

Book VI.
Title XXIII.

Concerning testaments: In what manner testaments are executed.
(De testamentis: Quemadmodum testamenta ordinantur.)

D. 28.1; Inst. 2.10; Bas. 35.2.

Headnote.

Formalities in executing wills.

Aside from still older forms in executing wills, which went out of use, the original civil law will was made by a fictitious sale to a fictitious purchaser, who was the distributor of the estate, and acted as executor, or heir - for an heir under a Roman will frequently was nothing but the executor of a will - in the presence of five Roman citizens above the age of puberty, a holder of a balance, on which the fictitious purchaser weighed the bronze which he handed over to the owner of the property, and the fictitious purchaser - in the presence, in other words, of seven persons. Under the praetorian law this fictitious sale was dispensed with and a will executed in the presence of seven witnesses was held sufficient in order to get the right of possession of the inheritance. Inst. 2.10.1-3; C. 6.11.2 and note.

This will, executed in the presence of seven witnesses and duly sealed by them, came, it seems, to be recognized as a good and perfect will even under the civil law. See laws 12, 21, 28 and 29 of this title; Nov. 119, c. 9. It was required to be made in one operation, with seven witnesses, continuously present, who must affix their seals thereto. The testator and the witnesses were all required to sign it. The law in respect to particular requirements varied from time to time. Special forms of wills were, however, provided, and will be pointed out briefly:

1. Public wills, that is to say, wills entered on the public records, or deposited in the state archives, were not required to be witnessed or executed with the usual formalities. Law 19 of this title.

2. A will might be oral - nuncupative - in connection with which the names of the heirs must be clearly stated by the testator so as to be clearly understood by the witnesses, who, as in written will, were required to be seven in number. Law 21 of this title. Such will might be proved by two witnesses who were present or by two other credible witnesses. Mackeldy §694.

3. In time of pestilence, the witnesses were not required to be present at the testamentation at the same time. Law 8 of this title. Buckland and Girard both think that the witnesses were not required to be in the immediate presence of the testator. Buckland 286; Girard 861.

4. In country districts five witnesses to the will sufficed if no greater number could be had. Law 31 of this title.

5. A blind man could dictate his will before seven witnesses and a notary. An eighth witness was necessary if there was no notary. C. 6.22.8.

6. Special provisions were made for deaf-mutes. C. 6.22.10.

7. Wills of soldiers did not require any formalities, as already shown in the preceding title.¹

8. Informal wills came to be recognized as valid, if made in favor of children. Legislation on that subject commenced as early as the time of Constantine. C. Th. 2.24.1.2. Further legislation on that subject is contained in Nov. Th. 16.5, and Nov. Vel. 21.2.1. Such imperfect wills are recognized in C. 6. 23. 21. 3. Full legislation on that subject is contained in Nov. 107, appended to this title, which shows that even any arrangement made between father and children, during the former's lifetime, was valid. See also C. 3.36.10.

6.23.1. Emperor Hadrian to Catonius Verus.

Whether witnesses were slaves or free should not be considered in this matter, when at the time that the testament was signed, they were treated as free by the consent of all, and no one shall have questioned their status up to this time. Without day or consul.

Note.

Witnesses to a will.

No one but a Roman citizen was competent to act as witness to a will, and hence a slave was barred to act in that capacity; but as long as he acted as a free person and was recognized as such, the fact that he was subsequently declared to be a slave did not vitiate his act in witnessing a will.

Other person who could not be such witnesses were women, persons below the age of puberty, lunatics, persons deaf and dumb, and persons who had been legally declared to be prodigals. So also persons in the testator's power and persons appointed as heirs were barred. Inst. 2.10.6-10; Mackeldy § 692. A legatee, however, who was not, under the Roman law, considered as an heir, and similar persons, were not prohibited from acting as such witnesses. C. 6.23.22; Inst. 2.10.11.

6.23.2. Emperor Alexander to Expeditus.

A testament once made public, although the material on which it was written in the first place by the testator was destroyed by the accident shown, is nevertheless valid. Promulgated June 1 (225).

6.23.3. The same Emperor to Antigonus.

It has often been decided that nor even the emperor may claim an inheritance by virtue of an imperfect testament. For though the law relating to sovereignty has released the emperor from the formalities of the law, nothing is so becoming to sovereign authority as to live according to the laws. Promulgated December 22 (232).

6.23.4. Emperor Gordian to Rufinus.

If the testator erred in a name, given name or surname, but there is no uncertainty as to whom, he meant, such error cannot stand in the way of truth.

¹ Blume wrote in the margin here what seems to be a note to himself: "Read law 21." He wrote similar notes following the references at the end of points 4 and 6 in this series as well.

Promulgated July 21 (239).

6.23.5. Emperors Valerian and Gallien to Lucillus.

The law is certain that neither an enrollment of the name of a child on the public register, nor the assurance of a testator that certain persons are his children when in fact they are not, can prejudice the truth, and whatever is left them as children, need not, according to the decisions of the emperors, be delivered to them.

Received July 4 (254).

Note.

Here the gift of property to one as to a child, when the beneficiary was not in fact a child, was void. Ordinarily a misdescription made no difference. C. 6.44.2 and note. But the instant rescript is confirmed by the Syrian Law Book (p. 16; 23 Z.S.S. 119), which shows that a testator could leave any part of his estate to an illegitimate child only in the manner in which he would leave anything to a stranger. In the same way a bequest to one named as brother who was not such was void.

6.23.6. Emperors Diocletian and Maximian to Terentia.

The words of a testament by which your dying mother asserted that she had made no gift to anyone, cannot, if the facts are otherwise, avail against the truth.

Promulgated November 3 (285).

6.23.7. The same Emperors to Rufina.

The solemn effect of a testament cannot be destroyed by an error of the scrivener thereof, although such testament may appear to be more of a nuncupative than a written will. And when a testament is, therefore, made legally, though the provision "let him be heir" is absent, when in fact there is an heir, the legacies and trusts must be paid over according to the wish of the testator.

Promulgated January 16 (290).

Note.

The intent is, that though the formal "heres esto" - let him be heir - was absent by reason of an error of the scrivener, it should be implied, if it could be done.

The essential and main requirement of a testament was the designation of an heir, or heirs. It has already been pointed out in the headnote that the term "heir" was not always used in the same sense as we use it. Any person, who, under our system of law, receives any portion of the net estate of a decedent - after payment of debts and costs of administration - is generally spoken of as an heir. But an heir under a will under the Roman law was a person who became a universal successor of the deceased, and not one could be so, unless, generally, he received the whole or a definite undivided portion of an inheritance, even though he might be required to pay the larger portion of what he received out in legacies and similar gifts. Read C. 6.24.13 and note. An heir represented the estate; he was the successor of the deceased, and was compelled to pay the debts of the estate, at all events as far as the estate would reach. He was the person to pay the legacies and similar gifts left by the decedent. He, accordingly, in many respects, was similar to the modern executor or administrator of an estate. A legatee, or person receiving some sort of gift from the decedent, was not, as such an heir - although one and the same person might be made an heir to an undivided portion of the estate, and at the

same time receive a legacy from other heirs. An heir could not be instituted by a codicil. That must be done by a will. C. 6.36.2 and 7. And the heir was required to be designated by name, or so described that no doubt could exist as to his individuality. But aside from this, as shown by this and other laws, mistakes in the description, or the manner of designation, did not matter. See particularly law 15 of this title. Originally, doubtless, requirements in this regard were strict, as indicated by the amendatory enactments. For further details on this subject see the next title. Other requirements were implied, as evidenced by laws 15, 24, 26 and 28 of this title.

6.23.8. The same Emperors to Marcellinus.

Although, by reason of fear of contagion which seizes witnesses in case of a severe and new pestilence, the law has been somewhat relaxed, still the formality of making testaments has not been dispensed with in other respects. 1. For although it is not necessary that the witnesses should be together at one and the same time, when they are beset with fear on account of such disease, still the requirement as to the necessary number is not also dispensed with.

Subscribed July 1 (290).

6.23.9. The same Emperors to Patrocia.

If the requirements of the law were not relaxed through special privileges conferred on your fatherland, and the witnesses did not attest the testament in the presence of the testator, it is of no validity.

Promulgated July 1 (290).

Note.

The emperor was the source of all laws. He might, as indicated by the present rescript, exempt any locality or any individual from the usual rules of law. The rule is not entirely unknown in our time in those jurisdictions where the legislature may pass special laws.

6.23.10. The same Emperors and the Caesars to Menophilianus.

If the testament was made legally and the heir is competent to take, it cannot be invalidated by an imperial rescript.

Subscribed (293).

Note.

A similar provision as to gifts is made at C. 8.55.5. The present rescript shows that the heir must have capacity to take; not all persons had that. This subject is treated in the next title.

6.23.11. The same Emperor and the Caesars to Tethus.

A testament legally made will not any the less be valid because it is shown to have been purloined after the death of the testator.

Subscribed July 6 (293).

Note.

A similar provision as to gifts is found at C. 8.55.2.

6.23.12. The same Emperors and the Caesars to Matronia.

If one of the seven witnesses was absent, or if the will was not sealed by all of the witnesses with their own seal or that of another in the presence of the testator and in the same place, the testament lacks legality. 1. Erasures and interlineations, however, do not affect the formality required by law, but only the genuineness of the will, for the purpose of determining whether the correction was made with the consent of the testator, or whether a deletion was carelessly made by someone, or whether someone made the changes fraudulently.

Subscribed July 6 (293) at Philippolis.

6.23.13. The same Emperors and the Caesars to Euripides.

The power to dispose of property by testament according to definite rules, has given no one the right to change the lawful manner of making it² or violate the public law.

Subscribed November 26 (294).

6.23.14. The same Emperors and the Caesars to Achilleus.

The fact that your grandmother appointed an heir and made a disinherison, clearly proves that she wanted to make a testament and not a codicil.

Subscribed December 13 (294).

Note.

As pointed out before, an heir could not be instituted by a codicil; that was required to be done by a testament. In the present case, the indication was that the decedent meant to make a testament and not a codicil, on account of designating someone as heir. In the present case, the document was probably invalid as a testament, and in such case, with some exceptions, all legacies and trusts left in the document failed. On that subject see further title 39 of this book and headnote. Law 16 of this title provides that if a person voluntarily accepts under a will, he cannot thereafter claim that it is invalid. See also C. 6.36.8.

6.23.15. Emperor Constantine to the people.

Since it is undignified that testaments and last wishes of decedents should become invalid through useless technicalities, we deem it best to dispense with formalities, the value of which is imaginary, and in instituting an heir no particular form of words is necessary, whether that is done by imperative, direct or indirect words. 1. For it makes no difference whether it is stated: "I make and heir," or "I institute," or "wish," or "I charge," or "I desire," or "let him be," or "he will be;" but an appointient shall be valid, by whatever expressions or by whatever form or words that is made, provided only that the intention is thereby made clear. No solemnity of words which are uttered, perchance by a half-dead and stuttering tongue, is necessary. 2. The necessity of use of customary words is, accordingly, dispensed with in making a will, and persons who desire to arrange their affairs, may do so by writing their will on any material suitable for documents and by using any words they wish.³

Subscribed at Serdica February 1 (339).

² [Blume] *Juris dictionis forma* - it here means the same as *juris forma*. 9 Donn. Comm. 34.

³ [Blume] See note to law 7 of this title.

6.23.16. Emperors Gratian, Valentinian and Theodosius to Eutropius, Praetorian Prefect.

It is neither doubtful nor uncertain that an inheritance or legacy or trust may be left just as to the emperor so to any other men of rank or power.⁴ 1. It should be added that a person who becomes an heir under a testament or on intestacy, and voluntarily gives recognition to the legacies, trusts or manumissions must carry them out although the wish of the testator in connection therewith is not supported (by the formality required) by the laws.⁵

Subscribed and given at Thessalonica July 1 (380).

6.23.17. Emperors Arcadius and Honorius to Aeternalis, Proconsul of Asia.

A testament ought not to be held invalid, because the decedent called it by different names, since superfluous matters are not prejudicial. For only the omission of necessary requirements, not abundant caution, renders contracts ineffective and thwart the testator's wishes.

Given March 21 (396).

C. Th. 4.4.3.

6.23.18. The same Emperors to Africanus, City Prefect.

Testaments and other documents which are customarily made public at the censor's office, shall be kept there, and transfer from that place shall not be permitted. Ancient custom is to be faithfully followed, and anyone in this city who would want to change it would seem to want to invalidate the wish of decedents.

Given at Constantinople September 26 (397).

C. Th. 4.4.4.

Note.

At C. 8.52.32, it is stated that gifts in the capital of the empire must be registered before the master of the census. And it seems clear that wills opened and made public in the capital were opened in the office of the master of the census; which seems to have been the registration office there. The master of the bureau of census was, according to the register of dignitaries, under the city prefect. In the provinces, documents were registered with the governor of the province or in registration offices in municipalities. 9 Cujacius 666-7. See also law 23 of this title, and note C. 12.21.2; Steinwenter, Beiträge 72.

6.23.19. Emperors Honorius and Theodosius to Johannes, Praetorian Prefect.

The formality required in testaments would seem to be unnecessary, when an informal testament comes to the knowledge of the emperor, through petition, before so many noble and excellent men (in the imperial council). 1. For as a person will be protected who makes his last will public upon the records of any judge or municipal officer, or in the hearing of private individuals, so no question will ever be raised as to the succession of a person who has us, and the evidence attached to (the record in) our

⁴ This is as penciled in by Blume. The type written original read: "...may be left to the emperor as well as to other men of tank or power." It would seem to read better as "...may be left to the emperor just as to any other men of rank or power."

⁵ [Blume] See C. 6.42.1 and 2.

bureaus as a witness. 2. Nor shall heirs be prejudiced because no imperial rescript was issued concerned such a testament. For we are willing to listen to the last wishes of men, but not command them, so that it may not appear, when we express our opinion (in a rescript) that the right to change the testament is forbidden, and the very testament which, through supplication, is communicated to our ears, shall not be in effect, unless it is proven to be the last will and testament and that the decedent did not thereafter change his mind. 1. And in order that we may not be thought to have omitted something, we order that the heirs designated in such a will shall be entitled to all the rights to which heirs appointed in writing are entitled. No controversy shall be permissible as to a claim of the right of the possession of the inheritance, but to act as heir and an informal acceptance of the inheritance will satisfy the law. For we think that we should grant every person who is competent to make a testament the right to state in a petition directed to us who is his heir, and he may know that his act will be valid. Ad the appointed heir, too, need have no fear, since he can prove the petition (of the testator) sent pursuant to the wish of the decedent, by so many suitable witnesses, if there is nothing else that can prejudice his rights.

Given at Ravenna February 17 (413).

See Glück, 34 Pandekten 174.

Note.

The law is important. It shows that there were two kinds of testaments, public and private. Formalities in execution applied only to the latter. Public wills are those that were (a) presented to the emperor, in council, and subsequently kept in the archives of one of the imperial bureaus, probably that of petitions; (b) those that were recorded on the public records of a judge (president, rector etc.) or of a municipal officer, which might be done either by going to such office and letting the officer record the testament upon oral declaration, or by taking a written document there and having it spread upon the public records. Mackeldy §§689-691; Donellus, 9 Comm. 47; Hunter 771; Girard 861; Steinwenter, Beiträge 72.

6. 23. 20. The same Emperors: An edict to the people of the city of Constantinople and to all provincials.

We do not want last wills of decedents, executed in writing in legal and usual form, to be held ineffectual when a later nuncupative will is affirmed to have been made by the decedent under which the decedent is said to have wanted his property to go to us. 1. We forbid all persons, private and public, to give testimony of that kind, and when last wishes of decedents exist which have been executed in writing in legal and usual form, all who undertake to bring forward an unwritten will in our favor shall be held guilty as forgers. 2. Thus let no one who is appointed as heir or is called to the inheritance-succession by law fear either our name or that of persons of power, and no one shall dare to produce or accept testimony of that kind either in our name or that of powerful persons in private station.

Given at Constantinople March 9 (416).

6.23.21. Emperors Theodosius and Valentinian to Florentius, Praetorian Prefect.

By this well-considered law, we ordain that persons making their testament in writing shall be permitted, if they do not want anyone to know its contents, to produce the

writing, written by the testator or by someone else, sealed or tied, or only closed and folded, and lay it before all of the witnesses at the same time, said witnesses to be seven Roman citizens over the age of puberty, in order that it may be sealed and signed by them, provided that the testator shall, in the presence of the witnesses, state that what is laid before them is his testament, and provided that he signs the testament at its conclusion with his own hand in the presence of the witnesses. If this is done and the witnesses subscribe and seal it on one and the same day and at the same time, the testament shall be valid, and shall not be void because the witnesses do not know the contents of the testament. 1. If the testator does not know how to write or cannot subscribe his name, in order that an eighth witness shall be summoned to subscribe the will on behalf of the testator, under observance of the (other) foregoing provisions. 2. In all testaments, moreover, which are dictated either in the presence or the absence of the witnesses, it is superfluous to demand that the testator and the witnesses be summoned, and the will be dictated and finished at one and the same time. On the contrary, if a testament is produced which was dictated previously, it will suffice that all the witnesses shall, without any other intervening transaction, at one and the same, and not at different times, subscribe and seal the testament. 2a. We direct that the conclusion of a will shall consist of the subscriptions and seals of witnesses. A testament not subscribed and sealed is to be considered as incomplete. 3. We do not permit the will of a decedent, expressed in an incomplete testament, to have any force, except when parents make their testament in favor of children of either sex. 3a. If an outsider is mentioned as heir in such a will jointly with children, it is invalid in so far as it relates to such outsider, and his portion will accrue to the children. 4. We also ordain that a nuncupative will, that is to say, one not in writing, shall not be valid unless seven witnesses, as stated above, are assembled at one and the same time and listen to the last wish of the testator as his nuncupative testament. 5. If, moreover, a person has made a legal will, but makes another, we direct that the former will shall not be invalidate^{3d} unless the second one made by the testator is made legally or unless, perchance, the heirs appointed in the first will are persons who could inherit from the testator on intestacy, while the heirs appointed in the second will are persons who, by law, inherit from the testator on intestacy. For we ordain that in that case the former will, although the subsequent will appears to be imperfect, becomes void, and the second valid, not as a testament, but as the wish of a person who dies intestate. 5a. In such a will the testimony of five sworn witnesses suffices; if that is absent, the first will remains valid, tho outsiders are appointed as heirs. 6. We have deemed it proper to add that everyone is permitted to make his testament in Greek.

Given at Constantinople September 12 (439).

Note.

The signatures and the seals of the witnesses were on the outside, which was the end or conclusion of the will. In this manner it was possible for the testator to sign his name at the conclusion of the will, as well as to conceal from the witnesses the contents of the document. The manner in which documents were customarily tied with thread is described in Smith's Greek and Roman Antiq. under "testamentum." See also law 30 of this title.

The present law is taken from Nov. Th. 16, which recites that in ancient times the testator showed the will to the witnesses (without acquainting them with the contents thereof) and asked them to sign it; but that later the ancient caution was abandoned and

the witnesses were required to know the contents of the document, the consequence of which was that many persons preferred to die intestate rather than to let others know the provisions of his will. The Novel, accordingly, provides for the return of the former rule.

As noted in the headnote to this title, a will in favor of children was not required to be as formal as a will in favor of others. See also Nov. 107, appended to this title. Still a will executed as required by law could not be revoked in favor even of children by the execution of a second will, unless it was signed by five witnesses, which was the number of witnesses required for a codicil. Law 28 of this title. If a testament, however, was more than ten years old, the rule was different. See law 27 of this title.

6.23.22. Emperor Zeno to Sebastianus, Praetorian Prefect.

There is no doubt that a testator may leave to persons who take dictation of testaments or any other last will, a legacy, trust or any other legal gift. A testator may also, in his discretion, leave what he wishes to persons called to witness the making of his will.

Given at Constantinople May 1 (480).

Note.

It was a crime for a man to write a testament for another and write down therein a provision in his own favor. C. 9.23. But that did not apply to those who dictated testaments for a testator; that is to say, notaries and like persons who caused a testament to be written at the request of the testator.

As shown in not to law 1 of this title, a witness to a will could not be appointed as heir, but he could receive a legacy or similar bequest.

6.23.23. Emperor Justinus to Archelous, Praetorian Prefect.

We hereby confirm the imperial orders in which it was thoughtfully provided that last wills of decedents make in this imperial city should not be opened before anyone except the master of the census-office, records being made according to ordinary legal procedure, and that in connection with an inheritance, the amount of which does not exceed 100 aurei, the administrators of the census office, or their apparitors, shall not dare to accept any compensation or expense money for recording last wills, and we, by this repeated promulgation, again warn not only the judges of all the tribunals but also the defenders of churches who have scandalously assumed the right of opening and making wills public, not to meddle with a matter that belongs to no one according to the precepts of all constitutions except to the master of the census. For it would be absurd to disturb the regular order of duties by promiscuous activities and that anyone should arrogate to himself the right to do something in the charge of another, particularly in the case of the clergy; for it is disgraceful for them to affect to be skilled in forensic disputes. A fine of fifty pounds of gold will be inflicted on those who rashly transgress the present law. It must not be permitted to have the last wishes of decedents run the danger of invalidation by an unlawful publication thereof by person who audaciously, but improperly, assume the right to do so.⁶

Given at Constantinople November 19 (524).

⁶ [Blume] See Steinwenter, Beiträge 36. Part of this law is found in C. 1.4.40. See note thereto.

6.23.24. Emperor Justinian to Mena, Praetorian Prefect.

We think we should eliminate doubts which arise either from want of knowledge or sloth of those who write testaments, and the fact that the provision appointing heirs is written after the provision for legacies, and lack of regard for any other rule, not due to the intention of the testator but to the fault of the notary or other person writing the testament, shall give no one the right to overturn the will of the testator, or subtract therefrom.⁷

Given January 1 (528).

6.23.25. The same Emperor to Mena, Praetorian Prefect.

The fault attached to an expression inverted in order, which was directed to be disregarded in the recent constitution of Leo, in connection with dotal documents, must also be disregarded in all other contracts and in all testaments, and gives rise to no defense. Hence a stipulation and other contracts, as well as a will of a testator, shall be valid notwithstanding such fault, and the right thereunder shall accrue after the happening of the condition stated, or after the day fixed.

Subscribed and Given December 7 (528).

Note.

A question in the form “do you promise today, if such or such ship arrives tomorrow?” is an expression inverted in order, because what should come last is put first. Hence a stipulation based thereon was formerly void. But, by a law of Leo this rule was changed as to dotal documents, and the amount promised became due on the arrival of the day fixed or the happening of the condition. Justinian extended the provision of Leo so as to apply to all contracts and documents. Inst. 3.19.14.

6.23.26. The same Emperor to Mena, Praetorian Prefect.

Abolishing all (other) formalities in the making of nuncupative wills, it shall suffice when seven witnesses have been assembled, to make the will of the testator or testatrix known to all at the same time, stating to whom he or she wants his or her property to go or to whom he or she gives legacies, trusts or liberty, although the testator or testatrix did not, before doing so, normally state that the witnesses had been called because he (or she) wanted to make his or her nuncupative will.

Subscribed and given at Constantinople December 13 (528).

6.23.27. The same Emperor to Julianus, Praetorian Prefect.

We ordain, that if anyone has made a testament in a legal manner, it shall be valid though a period of ten years has passed after its making, if it does not appear that the testator changed his mind. For why should it be void, if it is not changed? How can anyone die intestate, when he executed a testament and made no change to the contrary?

1. If, however, it is shown that he changed his mind in the meantime, and he executed a second testament in a perfectly legal manner, the first testament is made void by the law itself. 2. And if, moreover, the testator merely stated that he did not want the first testament to stand, or indicated a change of mind by the use of other words, and he did so before suitable witnesses, not less than three, or by having that fact recorded in the public records, and ten years have elapsed, then the testament shall be void, both by reason of

⁷ [Blume] See note to law 7 of this title.

the testator's change of mind, as well as by the lapse of time. 3. We do not permit testaments of decedents to become void through the lapse of ten years, in any other manner, and hereby annul, as antiquated, all former constitutions enacted as to revocation of such testaments.

Given March 18 (530) at Constantinople.

Note.

By a law of 418 A.D. (C. Th. 4.4.6), a testament more than ten years old was invalidated, if the testator survived. The present law changes the rule of that law, although it shows that a will more than ten years old might be revoked by a comparatively easy method.

6.23.28. The same Emperor to Julianus, Praetorian Prefect.

Since antiquity wanted testaments to be made without any interruption by any (other) transaction, and the words of this provision (of the law) were wrongly interpreted, which resulted in great detriment to testators and testaments, we ordain that during the time that a testament or codicil or any last disposition is made in accordance with rules heretofore existing - for we do not think that any of these should be changed - no attention need be paid to needless things, since they should not interfere in so important a matter. 1. And if the body suffers and requires attention - if, for instance, victuals or drink or medicine are necessary, the omission of which would endanger the very health of the testator, or should the testator or witnesses be required to answer a call of nature - the testament will not be void on that account, and that is true though epilepsy should happen to attack one of the witnesses, which, we have learned, has occurred. When urgencies have been complied with, or the danger is passed, the making of the testament shall be resumed as to the matters still ordinarily required. 2. And even though the testator should do something while the witnesses are somewhat removed - since he may be too modest to answer nature's call in their presence - the latter shall be brought back to his presence, and the making of the testament proceed. 3. If something of that sort should happen to a witness or witnesses, and the required acts may be done in a short time, the return of witnesses is to be awaited, whereupon the testament may be completed. 4. But if recovery from a misfortune demands a longer time, and especially if the safety of a testator is in danger, then such witness or witnesses to whom such misfortune may happen, may be removed and others substituted, who shall ask the testator and the other witnesses whether the things done previous to their own arrival have been done in the presence of the others. 5. And if that is made known to be true, then they or he shall, together with the others, proceed to do what is still necessary, although the other witnesses have already signed the testament in the meantime. In this manner we satisfy nature as well as letting testaments of decedents remain valid. 6. Since, moreover it is provided in the constitution regulating the making of testaments⁸, that the presence of seven witnesses is required in the making of testaments and that it shall be subscribed by the testator or by someone for him by an eighth person called as provided by the constitution, and since some man wrote his testament with his own hand and thereupon called the witnesses, who signed it immediately following his writing, and all customary things in connection with the testament were performed, but such testament was

⁸ [Blume] C. 21, supra.

invalidated by reason of the point in question⁹, we amend that constitution and ordain that if anyone writes a testament or codicil with his own hand, and specially states therein that he himself has written it, such writing by him of the whole testament shall suffice and no other subscription shall be required either from him or from another for him, but the witnesses shall sign it and the (other) requirements shall be complied with. (If this is done) the testament shall be valid. A codicil shall be valid (in such case) if five witnesses sign such writing. And let no cunning intriguer of such iniquity be found hereafter. Given at Constantinople March 27 (530).

6.23.29. The same Emperor to Julianus, Praetorian Prefect.

We order that if a testator is able to write, he shall himself write the name of the heir or heirs in some part of the testament, so that it may be clear that the inheritance is transmitted pursuant to his wish. 1. But if, perchance, he cannot do so, either by reason of severe sickness or want of ability to write, he shall announce the name or names of the heirs in the presence of the witnesses to the testament, so that if the testator cannot write, the witnesses, in any event, will know who are appointed as heirs, and the succession will take place under the name of a definitely known heir. 2. For if a testator can neither write nor speak articulately he is not unlike one who is dead, and forgery will be committed in connection with wills. In order to banish this from our empire, particularly desirous as we are to do so in connection with the making of testaments, we enact this edictal law for the whole (Roman) world. 3. If the foregoing rule is not observed, and the name of the heir or heirs is not written in the testator's own hand, or has not been announced in the presence of the witnesses, such testament shall be void either as to the whole - if none of the name of the heirs were either so written or announced - or to the extent of the appointment of an heir, whose name was not made known either by the tongue or the hand of the testator. 4. And lest the witnesses, perchance, forget, when the names of several heirs have been given, these witnesses shall, if the testator has not written but has announced the names of the heirs, add these names to their signatures in order to serve as perpetual memorial. 5. But if, as stated, the testator himself has written the names of the heirs in some part of the testament, it is not necessary for the witnesses to do so, since the testator, perchance, did not want them to know who were his heirs, and the fact itself clearly appears by the testator's writing. 6. But the names of the heirs should be made fully known, either by the writing of the testator, or at least by his words, followed by the writing of the witnesses who were called to witness the testament. For as the testator must, in case of a nuncupative will, announce the name or names of the heirs, so that must also be done in case of a written will, if the testator will not or cannot write these names with his own hand. 7. These provisions apply only to the future, so that testaments made subsequent to the enactment of this, our majesty's law, must be executed under observance of its provisions. For how could the past be at fault, which, while ignorant of the present law, followed the rules formerly in force? Notaries and other persons who assist in the making of testaments, must take notice, that if they dare to

⁹ [Blume] Here the testator did not sign his name, though he wrote the whole testament in his own handwriting. The point in question was whether he should not have signed his name, or summoned an eighth witness for him. The law provides that such testament is valid, without either of these requirements.

act contrary hereto, they will not escape the penalty of forgery, as if they had acted with intentional deceit in such an important matter.

Given at Constantinople March 1 (531).

Note.

The foregoing law was found impracticable and was virtually repealed by Novel 119, c. 9, which is as follows:

c. 9. Since, moreover, we formerly enacted a law that testators should write the names of their heirs with their own hand or cause it to be done by the witnesses, and we have learned that through this technicality many testaments have been overthrown, inasmuch as the testators were not able to comply therewith, or, perchance, did not want to acquaint anyone with their wish, we direct that those, indeed, who want to observe this form, may do so, but if they fail to do so, and make their testaments in pursuance of the ancient custom, such testament shall be valid, whether the testator writes the name of the heir himself or causes it to be done by another, provided he observes the remaining legal formalities in making the testament.

(A.D. 554)

6.23.30. The same Emperor to Johannes, Praetorian Prefect.

We hasten to broaden the scope of our providential care also in this instance, particularly in connection with last wills of decedents. We find that some controversies arose among the ancient interpreters of the law as to a testament, which had been executed legally and had the seals of seven witnesses, but the linen band of which had thereafter been cut, entirely or in part, either accidentally or by the testator himself, thus raising a doubt as to the validity of the will. Affording the usual remedy, we ordain, that if the testator cut or tore off the linen band or the seals as an indication that he changed his mind, the testament shall be void; but if this happened from any other cause, the testament shall remain in force and the appointed heirs shall receive the inheritance, particularly because our constitution which we promulgated for the protection of testaments provides that the testator shall write the name of the heir with his own hand, or if he cannot do so on account of lack of ability to write or sickness or other reason, that the witnesses shall, after having heard it, add such name to their signature in the presence of the testator.¹⁰

Given October 18 (531).

6.23.31. The same Emperor to Johannes, Praetorian Prefect.

The interests of farmers were consulted both by the ancient laws and by the emperors of the past, and these farmers were relieved from strict observance of many technical requirements of law, as we find from existing proofs. Testaments were provided to be made in accordance with definite rules of law, but how is it possible for farmers and person ignorant of letters to comply with so much technicality of the law, when they make their last wills? In imitation, therefore, of the grace of God, we thought it necessary to come to the aid of their rusticity by enacting the present law. 1. We, therefore, ordain that in all cities and camps of the Roman world, where our laws are known and the knowledge of letters flourishes, all the requirements made in our Digests

¹⁰ [Blume] The provision as to writing the names of the heirs was repealed, as shown immediately above.

or Institutes and imperial sanctions and orders concerning the execution of testaments, shall be complied with and no change is to be made by the present law for such a case. 2. But in places, in which men of letters are rarely found, we permit farmers, by virtue of the present sanction to follow their ancient custom as law, provided that if there are men with knowledge of letters, seven such witnesses - which number is necessary to witness a will - must be called, and each of them shall personally sign the testament. If no witnesses who have knowledge of letters are found, seven witnesses to the testament, who act as such, shall be sufficient, though they do not write. 3. If not as many as seven witnesses can be found in the place, at least five witnesses shall be called; we do not permit any number less than that. 4. And if one or two or more of them know letters, they may sign for those who do not know how to write, in the presence, however, of the latter, and provided that the witnesses know the wish of the testator, particularly whom he wishes to leave as his heir or heirs, and provided that they swear to this after the testator's death. 5. Whatever provision, accordingly, any farmer has made, as has been said, concerning his property, shall be valid and in force hereby, relaxing the technicality of the laws.¹¹

Given at Constantinople July 5 (534).

Note.

It appears from various laws in the Code, as in C. 3.28.8, C. 3.36.16 and 21, C. 6.23.21, and particularly C. 3.36.26, that fathers were permitted to leave their property to their children in a very informal manner, and that the strict rules relating to the execution of testaments did not apply in such case. It appears, however, that this privilege led to many uncertain ties and Justinian, accordingly, made two enactments on that subject, in order, if possible, to avoid these uncertainties. These enactments, contained in Novel 18, c. 7, and Nov. 107, are here appended.

Novel 18. (A.D. 536)

c. 7. In the next place, we have thought it necessary to embody in the present law decisions that we have often made on certain matters. Men who have several children, and who divide their property among them in order to prevent discord, thereby frequently create greater and more serious contentions among them. They should, in their testaments, clearly divide the several parcels of property, if¹²

¹¹ [Blume] See headnote to this title.

¹² This sentence ends thusly and the bottom of a page, and the rest is missing.