Book V.
Title XVI.

Concerning gifts between husband and wife, and those made by parents to their children, and concerning ratification thereof.
(De donationibus inter virum ex uxorem et a parentibus in liberos factis et de ratihabitione.)

Headnote.

The subject of prenuptial gifts is treated in title 3 of this book and in other titles preceding this. The present title deals mainly with the subject of gifts between husband and wife. The general subject of gifts is treated in C. 8, titles 53 to 56, and should be read in connection herewith. Generally speaking, gifts between husband and wife during marriage were forbidden, the theory being that there would be no end of gifts between them, if not forbidden, and might lead to strife, contention and divorce. Reasonable gifts on festive occasions were, however, not forbidden. D. 24.1.31.8; D. 24.1.40.42. Buckland, 112.[1] Forbidden gifts were void, but might be confirmed by non-revocation during life. See law 1 h.t. 3.10. See note to law 14 of this title. The principle prohibiting husband and wife to make gifts to each other was extended also to gifts of the related parties to each other, as from one father in law to the other, or a father in law to his son in law or daughter in law. See laws 4 and 5 of this title.

The principle was profoundly modified by legislation of Justinian, who permitted the husband to make a gift to his wife during marriage to equal the dowry which she had brought him or which she might increase during the marriage. This is fully shown in C. 5.3.19 and 20, and C. 5.14.9 and 10, and Nov. 97 cc. 1 and 2.

5.16.1. Emperor Antoninus to Tryphaena.

If (though), in the absence of an heir, the fisc has taken possession of the property of your former husband as unclaimed property, the gifts made by him cannot be recalled, if he remained of the same mind to the end of his life.
Promulgated January 11 (212).

Note.

The gift made by the husband to the wife during marriage was originally void. But it was ratified by the husband dying without recalling the gift. Mere silence meant that the giver had persevered in his intention to keep the gift in force. 9 Cujacius 494. To the same effect as this law see law 2 of the preceding title, and laws 3 and 10 of this title.

5.16.2. The same Emperor to Marcus, a soldier.

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[1] [Blume] So a gift by the one to the other in contemplation of death—a subject considered more at length at C. 8.56—was valid, the ownership of the property remaining with the donor during his lifetime. D. 24.1.9-11 pr.

If you prove to the president of the province that you acquired the female slave with your money, and that the document of purchase was taken in the name of your housekeeper only for the purpose of making her a gift, he will order the slave to be returned to you. For although, since no marriage existed, the gift to your housekeeper could have been lawfully made, still I do not want my soldiers despoiled in this manner by pretended adulations of their housekeepers.

Note.

Gifts to concubines, even strumpets, out of affection, were valid. D. 39.5.5.31. But it was not considered good policy to have such gifts valid, if made by soldiers to their housekeepers. Gifts to wives were considered on a different footing than gifts to the women first mentioned, for the reason that it was believed that the deeper affection existing between husband and wife would cause continuous gifts between them.
9 Cujacius 494.

5.16.3. The same Emperor to Epictetus.

The gift of slaves and of other things, which you say was made to you by your wife, is valid, according to my constitution, and that of the divine Severus, my father,[2] if, at the time she made it, she was sui juris or made it with the consent of her father, and if she shall have persevered in the same intention of making the gift to the end of her life.
1. And if the gift was made by your former father in law, after the death of his daughter, it could also be legally perfected between the living.
Promulgated March 4 (213).

5.16.4. Emperor Alexander to Claudianus.

Gifts cannot be made under the civil law even between persons to whose power husband and wife are subject, or (between them and) persons so under their power.
Promulgated September 15.

Note.

The law is not plain, standing by itself. It means that the persons having the married children in their power, that is to say the fathers of the children respectively, cannot made a gift to each other; nor is a gift between them, and the persons so in their power, valid; Bas. 30.1.67. In C. 8.53.11 and note it is stated that a man cannot make a gift to a person under his power. The present law is an extension of that principle. If not revoked, however, during the lifetime of the giver, it would stand ratified. C. 8.53.17; D. 24.32.16. See law 14 of this title and note and special provision in law 25 of this title.

5.16.5. The same Emperor to Quintitla.

If, as you say, your father, in whose power you were, gave to your husband, his son in law, an account against a debtor, as a gift, and died during your marriage, and you subsequently separated from your husband, the gift made is invalid.
Promulgated February 13 (227).

Note.

A gift made to the son in law is stated to be invalidated. We saw in the note to the preceding law that if the giver persevered in his intention to the time of his death, that is

[2] [Blume] This provision is found in D. 24.1.32 pr. and 4.

to say, if he did not revoke it, it was ratified. Hence it would seem that a different situation is here treated. Probably the gift was made by the father in law to the son in law in contemplation of a divorce. Such a gift was invalid (D. 24.11.11) and had the divorce taken place in the lifetime of the donor of the gift, it would have been effective. But inasmuch as the divorce did not take place until after the death of the donor of the gift, it is declared invalid. Under C. 5.3.12, a gift by a mother in law remained valid, though the daughter was divorced.

Addition to Note.

It will be noticed in this law—as also in other laws—that a married daughter is spoken of as still under the paternal power of her father. In early Roman law the wife usually passed into the power (in manu) of her husband. But as women asserted their rights, this soon passed out of use. In such case, however, they remained in the power of the head of her own family, whether that was her father, grandfather or even remoter make ascendant, unless emancipated. See Hunter 195; 2 Karlowa 192; 3 Clark 83.

5.16.6. The same Emperor to Nepotianus.

Although things which belonged to you were deposited in the name of your wife, the right of ownership could not be changed in that manner, even though one might understand from it that you gave your property to your wife, since a gift made during marriage is void if the person who was the recipient of the generosity dies first. 1. Nor is it unknown that if it could not be shown from what source she, during marriage, honestly acquired property, it was by the ancient founder of the law believed it to have been obtained from her husband.
Promulgated December 5 (229).

5.16.7. The same Emperor to Theodata.

If you were married to the son of your guardian pursuant to your father's (last) wish, the gift made to your husband is void in law. But if the marriage was invalid[3] then, although the gift would, considered by itself, be valid, still because such person who could not even be your husband is unworthy, you have an effective (utitis) action for revocation of a gift.[4]
Promulgated October 1 (232).

5.16.8. The same Emperor to Leo.

If you permitted your wife, during marriage, to take the increase (fruits) of lands which you say you received as dowry, and your wife consumed the income, you contend without reason that it should be paid back to you after divorce. But you can sue her to the extent that she was made richer thereby.
Promulgated September 27 (233).

5.16.9. Emperor Gordian to Origines.

Although our wife acquired slaves with your money, still if they were delivered to her, they belong to her and not to you, but you have the right to recover the money, whether you paid it (for the slaves) while you managed her business, or whether you paid

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[3] [Blume] Without such wish, the marriage was invalid. C. 5.6.1.
[4] [Blume] See note to law 5 of this title.

the purchase price, intending to make her a gift thereof. You can sue her in the proper action for all of such money, or in so far as she has been enriched.[5]
Promulgated September 25 (238).

5.16.10. The same Emperor to Verianus.

If the former husband of your wife, while his own master (sui juris) turned land or other property over to her as a gift, and persevered in that intention till his death, the gift is valid, according to the oration of the divine Severus.[6] And if the father of the deceased wrongly took these things away, he will be compelled by the president of the province to restore them. Nor could he carry them off under the pretense of bringing an accusation against her to the effect that her husband had met his death through her criminal acts, for the gift is a matter distinct from a criminal accusation.
Promulgated March 30 (239).

5.16.11. The same Emperor to Maximius.

As no action lies for money which a husband promises to give to his wife from month to month or year to year, for her own use, out of his own property, so, too, it is clear that no right to reclaim it is given for such money so actually paid and expended.
Promulgated June 27 (241).

5.16.12. The same Emperor to Secunderia.

If your husband, after making you a gift of a farm which you claim as your own by reason thereof, specially pledged it to creditors, selected (by him) you perceive that this pledge destroys the validity of your defense, since it is clear that a gift made by a husband to his wife is revoked not only be such pledge, but also by an alienation by him of the property, either by gift, sale, or in any other manner.
Promulgated January 28 (243).

Note.

The rule herein stated that a pledge of property by the giver subsequent to the making of the gift revoked it, was repealed by Justinian by Nov. 162, c. 1.

5.16.13. Emperors Diocletian and Maximian to Rufina.

If the land, of which, as you say, your husband made you a gift, was previously pledged by him to a creditor, there is no doubt that the gift is subject to the debt, assuming that no rule of law bars an action thereon. 1. But if the pledge was made subsequent to the making of the gift, and the gift was legally made either because made before marriage or because it is such as can be made during marriage, then it is certain that the act of your husband, who, according to what you say, has died, could not prejudice your right.
Promulgated June 20 (286).

5.16.14. The same Emperors to Octaviana.

Although words inserted in last declarations before death may create a trust or legacy, a right of action for such legacy or trust does not always arise therefrom, but if the words were written with the intention of leaving such legacy or trust (to the

[5] [Blume] See C. 4.50.1 note; C. 4.50.6 note; law 16 h.t.
[6] [Blume] See law 1 of this title.

beneficiary thereof). Hence it is clear that your petition contains a question as to the intention, not as to the law. 1. After reading the testament, we perceive that your husband confirmed your ownership pursuant to a preceding gift, and took care that you should be safe in your ownership thereof. The meaning of the words used do not show that a trust has been left you, but that a gift, made according to the authority of a senate decree, for the safety of which he provided also while dying, as far as he could confirm the ownership thereof, was at the time of his death, adjudged to you.
Promulgated October 5 (290).

Note.

The senate decree here mentioned was caused to be passed by Antoninus during the life time of Severus, and is found as already stated, in note to law 3 of this title, in D. 24.1.32 pr. and 4, and was passed to release the rigor of the old law prohibiting gifts between husband and wife. The decree was to the effect that the giver could, indeed, repent of the gift, but that his heir could not sue for the recovery of it, contrary to the wishes of the deceased giver. Hence any gift between husband and wife, if not revoked during the lifetime of the giver, came to be considered valid, or rather stood confirmed by reason of the silence of the giver, subject, however, to the rule that if the gift exceeded 500 solidi, it must be registered or expressly confirmed in the testament of the deceased giver. Law 25 of this title. The laws relating to registration of gifts are contained in C. 8.53.34 and 36. It further appears from the next law that the gift was also subject to the debts due to the fisc. And in addition to that, it was, just as gifts in contemplation of death, subject to the Falcidian fourth, that it to say, the heir appointed under the will had a right to deduct one fourth thereof for his own benefit. C. 6.50.12; D. 24.1.32.1. Again, the gift was not confirmed by silence of the giver, if the parties were divorced or even permanently separated without a formal divorce and not remarried before death; of if the donee of the gift died first, or was reduced to slavery. D. 24.1.32.6; 32.10; D. 32.18; D. 32.19; D. 62.1.

5.16.15. The same Emperors to Justinianus and others.

If your father did not enter into an actual contract, but simply made a gift of land to your mother making it appear as a sale, and the loss to the fisc on account of his administration of the office of chief centurion (principilus)[7] could not be made good out of the things which appeared to have been left by your father, then, though it can be shown that he persevered in his intention of making the gift, the deficiency due to the fisc, for which the property left does not suffice, must be made good out of the land so given. 1. But if your father nullified the gift by changing his intention, there is no doubt that the ownership thereof was part of the inheritance left by him.
Promulgated January 29 (291).

5.16.16. The same Emperors to Theodorus.

If your emancipated sons have taken over the inheritance from their mother, go before the president of the province and prove that you bought the land in the name of your wife, not with an intention of giving it to her, but that you merely used her name and that you became actual owner by taking possession of the property delivered to you by

[7] [Blume] See index; he was responsible for defaults in the management of his office. [It is not at all clear what index Blume refers to here. Blume did not create an index for his manuscript.]

the vendors, so that the wrong of your sons may be understood and your right of ownership may remain unaffected. But if it shall appear that you did so with intention of making a gift, you (still) have the right to recover the (purchase) money.
Promulgated March 10 (291).

Note.

The last part of the rescript evidently embodies the idea that the property was delivered to the wife, since the document of purchase was not controlling. C. 4.50.4 note. If it was so delivered, and the price was paid by the husband, he could recover the latter, since, ordinarily, a gift to his wife was void. Law 9 h.t. C. 4.50.6.1.

5.16.17. The same Emperors and Caesars to Capitolina.

As to the things which you say you brought to your (husband's) home, aside from the dowry, and used up by him, if they were consumed and you gave them for that purpose, you perceive that you have no right of action against the heirs except in so far as your husband was enriched thereby, but if they were consumed against your consent, they all should be restored to you.
Given at Heraclea April 24 (293).

Note.

The husband was responsible for the return of the dowry, in case of the dissolution of the marriage by the death of the husband or otherwise, and hence though the dowry was consumed, the wife had the right to the return thereof, or its equivalent. But as to other property, it depended on whether a gift thereof was made. If a gift was made, but the property was consumed, no right to its return, or its equivalent, existed. If the husband was enriched thereby, and to that extent the property was not consumed, the value of such enrichment might be recovered, since the gift was revocable. If it was consumed against the wish of the wife, the whole might be recovered.

A divorce, or the death of the donee previous to that of the giver, or express revocation, ended the gift.

5.16.18. The same Emperors and Caesars to Materna.

If a gift is made by the husband to his wife during marriage, ownership thereof is neither transferred in the beginning, nor after that time, if a divorce intervenes or if the person who received the gift dies first, or if the gift is revoked by the giver.
Given at Serdica June 28 (293).

Note.

A mother had no paternal power, and hence a gift from her did not stand on the same footing with a gift from a father who had the daughter in his power—such power not ending with marriage. Hence the gift in the present case was valid.

5.16.19. The same Emperors and Caesars to Dionysia.

If your mother, during your marriage, delivered a house to you, it became part of your property.
Given at Philippolis July 15 (294).

5.16.20. The same Emperors and Caesars to Claudia.

A creditor could not, when his debt was paid, transfer any of the pledged property to the wife of his former debtor. Not even the consent of such debtor to an imaginary sale made by such former creditor can transfer ownership. Such fictitious acts, as well as a gift to a wife by a husband during marriage, are, under the interdict of the civil law, invalid, if the wife dies and leaves her husband surviving her.[8]
Given at Viminacium August 9 (294).

5.16.21. The same Emperors and Caesars.

If you received a loan under a contract made by yourself and you paid out the money for your husband, with intention of a gift to him, then since it was not used to acquire a dignity (title), and our husband has not been enriched thereby, you perceive that you have no right of action against him.
Given at Viminacium August 11 (204).

Note.

The rescript assumes that the money received for the loan was consumed, and we already saw under law 17 of this title that a gift to a husband which was consumed was not recoverable by the wife, unless the husband was enriched thereby. The law implies that if the gift had been made in order to fain a position of dignity for the husband, it might be revoked, and the money paid recovered. D. 24.1.40-42 permits a gift by the wife to her husband, if made for the purpose of acquiring a position of honor without, however, mentioning that it might be revoked.

5.16.22. The same Emperors and Caesars to Arsinoa.

A husband may, during marriage, give a slave to his wife for the purpose of manumission.
Subscribed at Sirmium August 1 (294).

Note.

The gift did not involve profit to the receiver, and hence was not condemned by the law. D. 24.1.5.16; D. 7.8.22.

5.16.23. The same Emperors and Caesars to Calciliana.

If your mother in law, for the purpose of making you a gift, gave you the unquestioned possession of land before or after your marriage, repentance avails nothing for rescinding the gift.[9]
Subscribed at Brundusium November 1 (294).

5.16.24. Emperor Constantine to Petronius Probianus.

I direct that the rights of a wife to property which she rightly received by inheritance, purchase, or even by gift from her husband, before any accusation is lodged against him, shall remain unimpaired after her husband has been condemned to death and has been executed, or after he has been reduced to servile condition on account of the nature of the punishment; and a wife shall not suffer through the misfortune of another's

[8] [Blume] For simulated transactions see headnote C. 4.22.
[9] [Blume] See law 18 of this title.

crime, since it is consistent with the maintenance of the laws to leave her to enjoy her paternal, maternal or her own property. 1. And a marital gift made to the wife before the crime and the accusation, since it is made as a reparation for (sacrificing) her chastity, is to be held valid, as though nature and not the punishment took her husband from her. But if he has been sent into exile or suffers deportation, not followed by punishment of death, the gifts made by a husband to a wife shall remain in suspense, because marriage is not in such cases dissolved, and if the husband does not revoke the gift before he dies I will be confirmed by his death. Our fisc shall hereafter have no claim on such property.
Given at Serdica February 27 (321).

Note.

See also C. 9.49.9. A man condemned to death or penal servitude lost his property, which was confiscated to the fisc, subject to the modification made by Justinian in Nov. 134, c. 12. 2, and subject to the provisions of the present law. Law 13 of this title speaks of debts due to the fisc, and that provision appears not to be modified hereby. See also C. 5.17.1 and Nov. 22, c. 13.

5.16.25. Emperor Justinian to Nina, Praetorian Prefect.

Gifts which parents make to children of either sex who are in their power, or which a wife makes to her husband or a husband to his wife, or either of them to some other person to whom, during marriage, they are not permitted to make a gift, or gifts from such other persons to some one else to whom they cannot legally make a gift, shall become valid through the silence of the giver, male or female, till death, if they do not exceed the legal amount, or exceeding it are registered on the public records. A gift which exceeds such legal amount and is not registered will not be confirmed by the silence of the giver.

1. But if a giver specially confirms his gifts in a last testament they shall all, without any distinction, be considered valid, provided, nevertheless, that if they exceed such legal amount and have not been registered on the public records, the special confirmation shall make them valid only from the time that such confirmation is made.

2. But if the amount does not exceed the legal limit, or if it does, the gift is registered on the public records, the silence of the giver and special confirmation shall related back to the time when the gift was made, just as also other ratification should related back to the times when the transactions ratified took place. Nor shall too fine a distinction hereafter be made between fact and law.
Given December 11 (528).

Note.

We saw in note to law 14 of this title that a gift was impliedly ratified by non-revocation during the lifetime of the giver. In the present law it is provided that if the gift exceeds the lawful amount, that is to say, 500 solidi, it is not confirmed by silence but must either be registered as mentioned in C. 8.53.34 and 36 or expressly confirmed by testament.

If the property was not, however, actually given, but merely promised, did a cause of action arise after the death of the deceased who had ratified his gift by silence? Papinian answered in the negative; D. 24.1.23; Ulpian answered in the affirmative. D. 24.1.33 pr. and 2. Justinian in Novel 162, c. 1, adopted Ulpian's view.

15.16.26. The same Emperor to Mena, Praetorian Prefect.

Gifts which the divine emperor makes to the most pious queen, his consort, or she to her most serene husband, shall be instantly valid and of full force, since imperial contracts have the force of law, and need no extrinsic assistance.
Given at Constantinople April 6 (529).

5.16.27. The same Emperor to Johannes, Praetorian Prefect.

If one of the parties who had been united in marriage, having made a gift to the other, was captured by the enemy, reduced to servitude and subsequently died therein, it was questioned whether such a gift, make previously, was valid or void; and again if the giver, a Roman citizen, should die, but at the time of his death the beneficiary of the gift should live in captivity, but should return subsequently, whether then also the gift should be considered valid. 1. And since the matter, must, in either case, be settled by imperial authority, and nothing is so peculiar to the imperial majesty as benevolence, through which alone the imitation of God may be preserved, we direct that the gift shall in both cases be valid.
Given December 1 (530).