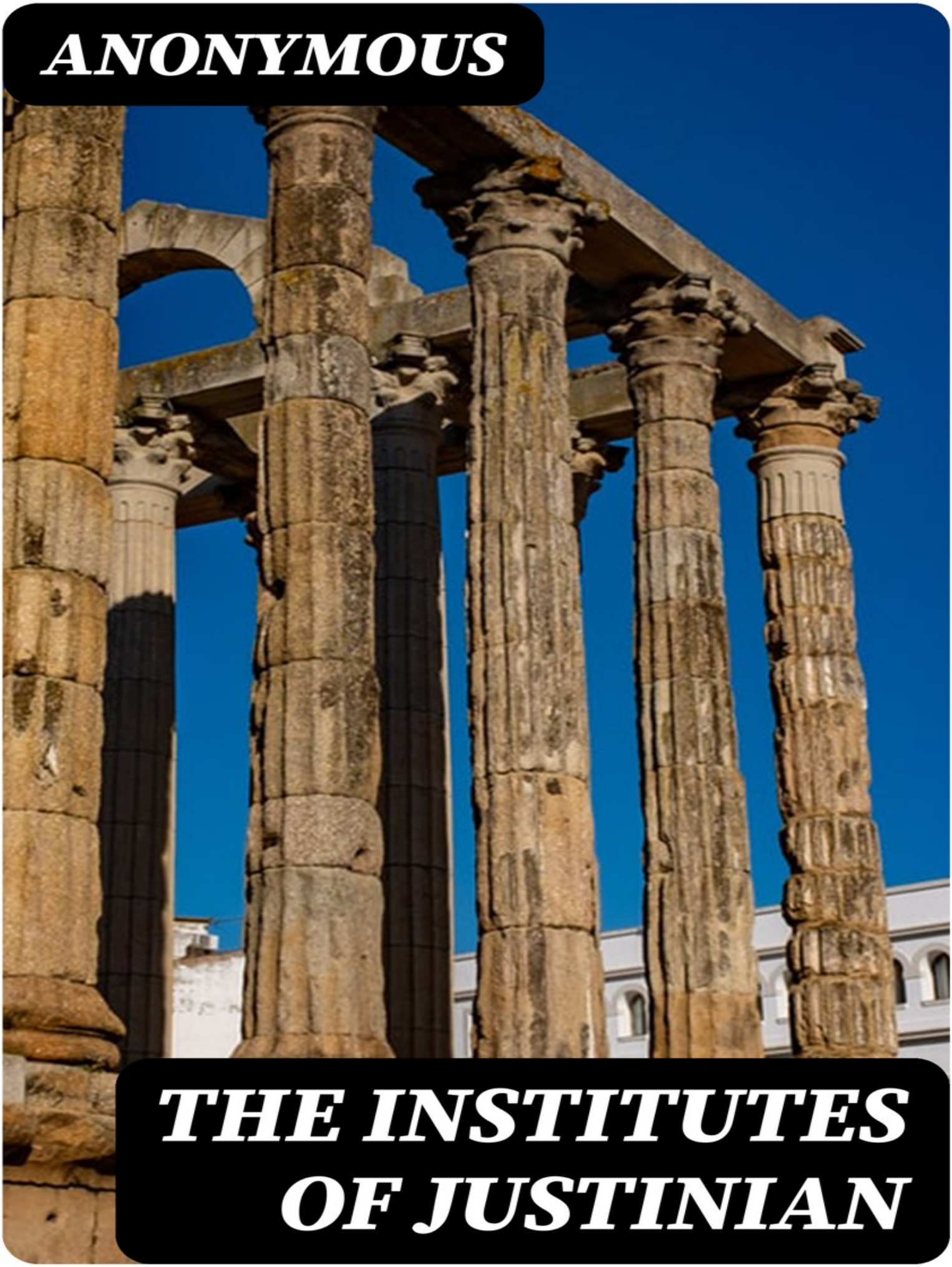
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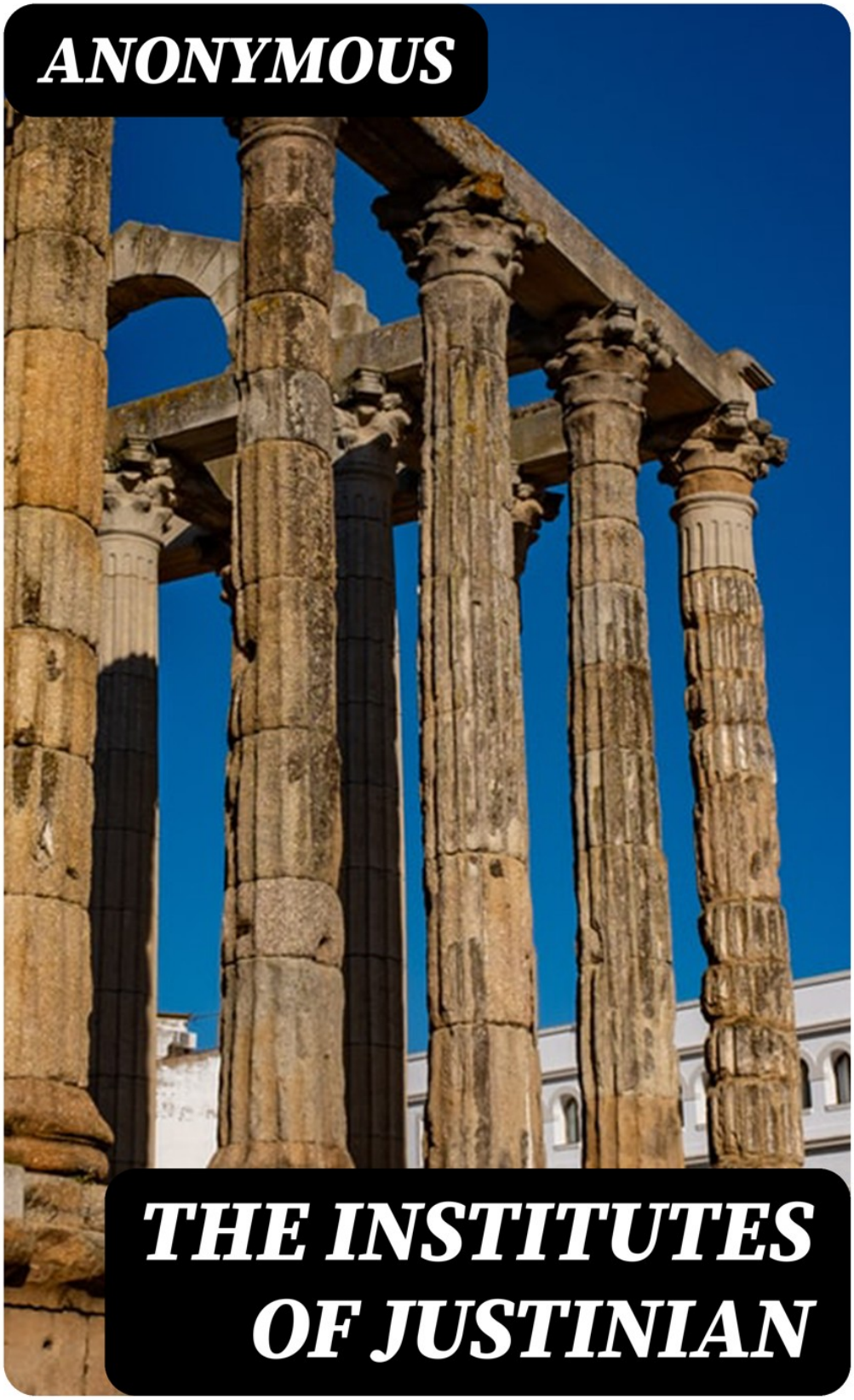

THE INSTITUTES OF JUSTINIAN

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The Institutes of Justinian

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BOOK I.

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TITLES

TITLE I. OF JUSTICE AND LAW

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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

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1 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. 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 of 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 the 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 jurisconsults, 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

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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.

5 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 IV. OF MEN FREE BORN

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A freeborn man is one free from his birth, being the offspring of parents united in wedlock, whether both be free born or both made free, or one made free and the other free born. He is also free born if his mother be free even though his father be a slave, and so also is he whose paternity is uncertain, being the offspring of promiscuous intercourse, but whose mother is free. It is enough if the mother be free at the moment of birth, though a slave at that of conception: and conversely if she be free at the time of conception, and then becomes a slave before the birth of the child, the latter is held to be free born, on the ground that an unborn child ought not to be prejudiced by the mother's misfortune. Hence arose the question of whether the child of a woman is born free, or a slave, who, while pregnant, is manumitted, and then becomes a slave again before delivery. Marcellus thinks he is born free, for it is enough if the mother of an unborn infant is free at any moment between conception and delivery: and this view is right.

1 The status of a man born free is not prejudiced by his being placed in the position of a slave and then being manumitted: for it has been decided that manumission cannot stand in the way of rights acquired by birth.

TITLE V. OF FREEDMEN

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Those are freedmen, or made free, who have been manumitted from legal slavery. Manumission is the giving of freedom; for while a man is in slavery he is subject to the power once known as 'manus'; and from that power he is set free by manumission. All this originated in the law of nations; for by natural law all men were born free—slavery, and by consequence manumission, being unknown. But afterwards slavery came in by the law of nations; and was followed by the boon of manumission; so that though we are all known by the common name of 'man,' three classes of men came into existence with the law of nations, namely men free born, slaves, and thirdly freedmen who had ceased to be slaves.

1 Manumission may take place in various ways; either in the holy church, according to the sacred constitutions, or by default in a fictitious vindication, or before friends, or by letter, or by testament or any other expression of a man's last will: and indeed there are many other modes in which freedom may be acquired, introduced by the constitutions of earlier emperors as well as by our own.

2 It is usual for slaves to be manumitted by their masters at any time, even when the magistrate is merely passing by, as for instance while the praetor or proconsul or governor of a province is going to the baths or the theatre.

3 Of freedmen there were formerly three grades; for those who were manumitted sometimes obtained a higher freedom fully recognised by the laws, and became Roman citizens; sometimes a lower form, becoming by the lex Iunia Norbana Latins; and sometimes finally a liberty still more circumscribed, being placed by the lex Aelia Sentia on the footing of enemies surrendered at discretion. This last and lowest class, however, has long ceased to exist, and the title of Latin also had become rare: and so in our goodness, which desires to raise and improve in every matter, we have amended this in two constitutions, and reintroduced the earlier usage; for in the earliest infancy of Rome there was but one simple type of liberty, namely that possessed by the manumitter, the only distinction possible being that the latter was free born, while the manumitted slave became a freedman. We have abolished the class of 'dediticii,' or enemies surrendered at discretion, by our constitution, published among those our decisions, by which, at the suggestion of the eminent Tribonian, our quaestor, we have set at rest the disputes of the older law. By another constitution, which shines brightly among the imperial enactments, and suggested by the same quaestor, we have altered the position of the 'Latini Iuniani,' and dispensed with all the rules relating to their condition; and have endowed with the citizenship of Rome all freedmen alike, without regard to the age of the person manuumitted, and nature of the master's ownership, or the mode of manumission, in accordance with the earlier usage; with the addition of many new modes in which freedom coupled with

the Roman citizenship, the only kind of freedom now known may be bestowed on slaves.

TITLE VI. OF PERSONS UNABLE TO MANUMIT, AND THE CAUSES OF THEIR INCAPACITY

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In some cases, however, manumission is not permitted; for an owner who would defraud his creditors by an intended manumission attempts in vain to manumit, the act being made of no effect by the lex Aelia Sentia.

1 A master, however, who is insolvent may institute one of his slaves heir in his will, conferring freedom on him at the same time, so that he may become free and his sole and necessary heir, provided no one else takes as heir under the will, either because no one else was instituted at all, or because the person instituted for some reason or other does not take the inheritance. And this was a judicious provision of the lex Aelia Sentia, for it was most desirable that persons in embarrassed circumstances, who could get no other heir, should have a slave as necessary heir to satisfy their creditors' claims, or that at least (if he did not do this) the creditors might sell the estate in the slave's name, so as to save the memory of the deceased from disrepute.

2 The law is the same if a slave be instituted heir without liberty being expressly given him, this being enacted by our constitution in all cases, and not merely where the master is insolvent; so that in accordance with the modern spirit of humanity, institution will be equivalent to a gift of liberty; for it is unlikely, in spite of the omission of the grant of freedom, that one should have wished the person whom one has chosen as one's heir to remain a slave, so that one should have no heir at all.

3 If a person is insolvent at the time of a manumission, or becomes so by the manumission itself, this is manumission in fraud of creditors. It is, however, now settled law, that the gift of liberty is not avoided unless the intention of the manumitter was fraudulent, even though his property is in fact insufficient to meet his creditors' claims; for men often hope and believe that they are better off than they really are. Consequently, we understand a gift of liberty to be avoided only when the creditors are defrauded both by the intention of the manumitter, and in fact: that is to say, by his property being insufficient to meet their claims.

4 The same lex Aelia Sentia makes it unlawful for a master under twenty years of age to manumit, except in the mode of fictitious vindication, preceded by proof of some legitimate motive before the council.

5 It is a legitimate motive of manumission if the slave to be manumitted be, for instance, the father or mother of the manumitter, or his son or daughter, or his natural brother or sister, or governor or nurse or teacher, or fosterson or fosterdaughter or fosterbrother, or a slave whom he wishes to make his agent, or a female slave whom he intends to

marry; provided he marry her within six months, and provided that the slave intended as an agent is not less than seventeen years of age at the time of manumission.

6 When a motive for manumission, whether true or false, has once been proved, the council cannot withdraw its sanction.

7 Thus the lex Aelia Sentia having prescribed a certain mode of manumission for owners under twenty, it followed that though a person fourteen years of age could make a will, and therein institute an heir and leave legacies, yet he could not confer liberty on a slave until he had completed his twentieth year. But it seemed an intolerable hardship that a man who had the power of disposing freely of all his property by will should not be allowed to give his freedom to a single slave: wherefore we allow him to deal in his last will as he pleases with his slaves as with the rest of his property, and even to give them their liberty if he will. But liberty being a boon beyond price, for which very reason the power of manumission was denied by the older law to owners under twenty years of age, we have as it were selected a middle course, and permitted persons under twenty years of age to manumit their slaves by will, but not until they have completed their seventeenth and entered on their eighteenth year. For when ancient custom allowed persons of this age to plead on behalf of others, why should not their judgement be deemed sound enough to enable them to use discretion in giving freedom to their own slaves?

TITLE VII. OF THE REPEAL OF THE LEX FUFIA CANINIA

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Moreover, by the lex Fufia Caninia a limit was placed on the number of slaves who could be manumitted by their master's testament: but this law we have thought fit to repeal, as an obstacle to freedom and to some extent invidious, for it was certainly inhuman to take away from a man on his deathbed the right of liberating the whole of his slaves, which he could have exercised at any moment during his lifetime, unless there were some other obstacle to the act of manumission.

TITLE VIII. OF PERSONS INDEPENDENT OR DEPENDENT

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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. And first let us look at those who are in the power of masters.

1 Now slaves are in the power of masters, a power recognised by the law of all nations, for all nations present the spectacle of masters invested with power of life and death over slaves; and to whatever is acquired through a slave his owner is entitled.

2 But in the present day no one under our sway is permitted to indulge in excessive harshness towards his slaves, without some reason recognised by law; for, by a constitution of the Emperor Antoninus Pius, a man is made as liable to punishment for killing his own slave as for killing the slave of another person; and extreme severity on the part of masters is checked by another constitution whereby the same Emperor, in answer to inquiries from presidents of provinces concerning slaves who take refuge at churches or statues of the Emperor, commanded that on proof of intolerable cruelty a master should be compelled to sell his slaves on fair terms, so as to receive their value. And both of these are reasonable enactments, for the public interest requires that no one should make an evil use of his own property. The terms of the rescript of Antoninus to Aelius Marcianus are as follow:—'The powers of masters over their slaves ought to continue undiminished, nor ought any man to be deprived of his lawful rights; but it is the master's own interest that relief justly sought against cruelty, insufficient sustenance, or intolerable wrong, should not be denied. I enjoin you then to look into the complaints of the slaves of Iulius Sabinus, who have fled for protection to the statue of

the Emperor, and if you find them treated with undue harshness or other ignominious wrong, order them to be sold, so that they may not again fall under the power of their master; and the latter will find that if he attempts to evade this my enactment, I shall visit his offence with severe punishment.'

TITLE IX. OF PATERNAL POWER

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Our children whom we have begotten in lawful wedlock are in our power.

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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

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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 recognised 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 daughterinlaw, that 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 daughterinlaw, nor your father's betrothed you

stepmother, yet it is more decent and more in accordance with what is right to abstain 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.

TITLE XI. OF ADOPTIONS

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Not only natural children are subject, as we said, to paternal power, but also adoptive children.

1 Adoption is of two forms, being effected either by rescript of the Emperor, or by the judicial authority of a magistrate. The first is the mode in which we adopt independent persons, and this form of adoption is called adrogation: the second is the mode in which we adopt a person subject to the power of an ascendant, whether a descendant in the first degree, as a son or daughter, or in a remoter degree, as a grandson, granddaughter, great-grandson, or great-granddaughter.

2 But by the law, as now settled by our constitution, when a child in power is given in adoption to a stranger by his natural father, the power of the latter is not extinguished; no right passes to the adoptive father, nor is the person adopted in his power, though we have given a right of succession in case of the adoptive father dying intestate. But if the person to whom the child is given in adoption by its natural father is not a stranger, but the

child's own maternal grandfather, or, supposing the father to have been emancipated, its paternal grandfather, or its great-grandfather paternal or maternal, in this case, because the rights given by nature and those given by adoption are vested in one and the same person, the old power of the adoptive father is left unimpaired, the strength of the natural bond of blood being augmented by the civil one of adoption, so that the child is in the family and power of an adoptive father, between whom and himself there existed antecedently the relationship described.

3 When a child under the age of puberty is adopted by rescript of the Emperor, the adrogation is only permitted after cause shown, the goodness of the motive and the expediency of the step for the pupil being inquired into. The adrogation is also made under certain conditions; that is to say, the adrogator has to give security to a public agent or attorney of the people, that if the pupil should die within the age of puberty, he will return his property to the persons who would have succeeded him had no adoption taken place. The adoptive father again may not emancipate them unless upon inquiry they are found deserving of emancipation, or without restoring them their property. Finally, if he disinherits him at death, or emancipates him in his lifetime without just cause, he is obliged to leave him a fourth of his own property, besides that which he brought him when adopted, or by subsequent acquisition.

4 It is settled that a man cannot adopt another person older than himself, for adoption imitates nature, and it would be unnatural for a son to be older than his father. Consequently a man who desires either to adopt or to