

Book VI.
Title XLVI.

Concerning conditions attached to legacies, trusts and manumissions.
(De condicionibus insertis tam legatis quam fideicommissis et libertatibus.)

Bas. 44.29; D. 35.1.

6.46.1. Emperors Severus and Antoninus to Claudia.

Since you state that the testator imposed on him whom he appointed as part-heir, the burden to pay a trust to Trallus, upon condition that the appointed heir should die without descendants, and such heir has a grandson, son of his daughter, whom he appointed as his heir, it is clear that the condition, affixed to the trust, has failed, unless the wish of the decedent is clearly shown to have been different.

Promulgated December 5 (197).

6.46.2. The same Emperors to Gallicanus.

Since you state that a father directed that his daughter if she should not separate from her husband, should furnish a bond to pay a trust, which the former had left to someone, to be paid at a certain time in the future, the praetorian law (requiring her to furnish a bond) must be complied with, as though the testator had not mentioned the matter. Nor is the example of a legacy or an inheritance, in which the fulfillment of the condition as to a divorce is a times remitted to be compared here, since it would be absurd to neglect the rule of the perpetual edict (in reference to giving a bond) because of non-compliance with the father's wish.

Promulgated at Antioch July 22 (205).

Note.

A condition affixed to inheritances etc. which required the beneficiary to get a divorce was deemed to be against good morals and void. C. 6.25.5. In the case above mentioned, the father desired his daughter to be divorced and as an inducement relieved her from giving a bond for the payment of a trust which she was required to pay to someone, if she should get a divorce. She did not comply with her father's desire as to a divorce and still wanted to be relieved from giving the bond. The law, however, required such bond, and hence the situation was as though the father had not mentioned the subject at all. 9 Cujacius 801.

6.46.3. Emperor Antoninus to Aurelius, a soldier.

If Auluzanus wanted the legacy left in the will to be paid only upon condition that the legatee should stay with his housekeeper and her mother, and it was the legatee's fault that the testator's wish was not complied with, purposely failing to obey it, he will not be permitted to claim the legacy.

Promulgated July 10 (215).

6.46.4. Emperor Alexander to Licinia.

You think without reason that the legacy or trust to be paid to you by your uncle upon condition that you should marry his son is due you, inasmuch as the condition failed when the son died before you had married him.

Promulgated December 1 (226).

Note.

A condition attached to an inheritance or legacy, impossible of fulfillment from the beginning was considered as not made, though this was disputed in the time of Gaius. G. 3.98; Inst. 2.14.10. A supervening impossibility, as in this rescript, made the gift void, except in case of manumission and except when the fulfillment of the condition was defeated by the want of cooperation of another, whose cooperation was necessary-- as where such other refused to marry the legatee. D. 35.1.35; 94 pr. Law 6. h.t. In the latter respect it was treated the same as a gift subject to a duty. C. 6.45.1.

6.46.5. Emperors Diocletian and Maximian and the Caesars to Faustinus.

If it is shown that your wife was in her father's power at the time of her marriage, the trust which was left her "when she should marry," belongs to her father, if there is nothing else to prevent the vesting of it at that time. 1. But if she was emancipated by her father before the marriage and she died afterwards, leaving surviving her a father, husband and children, the right of action which she had for the recovery of the trust, was transmitted to her heirs.

Subscribed at Sirmium June 27 (294).

Note.

The legacy in this case was held to have vested upon the marriage, and if the daughter was then under paternal power, the trust became, so says this law, the property of the father. This statement was made on the theory that the property acquired by a child under power belonged to the father. This was the law at the time this rescript was written. But, as already pointed out in note to C. 6.42.15, that law was materially modified by Justinian.

6.46.6. Emperor Justinian to Johannes, Praetorian Prefect.

Someone in his testament left freedom to his slave upon condition that he should furnish to his heir a certain number of solidi (gold pieces) or some other property or a substitute-slave, and the slave (so benefited), who did not live in the same place as the heir, upon learning of this master's will, hastened to the heir with what he had been directed to deliver to him, but the property which he carried with him was lost on the way through an attack by robbers or by an incursion of enemies. It was questioned by the ancients whether the slave would lose his freedom on account of his inability to give what he was directed to give, by reason of the unfortunate accidents above mentioned. 1. Settling the doubt of the ancients, we have decided that the slave shall have his liberty, but the heir or a stranger shall not be deprived of the benefit which they were to receive by reason thereof. 1a. By whatever cause, therefore, the slave is hindered (from delivering what he was directed to deliver) whether by the heir or someone else to whom the slave was to give something, or by fortuitous circumstances, he shall, nevertheless, receive his liberty, unless he himself refused to comply with the condition; but he shall, nevertheless, after receiving his freedom, be liable to the heir or to someone else to whom

he was ordered to give - unless the latter fail to accept the property brought - and when it has once been refused by him, they cannot again lay claim thereto - and must give all that he was ordered to give, whether that be a substitute slave, if he exists, or his value, computed at not more than fifteen solidi, or whether it be some other property, if that exists, and if it does not exist, then its value.¹
Given at Constantinople April 30 (532).

6.46.7. The same to Johannes, Praetorian Prefect.

If several persons were ordered to fulfill a condition, it was doubted by Ulpian whether all should jointly fulfill it, or whether each is compelled to do so as though imposed on him alone. 1. It appears to us that each should fulfill the condition, and each respectively receive that portion of the benefit destined for him, so that those who have complied with the directions, receive what is due them by reason thereof, while those who have failed to do so may blame themselves, if they are barred from receiving anything.

Given at Constantinople July 30 (531).

Note.

It is left uncertain what the party who fulfilled the condition received. If the portion was specifically mentioned, that would doubtless control. Hunter, treating this subject, says: "When the condition was that something should be done by two or more legatees, could one do the whole; and if he did, did he acquire all the rights? It depends on whether the performance can be divided or not." He cites to the following illustrations from the Digest:

1) The same thing is bequeathed to two persons if they give the heir one hundred aurei . One of them by giving fifty gets half; if the other does not give fifty, the first can get the other half by paying an additional fifty. D. 35.1.54.1.

2) If Stichus and Pomphilus give ten aurei, they shall be free. Either of them by paying five aurei gets his freedom, and if the whole is paid both are free. D. 40.4.11.1.

3) Freedom is bequeathed to two slaves if they render proper accounts. If their accounts are separate, each gets his freedom by proving his accounts and paying the balance he owes, but if the accounts are mixed, neither gets his liberty, unless both render an account and the balance due by both is paid. D. 40.13.2; D. 40.7.13.2.

4) Freedom is given to two slaves on condition that they build a house or put up a statue. If one does the whole, he gets his freedom and the other remains a slave; if both join in the work, both are free. D. 40.4.13 pr; D. 35.1.112 pr.

From the foregoing it appears that if the performance could be divided, the one performing the condition received the benefit of what was left him. In doing a certain thing, the performance could not be divided. In paying a certain thing, it could be. But Justinian appears to have changed the former rule and held that in all cases the condition must be performed as whole in order that anyone might get the benefit of what was given him. 9 Cujacius 803.

¹ [Blume] See law 4 h.t., note.