

Novel 98.

A constitution that a husband shall not acquire the dowry nor the wife the pre-nuptial gift as a gain, but that though they do not remarry the ownership thereof shall be preserved for the children.

Written to Johannes, glorious prefect the second time, ex-consul and patrician.

Preface. That which remains the same is in no need of manifold laws, since the simple, exempt from change, forever preserves its condition, and is governed by eternal and divine laws which are in no need of amendment. But things, among us, in unrest and confusion, need wisdom as a governess, which is furnished in (the different) cases through the laws. And since many suits, which we do shirk to decide, are brought before us, we indeed remedy individual matters, but as we learn from different points called in question by us or by our judges, we define by a general law what should be done in each case. Now, perhaps above all, it appeared to the ancient lawgivers that there was a distinction to be drawn (in the matter hereinafter mentioned), but we have thought it best, by a wise law, to lead the matter back to simplicity, this law to take effect from now on without disturbing what has been done in the past. The laws heretofore enacted on this subject did not (at first) displease us, but later thoughts thereon have appeared to us to be better. Gains from a marriage would (under the past laws) be retained by the beneficiaries and would become part of their property, if they did not remarry, but were required to be preserved for children of the first marriage, if they should marry a second time. It has seemed best to eliminate this two-fold situation by a simple and better law. For if a woman who remarries, or a man who thinks of a second marriage, must preserve what he gets by reason of death or divorce for the children, although there may be children from the second marriage, how is it right that those who are solicitous only about their legitimate children, should not preserve for them what comes from their deceased parents, but give it to others? And what would be more costly to children not ungrateful to their parents?

Note.

By the word gain—"lucrum"—the dowry and prenuptial gift is meant.

c. 1. We therefore ordain that if a wife dies and the dowry falls to the husband, it shall be preserved for the children, whether he contracts a second marriage or not; so, on the other hand, if a husband dies and his widow receives the prenuptial gift, it too, shall be preserved for the children. The usufruct of the marriage gift shall be enjoyed by them (the survivors, respectively), the ownership shall be preserved for their children, the enactments made for the parents who remarry remaining in force. This shall be true as to all marriages which from this day may be dissolved in any manner in the future and also as to marriages which have already been dissolved either by death or in some other manner, but (in connection with which the property) is still in suspense by reason of one of the spouses still surviving. If both spouses have already died, this shall not apply, but we leave the matter as provided by the former laws. It is certain that if the property has once fallen to the children and the law has made them owners thereof, they have the rights appertaining to succession and other accessions^a as provided in the case of children of the first marriage, who have been granted anything under the laws by reason of the second marriage of their parents.

a. Probably the lien granted under the law. Compare C. 5.9.6 and 8, and Nov. 22, c. 24, Nov. 91 pref.

c. 2. We have also believed it necessary to make the following matter, which has come to our notice through a lawsuit, the subject of legislation. For after the husband and wife separated, both parents neglected the children from this marriage, and the latter went around begging; we have therefore believed it necessary to enact a perhaps severer law, but one intended for a good purpose, so that (parents), in fear of punishment, will cease either to dissolve their marriage for unjust gain or to neglect their own children. **1.** If a marriage is dissolved by divorce or in some other manner, and there are no children, the former law will remain in force; but if that is done when there are children, and the parties, without blushing because of the children, separate by consent, or even without consent, the husband

is doing something for which he justly loses the prenuptial gift or the wife doing something for which she justly loses the dowry, the husband shall not have the dowry and the wife shall not have the prenuptial gift, but they shall immediately lose the dowry and prenuptial gift respectively, the ownership thereof shall vest in the children, and the usufruct thereof alone shall be enjoyed by the spouses separated by divorce; provided that the spouse who receives such usufruct shall nourish the children born of such marriage and shall give them everything else (that may be necessary), as the amount of the property received may make proper. We also know that it has happened that a marriage was dissolved without objection (*bona gratia*) and that the prenuptial gift appeared to have been returned to the man who gave it and the dowry to the woman who gave it, but as a matter of fact a not insignificant sum was given to one of the parties as if for damages or for some other reason; so that such sum would not appear as a gain from the marriage, and, therefore, not necessary to be preserved for the children according to the laws on that subject, but that the sum which the party exacting it would receive would appear to be a gain from some outside source. In order to meet the damage arising from such source, we ordain that if anything of that kind happens and one of the parties receives a gain, that too shall be preserved for the children, the ownership thereof shall immediately pass to them, and the usufruct alone shall be enjoyed by the party that receives it. In this way they will abstain from all wrong and from every irrational desire; they will inflict no damage on their children either involuntarily or voluntarily, but they will assume a better attitude, in the first place toward chastity, next in regard to conjugal affection which those who are once united to each other ought to have—a feeling, happy in chastity, in conformity with good manners, replete with paternal and maternal affection. So that what the parents do not preserve for their children of their own free will, will be preserved for such children who are wronged by their parents, by the emperor who is, after God, the common father of all. And in such case, too, the laws formerly enacted concerning gains (from marriage) and concerning successions shall be in force; for we make no innovation therein, except as expressly stated in this law.

Epilogue. Your Sublimity will take care to carry this our will, declared by this imperial law, into force and effect.

Given Dec. 16, 539.