Book VI.
Title LVIII.

Concerning statutory (agnate) heirs.
(De legitimis heredibus.)

D. 38.16; Bas. 45.1.44.

Headnote.

Children of the same father were agnatic relatives of the first degree, adopted children being, generally, unless emancipated, treated as children of the body. Their rights were to some extent considered in C. 6.55, and the present title also contains some provisions relating to them, or to those who were placed on the same footing with them. Many of the laws in this title, however, treat of agnatic relatives, and those made so by statute, of remoter degree, and mainly of those of the second and the third degree.

6.58.1. Emperor Alexander to Cassius and Hermiona.

The law is certain that in connection with succession by right of consanguinity or in connection with the right of possession of an inheritance, which is granted by reason of close kinship, the rights of brothers and sisters are equal, though they are not born of the same mother. Nor is the rule different because you say that your grandfather gave dowries to your aunts.
Promulgated May 7 (223).

Note.

The present case involved an inheritance of a man who left surviving him some sisters, or, as is more probable, some children of sisters, and some children of a brother, also deceased. The latter thought that the former, the sisters or their children, were not entitled to inherit any part of the estate. This was in accordance with Greek law, under which daughters who had received a dowry were not entitled to inherit along with their brothers, or -- at least as was thought by the children of the deceased brother -- along with them - children of the deceased brother. The instant rescript was addressed to at lease one Greek -- Hermiona. But the Roman law was different from the Greek, which it supplanted. In fact, if the estate leaver left sisters and no brothers, but only children of a brother, the sisters took the whole estate. Law 3.h.t. See Mitteis, R.R.u.V.R. 236, 244, 348.

6.58.2. The same to Tatiana and others.

If you did not acquire the inheritance of the woman who made you her heir, for the benefit of your father, and afterwards, when your father died you repudiated his inheritance, but accepted the former one, the president of the province will not be unaware that the property of the woman whose heir you were made, must be separated from that of your father.
Promulgated April 8 (239).

Note.

A father had no rights in the property of an emancipated son, and the latter's acquisitions did not belong to the father. But the property of an unemancipated son at

first belonged absolutely to the father; the son had no rights therein except what might be voluntarily conceded by the father. These rights of the father were more and more limited by law, as shown in headnote to C. 6.60, and laws there mentioned, so that finally all property acquired by the son, other than that derived from the father, belonged to the son, subject to usufructuary rights of the father. Sohm, Institutes 505, 506. If a son acquired property which could not be claimed by the father, and he also had a right to accept an inheritance of his father, he could repudiate the latter and accept the former, without commingling the property, and creditors of the inheritance could not claim the former.

6.58.3. Emperor Decius to Asclepiodota.

The law is clear that women may, by right of consanguinity, be admitted to the succession of persons dying intestate. Hence, since the inheritance of your brother who died intestate, belongs to you by right of consanguinity, the sons of your other brother demand without reason to be admitted to the succession. For no rights by reason of agnatic relationship exist (in this case) and the inheritance, by virtue of the praetorian law, belongs to you, who are related in the second degree rather than to the sons of your brother, who are related in the third degree.
Promulgated December 4 (250).

Note.

In this case the sister was an agnate relative of the brother. Her relationship to him was of the second degree; the relationship of the children of another deceased brother to the brother in question was of the third degree. Headnote (7) C. 6.9. The nearest agnate had preference over those of remoter degree, and representation of a person deceased was not recognized when it came to collateral relatives. Headnote (6) C. 6.9; 9 Cujacius 860. So in this case, the sister had the superior right. This was changed by Justinian by Novels 118 and 127, appended to C. 6.59, giving children of deceased the same rights in such case as their parent would have had, if living. The instant rescript is addressed to a Greek, and under Greek law the nephews would have excluded their aunts from the estate. Mitteis, R.R.u.V.R. 349.

6.58.4. Emperors Diocletian and Maximian to Caecilius.

If the grandson of your uncle made no will, or if he made a will when he was still under the age of fourteen years, and you have the right to his inheritance by reason of agnatic relationship, you are protected in your legal right without any grant of the right of possession of the inheritance.
Promulgated July 15 (290).

Note.

Agnate relatives who were entitled to an inheritance became heirs under the civil law, and were not required to ask for the right of possession of the inheritance under the praetorian law, though they might ask for it, if they wished. Headnote C. 6.9 (6). They were, however, required to accept either formally or informally. Headnote C. 6.30; C. 6.30.3; Hunter 876.

6.58.5. The same Emperors and the Caesars to Cyrilla.

It is certain that agnatic rights have the preference over cognatic right in connection with intestate succession.
Subscribed June 16 (293) at Sirmium.

Note.

By Novel 118, appended to C. 6.59, Justinian placed agnatic and cognatic relatives of the same degree on the same footing, and hence the present law was thereby repealed. This was also true with law 7 of this title.

6.58.6. The same to Claudiana.

A brother can inherit from a decedent by reason of consanguinity, if the heirs of the body of the decedent abstain from or repudiate the inheritance.
Subscribed December 31 (293).

6.58.7. The same to Ammianus.

A paternal uncle and a maternal aunt, who stand in the third degree of relationship to the decedent, do not have equal rights to inherit on intestacy, for the brother of the father (paternal uncle) has, by reason of the right of agnatic relationship, preference over the sister of the mother (maternal aunt).[1]
Subscribed at Sirmium February 14 (294).

6.58.8. The same to Silanus.

If you, pursuant to the benefit of the Cornelian law[2], and by right of agnatic relationship, inherited from those whose property is in question, and who died among the enemy, and you entered upon the inheritance or sought the right of possession of the inheritance, you are not forbidden to sue to recover the property.
Subscribed at Sirmium July 7 (293).

6.58.9. The same to Damagora.

It is not doubtful that a sister has preference over a maternal uncle in inheriting on intestacy.
Subscribed at Nicomedia June 26 (294).

6.58.10. Emperors Theodosius and Valentinian to Florentius, Praetorian Prefect.

Persons who are by law called to the succession of a deceased minor under the age of puberty may know that if they fail for one year after his father died to ask for the appointment of a guardian for him, according to law, they will be denied every right of succession of the minor, either on intestacy or by virtue of any substitution, if he dies while under the age of puberty.[3]
Given at Constantinople July 10 (439).

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[1] [Blume] Repealed by Novel 118.
[2] [Blume] The Cornelian law provided that special military property possessed by captives, belonged, if they died in captivity, to their heirs. D. 49.15.22.3.
[3] [Blume] See also C. 6.56.3; C. 5.31.8.

6.58.11. Emperor Anastasius to Constantinus, Praetorian Prefect.

If a man has asked, pursuant to our constitution (C. 8.48.5) that his children be emancipated in accordance with an imperial rescript and had also asked that the statutory rights of the person to be emancipated should not be extinguished by the emancipation, then all the rights in favor of the emancipated persons against others, related to them in this (statutory) manner, as well as the rights in favor of others against the person emancipated, shall remain unchanged in connection with inheritances, successions, guardianship or other matters.

Given at Constantinople July 18 (502).

Note.

This shows that where an emancipation was made pursuant to imperial rescript all statutory rights to inherit could be reserved for the person emancipated. The last clause means, among other things, that in such connection the duty which he or she owed, namely, that of collation or bringing his or her own property into hotchpot, should exist in favor of the coheirs. Hence, in some editions this clause is added: "But they must bring their property into collation, when the occasion therefor arises, according to the law provided concerning emancipated persons, as though the emancipation had been complete." That provision is made in C. 6.20.18. See also law 13 of this title.

6.58.12. Emperor Justinian to Johannes, Praetorian Prefect.

We have been asked by the guild of imperial advocates whether when a woman more than fifty years old gives birth to a child, such offspring could be the father's heir and take an inheritance under him. 1. We ordain that although such birth is remarkable and only happens rarely, still none of such children who are known to be nature's product, must be rejected, but they shall have the same rights which are given by law to other children, in connection with all successions, testate or intestate. 2. In a word, those whom nature made like others, shall not be treated dissimilarly, especially since by a former law (C. 5.4.27), we permitted marriages by women of that age, not permitting them to be considered unlike others.

Given at Constantinople October 18 (532).

6.58.13. The same to Johannes, Praetorian Prefect.

A doubt existed as to emancipated children who were emancipated by their father pursuant to an imperial rescript written to the father. For since the Anastasian law (8.48.5.6), is known to preserve all legal rights for the brothers and sisters, there was a doubt, in case such emancipated child died without descendants, whether his succession would devolve upon his brother and sister or on his surviving father. We think that such doubt should be ended by a brief and plain response and we, therefore, ordain that as in case of property of mothers and of others, in reference to which we have already enacted a law (C. 6.59.11) the fee to such inheritance, too, shall entirely belong to the brothers and sisters, but all of the usufruct to the father, whether he remains a widower or remarries, and whether they[4] were freed from paternal power pursuant to an imperial rescript of in any other legal manner. 2. For since the father enjoys the usufruct, and he also naturally desires his property to go to his other children, why, since the Anastasian

[4] Blume penciled in here: “See 6.56.7.”

law looks after the interests of brothers and sisters in one point, should we not extend fuller aid, letting the father have the usufruct and giving to the brothers and sisters the fee of such property? 3. We except herefrom maternal property. In such case if there are brothers and sisters of the same mother,[5] they only shall be called to the inheritance; if there are none, then, like other property, it shall go to all the brothers and sisters, so that the method of treatment will be definite in connection with all matters, and will not be doubtful because of difference in persons or things.
Given at Constantinople November 1 (531).

Note.

This law is related to law 11 of this title, and directs how the property of a deceased brother, who had been emancipated in the manner stated, should be inherited. Property, however, which such son had derived from his mother, went to those of his brothers and sisters who had the same mother with him, unless he should have none of those. And this justly, for brothers and sisters who might have the same father with him, but not the same mother, would be related to him, but not to the mother. By the provisions of Novel 84, appended to C. 6.59, brothers and sisters of full blood were preferred to those of half blood and this principle was maintained in Novel 118.[6]

6.58.14. The same to Johannes, Praetorian Prefect.

The interests of the Roman people were well looked after by the law of the twelve tables, which considered that a uniform rule should be observed in connection with agnatic males and females in relation to their inheritance and their children[7], making no discrimination between them as to succession by them, since nature creates both, so that each might continue to exist through their reciprocal aid, and when one is destroyed the other goes to destruction also. 1. But posterity, employing too much technicality, introduced an unjust difference, as Julius Paulus clearly shows in the beginning of his book on the Tertullian senate decree. 2. How could it be tolerable that daughters in the power of their father should be called to the latter's succession, in case of intestacy, just as males; that sisters should claim the same rights (as males) by reason of consanguinity, but that agnatic females or remoter degree, not related as sisters (si jura consanguinitatis non possident) should be excluded from a succession which is open to males? 3. Why should not a father's sister be called to the succession of a brother's son along with the males, and why should one rule be observed in the case of a paternal aunt, another in the case of a paternal uncle? Or for what reason is a brother's son called to the succession of a paternal uncle, while excluding his full-blood sister therefrom? 4. We think that the venerable provisions of the ancient law should have preference over the new law, and we ordain that all agnatic persons, that is the descendants through males, whether males or females, shall be equally and alike called tot eh right of statutory succession in case of intestacy, in accordance with the respective degree of relationship, and females are not to be excluded simply because they do not come within the rule of consanguinity as a sister.

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[5] Here is penciled: “See C. 6.61.”

[6] Blume penciled in here the following note: “Applies only if no mother survived. If one survived, C. 6.56.7 applied. 2 Vangerow 43. Maternal property excepted, apparently only in so far as fee was concerned, not as to usufruct.”

[7] [Blume] Text has "libertis," but should eventually be "liberis."

5. For since the rights of blood remain uncorrupted through the male sex, why offend nature and chance any agnatic right, since this matter contains within itself a very grave injury, which, because it is an internal wound, is unknown to most. Since males are by the right of agnation, called to the succession of these women, who can bear to see that the succession of the latter should legally devolve on the former, whole the women themselves should not, by the same right, be able to inherit either from each other or from males, but should be punished solely because they are born women, and punish innocent offspring for a paternal fault - if it is a fault. 6. Therefore, following the law of the twelve tables in such cases, and correcting a recent law by one still more recent, we, out of regard for family-relationship, grant the right of statutory (agnatic) succession to one degree of cognate relationship; so that, not only shall a brother's son and daughter be called to the succession of a paternal uncle, but, according to what we have already said, the son and daughter also of a sister of full-blood, or of a sister of half-blood (through the mother only), but no other person shall, together with the former, inherit from their maternal uncle, so that when a person dies who is paternal uncle to the children of his brother, and maternal uncle to the offspring of his sister, the inheritance shall go to all alike, just as though they all inherited by statutory (agnatic) right, provided, of course, that no brother or sister (of the decedent) survives. For such person take precedence and if they accept the inheritance, the other degrees are entirely excluded. 7. And it must be further observed that the succession must be divided per capita and not per stirpes, and that this degree (only) is transferred to the statutory (agnatic) order of succession. All other rights of succession shall remain as they are under the law in force at the present time. 8. Inheritances, where death has already taken place, shall be distributed according to the provisions of former laws.
Given November 27 (531).

Note.

Antiquity had preferred males to females. Male-agnates - persons tracing their relationship through males - had reciprocal rights of succession, however remote the degree of relationship; but the rule as regards females was, that they could not succeed as agates to anyone more remotely related to them than a brother, while they themselves could be succeeded by their male agnates, however distant the connection. Thus a male could take the inheritance of a daughter of a brother or paternal uncle or aunt, but a female of the same degree of relationship could not take his, simply because males were preferred to females. This inequality was reduced by the present law. Inst. 3.2.3.

But Justinian went further in this law and took another step in the equalization of agnatic and cognate relationship, and transferred to cognate relative to the rank of an agnatic relative; for the children of a sister were not agnates, but simply cognates of their maternal uncle, and yet were permitted to inherit from their paternal uncle along with the children of a brother of such paternal uncle. The equalization here mentioned stopped at that point, but was a distinct forerunner of the equalization between all agnates and cognates by Novel 118.

6.58.15. The same to Johannes, Praetorian Prefect.

We remember that we previously promulgated an imperial constitution by which, following in the footsteps of the twelve tables, we ordained that all of the agnatic descendants, male or female, should inherit by statutory (agnatic) right, so that, inasmuch

as they are succeeded by agnatic heirs, they themselves should also be able to inherit from the latter. 1. In that constitution we transferred one degree of cognates to the order of statutory (agnatic) heirs, namely sons and daughters of a sister of full-blood and of half-blood (by the mother). That constitution shall, we order, remain in full force, and the tenor of it is also contained in our Institutes[8]. 1a. Upon more careful consideration, we have thought it necessary to include in our laws, in more perfect form, whatever useful provisions is found in the praetorian law. 1b. Since, therefore, it is perfectly clear that the praetor called an emancipated son, though his status was technically lowered[9] to the succession of his father, without diminution of rights, but not to the succession of his brothers and sisters, and since his children id not by statutory (agnatic) right succeed to their paternal uncles, we have thought it necessary to correct this first, and to perfect the Anastasian law, so that not only shall an emancipate son or daughter succeed, like unemancipated children, to the property of the father, but of brothers and sisters also, and whether all are emancipated or some are not, they shall inherit from each other with equal right, and not, as provided by the Anastasian law, with and diminution. We have thought it proper to ordain this as to emancipated children. 2. But further, we do not permit half brothers or half sisters (by the mother) to be left simply in the place of cognates (without legal right to inherit). For as they are so near in degree, we justly ordain that they are to be called along with their agnatic brothers and sisters, without distinction and as though they were of full-blood, so that, being of the second degree, and found worthy of legal succession, they shall precede all others of a remoter degree, though statutory (agnatic) heirs. And these beneficial provisions are sufficient concerning succession by those of the second degree. 3. Moreover, since succession was sometimes granted to the relatives of the third degree of the collateral line in which antiquity placed paternal uncles, and sons of brothers or sisters, we order that with them shall be called the son and daughter only of an emancipated brother or sister, whether they are themselves emancipated or not, and no one of remoter degree. Likewise the son and daughter - if of the agnatic line - of a half-brother and of a full-blood or half-blood sister (by the mother), shall be called reciprocally for each other, as we have already ordained, so that all persons of the third degree who by the ancient law or by our liberality are given the prerogative of statutory heirs, shall be equally called. 3a. The right of succession applies if those of the second degree renounce the inheritance and refuse to enter on it, and there is no one else of the second degree, who can or wishes to succeed; for in that case those whom we have in the present law enumerated as belonging to the third degree, shall succeed in place of those who refuse. 3b. It is further to be observed, that the inheritance shall be divided, not per stirpes but per capita. All other inheritances shall be governed by the law heretofore in force, and no cognate beyond the above mentioned degrees shall receive agnatic rights, but his place and degree shall remain unchanged. Moreover, those cognates whom we have given the right of statutory (agnatic) succession, must also, in turn, bear the burdens of guardianship, so that all males among them of legal age, according to the tenor of our constitution, shall not only enjoy a benefit but also be subjected to a burden. 5. Cases that arose in the past and have been settled by judicial decree or friendly compromise, shall not be reopened by reason of this law.

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[8] [Blume] Inst. 3.2.4.

[9] [Blume] The emancipation technically caused his change (lowering) of status.

Given at Constantinople October 15 (534).

Note.

In the present law, another step was taken in the equalization of agnatic and cognatic relationship. An emancipated child was not an agnatic relative. He ceased to be a member of the family. But the praetor stepped in and gave him, upon application, the same rights to inherit from his father, or other paternal ascendants having paternal power, which were possessed by an unemancipated child. But the praetor went no further. The present law extended his rights to inherit from his collateral relatives - that is to say, from his deceased brothers and sisters. Anastasius had previously granted such right with limitations. That law is not extant, but is referred to here and also in C. 5.30.4, and gave to emancipated children only two-thirds of what unemancipated children would receive in such case. The present law placed all the children on the same footing in this respect.

The Anastasian law had not mentioned children of an emancipated child. Justinian gave such children the same rights to inherit from uncles as were given to children of an unemancipated child. It must, however, be borne in mind that the principle that children represented their deceased parents applied - before the enactment of Novels 118 and 127 - only to successions in direct, and not to successions in the collateral line. The nearest in degree inherited in the latter case. Brothers and sisters were of the second degree; nephews and nieces of the third degree. Hence the latter did not inherit if any of the former were living. Inst. 3.2.4.