Book VI.
Title XXV.

Concerning appointments, substitutions or trusts, made upon condition.
(De institutionibus vel substitutionibus seu restitutionibus sub condicione factis.)

Bas. 35.12.29; D. 28.7.

Headnote.

Conditional appointments as heir have already been somewhat referred to in note C. 6.21.8 and note C. 6.24 9. An appointment as heir might be absolute, and with some limitations, conditional. An uncertain time, certain to come, in a testament, was treated as a condition. D. 35.1.75; Buckland 295. As we have already seen, a condition that was intended to limit the effect of vesting an inheritance, called a resolutive or dissolving condition, was void. So, too, a condition impossible of fulfillment in the very nature of things, and one contrary to good morals was void. C. 6.41. So a legacy-hunting condition was void. D. 28.5.70.71; D. 28.7.16; see notes to C 6.21.11. And note C. 8.38.4. The institution of an heir could not be placed at the absolute will of another, but could be made to depend on the performance of an act by another. D. 28.5.32; 68.

A person conditionally appointed as heir could get the right to the possession of the inheritance (bonorum possessio) upon giving security. D. 37.11 6; D. 28.5.23.

While a resolutive condition was, as stated, ordinarily void, yet it was provided by C. 6.41.1, that a testator had the right to penalize an heir and take an inheritance away from him in case the heir should fail to comply with the requirements in the testament. And then, too, under the system of trusts, dealt with at C. 6.42, a testator might require an heir to surrender the property received, at least up to three-fourths thereof, and he might further entail his property by requiring surrender thereof to successive transferees. Inst. 2.23.11; Mackeldy §§782 and 788. See C. 6.42, and Novel 159; see also law 7 of this title.

6.25.1. Emperors Severus and Antoninus to Alexander.

Since you state that your maternal grandfather appointed your daughter his heir upon condition that she should marry the son of Anthyllus, it is clear that she does not become heir till she shall have fulfilled the condition or the son of Anthyllus, by refusal, prevents the marriage.
Promulgated October 1 (199).

6.25.2. Emperor Antonine to Cassia.

If you did not fulfill the condition under which you were appointed as heir in the testament of your mother, the substitute takes your place. Nor does it appear that she attempted to pledge you to widowhood under pretense of arranging a dishonorable marriage, since her purpose in wanting to join you in marriage to the son of her sister, your cousin, was entirely commendable. 1. Nor are you entitled to special relief, since it appears form the contents of your petition, that it is not your cousin's fault that the last wish of your mother, the testatrix, has not been complied with.
Promulgated March 8 (213) at Rome.

6.25.3. The same Emperor to Maxentius and others.

If your mother appointed you her heirs upon condition of your emancipation, and if before the wish of the decedent was carried out, your father was sentenced to deportation[1] or died, you, being released from the paternal power by his death, or in some other manner, acquired the right to enter on the inheritance together with its belongings.[2]
Subscribed April 30 (216).

6.25.4. Emperor Alexander to Aemilius.

If a father appointed his son, whom he had in his power, as heir upon a condition, the fulfillment of which was not in the power of the son, nor disinherited him in case of default (in said condition), his testament does no seem to be valid. Since, moreover, you say that you were appointed heir, while you were across the sea and lived far away, made you his heir on condition that you should have returned to your fatherland, which was in the province of Mauritania, and you also say that your were not disinherited in case you should not return, it is manifest that non-fulfillment of the condition might have been brought about through many circumstances, not voluntary on your part, but so that you could not fulfilled it fortuitous; and you are nor, therefore, forbidden to enter on the inheritance.[3]
Promulgated March 27 (224).

6.25.5. Emperors Valerian and Gallien to Maxima.

You are to be blamed, more than your mother. For she could not, if she wanted you to be her heir, order you to do something which she had no power to order, namely for you to dissolve the matrimony with your husband. 1. But you approved her wish by divorcing him. However, even though such condition were permissible to be made, marital peace should be preferred to gain. Since good morals forbid that such condition should be complied with, you could have retained your marriage in effect without prejudice to you. You may, therefore, return to your husband, knowing that you will retain the inheritance from your mother, despite such return, since, forsooth, you would have retained it even though you had not left him at all.
Promulgated November 20 (257).

6.25.6. The Emperor Justinian. (In Greek).

If a man left anything to his daughter upon condition that she would have children by her then husband, and she had no children by him, but had children by another marriage, then let her have what was left her, although her father specially mentioned the matrimony then existing.

6.25.7. The same Emperor to the Senate.

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[1] [Blume] Which emancipated the children, deportation being equivalent to death.
[2] [Blume] A similar provision in connection with a gift is found in C. 8.54.5. See also C. 3.28.25.
[3] [Blume] See note C. 6.24.9.

We ordain generally, that if anyone uses the words: "If my son or daughter should die intestate" or "without children" or "without marriage," (the property given shall go to a substitute) and such son or daughter either has children, or marries or makes a testament[4], he or she may firmly retain the property left him or her, and a provision for substitution or restitution shall not apply in such case. If, however, none of these things happen, the condition is effective, and the property must be surrendered (to the substitute) according to the wording of the testament, in order to end the uncertainty of the succession of the decedent by a definite substitution or restitution. Who could approve of the view, that if he or she does not, perchance, make a testament, but has posterity, his (or her) children should, on account of narrow construction of words, be altogether cheated out of their paternal inheritance? In order to block a path so devoid of love, and that no one may wander astray, we enact this sanction and ever-enduring law, pleasing alike to father and children, and by which example we also come to the assistance of others, including outside heirs, for whose benefit like provisions have been made. 1. Since we find, moreover, that Papinian, a man of great genius, considered a case where the father provided a substitute for his son without making any reference to the latter's children, and that he properly solved the case by holding that the substitution would not take place if the child, burdened by the substitution, should become a father and have children, thinking that it was not likely that the father would have made the substitution if he had thought of his grandchildren, we believe that, for the interests of humanity, such holding should be applied more extendedly and effectively. 2. So if anyone has natural children and has left or given them a portion of his property within the limit fixed by us, and has provided substitution will in such case, too, be inapplicable, and will be excluded by such children according to the more liberal interpretation, barring those who are called to the substitution and not permitting them to receive this portion; but such portion shall go to the sons or daughters, grandsons or granddaughters, great-grandsons or great-granddaughters of the deceased, and the substitution shall not take place unless the children die without legitimate offspring. So that the provision made for legitimate children shall also be extended to natural children. We ordain that all these provisions shall apply to legacies and special trusts.
Given at Constantinople July 22 (530).

Note.

This constitution deals with conditional trusts. The subject of trusts, by which a man might entail his property, has already been referred to in note to C. 6.21.8, and headnote to this title, and will be further dealt with in C. 6.42. It is here provided that if a testator should leave his property to a son or daughter upon trust to surrender it to a substitute, if he (of she) should not marry, or die intestate or without children, the substitute should receive nothing if either of these events should not take place - which would be contrary to the ordinary meaning of the words, and contrary to the general rule of construction. Inst. 2.14.11. The liberal provision is specially made in favor of children.

The opinion of Papinian referred to in this law is also stated in C. 6. 42. 30, and approved in similar manner as in this constitution.

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[4] [Blume] I.e., if either of the conditions are fulfilled.

A testator could leave only a certain portion of his property to his natural children, and only under certain conditions, referred to in C. 5.27. In so far as property could be and was left by a testator to his natural children, the rule of Papinian was applied to them the same as in the case of legitimate children.

6.25.8. The same Emperor to Johannes, Praetorian Prefect.

If anyone appoints an heir under this condition: "If he shall become consul," or "praetor," or appoints his daughter as heir upon condition: "if she shall marry," and if during the testator's lifetime such heir shall become consul or praetor, or finishes his office as such, or the daughter is married, but divorced from her husband, the condition - solving all doubt among the ancients - shall be considered fulfilled, without reference whether that happened in the lifetime of the testator, or at the time of , or after his death. This shall also apply to legacies, trusts and manumissions, lest, if we construe such provisions too technically, the wishes of testator will be defeated.
Given at Constantinople July 24 (531).

Note.

The point of this law is, that there was a doubt whether a condition could be said to be fulfilled, if it was fulfilled in the lifetime of the testator. The answer is in the affirmative. It was usually indifferent when and how a condition was fulfilled. Buckland 297.

6.25.9. The same Emperor to Johannes, Praetorian Prefect.

If a testament is found to state: "Let him be heir according to the conditions written below," but nothing of the kind was added to or mentioned in the testament, the provision relating to the condition shall be void and the appointment in the testament shall be considered unconditional. 1. As argument (for this decision), we use a certain answer of Papinian: that certain villages with definite boundaries, which were bequeathed to a city, did not any the less belong to the city pursuant to a trust, because the testator stated that he would in some other writing specify the boundaries, and the form of contests which he wanted celebrated each year, but was prevented by death from doing so. If such conditions, however, were stated in any part of the testament, the appointment as heir shall be considered conditional from the beginning, and the conditions must be complied with the same as if the testator had made the appointment dependent on conditions written below.
Given at Constantinople July 27 (531).

6.25.10. The same Emperor to Johannes, Praetorian Prefect.

In case a man appointed his pregnant wife as heir to a part of his estate, and the unborn child as heir to another part, adding that if no posthumous child should be born someone else should be heir, and such posthumous child, after being born, died before reaching the age of puberty, it was doubted what the law was, Ulpian and Papinian, both learned men, considered it to be a question of the intention of the testator, Papinian thinking that the testator intended that if the posthumous child were born but should die before the age of puberty, the mother should receive the inheritance rather that the substitute, reasoning that since he left part of his property to his wife, he would the more want such inheritance to go to the sorrowing mother. In order to dispel and doubt which

Papinian may have had, we order that, where the posthumous child is born and dies before the age of puberty, no substitution shall take place, and we permit such substitution only if no posthumous child is born at all, or if, after its birth, the mother dies first.
Given at Constantinople July 30 (531).