

Novel 162.

An imperial order transmitted to Dominicus, glorious prefect, concerning various subjects.

Preface:

We have been asked by your Glory concerning some controversies among the lawyers of Illyrium, which deserve, as you state, a decision by us, so as not to continue indefinitely.

c. 1. The first point is as follows: Some women to whom her husband had given, but not delivered certain property, wanted to bring an action to recover it (vindicare) when her husband died and who had remained silent as to the gift, claiming that she became the owner of the property by virtue of the gift and the silence of the husband thereafter. The claim made by the possessor of the property was that while she would have a valid defense in case she were in possession and were sued by someone, she could not bring an action to recover it. This then is the subject of controversy. Now we recollect a constitution of ours which provides that a donor must deliver the property given although he made no promise to do so.^a For an instrument should not be made to deceive nor consist of mere letters. We also recall the ancient Cincian law, which had provisions on the subject now in controversy, and which was recently removed from the body of the laws. 1. And we ordain that if, according to what has been previously stated by us, everything pertaining to such a gift is complete, including what relates to the amount and the registration thereof, it shall according to our constitution be considered by the silence of the husband as confirmed from the beginning, when it was made, so that, although the husband subsequently given a mortgage or pledge thereon^b it shall be considered as having been previously alienated by him, if he remained silent during his life time. If delivery thereof was made, the wife shall have a defense (against the recovery from her), or if no delivery was made, she shall have a right to sue to recover the property given, either by an action on a stipulation, if such was given, or if not, in another personal action (condictio).

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2. We also deem it proper to decide, that if such gifts were registered at the beginning, they are confirmed by silence, but if they remained unregistered, and are of amounts requiring registration, they shall be valid only up to the amount that unregistered gifts have been declared to be valid. They shall be valid up to that amount, as we lately decided, and a gift that would otherwise be valid, shall not fail by reason of such addition, as our law has already generally provided in case of gifts. This shall apply not only to wives and husbands, but also to other persons, between whom gifts, during marriage, are forbidden.

(a) c.8.53,35.

(b) See law 12 of this title.

c. 2. We have also been interrogated by Your Sublimity on a second subject, namely, whether our constitution, which provides that children born of a free woman and a serf should, because of the status of the woman, be free, should not be construed to mean that while such children are not unfree serfs (adscripticii) in the sense of the ancient law, that they are, nevertheless, serfs (coloni) because another of our constitutions forbids children of serfs (coloni) to leave the soil, but orders them to remain serfs, and whether this should not so much the more be true since there is among these persons the progeny of unfree serfs. This then is the subject of your interrogation. But those who consider the bent of our mind, must know, that we can never permit a free woman to give birth to an unfree serf, but the mark and sign of liberty shall be impressed upon those who are born after the passage of that law of a free woman. 1. If, therefore, a child is the offspring of a free woman and an unfree serf, it shall be free and not lose the status of free birth of the mother. But the constitution enacted by us shows that such persons must remain inhabitants on, and cultivators of land, since they have been born there. For that is what is meant by a colonus. So we give them no permission to leave the farm (of their birth) and go somewhere else. But if they are born on any farm, of a mother that is an unfree serf, they will, it is clear remain unfree serfs; if, on the other hand they are born of a free mother, they will indeed be free; property acquired by them will be their own, and will not belong to the owners of the land, but they cannot leave the land, but must cultivate it. They cannot leave it and go to cultivate other land, unless they acquire a possession of their own on which they settle and which is sufficiently large to occupy their time and

preventing them from cultivating other property. And they must remain on the property, free, it is true, but they are bound to their habitation. These, then, are the provisions in reference hereto.

Note.

This Novel clearly distinguishes between free and unfree serfs. Both were bound to the soil, but the free serfs could acquire property of their own, and if the land which they acquired was of sufficient size, they could move on to that without being bound to any land of another. They could also own personal property with the right to sell it, which unfree serfs could not do. See as to private property by serfs C. 11, 68, 6.

c. 3. And it appears to us to be not inappropriate to decide another point called in question. It has been asked, whether, in case a woman, an unfree serf married an unfree serf belonging to some other master, their offspring belongs to the master of the man or the master of the woman? We therefore ordain, that in a case of that kind, when unfree serfs of different masters intermarry, and their status is not questioned, and the woman is not free, their children are unfree serfs, but we do not give them all to the mother or her master; but if there is only one child, the mother shall be preferred to the man and the child belongs to her master; if there are two children they shall be divided according to lot; if the number of children is uneven, the mother retains the extra child, so that if there are three children, two belong to the mother, one belongs to the father; and, again, if there are five, three belong to the mother, two to the father; and the same rule applies to a larger number, so that an equal division shall be made; as far as that can be done, the excess, as

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is proper, belongs to the mother. For she, who bore the pangs of childbirth and bore and nourished her children should be given greater consideration than the man who in a pleasurable pastime aided in the procreation of the offspring.

Epilogue.

Your Glory must observe the provisions of this pragmatic order in similar cases. And we shall enact a general law on this subject, embodying these and other provisions which we deem necessary to be enacted.

Given June 13, (539).