

Book V.  
Title XVII.

Concerning divorces and abolishing the action concerning misconduct.  
(De repudiis et iudicio de moribus sublato.)

Bas. 28.7; D. 24.2.

Headnote.

Divorce. It is stated by some Roman writers that 520 years elapsed after the foundation of Rome before any divorce occurred, at which time one Spurius Carvilius put his wife away on the ground of barrenness. Valerius Maximus 2.1.4. Smith's Dictionary of Greek and Roman Antiquities under "divortium." The truth probably is that this was the time when divorces began to be frequent. In any event, it became a fixed rule of law that any marriage might be dissolved by consent or otherwise, and many noted men, including Pompey, Cicero, and Caesar divorced their wives. No action in court was necessary, although judicial proceedings might be taken in connection with the property rights of the parties, and the property of one of the married people might be awarded to the other on some ground authorized by law. All that was necessary was for one of the contracting parties to let the other know that the marriage was at an end. It became customary to deliver a written not to the divorced party, and the Julian law on adultery required the presence of seven witnesses, Roman citizens, to the act of repudiation of the marriage. D. 24.2.9. In cases of gravity even the father of a married child could send a bill of divorce on behalf of his child, and, on account of the property rights involved, the consent of the father, with paternal power, was required before his child could repudiate the marriage. So firmly fixed became the rule of a free divorce that a contract against it was considered to be against public policy and void. C. 8.38.2. The one exception to the foregoing rule was that a freedwoman could not be effectively divorced from her husband who was her patron and who had not freed her pursuant to a trial. C. 5.5.1; D. 24.2.10.

The Christian emperors began to legislate against divorces, and while not declaring them illegal, affixed a penalty against causeless divorces. Justinian went rather than any of his predecessors and penalized divorces which were not upon some one of the grounds enumerated, very heavily, even, finally, punishing the parties by throwing them into a monastery. He forbade divorces by consent; but this legislation was repealed within a year after his death.

5.17.1. Emperor Alexander to Avitiana.

Marriage is not dissolved by deportation or interdiction from fire and water, if the misfortune into which the husband falls does not change the affection of the wife. The action on dowry does not, therefore, lie as of course (*ipso jure*), but that the woman whose course is to be commended should lose her dowry is permitted by neither by justice nor example.

Promulgated November 5 (229).

Note.

See C. 5.16.24. Interdiction from fire and water was the name given to the old form of banishment in Rome.

Deportation did not of itself dissolve marriage; still the wife of the person deported could bring an action to recover her dowry and the fisc was not entitled to it.

This is the general sense of the law. Deportation was for life and entailed confiscation of all property of the person deported. Modifications were made by Justinian. See note C. 5.16.24;

9 Cujacius 48. See also Nov. 22, c. 13.

5.17.2. Emperors Valerian and Gallian and Caesar Valerian to Paulina.

If your daughter waited while betrothed for three years while he was wandering about and she does not want to wait longer for him, having lost hope of an alliance with him, she is at liberty to marry another, lest she may lose the opportune time of marrying, since she could, if she wished, send him, if he were present, an announcement of the change of her plan.<sup>1</sup>

Promulgated March 26 (259).

5.17.3. Emperors Diocletian and Maximian to Tullius.

It is not doubtful that things done with deliberation and according to law should rightly and justly have full effect and validity.

1. Hence, if you gave a dowry for a woman and had it stipulated that it should be returned to you at her death, and the marriage is dissolved in a short time by a fictitious divorce for the purpose of defrauding you, the president of the province will not hesitate to order the dowry which you gave before marriage returned to you.

2. For it is certain that the moderator (president) of the province will take care that unjust acts will not be benefited by cunning, since such trickery is displeasing to us.

3. That fictitious divorces or renouncements of betrothal are of no force was also the opinion of the ancient authors of the law.<sup>2</sup>

Given August 31 (290).

5.17.4. The same Emperors and Caesars to Piso.

A mother has no power to dissolve her daughter's marriage.

Given at Sirmium December 30 (294).

5.17.5. The same Emperors and Caesars to Scyrio.

That the wish of a father to have his daughter, under his power, divorce her husband, is of no force when he gave his consent to a marriage in the beginning, and when the wife, his daughter, lives in concord with her husband, was decided by the Divine Marcus, our most pious father, unless such father wishes such divorce for a great and just reason. Moreover, no constitution directs that an unwilling woman must return to her husband. And a father of an emancipated daughter has, in no event, any power in the matter of her divorce.

Given at Nicomedia August 28 (294).

Note.

It would seem that under the present law a father or grandfather who has a married person in his power could send a bill of divorce on behalf of such person for a grave reason, but not otherwise. It seems further that before the time of Severus, or

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<sup>1</sup> [Blume] See C. 5.1.2.

<sup>2</sup> [Blume] See law 12 of this title and Nov. 22, c. 19. For simulated transactions, see headnote C. 4.22.

perhaps Marcus Aurelius (C. 5.17.12), such parent had the absolute right to send a bill of divorce for and on behalf of such person, but that emperor directed that if the married people were in accord, a bill of divorce sent by a parent should not affect the marriage, although it would affect the marriage gift made by such parent. D. 24.1.32.19. After the time above mentioned, it clearly came to be against public policy for a parent to attempt to dissolve the marriage of his son or daughter (except, as stated, for a grave reason). C. 5.4.11; C. 8.8.3; D. 43.30.1.5. One grave reason was impotency of the husband. Law 10 of this title. And law 12 of this title is to the effect that a marriage could not be dissolved by consent of the married people, if under paternal power, unless the consent also of the parent with paternal power was obtained, in order that no fraud as to the property rights, connected with the marriage gifts, could be perpetrated on the later. Such parent, however, had a right to dissolve a betrothal agreement. D. 23.10.

#### 5.17.6. The same Emperors and Caesars to Phoebus.

Although written announcement of a divorce is not delivered or has not become known to the husband, the marriage is, nevertheless, dissolved.  
Given at Nicomedia December 15 (294).

#### 5.17.7. Emperor Constantine to Dalmatius.

A wife who, for four years, was unable to get any news as to the existence of her husband who had gone on a military expedition and who, therefore, thought of entering into marriage with another, but did not in fact do so until she communicated her wish in writing to the duke (of the army of her husband), does not seem to have entered into any furtive marriage. Nor does she seem to have lost her dowry or be subject to capital punishment when she, after the lapse of so long a time, is shown to have married not rashly or secretly, but publicly, after making her intention known. 1. It may, therefore, be remarked that, if there is no suspicion of adultery, and the alliance is not found to have been secret, (women so situated) need not fear the men whom they married, since only when the marriage bed is knowingly violated does the policy of the law demand a suitable punishment.<sup>3</sup>  
Given at Naissus (337).

#### 5.17.8. Emperors Theodosius and Valentinian to Hormisda, Praetorian Prefect.

We direct that a lawful marriage may be entered into by consent, but cannot be dissolved without sending a bill of divorce. For regard for the children demands that a dissolution of the marriage should be more difficult.

1. We, moreover, designate with clearness by this most salutary law the causes of a divorce. For as we justly forbid the dissolution of marriages without just cause, so we want a married party, who is pressed by adverse circumstances, to be freed by our, though unfortunate, still necessary assistance.

2. If any woman, therefore, finds that her husband is an adulterer, murderer, poisoner, conspirator, against our regime, or is condemned for forgery, or is a violator of sepulchers, a robber of sacred edifices, a highwayman, a harbinger of highwaymen, a cattle thief, a kidnapper, or that he, in contempt of his home, associates with lewd women while she herself is looking on, which especially exasperates chaste women, of if she

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<sup>3</sup> [Blume] Modified by Nov. 22, c. 14, lengthening the time to ten years. That provision was in turn modified by Nov. 117, C. 11 to this title.

proves that he laid snares for her life by poison, sword, or in any other sinister manner; or that he inflicted lashes on her, which is an insult to free-born people—then we give her permission, necessary in such case, to avail herself of the help of divorce and legally prove the causes thereof.

3. The husband shall be restrained in like manner, and shall not be permitted to repudiate his marriage-yoke without clearly designated causes, nor shall he expel his wife from his home in any manner, unless she is an adulteress, poisoner, murderer, kidnapper, violator of sepulchers, robber of sacred edifices, accomplice highwaymen, or seeks the society of other men without his knowledge or consent, or spends the night away from home against his will and without just cause, or seeks, without his consent, enjoyment at the circus, theatre, or amphitheater in the places in which these are usually given, or lays snares for him by poison, sword, or in any other sinister manner, or is accomplice of persons conspiring against our regime, or participates in a crime of forgery, or lays audacious hands on him; for in that case we give him the necessary right of divorce and to legally prove the causes of action.

4. Unless the husband or wife complies with these provisions, they shall be punished in accordance with this most provident law. If the woman should try to send a bill of divorce in disregard of this law, she shall lose her dowry and prenuptial gift, and she shall have no right to marry within five years, for it is just that she should in the meantime abstain from a status of which she has shown herself to be unworthy.

4a. But if she marries nevertheless, she will become infamous. We refuse to call such an alliance a marriage, and everyone has permission to attack it.

4b. If she proves a legal cause of the divorcee, however, she may have back her dowry and receive her prenuptial gift or recover it according to law, and shall have the right to remarry after a year, when there can be no doubt as to the offspring.

5. So, too, we ordain by this equitable law that if the husband shall prove his wife guilty of the things forbidden her, he shall have or recover the dowry and prenuptial gift, and may remarry immediately if he wishes. But if he wants to renounce his wife otherwise, he must return the dowry and lose the prenuptial gift.

6. If an accusation of adultery or of violated majesty is made (in the bill of divorce) and documentary evidence is lacking, the slaves of the husband and wife who are over the age of 14 years, male and female, must be examined under torture as to the cause of divorce so that the truth may be more easily be found or more clearly uncovered.<sup>4</sup> If blows are inflicted, as has been said, by one of them on the other, the same method of proof shall be followed, since things done at home cannot easily be shown by others.

7. If a bill of divorce was sent, when a son or sons, a daughter or daughters, are living, everything which is gained through the marriage must be preserved for the son or sons, daughter or daughters, to become theirs after the death of the receiver, that is to say, if the father, without just cause, sends a bill of divorce, the prenuptial gift must be preserved by the mother; if the mother sends such a bill, the dowry shall, after the death of the father, be turned over to the child or children, reserving to the father and mother the right, however, to appoint one or all of the children heirs (of such property).<sup>5</sup>

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<sup>4</sup> [Blume] See C. 9.41 headnote.

<sup>5</sup> [Blume] this right of selection was taken away in case of second marriage by Nov. 12. c. 25 and in the light of Nov. 22, c. 30 also in case of divorce. The grounds for divorce were reenacted and somewhat amended in Nov. 22, c. 15 and Nov. 117, c. 8 and 9.

7a. Nor do we permit them to alienate or pledge such property; but if any part thereof is lacking, it must, if the children are not appointed as heirs, or if appointed, do not enter on the inheritance, be made whole by the heirs or by those in possession thereof, so that inconsiderate minds may also in this manner be restrained, through the resulting damage, from sending a bill of divorce.

8. And any agreements, of course, made contrary to the present orders of our majesty, will be contrary to law and of no validity.  
Given January 9 (449).

#### 5.17.9. Emperor Anastasius to Theodorus.

If a bill of divorce was sent during marriage by the common consent of the husband and wife, and the bill contains none of the causes of mentioned in the well-considered constitution of Theodosius and Valentinian, of blessed memory, the woman need not wait five years, but may remarry after one year.  
Given February 15 (497).

#### 5.17.10. Emperor Justinian to Mena, Praetorian Prefect.

To the causes formerly specifically defined for which bills of divorce are legally send, we add another, namely, that if the husband is unable for two continuous years<sup>6</sup> after the beginning of the marriage to cohabit with his wife on account of impotency, the woman or her parents may send a bill of divorce to the husband without loss of the dowry, provided, however, that the husband shall retain the prenuptial gift.  
Given December 11 (528).

#### 5.17.11. The same Emperor to Hermogenes, Master of Offices.

We order that whoever has taken in marriage a woman with the consent of her parents, or if she had no parents, with her own consent, and with conjugal affection, when no marriage contract was executed and no dowry was given, such alliance shall be considered as valid as though marriage had been solemnized after the execution of such contracts; for marriages are not contracts by dowries but by matrimonial intent.

1. If anyone wants to expel from his bed a wife whom he had married without dowry, he will not be permitted to it otherwise than when a misconduct has intervened which is condemned by our laws.

1a. And if he divorces her without (such) misconduct or if he himself is guilty of such misconduct toward his wife, who is blameless, he shall be compelled to deliver to her the just portion of one-fourth of his property, provided that if the husband has more than 400 pounds of gold he shall pay 100 to his wife, but no more, whatever greater amount of property he may have. But if he has less than four hundred pounds of gold, net, then, upon computing the amount, the fourth part of his net property shall, to the last penny, be given to his wife.

1b. The same rule shall apply to undowered women who repudiate their husband when the latter is not guilty of misconduct specified in the constitution or who themselves are guilty of such misconduct toward a husband who is blameless, so that an even balance of justice and punishment may be maintained on both sides.

1c. The man or woman who received such fourth may enjoy and dispose of the same as they wish in the absence of children, but if there are children, or other offspring

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<sup>6</sup> [Blume] Changed to 3 years by Nov. 22, c. 6. See note to law 5 of this title.

in the descending line, it shall be preserved for them in all respects as is provided in connection with dowry and prenuptial gifts.

2. To the causes of divorce from women, enumerated in the constitutions, we add the following, namely: if the wife, perchance, by her efforts or purposely commits abortion, or is so wantonly inclined out of a spirit of sensuality as to go bathing with men, or has, during marriage, attempted to acquire another husband for herself.

2a. In these cases, too, the constitutions which deal with misconduct of husband and wife shall apply, and just as dowry and a prenuptial gift is lost, so, too, undowered women shall incur the loss of the fourth part of their property—the benefit of which is, by this law, provided for both the husband and wife (according to which of them is at fault).

2b. The action concerning misconduct which was provided for by the ancient laws but which was little used, is entirely abolished, for after searching for and reading all the various causes of divorce which antiquity introduced, we have found none to be valid aside from those mentioned in the previous constitutions and the present sanction.

Given at Constantinople November 17 (533).

Note.

See note, C. 5.13.1. The present law was reenacted and slightly amended. Nov. 22, c. 18; Nov. 117, c. 5. See also Nov. 74, c. 5.

5.17.12. The same Emperor to Johannes, Praetorian Prefect. [Synopsis in Greek]

From an inquiry directed to us on the subject, coming from Constantine, a city in Osroean, we have learned that some evil-minded children, working against the interests of their father, dissolved their marriage without their father's consent, lending their aid to their wives, so that the latter might demand back the dowry and prenuptial gift from the parents who had given or received the same.<sup>7</sup> (The constitution provides) that no children, unemancipated or emancipated, male or female, can dissolve a marriage by consent of the spouse, in fraud and to the damage of parents, male or female, who have given or received dowries or antenuptial gifts. And as marriage cannot be entered into without the consent of those who have the children in their power, so marriage cannot be dissolved without the consent of the parents; and if anything of that kind was done by children contrary hereto, no claim shall exist against the parents for dowry or prenuptial gift, although they have given or received the same; but the risk pertaining thereto shall fall on the person who does this. We impose this penalty on the evil-doing of those who act so impiously that they would thereby bring ignominy on themselves and poverty on their parents. For, as it seemed to Marcus, the great philosopher among emperors, it would be unseemly that fathers should be forbidden to dissolve a marriage without the consent of their children, except for a great and pressing reason, but that children who perhaps are minors and do not know what is best for their own interest, or who, as stated above, purposely commit a wrong, should be given the liberty to bring ignominy on themselves and loss on their parents.<sup>8</sup>

Given at Constantinople August 11 (534).

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<sup>7</sup> [Blume] The dowry might be delivered to the father or grandfather of the husband. C. 5.13.1 note. By dissolving the marriage, the couple sought to get the dowry back from such parent and also sought to get the prenuptial gift promised in the marriage contract on behalf of the son.

<sup>8</sup> [Blume] To the same effect as the present law is Nov. 22, c. 19; see also law 3 of this title.

