

## OUTLINE — LECTURE 4

### The Burgundian Laws

#### Introduction.

1. The Burgundians crossed the Rhine sometime around 410 — kingdom centered in Worms, Speyer and Strasbourg, overthrown by the Huns (in Roman employ) c.436 — the remnants regathered north of Lake Geneva and under Gundobad (r.474–516) established a kingdom up and down the Rhone. By 534 it was gone, divided among the Franks but it retained a territorial identity Burgundy, throughout the M.A. and beyond.

2. *Territorial law and personal law.* The *Lex romana burgundionum* (L.R.B.) for the Romans, the *Lex Burgundionum* (L.B.) for the Burgundians. Tit. 2–41 of the L.B. composed between 483, date of Euric's Visigothic laws, and 501 first dated constitution. The L.B. remained in force after the fall of the kingdom, the *loi Gombette*. The date of the L.R.B. is uncertain but it was almost certainly composed before 506, the date of the massive compilation of Roman material that goes under the name of the Visigothic king Alaric.

#### Titles in the L.R.B. compared to L.B.

(See the notes following the Burgundian Laws in *Materials*, § 3B.)

Most of the provisions of the L.R.B. contain references to known sources of Roman law. The most commonly cited are the Theodosian Code, the *Sentences* of Paul, a post-classical work that contains summaries of what seems to be material written by the classical jurist Paul, and the *Institutes* of Gaius, probably known to the author through an epitome. There are no citations in the L.B. but the correspondence, at least at the beginning, to the titles of the L.R.B. is pretty obvious:

L.R.B. 1. Concerning the gift of father or mother or the munificence of lords

L.B. 1. Of the privilege of bestowing gifts permitted to fathers, and concerning royal gifts and gratuities

L.R.B. 2. Concerning homicides

L.B. 2. Of murders (translation difference, it's *De homicidiis* in the Latin of both)

L.R.B. 3. Concerning grants of freedom (*libertatibus*) [to slaves]

L.B. 3. Of the emancipation (*De libertatibus*) [of our slaves, only in some manuscripts.]

Someone is clearly engaged in a comparative effort. It is unlikely to be Syagrius, but the fact that Syagrius is known to have mastered Burgundian shows what is possible.

#### Some Specific Comparisons of the two laws

(See the notes following the Burgundian Laws in *Materials*, § 3B.)

1. Homicide:

- a. L.R.B. tit. 2.1: “A man who commits homicide, be he freeborn or slave, if they are [sic] found outside of a church, shall be condemned to death.”

L.R.B. tit. 2.2: “If, moreover, it is said that homicide happens to have been committed by accident or for the sake of avoiding death, [the matter] is to be referred to the notice of the prince by report of the judge, according to the law in the body of Novels of Theodosius and Valentinian given to the patrician Maximus.”

- b. L.B. tit. 2.1: “If anyone presumes with boldness or rashness bent on injury to kill a native freeman of our people of any nation or a servant of the king, in any case a man of a barbarian tribe, let him make restitution (*conponat*) for the committed crime not otherwise than by the shedding of his own blood.”

L.B. tit. 2.2. “We decree that this rule be added to the law by a reasonable provision, that if violence shall have been done by anyone to any person, so that he is injured by blows of lashes or by wounds, and if he pursues his persecutor and overcome by grief and indignation kills him, proof of the deed shall be afforded by the act itself or by suitable witnesses who can be believed. Then the guilty party shall be compelled to pay to the relatives of the person killed half his wergeld according to the status of the person: that is, if he shall have killed a noble of the highest class (*optimas nobilis*), we decree that the payment be set at one hundred fifty *solidi*, i.e., half his wergeld; if a person of middle class (*mediocris*), one hundred *solidi*; if a person of the lowest class (*minor persona*), seventy-five *solidi*.”

2. Proof:

I’m going to skip the materials on proof (see *Mats.*, III–41, III–43). I think it’s fairly clear that the author of the L.R.B. is still thinking in terms of the Roman law of proof, with witnesses and documents. The Burgundians seem to be thinking about decisory oaths and ordeals. This is a wonderful group of texts on which to do a short paper.

3. *Furtum prohibitum*

- a. L.R.B. tit. 12.1: “If any freeman prohibits someone who is seeking his animals or his things from entering his house to investigate, let him be held for theft, so that the thing which is being sought be paid for four-fold, by the same reason that when he has suspicion of finding theft he enters with three free witnesses.”

“12.2. But if a *colonus* or a slave prohibits someone who is so inquiring, his presumption shall be vindicated by the judges by torture of blows and by these [presumably the *coloni*] the things lost shall be paid for simply, after the fashion of Gaius who lays this down concerning prohibitions.”

[The reference is probably to G.I. 3.186, 188, 192. The references to the classical law are not exact. *Furtum prohibitum* is a praetorian four-fold penalty for Gaius, so 12.1 is reasonably accurate, but Gaius says nothing about 3 witnesses. The author may have confused *furtum prohibitum* with *futum conceptum*, where someone, with witnesses, finds stolen goods in another's house. This is a three-fold penalty. Gaius says nothing about *coloni* or slaves.]

- b. L.B. tit. 16.1: "If anyone has followed the tracks of an animal, and following those tracks comes to another's house, and if he to whose house he comes prohibits his entering the house to seek back his property, let him who drives him away from his house when he is making inquiry about that which he seeks back be held for punishment as a thief, with the further provision that it is not permitted a woman to deny questioning [i.e., to refuse to reply to an inquiry].

"2. But if perhaps a slave or a maidservant prohibits this when his or her master is absent, let him who prohibits it be held by law liable to punishment as a thief."

"3. If there is a way-pointer (tracker, *veius*)<sup>1</sup> present and he has received his payment (*vegiatura*) and he to whom he points the way is not able to find them (the animals), let the way-pointer (tracker, *veius*) pay for the theft in fee simple because he lies that he has pointed the way to them."

<sup>1</sup>. Cf. DuCange, *op. cit.*, VI, 753–54. The word *vegius* seems to refer to some type of soothsayer, prophet, or diviner (*harioli, vates, divini*) whom the Saxons call *vigileri* and the Germans *viclers*, whence *viglias* means soothsayers, for these consult the auspices to determine whether slaves and animals have been taken away by theft so that they might point out where they are. The payment for providing this information is called *vegiaturum*. Others deduce a meaning from the Saxon word *veg* or *vaeg*, which means a road, thus they are road-pointers (*vegi*) who point out the tracks of animals. Cf. XCV.

#### 4. Damage by animals

- a. L.R.B. tit. 13.1: "If anyone's animal does damage, the owner shall either pay the estimate of the damage or turn over the animal; this we also wish to be observed concerning a dog or a biped, according to the form of Paul's *Sentences* book one, under the title, "If a four-footed animal does *pauperies*"

[Not a quotation but close, except for the reference to the biped. The L.R.B. continues with material that has no direct parallel in the L.B. that suggests, at least to me, that the author of the L.R.B. was capable of thinking conceptually about fault in situations where there is damage to property. Another passage that would make a wonderful paper.]

- b. L.B. tit. 18.1: "If any animal by chance or if any dog by bite, cause death to a man, we order that among Burgundians the ancient rule of blame be removed henceforth: because what happens by chance ought not to conduce to the loss or discomfiture of man. So that if among animals, a horse kills a horse unexpectedly, or an ox gores an ox, or a dog gnaws a dog, so that it is crippled, let the owner hand over the

animal or dog through which the loss is seen to have been committed to him who suffers the loss.”

[Then follows a remarkable passage about the lance, with echoes of the XII Tables, and no parallel in the L.R.B.: “In truth, if a lance or any kind of weapon shall have been thrown upon the ground or set there without intent to do harm (*simpliciter*), and if by accident a man or animal impales himself thereupon, we order that he to whom the weapon belongs shall pay nothing unless by chance he held the weapon in his own hands in such a manner that it could cause harm to a man.”]

## 5. Divorce

- a. L.R.B. tit. 21.1-3: “1. By the consent of the father of each repudiation can be given and marriage dissolved.

[Cf. Nov. Th. 12.1; (repealed in 439); C.J.5.17.8pr, 9pr (none of these mentions parental consent).]

“2. But if the man’s part wishes to give repudiation, his wife contradicting, not otherwise shall it be allowed to him unless he convicts her of adultery, or poisoning, or bawdry; one of these crimes being proven, he shall be permitted to repudiate his wife and the marriage gift shall be recalled to his right.

“3. But if the woman wants to repudiate the man, the husband unwilling, not otherwise shall it be allowed her, unless she prove the man a homicide or a violator of graves or a poisoner. And if she proves one of these crimes, she shall dismiss the man, and shall rightfully keep the gift granted for herself, and she shall vindicate the dowry that her husband made for her, according to the Theodosian law promulgated under the title, “Concerning repudiations.”

[C.Th.3.16.1 (which also mentions the possibility of relegation as punishment for the woman)].

- b. L.B. tit. 34: “1. If any woman leaves (puts aside) her husband to whom she is legally married, let her be smothered in mire.

“2. If anyone wishes to put away his wife without cause, let him give her another payment such as he gave for her marriage price and let the amount of the fine be twelve *solidi*.

“3. If by chance a man wishes to put away his wife, and is able to prove one of these three crimes against her, that is, adultery, witchcraft, or violation of graves, let him have full right to put her away: and let the judge pronounce the sentence of the law against her, just as should be done against criminals.

“4. But if she admits none of these three crimes, let no man be permitted to put away his wife for any other crime. But if he chooses, he may go away from the home, leaving all household property behind,

and his wife with their children may possess the property of her husband.”

### **Æthelberht and the Burgundian Laws Compared**

1. Why is this stuff so hard?
  - a. Writing does not come easy to these guys. In the case of both Æthelbert’s Laws and the Burgundian Laws, we have reason to believe that neither of them was written by a native-speaker of the language. The Burgundian laws was not even written in Burgundian. It was written in Latin, though it’s a pretty queer Latin.
  - b. The problem of the self-understood in legal history. This is a perpetual problem, even with highly literate peoples. By and large people don’t write down what everyone knows.
2. So the best way we have to try to begin to figure out what is going on is to range widely and make comparisons.
3. The first kind of comparison is one that uses language, perhaps even comparative linguistics, and other uses of the same words in the same document. I’m something of a fan of this method, though some of the people who use it with this type of material probably go too far with the comparative linguistics. Let’s take a look at one example and see how far we can get on a really difficult passage, perhaps the most difficult passage in Æthelberht, the clause that our edition numbers as Æthelberht 72. It is the first in a rather extensive set of provisions about women in Æthelberht 72–77.2. Everybody listening to this knows modern English. Most of you are native-speakers. Let’s see how far we can get with that, my not-very-good Old English, and two competent translations, one by Lisi Oliver in your materials and an older one by Frederick Attenborough, if we take it slowly:

72. Gif friwif locbore leswæs hwæt gedep, XXX [þritig] sci℔ gebete.

[Oliver] If a free woman in charge of the locks does anything seriously dishonest, let her pay 30 shillings.

[Attenborough] If a freeborn woman, with long hair, misconducts herself, she shall pay 30 shillings as compensation.

[Literally] If friwif locbore does some leswæs, let her pay in compensation with 30 shillings.

friwif

locbore

leswæs

8. Gif cyning his leode to him gehateþ 7 heom mon þær yfel gedo, II bóte, 7 cyninge L scillinga.

[Oliver] If the king summons his people to him and a person does any harm to them there, 2[-fold] restitution and 50 shillings to the king.

[Attenborough] If the king calls his lieges to him, and anyone molests them there, he shall pay double compensation, and 50 shillings to the king.

9. Gif cyning æt mannes ham drincæþ 7 ðær man lyswæs hwæt gedo, twibote gebete.

[Oliver] If the king drinks at a person's home, and a person should do anything seriously dishonest there, let him pay two[-fold] restitution.

[Attenborough] If the king is feasting at anyone's house, and any sort of offence is committed there, twofold compensation shall be paid.

4. Another kind of comparison, and a dangerous one, is one made forward or backward in time. One of the great concepts that we find in later English law is the concept of the king's peace. It is striking that this concept of peace occurs what is now our very first English law. It says literally "church peace two fold; assembly (*mæthl*) peace two fold." Now I would suggest that we might posit as a working hypothesis that there is a notion that a peace adheres in certain kinds of activities, like going to church, and that extra compensation payment is owed if someone busts up a church gathering. There's support for this in other A-S texts; there may even be support for this in the notion of *mund* that we talked about when we talked about Æthelberht. Protection and peace may not be quite the same thing but they are related. There's even more here. The word *mæthl*, which your translation gives as assembly, is a perfectly good Germanic word, with cognates in Frankish and in other Germanic languages, and there's no reason to believe that there's anything new in Æthelberht's time about the people coming together in assemblies. In pagan Iceland it was called the *Allthing*. What is new in Æthelberht's time is churches; and it is hard not to see here a very early example of legal reasoning by analogy. What do we do with a guy who busts up a church? The same thing that we do with a guy who busts up an assembly. Make him pay two-fold.
5. Now another very simple, and also somewhat dangerous, way of making comparisons is to look at what contemporaries or near contemporaries did when they were writing in other languages. We spoke in the last lecture of Bede, who writes in the early 8th century and in Latin, calls Æthelbert's laws: *decreta iudicialia* = (in Spain) *forum iudicum* / *fuero juzgo*, = *domas*.
6. Another way of making comparisons is to look at similar laws and see if the similarities and the differences tell us anything. Most of what we have is in the form of compensation payments, and we are mightily ill-informed about how the system worked or didn't (although something must have happened in the *mæthl*), but we do have what they thought things were worth and we can compare different compensation payments to get some idea of value. We also can get something out of the way that they organized them. Æthelbert's Laws is quite well organized; the Burgundian Laws is not, but its organization is mirrored in the *Lex Romana Burgundionum*.
7. The broader we go the more dangerous the comparisons are, but with so little to go on we have to range widely. In comparing Æthelberht to the Burgundian laws we're stretching across a quite long space over some gap in time from an area in which Roman law influence is weak to one in which it is quite strong, from one in which the overwhelming majority of the population is probably Germanic to one in which the Germanic people are a conquering minority, from one Germanic language family

to a quite distant cousin. Much of what we see will be by way of contrast. Certainly the two laws have nothing in common with regard to their organization.

8. That said, let us try a comparison between the two laws in their laws about marriage. There are other provisions in each laws that could be brought to bear on this topic, and there are other possibilities for comparison suggested in the coursepack. In *Æthelberht* the following provision is the last of the rather extensive set of provisions on women, *Æthelberht* 72–77.2..In the case of Gundobad’s laws, there is only one English translation, and it’s one in which I have less confidence, but let’s start with it.

#### *Æthelberht*

77. **Gif man mægþman nede genimeþ, ðam agende L scillinga, 7 eft æt þam agende sinne willan ætgebigce.**

77.1. **Gif hio oþrum mæn in sceat bewyddod sy, XX scillinga gebete.**

77.2. **Gif gængang geweorðeþ, XXXV scill, 7 cyninge XV scillingas.**

[Oliver] 77. If a person takes a maiden by force: to the owner [of her protection] 50 shillings, and afterwards let him buy from the owner his consent [to marry her].

77.1. If she should be betrothed to another man by goods [i.e., the bride-price has been paid], let him pay 20 shillings [to that man as well].

77.2. If return [of the stolen maiden] occurs, 35 shillings and 15 shillings to the king.

[Attenborough] 82. If a man forcibly carries off a maiden, [he shall pay] 50 shillings to her owner, and afterwards buy from the owner his consent.

83. If she is betrothed, at a price, to another man, 20 shillings shall be paid as compensation.

84. If she is brought back, 35 shillings shall be paid, and 15 shillings to the king.

*Mægþman*, or the more common *mægþ*, is a young woman or a girl. The word does not have the emphasis on virginity that we tend to associate with the somewhat old-fashioned word ‘maiden’.

*Nede* is our word ‘need’, but in Old English it means ‘force’.

*Agende* is a property word. We can take it as meaning ‘owner’ so long as we remember that property concepts differ in different societies.

*Sceat* in 77.1 Oliver translates as ‘goods’ and Attenborough as ‘price’. In fact, it means both.

The word *bewyddod*, which both Oliver and Attenborough translate as ‘betrothed’ is derived from the Old English word, *wed*, which means ‘pledge’. It is found in our word ‘wedding’.

What *gængang* means is problematic, but both translators make the same guess, that it means ‘return’ or ‘brought back’, and that is probably right.

*Lex Burgundionum* (i.e., Gundobad)

L.B. 12.1. If anyone shall steal (*rapuerit*) a girl (*puellam*), let him be compelled to pay the price (*pretium*) set for such a girl ninefold (*in novigildo*), and let him pay a fine to the amount of twelve solidi.

12.2. If a girl who has been seized returns uncorrupted to her parents (*parentes*), let the abductor compound six times the wergeld (*pretium*) of the girl; moreover, let the fine be set at twelve solidi.

12.3. But if the abductor does not have the means to make the above-mentioned payment, let him be given over to the parents of the girl that they may have the power of doing to him whatever they choose.

12.4. If, indeed, the girl seeks the man of her own will and comes to his house, and he has intercourse with her, let him pay her marriage price (*pretium nuptiale*) threefold; if moreover, she returns uncorrupted to her home, let her return with all blame removed from him (*remota omni calumnia*).

12.5. If indeed a Roman girl, without the consent or knowledge of her parents, unites in marriage with a Burgundian, let her know that she will have none of the property of her parents.

*Puella* (*puellam* in the accusative) in Latin is a ‘girl’. The implied age-range may not go quite so high as the Old English *mægþ*, but there is no common Latin word that quite corresponds to our ‘young woman’ or our gender-neutral ‘teenager’ (nor is there such a word in Old English).

*Pretium* in Latin means ‘price’. The Latin in 12.2 uses the same word, *pretium*, as does 12.1. The text does not say *wergeld* as the translation does. Elsewhere the laws seems to give us wergelds for free people: 150 for the lowest class, 200 for the middle class, and 300 for the highest class. The *pretium* of 12.1 and 12.2 is almost certainly the same thing as the marriage price (*pretium nuptiale*) of 12.4. Whether the *pretium nuptiale* was equal to the woman’s wergeld seems unlikely.

*In novigildo* is not Classical Latin, but it almost certainly means ‘ninefold’ as in the translation. ‘Six times’ and ‘threefold’ in the later provisions use Classical Latin expressions, though not the same ones.

*Parentes* in Latin is wider than our ‘parents’. ‘Close kin’ probably translates it better.

*Solidus* (plural *solidi*) is the Latin word for shilling. That does not mean that the shilling was worth the same in Kent around the year 600 as it was in Burgundy in 500, but that the values were thought of in the same terms may be suggested by the fact that wergeld for the highest class people is the same in both laws, 300.

*Remota omni calumnia revertatur* in 12.4 might be better translated “let her return with no charges being brought.” That is to say, the law does not deal with this situation.

With all due caution, what can we get out of the comparison of the two provisions? In abduction cases, the Burgundians have a clear distinction based on the will of the woman. Does Æthelberht have such a distinction? (What do you make of Æthelberht



77?) (There's more about abduction in the Burgundian laws in later provisions. It's a great paper topic.)

With all due caution, is there anything in the comparison that might be used to begin to make generalizations about what is typically 'Germanic'?

One could do the same comparison with the provisions about divorce in the two laws. The Burgundians are clearly much tougher on divorce than is Æthelberht. Indeed, it has been argued that there are no provisions on divorce in Æthelberht, the provisions in Æthelberht 76 that look as if they are about divorce are really about the situation where the husband has died. If that is right, what do we make of the fact that the Burgundian Laws says a lot about divorce and Æthelberht nothing at all?

9. If we compare the two laws at the broadest level, we can make the following generalizations. The question is what do we do with them.
  - a. The "if ... then" construction dominates in both laws but the LB is much more rhetorical.
  - b. Æthelberht's laws is a laws about compensation. This characteristic is less obvious in LB, but see the wergeld payments in 2.2 and the detailing of injuries to the teeth in tit. 26.
  - c. The LB has much more on succession, courts and procedure than does Æthelberht.
  - d. There is much more evidence of problems with status in LB than there is in Æthelberht.
  - e. The LB does not have the concept of *mund* nor of peace.
  - f. There is no evidence of influence of Roman law in Æthelberht. Direct influence of Roman law in the LB is hard to spot but it exists. That it is there is beyond doubt because the LRB has basically the same structure of titles, and it seems relatively clear that someone, at least at the start, was doing a comparative law number. The question is the influence of Roman ideas in LB is much more difficult to evaluate. How would you generalize about it?
  - g. As we saw in the last lecture, there is some evidence of Celtic influence in Æthelberht's Laws; there is none in the Burgundian Laws.
10. Why were these laws written down? This is, in some sense, the bottom line of the whole exercise. Here are some suggestions that have been made in the context of Æthelberht's Laws, with some attempt to apply them to the Burgundian.
  - a. An expression of the *Volk*, the people?—the simplest counterargument to this is the virtually no one in Æthelbert's Kent could read, much less write. The same could be said of the Burgundians in Gundobad's Burgundy.
  - b. Mystification? This is what kings were supposed to do. This is a harder argument to counter in the case of Æthelberht's Laws, but the archaisms in the language do suggest that at least for the bodily offenses there's an oral substratum. We can't do that in the case of the Burgundian Laws because it is not written in Burgundian, but there are some references to customs in it, such

as that to the ‘way-tracker’ in XVI.3 that suggest that some elements in the Laws are not totally made up.

- c. The missionaries trying to persuade the Kentings to accept compensation payments in lieu of an obligation to take revenge?—the counter-argument to this is that virtually every society that practices blood-feud also has compensation payments, and Tacitus confirms this for the Germanic peoples. The argument works even less well for the Burgundians, because they were already Christians of a sort and had been so for some time.
- d. An expression of value but not a solvent of controversies?
- e. The beginnings of breaking out law and turning it into a specialized activity in a way in which we can see it?

<Note: What follows belongs with a later lecture.>

## II. WHAT HAPPENS WHEN THE TWO CULTURES COME TOGETHER?

1. Hence, we now have three starting points: Roman law, church law, and Germanic law.
2. Nicholas I to the Bulgarians (866, a part of a series of answers written in response to questions asked by Boris Michael khan of the Bulgarians who had just converted to Christianity)

Avoiding the verbiage that would be necessary to rehearse the custom that you say that the Greeks have in marital unions (*contuberniis*, a pejorative word, used for the unions of slaves), we will strive immediately to show you the usage that the Holy Roman Church had of old and still has in this kind of union (*coniunctionibus*, a more neutral word). Our people, both men and women, do not wear on their heads filigree of gold or silver or any other kind of metal when they contract nuptial covenants (*foedera*, a fancy word, sometimes meaning ‘treaty’, and not normally used of marriage), but after espousals (*sponsalia*, the standard word in Roman law for what we would call ‘engagement’), which are the promised covenants of future nuptials,<sup>1</sup> are celebrated by the consent of those who contract these things and with that of those in whose power (*potestate*, the power that a father had over his children in Roman law) they are, and after the espoused man gives earnest to the espoused woman by placing a ring on her finger of faith, and [after] he has handed over to her before those who are invited the *dos*<sup>2</sup> that was agreed on with a writing containing this thing, either soon or at an appropriate time, lest such a thing be presumed to be

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<sup>1</sup> This is probably a reference to D.23.1.1: “Espousals are the proposal and promise back of future nuptials.” If it is, it is the last time that the *Digest* is cited in the West until Ivo of Chartres does so in the late 11th century. The following material on parental consent may also be from D.23.1, but it need not be, because the same requirement is to be found in JI.1.10pr (*Materials* I-6).

<sup>2</sup> *Dos* in classical Roman law was dowry, a payment made by the bride or the bride’s father (or relatives) to the groom. Here, a payment by the bridegroom seems to be contemplated. Such payments were known to the classical Romans, at least in the later Empire, but they are never called *dos* but “gift before nuptials” (*donatio ante nuptias*). On the basis of this text, it has been suggested that the Germanic custom of the husband’s making a marriage payment had penetrated as far south as Rome in the mid-ninth century.

done before the time defined by law,<sup>3</sup> both are led to the nuptial covenants. And first they stand in the church of God with offerings, which they ought to offer to God by the hand of the priest, and then at length they receive the blessing and the heavenly veil, after the example of the Lord who blessed the first men in paradise, saying “Increase and multiply, etc.” [*Genesis* 1:28: “And God blessed them and said: ‘Increase and multiply’, etc.”] Indeed, Tobias, also, before he came together with his wife, is said to have prayed to the Lord with her. [*Tobias* 8:6–10] Nevertheless, those who are marrying for the second time do not receive the veil. Afterwards they leave the church carrying crowns on their heads, crowns that are commonly kept in the church.<sup>4</sup> And the nuptial festival (*festis nuptialibus*, the word can mean ‘feast’, but here it probably means ‘festival’) having been celebrated, they direct their way to leading an undivided life thereafter,<sup>5</sup> the Lord willing. These are the laws of nuptials (*iura nuptiarum*); these are the solemn pacts of marriage unions (except for other things that I do not at present remember). We do not say, however, that it is a sin if all of these things are not present in a nuptial covenant, as you say that the Greeks are instructing you, particularly when such great poverty can constrain some people that they do not have the means to prepare these things, and for this [reason], the consent alone of those whose joining is at stake suffices according to the laws.<sup>6</sup> If this consent alone is lacking, everything else, even if it is accompanied by carnal union, is frustrated, as the great doctor John Chrysostom testifies when he says “Carnal union does not make marriage but will.”<sup>7</sup>

3. 74T (i.e., The Collection in 74 Titles, a canonical collection written sometime between 1050 and 1073 in Italy, of which more tomorrow):
  - a. TITLE 62: ON LAWFUL MARRIAGES *Evaristus to all bishops*. A marriage cannot otherwise be legitimate unless the wife is sought from those who have lordship over the woman and by whom she is protected; and she is espoused by her nearest kin and lawfully dowered; and she is sacerdotally blessed at the proper time with prayers and offerings by a priest; and, accompanied by

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3 There was no fixed period in Roman law that had to elapse between the espousal and the nuptials. This is either a reference to the minimum ages for marriage fixed by Roman law (12 for the bride, 14 for the groom) or it is a reference to the period fixed by the agreement of espousals (the word *lex* being used in Roman law not only for laws passed by the Roman people but also those to which parties bind themselves by private agreement).

4 Nicholas does not say how these crowns differ from those that he says the Greeks wear and the Romans do not.

5 Perhaps an echo here of the definition of nuptials in JI.1.9.1: “Nuptials, moreover, or matrimony is the joining of man and woman, involving an undivided habit of life.”

6 It is probably significant that Nicholas says “according to the laws” (*leges*) and not “according to the canons” (*canones*), i.e., he is referring to Roman law.

7 Not by John Chrysostom but by an anonymous author of a collection of homilies on Matthew’s Gospel. The mistaken attribution is old, and probably antedates Nicholas. That Nicholas is citing a great father of the Greek Church in the context of an argument with the Greeks will not escape notice. In context, this passage is less powerful than it seems because the author of the homily is arguing that separation without remarriage does not violate the prohibition on divorce found in *Matthew* 19:9. See C.27 q.1 c.1, quoted below.

bridesmaids and escorted by those closest to her, she is solemnly given and received at a suitable time. Let them spend two or three days in prayer and preserve their chastity, so that good offspring might be produced, and they may please the Lord and beget not bastard sons, but lawful and legitimate heirs. Therefore, most beloved sons, know that marriages performed in this manner are lawful; but have no doubt that unions made otherwise are not marriages, but are adulteries, concubinages, lusts or fornications rather than lawful marriages, unless full consent is given and lawful vows are made.

Evaristus was the bishop of Rome, traditionally from 99–107. The first pope to write extensively in Latin is Damasus (d. 386). The first pope known to have written at all in Latin is Victor I, probably 189–199. You may draw your own conclusions as to whether it is likely that Evaristus wrote this. The author of 74T took this decretal from a collection known as Pseudo-Isidore, which dates from the mid-9th century. Pseudo-Isidore, in turn, got it from a collection also of mostly forged material of about a generation earlier written by a pseudonymous Benedict the Levite. There are echoes of it in earlier material, all from northern Europe, but unlike some of what is in Pseudo-Isidore (and Benedict), a specific earlier source has not been found. The contrast with Nicholas I is quite dramatic.

- b. TITLE 63: ON MARRIAGES FOR SOME REASON SEPARATED *Bishop Leo to Bishop Nicetas of Aquileia*. The scourge of war and the terrible onslaughts of hostility have so disrupted some marriages that wives have been left all alone when their husbands were taken prisoners of war, and because they came to believe that their husbands were either dead or that they would never be released from their captivity, they entered another union because of their own need and anxiety. If ever any of those who were considered dead return, we should of necessity believe that the unions of their lawful marriages should be restored and, after the evils which the hostility brought have been removed, each should have what he lawfully had. However, no one should be judged culpable and considered an intruder into another's right if he married the wife of a husband who was thought no longer to exist. If, however, wives are so enraptured with love for their second husbands, that they prefer to live with them rather than return to their lawful union, they are rightly to be censured so that they are deprived of ecclesiastical fellowship until they return to their lawful union.
- c. TITLE 64: THAT MARRIAGES MUST NOT BE DISSOLVED FOR THE SAKE OF RELIGION. *Gregory to the Patrician Theotista*. There are some who say that marriages ought to be dissolved for the sake of religion. Truly, it must be known that even if human law permitted this,<sup>8</sup> nevertheless divine law prohibited it. For the Truth himself says, "What God joined let no man separate."<sup>9</sup> He also says, "A man is not allowed to put away his wife, except by reason of fornication."<sup>10</sup> Who, therefore, would contradict this heavenly

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<sup>8</sup> The reference may be to Novel 128.40.

<sup>9</sup> Matt. 19:6.

<sup>10</sup> Matt. 5:32.

legislator? We know that it is written, “They shall be two in one flesh.”<sup>11</sup> If, therefore, husband and wife are one flesh and for the sake of religion the husband dismisses his wife or the wife her husband, leaving them to remain in this world or even to move to an illicit union, what is this religious conversion when one and the same flesh<sup>12</sup> in part moves to continence and in part remains in pollution? If they both agree to lead a life of continence, who would dare fault them? But if the wife does not follow the continence which the husband seeks, or the husband refuses what the wife seeks, the union may not legally be broken, because it is written, “The wife does not have the power of her body but the husband; and similarly the husband does not have the power of his body but the wife.”<sup>13</sup>

- d. **LIKEWISE ABOUT THE SAME MATTER.** *Gregory to the Notary Adrian of Palermo.* The woman Agathosa has complained that her husband was converted to the monastery of the Abbot Urbino against her will. Therefore, we order your honour to conduct a diligent inquiry, lest perchance he was converted by her wish or she herself promised to change. And if he learns this was so, let him both arrange for the husband to remain in the monastery and compel the wife to change as she promised. If, indeed, it is none of these, and you find that the aforesaid woman did not commit any crime of fornication on account of which it is lawful to dismiss a wife, in order that his conversion should not be an occasion of damnation to the wife left in the world, we wish you to return her husband to her even if he has already been tonsured, dismissing all excuses, because although the secular law orders that a marriage can be dissolved for the sake of conversion, even if one party is unwilling, nevertheless the divine law does not permit this to happen. Except for fornication it in no way allows a husband to dismiss the wife<sup>14</sup> because after the consummation of marriage husband and wife are made one body, which cannot be partly converted and partly remain in this world.
- e. **LIKEWISE ABOUT THE SAME MATTER.** *Gregory to Felix, bishop of Siponto.* It has come to our attention that your nephew Felix seduced the daughter of Evangelus your deacon. If this is true, although he ought to be punished with the full force of the law, we want the rigour of the law to be somewhat relaxed, in this way, that is, that either he should take the woman he seduced as his wife or, if he considers that he must refuse this, he should be severely and corporally punished and excommunicated, and put away in a monastery where he should do penance and from which he shall have no right to depart without permission.

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<sup>11</sup> Matt. 19:5.

<sup>12</sup> Gilchrist adds ‘both’ here, without warrant in the Latin text.

<sup>13</sup> 1 Cor. 7:4.

<sup>14</sup> Matt. 5:32.