Book V.
Title XXXVII.

Concerning the administration of guardians and curators and concerning the loaning (at interest) or deposit of the minor's money.
(De administratione tutorum et curatorum et de pecunia pulillari feneranda vel deponenda.)

Bas. 38.9.15; D. 26.7.

5.37.1. Emperors Severus and Antoninus to Modestus.

Your fear is groundless that in undertaking the management of the property of the minor, over the age of puberty, whose curator you are, it would be considered that you would be responsible for the time prior thereto. But do what you think should be done, and urge—what concerns all the parties the most, that the referee appointed to judge between you and the guardians (as to the settlement of accounts by the latter) perform his duty as soon as possible.

Note.

In the present case the curator was appointed when the minor became of the age of puberty, and he was not, accordingly, responsible for the administration of the guardians who managed the property of the minor before that time.

5.37.2. The same Emperors to Timones and Helpidophorus.

You cannot during your joint management bring an action against your colleague who, with you, is curator of a minor over the age of puberty.
Promulgated April 30 (207).

Note.

No accounting could be asked from a curator or guardian during the time that he managed the guardianship or curatorship. If, however, he was suspected of acting dishonestly it was the duty of his co-guardians or co-curators to accuse him thereof and have him removed. See C. 5.43; C. 5.52.2; C. 5.55.1. He could be sued after he was removed for an accounting. 9 Cujacius 550.

5.37.3. Emperor Antoninus to Eumusus.

The judge who will hear the matter will give you credit for the necessary expenses shown to have been incurred on behalf of the minor for honest and just reasons, although the praetor made no previous order in reference thereto. For payments made by guardian or curator in good faith are valid payments by reason of justice rather than by reason of anyone's authorization.
Given August 19 (212).

5.37.4. The same Emperor to Procula.

Unless the paternal freedman, guardian of your daughter, deposited, or used in the acquisition of land, the money which he clearly owes to your daughter, he will be sent to the prefect of the city to be punished in the latter's discretion according to provisions made.[1]

[1] [Blume] See law 10 of this title.

Promulgated September 20 (213).

5.37.5. The same Emperor to Rufinus.

The former guardians of the minors now over the age of puberty whose affairs you manage as curator, uselessly refuse to comply with the judgment (to pay over the money) since the money sued for may, by the consent of the president, be deposited (for safe-keeping).
Promulgated July (215).

Note.

In this case, as stated in the Basilica 38.9.19, the guardians would not pay till it had been shown that the curator was about to loan the money out at interest or buy some property with it; and they also raised the objection that he was spendthrift. None of these objections were available because the money could be deposited for safe-keeping.

5.37.6. Emperor Alexander to Paconius.

It is not unknown that if guardians and curators knowingly bring vexatious actions in the name of their wards, judgment should be rendered against them personally (for the penalty), lest they think that under cover of the names of their wards they may safely prosecute suits to satisfy their own grudge.
Promulgated May 10 (223).

5.37.7. The same Emperor to Valerius.

You ought to so manage the guardianship of your minors that you do not sell the building, which was devised by them, contrary to the condition against alienation fixed in the testament.
Promulgated July 10 (223).

5.37.8. The same Emperor to Apriles.

Although you should have known that you were appointed curator, but did not enter upon the performance of your duty, no action lies against you for any loss if the other curators who managed the curatorship are solvent. And if you did not know of your appointment as curator, you are not responsible for any loss although the other curators are not solvent.
Promulgated December 8 (229).

5.37.9. The same Emperor to Melitia.

If you have curators and they fail to provide a dowry for you out of your property, go before the president and he will compel them to furnish what is becoming to a respectable person.
Promulgated April 15 (230).

5.37.10. The same Emperor to Rufina.

If you incurred a loss of property by the fault or fraud of your freedman, who is your curator, the president of the province will take care that the damage be made good by the person who nominated (dedit) him, and will not hesitate to employ severer

measures if the act done by the freedman was so clearly fraudulent that he should be punished for a criminal offense.[2]
Promulgated July 22 (230).

5.37.11. Emperor Gordian to Caecilius.

If the cause of the female minor whose guardian you are was just and you failed to appeal after a decision against her, or if you failed to comply with the usual requirements on an appeal after it was instituted, you must indemnify your ward in an action of the guardianship.
Promulgated August 9 (239).

5.37.12. The same Emperor to Octaviana.

You should sue for the fraud committed by a guardian in the administration (of your property) or the negligent acts of the curators of those whose heir you allege you are, provided you have become of legal age. But you cannot be unaware that the fact that women (are married and) have children does not enable them to manage their own affairs, if they have not yet reaches the legal age.[3]
Promulgated October 5 (241).

5.37.13. The same Emperor to Longinus.

That guardians who sue for debts to their wards or for recovery of property deposited cannot be compelled to give a surety (to the debtor) is clear.[4]
Promulgated April 24 (243).

5.37.14. Emperor Philip and Caesar Philip to Clemeus.

It is clear that a curator cannot be compelled to render an account of the management of his curatorship while he is still performing his duty and before the minor reaches his 25th year.[5]
Promulgated August 4 (245).

5.37.15. Emperors Diocletian and Maximian to Licinius.

If you did not sign up as surety you needlessly fear that you can be sued on the instrument which you signed as curator, when, as you state, you were formerly released by order of the president from your office as curator.[6]
Promulgated March 6 (287).

Note.

A curator by signing an instrument as such, obligated the minor, and not himself, unless he also signed it as surety.

5.37.16. The same Emperors and Caesars to Proculus.

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[2] [Blume] See law 4 of this title.
[3] [Blume] Headnote C. 5.28.
[4] [Blume] See laws 18 and 25 of this title.
[5] [Blume] Law 2 of this title.
[6] [Blume] Riccobono, 33 Z.S.S. 300-301.

Guardians do not have unlimited power to give away the property of their ward. They can give proper possession to purchasers only when in the course of their administration they sell property on a ground which gives the right to do so. Since, therefore, they have no power to give away the property of persons whose affairs they manage, you are not forbidden to reclaim the property from the possessor thereof.
Subscribed at Heraclea April 22 (293).

5.37.17. The same Emperors and Caesars to Martial.

Guardians need have no fear as to the succession of their property, since the right to make a testament is not denied to persons who manage a guardianship. Neither are they forbidden to give away some of their property.

Note.

Minors had a lien on the property of their guardians and curators. Law 20 of this title. Still the latter had a perfect right to dispose of their property as they wished, though the transfer was subject to any lien which the minors might have. C. 4.53.1.

5.37.18. The same Emperors and Caesars to Soterichus.

Since you state that you have been appointed guardian, you are responsible for the collection of the accounts due your female ward by virtue of your office. Hence call upon the debtors to make payment. If they fail to do so, you may exercise the usual right of selling the property pledged.
Subscribed December 31 (293).

5.37.19. The same Emperors and Caesars to Vindicianus.

If a guardian was, by decree, appointed in his absence, but, knowing thereof, he fails to make his excuse in the customary manner, he is made liable for the management [7] of the affairs of the minor.
Subscribed at Sirmium February 11 (294).

5.37.20. Emperor Constantine.

If anything is due minors on account of the administration of a guardian or curator, they are not to be forbidden to sue to recover the property of the latter, as though they had a lien thereon.[8] The same is true if a person who was appointed as guardian or curator failed to manage the property of minors.[9]
Given at Trier March 26 (314).
C. Th. 3.30.1; 3.19.1.

5.37.21. The same Emperor to Maximus, Praetorian Prefect.

If through defenders (guardians and curators) of minors a condition attached to a gift (to such minors) was neglected, they must make good the loss.
Given at Rome February 3 (316).

Note.

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[7] [Blume] As to making excuses see C. 5.72.
[8] Blume penciled in at the start of this rescript "To be corrected." The reading given reflects penciled in changes. There is also a check mark in the margin, so it is likely, but not certain, that the changes are the corrections Blume felt were needed.
[9] [Blume] See note law 17 of this title.

The law made guardians and curators liable if a condition annexed to a gift remained unfulfilled through their fault. Bas. 38.9.35. Gothofredus on C. Th. 3.30.2, thinks that the law might also be understood in other ways.

5.37.22. The same Emperor to the People.

The law which made it the duty of guardians and curators to sell gems of gold and silver, vestments and other expensive movables, urban slaves, houses, baths, store-houses, and everything else within cities, and to exchange everything for money except farms in the country and the slaves thereon, is much against the interests of minors.

1. We therefore direct that no guardian or curator shall be permitted to sell any of these things unless under the same conditions under which it was heretofore permitted to sell, pledge, or give in dowry a farm in the country and the slaves thereon, that is to say, after an investigation by the judge, proof of the reasons and interposition of a decree, so that there will be no opportunity for fraud.

2. Above all, therefore, let them always retain urban slaves, because they have knowledge of all the household goods at home, as part of the inherited estate. For good slaves will prevent the perpetration of fraud, and bad slaves can, if the situation demands it, reveal the truth if placed under torture.

2a. And they will be so observant that a guardian will not be able to either diminish the inventory or to change or steal anything, and such observation (of the slaves) is necessary in connection with vestments, pearls, gems, small dishes, and other household utensils.

2b. And it is more tolerable for slaves to die, when that happens, with their masters, than to serve outsiders. If they flee, that will be ascribed to the fault of the guardian whether he negligently suffers the discipline to be lax, or mistreats them by harshness, hunger, or stripes.

2c. For they do not hate their masters but rather love them; so that this law is better in this respect than the ancient one; for when the watchful care of slaves was dispensed with, the lives of minors were often put in danger.

3. Nor is it permitted to sell a house in which the father died and the minor grew up and which is made gloomy by the absence of tearing off images of forebears.[10] Hence both the house and the other immovable property shall remain part of the patrimony of minors; no building, in good condition at the time of the inheritance, shall be torn down and perish through fraud of the guardians. And even if a parent, or the person whose heir the minor is, leaves a building in bad condition, the guardian shall repair it whenever that is necessary, according to the testimony of the building itself, and that of many others; for thus the annual returns will bring more to the minors than the sale price thereof, reduced by fraud.

4. Slaves, too, who know any trade, turn their labors to the advantage of the minor, and the other slaves whom the minor, their master, cannot use and who know no trade, shall be supported partly through their own labor, partly by giving them an allowance.

5. And the law protects minors not only against guardians but also against immoderate and extravagant women (mothers of the minors) who frequently sacrifice for their new husbands not only the property, but also the life of their children.

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[10] Blume penciled a question mark into the margin next to this line.

5a. To this is added, that money—which the ancients considered as the backbone of the patrimony—being loaned out at interest, is hardly lasting, uninterrupted, or safe, and by it money is often lost, and the patrimony of minors reduced to nothing.

6. Guardians, therefore, shall no longer have the right of sale without intervention of a decree, except only as to vestments, which are worn out or are spoiled and could no longer be preserved. Nor do we forbid the sale of superfluous animals of minors.[11]
Given at Sirmium March 15 (326).
C. Th. 3.30.3.

5.37.23. The same Emperor to Felix.

If a minor should lose emphyteutic lands,[12] through fault or fraud of a guardian or curator because they refused to pay the rent against it, the latter must make the damage which occurs good from their property.
Given at Constantinople April 18 (393).
C. Th. 3.30.5.

5.37.24. Emperors Arcadius and Honorius to Eutichianus, Praetorian Prefect.

Guardians and curators must, as soon as they are appointed, make an inventory in the usual manner, in the presence of public officials, of all property and documents. Gold, silver, and everything not changed by the passing of time, if such is found among the property of the ward, must be put into safe custody, provided that they shall either buy suitable lands with movable property; or if, perchance, as is usual, suitable lands cannot be found, they shall increase the (moveable) property by interest according to the rule of the ancient law, the collection of which is at the risk of the guardian.[13]
Given at Constantinople February 24 (396).

5.37.25. Emperor Justinian to Julianus, Praetorian Prefect.

We ordain that since the appointment of guardians and curators is made with caution, debtors of minor wards under or over the age of puberty may be permitted to make payment to the former, provided that a judicial order to that effect without expense shall first permit it.

1. If this is done, that is, if the judge makes the order and the debtor makes payment, the fullest security follows in such matter, and on one will be disturbed thereafter. For whatever has been done in the proper manner in the beginning according to law, should not be reopened, because of an unfortunate result.

2. We do not, however, extend this law to those payments which are due to a minor for income, rent, or other similar things; but if an outside debtor wants to make payment , for instance of a due bill or on other similar indebtedness, and wants to be released therefrom, then we order said form (herein prescribed) to be followed.
Given at Constantinople February 20 (531).

Note.

The present law was enacted for the benefit of debtors to minors, so that payments due to minors might be safely made without any right of restitution to their former rights

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[11] [Blume] See C. 2.27.2; C. 2.29.2 and note.
[12] [Blume] Emphyteutic land was under a perpetual lease. See C. 4.66.
[13] [Blume] As to loaning out money at interest, see Nov. 72, cc. 6-8. Further as to inventory, C. 5.51.13.

on the part of minors, and so that the debtors when they made payments would be fully and completely protected. It was accordingly provided by this law that payment of notes and of any indebtedness in general should be made only upon order of the court. Payments of income and rent, however, might be made without such order, this provision being extended to interest by law 27 of this title.

5.37.26. The same Emperor to Johannes, Praetorian Prefect.

When some woman had not mentioned her son in her testament, and the same son so passed over was the guardian or curator of his brother or of a stranger who was appointed heir by the mother of the guardian, it was clear that, in such case the guardian or curator stood in a peculiar position.

1. For if he does not want to give his authority or consent to the minor ward to enter on the inheritance, lest he should thereby prejudice his own rights, he is in danger of an action on the guardianship or an action analogous to that of the volunteer agency which the minor ward under or over the age of puberty may bring against him on account of injury from delay. Or, if actuated by such fear he should give such consent to the minor, he faced another danger, for when he gives his consent to another (to take the property), he loses his own rights; for he then seemed to ratify his mother's will which he thought should be attacked.

2. And many other cases arise, in which a guardian or curator has to fear prejudice to his own property, for instance in hypothecations and various other cases.

3. We find it, however, generally provided that all rights of action to which the guardian or curator was subject by virtue of his office, are at the expiration of their office transferred over against their former wards.

4. Wherefore, in view of such good example, shall we not remove all fear also in all other cases in which the guardian or curator fears that he may receive injury?

5. We therefore give them permission to manage the affairs of their minor wards with a feeling of utmost security and with the knowledge that our law preserves their rights for them, and that they will not suffer any loss by reason of giving such authority or consent.

Given at Constantinople August 23 (531).

Note.

Except in the case of emancipated children and persons situated like them, all heirs of a decedent were required to accept an inheritance in some manner, in order to get the benefit thereof. Before acceptance, the inheritance was merely in the position of being offered to the appointed or intestate heirs. Hence a guardian or curator who was himself an heir, except that he was not given anything in a testament but was overlooked, stood in a peculiar situation. He might have the right to set aside the will, or the will might be void as to him, but if he gave his consent to the minor, whose guardian or curator he was and who was appointed heir, to accept the inheritance, he might appear as consenting to the provisions in the will which were prejudicial to himself. As to acceptance see headnote C. 6.30. The present law, accordingly, provides that such consent should not be construed as though he consented to the provisions of the will so far as he was personally concerned.

5.37.27. The same Emperor to Johannes, Praetorian Prefect.

The constitution which we recently made, providing in what manner payments might be made on contracts of minors for income, rents, and other similar things, is also

extended to apply to payments of interest which has not accumulated or which is not in arrears for many years, but is confined to a payment for two years or 100 solidi in amount.[14]
Given at Constantinople November 1 (531).

5.37.28. The same Emperor to Johannes, Praetorian Prefect.

We ordain that no guardian or curator of a minor or of insane or other persons, for whom curators are appointed according to ancient laws or our constitutions, shall refuse to defend a lawsuit which they have undertaken, but they shall defend such person in every possible way from the beginning of the suit and shall prepare and carry it through according to law, knowing that this is a necessary duty of guardianship or curatorship.

1. And if they refuse or neglect to do this, they shall not only be removed as suspected (of dishonorable conduct) and lose their good name, but they shall also be compelled to make good the loss sustained by reason thereof by the above mentioned persons.

1a. And if anyone admonished by some suit has furnished the customary bond for his appearance and defense (propter lites instructionem) or after the issues have been joined in a suit which he has conducted personally and not through a procurator, and he becomes demented or mad, a curator shall be immediately appointed for him in the proper court through the care of the judge before whom the suit is pending, and that of the relatives and the plaintiff, if he wishes, so that the suit instituted by him will not be protracted for too long a time, and the curator so appointed must undertake the defense and do all things necessary in the suit.

2. Persons, too, who ask for the appointment of guardians or curators at their own risk,[15] or at the risk of their property—whether mothers or other persons—must put the guardians or curators in proper condition to undertake the defense.

2a. If such guardians or curators are unwilling, and are removed from their position on account of the refusal to defend, the persons mentioned shall cause other guardians or curators to be appointed who will state that they will act in connection with the transaction for which they have been so appointed.

2b. And in order that such (insane) persons may not be left without the proper care, and that the rights of those proceeding against them may not be too long delayed, we ordain that immediately, that is, upon refusal to defend—in cases in which, as stated, that should happen—other guardians or curators shall be appointed, upon application of relatives or kin, or creditors or other interested parties made to those who have the right according to law to appoint guardians or curators.

3. But clarifying what we mean by undertaking the defense in such case, in order that such guardians or curators may not think that we impose too great a burden on them, we order that they are not appointed to make a defense[16] which requires a surety that they will satisfy the judgment in the case, but they simply undertake to prepare the suit of the

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[14] [Blume] See law 25 of this title and note.
[15] [Blume] For responsibility of those nominating guardians see headnote C. 5.42; see also note C. 5.33.1.
[16] [Blume] Agents for defendants were generally required to give a bond that they would satisfy the judgment in the case. Inst. 4.11.5. When the principal defendant was present, however, he might himself give such bond or he might become surety for the agent. Inst. 4.11.4.

minor or other person according to law; and they have permission by virtue of the authority of this sanction without (judicial) order to pledge the property of which they have the management, to take the place of a surety in the suit.

4. In order, moreover, to remove all doubt as to the defense of minors, under or over the age of puberty, and of other persons, we ordain that guardians or curators shall only be appointed upon condition that in addition to the other solemn statements made by them in regard to the management of the property on the public records and in their written promises, they also specially state that they are under obligation to undertake the defense of their minor wards or other persons above mentioned promptly.

5. We also add in order not to leave this subject ambiguous, that guardians and all curators may, without order of court, sell for a just price, which then prevails at the place where the sale is made, the produce either collected as rents of lands or otherwise obtained from the property of their wards; that is to say, wine, oil, grain or other produce, and they shall handle the money collected from the sale of these fruits the same as the other property of the minor wards or other persons.

Given at Constantinople October 21 (531).