

47. After him of greatest authority were ATEIUS CAPITO, who followed Ofilius, and ANTISTILUS LABEO, who listened to all these, but was instructed by Trebatius. Of these Ateius was consul; Labeo, when the consulate was offered to him by Augustus, by which he would have become interim consul (*suffectus*), refused to take the office but gave his attention in the main to his studies. And he so divided the whole year that he was at Rome six months, six months away, and gave his attention to writing books. Accordingly, he left four hundred volumes, many of which are employed constantly. These two founded, as it were, respective schools; for Ateius Capito continued in those things which had been handed down to him; Labeo, by the quality of his originality and the faith of his own learning, having paid attention to other branches of knowledge, endeavored to innovate many things. 48. And so MASSURIUS SABINUS succeeded Ateius Capito, NERVA Labeo, who then increased these dissensions. This Nerva was very intimate with the emperor. Massurius Sabinus was in the equestrian order and was the first to respond publicly; afterwards, this privilege began to be given, which, however, had been granted to him by Tiberius Caesar. 49. And as we may observe in passing, before the time of Augustus the right of responding publicly (*ius respondendi publice*) was not given by the emperors, but he who had confidence in his studies responded to his consultants; nor were *responsa* always given under seal, but often they themselves wrote to the *iudices* (judge jurors) or were testified to by those who consulted them. Divus Augustus was the first to decree, in order to ensure greater authority to the law, that they might respond upon his authority; and from that time on, this began to be sought as a favor. And therefore the excellent emperor Hadrian, when praetorian men sought to be allowed to respond, rescripted that this was not to be sought, but was wont to be given, and consequently if anyone had faith in his own ability he (Hadrian) would be pleased to find <that> he was qualified to give *responsa* to the people. 50. Accordingly, it was conceded to Sabinus by Tiberius Caesar that he might respond to the people; Sabinus was received into the equestrian order when advanced in age, in fact about fifty years old. He did not have ample means but for the most part was supported by his students.

51. GAIUS CASSIUS LONGINUS, born of a daughter of Tubero, who was a grand-daughter of Servius Sulpicius, succeeded him (Sabinus); and accordingly he called Servius Sulpicius his great-grandfather. He was consul along with Quartinus in the time of Tiberius, and he had great authority in the state until Caesar expelled him from the commonwealth. 52. Banished by him to Sardinia, recalled by Vespasian, he died in his time. Nerva was succeeded by PROCULUS. There lived at the same time NERVA FILIUS; and there was another LONGINUS, indeed, of the equestrian order who afterwards came to the praetorship. But the authority of Proculus was greater, for indeed he had very great influence; the members of the schools were respectively called Cassians and Proculians, the distinction having begun with Capito and Labeo. 53. CAELIUS SABINUS succeeded Cassius and had great influence in the time of Vespasian; PEGASUS, who was *praefectus urbi* in the time of Vespasian (succeeded) Proculus; PRISCUS IAVOLENUS (succeeded) Caelius Sabinus; CELSUS (succeeded) Pegasus; CELSUS FILIUS and PRISCUS NERATIUS, both of whom were consuls, Celsus, indeed, a second time, (succeeded) Celsus, the father; ABURNIUS VALENS and TUSCIANUS, also SALVIUS IULIANUS (succeeded) Iavolenus Priscus.

F. DIGEST 23.2 (ON THE RITE OF NUPTIALS)

[Ed. T. Mommsen and P. Krueger, trans. A. Watson, *The Digest of Justinian* (Philadelphia, 1985), pp. 2:657–68]

2 FORMATION OF MARRIAGE

1. MODESTINUS, *Rules*, book 1: Marriage is the union of a man and a woman, a partnership for life involving divine as well as human law.

2. PAUL, *Edict*, book 85: Marriage cannot take place unless everyone involved consents, that is, those who are being united and those in whose power they are.

3. PAUL, *Sabinus*, book 1: According to Pomponius, if I have a grandson by one son and a granddaughter by another who are both in my power, my authority alone will be enough to allow them to marry, and this is correct.

4. POMPONIUS, *Sabinus*, book 3: A girl who was less than twelve years old when she married will not be a lawful wife until she reaches that age while living with her husband.

5. POMPONIUS, *Sabinus*, book 4: It is settled that a woman can be married by a man in his absence, either by letter or by messenger, if she is led to his house. But where she is absent, she cannot be married by

letter or by messenger because she must be led to her husband's house, not her own, since the former is, as it were, the domicile of the marriage.

6. ULPIAN, *Sabinus*, book 85: Finally according to Cinna, where a man married a woman in her absence, and on his way back from dinner by the side of the Tiber, he died, it was held that she ought to mourn for him as his wife.

7. PAUL, *Lex Falcidia*, sole book: So it is possible here for a virgin to have a dowry and an action for dowry.

8. POMPONIUS, *Sabinus*, book 5: A freedman cannot marry his mother or sister where they too have been freed, because this rule is founded on morality, not law.

9. ULPIAN, *Sabinus*, book 26: If a grandson wishes to marry and the grandfather is insane, his father's consent will be absolutely necessary, but if his father is insane and his grandfather sane, the grandfather's consent will suffice. 1. A man whose father has been captured by the enemy can marry, if he does not return within three years.

10. PAUL, *Edict*, book 85: There is justifiable doubt about what to do where a father is absent, so that it is not known where he is or whether he is still alive. If three years have passed from the time when it was known for sure where the father was and whether he was alive or not, his children of either sex will not be prevented from contracting a lawful marriage.

11. JULIAN, *Digest*, book 62: Where the son of a man who is in enemy hands, or otherwise absent, marries before his father has been in captivity or absent for three years, or if his daughter gets married, I think that both marriages will be valid, provided the son or daughter marries someone the father will be sure not to repudiate.

12. ULPIAN, *Sabinus*, book 26: If, on being repudiated by me, my wife marries Seius, whom I subsequently adrogate, the marriage is not incestuous. 1. There can be no marriage between me and a woman betrothed to my father, although she cannot really be called my stepmother. 2. On the other hand, a woman betrothed to me cannot marry my father, although she cannot really be called his daughter-in-law. 3. If my wife after a divorce marries someone else and has a daughter, according to Julian, although she is not my stepdaughter, I ought not to marry her. 4. I can marry my adopted sister's daughter, because she is not related to me by blood, since no one becomes an uncle by adoption. Only legitimate adoptions, that is, those involving agnatic rights, create such relationships. On the same principle, I can marry my adoptive father's sister, as long as they did not have the same father.

13. ULPIAN, *Sabinus*, book 84: If a patroness is so degraded that she thinks that marriage with her own freedman is honorable, it should not be prohibited by the judge who is investigating the matter.

14. PAUL, *Edict*, book 85: Where an adopted son has been emancipated, he cannot marry his adoptive father's wife, since she is in the position of a stepmother. 1. Similarly, if someone adopts a son, he will not be able to marry his wife, who is in the position of a daughter-in-law, even after the son is emancipated, because she was once his daughter-in-law. 2. Blood relationship between slaves must be considered in connection with this rule. So on manumission a man cannot marry his own mother, and the rule is the same for a sister and a sister's daughter. On the other hand, it must be said that a father cannot marry his daughter, if they have been manumitted, even where it is doubtful whether he is her father. So a natural father cannot marry his daughter who was born out of wedlock, because natural law and decency must be taken into consideration in marriage, and it is indecent to make a daughter into your wife. 3. The same rule which applied to blood relationship between slaves must also be observed in cases of relationship by marriage between slaves. So, for example, I cannot marry a woman who lived with my father while they were slaves just as if she were my stepmother, and conversely, a father cannot marry the woman who lived with his son while they were slaves, just as if she were his daughter-in-law. Nor can anyone marry the mother of a woman he lived with in slavery, just as if she were his mother-in-law; for since blood relationship between slaves is recognized, why not relationship by marriage as well? But in doubtful cases it is more certain and more decent not to marry in these circumstances. 4. Now let us see how the terms "stepmother," "stepdaughter," "mother-in-law," and "daughter-in-law" are to be understood, so that we can see who it is that we cannot marry. Some take a stepmother to be a father's wife, a daughter-in-law a son's wife, and a stepdaughter a wife's daughter by another husband. But it is better to say here that a man cannot marry his grandfather's or great-grandfather's wife. So there are two or more stepmothers whom he cannot marry. This is not surprising, since someone who has been adopted

cannot marry either his natural or his adoptive father's wife. If my father has several wives, I cannot marry any of them. So the term "mother-in-law," and "daughter-in-law" are to be understood, so that we can see who it is that we cannot marry. Some take a stepmother to be a father's wife; a daughter-in-law, a son's wife; and a stepdaughter, a wife's daughter by another husband. But it is better to say here that a man cannot marry his grandfather's or great-grandfather's wife. So there are two or more stepmothers whom he cannot marry. This is not surprising, since someone who has been adopted cannot marry either his natural or his adoptive father's wife. If my father has several wives, I cannot marry any of them. So the term "mother-in-law" includes not just my wife's mother but also her grandmother and great-grandmother, so that I cannot marry either of them. Again, the term "daughter-in-law" includes not only a son's wife but also the wife of a grandson or great-grandson, although some call these people "grand-daughters-in-law." "Step-daughter" means not just my wife's daughter but also her granddaughter and great-granddaughter; I cannot marry any of them. Augustus decided that I cannot marry the mother of someone who was betrothed to me, since she was once my mother-in-law.

15. PAPINIAN, *Replies*, book 4: A man cannot marry the former wife of his stepson, nor can a woman marry someone who was once her stepdaughter's husband.

16. PAUL, *Edict*, book 35: An oration of the deified Marcus provides that if a senator's daughter marries a freedman, the marriage will b.c. void, and this was followed by a *senatus consultum*, to the same effect. 1. Where a grandson marries, his father must also consent; but if a granddaughter gets married, the consent and authority of the grandfather will suffice. 2. Insanity prevents marriage being contracted, because consent is required; but once validly contracted, it does not invalidate the marriage.

17. GAIUS, *Provincial Edict*, book 11: When the relationship of brother and sister arises because of adoption, it is an impediment to marriage while the adoption lasts. So I will be able to marry a girl whom my father adopted and then emancipated. Similarly, if she is kept in his power and I am emancipated, we can be married. 1. It is advisable, then, for someone who wishes to adopt his son-in-law to emancipate his daughter-in-law and for someone who wishes to adopt his daughter-in-law to emancipate his son. 2. We are not allowed to marry our paternal or maternal aunts or paternal or maternal great-aunts although paternal and maternal great-aunts are related in the fourth degree. Again, we are not allowed to marry a paternal aunt or great-aunt, even though they are related to us by adoption.

18. JULIAN, *Digest*, book 16: Marriage between these persons is not held to be valid unless their relatives consent.

19. MARCIAN, *Institutes*, book 16: By chapter thirty-five of the *lex Julia*, people who wrongfully prevent children in their power from marrying, or who refuse to provide a dowry for them in accordance with the *constitutio* of the deified Severus and Antoninus, can be forced by proconsuls and provincial governors to arrange marriages and provide dowries for them. Those who do not try to arrange marriages are held to prevent them.

20. PAUL, *Oration of the Deified Severus and Commodus*, sole book: Note that it is not one of a curator's functions to see that his ward is married or not, because his duties only relate to transacting business for her. A rescript of Severus and Antoninus stated this in the following words: "It is a curator's duty to administer his ward's affairs, but she can marry or not as she pleases."

21. TERENTIUS CLEMENS, *Lex Julia et Papia*, book 3: A son-in-power cannot be compelled to marry.

22. CELSUS, *Digest*, book 15: Where he marries someone (*ducit uxorem*) because his father forces him to do so and he would not have married her if the choice had been his, the marriage will nevertheless be valid, because marriage cannot take place without the consent of the parties; he is held to have chosen this course of action.

23. CELSUS, *Digest*, book 80: The *lex Papia* provides that all freeborn men, apart from senators and their children, can marry freedwomen.

24. MODESTINUS, *Rules*, book 1: Living with a freewoman implies marriage, not concubinage, as long as she does not make money out of prostitution.

25. MODESTINUS, *Rules*, book 2: An emancipated son can marry without his father's consent, and any son he has will be his heir.

26. **MODESTINUS**, *Replies*, book 5: He replied that women accused of adultery cannot marry during the lifetime of their husbands, even before conviction.

27. **ULPIAN**, *Lex Julia et Papia*, book 3: If a man of senatorial rank purports to marry a freedwoman, though she does not become his legal wife in the meantime, she is in a position to become his wife if he loses his rank.

28. **MARCIAN**, *Institutes*, book 10: A patron cannot marry his freedwoman against her will.

29. **ULPIAN**, *Lex Julia et Papia*, book 8: And Ateius Capito is said to have decreed this when he was consul. Note, however, that this rule does not apply where the patron manumitted her in order to marry her.

30. **GAIUS**, *Lex Julia et Papia*, book 2: A pretended marriage has no effect.

31. **ULPIAN**, *Lex Julia et Papia*, book 6: Where a senator is given imperial permission to marry a freedwoman, she will be his lawful wife.

32. **MARCELLUS**, *Lex Julia et Papia*, book 1: Note that although a freedman, who was adrogated by someone who was born free, acquires the rights of a freeborn person in that family, as a freedman he is still barred from senatorial marriage.

33. **MARCELLUS**, *Lex Julia et Papia*, book 3: Many take the view that when the same woman goes back to the same man, it is the same marriage. I agree, provided they are reconciled before much time has elapsed, and neither one has married someone else in the meantime, and above all, if the husband has not returned the dowry.

34. **PAPINIAN**, *Replies*, book 4: A general commission to find a husband for a daughter-in-power is not a sufficient ground for marriage. So it is necessary for the person selected to meet the father and for him to consent in order for the marriage to be contracted. 1. Where a man has accused his wife of adultery, in the capacity of a husband, there is nothing to stop him marrying again after the annulment. But if he does not accuse her in the capacity of a husband, their marriage will be held valid. 2. Marriage can be contracted between stepchildren, even if they have a common brother, the child of their parents' new marriage. 3. Where a senator's daughter is married to a freedman, this lapse on her father's part does not make her a wife, since children should not be deprived of their rank because of their father's offenses.

36. **PAPINTAN**, *Replies*, book 6: A son-in-power in the army cannot contract a marriage without his father's consent.

36. **PAUL**, *Questions*, book 5: A tutor or a curator cannot marry an adult woman in his care, unless she was betrothed to or intended for him by her father, or where the marriage takes place in accordance with a condition in his will.

37. **PAUL**, *Replies*, book 7: The freedman of a girl's curator ought to be prevented from marrying her.

38. **PAUL**, *Views*, book 2: Where someone holds office in a province, he cannot marry a woman who was born there or lives there, although betrothal is not forbidden. But if, after he has laid down his office, the woman refuses to marry him, she can do so, as long as she returns any earnest she received. 1. A person holding office in a province can marry a woman to whom he was previously betrothed, and the dowry will not be confiscated. 2. Someone involved in provincial administration is allowed to arrange marriages for his daughters there, and provide dowries for them.

39. **PAUL**, *Plautius*, book 6: I cannot marry my sister's great-granddaughter, because I am in the position of a parent to her. 1. If someone marries a woman whom he is morally obliged not to, he is said to commit incest.

40. **POMPONIUS**, *From Plautius*, book 4: Aristo replied that a man could not marry his stepdaughter's daughter, any more than he could marry his stepdaughter herself.

41. **MARCELLUS**, *Digest*, book 26: Women who live in a shameful way and make money out of prostitution, even where it is not done openly, are held in disgrace. 1. If a woman lives as a concubine with anyone other than her patron, I would say that she lacks the character of the mother of a household.

42. **MODESTINUS**, *Formation of Marriage*, sole book: As far as marriages are concerned, it is always necessary to consider not just what is lawful but also what is decent. 1. If the daughter, granddaughter, or

great-granddaughter of a senator marries a freedman or someone who was an actor, or whose father or mother were actors, the marriage will be void.

43. ULPIAN, *Lex Julia et Papia*, book 1: We would say that a woman openly practices prostitution not just where she does so in brothels but also where she is used to showing she has no shame in taverns or other places. 1. “Openly,” then, we take to mean anywhere, that is, without preference, not just a woman who commits adultery or fornication, but one who plays the part of a prostitute. 2. Again, because a woman has intercourse with one or two men after accepting money from them, she is not held to have practiced open prostitution. 3. According to Octavenus, even a woman who openly practices prostitution but accepts no money should be included in this category, and he is quite right. 4. The law brands with *infamia* not just the woman who practices prostitution but also anyone who has done so in the past, even though she no longer behaves in this way; the disgrace is not removed by stopping the behavior. 5. Poverty is no excuse for a woman living a shameful life. 6. Procuring is no better than prostitution. 7. Women who prostitute other women for money we call “procuresses.” 8. By “procuress,” we mean a woman who leads this kind of life on behalf of someone else. 9. Where one woman keeps an inn and employs others as prostitutes (as many often do on the pretext that they are servants), she must be classed as a procuress. 10. The senate decreed that it was improper for a senator to marry or keep a woman convicted of a criminal offense, where anyone could bring the charge, unless there was some legal prohibition on bringing such a charge in court. 11. Where a woman has been publicly convicted of making a false accusation or *praevaricatio*, she is not held to have been convicted of a criminal offense. 12. A woman caught in adultery is in the same position as one convicted of a criminal offense. So if she is shown to be guilty of adultery, she will be branded with *infamia* not just because she was caught in adultery but also because she has been convicted of a crime. However, if she was not caught in adultery, but was convicted of it, she will suffer *infamia* because of the conviction. If she has been caught in adultery, but not convicted, would she still suffer *infamia*? I think that even if she were acquitted after being caught, she will still suffer *infamia*, because it is clear that a woman taken in adultery suffers *infamia* automatically by statute, no judgement being required. 13. We are not told here, as in the *lex Julia* on adultery, who must catch her or where it must be done; so it seems she will suffer *infamia* whether it is her husband or someone else who catches her. Even if she is not caught in her husband’s house or her father’s, she will suffer *infamia* according to the terms of the statute.

44. PAUL, *Lex Julia et Papia*, book 1: The *lex Julia* provides that: “A senator, his son, or his grandson, or his great-grandson by his son shall not knowingly or fraudulently become betrothed to or marry a freedwoman, or a woman who is or has been an actress or whose father or mother are or have been actors. Nor shall the daughter of a senator, his granddaughter by his son, or great-granddaughter by his grandson become betrothed to or marry, knowingly or fraudulently, a freedman, or a man who is or has been an actor or whose father or mother is or has been an actor. Nor shall any of these people knowingly or fraudulently become betrothed to or marry such a woman.” 1. This chapter prevents a senator from marrying a freedwoman or a woman whose father or mother have been actors. The same applies to a freedman marrying a senator’s daughter. 2. There is no obstacle to a marriage in the fact that someone’s grandfather or grandmother has been an actor. 3. No distinction is drawn between a father who has his daughter-in-power and one who does not. However, according to Octavenus, even if the child is illegitimate, its father as well as its mother must be taken as its lawful parents. 4. Again, it makes no difference whether the father is a natural or adoptive one. 5. Would it be an obstacle if he had been an actor before the adoption? Or if a natural father had been one before his daughter’s birth? Where a man in this disgraced condition adopts someone, then emancipates her, would it be wrong to marry her? What if her natural father, who was of the same kind, has died? According to Pomponius, in the circumstances, this view would be contrary to the meaning of the statute, so that people of this kind should not be classed with the others, and he is quite right. 6. If the father or mother of a freeborn woman became actors after her marriage, it would be most unfair to divorce her, since the marriage was respectable when it was contracted, and there may already be children. 7. Obviously, if the woman herself becomes an actress, she should be divorced. 8. Senators cannot marry women that other freeborn are not allowed to marry.

45. ULPIAN, *Lex Julia et Papia*, book 3: There is a provision which states that where a freedwoman was once married to her patron, she cannot marry someone else without his consent. In accordance with the rescript of our emperor and his deified father, we include as a patron someone who has bought a female slave under the condition of manumitting her, since on manumission she is considered the freedwoman of her buyer. 1. This rule does not apply to anyone who has sworn that he is her patron. 2. Nor should the

man who did not buy the woman with his own money be considered her patron. **3.** Clearly, in the case of a son-in-power in the army, we have no doubt that he acquires this right if he manumits a female slave who is part of his *peculium castrense*. This is because he becomes her patron in accordance with imperial *constitutiones*, and his father does not acquire this right. **4.** This section applies only to a freedwoman who has been married, not to one who was betrothed. So if a freedwoman who was betrothed gives notice of repudiation to her patron, she has the right to marry someone else, even if her patron is unwilling for her to do so. **5.** The statute says, “if her patron is unwilling”; being unwilling we should take to mean not consenting to a divorce. So a woman who divorces an insane person is not exempt from complying with the statute, nor is a woman who divorced her husband without his knowledge, since he can more accurately be described as unwilling than someone who actually refuses his consent. **6.** In the case of a patron who has been captured by the enemy, I am inclined to think that the woman involved has the right to marry, just as she could in he were dead. But those who take Julian’s view say that she does not have the right to marry because, according to Julian, a freedwoman’s marriage continues even where her patron is in captivity, because of the respect she owes him. It is clear, however, that if the patron is enslaved in any other way, the marriage is undoubtedly dissolved.

46. GAIUS, *Lex Julia et Papia*, book 8: There is some doubt whether this rule applies to a patron who marries a freedwoman in whom someone else has joint rights. According to Javolenus, it does not, because she cannot properly be considered to be one man’s freedwoman when she is also another’s. Others take the opposite view, since it is undeniable that she is one person’s freedwoman, even if she is also someone else’s; this is quite rightly the majority view.

47. PAUL, *Lex Julia et Papia*, book 2: A senator’s daughter who has been a prostitute or an actress or has been convicted of a criminal offense can safely marry a freedman, because a woman who has behaved so disgracefully has no honor left.

48. TERENCE CLEMENS, *Lex Julia et Papia*, book 8: The statute accords the same rights to a patron’s son in the marriage of his father’s freedwoman as it gives to the patron himself. The same applies where the son or one patron during the other’s lifetime marries the freedwoman of them both. **1.** If a patron marries a disgraced freedwoman, it is settled that he cannot benefit by this statute since he married in contravention of it. **2.** Where one son marries a freedwoman assigned by will to another, he will not acquire the same rights as a patron. Indeed, he will have no rights at all over her, because the senate transferred all such rights over freedmen assigned to someone to that person, as his father intended.

49. MARCELLUS, *Lex Julia et Papia*, book 1: Note that the lower orders can marry certain women where those of higher rank cannot legally do so, because of their superior position. On the other hand, the upper classes cannot marry certain women where those of lower rank are prohibited from doing so.

50. MARCELLUS, *Lex Julia et Papia*, book 3: It is said to have been recently decided that if someone marries his freedwoman, whom he had manumitted under a *fideicommissum*, she can marry someone else later without his consent. I think this is correct, since a man ought not to have the rights of a patron where he manumits someone because he had to, not because he wanted to. He did not confer any benefit on the woman, but gave her the freedom which was hers by right.

51. LICINIUS RUFINUS, *Rules*, book 1: A female slave manumitted for the purpose of marriage cannot get married to anyone other than the man who manumitted her unless he renounces his right as her patron to marry her. **1.** But if a son-in-power is ordered by his father to manumit a female slave for the purpose of marriage, according to Julian, she is in the same position as if she had been manumitted by the father, and so he can marry her.

52. PAUL, *Sabinus*, book 6: There can be no dowry where the marriage is incestuous, and so everything received in connection with it is forfeit, even where it comes under the head of profits.

53. GAIUS, *Provincial Edict*, book 11: There can be no marriage between those in the categories of parents and children whether they are related in the first or more distant degrees *ad infinitum*.

54. SCAEVOLA, *Rules*, book 1: It makes no difference whether the relationship is based on a valid civil law marriage or not; for a man cannot marry his sister even if she is illegitimate.

55. GAIUS, *Provincial Edict*, book 11: It is considered to be so abominable to marry an adopted daughter or granddaughter that the same rule continues to operate even where the adoption is ended by emancipation. **1.** I cannot marry my adoptive father’s mother, his maternal aunt, or his granddaughter by

his son as long as I am in his family. When I have been emancipated, however, clearly nothing prevents such a marriage, because I am not considered to be related to them after my emancipation.

56. ULPIAN, *Disputations*, book 3: A man commits incest by keeping his sister's daughter as a concubine, even if she is a freedwoman.

57. MARCIAN, *Institutes*, book 2: Anyone holding office in a province cannot consent to his son's marriage there.

57a. MARCIAN, *Note on* PAPINIAN, *Adultery*, book 2: The deified Marcus and Lucius, emperors, in a rescript to Flavia Tertulla by means of a freedman who was a surveyor, stated: "We are moved by the length of time you have lived in matrimony with your uncle in ignorance of the law, and the fact that your marriage was arranged by your grandmother, as well as your numerous children. All these factors taken together lead us to confirm the legal status of your children, the issue of a marriage contracted forty years ago, so that they shall be considered legitimate."

58. MARCIAN, *Rules*, book 4: A rescript of the deified Pius states that if a freedwoman deceives a senator into marrying her by claiming to be freeborn, an action, based on the one in the praetor's edict, should be given against her, since she cannot make a profit from a dowry which is void.

59. PAUL, *Assignment of Freedmen*, sole book: The *senatus consultum*, which provides that a tutor cannot arrange a marriage between her and his son or marry her himself, also applies to grandsons.

60. PAUL, *Oration of the Deified Antoninus and Commodus*, sole book: Where someone is not actually a tutor, but has a tutor's responsibilities, does he come within the scope of the oration? For example, suppose his ward has been captured by the enemy, or he withdraws from tutelage on the basis of false excuses, so that he remains responsible under the sacred *constitutiones*. The *senatus consultum* must be held applicable in these circumstances, since it has been established that liability of this kind existed where three tutelages were involved. **1.** But where a person becomes liable on someone else's account, let us see whether he is outside the ambit of the *senatus consultum*. Suppose, for example, a magistrate incurs responsibility in a case involving tutelage, or someone gives a verbal guarantee on behalf of a tutor or curator. Because under such circumstances these things are not equated with having three tutelages, it must consequently be approved. **2.** Surely, the position cannot be the same where an honorary tutor is appointed, since tutelage of this kind is not included among the three? Reason, however, leads to the opposite conclusion, because an honorary tutor is said to be used to liability for maladministration of tutelage. **3.** There is no doubt that the oration applies to someone who, on being appointed a tutor, neglects his administrative duties, since he is liable under the sacred *constitutiones* just as if he had carried them out. **4.** But suppose a tutor wanted to be excused on some ground or other but could not produce any proof at the time, so that the investigation of his excuse was deferred, and meanwhile his ward had come of age. Would the *senatus consultum* apply? The answer depends on whether his excuse could be accepted after the ward has reached the age of puberty and the tutelage was over. If it can be, he will be discharged and can marry her with impunity; but if it cannot be accepted at the end of his period in office, he cannot legally marry her. Papinian, in the fifth book of his *Replies*, says that at the end of his period in office, his excuse should not be accepted, and so he is responsible for the time which has elapsed. I do not agree with this at all, because it is unjust for a tutor not to be excused for a delay which was not fraudulent, but was a necessary one, or for his marriage to be stopped once his excuse has been accepted. **5.** Though the terms of the oration provide that a tutor cannot marry his ward, this must be understood to mean that he cannot even be betrothed to her, since she cannot generally be betrothed to someone with whom she cannot contract a marriage; where a woman can be married, she can lawfully be betrothed. **6.** But what if the adopted son of a tutor marries the ward unlawfully and then be emancipated? We must take it that the senate did not have children who have been adopted and then emancipated in mind, because on emancipation the adoptive family is entirely left out of consideration. **7.** The natural children of a tutor, even where they have been adopted by someone else, are covered by the *senatus consultum*. **8.** But what if a tutor, on being appointed, appeals, and his heir is then defeated? He must be held responsible during this period. What if the heir is the tutor's son and he is defeated, does the oration apply here? It follows that it would, since he must render an account.

61. PAPINIAN, *Questions*, book 32: Where a dowry is confiscated because the marriage was unlawful, the husband must pay back all that he would have to in an action on dowry, with the exception of the necessary expenses which usually reduce the dowry by operation of law.

62. PAPINIAN, *Replies*, book 4: Although a father was willing to leave the marriage of his daughter to her mother, she cannot select a tutor for this task, because the father is presumed not to have envisaged a tutor being involved, since he especially wanted the mother herself to do it, not to hand the matter of her daughter's marriage over to a tutor. 1. It is improper for a woman to marry the freedman of her husband who is also her patron. 2. Where a tutor renders an account to a curator, he cannot marry the girl before she comes of age at the appointed time, even if she has become a mother by contracting another marriage in the meantime.

63. PAPINIAN, *Definitions*, book 1: Where the prefect of a cohort or of cavalry, or a tribune marries a woman of the province in which he holds office in spite of the legal prohibition, the marriage will be void. The case is similar to that of a ward, since both marriages are forbidden because positions of power are involved. But if a girl does marry in this instance, there is room for doubt whether she can be deprived of what was left to her by will. As in the case of a ward marrying her tutor, however, she can acquire everything which has been left to her. But any money given to her as dowry must be returned to the heir.

64. CALLISTRATUS, *Questions*, book 2: The senate decreed that a freedman who was also the tutor of his patron's daughter should be relegated because she had married him or his son. 1. I think that the *extraneus heres* of a tutor is covered by the terms of the *senatus consultum* which prohibits marriage between tutors and their sons and their wards, since marriages of this kind are forbidden in order to prevent wards being cheated out of their family property by those who are compelled to account to them for the administration of the tutelage. 2. A tutor is not prohibited from marrying his daughter to his ward.

65. PAUL, *Replies*, book 7: Those who serve as soldiers in their own countries do not contravene the regulations by marrying in their own province. Certain imperial decrees also state this. 1. Paul, in the same place, replied in connection with this: "I take the view that even though a marriage is contracted in a province contrary to the regulations, once the man lays down his office, and if the parties are still of the same mind the marriage will become lawful, and so any children born afterward will be the legitimate children of a valid marriage."

66. PAUL, *Views*, book 2. Where a tutor or a curator marries his ward himself, or gives her in marriage to his son before she has reached the age of twenty-six, unless she was betrothed to him by her father or allotted to him by will, the marriage will be void. Both parties will suffer *infamia* and be punished in extraordinary proceedings according to the ward's rank. It makes no difference here whether the son is independent or subject to parental power. 1. It is highly improper for the freedman of a curator to marry the ward of his patron who administers her affairs.

67. TRYPHONINUS, *Disputations*, book 9: A tutor's son is prohibited from marrying the ward whose tutelage the father is bound to account for. This is true whether the tutor is alive or dead. I do not think it makes any difference whether the son becomes his heir, or rejects his father's estate, or does not become the heir at all (because either he was disinherited or passed over after emancipation). For it could happen that property which has been fraudulently transferred to him by his father may have to be recovered because of the tutelage. 1. Doubt on one point may arise. Where a grandfather administers the tutelage of his emancipated son's granddaughter, can he marry her to a grandson by another son whether emancipated or still in his power, since his equal affection for them both will remove any suspicion of fraud? Although strictly the *senatus consultum* affects all kinds of tutors, nevertheless, because of the great affection shown by the grandfather, a marriage of this kind should be allowed. 2. Where a son-in-power is a girl's tutor or curator, I think there is even more reason for not allowing her to marry his father. Surely, she should not be allowed to marry his brother, who is in the power of the same father? 3. If the son of Titius marries a girl who was your ward, and you then adopt Titius or his son, let us see whether the marriage will be annulled, as it will in the case of an adopted son-in-law, or whether adoption will be an impediment to the marriage. This is the better view, and it also applies to a curator who, while carrying out his duties, adopts the husband of the girl whose curator he is. For as soon as the tutelage is at an end, and the girl is married to someone else, in order to prevent the adoption of her husband, I think it would be necessary to show that it was contrived to prevent an account of the tutelage being rendered, which the oration of the deified Marcus included as a ground for preventing such marriages. 4. Where a curator for the property of an unborn child is appointed, the prohibition in the *senatus consultum* will also apply to him, because he too must render an account. The time spent in administration should not concern us, because long or short, the time spent by a tutor or a curator in carrying out this kind of duty is

irrelevant. **5.** While Titius was administering the tutelage of a ward, or as her curator transacting business for her, she died before he had rendered his account and left a daughter as her heir. Could Titius give her in marriage to his son? I said he could, because the account due to the estate was a simple debt. Otherwise, every debtor who was liable to her for any reason at all would be unable to marry her himself or marry his son to her. **6.** Where a tutor stops his ward from accepting her father's estate, he should give her some explanation. If he acted without seeking advice, he might have judgment rendered against him because of it. But even if, after taking proper advice, he applied to the praetor because the girl's father died insolvent, as this must be proved in court, nevertheless, there will be an impediment to marriage. For the person who has administered a tutelage well and in good faith still cannot marry here.

68. PAUL, *Senatus Consultum Turpillianum*, sole book: Where a man marries one of his female ascendants or descendants, he commits incest according to the *jus gentium*. Someone who marries a female relative in the collateral line where this is forbidden or a woman connected by affinity where there is some impediment will incur a lighter penalty where he does this openly, but a heavier one if he does it secretly. The reason for this difference is that in the case of unlawfully contracted marriages in the collateral line, those who commit the offense in public are excused from the heavier penalty because they are considered to have acted in error. On the other hand, those who commit it in secret are punished because they acted in defiance of the law.

NOTES

1. *D. 23.2. (On the rite of nuptials)*—The following table lists the fragments in D.23.2 according to their “Masses” in Bluhme’s theory of the composition of the *Digest*. (Ad Sab = Ad Sabinum; Ad leg. I & P = Ad legem Iuliam et Papianam) D.23.2 contains two runs through the piles: Sabinian, Edictal, Papinianic and Edictal, Sabinian, Papinianic. Fragments that are out of order are starred. There follows a list of jurists quoted, legislation mentioned, and miscellaneous matters about the title.

Ed*	1. Modestinus, Regulae, 1	Pap	36. Paul, Quaestiones, 5
Sab*	2. Paul, Ad edictum, 35	Pap	37. Paul, Responsa, 7
Sab	3. Paul, Ad Sabinum, 1	Pap	38. Paul, Sententiae, 2
Sab	4. Pomponius, Ad Sab, 3	Ed	39. Paul, Ad Plautium, 6
Sab	5. Pomponius, Ad Sab, 4	Ed	40. Pomponius, Ex Plautio, 4
Sab*	6. Ulpian, Ad Sab, 35	Ed	41. Marcellus, Digesta, 26
Pap*	7. Paul, Ad legem Falcidiam 4	Ed	42. Modestinus, De ritu nuptiarum
Sab	8. Pomponius, Ad Sab, 5	Ed	43. Ulpian, Ad leg. I & P, 1
Sab	9. Ulpian, Ad Sab, 26	Ed	44. Paul, Ad leg. I & P, 1
Sab*	10. Paul, Ad edictum, 35	Ed	45. Ulpian, Ad leg. I & P, 3
Sab*	11. Julian, Digesta, 62	Ed	46. Gaius, Ad leg. I & P, 8
Sab	12. Ulpian, Ad Sab, 26	Ed *	47. Paul, Ad leg. I & P, 2
Sab	13. Ulpian, Ad Sab, 34	Ed	48. Terentius Clemens, Ad. leg. I. & P., 8
Sab	14. Paul, Ad edictum, 35	Ed	49. Marcellus, Ad leg. I & P, 1
Pap*	15. Papinian, Responsa, 4	Ed	50. Marcellus, Ad leg. I & P, 3
Sab	16. Paul, Ad edictum, 35	Ed	51. Licinnius Rufinus, Regulae, 1
Sab	17. Gaius, Ad ed. prov., 11	Sab	52. Paul, Ad Sab, 6
Sab	18. Julian, Digesta, 16	Sab	53. Gaius, Ad ed. prov., 11
Sab	19. Marcianus, Institutiones, 16	Sab*	54. Scaevola, Regulae, 1
Sab	20. Paul, Ad orationem divorum Severi & Commodi	Sab	55. Gaius, Ad ed. prov., 11
Ed*	21. Terentius Clemens, Ad leg. I. & P., 3	Sab	56. Ulpian, Disputationes, 3
Ed	22. Celsus, Digesta, 15	Sab	57. Marcianus, Institutiones, 2
Ed	23. Celsus, Digesta, 30	Sab	57a. Marcianus, Notae ad Papinian, De Adulteriis, 2
Ed	24. Modestinus, Regulae, 1	Sab	58. Marcianus, Regulae, 4
Ed	25. Modestinus, Regulae, 2	Sab	59. Paul, De Adsignatione libertorum
Ed	26. Modestinus, Responsa, 26	Sab	60. Paul, Ad orationem divorum Antonini et Commodi
Ed	27. Ulpian, Ad leg. I & P, 3	Pap	61. Papinian, Quaestiones, 32
Sab*	28. Marcianus, Institutiones, 10	Pap	62. Papinian, Responsa 4

Ed	29. Ulpian, Ad leg. I & P, 3	Pap	63. Papinian, Definitiones, 1
Ed	30. Gaius, Ad leg. I & P, 2	Pap	64. Callistratus, Quaestiones, 2
Ed	31. Ulpian, Ad leg. I & P, 6	Pap	65. Paul, Responsa, 7
Ed	32. Marcellus, Ad leg. I & P, 1	Pap	66. Paul, Sententiae, 2
Ed	33. Marcellus, Ad leg. I & P, 3	Pap	67. Tryphoninus, Disputationes, 9
Pap	34. Papinian, Responsa, 4	Pap	68. Paul, Ad SC. Turpillianum
Pap	35. Papinian, Responsa, 6		

2. Jurists quoted:

- a. Celsus (junior), Hadrianic jurist, choleric and a great definer, head of the Proculeans.
- b. Julian, great jurist of the Hadrianic period, consolidated the edict c. 138.
- c. Pomponius, probably an academic jurist, roughly contemporary with Gaius (mid-2a c.).
- d. Gaius, already discussed.
- e. Marcellus, Antonine jurist (2d half of 2d c.), member of the imperial *consilium*.
- f. Scaevola (not to be confused with Q. Mucius, the Republican jurist), chief legal adviser to Marcus Aurelius, *praefectus vigilium* in 175, gave many responses of great brevity.
- g. Terentius Clemens, uncertain, this is his only known work, prob. 2d c.
- h. Papinian, great Severan jurist, praetorian prefect murdered in 212 (?).
- i. Callistratus, a Greek, wrote on the *extraordinaria cognitio*, contemporary of Papinian.
- j. Tryphoninus, contemporary of Papinian and member of Severus's *consilium*.
- k. Paul, perhaps praetorian prefect under Alexander Severus, encyclopedic jurist with a waspish style.
- l. Ulpian, encyclopedic jurist, praetorian prefect murdered in 223 (?).
- m. Licinnius Rufus, contemporary of Paul and Ulpian of whom little is known.
- n. Marcianus, younger contemporary of Paul and Ulpian, known only from his works.
- o. Modestinus, the last of the classical jurists, *praefectus vigilium* under Alexander Severus, only classical jurist to write in Greek, died c. 244.

3. Legislation Mentioned:

- a. *Lex Falcidia* — 40 B.C. — limited the amount which a testator could give away by legacy to the disherision of his heir.
- b. *Lex Iulia de maritandis ordinibus* (18 B.C.); *Lex Papia Poppaea* (9 A.D.) — important Augustan legislation designed to encourage child-bearing among the aristocracy.
- c. *SC. Turpillianum* (61 A.D.) — designed to prevent private accusers from withdrawing from criminal proceedings (*tergiversatio*).
- d. *Oratio* [a late classical name for an SC, introduced by an *oratio principis*] *divorum Antonini et Commodi* — Marcus Aurelius (sole imp. 169–80) and Commodus (imp. 180–92), the *oratio* prohibited marriage between a tutor and his ward [both D. 23.2.20 and D. 23.2.60 concern this *oratio*].

4. Miscellaneous:

- a. Cinna (in D.23.2.6) — Republican jurist of 1st half 1st c. B.C., pupil of Servius Sulpicius Rufus.
 - b. Plautius — jurist of the 1st c. A.D.
 - c. *Adsignatio libertorum* — the assignment by a patron of his right of patronage over his freedmen.
 - d. Paul's *Sententiae* (D.23.2.38, .60) is the only work extracted here that has survived independent of the *Digest*. Unfortunately, what has survived is not Paul's work but either extracts from a genuinely Pauline work or a compilation from Paul's works, made, in either case, in the late 3d or 4th c.
5. *Extracts from the Ordinary Gloss on D.23..2.5–7.* (compiled mid-13th century with additions into the 16th century) (CD trans.):

D.23.2.5: *Rubric*: Words of the future tense having been proffered lead to matrimony if the woman is led to the house of the man; otherwise if the man goes to the house of the wife. This notable law says this. Bartolus.

D.23.2.5: *Casus*: The woman Berta was my wife by words of the future tense; I sent a letter for her, and she came to my house. She is now presumed [to be my] wife. But if she sent for me and I went to her house, she is not presumed [to be my] wife. For an espoused woman frequently goes to the house of her espoused as wife, but the man does not go to the house of his espoused as husband. He proves the first [point] by a quite like [case], for a certain Cinna contracted with Berta espousals of the future tense. At length he sent for her and she went to the house of her espoused, and the spouse had dinner and left by chance separately and fell into the river and perished. It is asked if he is to be mourned by her as husband. And he says yes. She is therefore wife by presumption of law and nonetheless she is a virgin. It says this with the two following laws. Vivianus.

5. POMPONIUS, *Sabinus*, book 4: It is settled that a woman can be married by a man in his absence, either by letter¹ or by messenger, if she is led to his house. But where she is absent,² she cannot³ be married by letter or by messenger because she must be led⁴ to her husband's house, not her own, since the former is, as it were, the domicile of the marriage.

6. ULPIAN, *Sabinus*, book 85: Finally according to Cinna, where a man married a woman in her absence,⁵ and on his way back from dinner⁶ by the side of the Tiber, he died, it was held⁷ that she ought to mourn for him as his wife.

7. PAUL, *Lex Falcidia*, sole book: So it is possible here for a virgin to have a dowry and an action for dowry.

¹ *by means of a letter*—Understand of the husband. And the sense *of this law is that a man can lead a wife by his messenger or by letters.* A woman, however, cannot marry by her own messenger. For it is necessary that she be led into the house of the husband, and by that fact she is presumed** to have been made wife, if it does not appear clearly other wise. A husband,*** however, is not said to be made by the fact alone, that he has gone to the espoused's house, since laws are fitted to those things which happen more often, according to R[?offredus Beneventanus, probably Rogerius], as above, [D.1.3.5.]

* A man can lead a wife by or through a letter. [Godefroy]

** She is presumed to have been made wife who after espousals of the future tense has been lead into the house of the man. [Godefroy]

*** Someone is not presumed to be a husband by a leading into the house of the espoused woman. [Godefroy]

² *remains absent*—Understand from the house of the husband and her own. Azo.

³ *cannot*—That she be a wife before she has come to the house of the man, although he goes to the house of the wife.

⁴ *she must be brought*—Understand that the bringing may be adequate testimony of the nuptials.*

* By leading or handing over to the house of the man after espousals of the future tense, marriage is presumed, as here and D.35.1.15 v^o *ducta*; see more about this in [Josephus] Mascardus [d. 1588], *On conclusive proofs*, lib. 2, p. 1031.

⁵ *absent**—For by his friends he had her led to his house, as above preceding law.

* *absent*—Thus in the *Florentinus*. There are those who think that “woman who is absent” is the more correct reading. [Godefroy]

⁶ *from a banquet*—Held in the house of the man according to the first [law].

⁷ *it is held*—Even if his body does not appear, as D.3.2.25. [“If anyone falls in battle, he will be mourned even if his body doesn't appear.”] Accursius.

G. CODE 5.4 (CONCERNING MARRIAGE)

[In S.P. Scott trans., *The Civil Law* 13:146–55.]¹

TITLE IV. Concerning Marriage.

1. *The Emperors Severus and Antoninus to Porcius*. [(Septimius) Severus and Antoninus (Caracalla), A.D. 199.]²

When a question arises with reference to the marriage of a young girl, and the guardian, the mother, and the relatives cannot agree as to the selection of a husband, the decision of the Governor of the province must be obtained.

2. *The Same to Trophima*. [198 X 207.]

If your father consented to your marriage, it makes no difference, so far as you are concerned, if he did not sign the marriage contract.

3. *The Same to Valeria*. [The Same(?), 196.]

You can, before a competent judge, accuse a freedman who has dared to marry his patroness, or the daughter, the wife, the granddaughter, or the great-granddaughter of his patron, in order that a decision may be rendered in accordance with the customs of the present times, which very properly regard an union of this kind as odious.

4. *The Emperor Alexander to Perpetuus*. [(Severus) Alexander, 228.]

Children cannot marry the concubines of their ascendants, for the reason that an act of this kind when committed by them is not praiseworthy, and indicates a lack of filial duty. Those who violate this law are guilty of the crime of fornication.

5. *The Same to Maxima*. [222 X 235.]

If (as you allege) your husband's father, under whose power he was, having learned of your marriage, did not oppose it, you should not fear that he will not recognize his grandson.

6. *The Emperor Gordian to Valeria*. [239.]

When, contrary to the command of the Emperor, a marriage with an official has taken place in a province with the consent of the woman, still, if she remains of the same mind after the man has relinquished his employment, the marriage becomes legal, and hence any children who have been conceived and born of it are legitimate, as is set forth in the opinion of the most learned Paulus.

7. *The Same to Aper*. [240.]

If (as you state) after a complaint has been made to you by your daughter against her husband, the marriage was dissolved, and the parties again became united without your consent, the marriage is illegitimate, as it was contracted without the consent of the father, under whose control the woman was, and therefore, as your daughter does not claim her dowry, you will not be prevented from bringing suit to recover it.

8. *The Same to Romanus*. [241.]

In questions relating to marriage, neither the authority of the curator (which only extends to the administration of the property of the minor) nor that of the blood-relatives or connections can be interposed, but the will of the person whose marriage in question should be considered.

9. *The Emperor Probus to Fortunatus*. [276 X 281.]

When, with the knowledge of your neighbors or others, you keep your wife at home for the purpose of having children, and a daughter is born of this marriage, although neither the nuptial contract nor the birth

¹ Probably because he was more interested in the second life of Roman law rather than in the classical law, Scott translated the "vulgate" edition of the Code, the one used by the medieval glossators and practitioners of the *mos italicus* in the early modern period. In what follows, I have corrected the ascriptions of the extracts from Code in square brackets following the translated catch-line and have noted where the vulgate edition includes material that is not in the original text.

² The inscription in italics is that given in the vulgate, that in brackets gives modern corrections and/or dates.

certificate of the daughter may have been published, the fact of the marriage and the legitimate birth of your daughter are none the less established on that account.

10. *The Emperors Diocletian and Maximian, and the Caesars, to Paulina.* [293 X 305. Ceasars = Maximian and Constantine.]

As you allege that you did not attain to the rank of an illustrious woman because your father was a senator, but for the reason that you contracted marriage with a member of the Senate, you will lose the exalted position which you obtained from your first husband, and be reduced to your former status, if you should subsequently marry a man of inferior degree.

11. *The Same Emperors and Caesars to Alexander.* [293 X 305.]

If your wife is detained by her parents without her consent, and Our friend the Governor of the province is notified of the fact, he will grant your request, and having caused the woman to be produced, you can consult her wishes in the matter.

12. *The Same Emperors and Caesars to Sabinus.* [The Same (?), 285.]

The policy of the law does not permit that even a son under paternal control shall be compelled to marry against his consent. Therefore if you observe the ordinary legal precepts, you will not be prevented from marrying the wife whom you may choose, if you desire to do so, provided, however, that your father consents to the marriage.

13. *The Same Emperors and Caesars to Onesimus.* [293 X 305.]

Instruments drawn up for the proof of marriage are not suitable for that purpose when the ceremony does not take place and they contain what is not true; but where no instruments have been drawn up, a marriage which has been contracted with the requisite formalities is not void, since by the failure to reduce the contract to writing, the other evidence of its solemnization is not invalidated.

14. *The Same Emperors and Caesars to Titius.* [293 X 305.]

No one can be compelled either to contract marriage in the beginning, or to renew it after it has once been dissolved. Therefore you understand that the unrestrained power of dissolving and contracting marriage cannot be rendered a matter of necessity.

15. *The Same Emperors and Caesars to Tatian.* [293 X 305.]

Anyone who has manumitted a slave is not forbidden to marry her, if he does not belong to one of those classes of persons especially prohibited from doing so; and it is absolutely certain that legitimate children can be born to a father by such a marriage.

Extract from Novel 78, Chapter III. Latin Text. [Not in original.]

By the new law, however, no rank prevents anyone from marrying his freedwoman, provided dotal instruments are drawn up with reference to the marriage.

16. *The Same Emperors and Caesars to Rhodonus.* [293 X 305.]

It is proper that a father who exposed his daughter, who was taken by you and brought up at your expense, and under your care, should consent for her to be married to your son. If, however, he refuses to give his consent, he should be compelled to do so only in case he indemnifies you for the maintenance which you provided for his daughter.

17. *The Same Emperors and Caesars.* [295.]

No one shall be permitted to contract marriage with his daughter, his granddaughter, or his great-granddaughter, his mother, his grandmother, or his great-grandmother; and, in the collateral line, with his paternal or maternal aunt, his sister, the daughter of his sister, or her granddaughter; nor with the daughter of his brother, or his granddaughter; and among connections by marriage, with his step daughter, his stepmother, his daughter-in-law, his mother-in-law, or any other persons prohibited by ancient law, with whom We desire that all persons shall abstain from contracting marriage.

18. *The Emperors Valentinian, Valens, and Gratian to the Senate.* [371.]

Widows under the age of twenty-five, even though they may have obtained the freedom of emancipation, still cannot marry a second time without the consent of their fathers. If, however, in the

choice of a husband, the desire of the woman is opposed to that of her father, and other relatives, it is established (just as has already been decreed with reference to the marriage of virgins), that judicial authority should be interposed for the purpose of examination, and if the parties are equal in family, and in morals, he shall be considered preferable whom the woman has selected for herself. But in order to prevent those who are nearest in degree to the succession of widows, from hindering the latter from contracting honorable marriage, where any suspicion of this kind arises, We desire that authority of the courts should be invoked to prevent her estate from descending to them, if death should occur.

Given on the seventeenth of the *Kalends* of August, during the Consulate of Gratian, Consul for the second time, and Probus, 371.

19. *The Emperors Arcadius and Honorius to Eutychianus, Praetorian Prefect.* [405.]

Marriage between first cousins is permitted by this salutary law, so that the former one having been annulled, and the temptation to calumny having been restrained, marriage between such cousins shall be considered lawful, whether they are the children of two brothers, or of two sisters, or of brother and sister; and any children by such a marriage shall be legitimate and can become the heirs of their parents.

Given during the Consulate of Stilicho, Consul for the second time, and Anthemius, 405.

20. *The Emperors Honorius and Theodosius to Theodore, Praetorian Prefect.* [Theodosius II, 408 X 409.]

The wishes of the father are to be considered in case of the marriage of daughters under paternal control. Where, however, a girl is her own mistress, and is under twenty-five years of age, the consent of her father must be obtained. Where she is deprived of the aid of her father, the consent of her mother and her kindred, as well as of herself, will be necessary.

If, however, having lost both her parents, she has been placed under the protection of a curator, and a dispute should arise between several honorable candidates for marriage, so that it may be doubtful to which one it would be advantageous for the girl to be united, and she, through modesty, is unwilling to express her preference in the presence of her relatives, the judge is authorized to decide to which suitor it is best that she be married.

21. *The Emperors Theodosius and Valentian to Basses, Praetorian Prefect.* [Theodosius II and Valentinian, 426.]

We grant free permission to soldiers, from those of no military rank up to that of protector, to contract marriage with freeborn women, without any of the usual formalities.

22. *The Same to Hierius, Praetorian Prefect.* [428.]

If the instruments relating to an ante-nuptial contract or a dowry are lacking, and the ceremony and other formalities associated with marriage have been omitted, let no one think that, on account of this neglect, marriage which has otherwise been legally performed is not valid; or that on this account children born of it can be deprived of their rights as legitimate; for among persons of equal standing, whose union is not prevented by any law, matrimonial union will take place by their own consent and the testimony of their friends.

Given at Constantinople, on the tenth of the *Kalends* of March, during the Consulate of Felix and Taurus, 428.

23. *The Emperor Justinian to Demosthenes, Praetorian Prefect.* [Justin (N.B.), 520 X 523.]

Believing that it is a peculiar duty of Imperial beneficence at all times not only to consider the convenience of Our subjects, but also to attempt to supply their needs, We have determined that the errors of women on account of which, through the weakness of their sex, they have chosen to be guilty of dishonorable conduct, should be corrected by a display of proper moderation, and that they should by no means be deprived of the hope of an improvement of status, so that, taking this into consideration, they may the more readily abandon the improvident and disgraceful choice of life which they have made.

For We believe that the benevolence of God, and His exceeding clemency towards the human race, should be imitated by Us (as far as Our nature will permit), who is always willing to pardon the sins daily committed by man, accept Our repentance, and bring us to a better condition. Hence, We should seem to

be unworthy of pardon Ourselves were We to fail to act in this manner with reference to those subject to Our empire.

(1) Therefore, as it would be unjust for slaves, to whom their liberty has been given, to be raised by Imperial indulgence to the status of men who are born free, and, by the effect of an Imperial privilege of this kind, be placed in the same position as if they had never been slaves, but were freeborn; and that women who had devoted themselves to theatrical performances, and, afterwards having become disgusted with this degraded status, abandoned their infamous occupation and obtained better repute, should have no hope of obtaining any benefit from the Emperor, who had the power to place them in the condition in which they could have remained, if they had never been guilty of dishonorable acts, We, by the present most merciful law, grant them this Imperial benefit under the condition that where, having deserted their evil and disgraceful condition, they embrace a more proper life, and conduct themselves honorably, they shall be permitted to petition Us to grant them Our Divine permission to contract legal marriage when they are unquestionably worthy of it. Those who may be united with them need be under no apprehension, nor think that such marriages are void by the provisions of former laws; but, on the other hand, they shall remain valid, and be considered just as if the women had never previously led dishonorable lives, whether their husbands are invested with office, or, for some other reason, are prohibited from marrying women of the stage, provided, however, that the marriage can be proved by dotal contracts reduced to writing. For women of this kind having been purified from all blemishes, any as it were, restored to the condition in which they were born, We desire that no disgraceful epithet be applied to them, and that no difference shall exist between them and those who have never committed a similar breach of morality.

(2) Children born of a marriage of this kind shall be legitimate, and the proper heirs of their father, even though he may have other lawful heirs by a former marriage; so that such children may also, without any obstacle, be able to acquire the estates of their parents, either *ab intestato*, or under the terms of a will.

(3) If, however, women of this description, after an Imperial Rescript has been granted them in accordance with their request, should defer contracting marriage, We order that their reputations shall, nevertheless, remain intact, as in the case of all others who may desire to transfer their property to anyone; and that they shall be competent to receive anything bequeathed to them, in accordance with law, or an estate which may descend to them on the ground of intestacy.

Extract from Novel 51. Latin Text. [Not in original.]

These privileges shall be granted them, even if they may have sworn that they will continue in their former profession, because it is expressly stated by the laws that an oath to perform an unlawful act must not be observed, and that the penalty for perjury, if any exists, shall be inflicted upon him who exacts an oath of this description.

End of extract. The text of the Code follows.

(4) We also decree that such of these women as have obtained a privilege from the Emperor shall occupy the same position as those who have obtained some other benefit which was not bestowed by the sovereign, but was acquired by them as a voluntary donation before their marriage; for, by a concession of this kind, every other stigma on account of which women are forbidden to contract lawful marriage with certain men is absolutely removed.

(5) To this We add that when the daughters of women of this kind are born after the purification of their mother from the disgrace of her former life, they shall not be considered as the children of females belonging to the stage, or be subject to the laws which forbid certain men to marry such women. Where, however, they were born before that time, they shall be permitted to petition the Emperor for a Rescript, which should be granted without any opposition, by means of which they may be permitted to marry, just as if they were not the daughters of actresses; and those men shall not be prohibited from marrying them who are forbidden to take as wives girls belonging to the stage, either on account of their own rank, or for some other reason; provided, however, that in every instance, dotal instruments in writing are executed by the parties concerned.

(6) If, however, a girl born of a theatrical mother, who practiced her profession until the time of her death, should, after her mother's decease, petition for Imperial indulgence, and obtain it, she shall be freed from the blemish of her mother's reputation, and herself be granted permission to marry; and she

also can without the fear of former laws be united in matrimony with those who not long ago were prohibited from marrying the daughter of an actress.

(7) Moreover, We have thought that what was prescribed by former laws (although this was somewhat obscure) should be abolished, namely, that a marriage contracted between persons of unequal rank shall not be considered valid, unless dotal instruments with reference to it were executed. When, however, this does not take place, such marriages shall still be absolutely valid, without any distinction of persons, provided the women are free and freeborn, and that no suspicion of any criminal or incestuous union arises, for We, under an circumstances, annul criminal and incestuous unions, as well as those which were especially prohibited by the provisions of former laws; with the exception, however, of such as We authorize by the present decree, and direct shall be considered legal, in accordance with the rights of marriage.³

Extract from Novel 117, Chapter IV. Latin Text. [Not in original.]

Those who are invested with exalted dignity, up to persons styled illustrious, cannot legally contract matrimony, unless dotal instruments have been drawn up in writing, although marriages previously contracted will stand. Barbarians are excepted from this rule, but all others can legally marry under the inducement of affection alone.

End of extract. The text of the Code follows.

(8) Therefore these matters having been settled in this manner, by this general law which must hereafter be observed, We order that any such unions which have subsequently been made shall be regulated in accordance with the aforesaid provisions; so that where any one has married a wife of this kind during Our reign (as has already been stated), and has children by her, they shall be legitimate, and be entitled to succeed to their father ab intestate, as well as under a will, and the wife, as well as any children hereafter born of her, shall also be considered legitimate.

24. The Same to the Senate. [Justinian, 530.]

We order that if anyone should, in any agreement whatsoever, whether it is drawn up for the purpose of giving something, or for the performance of some act, or for not giving anything, or for the non-performance of some act, either refer to the time of his marriage or merely mention the marriage itself, the condition of the contract shall not be understood to have been complied with, or not to have been dispensed with, unless the ceremony of marriage actually takes place; and that the age at which marriage can be solemnized, which in the case of a female is after she has completed her twelfth year, and in case of a male after he has completed his fourteenth year, should not be considered, but the time when the marriage was performed shall only be taken into account; for in this way any disputes arising from the ancient law are disposed of, and the immense number of volumes on this subject are reduced to very few.

25. The Same to Julian, Praetorian Prefect. [530.]

The question was discussed by the ancients whether the children of insane parents, under whose control they were, could marry. Almost all the legal authorities admitted that the daughter of an insane person could marry, for they thought it was sufficient if the father did not object, but it was doubted whether a son could do so. Ulpian refers to a Constitution of the Emperor Marcus, which does not mention lunatics, but in general terms alludes to children of persons of weak minds, whether they are males or females, who contract marriage; and he states that they can do so without applying to the Emperor.

Another doubt arises from this constitution, that is to say, whether what it provides, with reference to persons of weak minds, should also apply to those who are insane; and whether the children of lunatics are also entitled to relief, just as those of a person of feeble intellect. Therefore, for the purpose of disposing of these doubts and difficulties, We order that whatever appears to be lacking in the Constitution of the Divine Marcus shall be supplied by the following provision, that is to say, that not only the children of a person of weak intellect, but also those of one who is insane, of either sex, can legally contract marriage; and that the dowry, as well as the ante-nuptial donation, shall be furnished by their curators. The amount of the dowry, as well as that of the ante-nuptial donation, must, in this

³ These laws were unquestionably promulgated in a vain attempt to render the Empress Theodora, who had been an actress, and whose vices had been the scandal of the Empire, respectable. [SPS]

Imperial City, be determined by the estimate of the most excellent Urban Prefect, and in the provinces by that of the illustrious Governors, or by the bishops of the various dioceses; and the curator of the person who has lost his mind or has become insane should be present, as well as those highest in rank in their families, so that nothing may arise in a case of this kind, either in this Imperial City, or in the provinces, to cause any loss of the property of said insane person, or of him of enfeebled intellect; and these proceedings shall be undertaken gratuitously, so that a human misfortune of this description may not be aggravated by any expense.

26. *The Same to Julian, Praetorian Prefect.* [530.] [CD modified trans.]

If anyone should grant freedom to his foster-daughter, and marry her, a doubt arose among the ancients whether a marriage of this kind should be considered lawful or not. **1.** Therefore We, desiring to resolve this long-existing doubt, decree that such a marriage is not prohibited, for if all marriages have their origin in affection (*adfectu*), and We find nothing impious or contrary to law in such a union, why should We think that they ought not to be allowed? No man can be found who is so wicked as to afterwards marry a girl whom, in the first place, he treated as his daughter; but it should be believed that he did not originally bring her up as his daughter, but gave her her freedom, and afterwards deemed her worthy to be married to him. **2.** A woman should, by all means, be prevented from marrying her godfather who received her in baptism whether she is his foster-child or not, as nothing else can be so productive of paternal affection and just prohibition of marriage as a tie of this kind, by means of which, through the mediation of God, the souls of the parties in question are united.

27. *The Same to John, Praetorian Prefect.* [531 X 532.]

We order that marriages which take place between men and women who are more or less than fifty or sixty years of age, and which are prohibited by the *Lex Julia et Papia*, cannot be prevented in any way, or on either side, where the men consent.

28. *The Same to John, Praetorian Prefect.* [531 X 532.]

Where a man has a wife who is a freedwoman, and afterwards becomes illustrious by being raised to the dignity of Senator, the question is raised by Ulpian whether the marriage is dissolved by his promotion, because the *Lex Papia* does not permit marriages to exist between senators and freedwomen. Hence We, following the judgment of God, do not permit that, in one and the same marriage, the happiness of the husband should become the misfortune of his wife, so that his wife may be debased to the extent that he is elevated, and indeed that she should absolutely be lost to him; therefore, as severity of this kind ought not to exist in our times, and the marriage should stand, and the wife rise with her husband and share his distinction, the marriage shall remain valid, and shall be, to no extent, affected by an occurrence of this description.

In like manner, where the daughter of a private person marries a freedman, and her father is afterwards raised to the senatorial dignity, the cruel provision of the Papian Law is silent on this point, and the marriage celebrated between the daughter of one who has become a senator and a freedman must not be dissolved on this account, so that the prosperity of the father-in-law may not be attained without the loss of his son-in-law; for it is better that the harshness of the Papian Law should be mitigated in both instances, rather than, by observing it, the marriages of men should be annulled, not on account of any vice of the wife or the husband, but because of the good fortune of both, for, as this defect proceeds from one source, the result is that it is removed by one law.

[One more extract is found in the original edition of the *Code* by Justinian, in Greek, published in 529.]