Novel 2.

(535 A.D.) C.5,9.

That women who remarry shall have no choice (in leaving the prenuptial gift) and other topics. One Gregoria gave the occasion for the enactment of this constitution.

(Ne mulieres secundo numbentes electionem habeant et de aliis capitibus.)

Preface. The variety of cases constantly arising gave to the Roman law-givers who preceded us many occasions for enacting laws, and we, improving our republic so far as legislation is concerned, have almost entirely reconstructed such legislation partly in connection with answers to suppliants and partly in our subjects and such occasion also now exists and has moved us to make this law. 1.For one Gregoria has supplicated us, saying that she was formerly married and gave birth to two children, a boy and a girl; and that she lost her husband.. Her son having shown much affection, she thought that he ought not to be left unrewarded and deprived of the proper recompense therefor. She accordingly, though she had not yet remarried, gave him her prenuptial gift; that the son, however, did not survive her, and died before she had any desire to remarry. So the ancient, as well as our, law called the daughter and the mother to the succession of the son. And if the mother had been content with one marriage, no question would have arisen. But she entered into a second marriage, having the whole usufruct of the prenuptial gift, for she had only given the title in fee to the property itself to the son, retaining the usufruct therein for herself. The daughter, however, threatens to claim the whole title in fee not as the brother's heir, but because her father had given the property to the mother, claiming that a mother who remarries has no right whatever to the title in fee of the prenuptial gift. The mother, on the other hand maintains that the property is no longer a prenuptial gift, but is already a part of the son's inheritance, and since the question relates to an inheritance and not to a prenuptial gift, she has the right to one half of the title

in fee of said property, as well as the usufruct, The dispute is not limited to that, but extends also to the inheritance of the son itself, the mother claiming one-half according to the law under which we call her to the inheritance of a son, who has died, and where there is only a sister who is called along with her;(a) the sister, on the other hand, insists vigorously that she inherits the property of her brother under former laws, saying that if the mother had not remarried, she could have rightly claimed the inheritance of the son, but that having remarried she was deprived of all the father's property which the son obtained, and that if the son had died after her remarriage, she, the daughter, would have been entitled to all the son's property from whatever source acquired, according to both constitutions, which make these provisions. The mother answers that these constitutions are harsh and not in accordance with the spirit of our times; and at the same time relies upon a constitution enacted by us and claims that it is not limited by the constitution first mentioned, and that while it does not call mothers who have not yet remarried along with the children, that is not true as to mothers who remarry;(a) that (further) there is something strange [in connection with this matter), and that she who made the son a gift through choice ought to seem to receive a reward in return, rather than seem to receive simply a gift, based on no reason. After long reflecting on the matter and considering the whole doctrine as to preference and as to such inheritance, we thought best to enact a general law, which will also serve to solve the question at present before us.

Note.

(a) 8-56,7.

(a) The mother here was evidently appealing to C.5,9,5, which while not calling mothers as a successor to a prenuptial gift along with the children did provide that she might give it to any child she wished, and therefore, by implication gave her certain rights therein. In fact it would seem that she had the better

of the argument and was defeated only because Justinian enacted by c.1 of this Novel an ex post facto law.

(b) C.5,9,3 and C.5,9,5 gave the right to the parent who remarried to designate which of the children should have the dowry or prenuptial gift, That right of designation was taken away by c.1 of this Novel and by Novel 22.

c. 1. We do not want to leave the matter of making a choice (i.e. giving a preference) confusing and doubtful, but to put it in this shape: When a mother once enters into a second marriage, the children immediately become owners of the prenuptial gift; nor shall the mother have the right to give it to some and leave others out, since she, by her second marriage, hurt the feelings of all of them. So in the present case, the fee of the whole prenuptial gift belongs to the daughter//, reserving to the mother the usufruct thereof during her life. And, according to (this) our constitution, if the mother dies first, the whole of such gift belongs to the daughter; if the daughter dies first, the mother receives the benefit stipulated in her favor in a contract relating to her childless condition, but the remainder belongs to the daughter, and she will transmit it to her heirs, if she has any, under the law.(a)

(a) See not (b) to preface.

c. 2. We shall make a beneficial addition to this law in reference to a matter that often arises, but concerning which no specific legislation has been enacted. If a mother who has not yet entered into a second marriage perchance gives or in any manner alienates any part of the gift on account of the marriage, or all of it, or some specific property belonging to it, not to a child but to some stranger, and thereafter remarries, it is clear that such alienation is rendered invalid through// such second marriage, but not completely so and the validity and invalidity of such alienation shall remain

in suspense. For if children survive, the transaction is invalidated, since the law gives the fee of the prenuptial gift to the children, without regard as to whether the woman has acted to the prejudice of the children or not. But if they all die before the mother does, the contract remains in force to the extent of the agreement against childlessness, which we first introduced and legislated on by a recent law.(a) So the alienation will be valid in part, but also invalid in part; that is to say, it remains valid to the extent that the property remains with the mother according to the agreement against childlessness, nut it is invalid as to the portion transmitted to the successors of the children, and if the mother is such sole successor, the whole remains valid. 1. And since the penalties for second marriage apply to men and women alike, the husband, who enters into a second marriage, imperils the dowry, the wife the prenuptial gift or gift on account of marriage. So this law applies to both, and is made on the subjects of giving a preference, alienation and benefits (accruing to the parties respectively).

(a) What this was does not appear. See Cujacius on this Novel (2,893), and Nov. 68 here appended. Evidently an agreement was permitted between husband and wife relating to what the survivor might have in case there were no surviving children. Nov. 98, appended here, provides that the prenuptial gift should belong to the children whether there was remarriage or not, and the foregoing provisions accordingly fell out of use.

c.3. It remains to treat of inheritance of children, in reference to which there is a controversy also in the present case, and think that this subject, too, should be settled by a general law, according to which all future cases may be adjudicated. We ordain that if a child, male or female makes a testament, all the property acquired by him or her aside from the prenuptial gift, shall go to the appointed

heirs. The mother may be appointed as such, and the rights which she has as against a testament, whether the child passes her over or disinherits her without cause, remain unaffected. If the child dies intestate and has children of his or her own, the property goes to the children; if he or she has no children, the brothers and sisters and the mother are called, the latter inheriting along with the former according to the law enacted by us, (a) and such mother shall retain such property in full right whether she has remarried or not. For we do not want to make the penalties against women who remarry so harsh, or reduce her to indigence so severe and unworthy of our times, that while, through fear, they abstain from a marriage that is chaste, though the second one. The make unlawful alliances, perchance commit debauchery with slaves, and so live a libidinous life contrary to law, when they are not permitted to lead a chaste life according to law. Hence we do not want to continue to keep in force the constitution, bearing our name, inserted in the fifth book of the Code, relating to inheritances of children who die before the death of their mother who has remarried, not the constitution contained in the sixth book of the Code under the titl relating to the Tortesthian senate decree, which treats of women who marrya second time and who lose their children before the second marriage. But the mother shall be called to the inheritance of her children along with brothers and sisters of the decedent, shall retain it firmly and shall not be prejdudiced by a second marriage. This shall also apply to the present case before us which gave rise to this law, so that she may enter on the inheritance along with the daughter, of if she has already entered, may retain it irrevocably and shall not be prejudiced by a second marriage, but shall be owner thereof, along with her daughter. It would, of course, be fine and laudable and to be hoped that women should be so chaste that after marrying one man, they would keep the bed of the decedent undefiled. We admire such a woman, praise her and almost put her on the same

footing as a virgin. But if she is unable to do that - and that is apt to be true with young women - and is unable to resist nature's impulse, she is not on that account to be punished, or forbidden to enjoy the laws applicable to others, but let her enter a second marriage, abstain from libidinousness and participate in the inheritance of her children. For she will then love them more dearly, and will not, because subjected to penalties and harshness, consider them as enemies. For as we do not deprive fathers who remarry of the inheritance of their children, and no law to that effect exists,(a) so also we do not deprive mothers of the inheritance of their children, if they remarry, whether the children die before or after the second marriage. Otherwise, through an absurdity of the law, the penalty would apply though her children were themselves to leave no children or grandchildren, and a mother could not succeed them, though they were to die without descendants, but would inhumanly be excluded from the inheritance, having in vain given birth to them, and being subjected to penalties on account of a legitimate marriage. Instead of her same remoter, cognate relatives would succeed, and the mother would, without reason, be excluded. So let her succeed to her children, let this law be benign, kindly, calculated to cause her to love her offspring. To summarize this part of the law: As we put a mother upon an equal footing with the father, as heretofore stated, we ordain, that she shall be penalized as to the prenuptial gift, in the same manner as we penalize the father in reference to the dowry, but that the father as well as the mother shall be able to inherit in all cases from their children according to the circumstances governing each case. So whatever fathers get, whether they remarry or not, mothers shall have also, and the latter shall inherit from her child whether she has already remarried or shall remarry thereafter. 1. But the woman who enters into a second marriage shall

accrue as a gain to the (other) children by operation of law, and it shall not be considered as any part of the gift. This shall apply to women who are widows and succeed to their children and have not yet entered into a second marriage, although they may hereafter do so. And the enactment concerning these subjects shall be in force for all time to come.

Note.

For full explanation of this chapter see C.5,9,3, note (b).

c. 4. And it has seemed best while treating of women who marry a second time and of prenuptial gifts, to add something else to the foregoing provisions. Former constitutions gave such women the choice to keep such gifts, so far as consistent with the contract made in relation thereto, and furnish security that she would return it after her death, or, in case she could not or would not give such security, that such gift should remain in the possession of the children, the latter to pay her four per cent. interest per annum thereon. We find that the property of minors is (in the latter case) endangered, since if the prenuptial gift consists of goods, and the children have no money, they are at times compelled to sell all of their father's property in order to make the necessary payments on account of such prenuptial gift, although such gift comes to them under the law. And so, moved by the variety of questions that arise, we thought best to so arrange the matter that if a man makes a prenuptial gift of immovable property, the mother shall have the usufruct thereof. She has no right to refuse that and ask for payment to her, by the children, of the interest on the value thereof, and she takes care of the property according to the laws governing usufructs, and preserves it for her children surviving her, or if all of them die, then the mother shall receive the portion fixed by law for such cases, the remainder belonging to the heirs of the children. If the prenuptial gift consists wholly of

money or other movable property, she may have the interest, together with the bond, but she cannot demand (possession of) the money (upon giving bond), unless the property of her (second) husband is ample and he has goldware, silverware, vestments and other property which is given her. For the mother shall, in such case, have the option to receive the property itself upon giving security, or the interest fixed by former laws as well as by our laws. If the prenuptial gift consists of mixed property, part of money and part of immovable property, the mother shall have (possession of) the immovable property, for her support; as to the movable property, the same rules shall govern which we have previously enacted for cases where all the property is movable.

Note.

This chapter modified C.5,9,6, and is re-enacted in substantially the form here given in Nov. 22, c. 45, 1. It gives the option to the woman to receive the possession of the principal, if it consists of money, only in case her husband has given herproperty which might, in a measure insure the return of the property.

The term "bond" as used herein or "security" is given in the text as cautio-asphaleia, and C.6,38,3 says that when that term is used it does not imply the giving of a surety unless so specified. It would, however, seem, that the givingof surety is implied herein. Cujacius in his comm. on this Novel so takes it and probably rightly. In Nov. 22 c. 45, 1 such surety is specifically required.

C.5. Another matter, too, which is only obscurely mentioned in former laws and which has rearely been brought up in court, should be provided for in a clear law, but to use and applied in the courts for the common benefit of all, namely: If a man and woman marry and have entered into contracts as to dowry and a premuptial gift, the man giving the premuptial gift, and the woman, either personally or through her father or some outsider promising the dowry and it thereafter appears that during the whole time of the marriage the dowry was never actually given to the husband, but that he alone bore the burdens of the marriage and the marriage was thereupon dissolved by death - it would be unjust that the woman who failed to deliver the dowry should receive the premuptial gift. If she failed to deliver all she can ask for the premuptial gift only to the extent that she delivered thd dowry. For we have equality and justice and want these principles applied to marriage as well as to all other matters. Hence the woman who delivered nothing can receive nothing; and if she delivered less than she promised, she can receive only to the extent that she delivered. And so these provisions should be a beneficial addition to the present law, deciding many doubtful questions, and in reference to which hardly any legislation has been enacted. And this law shall apply to the present case, which gives rise to its enactment, and to cases pending in court and in all cases arising in the future.

Epilogue:

Your Highness will take care to put this our will into force and effect and make it known through your edicts, so that it may become effective in all the cities under our sway and so that these our provisions may come to the knowledge of all.

Given at Constantinople, March 16, 535.