

Concerning the equality of dowry and preuptial gift, and other subjects.

(De aequalitate dotis et ante nuptios donationis. Habet autem alia quoque capita.)

Written to John, glorious praetorian prefect the second time, ex-consul-ordinary and patrician.

Preface.

Since we see that many questions have been raised in the laws concerning the first causes of our origin, that is to say, concerning marriages and the procreation of children, and also concerning the end, such as last wishes and testaments, we recently resolved to investigate and discover what was the purpose in the ancient law which requires that in dowry documents the proportion mutually given to the male and the female shall be equal, fixes an equality for the contracting parties, does not, for instance, permit one half to be given to the one and a third or fourth to the other, but balancing one against the other, requires the contract for each to be equal, that is to say, that the proportion fixed for each shall be a half or a third or a fourth or whatever proportion the parties agree upon. But no sooner did it require that the measure of the gift made to each should be equal, than it permitted the gift of a thousand or two thousand gold pieces or any other amount to one of the parties, without requiring a gift of the same amount, but of less, to the other, as though equality was to be sought in words and mere letters and not in the thing itself.

ol. We therefore correct this before all, so that what is given and stipulated by way of dowry and preuptial gift shall be equal. The man shall give the same amount as the woman; the same gain shall be stipulated. The amounts thereof may be such as they wish, provided they are equal. For the rule of justice and equality would not be preserved, if they cheated each other as merchants do, and (merely seem to make equal stipulations, which, in truth, have unequal effect

because the quantity of the gift what was made is not the same. The law would be ridiculous if it should appear to be a riddle that one portion is larger than another in a case where the man gives two thousand gold pieces, and the woman six thousand gold pieces as her dowry, the stipulation being that they should respectively receive a fourth of the amount given, and that when the occasion for the gain arrives the one receives only five hundred gold pieces as his fourth, but the other fifteen hundred gold pieces as her fourth. An absurd inequality necessarily results from a fictitious equality. Dowry documents heretofore made shall remain as they were, for what is done should not be undone; but as for the future, we direct all our subjects that gifts and gains shall be of equal measure, so that we may maintain justice and equality in all things. If one of the parties is richer than the other, he or she may show his or her liberality toward the other in some other manner, approved by law, but a greater gain shall not be given to one of them by an inequality which appears to be equality. This law, then, which is plain in its justice, shall be the law on this subject.

C. 2. We have also looked into and considered something else that takes place in connection with marriage gifts. We speak of the increase thereof. Since mention has been made concerning increases by the ancient lawgivers as well as by us ^(*), but since we have investigated many things, too numerous to mention, in connection herewith, beyond what the ancients did, and desiring to suppress all frauds that are invented and to preserve pure justice, we also make an amendment in this connection. We gave a preference to dowries ^(**), giving them superior rights over older mortgages, since the parties contracting with the husband rely upon his credit and not on that of a woman who, at the time of the contract was not yet married, perhaps, to the husband. We gave permission,

moreover -- a right of ancient origin -- to make increases, giving this permission to the husband and the wife, whether both (***) In the first place, therefore, or one of them wanted to do so.

in order that no fraud may take place, we ordain that if any one wants to increase a dowry or prenuptial gift, it shall not be permissible for one of the parties to do so, while the other one does not do it, but both must make the increase, and that shall not be discretionary, as formerly, but the requirement is absolute. And (***) the amounts shall be equal, as our father's constitution also provides. And in order that such increase may not be merely a pretense, especially on the part of the wife, so that she, using her preference right, may defraud the husband's creditors, both parties shall, if they have it, make such increase in immovable property, so that it may be clear and undoubted what the gift consisted of in the beginning and what was added. If both parties do not have immovable property, the woman shall make the increase by giving immovable property, in order that the dowry and also the increase will have a preference right over older creditors, since the increase is not (in such case) at all in doubt. And the husband may make the increase in movable property, since no prejudice results therefrom (to creditors) (****). If the wife, having no immovable property, makes the increase by movable property, she shall have no preference right except as to the dowry first given but not as to the increase, which may, perhaps, be merely pretended. For what was done in the beginning generally is free from suspicion, but what is thereafter added by trickery necessarily leads to trouble for creditors, and we do not want men to be injured in any manner by the preference right given by us to dowry. But if the husband owes no debts and there is no suspicion of any fraud to creditors, the increase may be made in money and in any manner desired by the spouses; but the increase must be made by

both, and must be in the same amount so as to preserve equality. For how can there be any suspicion of fraud, if the husband owes no one, and the increase may, therefore, be made withoutt trouble?

* C.5,3,19-20; Inst. 2,7,3.

** C.8,17,12.

*** Inst. 2,7,3.

**** C.5,3,19.

***** The wife had no preference right as to the prenuptial gift. See Nov. 61 appended to C.5,3,20.

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c. 3. And it is fitting to settle also what has been in doubt in such cases. We know that certain hypothecations, though later in date, have a preference, granted them under the laws, over those that are earlier in date, as in case where a man has bought, built or repaired a ship, or a house, land or something else (for another) with his money. In these cases the later creditor with whose money property is so bought or repaired, has a prior right over the much earlier creditors. Now it has been asked that if a woman sets up her preference right for the dowry originally given or for the increase, in so far as a preference right is also given for it as just stated, and so wants to be preferred to earlier creditors, and some other creditor comes along, who, though later in date, sets up that a ship, house or land has been bought or repaired with his money, and that it is proper that he should have the aforesaid preference right in the property bought or repaired with his money - whether the dowry would have a preference right also over them, or whether it would have a preference right over other creditors who could not set up such claim, but would be inferior in right to those by whose money the property was acquired? After carefully considering the matter, we have found that it would not be just, that the wife should be subject to such preference. For we perceived that it would be absurd that a dishonorable woman should submit her body as an object of gain and thereby sustain life, but that well-raised women who give themselves and their property to their husbands, should receive nothing from their husbands who conduct themselves badly, but should be damaged without leaving them any hope. So we ordain that, though a man has bought a field or repaired a house or a farm with another's money, a preference right shall not, by reason thereof, be set up as against the wife. For we know the weakness of woman's nature well, and now easily they may be defrauded. We do not permit their dowry to be in any way diminished, and it is sufficient if they

lose the benefit of a preemptial gift, if any such preference right exists therein (in favor of a creditor above mentioned); let the damage that they will suffer thereby be sufficient, but we do not want them to be endangered in relation to their dowry.

c. 4. Since representations have also been made to us, that persons who have extended credit in connection with the acquisition of positions in the public service, we ordain, that if anyone has in fact loaned money for a position in the public service, or that a son (of another) may become one of the regular number of men in such service^(a), or for a similar reason of that kind, and that fact is expressly stated in the instrument (evidencing the debt), and a pact with reference thereto has been entered into, then, if the occasion arises, such person so extending credit, and he only, shall be entitled to preference; but he is not to be believed as a matter of course, not even if he brings witnesses, but only if the matter is in writing, attested by witnesses, and if the loan was in fact made. For if the transaction has been carried on in this manner, there is no room for suspicion, and it is proper that those who made a contract, should not be deprived of their property. But the wife shall be preferred to all other persons, according to the right already extended by us to wives.

(a) i.e. one who had previously been a supernumerary, and, therefore, technically already in the service. In taking the place of one of the regulars in the service, he paid a stated price for the position.

c.5. Since we have already enacted a law, that a father who should give a dowry for a daughter in his power or emancipation - but who caused it to be agreed that it should be restored to him (upon the dissolution of the marriage) the question has been asked, whether it is proper in a case where the son in law has died and the dowry which the father gave has been restored to him, that he should diminish such dowry where the daughter marries a second time, or whether he can not do so, considering that he had already once separated that amount from his other property; but that he must give his daughter marrying the second time the same amount, as though she had not become a widow. For it has now been reported to us that a father gave thirty pounds of gold; that the daughter became a widow and married again, and that the father thereupon no longer gave the thirty pounds but only fifteen, inasmuch as the woman had received half of the preuptial gift (of her first husband) consisting of fifteen pounds, and the father (while giving thirty pounds in all), did not give the whole thirty from his own property, but only fifteen pounds in addition to the fifteen pounds which the woman had received (from her first husband). We do not consider this to be just, but as though the father sought to inflict damage on his daughter, and she should have her share of the preuptial gift (from her former husband) as specially hers and, further, the remaining fifteen pounds due her out of the father's property. For what would he have done, if it had not happened that she had remarried but that his (first) son in law had remained in life? Or how was he able to diminish the dowry already given by him, or claim the gain that she made (from the first marriage) and give that as dowry to the second husband? This gain should rather be her property, not belonging to her dowry (paraphernia), since she might, perhaps, marry a richer man because she would not alone be mistress of 30 pounds, 15 derived from the preuptial gift and 15 from her father, but mis-

tress of 45 pounds, part of it being her special, non-dotal, property (paraphernia) which fate bestowed upon her, and the part given her by her father remaining undiminished, We make these provisions for a case where the father's property has remained in the same situation in which it was before. For if fate has accidentally diminished his property, so that he would not be able to give the same amount of dowry that he gave before even if he wished to do so, and it is clearly shown that the father's property was diminished by accident, he shall not be compelled if he gives his daughter in marriage a second time, to give any more as dowry than his property permits. She shall however retain the gain from the prenuptial gift as her own, and shall have as dowry at her second marriage such amount as the property of the father permits to be given. For it is clear that he would at all events have to restore at his death the prenuptial gift of which we only give him the usufruct and of the fee of which she became the absolute owner.^(a)

(a) c. 6,60, headnote, as to the rights of a father with paternal power in the property of his children.

c. 6. We have also thought it very necessary to answer a question asked in many and infinite number of cases. A father, or perchance a mother, gave a dowry to a daughter; the latter gave it to her husband, and the husband thereafter died penniless; then the father or mother died and (the heirs) asked the married daughter to bring the dowry into hotchpot or receive that much less (from the inheritance). Now if the husband was rich the matter would easily be settled; but if she has nothing except a right of action against her husband which is of no value, and it is set up against her that she already received her portion (of the inheritance) as dowry and that what she brings into hotchpot is a right of action of no value, the situation is considered by us worthy of the enactment of a law. Now we know that harsh decisions have been given in many cases in which a woman was compelled to bring dowry into hotchpot or have it computed against her when in fact she had no benefit therefrom at all. We bring relief in the matter through other laws. We have given women the right even during the marriage, if the husband manages the property badly, to receive it back and manage it herself in a proper manner, as stated in our constitution.^(a) If then the woman is her own mistress (not in her father's power) and of age, and she does not, as soon as her husband commences to manage her property badly, take it back and help herself, charge (the loss) up to her own fault; for (if she had done so) she would have had her property intact in connection with collation, and would have had that in the computation thereof.^(b) But if she is under paternal power and is unable to do this without her father's consent, and she goes to her father and tells him and asks him to consent and to retake the property during the marriage and to preserve it for more favorable times, and the father does this, then, too, since the property is preserved for her, she will retain her right intact, since we even give her the right to claim the prenuptial gift during marriage so as to keep herself from future danger.^(c) If she has

asked her father to do this, but he neither brought action nor consented for his daughter to do so, she shall not be prejudiced, but simply bring the naked right of action against the poverty-stricken husband into hotchpot, and be in the same situation with her brothers and sisters, without being damaged by reason of what she brought into hotchpot, but she shall take her proper proportion of her father's property. The right of action shall be brought into hotchpot, but suit shall be brought by all, all reaping the benefit of a possible future result. This applies to cases where dowry has been given by the father and the bringing of it into hotchpot may be hoped for. If the dowry is larger^(d) and collation depends upon this hope (that the property may be brought into hotchpot), and the father neglects either to bring an action or to permit it to be brought - in case that the dowry is imperilled - then the daughter herself shall act and shall not be able to use the pretext that she was unable to act, but she shall help herself and obviate the danger of the future poverty of her husband. And we know that Ulpian also^(e), a man of great wisdom, investigated these matters, and thought that assistance should be given to the wife when the husband became poverty stricken, and that she should bring property into hotchpot in so far (only) as the husband was able to give. 2. Since amid the multitude of laws, before they were codified and put in proper order, there were many things that were not known to be necessary, and judges rendered decisions to the contrary (hereto), we have, accordingly, deemed it necessary, in order that no deception may take place - particularly since a constitution^(f) of ours exists which extends assistance to the wife even during marriage - to pursue a better and more direct path and to enact the present law. In order to avoid mentioning each of the persons to which it applies, we direct generally that this constitution shall apply whenever the rule of bringing into hotchpot applies, whether that is in connection with the inheritance of a father, grandfather, mother,

grandmother, or person of remoter degree of relationship.

Epilogue. Your Sublimity will cause this our will, declared by this imperial law, to be made known to all by your own orders in the usual manner, and you will take care always to observe it.

Given November 17, 539.

Notes.

(a) C. 5,12,29.

(b) That is substantially the meaning of "atque collationem tanto minore in summa factura" - literally - "and would have affected the collation by a sum that much less." She did not need to put the actual property into a common fund, except for purposes of computation, and she simply then received from the common fund that much less. C. 6,20,5. If she conserved her property, and had that to put in for computation, she did not have to make it up otherwise. This is evidently the meaning.

(c) C. 5,12,29. The father ordinarily was required to give his consent to such action by the daughter. Cujacius, 9, 991.

(d) Larger than 100 pounds - according to Cujacius, 9, 991.

(e) D. 37,8,1,6.

(f) C. 5,12,29.