

Book VI.
Title XXI.

Concerning the testament of a soldier.
(De testamento militis.)

Bas. 35.21.41.

Headnote.

The will of a soldier in the field, who died during service or within a year after honorable discharge (law 5 of this title), was not subject to the ordinary rules of law, and the usual formalities were not required to be observed. He might make it as he pleased. He might write it himself, or have it written by another, or make it orally before witnesses who could prove its execution. This privilege was extended to soldiers on account of necessity. The privilege did not extend to persons in governmental service who had a right to dispose of their own special property though under parental power. C. 3.28.37.

6.21.1. Emperor Antoninus to Florus, a soldier.

If your brother, a soldier, specially appointed you as heir of the property not held by him as such soldier, you have no right to claim what he left at camp, although the person appointed as heir thereof refuses to accept it; but it rather belongs to intestate successors, if no substitute was appointed for the heir and it clearly appears that your brother did not want you to have it. For the wish of a soldier in the field is considered law. See note C. 2.50.8.

Received September 9 (212).

6.21.2. The same Emperor to Septimius, a soldier.

If a soldier appointed his fellow-soldier as heir only of his property in the camp, his mother will rightfully get the remainder of his property as an intestate inheritance-succession. But if he appointed another as heir, and the latter accepted the inheritance, you cannot rightfully ask his property to be transferred to you.

Promulgated February 19 (213).

6.21.3. The same Emperor to Vindicianus.

Although testaments of soldiers are not subjected to the limitations of law, and military simplicity permits them to make such testaments in whatever manner they wish and can, still the appointment of heirs made in the testament of Valerian, former centurian, is valid also according to the general law. 1. For when he, as father, appointed his unemancipated daughter as heir for two twelfths, his mother for one twelfth, and said nothing as to the remaining portions, he appears to have divided his inheritance into three parts, so that the daughter, who is appointed as heir for a sixth, should have two parts (of the whole) and the mother, who is appointed as heir for a twelfth, should receive a third part.

Promulgated November 1 (213).

6.21.4. Emperor Alexander to Junius.

If Rufinus, of honorable rank, a tribune entitled to wear the wide purple stripe,¹ and older than the age fixed by law, manumitted you by his testament, you may know that you are justly entitled to liberty. 1. But if he was below the age fixed by law for that purpose when he made the testament, the law prevents you from acquiring liberty, since this requirement is not dispensed with even in the case of soldiers. 2. But if the same testator had some legal judgment of the (manumission) council if the manumitter had been living, then since liberty provided for in a trust, even by a minor of any age, must be granted to a slave who can prove his cause to be just, it follows that liberty which is justly due to slaves of that kind may be granted by virtue of a testament of a soldier.²
Promulgated November 16 (222).

6.21.5. The same Emperor to Sozomenus.

An inheritance and legacies left by a testament of a soldier who died in service or within a year after honorable discharge, must be turned over to the beneficiaries thereof, because soldiers have among other things, been granted the right to leave their property, by their last will, to whomever they wish, unless the law specifically prohibits them from doing so.³

6.21.6. The same Emperor to Valens.

If two heirs are appointed in the testament of one not a soldier, for one of whom a parent may, until the age of puberty, make a testament, but for the other of whom, upon actually becoming heir, he could not appoint a substitute, and substitution was, nevertheless made for them reciprocally in the same words, such substitution can be made for both in the same manner. 1. However, you say that a controversy has arisen out of the testament of a soldier; that his young daughter having died after she became heir of her father, and you having been appointed joint and equal heir with her and you two having been substituted for each other reciprocally, her mother claims the right of inheritance-succession to her daughter who died intestate, while you contend that the right belongs to you by virtue of the substitution. The rule of law is clear that soldiers are permitted, by reason of their peculiar privilege, to appoint a substitute for even outside heirs who die after they have entered on the inheritance. But you have to prove that this is what your brother intended.
Promulgated April 20 (225).

Note.

In this case a soldier made a testament and appointed his daughter below the age of puberty, as heir to part of this property and his brother Valens as heir for another part, and further provided that they should be substituted as heirs for each other reciprocally; that is to say, that if one died, the other should be substituted as heir. The daughter

¹ [Blume] A sign of the rank of senator.

² [Blume] For a minor to manumit a slave, he was required to be nineteen years of age (Inst. 1.6.7) - reduced to fourteen years by Nov. 119, c. 2. But manumission could be made before the manumission council by the ancient method of laying on the rod (vindicta) on legal grounds even though the minor was under the age specified. See headnote to C. 7.1, which discusses this subject fully.

³ [Blume] C. 3.28.9; 24; 37.1c.

accepted her part of the inheritance through a guardian. She thereupon died - intestate while still under the age of puberty. Valens then contended that he, being substituted for her as heir, should have the property; but the mother claimed it as the daughter's heir on intestacy.

Now a father had the right to make almost any sort of provision as to the property derived from himself, given to his minor child who died under the age of puberty. He could leave the child an inheritance, and provide that if the child should not become and heir - that is, not accept the inheritance - or if the child should accept, and become actually an heir, but should die below the age of puberty, someone else should be substituted as heir in the place of the child. See headnote to C. 6.26. This virtually amounted to a power on the part of the father, to make a will for the child. But no such power existed, in the ordinary case, in regard to other persons. Substitution provided in such case was called common substitution. An ordinary testator had the right to provide that if a person - as Valens in this case - should not accept his part of the inheritance, the daughter, or anyone else, should be substituted as heir in his place. But he had no power to provide a substitution upon the death of the appointed heir - as of Valens in this case - after he had once accepted. In other words, if the main heir once accepted the inheritance, and thus became actual heir, that ended the matter, the substitution failed, and the substitute could receive nothing.

And there was another rule, stated in this law, that reciprocal substitution applied only in so far as it could be made for both. Now in the present case, the father could, as already stated, make almost any sort of provision for his daughter who should die below the age of puberty, and could provide that though she accepted the inheritance and became actual heir, still, if she died below the age of puberty, someone else should be substituted for her. But he could not, under the ordinary right of substitution, do the same thing in the case of Valens. Hence the mother contended that the reciprocal substitution attempted in this case was invalid. But in the present case the will was made by a soldier, and a soldier's will was not subject to the ordinary rules of law. On the contrary, a soldier might provide for a substitution in case of death of his minor child below the age of puberty, but also for substitution in case of the death of any appointed heir at any time. Hence the reciprocal substitution could apply equally to the daughter and the brother - and was construed as coextensive with the power - and the latter was, accordingly, entitled to the share of the inheritance given to the daughter. It would have made no difference, accordingly, if the daughter had died after reaching the age of puberty. The subject of substitution of heirs is more fully treated in titles 25 and 26 of this book, particularly laws 2 and 4.

6.21.7. The same Emperor to Fortunatus.

By reason of the words: "I give and bequeath to Fortunatus, my freedman, - - " you cannot claim liberty, if that is stated in the testament of a civilian. 1. But since you state that a soldier was the testator, and he did not, by error, believe you free, but intended to give you liberty, his military prerogatives, not only gives you liberty, and that directly, but he also the right to claim the legacy.
Promulgated July 1 (229).

6.21.8. Emperor Gordian to Aetermius, a soldier.

The law is certain that a soldier has the right to appoint a person as heir for a limited time.

Promulgated September 29 (238).

Note.

A soldier's will, not being bound by the ordinary rules of law, might appoint someone as heir for a limited time. This was contrary to the law governing ordinary cases. An heir could not, ordinarily, be instituted from or up to some definite dates, as, for instance, in the following form: "be so and so my heir after five years from my decease," or "after the first of such or such a month," or "up to and until such and such a month." The appointment in such case, however, would be valid and the time limitation disregarded. Inst. 2.14.9; Buckland, R. L 295; D. 28.5.34; C. 6.24.9; headnote to C. 6.25.

6.21.9. The same Emperor to Valerius.

As the law is certain that a soldier who knows that he has a son but appoints others as heirs is to be understood as impliedly disinheriting the son, so it is not considered in that if he does not know that he has a son and appoints others as heirs, the inheritance is not to be taken from the son, but the testament is, if the son is in the father's power, invalid, and such son will receive the inheritance-succession.

Promulgated October 3 (238).

6.21.10. Emperor Philip and Caesar Philip to Justinus, a soldier.

If a daughter is conceived but is still in the womb, without the knowledge of her father who is a soldier, and she is passed over by him in his testament, or if such father, through a false rumor, believed her to be no longer in this world, and made no mention of her in his testament, his silence is not, under these circumstances, an indication of an intention to disinherit her. 1. But a soldier who mentions his daughter in his testament and gives her a legacy, disinherits her by not appointing her his heir.

Promulgated May 21 (246).

Note.

The two preceding laws deal with disinheritance of children. If a soldier had knowledge of the existence of a child and passed it over, or gave it simply a legacy, the institution of other heirs was equivalent to disinheritance, and such disinheritance was valid, although a father's will in other cases was void under these circumstances, as will be seen later. If the soldier, however, had no knowledge of the existence of the child, intention to disinherit could be implied, and the will accordingly void.

6.21.11. The same Emperor and Caesar to Aemilius, a soldier.

It is clear that an appointment of an heir, on condition that such heir should in turn appoint the testator as his heir, is of no force even if made in testament of a soldier.

Promulgated June 25 (246).

Note.

Two persons could not testamentate in one instrument, even if they instituted each other as heirs by directing that the survivor should inherit from the other. A reciprocal will was considered as legacy-hunting. See note to C. 8.38.4; Mackeldy §761; Hunter 947; 8 Donellus 1313. Mutual wills were, however, permitted by the emperor Diocletian, if made on the eve of battle. C. 2.3.19. See also headnote to C. 6.25.

6.21.12. The same Emperor and Caesar to Domitia.

It is clear that the Falcidian law does not apply either as to legacies and trusts left in a testament of a soldier. But if a demand is made which exceeds the amount of the estate, you may protect yourself by a competent defense.
Promulgated July 2 (246).

Note.

If a person, under the ordinary will, was instituted as heir, he was at all events, entitled to retain one-fourth of the net estate - that is to say, one-fourth of the estate, after the payment of the debts of the estate. This was called the Falcidian fourth. See C. 6.50. But this did not apply to a soldier's will, and the appointed heir thereunder was compelled to pay all the legacies, even though he did not retain anything out of the property for which he was appointed heir. He was not, however, compelled to pay more than he received, and he had a defense against a demand for payment of more. This is what, in the present law, is referred to as "competent defense." See to the same effect C. 6.50.7.

6.21.13. Emperors Valerian and Gallien to Claudia.

Soldiers, including centurions who are condemned to death on account of a military crime, may only dispose, by testament, of their property in camp, and those who die intestate are succeeded as heir by the fisc in its own right.⁴
Promulgated August 5 (254).

6.21.14. Emperors Diocletian and Maximian and the Caesars to the heirs of Maxima.

If your mother acquired the inheritance of her brother, who was a soldier, by reason of being appointed his heir (in his testament), it is clear that the brother of the testator or his sons cannot claim this inheritance as an intestacy, although the testament was not executed in accordance with the requirements of law.
Subscribed May 3 (294).

6.21.15. Emperor Constantine to the people.

If soldiers on an expedition⁵ want to affectionately remember their wives, sons, friends, fellow soldiers, or anyone else in their last will, they may make a testament in whatever manner they can and wish, and the merit, liberty or position of their wives or children shall not be investigated, since the wish of the father is in their favor. 1. And just as the law, for good reasons, has permitted it and always will permit it, if they note any wish by letters inscribed with their blood on the sheath of their sword or on their shield, or if they write anything in the dust with their sword, as they give up their life during battle, that sort of a will shall be valid.
Given August 11 (334) at Nicomedia.

6.21.16. Emperor Anastasius to Hierius, Praetorian Prefect.

⁴ [Blume] i.e. it receives all property not in camp, and the property in camp also, if no will is made.

⁵ [Blume] See note C. 2.50.8.

We decree that scribes or apparitors who attend and carry out the orders of the magnificent masters of the soldiers, shall not, although their names are inscribed in the military rolls, have the right to make a testament that soldiers have.

Given at Constantinople February 13 (496).

6.21.17. Emperor Justinian to Mena, Praetorian Prefect.

In order that no one may think that soldiers may at any time whatever make their testaments in any manner they wish, we ordain that the aforesaid privilege in making testaments is extended only to those who are occupied in an expedition.

Given at Constantinople April 11 (529).

6.21.18. The same Emperor to Johannes, Praetorian Prefect.

Although minors⁶ were by the ancient laws permitted to make a testament if they occupied the position of military tribune, still it seems unworthy of our times that a person still immature in mind, should have the rights of people of mature wisdom merely because of military privileges, and should, during his tender years, by reason of such permission, perhaps injure his parents or others by leaving his property to outsiders. Hence we do not permit this to be done.

Given at Constantinople October 21 (532).

⁶ [Blume] Pupillus - this is strictly a minor under the age of puberty, but that is probably not the meaning here.