Book VI.
Title XXVIII.

Concerning children passed over of disinherited.
(De liberis praeteritis vel exheredatis.)

D. 28.2; Inst. 2.13; Bas. 35.8.30.

Headnote.

The subject of disinherison and passing over of descendants in a will has already been fairly well covered by note C. 6.12.2. Little need be added here. In general, under the former law, sons could not be passed over in a will. If an unemancipated son was passed over, the will was not exactly void, but nearly the same result was reached when he asked for the right of the possession of the inheritance, which he could do. If others were passed over the effect was not quite so disastrous, as pointed out in note to C. 6.12.2, and in note to law 4 of this title. A son under the former law (and a grandson who took his father's place during the lifetime of the testator - law 2 of this title), was required to be disinherited (if disinherited at all), expressly, specially - nominatim as it is called - by name, or the equivalent thereof. This probably arose in the hundred court in the last century of the Republic. Cicero, De off. 38.57; Val. Max. 7.7.1; Woess 153. Others might be disinherited under a general clause. That situation was changed by law 4 of this title, and all descendants were thereafter required to be disinherited expressly. The rule applied to the will of a soldier in service was different. If he passed anyone over, that was the equivalent of express disinherison. That was true also in the case of a will of a mother or maternal-grandfather, for the rule here mentioned did not apply to anyone except the father, grandfather etc. who had paternal power over the persons passed over of disinherited. Inst. 2.13.6 and 7. As to the requirement, when a person was disinherited, see C. 3.28 headnote.

6.28.1. Emperors Severus and Antoninus to Fabius.

If after providing for the various grades of heirs, the testator disinherits someone and adds that he means the disinherison to apply to all grades, there is no doubt that the law is satisfied. And even though this is not added, still, if the intention to disinherit from all of the grades appears from the writing, the testament appears to be legal. 1. Hence, since your father appointed his sons as heirs and substituted them for each other, and disinherited his daughter, he must be understood to have the disinherison apply to both grades. For when the same heirs were appointed (for both grades by virtue of the substitution), no reason exists why he should be considered to have intended the disinherison to apply only to heirship of the second grade.
Promulgated June 26 (204).

Note.

A substitute was an heir of the second grade (or other grades); an heir who took directly under the will before any substitute was entitled thereto was an heir of the first grade. A child might be disinherited in the first grade - that is to say, he was to take nothing if the heir or heirs of the first grade took. But these might not take, and the substitute then became heir. The disinherison, to be valid, was required to be from the

entire inheritance and from every degree of heir. D. 28.2 3.2-4; Mackeldy §711. If that was not done expressly, it depended, as here stated, upon the intention of the testator, gathered from the contents of the will.

6.28.2. Emperor Alexander to Heraclida.

If your grandfather, who appointed your father and stepmother as heirs in equal portions, also had you in his power and did not expressly disinherit you, and your father died during the life of your grandfather, you, succeeding to your father's place without hindrance of the Vellean law, nullify your grandfather's testament and the whole inheritance from him belongs to you.
Promulgated April 8 (225).

Note.

In this case an unemancipated son was an heir. As long as he was so, a testator was not required to say anything about the grandchildren by that son. But if the son died in the lifetime of the testator, his children, also in the power of the grandfather, immediately, by operation of law, stepped into the son's shoes, and unless they were disinherited as by law provided, they had the right to the inheritance to the exclusion of outsiders. Inst. 2.13.2; G. 2.133. The Vellean law, passed about 46 A.D, provided that such grandchildren might be disinherited in the same way as posthumous children (the males expressly, the females either expressly or simply generally along "with others"). G. 2.134. Inasmuch as in the present law no such disinherison had been made, the Vellean law was no hindrance to the grandson in claiming the inheritance. See Hunter 778.

6.28.3. Emperor Justinian to Julianus, Praetorian Prefect.

If anyone disinherits his son thus: "that son of mine shall have none of my property," such son shall, by such words, be understood not as having been passed over but as having been disinherited. For since the intention of the testator is clear, the strict meaning of the words cannot be considered of sufficient importance to defeat such intention.
Given at Constantinople February 20 (531).

6.28.4. The same Emperor to Johannes, Praetorian Prefect.

We correct by the present law a severe fault of ancient technicality, (namely) that in case of testamentary succession a rule ought to be applied to males different from that applied to females (although the same rule was applied to both sexes in case of intestacy), and that a son should be disinherited by one set of words, a daughter by another; and in disinheriting grandsons, some provisions were introduced by the civil law, other by the praetorian law. 1. If a son was passed over, the testament was either void by operation of law, or the son received the right to possess all of the inheritance contrary to the terms of the will.[1] A daughter, however, passed over, received only the right to share in the

[1] [Blume] In case of an unemancipated son, the will was void by operation of law. That was not true in the case of an emancipated son; but he could obtain the right of possession of the inheritance (bonorum possessio), which, when obtained, had the same effect as though the will had been declared void. See note C. 6.12.2.

inheritance[2], so that she, in a sense, overturned the testament of the father by the right to share in the inheritance, while at the same time she was burdened with legacies as though regularly appointed as heir. She could, according to the praetorian law, obtain the right of possession of the whole inheritance contrary to the terms of the will, but the great Antonine limited her to the proportion to which she was entitled as a sharer in the estate. Parties introducing such differences accuse nature, as it were, because she did not generate males alone so that females from whom they are born might not exist. 2. In correcting these conditions, we follow the footsteps of our predecessors who clearly desired a treatment of equality. For we know that it was formerly allowed to disinherit a son equally with all others by a general clause of disherison of all persons not named as heirs. The centumviral court[3] (of 100 men) first introduced a difference. 3. And from this iniquity a vice arose which was found in the books of Ulpian on the praetorian edict, by the glorious Tribonianus, our quaestor and the other learned revisers of the law, and brought to our attention. 4. Inasmuch as, namely, an action to set a testament aside as undutiful is an extraordinary remedy and no descendant can resort thereto who has another remedy, it was found that a daughter passed over in a testament might receive less than one who was disinherited. For since a passed-over daughter received, by virtue of the right of possession of the inheritance contrary to the will, or by virtue of the right to share in such inheritance, one-half of the property (where outsiders were appointed as heirs), but might be compelled to pay all legacies up to three-fourths of her portion, three twenty-fourths remained for her.[4] 5. If she was disinherited, on the other hand, it was necessary to leave her, in any event, a fourth part of the whole property,[5] and the person

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[2] [Blume] G. 2.124. She had, and the law states, the right of "jus accrescendi" - the right of accrual - here meaning the she had the right to share in the inheritance concurrently with the appointed heirs in the proportion mentioned in the next note. Sohm, Inst. 583; Inst. 2.13 pr.

[3] [Blume] The centumviral court was a permanent tribunal, composed of one hundred men or more, elected annually, divided into four chambers, sitting separately, except in case of importance when they sat unitedly. It had an ancient origin, probably as early as the third century B.C. During the empire the court gradually decayed, maintaining a lingering existence down to the time of the Lower Empire. Cases involving wills, intestate succession, guardianship and certain property rights were tried before it. Hunter 49-51.

[4] [Blume] This upon the theory that there would be only one daughter, and the heirs were outsiders. In such event, she received on-half of the whole or 12/24ths, leaving her only 3/24ths, if she was compelled to pay out three-fourths of what she received, in legacies etc. The proportion would be different if there were more than one daughter, for in such even all of the daughters passed over together received only the half of the whole. 2 Karlowa 390.

[5] [Blume] This again upon the theory that the heirs were outsiders and there was only one daughter. A child, unless good cause to the contrary existed, was entitled to receive a fourth of what she would have received if the testator had died intestate. That was the birthright portion. If there was only one daughter - one child - she would have received 12/12th of the inheritance, if the testator had died intestate. Her birthright portion therefore would have been 3/12ths, or a fourth. But if there were more children, they

whome the father considered worthy of express disinherison (injuria) would, (in the case illustrated) have more than if he had passed her over in silence in appointing his heirs; and as we, by the provision of our constitution, introduced the principle of making up the deficiency in the fourth, the benefit thereof also accrued in favor of the disinherited female, and thus the vice remained and no correction (in favor of the passed-over daughter) was made even by our constitution. 6. We, therefore, ordain, that as males and females are treated alike, in intestate inheritance from parents, so they shall be treated alike in testaments and they must be expressly disinherited by like words, and they shall have the right of the possession of the inheritance contrary to the provisions of a will, the same as an unemancipated or emancipated son, so that a daughter, if passed over, will, as in case of an emancipated or unemancipated son, overturn the testament by force of the laws itself, or prevent its taking effect through the right of possession contrary to the will. 7. And we direct that these provisions shall apply not only in case of daughters, but also in the case of grandsons, and granddaughters and remoter descendants through the male line. 8. And since, under the pretence of difference, another vice was introduced, one rule on disinherison applying in case of posthumous children, another in case of those already born, it being necessary to give a legacy to a posthumous female, disinherited, in general words, along with others, while a daughter already born could be disinherited without a legacy, we have, by brief words, also brought this to a definite end, ordaining that the same rule which we have already provided in case of sons and daughters shall apply in disinheriting posthumous children, whether male or female, so that they, too, must be disinherited expressly; that is to say, express mention must be made of posthumous children.
Given September 1 (531).

Note.

The rule that to pass over a descendant avoided the will was not, prior to Justinian, applied in strictness except in the case of a son, and a grandson whose father had died during the testator's lifetime. G. 2.133; C. 2 h.t. But see G. 2.129, grandsons under praetorian law. If a daughter was passed over, the will was not entirely void; the portions therein given were merely modified, and the daughter and grandchildren (except as mentioned) were merely entitled to come in with the appointed heirs and take a certain portion of the inheritance. Gaius 2.124. See note C. 6.12.2. If the appointed heirs were self successors, for share and share alike; if they were outsiders, for half the property. For instance, if a man appointed say three sons as his heirs, and passed over a daughter, then the daughter came in as an heir for one fourth. If, however, he appointed outsiders his heirs, and passed over a daughter, then the latter came in and was made heir of one-half. Gaius 2.125. It is disputed whether if there was more than one daughter passed

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were all of them together entitled to the fourth of the whole property, and if, e.g. there were four children, each of them was entitled to 1/16th. The illustration, however, given in this law would have held good throughout, on the assumption that all the daughters would have been required to pay out three-fourths of what they received, in case they were passed over. We would always start out with 3/24ths in one case and 1/4th or 6/24ths in the other. The birthright portion was increased by Novel 18, c. 1, appended to C. 3.28.

over, all would share equally with self-successors, appointed as heirs, or whether all combined would take one share. See Buckland 319; 2 Karlowa 890.

The praetorian law, granting the right of possession of an inheritance to children made no difference between males and females. But the emperor Antoninus Pius, as stated in the present law, created a difference and provided that daughters in no event should have more than the share above mentioned. Gaius 2.126. This was all changed by Justinian by the present law, by which males and females - self-successors, or emancipated, including posthumous, children, were placed on the same footing, and to disinherit them otherwise than expressly or to overlook them, made the will void. Inst. 2.13.5; Buckland 323.

The present law places females on the same footing as males, and the requirement as to disinherison was the same - it must always be express, special, whereas before that the disinherison of a son had been required to be express, whereas others (except as illustrated in law 2 of this title) were only required to be disinherited under a general clause something like this: "Let all those who have not been appointed as heirs in this will, be disinherited." It was customary to insert such clause in wills.

It may be added here that under Novel 115, descendants could not be disinherited at all except for certain specific purposes enumerated.