

Book V.
Title XVIII.

When a marriage is dissolved, how a dowry may be reclaimed.
(Solutio matrimonii dos quemadmodum petatur.)

Headnote.

In early times, when, through marriage, a wife came into the power of her husband, she was in the same position as a child (Gaius 1.114), and all of her property became his. There was then no duty to return a dowry upon the dissolution of the marriage. But as marriage became freer, and when, ordinarily, the wife ceased to come into the power of her husband, the consciousness of duty to return is developed. It was probably first enforced pursuant to a contract, the making of which became customary, but an action to enforce the return of it came also to be given by the praetor during Republican times (actio uxoria C. 5.13.1) even in the absence of a contract. Generally speaking provisions in a contract relating to dowry were valid, although the fundamental nature of dowry could not thereby be destroyed. See C. 5.14.3 note. Nor could other fundamental rules of law be violated, as mentioned in C. 5.14. In the absence of a contract, the following were the principal rules that governed:

1. If the wife died during the marriage, the dowry belonged to her husband, unless it was furnished by her father or other paternal ancestor, in which event it was returnable to him. C. 5.12.18 and 24; Ulpian, Reg. 6.4 and 5. Under a law of 439 A.D., if there were children, and the husband remarried, he took only the usufruct in property which he received from the marriage, the fee vesting in the children. C. 5.9.5; C. 5.3 headnote. Under the Justinian law, however, enacted doubtless under the influence of Greek custom which denied the husband any right whatever in the dowry (Mitteis, R.R.u.V.R. 232 ff), the dowry, not returnable to the paternal ancestor were returnable to the wife's heirs, and the husband's rights were (in the absence of a contract) entirely abrogated, with a possible right of usufruct as noted below. Even if he was entitled to the dowry under a contract, his rights therein were, nevertheless limited by Justinian to a usufruct for life. Nov. 98, c. 1, modified somewhat by Nov. 127, c. 3 as noted in C. 5.3 headnote.

2. If the husband died first during marriage, the whole dowry was recoverable by the wife, or, if she was under paternal power, by her paternal ancestor in conjunction with her, as noted below. C. 5.18.4; C. 5.18.9-11; Vat. Fr. §269; C. 5.13.1.14.

3. That was true also if divorce ensued. Ulpian, Reg. 6.7. But in such case the husband not at fault, had certain rights of deduction. These rights were abolished or changed by Justinian. C. 5.13.1.4-5c. From 428 A.D. on, a woman divorced through her fault lost her dowry to her husband for the benefit of their children, he having a usufruct for life (Nov. 98), and the husband at fault could not even under contract receive any benefit therefrom. C. 5.17.8. But that law did not affect the rights of the wife's paternal ancestor having her in his paternal power. C. 6.61.2.

4. Points arising out of paternal power need special mention. None such could, of course, arise when the wife died first during marriage. In such case the surviving father etc. who furnished the dowry was (in the absence of a contract) entitled to receive it back (law 4, h.t.), subject, till Justinian, to certain deductions. If, however, some one else had furnished the dowry, the husband, as already mentioned, retained the dowry under the earlier law, but under Justinian it went to her heirs. But when the marriage was dissolved by divorce or by the death of the husband, the wife, if unemancipated, returned, during

the system of free marriage, to her former household, and all the property held by unemancipated children was, with some exceptions under the later law, legally the property of her father, or more remote ancestor having paternal power over her. C. 8.46.2; C. 6.60 headnote. Hence such ancestor was entitled, in such event, to recover the dowry from the husband, or his heirs, with the consent, however of the wife. Law 2, law 7 h.t. Vat. Fr. §116; C. 5.13.1.14 and 14a. But in 426 A.D. laws commenced to be enacted designed to limit the rights of the father etc to the usufruct of the property not furnished by himself, the fee remaining in the wife or her heirs. C. 6.61.1-3.

5. The question of paternal power might also arise on the husband's side. If, during classical law, he was under paternal power, the dowry came into the control of his paternal ancestor having power over him. His duty to return the dowry was the same, of course, as that of the husband. If, as above mentioned, the wife died first during the marriage, and the children acquired the rights to the dowry, as already stated, and paternal power existed over them, the paternal ancestor having such power had the usufruct of the property for life, and the children had, during that time, actually only the fee. C. 6.61.4. If, accordingly, it was the husband—father of the children—who had such power, he received the benefit of the dowry to that extent.

5.18.1. Emperors Severus and Antoninus to Gemina.

It is not doubtful that if a dowry was valued, accompanied by a pact or stipulation to the effect that the property itself should, upon dissolution of the marriage, be returned to the woman, if then living, the female slaves (a part of the dowry), together with their offspring, must be restored in an action on the stipulation. Promulgated April 11 (197).

Note.

A pact, or informal agreement, was not enforced by an action in special terms. C. 4.64 headnote. The word "pact" in this rescript was, accordingly, interpolated. 43 Z.S.S. 343, note 2. It shows that informal contracts were recognized in this connection in later time.

5.18.2. The same Emperors to Aquila.

You are accord with the rule of law in thinking that the imperial exchequer which received the property of your condemned father should restore your dowry to you. For although your father was the heir of your erstwhile husband, that fact cannot take away your right to such dowry since not even your father himself could, without your consent, demand or receive it. Promulgated April 4 (207).

5.18.3. Emperor Antoninus to Hastilia.

If you married Eros without knowing his status and gave him a dowry, and he was thereafter adjudged to be a slave, you will receive your dowry and whatever else he owes you back out of his special property (peculium). But your sons will be considered as children born of a free-born woman and an unknown father, that is to say, as freeborn bastards. Promulgated August 27 (215).

5.18.4. The same Emperor to Apollonius.

If a dowry is given by a father for his unemancipated daughter, and she dies during marriage, the dowry must be returned to the father.¹
Promulgated August 18 (225).

5.18.5. Emperors Valerian and Gallien and Caesar Calerian to Taurus.

If your wife is still living, though among the enemy, her brother has yet no right to claim the dowry as here heir. But if she is dead, he may claim the inheritance she left and may, since a stipulation was entered into, demand the dowry.
Promulgated May 6 (259).

Note.

The husband had promised by stipulation that the dowry should be restored upon the wife's death. The stipulation inured to the benefit of her heirs, consisting, in this case, of her brother.

5.18.6. Emperors Diocletian and Maximian to Alexandria and Nero.

If your mother was defrauded and the dowry was valued at too low a price, the law as to the invalidity of such contracts (in fixing the valuation) is well known.

1. Hence if you clearly prove to the president of the province that your mother was defrauded by the trickery of her husband and cheated by an unjust valuation—the defense of fraud for the purpose of acquiring ownership of the land being available to you as possessor thereof—the president will know how to fulfill his duty in giving judgment.

2. But if the husband, too, alleges that he was wronged by the valuation, he will not after the truth is examined, be compelled to restore more than the just value (of the dowry).

3. These provisions apply when the property given as dowry is still in existence; if it is not, the price fixed in the marriage contract will be considered (as the value).
Promulgated October 26, 290 or 293).

5.18.7. The same Emperors and Caesars to Erotius.

You are not forbidden to take the money of your daughter whom you have in your power. But if you have given a dowry for her, you cannot take that back during her marriage even with her consent; and if the marriage is dissolved (with her surviving) you cannot reclaim it against her will.²
Subscribed at Sirmium February 9 (294).

5.18.8. The same Emperors and Caesars to Sallustia.

Although a husband, after a divorce, has judgment rendered against him only for the amount which he is able to pay (in connection with the dowry) yet, if he subsequently becomes financially able and has not returned it all, he has no good reason to refuse to pay the remainder.³ And since there is no doubt that his heirs can each be sued for the

¹ [Blume] C. 5.13.1.13c. But it was otherwise if there was an agreement to the contrary. C. 5.14.6.

² [Blume] C. 5.13.1.14; law 2 h.t. note.

³ [Blume] A husband, upon dissolution of the marriage, when sued for the return of the dowry, was condemned only for the amount which he was able to pay. C. 5.13.1.7. This is called the benefit of competence. It applied in other cases, as when a freedman sued his patron, or one partner sued another partner (Inst. 4.6.38), or a son under paternal

whole, your fear is groundless that you cannot commence action against those that are solvent.⁴

Given at Sirmium March 20 (294).

5.18.9. The same Emperors and Caesars.

You should sue the heirs of the husband in an action on dowry, for what was given the latter as such. For you have no right without authority from the proper judge to take possession of the dowry property if the heirs of the husband do not consent.⁵

Subscribed October 25 (294).

5.18.10. The same Emperors and Caesars to Epigonus.

If you gave a dowry to the father in law of your daughter, though your son in law died while in his father's power, still the latter must make restitution of the whole and not only to the extent of his son's special property (peculium), if suit is brought with the consent of your daughter.

Subscribed at Heraclea November 7 (294).

5.18.11. Emperors Honorius and Theodosius to Marianus, Praetorian Prefect.

If the husband died during marriage, the dowry which was given or promised out of the wife's property should be returned to her, and the heir of the deceased cannot claim property which upon the husband's death reverts to the woman.

Given at Ravenna November 3 (442).

power was sued after his father's death, and he did not accept any part of the father's inheritance (C. 4.26.2), or when a debtor was sued who had previously made an assignment of his property for the benefit of his creditors (C. 7.72.3), and in other cases. See D. 42.1.16-23.

⁴ [Blume] Under Justinian, liability of heirs could be limited to the amount of property received, by making an inventory. C. 6.30.22.

⁵ [Blume] C. 8.13.3 note.