

Book III.  
Title XXXVI.

Partitioning an inheritance.  
(Familiae eriscundae.)

Headnote.

The rules of partition under the Roman law were similar to those under ours. There was a separate action provided for partitioning an inheritance, and for partitioning other property. The difference between these actions was small, and heirs could use the latter action, if they preferred (D. 17.2.38.1), and that action was the only proper action for partition, if one of the heirs as he had a right to do at any time (C. 4.52), had disposed of his share in the inheritance. D. 10.2.54. The fundamental idea, of course, was to give each heir his just portion. Any heir could bring the action, except minors under guardianship. C. 5.23.2; C. 5.71.17. All corporal property of the inheritance, except a burial plot (C. 3.44.4) was subject to partition (D. 10.2.25.10), but choses in action were divided by operation of law. Law 6 h.t. In order to equalize the portions of the various heirs, those of them who already had received a part, were, with some exceptions, required to bring such part into the common fund. Laws 4 and 13 h.t. C. 3.38.12; C. 6.20. So income received from, or outlay made on, the property, by one or more of the heirs, or damage done thereto by them, could be considered. Laws 3, 13, 18 and 19 h.t. C. 2.18.3 Property was divided, if possible, into distinct portions, and protection against future eviction therefrom provided. C. 3.38.1. Slaves belonging to the same family were, under the later law, kept might be assigned to one of the heirs upon payment of money to the others, or might be sold. C. 3.37.1 and 3; D. 10.2.22.1. Inst. 4.6.20.

3.36.1. Emperors Severus and Antoninus Marcianus.

If you have not divided all the paternal inheritance by agreements, and no (judicial) decision in connection therewith has been given or no compromise has been effected, you can bring an action in partition.  
Promulgated September 24 (197).

3.36.2. Emperor Antoninus to Avitianus.

If you were still united in marriage to your wife at the time of the death of your father, to whom your wife had paid her dowry, and you became his heir, you acquired according to a long recognized law, a right of action for division against your coheirs in order to recover the dowry, which you may retain, although your wife, subsequently and during your marriage, died.  
Promulgated February 12 ( ).

Note.

The son had here not been emancipated, and the dowry of the wife had been paid to his father. Upon his death, the son, taking on the burden of the marriage, was entitled to the dowry, to be paid as a pre-legacy, or debt, aside from his portion as heir, and to recover it could bring this action. D. 10.2.20.2; D. 10.2.51. If he had been disinherited, still he could have brought an analogous (utilis) action. D. 33.4.1.9. In case of divorce, of course, the wife herself was entitled to it; in other cases, the husband.

3.36.3. The same Emperor to Rufus.

Bring an action according to law against your coheirs to divide the inheritance. If it is proven that any of your part of your inheritance was carried off by your coheir, the referee will indemnify you, when he makes his adjudication, according to the provision of law giving a judgment to you against your coheir. A criminal accusation of despoiling an inheritance cannot be made against a coheir, since an heir can be indemnified by the decree dividing the inheritance.<sup>1</sup>

#### 3.36.4. Emperor Alexander to Antonius.

If, while you were unemancipated, your father gave you movable or self moving property, which could be a part of your own special-military property, this, together with other special-military property belonging to you, is not held in common by you with your brothers. Real estate, however, is not special-military property, though your father gave it to you when you entered military service. A different law governs real estate acquired by an unemancipated son by reason of his military service—such property belongs to special military property.<sup>2</sup>

#### 3.36.5. The same Emperor to Stalilia.

It was in the power of your husband to change the provision which he made concerning his slaves, while in anger, namely that one of them should forever remain in bondage, and that the other should be sold to be sent abroad. If he thereafter modified his displeasure by clemency, the referee appointed for dividing the inheritance will follow his last wishes. His change of sentiment need not be shown in writing. Nothing prevents it being shown by other proof, especially since their later desert is found to have been such so as to lead to mitigation of the master's ire.

#### 3.36.6. Emperor Gordian to Pompeius, a soldier.

Debts due the estate are not subject to partition, as they are divided among the heirs in proportion to the inherited portions by operation law of the twelve tables.

Note.

“Debts due to or by a deceased are divided among his successors by mere operation of law in proportion to their shares in the inheritance.” XII tables 5.9. The deceased, however, could bequeath certain debts owing to him to certain persons. C. 8.35.1; C. 6.37.18. He could also impose the burden of debts owing by him on certain heirs, without prejudice, however, to his creditors. D. 10.2.3; D. 10.20.5; D. 30.69.2. And in partition, debts might be assigned to certain heirs. D. 10.2.3. As to liability of heirs for debts, see also C. 2.3.26; C. 4.2.1; C. 4.16.1; C. 4.16.2; C. 6.30.10; C. 22.14.

#### 3.36.7. The same Emperor to Aelianus.

If any claim for trusts exists among the heirs (such trust to be paid by one of the heirs to the other or others), the praetor or president of the province who is the judge of the dispute, or the referee in a partition action, must, when asked, exercise their authority so that the last wish of the testatrix is carried into effect.  
Promulgated September 1 (239 or 241).

#### 3.36.8. The same Emperor to Telespharus.

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<sup>1</sup> [Blume] To the same effect see C. 9.32.1; see also law 19 h.t.

<sup>2</sup> [Blume] See headnote C. 6.60; note C. 8.46.2.

If you bring an action against your brother to divide the goods which you hold in common with him by reason of an inheritance from your father or mother, a division will be made.

Promulgated (243).

### 3.36.9. The same Emperor to Nervia.

There is no doubt, since an action in partition is numbered among equitable actions (*bonae fidei*), that the portion of an inheritance, which, if any, belongs to you, will be increased (in the award) by the income therefrom.

### 3.36.10. The same Emperor to Philotera.

It is clear that whenever a testator divides his property among all the heirs and orders each of them severally to be content with certain property, together with the slaves thereon, his wish, provided the Falcidian law is not violated, must be carried out. Nor is this changed by reason of the fact that, by subsequent words, he assigned all of his slaves (as a group), without making any distinction between them, to his heirs, since he, in any event, assigned them to those to whom he left them by a previous provision in the testament.

#### Note.

A father had a right to divide his property among his descendants in any manner he wished, and in a very informal manner. Laws 16.21.26 h.t.; C. 6.23.21; Nov. 18, c.7 and Nov. 107. Children, however, were entitled to a birthright portion. C. 3.28. This portion is sometimes wrongly called the Falcidian portion, which was a fourth of what a testamentary or a codiciliary heir was entitled to retain. (C. 6.50.) See headnote, 2, C. 3.28.

### 3.36.11. Emperor Philip and the Caesar Philip to Antonia.

The law is plain that the property of intestate parents must be equally divided, per capita, among the sons and daughters.

Promulgated February 14 ( ).

### 3.36.12. Emperors Gallus and Valerianus to Rufus.

The division which you say was made between you and your brother, is not to be considered void because not made in writing, since the truth of the fact itself is sufficient to make it valid.<sup>3</sup>

Promulgated March 14 (252).

### 3.36.13. Emperors Diocletian and Maximian to Saturninus.

It is certain that the special property (*peculium*) of children must, after the father's death, be put into the common fund with the other property, for the purpose of dividing the inheritance. But your brother and coheir cannot call upon you and your other brother, and coheir of both of you, for anything by reason of his liability on contracts which he entered into during the lifetime of your father without the latter's knowledge, beyond the point that he may retain out of his own special property (*peculium*) an amount equal to the judgment against him in favor of the parties with whom he made the contracts.

#### Note.

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<sup>3</sup> [Blume] See note law 15 h.t.; C. 3.37.4.

Various kinds of peculium—special property—which children might have are fully considered in headnote C. 6.60; note C. 8.46.2. The special property dealt with in the foregoing law was the special property given to a son under paternal power. It was a sort of pin money, and was the same sort of property as the peculium—special property—given to slaves. The son might trade with this pin money, and enter into contracts in connection with it. C. 4.26 deals to some extent with the special property mentioned here. The property was in fact the property of the father, and was, therefore, a part of the father's inheritance, upon the latter's death, and therefore was required to be put into the common fund for the purpose of making a division of the inheritance among the children. The subject of putting property into a common fund—collation (hotchpot)—is considered in C. 6.20, which might well be read in connection with this note, but which deals with such property as dowry, prenuptial gift, gifts made in anticipation of death, and property acquired by an emancipated son. The principle, however, is the same.

Now an unemancipated son could make contracts and become a debtor although his rights as creditor accrued to the father. He could be sued the same as though he had been emancipated, and his pin money—peculium—could be sequestered in order to pay a judgment against him. D. 15.1.44. Hence, as the foregoing law states, he was permitted to retain out of his pin money an amount sufficient to pay his creditors; but the remainder was required to be put into the common fund.

#### 3.36.14. The same Emperor to Hermianus.

If no special agreement was made in the action of partition, in which the paternal property was equally divided between you and our brother, in reference to a future eviction from the property assigned to you severally, that is, that each for himself assumed the responsibility for any such result, the president of the province will, in an action in special terms (*praescriptis verbis*) rightly compel your brother and coheir to bear his proportion of your damage by reason of your eviction from any of the property.<sup>4</sup>

#### 3.36.15. The same Emperor and the Caesars to Theophila.

If a division of the property made by agreement was followed up by possession which was agreed to, confirming in your father the ownership of the entire interest in the property which (in the division) was to belong to him, you can bring an action for the recovery of the property, if you have become your father's heir. But if nothing was done except making an agreement of division (and no possession was given), the referee appointed in a partition action will take care that your community interests will be divided.

293.

#### Note.

The father of Theophila and some other persons inherited some property and made an agreement for division. Theophila wanted the property which was set off to her father in the division agreement. Now the agreement itself was of no force, unless followed up by delivery—by possession, taken by consent of the parties. Delivery pursuant to the agreement gave ownership (C. 2.3.20) and was binding, unless the

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<sup>4</sup> [Blume] See note C. 8.44.3. See C. 4. 64 for the action in special terms.

agreement was made under some mistake of fact, where, for instance, a testament had been found to be invalid after the agreement was made. C. 1.18.4.

3.36.16. The same Emperors and Caesars to Heraclianus.

Sons cannot break the testament of their father if they cannot prove it to be unjust. If his wish is not clearly expressed in a testament or codicil, but it may be gathered from any words whatever used by him, then the referee before whom the action in partition is pending must, under the authority of the law, follow this wish, even though he dies intestate, reserving to the heir, however, the right to retain the amount provided by a decree of the senate (i.e. the birthright portion).<sup>5</sup>

3.36.17. The same Emperors and Caesars to Commodianus.

If coheirs made a division among themselves, it is certain that they cannot take away any right from the heir who is absent and ignorant thereof, and he retains his undivided share which belonged to him in the beginning, in all the common property. Hence you may receive your portion, with its increase, in an action in partition, without fear that your interests were prejudiced by the division made by the coheirs among themselves.

Given at Sirmium November 25 (293).

3.36.18. The same emperors and Caesars to Domna.

Rescripts have often been issued that if a father bought property in the name of a daughter, and it is not shown that the father subsequently changed his mind, this property will be assigned to her as her special property in an action in partition. If you are your father's heir, and he, as you say, bought property in your name, you can use the law of these rescripts against your sister before the president of the province, provided the matter is still undisposed of. 1. Moreover, it is not doubtful that, in the case of a common inheritance, the expenses paid out in good faith by one of the heirs may be recovered in an action in partition or on volunteer-agency.

Given December 15 (293).

Note.

The case here considered is doubtless that of an unemancipated child, the same as that in law 13 of this title. The property, accordingly, bought by the father in the daughter's name, did not belong to the daughter. It was still a part of the inheritance of the father. C. 6.20.13. And all that the foregoing law means is that in dividing the inheritance, the property so bought should be set off to the daughter as a part, or the whole, of her portion. The present action was considered an equitable one, and no reason existed why, in equity, the father's wish should not be followed in this respect. See also C. 8.53.11 and C. 3.29.2 and note.

3.36.19. The same Emperors and Caesars to Lysicratia.

The law is not uncertain that in an action in partition, an account will be taken of those things which some of the coheirs have taken from the common property or which they have deteriorated in value, and they must indemnify the others.<sup>6</sup>

Promulgated December 15 (293).

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<sup>5</sup> [Blume] See note at law 10 h.t.

<sup>6</sup> [Blume] See law 3 of this title.

3.36.20. The same Emperors and Caesars to Pactumeia.

That the price for the entire interest of a common property has been received by one of the heirs (in behalf of all), is a question which does not come up in an action of partition. In such case the coheir of the vendor may bring an action on a mandate, if such was given, or on volunteer-agency, if the sale was ratified. But if one has sold the property as though it belonged to him exclusively and he has the price, he is to be sued in an action for the inheritance.

Note.

The action for partition was extended rather than limited in the development of the law. It is somewhat strange, therefore, that it was not granted in the foregoing case. See law 19 h.t. which did not, however, involve a sale. But the instant rescript is not contrary to C. 4.52.1, as is thought (Berger, *Teilungsk.* 192), nor with D. 10.2.44.2: "If coheirs have sold property in the absence of one of their number, and have fraudulently contrived to get more than their share, they can be called on by partition action or action for inheritance to make good the excess amount they have received." A distinction exists. See C. 2.18 and 19, which, upon ratification of an unauthorized sale gave the action on volunteer-agency.

3.36.21. The same Emperors and Caesars to Fortunatus.

If a common father, in contemplation of the future succession to his property, anticipated the office of a referee in the division of his property, anticipated the office of a referee in the division of his property, and has in any manner declared his wish, the referee appointed in a partition action will follow the wish of the father in adjudicating the rights of the successors, taking into account the right of retainer in imitation of the Falcidian law (i.e. the birthright portion), and will divide the property, which as not been generally or specially assigned to anyone, equally between them.<sup>7</sup>  
November 26 (294).

3.36.22. The same Emperors and Caesars to Dionysius.

One of the heirs holding a slave owned in common, without the consent of the coheirs—they erroneously believing such slave to belong to the possessor—does not thereby make the slave his own, since he has no just title, but it is, on the contrary, clear that each heir owns the slave in the proportion of his inheritance.  
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3.36.23. The same emperors and Caesars to Hermogenes.

Although an action given to a creditor against the individual heirs in proportion to the part of an inheritance received by the latter cannot be changed by an agreement of division between the heirs, still one of the heirs who violates the agreement of division may be compelled to abide by it through the remedy arising out of the stipulation and the law, since, even though a stipulation had been omitted, he could have been sued in an action of the special facts, unless it were shown that an agreement to the contrary had been made subsequently.  
294.

3.36.24. The same Emperors and Caesars to Socrates.

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<sup>7</sup> [Blume] See note at law 10 h.t.

A testator provided by precatory words that a son who had a farm (as a pre-legacy), should, under a certain condition, turn over his portion of the inheritance to his brothers and some others. Upon fulfillment of the condition, retaining the portion of the farm, received as heir, as part of his fourth (birthright portion), besides that which he received in return from his coheirs (in fulfillment of the condition) being compensated, and if anything is lacking being deducted (from what he was to turn over) to make that up, he will be compelled to turn over what, above the fourth, was contributed for the farm by the others.<sup>8</sup>

Give December 27 (294).

Note.

An heir might be an heir and a legatee at the same time, as in this case. As heir, he, together with his coheirs, had to pay the legacy to himself. He, as heir, contributed his proportion. When he was required to turn his inheritance over to some one else as a trust, as here, he was entitled to retain his Falcidian fourth. C. 6.50. Now in this fourth was counted (a) the amount which he himself contributed to pay the legacy to himself, and (b) the amount which the parties to whom he was directed to give his inheritance were to give him in turn, but not the proportion which the coheirs contributed to the legacy. D. 36.1.18.3; D. 35.2.74; D. 35.2.91.

Suppose he was heir to 1/3, worth \$6,000, and his pre-legacy worth \$3,000, and he was required to be paid \$500. He was entitled to retain as his fourth \$1,500. From this was deducted his one-third contribution to the pre-legacy, namely \$1,000, leaving \$500. If the \$500, which the beneficiaries of the trust were directed to pay him was actually paid, his fourth would have been satisfied, and he would have been required to turn all his property as heir over; if not paid, he retained it out of his property as heir. If the beneficiaries had been required to pay a less amount, then the deficiency would have been likewise made up.

3.36.25. The same Emperors and Caesars to Diocles.

If you refused the inheritance from your grandfather, you cannot be compelled to put into hotchpot with your brothers what you acquired by gift or otherwise.

Given April 13 (295).

Note.

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<sup>8</sup> The law itself is as translated on a separate piece of paper pinned over another translation which had been pasted onto the original manuscript page. The note on the pinned paper begins: "This rescript is difficult and obscure." Unfortunately, this note terminates abruptly in the midst of a description of how Otto, Schilling and Sentennis explain the law in their German translation. The note I have used here is that written by Blume to accompany the translation he pasted over the original manuscript page. Scott's translation is: "A testator, by means of entreaties, implored his son to transfer conditionally to his brothers and certain other persons a tract of land which he had in his possession, and which formed a part of the estate; but, after the condition had been fulfilled, the son retained his hereditary share of the land as his fourth under the Falcidian law, setting off against it what he had received from his co-heirs as a loan. In case anything should be lacking to make up his fourth, and, after deducting what was paid by the others for the said land any excess over and above the fourth should remain, he will be compelled to surrender it." 6 [12] Scott 323.

As to collation or bringing into hotchpot in general, see C. 6.20 and the many laws therein and notes thereto. The foregoing rescript appears to deal with an emancipated child, who asked no part of the inheritance of the grandfather, and who, in that case, was not required to collate—bring the property which he had acquired by gift or otherwise, into a common fund, in order that just distribution might be made. Notes to Bas. 42.2.80. If the grandson had been in the power of the grandfather, he would have been required to bring the property into a common fund (law 18 of this title and C. 3.29.2), unless, under the later law, the gifts had been received from outside sources—sources other than the grandfather. C. 6.20.21. Even where a child was emancipated, he might be required to divide up property which he had received from his father, or other ascendant through an immoderate gift. C. 3.29.2.

### 3.36.26. Emperor Constantine to Bassus.

In a partition action, the wish of the decedent, leaving the *help* of the senate decree, however, unimpaired (i.e. as to the birthright portion), shall be carried out, though the children inherit by intestacy, and though such wish is not expressed in the customary legal formality, and was only shown in a testament commenced but not completed, or in a codicil, letter of the parent, or writing in any form of words or signs. But this shall be true only as to heirs of the body who, though of different degrees,<sup>9</sup> are equals, and as to emancipated children whom the praetor calls to the succession. 1. If an outside person is mixed in with the designated children, in connection with such (informal wishes, such wishes will be held illegal as to such outside person.<sup>10</sup>

Given at Rome (321).

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<sup>9</sup> [Blume] I.e., children, grandchildren, etc.

<sup>10</sup> [Blume] See note to law 10 h.t.