Book VI.
Title LX.

Concerning maternal property and property coming from the mother's side.
(De bonis maternis et materni generis.)

Bas. 45.4.

Headnote.

1. Rights of male parent in the property of his children and other descendants in his power.

The titles immediately preceding this dealt with intestate succession. The following two titles deal mainly with another subject, namely the rights which a parent with paternal power had during his lifetime in the property acquired by his descendants in his power during that time. Rights to inherit are mentioned in a few of the laws, but these are in conformity with what has already been stated.

Under the ancient law a family child, i.e. a child under paternal power, could not own any property. Everything that he had belonged to the head of the family, whether that was the father, or grandfather, or, as at times perhaps happened, great-grandfather. Gaius 2.87; Ulpian 19.18; Inst. 2.9; see note C. 8.46.2. The parent might give the child some property to use as his own which was called peculium - herein translated as special property - but he might retake it at will, unless it consisted of a dowry for a daughter or prenuptial gift for a son, in which even the marriage relation entered into by the child created certain rights in the spouse of such child, or unless the son created certain liabilities against the peculium. The property so given by such parent was called peculium profecticium - property acquired from the father or other parent with parental power. This right of property of such parent was, however, gradually diminished until, in the time of Justinian, it was exceedingly limited. The steps by which this was done was by the recognition from time to time of certain other peculium - special property - to which the child had either an absolute or qualified right, to the exclusion of such parent. If the term father is herein used, it must be understood as including male ascendant with paternal power.

In the first place, a son in military service acquired, int he early period of the Roman empire, what was called castrense peculium - herein translated as "special-military-property," consisting generally of all property which he obtained form his parents or relatives or other parties for his equipment, whatever he acquired by his was services; gifts and inheritance from his companions in arms, and everything that he acquired by means of such property. See especially C. 12.36, where some of the limitations are mentioned and C. 3.28.37; C. 49.17. The father had no interest in such property. The soldier held it by absolute right, could sue to protect it, and dispose of it by will as he wished.

The next peculium - or special property - given to a son was called quasi-castrense peculium - herein translated as "quasi-special military property." For about three centuries after soldiers were granted an absolute right in their property acquired by or in connection with their service, no other exceptions to the rights of the parent with paternal power over property held by children or other descendants under paternal power

was recognized. But the empire was reorganized under Diocletian and Constantine the Great; civil offices were separated from military ones, and yet civil officers were treated as though actually still a part of the military force, and frequently bore the name of military officials. They were said to be "in service" (militia), though their functions were limited. It was, accordingly, but natural that the rights of soldiers should be extended to them. This was done gradually, as shown in note to C. 8.46.2. Gifts from the emperor or empress were declared to be the absolute property of the receiver in law 7 of this title. The persons who had such special property could, like soldiers, dispose of it by testament. Inst. 2.11; 2.12 pr.; C. 3.28.37.

We come then to another peculium, much broader in its scope, called "peculium adventicium" - property acquired from others than the head of the family of which this and the next title treat in detail, and the history of which appears somewhat more clearly from the Theodosian Code than here. By a series of three laws (C. Th. 8.18.1-3; C. 6.60.1), Constantine the Great provided that property acquired by children under power from the mother, should not become the property of the father, or other ascendant with parental power, but that such parent should have the usufruct of such property during life. These provisions were limited to the property acquired from the mother and did not include other property, which still became such parent's property as under the ancient law. In 379 A.D., Gratian and Valentinian enacted a law that property given by a maternal grandfather or grandmother or maternal great-grandfather or great-grandmother to their grandchildren or great-grandchildren could not be sold by the parent with paternal power over these grandchildren or great-grandchildren, any more than property acquired by the latter through their mother. C. Th. 8.18.6. This provision was confirmed by Arcadius and Honorius in 395. C. 6.60.2. These provisions then covered property acquired by children, or grandchildren etc. through the mother or the maternal line of relationship. In 426 A.D., Theodosius and Valentinian took a step further, and provided that in any property which a son got through his wife, or a wife through a husband, should not become the property of the parent who had such husband or wife under power. C. 6.61.6. This principle was extended and amplified in the subsequent laws found in the same title, the parent with paternal power having a usufruct in such property during life. Finally Justinian, in 529 A.D., applied these principles to all other property acquired by descendants under paternal power, (C. 6.61. 6; Inst. 2.9), making certain special exceptions in 531 A.D. by law 8 under title 61, in certain cases when the child refused to accept an inheritance. Even the right to a usufruct was denied to the parent with parental power in certain cases mentioned in C. 6.61.7, and note, and Novel 117, c. 1. By Novel 98, children, even though under paternal power, also received the dowry of the wife, if she died, and the prenuptial gift, if the husband died, without reference to the fact whether the survivor remarried or not, that provision having been first made in case of second marriage of the survivor. Similar provisions were made in case of divorce.

2. Line of succession.

An unemancipated child could not make a will except as to special or quasi-special military property. His will was void, if he attempted to dispose of any other of his property. Inst. 2.12 pr. Hence the succession to all other property was necessarily by intestacy. The right of such intestate succession was very clearly established in C. 6.59.11, and C. 6.61.3, and 4 and 6 infra. Now in case of special-military property, the

line of intestate succession was: 1. the children of the deceased; 2. the brothers; 3. the father or other ascendant under whose power he was. Inst. 2. 12pr. The line of succession to maternal property under C. 6.61.3 and 4 was: 1. children, no matter of what marriage; 2. brothers and sisters of the same marriage; i.e. full-blood brothers and sisters; 3. brothers and sisters of another marriage; i.e. half-blood brothers and sisters; 4. the father or other ascendant with paternal power; if the father was himself under power, he took it and not the grandfather. Law 4 herein covers only property acquired through marriage. In C. 6.59.11 supra, the same line of succession was provided for maternal property and property derived through the maternal line. In C. 6.61.6, it was provided that the same line of succession should apply to all other property acquired by descendants under power not derived from the father or ascendant with paternal power. Where the father did not inherit, he retained the usufruct which he had during the child's lifetime. C. 6.56.7.2.

The intestate succession of an emancipated child was at first the same as stated above (C. 6.56.3), but Justinian modified the law and gave to the father and mother in case he left no descendants, but only brothers and sisters as well as a father and mother, the usufruct of the property, equally divided between the mother and father. C. 6.56.7. The changes in Novel 118 have already been mentioned.

6.60.1. Emperor Constantine to the consuls, praetors, tribunes of the people and the senate, greeting.

The property which falls to children by inheritance from the mother shall be in the control of the father to the extent that he has the usufruct thereof while the fee thereof belongs to the children. 1. Moreover, fathers, who have only the usufruct of maternal property, must exercise every care to protect it, must carefully demand, either personally or through a procurator, what is rightfully owing to the children, must diligently defray the expenses out of the income, must resist those bringing law suits and must so manage all things as if they had the whole and complete ownership thereof and were in fact such owner. And if they at sometime alienate anything, the purchaser or donee must himself be careful that he does not, knowingly or ignorantly, receive any part of the property which is prohibited from being so alienated. 2. For the father must show that the property which he gives or sells belongs to himself, and the purchaser may, if he wishes, require a guarantor, because he cannot, whenever the children claim their property, set up the defense of prescription.

Given at Aquileia July 18 (319).

C. Th. 8.18.1.

Note.

Children, as anyone else, were entitled to take under a will made by a mother. They were also entitled to inherit from her under the Orfitian senate decree, considered at C. 6.57. But the usufruct of the property belonged to the father, who had paternal power over them, as long as he lived. That was true also if the property came from remoter ascendants, as mentioned in the next law. Where the child had been emancipated at the time the inheritance devolved upon him or her, or was emancipated thereafter, the rule was somewhat different. That is considered in law 3 of this title. As to guarantor of title see C. 4.38.12 and note.

6.60.2. Emperors Arcadius and Honorius to Florentius, City Prefect.

Whatever property maternal grandparents or great-grandparents have left to a grandson, granddaughter, great-grandson or great-granddaughter by testament, trust, legacy, gift, or by any other mode of bounty or by intestate succession, shall be left unimpaired by the father for the benefit of his son or daughter, and he can no more sell, give or bequeath it or obligate it to another, than he can the maternal property, the usufruct thereof only belonging to him. And as he himself loses power over it, when he dies, it shall be turned over to the son or daughter as his or her special property, and it cannot be claimed by other heirs of the father.

Given at Milan October 15 (395).

6.60.3. Emperors Theodosius and Valentinian to the Senate of the City of Rome.

If children are emancipated during the lifetime of their mother, and the mother, subsequently dies, then, since the father would (ordinarily) receive no benefit (of the mother's property), not even retaining the usufruct thereof, we grant him the usufruct of a portion equal to that inherited by each of the children, whether one or more. 1. And if when the woman died, directing some of the children to be emancipated, leaving others still under paternal power, the husband of the decedent shall have the benefit incident to both of such situations; that is to say, he shall, pursuant to law, have the usufruct of an equal portion of those whom he retains in his power, and he may also receive his reward for the emancipation of the children ordered to be emancipated by the mother, but as to the part of those who were emancipated during the lifetime of the mother, he shall receive the usufruct only of an equal portion received by them, according to what has been said above. 2. In the case of grandsons and granddaughters, the husband shall, upon the death of his wife, without children surviving, receive a benefit pursuant to this law, along with his grandsons or granddaughter; and whether there are one or more grandchildren born of a son or sons who died while under paternal power, he shall enjoy the same rights fixed in cases of children. 2a. For although the present law makes a new provision for grandchildren, still it is proper that in such case the rights of children should not be permitted to be worse than those of grandchildren. 2b. The grandfather, therefore, inheriting along with his grandchildren remaining in his power, shall enjoy the usufruct of all of the property of the inheritance of the grandmother. 2c. If they, too, have been ordered by the decedent to be emancipated, he shall, in the same manner as in the case of children, receive the reward of emancipation, or if he emancipates some and others not, he shall receive such reward from those that are emancipated, and shall receive the usufruct of the property left to those that remain in his power. 3. But if the grandson or granddaughters are children of an emancipated son or daughter, or if they have been emancipated by the grandfather himself during the life of the grandmother, then the grandfather shall have the usufruct of an equal portion which each of them receives. If at the time that they are called to the succession of the grandmother, some of the grandsons or granddaughters are in the power of the grandfather, that is, the husband of the deceased, while others are sui juris, then the grandfather shall receive the reward for emancipation and the usufruct of the property left to the former class of grandchildren, according to the rule above mentioned, and shall receive the same portion of the usufruct as each of the grandchildren sui juris receives. The same rule shall apply to great-

grandchildren of either sex, and if there are children and grandchildren at the same time, the provisions made as to each class shall remain in force and effect.
Given at Ravenna November 6 (426).
C. Th. 8.18.9.

Note.

If a child was emancipated at the time that he or she inherited any property, the father would, ordinarily, have no rights therein. Still, the present law gave him a usufruct in a portion of the property. This portion equaled that of the children, which appears to mean that if, for instance, there was only one child, he had the usufruct of one-half; if two children, he had the usufruct of a third etc. The rule applied also to grandchildren. See also C. 3.28.24; C. 6.25.3.

The law mentions reward for subsequent emancipation. That originally consisted of one-third in fee of the property which the child emancipated had. But Justinian changed this and provided that upon such emancipation the reward should consist of the usufruct of the property of the child emancipated. C. 6.61.6.3; Inst. 2.9.2.

6.60.4. Emperor Leo to Callicrates, Praetorian Prefect of Illyria.

Removing every cause of doubt, we ordain by this clear and succinct law that there shall be no difference as to the usufruct or maternal property, whether the father wants to remain unmarried after the dissolution of the marriage by which he had children, or whether he gives a stepmother to his children; the law enacted in regard to maternal property shall (in either event) remain in force and effect. 1. A father will, accordingly, without question, have the usufruct of the maternal property, though he remarries. And no shameless, accusing voice of children or their offspring will be heard against their father.[1]
Given September 1 (468).

[1] [Blume] The principle of this law is also stated in C. 6.58.13, and in Novel 22, c. 34. See also C. 5.3.18.