Book V.
Title XXVII.

Concerning natural children and their mothers and in what cases the former become legitimate.
(De naturalibus liberis et matribus eorum et ex quibus casibus justi efficiuntur.)

5.27.1. Emperor Constantine to Gregorius.

We order that senators or persons of the rank of prefect (perfectissimus) or who occupy the office of duumvir or who are decorated with the ornaments of the chief priesthood of Syria or Phoenicia shall be branded with infamy and lose the privileges of the Roman laws if they treat children born to them of a slave, daughter of a slave, freedwoman, daughter of a freedwoman, actress, daughter of an actress, mistress of a tavern, daughter of a tavern keeper, or a low and degraded woman, or the daughter of a panderer or gladiator or a woman who offered herself to public trade, as their legitimate children, either pursuant to their own declaration to that effect or pursuant to the privilege extended by our rescript; and whatever a father shall have given to such children, whether he calls them legitimate or natural, shall be taken from them and shall be turned over to the legitimate offspring, or to his brother, sister, father or mother.

1. So, also, whatever property of any kind shall have been given to such women, or turned over to them pursuant to a purchase, shall be taken from them and returned; and the women themselves by whose poison the souls of misled men are infected shall be subjected to examination under torture, if anything which is to be returned to the persons whom we have mentioned, or to our fisc, is missed or is entrusted to such women.

2. Whether, therefore, the gift is made by the putative father himself, or by another, or by a mediator, and whether the property is bought from[1] him or from another, or in the name of such children (ipsorum), it shall be immediately taken away from them and turned over to those whom we have mentioned, or if there are no such persons, then to the fisc.

3. And if there are such persons and they are present,[2] but they are bound by an agreement or an oath, not to claim such property, the fisc shall seize it.

4. If such persons remain silent or act in disregard hereof, they have a period of two months in which to prevent the fisc from making its claim, but if they do not retake the property within that time or have not applied to the rector of the province for that purpose, our fisc will take possession of property which by impure liberality was given such children or wives, and will claim the things given or entrusted with a fourfold penalty after severe examination under torture.

Read at Carthage July 21 (336).

Note.

The present law was repealed by Nov. 117, c. 6. It deals with marriages between men of rank and women of low standing. Justinian permitted marriages with all women, but a marriage contract was required in many of the cases where marriage with such women had formerly been forbidden. C. 5.4.

5.27.2. Emperors Arcadius and Honorius to Anthemius, Praetorian Prefect.

---

[1] Blume has penciled in above this "by ? (so Pharr)." Scott has "by." See 6 [13] Scott 214.

[2] Blume has penciled in above this "in praesenti rerum constituti ?"

When a father leaves surviving him mother, legitimate children, grandchildren or great-grandchildren of either sex, whether one or more, he may leave to his natural sons or daughters and to their mother only one twelfth part of his property, or to the concubine alone only the twenty-fourth part thereof. Whatever was left beyond the legal limit must be turned over, according to law, to the legitimate children, or mother or other heirs.
Given at Constantinople November 13 (495).
C. Th. 4.6.6.

Note.

The present law was partly modeled after C. Th. 4.6.1, enacted in 371 A.D. by Valentinian, Valens, and Gratian, which provided that where a man had legitimate children he could leave only a twelfth to his illegitimate, or natural, children, and which further provided that if a man left no legitimate children, he might leave a fourth of his property to his natural children. The second part of this law was omitted from the present law, but evidently remained in force, for it is mentioned in law 8 of this title. Reference to these laws is made in Nov. 89, c. 12.

5.27.3. Emperors Theodosius and Valentinian to Apollonius, Praetorian Prefect.

Whether anyone is exempt from, or bound by, the bonds of the curia, he may deliver his natural sons, all of them or such as he wishes, to the curia of his native city, and to appoint them as the heirs of all of his property.

1. And if anyone, not coming from any city, but from a village or landed-estate, has natural children, and he wants to honor them, according to the foregoing provision by the splendor of the curia or assist them by the riches of an inheritance, they must be assigned to the curial order of the city of which such village or landed-estate is a part.

2. If either of the regal cities (Rome or Constantinople) is his native city, he may enroll the offspring of such unequal alliance among the decurions of any other city which is the capital of a province. For it is unbecoming that a person who glories in the splendor of a sacred city should enroll his natural sons in the senate of an unimportant city.

3. Provisions made by testament or a gift of any amount made by a father to his natural sons, and his wishes as to enrollment in a curia expressed either in his testament or by a registered document, shall be valid and fully carried out, and if the natural children shall want to evade the curial fortune by abstaining from the inheritance or by renouncing the gift, but are subsequently found to be in possession of the paternal goods, either in whole or in part, they shall be compelled, even against their will and even though they have sold the paternal property, to submit to the condition to which their father, while increasing their means, assigned them.

4. And if a man had one or more natural daughters, and he has given her or them in marriage to a curial or curials of the city in which he was born or which has jurisdiction over the village or landed-estate where he was born, or to a curial or curials of the city which is the capital of a province, the foregoing provision shall also apply to her or them just as in the case of male offspring.

5. For what is the difference whether the interests of cities are provided for through sons or sons-in-law, and whether the law makes new curials or favors those whom it already finds to be such.
Given at Constantinople December 16 (443).
C. Th. 22.1.5.7-9; C. Th. 22.2.11.

Note.

The present law and other similar laws in this title cannot be understood except in the light of historical facts and of laws on the subject of curials or decurions. Municipalities ordinarily had a local senate, or curia, the members of which were called curials or decurions. Many of the burdens of the empire, including the collection of taxes, looking after the state post, highways, public buildings, and public works in general, were cast upon them, so that their burden ultimately became so great that many deserted from the cities. Their property was responsible for the due fulfillment of the duties resting upon them. It became a matter of concern, accordingly, as the decurions became impoverished, to keep property within their ranks and to increase the membership thereof. That was the reason that the emperors were willing to make natural children legitimate if they were assigned to a curia. Rome and Constantinople had no such local senates, and natural children of citizens of these cities, therefore, were authorized to assign their natural children to the curia of a metropolitan city in the provinces. The subject of decurions is fully considered in C. 10.3.2 and subsequent titles.

5.27.4. Emperors Leo and Anthemius to Aramsius, Praetorian Prefect.

We do not without reason gather the wishes of dying persons from their resolutions made while living. And when a man who has a natural son, voluntarily and pursuant to the policy of the law, has made it known by the clearest declaration that admits of no doubt that he wants such son to be assigned to municipal duties and to be one of the chief men of his native city just as though he were a legitimate son and that he has selected such a son as the heir of all of his property, urged thereto through his natural affection, such son and others situated like him, are assisted by the imperial constitution (permitting them to inherit such property), but they are not at liberty to renounce, alienate, or repudiate their paternal inheritance or gifts in fraud of the curia, and they must undertake municipal duties while taking over the property. So we permit no misinterpretation to prevail, but direct that Philocalus, intestate heir of all of his father's property, shall undertake the duties enjoined or to be enjoined on one of the principle men (principalis) of the curia of the city of Bostrana and that his sons, likewise, must submit to their paternal condition. This rule must hereafter be applied in all similar cases relating to any curia of any city.
Given at Constantinople January 1 (470).

5.27.5. Emperor Zeno to Sebastianus, Praetorian Prefect.

In revising the constitution of the divine Constantine, who strengthened the Roman power through the venerable Christian faith, and who by said constitution provided that free born concubines might be made wives and that sons born to people thus married, before or subsequent to such marriage should be considered as legitimate, we order that unmarried men having no children from a legitimate marriage, but who previous to this law, had children of either sex from an alliance without marriage, with free born women, may, if they have no children from a legal marriage, marry such women who previously were their concubines, and may not only contract with them, as has been said, a legal marriage, but the children also, of either sex, born of these same women prior to marriage, shall, as soon as the marriage with their mother is celebrated, be considered as the legitimate children of the father and shall be in his power, and may, together with those who are subsequently born of this marriage, or alone, if no other children are so born, take their father's property if left to them by will, and claim it if their father dies intestate. The agreements made concerning dowry and prenuptial gifts at

the time of the marriage shall also be for their benefit, so that they, together with their brother (and sisters) subsequently born, receive he benefit of the dowry and the prenuptial gift according to the tenor of the law and of the agreement made. 1. But persons who at the time of the enactment of this imperial sanction had no offspring of an alliance with freewomen, shall not enjoy the benefit of this law, since they are permitted, if they have no wife or legitimate children, to marry such women and have children of a legal marriage, and they cannot ask that children born to them of a free concubine, after delaying marriage with her subsequent to the enactment of this law, should be considered legitimate.
Given February 20 (477).

5.27.6. Emperor Anastasius to Sergius, Praetorian Prefect.

We order that persons who have no legitimate children, and who at present have a concubine in place of a wife, shall have their children born of such concubines, in their power as legitimate children, and they may, if they wish, transfer their property to them by testament, gift, or by other method known to law. Such children may also be called as heirs of their intestate fathers; and the agnates or cognates of their progenitor or anybody else shall hereafter have no power to make them any difficulty or dispute such right by any cunning or crafty pretense under any law or constitution. A like rule applies to children of a man who has such concubine in place of a wife, and dotal documents have been executed, so that permission may not be taken from the man to acquire property through his own children. 1. We direct, moreover, that sons and daughters who have already been adopted by their (natural) fathers pursuant to imperial permission shall enjoy the benefit and assistance of this provident law.
Given April 1 (517).

5.27.7. Emperor Justin to Marinus, Praetorian Prefect.

The law of Anastasius, of blessed memory, which was enacted concerning natural children, shall be valid only as to marriages that had then, and have since been entered into up to this time, according to that law, provided that only children shall be considered as benefited thereby who were not born of an unholy or an incestuous alliance.

1. Besides we have thought it well to aid all natural sons and daughters, not born of an incestuous or unholy alliance, who, by virtue of an imperial order, were brought under paternal power through adoption, or adrogation, either before the foregoing law crept in or thereafter, up to the present day, and the adoption or adrogation shall remain valid and shall not, upon any ground, be rescinded, as though what they (the children) obtained, were forbidden by some law, since, though formerly a doubt existed on this point, that doubt should be removed through mercy, of which those who suffer through another's fault are not unworthy.

2. Such children shall, accordingly, after adoption or adrogation, be the (legitimate) children of their father, they shall be in his power, and may inherit his property by testament or by intestacy, in accordance with the law that applies to adopted or adrogated children.

3. But all must know that in the future legitimate posterity must be sought by legal marriage, as though the above mentioned constitution had not been enacted. For hereafter unlawful lust will not be excused, will not be remedied by any new law contrary to former provisions, will not be helped by the former Sanction (of Anastasius) which for pious reasons is abrogated from this day on, will find no cure in adoption or adrogation

which cannot be further tolerated, and will find no corrective in an imperial rescript obtained through craft and unlawful, corrupt solicitation, since it is unbecoming and impious to seek protection for flagitiousness, in order that they may indulge in wantonness and under color of law presume to have the right and the name of father which is denied them.
Given at Constantinople November 9 (519).

5.27.8. Emperor Justinian to Mena, Praetorian Prefect.

In consideration of humane feelings we grant to fathers of natural children, if they have none who are legitimate or leave no mother surviving them, the right to appoint such natural children or the mother of them, as heirs not only for one-fourth[3] of their property, as the past laws have permitted, but for double that, that is to say, for one-half of their property, so that, although such children have no share in the succession of an intestate natural father, they may if the natural father so desires, inherit one-half of his property pursuant to his last will, provided that the testator shall not devise more than the aforesaid one-half of his property to the natural children and their mother combined.

1. We also give the right to natural fathers to leave their property to said persons to the extent of one-half in value, by way of legacies, trusts, dowries, gifts, prenuptial gifts, or in other ways.

2. These provisions, however, shall apply only to future testaments, last will, dowries, or gifts.
Given at Constantinople January 1 (528).

5.27.9. The same Emperor to Mena, Praetorian Prefect.

Rightly judging it for the common good that our subjects should enjoy lucid laws, clear of every ambiguity, we come to the present sanction, by which we remove every doubt which has heretofore existed, and make it certain that whenever natural sons are (by their father) assigned to the curia of the native city of their father, either during the father's life or upon the latter's death pursuant to the direction in a testament, and in that manner acquire legal rights to their paternal property, which without question is right, they shall not be permitted though they have attained the illustrious rank, which cannot release them from the curia, to claim any property (by succession) of the legitimate descendants of the same natural father, or his ascendants or his collateral relatives by cognation or agnation although they, said natural children, become legal heirs to their natural father by reason of said status (as curial).

1. The rule shall apply to any natural sons assigned to the curial condition by their natural father, and who are still living. And in like manner said legitimate relatives shall claim no right to the property of the same natural son or his descendants, ascendants and collateral relatives.

2. If a natural son has children or other descendants of a legal marriage, whether born after he became a legal heir of his father or previously, they will become his heirs though no testament is made by the decedent, and the curia will get no portion of the property, except when a fourth part of his goods belong to it because no one of the children of the decedent is subject to curial duties.[4] It must, however, be observed that

[3] [Blume] See note to law 2 of this title.
[4] [Blume] See C. 10.35.

sons of such natural son, born to him after he was assigned to the curia become decurions and will be compelled to perform curial duties.

3. If such natural son dies intestate, without leaving any offspring of any degree, his mother, if she survives him, shall have a third of his property, and, two-thirds thereof shall belong to the curia to whom he was assigned by his father.

4. But if the mother of the decedent does not survive him, and other cognate relatives on the maternal side, descendants or ascendants or collateral relatives become his heirs, the property which he obtained from his natural father will belong to the curia; but whatever the son, subsequently made legal heir (of his father), acquired from his mother or in other lawful manner, will go to his nearest cognate, maternal relatives.

5. It must, however, be observed that whether his mother survives him or whether her death precedes that of her son, if anyone of her family is ready to submit to the fortunes of the same curia, and offers to join it, he shall receive the property of the deceased which the latter received from his father, and fulfill his curial duties; in which case, the mother of the deceased, if she survives, shall not only receive the third part of the property which the decedent acquired outside of the paternal property, but she, either alone or together with her co-heirs, shall receive it all.

6. The provisions which we have made concerning the heirship of a deceased natural son who has become a decurions shall apply not only to those who shall hereafter be assigned to the curia by their natural father, but also to those who have already been so assigned and who are now living.

7. If they have died before the enactment of the present sanction, the provisions thereof shall not apply to their inheritance.

8. And since the local senates of cities (curial) are to be favored in every way, we think we should also add that fathers should be permitted to assign their natural sons to the curia of their native city not only when they have no legitimate offspring, but also in case they have sons or other offspring of a legitimate marriage, and in this manner make their natural sons also their legitimate heirs, provided, however, that the fathers shall not be permitted to leave to a natural son, by gift of last will, more than the smallest portion which he has given or left to any son born to him of a legitimate marriage.
Given June 1 (523).

5.27.10. The same Emperor to Demosthenes, Praetorian Prefect.

When anyone, without a marriage contract, has children by a free woman, marriage to whom is not by law prohibited and whom he took to his bed, and thereafter by reason of the same affection a marriage contract is executed, and he has other children from this marriage, we order that the children who were born subsequent to the marriage contract shall not claim all the paternal property for themselves because of being children that are legitimate and under the father's power, as against their brothers (and sisters) who were born before the marriage contract, and oust the latter from any paternal inheritance. Such injustice is not to be tolerated.

1. For since the affection for the prior offspring furnished the reason for the execution of the marriage contract, and the occasion for the birth of subsequent children, it would be most unjust that the subsequent offspring should exclude the former as illegitimate; the subsequent children should rather give thinks to their brothers (and sisters) through whom they themselves acquired the name and status of legitimate children.

2. Nor is it likely that he who afterwards entered into a contract in writing as to a gift or dowry did not from the very beginning have that affection toward the woman which caused her to become worthy of the name of wife.

3. Hence we ordain in cases of this kind, that all the children, whether born before or after the execution of the marriage contract shall be treated with equality, all alike being the children of their progenitor and in his power, and no difference shall exist between them, but all that are born of the same parents shall enjoy a like status.
Given at Chalcedon September 17 (529).

Note.

The present law shows the importance attached to a marriage contract. It was not necessary, in order to contract a legitimate marriage, to enter into a regular marriage contract, except only in a few cases, as already shown at C. 5.4, provided that the parties cohabited with conjugal inclination or affection, and not merely in a state of concubinage. The present law seems to have had in mind, however, as shown by the next law, that the parties only lived together in that state, and that no legal marriage had been entered into by them in the first place. Entering into a marriage contract subsequently made the children previously born legitimate.

5.27.11. The same Emperor to Julianus, Praetorian Prefect.

We recently enacted a law by which we ordered that, if anyone takes to his bed a woman with whom he could conclude marriage, without intention of marriage existing in the beginning, and has children by her, and afterwards, through matrimonial inclinations, enters into a marriage contract with her, and shall have subsequent sons and daughters, not only shall the subsequent children, born after the execution of the marriage contract, be considered legitimate and in their father's power, but the former children shall be likewise so considered, for they furnished the occasion of the legitimacy of the subsequent children.

1. Some persons have thought that this law ought to be interpreted that the former children should not be considered legitimate if no subsequent children were born, or the latter should die, and that living and surviving children of both periods should exist to render the former children legitimate.

2. We direct that such interpretation should be entirely forbidden as too subtle. The existence of an affection, which after the raising of children gave rise to the execution of [a] marriage contract in the hope of offspring shall suffice; though such hope is not realized, that circumstance shall take nothing from the earlier children. That is particularly true when a man causes a woman whom he has taken to his bed to become pregnant and makes a marriage contract while she is in that condition. If a boy or girl is born thereafter, the child is the legitimate offspring of its father, is in his power, and becomes his heir after his death, testate or intestate. For it would be absurd that children born after the execution of a marriage document should be able to bring advantage to those born before, but that such boy or girl should not be able to bring any advantage to himself or herself.

3. And we provide generally, thus settling the differences of opinion in regard to such cases, by this definite enactment, that in cases in which a doubt arises as to the status of children, the time of birth, not that of conception, shall control. We do this in view of our favorable inclination toward children. The time of birth shall control, except when it is to the advantage of the status of children that the time of conception should govern.
Given at Constantinople March 18 (533).

5.27.12. The same Emperor to Johannes, Praetorian Prefect.

Someone, who had a legitimate grandson, had a natural grandson. It was questioned whether the name of grandson should legally be given to an offspring of that kind. For he wanted to leave all of his property to such natural grandson, born to his legitimate son, already deceased, as though the imperial constitutions which prohibit the giving of all or a portion of property as desired, and limiting the right of participation therein were confined to natural sons.

1. This doubt has been raised also in another case. For what is the situation of a grandfather has a grandson, the legitimate son of his own natural son?

2. Since there is no lawful succession in the case of such persons, and the rights of legitimacy, by reason of which the necessity arises to leave something to them according to law, cannot exist. We order, in all such cases of doubt, that the grandfathers may leave to such offspring as much of their property as they like, provided that no legitimate offspring exists.

3. For the constitutions limit the right of fathers in leaving property to their natural children because it was deemed best to curb the former's licentiousness. But no such rule needs to be applied in the case of grandchildren if the existence of legitimate offspring offers no impediment. If such offspring exists, the ancient constitutions which apply to the status of natural children shall also be applied to grandchildren.

4. But that shall be true only when such offspring obtains anything through voluntary action. For we do not in any manner open to them the right to inherit the property of a grandfather by intestacy.

5. We direct that such natural children shall receive the benefit herein mentioned not only in connection with the property of a paternal grandfather, but also in connection with that of a great-grandfather or his cognate relatives if, perchance, the they want to recognize such relationship to such degenerate persons.

Given Nov. 1 (531).