Book VI.
Title XXIX.

Concerning appointing posthumous children as heirs or disinheriting them or passing them over.[1]
(De postumis heredibus instituendis vel exheredandis vel praeteritis.)

Bas. 35.8.33.

Headnote.

The rule mentioned in the present title, too, is a stranger to the law in the United States. The Roman law required a testator to bear his children in mind when he made a testament. He was either required to appoint them as heirs or disinherit them. He could not pass them over in silence. That was just as true in the case of posthumous children, in which term all children born after the making of the will were included, as it was in the case of other descendants. If a son or other self-successor, male or female, born after the making of the will, was passed over in silence, the will, though originally valid, was invalidated by the subsequent birth of the child, and became completely void, even though the child died before the death of the testator. Male children were required to be disinherited expressly; females might be disinherited expressly or by a general clause; but if the latter mode was adopted, a legacy was required to be left them. Inst. 2.13.1. By C. 6.28.4.8, as we have seen, both males and females were required to be disinherited expressly, if disinherited at all, and the provision for a legacy above mentioned, was, therefore, repealed.

6.29.1. Emperor Antoninus to Brittianus.

If after the making of a testament in which the testator has made no mention of posthumous children, a daughter was born to him, he died intestate, since a testament is broken by the birth of a posthumous child of which no mention is made, and the law is clear that no debt or claim can arise out of a testament which is broken.
Given and Promulgated June 28 (213).

6.29.2. Emperors Diocletian and Maximian and the Caesars to Saterichus.

It is clear law that the testament of a husband is not broken through a miscarriage of his wife; but when a posthumous child (that lives) although it immediately dies, is passed over, the broken testament is not reinstated.
Subscribed at Sirmium February 20 (294).

6.29.3. Emperor Justinian to Julianus, Praetorian Prefect.

We have decided a point in dispute among the ancients. When a descendant, carried in the womb of its mother, was passed over, and the could would, if it saw the

[1] [Blume] A posthumous child included one born after the making of a testament. 9 Hugo Don. 323.

light of day, be heir to its father, and no one else would have precedence over it[2], and it, by birth, would (ordinarily) have caused a testament to be broken, it was doubted whether if such posthumous child was indeed brought into the world, but died without emitting a sound, it could cause the testament to be broken. 1. The ancients were divided in their opinion as to what was to be said of the parents' will. The Sabinians thought that if the child was born alive, the testament was broken, though it uttered no sound, which too, would be true if it had been dumb. We commend their opinion and ordain that if it was born completely alive, tho it died immediately after coming to this earth, or in the hands of the midwife, the testament will, nevertheless, be void, provided only that it arrived in this world as a human being and not as a monster or prodigy.
Given at Constantinople.

6.29.4. The same Emperor to Julianus, Praetorian Prefect.

Someone, in making his testament, used these words: "If a son or daughter of mine shall be born within ten months after my death, let them be heirs," or stated as follows: "A son or daughter of mine, who is born within ten months next after my death, shall be my heirs." A dispute arose among the ancient interpreters of the law, whether (children born during the lifetime of the testator) would seem not to have been contemplated in the testament, and that this would be broken (by their birth).[3] Since we have made many laws aiding the wishes of testators, we, in deciding this dispute, direct that the testament shall be effective, not withstanding the use of either of these phrases, and the testator's intention shall be upheld whether a son or daughter are born during the testator's lifetime or within ten months from the time of the testator's death, so that no testator who did not in fact overlook his children, suffer the penalty of doing so.
Given at Constantinople November 20 (530).

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[2] [Blume] If a father is a living heir, a grandchild need not be disinherited. 9 Hugo Donellus 324.

[3] This reflects changes penciled in by Blume. The typewritten original reads (after the first set of parentheses): "...were contemplated in the testament, or they would (by their birth) nullify it."