

Book V.
Title XLII.

Concerning a guardian or curator who failed to give security.
(De tutore vel curatore qui satis no dedit.)

Bas. 38.8.10.

Headnote.

Guardians were in certain cases required to give security against maladministration. Inst.1. 24 pr. That was not required of testamentary guardians, or, strictly, of those confirmed or appointed by a superior magistrate, as the president, after inquire; but in other cases it was required. Buckland 154; Hunter 715, 716; D. 25.2.2.17; D. 26.3.2.3; D. 26.4.5.1; D. 27.8.1. The security required was a surety with ample property, who made a promise in the form of a stipulation (fide jussio) to make good any loss sustained by the minor through misconduct of the guardian. D. 27.8.1.15. The president of the province did not take security himself; when he wanted that to be given, he directed the municipal magistrate to appoint the guardian named by him on giving security. The inferior magistrate always took security; failure to do so made him responsible for any loss. D. 26.3.5. See C. 5.75. Persons (nominators) who applied to a magistrate for the appointment of a particular person as guardian made themselves responsible as sureties. D. 27.7.2; D. 27.8.1 pr. That was true also of those who testified to the fitness of a person's guardian when an examination in reference thereto was conducted. D. 27.7.4.3. A woman was exempted from the application of these rules of responsibility when she asked for a guardian. C. 5.46.1 and 3. The rule relating to security by curators was similar to that in the case of guardians. Buckland 170; see C. 5.70.7.

5.42.1. Emperors Valerian and Gallienus to Titus and Flavianus.

If you have not yet arrived at full legal age, demand security from those who, as you say, were, by your adversary, while acting as magistrate, appointed as curators for you without having sufficient property. For those who fail to make you safe by giving security are forbidden to undertake such administration.
Promulgated July 7 (259).

5.42.2. The same Emperors and Caesar Valerian to Euploius.

If you go before the rector of the province, he will order the surviving guardian who fails to give security according to the president's direction and the rule of law, to be removed—if he fails to give such security from want, without infamy, if through fraud, with infamy. And the rector will order other persons with sufficient property to be substituted in place of those who are dead, especially since you state that the patrimony of the minor has been increased by a recent inheritance. The guardians so appointed must, moreover, demand an accounting of the guardianship of the decedents from the latter's heirs.
Promulgated May 15 (260).

5.42.3. Emperors Diocletian and Maximian to Stratonica.

There is no doubt that guardians not appointed by testament have no right of administration unless they give security that the guardianship will be managed properly.¹ 1. If the guardian, therefore, who had given no security for his conduct, tried a lawsuit, the decision given against him could not prejudice you, and his acts could have no validity. Hence you needlessly seek restitution of your former rights, since his acts are void by operation of law.²

Note.

One not lawfully appointed as guardian could not even recover his expenses for a lawsuit prosecuted by him on behalf of a minor. C. 5.45.2. A guardian who failed to give security might do things that required immediate attention and were of benefit to the minor. Law 5 of this title.

5.42.4. The same Emperors and the Caesars to Tertullus.

The situation (causa) of all guardians is not alike and similar. Hence though it is clear that, as in case of a testamentary guardian, one confirmed or appointed by the president after investigation is not required to give security that the minor's property will be safe, still it has long been the rule that if several are appointed after investigation, the person who has given security according to the rule of the edict that the minor's property will be safe is to be preferred in the active administration thereof.

Subscribed at Nicomedia December 13 (294).

5.42.5. Emperor Constantius and Maximian and the Caesars Deverus and Maximinus.

A guardian who fails to give security when he should give it cannot alienate any property of the ward. But it appears to be clear that after he has been appointed to manage the guardianship he may take possession of an inheritance in the name of his ward and transact what does not admit of delay.³

Given December 22 (305).

¹ [Blume] This is not strictly true. See headnote and also the next law.

² [Blume] C. 2.40.4. Guardians and curators were required in certain cases to give security against maladministration. Inst. 1.24 pr. This was not required of a testamentary guardian, or of one confirmed or appointed by the superior magistrates after inquiry, but in all other cases it was. Buckland 154; Hunter 715, 716; D. 26.2.17; D. 26.3.2.3; D. 26.4.5.1; D. 26.3.5; D. 27.8.1.

³ [Blume] Law 3 of this title and note.