

Book VIII.  
Title XXXVIII.

Concerning invalid stipulations.  
(De inutilibus stipulationibus.)

Bas. 43.6.

8.38.1. Emperor Antoninus to Paulinus.

You are not bound by a stipulation made by you while under the age of puberty without consent of a guardian.<sup>1</sup>

Promulgated at Rome July 1 (215).

8.38.2. Emperor Alexander to Menaphilus.

Antiquity agreed that marriage should be without compulsion. It is clear, therefore, that a pact against separation (of the married couple) is void, and a stipulation under which penalties are visited on the party who should send a bill of divorce, cannot be considered valid.

Promulgated February 3 (223).

8.38.3. Emperors Diocletian and Maximian to Isidorus.

Just as a stipulation (obligation of words) cannot be entered into between parties who are not in the presence of each other, so no one can effectually cause another to promise by stipulation to give or pay something to a third person, to whose power he is not subjected, unless he has an interest therein. 1. Since, therefore, you state that you daughter died during marriage and that, pursuant to a pact, half of the dowry was to be held by the husband in the name of the surviving son, and that the other half was to be turned over to your grandson, or in case he should not be alive, to Julianus, and since you give us to understand that the grandson is dead, and that the stipulation in favor of Julianus is of no force because he was not present when it was made, and that you therefore want the property returned pursuant to a stipulation (also added) whereby everything was to be returned according to the tenor of the pact (if not turned over to Julianus) - go before the president of the province concerning the stipulation, so that having examined the allegation of both parties, and determined the portion of the dowry which it would have been to your interest to have had turned over to Julianus according to contract, give - on account of the working of an uncertain quantity - judgment for the estimated value (of such interest).

Promulgated December 13 (290).

Note.

The rescript in brief is this: The daughter of Isidorus died in marriage and Isidorus had made a contract with his<sup>2</sup> son-in-law, husband of the daughter, to the following effect: One-half of the dowry was to remain with the son-in-law, as a provision for the son of the marriage; the other half was to go to the grandson of Isidorus,

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<sup>1</sup> [Blume] See C. 8.37.7, and note to the same effect.

<sup>2</sup> The typed ms. reads "her," but Blume penciled in "his" without striking "her."

if alive, if not, to Julianus. A stipulation was added, that if the half were not so paid to the grandson or Julianus, it should be returned to Isidorus. The last stipulation could be enforced.

It will be noted that in this rescript, as in C. 8.37.3, the stipulation was void, because Julianus was not present. See note on the latter law. It must, probably, be assumed, though the point is not clear, that the stipulation in favor of Julianus would not have been valid in any event, unless it was to the interest of Isidorus that the property should be turned over to Julianus - the latter being, for instance, a creditor. See 9 Cujacius 1197 and note C. 4.27.1.

#### 8.38.4. The same and the Caesars to Domna.

It is manifest that you have no right of action on that document, because, contrary to good morals, the stipulation was entered into as to a future inheritance, since everything contained in a pact or stipulation which is contrary to good morals is void. Promulgated April 29 (293).

#### Note.

The foregoing law is stated in Bas. 53.6.4, as follows: "If parties agree that the first to die should leave his property to the other, such agreement is void, because it is contrary to good morals. Neither a pact nor a stipulation to that effect has any validity." See also C. 6.21.11; C. 2.3.30.

#### 8.38.5. The same to Aquilina.

An action indeed arises on a contract, though fraud and intimidation were used, if a stipulation was added. Nevertheless the claim thereon may be defeated by setting up the defense of fraud and intimidation. Subscribed September 19 (293).

#### 8.38.6. The same to Septimius and Eustalius.

If your grandmother exacted a stipulation for the benefit of herself and of Eustolius to the effect that the loan which she had made should be repaid, no right could be acquired for him (Eustolius) to whose power she was not subject. If, of course, he himself exacted a stipulation in his name for the payment to him of the amount which had been agreed to be paid to him, there is no doubt that an obligation to pay him arose therefrom.

Subscribed September 27 (294).

#### Note.

This law states the rule referred to in note to C. 4.27.1, and notes to C. 8.37.2 and 8.38.3, that one person cannot exact a stipulation in favor of another who is not in his power, or who is not in the power of such person.