

Book V.
Title III.

Concerning gifts before or on account of nuptials and about betrothal-gifts.
(Da donationibus ante nuptias vel propter nuptial vel sponsaliciis.)

Bas. 28.3.

Headnote.

It had been customary from early times, among Romans as among other nations, for a man who was betrothed to a woman to give her a prenuptial gift, which sometimes was of considerable value. Law 8 h.t. The prenuptial gift, if of any proportion, usually became a part of the woman's dowry, and was returned to the husband in that form. That as customary in many countries. Mitteis, R.R.u.V.R. 297; 28 Z.S.S. 332; C. 5.9.5.1. The gift became the absolute property of the woman unless it was given with the understanding that it should be returned if the marriage should not take place. Laws 2, 7, 10, 12 h.t. Vat. Fr. §282. But Constantine was displeased with that rule and regarded all such gifts as made in contemplation of marriage and returnable in all cases if the marriage did not take place without the man's fault. Law 15 h.t.

In the Orient, a prenuptial gift by the husband was substantially essential to a valid marriage (see C. 5.5.8), and was principally intended as a provision for the wife in case of divorce or death of the husband. This, and the Christian thought that husband and wife were equal sharers of the family duty, considerably influenced Roman legislation, particularly in the eastern portion, making the prenuptial gift a distinct institution, and as a sort of counterpart to dowry. From Constantine on, as noted, it was no longer an absolute gift to an intended wife. A century later, this gift, and that part of the dowry which under the law or under contract went to the husband after dissolution of the marriage, became principally what may be called a family fund or foundation. Theodosius II, probably influenced by oriental custom, provided in 439 A.D. that in case of divorce the innocent party should have that portion brought to the marriage by the other, the wife the prenuptial gift, the husband the dowry, but that, if there were children born of the marriage, they themselves should only have the usufruct thereof, the children the fee. C. 5.17.8.4-7. That law did not apply to dowry given by the wife's paternal ancestor who had her in his power (C. 6.61.20), nor, of course, to dowry returnable, under contract to a third person. Aside from that, all of it went to the survivor in case of death during marriage. C. 5.9.5.7; C. 5.9.6.10; C. 5.9.8.1. But on account of the distaste of the Christian Church for second marriages, that absolute right to property accruing to the survivor was limited by a series of laws, in case there were children of the marriage and if the survivor remarried. From 382 A.D. on, the surviving husband who remarried was, in such case, limited to a usufruct in the property which he received through the marriage, the fee being left to the children. C. 5.9.5. Justinian, however, by a law of 539 A.D., required the fee to be left to the children in all cases whether the husband or wife remarried or not (Nov. 98, c. 1), modifying that law in 547 A.D. by Nov. 127, c. 3, by which the survivor who did not remarry was given not only a usufruct but also the same share in the fee as each of the children. As to dowry, see C. 5.18 headnote. Special rules governed if the survivor was still under paternal power. See C. 6.61. The gift by the husband had prior to Justinian been known and was a prenuptial gift, for gifts between husband and wife were forbidden. C. 5.16. But Justin and Justinian permitted gifts of

that character to be made after marriage, Justinian changing the name to “gifts on account of marriage” (laws 19 and 20 h.t.), and by Nov. 97 requiring these gifts and dowries to be absolutely equal, but this law soon fell into desuetude. During marriage both were under the control of the husband. See generally, Mitteis, R.R.u.V.R., 256 ff.; Collinet, Etudes 145 ff.; 48 Z.S.S., 55 ff. The Syrian Law Book (see 23 Z.S.S., 125-127) mentions laws as enacted by Theodosius II and Leo on this subject, but these laws cannot, in many respects, be harmonized with the Roman laws extant.¹

5.3.1. Emperors Seveuis and Antoninus to Metradorus.

It makes a great deal of difference whether a future husband actually delivers a gift of property to a wife which he later receives as a dowry, or whether with intent to give, he increased the dowry, so that he might seem to have received what he in fact did not receive. For in the former case the gift is valid, and the property, which became part of the dowry, can, under such circumstances, be recovered by the wife after marriage has ceased, in an action for the recovery thereof. In the latter case, nothing is accomplished by the gift, and what is not actually given as part of the dowry cannot be recovered (by the wife).

Note.

Bas. 28.3.1 makes this law somewhat plainer. It says: “If a man, not having received any dowry for his betrothed and future wife, gives property to her, and afterwards receives the same property as her dowry, the gift is complete, as made before marriage, and is a dowry when delivered (to him). But if he merely wrote that he had received a dowry, when he in fact received none, the woman has no right to reclaim (after dissolution of the marriage), property not given. See for a similar principle C. 4.6.4. See also 28 S.Z., 329ff.; 42 S.Z., 324; Mitteis 247; and C. 5.15.

A fictitious statement by the husband that he had received a certain property as dowry was not binding C. 5.11.4; C. 5.15.1. That was simply the application of a general principle. C. 4.6.4. But later laws made such statements, if in writing, binding after the expiration of a certain period of time. C. 5.15.3 and note.

5.3.2. Emperor Alexander to Attalus.

If you prove to the president of the province that you made gifts to the parents of Euclia, merely that you might be married to the latter, and that she did not in fact marry you, he will order the gifts to be restored to you.

Note.

It must be understood in this case that the gift was made upon condition that the marriage with the daughter should take place. If the gift was not made with that understanding, it could not be recovered. Law 10 of this title. Special provision, however, is made for such case, in law 15 of this title.

5.3.3. The same Emperor to Marcella.

A promise of a gift formerly made by your brother because of his betrothal need not be performed, even though embodied in a stipulation, since his wife deceived him as to her dowry, and hence you may justly defend the action on the stipulation.

Note.

¹ Blume wrote at the top of this note: “See if Nov.68 & Nov.98 should not be appended to this title.”

Bas. 28.3.3 explains this law as follows: “A woman, about to marry a man, deceived him as to her dowry, not promising him anything specifically, but deceived him with the hope of a large dowry. The man, therefore, by a naked promise or by stipulation, promised to give the woman a certain amount of money as a betrothal gift. And so the marriage was solemnized. Afterwards the husband died, leaving his brother as his heir. The wife brought an action against the heir, and brother, seeking to recover what had been promised by naked pact or by stipulation. The constitution says to the brother of the husband: The promise made by your erstwhile brother in connection with the betrothal, though a stipulation entered into, need not be carried out, since the wife deceived her husband as to the dowry.”

5.3.4. Emperor Gordian to Marcus.

A gift made to a betrothed woman upon condition that she should become the owner of the property given after the marriage had taken place, is not valid.

Note.

A gift to become effective only after marriage was in effect, a gift during marriage, and such gifts were prohibited by law, except as hereinafter in this title mentioned. This is stated in a number of laws in title 16 of this book. Promulgated November 24 (239).

5.3.5. Emperors Valerian and Gallien to Theodora.

You cannot successfully sue for a gift promised to you, as to his betrothed, by a man who, pretending to be single, solicited you in marriage, when in fact he had another wife at home, since, having such wife at home, you were not in fact his betrothed. Received May 15 (258).

Note.

See C. 9.9.9.18 and C. 6.44.2 note.

5.3.6. Emperor Aurelian to Donata.

Since you say that your betrothed made you an unconditional gift on the day of your marriage, and that it may be drawn in question whether it was made by your betrothed or by your husband, the solution is as follows: If you received the gift in your house it seems to have been made before the marriage, but if your betrothed gave it to you in his own house, it may be reclaimed, for you were then his wife.

Note.

See note to law 4 of this title.

5.3.7. Emperors Carus, Carinus and Numerian to Junciana.

If, when a prenuptial gift was made, it was agreed in an agreement reduced to writing, that if ill luck should, contrary to his (the man's wishes), dissolve the matrimony, the gift should remain the property of the giver and his heirs, the heir of the man whose betrothed had received the gift upon the above mentioned understanding may rightfully demand it back.

5.3.8. Emperors Diocletian and Maximian and the Caesars to Euphrosynus.

If a man over 25 years of age gave a farm to his betrothed before marriage or even before his betrothal, and delivered unquestioned possession to her, it is certain and the law is plain, that he cannot alienate it while living or leave it by his testament. Given at Tirallum May 1 (293).

Note.

A note to Bas. 28.3.8 says that if he had not delivered the property to the possession of the donee, he might sell it or leave it by testament—doubtless on the theory of revocation. This probably was not true in those cases in which, in later law, it was provided that no delivery was necessary in case of a gift, provided it was in compliance with law in other respects. See law 17 h.t. and C. 8.53.1 note.

5.3.9. The same Emperors and Caesars.

Since you acknowledge that you made a gift of some property to the betrothed of your son, a perfected gift, valid by your voluntary action and authorized by law, it cannot be rescinded even by an imperial rescript.

5.3.10. The same Emperors and Caesars to Dionysius.

If the betrothed of your daughter gave her slave and you made him a gift of some draft animals, and the marriage did not take place, and he unlawfully took away what he had given, an action for restitution lies, not for what was reciprocally given, but for what he unlawfully carried away.

Note.

If the gifts had been made upon condition that the marriage should take place, they could have been recovered. Law 2 of this title. And the present law is modified by law 15 of this title.

5.3.11. The same Emperors and Caesars.

If your betrothed made and delivered to you a gift of his property the gift did not become void by the fact that he was afterwards killed by the enemy.

5.3.12. The same Emperors and Caesars to Timoclea and Cleotima.

If your mother gave land to the betrothed or to the husband of her daughter without any condition for its return and delivered unquestioned possession to him, the gift cannot be recalled although the marriage is dissolved by divorce, Subscribed February 8 (294).

Note.

At C. 5.16.5 it is stated that where a father-in-law made a gift to a son-in-law, subsequent divorce, even after the death of the donor, made the gift invalid. That law, however, is governed by a different principle as stated in a note thereto. As to whether or not “unquestioned possession” as here stated was necessary to be given under Justinian’s law is doubtful. See note to law 8 of this title.

5.3.13. The same Emperors and Caesars to Alexander.

The creditors of a husband cannot sue his wife because of a gift made to her when she was betrothed to him, if they cannot show that they had a lien on it previously.

5.3.14. The same Emperors and Caesars to Aurelia.

If the betrothed of your daughter gave her slaves with the consent of his mother and these were received by him as part of your daughter's dowry, without valuation² and he subsequently died while the matrimony was subsisting his mother and heir, though she offers the price of the slaves, wrongly refuses to turn them over.³

5.3.15. Emperor Constantine to Maximus, City Prefect.

Since the opinion of the ancients that gifts made to the betrothed woman without subsequent marriage are valid displeases us, we order that the following distinctions shall be made in the case of gifts made between a betrothed man and woman: If people under paternal power or sui juris, whether of their own accord only or with the consent of their parents, made presents to each other, either for the (express) purpose of future relationship, or otherwise, but as thought with the view of future matrimony, in such case, if the man refuses to marry the woman or his parents refuse to have him do so, the gift made and delivered by him cannot be recovered, and if any part of the gift remains in the possession of the giver, it shall, without evasion, be turned over to the woman or her heirs.

1. But if the betrothed woman or the person in whose power she is furnished the cause for the non-performance of the marriage, then the gift may be recovered by the betrothed man and his heirs without any diminution in a personal action (condictio) or in an action analogous to that in rem.⁴

2. These provisions shall also apply if the betrothed woman made a gift to the betrothed man.

Given October 16 (319).

C. Th. 5.3.2.

5.3.16. The same Emperor to Tiberianus, Vicar of Spain.

If things are given to a betrothed woman by a betrothed man, and kisses have been interchanged, and it happens that he or she dies before the marriage, we direct that one-half of the things given, shall belong to the survivor, the other half shall belong to the heirs of the deceased, of whatever degree they may be, and by whatever right they became his heirs, so that the gift shall be valid for half and void as to the other half. But if no kisses have been exchanged and the man or woman dies, the whole gift shall be void, and shall be restored to the giver or to his or her heirs. 1. But in case the woman makes a gift to her betrothed, which seldom happens, and he or she should happen to die before marriage, then the whole gift shall be void whether kisses have been exchanged or not, and the property given shall be restored to the woman or to her heirs.

Given at Constantinople July 15 (336).

C. Th. 3.5.6.

5.3.17. Emperor Theodosius and Valentinian to Heirius, Praetorian Prefect.

If a prenuptial gift is made to a woman who is a minor, and she is deprived of paternal protection, the gift shall be valid though not registered.

² [Blume] If valued, only the value was returnable.

³ [Blume] See note to law 1 of this title.

⁴ [Blume] This action of late origin. See C. 3.32. Previously gift not recoverable. Vat. Fr. §262; Koschembahr 179.

Given at Constantinople February 20 (428).

Note.

Registration of gifts was introduced and required by the father of Constantine the Great, and this applied to marriage gifts. C. Th. 3.5.1. In the instant rescript an exception was made, as was true also of gifts of comparatively small amounts. See C. 8.53. Justinian by C. 8.53.34 required all prenuptial gifts over the value of 500 gold pieces to be registered. But under Novels 119 and 127 a marriage gift to a wife or intended wife was made valid, though not registered, since it was the husband's duty to cause it to be registered, and he could not take advantage of his own neglect. But a man could not sue for a promised marriage gift (dowry) over 500 gold pieces unless it was registered. See also C. 5.12.31.

5.3.18. Emperor Zeno to Sebastianus, Praetorian Prefect.

Whether a father, who has children by his first marriage, marries again or not, he is not compelled to keep for the children of his first marriage the prenuptial gift which he, or someone else for him, had given to his former wife, the mother of their common children, since the mother also is not compelled though she has children by her first marriage, to keep for the children, after her second marriage, and much less if she does not remarry, any part of the dowry which she personally, or some one for her, had given to their father.⁵

Given May 1 (479).

5.3.19. Emperor Justinian to Archelaus, Praetorian Prefect.

If, during marriage, the wife or some one else for her, plans to increase her dowry, the husband, or someone else for him, may increase the prenuptial gift by a like amount as the dowry is increased, nor shall it be an objection that a gift during marriage is forbidden. We should yield to the common consent of the parties, lest, if the power of increasing the prenuptial gift were denied, an increase of the dowry, too, would be sparingly made.

1. We direct that this shall be permitted also in cases in which, as sometimes happens, no prenuptial gift at all was made, and only the woman brought a dowry to her husband, so that if a woman in such case increases her dowry, the husband shall be permitted to make a gift to his wife to the extent of the increased amount of the dowry; and an agreement may be legally made in the manner already provided, as to the return or retention of the increased dowry or gift, as the parties desire, or they may be made part of the original agreements entered into at the beginning of the marriage, as to the prenuptial gift and the dowry.

2. The right of a lien⁶ pertaining to increased dowry or gift, shall take its beginning from the time when the contracts were entered into, and are not to be referred to the time of the prior dowry or prenuptial gift.

⁵ [Blume] So second marriage by father made no difference as to his usufruct in maternal property. C. 6.60.4. In case of death of the wife, the prenuptial gift which he had given her simply reverted to him, as the dowry reverted to the woman. As to dowry, see C. 5.12 headnote.

⁶ [Blume] The wife had a lien for the dowry as well as prenuptial gift. Note C. 5.12.9 and authorities cited.

3. And so, if on the contrary the husband and wife should agree to diminish the dowry and prenuptial gift, they shall be permitted to decrease the prenuptial gift in like manner as the dowry, and the agreements as to the diminution shall be valid and legal, except in these cases in which the husband, having children by his first marriage, remarries, or the wife, similarly having children of a former marriage, remarries, and we direct that if the husband or wife or both, marry a second time, diminution of dowry or prenuptial gift shall be forbidden, so that no detriment will be caused to the children of the prior marriage.⁷
(527).

5.3.20. Emperor Justinian to John, Praetorian Prefect.

Since many appeals have been made to us against husbands who, to deceive their wives, have been accustomed to make gifts which antiquity called prenuptial gifts, and which they neglected to register on the records, so that they might remain ineffective although they enjoyed the benefit of the dowry, leaving the wives without assistance for the marriage burden, we ordain that the former name shall be changed, the situation corrected, and such gift shall no longer be called a prenuptial gift, but a gift on account of marriage.

1. Why should a woman be permitted to give a dowry to her husband over during marriage, while a husband should not be permitted to make any gift except before marriage? And how can this difference be considered rational, when it would be better to help women on account of the weakness of their sex, rather than husband?

2. For as dowry becomes such on account of marriage, and there is no dowry without a marriage, although marriage may be entered into without dowry, so husbands, or others for them, ought to be permitted to make gifts during marriage, which may be considered in the light of return gifts of the bridegroom rather than as pure gifts. On that account the ancient founders of the law classed dowry as a gift.

3. If, then, a prenuptial gift does not differ either in name or substance from dowry, why, likewise, should it not be permitted to be given after marriage?

4. We accordingly ordain that all have permission to make gifts to women on account of marriage before or after the marriage, and these gifts shall not be considered as simple gifts, but as gifts made on account of dowry and on account of marriage. For simple gifts are not made on account of marriage; are in fact forbidden, and are made for other reasons, such as libidinousness, perchance, or poverty of one of the parties, but not on account of marriage.

5. If, therefore, dowry has already been given, but no prenuptial gift has been made, and the husband wants to make one to his wife he may do so, if it does not exceed the dowry, and if he expressly states that he does not make a simple gift, but is making it on account of a dowry already assured him in writing, and such gift may be added to the dotal documents and the agreements made in which this is expressly stated must be kept.

6. If, moreover, such a gift is made, and a dotal compact had previously been executed, but no agreement as to the gift made after the marriage has been inserted therein, it shall be tacitly understood that the agreement as to such a gift shall be

⁷ [Blume] A prenuptial gift or dowry could not be diminished in case of a second marriage. Nov. 22, c. 31. Nov. 97, chapters 1 and 2 provided for equality of dowry and prenuptial gift throughout.

governed by the same terms as the dotal compact, so that the dowry and gift shall stand on the same footing.

7. The constitution of Leo (5.14.9) however, which relates to the equalization of agreements, not as to quantity but as to the portions, shall remain in force in such cases. That is true also as to our constitution (5.14.10), which we enacted to interpret the former, so as to dispel all ambiguity therein; and where agreements providing for unequal gifts are made, the greater gift shall be equalized with the smaller, that is to say, both shall in equal manner have the benefit only of the smaller gift.

8. If, in like manner, a gift shall have been made, which was formerly called a prenuptial gift, but now a gift on account of marriage, and was not registered before the marriage, it may be registered during marriage, and the subsisting marriage shall not be an obstacle thereto; for if these gifts are permitted to be made after marriage, much more should they be permitted to be registered.

9. In the same way the constitution (5.3.19) also which we made as to the increase of both dowry and prenuptial gifts, shall remain in full force and effect, but all provisions made by the ancients or by us as to simple gifts between husband and wife, during marriage shall retain their full vigor.
(531-533).