

## PART I. THE LEGACY OF ROMAN LAW

### A. JUSTINIAN'S INSTITUTES

Contents, Proemium, 1.1-3, 1.8pr, 1.9-10, 2.1-2, 2.5.6, 2.9.6, 3.13, 4.1pr, 4.6.pr-30  
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**PROOEMIUM**

IN the name of our Lord Jesus Christ.

The Emperor Caesar Flavius Justinian, conqueror of the Alamanni, the Goths, the Franks, the Germans, the Antes, the Alani, the Vandals, the Africans, pious, prosperous, renowned, victorious, and triumphant, ever august,

To the youth desirous of studying the law:

The imperial majesty should be armed with laws as well as glorified with arms, that there may be good government in times both of war and of peace, and the ruler of Rome may not only be victorious over his enemies, but may show himself as scrupulously regardful of justice as triumphant over his conquered foes.

1. With deepest application and forethought, and by the blessing of God, we have attained both of these objects. The barbarian nations which we have subjugated know our valour, Africa and other provinces without number being once more, after so long an interval, reduced beneath the sway of Rome by victories granted by Heaven, and themselves bearing witness to our dominion. All peoples too are ruled by laws which we have either enacted or arranged. 2. Having removed every inconsistency from the sacred constitutions, hitherto inharmonious and confused, we extended our care to the immense volumes of the older jurisprudence; and, like sailors crossing the mid-ocean, by the favour of Heaven have now completed a work of which we once despaired. 3. When this, with God's blessing, had been done, we called together that distinguished man Tribonian, master and ex-quaestor of our sacred palace, and the illustrious Theophilus and Dorotheus, professors of law, of whose ability, legal knowledge, and trusty observance of our orders we have received many and genuine proofs, and specially commissioned them to compose by our authority and advice a book of Institutes, whereby you may be enabled to learn your first lessons in law no longer from ancient fables, but to grasp them by the brilliant light of imperial learning, and that your ears and minds may receive nothing useless or incorrect, but only what holds good in actual fact. And thus whereas in past time even the foremost of you were unable to read the imperial constitutions until after four years, you, who have been so honoured and fortunate as to receive both the beginning and the end of your legal teaching from the mouth of the Emperor, can now enter on the study of them without delay. 4. After the completion therefore of the fifty books of the Digest or Pandects, in which all the earlier law has been collected by the aid of the said distinguished Tribonian and other illustrious and most able men, we directed the division of these same Institutes into four books, comprising the first elements of the whole science of law. 5. In these the law previously obtaining has been briefly stated, as well as that which after becoming disused has been again brought to light by our imperial aid. 6. Compiled from all the Institutes of the

ancient jurists, and in particular from the commentaries of our Gaius on both the Institutes and the common cases, and from many other legal works, these Institutes were submitted to us by the three learned men aforesaid, and after reading and examining them we have given them the fullest force of our constitutions.

7. Receive then these laws with your best powers and with the eagerness of study, and show yourselves so learned as to be encouraged to hope that when you have compassed the whole field of law you may have ability to govern such portion of the state as may be entrusted to you.

Given at Constantinople the 21st day of November, in the third consulate of the Emperor Justinian, Father of his Country, ever august.

### **BOOK I**

#### TITLE I OF JUSTICE AND LAW

JUSTICE is the set and constant purpose which gives to every man his due. 1. Jurisprudence is the knowledge of things divine and human, the science of the just and the unjust.

2. Having laid down these general definitions, and our object being the exposition of the law of the Roman people, we think that the most advantageous plan will be to commence with an easy and simple path, and then to proceed to details with a most careful and scrupulous exactness of interpretation. Otherwise, if we begin by burdening the student's memory, as yet weak and untrained, with a multitude and variety of matters, one of two things will happen: either we shall cause him wholly to desert the study of law, or else we shall bring him at last, after great labour, and often, too, distrustful of his own powers (the commonest cause, among the young, of ill-success), to a point which he might have reached earlier, without such labour and confident in himself, had he been led along a smoother path.

3. The precepts of the law are these: to live honestly, to injure no one, and to give every man his due. 4. The study of law consists of two branches, law public, and law private. The former relates to the welfare of the Roman State; the latter to the advantage of the individual citizen. Of private law then we may say that it is of threefold origin, being collected from the precepts of nature, from those of the law of nations, or from those of the civil law of Rome.

#### TITLE II OF THE LAW OF NATURE, THE LAW OF NATIONS, AND THE CIVIL LAW

The law of nature is that which she has taught all animals; a law not peculiar to the human race, but shared by all living creatures, whether denizens of the air, the dry land, or the sea. Hence comes the union of male and female, which we call marriage; hence the procreation and rearing of children, for this is a law by the knowledge of which we see even the lower animals are distinguished. 1. The civil law of Rome, and the law of all nations, differ from each other thus. The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. Those rules which a state enacts for its own members are peculiar to itself, and are called civil law: those rules prescribed by natural reason for all men are observed by all peoples alike, and are called the law of nations. Thus the laws of the Roman people are partly peculiar to itself, partly common to all nations; a distinction of which we shall take notice as occasion offers. 2. Civil law takes its name from the state wherein it binds; for instance, the civil law of Athens, it being quite correct to speak thus of the enactments of Solon or Draco. So too we call the law observed by the Roman people the civil law of the Romans, or the law of the Quirites; the law, that is to say, which they observe, the Romans being called Quirites after Quirinus. Whenever we speak, however, of civil law, without any qualification, we mean our own; exactly as, when 'the poet' is spoken of, without addition or qualification, the Greeks understand the great Homer, and we understand Vergil. But the law of nations is common to the whole human race; for nations have settled certain things for themselves as occasion and the necessities of human life required. For instance, wars arose, and then followed captivity and slavery, which are contrary to the law of nature; for by the law of nature all men from the beginning were born free. The law of nations again is the source of almost all contracts; for instance, sale, hire, partnership, deposit, loan for consumption, and very many others.

3. Our law is partly written, partly unwritten, as among the Greeks. The written law consists of statutes, plebiscites, senatusconsults, enactments of the Emperors, edicts of the magistrates, and answers of those

learned in the law. **4.** A statute is an enactment of the Roman people, which it used to make on the motion of a senatorial magistrate, as for instance a consul. A plebiscite is an enactment of the commonalty, such as was made on the motion of one of their own magistrates, as a tribune. The commonalty differs from the people as a species from its genus; for 'the people' includes whole aggregate of citizens, among them patricians and senators, while the term 'commonalty' embraces only such citizens as are not patricians or senators. After the passing, however, of the statute called the *lex Hortensia*, plebiscites acquired for the first time the force of statutes. **5.** A *senatusconsult* is a command and ordinance of the senate, for when the Roman people had been so increased that it was difficult to assemble it together for the purpose of enacting statutes, it seemed right that the senate should be consulted instead of the people. **6.** Again, what the Emperor determines has the force of a statute, the people having conferred on him all their authority and power by the *lex regia*, which was passed concerning his office and authority. Consequently, whatever the Emperor settles by rescript, or decides in his judicial capacity, or ordains by edicts, is clearly a statute: and these are what are called constitutions. Some of these of course are personal, and not to be followed as precedents, since this is not the Emperor's will; for a favour bestowed on individual merit, or a penalty inflicted for individual wrongdoing, or relief given without a precedent, do not go beyond the particular person: though others are general, and bind all beyond a doubt. **7.** The edicts of the praetors too have no small legal authority, and these we are used to call the *ius honorarium*, because those who occupy posts of honour in the state, in other words the magistrates, have given authority to this branch of law. The curule aediles also used to issue an edict relating to certain matters, which forms part of the *ius honorarium*. **8.** The answers of those learned in the law are the opinions and views of persons authorized to determine and expound the law; for it was of old provided that certain persons should publicly interpret the laws, who were called juriconsults, and whom the Emperor privileged to give formal answers. If they were unanimous the judge was forbidden by imperial constitution to depart from their opinion, so great was its authority. **9.** The unwritten law is that which usage has approved: for ancient customs, when approved by consent of those who follow them, are like statute. **10.** And this division of the civil law into two kinds seems not inappropriate, for it appears to have originated in the institutions of two states, namely Athens and Lacedaemon; it having been usual in the latter to commit to memory what was observed as law, while the Athenians observed only what they had made permanent in written statutes.

**11.** But the laws of nature, which are observed by all nations alike, are established, as it were, by divine providence, and remain ever fixed and immutable: but the municipal laws of each individual state are subject to frequent change, either by the tacit consent of the people, or by the subsequent enactment of another statute.

**12.** The whole of the law which we observe relates either to persons, or to things, or to actions. And first let us speak of persons: for it is useless to know the law without knowing the persons for whose sake it was established.

### TITLE III OF THE LAW OF PERSONS

In the law of persons, then, the first division is into free men and slaves. **1.** Freedom, from which men are called free, is a man's natural power of doing what he pleases, so far as he is not prevented by force or law: **2.** Slavery is an institution of the law of nations, against nature subjecting one man to the dominion of another. **3.** The name 'slave' is derived from the practice of generals to order the preservation and sale of captives, instead of killing them; hence they are also called *mancipia*, because they are taken from the enemy by the strong hand. **4.** Slaves are either born so, their mothers being slaves themselves; or they become so, and this either by the law of nations, that is to say by capture in war, or by the civil law, as when a free man, over twenty years of age, collusively allows himself to be sold in order that he may share the purchase money. The condition of all slaves is one and the same: in the conditions of free men there are many distinctions; to begin with, they are either free born, or made free. ...

### TITLE VIII OF PERSONS INDEPENDENT OR DEPENDENT

Another division of the law relating to persons classifies them as either independent or dependent. Those again who are dependent are in the power either of parents or of masters. Let us first then consider those who are dependent, for by learning who these are we shall at the same time learn who are independent. ...

## TITLE IX OF PATERNAL POWER

Our children whom we have begotten in lawful wedlock are in our power. **1.** Wedlock or matrimony is the union of male and female, involving the habitual intercourse of daily life. **2.** The power which we have over our children is peculiar to Roman citizens, and is found in no other nation. **3.** The offspring then of you and your wife is in your power, and so too is that of your son and his wife, that is to say, your grandson and granddaughter, and so on. But the offspring of your daughter is not in your power, but in that of its own father.

## TITLE X OF MARRIAGE

Roman citizens are joined together in lawful wedlock when they are united according to law, the man having reached years of puberty and the woman being of a marriageable age, whether they be independent or dependent: provided that, in the latter case, they must have the consent of the parents in whose power they respectively are, the necessity of which, and even of its being given before the marriage takes place, is recognized no less by natural reason than by law. Hence the question has arisen, can the daughter or son of a lunatic lawfully contract marriage? and as the doubt still remained with regard to the son, we decided that, like the daughter, the son of a lunatic might marry even without the intervention of his father, according to the mode prescribed by our constitution.

**1.** It is not every woman that can be taken to wife: for marriage with certain classes of persons is forbidden. Thus, persons related as ascendant and descendant are incapable of lawfully intermarrying; for instance, father and daughter, grandfather and granddaughter, mother and son, grandmother and grandson, and so on *ad infinitum*; and the union of such persons is called criminal and incestuous. And so absolute is the rule, that persons related as ascendant and descendant merely by adoption are so utterly prohibited from intermarriage that dissolution of the adoption does not dissolve the prohibition: so that an adoptive daughter or granddaughter cannot be taken to wife even after emancipation.

**2.** Collateral relations also are subject to similar prohibitions, but not so stringent. Brother and sister indeed are prohibited from intermarriage, whether they are both of the same father and mother, or have only one parent in common: but though an adoptive sister cannot, during the subsistence of the adoption, become a man's wife, yet if the adoption is dissolved by her emancipation, or if the man is emancipated, there is no impediment to their intermarriage. Consequently, if a man wished to adopt his son-in-law, he ought first to emancipate his daughter: and if he wished to adopt his daughter-in-law, he ought first to emancipate his son. **3.** A man may not marry his brother's or his sister's daughter, or even his or her granddaughter, though she is in the fourth degree; for when we may not marry a person's daughter, we may not marry the granddaughter either. But there seems to be no obstacle to a man's marrying the daughter of a woman whom his father has adopted, for she is no relation of his by either natural or civil law. **4.** The children of two brothers or sisters, or of a brother and sister, may lawfully intermarry. **5.** Again, a man may not marry his father's sister, even though the tie be merely adoptive, or his mother's sister: for they are considered to stand in the relation of ascendants. For the same reason too a man may not marry his great-aunt either paternal or maternal. **6.** Certain marriages again are prohibited on the ground of affinity, or the tie between a man or his wife and the kin of the other respectively. For instance, a man may not marry his wife's daughter or his son's wife, for both are to him in the position of daughters. By wife's daughter or son's wife we must be understood to mean persons who have been thus related to us; for if a woman is still your daughter-in-law, that is, is still married to your son, you cannot marry her for another reason, namely, because she cannot be the wife of two persons at once. So too if a woman is still your stepdaughter, that is, if her mother is still married to you, you cannot marry her for the same reason, namely, because a man cannot have two wives at the same time. **7.** Again, it is forbidden for a man to marry his wife's mother or his father's wife, because to him they are in the position of a mother, though in this case too our statement applies only after the relationship has finally terminated; otherwise, if a woman is still your stepmother, that is, is married to your father, the common rule of law prevents her from marrying you, because a woman cannot have two husbands at the same time: and if she is still your wife's mother, that is, if her daughter is still married to you, you cannot marry her because you cannot have two wives at the same time. **8.** But a son of the husband by another wife, and a daughter of the wife by another husband, and vice versa, can lawfully

intermarry, even though they have a brother or sister born of the second marriage. **9.** If a woman who has been divorced from you has a daughter by a second husband, she is not your stepdaughter, but Iulian is of opinion that you ought not to marry her, on the ground that though your son's betrothed is not your daughter-in-law, nor your father's betrothed your stepmother, yet it is more decent and more in accordance with what is right to abstain IO from intermarrying with them. **10.** It is certain that the rules relating to the prohibited degrees of marriage apply to slaves: supposing, for instance, that a father and daughter, or a brother and sister, acquired freedom by manumission. **11.** There are also other persons who for various reasons are forbidden to intermarry, a list of whom we have permitted to be inserted in the books of the Digest or Pandects collected from the older law.

**12.** Alliances which infringe the rules here stated do not confer the status of husband and wife, nor is there in such case either wedlock or marriage or dowry. Consequently children born of such a connexion are not in their father's power, but as regards the latter are in the position of children born of promiscuous intercourse, who, their paternity being uncertain, are deemed to have no father at all, and who are called bastards, either from the Greek word denoting illicit intercourse, or because they are fatherless. Consequently, on the dissolution of such a connexion there can be no claim for return of dowry. Persons who contract prohibited marriages are subjected to penalties set forth in our sacred constitutions.

**13.** Sometimes it happens that children who are not born in their father's power are subsequently brought under it. Such for instance is the case of a natural son made subject to his father's power by being inscribed a member of the curia; and so too is that of a child of a free woman with whom his father cohabited, though he could have lawfully married her, who is subjected to the power of his father by the subsequent execution of a dowry deed according to the terms of our constitution: and the same boon is in effect bestowed by that enactment on children subsequently born of the same marriage. ...

## **BOOK II**

### TITLE I OF THE DIFFERENT KINDS OF THINGS

In the preceding book we have expounded the law of Persons: now let us proceed to the law of Things. Of these, some admit of private ownership, while others, it is held, cannot belong to individuals: for some things are by natural law common to all, some are public, some belong to a society or corporation, and some belong to no one. But most things belong to individuals, being acquired by various titles, as will appear from what follows.

**1.** Thus, the following things are by natural law common all—the air, running water, the sea, and consequently the sea-shore. No one therefore is forbidden access to the seashore, provided he abstains from injury to houses, monuments, and buildings generally; for these are not, like the sea itself, subject to the law of nations. **2.** On the other hand, all rivers and harbours are public, so that all persons have a right to fish therein. **3.** The sea-shore extends to the limit of the highest tide in time of storm or winter. **4.** Again, the public use of the banks of a river, as of the river itself, is part of the law of nations; consequently every one is entitled to bring his vessel to the bank, and fasten cables to the trees growing there, and use it as a resting-place for the cargo, as freely as he may navigate the river itself. But the ownership of the bank is in the owner of the adjoining land, and consequently so too is the ownership of the trees which grow upon it. **5.** Again, the public use of the sea-shore, as of the sea itself, is part of the law of nations; consequently every one is free to build a cottage upon it for purposes of retreat, as well as to dry his nets and haul them up from the sea. But they cannot b.c. said to belong to any one as private property, but rather are subject to the same law as the sea itself, with the soil or sand which lies beneath it. **6.** As examples of things belonging to a society or corporation, and not to individuals, may be cited buildings in cities—theatres, racecourses, and such other similar things as belong to cities in their corporate capacity.

**7.** Things which are sacred, devoted to superstitious uses, or sanctioned, belong to no one, for what is subject to divine law is no one's property. **8.** Those things are sacred which have been duly consecrated to God by His ministers, such as churches and votive offerings which have been properly dedicated to His service; and these we have by our constitution forbidden to be alienated or pledged, except to redeem captives from bondage. If any one attempts to consecrate a thing for himself and by his own authority, its character is unaltered, and it does not become sacred. The ground on which a sacred building is erected

remains sacred even after the destruction of the building, as was declared also by Papinian. **9.** Any one can devote a place to superstitious uses of his own free will, that is to say, by burying a dead body in his own land. It is not lawful, however, to bury in land which one owns jointly with some one else, and which has not hitherto been used for this purpose, without the other's consent, though one may lawfully bury in a common sepulchre even without such consent. Again, the owner may not devote a place to superstitious uses in which another has a usufruct, without the consent of the latter. It is lawful to bury in another man's ground, if he gives permission, and the ground thereby becomes religious even though he should not give his consent to the interment till after it has taken place. **10.** Sanctioned things too, such as city walls and gates, are, in a sense, subject to divine law, and therefore are not owned by any individual. Such walls are said to be 'sanctioned', because any offence against them is visited with capital punishment; for which reason those parts of the laws in which we establish a penalty for their transgressors are called sanctions.

**11.** Things become the private property of individuals in many ways; for the titles by which we acquire ownership in them are some of them titles of natural law, which, as we said, is called the law of nations, while some of them are titles of civil law. It will thus be most convenient to take the older law first: and natural law is clearly the older, having been instituted by nature at the first origin of mankind, whereas civil laws first came into existence when states began to be founded, magistrates to be created, and laws to be written.

**12.** Wild animals, birds, and fish, that is to say all the creatures which the land, the sea, and the sky produce, as soon as they are caught by any one become at once the property of their captor by the law of nations; for natural reason admits the title of the first occupant to that which previously had no owner. So far as the occupant's title is concerned, it is immaterial whether it is on his own land or on that of another that he catches wild animals or birds, though it is clear that if he goes on another man's land for the sake of hunting or fowling, the latter may forbid him entry if aware of his purpose. An animal thus caught by you is deemed your property so long as it is completely under your control; but so soon as it has escaped from your control, and recovered its natural liberty, it ceases to be yours, and belongs to the first person who subsequently catches it. It is deemed to have recovered its natural liberty when you have lost sight of it, or when, though it is still in your sight, it would be difficult to pursue it. **13.** It has been doubted whether a wild animal becomes your property immediately you have wounded it so severely as to be able to catch it. Some have thought that it becomes yours at once, and remains so as long as you pursue it, though it ceases to be yours when you cease the pursuit, and becomes again the property of any one who catches it: others have been of opinion that it does not belong to you till you have actually caught it. And we confirm this latter view, for it may happen in many ways that you will not capture it. **14.** Bees again are naturally wild; hence if a swarm settles on your tree, it is no more considered yours, until you have hived it, than the birds which build their nests there, and consequently if it is hived by some one else, it becomes his property. So too any one may take the honey-combs which bees may chance to have made, though, of course, if you see some one coming on your land for this purpose, you have a right to forbid him entry before that purpose is effected. A swarm which has flown from your hive is considered to remain yours so long as it is in your sight and easy of pursuit: otherwise it belongs to the first person who catches it. **15.** Peafowl too and pigeons are naturally wild, and it is no valid objection that they are used to return to the same spots from which they fly away, for bees do this, and it is admitted that bees are wild by nature; and some people have deer so tame that they will go into the woods and yet habitually come back again, and still no one denies that they are naturally wild. With regard, however, to animals which have this habit of going away and coming back again, the rule has been established that they are deemed yours so long as they have the intent to return: for if they cease to have this intention they cease to be yours, and belong to the first person who takes them; and when they lose the habit they seem also to have lost the intention of returning. **16.** Fowls and geese are not naturally wild, as is shown by the fact that there are some kinds of fowls and geese which we call wild kinds. Hence if your geese or fowls are frightened and fly away, they are considered to continue yours wherever they may be, even though you have lost sight of them; and any one who keeps them intending thereby to make a profit is held guilty of theft. **17.** Things again which we capture from the enemy at once become ours by the law of nations, so that by this rule even free men become our slaves, though, if they escape from our power and return to their own people, they recover their previous condition. **18.** Precious



stones too, and gems, and all other things found on the sea-shore, become immediately by natural law the property of the finder. **19.** And by the same law the young of animals of which you are the owner become your property also.

**20.** Moreover, soil which a river has added to your land by alluvion becomes yours by the law of nations. Alluvion is an imperceptible addition; and that which is added so gradually that you cannot perceive the exact increase from one moment of time to another is added by alluvion. **21.** If, however, the violence of the stream sweeps away a parcel of your land and carries it down to the land of your neighbour, it clearly remains yours; though of course if in process of time it becomes firmly attached to your neighbour's land, and the trees which it carried with it strike root in the latter, they are deemed from that time to have become part and parcel thereof. **22.** When an island rises in the sea, though this rarely happens, it belongs to the first occupant; for, until occupied, it is held to belong to no one. If, however (as often occurs), an island rises in a river, and it lies in the middle of the stream, it belongs in common to the landowners on either bank, in proportion to the extent of their riparian interest; but if it lies nearer to one bank than to the other, it belongs to the landowners on that bank only. If a river divides into two channels, and by uniting again these channels transform a man's land into an island, the ownership of that land is in no way altered. **23.** But if a river entirely leaves its old channel, and begins to run in a new one, the old channel belongs to the landowners on either side of it in proportion to the extent of their riparian interest, while the new one acquires the same legal character as the river itself, and becomes public. But if after a while the river returns to its old channel, the new channel again becomes the property of those who possess the land along its banks. **24.** It is otherwise if one's land is wholly flooded, for a flood does not permanently alter the nature of the land, and consequently if the water goes back the soil clearly belongs to its previous owner.

**25.** When a man makes a new object out of materials belonging to another, the question usually arises, to which of them, by natural reason, does this new object belong—to the man who made it, or to the owner of the materials? For instance, one man may make wine, or oil, or corn, out of another man's grapes, olives, or sheaves; or a vessel out of his gold, silver, or bronze; or mead of his wine and honey; or a plaster or eyesalve out of his drugs; or cloth out of his wool; or a ship, a chest, or a chair out of his timber. After many controversies between the Sabinians and Proculians, the law has now been settled as follows, in accordance with the view of those who followed a middle course between the opinions of the two schools. If the new object can be reduced to the materials of which it was made, it belongs to the owner of the materials; if not, it belongs to the person who made it. For instance, a vessel can be melted down, and so reduced to the rude material—bronze, silver, or gold—of which it is made: but it is impossible to reconvert wine into grapes, oil into olives, or corn into sheaves, or even mead into the wine and honey of which it was compounded. But if a man makes a new object out of materials which belong partly to him and partly to another—for instance, mead of his own wine and another's honey, or a plaster or eyesalve of drugs which are not all his own, or cloth of wool which belongs only in part to him—in this case there can be no doubt that the new object belongs to its creator, for he has contributed not only part of the material, but the labour by which it was made. **26.** If, however, a man weaves into his own cloth another man's purple, the latter, though the more valuable, becomes part of the cloth by accession; but its former owner can maintain an action of theft against the purloiner, and also a *condiction*, or action for reparative damages, whether it was he who made the cloth, or some one else; for although the destruction of property is a bar to a real action for its recovery, it is no bar to a *condiction* against the thief and certain other possessors. **27.** If materials belonging to two persons are mixed by consent—for instance, if they mix their wines, or melt together their gold or their silver—the result of the mixture belongs to them in common. And the law is the same if the materials are of different kinds, and their mixture consequently results in a new object, as where mead is made by mixing wine and honey, or *electrum* by mixing gold and silver; for even here it is not doubted that the new object belongs in common to the owners of the materials. And if it is by accident, and not by the intention of the owners, that materials have become mixed, the law is the same, whether they were of the same or of different kinds. **28.** But if the corn of Titius has become mixed with yours, and this by mutual consent, the whole will belong to you in common, because the separate bodies or grains, which before belonged to one or the other of you in severally, have by consent on both sides been made your joint property. If, however, the mixture was

accidental, or if Titius mixed the two parcels of corn without your consent, they do not belong to you in common, because the separate grains remain distinct, and their substance is unaltered; and in such cases the corn no more becomes common property than does a flock formed by the accidental mixture of Titius's sheep with yours. But if either of you keeps the whole of the mixed corn, the other can bring a real action for the recovery of such part of it as belongs to him, it being part of the province of the judge to determine the quality of the wheat which belonged to each. **29.** If a man builds upon his own ground with another's materials, the building is deemed to be his property, for buildings become a part of the ground on which they stand. And yet he who was owner of the materials does not cease to own them, but he cannot bring a real action for their recovery, or sue for their production, by reason of a clause in the Twelve Tables providing that no one shall be compelled to take out of his house materials *tignum*, even though they belong to another, which have once been built into it, but that double their value may be recovered by the action called *de tigno iniuncto*. The term *tignum* includes every kind of material employed in building, and the object of this provision is to avoid the necessity of having buildings pulled down; but if through some cause or other they should be destroyed, the owner of the materials, unless he has already sued for double value, may bring a real action for recovery, or a personal action for production. **30.** On the other hand, if one man builds a house on another's land with his own materials, the house belongs to the owner of the land. In this case, however, the right of the previous owner in the materials is extinguished, because he is deemed to have voluntarily parted with them, though only, of course, if he was aware that the land on which he was building belonged to another man. Consequently, though the house should be destroyed, he cannot claim the materials by real action. Of course, if the builder of the house has possession of the land, and the owner of the latter claims the house by real action, but refuses to pay for the materials and the workmen's wages, he can be defeated by the plea of fraud, provided the builder's possession is in good faith: for if he knew that the land belonged to some one else it may be urged against him that he was to blame for rashly building on land owned to his knowledge by another man. **31.** If Titius plants another man's shrub in land belonging to himself, the shrub will become his; and, conversely, if he plants his own shrub in the land of Maevius, it will belong to Maevius. In neither case, however, will the ownership be transferred until the shrub has taken root: for, until it has done this, it continues to belong to its original owner. So strict indeed is the rule that the ownership of the shrub is transferred from the moment it has taken root, that if a neighbour's tree grows so close to the land of Titius that the soil of the latter presses round it, whereby it drives its roots entirely into the same, we say the tree becomes the property of Titius, on the ground that it would be unreasonable to allow the owner of a tree to be a different person from the owner of the land in which it is rooted. Consequently, if a tree which grows on the boundaries of two estates drives its roots even partially into the neighbour's soil, it becomes the common property of the two landowners. **32.** On the same principle corn is reckoned to become a part of the soil in which it is sown. But exactly as (according to what we said) a man who builds on another's land can defend himself by the plea of fraud when sued for the building by the owner of the land, so here too one who has in good faith and at his own expense put crops into another man's soil can shelter himself behind the same plea, if refused compensation for labour and outlay. **33.** Writing again, even though it be in letters of gold, becomes a part of the paper or parchment, exactly as buildings and sown crops become part of the soil, and consequently if Titius writes a poem, or a history, or a speech on your paper or parchment, the whole will be held to belong to you, and not to Titius. But if you sue Titius to recover your books or parchments, and refuse to pay the value of the writing, he will be able to defend himself by the plea of fraud, provided that he obtained possession of the paper or parchment in good faith. **34.** Where, on the other hand, one man paints a picture on another's board, some think that the board belongs, by accession, to the painter, others, that the painting, however great its excellence, becomes part of the board. The former appears to us the better opinion, for it is absurd that a painting by Apelles or Parrhasius should be an accessory of a board which, in itself, is thoroughly worthless. Hence, if the owner of the board has possession of the picture, and is sued for it by the painter, who nevertheless refuses to pay the cost of the board, he will be able to repel him by the plea of fraud. If, on the other hand, the painter has possession, it follows from what has been said that the former owner of the board, [if he is to be able to sue at all], must claim it by a modified and not by a direct action; and in this case, if he refuses to pay the cost of the picture, he can be repelled by the plea of fraud, provided that the possession of the painter be in good

faith; for it is clear, that if the board was stolen by the painter, or some one else, from its former owner, the latter can bring the action of theft.

**35.** If a man in good faith buys land from another who is not its owner, though he believed he was, or acquires it in good faith by gift or some other lawful title, natural reason directs that the fruits which he has gathered shall be his, in consideration of his care and cultivation: consequently if the owner subsequently appears and claims the land by real action, he cannot sue for fruits which the possessor has consumed. This, however, is not allowed to one who takes possession of land which to his knowledge belongs to another person, and therefore he is obliged not only to restore the land, but to make compensation for fruits even though they have been consumed. **36.** A person who has a usufruct in land does not become owner of the fruits which grow thereon until he has himself gathered them; consequently fruits which, at the moment of his decease, though ripe, are yet ungathered, do not belong to his heir, but to the owner of the land. What has been said applies also in the main to the lessee of land. **37.** The term 'fruits', when used of animals, comprises their young, as well as milk, hair, and wool; thus lambs, kids, calves, and foals, belong at once, by the natural law of ownership, to the fructuary. But the term does not include the offspring of a female slave, which consequently belongs to her master; for it seemed absurd to reckon human beings as fruits, when it is for their sake that all other fruits have been provided by nature. **38.** The usufructuary of a flock, as Julian held, ought to replace any of the animals which die from the young of the rest, and, if his usufruct be of land, to replace dead vines or trees; for it is his duty to cultivate according to law and use them like a careful head of a family.

**39.** If a man found a treasure in his own land, the Emperor Hadrian, following natural equity, adjudged to him the ownership of it, as he also did to a man who found one by accident in soil which was sacred or religious. If he found it in another man's land by accident, and without specially searching for it, he gave half to the finder, half to the owner of the soil; and upon this principle, if a treasure were found in land belonging to the Emperor, he decided that half should belong to the latter, and half to the finder; and consistently with this, if a man finds one in land which belongs to the imperial treasury or the people, half belongs to him, and half to the treasury or the State.

**40.** Delivery again is a mode in which we acquire things by natural law; for it is most agreeable to natural equity that where a Man wishes to transfer his property to another person his wish should be confirmed. Consequently corporeal things, whatever be their nature, admit of delivery, and delivery by their owner makes them the property of the alienee; this, for instance, is the mode of alienating stipendiary and tributary estates, that is to say, estates lying in provincial soil; between which, however, and estates in Italy there now exists, according to our constitution, no difference. **41.** And ownership is transferred whether the motive of the delivery be the desire to make a gift, to confer a dowry, or any other motive whatsoever. When, however, a thing is sold and delivered, it does not become the purchaser's property until he has paid the price to the vendor, or satisfied him in some other way, as by getting some one else to accept liability for him, or by pledge. And this rule, though laid down also in the statute of the Twelve Tables, is rightly said to be a dictate of the law of all nations, that is, of natural law. But if the vendor gives the purchaser credit, the goods sold belong to the latter at once. **42.** It is immaterial whether the person who makes delivery is the owner himself, or some one else acting with his consent. **43.** Consequently, if any one is entrusted by an owner with the management of his business at his own free discretion, and in the execution of his commission sells and delivers any article, he makes the receiver its owner. **44.** In some cases even the owner's bare will is sufficient, without delivery, to transfer ownership. For instance, if a man sells or makes you a present of a thing which he has previously lent or let to you or placed in your custody, though it was not from that motive he originally delivered it to you, yet by the very fact that he suffers it to be yours you at once become its owner as fully as if it had been originally delivered for the purpose of passing the property. **45.** So too if a man sells goods lying in a warehouse, he transfers the ownership of them to the purchaser immediately he has delivered to the latter the keys of the warehouse. **46.** Nay, in some cases the will of the owner, though directed only towards an uncertain person, transfers the ownership of the thing, as for instance when praetors and consuls throw money to a crowd: here they know not which specific coin each person will get, yet they make the unknown recipient immediate owner, because it is their will that each shall have what he gets. **47.** Accordingly, it is true that if a man takes possession of property abandoned by

its previous owner, he at once becomes its owner himself: and a thing is said to be abandoned which its owner throws away with the deliberate intention that it shall no longer be part of his property, and of which, consequently, he immediately ceases to be owner. **48.** It is otherwise with things which are thrown overboard during a storm, in order to lighten the ship; in the ownership of these things there is no change, because the reason for which they are thrown overboard is obviously not that the owner does not care to own them any longer, but that he and the ship besides may be more likely to escape the perils of the sea. Consequently any one who carries them off after they are washed on shore, or who picks them up at sea and keeps them, intending to make a profit thereby, commits a theft; for such things seem to be in much the same position as those which fall out of a carriage in motion unknown to their owners.

#### TITLE II OF INCORPOREAL THINGS

Some things again are corporeal, and others incorporeal. **1.** Those are corporeal which in their own nature are tangible, such as land, slaves, clothing, gold, silver, and others innumerable. **2.** Things incorporeal are such as are intangible: rights, for instance, such as inheritance, usufruct, and obligations, however acquired. And it is no objection to this definition that an inheritance comprises things which are corporeal; for the fruits of land enjoyed by a usufructuary are corporeal too, and obligations generally relate to the conveyance of something corporeal, such as land, slaves, or money, and yet the right of succession, the right of usufruct, and the right existing in every obligation, are incorporeal. **3.** So too the rights appurtenant to land, whether in town or country, which are usually called servitudes, are incorporeal things.

...

#### TITLE V OF USE AND HABITATION

...

**6.** What we have here said concerning servitudes, and the rights of usufruct, use, and habitation, will be sufficient; of inheritance and obligations we will treat in their proper places respectively. And having now briefly expounded the modes in which we acquire things by the law of nations, let us turn and see in what modes they are acquired by statute or by civil law. ...

#### TITLE IX OF PERSONS THROUGH WHOM WE ACQUIRE

...

**6.** So much at present concerning the modes of acquiring rights over single things: for direct and fiduciary bequests, which are also among such modes, will find a more suitable place in a later portion of our treatise. We proceed therefore to the titles whereby an aggregate of rights is acquired. If you become the successors, civil or praetorian, of a person deceased, or adopt an independent person by adrogation, or become assignees of a deceased's estate in order to secure their liberty to slaves manumitted by his will, the whole estate of those persons is transferred to you in an aggregate mass. Let us begin with inheritances, whose mode of devolution is twofold, according as a person dies testate or intestate; and of these two modes we will first treat of acquisition by will. The first point which here calls for exposition is the mode in which wills are made. ...

### **BOOK III**

...

#### TITLE XIII OF OBLIGATIONS

Let us now pass on to obligations. An obligation is a legal bond, with which we are bound by a necessity of performing some act according to the laws of our State. **1.** The leading division of obligations is into two kinds, civil and praetorian. Those obligations are civil which are established by statute, or at least are sanctioned by the civil law; those are praetorian which the praetor has established by his own jurisdiction, and which are also called honorary. **2.** By another division they are arranged in four classes, contractual, quasicontractual, delictal, and quasi-delictal. And, first, we must examine those which are contractual, and which again fall into four species, for contract is concluded either by delivery, by a form of words, by writing, or by consent: each of which we will treat in detail. ...

**BOOK IV**

## TITLE I OF OBLIGATIONS ARISING FROM DELICT

HAVING treated in the preceding Book of contractual and quasi-contractual obligations, it remains to inquire into obligations arising from delict. The former, as we remarked in the proper place, are divided into four kinds; but of these latter there is but one kind, for, like obligations arising from real contracts, they all originate in some act, that is to say, in the delict itself, such as a theft, a robbery, wrongful damage, or an injury. ...

## TITLE VI OF ACTIONS

The subject of actions still remains for discussion. An action is nothing else than the right of suing before a judge for what is due to one.

1. The leading division of all actions whatsoever, whether tried before a judge or a referee, is into two kinds, real and personal; that is to say, the defendant is either under a contractual or delictal obligation to the plaintiff, in which case the action is personal, and the plaintiff's contention is that the defendant ought to convey something to, or do something for him, or of a similar nature; or else, though there is no legal obligation between the parties, the plaintiff asserts a ground of action against some one else relating to some thing, in which case the action is real. Thus, a man may be in possession of some corporeal thing, in which Titius claims a right of property, and which the possessor affirms belongs to him; here, if Titius sues for its recovery, the action is real. 2. It is real also if a man asserts that he has a right of usufruct over a landed estate or a house, or a right of going or driving cattle over his neighbour's land, or of drawing water from the same; and so too are the actions relating to urban servitudes, as, for instance, where a man asserts a right to raise his house, to have an uninterrupted prospect, to project some building over his neighbour's land, or to rest the beams of his own house in his neighbour's wall. Conversely, there are actions relating to usufructs, and to rustic and urban servitudes, of a contrary import, which lie at the suit of plaintiffs who deny their opponent's right of usufruct, of going or driving cattle, of drawing water, of raising their house, of having an uninterrupted view, of projecting some building over the plaintiff's land, or of resting the beams of their house in the plaintiff's wall. These actions too are real, but negative, and never occur in disputes as to corporeal things, in which the plaintiff is always the party out of possession; and there is no action by which the possessor can (as plaintiff) deny that the thing in question belongs to his adversary, except in one case only, as to which all requisite information can be gathered from the fuller books of the Digest. 3. The actions which have hitherto been mentioned, and others which resemble them, are either of statutory origin, or at any rate belong to the civil law. There are other actions, however, both real and personal, which the praetor has introduced in virtue of his jurisdiction, and of which it is necessary to give examples. For instance, he will usually, under the circumstances to be mentioned, allow a real action to be brought with a fictitious allegation—namely, that the plaintiff has acquired a title by usucapion where this, in fact, is not the case; or, conversely, he will allow a fictitious plea on the part of the defendant, to the effect that the plaintiff has not acquired such title where, in point of fact, he has. 4. Thus, if possession of some object be delivered on a ground sufficient to legally transfer the same—for instance, under a sale or gift, as part of a dowry, or as a legacy—and the transferee has not yet acquired a complete title by usucapion, he has no direct real action for its recovery, if he accidentally loses possession, because by the civil law a real action lies at the suit of the owner only. But as it seemed hard that in such a case there should be no remedy, the praetor introduced an action in which the plaintiff, who has lost possession, fictitiously alleges that he has acquired a full title by usucapion, and thus claims the thing as his own. This is called the Publician action, because it was first placed in the Edict by a praetor called Publicius. 5. Conversely, if a person, while absent in the service of the State, or while in the power of an enemy, acquires by usucapion property belonging to some one resident at home, the latter is allowed, within a year from the cessation of the possessor's public employment, to sue for a recovery of the property by a rescission of the usucapion: by fictitiously alleging, in other words, that the defendant has not thus acquired it; and the praetor from motives of equity allows this kind of action to be brought in certain other cases, as to which information may be gathered from the larger work of the Digest or Pandects. 6. Similarly, if a person conveys away his property in fraud of creditors, the latter, on obtaining from the governor of the province a decree vesting in them possession of the debtor's

estate, are allowed to avoid the conveyance, and sue for the recovery of the property; in other words, to allege that the conveyance has never taken place, and that the property consequently still belongs to the debtor. 7. Again, the Servian and quasi-Servian actions, the latter of which is also called 'hypothecary', are derived merely from the praetor's jurisdiction. The Servian action is that by which a landlord sues for his tenant's property, over which he has a right in the nature of mortgage as security for his rent; the quasi-Servian is a similar remedy, open to every pledgee or hypothecary creditor. So far then as this action is concerned, there is no difference between a pledge and a hypothec: and indeed whenever a debtor and a creditor agree that certain property of the former shall be the latter's security for his debt, the transaction is called a pledge or a hypothec indifferently. In other points, however, there is a distinction between them; for the term 'pledge' is properly used only where possession of the property in question is delivered to the creditor, especially if that property be movable: while a hypothec is, strictly speaking, such a right created by mere agreement without delivery of possession. 8. Besides these, there are also personal actions which the praetor has introduced in virtue of his jurisdiction, for instance, that brought to enforce payment of money already owed, and the action on a banker's acceptance, which closely resembled it. By our constitution, however, the first of these actions has been endowed with all the advantages which belonged to the second, and the latter, as superfluous, has therefore been deprived of all force and expunged from our legislation. To the praetor is due also the action claiming an account of the *peculium* of a slave or child in power, that in which the issue is whether a plaintiff has made oath, and many others. 9. The action brought to enforce payment of money already owed is the proper remedy against a person who, by a mere promise, without stipulation, has engaged to discharge a debt due either from himself or from some third party. If he has promised by stipulation, he is liable by the civil law. 10. The action claiming an account of a *peculium* is a remedy introduced by the praetor against a master or a father. By strict law, such persons incur no liability on the contracts of their slaves or children in power; yet it is only equitable that damages should be recoverable against them to the extent of the *peculium*, in which children in power and slaves have a sort of property. 11. Again, if a plaintiff, on being challenged by the defendant, deposes on oath that the latter owes him the money which is the object of the action, and payment is not made to him, the praetor most justly grants to him an action in which the issue is, not whether the money is owing, but whether the plaintiff has sworn to the debt. 12. There is also a considerable number of penal actions which the praetor has introduced in the exercise of his jurisdiction; for instance, against those who in any way injure or deface his album; or who summon a parent or patron without magisterial sanction; or who violently rescue persons summoned before himself, or who compass such a rescue; and others innumerable. 13. 'Prejudicial' actions would seem to be real, and may be exemplified by those in which it is inquired whether a man is free born, or has become free by manumission, or in which the question relates to a child's paternity. Of these the first alone belongs to the civil law: the others are derived from the praetor's jurisdiction. 14. The kinds of actions having been thus distinguished, it is clear that a plaintiff cannot demand his property from another in the form 'if it be proved that the defendant is bound to convey'. It cannot be said that what already belongs to the plaintiff ought to be conveyed to him, for conveyance transfers ownership, and what is his cannot be made more his than it is already. Yet for the prevention of theft, and multiplication of remedies against the thief, it has been provided that, besides the penalty of twice or four times the value of the property stolen, the property itself, or its value, may be recovered from the thief by a personal action in the form 'if it be proved that the defendant ought to convey', as an alternative for the real action which is also available to the plaintiff, and in which he asserts his ownership of the stolen property. 15. We call a real action a 'vindication', and a personal action, in which the contention is that some property should be conveyed to us, or some service performed for us, a 'condiction', this term being derived from *condicere*, which has an old meaning of 'giving notice'. To call a personal action, in which the plaintiff contends that the defendant ought to convey to him, a condiction, is in reality an abuse of the term, for nowadays there is no such notice as was given in the old action of that name.

16. Actions may next be divided into those which are purely reparative, those which are purely penal, and those which are mixed, or partly reparative, partly penal. 17. All real actions are purely reparative. Of personal actions those which spring from contract are nearly all of the same character; for instance, the actions on loans of money, or stipulations, on loans for use, on deposit, agency, partnership, sale, and hire. If, however, the action be on a deposit occasioned by a riot, a fire, the fall of a building, or a shipwreck, the

praetor enables the depositor to recover double damages, provided he sues the bailee in person; he cannot recover double damages from the bailee's heir, unless he can prove personal fraud against the latter. **18.** In these two cases the action, though on contract, is mixed. Actions arising from delict are sometimes purely penal, sometimes are partly penal and partly reparative, and consequently mixed. The sole object of the action of theft is the recovery of a penalty, whether that penalty be four times the value of the property stolen, as in theft detected in the commission, or only twice that value, as in simple theft. The property itself is recoverable by an independent action in which the person from whom it has been stolen claims it as his own, whether it be in the possession of the thief himself or of some third person; and against the thief himself he may even bring a condictio, to recover the property or its value. **19.** The action on robbery is mixed, for the damages recoverable thereunder are four times the value of the property taken, three-fourths being pure penalty, and the remaining fourth compensation for the loss which the plaintiff has sustained. So too the action on unlawful damage under the lex Aquilia is mixed, not only where the defendant denies his liability, and so is sued for double damages, but also sometimes where the claim is for simple damages only; as where a lame or one-eyed slave is killed, who within the year previous was sound and of large value; in which case the defendant is condemned to pay his greatest value within the year, according to the distinction which has been drawn above. Persons too who are under an obligation as heirs to pay legacies or trust bequests to our holy churches or other venerable places, and neglect to do so until sued by the legatee, are liable to a mixed action, by which they are compelled to give the thing or pay the money left by the deceased, and, in addition, an equivalent thing or sum as penalty, the condemnation being thus in twice the value of the original claim.

**20.** Some actions are mixed in a different sense, being partly real, partly personal. They are exemplified by the action for the division of a 'family', by which one of two or more joint heirs can enforce against the other or rest a partition of the inheritance, and by the actions for the division of common property, and for rectification of boundaries between adjoining landed proprietors. In these three actions the judge has power, according as shall to him seem fair and equitable, to adjudge any part of the joint property, or of the land in dispute, to any one of the parties, and to order any one of them who seems to have an undue advantage in the partition or rectification to pay a certain sum of money to the other or the rest as compensation. **21.** The damages recoverable in an action may be either once, twice, three, or four times the value of the plaintiff's original interest; there is no action by which more than fourfold damages can be claimed. **22.** Single damages only are recoverable in the actions on stipulation, loan for consumption, sale, hire, agency, and many others besides. **23.** Actions claiming double damages are exemplified by those on simple theft, on unlawful damage under the lex Aquilia, on certain kinds of deposit, and for corruption of a slave, which lies against any one by whose instigation and advice another man's slave runs away, or becomes disobedient to his master, or takes to dissolute habits, or becomes worse in any way whatsoever, and in which the value of property which the runaway slave has carried off is taken into account. Finally, as we remarked above, the action for the recovery of legacies left to places of religion is of this character. **24.** An action for triple damages is grounded when a plaintiff makes an overstatement of his claim in the writ of summons, in consequence of which the officers of the court take too large a fee from the defendant. In such a case the latter will be able to recover from the plaintiff three times the loss which he sustains by the overcharge, including in these damages simple compensation for the sum paid in excess of the proper fee. This is provided by a distinguished constitution in our Code, under which a statutory condictio clearly lies for the damages in question. **25.** Quadruple damages are recoverable by the action on theft detected in the commission, by the action on intimidation, and by the action grounded on the giving of money in order to induce one man to bring a vexatious suit against another, or to desist from a suit when brought. Under our constitution too a statutory condictio lies for the recovery of fourfold damages from officers of the court, who exact money from defendants in excess of its provisions. **26.** There is this difference between the actions on simple theft and for the corruption of a slave, and the other of which we spoke in connexion with them, that by the two former double damages are recoverable under any circumstances; the latter, namely the action on unlawful damage under the lex Aquilia, and that on certain kinds of deposit, entail double damages on the defendant only if he denies his liability; if he admits it, simple damages alone can be recovered. The damages are double under an action for recovery of legacies left to religious places not only when the liability is denied, but also when the defendant delays payment until sued by the order of a

magistrate; if he admits his liability, and pays before being so sued, he cannot be compelled to pay more than the original debt. **27.** The action on intimidation also differs from the others which we mentioned in the same connexion, in that it contains in its very nature an implied condition that the defendant is entitled to acquittal if, on being so ordered by the judge, he restores to the plaintiff the property of which the latter has been deprived. In other actions of the same class this is not so; for instance, in the action on theft detected in the commission, the defendant has under any circumstances to pay fourfold damages. **28.** Again, some actions are equitable, others are actions of strict law. To the former class belong the actions on sale, hire, unauthorized agency, agency proper, deposit, partnership, guardianship, loan for use, mortgage, division of a 'family', partition of joint property, those on the innominate contracts of sale by commission and exchange, and the suit for recovery of an inheritance. Until quite recently it was a moot point whether the lastnamed was properly an equitable action, but our constitution has definitely decided the question in the affirmative. **29.** Formerly too the action for the recovery of a dowry was an equitable action: but as we found that the action on stipulation was more convenient, we have, while establishing many distinctions, attached all the advantages which the former remedy possessed to the action on stipulation, when employed for the recovery of a dowry. The former action being thus by a judicious reform abolished, that on stipulation, by which it has been replaced, has deservedly been invented with all the characteristics of an equitable action, so far as and whenever it is brought for the recovery of a dowry. We have also given persons entitled to sue for such recovery a tacit hypothec over the husband's property, but this right is not to give any priority over other hypothecary creditors except where it is the wife herself who sues to recover her dowry; it being in her interest only that we have made this new provision. **30.** In equitable actions the judge has full power to assess on good and fair grounds the amount due to the plaintiff, and in so doing to take into account counterclaims of the defendant, condemning the latter only in the balance. Even in actions of strict law counterclaims have been permitted since a rescript of the Emperor Marcus, the defendant meeting the plaintiff's claim by a plea of fraud. By our constitution, however, a wider field has been given to the principle of set-off, when the counterclaim is clearly established, the amount claimed in the plaintiff's action, whether real or personal, or whatever its nature, being reduced by operation of law to the extent of the defendant's counterclaim. The only exception to this rule is the action on deposit, against which we have deemed it no less than dishonest to allow any counterclaim to be set up; for if this were permitted persons might be fraudulently prevented from recovering property deposited under the presence of a set-off. **31.** There are some actions again which we call arbitrary, because their issue depends on an '*arbitrium*' or order of the judge. Here, unless on such order the defendant satisfies the plaintiff's claim by restoring or producing the property, or by performing his obligation, or in a noxal action by surrendering the guilty slave, he ought to be condemned. Some of such actions are real, others personal. The former are exemplified by the Publician action, the Servian action for the recovery of a tenant farmer's stock, and the quasi-Servian or so-called hypothecary action; the latter by the actions on intimidation and on fraud, by that for the recovery of a thing promised at a particular place, and by the action claiming production of property. In all these actions, and others of a similar nature, the judge has full power to determine on good and just grounds, according to the circumstances of each particular case, the form in which reparation ought to be made to the plaintiff. ...

## B. DIGEST 23.2 (ON THE RITE OF NUPTIALS)

[ed. T. Mommsen and P. Krueger, trans. A. Watson, *The Digest of Justinian* (Philadelphia, 1985),<sup>†</sup> 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.

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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.** PAPIANUS, *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 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.
35. 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. TERENTIUS 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.

**65.** 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. PAPIANIAN, *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. PAPIANIAN, *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. PAPIANIAN, *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 Turpilianum*, 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

The following table lists the fragments in D.23.2 according to their “Masses” in Bluhme’s theory of the composition of the *Digest*. 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. The “ordinary gloss” on three fragments of the title taken from the edition of the great sixteenth-century humanist Godefroy (Gothofredus, Godofredus), together with other medieval juristic commentary on the topic, is found in § 8D2–3.

1. *D. 23.2. (On the rite of nuptials)*—According to Bluhme’s “Masses”

[Ad Sab = Ad Sabinum; Ad leg. I & P = Ad legem Iuliam et Papiam]

Ed	* 1. Modestinus, Regulae, 1	Pap	34. Papinian, Responsa, 4
Sab	* 2. Paul, Ad edictum, 35		35. Papinian, Responsa, 6
	3. Paul, Ad Sabinum, 1		36. Paul, Quaestiones, 5
	4. Pomponius, Ad Sab, 3		37. Paul, Responsa, 7
	5. Pomponius, Ad Sab, 4	∨	38. Paul, Sententiae, 2
∨	* 6. Ulpian, Ad Sab, 35	Ed	39. Paul, Ad Plautium, 6
Pap	* 7. Paul, Ad legem Falcidiam 4		40. Pomponius, Ex Plautio,
Sab	8. Pomponius, Ad Sab, 5		41. Marcellus, Digesta, 26
	9. Ulpian, Ad Sab, 26		42. Modestinus, De ritu nuptiarum
	* 10. Paul, Ad edictum, 35		43. Ulpian, Ad leg. I & P, 1
	* 11. Julian, Digesta, 62		44. Paul, Ad leg. I & P, 1
	12. Ulpian, Ad Sab, 26		45. Ulpian, Ad leg. I & P, 3
	13. Ulpian, Ad Sab, 34		46. Gaius, Ad leg. I & P, 8
	14. Paul, Ad edictum, 35		* 47. Paul, Ad leg. I & P, 2
Pap	* 15. Papinian, Responsa, 4		48. Terentius Clemens, Ad. legem
∨			Iuliam et Papiam, 8
Sab	16. Paul, Ad edictum, 35		49. Marcellus, Ad leg. I & P, 1
	17. Gaius, Ad edictum provin-		50. Marcellus, Ad leg. I & P, 3
	cialia, 11	∨	51. Licinius Rufinus, Regulae, 1
	18. Julian, Digesta, 16	Sab	52. Paul, Ad Sab, 6
	19. Marcianus, Institutiones, 16		53. Gaius, Ad ed. prov., 11
	20. Paul, Ad orationem divorum		* 54. Scaevola, Regulae, 1
∨	Severi & Commodi		55. Gaius, Ad ed. prov., 11
Ed	* 21. Terentius Clemens, Ad legem		56. Ulpian, Disputationes, 3
	Iuliam et Papiam, 3		57. Marcianus, Institutiones, 2
	22. Celsus, Digesta, 15		57a. Marcianus, Notae ad Papinian,
			De Adulteriis, 2
	23. Celsus, Digesta, 30		58. Marcianus, Regulae, 4
	24. Modestinus, Regulae, 1		59. Paul, De Adsignatione libertorum
	25. Modestinus, Regulae, 2		60. Paul, Ad orationem
		∨	divorum Antonini et Commodi
	26. Modestinus, Responsa, 26	Pap	61. Papinian, Quaestiones, 32
∨	27. Ulpian, Ad leg. I & P, 3		62. Papinian, Responsa 4
Sab	* 28. Marcianus, Institutiones, 10		63. Papinian, Definitiones, 1
Ed	29. Ulpian, Ad leg. I & P, 3		64. Callistratus, Quaestiones, 2
	30. Gaius, Ad leg. I & P, 2		65. Paul, Responsa, 7
	31. Ulpian, Ad leg. I & P, 6		66. Paul, Sententiae, 2
	32. Marcellus, Ad leg. I & P, 1		67. Tryphoninus, Disputationes, 9
∨	33. Marcellus, Ad leg. I & P, 3	∨	68. Paul, Ad SC. Turpillianum

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 vigiliis* 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. 1. 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 which 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.

## C. CODE 5.4 (CONCERNING MARRIAGE)

[in S.P. Scott trans., *The Civil Law* (Cincinnati, 1932)<sup>†</sup> 13:146-55.]<sup>2</sup>

### TITLE IV. CONCERNING MARRIAGE.

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

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.]

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<sup>2</sup> 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.

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 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 Valentintan 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 off 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 de voted 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.<sup>3</sup>

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<sup>3</sup> 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.]

*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 lye 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 an 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 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.]*

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. Therefore we, desiring to resolve this long-existing doubt, decree that such a marriage is not prohibited, for if these marriages have their origin in affection, 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. 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.]

## D. DIGEST 22.5

[ed. T. Mommsen and P. Krueger, trans. A. Watson, *The Digest of Justinian* (Philadelphia, 1985),<sup>†</sup> 2:650–53]

### 5 WITNESSES

1. ARCADIUS CHARISIUS, *Witnesses*, sole book: Oral evidence is often and necessarily given and should be sought particularly from those who are reliable. 1. Witnesses can be called not only in criminal cases but, when appropriate, in money suits, if not forbidden to testify nor excused from testimony by any statute. 2. Though some statutes mention a large number of witnesses, imperial *constitutiones* reduce this to a sufficient number, so that judges should allow only the number they think necessary to be called, lest an unbridled license to call superfluous witnesses becomes vexatious.

2. MODESTINUS, *Rules*, book 8: The value of testimony depends on the dignity, faith, morals, and gravity of witnesses. Hence, those who depart from their previous evidence are not to be listened to.

3. CALLISTRATUS, *Cognitiones*, book 4: The reliability of witnesses must be carefully assessed. One must first inquire into their status. Are they decurions or plebeians? Do they lead an honest and blameless life, or has there been some mark of disgrace? Are they well off or needy, so that they may readily act for gain?

<sup>†</sup> Copyright © 1985 by the University of Pennsylvania Press.



Are they enemies of those against whom they give evidence or friends of those for whom they give it? Evidence can be admitted if it is free from suspicion, because of the witness (an honest man) or the motive (not gain, favor, or enmity). **1.** Hence, the deified Hadrian gave a rescript to Vibius Varus, legate of the province of Cilicia, that the judge knows best what weight to attach to witnesses. It runs as follows: “You know best what weight to attach to witnesses, what their dignity and reputation is, who speaks simply, and whether they keep to a premeditated story, or give likely answers to your *ex tempore* questions.” **2.** There is a rescript of the same emperor to Valerius Verus about assessing witness evidence as follows: “It is impossible to define strictly the amount and mode of proof needed on each issue. The truth can often but not always be found without recourse to public records. Sometimes the number of witnesses, sometimes their dignity and authority, at others common knowledge settles the truth of the matter in issue. In short, all I can reply to you is that a *cognitio* should not be tied at once to a single mode of proof. You must judge from your own conviction what you believe and what you find not proved.” **3.** The deified Hadrian also sent a rescript to Rufinus, proconsul of Macedonia, that he should believe witnesses, not depositions. This part of the letter runs: “Alexander made charges against Aper before me. He did not prove them or produce witnesses but wanted to use depositions, which are out of place before me, since my practice is to question witnesses. I sent him to the governor, to inquire about the veracity of the witnesses and, if he did not make out his charges, relegate him.” **4.** The same emperor gave the following rescript to Gabinius Maximus: “The evidence of witnesses actually present has a different weight from that of depositions recited in court. So reflect and, if you believe the witnesses, give them expenses.” **5.** The *lex Julia* on force provides that evidence should not be given against a person accused under this statute by a person freed by him or his parent; an *impubes*; one found guilty of a criminal offense, unless reinstated; a person chained or in public custody; one who has hired himself to fight beasts; a female prostitute present or past; or a person liable or found guilty of taking money for giving or not giving evidence. Some are excluded from giving evidence out of respect for persons, some for their want of judgment, some for marks of bad repute in their way of life. **6.** Witnesses should not lightly be summoned from long distances, still less soldiers called away from their military duties, as the deified Hadrian said in a rescript. The deified brothers also wrote: “So far as summoning witnesses is concerned, the careful judge should find out what the practice is in the province in which he is judge.” If it is found that several witnesses are often summoned to another *civitas* to give evidence, the witnesses whom the judge thinks necessary for the *cognitio* should undoubtedly be summoned.

**4.** PAUL, *Lex Julia et Papia*, book 2: The *lex Julia* on criminal proceedings provides that no one who is unwilling should be summoned to give evidence in court against his father-in-law, son-in-law, stepfather, stepson, cousin, or cousin’s child, or those nearer in degree; and likewise no one’s freedman should be summoned nor the freedman of his child, parent, husband, wife, patron, or patroness. Further, that a patron or patroness cannot be compelled to give evidence against a freedman nor a freedman against a patron.

**5.** GAIUS, *Lex Julia et Papia*, book 4: When statutes provide that a son- or father-in-law cannot be compelled to give evidence against his will, “son-in-law” includes a daughter’s fiancé and “father-in-law,” a fiancée’s father.

**6.** LICINIUS, *Rules*, book 2: Those who can be ordered to give evidence are not satisfactory witnesses.

**7.** MODESTINUS, *Rules*, book 3: A slave’s answer can be relied on when there is no other means of discovering the truth.

**8.** SCAEVOLA, *Rules*, book 4: Those who are old, ill, soldiers, absent with a magistrate on public business, or not allowed to come cannot be compelled to give evidence against their will.

**9.** PAUL, *Sabinus*, book 1: A father is not a satisfactory witness for a son or a son for a father.

**10.** POMPONIUS, *Sabinus*, book 1: No one is a satisfactory witness in his own cause.

**11.** POMPONIUS, *Sabinus*, book 1: To confirm the occurrence of a transaction even a witness who is not called counts.

**12.** ULPIAN, *Edict*, book 33: If the number of “witnesses” is not mentioned, two are enough, since the plural is satisfied by two.

**13.** PAPIAN, *Adultery*, book 1: Can those found guilty of the crime of calumny give evidence in criminal proceedings? The *lex Remmia* does not forbid them, nor did the *lex Julia* on force, corruption, or embezzlement. But the statutory omission will be made good by the judge's sense of duty; for he has to weigh the testimony even of a man of unblemished character.

**14.** PAPIAN, *Adultery*, sole book: Can someone found guilty of adultery witness a will? Properly speaking he is barred from testimony. Hence, I think that a will witnessed by such a person is invalid at civil law and, since it follows civil law, also in praetorian law. Hence, the inheritance cannot be formally accepted, nor can *bonorum possessio* be given.

**15.** PAUL, *Views*, book 3: A person found guilty of corruption cannot witness a will or give evidence. **1.** Whether a hermaphrodite can witness a will depends on his sexual development.

**16.** PAUL, *Views*, book 5: False, inconsistent, or double-faced witnesses are appropriately punished by the judge.

**17.** ULPIAN, *Rules*, sole book: A father and son-in-power, or two brothers in the same father's power, can witness the same will or transaction, since nothing bars several persons from the same household from witnessing another's transaction.

**18.** PAUL, *Adultery*, book 2: The fact that the *lex Julia* on adultery forbids a woman found guilty to give evidence shows that women have the right to give evidence at a trial.

**19.** ULPIAN, *Duties of Proconsul*, book 8: Tax farmers need not give evidence unless they wish, nor one who is absent but not with a view to avoiding giving evidence, nor an army contractor. **1.** Neither can *pupilli* be summoned to give evidence.

**20.** VENULEIUS, *Public Offenses*, book 2: The accuser should not summon a man accused of a crime or under 25 to give evidence.

**21.** ARCADIUS CHARISIUS, *Witnesses*, sole book: A person held liable for a defamatory verse is an incapable witness. **1.** If the matter requires it, it is unobjectionable for a magistrate who is present, as well as a private person, to give evidence. The senate also resolved that a praetor should give evidence in a trial for adultery. **2.** If the matter is such that an arena-fighter or similar person has to be called as a witness, his evidence should not be believed without torture. **3.** If the witnesses are all of the same honest reputation and the circumstances and inclination of the judge agrees with them, their evidence should be followed. But if some, though fewer, disagree, that evidence should be accepted which fits the circumstances and is not tainted by suspicion of favor or enmity. The judge confirms his personal view from the arguments and evidence that seem more appropriate and closer to the truth. What is decisive is not numbers, but sincere and reliable testimony which illuminates the truth.

**22.** VENULEIUS, *Duties of Proconsul*, book 2: Local magistrates should see that they themselves and other witnesses and signatories are available for those who wish to make declarations before witnesses, so that transactions are facilitated and proof of them is available.

**23.** VENULEIUS, *Criminal Proceedings*, book 1: A person who has previously given evidence against an accused person cannot be produced as a witness [for the accused].

**24.** PAUL, *Views*, book 5: It is held that witnesses produced by an accuser from his household cannot be tortured.

**25.** ARCADIUS CHARISIUS, *Witnesses*, sole book: Imperial mandates provide that a governor must see that those who represent clients in law suits do not give evidence in cases in which they appear. The same applies to court officials.

## E. CODE 4.20 (CONCERNING WITNESSES))

in S.P. Scott trans., *The Civil Law* (Cincinnati, 1932)<sup>†</sup> 13:36–41

### TITLE XX. CONCERNING WITNESSES.<sup>4</sup>

#### 1. *The Emperor Alexander to Carpus.* [223]

If a controversy arises with reference to your being freeborn, defend your case by documentary evidence and arguments if you can do so; for witnesses alone are not sufficient to establish proof of free birth.

Given on the tenth of the *Kalends* of May, during the Consulate of Maximus, Consul for the second time, and Aelianus, 224.

#### 2. *The Emperors Valerius and Gallienus to Rosa.* [255]

The testimony of members of a household is also rejected by the Civil Law.

Given on the third of the *Kalends* of September, under the Consulate of Valerian, Consul for the third time, and Gallienus, Consul for the second time, 256.

#### 3. *The Emperors Carus, Carinus and Numerian to Valenus.* [284]

It is certain that a case which is only proved by witnesses, and is not supported by any other lawful evidence, is of no force or effect.

Given on the *Kalends* of December, during the Consulate of Carus and Carinus, 283.

#### 4. *The Emperors Diocletian and Maximian to Candidus.* [286]

In order to ascertain the truth, witnesses must be produced who hold in greater esteem the faith due to justice than the favor and power of those entitled to the same.

Given on the fifth of the *Kalends* of May, during the Consulate of Maximus, Consul for the second time, and Aquilinus, 280.

#### 5. *The Same, and the Caesars, to Tertullus.* [294]

Fathers and children cannot be permitted to give evidence against one another, even if they are willing to do so.

Given at Nicomedia, on the fourth of the *Nones* of December, during the Consulate of the Caesars, 294.

#### 6. *The Same, and the Caesars, to Diogenes and Ingenua.* [293]

The demand which you make, namely, that the adverse party shall be compelled to produce the persons by whom the business was transacted, is entirely too strong. Therefore, understand that you yourself should introduce your own evidence in the case, and that your adversaries cannot be obliged to furnish testimony against themselves.

Given on the sixth of the *Kalends* of May, during the Consulate of the Caesars, 294.

#### 7. *The Same, and the Caesars, to Derulonis.* [294]

There is no doubt that a slave cannot be subjected to torture for or against his master, but he can be put to the question for some act of his own.

Given at Nicomedia, on the *Kalends* of November, under the Consulate of the Caesars, 294.

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<sup>†</sup> Copyright © 1932 by The Central Trust Company, Executor of the Estate Samuel P. Scott, Deceased.

<sup>4</sup> The critical edition contains an extract in Greek at the beginning (not ascribed to any emperor); hence the numbers in the Vulgate edition used by Scott are one less than those in the critical edition.

8. *The Emperor Constantine to Julian, Governor.* [334]

We have already directed that witnesses should testify after having been sworn, and that the preference should be given to those of honorable reputation.

(1) In like manner, we have ordered that no judge shall in any case readily accept the testimony of only one witness; and now we plainly order that the evidence of only one witness shall not be taken, even though he should be distinguished by senatorial rank.

Given on the eighth of the *Kalends* of September, during the Consulate of Optatus and Paulinus, 334.

9. *The Emperors Valens, Gratian, and Valentinian to Gracchus, Urban Prefect.* [376]

The laws deprive everyone of the power to testify in his own case.

Given on the fifth of the *Kalends* of December, during the Consulate of Valens, Consul for the fifth time, and Valentinian Junior, 376.

10. *The Emperors Honorius and Theodosius to Caecilianus, Urban Prefect.* [409]

Witnesses called to give evidence in the cases of others must be free, if they are not said to be implicated in the crime, and confidence in their knowledge shall be required of them; and the judge, in the production of the necessary persons, that is to say, of good witnesses, must not fail to direct that their proper expenses be paid by the accuser, or by the others by whom they were summoned, when they come to court.

The same rule applies when witnesses are produced by either side in a pecuniary case.

Given at Ravenna, on the twelfth of the *Kalends* of February, during the Consulate of Honorius, Consul for the eighth time, and Theodosius, Consul for the fourth time, 409.

*Extract from Novel 90, Chapter VI. Latin Text* [Not in original.]

If a witness, when introduced, is said to be a slave, and he desires to testify, but alleges that he is free, the question of his status must first be determined, and if it should appear after investigation that he is a slave, his evidence shall be rejected. Where, however, he says that he is a freedman, he must produce the document of his manumission before he testifies, unless he is willing to make oath that the evidence is elsewhere; and, if this is done, his testimony should be taken down, and if he does not produce the instrument showing his manumission, it shall be rejected. But if the witness is declared to be unacceptable on account of a criminal action pending between the parties, he shall not be heard before the said action has been decided. But when he is considered as prejudiced on account of some pecuniary litigation in which he is involved, or for some other reason, his evidence shall be taken, and the questions of this kind which arise shall be reserved for argument.

11. *The Same to Georgia.* [Addressed, according to the Theodosian Code, to the consuls, praetors, tribunes of the people, and the senate, 423]

We forbid freedmen, under a penalty, from giving unlawful and dishonorable testimony against their patrons, and as they must not voluntarily dare to give such testimony, so, if summoned as witnesses, they cannot be compelled to appear in court for that purpose.

Given at Ravenna, on the fourth of the *Ides* of August, during the Consulate of Marinius and Asclepiodotus, 243.

[The critical edition has a rescript in here in Greek, not attributed to any emperor. The Vulgate edition is now two numbers short.]

12. *The Emperor Zeno to Arcadius, Praetorian Prefect.* [486]

We order that no one who has appeared before any judge (even though he may not be under his jurisdiction) for the purpose of giving testimony, can claim exemption on the ground of being in the army, or plead any other exception for the purpose of evading the action of the judge, which is demanded either by dishonorable evidence, or the nature of the case; but that all those who testify in civil actions shall, as it were, be deprived of their privileges of offering an exception in court, and having been stripped of its

protection, shall be brought privately before the judge, in order that they may not apprehend that what they may say may offend his ears.

All magistrates (as has frequently been stated) without being prevented by any exception, are authorized to punish witnesses whose testimony seems to be either tainted with falsehood or fraud, in accordance with the nature of the offence.

Given on the twelfth of the *Kalends* of June, during the Consulate of Decius and Longinus, 486.

[The critical edition has two more rescripts in here in Greek, not attributed to any emperor. The Vulgate edition is now four numbers short.]

13. *The Emperor Justinian to Menna, Praetorian Prefect.* [528]

If anyone should have made use of witnesses, and the same ones are introduced against him in another action, he shall not be permitted to exclude them, unless he can show that enmity has subsequently arisen between him and them, on account of which the laws direct that witnesses shall be rejected; and under such circumstances he should not be deprived of the power to contradict their testimony by means of their own statements. If, however, he should show by undoubted evidence that they have been corrupted either by the gift or the promise of money, we order that he shall have the right to prosecute them.

Given on the seventh of the *Kalends* of June, during the second Consulate of our Lord Justinian, 528.

14. *The Same, to Menna, Praetorian Prefect.* [528]

With a view to curtailing as much as possible the ease with which witnesses are obtained, by means of whom many violations of the truth are perpetrated, we order all those who state that they have contracted debts in writing shall not be heard, if they say that they have paid all, or a portion of the indebtedness, without having obtained a written discharge of the same; and if they attempt to produce witnesses of low character, or who perhaps have been bought, to prove a payment of this kind, no attention shall be paid to them, unless five respectable witnesses, who are citizens of the highest reputation, and were present at the payment of the money, state under oath that the debt was paid in their presence; so that everyone may know that it has been decided that persons cannot make payment of a debt either wholly or in part, unless they have the fact committed to writing, or can prove it by the above-mentioned oral testimony. It is, however, but reasonable to except from the provisions of the present law those who have already paid a debt, or a portion of the same. But when payment has been evidenced by a written instrument, and it has been destroyed by accident, as that of fire, shipwreck, or some other misfortune, then those who have sustained the loss shall be permitted to show the cause, and prove the payment by witnesses, and in this way avoid the consequences of the loss by establishing the destruction of the instrument.

Given on the *Kalends* of June, during the Second Consulate of our Lord Justinian, 528.

*Extract from Novel 90, Chapter II. Latin Text.* [Not in original.]

Witnesses shall be summoned as in the case of wills, and not appear by accident as mere passersby. The same rule will apply if, being called after payment was made, they heard the acknowledgment of the creditor that the money due to him had been received.

15. *The Same to Julian, Praetorian Prefect.* [529]

If anyone, in accordance with our laws, in a pecuniary case desires to call witnesses who are unwilling, and they voluntarily consent to give security that they will be present, this can be done. If, however, they refuse to do so, we order that they shall not be imprisoned, but they shall be bound by oath to appear; for if those who have produced them think that their testimony should be believed, when they are sworn in the case, they should have still more faith that the presence of the witnesses will be secured by their oath.

But, as witnesses should not, under such circumstances, be compelled to leave their homes and submit to inconvenience for the benefit of others, we order that judges shall not compel them to be present for more than fifteen days after they have been summoned, and that they shall provide that the case in which the witnesses appear to be necessary shall be heard within that time, and when one of the parties to the suit is

absent, and, after having been notified by the bailiffs, has refused to appear, absolute permission is granted to judges to take the evidence of his witnesses as well as that of those of the other party who is present.

Moreover, the said term of fifteen days having expired, the witnesses shall be permitted by the judge to leave, and he shall have no authority to recall them after they have once departed. We also order that if the judge was to blame for not having the testimony given, he shall be forced to indemnify the injured party out of his own property for any damage which he may have sustained.

Given on the twelfth of the *Kalends* of April, during the Consulate of Lampadius and Orestes, 530.

*Extract from Novel 90, Chapter II. Latin Text.* [Not in original.]

When anyone has been wrongfully injured by another, or has sustained damage in some other way, or suffered a loss at his hands, and wishes to produce witnesses in court and publish their testimony, his adversary shall be notified by the judge, and the latter shall hear the evidence in his presence. If, however, he should refuse to appear, the judge can hear the witnesses even in his absence, and their testimony shall have as much weight as if it had been taken in his presence; nor can he oppose this on the ground that evidence was introduced by only one of the parties to the suit.

16. *The Same to Julian, Praetorian Prefect.* [530]

Where witnesses were produced before judges appointed for the purpose of compromise, it was doubted whether the party who called them could make use of their testimony in court, or whether he should not be heard. In consequence of this, we order that where anything has been decided with reference to a compromise in cases of this kind, it shall stand; but if nothing has been agreed upon, and the witnesses are living, he against whom they have testified, and who refuses to accept their evidence, shall be permitted to have them called a second time, and this shall not be opposed on the ground that they have already given their testimony. If, however, he should refuse to accept it, it shall be received as already given, but he can contradict it by all the legal means which he is entitled to use. But when all the witnesses are dead, he will then be required to accept any of their evidence which has been committed to writing. If, however, some of them should be dead, and some living, the said litigant will, so far as the testimony of those who are living is concerned, have a right to accept their statements, or have the witnesses recalled. With reference to such as are dead, their evidence should not be rejected; but he can, as we have previously stated, avail himself of every legal resource to contradict the witnesses and their testimony.

Given on the sixth of the *Kalends* of April, during the Consulate of Lampadius and Orestes, 531.

[Another rescript of Justinian's in Greek and undated follows in the critical edition.]