

Book VI.  
Title XLVIII.

Concerning uncertain persons.  
(De incertis personis.)

Bas. 44.18.29.

Headnote.

As general ruled, an heir, legatee or beneficiary of a trust had to be a definite, certain person; no uncertain, indefinite person could be appointed as such. Gaius 2.238-242; Ulpian, Frag. 22.4-6; Inst. 2.20.25-28. A provision: "Whoever comes to my funeral first shall be my heir," was void. Ulpian, supra. A corporation, including municipalities were, by a special enactment, allowed to leave their inheritance to municipalities. Idem. As noted in C. 6.24.12, the Emperor Leo, in 469 A.D., allowed cities to become heirs, legatees and beneficiaries of a trust; and corporations had already in 290 A.D. been allowed to become heirs by special privilege. C. 6.24.8. The present constitution further modified the rule by allowing corporations, churches and classes of persons, as the poor, captives, clergy and soldiers of a legion to take legacies. See also C. 1.3.24.

Originally, doubtless, all posthumous children were deemed to be uncertain persons and could not be appointed as heirs. The law, however, came to be modified so that those posthumous children, conceived at the time of the testator's death, could be appointed heirs, provided they were self-successors. Ulpian, Frag. 22.19. A posthumous child, not a self-successor, was considered a stranger, which included a grandson by an emancipated son, and as such could not be appointed as heir. Gaius 2.241 and 242; Inst. 2.20.26. But his rule was first modified by allowing such child, in the proper case, to take contrary to the terms of the will, and granting it the right to claim possession of the inheritance. Inst. 3.9 pr. and note; Poste at Inst. 2.20.28. By the terms of the present constitution, any posthumous child might be appointed as heir, if conceived at the time of the testator's death. One not conceived, could not be appointed. See generally Hunter 798, 799; 2 Karlowa 862-3; Mackeldy §§703, 704; Inst. 2.25 and 27.

But this limitation applied only to the appointment of heirs. Trusts, which now included all kinds of legacies, could be given to uncertain persons, and, as already mentioned in headnote to C. 6.42, they were used for the purpose of establishing perpetuities. It was possible to direct the heir to hand over the property on his death to his son, to direct the latter to do the same and so on forever. This, in fact, had been possible in the early period of trusts, was later made unlawful, but was again permitted after the enactment of C. 6.49.1. By Novel 159, appended to C. 6.42, however, it was decided that the limitation should not be good for more than four generations.

6.48.1. Emperor Justinian. (Synopsis in Greek).

1. Whoever wishes, may rightfully appoint a posthumous child as heir and leave it a legacy or trust, unless such child could not be legally appointed as heir even if in existence. 2. The constitution forbids the appointment of uncertain heirs unless such heir is in the womb. 3. For the womb of the mother which nurses it and the father supply the lack of a name. The constitution deals with the case when universal trusts and legacies

are left to all the cognates together, and no cognate is in existence at either time, for instance, at that of death<sup>1</sup>, and is only born at the time of the death or is yet in the womb. 4. And with the case where the testator leaves his property to those who are his cognates at the time of the execution of the testament, and then other are born, of whom he did not think when making the will. 5. And if the testator leaves it to all of his cognates, they should not be called (to take the property) according to degree (of relationship), or in (any regular) order, but all of them equally. 6. It provides who shall be called as heirs, if the testator directs the property to be given to those who would be called if he died intestate. 7. And if he has bequeathed to his freedmen, who will take the legacies. 8. And what shall be done if he should in this testament make general bequests to his freedmen, and then a special bequest to those that are manumitted in the testament, codicil or without writing. 9. If a legacy is left to the family, and there are no cognates, son-in-law or daughter-in-law, the freedmen are called. 10. If anyone leaves anything to the senate, or curia of the city, or an official staff of high dignitaries or of a governor in the provinces, or to the guild of physicians, professors or lawyers, or to soldiers or to the craftsmen of his own trade, or to clergymen, or in a word, to any lawful guild, the bequest is valid. And if he simply made mention of a guild or legion, those who at the time of his death belong thereto are the claimants and divide it according to the number of persons therein, unless the testator has ordered each one to take a definite amount. Nor let anyone take pains to inquire, as under the ancient constitution, whether the legatee belongs to a definite post (administratio) or not. 11. And (the law provides for the case) when the testator orders the donee of a bequest to leave it upon his death to his surviving children, grandchildren, great-grandchildren or cognate relatives. 12. If mention is made only of sons, this does not benefit daughters. If the testator orders generally that upon the donee's death his surviving offspring shall have the property, then sons, daughter, grandsons, granddaughters, great-grandsons and great-granddaughters alike shall be entitled to claim it. 13. And if he has added specially that his children and his remoter offspring should receive it, provision is made who then may claim it. 14. The same is true as to cognates. These provisions apply when property is left in bulk. 15. But if the testator leaves to his cognates annuities or monthly payments or payments at certain times, without adding anything else, such bequests are given only to those who are his blood-relatives at the time of his death and who are then living, which is true also if he had left annuities or monthly or daily payments, not to his cognates, but to a society, legion or guild. In such case, too, only those who are living at the time of the testator's death are entitled to such bequest, to be divided among themselves equally. 16. But if a testator leaves annual, monthly or daily payments to cognates, and orders them to be paid also to their offspring, and adds that it is in perpetuity, then the gift lasts in perpetuity and never ends. 17. This applies, too, in the case of lawyers, professors and physicians. 18. and (it applies) even if the testator has said nothing as to perpetuity, but has simply ordered the property to be given to the offspring. (The constitution also specifies) when a family or legion, as far as the third generation, is permitted to claim what is left. 20. (and provides what the law is) if a legacy is left to freedmen, without adding, or adding: "and to their offspring." 21. And what should be done in all these cases, if one of them should be dead. 22. And when

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<sup>1</sup> [Blume] Or in the alternative - the other time referred to - at the time of executing the testament.

it was ordered what each of the beneficiaries shall receive, or, on the contrary, when the bequest is left to them altogether, and it is ordered that the payments should be made in perpetuity. 23. Or when he did not add that it should be given in perpetuity. 24. And a freedman of a freedman is never entitled to such a legacy, unless the testator has so specially ordered. 25. (And the constitution directs) what shall be done if the testator has directed a certain sum to be divided between certain citizens, and how it should be divided. 26. (and provides what shall be done) when property is left in perpetuity to churches, hospitals, poorhouses, religious institutions, the whole of a clerical order, or for the redemption of captives, or to the poor or to captives themselves. 27. But if anyone shall appoint as his heir the person who shall first be made consul after his death, or shall first come to his sepulcher, or who gives his daughter in marriage to the testator's son, or who becomes the testator's son-in-law, or makes any other similar provision, such provision is invalid, because such heir is not definitely named, and even a legacy to such persons is invalid. 28. Nor can a guardian be appointed for uncertain persons. 29. But what is left to the poor is not to be considered as left to uncertain persons. 528-529.

Note.

For legacies and trusts to churches, chapels, the poor etc. see C. 1.2.26, and provisions in Nov. 131, cc. 9-12, which should be read in connection therewith.