

## **I. MECHANICS**

1. I always get asked what kind of background one needs for this course. All that I'm assuming is that the law students have had one semester of law school and that the grad students are undertaking graduate work in something. If someplace in your career you had some history of whatever sort, that helps, but so does literature. Everybody has probably also had pieces of background elsewhere, Chaucer, Shakespeare, some French, some Latin, but none of those things is required. Everybody has something different to bring to bear on the topic of this course.
2. The course has a take-home exam and short paper, no more than five pages exclusive of notes. It should analyze a document, any document in the materials or one that you find on your own. I'd like a draft more or less when we take up the topic in class on which I will comment and which you will rewrite and turn in with the take-home exam. I'll ask you to give a preliminary indication of your paper topic, in the broad sense next week.

## **I. THE LEGACY OF THE ANCIENT WORLD — ROMAN LAW**

### **Justinian's Institutes (Basic Categories)**

1. Public law vs. private law

*J.I.1.1.3–4.* The study of the 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.

2. Persons vs. things vs. actions: capacity vs. substantive rights and duties vs. remedies (procedure): who vs. what vs. how vindicated

*J.I.1.2.12.* 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.

3. Acquisitions of individual things vs. acquisitions "in the aggregate" vs. obligations (contract and delict)

- a. Acquisition of individual things

*J.I.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.

- b. Corporeal vs. incorporeal

*J.I.2.2.* Some things again are corporeal, and others incorporeal. **1.** Those are corporeal which in their own nature are tangible, such as land, slaves, clothing, gold, silver, and others innumerable. **2.** Things incorporeal are such as are intangible: rights, for instance, such as inheritance, usufruct, and obligations, however acquired. And it is no objection to this definition that an inheritance comprises things which are corporeal; for the fruits of land enjoyed by a usufructuary are corporeal too, and obligations generally relate to the

conveyance of something corporeal, such as land, slaves, or money, and yet the right of succession, the right of usufruct, and the right existing in every obligation, are incorporeal. 3. So too the rights appurtenant to land, whether in town or country, which are usually called servitudes, are incorporeal things.

c. Ownership vs. possession

*J.I.2.6pr.* It was a rule of the civil law that if a man in good faith bought a thing, or received it by way of gift, or on any other lawful ground, from a person who was not its owner, but whom he believed to be such, he should acquire it by usucapion—if a movable, by one year's possession, and by two years' possession if an immovable, though in this case only if it were in Italian soil;—the reason of the rule being the inexpediency of allowing ownership to be long unascertained. The ancients thus considered that the periods mentioned were sufficient to enable owners to look after their property; but we have arrived at a better opinion, in order to save people from being over-quickly defrauded of their own, and to prevent the benefit of this institution from being confined to only a certain part of the empire. We have consequently published a constitution on the subject, enacting that the period of usucapion for movables shall be three years, and that ownership of immovables shall be acquired by long possession—possession, that is to say, for ten years, if both parties dwell in the same province, and for twenty years if in different provinces; and things may in these modes be acquired in full ownership, provided the possession commences on a lawful ground, not only in Italy but in every land subject to our sway.

d. Acquisition of things “in the aggregate”

*J.I.2.9.6.* So much at present concerning the modes of acquiring rights over single things: for direct and fiduciary bequests, which are also among such modes, will find a more suitable place in a later portion of our treatise. We proceed therefore to the titles whereby an aggregate of rights is acquired. If you become the successors, civil or praetorian, of a person deceased, or adopt an independent person by adrogation, or become assignees of a deceased's estate in order to secure their liberty to slaves manumitted by his will, the whole estate of those persons is transferred to you in an aggregate mass.

e. Obligations

i. Contractual obligations

*J.I.3.1.13.* 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, quasi-contractual, delictal, and quasi-delictal. And, first, we must examine those which are contractual, and which again fall into four species, for contract is concluded either by delivery, by a form of words, by writing, or by consent: each of which we will treat in detail.

ii. Delictual obligations

*J.I.4.1pr.* Having treated in the preceding Book of contractual and quasi-contractual obligations, it remains to inquire into obligations arising from delict. The former, as we remarked in the proper place, are divided into four kinds; but of these latter there is but one kind, for, like obligations arising from real contracts, they all originate in some act, that is to say, in the delict itself, such as a theft, a robbery, wrongful damage, or injury.

f. Actions (procedure)

*J.I. 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.

## II. THE LEGACY OF THE ANCIENT WORLD — CHRISTIANITY

### Paul's Letter to the Romans

1. The importance of Christianity in English legal development.
  - a. The Germanic invaders of the Roman empire, including the Anglo-Saxons, became Christians
  - b. The church and its law, canon law, are important institutions in the story
  - c. *Ecclesia vivit lege romana* ('the church lives by Roman law'), so wherever we find the church we find pieces of Roman law, even before Roman law became a topic of formal study.
2. The anger of God against both pagan and Jew. Why God is angry against the Jews is easy: They have the Law but they do not keep it, Rom. 2:21–2: "You preach against stealing, yet you steal; you forbid adultery, yet you commit adultery; you despise idols, yet you rob their temples." Why God is angry against the pagans is a bit more complicated, Rom. 2:14–15: "Pagans who never heard of the Law but are led by reason to do what the Law commands, may not actually 'possess' the Law but they can be said to 'be' the Law. They can point to the substance of the Law engraved on their hearts—they can call a witness, that is, their own conscience—they have accusation and defense, that is, their own inner mental dialogue."
3. Now comes the first big move: Rom. 3:21: "God's justice that was made known through the Law and the Prophets has now been revealed outside the Law ... to everyone who believes in Jesus Christ. ... [Rom. 3:31] do we mean that faith makes the Law pointless? Not at all: we are giving the Law its true value."
4. Rom. 7:1: "Brothers, those of you who have studied law will know that laws affect a person only during his lifetime. A married woman, for instance, has legal obligations to her husband while he is alive, but all these obligations come to an end if the husband dies. ... That is why you, my brothers, who through the body of Christ are now dead to the Law, can now give yourself to another husband, to him who rose from the dead to make us productive for God. ... The reason [8:1] (p. 16) therefore why those who are in Christ Jesus are not condemned, it that the law of the spirit of life in Christ Jesus has set you free from the law of sin and death. God has done what the Law, because of our unspiritual nature was unable to do." But what is now law? The Church had already decided that circumcision and most of the rules of kashruth did not have to be followed, but what is left?
5. Rom. 13:8–9: "Avoid getting into debt except the debt of mutual love. If you love your fellow men you have carried out your obligations. All the commandments ... are summed up in this single command: You must love your neighbor as yourself."
6. Rom. 13:1: "You must obey the governing authorities. Since all government comes from God, the civil authorities were appointed by God, and so anyone who resists authority is rebelling against God's decision ... . The state is there to serve God for your benefit. If you break the law, however, you may well have fear; the bearing of the sword has its own

significance. The authorities ... carry out God's revenge by punishing wrongdoers. ... This is also the reason why you must pay taxes since all government officials are God's officers ... .”

7. Some points derivable from the Letter to the Romans beginning with chapter 13:
  - a. The descending theory of power
  - b. The sword imagery—“the bearing of the sword”, etc.
  - c. The notion of natural law
  - d. Winnow out the essential from the Mosaic law
  - e. The importance of authority but also freedom and equality
  - f. The multiplicity of meanings of the word law, *nomos* in Greek. This will lead to the use of a different and more specific word, *kanon*, canon, when the church comes consciously to legislate. More of this later.

### **Law in the Post-Apostolic Period**

1. Law in early Christianity
  - a. The relative absence of what we think of as law in the NT
  - b. Possible explanations
    - i. Law was not the Greeks' long suit
    - ii. Antinomianism in early Christianity
    - iii. The importance of the letter to the Romans: justification comes from faith in Christ Jesus, not from the Mosaic law, hence freedom from the law in Christ Jesus
  - c. The Council of Jerusalem (Ac 15:1-34; Gal 2:1-21): a church for both Jew and Gentile
  - d. The need for unity and the concept of communion (*koinonia*)
  - e. The need for an authority
2. Law and Christianity in the Roman Empire
  - a. Christianity becomes the official religion of the Roman empire (4th century)
    - i. The Greek councils (Nicaea (325), Constantinople I (381), Ephesus (431), Chalcedon (451))
    - ii. Canons of councils (*nomos* vs. *kanon*)
    - iii. Decretal letters of the popes (e.g., Leo I, 440–461)
  - b. Why does Christianity not develop a genuinely religious legal system? (That's not a question that we will try to answer here, but it's worth thinking about.)

### **AETHELBERHT'S 'CODE' ON WOMEN**

1. Aethelberht's Code. Clues as to social relations?

*The following gives most of the provisions about women in Aethelberht's Code first Old English from the Oliver edition, second the Oliver translation, and third in Courier type the older Attenborough translation (who uses a somewhat different numbering system indicated in the*

*margin of the Old English). The first two provisions listed are given here for the possible help that it gives for c. 72/3.*

8. **Gif** cyning his leode to him gehateþ 7 heom mon þær yfel gedo, II bóte, 7 cyninge L scillinga. [2]

8. 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.

2. 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. [3]

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

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

31. **Gif** friman wið fries mannes wif geligeþ, his wergilde abicge, 7 oðer wif his agenum scætte begete 7 ðæm oðrum æt þam gebrenge. [31]

31. If a freeman lies with a free man's wife, let him buy [him/her] off [with] his/her wergild and obtain another wife [for the husband] [with] his own money and bring her to the other man at home.

31. If [one] freeman lies with the wife of [another] freeman, he shall pay [the husband] his [or her] wergeld, and procure a second wife with his own money, and bring her to the other man's home.

*Between this provision and the next one there is a long section that outlines the payments that are to made for personal injury to parts of the body, starting with the head and ending with the toes..*

72. **Gif** friwif locbore leswæs hwæt gedep, XXX sciH gebete. [73]

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

73. If a freeborn woman, with long hair,<sup>1</sup> misconducts herself, she<sup>2</sup> shall pay 30 shillings as compensation.

73. **Mægþbot** sy<sup>1</sup> swa friges mannes. [74]

73. Compensation for [injury to/offense against] a maiden shall be as for a free man.

74. Compensation [for injury] to be paid to an unmarried woman, shall be on the same scale as that paid to a freeman.

74. **Mund** þære betstan widuwan eorlcundre, L scillinga gebete. [75]

74.1. **Ðare** oþre, XX sciH. [75.1]

74.2. **Ðare** þriddan, XII sciH.

74.3. **Þare** feorðan, VI sciH.

74. [For violation of] protection of the foremost widow of noble rank, let him pay 50 shillings.

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<sup>1</sup> Attenborough notes here: The precise significance of *locbore* is uncertain. The usual interpretation is that the long hair denotes the freeborn woman as opposed to the slave.

<sup>2</sup> Attenborough notes here: Liebermann [the editor of the standard edition of the laws] understands as the subject of *gebete* not the woman, but the man with whom she misconducts herself.

74.1. [For a widow] of the second [rank], 20 shillings.

74.2. [For a widow] of the third [rank], 12 shillings.

74.3. [For a widow] of the fourth [rank], 6 shillings.

75. The compensation to be paid for violation of the mund of a widow of the best class, [that is, of a widow] of the nobility, shall be 50 shillings.

§ 1. For violation of the mund of a widow of the second class, 20 shillings; of the third class, 12 shillings; of the fourth class, 6 shillings.

75. Gif man widuwan unagne genimeþ, II gelde seo mund sy.<sup>2</sup> [76]

75. If a person takes a widow who does not belong to him, the [payment for violation of] protection shall be 2[-fold] as compensation.

76. If a man takes a widow who does not [of right] belong to him, double the value of the mund shall be paid.

76. Gif man mægþ gebigeð ceapi, geceapod sy gif hit unfacne is. [77]

76.1. Gif hit þonne facne is, ef[t] þær æt ham gebrenge, 7 him man his scæt agefe. [77.1]

76.2. Gif hio cwic bearn gebyreþ, healfne scæt age gif ceorl ær swylteþ. /3v/ [new unit] [78]

76.3. Gif mid bearnum bugan wille, healfne scæt age. [79]

76.4. Gif ceorl agan wile, swa an bearn. [80]

76.5. Gif hio bearn ne gebyreþ, fæderingmagas fioh agan 7 morgengyfe. [81]

76. If a person buys a maiden with a [bride-]price, let the bargain be [valid], if there is no deception.

76.1 If there is deception, afterwards let him bring [her to her] home, and let him be given his money.

76.2 If she bears a living child, let her obtain half the goods [belonging to the household] if the husband dies first.

76.3 If she should wish to dwell with the children, let her obtain half the goods [of the household].

76.4 If she should wish to take a man [i.e., another husband], provision as for one child [i.e., the inheritance is split equally between the mother and each of the children].

76.5 If she does not bear a child, her paternal kin should obtain [her] property and the morning-gift.

77. If a man buys a maiden, the bargain shall stand, if there is no dishonesty.

§ 1. If however there is dishonesty, she shall be taken back to her home, and the money shall be returned to him.

78. If she bears a living child, she shall have half the goods left by her husband, if he dies first.

79. If she wishes to depart with her children, she shall have half the goods.

80. If the husband wishes to keep [the children], she shall have a share of the goods equal to a child's.

81. If she does not bear a child, [her] father's relatives shall have her goods, and the "morning gift."

77. Gif man mægþman nede genimeþ, ðam agende L scillinga, 7 eft æt þam agende sinne willan ætgebigce. [82]

77.1. Gif hio oþrum mæn in sceat bewyddod sy, XX scillinga gebete. [83]

77.2. Gif gængang geweorðeþ, XXXV scið, 7 cyninge XV scillingas. [84]

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.

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

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.

78. Gif man mid esnes cwyman geligeþ be cwicum ceorle, II gebete. [new unit] [85]

78. If a person lies with a servant's wife while the husband is alive, let him pay 2[-fold what he would have paid were she unmarried].

85. If a man lies with the woman of a servant, during the lifetime of the husband, he shall pay a twofold compensation.

2. Can we say anything generally about women in Aethelberht's society?

3. For what Aethelbert may have been up to, we'll have to wait until tomorrow.