Book VI.
Title XXVII.

Concerning the appointment and substitution of slaves, as compulsory heirs.
(De necessariis et servis heredibus instituendis vel substituendis.)

Bas. 35.13.36.

6.27.1 (2). Emperor Pertinax to Lucretius.

An insolvent person may leave a compulsory heir even in fraud of creditors. But if you (a slave) were pledged and so remained, you could not be manumitted and made compulsory heir by an insolvent debtor.
Promulgated March 22 (193).

Note.

A slave appointed as heir could not refuse to accept the inheritance. He was a compulsory heir - heres necessarius. This is a principle unknown to our law. The Romans adopted such principle perhaps because of their repugnance to intestacy, but mainly incase of the insolvency of the testator. There was infamy attached to such insolvency, and by appointing a slave as heir, who had to pay the debts as far as able, the infamy was, ludicrously enough, though to be attached to him and not to the testator. The slave so appointed must be given freedom at the same time; in fact under law 5 of this title, the appointment as heir carried manumission with it. And the giving of freedom under these circumstances was valid, and to that extent the creditors were defrauded. As the manumission of one slave would suffice for the purpose of taking over the insolvent inheritance, no more than one could be freed in such case. The slave so freed could apply for what was called a separation of goods, so that only the inheritance left him was liable for the debts of the estate, giving the slave - now freedman - the right to retain what he might acquire thereafter. But in order that a slave might be appointed as such heir, the testator must own him - must have the right of disposal of him, and accordingly no slave that was pledged could be appointed such heir. Buckland 302-303; Inst. 2.19.1.

6.27.2 (1). Emperor Antoninus to Aufidius.

If while you were slaves, you were appointed as heirs under the name of freedmen, such appointment is, under a liberal interpretation, to be construed as if you were appointed heirs as free persons. This does not apply when a legacy is left.
Received February 23 (169).

Note.

In this case the slaves were appointed heirs. The testator did not, however, state that he gave freedom to these slaves, although he called them his freedmen. This appellation was construed as equivalent to manumission. Under law 5 of this title, the slave received his freedom along with the appointment as heir, though nothing was said as to manumission. This was not true, however, if only a legacy or trust was left to the slave. The instant law was interpreted to conform to C. 5 h.t. The classical rule was to the contrary. Ulp. R. 22.7.11 and 12. See Ricobonno, 35 Z.S.S. [214,] 280.

6.27.3. Emperors Diocletian and Maximian and the Caesars to Felix.

If your guardian took your female slave to his marriage bed and thereafter appointed her his heir, he could not by that act deprive you of ownership, and you have the legal right to order her to accept the inheritance and thus acquire ownership thereof for yourself.

Subscribed at Sirmium December 17 (293).

Note.

Whatever was acquired by the slave was, ordinarily, acquired for the benefit of the master. But see C. 6.27.5.2.

6.27.4. Emperor Justinian to Julianus, Praetorian Prefect.

When someone appointed his minor son, under the age of puberty, his heir, and by direct bequest[1] gave liberty to a slave, but in appointing an heir of the second grade, that is when he made a pupillary substitution, he substituted this same slave for his minor son without providing for his liberty, and it was questioned among the jurists whether the slave by such substitution became a compulsory heir of the minor. 1. The cause of the dispute arose out of an ancient rule. All were agreed that a slave would become a compulsory heir of the master, to whom, as heir of a certain grade, an inheritance and liberty were left at the same time. But in the present instance liberty and substitution was not provided for in the same grade, but in different grades.[2] 2. Deciding the dispute, it seems marvelous that anyone should think that a testator's wish, and particularly that of a master, should be frustrated by such technicality, and that the slave would not become a compulsory heir, but should give him the right to acquire his liberty and at the same time refuse the inheritance, thus opposing the master's wish: Should he attempt to do so, he will be punished. He shall, accordingly, be free during the minor's lifetime, because that was the testator's wish, and he shall be compulsory heir of the minor, in case of the latter's death, because that, too, was the testator's wish.

Given at Constantinople November 17 (530).

6.27.5. The same Emperor to Johannes, Praetorian Prefect.

Someone, in making his testament, and in appointing two heirs, game a certain portion to one, and the remaining portion to the other - his slave, whose name he mentioned, without granting him liberty. He thereafter bequeathed the same slave to another, or, after appointing an heir, gave the slave as a legacy to another and then appointed such slave as his heir without giving him liberty. It was doubted whether such legacy or appointment could have any validity and who would have the benefit of such

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[1] [Blume] e.g. let Stichus, my slave, be free. This took effect as soon as the heir accepted the inheritance; if the heir did not accept, the manumission failed. This lead to manumission by way of trust, in which an heir or legatee was charged to manumit the slave. Even if the will failed in such case, the intestate heir was bound to carry out the testator's wish. Hunter 175, 176.

[2] [Blume] Liberty was given in connection with the appointment of the heir of the first degree, namely that of the son; but liberty was not given in connection with the appointment of an heir of the second degree, namely that of the slave as substitute for the son.

legacy or appointment. The reason of the doubt lay in the fact that he appointed his own slave as his heir without giving him liberty, and the contention that arose among the ancients was so great that it seems almost impossible to decide it. Antiquity which disputed over this must be disregarded. We have found some other way to settle the question, because we always follow the wish of the testator. 1b. Inasmuch as we find it to be the law that, if anyone has appointed his slave as guardian for his sons, without giving him liberty, it should, out of consideration of the minors, be presumed from the very appointment as such guardian, that liberty, too, is given the slave, why should we not also, in a humanitarian spirit and through partiality for liberty, apply this rule in case of heirship, so that if anyone appoints his slave as his heir, without giving him liberty, he will be nevertheless regarded as a Roman citizen? 1c. By doing so, neither acquisition (of property by anyone through such slave) nor the effusive and intricate treatises of the ancients have any place. It is not to be supposed that anyone is so thoughtless as to appoint a slave as heir, without liberty, and at the same time give him, by a legacy, to another. 1d. The ancients also doubted whether, if anyone had in his testament, appointed his slave as his heir, for a portion of his property, without giving him liberty, but had given him liberty in a codicil, the appointment was valid and that the slave could be heir as well as free; (and if so whether) it would not seem that an inheritance could be confirmed by a codicil, although such inheritance, cannot, according to the ancient rule, be given by a codicil. When such disposition is made, though in a codicil, we, though our liberality and beneficent interpretation, grant to slaves both liberty as well as the inheritance, and they may rejoice that they will not remain slaves, but will become freedmen as well as heirs. In fact, out benevolence goes to the extent that although liberty was not given them either in the testament or in a codicil, still when an inheritance was given them, liberty shall be considered as an inseparable part thereof. 2. But it must be observed that if only a legacy or trust is left them without liberty, they will remain in servitude. 2a. Heirs should not, however, be so impious as to attempt to cheat the testator's liberality which is due to slaves, and refuse to give them what is left them, although they still remain slaves. 3. This provision of our law should also be benevolently applied in other cases of doubt. So if anyone bequeathed his slave to someone in the beginning of his testament, but in providing for substitution for a minor, substituted the same slave for his son, without liberty, it was questioned, whether such substitution would be effective, and whether such substitution would, after the minor's death, be acquired by the legatee, through the slave bequeathed to him, or whether such substitution would be ineffective, because the slave was appointed as substitute without liberty. 3a. It accordingly seems to us best to ordain that the slave is not immediately acquired by the legatee, but the event for the substitution is to be awaited; and if the substitution takes place by the death of the minor, the slave becomes both free and heir; but if the substitution does not take place, the minor, perchance, arriving at the age of puberty, then ownership of the slave passes to the legatee. 3b. For as among the ancients, in case substitution, with liberty, was provided, liberty remained in suspense, the slave being known as one conditionally-free (statuliber), so under our construction, in case a slave is substituted without liberty (and the substitution takes place) such slave shall be both free and heir.

Given at Constantinople April 30 (531).

Note.

By virtue of this law, an appointment of a slave as heir carried with it his liberty, just as appointment of a slave as guardian carried liberty along with it. Inst. 1.14.1. Hence, if a testator appointed a slave as heir, and also gave him as a legacy to another, the legacy was void, since he could not be free and the property of another at the same time. If the slave was appointed as a substitute for a minor who might die before the age of puberty, and only in that event, and he was also given as a legacy, then whether the legacy was valid depended on whether the minor would die. If not, and the substitution failed, then the legacy became good. But if the minor died before the age of puberty, and the substitution took place, the slave became free as well as heir. A substitution was, as already indicated heretofore, a secondary appointment as heir - a conditional appointment.

Giving a legacy merely to a slave did not have the effect of making him free. Now a legacy to one's own slave not freed at the same time was ordinarily void. D. 30.34.9; C. 6.37.4; C. 6.42.28. A legacy for aliment seems to have been an exception. D. 33.1.16; D. 30.113.1; Hunter 943. Under the present law, a legacy given to a slave of the testator is directed to be paid to the slave notwithstanding the fact that no liberty was granted. It doubtless became part of his peculium (special property). See 9 Donellus 282. There was, however, no way for the slave to enforce the legacy, and in view of C. 6.34.4, it is doubtful just what this provision means.

6.27.6. The same Emperor to Johannes, Praetorian Prefect.

Leaving in force the constitution which we enacted[3], and by which we ordained that a slave who is appointed heir by his master without liberty should be considered as having been also granted his liberty, if anyone appoints his slave as his unconditional heir, but gives him liberty upon condition, then if the condition is such as is in the power of the slave to fulfill but the latter disregards it and fails to fulfill it, he will, through his own fault, be deprived of both liberty and his inheritance. But if the fulfillment of the condition depends upon fortuitous circumstances, and does not take place by reason of the snares of fortune, then, he shall, out of humanitarian consideration, be entitled to his liberty, but the inheritance, if solvent, shall go to the intestate heirs, if no one else is substituted. If the estate is not, however, solvent, the slave shall, as compulsory heir, have both liberty and the inheritance. For in such case he becomes free as well as compulsory heir, both under the provisions of ancient law, as well as that of our own. Given at Constantinople July 31 (531).

[3] [Blume] C. 5, supra.