Book VI.
Title XII.

Concerning the right of possession of an inheritance contrary to a testament, which the praetor promises to descendants (liberi).
(De bonorum possessione contra tabulas quam praetor liberis pollicetur.)[1]

6.12.1. Emperor Alexander to Rufus.

When descendants receive the right of possession of an inheritance contrary to a testament, they are only compelled, according to the edict, to pay the legacies left to parents and descendants.
Promulgated October 12 (223).

6.12.2. The same Emperor to Hilara.

When a posthumous child is born, which is neither appointed an heir nor expressly disinherited, the testament becomes void; and if the right of possession of an inheritance contrary to the testament is sought by a guardian for the infant, the right of possession in pursuance of the testament can not be granted (to another).
Given March 1 (224).

Note.

It was the duty of the testator who had children or other descendants in his power (a father, grandfather etc.) to disinherit them or appoint them as heirs, leaving them their birthright portion specified by law. This was substantially true, under the praetorian system of succession, also as to emancipated children. The testator could not overlook them - simply pass them over. If he did, the will failed, except as herein mentioned, and sons, emancipated and unemancipated, had the right to obtain possession of the inheritance contrary to the will. In other words, they could simply say that the will was void, and ask for the right of possession aforesaid, and the heirs appointed under the will thereupon took nothing under the will. If the testator disinherited these descendants in the manner provided by law (see C. 6.28), then the right of possession could not be asked, although, if the disinherison was unjust, the descendants had another remedy, namely to bring an action to set the will aside as unjust - undutiful as it is generally called, a subject more fully dealt with in C. 3.28.

The effect of omitting the appointment of children (and grandchildren who took their father's place in the testator's life-time) was different in different cases. If a son (or a grandson taking his father's place in the testator's life-time (G. 2. 123; See G. 2.12.4 and C. 6.28.2) was disinherited, and he had not been emancipated, the will was void by mere operation of law. He was not required to ask for the right herein stated, namely possession of the inheritance, but, if the appointed heir in the will refused to give him his inheritance, he might bring a straight action under the civil law for the recovery of the inheritance. D. 37.5.15 pr; D. 37.5.16; D. 5.2.7; 9 Cujacius 615. But he was permitted to ask for such right and that was sometimes beneficial. Cujacius, supra. He could, of course, claim no more than his share against heirs of equal rank with himself. The rule was originally different if a daughter, or grandchildren (except as mentioned), was passed

[1] Blume penciled into the margin here: "G-M-933. [This may refer to Girard, Manuel.] See note to C. 6. 39 [illegible]."

over in a will, and she, instead of breaking the entire will, was simply admitted to a portion of the inheritance. G. 2. 124. Note to C. 6.28.4c. But see as to grandsons under praetorian law G. 2.129. If an emancipated son was passed over, he was required to resort to the remedy mentioned in this title, namely ask for the right of possession of the inheritance, contrary to the provisions of the will, in order to be able to obtain any part of the inheritance. D. 38.6.2; C. 6.28.4.6. If outsiders had been appointed as heirs, they were excluded from the inheritance; if children had been appointed as heirs, such son shared equally with them; the object being to give each child the portion which he or she would have received if the testator had died intestate. D. 37.4.8.14. But such emancipated child was compelled to bring his own property into collation or hotchpot in favor of the unemancipated children, if an equitable distribution required that to be done. That subject is more fully treated in title 20 of this book.

An unemancipated son who was overlooked could not be required to pay any legacies, even those mentioned in the present law (C. 6.12.2). The will was, in such case, absolutely void so far as he was concerned, even though he sought the right to the possession of the inheritance contrary to the will. D. 34.5.15; D. 37.5.16. An emancipated son, however, was, with some exceptions, generally required to pay the legacies mentioned in the present law, and a few others, in case he asked for such right. D. 37.5.1 pr; Buckland 322. But he could not be compelled to pay out as much as he received, for he was entitled to retain his legal fourth. D. 37.5.5 pr; 18.

The right mentioned in the present law existed principally in favor of children of a deceased father (including adopted children not emancipated), and grandchildren and great-grandchildren, who father was dead and who took the share which their father, if living, would have taken.[2] Sons given in adoption, who remained in the adoptive family at the time of their natural father's death, could not get the right of possession contrary to the will; but if they were not a member of the adoptive family at that time, they were treated as emancipated sons. Inst. 3.2.10-12. The right herein mentioned was also granted to a patron against the will of his freedman (D. 38.2.1 and 2). There were but few other cases. It was not given to agnates or cognates generally, or to a husband and wife as such. It did not exist against the will of a mother or grandmother, but only against the will of a father, grandfather etc. D. 37.4.4.2.

Justinian made a number of changes. He substantially abolished all differences between males and females, and emancipated and unemancipated children. He required all disinherisons of them to be express, and that to pass them over without such express disinherison should invalidate the will. C. 6.28.4. He further provided in Nov. 115, c. 3, appended to C. 3. 28, that no father or mother, grandfather or grandmother etc. should be permitted to pass over or disinherit a son, daughter or other descendants, even though they had already received their birthright portion, unless ungrateful for one of the enumerated causes specified and which was required to be stated in the will. And it was further provided in the same chapter, subdivision 15, that disherison contrary to law should be invalid so far as the appointment of heirs was concerned, leaving in force legacies, trusts and manumissions granted in the will. It will be noted that the saving of legacies in the case of unjust or ineffective disinherison was much more far reaching than the saving of legacies provided in the present law (C. 6.12.2). There is a dispute, however, whether this provision in Novel 115 also applied to cases where descendants

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[2] Blume put a question mark in the margin next to the first clause in this sentence.

were merely passed over in a will. Buckland takes the view that there was no change in the remedies granted to an overlooked descendant, and if that view is true, the law as to saving of legacies doubtless remained the same. See 9 Donellus 12.20; 1 Roby 250-253.