Book V.
Title XXVIII.

Concerning testamentary guardianship.
(Se tutela testamentaria.)

Bas. 37.2.33; D. 26.2. Inst. 1.13.14.

Headnote.

Minority for both men and women ended with the age of 25 years. The age of puberty for boys was 14, for girls 12. C. 5.60.3. The protector of a minor during the age of puberty was called tutor, translated by "guardian; "the protector for a minor over the age of puberty was called curator. There was at times a curator for a minor under the age of puberty; he was then a special guardian, as it were, and was appointed, for instance, when the minor was required to conclude some transaction with his guardian; when there were claims or suits between the minor and the guardian; when the guardian was temporarily unable to act, or was suspended from his guardianship; when certain property at a distance required special management. Mackeldy §639; Inst. 1.23.5. A guardian or curator was not ordinarily appointed for a minor unless such minor was sui juris, that is to say, not under paternal power. Guardianship for a minor sui juris was legally necessary, at least if he had property or expectations. Buckland 172, and when there was a curator his consent was required to transactions of the minor. C. 2.21.3. See also headnote C. 2.21. A curator was absolutely essential to be appointed for him in a few cases, namely when he was in litigation; when he was to receive payment of a debt due him, and when his former guardian should render an account of his administration. Mackeldy §640. Under the earlier law, and lasting even up to the time of Diocletian, lifelong guardianship for women was customary. Gaius 1. 144. 190; Buckland 167. That was out of use in the later law. Guardian ship is generally divided according to the manner of appointment. The first class is that of testamentary guardianship mentioned in the present title.

A father or remoter male ascendant with paternal power (see C. 8.46.2) for the subject of paternal power) had a right to appoint a guardian, by a will or a codicil confirmed by a will, for the children under his power and for the grandchildren under his power, provided the grandchildren would not, on the death of the testator, come under the paternal power of their own father. No confirmation of the appointment by the court was necessary in such case. Inst. 1.13.3. When a father appointed a guardian for his emancipated son who was not appointed as heir in the testament, or where he appointed a guardian by an invalid testament or a codicil not confirmed by a will, the court having jurisdiction would, nevertheless, confirm the appointment as a matter of course. In other cases an appointment would be confirmed by the court if found to be proper, after an investigation; that was true, perhaps, in the case where a mother had appointed a guardian in her testament. MacKeldy §623; and see note to C. 5.28.4. The term tutor is at times used to include curator and vice versa. Minors were frequently entitled to restitution of their rights. That subject is treated in C. 2.21 and subsequent titles. See C. 1.3.31 as to quasi-guardians.

5.28.1. Emperors Severus and Antoninus to Sperata.

If he, whom you state to have been appointed your guardian by the testament of your patroness, did not undertake to act as such, he is not liable to you in any action; for

his appointment as your guardian was not legal. But if he voluntarily managed your property, you can sue him in an action on voluntary agency (negotiorum gestorum). Promulgated July 16 (207).

Note.

A patroness had no right to appoint a guardian. That was true generally in the case of women except mothers. See law 4 of this title.

5.28.2. Emperor Antoninus to Sabinianus.

Although your guardian, legally appointed as such by your father's testament, was living at the time that you became heir, still another guardian was legally appointed in a codicil, and both will be guardians pursuant to the will of the testator, unless he disapproved of the one appointed in the testament when he appointed another in the codicil; for in such case the one appointed later will be sole guardian.
Promulgated April 11 (212).

Note.

Where a guardian was appointed for several minors under the age of puberty, he continued as such guardian for those who had not yet reached the age of puberty although one of them had reached the age. The minor who had reached that age did not become guardian of the remaining minors.

The clause "that is to say, has passed the age of puberty" is probably an interpolation and probably does not belong in the law, and reference was doubtless intended to be made one of the parties (formerly a minor) who had reached the full age of 25 years, and that he did not become guardian simply because he reached that age. When no guardian had been appointed by a will, the nearest make agnate relative became guardian under the statute. Inst. 1.15 pr; D. 26.4.1.1. He was, however, required to be of full age. C. 5.30.5; D. 26.4.8; 2 Karlowa 274. The former minor who had become of age perhaps thought that he should be the guardian in accordance with this rule. But the rule did not apply when a testamentary guardian had been appointed.

5.28.3. Emperor Alexander to Gorgia.

If guardians were appointed for (several of) you in a testament, then although one of you has become of age, that is to say, has passed the age of puberty, the right to the guardianship does not pass to him.
Promulgated December 28 (223).

5.28.4. The same Emperor to Felicianus.

A mother cannot appoint testamentary guardians for her sons unless she appoints the latter as heirs. But though she does not[1] appoint them as heirs, it is customary for the

[1] [Blume] The "not" is not accepted by some authorities. If left in the law, it should, as a whole, be construed to mean that when a mother appointed her children as heirs, she also had the right to appoint a guardian for them. That construction is sometimes adopted. Hunter 710. It seems, however, to be inconsistent with C. 5.29.1; D. 26.2.4; D. 26.3.1.2.2 pr.; D. 26.6.4, indicating that a mother's designation of a guardian was always required to be confirmed, after investigation, in order to be of validity. If that theory is adopted the "not" above mentioned should be left out. Mackeldy §623, adopts this theory; so does Cujacius (9: 516) and that appears to be the prevailing, and seemingly the better, opinion.

presidents to confirm the appointment made by such deceased. If nothing of that kind is done and the guardians appointed (by the will) manage the property of the minor, they will be held to account in an action on quasi-guardianship.
Promulgated May 26 (224).

5.28.5. Emperors Valerian and Gallien to Daphnus.

If a father of minors under the age of puberty wanted another's slave concerning whom you made your demands, to be guardian and also to be a free man, and another guardian had previously been appointed, the slave should be purchased and manumitted before the president and joined as curator.
Promulgated February 27 (260).

Note.

See C. 7.4.10 and 11, showing that in the case mentioned in the present law, the slave appointed as guardian was required to be purchased in order that he might then be manumitted and act as guardian. Freedom for the slave was implied when he was appointed as such guardian. Buckland, 145. The term curator as used in the present law seems to mean the same as guardian.

5.28.6. Emperors Diocletian and Maximian and the Caesars to Donina.

If your father, in his testament, legally appointed your uncle as your guardian, and he has not been excused, sue him before a competent judge in an action on the guardianship concerning his management or neglect in what he should have managed, and he will order that your damages shall be made good as equity may demand.
Subscribed at Sirmium April (294).

Note.

The office of a guardian and curator was a public one and anyone duly appointed was bound to serve unless disqualified or excused. Inst. 1.25 pr. For the subject of excuses see C. 5.62 and Inst. 1.25.

5.28.7. The same Emperors and Caesars to Tryphalna.

If you bring an action on guardianship before the proper judge against the guardian whom you state to have been appointed for you as such by your father—if you were in the latter's power—he, the judge, will order the guardian to pay you what he owes you. But it is not doubtful that no curator can be legally appointed in a testament.
Given at Sirmium April 15 (294).

Note.

If the son was not in his father's power, the appointment of a guardian by the father's testament for the son, was requiring to be confirmed, though as stated in the headnote, that was done without even an inquisition. Unless such confirmation had been ordered, no liability rested on the so-called guardian, because he was not such in fact.

Again a guardian was appointed only for a minor under the age of puberty. The protector of a minor thereafter was a curator, and such curator could not be appointed by a father in his will. C. 2.18.6. The appointment was required to be made by the court, though even in such case the designation in the will was usually confirmed. Inst. 12.23.1. As to appointment of a guardian by a will for an insane person, see C. 5.70 and C. 1.4.27.

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

Guardians may be appointed in testaments written in Greek, so that such appointment is valid as though it had been done by legal language (i.e. the Latin). Given at Constantinople September 12 (439).
Nov. Th. 16.1.8.