

Book V.
Title V.

Concerning incestuous and void marriages.
(De incestis et inutilibus nuptiis)

Bas. 28.5.35.

5.5.1. Emperor Alexander to Amphigenes.

If a freedwoman, your wife, has left you against your will, she cannot form an alliance with another, if you want to retain her as you wife.¹

5.5.2. Emperors Diocletian and Maximian to Sebastina.

That no subject of the empire of Rome can have two wives is well known, since also in the praetor's edict men who have more than one wife, are branded with infamy. No judge shall permit a crime committed in his jurisdiction to go unavenged.

Note.

While monogamy was the rule in the west, polygamy was or had been practiced in Thrace, Lybia, Armenia, Syria, and perhaps Palestine and Egypt, and the instant rescript shows that it was continued at least in some parts of the empire. Mitteis, R.R.u.V.R. 223; see C. 1.9.7 as to the Jews. Polygamy was first made a crime by the instant rescript (Mommsen, Strafrecht 121), though it previously made the person guilty thereof infamous. C. 9.9.18.

5.5.3. Emperor Constantine to Patroclus.

There can be no regular marriage with female slaves; for the children of such alliance are slaves.

1. We, therefore, direct that no decurions shall go into the inner rooms of the houses of the nobles out of lust for female slaves. And if a decurions, without the knowledge of the managers or procurator of the place shall have allied himself to another's female slave, the woman shall be sentenced to a mine, the decurions himself shall be deported, and, if he has been emancipated, and has no children, parents or relatives who are his heirs according to the laws of inheritance and succession, all of his property shall be turned over to the city of which he was decurions.

2. But if the managers or procurators of the place on which the crime was committed were accomplices or refused to disclose the crime upon discovery, they also shall be sentenced to the mines.

3. And if the owner of the property permitted such crime or concealed it after it became known, and it was committed on his premises, the farm with its slaves, cattle, and other things used for farming shall be confiscated for the fisc; if the crime was committed in the city, then half of all of his (such owner's) property shall be confiscated, making the punishment greater in the former case, because he permitted the crime to be committed within the walls of his home and did not, upon hearing of it, immediately divulge it.

Given at Aquileia July 1 (319).

C.Th. 12.1.6.

Note.

¹ [Blume] D. 23.2.45; D. 2.11; Nov. 22, c. 37.

Decurions, members of the municipal senate, or council, became during the later part of the Roman empire, more and more the forced servants of the state, the collection of taxes and various public functions and duties devolving upon the membership. Many desertions took place from their rank. While originally, and perhaps even at the time of the enactment of the present law, membership in the local senate was considered an honor, the position ultimately became really a burden. In any event, it was considered against public policy to permit decurions to ally themselves to female slaves, since children of such women were slaves themselves. As to decurions generally, see C. 10.32 and subsequent titles.

5.5.4. Emperor Valentinian, Theodosius and Arcadius to Andromachus, Count of the Private Estate.

If anyone contracts a marriage contrary to the precepts of the laws or contrary to the orders or constitutions of the emperors, he or she shall receive no profit from said marriage, whether arising from a prenuptial gift or anything else in any manner given thereafter, and all of such property given by the one to the other, shall be confiscated for the fisc as property of an unworthy person.

1. But an exception hereto is made in the case of women as well as men who have been lead into such action by a real and substantial, and not affected or pretended, or groundless, error or cause, or who fell through thoughtlessness of youth.

2. We exempt them from the leashes of the law on condition that when they have learned of their error, or when they have arrived at legal age, they shall, without delay, dissolve an alliance of that kind.

Given February 23.

Note.

The present law excused minors and women if they married in contravention merely of statutory law, not if they violated the law of nations by marrying one too closely related. 9 Cujacius 414; headnote C. 9.9. Marriage in contravention of the law of nations was, for instance, marriage between brothers and sisters, ascendants and descendants, and between others closely related. The Romans extended prohibition of marriage to those that were adopted as well as to those related closely by marriage. No definite line seems to have been drawn between marriages void by the law of nations and those that were void merely under the statutory law. Under the latter head, however, may be definitely placed the following, which were prohibited: Monks and nuns, C. 13.3.5; Novel 5, c. 8; Nov. 6, c. 1; Nov. 123, cc. 14 and 29; Clergymen with high position (under Justinian), C. 1.3.45; Nov. 6, c. 5; Nov. 22, c. 42; Novel 123, c. 12; marriage between Jews and Christians, C. 1.9.6; between an adulterer and adulteress, C. 9.13; Novels 143 and 150; between a guardian and ward, C. 5.6; between the governor of a province and a female living in the province, C. 5.4.6 and note C. 5.7, and marriages for political reasons with abject women. Punishment for incest is provided in Nov. 12, cc. 1-3.

5.5.5. The same Emperors to Cynegius, Praetorian Prefect.

We take away the right to marry the wife of a brother, or to become united in matrimony successively to two sisters, no matter in what manner the former marriage was dissolved.

Given at Constantinople November (393).

5.5.6. Emperors Arcadius and Honorius to Eutychianus, Praetorian Prefect.

If anyone has become polluted by an impure or forbidden marriage he may hold his own property as long as he lives but shall be considered as having no wife, nor any children whom she may bear.

1. He shall not, either personally or through a third person, give, while living, or leave, when dead, anything whatever to the aforesaid person.

2. If a dowry has, in the customary manner, perchance been given or promised, it shall be confiscated for our fisc according to the ancient law.

3. He can leave nothing to outsiders by testament; but his descendants born to him in lawful wedlock may legally and lawfully inherit from him either under his testament or by intestacy; that is to say, his son, daughter, grandson, granddaughter, great-granddaughter, great-grandson; also in descending² line his father, mother, grandfather, grandmother; also in the collateral line his brother, sister, paternal uncle, paternal aunt in the lateral line.

4. He shall have power to make a testament, provided that he leaves his property under observance of the rules of law to only those of the persons whom we have directed to inherit from him by the tenor of this order; but if anyone of those whom we have mentioned is shown to have participated in counseling the impure marriage, he shall be entirely excluded from inheriting from the decedent, and the person next to him in degree of relationship shall take his place.

5. These provisions, of course, which we have made concerning men, shall also apply to the women who have become polluted by their marriage with the aforesaid men.

6. If none of the persons enumerated survive, the property shall fall to the fisc.

Given at Constantinople December 8 (396).

C. Th. 3.12.3.

5.5.7. Emperors Valentinian and Marcian to Palladius, Praetorian Prefect.

We order that no woman shall be considered abject and degraded, who, though poor, is nevertheless, born of free born parents.

1. We have accordingly decided to permit senators and all persons endowed with the highest rank to marry any woman born of free born parents, though poor, and there shall be no difference among the free born women by reason of riches or fortune.

2. We consider only the following women as low and degraded, namely, a female slave, a woman on the stage or daughter of a woman on the stage, a female inn-keeper, or the daughter of an inn-keeper, of a procurer or of gladiator, or a woman who publicly prostitutes her person for gain. We forbid senators to contract marriage with women whom we have so enumerated.

Given at Constantinople April 4 (454).

Nov. Marciani 4.1.

Note.

Repealed by Nov. 117, c. 6.

5.5.8. Emperor Zeno to Epinicus, Praetorian Prefect.

² Blume must have intended “ascending” here.

Although some of the Egyptians have married widows of a deceased brother, for the reason that these widows were said to have remained virgins until and after the death of their husbands, thinking, forsooth—which was the opinion of certain founders of the laws—that marriage was not in fact complete until their bodies had been joined, and although the marriage with such widows were then considered valid, nevertheless, we ordain by the present law that if any marriage of that kind takes place, the contracting parties and their offspring shall be subject to the rule of the ancient laws, and such marriages shall not, like the Egyptian marriages we have just mentioned, be considered or recognized as valid.

Given at Constantinople September 1 (475).

Note.

Mitteis, R.R.u.V.R. 224, believes that this rescript had reference to provisional or trial marriages which might precede permanent marriages and of which Egyptian records have been found. These provisional marriages are generally identified with the unwritten marriages mentioned in records from Egypt, Syria, and other oriental countries. 30 Z.S.S. 688; Brassloff, Zu Kentniss d. Volksrechtes, ff. Some authorities question this identity. 50 Z.S.S. 517. These unwritten (agraphos) marriages are opposed to permanent marriages in which no dowry or prenuptial gifts appear, and which seem to have been rather loose and temporary in character, and might result in a permanent marriage. The latter were always in writing in the orient, and property interests were fully settled and arranged. Mitteis, 228.

The instant rescript contemplates that the women therein mentioned remained virgins, which would probably be no more true in trial than in permanent marriages. That fact throws doubt on Mitteis's conjecture. But no other explanation has so far been suggested.

5.5.9. The same Emperor to Sebasianus, Praetorian Prefect.

All persons subject to our government must abstain from impure marriages, and we decree that all rescripts, pragmatic sanctions, or impious constitutions which, in the time of the tyrants, allowed persons to give the name of matrimony to criminal unions, permitting dishonorable alliance with the daughter of a brother or sister, or a former brother's wife, and permitting other similar wickedness, shall be deprived, we decree, of all validity, lest such nefarious license be strengthened by culpable disregard.³ (476-484).

³ [Blume] C. 5.4.17; C. 5.8.2.