

OUTLINE — LECTURE 2

Roman Legal History

<i>Period</i>	<i>Description</i>	<i>Politics</i>	<i>Sources of Law</i>
500–250 BC	Archaic	City-State	XII Tables
250–1 BC	Pre-Classical	Urban Empire	Statutes/Cases
1–250 AD	Classical	Principate	Cases
250–500 AD	Post-Classical	Dominate	Imperial Constitutions
550 AD	Justinian	Byzantine	Code

The ‘Codification’ of Roman Law

240 A.D. — End of classical period; no official collection except the praetor’s *edictum perpetuum* (perpetual edict), a collection of formulae and rules of procedure published by the chief judge of Rome, known as the praetor. Even before the end of the classical period unpublished decisions of the emperor, known as constitutions, were becoming an increasingly important source of law.

439 A.D. — Theodosian Code (begun 429). About 1/3 to 1/2 of the Theodosian Code survives. The *pays de droit écrit*, the land of the written law, in southern third of France, owes its name to the fact that for a long period Roman law as represented by the Theodosian Code was regarded as being in force there.

527 A.D. — Justinian becomes emperor

529 A.D. — Publication of the first Code

530–533 A.D. — Compilation of the Digest

533 A.D. — Publication of the Digest and the Institutes

534 A.D. — Publication of the second Code

534–565 A.D. — Justinian’s Novels

Justinian’s first Code does not survive, but the rest of his work does survive:

1. The *Digest* or *Pandects*, a mammoth collection of extracts from the writings of the classical jurists from roughly 100 BC to roughly 220 AD.
2. The *Institutes*, an elementary and quite short textbook following that of the second-century jurist Gaius.
3. The *Code*, a compilation of imperial constitutions (i.e., rulings by the emperor on matters of law) from roughly 100 AD to Justinian’s time.
4. The *Novels*, a private collection, probably made shortly after Justinian’s death, of 168 constitutions that he promulgated after 534.

Together, these became known as the *Corpus Iuris Civilis*. Extracts from the *Institutes*, the *Digest* and *Code*, designed to show how these books are arranged, may be found in Part I of the coursepack. Applying our tests of authoritative, systematic, and exclusive to the parts of the

CJCiv: The *Digest*, *Code*, and *Institutes* are all authoritative. The *Digest* is exclusive in its sphere but not systematic, the *Code* is not exclusive nor is it systematic, and the *Institutes* are systematic but not exclusive. The *Novels* are neither authoritative nor exclusive nor systematic, though the constitutions that they contain may be regarded as authoritative.

Sources:

Codex Theodosianus, P. Meyer & T. Mommsen eds., 2 vols. (1905) (includes the Sirmondian Constitutions and the Theodosian Novels)

The Theodosian Code and Novels and the Sirmondian Constitutions, C. Pharr trans. (1952)

Corpus Iuris Civilis, T. Mommsen, P. Krüger, R. Schöll, W. Kroll eds. (var. ed. 1911, 1915, 1904) (Many times reprinted, known as 'the Berlin stereotype edition')

The Civil Law, S.P. Scott trans., 17 vols. in 7 (1922) (a complete English trans. of the *Corpus Iuris Civilis* that is available online, but the more recent translations are far superior)

The Digest of Justinian, A. Watson ed. trans., 4 vols. (1985)

The Codex of Justinian, B. W. Frier ed., trans., 3 vols. (2016)

The Novels of Justinian, D. J. D. Miller, P. Sarris ed., trans., 2 vols. (2018)

The Institutes of Justinian, J.B. Moyle trans., 5th ed. (1913, repr. 1967)

Continental Legal History

<i>Period</i>	<i>Description</i>	<i>Politics</i>	<i>Roman</i>	<i>Canon</i>	<i>Customary/National</i>
450–1100	Early Middle Ages: primitive collections	Barbarian Invasions	Romano-barbarian Codes	Collections	Barbarian Codes
1100–1250	High Middle Ages: academic study	Feudalism, Feudal monarchy	CJC–glossators	Gratian→decretists Papal decretals	Coutumiers
1250–1500	Later Middle Ages: academic application:	National monarchy	CJC–commentators, <i>Consilia</i>	Decretalists – >encyclopedic jurists	Coutumiers and statutes
1450–1550	Renaissance and Reformation: academic bifurcation	Absolutism	Humanists	Councils, <i>Consilia</i>	Codification of custom Reception
1550–1750	Early Modern: bureaucracy and philosophers	Absolute monarchy	Natural law, <i>usus modernus pandectarum</i>	Papal bureaucracy, Handbooks	“Institutes” and statutes
1700–1900	Modern: codification	Revolution	Pandectists, Historical School	Pandectists →Codification	Codification

The Structural Features of Justinian's *Institutes*

Ius vs. *lex*. This is not in the scheme of Justinian's *Institutes*. It's simply fundamental to the language. The only place where J. uses the word *lex* is where he is referring to statutes.

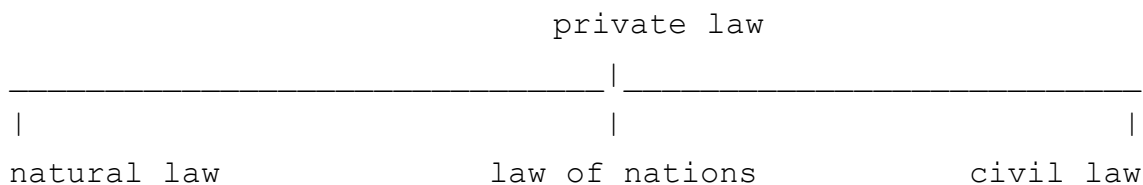
Justinian's *Institutes* (in general): JI.1.1.4: "The study of law consists of two branches, law public and law private."

1. Some things, e.g., rites, roads, and fields are public; some belong to individuals.
2. "Public law [*lex*] cannot be changed by private agreement."
3. Livy calls the XII Tables "the fountain of all public and private law."
4. The best-known statement of the distinction is in D.1.1.2 (Ulpian):

"Of this subject there are two positions [an odd word in this context], public law and private law. Public law is that which regards the constitution of the Roman state, private law looks at the interest of individuals; as a matter of fact, some things are beneficial from the point of view of the state, and some with reference to private persons. Public law is concerned with sacred rites, with priests, with public officers. Private law has a threefold division, it is deduced partly from the rules of natural law, partly from those of the *ius gentium*, partly from those of civil law."

5. The function of the public/private distinction may have been to make the jurists feel more autonomous.
6. Although the Roman-law texts that made the public-private distinction were known in the west after the fall of Rome and were well known from the 12th century on, but the western jurists made hardly any use of the distinction until the 16th century.

JI. 1.1.4 (continued) "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."



This is not structural. The third-century jurist Ulpian makes this three-fold distinction. The second-century jurist Gaius, on whom most of the *Institutes* is based makes a two-fold distinction, not separating natural law from the law of nations.

JI 1.2pr: From Ulpian: "The law of nature is that which nature 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."

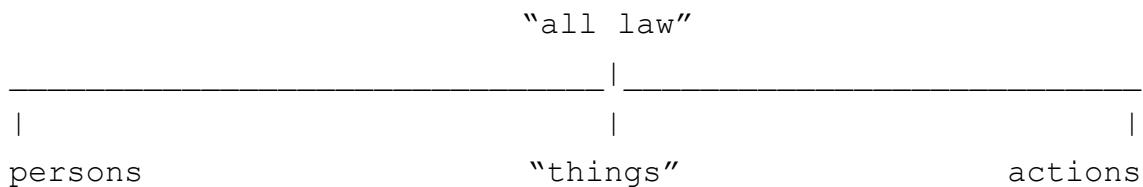
JI 1.2.1: From Gaius: "The civil law of Rome, and the law of all nations, differ from each other thus. The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. Those rules which a state enacts for its own members are peculiar

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.”

Jl 1.2.2: “[By the law of nations] when 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.”

It is hard to exaggerate how much confusion these passages caused in later centuries. Modern scholarship, and to some extent Renaissance scholarship, suggests that the philosophical basis of Ulpian’s views was Stoic, and those of Gaius, Aristotelian or Peripatetic. Be that as it may be, the Roman lawyers never thought that what was a matter of natural law could trump civil law. But as we saw from Gratian, in the last lecture, medieval lawyers did. Hence, the stakes were much higher for the medieval jurists.

Jl. 1.2.12: “The whole of the law which we observe relates either to persons, or to things, or to actions.”



In modern terms the first category is capacity; the second category is substantive rights and duties; the third is remedies. Who, what and how vindicated.

1. The legal realists of the first half of the last century taught us the danger of separating substantive rights from remedies. In Roman law, the sharp separation of the law of things from the law of actions was characteristic only of the institutional treatises and post-Classical writing. The jurists of the Digest are acutely aware of the procedural implications of substantive rights and duties.
2. If we look at this trichotomy from a neo-Marxist viewpoint, we might say that its function of this is to create a false consciousness.

Bk. 1. Persons

Jl.1.3pr: : “In the law of persons, then, the first division is into free men and slaves.”

Jl.1.8pr: “Another division of the law relating to persons classifies them as either independent or dependent.”

Bks. 2 and 3.

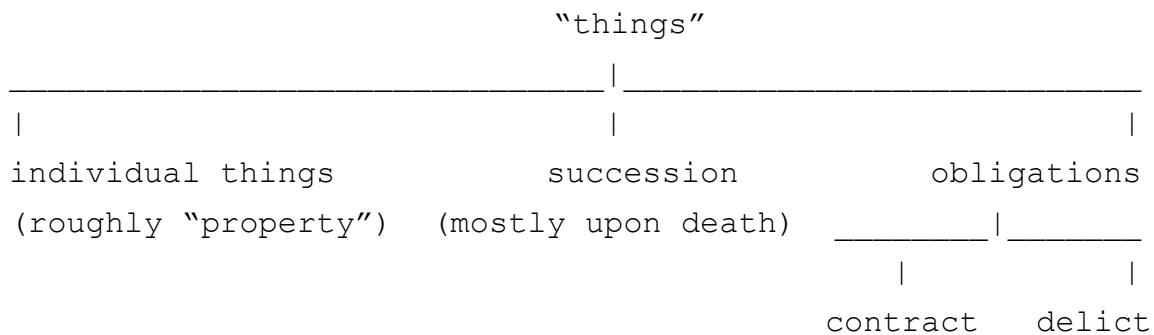
“Things” Jl.2.1pr: “In the preceding book we have expounded the law of Persons: now let us proceed to the law of Things. Of these, some admit of private ownership, while others, it is held, cannot belong to individuals: for some things are by natural law common to all, some are public, some belong to 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.”

I.2.9.6: “ ... 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

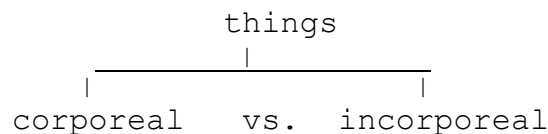
by adrogation, or become assignees of a deceased's estate in order to secure their liberty to slaves manumitted by his will, the whole estate of those persons is transferred to you in an aggregate mass."

Jl.3.13pr, 2: "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. ... [T]hey are arranged in four classes, contractual, quasicontractual, delictal, and quasi-delictal."

Books 2 and 3 are hence further subdivided:

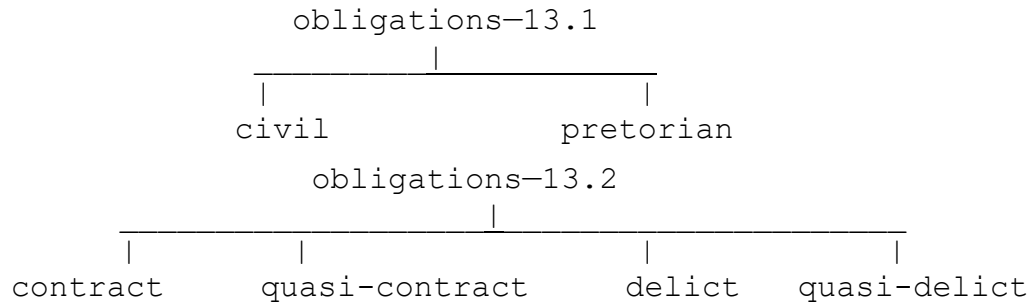


Let's try to burrow into the distinction between property and obligation, because it is clear that the middle category is a middle category because it contains both property and obligations. What separates property from obligation is not function, much less physical characteristics, it is a distinction made in Book 4, the book on procedure, *in rem* vs. *in personam*. In our legal system it means 2 things — one procedural and one substantive. It is either a process that involves the seizure of a specific thing or a remedy involving a specific thing, or it is a right good as against the whole world. The distinction is a particularly troublesome one in a legal system like the Roman which doesn't award specific restitution. The distinction is kept somewhat clearer in Roman law than it is in our system by the fact that a Roman action *in rem* focused on the plaintiff's right not the defendant's wrong. All corporeal things were subject to actions *in rem*. Some incorporeal things were, and those which were tended to be those which gave *in rem* rights, in the second sense of the term (good as against the whole world), in a corporeal thing, servitudes, usufructs, hereditas.



The first problem with the distinction is that all physical things are corporeal and all rights are incorporeal. This is a clue to J.'s understanding of ownership, i.e., it can only be of a corporeal thing. Further, incorporeal things includes obligations. BUT obligations cannot be conveyed. (G.2.38–9 (no parallel in J.I. but it's his rule too.) This is not quite true as we shall see when we get to succession *per universitatem*, but this eminently practical distinction forms the basis of 2+ books: things that can be conveyed singly, things that are conveyed in bunches, and things that cannot be conveyed singly.

The notion of obligation is never defined in the classical texts. J.3.13 is justly famous and is his own: "An obligation is a legal bond, with which we are bound by necessity of persorming some act according to the laws of our State." For Justinian obligations are then divided:



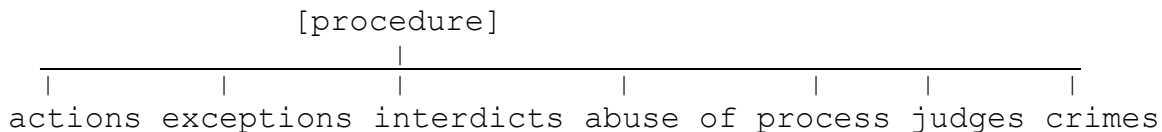
The development of the idea of obligation is complicated and not completely known. That J. should distinguish between civil and pretorian obligations 300 years after the distinction had ceased to have any meaning shows something of where the idea had been, as does the necessity for creating the two quasi-categories. We may expand his definition along the following lines: “An obligation is a legal bond between two persons which implies the duty of one to another enforceable by an *actio in personam*.”

As a general matter, one might say that the Roman law of contractual obligations is well developed. It is controversial whether they had a general notion of contract, but they certainly had extensive law about particular kinds of contracts: loans, bailments, pledges, formal oral contracts, sale, hire, partnership and agency all received extensive treatment.

As a general matter, one might say that the Roman law of delictual obligations is less well developed than is the law of contractual obligations. By contrast to the modern law of tort, the Roman law of delict tended to emphasize the penal element. It was thus somewhat in between our law of tort and our law of crime. The emphasis was also on intentional acts, theft, intentional physical injury, intentional injury to someone’s reputation. There is also a law of negligence, but most of the texts deal with damage to property (though we must remember that under Roman law slaves were property). There is very little about negligent injury to free persons.

Bk. 4. “Actions” (mostly civil procedure)

Jl.4.6pr “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.”



The Structural Features of Western Law Illustrated by the 19th-Century Codes

Code Napoléon (Napoleonic Code) (1804):

bk. 1. Of Persons. (This is where the marriage sections come from)

bk. 2. Of Property.

bk. 3. Of the different modes of acquiring property. (This is where the wild animal section comes from)

After this comes 1. Succession. 2. Donation. 3. Contracts in general. 4. Engagements formed without a contract (quasi-contract and delict). 5. Of the contract of marriage (marital property).

6–13. [Different kinds of contracts: sale, hire, partnership, loans, deposit, insurance, agency] 14–18. Security. 19. Ejectment. 20. Prescription.

(The section on witnesses is in a separate Code of Civil Procedure. There is also a separate Code of Criminal Procedure (more provisions about witnesses), a Code of [substantive] Criminal Law, Commercial Law. Later a Code of Administrative Law was added.)

Bürgerliches Gesetzbuch (German Civil Code) (1900):

Bk. 1. General Part (General rules on persons, things, legal transactions, limitations, security)

Bk. 2. Obligations (mostly contract, delict at very end)

Bk. 3. Law of Things (wild animal provision is in here)

Bk. 4. Family Law (marriage provision is in here)

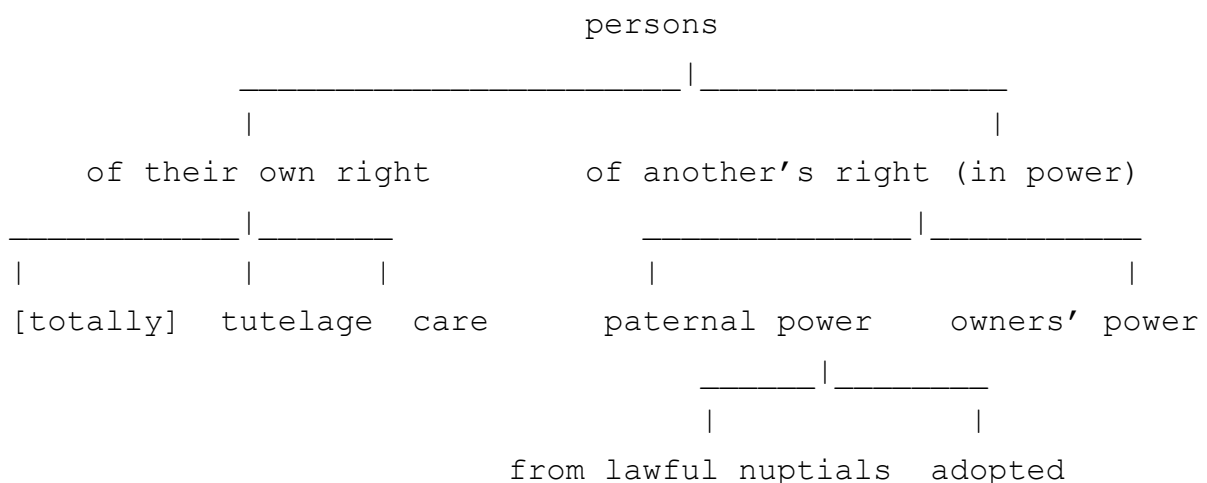
Bk. 5. Succession

(The section on witnesses is in a separate Code of Civil Procedure. There is also a separate Code of Criminal Procedure (more provisions about witnesses), a Code of [substantive] Criminal Law, and of Commercial Law.)

Marriage, wild animals, and witnesses in Justinian's *Institutes*

Marriage

Justinian's treatment of the law of persons in book 1 is subdivided as follows:



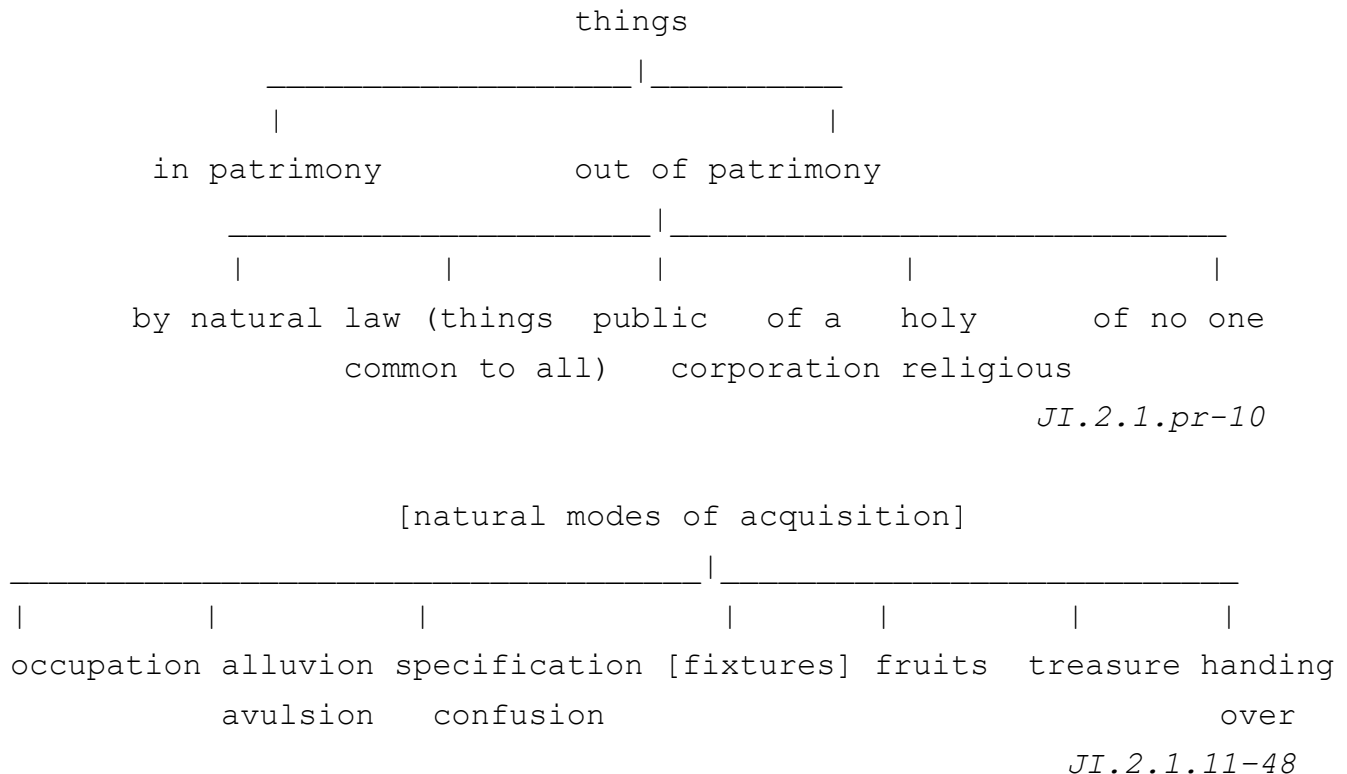
In considering those persons who are in paternal power from lawful nuptials, he says:

“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 [Other texts tell us that these ages are presumptively 14 and 12.] whether they be *sui iuris* or *in potestate* [all Roman children of whatever age were in the power of their fathers as long as the father was alive, unless the child were expressly emancipated.] 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. . . .”

But if parental consent is required, what if the parent is insane? Justinian tells us that he has fixed an anomaly in the classical law. The next three paragraphs outline incest prohibitions. They are not particularly extensive, ascendants and descendants and very close collaterals. The final paragraph (no. 13) seems to suggest that Justinian recognized the concept of legitimation by subsequent matrimony. It has become controversial today as to what the law about this was in J.'s time. The topic was also hugely controversial in the M.A.

Wild animals

The initial divisions of Justinian's law of single things in book 2 are schematized as follows:



'Occupation' is thus a natural mode of acquisition of things that belong to no one (and, hence, are not in someone's patrimony). Of occupation J. has this to say:

"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. It has been doubted whether a wild animal becomes your property immediately [when] 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 the 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. Bees, again, are naturally wild . . . [skipping to the end of the section]. 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.”

Witnesses

There is nothing about witnesses in the *Institutes*. (The *Institutes* are based on a treatise written by Gaius in the mid-2d century AD, when there was little law on witnesses.) There are, however, titles on witnesses in both the *Digest* and the *Code*, both of which are included in full in Chapter 1 of the *Materials*, p. I-33 and I-35. By comparison with the title on marriage, the *Digest* title is very short. Why? What little material that there is is late. One can tell this by looking up the names of the jurists. Much of it seems to be context-specific, i.e., whether a conviction of adultery bars that person from testifying under the provisions of certain statutes passed in the Augustan age. To the extent that there are general principles, they seem to be quite broad. E.g., the recript of Hadrian quoted in D.22.5.3.1: “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.” While we cannot fully demonstrate it on the basis of the *Code* passages given here, the concern for fixed rules about witnesses seems to have increased in the later empire. Nothing, however, gives us a basic form of procedure for the use of witnesses. That is simply assumed. Hence, while the passages on marriage and wild animals gave us quite a bit of what we have in the 19th century codes, the Roman law on witnesses gives us relatively little.

How the story came out: Wild animals, marriage and witnesses in the 19th-century European codes

Allgemeines Landrecht für den preussischen Staaten (Prussian Civil Code; literally: ‘General Provincial Law for the Prussian States’) (1794)

Code Napoléon (Napoleonic Code) (1804)

Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code; literally: ‘General Civil Law Book’) (1811) (1st ed. 1786).

Codico di Diritto Civile (Italian Civil Code) (1865)

Código Civil (Spanish Civil Code) (1889)

Bürgerliches Gesetzbuch (German Civil Code) (1900)

Code Civil Suisse; Schweizerisches Zivilgesetzbuch (Swiss Civil Code) (1907)

1. Wild Animals

a. The Napoleonic Code (1804)

[3. Of the different modes of acquiring property. General dispositions.]

711. Ownership in goods is acquired and transmitted by succession, by donation between living parties and by the effect of obligations.

712. Ownership is also acquired by accession, by incorporation, and by prescription.

713. Property which has no owner belongs to the nation.

714. There are things which belong to no one, and the use whereof is common to all.

The laws of police (*lois de police*) regulate the manner of enjoying such.

715. The right of hunting and fishing is alike regulated by particular laws.

b. The Austrian Code (1811)

[2. The law determining rights to things. 1. Of real rights. 3. Of the acquisition of property by occupancy.]

381. For vacant (*freistehenden*) things the title consists in the inborn liberty to take possession of them. The mode of acquisition is occupancy, by which one seizes a vacant thing with the intention to treat it as his own.

382. Vacant things can be acquired by all members of the State by means of occupancy, insofar as this right is not restricted by political laws (*politische Gesetze*), or insofar as some members do not have the privilege (*Vorrecht*) of occupancy.

383. This holds good especially in regard to the catching of animals. It is determined in the political laws, to whom the right of hunting or fishing belongs; how immoderate increase of the game will be checked, and damage caused by game will be compensated; how stealing of honey, which is produced by the bees of another person is to be prevented. The criminal laws determine how poachers are to be punished.

384. Domestic swarms of bees and other animals, which are tame or have been tamed, are not an object of the free catching of animals; on the contrary the proprietor has the right to follow them on the land of another person, but he must make up any damage caused to the proprietor of the land. In case the proprietor of a bee-hive kept for breeding has not followed the swarm within two days; or in case an animal, which has been tamed, has remained away of itself for forty two days, every one can take and keep it on common ground and the proprietor on his land.

c. The Italian, Spanish, German and Swiss codes are very close to the Austrian. The German is perhaps furthest away because it leaves the principle of occupancy to inference, but the Swiss returns to it. All seem fixated on bees.

2. Formation of marriage

a. French civil marriage (there's no mention of religious). Takes place before a civil officer, traditionally the mayor of the town. He reads the "aforementioned documents": the banns, any opposition to the banns and any renunciation, the birth certificates of the parties, the consents of the parents; then he reads 1.5.6 of the Code which begins "212. Married persons owe to each other fidelity, succour, assistance. 213. The husband owes protection to his wife, the wife obedience to her husband." He receives from each party his/her consent; he pronounces them husband and wife in the name of the law and immediately makes up a marriage certificate. Parents have right to oppose the marriage of their children.

- b. The Austrian code seems to contemplate a religious marriage (with some preference in language being given to the Catholic), but the form is very similar to the French as is also is the necessity for parental consent.
- c. The Italian is very similar to the French.
- d. The Spanish refers Catholics to the canon law, with a provision about parental consent, though its absence is not invalidating. The basic provision is worth quoting:

42. The law recognizes two forms of marriage, the canonical which all who profess the Catholic religion should contract, and the civil, which shall be celebrated in the manner provided in this Code.

The form of civil marriage, then, is like the French.

- e. The German provision is also remarkably like the French despite differences in detail.
- f. The Swiss is even closer to the French.

3. Witnesses

The unity of the systems is less clear in the provisions concerning witnesses. What they do seem to have in common (at least a majority of them) is a list of people who can either (a) refuse to testify, (b) are incapacitated from testifying, or (c) can be “reproached” if they do testify. Blood relatives are the most commonly mentioned, but others (e.g. the one who has eaten at the expense of a party) are mentioned as well. The consequences (this is most clearly seen in the French provisions) have to do with a system of taking written depositions. The French provision says that the reproached witness’s deposition is taken, but then if the reproach is “admitted” the deposition is not read.