

Novel 108.

Concerning restitutions.
(De restitutionibus.)

The same Augustus (Justinian) to Bassus, magnificent Count of the Devoted
Domestics, representing Johannes, glorious Praetorian Prefect.

Preface. We have heard a case in which a testament was in dispute, and we have deemed it best to interpret it as well as to embody (the interpretation) in an accurate law. For it is our custom to make questions arising in causes the occasion for the enactment of good laws. **1.** Someone appointed his children as his heirs and wanted them to be substituted for each other as such in case of absence of children, and directed that if one of his children and heir should happen to die without leaving any children, all the property and rights, given by himself, which such child should have remaining at the time of his death, except such portion to which he is entitled under the law, should pass to and become the property of the then surviving child, or of his children, if he too should be dead, directing, however, that no bond or surety for the restitution just mentioned should be required from each other. Having done this, and having died, one of his children and heirs had children, but the other had none, and the one who had children forbade the one without any to use the property, and thereby diminish it, but the latter, relying upon the testament and upon the fact that the father had directed to be turned over only what he should leave at the time of his death, thinks that on that ground he has the right to use the property as he pleases, inasmuch as no hindrance was put in the way of his managing it. **2.** We, seizing this occasion, have thought it best to clarify the ancient ambiguity and restore to its integrity the distinction drawn later, and to embody that in a law, so that men may know every arrangement of the law, according to which such matters must be understood and decided. And we know what is said by the wise Papinian in the nineteenth book of his Questions,^a that alienations are permitted in such case, only adding as though purposely by way of enigma, that alienations were forbidden only when the person burdened with a trust resorts thereto for the purpose of defeating the trust. And the philosopher-

emperor Marcus,^b in a case laid before him, held that the discretion of an honorable man seemed to be contemplated by such words.

a. D. 36.1.54; see also D. 22.1.3.2.

b. D. 36.1.54.

c. 1. And it seems right to us to enact a law to the effect that if someone directs the restitution of a trust as a whole, the provisions made in such cases and already ordained by us should be in force; but that we should, where the trust is such as has been stated and the testator subjects to a trust only the property that is found or left at the time of death, put what has been left uncertain by former lawgivers in definite order, with distinctions. And we ordain that if a man has made such or a similar requirement, the person burdened with the trust needs to preserve the property only to the extent of the Falcidian portion,^a and must not diminish it in any way. For it is sufficient if the heir is left three portions, and only a fourth is left to the other. Nor do we permit him, who is so burdened, to make a gift of some of the property, and that, perhaps, purposely—which Papinian called “the purpose of defeating the trust,” so as to diminish even the fourth; but he must leave that as a trust, all the other property being in his power, with power to use it as he wishes, the same as a man with complete ownership. But if the man burdened (with the trust) has also touched the fourth, it is necessary to examine the reason that he has done so. And if he wants to give a dowry or prenuptial gift out of it, and he has no other property, he may do so according to what has already been provided by our law,^b and we do not, for that purpose, deny him the right to make such diminution (of the fourth). And if (he wants to give property) for the purpose of the redemption of captives—for we have excepted that cause and have dedicated it to God—he may do that also, and diminish the fourth, for piety is worth to us more than everything else.

a. I.e. a fourth, as shown below.

b. Novel 39, c. 1.

C. 2. And if it happens that for some reason he has no (other) means with which to defray his (living) expenses, we give him permission to do so out of such trust to be

(otherwise) left, for the testator, too, has permitted this, inasmuch as he wanted the remainder (only) to be left as a trust, and, as we might say, wanted restitution to be made of property that would be superfluous. But if no such reason exists, it will be necessary to preserve the fourth of the amount left to him as heir, and comply with the requirement of restitution. If he has expended it, but has property to make that good, it shall be used to make up the fourth which shall not be for any cause (except as already mentioned) be diminished. If he touches the fourth, and has nothing out of which to make it good, an action in rem (vindicatio) and on a hypothecation is given pursuant to this law, against those who have bought or otherwise received it, so that the beneficiary of the trust may receive satisfaction by reclaiming the property, which right we have already given in the case of legacies, giving the power, by a constitution,^a to bring an action to recover the property, and to pursue the trust property.^b And the trustee (heir) shall give a guaranty (caution) that he will preserve no less than a fourth, unless the testator remitted the duty to do so, as he did in the present case reported to us. For if the testator remits the duty, not only to give surety (fidejussionem), but also the duty to give a guaranty (cautionem), and we should make a different provision, we should not be in accord with the wish of the decedent.^c

a. C. 6.43.1.

b. See D. 50.16.178.2.

c. See C. 6.54.2.

Epilogue. Decisions in cases shall, therefore, be according to these provisions—in the case in which the question has been presented, as well as all other cases still undecided—where the testament has been made in this manner, and where the testator has died, and the trust has not yet come into (full) force, but the person burdened (with the trust) is still living. And we decide this not only as to children, but also as to other cognate relatives and as to strangers to whom this sort of trust happens to be left. Your Glory will make these provisions known to all our subjects, so that they may know in what manner they must live and die and make a testament and leave a trust and proceed in other matters, which are usual in such cases.

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