

Book VIII.
Title XLVIII.

Concerning emancipation of children.
(De emancipationibus liberorum.)

Bas. 31.3; Dig. 1.7; Inst. 1.12.¹

8.48.1. Emperors Diocletian and Maximian to Herennius.

If the law of the municipality, in which your father emancipated you, gave the duumvirs power to also authorize strangers to emancipate their children, that which was done by the father is valid.

Promulgated December 3 (290).

Note.

Generally emancipations could be made only before magistrates (judges) with plenary jurisdiction, as in the case of adoptions. It appears, however, from the present law, as well as from law 6 of this title, that occasionally municipal magistrates had this power either pursuant to the law governing the municipality, or pursuant to the law governing the municipality, or pursuant to long custom. See 9 Cujacius 1238; 1 Donellus, 358; Paul. 2.25.4.

8.48.2. The same to Gennadia.

In emancipations of children as well as in gifts, the true facts, rather than what appears in a written document, are considered.

Promulgated March 11 (291).

Note.

The "gifts" mentioned in this law, were undoubtedly the gifts made by the father (or grandfather) in making the emancipation. These gifts were not unusual. D. 39.5.31.2; 9 Cujacius 1219. Unless the emancipation took place according to law, it was ineffectual. See 34 Z.S.S. 229.

8.48.3. The same and the Caesars to Heliodorus.

Children are released from paternal power not by naked consent, but by a solemn proceeding, or by an act of nature; and consideration is taken, not of the reasons which actuated the father in making the emancipation, but only of the solemnity of the proceeding.

Subscribed at Sirmium September 18 (293).

8.48.4. The same to Colonia.

Neither is a grandfather compelled to release his granddaughter from paternal power, nor is it our custom to bestow benefits on anyone to the injury of another.

Given October 15.

Note.

¹ Blume penciled in here: "Woess, R. Erbr. 39 note.

In the foregoing case, the granddaughter had evidently petitioned the emperor for emancipation. Emancipation in later times was, with few exceptions, a voluntary act on both sides. The person having the paternal power was not compelled to emancipate, and the child could not be compelled to consent to the emancipation. D. 1.7.31; Paul. 2.25.5; Nov. 89, c. 11; law of this title. Buckland 132, notes a few possible exceptions, where emancipation might be compelled. In the early law the consent of the child, or grandchild, was probably not required, and this is an innovation of the later law. Buckland 133 note. Where a grandchild was emancipated, the consent of the father was not required. A grandfather who had both a son, and by that son a grandson or granddaughter, in his power, might either emancipate the son, and retain the grandson or granddaughter in his power, or retain the son and emancipate the grandson or granddaughter.

8.48.5. Emperor Anastasius to Constantinus, Praetorian Prefect.

We order that if parents, that is a father, paternal grandfather or great-grandfather and other remoter (male) ascendants united in a continuous line through persons of the male sex, desire to emancipate children in their power, that is to say, a son, daughter, grandson or granddaughter by a son, great-grandson or great-granddaughter and others likewise united to them in continuous line through persons of the male sex, whether such descendants are absent and living abroad or in the same place, region or city, but not present in court, they may send a petition to us, (receive a rescript), register this with the proper judge who has jurisdiction over proceedings for emancipation, and deposit with him the petition presented (to us), so that when this is done, the emancipation shall be completely valid, through the imperial consent (previously) obtained, and the persons upon whom such benefit is bestowed will be released the same as though emancipated by parents (in the usual manner), provided that such emancipated persons declare their consent to the proposal of the parents, upon the records, either before the same or some other judge, and either previous to the supplication to the emperor and the issuance of the imperial rescript or thereafter, unless they are infants, in which case they will be released from paternal power in the manner aforesaid without their consent.²

Given July 22 (502).

8.48.6. Emperor Justinian to Johannes, Praetorian Prefect.

Since we have noticed in emancipations the continued observance of a foolish formula of fictitious sales of free persons and inextricable circuities and harmful blows with a rod, which have no rational effect, we order that such circuities shall be abolished and permission is given to the person who wants to emancipate a person in his power to do so, either pursuant to the Anastasian law, or to go, without an imperial rescript, before the tribunal of a competent judge or before those magistrates who have jurisdiction in the matter by law or by long custom, and dismiss from his power his sons, daughters, grandsons, granddaughters, or remoter descendants whom he has in his power, retaining all legal rights (as to inheritance) though not specially reserved, release their interest in

² [Blume] See 6.58.11, which provides that such emancipated person may, by order, retain their rights in connection with inheritances, and that others retain their rights in that connection against them.

the special property (peculium) (of those emancipated), make a gift to them of other property, retain, according to the measure of our constitution, in the property which cannot be acquired for their benefit, the usufruct thereof, and do everything else (which may be done), abolishing only, as said, observance of empty formulas.

Given at Constantinople November 1 (531).

Note.

The ancient form of emancipation resembled that of adoption, already noted in note to C. 8.47.11. There were three sales (for emancipatio means mancipatio - sale in the presence of five witnesses, and the use of the scales and a piece of money to indicate a fictitious sale), and two manumissions by the purchaser, which returned the child through the manumission, back into the father's power. After the third sale, the fictitious purchaser sold the son back to the father, who in turn freed the son in the same manner in which a slave would be freed, and he thereby acquired the rights of a patron; that is to say, he retained the right to inherit from his child. In this manumission a rod, vindicta, was used (C. 7.1 h.n.), mentioned in this law, and also referred to in Nov. 81, and the use of it is here said to be harmful, and in Nov. 81, is referred to as insulting.

The method of emancipation was entirely abolished by the present law. Anastasius had already provided another method of emancipation, as shown by law 5 of this title.

The usufruct here mentioned, which the parent received on emancipating a child was one-half of the child's property, as already noted in note to C. 8.46.2, and as shown by C. 6.61.63, and Inst. 2.9.2. It is stated in Inst. 1.12.6 that while emancipation releases from paternal power, the father has, by the praetor's edict, the same rights over the property of the emancipated child as a patron has over the property of his freedman; and if at the time of the emancipation, the child, or descendant of remoter degree, is under the age of puberty, the father becomes by the emancipation his or her guardian.

While emancipation in a certain sense severed the family ties, still an emancipated child had a right to inherit from his father. This subject is fully treated in C. 6.9 and subsequent titles.