Book V.
Title IX.

Concerning second marriage.
(De secundis nuptiis.)

Note.

By second marriage is meant any new marriage after dissolution of a preceding one, without reference to the number of preceding ones.

5.9.1. Emperors Gratian, Valentinian and Theodosius to Entrapius, Praetorian Prefect.

If any woman cuts short her observance of mourning for her former husband by hastening into another marriage, she is infamous according to a well known law.

1. Besides, she shall not give to the second husband more than a third of her property as dowry, nor shall she leave him more than a third of such property in her testament.

2. Further, she shall lose all inheritance, legacies and trusts, left by a last will, and gifts made in expectation of death. We order that all these shall belong to the heir or co-heirs, testate or intestate, lest we might seem to have the advantage of the fisc in mind when we make provisions for the betterment of morals.

3. She shall also lose the property which her husband left her in his last will, and such property so left her, but of which she is so deprived by her too hasty second marriage, shall go, first, to the ten persons enumerated in the edict of the praetor, that is to say, the ascendants and descendants, and to collateral kin to the second degree, (and if there are no such persons) then to the fisc.

4. Nor do we permit such woman so made infamous, to claim any intestate inheritance, either under the statutes or the praetorian law, if she is beyond the third degree in relationship.

Promulgated December 18 (380).

Note.

This law, substantially as here stated is found in C. 6.56.4 where second marriages are to some extent also treated. For more complete provisions see Nov. 22, c. 22, and Nov. 39 c. 2. The time of mourning was originally 10 months. Ovid, 1 Fasti 27. This dates back to the time of Romulus, when the year was composed of 10 months. It is fixed in the next law at one year. See also C. 5.17.9. While all the legislation on the second marriages was enacted by Christian emperors, second marriages were apparently never looked upon with favor. 10 Livy 23. Valerius Maximus says that the woman who was content with one marriage was honored by the crown of chastity, and that for her to engage in many marriages was a sign of the want of required moderation. 2.1.3. The title deals with second marriages and the rights of legitimate children of the first marriage, and partially with the rights of the children of the second marriage, as compared with the rights of those of the first marriage. The subjects are all closely related. Novel 22 revised practically all the preceding legislation, but cannot be well understood without reading the preceding legislation also. Some additional legislation was made after the enactment of Novel 22, as shown by parts of Novels 39, 91, 98, and 127. The whole legislation shows that the giving of dowry and the making of prenuptial gifts was quite prevalent, probably only the lower classes made no such gifts. But commencing with the time of Augustus, celibacy was frowned upon and certain penalties were attached to some

of the men and women who remained unmarried. Hence the early sentiment must have undergone a change. But the Christian Church encouraged celibacy, and legislation relaxing the rules against celibacy commenced with Constantine. C. 6.51, headnote, and see Novel 22 pr. The legislation on second marriages, while at first applying only to women, were [sic] gradually extended to men as well.

5.9.2. The same Emperors to Eutrapius, Praetorian Prefect.

If any woman who has lost her husband (by death) maries another within a year—for we add but little additional time to the ten months mourning although we think the time even then rather short—she shall be branded with ignominy, deprived of all the marks and rights of honor and nobility, and lose all property which she received from her former husband, either as a betrothal gift or under his last will.
Given at Constantinople May 30 (381).
C. Th. 3.8.1.

5.9.3. The same Emperors to Florus, Praetorian Prefect.

When women who have children born of a prior marriage, marry again after the time for mourning has expired the property which they received from their former husbands by reason of the betrothal or the marriage, all gifts made to them in expectation of death, and all property which they receive by the testament of their former husband, either directly or as a trust or legacy, or as a profit of any kind of munificent liberality as has been said, shall all, just as they received it, be transmitted to their children of the prior marriage, or to such of them, provided that they are by us deemed worthy to receive it, to whom they, in their discretion, want to leave it in view of the merit of such children.[1]

1. Such women shall not presume and they shall not have the power to alienate such property to any outside person or to her children of another marriage. They shall have the right of possession and enjoyment thereof only during life, and not the power of alienation. If any part of the property is transferred by her to anybody else, it must be restored out of her own means, so that the children for whom we have destined it may receive it undiminished and unimpaired.

1a. We also add to this law that if anyone of the children of the prior marriage should, perchance, die after the mother has already become polluted by a second marriage, and other children of the same marriage survive, she shall have the portion which she acquires through such child, under a will or by intestacy, only for life.[2] She

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[1] [Blume] Justinian withdrew this right of designation by Nov. 2, c. 1, and Nov. 22, c. 25, but the property went to the children equally. The present law provides that the wife shall preserve the property which she in any manner received from her husband for her children, in case of remarriage. C. 5.9.6.4 provided more specifically that she shall have only a usufruct therein. In Nov. 98 Justinian says that he want to simplify the matter and eliminate the question or remarriage, and provides that in all cases the prenuptial gift and the dowry respectively shall be preserved for the children upon the death of one of the spouses, or upon divorce. It speaks of dowry and prenuptial gifts. Whether all other property derived by one spouse to the other was meant to be included or not is not clear. See on that point Nov. 22, c. 29, 1. In C. 3.8.2 sons excluded mothers from inheriting.

[2] [Blume] In C. 6.56.5 it was provided that if the wife remarried after the death of a child, she should have her proportionate share along with the brothers and sisters, except that she should have only a usufruct in her per capita portion of the property derived from the

must leave it to the surviving children of the prior marriage and shall not have the power to leave it by testament to any outside person, or to alienate any of it.

2. But if she has no children of the prior marriage, or the child or children have died, she shall hold the property which she receives in any manner in complete ownership and may dispose of it by testament or otherwise as she wishes.
Given at Constantinople December 18 (382).
C. Th. 3.8.2.

5.9.4. Emperors Honorius and Theodosius to Marianus, Praetorian Prefect.

Although we have ordered by other sanctions that a woman's children shall receive her property undiminished, still children can claim as their special paternal property only that portion which she received from her husband who was the father of such children.

1. So if a woman, having children, perchance enters into a second marriage, the marriage gift, and all of it which her second husband gave her may be claimed only by the children born of the second marriage, nor shall it benefit the children from of her first marriage that she did not marry a third time.

2. But if a subsequent husband dies without any children born of that union, the wife shall own in her own right the property which she received as a marriage gift, although the giver is shown to have left children by a former marriage.

3. As to the succession to the maternal property,[3] received by her from any source, it shall pass to all of her posterity, from whatever husband born, in due proportion, whether pursuant to a voluntary gift of the mother or by her testament.

4. For we only provide by this law the special rule that the children of any marriage shall be entitled to the marriage gift given by their father.[4]

5.9.5. Emperors Theodosius and Valentinian to Florintius, Praetorian Prefect.

We ordain generally, that in whatever instances the constitutions before the present law ordered that a woman should when marriage was dissolved by the death of a husband, preserve the property which she received from her husband for their common children, in the same instance a husband also, when matrimony is dissolved by the death

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father. The present law says that if the woman remarried before the death of a child, she should have only a usufruct in a per capita portion of any of the property of the child. Justinian in Nov. 3, c. 3 stated that he repealed both of these laws, and he gave the wife a per capita portion in all of the property of which a child might die seized. In Nov. 22, cc. 46 and 47, however, he virtually restored the law as stated in C. 6.56.6, except that the time of her remarriage was made immaterial.

Neither of these laws, and the provisions of the Novels that took the place of them had any application whatever to any prenuptial gift, as is clear from Nov. 2 as well as specifically stated in Nov. 22, c. 46, even though the prenuptial gift, too, came from the father. That gift, along with the dowry, was governed by separate laws (the first part of the present law, C. 5.9.6.4, and Nov. 98, among others). [Blume bracketed this paragraph and placed a question mark along side it.]

[3] [Blume] Aside from wedding gifts.

[4] [Blume] In this and the preceding constitution the property specially mentioned is sponsalis [illegible], wedding gift, and from the succeeding constitution and later novels, it is clear that by such term is meant the same thing as is meant by prenuptial, or marriage, gift in other places. See Mitteis, R.R.u.V.R. 306.

of the woman, shall preserve for their common children the property which he received from the woman, nor shall it make any difference that some third person gave a prenuptial gift for the husband or a dowry for the woman.

1. We direct that this shall apply, although, as is customary, the prenuptial gift is turned into and brought back as a dowry by the woman.[5]

2. Moreover, the ownership of the property which is directed to be preserved for children by the authority of this law or past constitutions, shall belong to the children, so when the person who was to preserve it for the children dies, the latter can claim the property that is extant from whoever possesses it, and the value of the property that has been consumed may be demanded from the heirs of the person who should have preserved it.

3. Persons who are to preserve such property are deprived of the right of alienating or pledging it in their name.

4. But we give to the father the right to manage his children's business to their advantage.

5. Nor do we take away the right from parents to divide the property among these children according to their discretion or give it to the one they wish.[6]

6. In those cases, moreover, in which the mother is directed to preserve the property as the father's property for the children of her and her former husband, that is when the marriage is dissolved by the death of the husband and the woman enters into a second marriage, or in cases in which we have directed the father to preserve property for his and his former wife's children, as the property of the mother, that is, when marriage is dissolved by the death of the woman and the man enters into a second marriage, if the children do not accept the inheritance from the parent who dies first they shall be permitted to claim such property for themselves as though it were the property only of that parent who dies last; so that what has been introduced in favor of children may not in some cases turn out to be their detriment.[7]

7. We have thought that, through humane motives we should make this further addition to this law, that whenever a woman receives property from her husband, or the

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[5] [Blume] As noted in headnote to C. 5.3, it was not unusual—this law says that it was customary—that when a woman about to be married was poor so that she could bring no dowry to her husband out of her own means, the husband made a gift to her, and she used this gift as a dowry. The instant law says that this was true with the prenuptial gift. And it seems, according to the foregoing provision that if the woman died first such property should be considered as dowry, notwithstanding the fact that it was given her in the first place by the man, and that if the man died first, it should be treated as a prenuptial gift, so that the property would in either event inure to the benefit of the children. [In the margin next to the last two sentences, Blume penciled in: "Strike out; not correct." It is not clear which statements he deemed incorrect, and he did not actually draw a line through any of the note.]

[6] [Blume] This right was taken away by Nov. 2, c. 1 and Nov. 22, c. 25.

[7] [Blume] An inheritance might be subject to so many debts that it would be a burden rather than a benefit. So the children might not want to accept the inheritance of the person who died first. But this non-acceptance would not bar them from claiming the benefit of this law when the survivor died. The property became that of the children as a mater of law although they did not accept the inheritance of either parent. C. 5.9.6.11; C. 5.9.8.1; Nov. 22; 9 Cujacius 430.

husband receives property from his wife, and the marriage is dissolved by the death of one of them, but the survivor does not remarry, and such survivor does not consume the property or alienate it, which such survivor has unquestionably the right to do if he or she does not remarry, as the absolute owner thereof, in that case the children shall have the right to claim such remaining property which was so given by the father , as paternal property and the property so given by the mother as maternal property.
Given at Constantinople September 7 (439).
C. Th. 14.1.

Note.

If the wife did not remarry she might consume or dispose of the prenuptial gift. See to the same effect C. 5.9.6.10 and C. 5.9.8.1. But this right was taken away by Novel 98, c. 1, which provides that a prenuptial gift should be preserved for the children whether the woman remarried or not. The same rule was applied to the dowry, when the wife died, in case the husband was entitled to it.

5.9.6. Emperors Leo and Anthemius to Erythrius, Praetorian Prefect.

We order by this edict, to endure forever, that if there are children born of a prior marriage, and the father or mother enter into the second, third, or further marriage, such person shall not be permitted to leave to the stepmother or stepfather more than is left to a child—if there is only one child—by (written) testament, or orally or by a codicil, either as an inheritance or as a dowry or prenuptial gift or as a gift in expectation of death,[8] or as a written gift between the living—which although forbidden by the civil law during marriage, are, nevertheless, customarily, for certain reasons, confirmed by death. If there are several children and each of them receives an equal part, the stepfather or stepmother cannot receive a greater portion.

2. But even if the above mentioned property is not received by these children in equal parts, the stepmother or stepfather shall not be permitted to receive, by testament, or as a gift, or as a dowry or prenuptial gift more than the son or daughter who receives the smallest portion under the will, provided, however, that the fourth[9] owing to these children by law, shall not in any manner be diminished except for causes which bar complaints concerning unjust testaments.

3. We direct that these provisions shall also apply to grandfathers, grandmothers, great-grandfathers, great-grandmothers, grandsons, granddaughters, great-grandsons, and great-granddaughters, both on the paternal and maternal side. But if more than is permitted is left or given to the stepmother or stepfather, we order that the excess of what is lawfully left or given shall be turned over to the children and divided among them, as though not left or given to the former; and every evasion attempted through interposition of a third person, or in any other manner shall be invalid.[10]

4. We add to these provisions that in those cases in which a woman is compelled to preserve for the common children the prenuptial gift and other property that comes to her from her husband, as paternal property, according to the regulations of former laws—that is, when the marriage is dissolved by the death of her husband, and she remarries—

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[8] [Blume] See C. 5.9.5.7. According to the Syrian Law Book, Leo gave to wife only half of the prenuptial gift in case of the husband's death. Mitteis, R.R.u.V.R. 309, 23 Z.S.S. 129. That is inconsistent herewith.
[9] [Blume] I.e. the birthright portion. Headnote C. 3.28.
[10] [Blume] This provision is amended by law 9 of this title; also by law 10 of this title.

she shall have only the usufruct[11] of immovable things, slaves and rations of food supply[12] during life, and the alienation thereof is entirely forbidden.

5. In similar manner, she shall have the usufruct of movable things when their just price has been fixed by arbitrators under oath, chosen by both sides, and she furnishes suitable guaranty that she will, according to law, restore these movable things or their value to the sons and daughters born of the same marriage, or after their death to the grandsons or granddaughters born of such children, whether all or only one shall survive her.

6. And if she delays or cannot furnish suitable guaranty, the aforesaid movable things which have not yet been delivered to the mother by the children shall remain in the possession of the latter; if they have been turned over to the mother or she detains them (and no such bond is given) they shall be restored to the children, provided that suitable guaranty be given by them to their mother guarantying that they will not delay to pay her during life, instead of the usufruct of the property, interest at four per cent annually on the value at which it is fixed, and it shall also be agreed in the same guaranty that all of the aforesaid movable things will, according to law, be restored to the mother by the sons, daughters and their offspring, if all of them should die before the mother, so that she may have them as a solace.

7. Either side, therefore, which furnished guaranty, is permitted, if that appears best to the parties, to use and enjoy the movable things, to lend, pledge or sell them, so that the children especially when they acquire the property, can show their affection for their mother without injury to themselves.

8. But if either side neglects to furnish the aforesaid guaranty or perchance is unable to do so, the things shall remain in the possession of the woman during her life.

9. And all this property of the husband, and all the property which the woman has or will have, is pledged or hypothecated, as it were, as security for the prenuptial gift or other things which she received from her husband, from the day that she receives them, so that if anyone makes a contract with such woman who has remarried after the things are delivered to or detained by her—if that should happen—his rights in the property on which such lien exists shall be inferior to the rights of the children, born of the former marriage, and of the grandsons and granddaughters born of these children.

10. But if the father or mother, retaining their affection for their children, refuse to remarry, neither husband, as to the property which he receives from his wife, nor the wife, as to the property which she receives from her husband, are forbidden to use, sell, or alienate it, pledge or hypothecate it, if they wish, in their discretion, as owners thereof.[13]

11. But whatever remains of said property, if not alienated, consumed, or pledged, may be claimed by the children, though they fail to accept the inheritance from their parents.[14]

Given February 28 (472).

5.9.7. Emperor Zeno to Sebastianus, Praetorian Prefect.

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[11] [Blume] See C. 5.9.3 and note a.

[12] [Blume] Annonarum civilium—given out in Rome and Constantinople to certain families.

[13] [Blume] See note a to law 5 of this title.

[14] [Blume] Id.

In cases in which the father is directed to preserve for the children of either sex the dowry, the mother the prenuptial gift, and both of them, any property which one of them receives from the other, if any son or daughter happens to die before the death of the father or mother, either before or after a second marriage, leaving, while the father or mother is still living, a son, daughter, granddaughter or grandson, or several of them the portion owing to the deceased son or daughter, and the increase therefrom shall not belong to the brothers or sisters of the deceased, but to his or her sons or daughters, grandchildren of either sex or great-grandchildren even though the grandparents or great-grandparents are still living; permission is not denied to the decedent, while living, to leave the property to which ever of the surviving descendants he desires.
Given March 1 (478).

5.9.8. Emperor Justinian to Mena, Praetorian Prefect.

If any child of a prior marriage dies before a second marriage of a father or mother. Leaving children, grandchildren, or great-grandchildren, his portion shall not belong to his brothers or sisters, or if he has no brother or sister, to his father or mother, but to his children grandchildren, or great-grandchildren, but whether there is one or more of them they can claim only that portion which belongs to the deceased.

1. We think we should also provide by a definite law for a situation in which anyone having children by any marriage does not remarry. In such case the parent may, in any manner he wished, alienate or manage the property acquired by his previous marriage. It is true that the children may claim the property not so alienated, though they do not accept the paternal or maternal inheritance, but we ordain that in the future, the term alienation must be understood as embracing a special legacy, a testament, or a general appointment of an heir.

2. Moreover, permission given to children to claim without accepting the paternal or maternal inheritance, the property which their parent, who does not remarry, acquired from the former marriage but which he did not alienate, does not apply in those cases in which they acquire, by intestacy, a paternal or maternal inheritance only in part, if, e.g. other children, perchance of the deceased parent, from a preceding marriage, exist.[15]

3. Also adding to a former ordinance, we direct, just as in the case of a mother whose property, after a second marriage is pledged to the children born of the prior marriage so that the property which she received by reason of such prior marriage may be

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[15] [Blume] C. 5.9.6.11 states also that children would receive the property mentioned without accepting the inheritance. See also C. 5.9.5.6. But the instant law provides that this right should be absolute only in case the parent remarried. If the parent did not remarry, and died intestate, they, then. Also had the right to receive the property contemplated without accepting the inheritance, provided, however, that they were the only children. If there were children by a prior marriage, they were entitled to inherit the property of their father along with the others, and in as much as the father did not remarry, and was not, accordingly penalized, it would have been unjust to have excluded children of a prior marriage. If the father did not remarry, and died testate, the property devolved according to the will.

The provision herein that appointing some other person as heir should be considered an alienation was modified and virtually repealed by Nov. 22, c. 20. 2. By Novel 98 the property was provided to be conserved for the children whether the surviving spouse remarried or not.

conserved for such children, that the property of the father also, which he has or will acquire, shall be pledged after his second marriage the property which he acquired from the mother of the children.

4. We also order that the property of a father who is compelled to preserve for them the property coming to them from their mother or their maternal line, shall be pledged to these children for the purpose of preserving the maternal property for them; although such children are under their father's power. But the children shall not be able by reason of such lien given them, to inquire into the management of their father or mother , or institute any investigation, since the law is clear that though their property—outside of the mentioned property received through marriage and outside of the maternal property—should be alienated, the right under the lien remains unimpaired for the benefit of the children.[16]

Given December 11 (528).

5.9.9. The same Emperor to Mena, Praetorian Prefect.

Since past laws[17] have determined that when children are born of a former marriage, all things which a woman gives or leaves to a second husband or a husband to a second wife, in the name of dowry or prenuptial gift or in any other manner in excess of that which is to be given or left to anyone of the sons or daughters born of a prior marriage, and since no mention has been made therein of children born of the second marriage, we, in correcting this, ordain that all the gifts made void in the aforesaid manner shall belong not to children only of the prior marriage, but also to those born of the second marriage, and direct that they shall be divided among them all per capita. 1. In addition, all gain which a husband or wife receives by reason of dowry or prenuptial gift upon a divorce shall likewise, after a second marriage, be preserved for the children born of the prior marriage, in the same way as when the matrimony is dissolved by death, nor shall the cause of the divorce make any difference in the future, nor shall any inquiry in reference thereto be made.

Given at Constantinople April 13 (529).

5.9.10. The same Emperor to Demosthenes, Praetorian Prefect.

Although it is plainly provided by law that ungrateful children are rightly excluded from any inheritance from their forebears, if the latter state the fact of ingratitude in their last testament and such fact itself is clearly proven,[18] the constitution of Leo[19] of renowned memory, which he wrote concerning sons born of a prior marriage, seems to be contrary thereto.

1. For when it is necessary that a father or mother, who has remarried can give, in any case, to a second husband or to a stepmother only as much as to a son or daughter born of a prior marriage who will receive the smallest portion, the greatest injustice is, by this ordinance, done to progenitors.

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[16] [Blume] A provision that the parent should not be accountable to the children for the management of property is also contained in C. 6.61.6.2. The question of a lien granted by the present law is discussed in note to C. 6.61.6, to which the reader is referred.

[17] [Blume] Law 6 of this title pr. 3. This was changed again by Nov. 22, c. 27.

[18] [Blume] See C. 3.28 headnote.

[19] [Blume] C. 5.9.6.

2. For children, knowing that to them must in any event be left, even by unwilling progenitors, as much as the second husband or the stepmother receives, freely and wantonly inflict insult on their progenitors.

3. Hence we ordain that children, who are in fact ungrateful, cannot hereafter claim the benefit which the imperial constitution of Leo, of august memory, given them, but they may as ungrateful children be excluded from every gain of that kind.

4. This shall apply also in cases involving a grandfather, grandmother, great-grandfather, great-grandmother, grandsons, granddaughters, great-grandsons and great-granddaughters, of the paternal and maternal line, whether unemancipated or emancipated.

5. But as we look after the interests of progenitors, so we do not suffer any wrong to be inflicted on innocent posterity. Hence, parents who remarry shall not be permitted, in holding perchance, an unreasonable grudge against their first children, to call them ungrateful without good reason.

6. For we want only those children to be deprived of the benefit herein mentioned who are, by clear and undoubted proof, convicted by the heirs of the progenitor as ungrateful to their parent, for reasons enumerated in ancient laws.

Given at Chalcedon September 17 (529).