

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

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 Papiam) 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 led 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.