Book III.
Title XXXI.

Concerning the action for an inheritance.
(De petitione hereditatis.)

Headnote.

The action for the recovery of an inheritance developed as a separate action out of vindication—the regular action for the recovery of property (C. 3.32). It was brought by one claiming to be the true heir (either as heir under the civil or praetorian law) to recover an inheritance, or part thereof, from one in possession who also made claim to the property either as heir, or who simply was in possession under no claim. An intestate heir, for example, might bring the action against one claiming under a testament which the plaintiff might claim to be invalid. One who had an independent title—which, for instance claimed that he bought the property in dispute from the deceased, could not be sued in this action. Law 17 h.t. Any property belonging to the inheritance except debts were recoverable thereby, and even debts, if claimed by defendant as heir (D. 5.3.25.18; D. 5.3.42); hence, making the action a mixed real and personal one. If plaintiff claimed only an undivided portion, he sued only for that. D. 5.3.1.5. The action was advantageous when the defendant had a number of pieces of property claiming them as heir, obviating a number of actions for specific pieces by the regular action for the recovery thereof. In fact, plaintiff could be compelled to bring such action—instead of another in such case. G. 4.133. Partition between several heirs could not be had by this action. D. 5.4.7.

3.31.1. Emperor Antoninus to Augurinus, Proconsul of Africa.

The decree of the Senate, made at the instance of the emperor Hadrian, my grandfather, wherein it is provided of what property, in case of eviction from an inheritance, and from what time onward, restitution must be made, pertains not only to fiscal causes, but also to private claimants.

1. But bona fide possessors will not be compelled to turn over interest collected, from the date of sale, on the (purchase) money of property of the inheritance sold by them before joinder of issue, nor fruits (gathered by them before that time) unless they became richer thereby.

2. But after joinder of issue, the fruits received or which could have been received, as well as interest on money received from sale of property before joinder of issue, computed from the day of the joinder of issues, must be paid over (to the rightful owner).

Promulgated January 27 (170).

Note.

The senate decree called Juventianum, of 129 A.D. originally applicable only to the recovery of public lands, but later extended to private lands, made a distinction between possessors in good faith and those holding in bad faith. The latter were liable for all fruits (income) received or which could have been received before joinder of issues, the former only for those on hand at that time; both equally for later income. See also C. 3.32; 7.27; C. 7.51.1 and 2.

3.31.2. Emperors Severus and Antoninus to Marcellus, a soldier.

If Musaeus bought half of the property of Menacratis from his heir appointed in his will, with knowledge of the commencement of an action (brought by one who claimed to be entitled to the inheritance), he and his heirs will (if the suit is successful) be compelled, as possessors in bad faith, to restore the fruits thereof.

1. If, however, it is clearly shown that the sale took place before the litigation, then the fruits must be restored from the time that the litigation was brought to joinder of issue. For an inheritance is augmented by the fruits, if possessed by a person from whom it may be claimed (by an action for the inheritance).

2. A buyer, moreover, who has no independent title, may also rightly be sued according to the rule governing specific pieces of property.

Given July 1 (200).

Note.

The last two sentences probably read originally about like this: "for an inheritance is augmented by the fruits (only) when possessed by one from whom it may be claimed by petition for the inheritance, and a purchaser who is fortified by an independent title (as Musaeus would be, if he bought before litigation), may (only) be sued according to the rule governing single pieces of property." Beseler, 4 Beitraege 21. In other words, in classical law a purchaser before litigation could not be sued by petitioner for inheritances.[1] That rule was changed by interpolation, as in D. 5.3.13.4.

3.31.3. The same Emperors to Epicta.

An action for the inheritance of a maternal aunt does not prevent an action for an inheritance which comes through another. And further, if a person first brings an action to set a will aside as undutiful, the defense of res judicata does not stand in the way of the claimant claiming the same inheritance upon some other ground.

Promulgated August 11 (205).

3.31.4. Emperor Antoninus to Vitalianus.

In restoring an inheritance (recovered in an action), you have an offset for the expenses paid in good faith from your own property for sickness of the deceased and for his funeral expenses.

Promulgated February 23 (213).[2]

3.31.5. The same Emperor to Postumiana.

If judgment is pronounced against you to restore an inheritance which you possessed in good faith, you will be allowed to deduct the amount which you show[3] to have paid out in good faith to the creditors of the inheritance; for creditors who have received what is theirs cannot be compelled to repay.

Promulgated May 27 (213).

Note.

That one who paid by mistake could not recover the money from the one whom he paid was contrary to all the rules of condiction (C. 4.5.5), and directly opposed to

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[1] Blume penciled in a question mark in the margin next to this sentence.

[2] [Blume] See C. 3.32.5, note.

[3] Blume lined out "show" and wrote an illegible correction above it. Scott also uses "show." See 6 [12] Scott 309.

D. 5.3.31; D. 12.6.19.1; D. 46.3.38.2. He was not, of course, entitled to return from two sources.

3.31.6. Emperor Alexander to Firminus.

If you think that guardians for your grandsons could not be appointed legally because you say that they are in your power, do not delay to bring an action against them to recover the inheritance of our emancipated son, whose property you say belongs to you; and the judge will decide, whether or not the order of the president, who appointed the guardians when it was alleged that the grandchildren were not in your power, shall stand.

Promulgated June 22 (224).

Note.

In this case the grandfather had emancipated his son, but retained the son's children in his paternal power, which he had a right to do. D. 1.7.28. Then the son died and the grandsons, being minors, had a guardian appointed for them, upon the allegation that they were sui juris, that is to say, not under the paternal power of the grandfather, and thus sought to obtain control of the property left by their father. Ordinarily, at the time that the present rescript was written, the male ascendant with paternal power owned all the property acquired by the descendants under his power (law 10 h.t.), though this right was materially impaired by subsequent legislation, commencing with the time of Constantine. C. 6.60, headnote; C. 8.46.2 note. The grandfather, therefore, claimed that what the grandsons inherited belonged to him. Now if he had acquiesced for a long time in the claim of the grandsons, he would have been held to have impliedly emancipated the grandsons. C. 8.46.1. So the rescript advised the grandfather to proceed without delay to have his claim determined.

3.31.7. Emperors Diocletian and Maximian and the Casesars to Restituta.

It is not unknown to anyone that an action for an inheritance which may be brought against persons in possession as heirs or as mere possessors is not barred by the prescriptive period of a long time since the nature of this action as a mixed personal (and real) action requires that holding. It is clear, however, that in other cases only special actions in rem, for the recovery of specific property (which was part of the inheritance), may be brought, provided they are not barred by usucaption or by the prescriptive period of a long time (10 or 20 years).

Note.

A man who held property merely as heir, but who was not the true heir, or who held as a mere possessor, could not acquire a prescriptive title thereto. That had not always been so. Originally, any person who possessed an inheritance could get such title, and that in one year. G. 2.52. Hadrian changed the rule. G. 2.57; C. 7.29.1; but a man with an independent title, for instance under a purchase, could gain perfect title by prescription. C. 7.34.4. So, too, a man who held under such independent title could not be sued by petition for an inheritance, unless he bought the inheritance as such. Law 2 h.t. See C. 7.34.4.

3.31.8. The same Emperors and the Caesars to Aurelius Asterius.

When an inheritance is sought to be recovered, the question which must be solved before all others is as to whether or not the testator was free.

Given March 30 (294).

3.31.9. The same Emperors and the Caesars to Demophilia.

If the heirs designated (in the will) have refused the inheritance offered them, and you have acquired it either through the praetorian or civil law, you may recover the property belonging thereto which remains in the same situation, in an action for the inheritance.

Given at Nicomedia November 29 (294).

3.31.10. The same Emperors and the Caesars to Theodotianus.

If an unemancipated son has held in his possession through a long period of time an inheritance left him, he appears by that very fact as though he accepted the inheritance, (and) to have acquired it for his father's benefit.

Given December 20 (294).

Note.

At this period of the law, the property of an unemancipated son belonged to his father. That was modified by later law. See law 6 h.t. note.

3.31.11. Emperors Arcadius and Honorius to Aeternalis, Proconsul of Africa.

It is not just that a person in possession should be compelled by one who sues him to set forth the title of his property, except only he who may be compelled to answer whether he is in possession as heir or as mere possessor.

Given at Constantinople March 21 (396).

Note.

If an action was brought, but the defendant showed that he claimed under an independent title, the plaintiff lost his case, whether the title was valid or not. Wetzell, Rom. Vindicationsprocess 139. The mater was then res judicata. To avoid that danger, the defendant was required to answer before joinder of issue, whether he was in possession as heir or possessor. Bethmann-Hollweg, Civilprocess §91. A different view of the text is taken by Demelius, Confessio 344; Wetzell, supra; Mitteis, R.R.u. V.R., 500. They think he was required to answer only at some time during the trial, so as to determine whether he was in possession in good or bad faith, in order to fix the damages accordingly.

3.31.12. Emperor Justinian to Johannes, Praetorian Prefect.

When a petition for an inheritance lay, an objection was used which protected the action so that it would not be prejudiced. The importance and authority of the centumviral court did not permit the path of an action for inheritance to be obstructed by any collateral action.

1. But since many differences and controversies arose among the ancients, we, making an end of them, ordain that if anyone has undertaken or expects to defend or bring, such action, but someone else coming along believes it necessary to sue either the defendant or plaintiff therein (in an independent action) either on account of a deposit, gratuitous loan, legacy, trust, or other matters (in connection with the inheritance), then, if the (independent) action is on account of a legacy or trust, it may proceed without difficulty, since (in any event) a designated heir could not rightfully delay the claim where a bond has been given (by the legatee or beneficiary of a trust). So such legacy or trust can be rightly claimed if a bond is given with or without surety, according to the (financial) standing of the person, to the effect that if he (the person sued for the legacy or trust) fails in the action for the inheritance, he (the legatee or beneficiary of a trust) will

repay the money paid him with three per cent interest, or restore the field, with its fruits, which he received, or the house with its rents—in either case deducting the necessary and useful expenses. But if such claimant (in the action for the legacy or trust) simply wants to have issue joined, and then await the outcome of the action for the inheritance, he may do so, and have the legacy or trust, if due to him, together with the legal increase thereof, turned over to him (later).

1a. But if the action arising out of a contract of the deceased is brought against the possessor of the inheritance or against the possessor of the property involved in the litigation, and the property claimed consists of a deposit, gratuitous loan, pledge, or other similar existing property, the proceedings shall not be deferred on account of the action for the inheritance, no more than when a suit for money loaned is brought or some other personal action is instituted against the possessor or claimant of the inheritance, in which case the proceedings cannot be deferred, but must be prosecuted on to completion.

1b. When a suit for an inheritance is ended, and the possessor is defeated, he will not be compelled to restore the inheritance until an accounting is had between the claimant and the possessor, and the former pays the latter for everything rightly done by the latter in connection with the inheritance.

1c. But if the claimant is defeated, the possessor must, in like manner, by order of the judge make satisfaction to him (if sued in an independent action), and if such order is omitted, then in an action on volunteer-agency, or by condiction arising under the statute.

2. If, moreover, fiduciary manumissions are claimed from the possessor or claimant of the inheritance, or direct manumissions are said to be legally due, no more than a year from the death of the testator shall be awaited.

2a. If the action for the inheritance is ended within that period of time, the manumissions shall be effective or ineffective according to the outcome of the suit.

2b. But if the period of one year elapses (without the ending of the suit), then, out of favor for freedom and justice, the direct manumissions shall be in force, and the slaves mentioned in the trusts shall have freedom, provided, however, that the testament is not proven to be forged, and provided further, that if such slaves have acted as managers or have otherwise been in charge of accounts, they must, after they receive their liberty, surrender the property belonging to the inheritance which was in their charge and must render an account; and the rights of patron shall belong to the person who can legally be called thereto.

3. It must be borne in mind also, so no doubt may exist in the future, that the action for an inheritance shall be classed as an equitable one (bona fidae).[4]

Given at Constantinople September 1 (531).

Note.

Formerly no action had been permitted to interfere with or interrupt an action for an inheritance, and this was true partly because this action was formerly tried before the centumviral court, while other actions were ordinarily tried before a referee (judex). As said in D. 5.3.5.2: "A trial which is had for the recovery of an inheritance is of that preeminence that no other proceeding is allowed to prejudge the question which is at issue in it." If, accordingly, another action was brought, which in any way depended on the outcome of the action for the inheritance, it was defeated by the defense that the latter action was pending. The instant law provided (and see also D. 35.3.4.1and D. 49.14.35)

[4] [Blume] C. 4.9.1, note.

that legatees (including beneficiary of trusts) might sue either the plaintiff or defendant in the action for the inheritance, giving security to return pecuniary legacies with interest at three per cent, or the land with the produce, or houses with their rents, or in case they did not want to give security, simply join issue in their case and await the outcome of the main action. So creditors, too, might sue either the plaintiff or the defendant in the main action, as might be deemed advisable or the nature of the claim demanded. The successful party in the main action was then required to indemnify the other for whatever the latter had been required to indemnify the other for whatever the latter had been required to pay in any independent action. Manumissions could not be deferred for more than a year.[5] .

[5] Blume penciled in after the typed note: See 3 Vangerow §508 ff., contra Buckland; 3 Windsheid §616; Dernberg-Sokolowski §554; Wetzell 107 ff.