Book VI.
Title XI.

Concerning equitable heirship in pursuance of a testament.
(De bonorum possessione secundum tabulas.)

Bas. 40.7.1.

6.11.1. Emperor Alexander to Vitalis.

Pending an appeal from a decision by which a testament has been declared a forgery, and it being therefore uncertain whether the deceased died intestate, there in no room for the right of possession of an inheritance by reason of relationship (proximitates nomine).
Given April 29 (223).

6.11.2. Emperor Gordian to Cornelius.

There is no doubt that the right of possession of an inheritance (pursuant to a testament), may, according to the edict of the praetor, be claimed only when the testament is sealed by the seals of seven witnesses. 1. But if it can be shown that this number was present when a testament was made that is not in writing, it is clearly the law that such testament is made according to the civil (common) law and that the right of possession of the inheritance is granted according to the provisions of such nuncupative will.
Promulgated April 19 (242).

Note.

Where a will was valid in every respect, and no objection could be raised to it, the person appointed therein as heir, had, of course, no need of the grant of right of possession (bonorum possessio). But there was always danger of the invalidity of the will on some technical ground. For instance, if a man made a will, and he had a child subsequently, and such child was not mentioned in the will, the will was invalidated (C. 6.12.2; C. 6.29), even though the child died during the lifetime of the testator. But in this case, the will was sustained by the praetor; that is to say, the heir appointed in the will would be given the right of possession of the inheritance pursuant to the will, provided that a written will was witnessed by seven witnesses, or a verbal-nuncupative-will was made in the presence of the same number of witnesses. A will not thus witnessed was not recognized and did not furnish the basis of the right of possession of the inheritance. So if any other question arose as to whether a will was broken or invalid, or if an heir was appointed on condition, and there was a doubt as to whether the condition was fulfilled or not, the appointed heir, if he applied within a year, was entitled to the possession till the question was decided. Roby, 1 Roman Private Law 256, 257, and until such time no one had the right as stated in the first law of this title, to apply for the right of possession on the ground that the decedent died intestate.

The rights of children, however, were given first consideration, and the right of possession pursuant to the testament was legally given only when no children had a right to make a claim against it, or when their time for making such claim had expired or when

they declined the inheritance. (See note C. 6. 12. 2 for further particulars.) Such children could make a claim against it only when overlooked. See fully C. 6.12.2 note.

The right of possession here mentioned could be granted whenever it was shown that there was in fact a will, without producing it. D. 37.11.1.2. No particular proof, as already stated, was necessary that the will in fact existed. Hence it might happen in this, as in other cases, that the right was granted wrongly, and should in fact not have been granted. But, as already shown, in such case, where the basis of the right failed, the right itself failed, and physical possession unlawfully obtained would be taken away, or in a suit to obtain the physical possession, the facts warranting the granting of the right must be shown. Buckland, Roman Law, 385. See also C. 6.33.3.