

Novel 117.

Concerning various subjects and concerning dissolution of marriage.
(De diversis capitibus et solution matrimonii.)

Preface. Various matters having been reported to us, we have thought it necessary to make a decision in regard to them by enacting a general law.

c. 1. We therefore ordain that a mother, grandmother and other ascendants may, after leaving to their descendants the lawful portions owing them under the law, give or leave by a last will the remaining portion of their property or any part thereof to a son, daughter, grandson, granddaughter or descendants of remoter degree, upon condition, if they wish, that the father or other ascendant having such descendants in his power shall have no usufruct or other interest in such property. For they may leave such property even to outsiders so that such ascendant would have no interest therein. We direct that this privilege is given not only to ascendants but to all other persons. **1.** If the persons under power to whom such property is so left are of full age, they may manage it in any manner they think proper, even though they are under power; if they are not of full age, the testator or donor may direct it to be managed by any person whatever, till the donees or legatees arrive at full age. The testator or donor shall even have the right to entrust the management of such property to the mother or grandmother of those to whom such property is left, even though such women are married, provided that they wish to accept such management. If the testator or donor appoints no manager, or the one appointed will not or cannot accept the appointment, or dies before the persons to whom such property is left become of full age, the proper judge shall then appoint a curator worthy of confidence, with a proper surety, who must manage and preserve the property left to such descendants, until the latter, as stated, arrive at full age. The law relating to usufruct in favor of parents (having paternal power) must, however, be observed, in cases where no condition, as aforesaid, is imposed.

c. 2. We have also deemed to ordain that if a man has a son or daughter by a free wife with whom he could legally enter into matrimony, and he states in a document executed publicly or with his own hand, subscribed¹ by three witnesses worthy of credit, or in a testament or on the public records^a that such son or daughter is his, without adding that he or she is his natural child, such children shall be taken to be his legitimate children and no other proof of their legitimacy shall be required from them, but they shall enjoy all the rights granted by our laws to legitimate children, since, as stated, the father himself has stated them to be his children. By that is also shown the fact that the marriage with the mother of the children was legal, so that no other proof of that fact will be required from her. And if a father who has a number of children by the same woman has given his testimonial to only one of them in any manner heretofore stated, the testimonial so given to that child shall suffice as a testimonial of legitimacy also for the other children born of the same woman.²

^a See 24 How. 601.

c. 3. We have decided to also add to the present law that if a man, without any writing, and simply through matrimonial inclination, has married a woman, and has children by her, and upon that marriage perchance being dissolved he thereafter marries another woman and executes a marriage contract and also has children by her, the children born of the woman who had no dowry shall not be prejudiced in relation to the inheritance from their father, but shall take his inheritance along with the children born of the second wife who was married by the execution of a marriage contract, since marriage may be entered into through matrimonial inclination alone. That shall be true also in case a man is married the first time by

¹ Blume penciled-in what appears to be “subscribed,” having lined-out “witnessed” in the typed manuscript. Scott has this as “bearing the signatures of,” and Schoell and Kroll’s Latin is “habenti subscriptionem.”

² This is the hand-corrected version of which the relevant part of the typed original was: “And if a father who has a number of children by the same woman has named only one of them as his legitimate child in any manner heretofore stated...”

the execution of a marriage contract, but is married the second time through matrimonial inclination alone.

c. 4. Since we recently promulgated a law by which it was ordered that a marriage contract should be executed or other proofs appear before the defenders of the church, by which marriages would be confirmed, or that oaths should at least be taken (to show such marriages), we have decided to make better provisions in relation to these matters so ordered. And we direct that persons adorned with the great, illustrious dignity, shall not enter into any marriage except by the execution of a marriage contract, unless they previously married a woman through matrimonial inclination (intent) alone; for such marriages, entered into before the men received such dignity shall remain valid thereafter, and the children born to them of such marriage shall be legitimate; but after they have received such dignity, they shall not marry except by the execution of a marriage contract. We release from the severity of this law, however, barbarians subject to our sway, although adorned with this dignity, so that they may marry, if they wish, through matrimonial inclination alone. Persons other than those adorned with this great dignity, no matter what rank or position of state-service they occupy or what business they pursue, may, if they wish, and can, marry by the execution of a marriage contract; but if they do not observe that formality, their marriage through matrimonial inclination alone shall be valid, and the children born to them of such marriage shall be legitimate.

c. 5. We heretofore enacted a law^a providing that if a man should marry a woman without execution of dowry-documents and through conjugal inclination alone and should afterwards divorce her without a cause recognized by law, she would receive a fourth part of his property; and subsequently we enacted another law^b providing that if a man marries a woman without any property and through conjugal inclination alone and lives with her to the end of his life, and he dies first, she should also in that case receive a fourth of his property, not to exceed, however, one hundred pounds of gold. We amend both of these laws for the better by the present law and direct that in both of these cases the children of such marriage shall be

legitimate and shall be called to the inheritance of their father; the wife shall in both of these cases, if the husband has no more than three children by that or another marriage, have one-fourth of her husband's property; if the number of children is greater, then the wife shall in both of these cases have the same share as a child, provided that the woman shall have only the usufruct in such property and the ownership thereof shall be preserved for the children from such marriage with her. But if such woman has no children from such marriage, we direct that she shall also have the ownership of the property which, according to the present law, she receives from her husband. A woman divorced without cause shall receive the portion of the property mentioned herein, at the time of the divorce. We forbid the husband from receiving in such cases the fourth part of the property of the wife according to our former law.^c

^a C. 5 .17.11; Nov. 22, c. 18.

^b Nov. 53, c. 6, appended to C. 6.18.1 [not appended in this edition].

^c Excerpts from this chapter are appended to C. 6.18.1 [not in this edition].

c. 6. The constitution of Leo,^a of blessed memory, shall, however, unquestionably remain in force in all cases not mentioned herein. We do not, however, want to keep in force the law of Constantine,^b of blessed memory, written to Gregorius, and the interpretation thereof made by Marcian,^c of blessed memory, by which marriages of women, whom the Constantinian law^d calls abject, with men decorated with dignities are prohibited, but we give the right to those that wish, though decorated with one of the greater dignities, to enter into a marriage with these women by the execution of marriage documents. Others not decorated with one of the greater dignities shall have the right to marry such women either by the execution of documents or simply through conjugal affection, provided the women are free and such with whom they may (otherwise) contract marriages.

^a C. 5.14.9.

^b C. 5.27.1.

^c Nov. Marcian, title 4.

^d C. 5.5.7.

c. 7. It has also appeared best to us to provide that if a marriage between husband and wife happens to be dissolved, the children of such marriage shall not be injuriously affected thereby, but they shall be called to the inheritance of their parents, and shall be supported out of the property of their father. If the father gives cause for divorce and the mother does not remarry, they shall be raised by the mother at the expense of the father. If it is shown that the marriage was dissolved through the fault of the mother, they shall live with and be supported by the father. If the father happens, however, to be poor, they shall live with and be supported by the mother. For as children who are rich are compelled to support their mother who is poor, so it is proper that a mother who is rich should support her children. What we have said as to the support of a poor mother and of poor children shall also apply in the case of ascendants and descendants of either sex.

Note.

See C. 5.24.1 and C. 5.25.

c. 8. Since we find in the ancient and in our law many grounds for which marriages are easily dissolved, we deem it best to eliminate some of them from that number, which appear to us as insufficient for that purpose, and we embody in the present law the sole grounds for which the husband or wife may legally send a bill of divorce. The grounds, therefore, for which the husband may send such bill of divorce and at the same time receive the wife's dowry—the ownership thereof to be preserved for the children from their marriage, unless there are no children, in which case the husband shall have such ownership—are the following: 1. If the wife had knowledge of men conspiring against the emperor without communicating that fact to the husband. But if she reports it to the husband and he keeps still, she may report it to the emperor by any person whatsoever, and in such case the husband shall have no cause for divorce by reason of such fact. 2. If the husband thinks that he is able to convict his wife of adultery, he shall first make an accusation against his wife, or also against her paramour, and if such accusation is proven and the husband has sent a bill of divorce, he shall have the prenuptial gift and the dowry, and in

addition, if he has no children, an amount equivalent to a third of the dowry out of the remaining property of the wife, so that he shall have the ownership of the dowry and of the property given as a penalty. If the husband has children from such marriage, the dowry as well as the remaining property shall be preserved for the children according to the laws heretofore enacted.^a The adulterer, lawfully convicted shall be punished along with the woman. If such adulterer has a wife, she shall have the prenuptial gift, provided that if they have children, she shall only have the usufruct of such prenuptial gift, the ownership thereof being preserved for the children. We, out of our bounty, give the remaining property of the husband to the children. If there are no children, the wife shall have the ownership of the prenuptial gift, the remaining property of the husband shall, according to former law, go to the fisc. 3. If the wife in any manner lays any snares against the life of the husband, or knowing that others do so, does not report that fact to him. 4. If the wife dines or bathes with other men against the consent of her husband. 5. If she stays at someone else's house, other than that of her parents, against the husband's consent. 6. If she is a spectator at a circus, theater, or arena without the knowledge or against the prohibition of her husband. 7. If a husband, however, happens to expel his wife from his own home for any other cause than herein mentioned, and she, having no parents necessarily spends the night among others, the husband shall have no cause to send a bill of divorce on this ground, because he himself was responsible therefor.

^a Nov. 98, c. 2.

c. 9. The grounds on which a bill of divorce may be legally sent by a wife, and for which she may receive back her dowry and demand the prenuptial gift—the ownership thereof to be preserved for the children, unless there are none, in which event she shall have it—are the following: 1. If he conspires against the emperor or knows that others do so without either himself or through others reporting it to the emperor. 2. If the husband in any manner lays any snares against the life of the wife, or if he knows of others wanting to do so, does not tell his wife and does not attempt to avenge such attempt in accordance with law. 3. If the husband attempts

to involve her in unchastity and in adultery with others. 4. If the husband makes an accusation of adultery against his wife and fails to prove the charge, the wife may, if she wishes, send a bill of divorce on that ground, and receive back her dowry as well as receive the prenuptial gift; and if she has no children from such marriage, she will, on account of such malicious prosecution, receive the ownership of the remaining property of the husband an amount equal to a third of the prenuptial gift. But if she has children, all the property of the husband shall be preserved for them, and all the other laws enacted concerning prenuptial gifts shall remain in force. On account of an accusation made but not proven, the husband shall be subjected to the same punishment which the wife would have suffered if the accusation had been proven. 5. If the husband lives with some other woman in the same house in which he lives with his wife, disregarding the latter, or is shown to have steadily lived with some other woman in some other house in the same city, and that he has been repeatedly censured by his wife or his wife's parents or by some other persons worthy of credit, without however refraining from such dissoluteness, the wife shall have the right to dissolve the marriage on that ground, and to receive the dowry property and prenuptial gift and, as a penalty for such outrage, an amount equal to one third of the prenuptial give from the remaining property of the husband, provided that if she has children, she shall only have the usufruct of the property of the prenuptial gift and of the pecuniary penalty of a third as aforesaid, and the ownership thereof shall be preserved for their children. If she has no children from such marriage, she shall also have the ownership of such property.

c. 10. Since, moreover, some of the parties have heretofore dissolved a marriage between them by consent, we do not permit that to be done hereafter, unless that is done through the desire of living chastely. If such persons have children, the dowry and prenuptial gift shall be preserved for such children. If one of them, the man or woman, is found to have remarried after the dissolution of such marriage through the desire of chastity, or is found to live dissolutely, and there are children, as stated, of the marriage first mentioned, then aside from the dowry and prenuptial gift, such children shall also have the remaining property of the party so offending. If the

children are not of full age, they shall be governed and nourished by the parent who has not violated this law. If both parents are guilty of such transgression, the property of both shall be given to the children, and if they are not of full age, a manager shall be appointed for them by the proper judge or other parties to whom the duty thereof has been entrusted under our laws. If there are no children, the property of each offending party shall go to the fisc, and they themselves shall be subjected to the lawful punishment. Except as herein mentioned, marriages shall not in any manner be dissolved by consent.

Note.

The present chapter was entirely contrary to the spirit of the Romans, who considered that a contract of marriage should be able to be dissolved at any time, so that an agreement against divorce was even considered to be against public policy and therefore void. C. 8.38.2. Justinian did not succeed in retaining the present law in force. He died in 565, and in the very next year his successor, Justinian, repealed it, and reinstated the former law permitting divorces by consent. Nov. 140, appended to C. 5.17 along with the present Novel. [Not so appended in this edition.] It must, moreover, be noted that even Justinian did not declare a dissolution of marriage by consent to be void, but simply imposed a penalty on the offending parties, leaving the divorce in force.

c. 11. We deem it best to amend the provisions made by us in relation to those who are on expedition and are enrolled in the military service, whether they are soldiers, confederates, imperial guardsmen (scholars) or others enrolled in the armed military service. And we direct that however many years they may be on an expedition, their wives shall wait for them, although they receive no letters or response from their husband. If such woman hears that her husband is dead, she shall not marry someone else, until she or her parents or someone else for her go to the chiefs and the registrar (chartularius) of the troop in which her husband has in fact died. And when such protocol is executed and the woman receives that as her testimonial (of the fact of the death of her husband), she shall thereafter wait a year, but may after the expiration of that time enter into a lawful marriage. But if such

woman dares to enter into another marriage contrary hereto, she and the man whom she marries shall be punished as adulterers. If those who execute such protocol under oath are thereafter convicted of having made a false statement, they shall be ousted from service and shall be compelled to pay a penalty of ten pounds of gold to the party whom they state to be dead, and the latter, may, if he wishes, receive his wife back. If it is an imperial guardsman concerning whose death there is doubt, the woman must have the foregoing certificate from the chiefs of the school of imperial guardsmen (*primatibus scholae*) and the registrar (*actuarius*); if it is a confederate, then such certificate must be obtained from the head (*optio*) of such confederates. These provisions must be followed in all cases where men are enrolled in the armed military service.

c. 12. We should add to the foregoing grounds (of dissolving marriage) also the following, for which marriages may be dissolved without penalty, namely, the ground that relates to the men who are not able, from the beginning, to have natural relations with their wives, and are not able to do what nature grants them the power to do; and the ground which relates to the men and women who, during marriage choose a religious life and habitation in a monastery; and the ground that relates to the persons who, for a time, are held in captivity.^a In these three cases, the provisions made in our former laws shall remain in force. The grounds hereinbefore mentioned in this present law shall be the only grounds for dissolving a lawful marriage; all other grounds whether mentioned in our law or in previous laws shall cease to be valid grounds, and no lawful marriage may be dissolved for any grounds other than those herein specifically mentioned.

^a Nov. 22, chapters 5-7.

c. 13. Since there are some women and men who, desiring to lead a dishonorable life, seek to dissolve their marriage, we ordain that a woman shall have no right to do so for a cause other than those hereinbefore mentioned. If she perseveres in her impious desire and sends a bill of divorce, her dowry shall be given to the husband to be preserved for their children; if there are no children it shall be the gain of the

husband. And the woman shall, as the risk of the judge who investigates the matter, be delivered to the bishop of the city in which they both live, so that such bishop may see that she is thrown into a convent, to remain there during the remainder of her life. If such woman has children, two thirds of her (remaining) property shall be given to such children, and one third thereof shall become the property of the convent in which she is confined; if she has no children, but has parents, two thirds of such property shall be given to the convent in which she is confined; if she has no children, but has parents, two thirds of such property shall be given to the convent in which she is confined, and one third thereof shall be given to her parents, unless they, having such woman in their power, have consented to such divorce, in which event they shall have no part of the daughter's property, but all shall be given to the convent; if she has no children and no parents, then, likewise, all of such property shall be given to the convent. If the judge who examines this matter does not do this and does not deliver the woman who has been condemned on this account to the bishop, in order to be thrown into a convent, then, if the magistrate is in this fortunate city, he shall pay a fine of twenty pounds of gold; if the magistrate is one of those in the provinces, and does not comply with these provisions, he shall pay a fine of ten pounds of gold and his official staff five pounds of gold; if it is a judge who has no magistracy, he shall pay a fine of five pounds of gold, and his employees the same amount. The penalties to be paid by the aforesaid person shall be collected by the Count of the Crown Domain and his school (schola) to be paid into our treasury. And so if the husband desires to dissolve a marriage and sends a bill of divorce without lawful ground, he shall return the dowry which he received, and shall give to his wife the prenuptial gift together with an amount equal to a third of the prenuptial gift out of his remaining property. If the woman has children, she shall only have the usufruct of the property of the prenuptial gift and of the penalty of one third aforesaid, and the ownership thereof shall be preserved for the children; if she has no children, she shall also have the ownership of such property. These are the directions given concerning lawful and unlawful dissolutions of marriages, and everything in relation to such cases shall be adjudicated and decided according to this constitution.

c. 14. If a man strikes his wife with a whip or stick, for a cause other than one sufficient for dissolving marriage, the marriage shall not be dissolved on this ground, but the husband convicted of having done so shall, for such outrage, give to the wife, even during the marriage an amount out of his remaining property (property other than the dowry and prenuptial gift) equal to a third of the prenuptial gift.³

c. 15. We add further, that if a man, as happens, suspects some other man of seeking to destroy the chastity of his wife and has sent him three written warnings, attested by three witnesses worthy of credit, and thereafter finds him with his wife, either in his own house or in the house of his wife or of the adulterer, or in an eating house or in the suburbs, such husband may kill the man with his own hands, without fear of danger by reason of such act. If he finds him in another place talking to his wife, he shall call not less than three witnesses worthy of credit, by whom he can prove that he found such man with his wife, and may deliver him to the judge for trial. If the judge finds that such man was found with the woman after three warnings, duly witnessed, had been sent him, he shall without further proof punish him as a man who, on that ground alone, is guilty of adultery, and the husband shall have the right to bring an accusation against his wife, if he wishes, and prosecute the action according to law.

1. And since some persons are so impious as to be guilty of such flagitious conduct in holy places, and to lay plans for sinning in places where those who fear God ask pardon for their sins, we order that if any such man is found in holy places speaking with another's wife, in connection with whom he is under suspicion, after he has received, as stated, three warnings duly witnessed, the husband shall have the right to deliver them both to the defender of the church and to the other clergymen, to be guarded, separately, at their peril, until the magistrate of the place may be advised and he may ask the bishop of the place to deliver the culprits to him, the magistrate,

³ In the manuscript there is a note beneath chapter 14 indicating that chapter 15 and the Epilogue are appended to C. 9.9., which, of course, is not the case here.

so that they may be subjected to punishment according to the laws which forbid adulterers to be protected by the holy churches;^a and in such case, too, no other proof shall be required aside from the three attested warnings, as we have stated. If these three attested warnings have been proven, the culprits shall be punished as adulterers. Such persons should not rely for protection on a holy place which they, by their flagitious conduct, treat with contempt. For if those who, after committing the crime of ravishment of women or of adultery in other places, flee to sacred edifices, are not by law permitted to be protected thereby, how could we permit those who commit such crimes in the very churches themselves to be protected by the enclosures thereof? On the contrary, they shall be delivered to the judges, and shall be subjected to the punishment of which those who dare to pollute holy places are worthy. For where is the hope for those who commit sin in such places? And we direct in general that if anyone finds his wife, daughter, granddaughter or daughter-in-law talking with another man, and he suspects that they have met for some disgraceful reason, he may deliver them to the defender and the other clergymen of the holy church, to be guarded by the latter, separately, at their peril, until the magistrate of the place may receive them and examine the matter according to law.

^a See Nov. 17, c. 7.

Epilogue. The provisions of the present law, to be valid for all time, enacted by Our Serenity, shall apply in all cases which have not been finished by judicial decision or amicable settlement; for such decisions and settlements shall remain valid. Your glorious and sublime authority will make these provisions known in this glorious city by edicts, and will see to it, by orders sent to the honorable presidents, that they are made known in the provinces, so that no one will remain unaware of what we have decided for the benefit of our subjects, and you will also take care, through your edicts, that this law becomes known to our subjects without unjust expense to them.

Given Dec. 18, 542.