A CASEBOOK ON

Roman Family Law

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OXFORD
UNIVERSITY PRESS

2004

OXFORD
UNIVERSITY PRESS

Oxford New York
Auckland Bangkok Buenos Aires Cape Town Chennai
Dar es Salaam Delhi Hong Kong Istanbul Karachi Kolkata
Kuala Lumpur Madrid Melbourne Mexico City Mumbai Nairobi
São Paulo Shanghai Taipei Tokyo Toronto

Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016

www.oup.com

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Library of Congress Cataloging-in-Publication Data
Frier, Bruce W., 1943–
A casebook on Roman family law / Bruce W. Frier and Thomas A.J. McGinn
p. cm.—(Classical resources series / American Philological Association ; no. 5)
Includes bibliographical references and index.
ISBN 0-19-516185-8; 0-19-516186-6 (pbk.)
1. Domestic relations (Roman law) I. McGinn, Thomas A. II. Title.
III. Classical resources series ; no. 5.
KJA2227 .F75 2003
346.45'632015—dc21 2002013989

9 8 7 6 5 4 3 2 1

Printed in the United States of America
on acid-free paper

SECTION 2. Dowry

CASE 29: Marriage, Dowry, and Public Policy

D. 23.3.1 (Paulus libro quarto decimo ad Sabinum)

Dotis causa perpetua est, et cum voto eius qui dat ita contrahitur, ut semper apud maritum sit.

D. 23.3.2 (Paulus libro sexagesimo ad edictum) (= Paulus, D. 42.5.18)

Rei publicae interest mulieres dotes salvas habere, propter quas nubere possunt.

D. 23.3.3 (Ulpianus libro sexagesimo tertio ad edictum)

Dotis appellatio non refertur ad ea matrimonia, quae consistere non possunt: neque enim dos sine matrimonio esse potest. ubicumque igitur matrimonii nomen non est, nec dos est.

(Paul in the fourteenth book on Sabinus)

A dowry's purpose is permanent, and in accord with the giver's wishes, it is so arranged that it remain forever with the husband.

(Paul in the sixtieth book on the Edict)

It is in the public interest that women's dowries are secure, since they can marry because of them.

(Ulpian in the sixty-third book on the Edict)

The term "dowry" is not used for marriages that cannot arise (because they are illegal), since there can be no dowry without (legal) marriage. So whenever the word "marriage" is not applicable, neither is "dowry."

1. The Nature of Dowry. Dowries are unfamiliar in the modern Western world, but these three fragments, which begin the *Digest* title on dowries, make some fundamental points that should help you to understand them. A dowry is a contribution from the wife's side to the husband. It is given with the expectation that it will (or at least may) remain permanently with the husband, but it is also commonly intended in some sense to benefit the wife. Finally, dowries are integrally associated with marriages: they are almost always created during the marriage process, and they depend on the marriage for their validity. These principles will play out in the Cases that follow. Why would the custom of giving a dowry arise in the first place?

2. "Since They Can Marry Because of Them." What does Paul mean by saying that dowries must be secure because women need them in order to marry? Does he mean that a dowry helps a woman to enter her first marriage, or does he mean that it may help her in the future to enter subsequent marriages? In either case, why is there a public interest in this? What other benefits might the wife hope to receive from a dowry? With this Case, compare Pomponius,

D. 24.3.1: "It is in the public interest that dowries be preserved for women, since for the procreation of offspring and the replenishment of the state with children, it is emphatically necessary that women have dowries." How evident is the link between dowry and procreation?

3. **Limits on the Freedom of the Parties.** One reason the law of dowry is so complicated is that the parties had wide-ranging, though by no means unlimited, freedom to shape details of the dowry as they wished. Only when arrangements challenged the basic nature and purposes of dowry did their validity come into question. Here are some examples of invalid agreements:

   - When the marriage ends, the dowry will not be returned under any circumstances to the wife (Paul, D. 23.4.16; see ibid. 12.1).
   - In returning the dowry, the husband can delay beyond the usual legal time limits for its return (D. 23.4.14–18).
   - If there are children, then no matter how the marriage ends, the entire dowry will remain with the husband; this is invalid if the marriage ends through the husband's death (Ulpian, D. 23.4.2).
   - The land that the wife has placed in her dowry is subject to the condition that her husband will return any fruits from the land to the dowry; this is invalid in most circumstances (Ulpian, D. 23.4.4, because it infringes on the purpose of dowry; why?).
   - The husband, in administering the dowry, is liable for nothing but his deliberate misconduct, *dolus* (Ulpian, D. 23.4:6).
   - The husband cannot retain a portion of the dowry in the event of his wife's marital misconduct (Paul, D. 23.4.5 pr.).
   - The husband cannot sue for necessary expenses in maintaining the dowry, "because by operation of law such expenses reduce the dowry" (Paul, D. 23.4.5.2; see Case 85).

   In each instance, try to figure out what it is about the particular agreement that is legally offensive. How closely regulated was the dowry relationship? Could individual parties have had good reasons for wishing to depart from some of the set guidelines?

4. **How Much?** As we will see, the jurists often associate dowry with the wife's maintenance during marriage. Hence, depending on her social status, a dowry could be quite hefty, though the exact amount was subject to negotiation and depended on the relative power of the two families; but legal and other sources indicate that the practice of giving dowries occurred even when the couple's families were relatively poor. Dowries, although regarded as burdensome, seem typically to have amounted to only about one year's household income for the bride's family, rather than the three to five years' income

that was common in early modern Europe. Still, a dowry often represented a substantial transfer of assets from one family to another, and because it usually required dipping into capital, givers often found it difficult to raise the sums involved; cash payments, for instance, were normally allocated over a number of years in order to ease the hardship. The same problem also arose, naturally enough, when a husband later had to return the dowry to the giver, and much the same solution was adopted (*Tit. Ulp.* 6.8).

CASE 30: Giving the Dowry

Tituli ex Corpore Ulpiani 6.2

Dotem dicere potest mulier quae nuptura est et debitor mulieris, si iussu eius dicat: item parens mulieris virilis sexus per virilem sexum cognatione iunctus, velut pater avus paternus. Dare promittere dotem omnes possunt.

D. 23.3.5 pr.–4 (Ulpianus libro trigesimo primo ad Sabinum)

(pr.) Profecticia dos est, quae a patre vel parente profecta est de bonis vel facto eius. (1) Sive igitur parens dedit dotem sive procurator eius sive iussit alium dare sive, cum quis dedisset negotium eius gerens, parens ratum habuerit, profecticia dos est. (2) Quod si quis patri donaturus dedit, Marcellus libro sexto Digestorum scripsit hanc quoque a patre profectam esse: et est verum. (3) Sed et si curator furiosi vel prodigi vel cuiusvis alterius dotem dederit, similiter dicemus dotem profecticiam esse. (4) Sed et si proponas praetorem vel praesidem decrevisse, quantum ex bonis patris vel ab hostibus capti aut a latronibus oppressi filiae in dotem detur, haec quoque profecticia videtur.

(*Excerpts from Ulpian's Writings*)

A woman who is about to marry can unilaterally promise a dowry (*dicere dotem*), and (so too can) the woman's debtor if she orders him to promise; likewise, the woman's male ascendant who is related in the male line, for example, a father or paternal grandfather; (but) all persons can give or formally promise a dowry (for a woman).

(Ulpian in the thirty-first book on Sabinus)

(pr.) A dowry is "profectitious" (*profecticia*) when it has "traveled" (*profecta est*) from the property or from a transaction of a (wife's) father or (other) male ascendant. (1) So the dowry is profectitious if the ascendant gave the dowry or if his *procurator* (did so) or if he ordered a third party to give it or if the ascendant ratified the gift of someone who was managing his affairs. (2) So if the giver wished to make a gift to the (bride's) father, Marcellus in the sixth book of his *Digests* wrote that this too "traveled" from the father, a view that is correct. (3) Again, if the *curator* of a lunatic or a prodigal or of anyone else gives the dowry, we will similarly term this a profectitious dowry. (4) But suppose that a praetor or (provincial) governor judicially ruled on how much should be given as a dowry from the property of a father who had been either captured by the enemy or kidnapped by bandits; this too seems profectitious.

1. Who Can Create a Dowry, and How? In part, this Case deals with some technical details that are important to Roman law but of scant modern interest. The first fragment describes three ways to make a dowry: first, by a unilateral declaration (*dictio dotis*), which could be given only by the woman (or her

debtor on her order) or by an agnate ascendant; second, by handover of property; or third, by a formal promise, a contract called a stipulation, in which, typically, the promisee asks, "Do you promise to give me 50,000 sesterces as a dowry?" and the promisor answers, "I promise." The second two forms can be used by anyone, and dowries were sometimes created for poor women by wealthy relatives, friends, or patrons. However, by far the most common source of a dowry was the bride herself (if she was *sui iuris*) or her *pater familias*. Does this fact help to explain why a slightly less formal procedure was permitted in their case?

2. "Profectitious" and "Adventitious" Dowries. For reasons that have to do less with the form or content of the dowry than with what happens to it when the marriage ends (see Cases 81–82), the jurists distinguish between two main types of dowry. A "profectitious" dowry (*dos profecticia*) comes from a woman's paternal ascendant (usually her father and *pater familias*, but the same rules would apply even if she were emancipated); its main characteristic is that it can be reclaimed if a wife predeceases her husband. An "adventitious" dowry (*dos adventicia*) comes from any other source (including the woman herself), and upon the wife's death the giver can reclaim it only if this had been specified at the time of the dowry's creation; otherwise, it remains with the husband. Why should male ascendants have been privileged in this way? Pomponius (D. 23.3.6 pr.) tries to explain: "Legal help is given to the father to comfort him for his lost daughter by returning the dowry that came from him, so that he not suffer the loss of both his daughter and his money." Convinced?

3. "Traveling." Dowries were often the subject of protracted negotiation, and they took an almost infinite variety of forms. Almost any form of property could be in a dowry, but cash and land (particularly farms) were probably the most common. The profectitious dowry is interesting because it had to "travel" (derive) from the male ascendant's substance (his property or his transaction); that is, he had to be financially worse off because of the dowry. This Case illustrates some of the possibilities. Where the *pater familias* ordered someone else to give the dowry, he obligated himself to pay the third party; hence the dowry derives from his substance. Does the same logic apply in the case of the redirected gift (section 2)? In section 4, the *pater* does not even know that the dowry was created. Applying the logic of this Case, in which of the following situations does the dowry derive from the giver's substance?

   - The bride's father inherits an estate but declines it so that the estate can go to the groom, who has been named as substitute heir (Ulpian, D. 23.3.5.5).
   - A father provides a dowry for his adopted daughter (ibid. 13).

- A third party gives money to the father with instructions that it is to be used for the dowry (ibid. 9).

4. **Suing Your Father-in-Law.** If a bride's father has promised a dowry, can her husband sue for it? And if so, must the father pay the full amount or only what he is financially able to pay? Does it matter whether the couple are still married? All this was the subject of an unusually lively controversy among the jurists: Labeo/Paul, D. 23.3.84; Pomponius, D. 42.1.22 pr.; Paul (citing Neratius and Proculus), D. 24.3.17 pr.; Paul (citing Neratius), D. 42.1.21. Why might such questions have caused dissension? Can it be argued that the bride's father should enjoy special privileges?

CASE 31: The Bride Gets Cold Feet

D. 23.3.21 (Ulpianus libro trigesimo quinto ad Sabinum)

Stipulationem, quae propter causam dotis fiat, constat habere in se condicionem hanc "si nuptiae fuerint secutae," et ita demum ex ea agi posse (quamvis non sit expressa condicio), si nuptiae <fuerint secutae>, constat: quare si nuntius remittatur, defecisse condicio stipulationis videtur

D. 23.3.22 (Paulus libro septimo ad Sabinum)

et licet postea eidem nupserit, non convalescit stipulatio.

(Ulpian in the thirty-fifth book on Sabinus)

It is settled that a stipulation made for dowry purposes contains the implicit condition "if the marriage occurs," and so it is also settled that although the condition was not expressed, a lawsuit can be brought on it only if the marriage occurs. So if the messenger is sent back (and the marriage thereby called off), the stipulation's condition clearly failed,

(Paul in the seventh book on Sabinus)

and although she afterward marries the same man, the stipulation does not revive.

1. Stipulating for a Dowry. In this Case, someone—most likely, the bride-to-be's father—has formally promised a dowry to the groom before the marriage. Obviously the givers of a dowry usually prefer a promise rather than an immediate transfer, since they can then wait until the marriage actually takes place before fulfilling the promise. However, a premarriage transfer of dowry property can be reclaimed if the wedding is called off (see, e.g., Ulpian, D. 12.4.6). The general rule on enforcing the stipulation is stated by Paul (D. 2.14.4.2): "Prior to the marriage, a lawsuit on it fails, as if this had been expressly provided; and the stipulation is automatically void if the marriage doesn't ensue."

2. A Change of Mind. As it seems, the woman in this Case first called off the wedding and then decided to go through with it. Do you agree with the legal outcome? Contrast the following situation described by Papinian (D. 23.3.68): A dowry is promised, and a wedding then takes place; but the marriage is not immediately valid either because the bride's father has not agreed to it or because she is too young. Some time later, the deficiency is remedied and the marriage becomes valid. Can the promise now be sued upon? Papinian holds that it can be; but is this holding easily reconciled with the present Case? In any event, as Papinian observes, the promise definitely fails if the woman marries someone else first; and it does not revive if she later marries her original suitor.

CASE 32: The Duty to Provide a Dowry

D. 12.6.32.2 (Iulianus libro decimo Digestorum)

Mulier si in ea opinione sit, ut credat se pro dote obligatam, quidquid dotis nomine dederit, non repetit: sublata enim falsa opinione relinquitur pietatis causa, ex qua solutum repeti non potest.

(Julian in the tenth book of his *Digests*)

If a woman's state of mind is such that she believes herself obligated (to pay something) for a dowry, whatever she gives on account of the dowry she does not reclaim (as not being owed). For after her false belief is removed, there (still) remains the ground of family respect (*pietas*), because of which she cannot reclaim what she paid.

1. A Social Obligation. In this Case, a woman mistakenly thought she was obligated to pay something as a dowry to her husband, and she made the payment. Normally, amounts paid in error can be recovered through a legal device called the *condictio indebiti;* so, for example, Ulpian, D. 12.6.1.1: "If someone mistakenly pays an unowed debt, he can sue for it through this action." Here, however, it is held that the woman, despite her mistake, cannot reclaim the money (at least not before the end of her marriage). Julian explains this outcome by referring to the *pietas* that she owes her husband. Does this argument make his holding any clearer? Literary sources clearly indicate that dowry was a socially expected part of marriage, and some legal sources seem to suggest the same idea. For example, Venuleius (D. 42.8.25.1) indicates that undowered women would simply not find husbands; and Celsus (D. 37.6.6) says that male antecedents have a "duty," *officium*, to find them one. A nice example is Ulpian, D. 23.3.5.8: A son-in-power borrowed money and used it as a dowry for his daughter; although his *pater familias* was unaware of what had happened, the dowry is still held to be profectitious up to the amount that the grandfather would have given, "for the arrangement appears to have benefited him." How was he benefited? See also Cases 123, 217.

2. A Legal Obligation? Marcian (D. 23.2.19 = Case 103; very poorly preserved) may indicate that in the late classical period, under some circumstances, a *pater familias* could be legally compelled to provide his daughter with a dowry. The Emperor Justianian refers to earlier, "well-known" laws to the same effect (C. 5.11.7.2; A.D. 531). How this came about is impossible now to determine, but some form of imperial intervention (probably by the Emperor Septimius Severus; reign: A.D. 193–211) is not unlikely. A rescript of Diocletian (C. 5.12.14; A.D. 293) holds: "A mother is not forced to give a dowry for her daughter except when the cause is great, clear, and specially provided for by law; but a father lacks the capacity to provide a dowry from the property of

his unwilling wife." This rescript suggests that by the late third century A.D. fathers had some legal duty themselves to provide dowries.

3. **An Early Inheritance?** In many historical societies where dowry has been prevalent, fathers have tended to see the settlement of a dowry on a daughter as, in effect, the allocation to her of her future inheritance; that is, the daughter cannot anticipate a further distribution after her father's death. Roman legal sources provide some evidence for this view. For instance, Modestinus (D. 28.5.62) reports on a man who, in his will, disinherited his daughter, saying that she should be "content with the dowry." (Compare Papinian, D. 6.1.65.1, 31.77.9, 38.16.16; Modestinus, D. 31.34.5.) Still, such legal and literary evidence is, on the whole, rather thin for Rome. What legal and social considerations might have deterred the Romans from understanding dowry as an early estate distribution to the woman? You should keep this question in mind as you read further about dowry in the remainder of the present chapter.

4. **Family Relations.** "The provision of dowry was . . . one of the mechanisms by which Roman families, like those in many other preindustrial societies, maintained their social status relative to each other, and so there was a strong social if not, for most of the classical period at any rate, legal obligation to provide dowries for daughters" (Jane F. Gardner, *Women in Roman Law and Society*). Assess the cogency of this theory.

CASE 33: Appropriate Dowries

D. 32.43 (Celsus libro quinto decimo Digestorum)

Si filiae pater dotem arbitratu tutorum dari iussisset, Tubero perinde hoc habendum ait ac si viri boni arbitratu legatum sit. Labeo quaerit, quemadmodum apparet, quantam dotem cuiusque filiae boni viri arbitratu constitui oportet: ait id non esse difficile ex dignitate, ex facultatibus, ex numero liberorum testamentum facientis aestimare.

(Celsus in the fifteenth book of his *Digests*)

If (in his will) a father had ordered that his daughter (when she marries) is to be given a dowry "at her tutors' discretion," Tubero says this should be interpreted as if the legacy were made "at the discretion of a good man" (*viri boni arbitratu*).

Labeo asks how to determine the amount of a dowry that should be established for each daughter "at the discretion of a good man." He says it is not hard to assess this in accord with the testator's standing (*dignitas*), his means, and the number of his children.

1. How Much Is Enough? In this Case, a father left all or part of his estate to his minor daughter but ordered her guardians (on tutelage, see Chapter V.A.1) to provide her with a dowry at their discretion, from her property. This instruction might seem to give them sweeping powers, but the Roman jurists hold that such discretion must be exercised in accord with objective good faith (the amount that a "good man," a *vir bonus*, would have given by way of dowry), consideration being paid to the deceased's social standing, his means, and competing demands on those means (i.e., other dowries that must be paid). Is it clear how much the girl's guardians should provide to the woman? Elsewhere, Celsus states that the husband's *dignitas* also deserves consideration (D. 23.3.60; see Papinian, D. 23.3.69.4); does that seem reasonable?

2. An Objective Standard. If the guardians do not provide a proper dowry, can they be sued? If so, by whom and on what legal theory? What would be the most common complaint: that the girl's dowry was too much or too little?

3. Giving Too Much. The pressure on the bride's side to come up with a respectable dowry could sometimes be crushing. A poorly preserved fragment of Paul (*Frag. Vat.* 115) describes a *sui iuris* woman who married a man of appreciably higher *dignitas* than her own; she gave him her entire property as a dowry, and the jurists accept this as legal (so too Alexander Severus, C. 5.12.4; A.D. 223). Still, such extravagance was considered something an older woman would never engage in (Paul, D. 4.4.48.2). Perhaps for this reason, the jurists are especially cautious when it comes to younger women, below

the age of twenty-five. Ulpian, D. 4.4.9.1: "Also as regards the dowry's amount, the woman (less than twenty-five) should be helped if through trickery she gave a dowry exceeding the means of her estate, or (if she gave) the entire estate." (The legal help that Ulpian mentions took the form of allowing her to apply for rescission of the dowry; see Case 220.)

CASE 34: The "Dowered" Wife

D. 48.5.12.3 (Papinianus libro singulari de Adulteriis)

Socer cum nurum adulterii accusaturum se libellis praesidi datis testatus fuisset, maluit accusatione desistere et lucrum ex dote magis petere. quaeritur, an huiusmodi commentum eius admitti existimes. respondit: turpissimo exemplo is, qui nurum suam accusare instituisset, postea desistere maluit contentus lucrum ex dote retinere tamquam culpa mulieris dirempto matrimonio: quare non inique repelletur, qui commodum dotis vindictae domus suae praeponere non erubuit.

(Papinian in his monograph *On Adulteries*)

By filing a criminal complaint with the (provincial) governor, a father-in-law gave notice that he would accuse his daughter-in-law of adultery. But he subsequently preferred to abandon the accusation and instead to seek to profit from the dowry. It is asked whether you think this sort of chicanery is permissible.

He (Papinian) responded: It sets a dreadful precedent that a man, after he had begun to accuse his daughter-in-law, preferred (instead) to profit from the dowry on the theory that the woman was at fault (*culpa*) for the marriage's breakup. So he will not unfairly be repulsed (i.e., his claim to a portion of the dowry should be refused), since he did not blush to prefer benefit from the dowry over revenging his own home.

1. The Temptations of Money. This is a fascinating Case, the psychological complexity of which runs deep. The father-in-law officially accused his son's wife of adultery, but then withdrew his accusation in favor of an "amicable" divorce in which he would retain a portion of the dowry, evidently on the grounds that her misconduct had caused the marriage's breakup (see Case 83). Is Papinian suggesting that the father-in-law was in effect bribed, or just that he saw an opportunity and seized it? Is the father-in-law being treated as constructively a pimp (*leno*)? The recommended penalty is that he lose his claim to a dowry portion. Would the outcome probably have been different if he had not already filed notice of his intent to accuse his daughter-in-law? In any event, the more basic problem here is one that literary sources often allude to: a woman's dowry could be so large as to effectively grant her immunity from ordinary social responsibilities. From this perspective, although the husband's side would normally bargain for a high dowry, too high a dowry presented them with some offsetting risks. One of these risks was that her husband could find repayment extremely difficult, thus substantially weakening his negotiating position if a whisper of divorce was in the air.

CASE 35: The Burdens of Marriage

D. 23.3.56.1–2 (Paulus libro sexto ad Plautium)

(1) Ibi dos esse debet, ubi onera matrimonii sunt. (2) Post mortem patris statim onera matrimonii filium sequuntur, sicut liberi, sicut uxor.

D. 23.3.7 pr. (Ulpianus libro trigesimo primo ad Sabinum)

Dotis fructum ad maritum pertinere debere aequitas suggerit: cum enim ipse onera matrimoniii subeat, aequum est eum etiam fructus percipere.

(Paul in the sixth book on Plautius)

(1) The dowry should be where the burdens of marriage (*onera matrimonii*) are. (2) After a father's death, the burdens of marriage fall to the son instantly, along with his wife and children.

(Ulpian in the thirty-first book on Sabinus)

Fairness requires that the "fruits" of the dowry (*fructus dotis*) should accrue to the husband. Since he bears the burdens of the marriage (*onera matrimonii*), it is fair that he also receive the fruits.

1. Marriage Burdens. The "burdens of marriage" (*onera matrimonii*) are, as it seems, the additional expenses of maintaining a marital household, particularly food, clothing, and shelter for the wife, her attendant slaves, and perhaps the couple's children as well. In the case of a married son-in-power, these expenses are in principle borne by his father, who accordingly controls his daughter-in-law's dowry up until his death; but the dowry immediately reverts to the son after the father's death. Ulpian, D. 10.2.20.2: "Further, (in settling an estate of a deceased *pater familias*) his son-in-power, who is named as heir, has a preferential claim to his wife's dowry, and rightly so since he assumes the burdens of marriage." The jurists describe the link between a dowry and household expenses as a fundamental principle of law; for example, Paul, D. 23.4.28: "[T]he fruits of a dowry should relieve the burdens of marriage." Why is this such a problem for the Romans? (For one answer, see Case 60.)

2. Fruits of the Dowry. "Fruits" (*fructus*) is a technical term referring to the direct or indirect income that property produces. In general, fruits arise from capital through cultivation (e.g., crops, wool, milk), but the jurists extend the term to include minerals excavated from mines, the value of work done by slaves, and even the proceeds from a lease of property. It is these fruits, usually converted into cash, that are supposed to compensate the husband for his sustaining the burdens of marriage, although no exact accounting is ever required. On the general problem of linking dowry income to the actual costs of maintenance, see below, Part C. 4 and C.5.

CASE 36: Appraising the Dowry

D. 23.3.10 pr. (Ulpianus libro trigesimo quarto ad Sabinum)

Plerumque interest viri res non esse aestimatas idcirco, ne periculum rerum ad eum pertineat, maxime si animalia in dotem acceperit vel vestem, qua mulier utitur: eveniet enim, si aestimata sit et eam mulier adtrivit, ut nihilo minus maritus aestimationem eorum praestet. quotiens igitur non aestimatae res in dotem dantur, et meliores et deteriores mulieri fiunt.

D. 23.3.42 (Gaius libro undecimo ad edictum provinciale)

Res in dotem datae, quae pondere numero mensura constant, mariti periculo sunt, quia in hoc dantur, ut eas maritus ad arbitrium suum distrahat et quandoque soluto matrimonio eiusdem generis et qualitatis alias restituat vel ipse vel heres eius.

(Ulpian in the thirty-fourth book on Sabinus)

Usually it is in the husband's interest that the property (in the dowry) not be appraised, so that the risk for it not fall on him, especially if he receives as dowry the animals or the clothing his wife uses. For if it was appraised and his wife (then) wore it out, the result will be that the husband is still liable for its appraised value. So, whenever unappraised property is given as dowry, both an increase and a decrease in value fall on the wife.

(Gaius in the eleventh book on the Provincial Edict)

When items in the dowry can be weighed, counted, or measured, they are at the husband's risk, since they are given so that the husband may alienate them at his discretion; and when the marriage ends, he or his heir is to restore other property of the same kind and character.

1. **Appraisal.** In the bargaining before marriage, one weapon on the bride's side is appraisal (*aestimatio*), an agreement that sets a fixed value on an object in the dowry. As Ulpian points out (D. 23.3.10.4), once the marriage has taken place, the effect of this agreement is somewhat like a sale: if the object is destroyed, even without the husband's fault, he is liable for its appraised value. (There are some exceptions to this liability, of minor concern here.) In this Case, Ulpian points out a potential trap for the husband. Why should he bear the cost when his wife wears out her dowry clothing, or when dowry animals die? In general, the appraisal must be honest at least on the husband's part (ibid. 12.1). The husband might also provide security for the dowry's return (Gaius, *Inst.* 3.125).

2. **Risk.** This Case introduces the problem of risk (*periculum*) in dowry, the potential liabilities associated with the destruction or deterioration of dowry property. As Gaius observes, fungibles (things normally thought of as re-

placeable by substitutes; e.g., a sack of wheat or a sum of money) are not appraised because the husband is expected to return their replacements; hence they are held at his risk. What if they are accidentally destroyed before he can make use of them?

SECTION 2. Return of the Dowry

CASE 81: A Wife Dies

Tituli ex Corpore Ulpiani 6.4-5

(4) Mortua in matrimonio muliere dos a patre profecta ad patrem revertitur, quintis in singulos liberos in infinitum relictis penes virum. quod si pater non sit, apud maritum remanet. (5) Adventicia autem dos semper penes maritum remanet, praeterquam si is qui dedit, ut sibi redderetur, stipulatus fuerit: quae dos specialiter recepticia dicitur.

(*Excerpts from Ulpian's Writings*)

(4) When a wife dies during marriage, a dowry that came from her father returns to her father, but her husband keeps one-fifth for each child no matter how many. If the father is no longer alive, it (all) stays with the husband. (5) An "adventitious" dowry (*adventicia dos*) always stays with the husband unless the giver stipulated that it be returned to him; this form of dowry has the technical name "retained" (*recepticia*).

1. Profectitious versus Adventitious. Reread Case 30. Though the vocabulary is unfamiliar, the basic distinction here is not difficult. (1) In the typical case, a profectitious dowry deriving from the wife's father or paternal grandfather (whether or not she was still in his power) is given special treatment in that the giver can reclaim it when the marriage ends through the wife's death; the husband can, however, deduct a fifth for each (surviving?) child (with possible deductions as well for other things; see below). (2) In all other cases, including when the wife gave her own dowry, the dowry is adventitious, and the wife's death results in the entire dowry remaining with the husband, unless the giver had expressly arranged for its return. If the giver of a profectitious dowry dies before the wife, the dowry is treated as adventitious.

2. Why the Distinction? These are the rules. Much harder to explain is the reason for them. The default rule, as it appears (although this could be varied by agreement: *Tit. Ulp.* 6.5), is that the husband keeps the dowry when the marriage ends through his wife's death. First of all, why should this be true? Second, if the exception from the default rule in favor of the wife's present or former *pater familias* can be explained as an effort to encourage dowry giving within the household, what is the significance of the husband's deductions for their children? The most important problem here is to determine what legal or social functions the dowry is serving, or being made to serve, beyond its somewhat feeble role in providing the wife with maintenance during the marriage.

3. Uxoricide. Do the rules in this Case apply if a husband murders his wife? Most emphatically not! See Pomponius, D. 24.3.10.1: "It is not fair that the husband should expect to profit from the dowry through his crime." And so

too, it should be said, for the reverse situation. This is not a trivial issue; in some parts of the modern world where dowry is still common, husbands have allegedly killed their wives, or vice versa, to gain control of the dowry.

4. **And If the Husband Dies First?** Here the default rule is the exact reverse: in principle, the entire dowry returns to the wife (or to her *pater familias*) when the marriage ends through the husband's death. The claim lies against the husband's heir, who can make many of the normal retentions from the dowry but not that for immorality on the part of the wife (Paul, D. 24.3.15.1; why?). There is also no retention for children, and agreements between the parties to modify that rule are void (see, e.g., Ulpian, D. 23.4.2, 33.4.1.1). Do these rules help to clarify the general pattern?

5. **Reclaiming the Dowry.** It is important to note that even where the husband is obliged, at the end of marriage, to surrender the dowry, the dowry property does not automatically revert from his ownership. Instead, in the typical case, the couple had to reach agreement on his voluntary surrender of the dowry; and if this failed, then the wife had to sue for it. The relevant lawsuit is called "the action on a wife's property" (*actio rei uxoriae*). The model formula for this action—the instructions to the *iudex* in the case—has been reconstructed as follows: "If it appears that the defendant ought to return the dowry or a part of it to the plaintiff, let the *iudex* condemn the defendant to pay the plaintiff the portion of it that is better and fairer; if this does not appear, let him absolve him." Of particular importance is the phrase "better and fairer" (*aequius melius*), meaning that it is found to be "better and fairer" that the wife receive this portion rather than that her husband keep it. The jurists describe this action as a *bona fides* trial: in arriving at a judgment, the *iudex* can take into account all legitimate claims and counterclaims of the two parties (Gaius, *Inst.* 4.62-63). Such an open-ended format provides the legal basis for granting the various retentions discussed in the following Cases and also for many other rules governing how husbands administered dowries. In suing for recovery of dowry, an ex-wife enjoys privileged status over other unsecured creditors of her husband or of his estate; see Ulpian and Paul, D. 42.5.17.1-19 pr.

6. **"What He Can Provide."** Husbands often found it difficult to return dowries, presumably because they had a hard time laying their hands on so much capital. If the dowry was in money, they were usually permitted to repay in three annual installments rather than all at once (*Tit. Ulp.* 6.8). One unexpected implication that the jurists drew from the phrase "better and fairer" is that, even ignoring retentions, a husband was not necessarily obliged to return the entire dowry. As Ulpian puts it (D. 24.3.12): "The recognized rule is that a husband is condemned for what he can provide," meaning that if the husband has limited means, a *iudex* should lower the amount he has to return. This

rule points to the difficulties many husbands had in returning a large sum of dowry capital; but is it fair to the wife? What if the husband's own actions have rendered him insolvent? Pomponius (D. 24.3.18.1) holds that even if the husband was careless, the award should still be lowered unless he acted with malicious intent (*dolus*) to squander the dowry.

CASE 82: Divorce and the Dowry

Tituli ex Corpore Ulpiani 6.6-7

(6) Divortio facto, si quidem sui iuris sit mulier, ipsa habet rei uxoriae actionem, id est dotis repetitionem. quod si in potestate patris sit, pater adiuncta filiae persona habet actionem rei uxoriae: nec interest, adventicia sit dos an profecticia. (7) Post divortium defuncta muliere heredi eius actio non aliter datur, quam si moram in dote mulieri reddenda maritus fecerit.

(*Excerpts from Ulpian's Writings*)

(6) After a divorce, a wife herself, if she is *sui iuris*, has the action on a wife's property (*actio rei uxoriae*), that is, a claim for return of the dowry. But if she is in a father's power, the father, accompanied by the daughter, has the action on a wife's property; it does not matter whether the dowry is adventitious or profectitious. (7) If the wife dies after the divorce, her heir is given the action only if her husband has delayed in returning the dowry to the wife.

1. The Wife Sues. Although this Case states the law correctly, one thing it does not adequately emphasize is that, no matter the form of the dowry, after a divorce the wife is the primary plaintiff. This point is explained by Ulpian (D. 24.3.2.1): where the woman is in the power of a *pater familias*, the dowry is thought of as belonging to them jointly, so that her father cannot sue for it without obtaining her consent. However, by a rescript of Caracalla, it was decided that her consent should be presumed unless she knew of the lawsuit and actively opposed it. As Ulpian says (ibid. 2): "If the daughter is not present, we must hold that this (the lawsuit) is not brought in accord with her will, and the father must provide security that she will ratify it; for if she is sane, we require that she know (of the proceeding) so that she not appear to oppose it." Why might a wife be unwilling to sue her ex-husband over the dowry?

2. The Wife Delays in Suing. Pomponius, D. 24.3.9: "If the wife has delayed in recovering the dowry, her husband should be liable only for deliberate misconduct (*dolus malus*), not also for (unintentional) fault (*culpa*), so that he not be forced by his wife's act to cultivate her land in perpetuity. But the fruits that he acquires are returned (to her)." Here the husband is holding dowry property to which his former wife is now entitled; her failure to act in a timely fashion (called *mora*, "delay," in Roman law) results, not in her losing her rights through waiver, but rather in her suffering the "penalty" of his reduced duty of care for the property. Is this the best way to handle a situation of this kind? Does it make sense that the husband should no longer be liable for carelessness that results in harm to the property? Does the rule provide sufficient incentive for a woman to act quickly in reclaiming her dowry?

CASE 83: Retention on Moral Grounds

Tituli ex Corpore Ulpiani 6.9-10, 12-13

(9) Retentiones ex dote fiunt aut propter liberos aut propter mores aut propter impensas aut propter res donatas aut propter res amotas. (10) Propter liberos retentio fit, si culpa mulieris aut patris cuius in potestate est divortium factum sit: tunc enim singulorum liberorum nomine sextae retinentur ex dote, non plures tamen quam tres. . . . (12) Morum nomine graviorum quidem sexta retinetur, leviorum autem octava. graviores mores sunt adulteria tantum, leviores omnes reliqui. (13) Mariti mores puniuntur in ea quidem dote, quae a die reddi debet, ita ut propter maiores mores praesentem dotem reddat, propter minores senum mensum die. in ea autem, quae praesens reddi solet, tantum ex fructibus iubetur reddere, quantum in illa dote quae triennio redditur repraesentatio facit.

(*Excerpts from Ulpian's Writings*)

(9) Retentions from a dowry occur (for five reasons:) either because of children, because of morality, because of expenses, because of gifts, or because of removal of property. (10) Retention occurs because of children if the divorce came about through the wife's fault (*culpa*) or that of the father in whose power she was; for then a sixth is retained from the dowry for each child up to a maximum of three. . . .

(12) On the basis of serious immorality a sixth is retained, but an eighth for less serious instances. Only adultery counts as serious immorality; all the rest is less serious. (13) The husband's immorality is punished in the case of a dowry that must be returned from a (given) day, as follows: for serious immorality he returns the dowry at once; for less serious, in six months' time. In the case of a dowry that should be returned at once, he is ordered to return from the fruits as much as the payment made for a dowry returned over three years.

1. Fault (*Culpa*). Classical divorce itself was fault free, in the sense that no allegation of misconduct was required in order to effect a divorce. Things were different when it came to reclaiming the dowry, at any rate if there were children. The rule stated in (10) somewhat resembles that in Case 79: if the divorce occurs because of the wife's fault (*culpa*), the husband is allowed to retain a sixth of the dowry for each child; but this Case sets an upper limit of one-half the dowry (so also Paul, in Boethius's commentary *Ad Ciceronis Topica* 19). These sources do not refer to the husband's fault, which was evidently irrelevant in this context, except perhaps if both parties were held to be at fault. The reason for the rule is hard to make out, although it seems unconnected to the welfare of the children (who would normally remain under the husband's power in any case; see Case 49); a parallel rule is used for a dowry coming from the wife's *pater familias* (see Case 81). Perhaps the rationale was that the wife, in seeking return of her dowry, had "dirty hands" if she was re-

sponsible for the marriage ending. Can you see other possible explanations for shifting the costs of child rearing onto the ex-wife? In general, to what extent are the rules on dowry retentions likely to limit the unrestricted freedom to divorce?

2. **What Is Fault?** Classical sources are unclear on this point, although the spouse who initiates the divorce is not necessarily the one at fault (see, on this, Cicero, *Top.* 19, who otherwise misstates the rule); but perhaps this spouse usually bore the burden of proof. Doubtless, neither party is at fault when a divorce is amicable (Case 80). Some clue as to possible legitimate grounds for divorce may be had from late imperial legislation, which, under Christian influence, restricted divorce itself. According to the most complete list (Theodosius and Valentinian, C. 5.17.8; A.D. 449), one spouse could justify divorce if the other was convicted of a major crime (treason, kidnapping, etc.) or had betrayed the marriage in a specified way (adultery and attempted murder for both spouses; for a husband, wife beating or openly consorting with prostitutes; for a wife, licentious behavior). This list may at least suggest the flavor of classical law. Remarkable is the absence of alleged financial misconduct, especially by the husband with regard to the dowry. Further, desertion, mental cruelty, and mutual incompatibility, those familiar modern standbys, are also missing, unless perhaps they are implicit in other categories. On the other hand, Ulpian (D. 24.3.22.7) holds that a husband who divorces an insane wife is at fault for ending the marriage unless her insanity is "so savage and dangerous that there is no chance of recovery."

3. **Retention for Immorality.** At least serious immorality would surely be a justification for the other spouse to initiate divorce. However, as this Case makes clear, retention on the basis of immorality was separate and cumulative (since otherwise a childless but offending wife would escape without penalty); that is, the husband retained separate fractions on the basis of the wife's immorality and because of children if she had caused the divorce. By contrast, the wife who proves her husband's immorality receives only accelerated repayment. Where both spouses have grounds for repudiation because of each other's immoral conduct, their offenses are offset (Papinian, D. 24.3.39) and no retention is allowed; and so too, if the husband instigates his wife's adultery (Scaevola, D. 24.3.47). Are these legal proceedings likely to be messy? Only the husband or his *pater familias* is entitled to a retention for immorality; his heirs are not (Paul, D. 24.3.15.1). Further, the retention was probably available only while the wife was still alive (Constantius and Constans, *C.Th.* 3.13.1; A.D. 349). What might explain these limitations?

4. **The Action on Immorality.** In classical law, when a husband was sued for return of the dowry, he could assert his right to retain because of his wife's im-

morality. An older procedural form, called the *iudicium de moribus* (trial on morality), allowed the husband to sue his wife directly on a charge of immorality. Justinian (C. 5.17.11.2b; A.D. 533), describing the procedure as uncommon, abolished it; for this reason it is poorly known, although it could result in a woman's forfeiting part or all of her dowry.

5. Other Retentions. This Case also mentions retentions from the dowry to offset improper gifts (see Cases 61-65) and "removal of property" (see Case 45). In both instances separate lawsuits were also available, even where there was no dowry (Pomponius, D. 25.2.8 pr.). Of course, the wife could use these lawsuits against her husband as well.

CASE 84: Retaining Necessary Expenses

D. 25.1.1.3 (Ulpianus libro trigesimo sexto ad Sabinum)

Inter necessarias impensas esse Labeo ait moles in mare vel flumen proiectas. sed et si pistrinum vel horreum necessario factum sit, in necessariis impensis habendum ait. proinde Fulcinius inquit, si aedificium ruens quod habere mulieri utile erat refecerit, aut si oliveta reiecta restauraverit, vel ex stipulatione damni infecti ne committatur praestiterit,

D. 25.1.2 (Paulus libro septimo ad Sabinum)

vel in valetudinem servorum impenderit,

D. 25.1.3 pr. (Ulpianus libro trigesimo sexto ad Sabinum)

vel si vites propagaverit vel arbores curaverit vel seminaria pro utilitate agri fecerit, necessarias inpensas fecisse videbitur.

(Ulpian in the thirty-sixth book on Sabinus)

Labeo says that necessary expenses include jetties built out into the sea or a river. But also if it was necessary to build a mill or a storehouse, he says this should be treated as a necessary expense. So Fulcinius says that if he repairs a collapsing building that it was useful for his wife to have, or if he brought abandoned olive orchards back into cultivation, or he paid (something) on the basis of a stipulation against causing threatened loss,

(Paul in the seventh book on Sabinus)

or he spent (money) on the health of slaves,

(Ulpian in the thirty-sixth book on Sabinus)

or if he planted vines or cared for trees or made plant nurseries of use to the farm, he is held to have made necessary expenses.

1. What's Necessary? In Case 71, necessary expenses were described as those that the husband had to make in order to prevent the dowry from losing value. Do all the examples that are mentioned in this Case strike you as falling into that category? For example, when is it "necessary to build a mill or a storehouse" or to bring "abandoned olive orchards back into cultivation"? Wouldn't these normally be thought of as long-term capital improvements rather than emergency expenses? With this Case, compare Paul, D. 25.1.12: "An arbiter (in settling a lawsuit over return of dowry) should not bother about moderate expenses on constructing buildings, on replanting and cultivating vines, and on the health of slaves. Otherwise, the trial will seem to be on administration of affairs rather than on dowry." Paul's point is that the husband is not accurately described as administering the dowry on behalf of his

wife, since he himself derives a profit from it and hence must pay for its upkeep. Can a rule be devised for separating ordinary operating expenses from "necessary" ones?

2. **Ransoming the Wife's Relatives.** If a husband uses dowry money in order to pay ransom to bandits who are holding one of his wife's relations, is this payment a necessary expense? See Ulpian, D. 24.3.21 (yes). "Relations" are *necessarii,* persons closely connected by ties of friendship or family. Would you have expected Ulpian's ruling, granted the definition of "necessary expense" used in this Case? What if the ransom payment is as large as the entire value of the dowry?

3. **Paying for the Wife's Funeral.** Proculus (D. 24.3.60) considers the following case: A wife was still in the power of her father, who had provided her with a dowry. She died, and her father paid for her funeral. Can he seek compensation from her husband? Proculus says yes; indeed, he can sue immediately, even though the husband still has time left before he has to repay the dowry to the father. This source clearly indicates that the husband was legally obliged to pay for his wife's funeral; but why? If the husband had no duty to maintain his wife during her lifetime (Case 60), why should he have an obligation to bury her? Should the funeral expenses be thought of as "necessary expenses," such that the husband is liable via the dowry if he fails to make them (Case 71)? (Paul, *Sent.* 1.21.11, seems to take this line: "A husband can retain from the dowry what he spends on his wife's funeral.") What if the husband objects that his father-in-law's outlays were extravagant? Eventually, a fairly elaborate law developed around this subject (D. 11.7.16-20, 22-30, 46.1). If the wife had no dowry, or if her husband had already returned it, he had no obligation to pay for her funeral except as a last resort; and under no circumstances was she ever obligated to pay for his. Would a husband also be liable for his wife's emergency medical expenses, if she survived?

CASE 85: Reducing the Dowry by Law

D. 25.1.5 pr., 2 (Ulpianus libro trigesimo sexto ad Sabinum)

(pr.) Quod dicitur necessarias impensas dotem minuere, sic erit accipiendum, ut et Pomponius ait, non ut ipsae res corporaliter deminuantur, ut puta fundus vel quodcumque aliud corpus: etenim absurdum est deminutionem corporis fieri propter pecuniam. ceterum haec res faciet desinere esse fundum dotalem vel partem eius. manebit igitur maritus in rerum detentationem, donec ei satisfiat: non enim ipso iure corporum, sed dotis fit deminutio. ubi ergo admittimus deminutionem dotis ipso iure fieri? ubi non sunt corpora <in dote>, sed pecunia: nam in pecunia ratio admittit deminutionem fieri. proinde si aestimata corpora in dotem data sint, ipso iure dos deminuetur per inpensas necessarias. hoc de inpensis dictum est, quae in dotem ipsam factae sint: ceterum si exstrinsecus, non imminuent dotem. . . . (2) Si dos tota soluta sit non habita ratione inpensarum, videndum est, an condici possit id, quod pro impensis necessariis compensari solet. et Marcellus admittit condictioni esse locum: sed etsi plerique negent, tamen propter aequitatem Marcelli sententia admittenda est.

(Ulpian in the thirty-sixth book on Sabinus)

(pr.) As for the saying that necessary expenses reduce the dowry, this should not be interpreted to mean, as Pomponius also says, that the property is physically reduced, for instance, a farm or some other physical object; for it is ludicrous that physical loss occur because of money. But this will make the farm, or part of it, cease to be in the dowry. So the husband will continue to detain the property until he is satisfied (by receiving compensation for his necessary expenses), and the reduction that occurs by operation of law is not of the physical objects but of the dowry (itself).

Therefore, when do we concede that the dowry is (actually) reduced by operation of law? When the dowry consists not of physical objects but of money; for, in the case of money, reason permits a reduction. Hence, if appraised objects are given as dowry, by operation of law the dowry will be reduced through necessary expenses. This rule applies to expenses made on the dowry itself; but those made outside (the dowry) do not reduce the dowry. . . .

(2) If the entire dowry has been repaid without taking expenses into account, we must examine whether a claim can be brought for what should be offset for necessary expenses. Marcellus concedes that a claim is appropriate. Although many deny this, the view of Marcellus should be allowed because of fairness.

1. How to Reclaim Necessary Expenses. The problem dealt with in the first part of this Case stems from a venerable rule: "necessary expenses reduce the dowry by operation of law (*ipso iure*)." What this rule apparently means is that these expenses are, at least in principle, immediately offset against the value

of the dowry, even though this offset may not be realized until years later when the marriage ends. Where the wife's dowry consists entirely or partly of money, this rule meant that necessary expenses automatically reduced the dowry; that is, even though the money originally handed over had not been spent, the husband was entitled to take the appropriate amount as his own. The problem arose when the dowry consisted entirely of land or other physical objects, or when the money in the dowry ran out. How does Ulpian think this problem should be handled? Suppose, for instance, that the necessary expenses on a dowry farm had gradually grown until they equaled the total value of the farm; would the husband be obliged to wait until the marriage's end before reclaiming these expenses? This specific problem is dealt with by Paul, D. 23.3.56.3, where the text, as preserved, seems to say that the property would cease to be in the dowry if the wife failed to pay off the expenses within one year; but scholars widely believe that this text was subsequently altered to give a nonclassical solution.

2. **Final Settlement?** At the marriage's end, the husband (or his heir) is in a strong legal position in that he holds the dowry, while the wife is obliged to sue if the parties cannot settle amicably. In the course of this lawsuit, the husband's various retentions come into play, mainly as counterclaims. Normally, however, the husband also has available a separate action if he fails to raise one of his counterclaims. As the last part of this Case shows, this could well be untrue for necessary expenses, so that if the husband fails to raise them in the action for recovery of dowry, he may lose them as claims altogether. Marcellus and Ulpian believe, as a matter of equity, that he should be able to sue separately; but Ulpian notes that most jurists reject this view. What might their reasoning have been? Were they concerned that husbands might try to reclaim necessary expenses even before the dowry was being returned? If so, what reasons can be given for this not being permitted?

CASE 86: Useful Expenses

D. 25.1.5.3 (Ulpianus libro trigesimo sexto ad Sabinum)

Utiles autem impensae sunt, quas maritus utiliter fecit, <quae> meliorem <rem> uxoris feceri<n>t, hoc est dotem,

D. 25.1.6 (Paulus libro septimo ad Sabinum)

veluti si novelletum in fundo factum sit, aut si in domo pistrinum aut tabernam adiecerit, si servos artes docuerit.

D. 25.1.8 (Paulus libro septimo ad Sabinum)

Utilium nomine ita faciendam deductionem quidam dicunt, si voluntate mulieris factae sint: iniquum enim esse compelli mulierem rem vendere, ut impensas in eam factas solveret, si aliunde solvere non potest: quod summam habet aequitatis rationem.

(Ulpian in the thirty-sixth book on Sabinus)

Useful expenses are those the husband made usefully, that improve the wife's property, that is, the dowry,

(Paul in the seventh book on Sabinus)

for instance, if a plant nursery is constructed on a farm or if he adds a bakery or a shop in a house or if he teaches skills to slaves.

(Paul in the seventh book on Sabinus)

Some say that a deduction (from the dowry) should be made for useful expenses only if his wife was willing to have them made. For it is unfair that the wife be forced to sell property to pay expenses made on it if she cannot otherwise pay. This reasoning is eminently fair.

1. What's Useful? How clear is the conception of useful expenses that underlies this Case? Can they be readily distinguished from necessary expenses? Other sources state that, unlike necessary expenses (which only keep up the property's value), useful expenses lead to an increase in the property's profitability. So, Paul, D. 50.16.79.1: "Fulcinius says that useful expenses are those that make the dowry better, not those that do not allow it to worsen; (that is, they are expenses) from which return is acquired for his wife" (compare *Tit. Ulp.* 6.16). Other examples, besides those given in this Case, are bringing forestland under cultivation, planting new vineyards or olive orchards, or constructing a storehouse. Can these all be characterized as long-term capital investments? How about educating or teaching skills to a slave? Ulpian (D. 25.1.14.1) gives the strangest example: placing cows on property in order to fertilize it; what might he be thinking of?

2. **Compensation for Useful Expenses.** Paul, in the fragment quoted in the previous paragraph, describes useful expenses as those "from which return is acquired for his wife." This observation raises an important point: many such expenses should result in an increased income stream from the property, at least eventually. Under the rules of dowry, the husband acquires this income as "fruits" from the dowry (Case 67), but the wife has both a future interest in the increased income (since under many circumstances she will recover the dowry) and a present interest (to the rather limited extent that her maintenance is legally tied to the dowry income). Under these conditions, should the husband be compensated for expenses that seem likely to increase the dowry income? In this Case, Paul agrees with "some" jurists (perhaps a minority) who hold that the wife should pay for these expenses only if she had been consulted and was willing to have them made; this obviously means that if her husband wants compensation, he must first obtain her approval. In D. 50.16.79.1, Paul uses the same argument for this restriction: "It is wrong that a wife who is unaware or unwilling be burdened on their account, lest she be forced to lose her farm or slaves." Why is Paul fearful that the wife might lose her property? Does this rule presuppose a novel theory of a husband's control over his wife's dowry?

3. **Dissent?** This Case gives the rule preferred by Justinian (C. 5.13.1.5e; A.D. 530). As Paul indicates, during the classical period other jurists may have felt that the wife should usually, or perhaps even invariably, compensate her husband for useful, as well as necessary, expenses. One such jurist may have been Ulpian, who holds (D. 24.3.7.16): "Plainly, if he necessarily constructs a new farmhouse or repairs an old one that has totally collapsed through no fault of his, he will have a claim for this expense; and likewise if he brings land under cultivation. For these expenses are either necessary or useful, and they give rise to the husband's lawsuit." (See also Javolenus, in Case 87.) If Ulpian and Paul are in fact disagreeing (some scholars think that Ulpian's text was reworked by the *Digest* compilers), try to decide who has the better position. Among the things you should consider are the desirability of the wife's consent to any long-term improvements in her dowry property; the instability of the Roman marriage structure (high death rates and the ease of divorce), which may mean that the husband will not profit from long-term improvements; the husband's capacity to engage in embezzlement and other forms of opportunism, and the wife's limited means to prevent such misconduct during the marriage; and the perspective of public policy on all these issues. Should it matter whether the husband's "useful expenses" were reasonable, and whether they led in fact to increased income? How might the economic interests of husband and wife diverge when it comes to improvement of dowry property?

CASE 87: Opening a Quarry

D. 24.3.8 pr. (Paulus libro septimo ad Sabinum)

Si fundus in dotem datus sit, in quo lapis caeditur, lapidicinarum commodum ad maritum pertinere constat, quia palam sit eo animo dedisse mulierem fundum, ut iste fructus ad maritum pertineat, nisi si contrariam voluntatem in dote danda declaraverit mulier.

D. 23.5.18 pr. (Iavolenus libro sexto ex Posterioribus Labeonis)

Vir in fundo dotali lapidicinas marmoreas aperuerat: divortio facto quaeritur, marmor quod caesum neque exportatum esset cuius esset et impensam in lapidicinas factam mulier an vir praestare deberet. Labeo marmor viri esse ait: ceterum viro negat quidquam praestandum esse a muliere, quia nec necessaria ea impensa esset et fundus deterior esset factus. ego non tantum necessarias, sed etiam utiles impensas praestandas a muliere existimo nec puto fundum deteriorem esse, si tales sunt lapidicinae, in quibus lapis crescere possit.

D. 24.3.7.13-14 (Ulpianus libro trigesimo primo ad Sabinum)

(13) Si vir in fundo mulieris dotali lapidicinas marmoreas invenerit et fundum fructuosiorem fecerit, marmor, quod caesum neque exportatum est, <est> mariti et impensa non est ei praestanda, quia nec in fructu est marmor: nisi tale sit, ut lapis ibi renascatur, quales sunt in Gallia, sunt et in Asia. (14) Sed si cretifodinae, argenti fodinae vel auri vel cuius alterius materiae sint vel harenae, utique in fructu habebuntur.

(Paul in the seventh book on Sabinus)

If the dowry includes a farm on which stone is cut, it is settled that the husband takes the profit from the quarry, since his wife obviously gave him the farm intending that its fruits go to the husband, except if the wife states a contrary aim in giving the dowry.

(Javolenus in the sixth book from Labeo's *Posthumous Writings*)

A man had opened marble quarries on a dowry farm. After a divorce, it was asked who owned the marble that was cut but not removed, and whether the husband or wife should pay for expenses on the quarry. Labeo says the marble is the husband's; but he denies that the wife must pay anything to her husband, since these expenses were not necessary and the farm became worse. I think that the wife must pay not only necessary but also useful expenses, nor do I think the farm worse if the quarries are such that the stone in them can increase.

(Ulpian in the thirty-first book on Sabinus)

(13) If a man discovered marble quarries on his wife's dowry farm and he made the farm more profitable, the marble that was cut but not removed is the husband's, nor must his expenses be paid (by the wife) since marble is not included

in fruits unless it is such that the stone there is renewed, like some in Gaul and Asia. (14) But if there are clay beds, mines for silver or gold or any other substance, or sand pits, they will certainly be regarded as fruits.

1. A Babble of Sources? The juristic sources on marble quarries are not easy to follow, so don't worry if they seem contradictory. A number of questions are raised in these sources:

   - Should quarried stone be considered part of the fruits of the dowry?
   - Can a husband profit by extracting and selling stone from an already opened quarry on dowry land?
   - May he open a new quarry and profit in a similar manner?
   - Even if he is allowed to open a quarry, is he obliged to compensate his wife if the overall value of the land is lowered because of the quarry?
   - Must his wife compensate him for his expenses in opening a new quarry?
   - When stone is being extracted from the quarry, at what point does it become the husband's: when it is separated from the surrounding rock, or when it is actually removed?

   As to each question, how much real disagreement is there between the various jurists? Why does Ulpian believe that there is a difference between marble quarries and such other extractions as clay from a clay bed, gold or silver from a mine, or sand from a sand pit? More generally, what kinds of legal problems do extractions of this type raise, and how are they different from the legal problems associated with ordinary agricultural production? If quarries seem a little remote to your experience, consider a husband who wishes to strip-mine a farm belonging to his wife. Can he both capture the profits from the mine and force his wife to repay him for the expense of opening it? Would that just rub salt in the wound?

2. A Red Herring? Pomponius, D. 23.3.32: "If, with his wife's approval, a husband sold stone from the quarries on a dowry farm or trees which were not fruits or the right to construct a building atop land (*superficies*), the money from this sale is received for the dowry." This evidently means that proceeds from the sale go to increase the dowry. Is the ruling consistent with our other sources on quarries?

3. Another Red Herring? Alfenus, D. 23.5.8: "At his wife's request, a man cut down an olive orchard on a dowry farm in order to establish a new one. Later he died and left the dowry to his wife as a legacy. He (the jurist Servius) responded that the wood that was cut from the olive orchard must be returned to the wife." If he had not died, would the wood have belonged to him? How, if at all, is the wood different from the quarried stone in this Case?

4. Living Rock? The jurists were evidently the victims of a hoax.

CASE 88: Luxury Expenses

D. 25.1.9 (Ulpianus libro trigesimo sexto ad Sabinum)

Pro voluptariis impensis, nisi parata sit mulier pati maritum tollentem, exactionem patitur. nam si vult habere mulier, reddere ea quae impensa sunt debet marito: aut si non vult, pati debet tollentem, si modo recipiant separationem: ceterum si non recipiant, relinquendae sunt: ita enim permittendum est marito auferre ornatum quem posuit, si futurum est eius quod abstulit.

(Ulpian in the thirty-sixth book on Sabinus)

For luxury expenses, unless the wife is ready to permit their removal by her husband, she faces a demand for repayment (of their cost). For if the wife wishes to have them, she should return to her husband what was spent (on them); but if she does not want them, she should allow their removal, provided their separation is feasible. But if this is not feasible, they must be left; for the husband is allowed to take away the decoration he put up only if what he took will be his.

1. What's Luxury? The final category of expenses are those that, as *Tit. Ulp.* 6.17 puts it, neither worsen the dowry nor make it more profitable but only make the dowry property more pleasing. Paul (D. 50.16.79.2) gives as examples the installation of gardens, fountains, wall paneling and revetments, and pictures; Ulpian (D. 25.1.14.2) adds the construction of baths. All these were normal amenities of upper-class dwellings.

2. The Right to Remove. As a general rule, the husband cannot receive compensation for luxury expenses, even if his wife consents to them. Ulpian, D. 25.1.11 pr.: "Aristo writes that even if they are made with the wife's approval, repayment of luxury expenses cannot be demanded." Why should this be true, if the wife wanted the decorations and will enjoy them after the marriage has ended and the dowry has been returned to her? In this Case, Ulpian describes an exception: the husband may insist that his wife permit removal of the decorations; and she must then either permit removal or pay their cost. This remedy will work only if they are removable without damage to the structure and are usable after removal (compare Paul, D. 24.1.63: on the wife's removing her property that has become attached to that of her husband). Is this exception sufficient to protect the husband?

3. Saleability. If a house is redecorated in order to make it more saleable, is that a luxury expense? See Paul, D. 25.1.10 (no; it's useful). Explain the result.

CASE 89: Gaius Gracchus and Licinia's Dowry

D. 24.3.66 pr. (Iavolenus libro sexto ex Posterioribus Labeonis)

In his rebus, quas praeter numeratam pecuniam doti vir habet, dolum malum et culpam eum praestare oportere Servius ait. ea sententia Publii Mucii est: nam is in Licin[n]ia Gracchi uxore [statuit], quod res dotales in ea seditione, qua Gracchus occisus erat, perissent, ait, quia Gracchi culpa ea seditio facta esset, Licin[n]iae praestari oportere.

(Javolenus in the sixth book from Labeo's *Posthumous Writings*)

With regard to property (other than counted-out money) that the husband has as a dowry, Servius says he must be liable for intentional harm and for fault (*dolus malus* and *culpa*). This is the view of Publius Mucius Scaevola; for in the case of Licinia, the wife of (C.) Gracchus, because (her) dowry property had perished during the uprising in which Gracchus was killed, he says that Licinia should be compensated because Gracchus was at fault for the uprising.

1. **Liability for Harming the Property.** As you will recall from Case 70, a husband who harms property in the dowry is liable if the harm results from his deliberate misconduct (*dolus*) or from his negligent fault (*culpa*); the jurists eventually also required him to exercise a degree of diligence comparable to that he showed for his own property. This Case refers to a very early juristic decision related to the death of the popular politician Gaius Gracchus in 121 B.C. The Roman Senate had condemned Gracchus's political maneuvers as seditious, and on this basis his death at the hands of a mob was justified; but in their zeal the mob had also destroyed dowry property belonging to his wife, Licinia, who now wishes to receive compensation from Gracchus's estate. Does it seem fair to hold that Gracchus should be held responsible for causing this loss? Is this what you would normally think of as negligence?

2. **Publius Mucius Scaevola.** Would it surprise you to learn that P. Mucius Scaevola, the jurist who issued this opinion, was a political enemy of Gracchus? Gracchus's wife, Licinia, came from a wealthy and well-connected family. P. Mucius is the father of Q. Mucius Scaevola (consul in 95 B.C.), a much better known jurist.

3. **A Final Assessment of Dowry.** On the basis of what you have read so far, evaluate the following statement: "[T]he existence of dowry . . . was a central aspect of the family system, related to class differences that were relevant to women as well as to men. It structures the whole problem not simply of choice of partner but of the position of women throughout the marriage, especially after the death of the husband when widows often came to control

what, in gross, was considerable wealth. . . . Wealth of course is not to be translated directly into authority and even power, but it makes an important contribution. In general dowry represented an empowerment of women" (Jack Goody, in *The Development of the Family and Marriage in Europe*, 1983, writing of dowry "in Eurasia generally").