

Novel 39.

Concerning the restitution of dotal property and prenuptial gifts and concerning the woman who gives birth to a child in the eleventh month after the death of her husband.

(De restitution rerum dotalium et antenuptialium, et de ea quae undecimo mense post portem viri peterit.)

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Emperor Justinian to Johannes, glorious Praetorian Prefect of the Orient the second time, ex-consul and patrician.

Preface. The instability and changeability of human nature constantly needs a remedy and cannot be kept in a condition of wellbeing, though we should guide and regulate it from its very foundation, unless each single disturbance thereof is composed and it is thus restored to a condition that is tranquil, peaceful and in conformity with law. Something of that kind has arisen now and has led us to the necessity of enacting the present law. We know that recently doubts have arisen as to restitution (by an heir to whom property had been left to be turned over to someone else at a certain time or on certain contingencies). And if the party upon whom rested the duty to turn over the property, had perchance given some mortgages, the doubt arose as to whether the property so turned over was in any danger therefrom, or whether such mortgages bound only the (other) property of the man ordered to make such restitution. And quite a dispute arose as to the different meanings of the words—whether the decedent (who left the property) had directed the restitution only of the property that would still be in existence at the time of the death of the party ordered to make such restitution, or whether the duty to return was absolute and subject only to the right of retaining the lawful portion (one-fourth). And there were introduced actions for the recovery of trusts, orders putting the cestui qui trust in possession,<sup>a</sup> in case of poverty (of the heir), and many different and almost indissoluble intricacies in connection therewith. In order to remedy this, we recently enacted a law entirely prohibiting the alienation or pledging of property subject to restitution, and providing that it should remain as it was; that no intermediate person should have title thereto, but that it should pass on to the person who was directed to receive it.<sup>b</sup> And this law has been applied for a

long time and has been approved by constant use. But as we just said, the time, upon which everything usually depends, was bound to come when the law would appear to need some amendment. And both men and women have come before us making complaints in reference thereto. In one case that was pending, the husband was dead, and the widow demanded her dowry and that part of the prenuptial gift or gift made on account of marriage to which she became entitled by the death of her husband. But the brother of the deceased demanded the property, resting his claim on what the father (of the decedent) had ordered, took the property away from the women, alleging that his brother had indeed used up (most of) it, but that he saw some things in the woman's possession which his father had directed to be restored to himself (the son) in case the deceased should have no children, and that he would not cease to claim his property till he would have complete satisfaction according to the measure of the law. The woman justly complained of this and said that it was not just that her husband should have become master of her dowry by fraud, as it were, and should have had his benefit under the dowry contract, if she had died first, while now when the husband was dead, she, ignorant of the provision for restitution, should be compelled to incur the risk of such loss. This matter, however, has been decided in a manner which we deemed to be just. Another suppliant came before us, saying that the father of his wife had ordered the (dowry-) property to be restored to his other children, leaving her but a small portion absolutely, and that he, the suppliant, took a great risk in connection with the restitution of the dowry-property, and by reason of the provisions of the marriage-contract relating to the prenuptial gift, while, on the other hand, he would not be able, on account of the order for the restitution of the property, given as a dowry, to gain anything. We have been justly influenced by these matters, and we thought it better to amend our laws, than to put our subjects in danger, especially in connection with marriages, than which there is nothing more useful to mankind, and which alone are capable of producing (legitimate) offspring.

Notes.

- a. C. 6.43.3.
- b. See note C. 6.43.1(b).

It should be carefully borne in mind that the foregoing provisions do not relate to restitution of dowry or prenuptial gift, but to restitutions to be made of property left to someone by a decedent upon trust to restore it, or rather turn it over at a certain time, generally upon death, to someone else. In the first of these illustrations, a father had left some property to his son—the husband here mentioned—upon condition, or trust, to turn it over, upon death, to his brother. Now this son, the dead husband, had given this property to his wife as a prenuptial gift, and when he died she wanted the benefit of it, but the brother of the decedent claimed it, because it had been left as a trust as above mentioned.

In the second illustration, a father had left certain property to his daughter, who afterwards became the wife of the complainant, but had left it to his daughter upon trust to turn it, except a small portion, over upon her death to her brothers and sisters. Now after the property was left to her, she gave it as a dowry, and when she died, the husband claimed the benefit of, since he incurred a risk not only in connection with the preservation of it, but also in connection with the prenuptial gift which he had given to his wife. But the brothers and sisters of the deceased wife claimed the property so given as a dowry by reason of the trust created as above.

c. 1. We therefore enact the present law, leaving in force the provisions contained in a former law recently enacted by us, making this sole innovation, that if any one hereafter provides for restitution of his property, he must leave (unaffected by a trust), the legal portion to his child, not the fourth—which we have increased on account of being too small<sup>a</sup> –but the third or the half, according to the number of children. If such legal portion does not suffice for the dowry or prenuptial gift—which is to be given honestly and in accordance with the standing of the parties—the remaining portion of the property (left to the child as a trust) must be free from any provision for restitution in so far as, added to the lawful portion, may be required to satisfy such dowry or prenuptial gift. And we ordain that all marriage-contracts and all alienations or mortgages given on that account, shall to that extent be free from any duty of restitution. And whether a man or woman is burdened with such restitution, they may make what are called gifts before or on account of

marriage, and no provision for restitution shall be valid so far as it affects the property embraced therein; and if a woman is burdened therewith, it shall be no hindrance to the gift of dowry. For matters that are of common benefit to all have the preference over those that benefit only some private individuals. This privilege, then, shall be extended to marriage gifts and the enforcement thereof. For if our ancestors considered many things as impliedly excluded from general hypothecations<sup>b</sup> although they might not necessarily for us, why should not we, for a much better reason, exclude marriage gifts (from the burden of a trust)? These provisions shall apply to the future and to restitutions to be made hereafter. But we shall not permit them to be the source of injury, so that if a woman has but a small prenuptial gift, they cannot be permitted, when they know of this law, to increase the dowry or prenuptial gift in violation of the law for the purpose of defeating provisions for restitution. Such fraudulent conduct will be void, and we give the parties who [make] such increase no benefit therefrom, so far as it affects restitutions, keeping our law in full force in the future. This then is one of the subjects of our present law.<sup>c</sup>

a. Novel 18, c. 2, appended to C. 3.28 [not appended in this edition].

b. In Novel 108, appended to C. 6.50 [not appended in this edition], there are also provisions permitting dowry and prenuptial gifts out of property left as a trust.

c. [This note is missing from Blume's typed manuscript.]

c. 2.<sup>1</sup> Another subject (of this law) deals with women who remarry before the expiration of what is called the year of mourning. Punishment for them had been provided by three constitutions of preceding emperors,<sup>a</sup> and when we recently enacted a law on this subject, making some amendments,<sup>b</sup> we briefly touched upon the provisions that had been made concerning them. But a most shameful incident has occurred which we wish had not occurred in our time, and which we have justly deemed worthy of correction. For a married woman lost her husband, she already, it seems, having been set upon unchastity during his lifetime. For she gave birth to a

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<sup>1</sup> A note above this chapter in Justice Blume's manuscript states "appended to 5.9 (meaning C. 5.9).

child before the expiration of a year, at the end of the eleventh month, so that it could not be said that the child belonged to the deceased; for the period of pregnancy does not extend over such period. Now since it is one of the punishments of those who enter into untimely remarriage, that the woman is immediately deprived of the prenuptial gift made to her by her (first) husband, no even retaining a usufruct therein, the children (of the decedent) injuriously affected by this remarkable child-birth, thought that they should at least have the prenuptial gift of their father (the deceased), and that the woman who so early treated her husband with contempt should not receive any gain from him. But she—we blush to mention her words—contended that she did not deserve to lose the property, for the law contemplated lawful (second) marriages, but that she had not entered into any marriage except the first, and that her late offspring was the fruit of an unlawful lust. Now it is clear that she is liable to a thousand chastisements since she committed debauchery, nor shall we release her from these penalties; and we further—for the benefit of the children—impose upon her the loss of the prenuptial gift which the law imposes upon those who enter into a lawful (second) marriage during the period of mourning. For if the law does not leave unpunished those who enter into a lawful marriage—a suspicion arising from the hasty marriage of a previous unlawful regard on her part for her second husband—how can we leave unpunished a woman in a case where there is not merely a suspicion but where the impious child birth gives clear and undoubted proof of her offense? **1.** So we ordain that if anything of that kind happens and a woman gives birth to a child before the expiration of the year and toward the end of it, so that it cannot be doubted that the child is not the offspring of the prior marriage, the woman shall be deprived of the prenuptial gift, including the title as well as the usufruct thereof, and shall also be subject to all the other penalties the same as though she had contracted a second, lawful marriage before the expiration of the period of mourning. For wantonness shall never be treated better than chastity. But such woman shall be subjected to the same penalties, and she must, in addition, be in fear of an accusation of debauchery, so that she may not want either an untimely marriage, or instead of entering into lawful marriage, commit acts that are worse.

- a. C. 2.11.15; C. 5.9.11; C. 6.56.4.
- b. Nov. 22, c. 22.

Epilogue. Your Sublimity, upon learning of this our will, declared by this imperial law, will cause it to be made public to all by your own edicts in the usual manner. The law was sent to Johannes, glorious Prefect of the Orient the second time, ex-consul and patrician.

Given April 17, 536.