

Book VIII.
Title XLVI.

Concerning paternal power.
(De patria potestate.)

Bas. 31.2.4, et seq; Dig. 1.6; Inst. 1.9.

Headnote.

The paternal power - patria potestas - is mentioned in numberless places in this Code, and some of the phases of it are treated at length in the notes to the laws of this title. It was a power over legitimate children - extended to adopted children. The subject has been treated extensively not only by legal writers, but also by historians. An excellent treatise therein is contained in Maine, Ancient Laws 130, et seq. It was, in the first place, a power equivalent to that which a master had over his slave. It included in the earlier times, later modified, as hereinafter shown, power over the life and death of the child, and gave absolute control to the possessor thereof of any property which the child might have - this right, too, being modified later, as hereinafter shown. It was based upon the unity of the family, and was possessed by the oldest living male ascendant; thus a living grandfather or great-grandfather had the sole paternal power over the family, and it extended over all children and remoter descendants springing from him through males. Mackeldy § 589. It was not lost by reason of the marriage of the children, except in case of a daughter who passed into the power of the husband, which subsequent to the early law was not customary. Hunter 195. The power might be lost in various ways, the most usual of which were by emancipation, and by giving a child in adoption to another. It might also be lost involuntarily, as by deportation, or sentence to the mines whereby a man lost his liberty. Hunter 215; Inst. 1.12.1 and 3. But relegation had no such effect. Inst. 1.12.2. So a father who compelled his daughter to prostitute herself, or who exposed his free children, forfeited his power over them. C. 1.4.12 and 24; C. 11.41.6; C. 8.51.2; Nov. 153, 1. So if a man contracted an incestuous marriage, not only were his children released from his power, but they also gained all of his property, subject to affording him maintenance. Nov. 12.2.2. So any man who was made a patrician, or who was a bishop, consul, prefect, master of the soldiers, and person, generally, exempt from service in municipal senates, were exempt from paternal power under Justinian. Inst. 1.12.4; Nov. 81. Paternal power was among other ancients known to the [illegible] as among Romans, as among Gauls and [illegible]. [illegible] G. 4.19; Gaius 1.55.¹

8.46.1. Emperors Antoninus and Verus to Titius.

If, as you say, your son is in your power, the president of the province will determine whether he ought to listen to you (in wanting to control his property), since you have long permitted his property to be managed by the parties named as his guardians in his mother's testament, as though he had been emancipated.
Without day or consul.

¹ These last two sentences are added in pencil and are difficult to read.

Note.

A father had the power to emancipate his children. And in some cases the emancipation would be treated as made, though the formalities of the law had not been complied with. Thus it is said in D. 1.7.25, that on the death of a daughter who had been living as an independent woman as if in consequence of a lawful emancipation, and who before her decease appointed heirs by testament, the father is not allowed to take proceedings calling in question the validity of his own act, and on the alleged ground that the emancipation was not made according to law nor in the presence of witnesses. So in the present case, the mother named a guardian for a child, which she had no right to do unless the child was emancipated, and the guardian acted as such for a long time. That fact might be taken as an acquiescence by the father in the emancipation of the child. See also note. C. 3.31.6.

8.46.2. Emperor Antoninus to Marania.

The ownership of property which you had, while under paternal power, belonged to your father, excepting certain property not acquired (by you for his benefit). Promulgated February 17 (215).

Note.

There is no doubt that in the early stages of Roman society, all the property of the members of the society were held in common, of which the head of the family, whether a father, grandfather or even remoter ascendant, had the control. And that rule remained the general rule up to the time of Justinian. (Inheritance Gaius 2.87; Hollweg 6.) But gradual, though slow, encroachments were made thereon. A certain qualified and dependent ownership seems to have been recognized by Roman law, commencing with a time which we cannot trace, in the perquisites and savings which slaves and sons under power were not compelled to account for, and the special name of this permissive property was peculium. Maine, Ancient Law 137; Hunter 292; D. 15.1.1.5. It was called peculium prefecticium - peculium proceeding from the father, as distinguished from peculium adventicium - peculium proceeding from some source other than the father. This property, permitted to the child, theoretically remained the property of the father. The son was only the administrator thereof, and what he acquired therewith was acquired for the benefit of the father. Inst. 2.9.1. But the father might be sued on legitimate contracts of the son to the extent of his special property. C. 4.26, where the subject is treated more fully. This special property - peculium - became the son's if the father's goods had been sold by the fisc for debt, or when the son passed out of the paternal power by the acquisition of a higher honor, or when the father emancipated the son without withdrawing this peculium. D. 4.4.3.4; Nov. 81, c. 1, 1; C. 8.53.17; Mackeldy § 603.

The next step taken in modification of the general rule was to withdraw from the paternal power the special property of a soldier, called castrense peculium - literally military-camp peculium. This was done in the time of Caesar or Titus. In such property was embraced everything which a family son - unemancipated son - acquired by war services; further everything which he acquired from the circumstances resulting from war service, including property presented to him by his kin and friends on his departure for the camp; further, gifts and inheritances from his companions in war; all that he received from his wife as heir, but not what he received from her as legatee, and all that he

procured through this special property - the *castrense peculium*. C. 12.36 - various laws; C. 4.28.37; Mackeldy § 602. Land given by the father was not, however, a part. C. 3.36.4. This property was the absolute property of the son, to do with as he wished, including the disposition thereof by testament. If he died intestate, it passed to his intestate heirs according to the general principles governing intestate succession. Inst. 2.11; Inst. 2.12 pr; C. 4.28.37; C. 12.36; Mackeldy § 603; see C. 1.3.34; Hunter 292.

A further step taken in modification of the general rule was by giving like privileges as given to soldiers to persons engaged in the higher civil offices. Constantine provided that the officials attached to the imperial palace (*palatini*) should be owners of what they saved out of their salary, or obtained as gratuities from the emperor. C. 12.30. This privilege was later extended to the officials of the praetorian prefect, the shorthand writers (*exceptores*) and the keepers of records (*scriniarii*). C. 12.36.6. The same right was conferred on advocates of the praetorian court and of the court of the city prefect in 440 A.D., as to any property which they acquired from any source. C. 2.7.8. See also C. 1.51.7; C. 2.7.4-7. In 469 A.D., bishops, presbyters and deacons were allowed full control over their clerical income. C. 1.3.34. And Justinian gave sub-deacons, singers and readers in the church independent ownership over everything they acquired. Nov. 123, 19. He also released patricians and bishops from paternal power entirely, and released from the same power all property acquired by gift from the emperor or empress. C. 12.3.5. C. 6.61.7; Nov. 81. These parties had the same rights over this special property, which soldiers had over theirs. Hunter 293; Mackeldy § 603; Inst. 2.12.

A further step taken in modification of the general rule was by limiting the right of a father in property received by a child under power to a usufruct therein, and compelling him to take proper care of it, without power of disposition. This rule was applied to property received from a mother (C. 6.60.1), from other maternal ancestors (C. 6.60.2), from a wife (C. 6.61.1), and other property received from sources other than the father. Inst. 2.9.1.

Another inroad into the general rule was made. A father, on emancipating his child, was permitted by Constantine to retain a third of his property. But Justinian changed the rule permitting him to retain, not a third of the property as owner, but the usufruct in half of it. C. 6.61.6.3; Inst. 2.9.2. See generally headnote C. 6.60.

8.46.3. Emperor Alexander to Artemidorus.

If your son is in your power, he could not alienate the property acquired for your benefit. If he does not recognize the filial duty which he owes you, you are not forbidden to chastise him by virtue of your paternal power, using severer measures if he perseveres in his contumacy, and taking him before the president of the province to impose such sentence, as you too, will want.

Promulgated December 9 (227).

Note.

The law of the twelve tables (4.1 and 2) provided that a deformed offspring might be put to death; further, that "the father shall, during his whole life, have absolute power over his legitimate children; he may imprison the son or scourge him, or keep him working in the field in fetters, or put him to death, even if the son hold the highest offices in the state and is celebrated for his public services. He may also sell the son." This right over life and death, while existing theoretically, and occasionally exercised, came finally

to be abolished altogether. Trajan compelled a man to emancipate his son whom he had treated cruelly. D. 37.12.5. Under Hadrian, a father who killed his son while caught in the act of adultery with his stepmother, was stigmatized as exercising the right of a robber rather than that of a father. D. 48.9.5. In 228 A.D., the emperor treated the right over life and death as obsolete, and stated that if the father wished to impose more severe punishment on a child than a simple flogging, he must apply to the president of the province. D. 48.6.2. In 318 A.D., Constantine enacted a law providing that a father who slew his son, should be guilty of the crime of murder, and punished such crime by the severest punishment known. C. 9.17.1. As to exposure and pledge of children, see C. 8.51; and C. 4.43.2 and note.

The children owed obedience and respect to their parents, as shown by laws 3 and 4 of this title, and might be moderately punished at home, and more severely by the judge. The measure of punishment dealt out by the judge is not stated. See in addition, C. 9.15.1.

8.46.4. Emperors Valerian and Gallienus and the Caesars to Galla.

If any controversies arise between you and your sons, it is more becoming that it should be settled within your home. 1. If the point was reached that their willful misconduct induced you to resort to law and to revenge, the president of the province, if you go before him, will, indeed, direct the customary legal paths to be pursued in property matters, but he will also compel your sons to exhibit their filial duty toward their mother, and if he learns that their ingratitude was carried to the extent of inflicting intentional wrong, he will avenge their forgotten filial duty with severity. Promulgated May 17 (259).

8.46.5. Emperors Diocletian and Maximian to Donatius.

Your daughter will be compelled, by the authority of the rector of the province, not only to show you respect, but also to furnish you with means of support.² Promulgated March 1 (287).

8.46.6. The same to Hermagenes.

Public renouncement resorted to by Greek custom, in order to disown children (called apokeryxis), is not approved by Roman laws. Promulgated November 15 (288).

Note.

An Athenian father could dissolve the legal tie between himself and his son, and disown or disinherit him. A subsequent act of pardon might annul this solemn rejection, but if not annulled, the son was disowned by the father while alive and disinherited afterwards. See title "apokeryxis" in Smith, Dict. Of G. & R. Ant. Mitteis, R.R.u.V.R. 212ff; 18 Z.S.S. 163; Weiss, Gr. P.R. 316. The practice continued subsequent to the instant rescript. The disowning took place while the father was living. A somewhat similar practice in Rome was disinheritison. See law 6 h.t.

² [Blume] See note to law 9 of this title as to duty of children to support parents.

8.46.7. The same and the Caesars to Dupliana.

There is no doubt that if your husband, who was in military service, and who was himself under paternal power, had a son by a legitimate marriage, the latter remained in the power of his grandfather.

Subscribed April 4 (294).

8.46.8. The same to Aemiliana.

It is not forbidden that freedmen, just as free-born people, should have paternal power over their children born in legal marriage after their (own) manumission.

Subscribed at Sirmium April 16 (294).

8.46.9. The same to Miagora.

That no one has the right to disown his child is plainly declared by the senate decrees as to acknowledgment of offspring, by the threatened penalty, by the summary investigation (praejudicium) provided for in the perpetual edict, and by the remedy afforded by the president for support of a weaned child claiming (needing) it.

Subscribed at Sirmium April 27 (294).

Note.

Legitimate children were entitled to claim from their parents sustenance and nurture conformable to their rank, if they did not have property of their own out of which to support themselves. In cases of necessity, grandparents were also bound to give such support. This duty, however, was mutual, and the children were bound to support their necessitous parents. D. 25.3.5.11; Mackeldy § 585; law 5 of this title. Justinian, by Nov. 117, c. 7, provided that children should not be prejudiced by divorce between their parents; that if the father gave cause for the divorce, and the mother did not remarry, they should be raised by the mother, at the expense of their father; if the marriage was dissolved through the fault of the mother, they should live with and be supported by the father; if the father should happen to be poor, they should live with and be supported by the mother. See also C. 5.25 for laws on the subject.

The father had the primary right to rear the children, but that was subject to limitations, as already indicated in note to C. 8.8.2, and authorities there cited, the children having a voice in the matter when they become of maturer years. C. 5.24.1 provides that after a divorce, the judge shall determine by whom the children should be reared. This provision is made more definite by Nov. 117, c. 7, already mentioned.

8.46.10. Emperor Constantine to Maximus, City Prefect.

So much importance was attached to liberty by our forbears, that fathers, who formerly had the power of life and death over their children, could not take away their liberty.³

Given at Thessalonica May 18 (323).

³ [Blume] C. 4.43.2 note.