

Book III.  
Title XXVIII.

Concerning an unjust testament.  
(De inofficioso testamento.)

Bas. 39.1.34.

Headnote.<sup>1</sup>

The father was head of the household. Children were under his power, no matter whether they became of age or not, unless they were emancipated, and the father originally became owner of all that accrued to or was gained by his son. Hence, there was a community interest in all property and it would have been harsh to have permitted total disinheritance. Testamentary disposition of property away from the family was an invasion of family rights, and legislation was required on the subject. It became the law that direct descendants, ascendants, and consanguineous brothers and sisters (i.e. having the same father) had the right to bring an action to set a will aside as undutiful, or unjust, in case a definite portion was not left them. This portion, called “legitima portio”—herein translated legal or birthright portion—became fixed at one quarter of the property of the deceased, divided among the children in [illegible], i.e., the amount which the complainant would have obtained had the deceased died without making a will.<sup>2</sup> Const. 6 infra; Inst. 2.18.6; D. 5.2.8.6. This was later, by Novel 18.1, increased to one-third in case of children, if there were not to exceed four children, and to one-half if there were children over that number. This fourth, here referred to, must not be confused with the Falcidian fourth, which is treated in C. 6.50, and was a fourth of the net estate which an “heir” received, who in such case was really an executor under the will, and who might or might not be a child, a parent, etc. The legal or birthright portion here spoken of might not be so large. If, e.g., there were four children, then, prior to the enactment of Novel 18, each child was entitled to at least one-fourth of one-fourth, or one-sixteenth; after the enactment of Novel 18, one-fourth of one-third, or one-twelfth. If there were seven children, then, under Novel 18, each was entitled to one-seventh of one-half, or one-fourteenth. This legal or birthright portion might be given by way of inheritance, legacy, trust, or as a gift in anticipation of death, or, in certain cases, as a present among the living. Inst. 2.18.6. In certain cases, however, persons embraced within the class that could bring an action to set the will aside, might be disinherited. Illustrations of this are found in the following title and particularly in part of Novel 115. Where males or the masculine are mentioned, females and the feminine are ordinarily included, unless the context shows otherwise. A mother could not neglect or overlook her children any more than the father, and either the father or mother could not overlook a daughter any more than a son. If a parent thought that a child was ungrateful and therefore wanted to disinherit him or her, the fact of such ingratitude was required to be stated in the will. Law 30 of this title and Novel 18, c. 3. See also C. 5.9.10, and C. 6.28. Specially favorable provisions were made for orthodox children of heretical parents. C. 1.5.13.

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<sup>1</sup> Blume has penciled in here: “Rewritten. Can’t find note rewritten, so let it stand.”

<sup>2</sup> In the margin, Blume has penciled in: “[illegible] only in certain cases; if children, the others would not ordinarily unless they failed. Buckland 325.

An action to set aside a will as unjust was essentially an action for the inheritance, considered in title 31 of this book, and nominally rested on the notion that the testator must have been insane, which would involve complete nullity of the will, but the notion was not carried out logically, for the will was sometimes permitted to stand in part, while it was overthrown in part. Buckland 324 says that the proceeding seems to have been the basis for an action for the inheritance rather than an independent procedure, though this is disputed; nor is it clear whether there was a separate judgment or whether the judgment in the action for the inheritance followed directly on the inquiry as to the testament being just. Buckland says that the better view seems to be that there was a separate judgment. If the proceeding succeeded as a whole, the property of the decedent passed, of course, on intestacy. Similar to the proceeding mentioned in the present title was the proceeding on the part of an heir to set aside unjust gifts to his prejudice, which, however, had for its object to have the property unjustly given away considered as part of the inheritance. These subjects are treated in titles 20 and 30 of this book. See also Girard 908, 916; Collinet, Études Historiques: La caractère oriental de l'oeuvre législative 200-210. The present title, as well as titles 29, 30, 31, 36, and 38 of this book, relate to remedies of heirs and are best read in connection with titles 9 to the end of book 6 of the Code, frequent references to which are made in the above titles of this book.

#### 3.28.1. Emperors Severus and Antoninus to Victorinus.

Since a son wishes to make complaint concerning the testament of his mother as unjust, against the person who holds the inheritance by reason of a trust, it is not unjust that he [be] accommodated; the right to do so should be granted so that the beneficiary of a trust may be held responsible the same as though he held the inheritance as heir or as possessor.

Promulgated June 27 (193).

#### 3.28.2. The same Emperors to Lucretius.

Although you say that you received the right of the possession of the inheritance with the intention to commence a complaint to set aside a testament as unjust, yet it is not right that possession should be taken away from the heirs appointed in the will.<sup>3</sup>

Given November 28 (196).

#### 3.28.3. The same Emperors to Januarius.

If a mother designated two sons as heirs, and afterwards gave birth to a third, and neglected to change the testament when she had opportunity to do so, (the third son) could bring a complaint to set aside the testament as unjust, because he was disregarded therein for no just reasons.

1. But since you say that she died at childbirth, the injustice of a sudden calamity is to be remedied by assuming that she intended to fulfill her duty as a mother. Hence we are of opinion that an equal share must be assigned to your son, against whom only the maternal fate operated, as though all the sons had been designated as heirs.

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<sup>3</sup> [Blume] The right of possession of an inheritance granted by the praetor ordinarily carried with it the right to enforce actual possession by an interdict. C. 8.2. In the instant case, however, the right was granted merely so as to enable the party to commence the complaint. D. 5.2.8 pr. See full note C. 6.33.3.

2. If the designated heirs are strangers, then he (the son) is not forbidden to commence an action to set the unjust testament aside.  
Promulgated June 24 (197).

Note.

Children could not safely be disregarded in a will, and that was true in the case of posthumous children; that is to say, children born after the making of the will. Note C. 6.33.3. If a daughter was overlooked, she was permitted to take her equal share with the other children. G. 2.124; C. 6.12.2, note. The instant provision was evidently modeled after that. If a stranger was appointed heir, the posthumous child took all by commencing complaint against the testament as unduteous. Ordinarily that was the only remedy against the testament of a mother. Law 15 h.t.

3.28.4. The same Emperors to Soterichus and others.

Since you lived in freedom according to a decree of the praetor, pursuant to a trust, and also gave birth to sons, it would be unjust to question your freedom, although the testament of your master was thereafter pronounced unjust in an action brought by a son.

Promulgated March 8 (208).

Note.

Where a will was wholly upset, legacies, trusts, and manumissions ordinarily failed. Headnote h.t. But apparently not, if it was upset only partially. Law 13 h.t. That was true also if the judgment was by default. D. 5.2.17.1.

3.28.5. Emperor Antoninus to Aelius.

If your father died after joinder of issue or after he had determined to bring complaint to have a testament declared unjust, you may bring the suit commenced, or in any manner determined by him to be commenced, to a conclusion.

Promulgated October 6 (211).

Note.

On one could bring an action to set aside a will as unjust who was not entitled to inherit on intestacy. D. 5.2.6.1. The son in this case was not so entitled, inasmuch as his father was living at the time of the death of the grandfather. But his right of action was transmitted to the son when the father had commenced the action or had indicated in some manner his intention to bring it. See law 34 pr. h.t. and D. 5.2.9.

3.28.6. The same Emperor to Igenuus.

When the question is whether sons may bring a complaint to set a testament aside as unjust, the point whether the testator left a fourth part of his property which he had at the time of his death, is considered.

Promulgated June 25 (212).

Note.

Under law 30 of this title, if part, but not all, of the legal or birthright portion was left, only an action to supplement was given. Novel 18 increased this portion.

3.28.7. The same Emperor to Secundinus.

You must know that the granddaughter of the decedent may bring complaint to set aside a testament as unjust, although her father, emancipated, had died.  
Promulgated at Rome June 26 (215).

Note.

Grandchildren had, generally, the rights of their father, and took what he would have taken, if living, in the property of their paternal grandfather, and later also in the property of other grandparents, without reference to the fact of emancipation. C. 6.55.9 note.

3.28.8. The same Emperor to Florentinus.

The choice of parents to divide the inheritance among their children must not be taken away, provided that a child, conscious of filial loyalty, receives under the will of the parent, a fourth of the amount which he could have received in case of intestacy. 1. A child over twenty-five years of age, however, who has ratified the action of the deceased by paying the paternal debt in proportion to his inheritance or by some other lawful method, cannot question as unjust an act of the parent which he approved, although he received less than his birthright portion.  
Promulgated February 7 (223).

3.28.9. The same Emperor to Romana.

The law is certain that sons cannot bring complaint concerning unjust testaments of a soldier or of a centurion or tribune of a division of an army, whether the will is executed according to military or civil law.<sup>4</sup>  
Promulgated May 15 (223).

3.28.10. The same Emperor to Quintilianus.

If the property of the heirs of Quintianus, against whom you intended to bring an action to set aside as unjust the will of the decedent whose son you claim to be, belongs to the fisc by right of succession, or if the fisc holds the property of Quintianus himself as heirless property, you may commence the action before my procurator.  
Promulgated August 12 (223).

3.28.11. The same Emperor to Ingenuus.

A person who is not condemned to the arena, but is there voluntarily, retains his legal rights of succession, as well as his citizenship and freedom. But if his parent made a testament, he can neither bring a complaint concerning an unjust testament, nor may he be granted the right of possession of the inheritance;<sup>5</sup> for a testator may rightly consider

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<sup>4</sup> [Blume] to the same effect are law 24 h.t.; C.6.21.5. Ordinarily, persons under paternal power could not make a will. C. 6.25, headnote. But commencing with the early empire, soldiers could will away the property acquired in connection with their service, as they wished. Only if they did so by mistake could their testament be overturned. C. 6.21.9; 10. Soldiers had many privileges. C. 6.21; C. 8.46.2, note Veterans, too, might make a will. Law 37. h.t.; Inst. 2.12 pr. D. 5.2.8.3 says that it was subject to attack as unduteous. Doubt is thrown on that by law 37. h.t. Many public officials and others had rights similar to that of soldiers.

<sup>5</sup> [Blume] As to such right (bonorum possessio), see headnote C. 6.9.

such a son as unworthy of inheriting from him, unless he himself occupies the same status.

Promulgated December 29 (224).

3.28.12. The same Emperor to Licinius and Diogianus.

If the father of the girl, whose curators you claim to be left half of his property to his son, one-third to his daughter, and the remaining one-sixth to his wife, upon trust<sup>6</sup> that if either of said children should die before reaching the age of twenty-five years, the portion of such deceased child should belong to the others, and upon further trust that the property which by reason of the inheritance should come to his widow, should, after her death, belong to the children, then you should not bring against (such) just will the disparaging<sup>7</sup> action to set the will aside as unjust, since by reason of such conditions the portion of the mother as well as that of the brother may become the property of the daughter.

Promulgated December 5 (229).

3.28.13. Emperor Gordian to Priscianus.

When two heirs are named in the testament, one receiving five-twelfths, the other seven-twelfths of the property, and you say that you succeeded in your complaint against the one receiving seven-twelfths, but were beaten by the one receiving five-twelfths, then neither legacies nor trusts are good against that portion as to which the testament was annulled, since he who gains the suit inherits by the law of intestacy. But direct manumissions are valid and those given by way of trust must be made.

Promulgated January 30 (239).

Note.

See law 4. h.t. As to failure of legacies and trusts generally, see C. 6.39, headnote.

3.28.14. The same Emperor to Priscus.

It has been determined that a person who fails to win a suit to set a will aside as unjust is not prohibited from bringing an action to have the will declared a forgery. The same holds true if, on the other hand, a man is beaten in a case for forgery and afterwards commences an action to have the will set aside as unjust.

Promulgated November 26 (239).

3.28.15. Emperor Philip and the Caesar Philip to Aphrodisia.

The law is plain that a daughter, overlooked in a mother's will, cannot succeed to the property without a complaint to have the will set aside as undutiful.

Promulgated July 28 (245).

3.28.16. Emperors Valerian and Gallien and the noble Caesar Valerian to Theodota.

When persons more than twenty-five years of age bring two actions, one that the testament has not been legally executed, the other that the testament, though legally

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<sup>6</sup> [Blume] As to trusts, a form of legacy, see C. 6.42.

<sup>7</sup> [Blume] The complaint, called "accusation" in law 11 h.t., was considered as involving reflection on the testator. Hence it could not be brought unless there was no other remedy. Headnote h.t.

executed, is invalid because unjust, the prescriptive five years' period (for complaints to have a will declared unjust) does not apply when the delay is caused by the first action, since said period does not operate against those who do not agree to press their demands.<sup>8</sup> Promulgated August 13 (258).

3.28.17. Emperors Carinus and Numerian to Flora.

Since you say that your son has overlooked you in his will and has named his sister as his heir, you may bring an action before the president of the province to have the will set aside as unjust.

Promulgated February 12 (284).

3.28.18. Emperors Diocletian and Maximian to Faustina.

Since you say that you did not violate your filial duty, but that you were simply unwilling to dissolve the marriage relation entered into with your husband, because of which your offended and irate father disgraced you by disinheriting you, you will not be prevented from bringing a complaint to have the will set aside as unjust.

Promulgated at Nicomedia, February 14 (286).

3.28.19. The same Emperors to Apollinaris.

If your daughter lives dishonestly and in shameful alliance, to that you feel that she should be excluded from inheriting from you, and if you have not been incited to that odious step by inconsiderate passion, but by her just deserts, you are at liberty to make your last testament as you wish.

Given at Sirmium June 17 (293).

3.28.20. The same Emperors and the Caesars to Sabinianus.

A daughter bereft of her father, who marries a man with the consent of her mother, and lives in harmony with him, gives no just cause of offense, because her mother afterwards regrets the marriage, and cannot justly be compelled to be married or be a widow according to the momentary caprice of her mother.

Given at Sirmium, January 5 (294).

3.28.21. The same Emperors and Caesars to Alexander.

The children of a brother or sister, fruitlessly attack a testament of a paternal or maternal uncle and of a paternal or maternal aunt as unjust, since no collateral heir, except brothers and sisters, is permitted to bring such complaint. They are not, however, forbidden to complain of forgery by making an accusation of that crime.

Given February 8 (294).

Note.

It will be noted that no collateral relatives except brothers and sisters (and that by the same father) were permitted to bring an action to set a will aside as unjust. See law 27 h.t.

3.28.22. The same Emperors and Caesars to Statilla.

If our husband named you sole heir in his testament, but disinheritance of his daughter whom he had in his power is not acceptable to her, and if nothing was left her,

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<sup>8</sup> [Blume] As to limitations of actions generally, see note C. 7.39.3.

and she is not shown to have given just cause of offense, then there is no doubt that she can obtain the whole estate in a complaint to have the testament set aside as unjust. But if she has already obtained it, or is hereafter awarded it, she must return to you whatever is shown to have been owing to you by your husband at the time of his death.  
Given at Sirmium February 13 (294).

Note.

Where a will was set aside as unjust, the person who succeeded in the action inherited as on intestacy. Law 13 of this title. As to burden of proof see law 28 of this title.

3.28.23. The same Emperors and Caesars to Philippa.

You testify plainly that you gave just offense to your mother by acknowledging that you forbade her to make a will before witnesses.  
Given September 9 (294).

Note.

Persons who hindered another from making a will were considered unworthy persons to inherit from such other. C. 6.34, generally.

3.28.24. The same Emperors and the Caesars to Successus.

A testament of a son under paternal power who is a soldier, disposing of his own special military property, cannot be annulled either by the father or by the children in a complaint to have the will declared unjust.<sup>9</sup>  
Given at Nicomedia, December 3 (294).

Note.

As to a soldier's special military property, see headnote C. 6.60, and note C. 8.46.2. Soldiers had special privileges in making their wills and were not, generally, governed by the ordinary laws. This subject is fully considered in C. 6.21.

3.28.25. The same Emperors and Caesars to Menodotus.

It is disclosed by the law that a mother who looks with disfavor on the morals of her husband may look after the interests of her children by designating them as her heirs upon condition that they shall be emancipated by the father. Hence, the father who fails to comply with this condition does not have the right of possession of the inheritance in accordance with the provisions of the will, nor may he in such case bring a complaint to have the testament declared unjust in the name of the children to whom the mother did no wrong, but for whom she rather wanted to provide properly.  
Given at Antioch July 4 (301).

Note.

Until the time of Constantine, the father ordinarily became the absolute owner of all the property acquired by his children under his paternal power. Headnote to C. 6.60; note C. 8.46.2. If the mother, accordingly, had appointed the children her heirs without condition, the surviving husband, instead of the children, would have had the benefit of the inheritance. This she sought to avoid by appointing the children her heirs upon condition that they should be emancipated. Provisions of that kind are mentioned in C. 6.25.3; C. 8.54.5. If the father did not do so, he could not get the right to the possession of the inheritance in accordance with the will—that is to say, in simple words, he could

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<sup>9</sup> [Blume] Law 9 h.t.

bring an action that the will was unjust, in the name of his children. In other words, he was required to comply with the condition, or neither he nor his children would get anything under the will. Such condition affixed by the mother was considered a legal condition. For conditions in a will generally, see C. 6, titles 45 and 46.

3.28.26. The same Emperors and the Caesars to Serapio, greeting.

It is certain that a father who appoints his son as heir to three-twelfths of his estate may validly provide for direct substitution in case the son should die while under the age of puberty.

Given at Nicomedia August 28 (304).

Note.

The subject of substitutions is fully considered in headnote to C. 6.26. The substitution mentioned in the foregoing law was what was commonly called pupillary substitution—substituting an heir for a minor who might die before reaching the age of puberty—twelve years in case of girls, fourteen years in case of boys.

3.28.27. Emperor Constantine to Lucrius Verinus.

Uterine brothers and sisters who (having the same mother only and not the same father) are entirely excluded from the complaint of an unjust testament of their half-brothers or half-sisters (i.e., having the same father) may, during or after the continuance of the agnatic relationship, bring an action to annul the testament of a brother or a sister as unjust, if the designated heirs are infamous, guilty of moral turpitude, or marked by some smaller stain,<sup>10</sup> or if they are freedmen who have been appointed as heir without deserving it and without showering any great benefits upon their patrons, unless it be a case where a slave is appointed as necessary heir.

Given at Sirmium April 13 (319).

C. Th. 2.19.1.

3.28.28. The same Emperor to Claudius, President of Dacia.

Descendants who bring a complaint to set aside a testament as undutiful should prove that they have constantly exhibited toward parents that filial duty which the law of nature demands, unless the heirs designated in the will prefer to prove them to have been ungrateful children.

1. If a mother brings such complaint in relation to the testament of a son, we direct you to make careful inquiry whether the latter offended his mother in his last testament and failed to leave her the legal portion intended for her consolation without just cause, and (if that is true) the will should be set aside and the succession awarded to the mother.

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<sup>10</sup> [Blume] E.g., are illegitimate children. Gothofredus at C. Th. 2.19.3. It will be noted here that consanguineous brothers and sisters, even though emancipated—that is to say, after their agnatic relationship ceased see headnote C. 6.9.)—had a right to set the will of a brother or sister aside as unjust. Under C. Th. 2.19.1, from which the instant law was taken, only unemancipated brothers and sisters could bring the action. But the tendency was to abolish the difference. The limitation that brothers and sisters could only bring the complaint against unworthy persons is not in the Digest. D. 5.2.1, and may be of later origin. As to a slave as necessary heir, see C. 6.27.



2. But if the mother, perchance, committed dishonorable acts and was guilty of evil machinations against him, sought to entrap him secretly or openly, gave her friendship to his enemies, and did other things by reason of which she might be considered an enemy rather than a mother, then she must, on proof thereof, acquiesce in the will of her son even unwillingly.

Given at Serdica February 6 (321).

C. Th. 2.19.2.

Note.

A mother inherited from her children on intestacy only after the Pertullian Senate decree of about 129 A.D. See C. 6.56. Previously, brothers of the deceased son preceded her in right. According to the instant law, the burden of proving lack of good ground for disinheritance was on the complainant. See also D. 5.2.3.5. In law 22 and law 30, h.t., the contrary is stated. Novel 115 fixed the burden on the testamentary heir to show unworthiness of those disinherited.

3.28.29. Emperor Zeno to Sebastianus, Praetorian Prefect.

Since a recent novel of Leo of blessed memory,<sup>11</sup> directs that a prenuptial gift shall be brought into hotchpot by a son in the same manner as dowry is brought into hotchpot by a daughter, so we direct that this prenuptial gift shall be charged up to the son as part of the legal portion (the fourth which he is entitled to receive from his parent).

1. So when a mother gives a dowry for a daughter or a prenuptial gift for a son, or when such gifts are made by a paternal or maternal grandfather or grandmother for a granddaughter or grandson, or by a paternal or maternal great-grandfather or great-grandmother for a great-granddaughter or great-grandson, not only do we want such dowry or gift to be put into hotchpot, but the dowry as well as the prenuptial gift shall also be charged up to the fourth (the legal portion) so as to exclude any complaint of unjustness, if it has come from the property of the person concerning whose inheritance a suit is brought.

Given May 1 (479).

3.28.30. Emperor Justinian to Mena, Praetorian Prefect.

Looking in every way to uphold last wishes of testators, we think we should destroy the main cause which gives the occasion in numberless cases for nullifying them, and to make definite statutory provisions for the interests of decedents and their descendants and other persons legally able to sue in certain cases in which an action to have a will declared as unjust or to have it overturned in some other manner, was usually brought. So that whether a provision for supplementing the birthright portion is added to a testament or not, it shall remain in force, but the persons who could heretofore complain of an unjust testament or could overturn it in some manner, may immediately and without hindrance, demand that the legal portion be supplied to the extent that the provisions of the will are deficient therein, provided, however, that they are not, by legal proof, shown to be ungrateful persons, when testator has accused them of ingratitude in his will—for if he makes no mention of such ingratitude, his appointed heirs cannot claim that they were ungrateful and cannot bring that matter into question. These provisions are made for persons whom testators have mentioned in the will, and to whom some

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<sup>11</sup> [Blume] C. 6.20.17.

property has been left, either as an inheritance. Legacy, or trust, but in an amount which is less than the legal portion.

1. If testators, however, have entirely disregarded such person, either already born or conceived before the making of the will, although still in the mother's womb, and have left them no property, either by disinheriting them or otherwise mentioning them, then the ancient laws shall remain in full force without being affected by the present provisions.

2. In the case of sons and other persons who have long been permitted to bring complaint concerning unjust testaments, the sums paid for them by a testator for the purchase of a governmental position, which is clearly a gain to the recipient, that is to say, a position which may be sold, or which entitles the heirs of the holder, upon his death, to a certain sum of money, shall be counted as part of the legal portions of such sons or other persons. In such case, however, the grade only, which the official has at the time of the death of the testator, shall be considered, and the person who obtained his position by means of the money of the testator shall be charged only with that amount, as part of his legal portion, which his heirs would receive, under the law, in case he died in that grade.

3. Excepted herefrom only are the worshipful watchmen (silentiarii) of the imperial palace. The special benefits already conferred on them in connection with other things as well as money given them by their parents in connection with their position, shall remain in force, so that such money shall not be charged to them as part of their legal portion. But the foregoing provisions shall apply to all other persons.

Given at Constantinople June 1 (528).

Note.

See headnote h.t. subdivision 5. In order to reduce the number of actions to have a will set aside as unjust, Justinian provided for an action to supplement a portion left by a will; that is to say, for an action to supply the deficiency in the legal portion.

The law mentions salable offices in the Roman empire, as mentioned more fully in note to C. 8.13.27, and the references there given.

The silentiarii had the immediate watch in front of the emperor's chamber, and the imperial council room, keeping peace and quiet there. They were thirty in number, with three so-called decurions (heads of ten) as their chiefs. C. 12.16; 1 Karlowa 848.

3.28.31. The same Emperor to Mena, Praetorian Prefect.

The provisions recently made concerning upholding wills and not overturning them easily, shall apply also to testaments made without writing—(namely) that testaments should not be held invalid by reason of not leaving the Falcidian portion to persons who, under former laws, were authorized to bring complaint to have testaments set aside as unjust, but that only the amount in which the legal portion, that is the fourth of the amount which an heir would receive by intestacy, was deficient should be supplied, excepting from the law, however, persons to whom nothing is left and as to whom the ancient laws shall remain undisturbed.

Given at Constantinople December 11 (528).

Note.

The law here translated speaks of the legal-birthright-portion as the Falcidian portion. See to the same effect Novel 92 pr.; also C. 5.12.19. As already noted in the headnote, however, the fourth provided by the Falcidian law was in fact an entirely different fourth from the legal portion here mentioned, to which children, parents and

brothers and sisters were entitled. The legal portion, consisting of a fourth of the amount which such person would have received on intestacy, was increased, in case of children, by Novel 18, c. 1.

3.28.32. The same Emperor to Mena, Praetorian Prefect.

Since we decided in former sanctions that if less than the legal portion be left to those who by virtue of ancient laws could bring an action to set aside a testament as unjust, this deficiency should be supplied, and not furnish the occasion for annulling the testament, we think we should add at present that if the rights of heirs who were permitted to bring such actions appear to be diminished by reason of certain conditions, deferments or other provisions involving delay, condition, or other burden, such condition, deferments, or other provisions involving any burden whatever, shall be void, and the matter in connection with the will shall proceed as though no such addition had been made to the testament.

Given at Constantinople March 31 (529).

3.28.33. The same Emperor to Demosthenes, Praetorian Prefect.

If a person, by his testament, leaves the greater part (of his estate) to one child, and a small part to another or others of his offspring—sufficient, however, to be the legal portion—either as an inheritance, legacy, or trust, so that no complaint to have the testament set aside as unjust may be brought, and the person who receives the small portion from his progenitor decides to accept it, but the person receiving the larger portion—or all of them if more than one—fails to deliver the smaller portion immediately and without contention and delay, but awaits judicial proceedings, raises many and various contentions, and then after a long time begrudgingly delivers it pursuant to a judicial order, his cruel conduct shall be visited by proper punishment, and he shall, in such case, be condemned to deliver not only the portion which the testator directed to be delivered, but one-third of such amount so left by the testament in addition thereto, so that his avarice will meet with proper punishment; all other provisions in the testament or last will, however, must be carried into effect, according to the tenor thereof. 1. We also make the following just provision and remove by its roots an iniquity contained in the ancient law, so that the law need no longer blush by reason of a statement which Julius Paulus makes in his Questions. For when he wrote that an infant cannot be called ungrateful by its mother and cannot, therefore, be disinherited by its mother, except it be done through hatred of her husband who is the father of the child, we considering unjust that one person should be wronged on account of hatred for another, ordain that such cause shall be entirely nullified and in no way permitted to be set up, not only in the case of infants, but also in the case of all children of whatever age, since the mother may leave the inheritance to the child upon condition that it is to be emancipated, and can thus at the same time punish the father, without hurting the right of her child and violating her own nature.<sup>12</sup> For it appears cruel to us that a child which does not feel so, should be considered as ungrateful.

3.28.34. The same Emperor to Johannes, Praetorian Prefect.

If a testator disinherited his son, designating someone else as heir, but left a grandson (through the son) either living or still in his mother's womb, and the son died

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<sup>12</sup> [Blume] See note to law 25 of this title.

while the designated heir is deliberating (whether to enter upon the inheritance or not and before an action for the inheritance on the ground of injustice of the testament had been commenced or prepared, the grandson has no redress (under the present law). For the father of the grandson left, when he died, no right to his son to question the testament of his father, because the stranger entered upon the inheritance only subsequently, and because the father survived the grandfather, so that (the grandson) cannot, under the Velleian law, take the place of the father and annul the testament. Some of the juriconsultants have discussed this subject but have left it in a cruel shape. 1. But we, who think that all our subjects have paternal affection for their sons, and a similar affection for their grandsons, and, desirous as we are to look after the welfare of all as nearly as that is possible, we order that in such a case the grandson shall have the same rights as the son, and even though no complaint of the undutifulness of the testament has been prepared, the grandson may nevertheless commence such action. And unless the heir appointed by the will shows clearly that the father of the grandson was ungrateful toward the testator, the testament shall be annulled and the grandson shall inherit as on intestacy, unless a certain amount, less than the legal portion, was left to the father; for in such case, according to the recent constitution of our Majesty,<sup>13</sup> there is left to the grandson the right—if his father had it—to have the fourth supplemented by other property to make up the legal portion; so that he, long neglected by the ancients, but provided for anew by our living force, may enjoy our benefaction, unless his father, then living, either refused to institute the complaint, or was silent for the period of five years, after the inheritance was entered upon.  
Given at Constantinople, July 30 (531).

Note.

The Velleian law is discussed in D. 28.2.29. The law provided a method whereby descendants born after the will might be disinherited. In the foregoing case, the son had been disinherited, but the grandson evidently had not been, and should have been, in accordance with the Velleian law, if the son had died before the death of the grandfather, because he would have occupied his father's place. Note C. 6.55.9. But inasmuch as the son died after the death of the grandfather, no disinheritance under the Velleian law was necessary. That is evidently the meaning of the reference to that law. See note to law 5 of this title. As to the necessity of disinheriting descendants or appointing them as heirs, see C. 6.28 and 29.

The action here mentioned was required to be commenced within five years, as here stated, except in the case of a minor (C. 2.40.2), the time to be computed as stated in law 36 of this title.

3.28.35. The same Emperor to Johannes, Praetorian Prefect.

If an imperial rescript is at any time obtained by which freedom in making a will is granted,<sup>14</sup> the emperor thereby grants nothing more than the right of making it according to the customary and legal manner. For it is not to be thought that a Roman emperor, who preserves the laws, would thereby overturn the formality, carefully thought out during many vigils, of making testaments.

1. We ordain, also, settling an ancient dispute, that if any one had received certain things or certain money from his father under an agreement not to bring a complaint to

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<sup>13</sup> [Blume] C. 3.28.30.

<sup>14</sup> [Blume] Not everyone had this right.

set aside the father's will as unjust, and the son, after his father's death and after knowledge of his father's testament, fails to acknowledge it as valid, but thinks of having it attacked, his agreement shall not incommode him, according to the responses of Papinian, in which he says that filial affection must be gained by deserving acts, rather than by making such agreements binding.

1a. But we permit that only, upon condition that the son has not compromised with the heirs appointed in the will, for which he openly ratified the paternal act.

2. And we provide, generally, that whenever a father has left less than the legal portion to his son, or has made him a gift in anticipation of death, or as one between the living, upon condition that such gift between the living should be counted as part of the birthright portion, and the son, after his father's death, receives what has been left or given him, without reserve, and has, perchance, given a receipt to the heirs that he has received what has been left him, without adding that his legal portion is not to be supplemented, then he shall not be prejudiced, and his legal portion shall be supplemented unless he has specially acknowledged or agreed in a receipt or in a (document of) compromise, that he is content with what has been left or given him and that there is no question of a deficiency due him; for in such case, every complaint is bared and he is compelled to abide by his father's will.

3. This law applies to only to a son or daughter, but also to all other persons who are able to bring a complaint to set a will aside as unjust.

Given at Constantinople September 1 (531).

### 3.28.36. The same Emperor to Johannes, Praetorian Prefect.

We know that we heretofore enacted a constitution (C. 3. 28. 30), providing that if a father should leave less than the legal portion to his son (or daughter), then though he has not stated that the deficiency should be supplied according to the judgment of a fair man, nevertheless the making up of such deficiency should, in all cases, be implied by operation of law.

1. Hence, it has been asked whether, if a person has acknowledged and accepted a gift between the living or one in anticipation of death, or one made by testament, as his portion, but was legally evicted from all or part thereof, the deficiency in the birthright portion should, after the eviction, be supplied according to our constitution; or, whether in case legacies, trusts, or gifts in anticipation of death are diminished by reason of the Falcidian law, the deficiency should also be supplied in such case—lest while the heir is trying to retain the whole Falcidian fourth, he (the son) might lose all the benefit of his inheritance.<sup>15</sup>

1a. We accordingly ordain that in all such cases, whether the eviction takes place as to all or part of the property, the loss shall be made up, and other property or money

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<sup>15</sup> [Blume] Under the Falcidian law (C. 6.50), a person who was appointed as heir was entitled to retain one-fourth of the net estate, as his compensation for acting as heir, or, as we might say, executor under the will. In case the inheritance was not sufficient to satisfy such fourth, as well as all the legacies and trusts, the latter were reduced and diminished in a proportion so as to permit the retention of the fourth. Inst. 2.22.3. The question in the foregoing law was whether the birthright portion could be diminished in order that the full Falcidian fourth might be retained. The answer was in the negative, and the birthright portion was given over the Falcidian fourth.

shall be supplied, or the deficiency shall be made up, without regard to the Falcidian law, so that whether less than the legal portion was left in the beginning, or whether some outside intervening cause burdens the legal portion, either in quantity or by time (of delivery), all this shall be made up and our help (through the law), is extended to the sons (and daughters) without burdens attached thereto.

1b. The deficiency shall be supplied, moreover, out of the property of the father, not out of property which the son has acquired from any other source—either by reason of being substituted as heir for someone or by right of accrual, as, for instance, that of usufruct; for we ordain, in the spirit of benevolence, that all these things shall be considered as outside gain, and the deficiency must be made good out of the principal of the property (of the father).<sup>16</sup>

1c. In view of the fact that our constitution previously enacted forbids all delay and provides that a fourth (the legal portion) shall be turned over to the son quickly and without burden to him, it has been questioned what is to be done if a testator designates a stranger as his heir, but provides further that in case of his (the stranger's) death, the inheritance shall be turned over to the son, or that this shall be done at a certain time.

1d. We accordingly ordain that the legal fourth shall be delivered immediately, without waiting for the death of the heir or the lapse of time, but the remainder over and above such legal portion shall be delivered at the time the testator has directed.

1e. For thus the son will have his portion undiminished and as the laws and our constitution have defined, and the designated heir will enjoy the benefaction of the testator within legal limits.

2. We also ordain that the time for commencing a complaint against an unjust testament shall, in accordance with the opinion of Ulpian, commence to run from the time of entering upon the inheritance, rejecting the opinion of Herennius Modestinus, who said that the time would commence to run from the death of the testator, and the designated heir may not enter upon the inheritance when he pleases and in that manner defraud the son out of the property naturally due him.

2a. And so we ordain that when the testator has died, having appointed a stranger as heir, and the son is awaiting the time to bring a complaint to set the will aside as unjust, the designated heir must enter upon the inheritance, or make known his sentiment to the contrary within six months<sup>17</sup> if he is present and living in the same province, or within an uninterrupted year from the death of the testator, if both parties live in different provinces, for thus the way will be opened for the son to commence his action. If the designated heir fails to enter upon the inheritance within the time specified, he will be compelled to do so by the official staff of the judge.

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<sup>16</sup> [Blume] A father might appoint a child as a substitute for another beneficiary of a gift, or might appoint such child as the joint beneficiary of a gift given to several, in which case the portion not accepted by one of the joint beneficiaries would accrue to the others in the manner set forth in C. 6.51. If a child should happen to receive a benefit as a substitute or by right of accrual, it would indirectly, at least, be a benefit received from the father. Yet the law says that it should not be considered so, but should be treated as property acquired from outside sources—that is to say, sources other than the father.

<sup>17</sup> If heirs appointed in a will were not pressed, and no time for acceptance was fixed in a will, or by the judge, they might, ordinarily, delay acceptance as long as they wished. C. 6.30, headnote. The limitation of time mentioned in the foregoing law applied specially to cases treated in this title.

2b. If the son dies in the meantime, that is from the time of the testator's death and before the inheritance is entered upon, the right to such action, though not prepared in the son's lifetime, is transmitted to his posterity; but in the case of heirs that are strangers, such right of action will be so transmitted only if the preparation has been, for such action, made according to the provisions of the ancient laws.  
Given at Constantinople September 1 (531).

3.28.37. The same Emepror to Johannes, Pretorian Prefect.

Since it is declared in ancient laws that military testaments are exempt from attacks as being unjust, many cases have come up in which a doubt which has arisen must be settled.

1. For a subdivision had been added to special military property, and there are in fact three kinds of special property. It is either non-military or military, or—a class between the two—called quasi-military.

1a. As to such special property, called quasi-military, certain persons are permitted to make testaments, not like soldiers in any manner they please, but in the ordinarily permitted and customary manner, as has been provided in the case of consuls, prefects of legions, presidents of provinces, and all others who are placed in various administrative positions of rank and receive salaries either at our hands or out of the public treasury.

1b. Such persons may make testamentary disposition, as they wish, of the special property already mentioned, namely the quasi-military property, but of that only.

1c. Veterans, too, who acquired special property during the time of service, but who have left the service, are not forbidden to thus dispose of their property by a lawfully executed will.

1d. Now doubts have arisen whether in these cases involving special-quasi-military-property, the complaint to set aside a will as unjust should be permitted.

1e. But another question to be answered first was whether all persons who have such special-quasi-military-property might thus dispose of it, since this privilege was not granted indiscriminately to everyone, but only to certain individuals. Soldiers and veterans concededly had the right to dispose of special-military property as they wished—soldiers in active service in any manner they pleased, and veterans by the customary testament; but whether other persons could do so, unless they received a special privilege, has been doubted—for instance, whether lawyers, clerks in the bureau of memorials, imperial messengers (*agentes in rebus*), teachers of the liberal arts, chief physicians and all others, in a word, those who receive public salaries or stipends could do so.

1f. We ordain in regard to all these, that since special-quasi-military-property has arisen in pattern of special-military-property, all persons who have such special property may dispose thereof in lawful manner, by a last will, but by that only; granting them the additional privilege that their testaments may not be attacked as unjust.

1g. For if a patron overlooked by an ungrateful freedman has, according to the ancient laws, no right of possession of the inheritance contrary to the will of such freedman, who is *sui juris*, made concerning special-military-property, why should the aforesaid special property introduced in pattern of special-military-property be subjected to complaint concerning unjust testaments?

2. But these provisions apply only so long as persons who have special-quasi-military property are in the power of their parents. For when they become *sui juris*, their

testaments, even as to that special property which they previously acquired as quasi-military, are subject to complaint concerning unjust testaments, since then the name of "peculium" (special property) no longer applies, but such property then is intermingled with, and is subject to the same conditions as the remainder of their property, and becomes one and the same property.

Given at Constantinople September 1 (531).

Note.

The name "peculium" was applied to special property controlled and in the possession of slaves and of children under paternal power. It theoretically belonged to the master or parent with paternal power, and the slaves and the children could be deprived thereof by them. In the early part of the empire, soldiers were given special privileges, and they were permitted to hold certain property free from paternal control. Similar privileges were subsequently extended to certain men occupying civil offices under the government. It was property free from the control of the person having paternal control over the possessor thereof, and hence, as stated in this law, when the paternal control ceased, the special privileges connected with the quasi-military property also ceased. Soldiers in the field, however, could make their wills in any manner they wished, whether under paternal power or not. C. 6.21; see note C. 6.22; headnote C. 6.60; note C. 8.46.2. It is thought that, perhaps, the provisions of this law, in so far as it applied to persons with quasi-military property, was repealed by Nov. 115, c. 4, which provided that children should not overlook their parents or exclude them from property over which they had power of testamentary disposition. Nov. 123, c. 19, specially provided that presbyters, deacons, and subdeacons under paternal power, who had the right above mentioned should give their children, or parents, the legal portion of their property.