

Book II.
Title XXI (XXII).

Concerning restoration of rights to persons under twenty-five years of age.

Headnote C. 2.2.

Restitution of rights. This term, while in its broad sense sometimes applied to any action which, by its results, repaired a complainant's rights (Savigny, 7 Syst. 101), was properly a proceeding before the praetor or other proper magistrate to cancel or nullify, on equitable grounds, the legal effect resulting in pecuniary injury or damage, of an act, transaction or omission. Thus an omitted defense might be restored, a transfer cancelled, an acquisition or a loss of a right by prescription decreed to be without effect. It was an extraordinary, special and equitable remedy, not applicable when relief might be had in an ordinary action, or by a special remedy provided by law (D. 4.4.16 pr.), lay in favor of the heirs of a person entitled thereto (D. 4.1.6 pr.), and was granted only after special investigation, and, ordinarily, only in the presence of the adverse party. D. 4.1.3 and 8; D. 4.4. 29.2; Paul. Sent. 1.7.3. Numerous and sufficient illustrations of the grounds and the limitations of this remedy are given in this and subsequent titles.

In many instances, complete relief would be given by the proper magistrate himself, for instance, by refusing a suit against a minor (D. 4.4.27.1), letting in to defend, correcting missteps in procedure, setting aside a judgment or order, or canceling a sale. D. 4.4.13.1; D. 4.6.2; D. 4.4.24.4. But that was not always true. When, e.g., a suit was necessary to determine a right, aside from the question of restitution of rights, the magistrate could, and probably generally would, simply put the complainant in position to assert that right, leaving, in classical law, the ultimate determination of that right to a trier of facts. Thus, if a claim to real or personal property or to a pecuniary right was, by law, barred by prescription, or lost by a valid release or otherwise, the magistrate would, in the proper case, declare the prescription or loss of no effect, and give to complainant an action, under the assumed fact, or fiction—determined by him—that the action was not barred or lost, and the trier of facts would try the case on that theory and under that assumption. D. 4.4.13.1; D. 4.2.9.4. Here two proceedings would take place, one in which the opportunity to obtain a right was given, which, for convenience, may be called the preliminary proceeding, and one the main action. Of course, if only the facts giving rise to restitution of rights were involved, the preliminary proceeding doubtless generally disposed of the controversy, but there might be other points barring ultimate recovery, and it was, doubtless, only in that class of cases, in which a main action was necessary. Such main action was called *restitutoria* or *rescissoria*, i.e., granted pursuant to an order for restitution of rights. The practice of having two proceedings in such cases is not followed by us, and has been largely disapproved in Continental Europe (Savigny, 7 System. 113, 230, 237)—the whole dispute being tried in one action.

The division into two proceedings was unnecessary, and the modern practice obtained in those cases in which a transaction, act or omission did not, according to the ordinary course of law, cut off the rights of the complainant, and which, accordingly, was not in law, a defense. For instance, a transfer of property by a minor without consent of his guardian was absolutely void. Hence an action to recover the property could be brought without any preliminary proceeding or order. C. 2.40.4; D. 4.4.16 pr. That kind of action was called a direct action, as opposed to an action *rescissoria*, the difference being aptly illustrated, for instance, in C. 2.29.2; C. 3.32.24; C. 8.50.18. Other texts in

which a preliminary order was held unnecessary are C. 2.40.1-5; C. 5.71.11; C. 3. h.t.; C. 2.26.4; C. 2.30.3. The difference here mentioned appears to have been maintained even in Justinian's time, though procedure had then been simplified and a case was tried by the same judge, or person acting for him, from beginning to end. That, at that time, evidently meant merely that the question of restitution of rights, if involved, was first determined and disposed of before proceeding further in the case.

The tendency and development in the Roman law was to eliminate the necessity of such preliminary proceeding. This is well illustrated in C. 2.40.5. Again, while in the earlier law, restitution of rights had been necessary to bring an action in rem to recover property transferred under intimidation, a direct action was permitted under post-classical law. C. 2.18.3; 43 Z.S.S. 200. And special actions were developed, designed to take the place of the preliminary proceeding here mentioned. Savigny, 7 System 112-114. Thus restitution of rights, by this special proceeding, could, in early law, be had in connection with transactions extorted by violence, fear or intimidation, or fraud, and against transfer for the purpose of changing the action over to some other party, and probably to cancel transfers in fraud of creditors. But the special proceeding was largely supplanted in later law by the action on account of intimidation (C. 2.18) or fraud (C. 2.19), by an action on the facts (C. 2.54) and the action Paulina to set aside transfers in fraud of creditors. See an exhaustive treatise on the action on account of intimidation in 43 Z.S.S. 171 ff. See generally, Savigny, 7 System 90 ff; Karlowa, 1 R.R.G. 1064-1104; 4 Gluck 392 ff; 5 Gluck 1-53.

2.21.1. Emperor Alexander to Plotiana.

It should be determined (in the ordinary case) whether a complaint that a testament is undutiful has been renounced openly or by tacit dissimulation. But that this cannot apply to you is shown by the aid extended to the age of minority. Given July 11 (223).

Note.

The complaint that a testament was undutiful could be brought by certain persons, particularly children, when the proper proportion of an inheritance was not left them by a will. C. 3.28. The action, however, was barred through various forms of recognition of the validity of the will. D. 5.2.12 pr.; D. 5.2.27 pr. Buckland, Textbook 326-327. But a minor might be entitled to restitution of rights. Bas. 10.4.51 states the instant law as follows: "A minor under twenty-five years of age does not suffer any prejudice by renouncing either openly or impliedly that a testament is undutiful." The person to whom the rescript was addressed was evidently a minor.

2.21.2. The same emperor to Alexander.

If your sister, during the time in which she had the aid given on account of age,¹ should have received the right of possession of the inheritance of her intestate father, but she failed to ask for it,² she has none the less (a claim to) the privilege of the edict, though

¹ [Blume] Simply a circumlocution for "while she was a minor."

² [Blume] Added, properly, in Bas. 10.4.52.

she has³ five living sons, provided that the benefit of restitution (of rights) on account of age is now (still) available.⁴
Promulgated August 6 (238).

2.21.3. Emperors Diocletian and Maximian and the Caesars to Attianus.

If you, a minor below the age of twenty-five years, having a curator, sold property after you were over the age of puberty (fourteen years), (without his consent⁵) such contract should not be upheld, since a minor who has a curator is in a not dissimilar position from that of a person for whom a curator is appointed by the praetor and is forbidden to manage his own property. But if you made the contract without having a curator, you are not forbidden to seek, upon investigation, restitution of rights, if the time for doing so has not elapsed.

Given April 18 (293).

2.21.4. The same emperors and Caesars to Isidorus.

If you prove that when you made the contract, you were below twenty-five years of age, and your adversary fails to show that the time fixed for restoration of rights has elapsed, the president of the province should extend the aid of restitution of rights to you.⁶

Given at Heraclea April 27 (293).

2.21.5. The same emperors and Caesars to Rufus.

Restitution of rights is available to minors in transactions in which they can show themselves to have been overreached, although no fraud of the adversary is shown. 1. It is also settled law that they may ask for restitution of rights even before they have completed their twenty-fifth year, as to transactions in which they thing they were overreached.

Given at Heraclea April 27 (293).

2.21.6. The same emperors and Caesars to Sententia.

If a suit for restitution of rights was commenced during the age to which aid is usually extended, and you have not renounced it, the death of the person against whom you had asked it (the restitution) cannot prejudice you.

Given at Sirmium April 27 (294).

³ [Blume] Text has “had”—habuerit. Bas. 10.4.52, “has”—habeat.

⁴ [Blume] The edict here referred to is the edict which gave restitution of rights to minors. The daughter here was doubtless emancipated. So she was required to ask for the right of possession of the inheritance, in order to receive any part of it. C. 6.9. headnote. The time for that was limited, and she failed to do so during that time. Nevertheless, if she was still a minor, she could still do so upon being restored to her rights. She evidently thought that she was prevented from doing so by reason of her children, who, next to her, were interested in the inheritance, and whose interests were, therefore, antagonistic.

⁵ [Blume] The rescript established a new rule. A minor over the age of puberty could, in classical law, transact business, against which he could have, and needed restitution of rights. Under the rescript, a transaction without consent of curator, if minor had one, was absolutely void, needing no restitution. 32 Z.S.S. 305; 35 Z.S.S. 132. See also C. 5.28 headnote.

⁶ [Blume] See C. 4.19.9 and note as to burden of proof. Join C. 2.24.1.

2.21.7. The same emperors and Caesars to Severa.

You are able, if the legal time has not elapsed, to sue for restitution of rights, the heirs of your maternal uncle who was your guardian, to whom—your age being stated falsely with his approval⁷--you gave a release concerning his guardianship, when his position as guardian, and the nearness of his relationship shows that he was not ignorant as to your age.

Given July 222 (294).

2.21.8. Emperors Honorius and Theodosius to Julianus, Proconsul of Africa.

It is well known from innumerable authorities that the interests of minors must be consulted as to things which they overlooked or of which they were ignorant.

Given March 7 (414) at Ravenna.

C. Th. 2. 16. 3.

2.21.9. Emperor Zeno to Aelianus, Prateorian Prefect.

A minor does not seem to be defrauded by invoking the ordinary legal rights.⁸

Given January 1 (480).

⁷ [Blume] Falso aetate probata (?)

⁸ Blume penciled a question mark into the margin next to this translation. Scott renders this: "A minor is not considered to have been taken advantage of who avails himself of the Common Law." 6 [12] Scott 224 (as C. 2.21.9).