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РОМАНИСТИЧНАТА ТРАДИЦИЯ В НАСЛЕДСТВЕНОТО ПРАВО. НЯКОИ СЪОБРАЖЕНИЯ ЗА *REGULA CATONIANA* (НА АНГЛИЙСКИ ЕЗИК)

Доц. д-р Теуисе Ортега Гонсалес
Университет в Лас Палмас, Канарски острови, Испания

Резюме: В настоящото изследване ще анализираме накратко съдържанието на *Regula Catoniana*, включена в D. 34.7.1, която по отношение на наследството предотвратява произвеждането на ефекта на недействителност *ab initio*, независимо от това, че към момента на смъртта на наследодателя причината за обезсилване да е изчезнала. Има се предвид, че ако е налице основание за недействителност към момента на предоставяне на една вещ, тясъществува по всяко време, но се прави специално позоваване на един случаите на прилагане на гореспоменатото правило за *rem legatarii*. В същото време ще разгледаме накратко този въпрос според Испанския Граждански кодекс по отношение на наследяването на вещи, принадлежащи на завещателя, за да определим влиянието на римските правни разпоредби в конфигурацията на този тип наследство в момента.

Ключови думи: завещание; наследство; regula catoniana; нищожност; rem legataraii.

ROMANISTIC TRADITION IN SUCCESSORY LAW. SOME CONSIDERATIONS FOR THE REGULA CATONIANA (ENGLISH LANGUAGE)

Assoc. prof. Tewise Ortega González, PhD
University of Las Palmas de Gran Canaria, Spain

Abstract: In the present study, we will analyze succinctly the content of the *Regula Catoniana*, included in D. 34.7.1, which in the matter of legacies, prevents the production of effects of a invalid legacy *ab initio*, regardless of the moment in the one that the death of the testator, has taken place and even if the invalidating cause has disappeared, considering that, if it´s invalid at the time of being granted, it shall be null at all times, making special reference to one of the cases of application of the aforementioned rule, as is the legacy *rem legatarii*. At the same time, we will reflect briefly on the matter contained in the Spanish Civil Code, regarding the legacy of thing belonging to the legatee, to determine the influence of Roman legal provisions in the configuration of this type of legacy at present.

Keywords: Testament; legacy; regula catoniana; nullity; rem legataraii.

PRELIMINARY CONSIDERATIONS

A legacy[1] its invalid *ab initio*, when it suffers from an essential element for its validity, producing an original and irrevocable nullity, which frees the heir who does not even owe the estimate[2], as it would be in the case of lack active and passive *testamentifactio* [3], the legacy that aims at a *"res cuius commercium non est"[4],* a *res divina iuris,* a free man, a inexistent object or that foreseeably ceases to exist, and finally, the irregular legacy or *injustum,* having to remember that with the promulgation of the *Senatus Consultum Neroniano*, the use of an improper formula ceases to be a cause nullity *ab initio[5],* since in ancient law, the pronouncement of *certa verba*, determines that the testator's provisions fall within one or another type of legacy.

It may happen that a legacy meets all the essential conditions for its validity, but that at the time of being drafted it suffers from accidental defects that hinder its

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1 DU CANGE, V. legatus, Glosarium mediae et infimae latinitatis. V. 4, 1954, p. 112. CALASSO, F. Enciclopedia del Diritto. Giuffrè, 1958, Der 34 (031) cal. ERNOUT, A., MEILLET, A. Dictionnaire étymologique e la langue latine. Paris, 1959, p. 350, "... in particular, dans la langue du droit privé," deléguer à ses héritiers l´exercise d´une autorité posthume ", pater familias uti super familia pecuniae sua legassit, ita *ius* esto, L. XII Tab". For the doctrine of legacies in Roman Law vid. ARNDTS, S. Dei legati e dei fedecommessi (in Gluck Pandette). Trad. Ital. de Ferrini. Milan, 1898-1901; FERRINI, C. Teoria generale dei legati e dei fedecommes. Milan, 1889. Sull´origine dei legati, BIDR I, p. 111. BONFANTE, P. L´ereditá e il suo rapporto coi legati nel diritto romano in the modern diritto, BIDR, VII, p. 151 et seq. Modestino, fr, 36.D. 31 *Legatum est donatio relict testament* and I.2.20.1 "*Legatum est donatio quaedam a defuncto relicta*".

2 I.2.20.4 "... si talis res sit cuius non est commercium, nec aestimatio eius debetur ... nam nullius momenti legatum est".

3 I. 2.20: "... legati autem illis solis potest cum quibus testamentifactio est".

4 I.2.20.4.

5 The aforementioned Senateconsult, although it does not modify civil law, introduces a reform of the current law, since it admits the possibility that a vindictive legacy, ineffective due to the inadequacy of the formula used, taking into account the civil law provisions, was valid as a damnationem legacy. The SC decides that a null legacy due to improper use of the formula, is valid as a legacy per damnationem, allowing the legatee to exercise personal action ex testamento by the useful means (praetor), which he could later exercise without distinction with the real action the legatee per vindicationem whose legacy was valid, as Juliano 33 in D. 30.1.84. 13 "*Si is, cui legatum fuerat antequam constitueret, qua actione uti vellet, decessit duobus heredibus relictis, legatum accipere simul venientes, nisi consenserint,, non possunt: quare quamdiu alter rem vindicare vult, alter in personam agere non potest. sed si consenserint, rem communiter habebunt: consentire autem vel sua sponte debent, vel iudice inminente*". Ultimately, if at the time of the manifestation of the will contained in the will, the death of the testament takes place, which has bequeathed per vindicationem a foreign thing, it would not be valid as such, but if as per damnationem (Gayo, 2, 202). Finally, the Imperator Justinian decides that the legacies had a single nature, regardless of the formula that the testator may have used, and recognizes the right of the legatee to be able to exercise three actions: the actiones personales, in rem, and the hypothecariam (I. 2.20.2 and C.6.43). GIUFRRÉ, V. L´utilizzazione degli atti giuridici by means of "conversion" in diritto Romano. Napolés. 1965, p.129, n.80, IGLESIAS, J., Derecho Romano, Barcelona, 1972, p. 684, n. 21. SAINZ-EZQUERRA, JM. La Regula Catoniana y la imposibilidad de convalidación de los actos nulos. La Laguna, 1976, p. 125–133, 138. ... ".

execution and subsistence, as it arises from particular and temporary relationships, such as the assumption of the legacy of *rem legatarii* or, having been born valid, it becomes ineffective due to causes subsequent to the making of the will attributable to the will of the testator, or beyond the will, among which we highlight the contest of lucrative causes for the legatee, that we will address in greater detail when analyzing the peculiarities of the legacies of property of the beneficiary legatee.

On the basis that legal transactions that are null *ab initio* cannot be validated, based on the provisions of Paul ad. Sat in D. 50.17.29, "*Quod initio vitiosum est, non potest tractu temporis convalescere*"[6], in matters of legacies, if the testator bequeaths a person an asset that already belongs to him, it suffers from a nullity defect, which is not validated because the invalidating cause disappears before the death of the testator, by virtue of *regula catoniana*[7]enunciated by Celso, 35 in D. 34.7.1, which sets the *initium* to determine the validity of the legacy, at the time of the making of the testament, "..*si testamenti facti tempore decessisset testator, inutile foret, id legatum, quandocunque decesserit, non valere* ... ". However, we will see assumptions which contradict this general rule and that exclude the application of the *regula* in order to guarantee the *voluntas testatoris*, for example, the conditional legacies.

The *regula catoniana* applies to trusts and legacies, as noted by the emperors Diocletian and Maximian in C.6.37.13, *"proper tuas res legari vel fideicomitti tibi non potuisse manifestum est*", and the legacies for which the *dies cedit*[8] is established at the time of the testator's death[9], such as pure and simple legacies and those subject

[6] WACKE, A. Ex *post facto convalescere.* – In: Derecho romano y Derecho alemán moderno en Anuarios de Derecho Civil, Vol. 53, nº 4, 2000, p. 1369-1396, p.1369.

[7] HEUMANN-SECKEL, s.v. regula Catoniana, en Handlexikon z.q. des römischen recht, Graz, 1958, p. 59. SAINZ-EZQUERRA, JM. La Regula Catoniana y la imposibilidad de convalidación de los actos nulos, p. 131 "La RC ha nacido con toda probabilidad para lograr que lo que se legaba per vindicationem fuese propiedad del testador en el momento de la confección del testamento. Su prescripción está construida desde la hipótesis de la inutilidad del legado en el tiempo de la confección del testamento: "si testamenti facti tempore decessisset testator, inutile foret…", y a esa hipótesis se engarza una consecuencia: *id legatum quandocumque decesserit non valere*".

[8] When the legatee has acquired his legacy in a certain and definitive way, he can demand its execution, and to determine when the acquisition takes place, it´s necessary to establish the appropriate distinction between pure and simple legacy, of which it's subject to term or condition.

[9] Ulpiano 20 ad. Sab in D. 36.2.5.1 "… *si purum legatum est, ex die mortis dies eius cedit, si vero post diem sim legata relicta simili modo atque in puris dies cedit*…" For the pure and simple legacy or term, the law Papia Poppaea decides that the dies cedit be traced back to the opening of the testament that took place between three and five days after the death, complying with the formalities described by Paulo in S.4.6. The Emperator Justinian, with respect to the dies cedit, stands next to the classical jurists, placing the dies cedens at the time of the testator's death, as stated in C. 6.51.1: "*Cum igitur materiam et exordium*

to a certain term, which favor the transmission of the bequeathed assets to the heirs of the legatee[10]if the death of the latter occurs after that of the testator and before the addition of the inheritance takes place, having to specify, with respect to those subject to term, that the definitive acquisition is consummated with the addition and expiration of the term, and that only at this time the legatee can demand the execution of the legacy or repudiate it.

There are situations or assumptions that exempt the application of the content of the *regula catoniana*, such as the obstacles that come from a disability established by *novas leges*[11], by virtue of the provisions of Ulpiano, 22 ad Sab. in D. 34.7.5 *"Regula Catoniana ad novas leges non pertinet",* and until the time of Justinian where said laws were repealed. It also does not apply to inheritances[12], nor to the legacies that unfold their effects after the addition of the inheritance, that is to say, legacies whose *dies cedens* do not coincide with the *mortis tempore*, as Papiniano Quaest. 15 in D. 34.7.3, *"Catoniana regula non pertinet ad hereditates, neque ad es legata, quorum dies non mortis tempore, sed post aditam cedit hereditatem".* Indeed, in this case, if the testator dies at the time of write the testament, the nullity does not occur, because the obstacle may disappear before the death, that is, the legacy shall be valid if it´s possible to overcome the difficulty at the time of the *dies cedit*, and null otherwise.

caducorum lex papia ab aditionibus, quae circa defunctorum hereditates procedebant, sumpsit et ideo non a morte testatoris, sed ab apertura tabularum dies cedere legatorum senatus consulta, quae circa legem papiam introducta sunt, concesserunt, ut, quod in medio deficiat, hoc caducum fiat, "…primum hoc corrigentes et antiquum statum revocantes sancimus omnes habere licentiam a morte testatoris adire hereditates similique modo legatorum vel fideicommissorum pure vel in diem relictorum diem a morte testatoris cedere". Vid. in relation to the dies cedit of the legacy, Escévola III, in D. 36.2.28 and Ulpiano 20 ad. Sat. in D. 33.7.28.

10 Ulpiano 20 ad. Sat, in D. 36.2.5 "si post diem legati cedentem legatarius decesserit, ad heredem suu transfer legatum".

11 These laws, applied indistinctly to the institutions of heirs as legatees, and imposed certain disabilities on celibates, or married people who had no offspring or who, if they had had, would have predead. These people, although they retained the ability to testify, and could be validly instituted, could not collect the succession that had been left to them, as they did not enjoy the *ius* capiendi. In order to be beneficiaries of the inheritance and the legacies, they had to acquire within a maximum period of 100 days after the death of the testator, the quality that justified the deprivation of the *ius* capendi. In the case of the celibate, to marry, and in the case of the orbi, to have a child or conceive it. After the period has elapsed without acquiring the *ius* capiendi, ARIAS RAMOS, J. Fideicomisos y leyes caducarias, en RDP 24, 1940, p. 154, D'ORS, Á. Derecho Privado Romano, Pamplona, 2004, p. 362. DE LA FUENTE Y HONTAÑÓN, R. Algunas consideraciones sobre el reconocimiento y sanción jurídica de los fideicomisos, en RGDR 16, 2011, pp, 1-48, p. 28, NÚÑEZ PAZ, M. I. Auctoritas y mujeres romanas ¿Ejercicio o sumisión?, en ARENAL, 22:2; julio-diciembre 2015, p. 347-387, p. 356, FERNANDEZ DE BUJÁN, A., op.cit. p. 89.

12 SAINZ-EZQUERRA, JM. La Regula Catoniana y la imposibilidad de convalidación de los actos nulos, p. 106.

Nor does it apply to conditional bequests, as Ulpiano 10 ad Sab. in D. 34.7.4. *"Catonis regulam ad conditionales institutions non pertinere",* and Ulpiano 21 ad. Sab, in D. 30.41.1-2 *in fine* "… *Purum igitur legatum Catoniana regula impediet, conditionale non, quia ad conditionalia Catoniana non pertinent",* and in general to those for whom the *dies cedit* is postponed to a later time, since it is not enough that the addition has taken place, for the acquisition of the legacy or for the right to acquire it, so it is also necessary that the term has expired or that the condition has been fulfilled[13]. In the words of Ferrini[14], the "*foundation of this exception is that in conditional legacies the perfection of the business depends on a future and uncertain event; therefore, it cannot be affirmed that the legacy is useless from the moment of the will, since, at that time, the business is not yet understood to be perfected".* At the time of making the testament, the legacy is *non datum* (D. 34.7.1.1)

In the case of conditional legacy, the death does not take place until it is carried out.[15], which makes it impossible to transmit the right to their heirs, as Ulpiano 20 ad. Sat. in D. 36.2.5.2 *"Sed si sub condicione sit legatum relictum, non prius dies legati cedit quam condictio fuerit impleta, ne quidem si ea sit condictio, quae in potestate sit legatarii*", meaning *dies legati cedit*, the moment in which the legatee acquires the right to the legacy, and, consequently, the right to transmit it. Therefore, if he dies before the condition is fulfilled, the legacy is ineffective, and, consequently, not transferable. In this sense, submitting the acquisition of a legacy to the fulfillment of a condition, requires that it be expressly formulated when it does not result from the same nature of the legacy, such as the legacy of the child of a slave who has not yet been born, since, in such cases, the condition does not produce the merited effect, as Papiniano

13 Pomponius 8 ad q. muc. in D. 31.45.1: "Si sub condicione vel ex die certa nobis legatum sit, ante condicionem vel diem certum repudiare non possumus: nam nec pertinet ad nos, antequam dies veniet vel condicio existat".

14 FERRINI, C. Teoria generale dei legati e dei fedecommessi secondo il diritto romano con particolare riguardo alla giurisprudenza. Roma, 1889. Reimpresión de 1976, p. 303.

15 The jurist Gaius 2.195, in relation to the acquisition of the property of the vindicatory legacies subject to condition, tells us of the difference in criteria between the Sabinians and the Proculeyans, highlighting that for the former the acquisition of the property of the res bequeathed, occurs after the addition of the inheritance – statim post aditam hereditatem – and provided that the condition is met, while for the Proculeyans, acceptance is required (G. 2.195: *non aliter … Quam si voluerit eam ad se pertinere*). For these, before said acceptance, the legacy shall be res nullius. Regarding the effects of the conditional legacy during the pendency period, following the opinion of the Sabinianos, the property of the legacy corresponds to the encumbered heir, in accordance with the provisions of Ulpiano 17 ad. Sab. in D. 7.1.12.5 "…*Exempio rei sub conditione legatae, quae interim heredis est, existente autem conditione ad legatarium transit; verum est enim, condictionem competere proprietario…* ".

18 quaest in D. 35.1.99.1 *“Conditiones extrinsecus, non ex testamento venientes, id est quae tacite inesse videantur, non faciunt legata conditionalia”* “the conditions extrinsic not coming from the testament, that is, those that are tacitly considered to be inherent, do not make the legacies conditional ”.

In short, it should be noted that if a conditional legacy is flawed at the time of making the testament, it shall be valid if, when the conditional event occurs, the vice from which it was initially suffered has disappeared, as inferred from Paulo's text contained in D. 35.1. 98: *mea res sub conditione legari mihi potest, quia in huiusmodi legatis non testamenti facti tempus, sed conditionis expletae espectari oportet.*

In the case of legacies subject to resolution, we must remember that *a priori*, in ancient and classical times, as a consequence of the perpetual nature of the right to property, property could not be transmitted *ad tempus*, that is, in a temporary and revocable manner, since the property passed to the acquirer in an absolute way, the legacies subject to condition being invalid[16]. We do not mean to say that this type of clause could not be included in the contracts, but that, if they were included, the transferor, could exercise a personal action to oblige the acquirer to transfer the property to him.[17]. However, we find references in legal texts[18] that show a change in criteria and that allow transmissions under a resolutive condition, highlighting the adequacy of the object of our study, the provisions of Justiniano in C.6.37.26[19], where it grants validity to said clauses for both legacies and trusts, requiring the legatee, the

16 This affirmation is made by Justiniano in C.6.37.26, where after recognizing that classical epoch both legacies and temporary trusts were considered null provisions "*quod de legatis vel fideicommissis temporalibus, utpote irritis a legum conditoribus definitum est*" admits the validity of legacy subject to condition.

17 V.gr. Paulo 6 ad. Plautium in D. 22.1.38.3 "si *mortis causa* fundus sit donatus, et revaluerit, qui donavit, atque ita condictio nascatur".

18 Ulpiano ad. Sab. in D. 18.2.4.3: “… pure vendito et in diem addicto fundo, si melior conditio allata sit, rem pignori that desinere, si emptor eum fundum pignori dedisset. Ex quo colligitur, quod emptor medio tempore dominus esset, alioquin nec pignus teneret”. For the assumptions of vindication of the thing donated due to death if it does not occur, vid. Ulpiano 17 ad. Ed. In D. 39.6.29 “Si mortis causa res donata est et convaluit qui donavit, videndum, an habeat in rem actionem. et si quidem quis sic donavit, ut, si mors contigisset, tunc haberet cui donatum est, sine dubio donator poterit rem vindicare: mortuo eo tunc is cui donatum est. Si vero sic, ut iam nunc haberet, redderet, si convaluisset, vel de proelio vel peregre redisset, potest defendi in rem competere donatori, si quid horum contigisset, interim autem ei, cui donatum est. Si vero sic, ut iam nunc haberet, redderet, si convaluisset, vel de proelio vel peregre redisset, potest defendi in rem competere donatori, si quid horum contigisset, interim autem ei, cui donatum est. Sed et si morte praeventus sit is cui donatum est, adhuc quis dabit in rem donatori”.

19 Justinian in C. 6.37.26 “… Quum enim iam constitutunt est, fieri posse temporales donationes et contractus, consequens est, etiam legata vel fideicommissa, quae ad tempus relicta sunt, ad eandem similitudinem confirmare”.

obligation to guarantee by means of a surety to the heir, the return of the thing bequeathed if the condition is met, and provided that it is in perfect condition, or otherwise, that the deterioration of the property is not attributable to him.

When we are faced with a pure and simple legacy, it´s acquired and demanded at the time of the addition of the inheritance[20], since it´s at this moment when the testament begins to unfold its effects, and when the heirs who must comply with the legacies can be identified, as Modestino attests in D. 31.32: *"Omnia, quae testamentis sine die vel conditione adscribuntur, ex die aditae hereditatis praestentur*". Regarding the moment of acquisition of the pure and simple legacies, the Roman jurists determined that it should be at the death of the testator, "*ex die mortis dies legati cedit",* admitting said solution also for the legacies submitted to a certain term (a condition that must be fulfilled before the death of the testator[21], in which case, compliance makes the legacy pure, placing the *dies cedens,* as in the initially pure legacies, at the time of the testator's death) following Ulpiano 20, ad Sab. 36.2.5.1 *"Si purum legatum sit, ex die mortis dies eius cedit: si vero post diem sin legata relict, similarly atque in puris dies cedit (…)".* Therefore, if the legatee dies after that time, transmit his right to his heirs even when there has been no addition by the heirs, and if the beneficiary for the legacy was a slave at the time of death and free at the time of addition, the owner acquires the legacy.

THE LEGACY OF *REM LEGATARII* AS A COURSE OF APPLICATION OF THE *REGULA CATONIANA*

Legacy of property of the legatee at the time of granting a testament

Ulpiano 21, ad. Sab. in D. 30.41.1-2, expressly mentions the legacy of property of the legatee, as an assumption of application of the catonian rule, considering it an example of a null legacy *ab initio,* which hinders any possibility of validation, *"et si quidem ab initio non constitit legatum, ex post facto non convalescet, quemadmodum*

[20] With regard to the moment in which the legatee became the owner of the thing bequeathed, it should be noted that, according to Ulpiano, the legatee, as he doesn´t have the obligation to accept, but rather to express his repudiation, in the case of not wanting to, acquires the same at the time of the addition of the inheritance. Ulpiano 22 ad. Sab. in D. 30.1.44.1 "… *legatum valebit, quia, ubi legatarius non repudiavit… ex quo hereditatis adita est*…"

[21] D. 34.7.1.1: If the testator dies before the kalendas, the legacy would be non datum, and no, inutiliter datum. A prescribed condition, if post kalendas mortuus fuero is to be considered fulfilled on arrival of the kalendas living testatore, only living testatore can be fulfilled, and therefore does not delay the dies cedens.

nec res mea legata mihi", even in the event of alienation of the thing bequeathed after the testator manifested the declaration of *voluntas* in a testament, *"si post testamentum factumm fuerit alienata, quia vires ab initio legatum non habuit",* a circumstance that emperator Justinian also warns in the same sense in I. 2.2.10 *"sed si rem legataraii quis ei legaverit, inutile est legatum, quia, quod propium est ipsius, amplius eius fieri non potest; et licet alienaverit eam, non debetur ne ipsa, nec aestimatio eius"*

Although the nullity of *rem legatarii* has been proven, we must emphasize that the *regula Catoniana* does not apply, which, as we saw, declared the invalidity of a null legacy *ab initio* regardless of the moment testator death, if the legacy is conditional and the testator expressly recognizes the effectiveness of the stipulation if the condition is met, and on the other hand, the validity of the legacies of property of the legatee is also appreciated at the time of granting a testament, if the latter proceeds to the alienation of the object while the testator is alive, as recognizes Celso 35 in D. 34.7.1.2, *"si tibi legatus est fundus, qui scribendi testamenti tempore tuus est, si eum vivo testatore alienaveris, legatum tibi debetur; quod non deberetur, si testator statim decessisset"," if a fund was bequeathed to you, that at the time the testament is written, it is yours, if you had alienated it while the testator was living, the legacy is owed to you; which would not be owed to you, if the testator had died immediately*". Regarding the interpretation of the aforementioned text, it is discussed whether in the passage by Celso the words *"si eum vivo testatore alienaveris"* should be understood as an integral part of the testator's manifestation of will, being configured as a condition, or if, by the on the contrary, with these words the lawyer intends to validate a legacy that is invalid in origin, and that becomes effective if the sale occurs within the times described[22].

The majority doctrine[23] is pronounced in favor of interpreting the passage as a legacy whose effectiveness is conditioned to the sale of the thing while the testator is alive, without prejudice to the opinion of those[24], who consider that with said passage a general principle of validity of the legatee's legacy is proclaimed at the time the will is granted, provided that the sale of the property took place before the death of the testator.

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22 This duality of interpretations goes back to the time of the glossers, owing to Bassiano its consideration as a conditional legacy, and to Rogiero the theory of validation. ECHEVARRIA DE RADA, T. op.cit. p. 43. Vine. MASI, Studi sulla condizione, 107, n. 344.

23 WINDSCHEID, B. Diritto delle Pandette. Vol. 3. Turin, 1925, p. 505. FERRINI, C. Teoria generale dei legati e dei fedecommes, p. 554. GROSSO, G. I legati nel Diritto Romano. 1962, p. 307.

24 BIONDI, B. Testamentary succession and donation. Barcelona, 1960, p. 425.

On the other hand, the Roman Law admitted the possibility of recognizing the validity of the legacies of property of the legatee, when the testator, or in his case, the heir, enjoys some real right that notably affects the proprietary powers of the owner[25], in which case, the manifestation of the will of the testator in favor of the legatee, on an asset that already belongs to him, has a release effect, as long as the property is no longer encumbered by a real right which is extinguished upon the death of the deceased.

At the same time, the effectiveness of this type of legacies is admitted, when the ownership that the legatee had over the thing was not full, as it´s conditioned by the possibility of a subsequent claim by its previous owner, as attests Juliano 33 in D. 30.82.1 "*Si ex bonis eius, qui rei publicae causa aberat, rem usu adquisierim et ea antequam evinceretur mihi legata sit, deinde postea evincatur, recte ex testamento petam eam mihi dari oportere".* To paraphrase Echevarría, "*the legacy is aimed at procuring the legatee an absolute and irrevocable domain, and, therefore, is effective, insofar as it contains more than the legatee has already achieved".*

Legacy of *res* acquired by the legatee after the testament.

This possibility is expressly described in the Institutions, particularly in I. 2.20.6:

> *"Si res aliena legata fuerit, et eius vivo testatore legatarius dominus factus fuerit, si quidem ex causa emptionis, ex testamento actione pretium consequi potest; si vero ex causa lucrativa, veluti ex donatione vel ex alia simili causa, agere non potest: nam traditum est, duas lucrativas causas in eundem hominem et in eandem rem concurrere non posse. Hac ratione, si ex duobus testamentis eadem res eidem debeatur, interest, utrum rem, an aestimationem ex testamento consecutus est: nam si rem, agere non potest, quia habet eam ex causa lucrativa; si aestimationem, agere potest".*

[25] In the legal sources we find various provisions, where the validity of this type of legacies and the liberatory nature of the manifestation of the will of the testator with respect to the real right that encumbers the property of the legatee is evidenced. Juliano 34 in D. 30.86 *"Si tibi homo, quem pignori dederas, legatus ab alio fuerit, actionem ex testamento habebis adversus heredem, ut pignus luatur", "If one had bequeathed you the slave you had pledged, you will have against the heir the legacy enforcement action to demand that you release the security*. Another example is found in the same book and title by Juliano 34 in D. 30.86.4 *"Valet legatum, si superficies legata sit ei, cuius in solo fuerit, licet is dominus soli sit; nam consequetur, ut hac servitute liberetur, et superficiem lucrifaciat*". If it only reduces the powers of the holder in some aspect or at certain times, the legacy is deemed invalid. ECHEVARRIA DE RADA, T. op. cit. pág. 39, ARNDTS, C. L. Dei legati e dei fedecommessi, p. 157, BIONDI, B. Testamentary succession and donation, p. 437–438.

In said fragment, the jurist establishes a distinction according to the things bequeathed that the legatee has previously acquired for lucrative reasons[26] or for onerous causes. In the first case, the lawyer provides that a person cannot obtain the same good twice by virtue of two lucrative causes *"duas lucrative causes in eundem hominem et in eandem rem concurre non posse"* so that, if the legatee has acquired a property free of charge, during the life of the testator, and he bequeaths said property, the legacy is invalid and is extinguished due to the impossibility of compliance by the debtor heir[27]. On the contrary, if the legatee has acquired said asset for consideration and is later favored with a legacy on the thing that already belongs to him, he has the right to demand from the encumbered heir through the filing of the actio ex testamento, the price paid to acquire it., its estimation, or compliance by equivalence[28], since the

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[26] FERRINI, C. Sul concursus duarum causaum lucrativarum. 1891, p. 547 ff. DI MARZO, S. Appunti sulla dottrina della causa lucrative. – In: BIDR, 15 (1903), p. 91 ss; 17 (1905), p. 103 ss; SCHULZ, F. Die Lehre vom Concursus Causarum im klassischen und justinianischen Recht. – In: Zeitrschrift der Savigny – Stiftung rom. Abt. 38, 1917, p. 114. BESELER, G. Beiträge zur Kritik der römischen Rechtsquellen. Vol. IV. Tübingen, JCB Mohr, 1920, p. 326 sq. MICHEL, J. Gratuité en droit romain. Bruxelles, 1962, p. 404 ff.; VOCI, P. Diritto ereditario romano. II. Milano, Giuffrè, 1963, p. 257. ANKUM, H. Concursus causarumm. – In: Seminarios Complutenses de Derecho Romano, 1996, vol. VII, p. 57. GUZMÁN BRITO, A. Derecho Privado Romano. Vol. II. Santiago, Editorial Jurídica de Chile, 1996, p. 342 ss and The contest of causes. Law Review of the Catholic University of Valparaíso, Chile, 1998, p. 383–389, in part. 387. The author considers it appropriate to point out the differences between two concepts commonly used to refer to acquisitions of goods in which no price or consideration intervenes. Thus, he establishes: "…there is profitability in those acquisitions that are definitive and without obligation to restore. An acquisition can be free but not lucrative, as in the one of fungibles that is made in the mutual without interest; or, lucrative but not gratuitous, that is to say, onerous, as in that of a thing that is bought; or, free and lucrative, like the one that takes place in the donation".

[27] The acquisition of the property by the legatee can release the heir from performance when two lucrative causes concur, but not when onerous causes, or onerous and gratuitous causes concur. Consequently, we can affirm, based on the provisions of Juliano 33, contained in D. 44.7.17 *"Omnes debitores, qui speciem ex causa lucrativa debent, liberantur, cum ea species ex causa lucrativa ad creditores pervenisset", and in I. 2.20 .6 "si vero ex causa lucrativa, veluto ex donatione vel ex alia simili causa, agere non potest: nam traditum est, duas lucrative causes in eundem hominem et in eandem rem concurrere non posse ...",* that the concurrence of lucrative causes operates as a way of extinguishing obligations. Although in relation to the concurrence of causes we have relied on I. 2.20.6, it is no less true, that the contest of causes has a broader scope, and proof of this is the fact that it is configured as a cause of extinction of the obligations. POTHIER*,* Traité des obligations. Part 3. 1835, ch. VI, paragraphs 652-655. ARNDTS, CL. De legatis et fideicommiissis. – In: GLÜCK. Commentary alle Pandette. XXX-XXXII. 1st part. Milan, 1898, p. 173, SALKOWSKI. De legatis et fideicommiissis. – In: Glück. Commentary alle Pandette. XXX-XXXII. 2nd part. Milan, 1901, p. 94, CHIRONI, About the legato di cosa propria dell'erede or the legatee. – In: Scritti per Moriani, 1907, p. 279 y ss. WINDSCHEID, B. Diritto delle Pandette. Vol. 3. Turín, 1925, p. 447 n.5 y p. 506.

[28] In relation to the concurrence of an onerous cause with a lucrative cause, and compliance by equivalence, the solution offered is found in a text by Ulpiano, 32 ad. Ed. D. 19.1.13.14, by virtue of which it is established that if Ticio sells a 90-hectare farm, having declared in a sales contract that the extension of the farm was 100 hectares, and subsequently, there is an increase in dimensions of the property in 10 hectares, the result of an accession, it

release of the heir implies that the legatee loses the profit that was destined to him for gratuitous cause, or in other words, the acquisition of the thing from the testator or from a third party by the legatee, supposes a patrimonial sacrifice of the latter, an economic outlay, which is only rewarded with the return of the price by the heir or heirs. Applying the same rule, if the legatee of a property has acquired the bare property of the estate while the testator was living for consideration, and the usufruct for gratuitous title, he only obtains by virtue of the legacy, the value of the property[29].

On the other hand, we wonder what happens when two subjects are obliged to deliver by virtue of a testament, and by way of a legacy, the same property to the same subject, that is, a case of acquisition in which two lucrative causes concur. In this case, and in accordance with what was previously analyzed, in relation to the contest of causes, we understand that, once the legacy by any of the obligated parties has been fulfilled, the acquisition of the property by the debtor-legatee, releases the obligor who has not satisfied the obligation, due to impossibility of compliance, since the *res* has already been delivered. Consequently, the legatee, who already has the property, cannot demand neither the estimate nor the compliance by equivalence to it, since the debtor's release is based on the effective acquisition, and delivering the estimated value of the asset due to impossibility of compliance, would entail the benefit of something that does not correspond to it, because the legacy consists of the delivery of one thing, and nothing else. Now, if what the legatee obtains in the first place is an estimate of the property, he has the right to have the thing delivered[30]. Consequently,

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happens that the buyer obtains 90 hectares by virtue of a contract of sale (onerous) and 10 hectares as a result of an accession (free), which does not mean that he cannot demand through the filing of the action corresponding to the seller, who completes the remaining 10 hectares, if the latter knew that the alienated farm did not have the dimensions that it had declared at the time of entering into the contract, and this because the seller contracted, as a result of the contract, the obligation to complete the capacity declared in 10 hectares. Regarding the obligation of compliance by estimation, we highlight the provisions of Gayo 1 in D. 32.14.2, where the lawyer offers a solution to those who have to comply with the legacy of acquiring an asset and delivering it to another person, and that It cannot do so because the owner does not agree to the sale, in which case it imposes the obligation to deliver to the recipient the estimated value of the asset that could not be delivered. *“Sed si cui legatum relictum est, ut alienam rem redimat, vel praestet, si redimere non possit, quod dominus non vendant, vel immodico pretio vendat, iustam aestimationem inferat”.*

29 Instituciones II, 20.9: “Si cui fundus alienus legatus fuerit, et emerit propietatem deducto usufructru, et usufructus ad eum pervenerit, et postea ex testamento agat, recte eum agere et fundum petere Iulianus ait, quia usufructus in petitione servitutis locus obtinet, sed officio iudis contineri, ut deducto usufructu iubeat aestimationem praestari”.

30 I. 2.20.6 ”…si ex duobus testamentis eadem res eidem debeatur, interest, utrum rem, an aestimationem ex testamento consecutus est; nam si rem, agere non potest, quia habet eam ex lucrative cause, si aestimationem, agere potest". For his part, Ulpiano 21 ad. Sab.

if the object has been made available to him, he cannot ask for its value, but if what he receives is an estimate of the property, he can demand from the obligee the acquisition of the thing.

INFLUENCE OF THE *REGULA CATONIANA* ON CURRENT LEGISLATION. SPECIAL REFERENCE TO THE LEGACY *REM LEGATARII* IN THE SPANISH CIVIL CODE

The Spanish Civil Code includes in section X, of Chapter I of title III regarding successions, the legal treatment of orders and legacies, having to rely on two precepts that, although they are separated by other articles with a different content[31], regulate the subject matter of our study, and on which we do not intend to carry out an exhaustive analysis, but to establish the existing concordances or divergences with the regulation that, on the same subject, we find in Roman legal sources, highlighting on the one hand, the assumption in which the thing bequeathed belongs to the legatee at the time of granting the will, even if it was encumbered by some right of a third party or at a later time it had been alienated, included in article 866 and the first paragraph of article 878, and on the other, the situation that occurs when the legatee property or object is acquired by the legatee for profit or consideration after the testator has expressed his declaration of will by will.

Following the Romanistic legal tradition, the Spanish legislator welcomes the logical limitations, taking into account the reality of the moment in which the norms must be applied, the content of the Catonian rule, setting the moment to determine the validity of the legacies at the time of the making of the will, by declaring the nullity of the legatee's own property at the time of the drafting of the will, by virtue of the provisions of article 866 and 878, of the Civil Code, hereinafter CC, which establish the following:

Art. 866 CC: "*The legacy of a thing which, at the time of making the will, should already belong to the legatee, shall be without forcé and effect, even if any other person should hold a right over it".*

in D. 30.34.2, it recognizes the right of the legatee to obtain the object, testamento rem consequar, its estimate, altero aestimationem.

[31] The fact that the issue is regulated in various non-consecutive articles and that the legislator has not located them in the same precept has been criticized by the doctrine. ALBALADEJO, M. Comments to the Civil Code. XII, vol. 1st. 1998, p. 138, MARIN CASTÁN, F. Commentary on the Civil Code. Vol. 5. Barcelona, 2000, p. 69.

"If the testator expressly provides that the thing is to be released of this right or encumbrance, the legacy shall be valid in this respect"

Art. 878.1 CC: "*If the thing bequeathed belonged to the legatee on the date of the will, the legacy shall be invalid, even if it should have been disposed of subsequently.*

If the legatee should have acquired it as a gift subsequently to such date, it may not request any amount as a result; however, if the acquisition should have been made for valuable consideration, he may request the heir to compensate him for the amount given to acquire it"

The ineffectiveness of the legacy is based on the impossibility of fulfilling, and, consequently, transmitting the legacy asset or object, as it is integrated into the patrimony of the favored legatee, as stated in I.2.20.10 of Justinian. In the event that the testator was not aware of this circumstance and believed that the property he bequeathed belongs to a third party or is his property, it is understood that he would not have ordered it had he known the real situation, unless, as pointed out Albadalejo[32], the testator expressly stated that in the event that the property belonged to the favored legatee at the time of the opening of the succession, the value of the thing bequeathed is delivered to him, his will prevailing.

The regulation contained in art. 866 CC, is understood to refer to the nullity of the legacy when the property belongs entirely to the legatee, since, if the legatee owns only one part, the majority understands the doctrine[33], By application of the provisions of art. 864 of the same legal body, that the legacy would be ineffective with respect to the quota of the property over which the legatee is the owner, and valid, therefore enforceable, with respect to that which does not belong to him, without the need for an express pronouncement on the part of the testator who bequeaths all or part, that is, it is presumed that the testator bequeaths the entire property, and if it turns out that the bequeathed property belongs to the legatee only in part or in installments, the legacy declines with respect to the part that corresponds to him, and the obligation of the heir, or the third party, to fulfill the legacy and acquire the remaining quota to transmit it or pay its fair estimate is maintained.

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32 ALBALADEJO, M. Comments to the Civil Code, p. 140–141.

33 GONZÁLEZ PACANOWSKA, E. El legado de cosa ajena. Madrid, 1985, p. 508, OSSORIO SERRANO, JM. Comentarios al Código Civil. T. I. 1993, p. 2123; ALBALADEJO, M. Comments to the Civil Code, p. 155. MANRESA, JM. Comentarios al Código Civil Español. T. VI. Vol. II, p. 387 y 388; ECHEVARRÍA DE RADA, T., Ibídem.p.47.

At the same time, the possibility is noted that the property belongs to the legatee at the time of granting the will, and to a third, after that moment, by virtue of a voluntary alienation, as when it comes from another cause that implies the departure of the patrimony of the legatee, as stated in art. 878.1 *in fine,* in which case there is no possibility of granting validity to the legacy that is null in origin, and consequently, the validation by subsequent sale, in application of the Catonian rule that declared the nullity of the legacies regardless of the moment of death of the testator, and which has been accepted by our legislator in the aforementioned precepts, in contrast to the statement made by the jurist Celso in D. 34.7.1.2, where he imposed on the heir encumbered by the legacy, the obligation to comply with the same, if the legatee had detached himself from the property before the death of the testator. Notwithstanding this normative provision, we must bring up the opinion of a certain doctrinal sector that understands the invalidity of the legacy, provided that there is no express statement of the testator to the contrary, that is, for them the legacy of things belonging to the legatee would be valid even if the sale occurs, if the testator has so expressly declared, that is, if he or she provides that the legacy is valid in the event that the legatee had disposed of the thing bequeathed, thus respecting the will of the testator, who in succession matter is law[34].

Continuing with the analysis of the enunciated precepts, the second paragraph of article 878 CC, the legislator following the legal scheme of the Roman era, once the nullity of the legacy of property of the legatee has been noticed in the moment of the grant, recognizes the right of the legatee who has acquired the legacy asset for consideration after the preparation of the will, to demand from the encumbered person with the fulfillment of the legacy, the value of what he would have paid for the acquisition of the same or its fair estimate, without going to assess, for reasons that exceed the object of our study, who the acquisition may come from, and the particularities of each case. However, it seems appropriate to point out that if the acquisition comes from the testator, that is, if the testator alienates the property that he had bequeathed in the testament, the provisions of art. 878.2, or what is the same, the claim to the heir of the amounts paid to the testator for this purpose, since in such

[34] STS of December 11, 1991 RJ1191/8930 “the will of the testator is the law of succession, since every testamentary provision must be understood in the literal sense of its words, unless it clearly appears that it was another will of the testator, and in case of doubt, whatever is more in accordance with the testator's intention shall be observed "

circumstances, the CC provides in article 869.2, that "*if the testator should dispose…of the thing bequeathed or a part of it, understanding in this last case that the legacy shall only be rendered ineffectve in respect of the part which has been dispose of",* that is, the alienation implies the revocation of the legacy, and the impossibility of claiming the heirs. On the other hand, if the acquisition of the property has taken place in a lucrative-gratuitous way, operating a contest of lucrative causes, the sources have "that nothing shall be able to ask with it", in accordance with the provisions of Justinian in I.2.20.6, where it expressly establishes that *"… if it was (acquisition) for profit, such as donation or other similar cause, he cannot exercise the action: because it is said that two lucrative causes cannot concur in the same person and on the same thing".* Based on this, if the testator bequeaths an asset to the legatee that did not belong to him at the time of the testament, but acquired after it for lucrative reasons, it is invalid, exonerating the encumbered heir from compliance, who does not owe neither delivery nor the value of the good.

We cannot include under the provisions of art. 878.2 of the CC, the assumptions of alienation of the thing bequeathed by the legatee and that he acquires again before the opening of the succession, since, previously, at the time of granting the will it belonged to him and that circumstance is the one that invalidates it, even when it has been acquired again for an onerous way before the opening of the succession. This interpretation is extensive to the cases of acquisition of the thing bequeathed subject to resolutory condition, since at the time of granting it was the owner of an asset, which does not belong to it at a later time, for reasons beyond its control, and that at no time case allow the validation of the ineffective legacy.

Finally, article 866 declares the nullity of the legacy *rem legatarii* even when a real right falls on said property that limits the powers of its owner, highlighting as an exception, to said general rule, the express statement of the testator who bequeaths said property taxed, that with said legacy, the thing is released from the charges and / or rights that fall on it, that is, the legacy remains null, because the ownership corresponds to the same person who is favored, but the provision made by the testator bequeathing said asset, if in the same, it expressly pronounces on the release of the right that encumbers the property of the legatee, going from being a legacy of property accused of a defect of nullity, to a legacy of release perfectly valid.

In this case, the liberatory effect of this type of legacy, which requires the express manifestation of the testator, is rooted in Roman legal provisions, as Juliano testifies in some fragments contained in D. 30.86. In short, there is no doubt about the influence of the *regula catoniana* and the treatment of the legacies of things belonging to the legatee contained in the Roman sources, with respect to the norm that regulates this matter in the Civil Code, since as we have been able to verify they are a literal and faithful transcript of the analyzed Roman legal provisions.