Book VII.
Title LXXII.

Concerning possession and sale of goods by the authority of the judge and concerning separation of property.
(De bonis auctoritate judicis possidendis seu venumdandis et de separationibus.)

Dig. 42.5.6; Bas. 9.7.50 et seq.

7.72.1. Emperor Antoninus to Attica.

It is clear that the rights of legatees who might have sued the decedent as heir (because of a legacy owing them by him as such heir), are greater in connection with the property which such decedent left that the rights of those to whom he himself only left a legacy, since the former legacy is collected as a debt, but the latter left by such decedent, cannot be collected until after the payment of debts.

Note.

The decedent inherited some property but was charged with the payment of some legacies, but which he did not, in fact pay. The law says that these legacies not so paid, are a debt owing by the decedent and hence have a preference over legacies which the decedent left to others.

7.72.2. Emperor Gordian to Aristo.

The quickest relief and a remedy against loss is given creditors of an inheritance by the edict of the praetor, (which provides) that whenever they demand separation of property the demand will, after hearing, be granted. Your wish will, accordingly bear proper fruit, if you show that you did not depend on the heirs, but brought them into court through necessity.

Note.

When an inheritance was solvent, but the heir insolvent, the creditors of the deceased might go into court and demand the separation of the property of the deceased from that of the heir. D. 42.6.1. After they had once asked and obtained such separation, they could not thereafter, if not paid in full, ask the heir to pay the deficiency. D. 42.6.5. If the inheritance was not solvent, but the heir solvent, the separate creditors of the heir could not demand any separation of the property, for they were in the same situation as if the heir had created additional debts in any other manner. D. 42.6.1.2. When a slave was the heir of an insolvent inheritance, thereby obtaining his freedom, and he acquired other property after the testator's decease, he could have such property separated from the inheritance. D. 42.6.18. See also note C. 4.16.6.

7.72.3. The same to Claudiana.

You summon the debtor on the contract made earlier than an assignment of property in favor of creditors, contrary to the rule of law, since equity fortifies him by the help of a defense, and you can ask a second summons only when he has acquired so much property that the president should be moved to grant you permission to sue.[1]

[1] [Blume] See C. 7.71.7 note.

7.72.4. Emperors Diocletian and Maximian and the Caesars to Clearchiana.

What you ask, namely, that one of the chirographic (unsecured), creditors should accept the property of the debtor and pay all of the other creditors, is not according to law.
293.

7.72.5. The same to Abydonius.

If it appears that the property of your deceased debtor is heirless (racous) and is not claimed by the fisc, you rightfully ask the judge to put you in possession.
December 16 (293).

7.72.6. The same to Agathemerus.

Creditors cannot legally ask that the property of their debtor be set over to them for their debt. Hence if other creditors of your debtor had property pledged to them, they have, without a doubt, preference over you, was are but a chirographic (unsecured) creditor. 1. But if it is shown that no property was specially or generally mortgaged to anyone and the common debtor or his heir died without a successor, the interests of all of the creditors will be equally protected, in proportion to the amount of their debt, not by giving them any right to claim the ownership of the property, but by taking possession thereof (pursuant to an order of court) and selling it.

Note.

In this case, perhaps, the creditor had a contract that in case of default he might seize the debtor's property, though he had no direct lien. So he, perhaps, wanted to seize and take possession of the debtor's property and claim ownership thereof, in accordance with Greek ideas. This was contrary to Roman law. C. 8.13.3; Mitteis, R.R.u.V.R, 438-9. He was required to share with others in bankruptcy proceedings. See law 10 h.t.

7.72.7. The same to Domnus.

If your wife is heir to one-third of the inheritance of her paternal uncle, and she was not forbidden (in the testament) to ask for payment of the debt due her from him, she is not forbidden to claim two-thirds of her debt from her co-heirs, since her right of action is not merged beyond the proportion in which she succeeds as heir, and if her co-heirs are not solvent, she may ask for a separation of the property so as not to suffer any damage.[2]
Given December 1 (294).

7.72.8. The same to Aelida.

A widow of a decedent or a creditor who is put in possession of property to preserve it, cannot thereby acquire ownership thereof.[3]
Given at Nicomedia under date December 27 (294).

7.72.9. The same to Aurelius Gerantius.

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[2] [Blume] See C. 4.16.6.
[3] [Blume] See law 6 of this title; C. 5.22.1.

Since you state that the man against whom you complain, is indebted to you on account of managing your affairs, you may, according to law, go before the rector of the province and sue him. If he hides, to defraud you of your rights, and is not defended, and appears to be your debtor, you may, according to the edict, obtain possession of his property. You are not forbidden, after the legal time has passed, to also ask the proper judge for the sale thereof.[4]
Given August 19 (299).

7.72.10. Emperor Justinian to Johannes, Praetorian Prefect.[5]

We find that a dispute existed among the ancients as to debts for which no lien had been given, in relation to property belonging to the debtor, when such debtor, fearing his harsh creditors, concealed himself, and they went before the proper tribunal concerning his property and asked to be put in possession thereof; (it was doubted) whether other creditors to whom the debtor was liable could in such case participate in any rights under such possession. Solving such doubt, we order by the present, general, imperial constitution, that if only part of the debtors bring their claims forward, and certain ones only are put in possession of the property by judicial order, not only they, but all others who bring such debts forward, shall enjoy the advantage of, and may have a right in common with, the parties above mentioned to whom an order for possession was granted. For what is more just than that all who have a right to a debtor's property, should be participants in such benefit? 1. In order, however, that persons who are shown to have been more vigilant in connection with their debts than others, should not forever be handicapped by the negligence of others, it seems to us to be right that creditors who have not already asked for it, shall have the rights of joint possession of the property only if they make their claim known to those in possession of the property in the manner aforesaid, within two year, in case they live in the same province with the former, and within four years in case they live in a different province, and provided, further, that they pay to those to whom the judicial order for possession of the property was granted the expenses thereof in proportion to the amount of debt, such expenses to be determined by the oath by those who incurred them for the purpose of obtaining such possession, since it is clear law that their debt will also be paid in the proportion which it bears to the total. 1a. But the tardy creditors shall have no right, after the lapse of the aforementioned time, to molest the creditors who obtained possession, or damage them in any way, and they must bring whatever actions they think they have under the laws, against their debtors. 2. If those who have possession of the property either sell the property under order of court or transfer the rights which they have in the property, to other persons after the period fixed by us above and receive a certain price therefor which is in excess of the amount which is due them, they shall seal such excess in the presence of notaries and deposit it in the treasury of the holy church of the city where such contract (of sale) is made. The above mentioned notaries shall first make a certificate in writing in the presence of the vendor of the party who transfers his rights, stating therein the amount of the money paid by reason of sale or transfer, and the amount which remains after the payment of the debt,

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[4] [Blume] See for the proceedings in such case note 2.2.4 (c).
[5] Blume struck the reference to the following footnote but did not strike the note itself: "See headnote (2) to 7.53."

so that if some other creditor appears thereafter and shows his duebill, his debt may be paid out of such deposit; provided that the rector of the province must first, without cost, make an examination of the claim and must make an order for the creditor to satisfy his claim, according to the amount thereof, out of such deposit, and (provided further, that) the rector must not permit the reverend steward or treasurer of the holy church in which the money is deposited, to suffer any loss. 3. In order that a creditor, moreover, may not be permitted to commit any fraud, trickery or to cheat in making such sale or transfer, we order that a certificate concerning it shall be executed, to be made a matter of record by the defender of the place, showing whether only the amount of the debt was collected or more or less; which certificate shall be made not only in the presence of the notaries, as stated, but also in the presence of the reverend church treasurer with whom any excess money, if there is any, shall be deposited, after sealing it; and the seller or transferrer of the property shall, further, take an oath on the holy gospel to the effect that the amount received is just and was not diminished by reason of any partiality for the purchaser of the transferee of the property, nor by any fraud, but that he received a price which he was able to obtain only by the zealous exercise of care.

Given at Constantinople October 18 (532).

Note.

In law 9 of this title, proceedings by one creditor against an absent debtor are contemplated. The procedure in such case, is fully explained in note to C. 2. 2. 4e, and C. 7.43, namely citations were required to be issued against the debtor, and if he failed to appeal pursuant thereto, the creditor was put in possession, to preserve the property and after a certain interval, the length of which is unknown, he was authorized to sell the property to satisfy his claim. He was, however, put in possession of only so much property as would satisfy his claim, and not necessarily all of the property.

The proceedings contemplated in the present law (C. 7. 72. 10), refer to bankruptcy and possession of all of a debtor's property by one or more creditors on behalf of all. This was evidently the only proceeding permissible in case there were two or more creditors. A number of points in connection therewith are not clear. If there was only one creditor, he would naturally, not want to resort to these proceedings, since they were cumbersome and took a long time. The law itself refers apparently only to a debtor who concealed himself, but it is assumed that the proceeding therein mentioned applied as well when the debtor was present and failed to pay, and to a case where the debtor made an assignment of property for the benefit of his creditors. 3 Bethmann-Hollweg 316, 317; Girard, 1144-1145; see Cujacius, 9, 1059. This view seems reasonable, since no other proceedings in such case were provided to apply in such case. It was doubtless also applicable in the case mentioned in law 6 of this title, where the debtor died, leaving no appointed heir or successor to his estate. What was the situation if only one creditor sued and he obtained possession of part of the property of the debtor, in accordance with the proceedings mentioned in law 9 of this title and in note 2.2.4e, and it did not then appear that there were other creditors, but such other creditors appeared later, we are not told. 2. It would seem that if the latter appeared before the property was sold, the exclusive right of the creditor in possession probably ceased and he ant the others were then jointly permitted to take possession of all the property of the debtor. It does not seem to have been essential that the creditors who claimed possession should first procure a judgment against the defendant. In fact in some cases, as where the debtor had

died, this would have been impossible. But the claim was required to be certain and one that would be approved and allowed by the judge. 3 Bethmann-Hollweg 318; Girard 1145. And, doubtless in analogy to other proceedings, notice was given to the debtor, if living.

The proceeding was cumbersome and extended over a long period of time, for a sale of the property could evidently not be made until the period of four years, mentioned in the law, had expired. The proceeds of the sale were divided among the creditors in proportion to the amount of their respective claims, subject, however, to liens thereon, and to certain preferential rights in favor of the fisc, funeral expenses (if the debtor had died), the dowry of the widow or bride, expenses incurred in making repairs, deposits with bankers, if made without drawing interest, and various other preferred debts provided by law. D. 42.5-17; 24.1; 25; 26; 34; 38. See in general 3 Bethmann-Hollweg 315-325.

Justinian in many enactments showed his spirit of leniency toward debtors. He accordingly provided another method whereby debtor might be paid, requiring them in certain cases to accept payment in land, although ordinarily payment in anything else than that called for in the contract was not good. C. 4. 210; C. 8. 42. 16 and 17. The provision mentioned is in Novel 4, c. 3.