Book V.
Title XIII.

Concerning the action for dowry merged with an action on a stipulation and concerning the nature attributed to dowries.
(De rei uxoriae actione in ex stipulatu actionem transfusa et de natura dotibus praestita.)

Bas. 29.1.119.

5.13.1. Emperor Justinian to the people of the city of Constantinople and of all the provinces.

We shall now deal with a matter which is not unimportant but runs through the whole body of the laws, namely, with the action for the recovery of dowry and the action on a stipulation, and abolishing all points in common and all differences between them, we confine the rights of dowry, in so far as we think proper to preserve them, to the one for the action on a stipulation. Accordingly abolishing the action on the dowry (rei uxoriae), we ordain that every dowry shall be sued for in an action on a stipulation, whether such stipulation is actually made or not, since one will be implied as inhering in the transaction.

1a. And that, too, shall be true if an invalid stipulation has been entered into, for it should be sustained rather than be considered void. For if one valid stipulation found in a document lends support to others that are invalid, why should such stipulation not be given legal force by our law? And it follows that if a stipulation is not in fact attached to a contract it shall be considered as though it had been, much more should a stipulation (ordinarily) ineffective be considered valid.

1b. And since we consider implied hypthecation to exist in case of administration of property of minors, and in many other legal matters, so, also, in order to make dowries more secure we give an implied hypothecation to both sides, in connection with actions now under consideration, on the part of the husband for restitution of the dowry, on the part of the wife, to deliver the dowry, or to secure the damages in case of eviction, whether the principals themselves, or other persons for them, have given, promised or received the dowry, and whether the dowry is according to ancient law, called adventicia (one given by a party other than the father) or profecticia (one given by the father).

1c. For thus neither inexperience nor rusticity of men can prejudice them, since we extend our providential hand in such case also to the unknowing and ignorant. For as stipulations and liens are understood to be attached to dowries and invalid stipulations are corrected, so the matter shall be as valid and perfect as if the dotal documents had been drawn by the best of jurists.

1d. And let no one think that these provisions apply only to dowries which are mentioned in written documents; for although a dowry is given, promised, or taken without writing, nothing forbids the stipulation to be considered made and hypothecation (lien) given as though embodied in a document. The nature of the action shall be considered as one on a stipulation, the action on a dowry (re uxorial) being abolished.

2. And although we are not unaware that the former action (on a stipulation) is one hedged in by strict law and is not derived from equity, still, since the stipulation as to dowry receives a new nature, such action also receives from the nature of an action on a dowry the benefits derived from equity.

2a. And indeed all legal effects that arise when a stipulation is attached to the gift of dowry shall remain as heretofore, according to the nature of the stipulation, and anything better found in an action on dowry is hereby specially added to the action on the stipulation, so that this new action on the stipulation provided by us shall be adorned not only by its own beauty but also by that of the ancient action on dowry.

3. In the first place, therefore, will be explained what is natural to an action on the stipulation, and whatever addition thereto is borrowed from the action on dowry, will follow. Be it known, accordingly, that the praetorian edict which compelled a wife to elect whether to receive back the dowry or take instead property left her under her husband's testament shall not be in force in connection with an action on the stipulation, so that the wife may receive what was left her by the husband as well as have her dowry returned, unless the husband specially leaves her the property as a substitute for the dowry, since it is manifest that the testator who does not make such special provision wanted her to have both.

4. The right of action on the stipulation is transmitted to heirs, unaffected by the delay in transmission. Let no further mention be made of the rights of retention. For why is it necessary to have the right of retention (e.g.) for misconduct, when other remedies have been introduced by the constitutions.

5a. Or why should such right of retention exist on account of gifts made when the giver may protect himself in a direct or analogous action in rem or by a personal action (condictio).

5b. Nor is retention necessary on account of taking property away (without consent) since husbands have an action to recover such things.

5c. Let no right of retention exist on account of children; for nature impels parents to rear them.

5d. Husbands need not conjure up various accusations against their wives, for the purpose of using the right of retention, since it has already been provided by imperial constitutions what is to be done if marriage is dissolved through the fault of the wife. (C. 5.17.8).

5e. Nor is the outlay of expenses on dowry property a sufficient reason for the existence of the right of retention. For since necessary expenses indeed diminish the quantity of the dowry, but (merely) useful expenditures are not deducted in (the old) action on dowry otherwise than if made by the consent of the wife, it is not improper, if the consent of the wife was given, that an action on mandate (mandati) be, by our authority, given to the husband against the wife so that he may therein be protected for what he has usefully expended; or if the expenses were incurred without the consent of the wife, but they were nevertheless incurred for her benefit, the action on volunteer agency (C. 2.18) suffices against her.

5f. But if the outlay was for ornamentation, made solely upon his initiative, the husband may retain that part of any addition made which may be retained (by him0 without injury to the original property. Thus the treatment of the subject of retention is clear, and the action on a stipulation should not, justly, according to its nature, admit of any retention.

6. It must not be overlooked in an action on the stipulation that if the wife should die during marriage, the dowry shall not belong to the husband, except pursuant to some agreement, and the action on the stipulation is transmitted to the wife's heirs according to its nature, whether it is express or implied according to this law.

7. Since, moreover, the husband was liable, in an action on a stipulation, to restore the whole of the dowry immediately, while under (the old) action on dowry payment was compelled as to things reckoned by weight, number, and measure, in a year, two years, and three years, and not as a whole, but so much thereof as the husband was able to return, provided that he had not fraudulently diminished his property, we give to the action on a stipulation a new form as to this point, so that if the marriage is dissolved, and no agreement exists (to the contrary), the husband, if he did not act fraudulently, shall be condemned to pay only as much as he is able, because this is just and due to the respect for the husband, as he did not act fraudulently, but he shall give a promise that if his financial condition should improve he will pay the amount still due.

7a. Payment of the dowry, moreover, shall be made, not in one, two, or three years, but movable, self-moving and incorporeal things shall all be paid within a year; immovable property shall be restored immediately, this being common to both of the former actions.

7b. If the husband neglects to restore movable, self-moving, or incorporeal property after a year's time, or the other property immediately upon dissolution of marriage, the husband shall pay, in order to do equity, interest at four per cent on the value of all the property except what is immovable. The fruits of the immovable things shall be due to the woman from the time of the dissolution of the marriage, and in like manner rents, the compensation for haulage by ships or beasts or for work of slaves, and the benefit of public rations, and other things similar to the foregoing shall be due to the woman.

8. And also in the following situation, the action on the stipulation shall retain its own nature, that is to say, if a woman has been appointed heir by her husband, and a question as to computation under the Falcidian law arises, the debt of dowry shall be subtracted from the husband's property the same as other debts and the fourth part computed thereafter.

9. In the cases enumerated, the action on a stipulation retains its own nature, and it is necessary in what follows to treat of matters which are either common to both actions, or which are confined to the action on the stipulation, or which are peculiar only to an action on dowry but should be borrowed from it and added to the action on a stipulation.

9a. Thus the offspring of dotal slaves, that is to say, those that were not valued, and property which the dotal slaves acquired from any cause except with the means of the husband or by their own labor, belong to the woman, as contemplated by both actions. The increase of beasts and all things comprised under the name of fruits belong to the husband during marriage, whether valued or not.

9b. Both actions contemplated that the fruits of the year in which the marriage is dissolved should belong to both parties in proportion to the time, if the things are not valued. For if things are valued, the husband, as quasi-purchaser, receives the benefit thereof and also bears the loss and risk in connection therewith.

10. Of course, in case of an action to partition an inheritance, if a son of the deceased receives as his portion the dowry of his wife or of his daughter in law, he must, according to the nature of an action on the stipulation, give a bond to his co-heirs protecting them against the suit for its recovery.

11. Let us, then see what addition, taken from the action on dowry, the new action on a stipulation should take. It is certain and undoubted law that if a parent, an ascendant in the male line, who had given a dowry to his daughter or granddaughter, emancipates her or he himself dies, the action on dowry belongs entirely to the woman, although she

has been disinherited. This was not true in an action on a stipulation; for there the action belonged equally to all the heirs just like all other actions. So it appears to us to be just that a woman should be able to exclude the heirs and to recover her dowry, as her property, also in an action on the stipulation, although she is emancipated, disinherited, or is named as heir, with others.

12. This being accepted by us, many other questions receive a ready answer, since the rescript of dowry may bar an action concerning an unjust testament, particularly if it suffices for the birthright portion and may be compelled to be brought into hotchpotch, if an intestate father had dies or has directed that to be done in his testament.

13. Other things, too, are added to it from the action on dowry. For if it happened that an outsider, whoever he was (i.e., someone other than the father), gave a dowry, exacting no stipulation or agreement for restitution to himself, the woman had the right of action on dowry. This was heretofore not true in an action on a stipulation. But if a stipulation or pact was made, the promisee of the stipulation or pact had an action on the stipulation or a civil action on the special facts (praescriptis verbis).

13a. But we do not want that to be the law now. But if an outsider in giving a dowry did not receive a special stipulation or pact for the return of the dowry to him, then it shall be presumed that the woman had the stipulation made for her benefit, so that in such case the dowry shall belong to her.

13b. We do not want it to be considered in such case that the outsider had an implied stipulation made for his own benefit, lest what we have introduced for the advantage of women might be turned to their disadvantage. On the contrary, in cases of such dowries given or promised by outsiders, the woman herself shall be considered to have had the stipulation exacted in her favor, unless the outsider had an express promise, by stipulation or pact, that the dowry should be returned to him, since the stranger, by not having such express promise, seems to have given the right to it to the woman rather than to have reserved it for himself.

13c. By an outsider we understand anyone not a parent in the male ascending line and having the dowered person in his power, for we give an action on an implied stipulation to such a parent.

14. And the following incidence of an action on dowry is also given to an action on a stipulation. If, after the dissolution of the marriage, the dowry happened to be claimed by the father, and the action was an action on dowry, the father could not alone, without his daughter's consent, bring such action, and if he happened to die before the action was tried, even though the issues had been joined, the dowry reverted to the daughter as her own property.

14a. This was not so in the action on a stipulation, for these he had the sale right to reclaim the dowry without the consent of the daughter, and if he happened to die, he transmitted it to his heirs. To assimilate this right of action on dowry to an action on a stipulation is humane, pious, and useful to marriages.

15. And since the Julian law prohibited the alienation of a dotal farm in Italy by a husband without the consent of his wife, and forbade him to mortgage it even with her consent, we have been asked whether that applied not only to Italian farms, but to other farms as well.

15a. It pleases us, therefore, that its application shall be made not only to Italian farms, but to other farms as well. Since, moreover, we have also given a lien (hypothecam) by this law, the woman has a sufficient remedy, even if the husband should want to alienate the farm.

15b. But lest the lien of the woman be rendered valueless through her consent, it is necessary also to come to the assistance of women in this respect, by adding only this, that the husband cannot merely not mortgage the dotal farm, even with the woman's consent, but he cannot alienate it, lest she by the weakness of her nature may be led into sudden poverty.

15c. For though the Anastasian law speaks about women giving their consent or renouncing their rights, still that must be understood as having reference to property of her husband, or dowry property which has been valued, the ownership and risk of which is that of the husband; but as to a farm not valued, which is by our authority perfected and is extended throughout the earth, and applies not only to Italian farms, nor to hypothecations only.

16. We think that this general provision, too, is necessary to be added to the present sanction, that if any agreements are made either for the restitution of the dowry or as to the time (thereof) or as to interest or as to any other matters, which are not contrary to any laws or constitutions, they shall be valid.

16a. But if a marriage is dissolved by a divorce, all rights arising under the Theodosian law (5.17.8) or our law (5.7.10) shall be enforced.

16b. In like manner, the provisions of the Anastasian law (5.17.9) made for those who separate by agreement (bona gratia) shall remain firm and unaffected.

16c. And generally whatever has been provided by the imperial constitutions or is stated in the books of jurisconsults, which is not contrary to this law, shall also remain valid, and shall be applicable to an action on a stipulation though it treats of an action on dowry.

16d. All of which shall apply only to those dowries which shall have been given or promised or have been received, though not evidenced by writing, after the enactment of this law; for no documents already executed shall lose their validity, but shall remain effective according to the terms thereof.

Given November 1 (530).

Note.

The instant law shows, perhaps better than any other in the Code, that the Romans, contrary to present day conceptions, considered remedies the basic foundation of all law, grouping all rights around certain remedies. They started with remedies and attached certain substantive rights thereto—such and such could be done or could be recovered thereunder. Thus as stated in the instant law, certain things could be done, or certain rights could be enforced in an action on a stipulation, certain other things or rights in an action on dowry (uxorial actio)—the action for the recovery of a dowry in the absence of a stipulation or other express contract. The instant law fused the two actions, so far as the recovery of dowry was concerned, and created a special action, called an action on a stipulation, which partook of the nature of the two former actions—one on an actual stipulation and the other the ordinary action, and made the new action an equitable one, although the ordinary action on a stipulation—the strict and formal contract under the Roman law (C. 8.37)—was one at strict law. C. 4.10.4 note. A stipulation was to be implied whenever any dowry was constituted, whether orally or in writing. If an actual stipulation had been entered into, any provisions contrary to the instant law were, of course, invalid. The law will be easily understood, if we but bear in mind the substantive rights therein intended to be given. Id deals mainly with the return of the dowry after dissolution of marriage, a subject more fully dealt with at C. 5.18, which should be read in this connection. Simplified, the law's main provisions are:

It gave a lien on the property of the husband (or his paternal ancestor having him in his power) who received the dowry, in order to fully protect the dowry. Laws 1b-1d, h.t. It abolished the former law that the wife should elect whether, in case of her husband's death, to take under his will or receive back the dowry, unless the will specially so provided. Law 3, h.t.. Formerly an action on dowry (uxorial actio) was not transmissible to heirs, but died with the death of the wife, if the husband was not at that time in default. Ulpian Reg. 6.7; Vat. Frag. 97. That rule was abolished The new action was transmitted to the heirs, just as any action on a stipulation under the old law. Law 4 h.t. Formerly a husband could, in the absence of a contract, make certain deductions from the dowry, if the marriage was dissolved by divorce for misconduct of the wife (C. 5.12.24 note), or when the wife had carried away property of the husband (C. 5.21), or when he had made an invalid gift to the wife, or for necessary outlays on the dowry property, or on account of children. All rights of deductions were swept away by the instant law. C. 5.17.8, providing that a wife at fault should lose her dowry to her husband, had already taken the place for deductions for misconduct. Deductions for children were not deemed proper. Separate rights of action, however, for beneficial outlays, etc. were given or left in force. Laws 4-5c h.t. See C. 5.21.1 note. The time for the return of the dowry by the husband was changed (laws 7-7b h.t.), but the benefit of competence (see C. 5.18.8 note) granted in all cases. While formerly a dowry not derived from the wife's father (or other paternal ancestor) belonged to the husband in case of the wife's death, under the instant law it went to her heirs. That appears not only from law 6 h.t., but also from laws 13a-13c providing that unless an outsider had an express agreement that the dowry should be returned to him, a stipulation in the wife's favor should be implied, and such stipulation inured to her heirs, in case of her death, according to the ordinary rule. That rule, however, was changed when a stipulation was exacted by her father, etc. , at the time of constituting the dowry, for it was ordered to inure to the wife rather than to his heirs. Law 11 h.t. If a dowry was turned over to the father or grandfather of the husband having the latter under power, and the former died and the dowry was, in an action in partition, turned over to the husband (or his father) as his share, it was, of course, just, as provided in law 10 h.t., that the co-heirs should be protected against any claim for any part of the dowry, since the latter was a lien against the whole estate. If the wife survived dissolution of a marriage, her dowry could be recovered by her father etc. only in conjunction with her. That rule was made applicable in all cases. Laws 14-14c h.t. The Julian law relating to alienation of dowry land was broader. Law 15 h.t. Other laws were left in force. For the Falcidian law, see C. 6.50; for collation or bringing property into hotchpot. C. 6.20.