

Book VIII.
Title L.

Concerning rights of a captive upon return home, and concerning redeemed captives.
(De postliminio et de redemptis ab hostibus.)

Dig. 49.15; Bas. 34.2.

Headnote.

Rome carried on so many wars, that special rules of law were evolved in reference to the status and rights of a person who, after being captured, returned, and in reference to other questions naturally arising out of such conditions. The right of a returned captive was known as *postliminium*. A returned captive was restored to all of his former rights, as nearly as possible, even though the period of prescription had run against him, provided that he applied therefor within a judicial year - that is to say, a year composed of as many days as he had an opportunity to go before the court. See C. 2.50.

This left many matters in suspense, differently determined according as the captive returned or not, or died in captivity. For instance, property acquired by a son while his father was a captive, was acquired for his own benefit or that of the father, depending on whether the latter returned or not. Marriage was, however, ended, until Justinian changed the rule by Nov. 22, c. 7, to the effect that the marriage of a woman continued so long as her captured husband was certainly alive, and if this was not certain, she could not remarry for five years.

A man in captivity was considered to be in slavery, which he doubtless generally was. A slave owned no property. How then could his children or anyone else inherit from a slave? To avoid this difficulty, the Cornelian law was passed in 81 B.C., which, as stated in law 1 of this title, considered that the captive died at the very moment of his capture, and hence never became a slave. But such fiction was indulged in only for some purposes, and until it was certain that he was actually dead, his property could not be taken possession of as an inheritance, as stated in law 4 of this title, and as we have seen, a marriage, under Justinian, was not considered effectually dissolved until the expiration of five years, in case it was uncertain whether the captured husband was dead or not.

Captives were often redeemed, and, as found in numerous places in this Code, such redemption was encouraged. The ransom had, generally, a lien on the person ransomed, until the ransom money was paid back, unless the situation was such that the payment of the money was presumed to be gratuitous.

An exhaustive treatise on this subject is contained in Buckland, Roman Law of Slavery 291-317. See also Hunter 216, 217. Nov. 115, c. 2 (13).

8.50.1. Emperors Severus and Antoninus to Avinius.

A daughter born in Sarmatia to two captive parents is considered as having the status of her father, if both parents return to Roman territory. For although a daughter who has not been captured cannot have the rights of a captive upon return home, in her own right, still the restitution of their rights to her parents returns the daughter to her father (i.e. to paternal power). If the latter has been killed by the enemy, she appears necessarily to follow the condition of her mother who has the daughter with her. For the

fiction of the Cornelian law, which makes the statutory heirs the heirs of the person who dies among the enemy, does not apply to one who is born there, since it is assumed that the father died at the moment when he was captured.

Promulgated without day or consul.

Note.

The rule to be gathered from this law and from D. 49.15.25; D. 38.17.1.3, seems to be: If the child returns with her father and mother, it has the status of its father; if it returns only with its mother, it is considered a spurious child and does not inherit her father's property. Buckland, Roman Law of Slavery 305, 308. Compare law 16 of this title. D. 49.15.25, says: "The Emperors Severus and Antoninus wrote, that if a wife is captured with her husband by the enemy and gives birth to a child, and returns home, the lawful relation of parents and children exists and the child is in its father's power, under the rights which a captive has who returns home. But if the child returns only with its mother, it will be considered spurious, as having no father." See also law 16 of this title.

8.50.2. Emperor Gordian to Publicianus.

Person ransomed from the enemy appear, until the price is repaid, more in the nature of pledges than in a servile condition. Hence, if the money paid out on that account is a gift to them, it is clear that they are restored to their former condition. So, if you married a woman, who was ransomed from the enemy, after the release, as it were, of the pledge of herself, you have nothing to fear as to her status or the status of the children born to you and her.

Promulgated June 12 (241).

8.50.3. Emperors Diocletian and Maximian to Varus.

Since you state that your relatives have not yet returned with the rights of captives upon return home, but that they are living, and that their property is being dissipated by fraud of your adversary, the rector of the province will, when you go before him, see to it that a man is appointed, under the usual formality to manage the property, who has furnished sufficient security by stipulation exacted by a public slave¹ (for the benefit of the captives).

Promulgated August 28 (287).

8.50.4. The same to Hermogenes.

We do not overlook the fact that while it is unknown whether a woman was killed by the enemy or was captured, her inheritance cannot be entered upon by her son. The property of persons in the power of the enemy can only be acquired by the right of succession when the captives are known to have died. And no compromise can be made and no decision rendered as to the property of one whose life and fate is uncertain. 1. So, entrance upon your maternal aunt's inheritance is permitted only after it is known that she has succumbed to her fate. (Hence), Since acts illegally done have no effect, and if you are the nearest heir, the benefit of her inheritance belongs to you.

Promulgated May 28 (290).

¹ [Blume] A municipal employee, having the right to take security - a tabularius. See C. 8.47.2.

Note.

The son evidently had, before it was known that the captive was dead, unlawfully undertaken to get possession of the inheritance, and had undoubtedly died thereafter, making the nephew the nearest heir. Such premature action is held to be illegal and no rights vested by reason thereof.

8.50.5. The same to Ursus.

Since you say that your son was not ransomed from the enemy, but was delivered by the barbarians to the prefect of the legion without any contract, he had the rights of a captive upon return home, and the president of the province will order him to be immediately restored to his status as a free-born man.

Promulgated May 17 (290).

8.50.6. The same to Justus.

Since both the right given to captives upon return home and public benefit demand that if anyone ransoms captives from the enemy, he should restore them to liberty after the price for the ransom is repaid, and (since) you state that the person who has ransomed a captive refuses to accept the price which he paid, either from you or from anyone else, the president of the province will, with efficacious insistence, compel him to obey the laws and not interfere with the status of the ransomed captive after he has received the money which he paid out.

Promulgated August 1 (291).

8.50.7. The same to Claudius.

We are disgusted with the iniquity of such abominable woman. Since, therefore, you state that your captive daughter was prostituted by the woman who had ransomed her, and fled to you in order to retain her chastity and preserve the honorable status of her birth, if the president of the province learns that this wrong was inflicted on your daughter by a woman who knew her to be free-born, he will, since such woman is not, on account of the odiousness of her detestable occupation, worthy to receive the price for the ransom back, liberate your daughter from her miserable situation, keep the status of her free birth safe and guard and protect her against the wickedness of the flagitious woman, though the latter has not received her money back.

Promulgated February 3 (291).

8.50.8. The same to Matrona.

The president of the province will take care that you are no longer detained in servitude. And he, in proportion to your watchfulness, knows to protect the status of your children, to whom, as you state, you gave birth after you were ransomed, since no jurist has held that children born after (the mother's) redemption should be held as a pledge for any money for ransom which was not paid for them.

Promulgated February 9 (291).

8.50.9. The same and the Caesars to Gregorius.

If a son is captured by the enemy and his father dies during his captivity, the Cornelian law makes the returned son, if he was in his father's power at the time of his

capture, an heir of the body (self-successor - indefeasible heir) of the latter. Hence, if you prove before the president of the province that the inheritance of your father belongs to you, either pursuant to a testament or upon intestacy, he will order the property which belongs to the inheritance to be restored to you, unless a period has elapsed since your return which bars your claim (by prescription).²
Promulgated April 9 (293).

8.50.10. The same to Apollodora.

As former rights are restored to free people who are captured by the enemy and who return home with the rights which captives have upon their return, so slaves are restored to their master. Hence, if the woman whom you mention was the slave of your father, and she returned without any money being paid for her ransom, she belongs, upon her return, to the owner or to his successor, who had lost her by capture.³
Subscribed at Hadrianapolis April 29 (293).

8.50.11. The same to Euty chius.

If you were captured by the enemy, and Sabinus ransomed you by payment, and it is shown that he released you, from the lien he had upon you, during his lifetime, you did not thereupon become a freedman, but were restored to your status as a free-born man, which you had lost, and you owe no duty to his sons.
Subscribed December 18 (293).

8.50.12. The same to Quintiana.

Persons who are captured by the enemy and not redeemed by payment but are freed by the bravery of your soldiers, are immediately restored to the status which they had lost by the misfortune of captivity. Slaves, however, will be restored to their masters. For we must consider them as having been recovered, not captured by our soldiers, and the latter should be their defenders and not their masters.⁴
Subscribed December 28 (293).

8.50.13. The same.

If he who redeemed you, a free woman, with money when you were captured by the enemy, and married you, the reasonable conclusion is that, in view of the dignity of marriage and the hope of legitimate offspring, the lien upon you was released, and your birth-rights were restored to you.⁵
Subscribed March 11 (294).

² [Blume] To the same effect see C. 2.53.5, and see law 18 of this title and note.

³ [Blume] See law 12 of this title.

⁴ [Blume] As to the return of slaves to their masters, see law 10 of this title.

⁵ [Blume] See law 19 of this title as to presumption in case of payment of ransom money.

8.50.14. The same to Severa.

The right of captives upon return home invites a daughter who was in compulsory slavery through captivity when her mother died⁶ to take the inheritance of such mother, and we do not permit your situation in the meantime to prejudice you in claiming the maternal property acquired by right of succession.

Subscribed March 17 (294).

8.50.15. The same to Mucatraulus.

A free man who was captured by the enemy and is ransomed with money is, through partiality for freedom, permitted to claim his rights to an inheritance before the money for his ransom is paid back, so that he may by that means repay the price paid for his ransom.

(294).

Note.

Ordinarily a person who was ransomed did not have the rights of a returned captive till the money for the ransom was paid. D. 38.16.1; D. 49.15.12.14. An exception is made in this case.

8.50.16. The same to Basilina.

It is fitting, as has been benignly agreed, that sons of a free woman, ransomed with money, though begotten by a slave during her captivity, should have the status of her free-born mother.

Subscribed at Vimacium August 28 (293).

Note.

This law contemplates, doubtless, that both the parents were captured by the enemy, but that the father did not return. Born, as the child was, in captivity, it was presumptively a slave, since the parents were considered to be in slavery, but this was changed when the mother was ransomed and returned. The child could not, however, as mentioned in law one of this title, inherit the property of its father. See Buckland, Roman Law of Slavery 305, 308.

8.50.17. The same to Diogenia.

A free man, captured by the enemy and ransomed with money receives his former status back only when the price of the ransom has been repaid or by any indication remitted. 1.⁷ That indication exists when a mother ransoms her son, since she does not pay such money in a commercial spirit, but to make an end of a sad condition, and the

⁶ Blume inserted in pencil here: "has been purged of her blemish," but this makes the sentence ungrammatical. His typed original had as an additional clause following "... take the inheritance of such mother..." that read: "when she is freed from her condition (of slavery)..." Scott's translation (as C. 8.51.14) is: The right of postliminium gives a daughter, as heir at law, the estate of her mother, where the latter died in slavery due to captivity, by the mere fact of the occurrence, and, in the meantime, We shall not permit any injury to be done to you by which you may be prevented from obtaining the property belonging to your mother's estate." 6 [14] Scott 329-330.

⁷ Blume penciled in a question mark here.

wish to receive her son back, with the best possible status, restores the son to the mother immediately, so that he is not even excused, by reason of his past misfortune, from fulfillment of his civic duties. 2. You should not, accordingly, repent that you ransomed you son from the enemy out of motherly love, and should not raise any question as to the price that you paid. But you, with full right, demand the dowry which he owes (which he received from his deceased father).⁸

Subscribed October 30 (294) at Develto (Deultum?).

8.50.18. The same to Tryphonianus.

Person who are captured by the enemy and return home with the rights granted to captives upon return, may recover any property lost by such misfortune by a direct action, if it remains in its former situation. If it seems to be lost by prescription, manumission or non-user, it may be recovered in an action, by restitution of rights, within a judicial year (after return).

Promulgated November 20 (294).

Note.

This law, as well as the next one, provide for restitution of former rights, in case prescription had run, or in case property, e.g. a usufruct, had been lost by nonuser. This is stated to be the law also in D. 4.6.1.1 and 15; Buckland, Roman Law of Slavery 309. If a child, captured with his parents, returned, but they died in captivity, he had the right of succession, and a right to recover it by action. C. 2.53.5. The action must be brought in a judicial year. Whether property, which got into the hands of the fisc, and then by gift or otherwise came into the hands of a third party, was recoverable, may be questioned, on account of the provisions of C. 7.37.2. Up to the time of the enactment of that law, such property was in the same position as any other. C. Th. 5.5 (7) 1.

8.50.19. Emperors Valentinian, Valens and Gratian to Severianus, Duke.

If men, perchance, have been carried into captivity, they may know that if they did not go voluntarily, but were forcibly carried off during an incursion of the enemy, they should (when possible) hasten back to their own territory, to receive back, by virtue of the rights granted to captives upon their return home, the land, slaves and other property which they previously had, although held by our fisc. 1. Nor need anyone fear that a defense will prevent this, since the only inquiry to be made is whether he was with the barbarians voluntarily or by compulsion.

Given at Remis June 27 (366).

C. Th. 5.5 (7) 1.

Note.

The rights of a captive upon return home were not granted to one who voluntarily went over to the enemy. Soldiers who surrendered with arms in their hands, were held to be made captive by their own will, and so were deserters. Person who voluntarily remained with the enemy after a treaty of peace, were held to be in voluntary captivity.

⁸ This is Blume's edited version. His original read: "But you may lawfully sue him if he owes you anything on account of your dowry (which he received from his father). Scott renders this "...you can, however, justly demand from him the dowry which he owes you." 6 [14] Scott 330 (in C. 8.51.17).

D. 49.15.17 and 19.4; D. 49.15.20. As to presumption of payment of ransom money by a person closely allied, see law 13 of this title.

8.50.20. Emperors Honorius and Theodosius to Theodorus, Praetorian Prefect.

No one shall detain, against their will, any people of either sex and of any condition or age who may have been driven into any of the provinces through the cruelty and compulsion of the barbarians, but if they wish to return to their own property, they shall be free to do so. 1. If any clothing or food was given them, it must be considered as given for humanity's sake, and no action lies to recover the cost of supporting them, except, however, that if anyone buys captives from the barbarians, the persons ransomed should, on account of the public benefit, justly repay the purchase price to the purchaser. 2. In order that fear of loss may not deter anyone from purchasing a person in such unfortunate circumstances, the ransomed persons must repay the purchase price or requite the benefit by service and labor for a period of five years, retaining his liberty, if a free man. 3. Let them, therefore, subject to the limitation mentioned, return to their own home, where everything is to be preserved for them, even under the holding of the ancients, pursuant to the rights granted captives upon their return home. 4. If, therefore, any manager, lessee⁹ or procurator attempts to resist this law, he may not doubt that he will be punished by deportation to the mines; if the owner of a possession is guilty thereof, he should know that his property will be confiscated and he will be deported. 5. And in order to facilitate the enforcement hereof, we want the Christian bishops or clergymen of the neighboring places, to give it their attention; we want curials, too, of the neighboring cities to be admonished that they must lend their aid in the enforcement of our law in such cases, and all the rectors may know that a fine of ten pounds of gold will be collected from them and an equal amount from their apparitors, if they neglect this order.

Given at Ravenna December 11 (409).

C. Th. 5.5.¹⁰

⁹ Blume penciled "chief tenant" in above "lessee" without striking the latter. Scott also uses "lessee." See 6 [14] Scott 331 (where this is C. 8.51.20).

¹⁰ Blume added the following below this rescript:

Pragmatic constitution.

c. 6. Concerning the time of portliminium, that is after captivity.

Since everything has been restored to us by the propitious God, we ordain that the prescriptive periods of thirty and forty years and others shall apply and be in force, according to the tenor of our laws, provided that the times during the warlike confusion since the advent of the tyrants, shall not be included in the prescriptive periods.

Given August 13 (554).