

Concerning children, and how they are to be considered legitimate or natural, and concerning undowried marriages.

(De liberis quomodo legitimi aut naturales existimandi sint. Et de indotalis nuptiis.)

Emperor Justinian to Johannes, glorious prefect of the Orient the second time, exconsul ordinary and patrician.

Preface. It was rightly said by our forebears, and especially by the wise Julianus ^(a) that no law or senate decree is passed for the Roman state, which, from the beginning, is sufficient (to meet all conditions), but will need amendments in many respects, in order to meet the various changes brought about by nature. And we have written many laws about the acquisition of the rights of legitimacy on the part of natural children, but since there is something lacking in the laws already enacted on account of the changes daily wrought by nature, we supply the deficiency by the present law. For it has (already) been ordained that if a man, allied to a woman through mere affection, ^(b) has children by her, and thereafter executes a marriage contract with her, and thereafter has more children by her, not even those who were born before remain natural children, but they, too, are considered legitimate, because they furnished the occasion for the children ^(c) born thereafter. That law also was amended.

(a) The jurist Julianus in Dig. 1, 3, 10-12.

(b) The alliance here referred to is concubinage. C. 5, 27, 10.

(c) C. 5, 27, 11.

For as some persons thought that if the children born after the execution of the marriage contract did not survive, they did not aid those that were born before (to make them legitimate), we corrected this situation, and gave them the rights of legitimate children, although they children born subsequently did not survive,

Novel 74. Preface cont'd.

and further added - since there was doubt also on that point - that though there should be no children born after the execution of the marriage contract, those born before the execution thereof should, nevertheless, be considered legitimate, upon the father doing this (i.e. executing the marriage contract). 1. And then something else arose. For a father had children born to him out of an alliance of that kind, and wanted to make them legitimate by the method devised by us, namely, by the execution of a marriage contract; but as the father had that intention in mind, the woman died, and the method of our constitution failed, for there was then no one with whom he could enter into a marriage agreement, and the children remained natural children against the desire of the father. And another matter arose in case of men not unknown to us. Someone had natural children, loved them very much and wanted to make them legitimate according to our law, but the woman was not without stain and he did not consider her worthy of the name of a legitimate wife, in as much as she had ill-treated herself for it is sufficient to say that. This then is the second case in which the children are prejudic'd - in the first because the mother dies, in the second, because the mother sins. 2. And we know of a third case that happened. A father wanted to make his children legitimate and carry out our provisions concerning a marriage contract, but when the children learned of this, and after some property had unexpectedly been left to their mother by a relative, though she was not a legitimate wife, dishonestly and fraudulently kept their mother in concealment, so as not to give their father an opportunity, by making them legitimate, to have the usufruct of their mother's property, in case of her death, which the law justly gives to the father. (a) In order to prevent such machinations is the precise

object of the law which we hereby enact.

(a) C. 6, 60 and 61.

c. 1. If anyone, therefore, who has no legitimate, but only natural children, wants to make them legitimate, but the mother is not living, or she is not free from stain or she disappears, or she is prevented by some law from entering into a marriage with him, we give him permission to give the children the rights of legitimacy by a new method, now devised, provided that he has no legitimate children. For as a method was devised by our predecessors whereby freedmen were given the rights of free birth, cleansing them by another act and then giving them the right of the gold ring, ^(a) thereby restoring them to nature which originally made no discrimination between bond and free, but made the offspring of all men free - ^(b) we, too, have found a method in this matter. Hence a father, if he has no legitimate children, shall have the right, in the cases heretofore mentioned, or in other cases of that kind - for nature makes, as stated, many innovations - to restore his children to nature and to the original right of free birth, if they are born of a free mother; and he may thereafter have them as his legitimate children and in his paternal power. For in the beginning, when nature alone gave laws to men, and before the appearance of written laws, there was no difference between a natural and a legitimate child, but the first children of the first parents were legitimate as soon as they were born; and as among the free nature made all free, but slavery was invented by wars, so in this case, too, nature indeed, gave birth to legitimate offspring, but lust impressed upon them the mark of natural children. And as the conditions (of slaves and of natural children) are like, so a like remedy is properly provided - the one (was provided by our

predecessors, and the other, (is provided) by us.

(a) See C. 6, 8; Nov. 78, Dig. 40, 10.

(b) See C. 6, 8; Nov. 78, Dig. 40, 11. 2.

c. 2. The father shall, accordingly, have permission to look after the interests of his children, though he leaves the mother in her former condition - in case she has violated her chastity, but we do not permit that to be done otherwise - or though he is prevented from adopting the method of executing a marriage contract by force of circumstances, that is to say, by reason of the fact that she is not living, or is in hiding or something else has happened to her, But the father must direct a supplication to the emperor stating that he wants to restore his natural children to their natural condition and their original right of free birth, so that they may be in his paternal power and not be in any way different from legitimate children. If this is done, the children shall enjoy our beneficence, nor can they defraud their father, and, by hiding their mother, repudiate the rights of legitimacy. By this method alone do we remedy the lapses and inventions of nature in connection with those who have no legitimate children, and by this direct method correct the impulses of nature. 1. And in case a father who has only natural children is prevented from doing (what is mentioned above) by fortuitous circumstances, but states in his testament that for one of the reasons above mentioned, he wants his children to be legitimate and his heirs, he shall also have the right to do that; provided that the children, after the death of the father must supplicate the emperor, show this fact (that for one of the reasons mentioned the father was not able to execute a marriage contract) and produce the testament; and they shall (thereupon) be heirs in the amount for which they were appointed as such, receiving that

Novel 74, c. 2 cont'd.

right from the emperor, so that it will at the same time appear as a right granted by the father and the emperor, or what is the same thing, by nature and by law. These provisions are made without affecting the former lawful method (of legitimation), but make them in addition thereto where the former methods cannot be applied. But if there are legitimate children, and natural children are born thereafter or previously, such natural children cannot obtain the rights of legitimacy except pursuant to our constitutions which enable that to be done by the execution of a marriage contract.

* See C. 5.27.10. Nov. 12, c. 4.

c. 3. Nor has it escaped us that the method of adoption was considered proper by some of our imperial predecessors in order to make natural children legitimate. But our father, of blessed memory, and the constitution enacted by him, rejected this method.^a That constitution shall remain in force, since chastity is its earnest object, and it is improper to reintroduce into the republic what has once been rightly rejected.

(Note—cc. 4, 5 appended to C. 5.4.29.)

(a) See C. 5.27.7.

c.4. We have also thought it best to make better provisions in a matter that we have learned by experience. Many suits brought before our majesty have led us to the necessity of enacting the present law. It was provided by former, and by our, laws that marriages entered into without marriage contracts and through mere intention should be valid and in force. By reason of that the republic has been filled with fictitious contracts, and witnesses come forward who lie without impunity, that men and women living with each other had called each other husband and wife, and in this manner invent marriages that in fact were not contracted. So we have thought it necessary to define this situation according to natural laws. For although we are lovers of chastity and give laws of that character to our subjects, still we know that there is nothing so vehement as the furor of love, and it takes a stern philosophy to repress it, and to frown upon and restrain the moving, restless passion. From what words to those whom they love will they, controlled by that furor, abstain; what blandishments toward them will they not employ? The lawgivers before us were so well acquainted with that state of mind that they prohibited gifts during marriage, lest the spouses, controlled by too much love, might gradually deprive themselves of their property. We have thought it best to regulate these matters by a wise law. So we do not permit this to happen with our great dignitaries, up to the senators and men of illustrious rank, but in their case dowry shall be given and a preuptial gift, and everything else that is becoming to people of honorable station shall be done. Moreover, if a man in honorable state-service, business or the higher profession, want to contract a lawful marriage without executing marriage documents, he shall not haphazardly, without caution, loosely and without proof, he shall go to one of the chapels, communicate the matter to the defender of that church; and he,

summoning three or four of the clergymen of that place, shall execute a certificate, that in a certain tax year, in a certain month, on a certain day, in a certain year of our reign, when so or so was consul, so and so had come to this chapel and had been joined in marriage. And if both or one of the contracting parties want such certificate, they must make it, and together with the defender of the holy church and together with the other three or as many as wish -- not less than three -- subscribe such certificate which states what has been done.

1. If the contracting parties have not done this (asked for the certificate), nevertheless the defender of the holy church shall deposit a document bearing the subscription of those we have mentioned, among the archives of that holy church, that is to say, in the sacred treasury thereof, so that protection may thereby be given to people, and these parties shall not be considered to have come to an agreement of marriage through matrimonial inclination (intent) unless something of this kind is done and certified in writing. But if these things are carried out, the marriage shall be lawful and the offspring legitimate.

Note.

Novel. 74 cc 4, 5 and Novel 117 cc 2,3,4, illustrate the fact that marriage through matrimonial intention alone was sufficient, except in certain cases.

These provisions are made for a case where no document relating to dowry or prenuptial gift is executed, for we have enacted the present law because we mistrust the testimonial of witnesses along (when not verified by writing). 3 But a person who lives a plebeian life, who is owner of little property, and who is considered a part of the dregs of the people, shall enjoy the license that is granted the latter (who is excused in this respect). Nor do we care about rustics or armed soldiers, called "booted" (common), that is to say the lowly and obscure, who are ignorant of affairs

of state, and who are intent only upon agriculture and war, which are worthy of zeal and justly praised; so that persons of low station, common soldiers and farmers shall have permission to enter into a contract of marriage with women without writing, and their children, who aid their parents in their lowly station, in their military work, their agriculture and their rusticity, shall be legitimate.

Note.

This provision repealed except as to persons of illustrious rank by Novel 117 c.4, which is appended to this novel.

c.5. And since we have become aware through supplications, and especially by complaints and reports of women, that men, induced by affection toward them, took them to their homes, each respectively swearing by touching the holy scriptures or in a chapel that the woman should be his legitimate wife, and after living with her for a long time and perchance having children by her, thereafter, upon becoming satiated with the desire for her, ejected her from his house, with or without the children, we have deemed it necessary to remedy this situation. And if the woman can show in a legal manner that the man took her to his home upon condition that he might have a lawful wife and a mother of legitimate children, he shall have no right to eject her from his home contrary to the provisions of law, but she shall be his lawful wife and their children shall be legitimate. And if the woman had no dowry, she shall have the benefit of our constitution, that is to say, she shall have a fourth of his property, ^(a) whether she is ejected or loses her husband. Nor do we trouble to inquire whether the man sent her away with or without a bill of divorce, for it is not likely that a man who would deny the marriage would send a bill of divorce. And if he ejects her from his home without cause, this very fact shall be a sufficient ground against the man, and the woman may, upon this being done, send him a bill of

Novel 74 (cont'd.)

divorce and receive the fourth of the property, provided she can show that she is his wife, though she went to him without a dowry, relying upon his oath. For what else can a woman do who has no dowry than to give herself in place thereof?

1. And the offspring shall be legitimate even against the wishes of the father. For a man who takes a wife and has children, in order that the woman may be the mother of legitimate children, may not thereafter put those born of such marriage on the plane of natural children, and if he subsequently remarries either after the death or divorce of his wife, he cannot be permitted to want only the children born from such subsequent marriage to be legitimate, any more than those born previously. Those born earlier will be on the same footing with those born later; the man will be father of all alike, God being witness to the first marriage and the law to the latter. These provisions are made for the protection of those who enter into a marriage; and the children born from such parents will be legitimate and enjoy the benefits of the laws made concerning legitimate children.

(a) See c 5,17,11; Nov. 22 c 18; Nov. 53 c 6 appended to c 6,18; Nov. 117 c 5 appended to c 5, 17, 11.

Novel 74, cont'd.

c. 6. If these provisions are violated, the children, if not born from a prohibited union, will be natural children, and they will have what has been provided by us for natural children, both pursuant to a testament and on intestacy. For children born of unions plainly hateful to, and therefore prohibited by, us,^a shall not be considered even natural children and shall not have the benefit of any liberality in order that this may be punishment of their parents who may know that their children born of sinful lust shall not have anything.

Novel 74.

Epilogue.

These provisions made for the protection of men and as an aid to nature must be made known by Your Sublimity by edicts by which this law may become known to all, so that they may learn in what manner they must conduct themselves in this matter, and that they may understand our providential care and that we put their benefit above everything else.

Given June 4, 1638.

(a) See Nov. 12 C. 1 appended to C. 5, 5; Nov. 89 C. 15.