

Book VI.
Title IX.

Those who are entitle to the right to the possession of an inheritance (bonorum possessio) and within what time.

(Qui admitti ad bonorum possessionem possunt et intra quod tempus.)

Bas. 40.1.17.

Headnote.

The subject of bonorum possessio, throughout translated as the “right of possession of an inheritance,” sounds strange to our ears, and is, on first view, somewhat puzzling, and an attempt will be made to make it clear, without stating too many details here.

1. We must bear in mid that the statute or common law of Rome was but a portion of the whole body of the Roman law, and that the praetor, the Roman judge, modified that law from time to time, until the edict was put into permanent form in the early part of the empire. This action on the part of the praetor is well illustrated in connection with the law of inheritances. If, under our civilization the system of succession to the property of decedents or the details thereof, are not considered just, the legislature will remedy the situation, and the right of succession is purely statutory. Not so in Rome. There was a system of succession, origination with the Twelve Tables, or earlier, which was the statutory system of succession. It was based primarily on the theory of the unity of a family, with a man, the oldest male ascendant living who had paternal power as set forth in C. 8.46, as the head thereof, and that the property of the head of the family should always remain within that family. Only agnate relationship - relationship through the males - was recognized. Descendants and ascendants through females only did not belong to the family; even emancipated children passed outside of the circle thereof, and they were not entitled to any right of succession. A mother, not being related to her children by right of agnatic relationship, could not inherit from them, nor they from her.

2. Without attempting to state when or in what instance the praetor began to liberalize the requirements in regard to inheritances, testate and intestate, and encroached on the statutory law, he established an equitable system of law in connection with successions. He recognized the statutory law, except only in so far as modified by him, and he gave the persons whom he considered as justly entitled to an inheritance or a portion thereof, the right of possession of the inheritance, not exactly a heir, but as quasi heir. He made, in effect, an order, in other words, that such and such a person should be recognized as one who was entitled to an inheritance or a portion thereof. And he made his system complete. Thus, while he admitted an emancipated child, and gave him the right to the possession of the inheritance, he did not discriminate against the unemancipated child, but admitted him as well, although the latter might well be content with his rights under the statute. He established therefore a praetorian system of succession, complete in itself, which for many centuries and to the time of Justinian, was a separate, though closely related, system, to that under the statutes. Justinian, by Novel 118, practically abolished the praetorian system and made all rights of succession

statutory. Up to the time that the praetorian edict was put into permanent form, the praetorian system was the most flexible, although it embodied within its scope some statutory regulations. But after that time the changes came either through interpretation of jurists or through direct statutory legislation, and there was considerable of that. The praetor, for instance, gave no relief to grandchildren of a man through females or to grandchildren of women, but the statutes did. C. 6.55.9. So children were not originally able to inherit from their mothers as already stated, but an early statute remedied that. C. 6.57. So mothers were given the right to inherit from their children by statute. C. 6.56. The course of statutory modifications is clearly shown in a number of laws contained in titles 55 to 59 inclusive in this book.

3. Let us consider more in detail just how the praetor modified the statutory law, and whom he recognized as entitled to inherit. And first as to testate succession: (a) In the first place, his requirements as to the formality of executing a will were not so strict. If a will was executed in the presence of seven witnesses, he recognized it as valid, though it lacked some of the formalities under the statutory law. This subject is more fully dealt with at title 11 of this book; (b) If a son, and later all children, were not appointed as heirs in the will, he gave the right of possession of the inheritance to them in opposition to the will (*contra tabulas*). In other words, he virtually set the will aside. This was true as to emancipated sons as well as to unemancipated sons, although the latter did not need this help. The rule as to daughters was not always uniform. During a great period they could be let in only for their share, but Justinian finally made the rule uniform as to all children. This subject is more fully treated at C. 6.12, and note C. 6.28.4. The rule applied only to the testament of a father or other paternal ancestor, the head of the family.

4. We come then to intestate succession, excluding from consideration here the succession of children to mothers, and mothers to children, of fathers to children (C. 6.56) and the rights of grandchildren (C. 6.55.9). Under the statutory right of succession, the property of a decedent devolved (1) upon unemancipated children, (2) on the nearest collateral agnate, and (3) upon the clansmen or the public treasury. All emancipated children and other cognate relatives - kinsmen by blood - were excluded. The praetor enlarged the number of classes that could take, upon asking for the right of possession of the inheritance. He established eight classes of heirs that could take, the first class consisting of the children, whether emancipated or not, the second class consisting of the nearest agnate - this class corresponding with the second class under the statutory right of succession. Justinian reduced these eight classes to four, namely: Class 1: Children (including adopted children not emancipated). Class 2: Collateral agnate relatives; if, under Justinian, the nearest agnate did not take, the next nearest took. Class 3: Cognate relatives, in accordance with the degree of relationship. Class 4: Husband and wife reciprocally. The rights of these classes will now be considered somewhat more in detail.

5. Children. Children were considered the natural heirs of their father, and they inherited equally. A child who was not emancipated, but remained in the power of his or her father, was what was termed a *suus* (plural *sui*), which has been translated by some as "self-successor," by others as "indefeasible heir." Such children were, in other words (adopted children, if not emancipated, being treated the same as other children), heirs of the body not emancipated, and were called *sui*, as opposed to *extranei* - outside heirs.

Such children were entitled to inherit equally under both systems of succession heretofore mentioned; that is to say, they became heirs, on intestacy, by mere operation of law, but they were also entitled to the right of possession (bonorum possession) of the inheritance under the praetorian law, if they wished it. They did not need to ask for such right; but it was given to them, if they asked for it. An emancipated child, on the other hand, was no longer a member of the family; he or she was not a *suus*, a self-successor, and did not inherit from the father by mere operation of law; but by reason of the justice of his or her position, he or she was able to succeed under the system of succession, created by the praetor; but he or she must ask to succeed under that law; that is to say, must ask to obtain the right of possession of the inheritance.

6. Agnates. While children, except those that were emancipated, were included in the term agnates, reference here is made to other agnates, in determining the order of succession next to the children. Agnates were those cognates - relatives by blood - who traced their relationship through males, or in other words, cognates on the father's side. Thus brothers by the same father were agnates, whether by the same mother or not; so an uncle was an agnate to his brother's son, and the children of brothers by the same father were on another's agnates. For some time male agnates had reciprocal rights of succession, but females could not succeed as agnates 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 man could take the inheritance of the daughter, either of a brother or of a paternal uncle or aunt, but she could not take that of the man. But the rights of women were gradually extended. C. 6.58.14; Nov. 118. The agnates did not, of course, all succeed with the same rights. Aside from the fact, as heretofore mentioned, that children, including those that were emancipated, altogether excluded agnates of remoter degree, preference was given to the others also in accordance with the degree of relationship. These degrees will be mentioned later. And it was the law up to the time of Justinian, that only the nearest agnates were called. If they did not accept the inheritance, no other agnates, as such, could take, but the inheritance then went to the nearest cognate relatives. But Justinian altered this law, and if one degree of agnates refused to accept, the next degree came in, before the cognates, as such, could take. Inst. 3.2. Agnates were, like unemancipated children, entitled to inherit under the civil law, but like them could ask for the right of possession, though they were not compelled to do so. C. 6.58.4 and 8.

7. Cognates. In default of children (grandchildren), and other agnates, the cognate-blood-relatives in general were entitled to the inheritance, in case the decedent died intestate, the nearest in degree taking it. But they did not inherit under both systems of succession, like children and agnates, but only under the praetorian system; in other words, they were required to ask for the right of possession of the inheritance. It might happen that the cognate relative entitled to the inheritance, or part of it, was also an agnate, but if he had not accepted the inheritance, or had not asked for the right of possession within the time provided by law or by the order of the praetor, he might have to share with some other cognate. Let us assume, for instance, that a son of a brother or the decedent, was entitled to the inheritance as an agnate,¹ and that he did not accept the inheritance, within the time mentioned, in either of the modes provided by law and hereinafter again referred to; and let us assume further, that there was also a son of a

¹ In the margin next to this sentence, Blume wrote: "as to wife—Woess 45 ff.

sister of the decedent, who was not entitled to any portion of the inheritance by right of agnation; they were related to the decedent in the same degree, and hence the former was required in such case to share the inheritance with the latter. By Novel 118, the difference between agnates and cognates was abolished, and both classes inherited by operation of law, so that none of them, in order to inherit, were required, thereafter, to ask for the right of possession. In this connection, we shall consider:

Degrees of cognate relationship.

Each generation between ascendants and descendants counted one degree; thus from father to son was one degree; from grandfather to grandson two degrees. The degree of collaterals, descendants of a common ancestor, was determined by counting each² way from the common ancestor. Thus to determine the degree of relationship between brothers, count from one brother to the father (or mother) which was one degree, and from the father, again, to the other brother, which was also one degree, making the relationship accordingly in the second degree. Take two first cousins: The common ancestor was a grandfather (or grandmother); there were two degrees from the cousins to the grandfather, in each case; adding these degrees makes four degrees, which was the degree of relationship between the cousins. The common ancestor might be either male or female. The Roman law provided no special names beyond the sixth degree. To be more specific, let us enumerate the relationship to the fourth degree. In the first degree: Going up, father and mother; coming down, son and daughter. In the second degree: Going up, Grandfather, grandmother; coming down, grandson, granddaughter; collaterally, brother, sister. In the third degree: Going up, great-grandfather, great-grandmother; coming down, great-grandson, great-granddaughter; collaterally, child of brother or sister; uncle or aunt on father's or mother's side. Fourth degree: Going up, great-great-grandfather, great-great-grandmother; coming down, great-great-grandson, great-great-granddaughter; collaterally, first cousins, a great uncle or great aunt on the father's or mother's side; that is to say, a grandfather's or grandmother's brother or sister; a brother's or sister's grandchild.

8. An heir stepped into the shoes of the decedent and was liable, if he accepted the inheritance, for all of the debts of the estate. Justinian modified this principle (C. 6.30.22) by providing that if the heir made an inventory he should not be liable for more than he received from the estate. But until this modification, at least, the question for an heir whether to accept an inheritance or not was of great importance. Now self-successors, unemancipated children and other descendants under paternal power, were the natural heirs of the decedent, and the inheritance of the male parent under whose power they were, devolved upon them (in the absence of disinheritance) by operation of law. But the praetor permitted them to abstain from the inheritance. He did not say that they were not heirs, but he said so in effect, and did so by simply ignoring them in case they did not want to accept, and granted the right of possession of the inheritance to someone else - namely, the heirs next in line, who applied for it.

All other heirs (except slaves who might become compulsory heirs - C. 6.27) were required to accept in order to get any benefit from the inheritance - in order to become heirs, in fact - and the two systems of succession had their counterpart. Under the praetorian system, the heir was required to apply within a time fixed, for the right of possession of the inheritance. C. 6.9.1 note. An heir under a will or an heir on intestacy

² Blume has penciled in here "both?"

under the civil law (other than a self-successor) was required to make “entrance” (aditio) upon it. The older law required considerable formality (called *cretio*). Under the later law, however, any act or declaration that manifested the intention of the heir to accept was sufficient. Thus intermeddling with the estate was construed as acceptance (in all cases including that of self-successors), and the heir was thereupon bound thereby, except that a minor might obtain restitution of his rights. Inst. 2.19.7. See C. 6.30 on this subject generally.

9. The right of possession granted to a praetorian heir as heretofore mentioned should be more fully explained. A petition for the right, and an order granting it, were, at least under the later law, ordinarily very informal. C. 6.9.8 and 9, and note; Inst. 3.9.12; Buckland 384-385. For an exception, in the case of a minor, see C. 6.16. No particular investigation was made. It could easily happen, therefore, that the applicant for the right should not have been granted it. However, in such case it was without effect (*sine re*); he acquired no rights under it, if some other person with a better right claimed it, or if none with a better right claimed it, but an heir under the statutory system of succession had a better right, and asserted it, the former would, in the long run, gain nothing. The right of the possession to the inheritance so granted by the judge or magistrate, was in any event but a legal right; it amounted to no more than a *prima facie* recognition that the grantee of the right was entitled to the inheritance, or a portion of it. The grantee of the right might take peaceable possession of the property of the inheritance, if he could get it; if not, he was required to bring an action for possession, which was under the edictal action *quorum bonorum*, considered at C. 8.2. That action gave only a possessory right. The action for an inheritance, considered at C. 3.31, also was open to him, in which, if successful, the title in him as heir was established.

10. A number of matters relating to inheritances are not contained in this book. That is particularly true as to many of the remedies given an heir. The following subjects are found elsewhere: Action to set a will aside as unjust; C. 3.28: Extravagant gifts by parents to children; C. 3.29, C. 3.30: Action for an inheritance; C. 3.31: Action in partition; C. 3.36 and 38: Actions for debts, by or against heirs; C. 4.16: Succession of illegitimate children; C. 5.27: Action to obtain possession; C. 8.2: Inheritances of decurions; C. 10.35: Special provisions as to heretics; C. 1.5: Devolution of dowry and prenuptial gift in case of remarriage of surviving parent; C. 5.9. Other references will be found elsewhere in the notes.

6.9.1. Emperors Severus and Antoninus to Macrina.

Since the right given by law to an unemancipated son, to ask for the right of possession of an inheritance, may be exercised without the father’s knowledge and would inure (partially) to the father’s benefit, upon his ratification thereof, such right is lost when the time (for claiming it) has elapsed.

Without day or consul.

Note.

Bas. 40.1.17 states as to this law: “Every (petition for the) right of possession is barred within a certain time. A son may ask for such right of possession even without the knowledge of his father; and if the father ratifies what he has done, he acquires the usufruct in the property. If the father does not ratify, the son has both the ownership and the usufruct.”

In other words, when the son had the right aforesaid to ask for the right to the possession of an inheritance, he might do so without the consent of his father, and if he did not ask for it within the time allowed by law, the loss was his, as well as the father's, though ordinarily the son's acts could not prejudice the rights of the father. The estate here spoken of accrued to the son doubtless from an outside source, and in such case, as stated in C. 6.61.8, the father received the usufruct of the property during his life, and not the ownership thereof, as formerly.

In general, the time allowed to ask for the right of possession was one hundred days. See the next law. But in the case of ascendants and descendants, whether claiming under a will or by intestacy, a year was allowed. Inst. 3.9.9. The days counted were utiles, i.e. during which the party was able to claim the right. But this did not mean much, since the judge in nearly all the cases could grant the right in chambers or in any other place. Further, the time did not run, until the party was certain of his right, and hence the time might be different even for persons who had the same priority. Buckland, Roman Law 383. Hence, too, theoretically, the time in which the last persons in priority could claim the right might be very long, but since it was generally known whether, for instance, children or agnates or cognates existed, and since persons who refused to claim the right were thereafter excluded, the general result was that in an ordinary case no very long time would elapse before the claim, however remote, could come in. Buckland supra, 384.

6.9.2. The same Emperor to Crispinus.

If you are entitled to the right of possession of an inheritance only on account of relationship, you had one hundred judicial days from the time you know of the death of the deceased, in which to claim it.
Promulgated November 3 (205).

Note.

It is clear from the fact that only one hundred days were given to claim the right, that the claimant in this case was neither parent nor child.

6.9.3. Emperors Diocletian and Maximian to Crescentinus.

There is no doubt that on acceptance the right of possession of an inheritance may be made in the name of an infant, though it died before it could speak.
Promulgated December 28 (286).

6.9.4. The same Emperors and the Caesars to Marcellus.

If an emancipated daughter failed to claim the right of the possession of an inheritance, which is given to descendants (unde liberi), within a year, she could not transmit any claim to the inheritance to her heirs.
Given April 18 (294) at Herclea.

Note.

It must be remembered that an emancipated child did not inherit any property from her father under the civil (common) law of Rome, but the praetor gave her the right of bonorum possessio, which she might claim within a year. In order to be able to transmit the rights therein to an heir, it was required to be accepted. Note C. 6.30.3.

6.9.5. The same Emperors and the Caesars to Maximus.

As long as the question of fact is undecided, as to whether the right of possession to an inheritance is due pursuant to testament or on intestacy, and on which ground, you are unnecessarily solicitous lest the time fixed for claiming possession of the inheritance pass by.

(294)

Note.

See note to C. 6.9.1, which shows that the time for asking the right to the possession of an inheritance did not commence to run till the heir was certain of this claim. This relates to ignorance of a fact. Ignorance of law was, generally, no excuse, as shown by the next law, although all formalities were abolished, as shown by law 9 of this title.

6.9.6. The same Emperors and the Caesars to Frantina.

It is clear that ignorance of the law cannot excuse even women as to the time fixed in the perpetual edict, for claiming the right of the possession of an inheritance. Given at Sirmium April 29 (294).

Note.

The rule that ignorance of the law excuses no one, was not carried to the same extent by the Romans as it is with us. For unless a man was himself versed in the law, or had an opportunity to consult one who knew the law, he was excused. D. 37.1.10; D. 38.15.2.5. The Romans would probably not have applied the exception under a civilization such as ours.

6.9.7. Part of the letter of the Emperors Constantius and Maximian and of the Caesars to Severus and Maximinus.

It has been plainly declared that a guardian may claim the right of possession of an inheritance in the name of a minor under the age of puberty. 1. Such minor himself, moreover, cannot have the right to possession,³ without the guardian's consent, unless a proper judge knowingly gives it to him without such consent, for in such case the advantage from the inheritance must be taken to have accrued to the minor by praetorian right.

Given September 8 (305).

Note.

See law 3 of this title. Where the judge granted the right without application, on the part of the guardian, he did so after investigation, so as to determine whether the estate was solvent or not, and he entered a formal decree in such case. C. 6.30.18; 8 Donnellus 1194.

6.9.8. Emperor Constantine to Dionysius.

Whoever is confident that some property rightfully belongs to him by reason of inheriting it from parents or relatives, may know that he will not be prejudiced, if he, through his rusticity, ignorance or the fact, absence or any other (equitable) reason, has failed to claim the right of possession of the inheritance, since this ordinance changed the vigor of such customary requirement.

³ Here Blume lined out "such equitable heirship" and penciled in possession.

Given at Helispalis March 14 (320 or 326).

6.9.9. The same Emperor to the people.

In order to banish sophistry of empty words, we order that a declaration accepting an inheritance, may be made in any sort of manner, before any judge or duumvir, within the times fixed by former law, adding that, though made too hastily, and within the time allotted to another, who is nearer in degree of relationship, it shall have the same efficacy as if made within the time fixed for him.

Given at Laodicea, February 1(339).

Note.

The two foregoing laws abolished much of the formality that had existed in connection with obtaining the right of possession of an inheritance. It had formerly been necessary to address a formal petition to the judge with plenary jurisdiction and an order was made by the judge. Under these laws no further petitions were required, but all that remained necessary was for the applicant to go before a magistrate who might be a municipal official, and signify to him in any manner whatever that he desired to take and accept the inheritance. That fact alone gave him the right that he formerly obtained under a petition, provided, of course, that he signified his desire within the time allowed by law. The time of the application was not changed, because it was necessary that the rights to an estate should be determined quickly. A record of the proceeding was doubtless made. Buckland 389. The law also seems to apply to an acceptance by a civil law heir. See note C. 6.30.17.

Formerly it was fatal for one to make his claim out of time. If a nephew, for instance, asked for the right during the time that a son had the right to ask for the bonorum possessio, and it happened that the son did not exercise his right at all, the nephew must renew his application, or his rights, too, lapsed. The present constitution changes this and provides that an application that is too early shall not be prejudiced by reason of that fact. Using the same illustration as above; if a nephew made his application too early, and it turned out that a son did not exercise his right, so that the agnates had a right to make the application, the nephew need not renew his application, but would be considered as though made in proper time.