Book V.
Title IV.

Concerning marriage.
(De nuptiis).

Bas. 28.4.25; Dig. 23.2; Inst. 1.10.

5.4.1. Emperors Severius and Antoninus to Potius.

When a dispute arises as to the marriage of a girl, and no agreement is reached between the guardian and mother and relatives as to selection of a future husband, the decision of the president of the province is necessary.
Given May 7 (199).

5.4.2. The same Emperors to Taphina.

If your father consented to your marriage, it does not matter that he did not subscribed the marriage document.

5.4.3. The same Emperors to Valeria.

If a freedman dares to marry his patroness, or the daughter, wife, granddaughter or great-granddaughter of his patron, you may accuse him before a competent judge, who will punish him consonant with the spirit of our age which rightly judges such alliances as odious.
November 5 (196).

5.4.4. Emperor Alexander to Perpetuuus.

Children marry the concubines of their father, for that is godless and objectionable. Those who violate this law commit the crime of unchastity (stupri).[1]
April 11 (228).

5.4.5. The same Emperor to Maxima.

If, as you say, the father of your former husband, in whose power the latter was, did not oppose your marriage, though he knew of it, you should not fear that he will not acknowledge his grandson.

5.4.6. Emperor Gordion to Valeria.

Although the marriage, with the woman's consent, was contracted in the province contrary to the commands of the emperors (with a provincial official) still if he remains in the same frame of mind after retiring from office, the marriage will be thereby made lawful; and hence, according to the opinion of the learned Paulus, the children conceived and born after the lawful marriage are legitimate.
August 21 (239).

Note.

[1] [Blume] As to this crime se headnote C. 9.9.

It was deemed public policy to prohibit a man sent into another province in an administrative capacity from marrying a woman in that province, unless he was already betrothed to her. He was even forbidden to give his consent to the marriage of his son to a girl in the province, although the marriage of his daughter to a man in the province was not forbidden. A marriage entered into a violation of this prohibition was a nullity, although it would become legal, if, as stated in the instant law, the parties consented to continue their marriage after the term of office was up. D. 23.2.38, 57, 63 and 65. See C. 5.2.1 and C. 5.7.1. It may be here mentioned that except in the case of apparitors to the governors, a man could not, ordinarily, occupy an administrative position in his native province. See: C. 1.42.1 note; title 7 of this book; C. 12.56.3.

5.4.7. The same Emperor to Aper.

If, as you say, your daughter made a complaint against her husband, and that the marriage was thereupon dissolved, but that she returned to him without your consent, the marriage is not legal in the absence of the consent of her father, in whose power she is; and you are therefore not forbidden to reclaim the dowry, though your daughter does not regret her step.

Promulgated October 29 (240).

Note.

The consent of the father, if living, was ordinarily necessary to a valid marriage on the part of the child, if he had the son in his power, and whether he had his daughter in his power or not, provided she was under 25 years of age. Law 18 of this title. That was true, as noticed, even to the extent that a daughter could not divorce her husband and then go back to him without her father's consent. The consent, however, might be implied. Law 5 of this title. There were some exceptions, as in case of his insanity. Law 25 of this title; C. 1.4.28), or where he had been absent from home for three years without being heard from, and that time was not required to be awaited if the marriage was with one of good station in life, so that consent would have been given as a matter or course. D. 23.2.10 and 11. See also law 16 of this title. If the grandfather was the man who had the paternal power in the family (see C. 8.46.2) his consent was necessary, the father's also in case of a son, but not in case of a daughter. D. 23.2.16.

5.4.8. The same Emperor to Romanus.

Neither the consent of the curator who has only the management of the property, nor that of the kindred or relatives, is required for marriage (when there is no head of the house), but only the consent of the person where marriage is in question.[2]

Given February 25 (241).

Note.

A child under the age of puberty not under paternal power had a guardian (tutor), not ordinarily a curator. A child over the age of puberty not under paternal power had a curator; if there was any property he looked after the property. His consent to a marriage was not required. And since a marriage could not be entered into until the age of puberty, the consent of a guardian was not required, except in case of arrangements for the marriage before the child reached the age of puberty. Law 1 of this title.

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[2] Blume penciled in this last phrase without striking the original "is to be considered in such case."

Where there was no head of the family, no one's consent was required to the marriage of a son; but it was different in case of a daughter under the age of 25 years. Law 20 of this title.

5.4.9. Emperor Probius to Fortunatus.

If you had a wife at home for the purpose of procreating children with the knowledge of your neighbors or other persons, and a daughter was born of this marriage, the marriage is no less valid nor the daughter any the less legitimate because no documents were drawn as to such marriage or as to the birth of the daughter.

Note.

The only real essential to the ordinary marriage was the consent of the married people and of the heads of the respective families of the bride and bridegroom. D. 23.2.2. The marriage was, of course, to be manifested by some visible signs. Thus the woman must be delivered into the hands of the man, or at least to his house. D. 23.2.5. The consent, and the cohabitation of the parties, must be to live as husband and wife—as it is frequently stated in what follows, it must be with matrimonial or conjugal inclination (affectio), and not merely to live together in concubinage. Marriage ceremony was not essential, though in the early days doubtless usual. It continued, no doubt, to be frequent, but the many references to the fact that cohabitation with conjugal inclination was alone sufficient for marriage, and the fact that marriage contracts were required in some cases, makes it somewhat doubtful, to what extent marriage ceremonies were in vogue. Law 22 of this title, however, speaks of the presence of friends and law 24 of this title speaks of marriage vows. In other words, marriages were usually public at least and not secret.

The giving of a dowry on the part of the wife, and a prenuptial gift on the part of the husband (or for them respectively), while usual (C. 5.3 headnote; C. 5.11 headnote), was not essential. The contrary was true in at least some Oriental countries. Mitteis, R.R.u.V.R. 226, 228; Syrian Law Book, L.93; p. 40. And the emperor Majorian in 458 A.D. attempted to make the giving of a dowry obligatory, but the law proved to be temporary. Nov. Maj. 6. 9. In the Orient, the property rights were carefully regulated by a marriage or dowry contract, except in provisional marriages. C. 5.5.8 note, but that was not ordinarily necessary under the Roman law. Justinian in Nov. 74, c. 4 required them in the case of all titled persons, from senators up, and required of other persons of standing, who did not want to enter into such contracts, to cause a record to be made of the marriage in church—the first evidence of the interposition of the church in marriages. But this requirement was modified by Nov. 117, c. 4, church records were dispensed with, and only persons of illustrious or higher rank were required to enter into a marriage contract. There were two other cases where marriage contracts were required. If a person who lived with a woman as his concubine wanted to make [her] his legal wife, or wanted to make his children legitimate, he was required to execute a dowry document. C. 5.27. So, too, if men of title from senators up, wanted to marry a woman who was a freedwoman or who had been on the estate, marriage contracts were required to be executed. Law 23 of this title, and Nov. 117, c. 6, and Nov. 78, c. 3. All persons, it seems, might have a record made of their marriage before a keeper of public records. C. 2.7.23.4. On the subject of marriage ceremonies in the older and newer times, see "matrimonium" in Smith, Greek and Roman Antiquities.

5.4.10. Emperor Diocletian and Maximian to Paulina.

Since you say that you are not the daughter of a father of senatorial rank, but that by reason of your marriage with a senator you afterward acquired the rank of clarissima (honorable), this rank which you acquired through your husband, was lost if thereafter you married a man of lower rank, and you were thereby reduced to your former status.[3]

5.4.11. The same Emperors to Alexander.

If you wife is detained by her parents against her consent, the rector of the province, our friend, will, when you go before him, and she is produced, follow her wished and fulfill your desire.

Note.

See C. 8.8.3 to a similar effect; see also C. 5.17.5 and note.

5.4.12. The same Emperors to Sabinus.

The policy of the law does not permit that even a son under paternal power should be compelled to marry against his will. You are accordingly not forbidden to marry the woman of your choice by following the rules of law, provided that you have the consent of your father thereto.

Given November 5 (285).

5.4.13. The same Emperors and the Caesars to Onesimus.

Without subsequent nuptials, marriage documents do not prove marriage, nor is matrimony lawfully entered into invalid because no marriage documents were executed, since the other[4] proofs of marriage are not void in the absence of such document.

5.4.14. The same Emperors and Caesar to Titius.

No one cam be compelled to contract a marriage in the beginning or to renew one once dissolved. Hence you know that the free right of contracting or dissolving marriage should not be the subject of force.

5.4.15. The same Emperors and Caesars to Titianus.

One who manumits his female slave is not forbidden to marry her if he is not one of those persons who are specially prohibited from doing so, and it is certain that legitimate children may be born to a father from this marrige.[5]

5.4.16. The same Emperors and Caesars to Rhodo.

A father who has exposed his daughter, the latter being raised at your expense and trouble, should agree to your wish of joining her in matrimony to your son. If he refuses, he must be obeyed only if he pays the expense of bringing her up.

Note.

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[3] [Blume] To the same effect is C. 12.1.13; Nov. 22, c. 36.

[4] [Blume] Note law 9 of this title.

[5] [Blume] See also law 26 of this title. A son of a senator formerly could not marry a freed woman. D. 23.2.16 pr.; 9 Cujacius 408.

The present rescript contemplates that the father still retained control of a child which was exposed (cast out) by him. That was the general rule at the time when this rescript was written. But from the time of Constantine on, such person lost all power over the child, and hence it is doubtful that the rule of this rescript was in force thereafter. Headnote to C. 8.51. Cujacius, however, believes that the present law remained in force. 9 Cucacius 410.

5.4.17. Emperors Diocletian and Maximian and the Caesars.

No one is permitted to contract marriage with a daughter, granddaughter, great-granddaughter, or with a mother, grandmother, great-grandmother, aunt, great-aunt, sister, daughter of a sister, or the sister's granddaughter by her daughter; or with the daughter of a brother or the brother's granddaughter by his daughter; or with his stepdaughter, stepmother, daughter-in-law, mother-in-law, who are relatives by marriage, or with others forbidden by the ancient law. Everyone must abstain from such a marriage.
Given May 1 (295).

5.4.18. Emperors Valentinian, Valens and Gratian to the Senate.

Although widows less than 25 years old enjoy the freedom of emancipation, they shall not enter a second marriage without consent of the father.

1. But if the woman's choice of a husband does not agree with that of her relatives, then as is provided in the case of girls (C. 5.4.10) the judge shall decide the matter, after investigation, and if the claimants of her hand are equal in birth and morals, the person whom the woman herself approves shall be adjudged the more suitable.

2. And lest honorable marriage should be opposed by those who by reason of close relationship might become heirs of widows, we want, if a suspicion of that sort arises, the authority and judgment of those to prevail who, though death should intervene, could not receive any of her property by inheritance.
Given July 16 (371).

5.4.19. Emperors Arcadius and Honorius Eutychianus, Praetorian Prefect.

Permission is given by this salutary law for first cousins to intermarry. We reinstate the respect therefor under the ancient law, suppress the cause of accusations in connection therewith, and declare matrimony between first cousins to be legal, whether such cousins are children of two brothers, two sisters, or of a brother and sister. Children born of such marriage shall be considered legitimate and heirs of their fathers.[6]
Given at Nicea June 11 (405).

5.4.20. Emperors Honorius and Theodosius to Theodorus, Praetorian Prefect.

The consent of the father is necessary to the marriage of his daughter in his power. If the girl is sui juris and less than 25 years of age, her consent also is necessary. If she has been deprived of the aid of a father, the judgment of her mother and relations as well as of herself is necessary. If she has been deprived of both parents and is under the protection of a curator, and a struggle for her hand arises, perchance among honorable competitors, so that it is a question whom the girl should marry, but she, through modesty

[6] [Blume] Cujacius says that this was permitted in France in his day. 9 Cujacius 408.

refuses to express her wish, the judge may, in the presence of the relatives, decide to whom she should give her hand.
(408-409).

5.4.21. Emperors Theodosius and Valentinian to Bassus, Praetorian Prefect.

Soldiers, from the common soldier up to the protectors, are free to contract marriage without marriage ceremony, but with free born women only.
(426).

5.4.22. The same Emperors to Hierius, Praetorian Prefect.

If no documents providing for a prenuptial gift or dowry are executed, public celebration (pompa) and other solemnities in connection with the marriage may also be omitted, and no one need think that no valid marriage has been entered into on that account, or that the rights of legitimacy could be denied to children of such a marriage; and no law hinders an alliance between persons equal in status of life which is confirmed by the consent of themselves and by the testimony of their friends.
Given at Constantinople February 20 (428).

Note.

In the Orient, marriages (except provisional marriages—C. 5.5.8) were evidenced by a written instrument in which the property rights were carefully stated. Mitteis, R.R.u.V.R. 228; as to prenuptial gifts, C. 5.3 headnote). The emperor Marjorian had also provided that no marriage without a dowry should be valid. Nov. 16. c. 9. But, as noted, that law did not remain in force very long. A dowry, as well as a prenuptial gift, however, was usually given. C. 5.3 headnote; C. 5.11 headnote.

5.4.23. Emperor Justin to Desmothenes, Praetorian Prefect.

Deeming it the proper subject of imperial benevolence to investigate and at all times foster the advantages of our subjects, we think that the errors also of women, through which, on account of the frailty of their sex, they may choose a mode of life unworthy of their honor, should be corrected by proper restraint, so that they may not be deprived of the hope of a better condition, but may look forward to that and thus more easily avoid an inconsiderate and dishonorable alliance. For we believe that we can thus imitate, as much as it is possible for us to do, the benevolence and great clemency of God to the human race, who condescends always to pardon the daily sins of men, to receive our repentance and to lend us back to a better condition; if we fail to do this in the case of those subjected to our sway, we shall seem unworthy of forgiveness.

1. Thus since it would be unjust that slaves should be able to receive their freedom by imperial indulgence and be restored to their natural rights so as to live, upon bestowal of imperial beneficence of that kind, as if they had never been slaves and had always been free born, but that women, who have been on the stage, but who have changed their mind and have abandoned a dishonorable profession, should have no hope of imperial beneficence which might lead them back to the condition in which they might have lived if they had not sinned, we grant them by this beneficent imperial sanction the right that, if they abandon their dishonorable conduct, and embrace a better and honorable mode of life, they may supplicate our majesty, and they will unhesitatingly be granted an imperial rescript permitting them to enter into a legal marriage.

1a. Persons who marry them need not fear that such alliance will be invalid under the provisions of our former laws, but may be confident that such matrimony shall be as

valid as if their wives had not previously lived any dishonorable life, whether the husbands possess a title or are otherwise forbidden to marry women that have been on the stage, provided that such alliance must be proven by marriage documents, and not otherwise.

1b. Such women shall be entirely cleansed of all stain as if they had been returned to their natal condition. No dishonor shall adhere to them, and we want no difference to exist between them and those who have not sinned in a similar manner.

2. Children born of such marriage shall be legitimate children of a prior marriage and may without any impediment inherit his property whether he dies intestate or testate.

3. If such women delay marriage after they receive an imperial rescript giving them permission therefor pursuant to their prayer, nevertheless, they shall retain their good name for all purposes, including the right to transmit their good name for all purposes, including the right to transmit their property to whomever they wish and accept what has been legally left them (by testament) or by inheritance upon intestacy.

4. Similar to these women who so receive the indulgence of the emperor, we want those women[7] to be who possess a title which they received from the serene emperor as a voluntary gift before marriage, although they did not ask it, by reason of which title every stain, on account of which women are forbidden to legally marry certain, is entirely removed.

5. And we further add that if daughters are born to women of this kind, after the latter were purged from the stains of their former life, they shall not be considered as daughters of women on the stage, nor shall they be subject to the laws which forbid certain men to marry a daughter of a woman on the stage.

5a. And if they were born before, they may address a petition to the unconquered emperor, and they will unhesitatingly be granted a rescript permitting them to marry, as if they were not daughters of a woman on the stage, and they shall no longer be forbidden to marry those who are not allowed, on account of rank or for some other reason, to marry daughters of a woman on the stage, provided, however, that marriage documents must at all events be executed between them.

6. And if a daughter of a mother on the stage, the latter remaining in the profession till death, address a petition to our clemency, and shall receive imperial indulgence which exempts her from the harm received through her mother and gives to her liberty to marry, she, too, may without fear of prior laws, marry one of those who hitherto have been forbidden to marry a daughter of a woman on the stage.

7. Nay we order that another provision, contained, although obscurely, in former laws, namely, that marriages contracted between parties of unequal standing should not be valid unless marriage documents were executed, shall be expunged to that, thought such documents are lacking, such marriages shall be entirely valid without any distinction of persons, provided only that women are free and free born, and that there is no suspicion that the alliance is nefarious and incestuous.

7a. For we forbid all nefarious and incestuous alliances, as well as those which were especially forbidden by the sanction of past laws, except, forsooth, those which we permit and protect as legal marriages under the present law.

8. We direct that these provisions so settled by this present law shall hereafter be observed, and past alliances of this kind entered into within the time here mentioned shall be judged according to them, so that if anyone has married such a wife since the

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[7] [Blume] Reference appears to be still made to women who were on the stage.

beginning of our reign, as has been stated, and has children born of her, these children shall be his lawful and legitimate heirs whether he dies testate or intestate, and the children which he has by her so long as she remains his lawful wife, shall also be legitimate.
(520-523).

Note.

Because of decency, marriage between a freeborn person and a public woman was formerly prohibited. Ulpian 16.2. So, too, because of inequality of position, marriage between a senator and his descendants through males to the third degree with an emancipated person and with actors, actresses and their children was forbidden. D. 23.2.44; C. 5.5.7; C. 5.27.1. These inequalities were largely abolished by the present law, and by C. 1.4.33; Nov. 78, c. 3; Nov. 117, c. 6; and see law 29 of this title, and note.

5.4.24. Emperor Justinian to the Senate.

We ordain that if any one makes marriage a condition in any contract for giving or doing or not giving or not doing something, and he fixes the time of the marriage or mentions the marriage at all, the condition shall not be considered fulfilled, in whole or part until the actual celebration of the marriage; not when the time for marriage arrives, which is when the girl is twelve and the male fourteen years of age, but when the vows of marriage are actually taken. For thus the disputes as to the ancient law is settled and the immense volumes of books may at length be reduced to moderate measure.
Given at Constantinople July 22 (530).

5.4.25. The same Emperor to Julianus, Praetorian Prefect.

The ancients debated the question whether the children of a mad father in whose power they were could contract marriage.

1. Almost all the founders of ancient law admitted that a daughter of a mad person could be allied to a husband; for they thought it sufficient in such case, if the father did not object.

2. But that was doubted in the case of a son under paternal power. Ulpian, it is true, has reported a constitution of the Emperor Marcus which does not treat of a mad person (furioso) but generally of children of a demented person (mente capti) stating that they, males as well as females, would in such case be permitted to marry without obtaining the consent of the emperor.

3. And another doubt arose because the emperor did not add whether the constitution was applicable in case the father was mad as well as when he was demented; that is, whether the example given of a demented person also benefited the children when the father was mad. With these things in doubt, and in order to settle such ambiguities, we ordain that what appears to be lacking in the constitution of the divine Marcus shall be supplied by this constitution, so that not only the children of both sexes of a demented person, but also those of a mad person, shall be able to contract marriage, and the dowry as well as the prenuptial gift shall be supplied by their curator.

4. But the standing of the person (whom the child is to marry) is to be ascertained and the amount of the dowry and prenuptial gift is to be determined by the excellent city prefect in this city, and by the honorable president or by the bishop of the place in the provinces, in the presence of the curators of the person demented or mad, and of those of the family who are noble.

5. Provided that in this imperial city or in the provinces the property of the person mad or demented shall suffer no loss, but all things shall be done gratuitously, so that such property of such unfortunate persons may not be burdened by expenses.[8]
Given at Constantinople October 1 (530).

5.4.26. The same Emperor to Julianus, Praetorian Prefect.

It was disputed among the ancients whether if anyone gave freedom to his female slave whom he had raised, and then married her, such marriage was legal or not.

1. We, therefore, settle the doubt, and decide that such marriage is not forbidden. For if marriages are entered into through affection, and there is nothing impious or contrary to law in such alliances, why should we think of prohibiting such marriages? No man would be found so impious that he would raise a girl as a daughter from the beginning and afterward marry her; he should rather be considered to have done the opposite, namely, that he did not from the beginning raise her as his daughter, but that he gave her freedom and only afterwards thought her worthy of matrimony.

2. However, no one shall marry a woman, whether she was brought up by him or not, whom he took from the sacred baptismal font, since nothing can so induce paternal affection and make a just cause for forbidding marriage as such a tie, by which, through God's mediation, their souls are united.
Given at Constantinople October 1 (530).

Note.

This is the first instance of prohibiting marriage on account of spiritual relationship.

5.4.27. The same Emperor to Johannes, Praetorian Prefect.

We ordain that marriages between men and women older than 60 years or younger than 50 years which were forbidden by the Julian or Papian law may be entered into if the parties are willing and shall not in any manner be hindered by anyone.
(531 or 532).

5.4.28. The same Emperor to Johannes, Praetorian Prefect.

Ulpian was in doubt in case anyone had a freedwoman as his wife, and then became one of the nobility by the grant of the title of senator as to whether such marriage was thereby dissolved, because the Papian law does not permit the continuance of marriage between a senator and a freedwoman.[9]

1. Following God's judgment we do not permit the fortune of the husband to become the misfortune of his wife and will not, while we raise him in his station, lower his wife to the same extent or rather cause her to perish entirely.

2. Let no such harshness, therefore, be manifested in our time, let marriage remain valid, let the wife rise with her husband; let her see his splendor and let the stability of such marriage remain unaffected by an event of that kind.

3. In similar manner, if a daughter of a person in private station marries a freedman, and her father is subsequently elevated to the senatorial rank, let the cruel

[8] [Blume] See C. 1.4.28 and note to law 7 of this title.
[9] [Blume] See note law 23 of this title. Under Nov. 78, c. 3, any person, no matter of what rank, might marry a freedwoman by marriage contract.

provision of the Papian law remain silent, and the marriage between the daughter of the man made senator and the freedman shall not be thereby dissolved, in order that the prosperity of the father-in-law may not rob him of his son-in-law.

4. It is much better to restrain the severity of the Papian law in both cases rather than to enforce it and thereby destroy marriages of people, not through any fault of the wife or the husband, but by reason of the fortune of one of the parties. As this vice springs from one root, it is proper that it be executed by one law.
(531 or 532).

5.4.29. The same Emperors. (Synopsis in Greek.)

No one shall compel an unwilling woman to become an actress, nor compel nor exhort one to remain so who voluntarily became such but wants to quit; nor shall anyone take sureties that she will not desert the stage.

1. If a person of any rank or endowed with power does so, the woman may go before the president—unless he is the person who used the force—and the bishop, so that they may compel the party who used such force to desist from his purposes and who in case of resistance will be ejected from the city and deprived of his property. These provisions apply if anyone drags a woman to the stage.

2. If anyone hinders a woman who voluntarily became an actress from turning back, any bond given by sureties shall be void and any payment exacted from them shall be returned in double the amount.

3. So, any payment exacted from the women themselves, shall be returned in double the amount. The president and the bishop shall carry out these provisions.

4. In fact it shall be unlawful to exact from women who go on the stage any guaranty that they will not desert it.

5. If the president of the province uses force the bishop may resist him and protect sureties against liability. And if the president does not yield, the bishop may report him in order that the former may be relegated (banished) in perpetuity.

6. Such women may also enter into matrimony without an imperial rescript.

7. This constitution applies in its proper circumstances, and all marriages formerly forbidden are (still) forbidden except to the extent that that is no longer, in an imperial rescript, considered necessary, contrary to what was true formerly.

8. All these things which that constitution ordains, shall be effective as long as the women continue to live an honorable life; for if they again become actresses after they have married, they shall not alone lose the right of a free born person, but they shall also receive no assistance from this constitution nor from that of Justin of blessed memory. For they then commit the crime of unchastity (stupri).

Note.

The present law left in force the prohibitions of marriage formerly existing, except as modified by an imperial rescript, by which law 23 of this title is probably meant. That law appears to permit all persons to marry stagewomen who had abandoned their profession, provided the marriage was entered into by marriage contract. The present law is referred to in C. 1.4.33. That states that persons of every rank may marry stage women who have abandoned the stage. The provision was reiterated in Nov. 117, c. 6. The present law was further followed up by another law which shows how the present law was sought to be evaded. That is Novel 51, enacted in 537. See also Nov. 14.