted concerning the *lex Falcidia* where something is left under a condition or fora given period; should ten be left to someone under a condition which is realized after, say, ten years, it is not a sum of ten which is regarded as having been bequeathed but something less; for the time lapse and interest of the interval reduce the sum from ten. 1. Just as legacies are not due unless there be a surplus over the deceased's debts, gifts in contemplation of death are not due, being nullified by his liabilities. Hence, if the debts be excessive, a person will receive nothing of what is given to him in respect of death.

67 TERENTIUS CLEMENS, *Lex Julia et Papia, book 4:* Whenever someone is left more than he is entitled to take and the *lex Falcidia* comes into operation, the Falcidian account must first be taken, obviously so that only what remains after the Falcidian deduction will be due, assuming that it does not exceed statutory limits.

68 AEMILIUS MACER, *The Five Percent Succession Tax Statute, book 2:* For computation to be made in the matter of maintenance, Ulpian gives this formula: From birth to the twenty-fifth year, the amount of thirty years' maintenance will be assessed and the Falcidian quota thereof be due; between twenty and twenty-five, the amount up to twenty-eight; between twenty-five and thirty, the amount of twenty-five; between thirty and thirty-five, the amount of twenty-two; between thirty-five and forty, the amount of twenty; between forty and fifty there will be a computation of as many years as are lacking to sixty, with one year's remission; between fifty and fifty-five, the amount of nine years; between fifty-five and sixty, the amount of seven years; for any age over sixty, the amount of five years. Ulpian says that we observe this rule also for the computation of a usufruct. Still, it has been the practice for the computation from birth to thirty to be of thirty years but from thirty of as many years as are lacking to sixty. The computation never goes beyond thirty. So equally in the case of a legacy of a usufruct to the state, whether for the provision of games or without restriction, the valuation will be of thirty years. 1. lf one of the heirs should claim a thing to be his own and then it be proved part of the estate, there are those who think that there cannot be a Falcidian retention in respect of it, since it makes no difference whether he appropriated it or denied that it is part of the inheritance. Ulpian justly rejects this.

69 POMPONIUS, *Sabinus, book 5:* Where a usufruct of one's property is bequeathed, debts of the deceased are chargeable against all items because, after the *senatus consultum,* there is no item which does not fall within the legacy of the usufruct.

70 ULPIAN, *Sabinus, book 16:* A Falcidian stipulation becomes enforceable as soon as the condition of a legacy or debt is realized.

71 PAUL, *Edict, book 32:* In selling the inheritance, an heir may give security that even though the *lex Falcidia* intervene, legacies will be honored in full; the statute was enacted for the heir's benefit, and the latter is at no disadvantage, if he diminishes his own entitlement.

72 GAIUS, *Praetor's Edict, Legacies, book 3:* The extent of the patrimony is valued with the deduction of any expense incurred for the effecting of sales.

73 GAIUS, *Provincial Edict, book 18:* It became accepted that in ascertaining the extent of the estate, one looks to the time of death. Hence, suppose that someone, having one hundred, made bequests of the whole; it will not avail the legatees that before the inheritance is accepted, there be such accretion to the estate through slaves of the inheritance or the issue of slave-women thereof or the young of animals that after the removal of the hundred for legacies, the heir would have his quarter. It is requisite nonetheless that a reduction of a quarter be made in the legacies. Conversely, where a testator, having one hundred, made legacies of seventy-five and before acceptance the inheritance so diminished through fires, say, wrecks, or the death of slaves that no more than seventy-five-possibly, even less-remained, the legacies would be due in full. This occasions no harm to the heir who is free not to accept the inheritance; such latter course could achieve the result that the legatees, lest they get nothing through the nonoperation of the will, settle with the heir for a share of their legacies. 1. Great uncertainty existed in respect of debts the condition of which was pending at the deceased's death; is the conditional amount included in the creditor's assets and deducted from those of the debtor? Our rule is that the amount of the obligation in expectancy is deemed to accrue to the stipulator's wealth and to reduce the debtor's. Alternatively, the matter can be adjusted by the giving and taking of security so that one of two courses follows: An account is taken either as though the debt were unconditional or as if nothing were owing; then the heirs and legatees enter into mutual undertakings that if the condition should eventuate, the heir will make restoration of his underpayment or the legatees return the amount of their overpayment. 2. Again, if there be legacies, both unconditional and conditional, which have the result that if the condition be realized, the *lex Falcidia* will apply, the legacies are paid *simpliciter* but with security. In such a case, it is the usual practice to have payment of the direct legacies, as though there were no others which were conditional, but for the legatees to undertake to return the excess which they have received in the event of the condition's being satisfied. 3. An undertaking of this

kind appears necessary also if the same will gives conditional freedom to certain slaves whose value will reduce the estate on the realization of the condition. 4. Obviously, legacies left as at a certain time come under a different regime; they are, from any point of view, due to the legatee or to his heirs; but the reduction to be made is that, corresponding to the deduction appropriate, until the day arrives, in the heir's benefit from the produce of and interest on the capital amount. 5. Overall, therefore, the most desirable course is that the heir from the outset should distribute legacies not exceeding three quarters of the estate. Should anyone exceed that limit, however, the statute makes an automatic, proportional reduction; thus, if the possessor of four hundred should leave the full amount in legacies, the legatees will be deprived of a quarter; should he bequeath three hundred and fifty, they lose an eighth. But what if one having four hundred should bequeath five hundred? A fifth is immediately deducted and then a further quarter is to be written off; there is, after all, first to be deducted what does not form part of the estate and then the portion of the assets which should remain with the heir.

74 GAIUS, *Praetor's Edict, Legacies, book 3:* We take the proposition that if the heir receive a quarter of the estate by the wish of the deceased, he is liable for legacies in full in this way, if he receives the quarter by right of inheritance; anything, therefore, which he may receive from a co-heir by way of legacy, is not attributed to his quarter.

75 MARCELLUS, *Julian, Digest, book 40:* But should he be given a legacy to pay legacies and *fideicommissa* in full, be will be refused the action on legacy, if be prefer to invoke the *lex Falcidia.*

76 GAIUS, *Praetor's Edict, Legacies, book 3:* What is given by a co-heir, legatee, or *statuliber* for the implementation of a condition is not chargeable to the *lex Falcidia,* being received by reason of death. Of course, if an heir receive from a *statuliber* coins from the latter's *peculium,* they are to be attributed to his quarter because be does not take them in respect of death but is held to take them by his title as heir. 1. This reasoning brought acceptance that legacies which the legatees do not take, since they remain wit the heir, are deemed so to remain by virtue of his title as heir and so count against his quarter; here it matters not whether the legacy never was or that the legacy remained with him.

77 GAIUS, *Provincial Edict, book 18:* There is no question but that the Falcidian account is to be taken in respect of each individual heir. In the case, therefore, where, Titius and Seius being instituted heirs, Titius's half of the estate being exhausted, Seius, having been left a quarter of the estate, Titius can invoke the concession of the *lex Falcidia.*

78 GAIUS, *Urban Praetor's Edict, Legacies, book 3:* Put the case that there being two heirs, one does not appear and the other is sole heir: Is the Falcidian account to be taken as though from the outset be were sole heir, or are the separate cases of their individual shares to be investigated? The view which bas prevailed is that if the share of the one who does become heir be exhausted by legacies, the legatees can look for relief to the share which has fallen in; it is not laden with legacies; and legacies which remain with the heir produce the consequence that the remaining legatees incur no, or a modified, loss. Should the share fallen in, however, be defective, the Falcidian reckoning is to be made as though the share belonged to the heir from whom it bas fallen in.

79 GAIUS, *Provincial Edict, book 18:* In the case of a twofold will, if our concern is the patrimony, we look only to what the bead of household bad when be died; subsequent acquisition or diminution by the son after that death is irrelevant. Should our query concern legacies, both those in the first and those in the second will go to make a single whole, just as if the testator left away from his own heir, under a different condition, what he bequeaths away from his son's heir.

80 GAIUS, *Praetor's Edict, Legacies, book 3:* A man, with a patrimony of four hundred, made his son, not yet of the age of puberty, heir, left two hundred, made Titius and Seius his substitute heirs, and made a legacy of one hundred away from Titius; what say we the law to be? Assuming the son to have died with the legacies .still unpaid so that both are due, only the heir Titius can invoke the *lex Falcidia;* two hundred being due to him from the estate of the *pupillus,* be owes two hundred by way of legacy: one hundred from the two which the *pupillus* owes him[and Seius] and the hundred which be is bidden to give himself. Deducting a quarter from each, be will consequently have fifty. The *lex Falcidia* does not apply to Seius, however, since two hundred fall his way from the estate of the *pupillus* and be owes one hundred by way

of legacy out of the two hundred left away from the *pupillus.* Should the *pupillus* pay the legacies, his tutors should ensure security from the legatees. 1. Some legacies, for example, the various rights of passage, do not admit of division; for to no one can such a thing belong in part. But where an heir is directed to effect some work for the townspeople, the legacy is unitary. No one can be held to erect a bath, stadium, or theater, who does not determine the form which its completion will bring to reality. In respect of all such legacies, though there be a plurality of heirs, individuals are accountable in full. Legacies, then, which do not admit of division, belong exclusively to the legatee. The heir, though, can invoke the relief that having valued the legacy, he may give notice to the legatee that the latter bear his share of the valuation; should the latter not do so, the defense of bad faith will be applicable.

81 GAIUS, *Provincial Edict, book 18:* A usufruct comes into the Falcidian reckoning, admitting of division to the extent that if it be left to two, each automatically has his own share. 1. Dowry falls outside the *lex Falcidia,* obviously because the woman gets back her own property. 2. In like manner, the *lex* itself expressly states that things bought or provided for the woman's interests also lie outside the scope of the statute.

82 ULPIAN, *Disputations, book 8:* This question used to be put: A person who had assets consisting solely in a book-debt of four hundred bequeathed discharge from his obligation to the debtor himself and four hundred to Seius; if the debtor either was insolvent or could raise only one hundred, what would each get on the operation of the *lex Falcidia?* My reply was that out of what can be realized from the estate, the *lex Falcidia* gives a quarter to the heir, the remaining three quarters to be distributed among the legatees. Accordingly, if the hereditary debt does not meet all the provisions of the will, there will be a pro rata distribution of what can be realized and sale of the residue, there being attributed to the inheritance the price for which the debt can be sold. Where, though, the will grants the debtor his discharge from his obligation, the debtor is regarded as solvent and, from his point of view, in funds; for if he be regarded as receiving his release as a liberality on death, he is deemed to have received four hundred even though he has no cash; he still receives full discharge, although penniless. Should he alone be granted release, then, by the *lex Falcidia,* he is remitted three hundred and the remaining hundred continue due and payable, and should the debtor acquire anything subsequently, it can be exacted from him up to the amount of one hundred. The same would hold if he received his discharge for four hundred as a gift in respect of death. In consequence, it is elegantly said that the formal release will be in a state of pendency; if, indeed, at the time of the testator's death, four hundred are found, the release will be effective for three hundred; should anything more be found in the estate for the heir to have his quarter, the release will be valid for the full four hundred. Now if the debtor of four hundred can raise only one hundred, he, being thus in funds, will have to make over that hundred. So if the debtor be in funds, the result will be that assuming that someone be instituted heir with legacies to the debtor of his release and to someone else of four hundred, assuming the debtor's solvency, he will keep one hundred and fifty out of three hundred, the other legatee will have one hundred and fifty due to him, and the heir will have a hundred. But if the debtor can raise only one hundred, the heir's quarter must be preserved out of that sum; the outcome will be that the hundred available for distribution will be divided into four parts, the legatee getting three quarters, the heir taking twenty-five, and the insolvent debtor settling with himself for one hundred and fifty. In respect of the outstanding one hundred and fifty which cannot be produced, the debt will be sold and that will be set up as the sole asset. In the event that the debtor can raise nothing, he will again be released in respect of one hundred and fifty and the remainder of the debt put up for sale; so says Neratius and we agree.

83 JULIAN, *Digest, book 12:* Should your son's creditor institute you as heir and you make a Falcidian reckoning, the value of the *peculium* as at the time of acceptance of the inheritance will be attributed to your quarter.

84 JULIAN, *Digest, book 13:* The case can be found in which the heir could sue though his testator could not; for instance, a tutor paying out legacies does not interpose a stipulation for the repayment of what be disburses beyond what the *lex Falcidia* allows; the *pupillus* himself could not proceed by the action of guardianship against the tutor, but the latter would be liable on that count to the heir of the *pupillus.*

85 JULIAN, *Digest, book 18:* If dowry be given to a father-in-law and the son-husband become sole heir to his father, be will forthwith bring the dowry into the computation of the inheritance as a debt under the *lex Falcidia;* otherwise, be would appear to have an undowered wife. Now, should be have as co-heir someone from outside the family, be will himself still set off the dowry as a debt to the extent that be is his father's heir, the co-heir will deduct before the son-husband pre-empts the dowry.

86 JULIAN, *Digest, book 40:* In her will, Titia instituted her brother, Titius, heir to a third of her estate and charged him with a *fideicommissum* that keeping a quarter for himself, be should band over the inheritance to Secunda and Procula; she also gave her brother certain lands as a preferred legacy. Question: Does Titius have to make over also these preferred legacies in the part of the inheritance affected by the *fideicommissum,* or does be retain them intact? My reply was that Titius should retain the legacies intact but that be should include in his quarter a twelfth of the value of the land. Had it not been particularized that be should keep a quarter, a full third of the value of the lands would be attributable to the *lex Falcidia;* for the *lex* would be invoked contrary to the testatrix's wishes.

87 JULIAN, *Digest, book 61:* A man, whose only asset was a plot worth one hundred, charged his heir to sell it for fifty to Titius; be is to be treated as having bequeathed a legacy of no more than fifty, so that the *lex Falcidia* is not in point. 1. Again, one having two plots worth in all one hundred made me and Titius his heirs; be charged me to sell Titius the Cornelian farm for fifty and conversely charged Titius to sell me the Seian estate for fifty; I do not advert to the question, bow the *lex Falcidia* can operate, since each heir by hereditary title will have half of each estate, each having a half share of the inheritance; the one, charged to sell the Cornelian estate, bas as heir his share of the Seian estate, just as the one charged to sell the Seian estate retains, as heir, his share of the Cornelian property. 2. Suppose someone to institute as heir one whom be puts under a *fideicommissum* to transfer one hundred on the latter's own death; one hundred comes into the Falcidian computation, because, bad there been a different instituted heir, that hundred could be treated as a debt. 3. You have been instituted heir to a quarter, as also Titius, and then you are later made conditionally heir to a half, legacies, including some of liberty, also being granted. While the condition is pending, the gifts of freedom operate, and the legacies are to be paid in full; for either the condition will be satisfied, and, you being heir, both will be operative; or the condition will fail, and you and Titius will be heirs. Suppose that you ask, concerning the *lex Falcidia,* whether, on the realization of the condition, your quarter and the half are to be lumped together and that, on this basis, the account of the three quarters is to be made with those to whom legacies have been left away from you; our answer is that the two shares are to be merged. 4. A man instituted his underage son and Titius as heirs in equal shares, bequeathed away from his son the whole of the latter's share, left nothing away from Titius, and substituted Titius as heir to his son. The following question arose: Titius accepted as instituted heir, and, the youth dying, also became heir as substitute; bow much bad be to pay up in respect of legacies? The view adopted was that the legacies were payable in full. The two halves of the inheritance coming together mean that an account of the estate as a whole is taken for Falcidian purposes, and so legacies are payable in full. This, however, is true in the event that the son dies before becoming his father's heir. Should the youth be heir to his father, the substitute will be liable for no more in legacies than was the *pupillus,* being liable in the latter's name, not his own; and the *pupillus* was liable for no more than three quarters of a half. 5. If, though, the full half of a nonfamily heir were bequeathed away from him and be became substitute heir to the *pupillus* on whom no charge bad been laid, it could be said that the legacies increase in value and that the course to follow would be the same as that if he were substituted to any co-heir one please and, the latter not coming to the inheritance, he became sole heir; a substitute always makes his Falcidian account on the basis of what the head of household leaves. 6. This would also hold good if a father instituted as heirs two sons below puberty and made mutual substitutions between them and then, by right of substitution, the inheritance fell to one of them alone and a Falcidian account were taken. 7. A man had two sons under age; he instituted one as heir, disinherited the other, then substituted the disinherited one to the instituted heir, and subsequently Maevius to the disinherited one, leaving bequests away; the disinherited son became heir to his brother and then himself died under age. Since the paternal wealth carne to him by way of inheritance, by virtue of his substitution, by the father's

wish, it may be said that the legacies left away from him are to be set by reason of the *lex Falcidia* among the father's assets as at his time of death. It in no way conflicts with this that the father having given a legacy to the disinherited son, the substitute will not the more be burdened with the legacies because what carne to him thereby was simply a legacy, not a share of his father's inheritance. I hear someone say: What, then, if the disinherited one became heir, not by substitution to his brother but by some statute or via an intervening person, and still died under age, is such a substitute to be held liable to legacies? Of course, not. The significance of the disinherited son's becoming heir by substitution to his brother or by some other route emerges from the fact that in the one case, the father could leave legacies away from him; in the other, not. It is, accordingly, consonant with reason that the father has no more jurisdiction over the person of his substitute heir than over the person to whom he makes him substitute. 8. Suppose that the co-heir appointed together with a *pupillus* discharge after a Falcidian account the legacies charged on his share and then, the youth dying, he became the latter's heir by substitution and the youth's half share be exhausted by legacies, a new Falcidian account is to be undertaken so that taking together the legacies left away from both himself and the *pupillus,* he still has a quarter of the estate. He may be the heir of the *pupillus,* but for the purposes of the *lex Falcidia,* the position is as though he were heir of the father. The legacies bequeathed away from himself beyond three quarters will not be augmented other than as they are augmented when a person, instituted heir in part and substituted to his co-heir, pay legacies, subject to Falcidian reckoning, while his co-heir still deliberates on acceptance or not, and then, by virtue of the substitution, he acquire also the other part of the inheritance.

88 AFRICANUS, *Questions, book 5:* A man with four hundred made legacies of three hundred; he then devised to you land worth one hundred gold pieces subject to the condition: "if the *lex Falcidia* has no application to [my] will." Question: What is the legal position? I replied that this is an impossible question, styled "a deception" by dialecticians. For whatever we assert to be true will be found to be false. Here is the proof: lf we say that your legacy is valid, the *lex Falcidia* operates, and so, the condition failing, the legacy will not be due. Again, if the legacy be not valid because of the failure of the condition, there will be no place for the *lex Falcidia.* Furthermore, if the *lex* should not obtain, the condition will be realized, and the legacy will be due to you. Since, however, it would appear to have been the testator's intention that the legacies of others should not be abated by reason of that to you, our better course is to hold that the condition of your legacy is not complied with. 1. What, then, would we say if he made bequests of two hundred and the case be put that two hundred were likewise left to you under the same condition? That the condition of your legacy either is or is not met so that you get either all or nothing must be deemed unfair and contrary to the testator's intentions; yet it runs counter to common sense that a part should be due when it is of the essence .that the condition of the *whole* legacy either be met or fail. The whole matter should then be regulated by the defense of bad faith. 2. Accordingly, when someone wish to effect such a legacy, he should do it in this form: "lf I have or shall have left legacies beyond what the *lex Falcidia* permits, Jet my heir be charged to take any deduction necessary to make up his quarter from my legacy to Titius." 3. Someone with two hundred left me one hundred forthwith and you one hundred under a condition; after some time, the condition was realized but in such circumstances that from the return on what was left to you, the heir received no more than twenty-five. The account under the *lex Falcidia* with the heir is to be taken in such wise that we have to grant him twenty-five plus the return on fifty for the period of pendency, say, five. Thirty thus being due to him, there are those who think that each of us is to contribute fifteen apiece. Nothing of the sort! Although each of us receives a legacy of the same amount, it is obvious that mine is somewhat the more lucrative. Hence, we have to determine the reduction in your legacy through the heir's interim enjoyment of the income. Consistently therewith, in the case envisaged, the accounting should be set up on the footing that out of a sum divided into seven shares, I contribute four sevenths and you three, there being in my legacy a quarter more than in yours.

89 MARCIAN, *Institutes, book 7:* In a rescript, the deified Severus and Antoninus ruled that money left for the maintenance of the young is subject to the *lex Falcidia* and that in order that the money be allocated to the appropriate beads of account, the provincial governor should take it into his own charge. 1. By

rescript, the deified Severus and Antoninus gave a general ruling to Bononius Maximus that interest was payable by one who invoked the *lex Falcidia* as a delaying tactic.

90 FLORENTINUS, *lnstitutes, book 11:* An heir, charged with a *fideicommissum* that accepting a specified sum, be make over the inheritance, departs from the testator's wishes and seeks to invoke the *lex Falcidia;* even though be does not get what be should when charged to make over the estate, be will still be obliged to honor the *fideicommissum* because what the testator wished him to have meets the benefit of the *lex Falcidia.*

91 MARCIAN, *Institutes, book 13:* The quarter of the inheritance to which the heir is entitled under the *lex Falcidia* will comprise what be takes in his capacity as heir, not what be may receive by way of legacy, *fideicommissum,* or for the fulfillment of a condition. Such items have no place in his quarter. Where an inheritance is to be made over under a *fideicommissum,* there will be imputed to the heir's quarter any legacy or *fideicommissum* to him as also any privileged claim which be is given or any deduction or retention which be is directed to make. Anything which be receives from a coheir is again outside his quarter. Should be, though, be charged to make over the inheritance accepting a sum of money, this last will count in his quarter as the deified Pius ruled. Anything, though, which the heir receives from legatees for the satisfaction of conditions will not go toward the Falcidian computation. Suppose, then, that the deceased left land valued at one hundred, if the legatee gave fifty to the heir; the reckoning will be of a legacy of *one* hundred, and the fifty will lie outside the inheritance, not to be charged against the heir's quarter.

92 MACER, *Military Matters, book 2:* A soldier, having made his will, directed the making over to you of half of his estate and then, after his discharge, drew codicils requesting the transfer of the other half to Titius. In the event of his demise more than a year after his discharge, the heir will keep a quarter against both you and Titius; for the testator died at a time when his will bad lost its principal advantage; were be to die within a year of discharge, only Titius would suffer the loss of a quarter because the *.fideicommissum* was made to him at a time when the testator had lost his capacity for testation under military law.

93 PAPINIAN, *Questions, book 20:* A man was charged with a *fideicommissum* to make over the inheritance to Maevius, on receiving one hundred from Maevius and then, on his own death, to give the money to Titius. Although the hundred may constitute a quarter of the estate, the second *fideicommissum* provides occasion for the retention of a quarter. A constitution of the deified Hadrian ordains that what meets the requirements of the *lex Falcidia* is that which remains with the heir; and only the person to whom the inheritance is left is the subject of the statute. The *Falcidia* has no application to the hundred taken by reason of the testator's death. Naturally, if a testator wrote thus, "I ask you to make over the inheritance on receiving one hundred," without indicating who should give the money, the money being held back [from the inheritance] as a preferred claim, the *Trebellianum* would operate.

94 SCAEVOLA, *Digest, book 21:* A testator, having instituted his son and daughter as heirs, left certain preferred legacies to each of them, the daughter, however, getting much the smaller amount; he also made her a preferred legacy of a mortgaged house with its effects and contents, adding: "This bequest is subject to the condition that Titius, my son's freedman, pay off any debt due on the house and the house become their common property." This question was posed: Should the daughter wish to invoke the *lex Falcidia* to keep a quarter of the inheritance, would she get her quarter out of the inheritance left her from what remained after discharge of the debt? The reply was that she had indeed a legal right to make such a claim but that she could receive what was left to her, assuming that thereby she got a quarter, only on complete compliance with the wishes of the deceased.

95 SCAEVOLA, *Digest, book 21:* A husband administered his wife's affairs additional to the dowry. The wife died before the husband had rendered an account of his administration, leaving him as sole heir with a *.fideicommissum* that on his own death, he leave five sixths thereof to their son and one sixth to their grandson. The question was asked: "Does the husband have to include in the son's five sixths, proportionally with the other assets, what is found to remain with him from his administration of her affairs?" His reply was that what was due to the wife's inheritance should come into account. 1. A mother laid a *.fideicommissum* on her daughter to make over the estate to Titius, if the girl herself died while still under age; the daughter's paternal uncle became her heir at law. In accounting under the *lex Falcidia,* this uncle wishes to deduct the capital from the interest on which the girl had been providing

maintenance for a number of persons in her mother's name. The question was: If he should make such deduction, should he give security that he would himself make good the share of deceased dependents in proportion to the capital? Answer: Yes. 2. Three years having elapsed since acceptance of the inheritance, the heir seeks to set up the *lex Falcidia* against the legatees on the ground that the testator administered some guardianships, an account of which had not yet been rendered, and he himself denies that as much can be realized from debts due in that context as carne into the security [given by the tutor]. Question: The legatees seeking the accounts of the deceased, should the heir be entitled to include an account of all documents, both those concerning the inheritance and those relating to the guardianships, since this might give him the opportunity to adduce what he please, thereby putting the legatees at a disadvantage? Answer: It will be the duty of the judge to ascertain how much is in the estate from the proofs submitted.

96 SCAEVOLA, *Questions Publicly Discussed, sole book:* While still a civilian, a soldier made a will, adding codicils after entering the army; his will comes within the *lex Falcidia,* not so the codicils.

3

ALLEGATION THAT A LEGACY EXCEEDS THE LIMITS OF THE *LEX FALCIDIA*

1 ULPIAN, *Edict, book 79:* If someone receive a legacy beyond the legal maximum and there be valid ground for doubt whether or not the *lex Falcidia* should come into account, the praetor affords the heir the relief that the legatee is to give him an undertaking that should it become apparent that he has taken by way of legacy more than is permitted to him by the *lex Falcidia,* he will give him the money value of the excess and that in the matter, there will be no bad faith on his part. 1. It matters not whether the issue arise on the primary will, the pupillary substitution, or both; the *lex Falcidia* comes in once and for all, even though the will be twofold, contribution being made both by legacies left away from the *pupillus* and by those left away from the substitute. 2. Let us suppose that a tutor was not subjected to a stipulation in the name of the ward himself; the action on guardianship will still lie to the heir of the *pupillus.* But, as Papinian says, the undertaking can become operative for both the heir and his substitute; for the heir himself, if the *lex Falcidia* become operative, while he still be alive. He says the same of the action on guardianship. 3. Marcellus says: A man, owning four hundred, instituted as heir his underage son and substituted to him Titius and Seius; the testator bequeathed nothing away from his heir but two hundred away from Titius; should two hundred be paid, it is said, or one hundred and fifty? For in no way can three hundred be taken from him. My view was that the truth is that he is obliged to put up no more from his share than the hundred lacking from that of Seius. From this, it emerges that the stipulation becomes enforceable not against one alone, but that it is applicable against all heirs naturally on an investing action of the issue. 4. Both the extent of legacies and the amount of debts bring the *lex Falcidia* into play. Of course, if the debts be obvious or ascertained, the computation is simple: Should there still, on the other hand, be uncertainty-a condition, for instance, is pending or a creditor has joined issue but the case is yet not decided there may be hesitancy by reason of such uncertainty over what is due to the legatees. 5. Nowadays, though, *.fideicommissa* are treated as an analogue. 6. Where the *lex Falcidia* is said to be operative, there is normally the appointment of an arbitrator for investigating the size of the estate, even though one person claim a modest amount in *.fideicommissa;* such computation is not to embarrass the other beneficiaries who are not directed to the examination. Still the heir should give notice to the other recipients of *.fideicommissa* that they should come before the arbitrator and there plead their causes; creditors also, especially, that they may establish the debts due to them. The account will be taken in such form in respect of both legacies and *.fideicommissa* that if the heir, seeking to safeguard himself by such undertaking, o:ffer payment in full of what was left, he is to have audience. 7. Where some legacies are left forthwith, others subject to a condition, the stipulation is to be introduced on account of the conditional legacies, provided that the others are discharged *instanter* in full. To sum up, Julian writes that should there be legacies, both unconditional and conditional, to guard against the *lex Falcidia's* becoming operative should the condition be realized, the unqualified legatees should be granted an action only on their undertaking to the heir in respect of "whatever they may take in excess of the limits of the *lex Falcidia."* 8. The pen of the same Julian informs us that one to whom a quarter is left

conditionally, three quarters without reservation, should give the undertaking "to restore anything which he receives beyond the limits of the *lex Falcidia."* 9. There is, then, scope for this stipulation; for even though overpayment may be reclaimed, it could happen that the payee is no longer solvent so that what was given is thereby no more. 10. It may be said that the stipulation pertains also to gifts made with a view to death. 11. The words of this stipulation "what you shall take by way of legacy beyond the limits of the *lex Falcidia"* embrace not only the person taking more than the statute allows him, so that he shall return, though also keeping, part but also one who may have to restore *in toto.* It follows that one should know that the *lex Falcidia* reclaims sometimes part, sometimes all, of the bequest. For when a Falcidian account of debts is launched, it often happens that, through the coming to light of some debt or condition, by reason of the liabilities the whole legacy is swallowed up. Again, the realization of the condition of grants of liberty may make a legacy wholly unpayable, since the valuation of legacies is consequent upon the account of the manumissions and the deduction of the value of t e slaves. 12. There are, nonetheless, wills to which the *lex Falcidia* has no application; still it is to be noted that although the heir may not retain his quarter, the inheritance is such that it can bear the legacies, even with the deduction of debts and of the value of slaves freed in the will, whether directly or by *fideicommissum.* 13. Security is also to be given to a legatee by one from whom a *fideicommissum* is left away. 14. It may sometimes be that account is to be taken of not the *lex Falcidia* but some other statute; suppose that a patron be instituted sole heir and five twelfths be bequeathed unconditionally and a further amount conditionally, beyond the patron's entitlement; in such a case, we look not to the *lex Falcidia* but to that on the rights of patrons. 15. Should a thing bequeathed perish in the legatee's hands, the view to be adopted is that the promisor will be given a defense,

2 PAUL, *Edict, book 75:* to the value of his undertaking,

3 ULPIAN, *Edict, book 79:* unless anything occurred through his own bad faith; in such a case, he would be caught by the "bad faith" clause comprised in the stipulation under consideration and be open to a replication. 1. This undertaking, which is found in respect of the *lex Falcidia,* applies also to *fideicommissa.* 2. Money is bequeathed for a succession of days; once it is clear that the *lex Falcidia* applies, Pedius says that the case is one not for an undertaking, but fora computation to estimate the total of what is so bequeathed, and the legacy will be held to be what the valuation reveals so that, in its light, an account may be taken at once under the *lex Falcidia* of all the several legacies. 3. Whenever we have the situation that the *lex Falcidia* will obviously be operative, even in advance, a computation thereof is made. For where a condition is pending, we await its realization; but once the day arrives, taking an account and valuation under the *lex Falcidia* also of the intervening period, we deliberate on the statute and say that the stipulation becomes enforceable. 4. Although all legatees and beneficiaries of a *fideicommissum* are under obligation to give the stipulation, the deified brothers held in a rescript that in some cases, it may be dispensed with, for example, where modest maintenance is left. This was their rescript to Pompeia Faustina: "The case which you put forward of the ten gold pieces per annum left to you by your patroness, Pompeia Crispiana, is not in the same category as the maintenance and clothing allowance left to her freedmen; we think, therefore, that these latter should be spared the burden of an undertaking." 5. Know also that the undertaking is not exacted from the imperial treasury, although the treasury can be sued as though it had given one. But in a rescript, the deified Pius ruled that all others, whatever their rank and dignity, will be compelled to give the undertaking, even though they have already received their legacies; this rescript reveals to us that the emperor wished the stipulation to be given, even after the legacies have been discharged. 6. A legatee gives security for the return of the legacy he has received to the heir who is already involved in or anticipates a dispute over the inheritance; the inheritance is evicted-but through the negligence or even bad faith of the heir who paid the legacy. In such a case, our rule is that the stipulation is not enforceable by reason of the criterion of the "judgment of a good man" which is inherent in such stipulation. 7. Again, if the person who paid the legacy should find himself evicted on some other ground, say that be is found to be instituted in a later will in which no legacy is made to that legatee, we bold the stipulation enforceable on the criterion mentioned. 8. Ali in all, wherever the inheritance, a sum, or benefit is made over by one who bas covered

himself by extracting this undertaking, it is to be said that the stipulation becomes enforceable, provided that there bas been no fault on the part of the stipulator. 9. It bas been asked whether the stipulation can become repeatedly enforceable; it can if the inheritance be taken away gradually. 10. A legacy was paid over before this stipulation was taken; can a *condictio* be brought for the legacy to enforce the giving of the undertaking? The question is prompted by the fact that anything left out or paid up by mistake can be recovered by *condictio;* in our case, more would appear to be given by reason of the absence of the stipulation. Pomponius says that the *condictio* may be invoked for the purpose of exacting security, and I think that policy considerations dictate endorsement of his opinion.

4 PAUL, *Edict, book 75:* There is scope for this form of security if there appear good ground for it. It would be unfair that it be taken in all cases, no dispute having yet arisen; for threats may be illusory. The praetor, accordingly, reserves the matter for his own consideration. 1. Suppose that two persons separately claim the whole estate under a will; they have, for instance, the same name, actions will lie to creditors and legatees against both the possessor of the estate and his adversary. 2. This undertaking is particularly necessary when a man pays his own money or delivers his property. But if be pays money or delivers something from the inheritance, there are those who think that security is unnecessary since, if be should lose his title to the inheritance, be cannot be liable on that score since be neither possessed nor ceased to possess in bad faith. This bolds good if be pays before any dispute arises; in other circumstances, be will be liable for fault. 3. Where the claimants' name is the issue between them, need there be security given to the one who delivers the hereditary property, since one of them, anyhow, will be discharged of liability? What, say, if be pay a debt of the inheritance? Where a claimant pays his own money or gives his own thing, however, be will have nothing from which be can make a retention, and thus the undertaking will be needed.

5 MARCELLUS, *Digest, book 21:* Let us consider this point: Should the stipulation "whereby you received more than the *lex Falcidia* allows" be available against one charged with a *fideicommissum* to transfer his legacy to someone else; it may suffice to say that no *fideicommissum* is laid upon him; the fideicommissary, of course, will also give an undertaking to the legatee, unless the latter, to avoid circuity of process, prefer that be do so to the heir. Still the legatee is also to be secured, if (as is usually fair) he be allowed to make a proportional retention from the *fideicommissum,* even though sufficient of the legacy will remain with him to allow the meeting of the *fideicommissum.*

6 CALLISTRATUS, *Judicial Examinations, book 4:* Since a legatee or fideicommissary may have difficulty in providing security and, on that account, be excluded from claiming his testamentary liberality, should be not be relieved of the burden of an undertaking? This view would derive support from the following words of a rescript of the deified Commodus: "The official charged with the case will, if be find that security is being demanded of you to prevent your claim for the *fideicommissum,* ensure that you are relieved of the burden."

7 PAUL, *Lex Julia et Papia, book 7:* The deified Pius ruled that an undertaking in respect of the shares of those who left this life should not be required of one directed to make a preferred claim for yearly legacies to be distributed, unless his instruction so to give security were express.

8 MAECIAN, *Fideicommissa, book 10:* An heir asserts that part, or indeed all, of the inheritance is the object of an information to the imperial treasury; he also states the existence of a *fideicommissum.* The decision is that performance be made to a claimant giving an undertaking that "restitution will be made, if there be eviction from the inheritance."

9 MAECIAN, *Fideicommissa, book 12:* Let us suppose that the dispute be not one aver title but one on usufruct (it can well be that Titius is given ownership of a thing while a usufruct in it is given to someone else); in such a case, security for its return should be given, not to the heir but to Titius. Titius is the person to be secured, even if, in the interim, the usufruct be not bequeathed away from the heir; suppose that ownership were left to him, subject to a devised usufruct, the latter going to Seius. In such a case, what would be the point of security to the heir, who would receive no benefit, were the usufruct to fall in? Put, though, the case that, a usufruct being left to Seius, the full title be

left to Titius in the terms that Seius ceasing to have a right, the property shall be his; in such a case, security to the heir would be requisite from the fructuary but also from the latter to Titius; for there is no guarantee that the usufruct lapsing, ownership would revert to Titius.

b. JI.2.22

(Moyle trans.)

TITLE XXII

OF THE LEX FALCIDIA

We have finally to consider the lex Falcidia, the most recent enactment limiting the amount which can be given in legacies. The statute of the Twelve Tables had conferred complete liberty of bequest on testators, by which they were enabled to give away their whole patrimony in legacies, that statute having enacted: 'let a man's testamentary disposition of his property be regarded as valid.' This complete liberty of bequest, however, it was thought proper to limit in the interest of testators themselves, for intestacy was becoming common through the refusal of instituted heirs to accept inheritances from which they received little or no advantage at all. The lex Furia and the lex Voconia were enactments designed to remedy the evil, but as both were found inadequate to the purpose, the lex Falcidia was finally passed, providing that no testator should be allowed to dispose of more than three-quarters of his property in legacies, or in other words, that whether there was a single heir instituted, or two or more, he or they should always be entitled to at least a quarter of the inheritance. **1**. If two heirs, say Titius and Seius, are instituted, and Titius's share of the inheritance is either wholly exhausted in legacies specifically charged thereon, or burdened beyond the limit fixed by the statute, while no legacies at all are charged on Seius, or at any rate legacies which exhaust it only to the extent of one half or less, the question arose whether, as Seius has at least a quarter of the whole inheritance, Titius was or was not entitled to retain anything out of the legacies which had been charged upon him: and it was settled that he could keep an entire fourth of his share of the inheritance; for the calculation of the lex Falcidia is to be applied separately to the share of each of several heirs in the inheritance. **2**. The amount of the property upon which the calculation is brought to bear is its amount at the moment of the testator's decease. Thus, to illustrate by an example, a testator who is worth a hundred *aurei* at his decease gives the whole hundred away in legacies: here, if before the heir accepts, the inheritance is so much augmented through slaves who belong to it, or by births of children from such of them as are females, or by the young of cattle, that, even after paying away a hundred *aurei* in legacies, the heir will still have a clear fourth of the inheritance, the legatee's position is in no way improved, but a quarter of the sum given in legacies may still be deducted for himself by the heir. Conversely, if only seventy-five *aurei* are given in legacies, and before acceptance the inheritance is so much diminished in value, say by fire, shipwreck, or death of slaves, that no more or even less than seventy-five *aurei* are left, the legatees can claim payment of their legacies in full. In this latter case, however, the heir is not prejudiced, for he is quite free to refuse the inheritance: consequently, the legatees must come to terms with him, and content themselves with a portion of their legacies, lest they lose all through no one's taking under the will. **3**. When the calculation of the lex Falcidia is made, the testator's debts and funeral expenses are first deducted, and the value of slaves whom he has manumitted in the will or directed to be manumitted is not reckoned as part of the inheritance; the residue is then divided so as to leave the heirs a clear fourth, the other three quarters being distributed among the legatees in proportion to the amount of the legacies given them respectively in the will. Thus, if we suppose four hundred *aurei* to have been given in legacies, and the value of the inheritance, out of which they are to be paid, to be exactly that sum, each legatee must have his legacy abated by one-fourth; if three hundred and fifty have been given in legacies, each legacy will be diminished by one-eighth; if five hundred, first a fifth, and then a fourth, must be deducted: for when the amount given in legacies actually exceeds the sum of the inheritance, there must be struck off first the excess, and then the share which the heir is entitled to retain.

B. CROOK, FAMILY AND SUCCESSION

J. A. Crook, *Law and Life of Rome* (London: Thames and Hudson, 1967) ch. 4 (pp. 98–132)†
[footnotes omitted, but the footnote numbers have been retained to show where the references are]

In modern English the word 'family', when we are not just using it as a general term for all our relatives (ascendants on mother's or father's side, descendants and collaterals), means a household—a man and wife and their unmarried children, a single conjugal group. Thus 'nuclear family' is only one of several types of family organization, both in the past and still today, classified by anthropologists;[1] the most familiar alternative is the 'joint' or 'extended' family of several conjugal groups under a common head. During our period the normal Roman family seems to have been a 'nuclear family' like our own, but to this bald assertion certain qualifications need to be made. First, the Roman word *familia*, besides meaning one's relatives and also a household, had another very common significance, namely a body of slaves. It was so used quite outside the domestic context; the slave personnel of a tax-farming company, for example, was *familia publicanorum.* Nevertheless it did also (and no doubt originally) mean the slaves of the household, all your servants as a group; the Roman household had its own individual cult of tutelary spirits, and for cult purposes it included the slaves as well as the free members. In the second place, when the Romans talked about *familia* in connexion with descent (a noble family, a wealthy family, the family of the Marcelli, and so on) they usually meant the line of people with the same name. Names, and with them 'family', were inherited like our surnames, through males, and this 'agnatic' principle of descent (as opposed to 'cognatic', in which descent is counted by blood from both father's and mother's side) had certain important consequences in property and succession which will be seen presently. Thirdly—and this is the most important qualification—one feature of the Roman family, is anomalous, in relation to what we think of as the standard 'nuclear family'; the authority of the head of family over his descendants lasted not merely until they grew up and married and formed their own conjugal groups but (unless deliberately broken by certain legal procedures) until the day he died. This very odd lifelong familial authority is usually supposed to be a survival from a time when the Romans lived in 'extended' families.[2] However that may be, its continued existence in an age when people certainly did not live in 'extended' families was responsible for some curious features of Roman family law.

With the one further proviso that Roman law did not interfere with the internal structure of the peregrine family, and that what follows is about the families of Roman citizens, we can examine Roman family law more closely.

The family begins with marriage,[3] to understand which it is important (but not easy) for the reader to make a clean break with all the Christian notions of marriage. To the Romans marriage was an honourable estate, for the purpose of concordant life together and the begetting of children;[4] many a tomb inscription testifies to a *bene concordans matrimonium.* But it was not sacramental, not 'holy' matrimony; it was not thought to be maintained or sanctioned by anything beyond the will of those who were parties to it—or their heads of families. The opposite of *iustae nuptiae* was not 'living in sin'.

The status requirement of *iustae nuptiae*, *conubium*, has been explained in Chapter II. There were certain other requirements. First, there existed certain statutory bars to marriage between people who would not otherwise have lacked *conubium.* (*a*) By an Augustan statute, senators and their sons could not have *iustae nuptiae* with freedwomen or other women of undignified condition; Paulus quotes a section of the statute,[5] mentioning, specifically freedwomen and actresses (which included prostitutes) and showing that the law applied vice versa to women of senatorial rank and men of low condition. (*b*) Ordinary soldiers could not, until the time of Septimius Severus, marry during their service and even children of marriages contracted before entry, if born during service, did not count as born of *iustae nuptiae*; the prefect of Egypt is found affirming this principle in AD 115 and 117:[6]

> 'Martialis could not have a legitimate son during his military service; though he quite legitimately made him his heir. ... It is not possible for a soldier to marry .'

(*c*) Officials in the provinces could not marry women of their province, nor (by a constitution of Marcus and Commodus) could guardians marry their wards. Secondly, there were, as in all societies, certain 'taboo' or 'prohibited' degrees—ascendants and descendants, and in our period anything nearer than first cousins. Marriage of an uncle with his brother's daughter was allowed on the precedent of Claudius and Agrippina.[7] Thirdly, there was a minimum marriageable age, based on the general notion of puberty but fixed at twelve for females and fourteen for males (although in the case of males some held that it must depend on physical inspection). If either of the parties was younger the union simply counted as an engagement until the legal age was reached;[8] it was in no way an offence to enter upon such a union. The striking thing is the extremely low minimum age of marriage for girls. It has been shown by statistical study of inscriptions that females in Roman society did in fact marry extremely early; the latest survey gives a modal marriage—age for women of twelve to fifteen, and argues forcibly the unlikelihood that the age of puberty of Roman girls was as low as twelve.[9] This is an important set of facts for the understanding of Roman society. It made the likelihood of early Widowhood great, and second marriages of women common (Antonia the wife of Drusus was regarded as exceptional in remaining a widow);[10] and whether or not it was possible in law for a father to force his daughter to marry, little girls of twelve or less cannot have had much practical freedom of choice.[11]

Consummation was not a necessary requirement of a valid marriage.[12] What is more, although marriage was normally begun to the accompaniment of many forms and ceremonies, none of these was of the essence. Marriage was a matter of intention; if you lived together 'as' man and wife, man and wife you were. What, then, about more than one? The Romans were monogamous, and Gaius says:[13]

'The same woman cannot be married to two men, nor the same man have two wives.'

But bigamy was not an offence; the situation is similar to 'marriage below the legal age'. The law simply assumed that people could not have the necessary intention to live as man and wife with more than one partner, so only one would count as a *iustum matrimonium.* Cicero records the problem raised by a man who left his wife in Spain and married another in Rome; it turned, in the Republic, on whether there was an automatic divorce even though nothing had been said, and, if there was not, the second 'wife' was just a concubine.[14] Gellius says that *paelex* was the ancient name (implying disesteem) of a woman who cohabited with a man who had a wife *in manu.*[15] Under the Augustan marriage legislation, though bigamy as such was still not an offence, a married woman who cohabited with someone other than her husband would be committing the grave criminal offence of adultery (and so would the man who cohabited with her) and a man who had non-marital sexual relations with an unmarried woman of high class would be committing criminal fornication, *stuprum.*

If you did not intend (or the rules did not allow you) to live together as man and wife you could live together as something else. Concubinage was regular and accepted in the life of Rome, (and was in no sense thought sinful. It: did not carry the respect attendant upon marriage, but this was because one of the partners was usually socially inferior; as Ulpian said, 'the difference is only in dignity'.[16] Emperors sometimes had concubines. Vespasian, after his wife's death, lived faithfully with a freed-woman, but never counted her as a wife;[17] and Marcus Aurelius, when his wife died, refused to marry the woman (almost certainly freeborn) with whom he subsequently lived, 'so as not to introduce a stepmother over all his children'.[18] We hear of, persons who, having lived in concubinage, subsequently enter into *iustae nuptiae*,[19] and there is plenty in the *Digest* about legacy to concubines. A large body of evidence is available on this institution from tombstones, and it has been the object of more than one study.[20] One striking feature is the predominance of concubinage between women of high status and men of a humbler sort. Perhaps unhappy first marital experience and early widowhood are relevant here. To marry a man of low class for whom she had a true affection might be impossible by the rules, or just socially declassing, for a woman of high family; but the alternative was there. It has often been held that the frequency of concubinage was forced upon Rome by Augustus' legislation making it impossible for the senatorial order to contract a full marriage with *humiliores.* But numerous cases have been shown of concubinage between couples whom the Augustan rules would not have debarred from full marriage.[21] There are certainly difficult problems of source-criticism in considering how far the status was legally regulated. Thus, the 'Opinions of Paulus' give a rule that a man cannot have a wife and a concubine

simultaneously,[22] but this must be post-classical. Not only do we hear of a wife making her husband promise on pain of a money penalty that he would not associate with a concubine during the marriage,[23] but there are tombstones erected by men to wife and concubine in situations where it is pretty certain that the women exercised their respective functions concurrently.[24] Again, at some stage it seems to have been held that concubines, or some concubines, could be prosecuted for adultery .[25] And finally there lurks the difficult question whether only such women could be concubines who were sufficiently humble for relations with them not to constitute *stuprum.* Some legal texts suggest this, but the better view is that that lawyers were themselves uncertain.[26]

Marriage, then, was a condition of fact dependent on the intention of the parties. How did you prove that you were married? Normally there would be the evidence of all those ceremonies that are described in the books on 'Daily Life in Rome'. There would be betrothal,[27] with its family pacts and property bargainings:[28]

> 'Taking a wife, eh, Postumus ? There you are, in this generation, preparing pacts and agreements and betrothal ceremonies and getting a master-barber's haircut.'

There would be the actual marriage ceremony itself, of great elaboration. Above all there would be the evidence of dowry, to Which we shall come. But first it must be explained that in the time of the Republic there were two kinds of marriage (or rather two sets of effects of marriage), according to what the parties decided. In one (doubtless the earlier and original) form. the woman passed into the *manus*, the hand, of her husband; which is to say that she left the agnatic family of her birth entirely and became part of that of her husband just as if she had been adopted. Whatever property she took with her (for she might own property if she was already *sui iuris*, not in the power of a *paterfamilias*) belonged henceforth to her husband or his *paterfamilias.* In the second form of marriage the woman did not pass into her husband's *manus* or his agnatic family. She stayed entirely in her own (though of course she and her husband formed a new matrimonial home), 'vas not agnatically related to her husband or children, and continued to be in the power of her own *paterfamilias*, or, if none existed, remained legally independent, *sui iuris*, and in ownership of her own property. This second, non-*manus* form of marriage gradually prevailed over the former kind. We do not .know how completely it had prevailed by Cicero's day; there were certainly still *manus*-marriages, referred to casually and not as freaks.[29] But within our period it became to all intents and purposes the only form of marriage; for simplicity's sake, therefore, m all that follows marriage will mean marriage without *manus.*

It is not possible to evaluate satisfactorily in general terms the much-asserted (or implied) independence of Roman women in the late Republic. The pieces of evidence that can be adduced point in different directions, or not unequivocally in any direction, and one must beware of generalizing from the notorious political women and the antics of Roman 'night-club' society. *Manus* and non-*manus* marriage are really neutral here, for the choice in first marriages must normally have been made by the woman's family, not by herself with an eye to ultimate independence. It has been argued that non-*manus* marriage was actually unfavourable to the wife, since she would acquire no share in her husband's acquisitions during the marriage[30] so the fact that it prevailed would suggest that it was the families of the males who, on average, determined the marriage pattern. In any case, non-*manus* marriage is attested in Rome for quite early times, long before there can be any question of feminine 'emancipation'. Divorce is equally neutral; again, it must normally have been at the decision not of the man and wife hut of their families, and in upper-class circles, where divorce seems frequent, the decisions were often political ones, while in humbler circles we do not know whether it was frequent. The family limitation of the upper classes, deplored by Augustus, is likely to. have been at least as much for reasons of property and succession as because women were able to make their distaste for childbirth prevail.

The early age of marriage tells, if anything, against 'emancipation'. So, at first sight, does the Roman dowry system, in which only the woman's side made a contribution to the marriage (not until after our period do legal rules appear about 'gift in contemplation of marriage' by the bridegroom); it suggests that it was the women who had to compete for husbands. But here too there are complicating considerations.

Dowry, *dos*, was a transfer (or promise to transfer) of things having a money value from the bride's side—her family or friends—to the husband. In so far as it consisted of land or such other things as were susceptible of full ownership, the husband became owner during the marriage, though there was an Augustan rule that he could not alienate land in Italy that was dotal.[31] The scale of dowry would naturally depend on tile wealth and rank of the parties, but it was not trivial—not just a sort of wedding-present. There was no rule that it had to be the bride's 'intestate portion', *i.e.* what she could expect from her father's estate in any event, but that this was at least the socially expected order of magnitude is suggested by the rules of *collatio dotis*,[32] whereby a woman claiming a share of a paternal inheritance might have to bring her dowry into account. A clear figure is given by Apuleius; his bride, the widow Pudentilla, had a fortune of four million sesterces, and he says he was content with a very modest dowry of three hundred thousand (and only promised at that).[33] A good deal of negotiation prior to a marriage would be about dowry agreements, *pacta dotalia.*[34] Almost any sort of agreements could be made, depending on the relative bargaining position of the parties. Some might secure that the wife would maintain herself out of her own, or her father's, property;[35] others might involve acceptance of the dotal property at a cash valuation—a weak position for the husband.[36] It is these variations that make it difficult to deduce an overall dominance by the male side. Most important of the dotal arrangements were those settling what was to happen to the dowry on dissolution of the marriage;[37] this was the crucial question. In default of any specific arrangement there was a rule of law, roughly as follows: if the wife died her family would recover what they had given as dowry, except for a fraction for children, but the husband could keep any dowry that came from outside the wife's family; if the marriage came to an end for any other reason, including divorce, everything went back, except again a fraction for children and certain other fractions, mostly penalties for misconduct by the wife.[38] Return of dowry was, of course, vitally important when women married young and were liable to be widowed young, to secure them a second marriage.

If the Romans were matter-of-fact about marriage, they were equally so about divorce. It could take place at any time, either by mutual consent or by the unilateral decision of either party (or their *paterfamilias*). In the Republican age marriages were often an aspect of politics amongst the upper class; marriages cemented political alliances and divorces uncemented them. Valerius Maximus quotes cases of divorce for causes so petty that one suspects that politics may have lain behind them,[39] and although here is a tendency to believe that the rules about return of dowry may have imposed some curb of frivolous divorce, readers of Cicero's correspondence who remember his long financial embarrassments over returning Terentia's dowry and getting back Tullia's will be conscious that he proceeded in his courses undeterred by them. It may be that the frequency of upper-class divorce in the late Republic testifies to the political rather than the moral weakness of Roman society, but Augustus at any rate thought that their family life left something to be desired. How much social effect the *leges Iuliae de maritandis ordinibus* and *de adulteriis* and the *lex Papia Poppaea* had is hard to decide, but hey certainly complicated the law of family and inheritance.[40] What concerns us here is that Augustus for the first time made adultery by a woman, and condonation of it by her husband, a crime; he must divorce her, and he or someone else must prosecute her. And extra-marital intercourse with any free woman of high status, 'living honourably', also became a crime. It consequently became vital to be able to prove that you were *not* married—for a man to show that he was not condoning adultery, and for a woman, when she married, to show that she was not married already. Hence a new formal procedure for divorce:[41]

> 'No divorce is valid unless made in the presence of seven adult Roman citizens. …'

One gets the impression that marriages were 'steadier' amongst he upper class during the Principate. Augustus' settling of the rights of retention of dowry may have helped, but it was perhaps more due to the dying out of political faction. Antoninus Pius, for example, prohibited fathers from breaking up a *bene concordans matrimonium.*[42]

Of legal relations between husband and wife one other rule needs mention: gifts between them were forbidden. A long title in the *Digest* deals with the boring details of this subject;[43] the only one worth mentioning is that a wife was allowed to bestow m her husband such property as would enable him to rise in rank where a fixed *census* was required.[44] The purpose of the prohibition was for the sake of family property, to prevent either party from parting with it to the other.

Children born of *iustae nuptiae* had the status of their fathers and were subject to *patria potestas.* This *potestas*-relationship expresses completely the agnatic principle of the Roman family; every member, male and female, was in the *potestas* of the oldest surviving male ascendant, the *paterfamilias* (*i.e.* if your grandfather was alive you and your father were in his *potestas*). Wives not *in manu*, it must be remembered, were not part of their husband's agnatic family; your wife was ill the *potestas* of *her* oldest male ascendant. We have seen that a man might well have children born otherwise than of *iustae nuptiae*, 'natural' or illegitimate sons and daughters. No disgrace attached to them, though it will be recalled that they might welt be slaves, and if he was a freedman with children born of a slave mother during his slavery they would still be slaves until he could obtain their manumission.[45] Quite a lot is said about natural children in the *Digest.*[46] Twice, for example, we are told that if a man's whole property is sold up or pledged this does not include Jus concubine and her children (all obviously slaves);[47] and one case is discussed of a man instituting as heirs his legitimate and his natural son.[48] Surprisingly, we never hear of quarrels over great estates between bastards and legitimate sons. Bastards, not being *in potestate*, would have a very low claim on a man's succession unless he made a will and instituted them as heirs. One imagines that if a man had left his property to a bastard to the exclusion of legitimate children they would have had an 'action of undutiful will', but no such case is discussed, and the Romans, whose society was non-feudal and who had no primogeniture, tended to institute all their children.

Patria potestas was lifelong. Those subject to it could have no property of their own, and their lives were almost wholly controlled by their *paterfamilias.* His *potestas* included the well known 'power of life and death', which was undoubtedly a reality in Republican times. His household jurisdiction, with a family council, dealt with offences of its members (such as sexual offences) that threatened the reputation of the family, and he could inflict chastisements and even death. This extreme is rarely heard of in the period of the Principate—only as a concession by the government to avoid odium (which had happened also in the Republic—you handed over criminous women to their families for punishment); as in the case of Aulus Plautius' domestic trial of his wife recorded by Tacitus:[49]

> 'She was accused of foreign superstition, and her husband was allowed to try her; and so in the old style, before a family council, he held trial over his wife's life and reputation—and declared her not guilty.'

In one sense, though not what the Romans meant by *ius vitae et necis*, a 'power of life and death' was regularly exercised: it was the right of the *paterfamilias* to decide whether newborn children should be reared or exposed (their mother had no voice in the matter), and exposure was common and not a crime. The *paterfamilias* could force his married children to divorce,[50] and they could not marry in the first place without his consent. Whether he could force them to marry particular persons is a slightly more complex question. He could not do so in the case of sons; not only is *Digest* 23. 2. 21 formal on the point,[51] but it is implied by Gellius, discussing the moral (*n.b.* not the legal) duty of a son:[52]

> '... he ought to obey; but if his father orders him to take a shameful or criminal wife ... he should not obey, for if turpitude enters into the question these things are no longer "indifferent".'

Of course, fathers might be jolly angry and make things difficult:[53]

> 'Father blazes with wrath when his son, mad on some tart, refuses to wed a wife with a huge dowry;'

All the more might they make things difficult for daughters. The law is less clear about this; *Digest* 23. 1. 11–12 says a daughter's consent is necessary for betrothal, but adds that anything short of positive resistance is taken for consent, and consent can only be refused if the proposed bridegroom is morally unfit. Little girls of twelve can have had small practical chance to refuse; but it must be remembered that your children *in potestate* might not be little girls or boys.

This lifelong power over children, however extraordinary it may seem (and did to the Romans),[54] was a reality, and we must not water it down. It did not apply in the sphere of public affairs:[55]

> 'A *filius familias* counts as a *paterfamilias* in public affairs, *e.g.* for holding magistracies or guardianships.'

We hear in the *Digest* of sons *in potestate* as consuls and provincial governors, as senators, and as local magistrates;[56] and a famous disquisition of Gellius arose out of a courtesy visit paid by a provincial governor and his father to a private house and the question who should sit on the one chair provided — which led to the telling of a story about how Quintus Fabius Maximus the proconsul dismounted from his horse on the orders of his son who was consul.[57] But in private life it mattered nothing that you might be forty years old or married or consul of the Roman people; if you were *in potestate* you owned nothing, whatever you acquired accrued automatically to your *paterfamilias*, you could make no gifts,[58] and if you borrowed money to give a dowry to your daughter it was a charge on your *paterfamilias.*[59]

Loans of money to sons *in potestate* produced various frauds, as can be imagined, and so in Vespasian's principate a *senatusconsultum Macedonianum* made it impossible for a lender to sue on most loans so made—and therefore unlikely that anyone would make them; and Ulpian in the *Digest* title on the rule expressly says:[60]

'even if the son is consul, or has any other position of standing, the *senatusconsultum* applies.'

One might well wonder how such a society can possibly have worked. How did the *.filius familias* with a wife and family and separate conjugal home and so on run his life and his household, if he could own nothing? An answer might be sought in two directions, but it is an irritating fact that we cannot back it with positive evidenced. First once might look at 'emancipation' *emancipatio*, which, as will be seen below, took you out of *potestas* Were adult sons, then, normally emancipated? On the whole the evidence suggests that this was not so in the Republican age—that emancipation was usually a penalty for misbehaviour;[61] and that the same was true in the rest of our period is suggested by: letter of Pliny in which he tells how his *bête noire* Regulus emancipated his son in order that the son might take an inheritance from his mother. This was clearly a special case, the mother having imposed it as a condition of making her son her heir, since otherwise the property would simply accrue to Regulus.[62]

The other institution to look at, with greater hope, is *peculium* The son *in potestate*, like the slave, could have a fund which though ultimately belonging to the head of the family, was it practice his to manage, and on the basis of which he could con tract. As an economic device the slave's *peculium* was of very great importance; we hear much less of the *peculium* of son and daughters, the rules governing which were the same, sc that it is not discussed separately in the *Digest.* It is, however overwhelmingly probable that married sons living independently had such a fund; but the limitations must be borne in mind it belonged to the *paterfamilias*, there was nothing to stop him withdrawing it, and it was part of his estate when he died. It seems, once again, to have been Augustan legislation that made a substantial modification to this position, by inventing new extra *peculium*, *peculium castrense*, the 'military fund'.[63] Over this fund, which consisted of what he acquired by or for the purpose of military service, the son *in potestate* had a right much nearer to ownership; above all, he could leave it by will (which became one of the facts of Roman law which 'everybody knew').[64]

If he did not do so it reverted to his *paterfamilias* as ordinary *peculium.* He could also alienate it at any time, and his *paterfamilias* could not touch it. It was, however, strictly limited to what was acquired by or in connection with military service. And this is curious; one might have expected this institution to be for the benefit of the sons of the upper classes; but the big salaries were for governorships and procuratorships, whereas, it is likely that military service meant here what it meant for the military will—that is, up to the junior officers, tribunes and prefects, but not beyond. Not until after our period did sons get control over official salaries in general. One must conclude that *castrense peculium* was invented as a privilege to encourage volunteer recruitment into Augustus' new professional army.

The *potestas*-relationship (or agnatic kinship) could be created otherwise than by birth. First, a man could be given *potestas* over his children by government grant. Gaius tells us that a peregrine who acquired citizenship for himself and his children by petition did not automatically get *potestas* over them, but only if it was specifically part of the grant.[65] He says that Hadrian laid down some rules about this, but we can see the principle working in a petition from Pliny to Trajan:[66]

> 'Please will you give citizenship to Chrysippus the son of Mithridates and to his wife Stratonice the daughter of Epigonus and to his children Epigonus and Mithridates, so that they may be in the *potestas* of their father.'

We must confine this to cases of petition. It cannot apply to the great block grants of citizenship to communities, to auxiliary soldiers and so on. Their grants never mention a specific privilege of *potestas* over their children, but it is inconceivable that they can all have been left without it.[66a]

An immensely more important case was adoption. A well-known feature of the social history of Rome is the infertility of the governing class, its failure to rear enough children to maintain its numbers. There were many factors involved: disease and high death-rate, the desire of society women to avoid childbearing, the danger of splitting up estates, and so on; but the point to observe here is that the characteristic remedy for a family in danger of dying out was adoption, and that that was the primary purpose of the institution. It had nothing to do with the welfare of children, and those adopted were often adults. Anyone with a spare son was in a strong position to link his family with some other noble house by giving him in adoption. With the forms we need not be concerned; they are described by Gaius and Gellius.[67] There were, however, really two institutions of very different origin: 'adrogation' of a person *sui iuris*, which always required public sanction, since such a person was in principle head of a family (whether he actually had one or not) which, along with its cult, would suffer extinction by being merged in yours; and 'adoption' in a technical sense, the transfer of someone *alieni iuris* from the *potestas* of his or her *paterfamilias* into yours. A man adrogated brought all his property and descendants across with him automatically; a man or woman 'adopted' came by themselves, leaving their children (if any) under their original *paterfamilias*—and of course they would own no property to bring. Since the purpose of the institution was to create *patria potestas*, women could not adrogate or 'adopt'; they could be 'adopted' but not adrogated. Another purpose or, at least, another result that could be achieved in this way, was the legitimization of natural children. If the child was a *civis Romanus* you could adrogate it, and if it was a slave you could manumit it and then adrogate it[68]—unless it was a girl, for whom, adrogation being impossible, you could do nothing. If the child was a peregrine you could do nothing either, for this whole institution was confined to *cives*; but the rules about error and Latinity (described in Chapter II) might sometimes relieve this difficulty. Ulpian seems to have thought it undesirable for people to adopt if they already had legitimate children alive or were still capable of having them,[69] but Cicero's furious fuss a bout the illegality of the adoption of his enemy Clodius[70] must not be taken too seriously, and the rules about the effect on a will of the arrival of a new son in the family by adoption[71] imply that it was perfectly possible. One thing which the law texts tell us nothing about, but which certainly happened and was accepted in high society, is adoption by will; that is how Augustus' relationship of son to Julius Caesar came about.[72] It may have counted technically not as adoption but as 'inheritance on condition of taking testator's name', but the silence of Gaius and the *Digest* is still strange. The unmarried and the childless were saddled by Augustus' laws with various penalties, and Tacitus records a fraud which had to be repressed in the time of Nero, whereby, in order to qualify for public office, they hastily carried out adoptions and then, when the offices were in the bag, equally hastily emancipated the adopted persons.[73]

Having examined the creation of *patria potestas* we must look for a moment at its dissolution. When your *paterfamilias* died, if you had no other ascendant in the male line into whose *potestas* you, could fall you became independent, *sui iuris*, irrespective of your age or sex (for example, when grandfather died, if your father was alive you would now be in his *potestas*, but if not you would be *sui iuris*). Besides this natural dissolution of *potestas* there were artificial ones. If the *paterfamilias* underwent *capitis deminutio* (either minor, like adoption, or major, like criminal conviction) the tic broke, and equally so if it was the person *in potestate* who underwent the *capitis deminutio* {by adoption, for example, or in the case of a woman passing into someone's *manus*). And secondly there was a way by which a *paterfamilias* could actually release his son or daughter into independence: 'emancipation'. Gaius describes the ancient ceremony which it involved;[74] it may in early times have helped sons to escape from cruel fathers, but in our period it mostly seems to have been a penalty-cutting your child out of the agnatic family as it were with a shilling (though not necessarily so, since you could always leave him his portion as a legacy or make over property to him on emancipation, and the fact that there was a rule that a son could not force

his father to emancipate him implies that it was sometimes desired.[75] If you performed the rigmarole correctly you could emerge as *parens manumissor* of your emancipated child, that is, in the same position as a *patronus* who, had manumitted his slave, with patronal rights against his will; the *Digest* title 37. 12 'concerning those manumitted by a parent' is illuminating about this.

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The fact that infants might often, by the death of their *paterfamilias*, be *sui iuris* threw considerable weight on the Roman institution of guardianship, *tutela.* Like adoption, this had originally nothing to do with the welfare of orphans, as is sufficiently shown by its application also to women, who had to have a guardian all their lives if they were *sui iuris.* It originated as a right of agnate relatives to keep a hold over property which, if the if the infant did not grow up and have heirs, was due to come to them—to see that the infant was not cozened into squandering it; and similarly with the woman *sui iuris*, to prevent her from disposing of family property. As early as the Twelve Tables a man making a will had the right to appoint a 'testamcntary' guardian to his children (to the exclusion, if he wished, of the agnate relatives); If he did not do this, or if the will failed, 'agnatic: guardianship. came into effect automatically. Already in the middle Republic the concept of the welfare of infants began to enter into guardianship, and a third kind, 'statutory' guardianship, arose: if no other guardian existed the authorities would appoint one.[76]

Males were released from guardianship when they reached puberty, since they were then capable of having children of their own who would legitimately exclude the agnates; there was dispute as to whether this depended on physical inspection or just meant the standard age of fourteen.[77] Women were never released (for even if married—except with *manus*—they were *sui iuris*, and their husband was not their guardian). Astonishment at this fact would be misplaced; subjection of women's legal acts to some male authority was virtually universal in antiquity.

What does need comment is that this lifelong guardianship was whittled away by legal devices, though as a formality it hung grimly on. In the Herculaneum Tablets, for example, when Calatoria Themis went bail to Petronia Iusta for appearance in court she promised 'with authorization of her guardian' (who was a freedman of her deceased husband). Pudentilla, the wealthy wife of Apuleius, bought a farm; even as a married woman she did so with her guardian's authorization, and he was brought into court to testify that she had bought it for herself and not for Apuleius.[78] And a document of AD 198 records the granting of a guardian by the prefect of Egypt:[79]

> 'Q. Aemilius Satuminus, prefect of Egypt, at the request of C. Terentius Sarapammon, granted a guardian to Maevia Dionysarion in accordance with the *lex Julia et Titia* and the *senatusconsultum*, to wit M. Iulius Alexander—this grant not being to the prejudice of any legitimate guardian'. ... 'I Maevia Dionysarion, have requested the above-named guardian, Iulius Alexander, as stated. I, Gaius Iulius Heracla, have written this on her behalf, she being illiterate.'

This is illuminating; for certain legal acts a woman must have, authorization, but if she said she had no guardian the authorities: would appoint one for the purpose, without enquiry but with a saving clause. The acts needing authorization were alienation of *res mancipi* (mainly land and slaves, as will be seen). making a will, and any contract that put the woman under an obligation. If a guardian refused she could apply to the authorities to force him to assent; if he was absent she could get a temporary guardian of her choice. (Calatoria Themis' guardian was however a witness for Petronia Iusta.) Moreover, the automatic guardianship of agnates over women was abolished by the emperor Claudius; and already under Augustus' legislation to encourage family size, three children (four for a freedwoman) released a woman altogether from the requirement of guardian's authorization. So women *sui iuris* did in practice, in our period, manage their own property and affairs; it has been pointed out that we hear a good deal about the business transactions of Cicero's wife Terentia, but never who her guardian was.

Guardianship of infant males was a different matter. It was a, necessary institution, involving administration of property as well as mere authorization, and though for agnates there might be advantages it was on the whole regarded as a great burden. Dealing With the fortunes of infants of wealthy families could be an immense task. There might be several guardians, and we hear more than once in the *Digest*[80] of division of the ward's estate. one set of guardians dealing with property in Italy

and another with that abroad. It was the business of the guardian to get in debts to the ward's estate, to buy landed property if at all possible, and to put any liquid funds out on loan at proper rates of interest.[81] He must also see that the ward received out of the fund of the estate education or training appropriate to his station in society.[82] At the end of this stewardship there must be an accounting, and the now adult ward had an action (*actio tutelae*) against his guardian if the administration had been fraudulent or negligent; it was one of the actions conviction in which resulted in 'infamy'. Guardians, like stepmothers, were proverbially wicked, and people were for ever complaining and demanding their removal.[83] They must have thought themselves, fortunate when they secured a clear pact not to sue, like that of 14 BC recorded on a papyrus:[84]

> '16th year of Caesar, month Tybi, ?6th day. To Protarchus, from Lucius Pomponius Rufus, son of Lucius, tribe Pollia, and Marcus Cottius Atticus. Since the father of Lucius Pomponius, Lucius Pomponius, in his Roman will made on his death bed left Marcus Cottius Atticus and also Canuleius as guardians to Lucius Pomponius his son, above named; and since subsequently Canuleius resigned his guardianship, according to the sealed document, leaving Marcus Cottius Atticus as guardian of Lucius: now Lucius Pomponius agrees that neither he nor anyone else on his behalf will sue Marcus Cottius Atticus or Canuleius, ... since Lucius Pomponius has received back from Marcus Cottius Atticus everything that his father had in his estate.'

It was a part of one's *officium* to one's friends to undertake guardianships, but the principles of mutual duty broke down somewhat in this sphere, exceptionally hard as it was on the *tutor dativus*, appointed compulsorily by the authorities, and we find growing up in our period an ever longer list of *excusationes*, circumstances that would let you of.[85]

Having called *tutela* 'guardianship' we are in difficulty for a word to translate another institution, *curatio* or *cura*;, 'caretakership' is not beautiful, but it will have to do. Caretakership of minors, lunatics and spendthrifts must briefly occupy us; tic last two of these were ancient Roman institutions with an origin like that of *tutela*, whereas the first grew up within our period to fill in the inadequacies of *tutela.*[86] As early as the middle Republic it was realized that the ending of *tutela* over males at fourteen left youngsters at a very tender age to be in sole control of great fortunes in a wicked world—not to mention that *filii familias* were sometimes cheated into doing foolish things with their *peculium.* A *lex Laetoria* in the second century BC gave an action to anyone of either sex, below the age of twenty-five, whether *sui iuris* or not, against persons whom they alleged to have defrauded them, and an *exceptio legis Laetoriae* if they themselves were sued and wanted to allege fraud. The praetor in his edict went further still:[87]

> 'Whatever transactions are said to have been made with a person under twenty-five, according to the circumstances I will give relief.'

The praetor's relief was *restitutio in integrum*, 'restoration to the *status quo*'; the offending transaction was null and void, any consideration that had passed between the parties must be handed back, and things were as if no such bargain had ever happened. To us this seems excessive; the Romans, having ended their guardianship too early, now take minority and its protection up to too late an age (for at twenty-five a man could hold the first Roman magistracy, the quaestorship). Of course, the young could not escape the consequences of delicts and crimes in this way; and even for commercial bargains there must be some allegation that they had been cheated or imposed upon. As Paulus says:[88]

> 'Not all transactions with minors can be rescinded. They must be referred to equitable principles, otherwise people of this age will labour under great inconvenience, because no one will enter into any transaction with them and they will in a sense be deprived of *commercium.*'

The latter was seen as a very serious point. It began to be met by the minor concerned bringing in a kind of 'best friend' to give sanction to his transactions so that those who hesitated whether to deal with him would have assurance that he was acting with advice. Eventually it became regular for minors to apply to the authorities for a 'caretaker' who could thus authorize all their transactions until they reached twenty-five. Ulpian records a case in which some young men had been given a 'caretaker' but he had ceased to act; the emperor forced him to resume his function.[89]

The right to caretakership of lunatics and (remarkably) spend-thrifts vested originally in their nearest agnate relative, though later a caretaker could be appointed by the authorities.[90] The purpose was the protection of family property; the person concerned was henceforward debarred from controlling his property, alienating it, or making a will. Both cases have a good deal of interest. They comprise the only situation in which a man's relatives could get a complete right to take over his property against his will, and yet, as has been pointed out, the crucial question how to decide whether a man was a lunatic or a spendthrift (or when he ceased to be so) is never discussed in the law texts.[91] Control of extravagance, it may be added, is unknown to English law; 'it may be better so in the interests of the community at large, ... but a wife or a widow and children will not quite accept this view'.[92] At any rate, while we are accustomed to see in Rome an extreme development of the principle that a man is entitled to 'do what he will with his own', in this sphere the Roman law imposed greater limitations than the English.

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Out of the fifty books of the *Digest* eleven are occupied by the law of succession—lovingly elaborated by the lawyers; one must admit that in will-making the idiosyncrasies of humanity are at their most abundant and generate a lot of law.

It is expedient to begin with intestate succession, not only because it is by definition automatic and not subject to the oddities of individuals, but also because it was almost certainly the oldest—and originally the only—form of succession in Rome;[93] the family's inheritance had to pass down according to ancient custom and the individual could not influence the succession. Many societies do not go beyond this; they do not have will-making, or only have it for the less important part of the family's substance, the earnings or personal accoutrements of individuals and so on. Roman law of our period had will-making of everything, but if there was no will or the will was invalid the old automatic rules applied. To understand them a technical term must be introduced: those persons in a man's *potestas* or manus who became *sui iuris* by his death were his *sui heredes*. The oldest rule of civil law said that if any *sui heredes* existed they automatically became heirs (hence, indeed, the name), in equal shares irrespective of sex; if none such existed the agnate relatives, of the nearest degree only, could take the estate; if none of those existed it went to the dead man's *gens* or clan. Here is agnatic succession, in the line of *potestas* at its most rigid; emancipated children, for example, and relatives on your wife's side, even your wife herself (unless *in manu*), were excluded. The praetor, exercising *ius honorarium*, had already modified it a great deal by the beginning of our period; he allowed certain other people to apply for 'possession of the, estate on intestacy', which they could retain at first only if there were no civil law heirs in the relevant degree of succession, but later even if there were, so as to come into a share alongside them: in the first degree all *liberi* could claim (technical again: not only *sui heredes* but those who would have been *sui heredes* if they or their father had not been emancipated); if there were no *liberi* then blood-relations down to the sixth degree could claim; and if there was still nobody, at long last a widow could claim her husband's estate or he hers.

This praetorian intestate succession is where *collatio bonorum* came in; if you claimed to share with civil law heirs you had to bring into account your property acquired since emancipation (since you had had opportunities of acquisition denied to the *sui heredes*) or your dowry. Finally by legislation, though not until the second century AD, a mother came to be allowed to succeed to her children on intestacy and children to their mother.

By our period, Romans could—and probably normally did—set aside these automatic rules by making a will. With the history of how testation grew up we are not concerned; by Cicero's day Roman *patresfamilias* had wide freedom to dispose as they liked of all the family owned, limited only by the pressure of what was socially expected (which is a powerful limitation). What they could not do was what in many legal systems is normal and actually unavoidable; they could not make a will as to part of their estate and leave the rest to devolve by the rules of intestacy. This is because of the Roman concept of an heir, *heres.* Your heir or heirs were not just people to whom you left particular bits of property; the heir was 'universal successor', stepping into almost the entire legal role of the deceased, including responsibility for the family cult and for his debts as well as his assets (and debts in full, not merely as far as the assets would go). The primary function of a will was to appoint one or more heirs; it need do no

more, but if that was not done, and not done first, the will was null and void. If there was more than one heir they were not inheritors of particular things but joint 'universal successors' to everything, according to the fractions named by the testator. They might very well continue in common ownership, if they were brothers and sisters, for example; but at any time any one of them could get an action in the courts for division according to the fractions (which would mean a valuation). If the testator had given a 'prior legacy', *legatum per praeceptionem*, of some particular thing to any one of them, he would get it without counting against his share in the division. 'Prior legacy' was important,[94] because the joint universal succession insisted on by the law ran counter to the natural desire of testators to leave the house to John and the best tea-set to Mary, and so on.

There were numerous limitations on who could make a will and who could be heir under a will (or otherwise). We shall not consider them exhaustively.[95] First, as to making a will: some people were barred as a penalty for conviction in the courts; some others we have already noted –lunatics, spendthrifts, Junian Latins; infants could not make wills; and women not only had to have guardian's authorization but, until Hadrian,[96] also had to go through a complicated rigmarole of changing guardians by *coemptio*—the 'Gnomon of the Idiologos' is formal as to this:[97]

> 'It is not allowed for a Roman woman to make a will without a so-called *coemptio*; and a legacy left by a Roman woman to a female Roman infant was forfeited.'

One of Cicero's letters also reveals the late Republican lawyers in engaged in a wrangle over it;[98] Secondly, as to heirship; some people were debarred simply from being heirs, others from taking legacies also. Most important is that peregrines could neither be heirs of, nor take in any way from, a Roman citizen. Perhaps equally important (for reasons which will appear) is that 'uncertain persons', *incertae personae*, could not be made heirs or take under a will-which meant, above all, unborn generations, persons not already at least physically conceived when the will was made. In Cicero's day women could not be instituted heirs by people in the highest property class; this ceased to be true under the Principate. Corporations (cities and guilds) could not be made heirs, but they could take legacies (though not *per praeciptionem*),[99] from Nerva's time onwards. Finally, there were complicated rules, stemming from Augustus' attempt to encourage larger families amongst the upper class, imposing disabilities on the unmarried and the childless. They could take little or nothing, not even childless husbands and wives as between one another. 'Now you are a father and can be heir in a will, as a result of my activities', says the adulterer to the husband in Juvenal; 'You get legacies whole, and even luscious lapsed bequests.'[100] The unmarried and the childless could certainly make wills; one of the evils of Roman society most familiar to readers of the classics is *captatio*, the way in which 'legacy-hunters' ingratiated themselves with the unmarried, the childless, and the senile. The fifth Satire of Horace's second book is about nothing else.

The testator could make as many people heirs as he liked, in any fractions he liked. He could also provide for the possibility that named heirs might predecease him or be unwilling to accept the inheritance, by 'substitution': 'let Titius be my heir, or if he has not accepted within *x* days let him be disinherited and let Seius be my heir'. Thus a will might contain grades of heirs, the lower only coming in if the higher did not take; it was customary to mention friends (or the emperor) in a will in this sort of way, in second or third grade, as a *politesse* – no doubt what Trimalchio meant when he said he was 'co-heir with the emperor' in his master's will.[101] What testators could not do was tie the hands of an heir who did not accept; the could not say 'let Titus be my heir and when he dies (or 'when my son grows up') let my son be my heir'. Only one such thing was allowed, namely to substitute for infant children by saying 'Let my son be my heir, but if he does not reach the end of his period of wardship then let Titius be my heir.' The reason for these rules, coupled with the rule that you could not make unborn generations heirs, was the great reluctance of Roman law to permit entailing—the tying up of property by a man in ways that could not be untied by his successors. Each generation must have its unimpaired right to make its own decisions and dispositions. It is feudalism that fosters the entail, and Rome was fundamentally un-feudal; nevertheless, testators hanker after power over the future, and it will presently be seen that the law was here standing against a strong current.

The Roman *paterfamilias* in our period was also entirely free in law to disinherit his children. It is true that formalities had to be observed, which amounted to this, that he could not just pass them over in

silence; any *liberi* in the technical sense, existing when the will was opened, who were not specifically accounted for in it either by institution or by express disherison (either because they had been passed over or because they had come into the agnatic line since the will was drafted, by birth or *manus* or adoption) had the effect of upsetting the will and were brought into shares in the estate. [102] Wills therefore commonly contained a clause 'and let all others be disinherited', Provided this was seen to, disherison was perfectly valid. On the other hand, social feeling in Rome was against a man cutting out his children, unless they were plainly bad and unfilial. So there arose during our period (the exact history of the matter is, as usual, hotly disputed) an important action that could be brought against the heirs; named in a will by a man's (or woman's) children who claimed they had been unjustly disinherited, the *querela inofficiosi testamenti* or 'complaint of undutiful will'.[103] It was one of the suits that came before the *centumviri*; Pliny gives an account of a celebrated *querela* in which he represented the plaintiffs.[104] The chance to upset wills in this way had dangers, indicated by Ulpian:[105]

> 'It must be realized that suits of undutiful will are frequently for everybody, parents and children can argue what constitutes "undutifulness".'

What the plaintiff actually got if the action succeeded was his intestate portion; but he could not bring the action at all if he had been left a quarter of that amount.[106]

Many other things could be done in a will besides the making of heirs, such as granting freedom to slaves and appointing guardians to infants and women, and especially leaving legacies. Legacy was the leaving of specific things to people—what testators of every age spend most of their time doing—and was an entirely different matter from making heirs, though the fate of the whole will, including the legacies, depended on the due entry of heirs. Since every legacy was a diminution of the inheritance, if their total was too great the heirs might not wish to enter. The interest for social history is to see the wide variety of things besides just pieces of property that were left, and could be left under all sorts of conditions, by legacy.[106]a We hear a good deal about legacy of life-interests and of the right to occupy houses, left to widows[107] or widowers:[108]

> 'he is to have the habitation and the remaining rooms of the house and courtyard for the term of his life without house-tax',

or to freedmen:[109]

> 'I bequest you to allow Negidius and Titius and Dio my freedmen, who are aged and infirm, to live out their old age in the places where they now dwell.'

We get annuities and pensions (a whole title on them, *Digest* 33. 1), which might have to be given a cash value on a life-expectancy basis;[110] on the humblest scale they are *alimenta*, 'keep' (with another whole title, 34. 1), or the purchase of a ticket of entitlement to the free corn distribution at Rome.[111] Then there is legacy of the *operae* of a freedman, legacy of her dowry to a wife, legacy in the form of a release from debts owed to the testator. As for pieces of property, there is fascinating social background information (and Latin vocabulary) in the minute analyses by the lawyers of what was included when a man gave a legacy of 'my house' or 'my books' or 'my furniture' or 'my farm fully stocked' or 'my dye-factory with all appurtenances'.[112]

Through a mass of legacies or a mass of debts, or both, heirs might find themselves with a *damnosa hereditas*, an inheritance 'more expense than it was worth'. They might simply decide not to accept heirship; thus, as to debts, Pliny writes to a lady called Calvina:[113]

> 'If your father had owed money to several people, or indeed to anyone but me, you might well have had a problem whether to enter an inheritance that even a man would find burdensome.

As to legacies, the praetor would not allow heirs to exercise a dodge by letting the will go void by their non-entrance and then taking their shares of the estate as an intestacy; he promised an action to legatees to secure their legacies in this event.[114] But already in the Republican period there was a run of legislation, culminating in a *lex Falcidia* of 40 BC, which may have improved, but certainly complicated the law by laying down that a quarter of the assets must be left to the heirs, so that if legacies exceeded three-quarters each of them must be cut down *pro rata* (that is one reason why such things as annuities

might have to be calculated out actuarially). Even then heirs might not be keen. Quite apart from the rule that legatees could demand security,[115] Ulpian points out that:[116]

> 'people's motives are various: some are frightened by the business side, some of the trouble they will be put to, some of the mound of debts (even if the estate is a rich one), some of the quarrels and jealousies that may arise...'

Some heirs, however, were not allowed to refuse to be heirs. *Sui heredes*, whether there was a will or an intestacy, could not. If there was a mound of debts what they could do was to apply for a 'privilege of abstaining' from the actual physical assets; the creditors would sell up the assets as a bankrupt estate, but could not touch the *sui* for the remainder. The Romans also practised what seems to us a particularly rotten trick: a man who knew he was dying in debt, in order to save his own name from disgrace, would free a slave and institute him heir, and this freedman could neither refuse the inheritance nor get a 'privilege of abstaining', but was liable in full, both to the debts and to the stigma of insolvency. All other heirs could refuse, and as a corollary of this, if they wanted the inheritance they must take specific formal steps to enter, usually by a declaration called for by the testator, a *cretio.* This process of *cernere hereditatem* is attested not only by Cicero[117] but by an Egyptian document of AD [170] (in very shaky Latin):[118]

> 'Valeria Scrapias, spinster, of Antinoopolis, testifies through her procurator, to wit her brother Lucius Valerius Lucretianus Matidius, known also as Plutinius, of Antinoopolis, that she has entered upon and formally accepted the inheritance, of her mother Flavia Valeria, and is her heir according to the tablets of her will.'

At this point it is necessary to go back and examine one more thing that Roman testators were accustomed to do. Making heirs and giving legacies were formal acts, void if wrongly carried out, with strict legal consequences if carried out correctly, and subject to irksome restrictions. But suppose you just made an informal request to your heir in your will or to the person who would succeed you on intestacy, to carry out some act, entrusting it to his good faith to do so? Suppose you simply said, for example, 'Please see that my friend Aristo of Chios gets the house' or 'It is my earnest hope that you will pass everything to my son when he marries'? Nothing could prevent you making such *fidei commissa* or 'trusts', but the law would not originally do anything to help you get them honoured. Nevertheless, for anyone prepared to accept the risk that his trust might be misplaced and his request ignored, *fideicommissa* were a means of getting round the restrictions on inheritance and legacy. You could entrust your heir with the passing of property to a peregrine,[119] or to a woman (to defeat the *lex Voconia*);[120] or you could create the perpetuities so hated by the jurisprudents, or get slaves manumitted in excess of the numbers allowed by the *lex Fufia Canina.*[121] You could request your intestate heirs that if your will failed they should carry out the whole of its provisions as a *fideicommissum.* And by *fideicommissum hereditatis*, 'trust of the inheritance', which meant instituting someone heir with a request to pass the entire estate on (to be an 'executor', in fact), you could in effect leave everything to a peregrine or to unborn generations.

Two things happened to the law about *fideicommissa* during our period. The first is described in Justinian's *Institutes*:[122]

> 'In early days all trusts were risky, because no one could be forced to carry out the trust if he did not want to. ... Augustus, induced more than once by personal favour, or because people were said to have made their requests with a plea "by the safety of Augustus", or because of (notorious cases of breach of trust, for the first time ordered the consuls to interpose their authority. And since this seemed equitable and was popular it gradually turned into a standard jurisdiction.'

So from Augustus onwards trusts became enforceable and a man could, for example, leave his estate to a peregrine in a way protected by the courts – not, be it noticed, the ordinary courts, but first a special consular jurisdiction and, from Claudius onwards, either the consuls or a special 'fideicommissary praetor' or the provincial governor.[123] The *fideicommissum hereditatis* in particular was given support by further legislation. The *senatusconsultum Trebellianum* of AD 56 made sure that creditors of the estate would sue the actual beneficiary and not trouble the nominal heir who had handed everything over as

requested.[124] The *senatusconsultum Apronianum* of Hadrian's time made *fideicommissum hereditatis* to municipalities enforceable;[125] it was already being done before that, as a remarkable letter of Pliny shows:[126]

> 'A certain Julius Largus from Pontus, my lord, whom I have never met or even heard of (I suppose he is relying on your judgement of my soundness) ... has asked me in his will to be his heir and enter, and then to transfer the whole, less a prior legacy to myself of fifty thousand sesterces, to the cities of Heraclea and Tyana ...'

On the other hand, for its support of *fideicommissa* the law exacted a price, no less than the gradual imposition upon them of some of the most important restrictions that applied to legacies. We are told in the 'Gnomon of the Idiologos' that fideicommissary inheritance from or to peregrines was stopped by Vespasian,[127] and a *senatusconsultum* going by the name of Vespasian's urban prefect, the *Pegasianum*, made *fideicommissa* subject to the rules of the *lex Falcidia.* Finally, Hadrian laid down that you could not leave by *fidei commissum* to an 'uncertain person', thereby once again stopping the loophole for entails. The law still struggled with what it regarded as the fraud of the 'tacit *fideicommissum*', which was not put in writing at all:[128]

> 'Those persons are making their trust available in fraud of the law who give tacit promises that they will hand over what they have received—or other things—to persons who cannot legitimately take under a will.'

Digest 49. 14 'on fiscal law' is much taken up with this; it was a fraud on the treasury, which was entitled to pounce on estates to which there was no legitimate heir.

The treasury also came into succession questions in another way. Augustus; looking for an extra source of revenue out of which to pay a professional army, invented a new tax falling exclusively on *cives Romani*, the *vicesima hereditatium* or five per cent estate duty. It applied to all but small estates and fell upon all heirs except close relatives; how bitterly it was hated can be seen from the praise lavished by Pliny on Nerva and Trajan for allowing more exemptions for blood relations.[129] The legislation establishing the tax also laid down rules for the opening of wills (a sort of probate),[130] presumably because there had to be a clear point at which the companies to whom the tax was farmed for collection could get in and make their valuations. A pair of letters of Pliny are relevant: as heir to five-twelfths of an estate, he sold his share to an old friend for less than its full value, she agreeing to pay the estate duty; and she had to pay the duty on the full value as assessed by the collectors, not on the purchase price.[131] Normally it was the heirs who paid; they could deduct from legacies accordingly, though out of benevolence or at the testator's request they might not.[132]

The proper Roman will was not merely a document but a ceremony, an 'imaginary sale by bronze and balance', with a 'purchaser of the estate', a 'holder of the balance' to weigh out the price, and five witnesses who must be citizens and adult.[133] The testator held up the written tablets of his dispositions and orally proclaimed their validity. The witnesses did not have to know the contents, but there was no harm in their knowing; when asked to peruse the will, says Horace:[134]

> 'say no, and put the tablets aside; but get a quick glance at page one line two—whether you are sole heir or co-heir with a multitude.'

So there was nothing to prevent beneficiaries being witnesses, though Gaius said it was better not to use your heirs as witnesses.[135] It is hard to tell whether people actually went through the ceremony; the surviving wills mostly allege it and refer to it, but that was probably enough. The *ius honorarium* went a little further; the praetor allowed 'entry to the estate' on the basis of any testament properly sealed with the seals of seven witnesses, whether it had the *per aes et libram* form or not—though even in Gaius' time such an entry could not be upheld against a counter-claim by any lawful intestate heirs.[136] Testators were sometimes anxious to keep their dispositions especially secret and wrote 'codicils', informal written dispositions; but the law was strict about these. If they were expressly confirmed in the will such documents counted as part of it; if they were not they could not purport to act as a will and could only pass fideicommissary requcsts.[137]

The wills of soldiers came to be free from all formal requirements. According to Ulpian, Julius Caesar had occasionally allowed anomalous wills by soldiers to stand; astonishingly Augustus and the Julio-Claudian emperors did not follow suit, but the Flavians were sometimes indulgent, and the privilege became a rule by a constitution of Trajan which was quoted in Chapter 1.[138] The reason given by Trajan for this privilege to soldiers, their 'simplicity', can hardly be the whole story. Soldiers were no simpler than civilians—though they were perhaps the only simple people the law much bothered about; and beside the privilege extended through centurions right up to the tribune who were *equites.* Genuine emergencies might, of course, occur, and so even governors and legates had the same dispensation actually on enemy territory.[139] And unavailability of technical legal advice might be relevant. But the fact is that soldiers' wills were free from much more than merely formal requirements. Above all, they could make peregrines their heirs or legatees;[149] since during all the long years of their service they could not contract a *iustum matrimonium* their children must in most cases have been born of peregrine concubines, and hence peregrine. Soldiers could also institute the unmarried and the childless (*e.g.* their fellow-soldiers); they could make one heir for a period and substitute another for when the period was up; they could make one will for their property acquired by service and another for their other property; the Falcidian rules did not apply to them, nor did the 'suit of undutiful will'; and the *filiusfamilias* who was a soldier could devise his *castrense peculium.* The basic purpose of these indulgences must have been to stimulate recruitment;[140a] Hadrian also allowed intestate 'entry into the estate' to children of soldiers born during service.[141] There was one crucial limitation: the military will only retained its validity for one year after discharge—so long and no more did you have to put your affairs in order and make a proper ordinary will with all its limitations. Naturally a soldier who did not wish to exercise his privileges could make an ordinary will at any time, as did the author of the most celebrated surviving will, which will be quoted presently.

We possess information about the wills of many individual Romans, and some of the actual documents survive in whole or part. There are the wills of the powerful, such as those of Julius Caesar and Augustus, quoted by Suetonius,[142] or of the eminent in literature, such as Virgil's will from the Donatus 'Life of Virgil' (heirs: his half-brother to a half, Augustus to a quarter, Maecenas to a twelfth, Varius and Tucca to the residue, with a prior legacy of his manuscripts on condition that they published nothing not already made public by himself).[143] There are the wills of the wealthy: Cluvius the banker of Puteoli (Cicero's share, as co-heir with numerous others, was house property bringing in a hundred thousand sesterces a year),[144] Domitius Tullus ('such marvellous properties, such staggering riches!', exclaimed Pliny, who was no pauper),[145] Dasumius, the friend of Pliny and Tacitus, part of whose complex bequests survives on stone,[146] or the unknown provincial magnate from Gaul whose will is partly preserved in a manuscript.[147] (In this category an honourable mention must go to Trimalchio, who read out his entire testamentary dispositions to his dinner guests from beginning to end 'accompanied by the sobs of the household'.)[148] Most impressive and significant, however, are two wills of very ordinary men indeed, a private soldier and a veteran, preserved by the sands of Egypt—significant precisely because they are no botch jobs or humble scraps, but dispose of their little patrimonies with all the formality of the testament *per aes et libram* exactly as the emperor did.[149] Here first is Augustus' will, recorded by Suetonius:

> 'He instituted as heirs: in Grade 1 Tiberius to two-thirds and Livia to one-third (requiring them to take his name); in Grade 2 Drusus the son of Tiberius to one-third and the residue to Germanicus and his three male children; in Grade 3 various relatives and friends. Legacies: to the Roman people forty million sesterces, to the tribes half a million, to the praetorian guard one thousand each, to the urban cohorts five hundred each, and to every legionary three hundred (all this to be paid at once in cash, for he had it already banked for the purpose); various other legacies, some going up to two million (for which there was a year's grace for payment, Augustus apologizing that his personal fortune was not large). ... He ordered that the two Julias, his daughter and granddaughter, should on decease not be buried in his tomb. In three separate documents he left instructions for his funeral, a list of his achievements to be inscribed on bronze and placed before his mausoleum, and a set of statistics about the empire. …'

Elsewhere in Suetonius[150] we learn the famous opening sentence:

> 'Since harsh fate has snatched my sons Gaius and Lucius from me, let Tiberius Caesar be my heir to two-thirds of my inheritance,'

and the humble position of the future emperor Claudius:

> 'he was only an heir in Grade 3 amongst what were virtually outsiders, and only to one-sixth,'

and the name of the 'purchaser of estate', confirming that it was a will *per aes et libram.*

At the opposite pole must be quoted in full that marvellous survival, the five waxed wooden tablets containing the entire will of Antonius Silvanus, dated AD [142], in slightly ungrammatical Latin:[151]

> 'Antonius Silvanus, trooper of the 1st Mauretanian squadron of Thracians, prefect's batman, troop of Valerius, made his will. Of all my property, military and civilian, let M. Antonius Satrianus be my sole heir. Let all others be disinherited. And let him formally accept my inheritance within the first hundred days; if he has not thus accepted let him be disinherited, and then in the second grade let (...) Antoluus R(...)lis, my brother, be my heir and formally accept my inheritance within the next sixty days. To him I give as legacy, if he does not become my heir, seven hundred and fifty silver denarii. As agent for my military property, to get in my assets and hand them over to Antonia Thermutha the mother of my heir aforementioned, I appoint Hierax the son of Behex, corporal of the same squadron, troop of Aebutius; and she is to hold the property until my son and heir becomes free of guardianship and receives it from her. To Hierax I give as legacy fifty silver denarii. To Antonia Thermutha, mother of my heir aforementioned, I give as legacy five hundred silver denarii.
>
> To my commanding officer I give as legacy fifty silver denarii. As to my slave Cronio after my death, if he shall have dealt correctly with everything and handed all to my heir aforementioned or to my agent, I wish him to be free, and I wish the five per cent tax on him [*i.e.* on his manumission] to be paid out of my estate.
>
> Let all fraud be absent from this testament.
>
> Purchaser of the estate for the purpose of testation: Nemonius, corporal of the troop of Marius; balance-holder: M. Iulius Tiberinus, corporal of the troop of Valerius; foreman of witnesses [this is a bit uncertain]: Turbinius, standard-bearer of the troop of Proculus.
>
> Will made at Alexandria-beside-Egypt, in the Augustan camp, winter quarters of legion II Traiana Fortis and the Mauretanian squadron, 27 March, consulships of Rufinus and Quadratus.'

There follows in Greek, presumably in the testator's own hand:

> 'I, Antonius Silvanus, the aforementioned, have perused this my will above written, and it has been read and I approve of it as it stands above.'

Ancient families surviving for many generations in genetic and property continuity are not characteristic of Rome; neither society as a whole nor any special noble class practised primogeniture. The rules of intestate succession reveal a 'partible' inheritance by which all a man's agnatic descendants could expect their share, and though the rules of testation made a system of primogeniture conceivable in theory they do not seem to have been used to that end. And if upper-class society had valued property continuity highly it is unlikely that the law could have held out so firmly against perpetuities. The desire not to partition their estates into too many fragments may have been a factor in the notorious infertility of the Roman upper class; but in an era of high mortality if you do not produce many children you may easily be left with none, and then adoption alone will enable you to preserve the family name.