

Book VI.
Title XLII.

Concerning trusts.
(De fideicommissis.)

Bas. 44.1.122; D. 30-32; Inst. 2.23-24.

Headnote.

As already stated in headnote C. 6.37, a trust was created by precatory words: "I request, or beg by heir to give my slave Stichus to Lucilius," created a trust. Trusts owed their origin primarily to the desire to evade restrictions of the law in appointing heirs. There were certain classes or persons to whom testators were unable, be reason of prohibitions in the law, to leave inheritances or legacies, and in order to evade the law they were wont to trust to the good faith of someone who was legally able to take under the will, and whom they asked to give the inheritance or legacy to the intended beneficiary; hence the name "trust," because they were not enforced by legal obligations, but only by the sense of honesty of the person trusted. Subsequently the emperor Augustus, for special reasons, commanded the consuls to enforce the trust in certain cases. The example was approved and followed, and trusts became so popular that soon a special praetor was appointed to hear suits relating to them, who was called the trust praetor. Inst. 2.23.1.

The form of words used to create a trust was not important. C. 6.42.2, gives a list of words in common use, and unless it appeared that the testator meant the direction to be quite discretionary with the person charged, it was construed to be a trust. Gaius 2.249. Trusts might be created in a will, in a codicil confirmed by a will, or in a codicil that was valid without a will. Inst. 2.25.1; Note C. 6.36.1. It might be in writing or verbal, and originally without witnesses. See C. 3.36.16 and 26; C. 6.42.22. But Justinian provided for five witnesses. Headnote C. 6.36.

Trusts were of the utmost importance in the Roman law, and by it, as an indirect method, many things were permitted which could not be done otherwise. The desire to secure the family property in the hands of descendants existed in Rome as it exists today. But it could not be done through the appointment of heirs or under the old rules pertaining to legacies, because no uncertain person (a subject treated in C. 6.48) could be given a legacy. But this limitation did not apply, at first to trusts, and it was possible to burden each successive beneficiary with a trust to hand over the property at his death to his son (subject to the Falcidian fourth, dealt with in C. 6.50), and so on in perpetuity. An example of this is found in the will of Dasumius, partially preserved for us (Girard, Textes 802; Bruns Fontes 304). It gave lands to freedmen, with no power to sell or pledge them, with a right of accrual or survivorship, and a direction that of the death of the last survivor the lands should go to future born children on the same terms. The last of these was to have the power of alienation. Thus the land was effectually entailed.

But limitations were soon introduced. Aside from the fact that trusts were subjected to the law of lapses (dealt with at C. 6.51) and aside from other limitations, Hadrian forbade trusts in favor of uncertain persons. Gaius 2.287; Ulpian 25.13. Hence the establishment of perpetuities ceased. But Justinian again permitted trusts (and in his

time this included legacies of all kinds) to be made to uncertain persons (C. 6.48), and thus again enabled property to be entailed in perpetuity. The only hindrance was the Falcidian fourth (dealt with in C. 6.49 and 50), but allowance could be made for that, and, as will be seen, Justinian even permitted the testator to provide that the property should not be subject thereto. Later on, however, by Novel 159, appended to the end of this title, the same emperor decided that no limitation should be good for more than four generations. Buckland 350, 358-360. See further on this subject headnote to C. 6.50, and references there made.

6.42.1. Emperor Antoninus to Demetrius.

If you show that Demetrius ordered his mother and heir (by his will) to give you a monthly allowance for food, and a yearly allowance for clothing, and that she carried out her son's wishes for a long time, that is for not less than three years, you will obtain an order that she continue to make these allowances in the future, together with payment of those which are delinquent.

Promulgated August 16 (212).

6.42.2. The same Emperor to Eupatrius.

Although the trust left was invalid (in form), still if the heirs, upon learning the wish of the decedent, turned over land to your grandfather, to carry out the trust, they will uselessly commence an action against you concerning it, since the decedent's wish appears to be complied with not solely pursuant to the writing (which attempted to create the trust), but also pursuant to a conviction that the property was left as a trust.

Promulgated July 27 (215).

Note.

The foregoing two rescripts but emphasize what is stated in C. 6.23.16, that an heir who gives recognition to legacies, trusts and manumissions must carry them out although these gifts were not made in the forms recognized or required by law. That is the thought which is expressed in these laws.

6.42.3. The same Emperor to Rufinus.

Since you state that the young girl Chrysis was manumitted by the heirs of the decedent according to the latter's wish, but that she dies intestate before the inheritance was turned over to her, her inheritance belongs to her manumitters. If they have entered upon her estate, they are released from the obligations of the trust by a merger of rights.

Promulgated December 9 (215).

Note.

In this case the heirs of the testator had been charged with the trust to manumit the slave Chrysis, a young girl. They manumitted the girl, but delayed to turn over the trust, a portion of the inheritance, to her, and in the meantime she died. The young girl had, of course, no children, and hence the heirs of the testator were also the heirs of the girl, being her patrons. Inst. 3.8.3; C. 6.4.4 and note; Buckland 376. Hence their rights as patrons, and their obligation to turn over the trust-inheritance, coalesced and were merged.

6.42.4. Emperor Alexander to Victorinus.

The will of the father forbidding the children to sell the farms or give them in pledge away from the family, does not appear to forbid the brother to give it to his sister. Promulgated June 27 (223).

6.42.5. The same Emperor to Regina.

If your brother died without children, after he became your father's heir and when he was the age of puberty, the inheritance does not become your property by reason of any pupillary substitution. But if your right thereto was confirmed in any part of the testament in the form of a trust, you are not forbidden to claim such trust from his heirs. Promulgated January 18 (224).

Note.

As explained in headnote to C. 6.26, a pupillary substitution was one provided by a male parent for a minor child, and was to the effect that if the child should die before it reached the age of puberty, someone else should receive the property left to the child. That is as far as such substitution went. If the child lived beyond the age specified, and had accepted the inheritance, that put an end to the rights of such substitute. But if there was a provision asking or praying the appointed heir to turn the property over to someone else at a certain time, this constituted a trust, and was valid.

6.42.6. The same Emperor to Nilus.

An heir must pay the lien against a pledged farm which is devised by legacy or trust, particularly if the testator knew of the lien, or would have left you something else of no less value had he know of it. 1. And if the farm has been sold by a creditor, the heir must pay its value, unless a contrary wish of the decedent is shown by the heir. Promulgated February 14 (224).

6.42.7. The same Emperor to Septimus.

The question of the intention of the deceased is a question in the judgment of the judge. Promulgated February 15 (225).

6.42.8. The same Emperor to Mascellus.

Whoever has been given freedom by way of a trust, may, in his own right, claim the legacies and trusts left him by the decedent. Promulgated May 18 (225).

Note.

A legacy or trust left to one's own slave without leaving him liberty at the same time was void. C. 6.27.5; C. 6.37.4. Now a slave to whom freedom was given by way of trust - that is to say, where someone was requested to give him freedom - the slave would still be such until the manumission was carried out, and the legacy being payable at the death of the testator, it was questioned whether or not it was not then payable to a slave. But it was held that the manumission was due at the same time as the legacy, namely immediately, and that the legacy and trust was, accordingly, valid. This is confirmed by D. 31.84.

6.42.9. Emperor Gordian to Paulina.

No one may be charge with the payment of a trust who receive neither a legacy, trust, inheritance or gift in anticipation of death.

Promulgated September 15 (238).

Note.¹

A person who received nothing from a decedent could not be charged with a legacy or trust, and, of course, no one could be charged with them in a greater amount than he received. Inst. 2.24.1; Mackeldy §762. But a person who receive something, either under a valid will or a valid codicil, could be so charged. This included heirs, legatees and beneficiaries of a trust. D. 32.1.6; 9 Donellus 598. But it was not even necessary that something be left directly in a will or codicil. A debtor of the decedent could be charged to turn the debt over to someone as a trust. D. 30.77. So a person who received a gift in contemplation of death could be charged with a legacy or trust. C. 8.56.1. Even an intestate heir could be so charged, for the rule was that not only a person to whom a decedent gave something, but also a person to whom he gave nothing, but from whom he did not take what he might have taken, could be charged with legacies and trusts. He could have willed property away from an intestate heir.

In accordance with this principle, no legacy or trust could be charged upon a disinherited child. Hunter 918; D. 30.126. This, however, at least in the later Justinian law, held true only so long as the child remained disinherited; for if the will was set aside as unjust, legacies, trusts and manumissions remained in force and were, subject to the legal portions to which a descendant was entitled, required to be carried out. Nov. 115, c. 3, appended to C. 3.28; note C. 6.12.2. But see C. 6.42.3.

What has been said is subject to another modification. The law abhorred disinherisons, and the rule was that no son, who was a self-successor, and who was passed over in a will, was liable for any legacies or trusts, even though he obtained the inheritance on intestacy. D. 32.2; note C. 6.12.2; Hunter 918. This was true also in the case where an emancipated son was passed over in a will (C. 6.42.31), subject to the limitation mentioned in C. 6.12.2, namely that where such son obtained the right of possession of an inheritance contrary to the will, he was liable for legacies to parents and near relatives, and a few other persons. The rule had been different with overlooked daughter, but by C. 6.28.4, they were evidently placed on the same footing with sons.

6.42.10. The same Emperor to Firmus.

Although the words "I will" are absent, still since the meaning is perfected by adding them, they must be considered as added.

Promulgated December 11 (239).

6.42.11. The same Emperor to Papinianus.

Whenever a sale is made by all those who may claim under a trust, or they give their consent to the sale made by others, the contract (of sale) cannot be broken.

Promulgated December 31 (241).

¹ Blume penciled in here "Also see law 31."

Note.

A testator, perhaps, forbade alienation of an inheritance, except to a certain person, or directed it to be turned over to someone else at a certain time or under certain conditions. Now under such circumstances the various persons who might be interested might appeal to the provisions of a trust and annul any alienation made contrary thereto. If, however, all the various person who might be interested therein, gave their consent to such alienation, it was valid. 9 Donellus 602-604. If all alike violated the prohibition against alienation, none could rely thereon. D. 31.77.27; Nov. 159.

6.42.12. Emperor Philip and Caesar Philip to Rufinus.

The law is clear that where one is required by the will of a decedent to deliver up an inheritance after his death, he may satisfy the requirement, that is to say, deliver the inheritance, before his death, either with or without subtraction of the Falcidian fourth, if he wishes.

Promulgated October 15 (244).

Note.

In this case the heir was asked to deliver the inheritance upon his death, to another - that is to say, the heirs of the first heir were asked or required to do this. In other words, a trust had been created. There was doubt as to whether the terms of the trust could be fulfilled during the life of the heir, and it was held that it could; and it was further held that the so-called Falcidian fourth (treated in C. 6.49 and C. 6.50) could be retained, if desired, at that time the same as if the property were delivered as requested, after the death of the heir. If for some reason the delivery of the property before the time set would have been injurious to the party who was to get it, then delivery could not be made till the time fixed. 9 Donellus 608. A legacy of this kind was unconditional. D. 35.1.79 pr.

6.42.13. The same to Sempronius.

Whenever an heir of the first grade succeeds the testator, the legacies and trusts ordered to be given by his substitute cannot be legally claimed.

Promulgated February 22 (246).

Note.

An heir of the first grade (*principali loco*) was the heir appointed as such in the first place - who preceded all substitutes in right. In this case he had not been requested, probably, to give any legacies or trusts; but such request had been made of the substitute. This substitute had been appointed to take the inheritance in case the main heir should not accept; but he accepted; he succeeded, in other words, as expressed in this law, to the testator; hence the substitution failed, and the legacies and trusts that went with it, as well.

6.42.14. Emperors Valerian and Gallien to Falcus.

If she whom your brother appointed as heir died before or after claiming the inheritance, and the testator provided unconditionally for substitutes for her, by precatory words if she should die before reaching the age of twelve years; nothing forbids (when she died before reaching that age) to claim the trust from the heirs of the testator who holds the property as on intestacy. 1. For the general rule that bequests left in a testament

are invalid if the inheritance is not entered on pursuant to a testament, applies only when an inheritance which is left by direct (instead of precatory) words is capable of being entered on, not if left in a manner so that it may also be claimed from intestate successors. 2. This applies only if your statement is true that the appointed heir was not legally adopted. If, on the other hand, she became a member of the family and died, her heirs must execute the trust.

Promulgated August 19 (255).

Note.

In this case the testator had attempted to adopt a young girl, but had, probably, not done so legally. He left his inheritance to her, providing in broad words that if she should die before reaching the age of twelve years, the inheritance should be turned over to certain other beneficiaries, asking that to be done by words which created a trust. The girl died before reaching the age of twelve without having entered on the inheritance. Hence Falcus, the brother of the testator claimed the inheritance as on intestacy, on the ground that the inheritance not having been accepted, it failed. It was held, however, that where it appeared that the testator did not charge the heir with the duty of turning over the inheritance, but provided generally that it should, in a certain event, be turned over, then it would become the duty of whoever might be heir to fulfill the trust - that is to say, turn the property over to the parties named. Hence it made no difference whether the girl entered upon the inheritance or not. If she had entered upon it, her heirs, if not, the intestate heirs of the testator, were required to fulfill the trust. In the latter part of the law it is stated that if the girl had been legally adopted, her heirs, would have been charged with the duty to carry out the trust; for had she been legally adopted she would, in this case (there being no other children) have been sole heir, and would have become actual heir without acceptance. Note C. 6.30.3. Hence the inheritance would have become, upon her death, the property of her heirs. Note the manner in which a trust might, by general words, be imposed upon any person who in any manner might become heir.

6.42.15. The same Emperor to Philocrates.

Although someone appointed you and your brother unconditionally as heirs, and your father acquired the benefit of that inheritance through you, according to your proportions, by reason of his paternal power, still since the testator by subsequent words of the testament provided that you should be emancipated, it must be understood that your father is bound to restore the benefit of the inheritance to you as a trust.

Promulgated at Rome October 10 (250).

Note.

By virtue of his paternal power, a father, under the earlier law, obtained the right to the property acquired in some way by his child under his power. This rule was gradually changed, and such right was finally limited to a usufruct therein. C. 6.60.1 and 2; C. 6.61.1; Inst. 2.9.1. See generally on paternal power, where this subject is fully discussed, note to C. 8.46 2. The present law holds that inasmuch as the gift to the children also required emancipation, a trust was created, whereby the father was required, when he emancipated the children, to turn the property over to them. He retained, however, a usufruct in one-half of it. C. 6.61.6.3.

6.42.16. Emperors Carus, Carinus and Numerian to Isidora.

Since we are not unaware that the prudent Papinian answered that when an heir was asked to turn whatever inheritance he should receive over to someone else, after his death - and since - a legacy (received by the heir) would also be embraced in that trust, you perceive that such trust also embraces a prelegacy. 1. But since the intention rather than words are to be considered in connection with trusts, you may, if you have additional proof that your father's intention was as you allege (namely that the prelegacy is not embraced in the trust), you are not forbidden to bring that matter before the president.

Promulgated November 12 (283).

Note.

In this case the testator gave a prelegacy - that is to say, he gave a legacy which was to be paid to turned over before the remainder of the inheritance was to be divided. Whether or not the trust created by the testator embraced this prelegacy was, as stated here, a question of intention which depended upon the facts in the case.

6.42.17. Emperors Diocletian and Maximian to Fortunatus.

It is clear that if a legal will of your (deceased) creditor can be shown by which he wanted you to be released from your debt, you have a defense against such debt, arising out of the decedent's will, even before his heir gives you a release in the usual form.

Promulgated April 20 (286).

6.42.18. The same to Apolaustus.

When the decedent asked that you should be released from the necessity of rendering an account, the law is clear, that such wish of the decedent should be fulfilled.

Promulgated March 15 (290).

6.42.19. The same to Ampliatus.

It is clear and unmistakable law that later-expressed wishes in connection with trusts prevail over those expressed earlier.

Promulgated September 6 (290).

6.42.20. The same to Julianus.

Trusts left are owing by guardians of minors under the age of puberty, the same as by the minors themselves.

Promulgated December 3 (290).

Note.

A testator had the right to make a will for his minor child under the age of puberty, as already mentioned, and could dispose of the minor's property if such minor should die before reaching the age of puberty. He could also appoint a guardian for him. The guardian was considered as the master, owner, in a certain sense - that is to say, so far as it was necessary for him to protect the property of the minor. D. 26.7.27. If a trust was imposed upon him, as such guardian, it was considered as imposed upon the minor (and this is true, whether imposed by a father or mother), and hence he had to carry out this trust, as though directly imposed upon the minor. D. 31.69.2. The doubt that arose on this point was by reason of the principle stated in law 9 of this title, that where nothing

was given to the guardian, he could not be burdened with any trust. But that principle was held not to apply for the reason that the trust was to be fulfilled by the guardian on behalf of the minor.

6.42.21. The same Emperors and the Caesars to Tiberius.

If the time for payment of a trust has arrived in the person of your father, whose heir you state you are, then, though it is proven that the time when it had been given, you were not yet born, you should sue concerning the trust, the wife of your paternal uncle, if she became his heir, when, as you contend, your paternal uncle was asked to turn over to your father what had been left him by your grandfather, if he should die without children. But if you also acquired the inheritance of your uncle, the inquiry to be made is not as to the trust, but the inheritance is to be claimed from her.

Given February 8 (293).

6.42.22. The same to Plancianus.

There is no doubt that, when (the proper number of) witnesses have been called, a trust may be left by letter, by a note, even by word of mouth, or by a nod.²

Given at Byzantium April 13 (293).

6.42.23. The same to Stratonicus.

If truth, or the formality required by law, is lacking, and you have not, recognizing the will as that of your father, given the bequest, and you have entered into no stipulation by way of compromise, and the matter stands in statu quo, you cannot be compelled to pay (the bequest).

Given January 28 (293).

Note.

If the reason therefor was absent - that is to say, if the document under which a bequest was claimed was forged, or did not in fact contain the bequests, none were owing thereunder. It was somewhat different if the proper solemnity in the execution of the document was absent; for if, in such case, recognition to the bequests was given by the party charged therewith, he was thereafter bound to carry out the bequests. Laws 1 and 2 of this title.

6.42.24. The same to Menestratus.

Heirs need not deliver up documents showing the title of lands left as a trust, but they must furnish a guaranty that, if necessary, they will, if in possession of them, show them to the legatee or cestui que trust.

Given at Sirmium (293).

Note.

The documents might be of use to the heirs in certain cases in order to fully protect themselves. Hence they were not required to deliver them up unless specifically bequeathed. C. 6.50.15; see 9 Donellus 650.

² [Blume] See C. 3.36.16 and 26; headnote to C. 6.36.

6.42.25. The same to Juliana.

There is no doubt that the property belonging to the heirs themselves may be left by way of a trust.

Given February 28 (294).

Note.

"Not only the testator's property, but that of an heir, or legatee or person already benefited by a trust, or anyone else, may be given by a trust." Such property, so asked to be transferred, would, of course, be in substitution of some other property received from the decedent, and no one could be asked to transfer more than he received. Inst. 2.24.1.

6.42.26. The same to Gaius.

Refusal to accept a trust gives rise to a just defense of fraud when the party to whom the trust was left, himself has declined to accept it. Since you aver that not you, but your father refused it, and since he could not hurt you, the refusal cannot be set up against you.

Given at Sirmium April 12 (294).

Note.

If a person to whom a trust was left, refused to accept it, he could not afterwards sue for it, and if he did the defense of fraud might be interposed. See D. 30.44.1; C. 6.46.6. But in the present case the bequest was made to the son, and he did not repudiate it; but his father did so for him. His father, however, could not prejudice him thereby. C. 6.19.2 and note; C. 6.30.11; C. 6.30.4 and note; D. 29.2.13.

6.42.27. The same to Olympiades.

When the party who left a trust is shown to have changed his mind, his heirs are not compelled to pay it.³

Given at Viminacium September 27 (294).

6.42.28. The same to Gaius.

Liberty cannot be claimed under a trust ineffectually given, upon condition, to one's own slaves, without (at the same time) giving them liberty.

Given across the sea October 18 (294).

Note.

See C. 6.27.5; C. 6.37.4.

6.42.29. The same to Achillus.

Not even a trust can be claimed under an illegal testament, if it is not shown that intestate successors also were directed to pay it.

Given December 6 (294).

Note.

Where a will failed, bequests made therein generally failed with it. Headnote C. 6.39. But though the will might be invalid as such, it was permissible to state therein that it should be valid as a codicil, and that the bequests made should be paid by whoever would become heir. In such case even an intestate heir would be compelled to pay the

³ [Blume] See law 19 of this title.

bequests. Headnote C. 6.39. Where a will was set aside as unjust, bequests made remained valid under Novel 115, c.3, as mentioned in not to law 9 of this title.

6.42.30. Emperor Justinian to Demosthenes, Praetorian Prefect.

Since Papinian, a man of acute intellect, and undoubtedly excelling all others, decided in his responses, that if anyone appointed his son as heir and imposed upon him the burden of restitution after death, he does not appear to have directed this (to be done), except when the son should die without offspring. We, justly admiring this interpretation, give it full application, so that if anyone shall make such provision, not only when appointing his son or daughter as heir, or, in the beginning (an not as substitute) his grandson, granddaughter, great-grandson or great-granddaughter or remoter posterity, and shall subject them to the burden of restitution after their death, this shall be understood as applying only when the parties so burdened shall die without sons or daughters, grandsons or granddaughters, lest it appear that a testator prefers other successors to his own kin.⁴

Given October 30 (529).

6.42.31. The same Emperor to Johannes, Praetorian Prefect.

Someone released his son from the paternal hearth and afterwards passed him over in his testament, leaving him nothing and appointing others as his heirs, but burdened him, whom he neither made his heir nor disinherited, with the payment of a trust. 1. It was questioned whether such a trust was valid. Settling, therefore, all ancient doubt in this regard, it has pleased us that the emancipated son, already unjustly treated by his father, shall not in such case be compelled to pay the trust which he was ordered to pay. 2. This shall also apply in case of other persons whom (in order to exclude them from the inheritance) it is necessary to disinherit.⁵

Given at Constantinople February 28 (531).

6.42.32. The same Emperor to Johannes, Praetorian Prefect.

Settling the dispute arising out of a fact, and in order to favor the wish of decedents, we ordain that if a trust is left orally and not in the presence of (five) witnesses, and the beneficiary shall choose to ask the heir, legatee or trustee who is (thought to be) burdened with a general or special trust to take an oath (denying the existence of the trust), the heir, legatee or trustee must, after the oath as to vexatious claims has been furnished, take the oath (denying the existence of the trust) and so to relieve himself from all further trouble. If he declines to take the oath, or refuses to let the beneficiary of the trust know the amount (of such trust), if the latter, perchance, expects a greater amount (than the former is will to admit), he must pay the trust according to the demand, since in such case he has become his own judge and witness, whose conscience and truth was appealed to by the beneficiary. No witnesses or other proof shall be required in such case, and whether there were five witnesses to the trust or less or none at all, and whether the trust was given by the father or a stranger, the validity (or invalidity) of the trust and the right to payment thereof shall be established through

⁴ [Blume] See C. 6.25.7, and note where this law is mentioned; also C. 6.49.6.

⁵ [Blume] See full note at C. 6.42.9.

taking or declining to take the oath (denying the existence of the trust), so that the same rule may be operative as to all. 1. If the existence of a trust is (sought to be) shown, by witnesses, the legal number thereof and exact formality is required. For the law, lest two people, perchance, set up something fraudulent, demands a greater number of witnesses, so that the real truth may be shown by a larger number of men. 2. But when a party who benefits by the will of a decedent, and especially the heir himself to whom complete authority over the property was entrusted, is compelled to tell the truth under the sanctity of an oath, what is the need of witnesses, or why should recourse be had to outside proof, when his own and undoubted proof is at hand? And in this connection we have borne in mind the laws which compel heirs to obey the legal orders of testators, in every particular, ordaining also that those who have failed to do so shall lose the benefit which they receive from the inheritance.⁶
Given at Constantinople November 27 (531).

⁶ [Blume] To the same effect is Inst. 2.23.12. See also note C. 6.36.1, where this law is mentioned.