Book VI.
Title LV.

Concerning succession on intestacy by one's unemancipated children, heirs under the statutory law, and grandchildren by a daughter.
(De suis et legitimis liberis et ex filia nepotibus ab intestato venientibus.)

Bas. 45.2.15; D. 38.16.

Headnote.

Heretofore the Code has dealt with intestate succession under the praetorian law, and with testate succession. The next succeeding titles deal with intestate succession under the civil or statutory law. A number of the provisions already dealt with, however, apply here also. That is true, for instance, as to the right of heirs under the civil law to refrain from accepting the inheritance, the right to time for deliberation whether to accept or not, the duty to accept or refuse in certain cases, the making of an inventory, the laws relating to trusts which might be created by a codicil even in the absence of a will, the right of accretion of part of the inherited property where some of the heirs or legatees or beneficiaries of a trust did not accept.

The rules of succession under the civil or statutory law were based on the twelve tables, which however dealt only with the succession of the property of a male parent having paternal power, and which provided that the succession should devolve upon the children under power (including adopted children), and if there were none, to nearest agnate, and if there was none, to the clansmen of the deceased. We shall see how subsequent statutory enactments broadened and modified the law of the twelve tables, ending in the enactment of Novels 118 and 127.

6.55.1. Emperors Severus and Antoninus to Crispina.

If you can be your brother's statutory heir, you are not excluded from the inheritance by the prescriptive period of one hundred days.
Promulgated November 3 (205).

Note.

The period of one hundred days here mentioned was applicable only to the praetorian law of succession; that is to say, that period was given to apply for the right of possession of the inheritance (bonorum possessio). C. 6.9.2. But under the civil law of succession, where a man had a claim not as quasi-heir, but as full heir, there was no limit for entering on the inheritance except that set by the judge. 9 Cujacius 832. There would generally be someone who would be anxious to have it determined who was the heir. In that event, the judge, upon application, would fix the time in which an heir was required to declare his intention whether he would accept or not, and would give time for deliberation if asked, for a period not less than one hundred days, nor more than nine months. The subject is fully stated in notes to C. 6.30.1 and 3.

6.55.2. Emperors Diocletian and Maximian to Avia.

Grandchildren of different children, who inherit from a grandfather on intestacy, do not inherit per capita but per stirpes, where the number of grandchildren born to the children respectively is not the same.
Subscribed at Hadrianople February 27 (290).

6.55.3. The same Emperors and the Caesars to Franto.

The law of the twelve tables clearly provides that when a man dies, leaving a son, and a grandson by another son who is deceased at the time of the grandson's death, such grandson being a member of the household, the living son and the grandson inherit equally. The praetorian law follows the same rule.
Subscribed June 17 (293).

6.55.4. The same to Marcella.

The order of succession provided by the law of the twelve tables shows clearly that when a man dies intestate, his posthumous heir has a better right to his inheritance than the sister of the decedent, though of full blood.
Subscribed December 8 (293).

6.55.5. The same to Appianus.

If your father in whose power you were, gave you in adoption in the usual manner, you can inherit from the adoptive father who dies intestate along with his children born to him previous or subsequent to such adoption.
Given at Sirmium December 27 (293).

6.55.6. The same to Pasidonius.

A child whose mother was a free woman and whose father was a slave is considered spurious and cannot claim to be the son of a decurion, although his natural father was emancipated, restored to his natal rights, and made decurion.
Subscribed February 8 (294).

6.55.7. The same to Aemiliana.

A freedman is not forbidden to have a son in his power, since his past status does not prevent him from having children by a legal marriage the same as persons who are free-born.
Subscribed at Sirmium February 14 (294).

6.55.8. The same to Catonia.

When the father died while among the enemy, his daughter, who is also yours, became his heir, since knowledge of his death is not required in such case, and she, accordingly (upon her death) transmitted the inheritance to you.[1]
Subscribed at Nicomedia November 20 (294).

[1] [Blume] See lengthy note to C. 6.30.3.

6.55.9. Emperors Valentinian, Theodosius and Arcadius to Constantinus, Praetorian Prefect of the two Gauls.

If a decedent left children of either sex and of any number, and also grandchildren of either sex or of any number, by a daughter, the grandchildren inherit through this daughter two-thirds of that portion which she, as one of the children would have taken if she had survived her father, and a third of such portion shall go to her brothers and sisters, that is to say, to the other sons and daughters of the person leaving the property, being the same as the maternal uncles or aunts of the grandchildren for whose benefit we make this law. 1. These provisions which we have made concerning the property of a maternal grandfather, shall equally apply to that of the maternal as well as paternal grandmother, unless (in the foregoing cases) the grandparents state that they were justly moved, to disinherit their impious grandchildren (ad elogia inurenda),[2] and this action is approved by law. 2. We ordain, moreover, that not only do we give such grandchildren the foregoing rights when the grandfather or grandmother die intestate, but in addition thereto when the grandfather or grandmother, who have such grandchildren, die testate and have passed the latter over or have disinherited them. We grant them the same rights of action to complain of the testament of the grandparents as unjust, according to the just measure of our law, which children have in connection with the testaments of their parents, if the daughter (would have) had any rights of action.[3]
Given at Milan February 25 (389).
C. Th. 5.1.4.

Note.

General note. Under the civil law, grandchildren of a man through an unemancipated son represented the son, if the latter was dead at the time of the grandfather's death, and took the share which their father would have taken, if living. Gaius 3.8. [Blume penciled in to the margin next to this sentence: “Same rule as to emancipated children. See law 3.”] But grandchildren of a man, through a daughter, were not agnates, and were not, accordingly, entitled to any share in the grandfather's estate. Nor did the praetorian law of succession give them any remedy, unless the cognate relatives of the second degree (see headnote to C. 6.9.) were called to an intestate succession. In other words, they were simply recognized as cognate relatives. Their rights were inferior to those of children and agnates. Inst. 3.1.15. Again, children did not, in the first place, inherit from their mother. This was corrected by the Orfitian senate decree, dealt with in title 57 of this book. But that did not give any rights to remoter issue. The present law was passed in 389, giving to grandchildren of a man through a daughter, and the grandchildren of a woman through a son or daughter, two-thirds of the share which their parent would have taken, if living, giving the other third to the brothers and sisters of the deceased parent.

The present law was one of a series of laws which leveled the differences between agnate and cognate relatives. In 528 A.D., Justinian recognized the present law as in force. C. 6.20.19. But in 536 he enacted Novel 18 and in c.4 (appended in full to C.

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[2] [Blume] 9 Cujacius 830; Ob. 18.17, and Gothofredus ad. C. Th. 5.1.44, think that the disinherison must have been made by the mother.

[3] [Blume] "et si quae filiae poterant vel de re vel de lite" competere actiones - is obscure. Gothofredus strikes "et."

3.28) provided: "Nor do we further permit that grandchildren by a son of a paternal grandfather should receive the whole portion which their father would have received, while the grandchildren of a daughter of a paternal grandfather, or grandchildren of a paternal or maternal grandmother receive a third less. But grandchildren and great-grandchildren, 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, not the female by herself, suffices to procreated children, but as God has joined them for that purpose, so we preserve an equality between them." And this provision was recognized in Novel 118, which gave the final blow to superior rights of agnate relatives.

The present law as first enacted contained the further provision that where such grandchildren had no uncles or aunts, the deduction from their portion should only be a fourth, [Blume wrote in the margin here "seems broader"] which the nearest agnate relative took. That provision was repealed by law 12 of this title.

We might pursue the subject of grandchildren further. If they were born before their father was emancipated, and the were not themselves emancipated, they were self-successors, and therefore entitled to inherit the share of their father in the grandfather's estate. Their father, however, though emancipated, was entitled to inherit under the praetorian law by asking for the right of the possession of the inheritance. If he did so, he was compelled to share with his children, bringing his own property into collation for their benefit. Buckland 366.

If the grandchildren were born, however, after the emancipation of their father, they were not entitled to inherit under the civil law, being under the same disability as their emancipated father. But in case their father was dead, they were entitled to ask for the right of possession of the inheritance under the praetorian law, just as their father could have done. Inst. 1.12.9; Inst. 3.6.11; C. 6.55.3; D. 38.6.51; D. 38.6.7 pr; D. 37.4.3 and 6; Paul. 4.8.12; Colquhoun §1367; Muirhead 275; 9 Cujacius 852. In other words, they represented their deceased parent in such case.

The principle of representation, however, while applicable to succession in the direct line, was, for a long time, not applicable to succession in the collateral line. For instance, children of a brother, who, if living, would have been entitled to inherit, were not so entitled. The principle of representation was, however, gradually extended and generally applied by Novels 118 and 127; see note C. 6.58.15.

It seems, in brief, that the rights of grandchildren may be summarized as follows: If they inherited from a grandfather through a son, they inherited the share which that son, their father, would have taken, if living, some of them taking under the civil law, some of them only under the praetorian law. Other grandchildren - that is to say, grandchildren of a man through a daughter and grandchildren of a woman through a son or daughter, inherited only two-thirds of the estate of their grandparent, as representatives of their deceased parent, until Justinian abolished this inequality.

6.55.10. Emperors Honorius and Theodosius to Maximus, Praetorian Prefect.

Whenever the succession of a paternal grandmother who has died, is in question, no inquiry may be made into the change of the mother's legal status. For we look into the status and condition of children in connection with inheritances only when the property of a person who had paternal power over the family is in question.
Given September 27 (420) at Ravenna.

C. Th. 5. 1. 6.

Note.

The grandchildren enumerated in the present law inherited in the manner specified therein notwithstanding their emancipation. Inst. 3.4.2; Buckland, 370; Gothofredus. [Blume neglected to add a specific section here and noted this later with a penciled-in question mark.] This was so, because, so far as women were concerned, emancipation made no difference, but it had a bearing only when the property of the emancipator was involved, or when the rights of an emancipator in the property of his emancipated child, living or deceased, came in question. In other words, it involved only the reciprocal relations between the emancipator and the emancipated. Hence, as stated in the present law, the fact that the mother of children had been emancipated, and her legal status had thereby changed, made no difference as to the right of the children to inherit the property of their grandmother. Cujacius explains this law differently.

6.55.11. Emperors Theodosius and Valentinian to the senate of the city of Rome.

If a son or daughter dies, leaving surviving a mother and children, the latter inherit from their father or mother by operation of law. And the same applies without a doubt, also to great-grandchildren.

Given at Ravenna November 7 (426).

C. Th. 5.1.8.

Note.

The gist of this rescript is that the children of a man or woman inherit from them in preference to the mother of such man or woman.

6.55.12. Emperor Justinian to Mena, Praetorian Prefect.

Whenever anyone, male or female, dies intestate, leaving grandchildren or great-grandchildren of either sex, or other remoter descendants who do not have the right to the possession of an inheritance granted by the edict to descendants, and also leaving agnatic collateral relatives, such agnatic relatives cannot claim the fourth of the property of the decedent, but the descendants alone are called to the succession. This shall govern only future and not past cases.[4]

Given at Constantinople July 1 (528).

[4] [Blume] See note to law 9 of this title (end).