

Novel 18.

That the birthright portion of children, if there are up to four children, shall be a third, but if more than four, a half. And that if there are no legitimate children, the illegitimate children shall receive two-twelfths along with their mother from the intestate father. And that collation shall apply in the case of a testament as well as on intestacy, unless the testator forbids it. And concerning the decision made by a mother between children. And concerning him who denies a writing written by himself. And concerning other subjects.

(Ut legitima portion liberorum, si usque ad quattuor sint liberi, etc.)

Emperor Justinian to Johannes, Praetorian Prefect of the Orient the second time, ex-consul and patrician.

Preface. Much has been enacted concerning testaments by this great Roman Republic, created, as has happily been said, by God, and the books of law are full of the subject. Not only was this done by the wise ancients and by pious and powerful emperors, but we ourselves have enacted laws concerning this subject in no less number than those of any of the preceding emperors. While, moreover, we always have God in mind, so that we may be pleasing to Him and do what may be worthy of the benefits conferred on us, we always try to discover something new which is fitting and corrects preceding legislation. And so we have often wondered why it was that former laws only fixed a fourth, which, while called a debt, was required to be left to legitimate children, who were pleasing to their parents, leaving the remainder to be disposed according to the pleasure of the parents, and might be given to cognate relatives, outsiders and slaves—the latter also with their liberty—while the children, although many of them and who committed no wrong against their parents, should be neglected and only receive the fourth, to be divided among them, although there might be ten or more of them, and thus the children of a rich father might be paupers.

c. 1. We are moved by these things to correct the law, in order that it may never need to blush, and to regulate the matter, so that if a father or mother has one, two, three or four children, he or she must leave them not only a fourth, but a third of his or her property, that is to say, four-twelfths. This amount is fixed when there are

not exceeding four children. If there are more, the half of the property must be left them, so that the proportion due the children will be six-twelfths. The third or the half respectively must be divided equally among them; and this must be done without partiality, for in this matter, too, some of them would be wronged, if some would receive the valuable property and others the property of less value; but the division between them shall be equal, both in quality and in quantity, whether the testator leaves it by appointing the child his heir, or by way of legacy, or—what comes to the same thing—by way of trust. The testator may leave the remainder, that is to say, the two-thirds or one-half respectively, to his children or to outsiders, in any amount he wishes, and when the debt naturally due has been satisfied, other bounties bestowed. This applies to all persons who under the ancient law had the right to set the will aside as unjust, in connection with the former fourth.

c. 2. Excepted herefrom is the law recently enacted by us concerning curials,^a which provides that three-fourths must be left to the sons of curials or to daughters intermarried with curials, leaving power to dispose only of the remaining fourth at will. And all other laws enacted concerning suits to set wills aside as undutiful, and especially those enacted by us, shall remain in full force, whether relating to children who are or are not ungrateful, excepting only as to the amount which is increased by the present law as above set fourth.

a. Compare Novel 38, appended to C. 10.35 [not appended in this edition].

c. 3. We also forbid a matter which is important and which, though based on some legal ground, leads to injustice and harshness. For we know of some testaments, in which the testators made an appointment of heirs not in a fatherly manner and as becomes men, but in an effeminate and weakly spirit. For they left all of the usufruct of their property to their widows, giving the children only the naked ownership, apparently. I think, with the intention that the woman might also acquire the ownership, while the children might perish of hunger. For from whence can they receive their necessities and daily food, when nothing has been left them, and the woman's unjust ire may even deprive them of their daily food? Hence no one who

has children shall hereafter do anything like that, but shall have them at least the usufruct as well as proprietorship of the legal portion which we have now fixed, if he wants to be called the father of children who will not immediately die of hunger but have the means to live. We say this not only of the father, but also of the mother, the grandfather, great-grandfather, and of the women occupying the same relative position, namely the grandmother, and great-grandmother, both on the father's and the mother's side.

c. 4. Nor shall a testator hereafter be permitted to leave to grandchildren or great-children who are not sui juris but under power of the testator, less than a third of the amount which they would have been compelled to leave to the former's parents, if living. Nor do we further permit grandchildren by a son of a paternal grandfather to receive the whole portion which their father would have received, while the grandchildren by a daughter of a paternal grandfather, or grandchildren of a paternal or maternal grandmother, respectively, shall stand on the same footing, and we do not permit women to be placed in an inferior position to men. For neither the male by himself, nor the female by herself, suffices to procreate children, but as God has joined them for that purpose, so we preserve an equality between them.^a 1. This law does not end here. For the same thing shall apply to descendants who are born in legal marriage, although no dowry was given,^b since the open and definite state of mind of the spouses indicating consent (to such marriage) makes their children legitimate. Marriage brings about dowry, but dowry does not make a marriage; that is made by a mutual state of mind. The law also applies to those children who are made legitimate, according to our constitutions, by reason of subsequent documents of dowry which follow mutual consent (to the marriage after the birth of children). The foregoing law relates to legitimate offspring.

Notes.

a. See note to C. 6.55.9.

b. Dowry was usually given in Roman marriages and the main evidence of the marriage was the so-called dowry document executed by the parties. See C. 5.3 & 4.

While the foregoing Novel provided for equal distribution of legal portions left to children, this was evaded by gifts made to some of them previous to death. That led to the enactment of Novel 92, appended to C. 3.29 [not appended in this edition].

c. 5. Let us look at a subject, which by its nature, requires humane consideration. Much trouble is made us by frequent supplication of weeping children, and while we have always given relief through humane orders, we blush to say that we have not done so by a general law. By enacting a law suitable to the subject matter we not only keep a crowd of supplicants away but also provide proper relief for all. We have permitted fathers of natural children, as appears by laws enacted by us, to leave them by will, in case there are legitimate children, one twelfth of their property, which is to be shared between them and their mother—as was also formerly the rule—and in case there are no legitimate children, to leave them as much as half of his property; and they may leave them this amount not alone by testament, but also by gifts made among the living. The present law deals with intestate succession and introduces something new. If, accordingly, a man dies without leaving legitimate offspring, either children, grandchildren or remoter descendants, or lawful wife, and without having disposed of his property by testament, and his relatives, or perhaps manumittor ask for the right of possession of his property, or the fisc, which we do not spare in this matter, claims his property, but the decedent lived with a free concubine and had children by her—for we have only such persons in mine when there can be no doubt as to the woman having lived at his home as his concubine and as to the children being his natural children, born and raised in his home—we permit all the children jointly, however many there are, to inherit, along with their mother one-sixth of the property of their intestate parent, the mother receiving a child's portion. This applies when the man had only one concubine by whom he had children; or when the latter remain in his home after the concubine has died or has been separated from him. In such case they shall inherit one-sixth. But if he engages in indiscriminate lust, continuously changing one woman for another and has a multitude of what we may call prostitutes and

dies leaving many concubines and children by them, he is worthy of our hatred and must not be permitted to come under the provisions of this law. For as a man cannot have legitimate children by another woman during the time that he is married and has a lawful wife, so when a man, as has been stated has a concubine, recognized by law and has children by her, it will not be permitted that children born of lust should inherit from him if he dies intestate. For unless we made this provision there would be no distinction as to women, which of them he loved more and which of them less and no distinction as to children. And we give the benefit of our law not to those who live in wantonness but to those who live chastely. No difference shall be made between male and female children, for as nature makes no distinction in connection with such matters so we cannot make one law for males and another for females. This law shall be in force in the future. It corrects many things and introduces some that are new. Matters that are past cannot be subjected to its rule.

c. 6. We have also thought best to include the following matter in this law: Former laws provided that if parents died intestate, property (advanced to children) should be brought into hotchpot, but not, if they made a testament and did not mention the subject; that in such case, on the contrary, a dowry given, or other gift made might be retained and the property left in the will might be claimed. But we ordain that such intention (of the testator) shall not be assumed, for it is uncertain whether he forgot what he had given or was prevented from mentioning it by reason of the troubles attendant upon impending death. And so whether a decedent died testate or made a testament, property shall be brought into hotchpot for the purpose of equalization (of the inherited portions) according to provisions formerly made, unless the testator expressly states that he does not want this to be done, and that he wants the heir, compelled by law to bring property into hotchpot, to enjoy what had been given as well as to receive what has been left him in the testament. All other former provisions on this subject shall remain in force.

c. 7. In the next place, we have thought it necessary to embody in the present law decisions that we have often made on certain matters. Men who have several children, and who divide their property among them in order to prevent discord, thereby frequently create greater and more serious contentions among them. They should, in their testaments, clearly divide the several parcels of property, if that is what they want to do, or, if not, state, over their signature, the several portions, and so make the division among the children certain. But they do not do this. They indeed write a portion in their own handwriting, but scatteringly, on small, worthless pieces of paper, and perhaps already written on by others considered unworthy of preservation. The remainder of the writing may not even be in their own handwriting, but in that of some corrupted scrivener, perhaps, or of someone else. Hence a thousand causes for litigation, whether the writing represents the wish of the father or is that of someone else, written for the purpose of raising discord and contention, and to favor, perhaps, some particular person. In order that these things may not trouble our subjects in the future, we ordain that if anyone wants to divide all or particular pieces of his property in his testament, if that is possible, and not leave the benefit left to the children doubtful. But if he cannot do so on account of some circumstances which frequently control men, he must designate the portions in which the property which he wants to be distributed is to be divided, and sign this with his own hand or have the children, among whom the property is to be distributed, do so, in order that the transaction may be entitled to undoubtful credit. Whatever is done in accordance with this rule shall be valid and enforceable, without needing any additional assurance. If a man does not do this, but scatters his writing, mostly without witnesses, he may know that his children will not be entitled to any benefit under it. But the children may divide the property as though nothing of the sort had been done and need not follow any writing that is uncertain and generally without witnesses, and judges who partition inheritance need not pay any attention to it. For children should be looked after carefully, and we should not safeguard one thing and leave other things uncertain, for that would give rise to difficult and inextricable disputes, nay even to criminal accusations.

Thus far as to successions, bringing property into hotchpot and other things stated above.¹

c. 8. A tendency toward evil conduct has imposed the necessity upon us to revive an ancient law, enacted by the people on the motion of one of its tribunes, after whom it was named the Aquilian law, by which a man who dishonestly made an unwarranted denial was subjected to double penalty. Other actions too are directed to the same end. An indulgent spirit gradually encouraged the evil conduct of dishonest men. Hence, it appeared necessary to us to restrain disgraceful and dishonest denials by the penalty stated. So if a duebill is produced but the debtor denies its genuineness, although clearly in his handwriting, so that the plaintiff is compelled to go to great trouble in proving its genuineness; or if the debtor acknowledges his handwriting but denies that he received the amount therein stated, and the plaintiff also proves that fact in legal manner; in either case the judgment against the party who made the denial shall be in double the amount—not that we delight in harsh laws, but in order to diminish the number of lawsuits thereby, and by this penalty induce acknowledgements where these should be made. Condemnation, accordingly, shall be made in such matters in that manner, and if the judge violates these provisions, he may know that he will himself be subjected to the provided penalties. The foregoing provisions shall apply unless the plaintiff does not attempt any proof but wants the matter that is being denied decided by an (decisory) oath. If he does that and he tenders the oath immediately after such denial is made, and the other party confesses the matter previously denied, the double penalty shall not be inflicted. If the plaintiff tenders the oath after the case has been long spun out, and the other party then confesses the matter

¹ The last sentence appears to have been cut off and perhaps mistyped. The gist of the Latin: *De successionibus itaque et de collationibus et aliis, quae praedicta sunt, usque in hoc sancitum sit* appears to be: “(Matters) as to successions, bringing property into hotchpot and other things thus far announced continue as confirmed.” S.P. Scott translates this provision as: *All other provisions having reference to successions, collations, and other matters, made up to this time, are hereby confirmed.*

previously denied, the latter shall be released from the double penalty but he shall pay all the expenses incurred by the plaintiff by reason of the attempt to produce the proper proof, the amount thereof to be determined by the (assessment) oath of the plaintiff. If a man denies that money for which a duebill was given, was in fact paid to him, and thereafter alleges that he paid the duebill, he shall not have the benefit of any payments in fact made by him, but must pay the total amount of such bill, and this shall be the only penalty, as had also been provided by one of the emperors.^a And the judge must not hesitate in using the keen edge of the law also here. If the defendant produces a written receipt of the plaintiff and the latter denies his writing, but the former proves it, not only the amount shown by the receipt shall be credited, but twice that amount. The rule as to the tender of an oath shall also apply in such case as to the defendant.

Notes.

a. C. 4.65.33; C. 8.4.10. It will be noticed that a man was not, as often in modern jurisprudence, permitted to make two inconsistent defenses—he could not, in this case, both deny having received the money on the duebill, and then affirm that he had paid the bill. The same principle is stated in c. 10 of this Novel—deny the ownership of a former holder, and then affirm a title through that very ownership.

As to the decisory oath, see title one of this book; for the assessment oath, see C. 5.53.

As to the penalty for denial in other cases, see note to C. 4.5.4.

c. 9. If a suit is carried on by a curator for a person who requires, the penalty for denial, when made as to writings of the curator, shall not be inflicted on the persons under curatorship, but on the curators personally who unbecomingly and dishonestly make such denial. Provisions for double, triple or quadruple penalty provided by ancient laws or imperial constitutions shall remain in force, as we have stated in our institutes, digest and cod of constitutions. The provisions for penalties herein mentioned are additions thereto.

c. 10. We also think best to make better provisions as to the following matter concerning which many disputes arise in court. If a man accuses another of detaining another's property, and the latter denies that the property in dispute (formerly) belonged to the party named by the plaintiff, so that the plaintiff will be compelled to prove his claim by documents, witnesses or in some other manner, and thereafter the man who denies such ownership wants to rely on some title derived from the other (the former owner), claiming that he has a better right through him than the plaintiff by reason of a mortgage or other alienation—in such case the opinions of our predecessors shall no longer prevail, and a moderate and humane penalty, suitable to the situation shall be imposed; that is to say, the possession of the property in litigation shall be transferred to the plaintiff (temporarily, during the litigation) as a penalty for making such denial and for the trouble incurred by the plaintiff on account thereof; but the party so restoring the property may bring forward and pursue any rights which he obtained from the person, against whom he committed the wrong of making such denial.

These then are the provisions devised and ordained by us to successions, bringing property into hotchpot, divisions, protection of litigants and to diminish the multitude of lawsuits, which provisions have been made, to be hereafter in force, so that men may know the law of successions, be not unaware as to what property is to be brought into hotchpot, cease to dispute as to divisions (of inheritances), be cautious in maliciously refusing to acknowledge their own writings, no longer dispute the fact that the amount shown by a duebill was not in fact loaned, while subsequently resorting to the allegation of payment, and stop to deny that parties through whom they hold any property are the owners thereof. But they should conduct themselves properly, justly, truthfully so as to be entitled to judgment in conformity therewith.

c. 11. A dispute has been unjustly raised as to some of our constitutions, aired in many cases, and we deemed it best to add a further provision hereto so as to allay all such doubt. We heretofore provided that if a man, looking with favor upon a

woman, took her to his home without executing any marriage contract, had children by her, and afterward, with conjugal affection executed such instruments and thereafter had other children, not only the children born thereafter, but also those born previously, should be considered legitimate. And in order to avoid cavil and malicious interpretations, we issued another constitution, that this should be true also in case no children were born after the execution of dowry-documents, or if born, had died. Now some men have raised another doubt, not admitting that this rule would apply if a man married a freedwoman, although to those rightly construing our intention it should have been plain that the rule applied also in such case, for since a marriage with a freedwoman is not at all prohibited, it was clear that the provisions covered such case. But since the dispute exists we ordain: If a man who has no lawful wife or lawfully-begotten children by her while she is in slavery, and afterwards gives liberty to her and them, asks for them the right to the gold ring^a and restitution of natal-rights, and in this manner raises them to the position of free-born people, confirms the marriage and executes a marriage contract, then whether any children are subsequently born or not—for we have both instances in mind—the wife shall be a lawful wife, and the children—speaking of those born before the execution of a marriage contract—shall be free, under paternal power, and heirs of the body of their father, since the latter obtain, by the method indicated, the status of free-born children, and receive the rights of legitimacy by the execution of dowry-documents.

- a. The sign of liberty, see C. 6.8.

Epilogue. Your Sublimity will cause this law, made for the welfare and tranquility of our subjects, known in all the provinces of which you are the head, by issuance of your own edicts, so that all may know that we are not kept from solicitude on their behalf by the greatest cares with which God at times burdens us.

Given March 1, 536.