Book V.
Title LI.

An action on guardianship (tutelae).
(Arbitium tutelae).

Bas. 38.3.26; D. 27.3.

5.51.1. Emperor Antoninus to Leo.

When an accounting is demanded of you as to your administration of your guardianship, the fact that, as you say, the testator either magnified or minimized the amount of the property by his statements in the testament cannot prevail over the truth and the actually proven facts.
Promulgated September 27 (212).

5.51.2. The same Emperor to Praesentinus.

If the debts due from the debtors of your father were good at the beginning of the guardianship, but deteriorated in value through the gross neglect[1] of the guardians during the time of the guardianship, the judge appointed to investigate the matter will look into this, and if the guardian delayed in collecting the debt through fraud or manifest negligence he will take care, in the action on the guardianship, to award the minor the damages which resulted therefrom.
Promulgated July 7 (213).

5.51.3. The same Emperor to Vitalius.

If your curator, upon order of the president, appropriates money which was deposited to acquire, pursuant to a decree of the president, a landed estate for you, and buys land with it for himself, you may elect whether to treat him as having acted as your agent in the purchase, or to receive legal interest from him on the money converted to his own use. The judge appointed for the trial on the guardianship will do his duty accordingly.[2]
Promulgated at Rome June 29 (215).

5.51.4. Emperor Alexander to Aglaus.

No reason permits suit for a debt due from the estate of a decedent against a person who, according to the rule of the edict, has refrained from entering on the paternal property.[3] 1. Nor does it make any difference that an action lies in favor of the heir against his curators, because of unadvisedly refraining from so entering; for in such

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[1] [Blume] See law 7 h.t. note.
[2] [Blume] This law indicates that property bought by a guardian or curator in his name with money of his ward, should, contrary to the general rule (C. 4.50.1 note) be considered the property of the ward. That is, however, not certain, since only a personal, and not a real action is mentioned. But D. 26.9.2 gave an analogous (utilis) vindication. This is widely thought (Springsheim, Kauf 125) to be interpolated, and that the rule arose with Justinian. The emperor had, however, in any event previously given a lien.
C. 7.8.6; D. 20.4.7 pr.; D. 27.9.3 pr.
[3] [Blume] C. 6.30.1.

action nothing comes in question as to what was or should have been done in the performance of duty, except negligence only and that to the extent of damage for not so entering.

2. It follows that if you have compromised with your curators concerning that matter, no claim lies in favor of the creditors of your father against you.
Promulgated April 29 (229).

5.51.5. Emperor Gordian to Victorinus.

All guardians who managed a guardianship (in common with others) and their heirs should, it has long been settled, go (be sued) before the same judge. When, therefore, you day that your father managed a guardianship with another, the president of the province will appoint the same judge (trior of facts) as to you and as to the heirs of the co-guardian of your father and he will decide as to the amount in which each should be condemned.
Promulgated July 23 (238).

Note.

There was a joint liability of co-guardians for the management of the guardianship. It was proper, therefore, that all those that were liable should be sued in the same court, and that the same trior of facts should have the whole case before him so as to render the proper judgment against all the parties. As to judgment against several defendants see C. 7.55. See also C. 3.1.10 note.

5.51.6. Emperor Diocletian and Maximian to Septemus and Canones.

When it is stated that your guardian, in addition to making a sale, which he was not allowed to make, also is guilty of fraud as to the price, the president of the province will, if you want to ratify the sale, not hesitate to order the remainder of the price of the property sold by the guardian, together with interest, to be promptly paid to you. 1. It is superfluous for you to ask us that the price (fraudulently withheld) be paid to you by the heirs of the guardian who made the sale, because it cannot have escaped the experience of the president that guardians who have the (active) management, or their heirs, should be sued first in connection with the transactions managed by them, the other guardians being held secondarily responsible only for neglect to see that no loss occurred, or if they are shown to have had the management alike, the right of action lies against anyone of them, the rights over against the others being transferred to the one who is sued.
Promulgated August 30 (290).

Note.

As shown in C. 5.71, a guardian could not sell lands without an order from court. In the present case a sale had been made evidently without such order and was, therefore, unlawful. But the minor might ratify the sale and sue the guardian who sold, and who had evidently the active management of the guardianship, for the actual price received, part of which was attempted to be fraudulently withheld. If there were several guardians, they might agree among themselves who should have the active management. Buckland 163. He and his heirs in case of death were primarily liable to the minor, the others being liable secondarily only. C. 5.52; C. 55.2.

5.51.7. The same Emperors and Caesars to Alexander.

The law is not uncertain that whatever minors have lost by the fraud or gross or slight negligence of a guardian or curator, or by failure to acquire what could have been

acquired by the latter, comes in question in an action on guardianship or in an analogous action on voluntary agency (negotiorum gestorum).
Subscribed April 12 (293).

Note.

Originally, and up to the time of Quintillian at least, and, perhaps, later, guardians were responsible only for their fraudulent, deliberate conduct (dolus) resulting in damage. Quint., Or. 7.4.35; D. 26.7 pr. But guardianship became a public duty, and they became responsible for culpable conduct of lesser degree—in this rescript (itp) for slight negligence. That seems inconsistent with law 2 h.t. See C. 55.2. It seems also inconsistent with D. 27.3.1 (itp), which required them to exercise that degree of care which they exercised in their own affairs. See C. 34.1 note. It may be noted that the form of action against a guardian was different than that against a curator.

5.51.8. The same Emperors and Caesars to Dalmatius.

A lapse of a long time (10 or 20 years)[4] does not bar suit against guardians on the guardianship. Hence if you have not released your guardians by compromise, novation, or formal discharge, you are not forbidden to sue them before the rector of the province for the amount due you.
Subscribed April 16 (293).

5.51.9. The same Emperors and Caesars to Julianus.

You may sue your former guardian before the praetor both for an accounting and to pay you what is due you. For although it is stated that your mother received your property and promised (by stipulation) to hold the guardian harmless by reason of her management thereof, still, you have an action on the guardianship against the guardian, but you do not have an action on the stipulation against the heirs of your mother.[5]

5.51.10. The same Emperors and Caesars to Pomponius.

If the decedent managed your guardianship, you cannot sue to recover or to hold his property, but you have an action on guardianship against his heirs. The debt (due you) must, however, be shown by other proofs. That neither he nor his wife and anything before his administration is not sufficient proof. For industry and increase in property, which is acquired by labor and in many other ways, is not forbidden to poor people.
Subscribed at Sirmium January 22 (294).

Note.

The property here referred to was that of the guardian, not as Siber, Passilegitimation 69, that of the ward. The last sentence shows that conclusively. Whether a different meaning than now appears was attached in classical law is problematical. See, Peters, 32 Z.S.S. 211; Pringsheim, Kauf 95; Festgabe für Güterbach 246-247.

5.51.11. The same Emperors and Caesars to Chrysiana.

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[4] [Blume] C. 7.33.

[5] [Blume] A stipulation, as other contracts, was ordinarily good only between the parties. C. 8. 37. 2 note. See C. 5.39.2.

If a guardian continued, uninterruptedly, to manage the property of a girl after she arrived at the age of puberty (12 years), he must render an account of his guardianship for the whole time. But if he had nothing to do with the property after finishing his administration thereof, he is not responsible for the subsequent time.[6]
Subscribed at Anchailus November 27 (294).

5.51.12. The same Emperors and Caesars to Quintilla.

An action on the guardianship lies in favor of heirs (of the minor) and against heirs (of the guardian).
Given November 22 (294).

5.51.13. Emperor Justinian to Julianus, Praetorian Prefect.

Solving the doubt of the ancient law, we ordain that if a guardian or curator has made a statement of some kind as to the property of his minor ward under or over the age of puberty, stating the amount thereof to be larger than it actually is, whether such statement was made for the good of the minor or adolescent ward, or through artlessness or for any other reason, the truth shall not be prejudiced thereby, but the facts—the actual shall not be prejudiced thereby, but the facts—the actual amount of the property that belongs to the minor, under or over the age of puberty, shall govern.

1. But if he publicly makes, in writing, an inventory of the property of the minor, under or over the age of puberty, and therein states the amount of the property to be greater than it is, nothing shall be considered except the written statement and the property of the minor, under or over the age of puberty, shall be accounted for according to this written statement; for no man is so artless or rather foolish, as to permit a written statement to be inserted in an inventory publicly made which is contrary to his own interests.

2. And it must be noted that guardians and curators must not dare to touch the property of a minor, under or over the age of puberty, or claim any interest therein until an inventory thereof has first been publicly made, and thereafter has been delivered to them in the usual manner, unless the testator who disposed of the property has specially stated in writing that no inventory should be made.

3. All guardians and curators must know that, if they fail to make an inventory, they shall be removed as persons suspected (of misconduct), shall suffer the legal penalties provided against them; shall thereafter be branded by a perpetual stain of infamy, and shall receive no absolution therefrom by any imperial rescript.[7]
Given at Constantinople August 1 (530).

Note.

The making of an inventory is provided for in C. 5.37.24. As to infamy of persons removed from guardianship, see C. 5.43.2 note and C. 5.43.9.

[6] [Blume] See C. 5.39.4; C. 5.38.6.