Book VI.
Title LXI.

Concerning property which children under paternal power acquired through marriage or otherwise and the management thereof.
(De bonis quae liberis in potestate constituendis ex matrimonio vel aliter adquiruntur et eorum administratione.)

Bas. 45.4.5.

6.61.1. Emperors Theodosius and Valentinian to the senate.

Since venerable laws have forbidden male parents to acquire for their own benefit by the right of paternal power, whatever property a grandfather, grandmother, great-grandfather or great-grandmother of the maternal line has in any way left to the children, it must also be observed, that whatever a wife, by any title or right, brings or transmits (by will) to an unemancipated husband, or a husband to a wife under paternal power, shall in no way be acquired for the benefit of the father (of the wife or husband) and shall, therefore, belong only to the person to whom it was left.[1]
Given at Ravenna November 7 (426).
C. Th. 8.19.1.

6.61.2. The same to Hierius, Praetorian Prefect.

To clarify a point in our recent constitution, we ordain that when we decreed that a parent who has a son, grandson, great-grandson or daughter, granddaughter or great-granddaughter in his paternal power, does not acquire for his benefit any property which has in any way been brought or transmitted to them by a husband or wife, this must not be thought to apply to property given (as a dowry) or furnished as a prenuptial gift to one of the aforementioned persons, by such parent himself, so that this, too, would in no case be returned to him; for we must see that, through fear thereof, we do not make such parents less generous in their bounty toward their children. So such property shall, by virtue of the right of paternal power, be returned to such parent, but only the usufruct of other property, which is left to the survivor as the special property of a deceased spouse, shall belong to such parent, although such survivor is still under paternal power. The fee of such property shall belong to the person to whom it was left by the deceased spouse, reserving to such parent, if he wishes it, the reward for emancipation[2], as in connection with maternal property or property derived form the maternal line.
Given February 20 (428).

6.61.3. The same to Florentius, Praetorian Prefect.

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[1] [Blume] Scope of law enlarged in law 4 of this title.
[2] [Blume] See note C. 6.60.3. The property might be left to a grandchild, also under the paternal power of the grandfather (or great-grandfather), and if when the bequest was left upon condition of its emancipation, such grandfather (or great-grandfather) would be entitled to the reward of emancipation.

The statement in prior constitutions, that a father does not acquire a prenuptial gift from a daughter under paternal power, nor a dowry through a son[3], is hereby confirmed with this addition, that if the son or daughter die while still under paternal power, leaving children surviving, their property shall go to the children by right of inheritance and not to the father by right of peculium,[4] nor does such property become that of the grandfather, through his grandchildren. 1. And if, moreover, a grandchild dies without children, leaving surviving his father as well as his grandfather, the ownership of property which such child acquired through the mother or through the maternal line, shall not go to the grandfather, but to the father, provided that the usufruct in such cases also shall belong to the grandfather while living.
Given at Constantinople September 7 (439).
Nov. Th. 14.1.8.

6.61.4. Emperors Leo and Anthemius to Erythrius, Praetorian Prefect.

Whatever property comes to a son or daughter, or grandchildren of either sex, under paternal power, through a first, second, third or other marriage, from dowry, any kind of gift, or inheritance, legacy or trust, the father, grandfather or great-grandfather shall, during life, have the usufruct thereof, but they have no right to alienate it in any manner or pledge or mortgage it; for the fee thereof shall belong to the children, grandchildren or great-grandchildren of either sex (of the party who received the property thru the marriage, etc.[5]), although not born of the same marriage, through which this property came to their parent under paternal power. 1. In case of death (of the parties who received such property through marriage . etc.[6]), their property shall, as has been said, first go to their children, if there are such; if there are none, then to only the surviving brothers and sisters, or to the survivor of them if one of these same brothers or sisters survive. 2. If all the brothers and sisters who were born of the same marriage die, it shall go to those born of another marriage, in equal portions; if none of them exist, then to their parents (having paternal power). 3. The parents, under whose paternal power (the descendants) are, have only the usufruct of such property and we deny them the right to alienate or obligate the property, and the descendants may, whenever they are sui juris, claim it, without being barred by any prescriptive time, unless, perchance, such length of time has passed, after they have been liberated from the paternal power, that their claim is barred by the continuous and uninterrupted possession of the holder (for the statutory time of thirty years).[7]
Given February 25 (472).

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[3] [Blume] This is so because the property would be acquired through marriage - the wife the prenuptial gift, the man the dowry - and according to law one of this title such property was not acquired for the benefit of the person having parental power.
[4] [Blume] If the property was peculium, such as was given by a father to an unemancipated son, the father could retake it at any time. See Buckland 375, on the distinction between retaking peculium and taking it as an inheritance.
[5] Blume penciled in "etc." here, along with a question mark.
[6] Blume penciled in "etc." and a question mark here as well.
[7] [Blume] Gothofredus ad C. Th. 8.18.3. For comments on this law see Goth. ad C. Th. 8.19.1.

Note.

The devolution of property upon death as here stated is substantially that stated in C. 6.59.11. The present law was dated in 472 A.D., while the law at C. 6.59.11 was enacted in 529 A.D. The one deals with property derived through marriage, the other with maternal property and the devolution thereof upon death, would naturally be the same. Novel 118, as already frequently shown, modified this method.

6.61.5. The same Emperors to Nepos, Master of the Soldiery of Dalmatia.

Your Magnitude has not without reason believed best to consult Our Clemency concerning the transaction between the house-mothers whom your inquiry has in mind, and her brother, in view of the different law cited by both sides, the woman trying to show that husband and betrothed must, under various provisions of law, be understood as meaning the same, but the brother contends that the name of husband applies only to a person who has already entered into matrimony, citing the constitution of the divine Emperors Theodosius and Valentinian, which provides that whatever a husband and wife, under paternal power, leave to each other, is not acquired by one from the other for the benefit of the father, but belongs to him or her to who it is left. 1. However, though the names husband or wife apply, strictly, only to the relationship existing after actual marriage, which indeed has given rise to the doubt, still it is proper to construe with justice, and temper with equity, ambiguous situations, rendered worse by different interpretations of the laws, and we are glad in the present matter, concerning which Your Sublimity has inquired, to follow the opinion of Julian, of great reputation and learned and experienced in the law, which we think is consonant with equity. When a case concerning land given as a dowry was put before him, he held that, though the Julian law speaks only of a wife, still the rule applied in her case should be also applied to a woman merely betrothed. Hence, we deem it equitable that a betrothal gift as well as an inheritance which a betrothed man wanted his bride to have, is not, (in case a man dies), acquired by her for the benefit of her father but belongs to her.
Given June 1 (473).

6.61.6. Emperor Justinian to Demosthenes, Praetorian Prefect.

Since it is proper that the interests of fathers as well as of children should be protected, but we find that, under the ancient law, there are many things that come to unemancipated children which are not by them acquired for the benefit of the father, as in the case of maternal property and property received by or through a marriage, so we shall also introduce a definite rule as to property which unemancipated children receive from other sources. 1. If, therefore, a child in the power of a father, grandfather or great-grandfather receives any property not originally belonging to the person in whose power he or she may be, but received from other sources, as, for instance, through the bounty of fortune or through his or her own labor, it shall not wholly belong to the parent who has the paternal power, as the law formerly was, but shall belong to such parent only to the extent of the usufruct thereof. Such father, grandfather or great-grandfather shall be entitled to such usufruct, but the fee of the property which is derived from a mother or from a spouse. 1a. In this way nothing is taken from the parent, as he will enjoy the usufruct and the children at the same time will have no cause to lament seeing the property acquired by their own labor, transferred to others, either to outsiders or - which

to many seems even worse - to their brothers and sisters. 1b. Special-military property (castrense peculium) is, however, excepted herefrom. The ancient laws do not grant to a father, grandfather or great-grandfather the usufruct thereof and we make no innovation in that respect, but keep the ancient laws intact. That, too, shall be true as to quasi-special-military property (emoluments of public office), which is acquired under similar circumstances. 1c. We introduce the regulations of this law with the limitations that the rights of succession to property acquired by unemancipated children from (other) outside sources shall be the same as the rights of succession to property acquired by or through a mother or by or through marriage. 2. Children, however, shall have no lien on the property of their parent (having paternal power), either while living or dead, and shall have no right to demand an accounting from him as to his management. And with the sole limitation that such parent may not dispose of or mortgage it, he shall have full right to use and enjoy the property which the unemancipated children acquire in the manner aforesaid. 2a. Their management thereof is uncontrolled and an unemancipated son or daughter or offspring of remoter degree shall not dare to forbid the person in whose power they are to hold and manage it at will, and if they do so, the paternal power (patria potestas) may be employed against them, but the father or other person above enumerated (who has paternal power), shall have the unlimited right of use and enjoyment of the property acquired by children under paternal power in the manner aforesaid. 2b. And if the father, grandfather or great-grandfather saves anything from such use, he shall have the right to dispose of it as he wishes and transmit it to other heirs, and if, likewise, he, through such saving, acquires any property movable, immovable or self-moving, he hay also hold and transmit that in any manner he wishes and transfer it to others, either to outsiders, to his children, or to any person whatever. 2c. But if such parent does not wish to hold the property acquired in the manner aforesaid, but leaves it in possession of the son, daughter or descendant of remoter degree, other heirs of such father, grandfather or great-grandfather shall have no right to claim, as though due to such parent, the use aforesaid or what the children derive therefrom, and the situation is to be considered as though a daily gift had been made of the usufruct which the parent might have had, but was (by his permission) detained by the child. After the death of the parent, such usufruct shall belong to the child, and such parent shall have no power to transmit to his posterity or successor, as though a debt were due him, the right to collect the usufruct, detained by his consent, so that there may be peace among his heirs and no occasion for dispute, especially among brothers and sisters, may arise. 3. Since, moreover, it was provided by the Constantinian law[8] that if children were emancipated by those having them in their power, the latter might receive or retain the third part of the property, which they would not otherwise get, as a sort of reward, and since thereby again a substantial part of the property of the children was taken from them, we ordain that in such case, when emancipation is granted to children, the parent who makes the emancipation shall acquire, not the third part of the fee but only the half of the usufruct.[9] But special-

[8] [Blume] C. 6.60.1.

[9] [Blume] This is the reward for emancipation already referred to in C. 6.60.3; Inst. 2.9.2. Previous to the emancipation the father (or grandfather etc.) had the usufruct in all of the property of the child; after the emancipation he had, according to this law, the usufruct in only half of the property. The term "reward" had, accordingly, become a misnomer.

military-property and quasi-special-military-property (emoluments of a public office) is excepted herefrom, and shall not in any way be affected for such reason. Thus the title to no property is taken from the children of either sex, but the usufruct of a greater amount of property is given to the parent. 3a. This shall apply even in case of those emancipations when parents do not reserve the right mentioned for their benefit; and unless they especially renounce it, when they make the emancipation, or make a gift of it to the children, they shall, by implication, retain the benefit of such usufruct. After their death, the usufruct in the cases mentioned shall belong to the owners of the fee, according to what we have already said and the succession thereof shall be governed by the same provisions already made, by carefully considered laws, in connection with property acquired by or through a mother or by or through marriage. 4. And since the ancient laws introduced implied liens in certain cases, and we applied them (C. 5.9.8.), and considered them necessary to be preserved in connection with maternal and other property, a doubt has arisen as to the time such liens should apply, whether from the beginning or from the time that an unauthorized act is done. To speak briefly, the beginning of the time when a management or supervision is to be assumed or given up, shall govern, and not the time when any unpermitted act is done.
Given October 30 (529).

Note.

This provision in reference to a lien appears to be inconsistent with the provision of subdivision 2 in this law, which says that children shall have no lien in connection with the administration of the property by the father. 9 Cujacius 873, explains this by saying that the provision for a lien herein applied only to maternal property and property derived from the mother through marriage, pursuant to C. 5.9.8, but did not apply to property otherwise acquired by or for the benefit of the child. C. 5.9.8, clearly provides for a lien on all of the father's property to secure the maternal property and the property derived through a dowry, but appears to confine the lien to a case when the parent remarried. The Greek commentator Theodorus, accordingly, confined the lien to such a case. Thalelaeus, on the other had, appeared to think that the lien existed in all cases and ignores the provision of subdivision 2 of the present law. See Bas. 45.4.9, and notes. On the whole it would seem that the opinion of Theodorus is the more logical, and that the lien was given only in case of a second marriage.

6.61.7. The same to Julianus, Praetorian Prefect.

Since many privileges have already been granted to imperial gifts, we have though it worthy of Our Clemency to make addition thereto. 1. If anyone, therefore, receives a gift from the serene emperor or the pious empress, whether consisting of movable, immovable or self-moving property, and the donee is under paternal power, he or she shall have the property free from the right of the acquisition thereof, for another's benefit, and the father, grandfather or great-grandfather shall not claim even the usufruct thereof, but the unemancipated son or daughter shall have absolute ownership thereof the same as of special-military property. 2. For as the imperial fortune surpasses that of all, so imperial bounties, too, should be entitled to special privileges.
Given and proposed at Constantinople March 21 (530).

Note.

It will be noted from this and the preceding law that while a parent with paternal power had the usufruct of practically all property acquired by a child under paternal power from outside sources, no such usufruct was given in 1) special-military property; 2) quasi-special-military property; 3) property received as a gift from the emperor or empress. So, too, he was deprived thereof in property given to children in case of divorce, and the divorce was without just cause on his part. Novel 134, c. 13; 9 Cujacius 871. So he might also be deprived of such usufruct, if the gift to the child specially so provided, as provided in Novel 117, c. 1, here appended and which is as follows:

6.61.8. The same to Johannes, Praetorian Prefect.

Various disputes have arisen - which are decided and treated in various ways and which constantly arise in court - relative not only to maternal property left to unemancipated children, but also as to all other (outside) property which is not acquired (by children of the parent with parental power). Particularly is this true after the enactment of the recent law (C. 6.61.6.) of Our Majesty, which determined that no property coming to unemancipated children from outside sources and not from such parent, should be acquired for the benefit of the latter, except only the usufruct thereof. So it is necessary and useful to make everything plain. 1. We, therefore, ordain, that when there is left to a child, of any degree or sex, property, the fee of which does not go to the parent, but of which the father or other ascendant (having paternal power) receives only the usufruct, and the father demands of the son of legal age to accept it, while the latter thinks it should be refused, or the son desires to accept it and the father thinks that it should not be accepted, (the rule shall be that) when the son refuses to accept the inheritance left him, the father shall himself have the right to accept it, and shall himself have all the benefit thereof and sustain all losses, without detriment to the son. If, on the contrary, the father refuses, but the son desires, to accept, the father shall acquire no right therein, not even the usufruct thereof, but all consequences of such acceptance shall fall on the son. No right of action shall be granted against the father, if the son, against his wish, wants to accept an inheritance, legacy, trust or anything else as a gift or pursuant to any contract; and in like manner, no right of action shall exist against the son, when he refuses to accept, but the father, through him, claims the property himself, which he is enabled to do by the path opened for such purpose by the present law. 1a. And the father alone shall have the right to commence, and he must defend, actions, whenever he alone receives the property. And so, when the property falls to the son alone, he only shall have the right, and he must defend, actions (in connection therewith) and on him alone shall fall all loss and he alone shall receive all the benefits; provided that the father must, on account of his position, give his consent to any suit by or defense of the child, so that the proceeding may not seem to be defective for want of such consent. These provisions apply if the son, who refuses to follow his father's wish, is of full age. 1b. But if he is still in the second age (from fourteen to twenty-five years of age), (it may happen that) the father refuses to consent to his accepting an inheritance left him, or the father may wish him to accept, but the son refuses. In the latter case we also give the father permission to accept it and possess it in his own right, all the provisions mentioned above being applicable. 1c. If the son objects, and if the latter refuses to manage the property, the son shall, by reason of the necessity of the case, have the right to go before a competent judge and petition him to appoint a curator, by whom the property left to the

son may be managed. In either case the right of restitution to his former condition shall not be denied such minor. 2. So if a son in military service refuses to accept an inheritance which comes to him by reason of his service, the father shall have the right to do so also in that case, and shall acquire the property in his own right, both the usufruct and the fee thereof as if he himself been appointed as heir from the beginning. He must sustain all of its burdens and will receive all of its benefits; and the son shall not suffer any disadvantage therefrom. These provisions apply in cases in which the father and son disagree. 3. But if they are of the same mind, the father shall receive the usufruct and the son the fee; the father shall bring and defend all actions, no matter of what age the son may be, provided the son's consent must be obtained thereto, unless he is still under the age of puberty or is absent for a long time. The expenses thereof shall be defrayed by the father because he receives the income of the property. For since the son has only the ownership thereof, without its (present) use, out of what property would it be possible for him to defray the expense of suits? 4. And since an actual inheritance is, and was even among the ancients, considered as consisting only of the property left after subtracting the debts, the father, if the decedent left debts, shall have permission to sell, in the name of the son, first the movable property of the estate; if that does not suffice, then a sufficient part of the immovable property, so that the debts may be paid immediately and the inheritance may not be weighed down by the burden of interest. 4a. If the father neglects to do this, he shall himself be compelled to pay the interest either out of the usufruct of the inheritance, or out of his own property. 4b. If the inheritance is burdened with legacies or trusts, either payable annually or at once, and the income from the property suffices to pay them, the father must use sufficient of the income for that purpose. 4c. But if the income of the property is not sufficient to pay the legacies or trusts, or there is no income from or accretions to the inheritance (with child to do so), but there is movable or immovable property which is unproductive, through not useless, such as expensive houses in the provinces or in a suburb, for instance, by which such legacies can be satisfied, the father has permission to sell sufficient thereof, in the name of the son, to pay them. 4d. The usufructuary must, without question, support the slaves and must do all things that are necessary to be done in connection with the usufruct, so that the property will not deteriorate. The honors due to a father will, however, excuse him from rendering any account, from giving bonds, and from everything required of other usufructuaries, according to the tenor of our constitution already reacted for such cases (C. 6.61.6). The father, moreover, must support his sons, daughters and other descendants, not because of of such inheritances, but because nature requires it and because of the laws which direct parents to support their children, and command children to support their parents if, in either case, necessity therefor exists. 5. The father shall have power to sell the children's property, in their name, or to obligate it, if he finds no purchaser, only in the instances specified, and the children have no power to invalidate such sales or liens. Aside from the instances mentioned, a father has no right to alienate, pledge or mortgage property, the fee of which belongs to his descendants, and if he does so, he must know that he will fall into the clutches of the law which forbid such sales or liens; provided, however, that movable or immovable property which is burdensome or in any manner injurious to the inheritances may, without any danger, be sold by the father, showing his paternal love by expending the price thereof on or in connection with the inheritance, or by preserving it for the child. 5a. Unemancipated children, moreover, cannot, during the life of the

parent, in cases in which the parent has the usufruct, make a testamentary disposition of the property, or, without the permission of the parent in whose power they are, alienate, mortgage or pledge the fee of the property. For it is better to hold youthful ardor in check, lest, giving away to their desires, they may find the sad end which awaits those who dissipate their patrimony. For since, as has been said, parents are, by law, compelled to support them, why should they want to sell the property? 6. When, moreover, the father may, by reason of the age of the child (C. 6. 30. 18), enter on an inheritance in the child's name, without its consent, and he does so, the child may have restitution to its former rights, after he or she is freed from paternal power or has grown to maturity, but the father must, though he entered the inheritance in his child's name, sustain all the burdens attached thereto. For why did he accept such an inheritance which neither he nor his son now thinks solvent? 6a. But a minor who, during his minority, seeks restitution to his rights, believing that he should repudiate the inheritance, may not subsequently accept it, through another restitution of rights, lest the law become a plaything for him who desires at one time to accept, at another to reject, the inheritance. For if he does not ratify what his father has done, and on that account is restored to his rights, how could it be tolerated that he should thereafter be permitted to come to a conclusion which he previously rejected against his father's wish? 6b. But if the father repudiates the inheritance while the child is still an infant, but the child, either while still under paternal power or after he is released therefrom, subsequently concludes that he should accept it, he shall have the right to do so, either personally, if he is sui juris, or through guardians or curators, and he shall suffer no prejudice by reason of the father's repudiation. And in such case, too, neither he, nor his guardians or curators shall be granted any restitution of former rights contrary to the earlier determination. 6c. The provision herein shall also apply to legacies and trusts, special or universal, and in other cases above enumerated and in similar cases. 7. Moreover, when slaves are given to unemancipated children, either during marriage or by outsiders, upon condition to immediately manumit them, the paternal authority shall not be a hindrance to do so. For how can a usufruct be acquired in a right existing but a moment? If it is necessary to set the slave free the moment possession of him is acquired, what kind of a usufruct in him can be acquired for the father?

Given at Constantinople July 29 (531).

Note.

What has been said in the law as to a father applied to him when he had the paternal power, or to another male ascendant who had the paternal power over the children, and what applied to male children applied to female children as well.

The law reaffirms what was stated in previous law, that a parent with paternal power should not have the fee but only the usufruct in property which was left to children in any form. But the inheritance or other gift to the child might be accepted or refused, and this law was specially made to provide for just such cases. Formerly consent of both the parent and the child was necessary to accept or refuse, if the child was not an infant. That rule was changed by the present law. See generally note C. 6.30.4, for the former law.

It should be noted here that children under paternal power could not make a testament. Their rights in the property passed to their heirs on intestacy, in case of their death. That rule, however, did not apply to special or quasi-special military property.

Inst. 2.11; 2.12 pr; C. 6.20. Appended hereto is C. 6, Nov. 119, as to restitution of rights by a minor where he had accepted an inheritance and wanted thereafter to renounce it.