Book III.
Title XXXVIII.

Matters common to an action in partition of an inheritance and in partition of property otherwise held in common.
(Communia utriuusque judicii tam familiae eriscundae quam communi dividundo.)

Bas. 12.3.

3.38.1. Emperor Antoninus to Marcus.

It has been decided that a division of land takes the place of a sale.
Promulgated November 24 (211).

Note.

The parties to the division were regarded as reciprocally vendors and purchasers, each a purchaser of his own share, and a vendor of all the other shares. Hence, the arties guaranteed each other against eviction, unless there was a special agreement to the contrary (C. 3.36.14; D. 10.3.10.2), or unless the existence of a burden against the property was known and nothing was, notwithstanding such knowledge, agreed in regard to it. Law 7 h.t. As to evictions generally, see C. 8.44.

3.38.2. Emperor Alexander to Euphrata.

Although a referee in partition is appointed by a person who had no right to do so, still if the owners in common have once consented to the division, each will hold as his own that part of the common property which he possesses according to the decision of the referee.
Promulgated November 16 (229).

3.38.3. Emperors Diocletian and Maximian to Aurelia Severa.

Aid will be extended even to persons who are of age, and who, induced thereto by fraud, cheating, or other wrong, divided property without action in court, since an inequality will be corrected in equitable actions (bonae fidei).
Promulgated June 15 (290).

3.38.4. The same Emperors to Maximus.

If your paternal uncle acquired some property by means of property held in common between you, but in doing so he acted for himself, and he was not in partnership with you as to property of every kind, he must indemnify you only as to your proportion of the property held in common, and you, accordingly, demand without right that the property which he bought should be held in common between you.
Promulgated October 17 (290).

Note.

The Greeks thought that the person whose money paid for property should become owner of the latter. That was not Roman law. C. 4.50.1 note.

3.38.5. The same Emperors and Caesars to Glafirio.

The rector of the province, if you go before him, will decide into whose custody shall be deposited the documents which you say your brother holds and you own in common with him.
Promulgated February 8 (293) at Sirmium.

3.38.6. The same Emperors and Caesars to Thesidiana.

If you made a division with your paternal uncle upon condition that he should take an oath that he had been guilty of no fraud, and he failed to comply with the condition, the agreement of division will not prevent you from demanding the property back as undivided.
Given at Sirmium March 28 (294).

3.38.7. The same Emperors and Caesars to Severianus and Flavianus.

If your brothers, without your consent, mortgaged the whole (pro indiviso) property held in common by you, and this property was set off to you in accordance with an agreement of division, without any mention of the mortgage to you, and you are evicted from the undivided portion on which previous to the division belonged to your brothers and against which alone the mortgage is good, you can bring an action against your brothers on the stipulation, if one was entered into, and if not, then in an action on the special facts. But if you took over the property with knowledge of the mortgage, you can sue them for the eviction only on proof of a promise (against eviction) in the form of a stipulation or a pact.[1]
Given at Nicomedia December 4 (294).

3.38.8. The same Emperors and Caesars to Nicomachus.

If a division was made between you when over twenty-five years of age, followed by leaving or delivering possession, the matter thus terminated in good faith by your mutual consent cannot be reopened.[2]
Given December 5 (294).

3.38.9. The same Emperors and Caesars to Demetrianus.

An action to partition an inheritance or (other) property held in common, can only be brought while the property is still held in common.
Dated at Nicomedia, December 8 (294).

Note.

We have seen that in an action in partition an equitable accounting was had between the arties as to the outlay and income in connection with the property. That applied, strictly, only where the property was actually held in common. It could easily happen, however, that an undivided interest owned by a person was sold, and the action for partition could then only be brought by or against the new owner. Yet the former owner might have taken in a great deal of money from the property. It was held that, nevertheless, an action might be brought to make him account. As the Romans expressed it, it was an action analogous to that in partition (utilis). D. 10.3.6.1.
3.38.10. The same Emperors and Caesars to Gallicanus.

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[1] [Blume] See C. 8.44.27.
[2] [Blume] See C. 3.36.15; C. 3.37.4.

A testament in writing which states that all property is specially divided, does not forbid the heirs to inquire in regard to property of which no mention is made.
Without day or consul.

3.38.11. Emperor Constantine to Gerulus.

Divisions of property should be so made that all the near relatives or connections among slaves, serfs affixed to the soil, or tenants (in quilini), remain under on ownership. For who would tolerate that children should be separated from parents, brothers from sisters, husbands from wives? If slaves or serfs have, accordingly, been separated and placed under different ownerships, they must be reunited under one.
Given April 29 (334).
C. Th. 2.25.1.

Note.

This law was important, because under the later Roman empire most of the cultivators of the soil consisted of slaves or serfs. There were very few free tenants. The age of feudalism had begun.

3.38.12. Emperor Justinian to the Senate.

It has appeared to us well to dedicate the following provisions to the principles of equity. If a father has promised in writing or given a prenuptial gift for his son, or a dowry for his daughter, and the property given is returned to him either pursuant to a stipulation or a provision of law, or in case a third party has given a dowry or a gift before marriage (on behalf of the father), and the return of the property is brought about by reason of the tenor of a stipulation, or pursuant to law, but the father, in the making of his testament and designating either his children or others as his heirs, has made no provision as to the property which was so returned or came to him, while there are other children of his who have received property from him as a prenuptial gift, dowry or purchase money to buy an official position, which need not be put into hotchpot by reason of the existence of the testament, then the son or the daughter (first referred to) shall have as their special property the property which was so returned or came to the father, but only to the extent that such other children have received property from the father in the manner above mentioned and which, on account of the testament, need not be brought into hotchpot.

1. If the latter received nothing from the father, then the former shall not have the property returned as above mentioned as their special property, but it shall be treated as part of the father's estate to be divided among all according to the tenor of the will. This shall be true when the will mentions children only.

2. But if strangers are designated as heirs, and the testator has made no mention of the portion (returned or received as above), then the son and daughter (first mentioned) shall have the property which he so received or was returned to him, as their special property. If, nevertheless, a less amount was given to their brothers (and sisters) and a greater amount came to the father, in such case, then, the amount necessary for equalization being excepted, then the remainder of the paternal property shall be divided according to the portions (provided respectively for each) of the will. If the amount is less, which the father had in such a case (namely property returned or which came to him in the contingency above mentioned), than the amount given to the other brothers (and sisters), the whole of this portion (so received or returned) shall go to the persons who were the occasion for the return of the property to the father.

3. What we have said as to the father shall also apply to a grandfather and great-grandfather, paternal or maternal, as well as to a mother, grandmother and great-grandmother, paternal and maternal.[3]
Given at Constantinople July 22 (530).

[3] [Blume] The subject of collation is considered in C. 6.20, and the present law is best read in connection therewith.