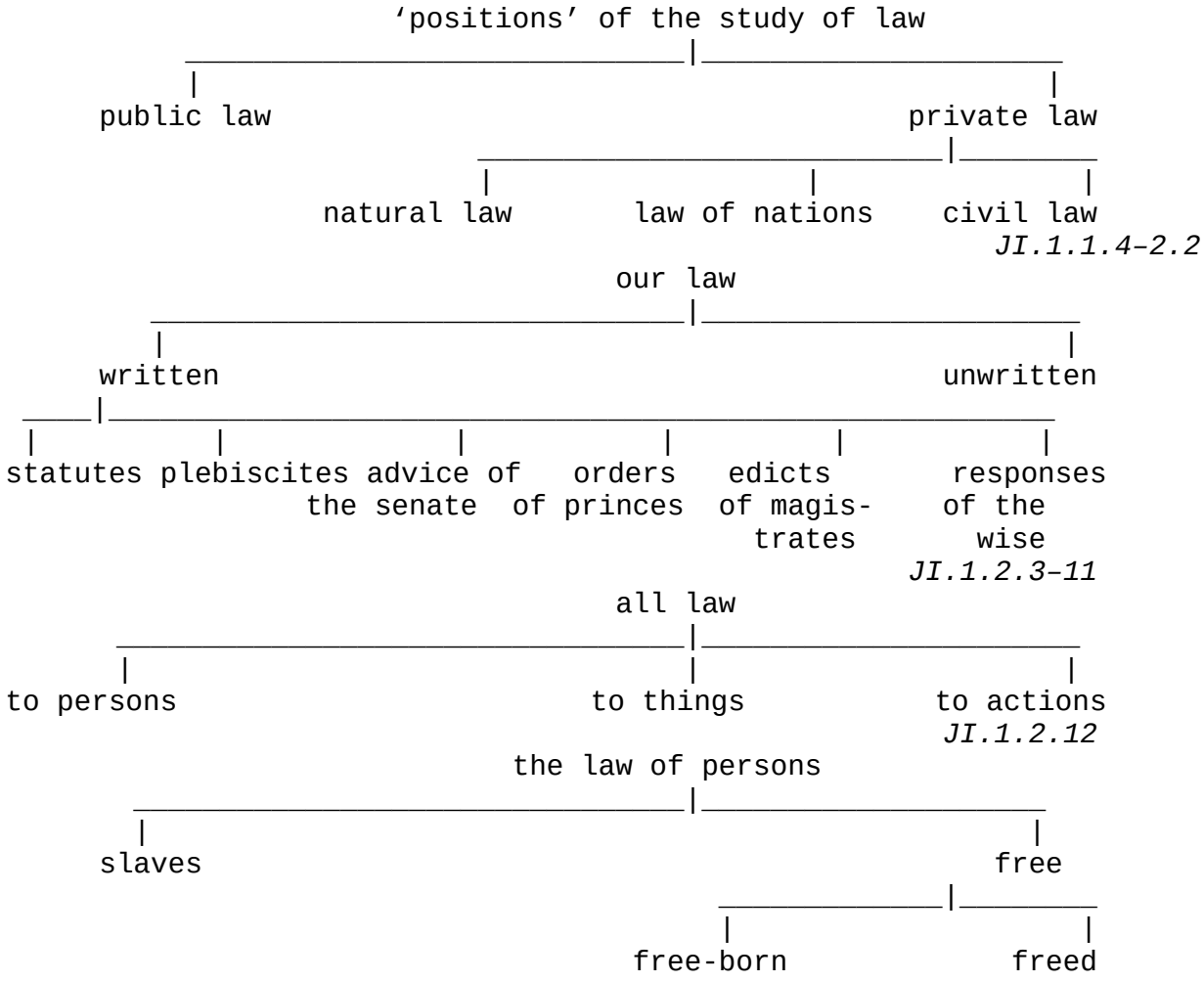
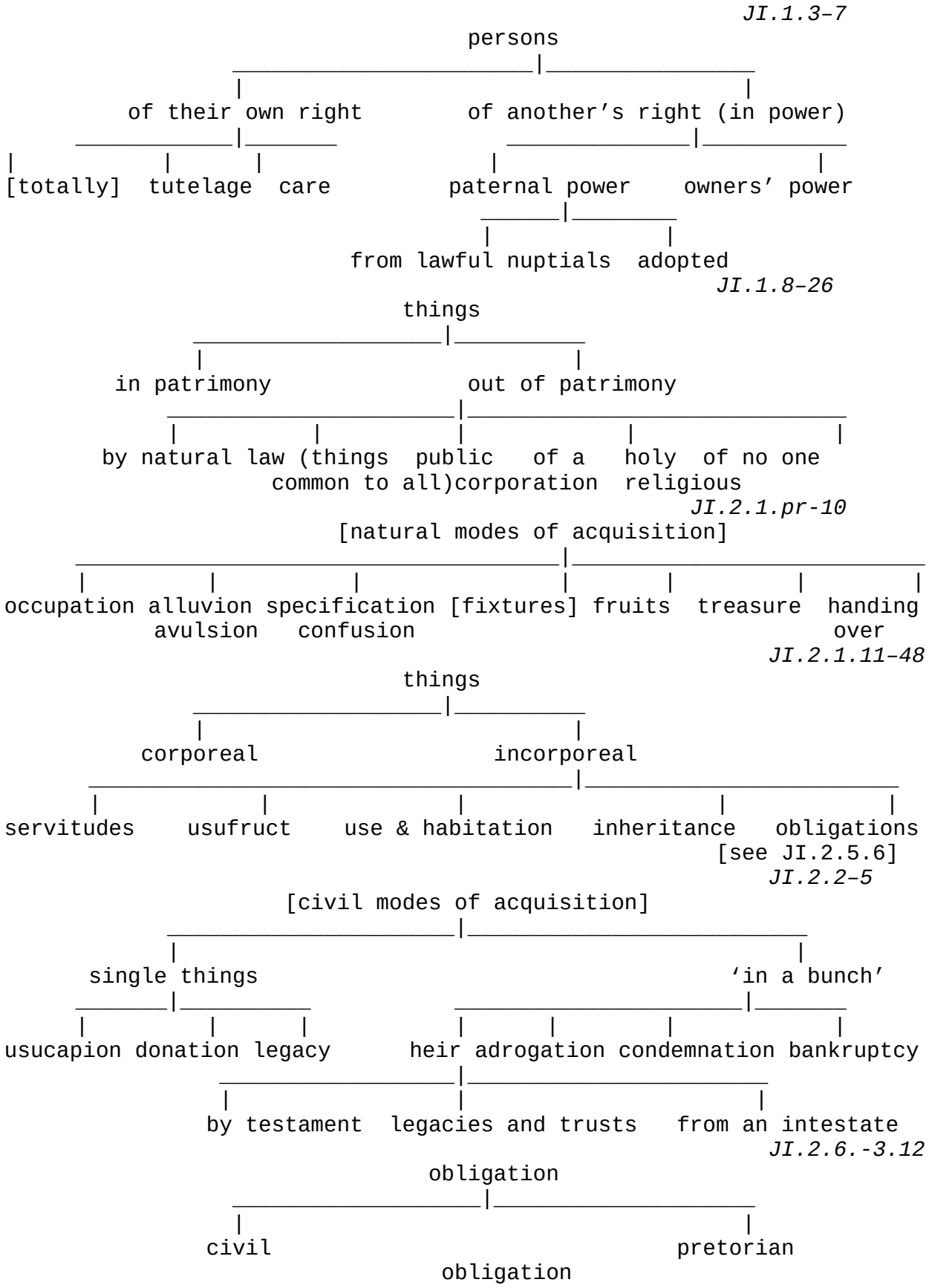
OUTLINE — LAW SECTION 2

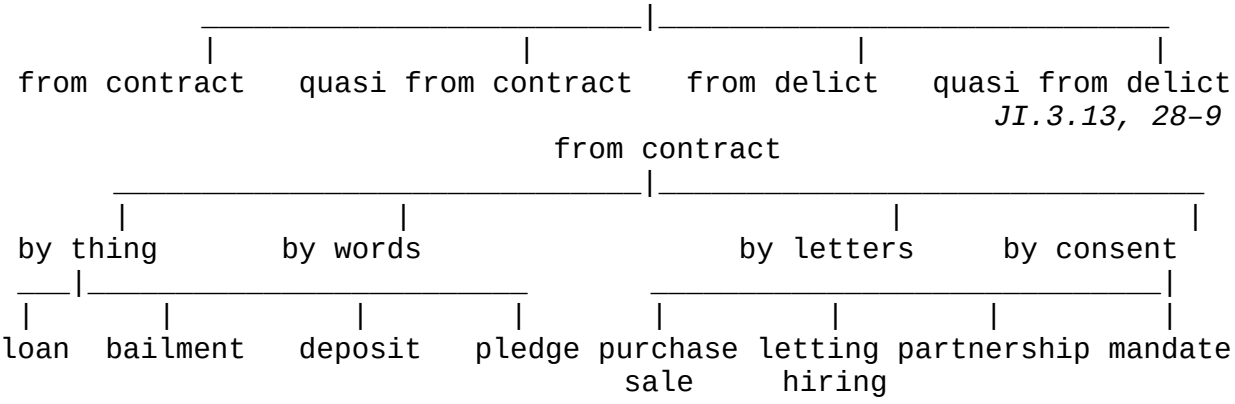
Structure of the *Institutes*
Christianity (cont'd)
The 'Barbarian Invasions'

The following set of schematics for Justinian's *Institutes* is obviously quite elaborate. Learning this scheme and its terminology will repay itself handsomely, not only for this course or any future work that you might do in legal history, but also for modern European law. Much of this terminology is still with us today. I do not, however, want to spend the whole section (or even half of it) focusing on the details of this scheme. Please feel free to ask questions about any of it that puzzles you. Our focus, however, will be on the basic categories: *ius* vs. *lex*; public law vs. private; persons, things, and actions; individual things, things in the aggregate, and obligations; contract and delict. The more we think about these distinctions, the more puzzling they are; yet they have shaped legal thought in the west for centuries. Then I would like to go on to look at the legacy of Roman law on our specific topics: marriage, wild animals, and witnesses.

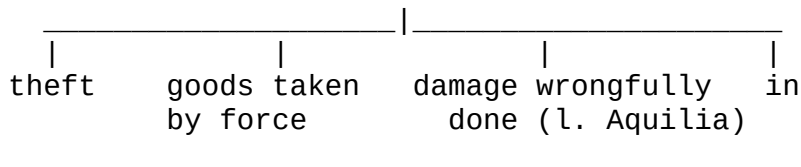
Schematics of Justinian's Institutes (translated; Latin terminology given below)



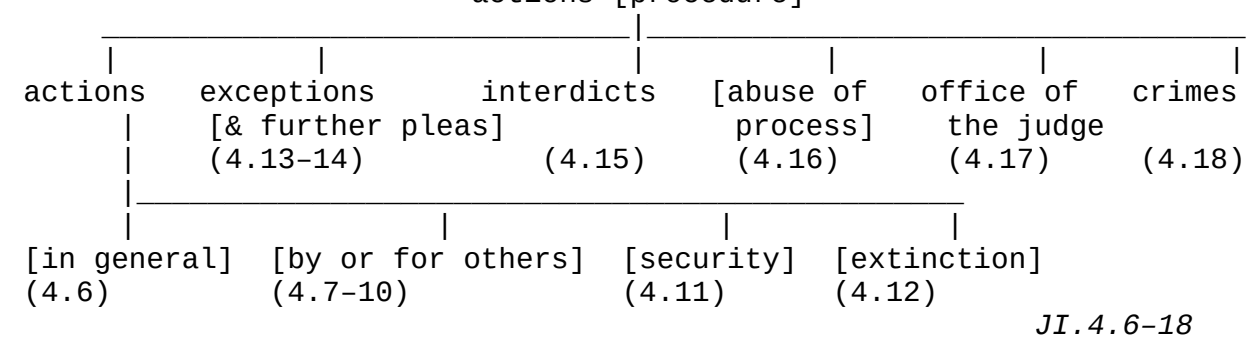

JI.1.3–7
persons
of their own right
of another's right (in power)
[totally]
tutelage
care
paternal power
owners' power
from lawful nuptials
adopted
JI.1.8–26
things
in patrimony
out of patrimony
by natural law (things common to all)
public corporation
of a holy religious
of no one
JI.2.1.pr-10
[natural modes of acquisition]
occupation
alluvion avulsion
specification confusion
[fixtures]
fruits
treasure
handing over
JI.2.1.11–48
things
corporeal
incorporeal
servitudes
usufruct
use & habitation
inheritance
obligations [see JI.2.5.6]
JI.2.2–5
[civil modes of acquisition]
single things
'in a bunch'
usucapion
donation
legacy
heir
adrogation
condemnation
bankruptcy
by testament
legacies and trusts
from an intestate
JI.2.6.-3.12
obligation
civil
pretorian
obligation



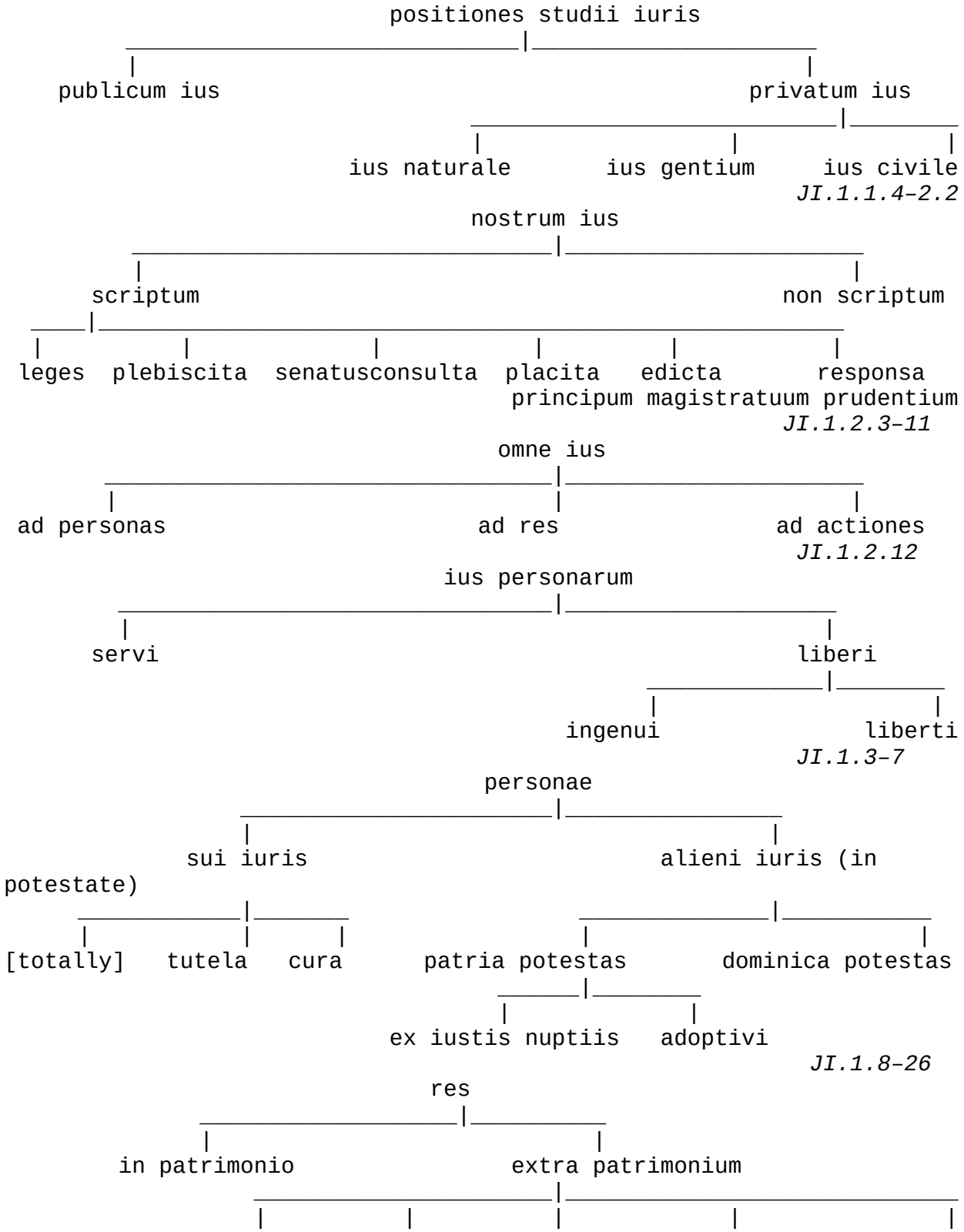
JI.3.27—quasi-contract, mostly involuntary agency



JI.4.5—quasi-delict, mostly examples of absolute or vicarious liability



Schematics of Justinian's Institutes (translated above)



naturali jure (res communia omnium) publica universitatis sacrae religiosae nullius

JI.2.1.pr-10

[natural modes of acquisition]

occupatio alluvio avulsio specificatio confusio [fixtures] fructus thesaurus traditio

JI.2.1.11–48

res

corporales incorporales

servitutes usufructus usus & habitatio hereditas obligationes [see JI.2.5.6]

JI.2.2–5

[civil modes of acquisition]

singulae res per universitatem

usucapio donatio legatum heres adrogatus addictio bonorum emptio

ex testamento legata et fideicommissa ab intestato

JI.2.6.-3.12

obligatio

civilis praetoriana

obligatio

ex contractu quasi ex contractu ex delicto quasi ex delicto

JI.3.13, 28–9

ex contractu

re verbis litteris consensu

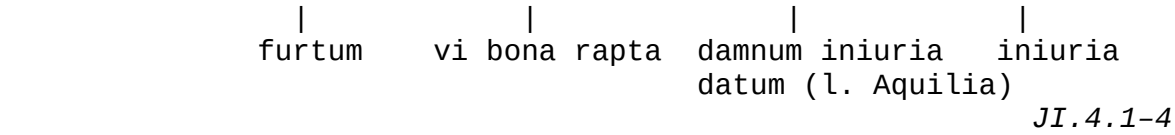
mutuum commodatum depositum pignus emptio locatio societas mandatum

venditio conductio

JI.3.14–26

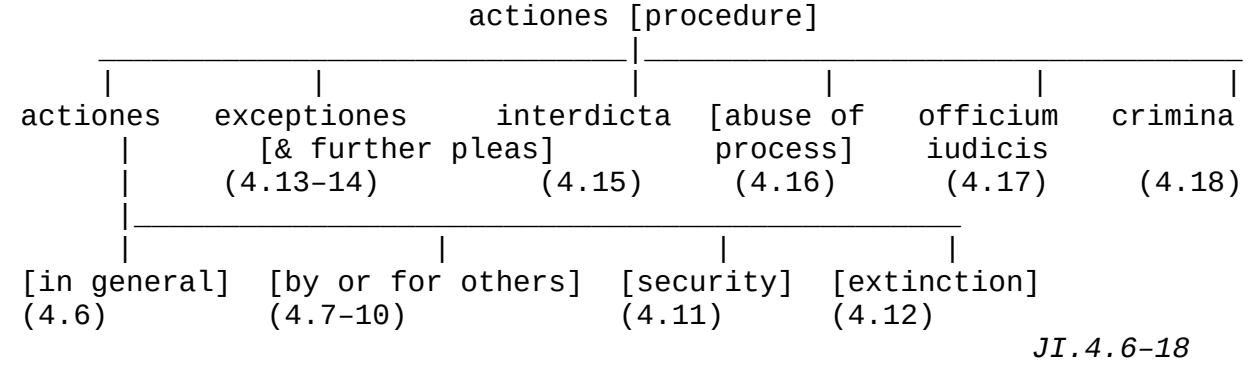
JI.3.27—quasi-contract, mostly negotiorum gestio

ex delicto



JI.4.1–4

JI.4.5—quasi-delict, mostly examples of absolute or vicarious liability



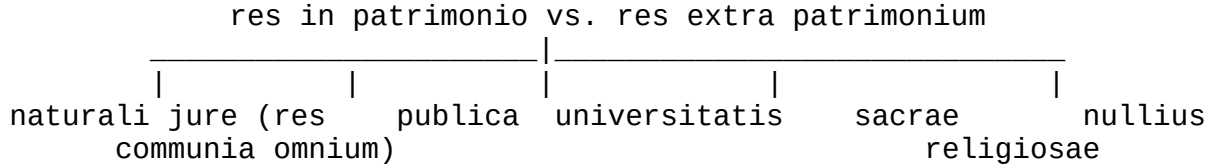
JI.4.6–18

1. *Ius* vs. *lex*. This isn't even in the scheme. It's simply fundamental to the language. The only place where J uses the word *lex* in the sources of law section is where he is referring to the Republican statutes.
2. Public law vs. private law. What's the problem with this distinction?
3. Persons, things, and actions. Capacity, substantive rights and remedies, procedure. What's the problem with making these distinctions?
4. Acquisition of individual things, acquisitions of things in the aggregate, obligations (i.e., contract and delict). *In rem* vs. *in personam*.
5. Where do you think the provisions in JI on the formation of marriage go?

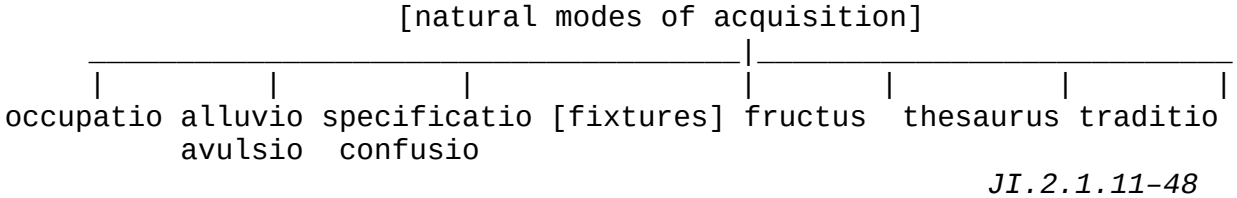
   "Roman citizens are joined together in lawful wedlock when they are united according to law, the man having reached years of puberty, and the woman being of a marriageable age [Other texts tell us that these ages are presumptively 14 and 12.] whether they be *sui iuris* or *in potestate* [all Roman children 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.
6. Before J. and G. get to the distinction between corporeal and incorporeal things, they both

make another distinction, principally, it would seem, for excluding topics from the book:



J. then deals (as Gaius had not, though it is in G. at a later point) with the "natural modes of acquisition," and the connection is almost certainly our old friends the wild animals, who are at once *res nullius* and are naturally acquired by *occupatio*.



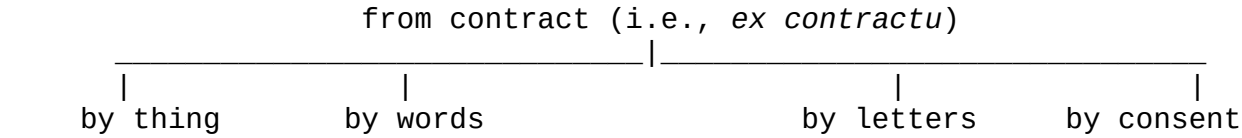
JI.2.1.11–48

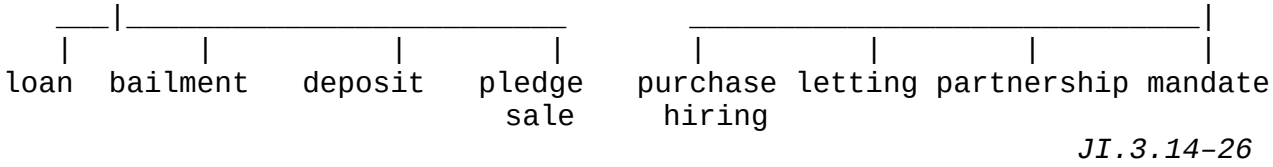
Of a long list of natural modes of acquisiton the most important is the last mentioned, we naturally acquire things that belong to someone by *traditio*, when the person who owns them hands them over to us with the intention of conveying them to us.

7. Let us take a look at the "natural mode" of acquiring wild animals:

"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."

8. Contractual obligations:



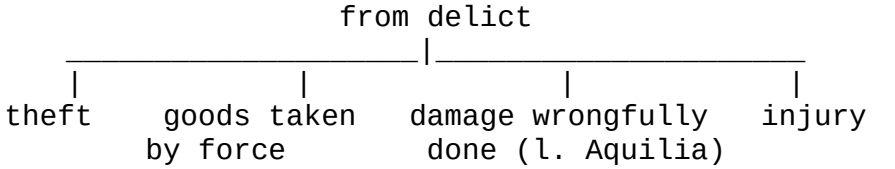


JI.3.14–26

a. The classification is by the formally binding element, the moment at which the obligation arises: transfer of the thing, exchange of the formal words, writing in the books, moment of agreement. Offer and acceptance is our notion not theirs except in the contract by words (stipulation); consideration is our notion not theirs. Indeed, loan *mutuum* and mandate *mandatum* must be gratuitous in form if not in fact. Whether the will theory of contract is our notion not theirs is a matter of more doubt.

b. This was not the only classification of contracts the Romans knew. We also find : (a) formal vs. formless (e.g., *stipulatio* vs. *emptio/venditio*, (b) *stricti juris* (e.g., *mutuum*) vs. *bonae fidei* (all the consensual), (c) gratuitous vs. non-gratuitous (e.g., *mandatum* vs. *locatio/conductio*), and (d) unilateral (all the K's *re*) vs. bilateral (stipulation) (the last distinction being implicit).

9. J.'s delicts are easier than his contracts:



JI.4.1–4

a. Delict is a curious category for us, sitting some place between tort and crime. The Romans regarded the delictual actions as private ones because the victim (in some sense, see *iniuria*) must bring the action. Criminal actions also had private prosecutors but he need not be the victim. Tort won't do as a translation because the delictual actions are highly penal, even under the *lex Aquilia*, the statutory action for damage to property. The penal character of the actions is shown by:

i. the multiplication of damages (in the case of furtum, if we add the *condictio* it can be five-fold; G.I. suggests 6 with the *in rem* action)

ii. by the fact that they are not passively transmissible

iii. by the fact that as in our law joint tort-feasors are jointly and severally liable

b. All of these actions are fault-based; except for damage wrongfully done (*damnum iniuria datum*) they all require intentional conduct.

c. *Damnum iniuria datum* only applies to property.

d. *Iniuria* is an intentional injury to a free person. There is no remedy in Roman law for negligent killing of a free man. There may have been a praetorian action for expenses for negligent injury to a free man. It is amazing that there should be any doubt about it.

e. It all adds up to a rather deficient law of wrongs and this characteristic is also notable in the 19th c. codifications.

10. I dealt with J's scheme of procedure in the lecture, and I won't repeat what I said here, unless there are questions. We should, however, note that there's nothing about witnesses in the *Institutes*. Does anybody have any idea why? 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.

Christianity (Cont'd)

The *logia* on divorce

Mark 10:9: "What God has united, man must not divide."

Mark 10:11–12: "The man who divorces his wife and marries another is guilty of adultery against her. And if a woman divorces her husband and marries another she is guilty of adultery too."

Luke 16:18: "Everyone who divorces his wife and marries another is guilty of adultery, and the man who marries a woman divorced by her husband commits adultery."

Matthew 5:32: "Everyone who divorces his wife, except for the case of fornication, makes her an adulteress; and anyone who marries a divorced woman commits adultery."

Matthew 19:6: "What God has united, man must not divide."

Matthew 19:9: "The man who divorces his wife—I am not speaking of fornication—and marries another, is guilty of adultery."

1 Corinthians 7:10–12: "A wife must not leave her husband—or if she does leave him, she must either remain unmarried or else make it up with her husband—nor must a husband send his wife away."

Hypothetical reconstruction of the earliest form of the more common *logion*: "The man who divorces his wife and marries another is guilty of adultery."

Mt. 19:3–12: "[3]Some Pharisees approached him, and to test him they said, "Is it against the Law for a man to divorce his wife on any pretext whatever?" [4]He answered, "Have you not read that the creator from the beginning *made them male and female* [Gn 1:27] [5]and that he said: *This is why a man must leave his father and mother, and cling to his wife, and the two become one body*? [Gn 2:24] [6]They are no longer two, therefore, but one body. So then, what God has

united, man must not divide."

"[7]They said to him, "Then why did Moses command that a writ of dismissal should be given in cases of divorce?' [8]"It was because you were so unteachable' he said "that Moses allowed you to divorce your wives, but it was not like this from the beginning. [9]Now I say this to you: the man who divorces his wife—I am not speaking of fornication—and marries another, is guilty of adultery."

"[10]The disciples said to him, "If that is how things are between husband and wife, it is not advisable to marry." [11]But he replied, "It is not everyone who can accept what I have said, but only those to whom it is granted. [12]There are eunuchs born that way from their mother's womb, there are eunuchs made so by men and there are eunuchs who have made themselves that way for the sake of the kingdom. Let anyone accept this who can."

Mishna Gitin 9:10, as reported in the Babylonian Talmud Gitin 90a (Soncino trans. modified by CD): "The school of Shammai say: a man should not divorce his wife unless he has found her guilty of some unseemly conduct, as it says, because he hath found some *unseemly* thing in her. [See Deutoronomy 24:1]. The school of Hillel, however, say [that he may divorce her] even if she has merely spoilt his food, since it says, because he hath found *some* unseemly *thing* in her. R. Akiba says, [he may divorce her] even if he finds another woman more beautiful than she is, as it says, it comes to pass, if she find no favour in his eyes. [Again, a reference to Dt 24:1.]" Dt 24:1 reads in the NRSV: "Suppose a man enters into marriage with a woman, but she does not please him because he finds something objectionable about her, and so he writes her a certificate of divorce, puts it in her hand, and sends her out of his house … ." The Hebrew is more ambiguous.

Marriage as a "mystery"

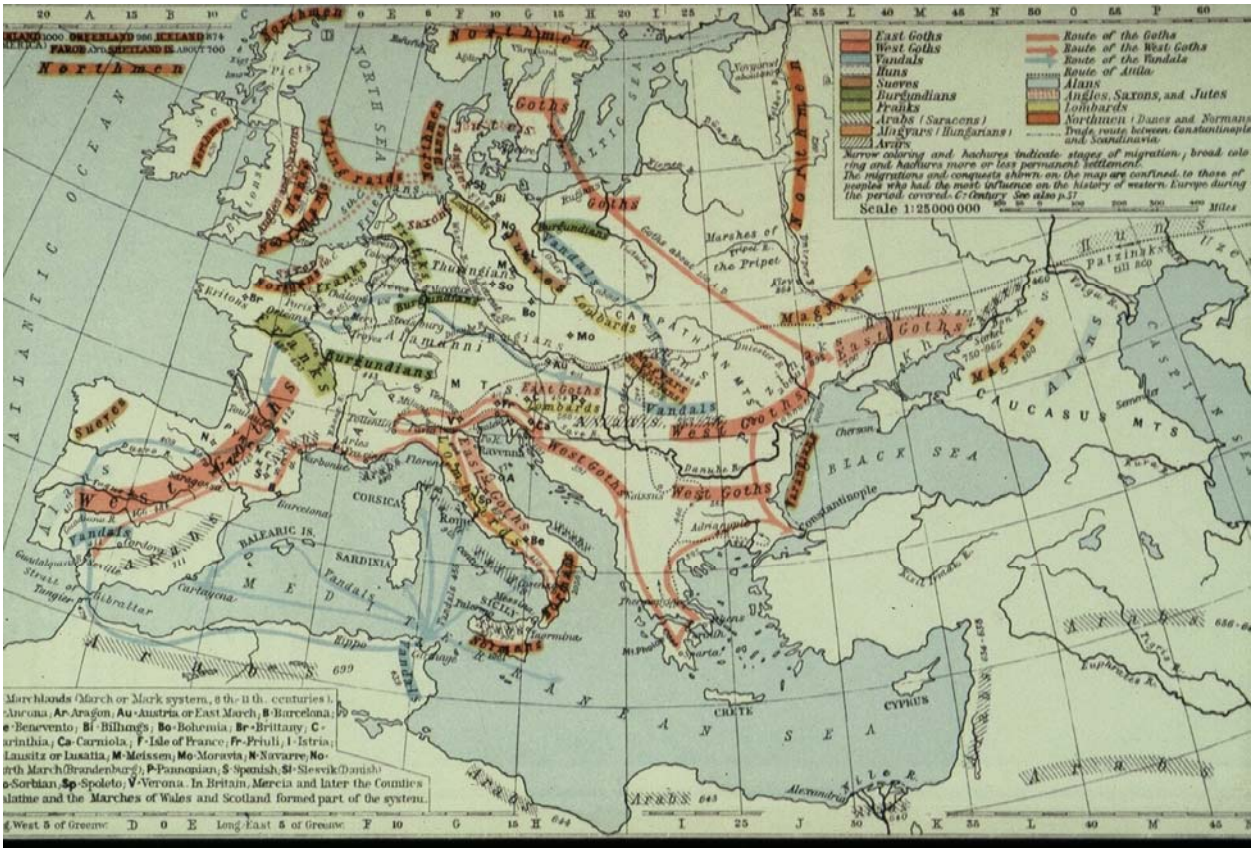
Ephesians 5:25–33: "Husbands should love their wives just as Christ loved the Church and sacrificed himself for her to make her holy. He made her clean by washing her in water with a form of words so that when he took her to himself she would be glorious, with no speck or wrinkle or anything like that, but holy and faultless. In the same way, husbands must love their wives as they love their own bodies; for a man to love his wife is for him to love himself. A man never hates his body, but he feeds it and looks after it; and that is the way Christ treats the Church, [30]because it is his body—and we are its living parts. *For this reason, a man must leave his father and mother and be joined to his wife, and the two will become one body.* [Gn 2:24] This mystery has many implications; but I am saying it applies to Christ and the Church. [33]To sum up; you too, each one of you, must love his wife as he loves himself; and let every wife respect her husband."

Two witnesses

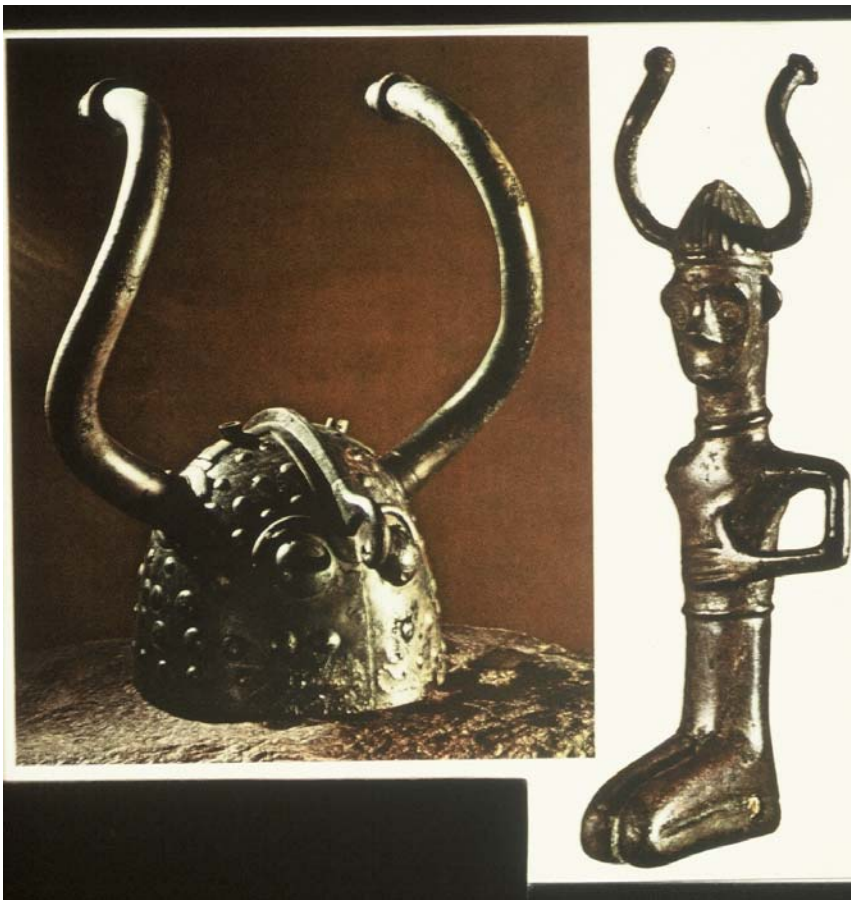
Dt. 19:15: *in ore duorum vel trium testium stabit omne verbum.* "In the mouth of two or three witnesses every word shall stand."

Mt. 18:16: *in ore duorum testium vel trium stet omne verbum.* "In the mourth of two witnesses or three let every word stand."

1 Cor. 13:1: *in ore duorum vel trium testium stabit omne verbum*. As in Dt. 19:15.



The map might be entitled all-hell-breaks-loose, and there are even more inelegant ways to describe it. As we will see, the map probably exaggerates the amount of disruption, but it does show that between the years 150 and 1000, a great many tribes, mostly but not exclusively Germanic, made their way into what was or had formerly been the Roman empire in the West, and this development had far-reaching consequences for Western European history and particularly for its law. We'll do some straight history with this story next week. What I want to do in the few minutes that we have left this morning is to ask a more cultural question about what these guys were like.



Designed to inspire awe, this bronze helmet unearthed at Viksoe in Denmark boasts curved horns and two staring eyes [the Vikings of history did not wear horned helmets]. The four-inch-high kneeling figure in Danish costume (right) wears a similar helmet, suggesting that such a headpiece was an important adjunct to the allure of a Bronze age warrior. [Neither has been dated precisely, but both come from the period before our era and may be as early as 500 BC.] [National Museum, Copenhagen]. Thomas Froncek, *The Northmen*, The Emergence of Man (New York: Time-Life Books, 1974) 111 (Brookline Library 930 F92n). This is clearly from the time before the Germanic peoples had any contact with the Romans.

Belt buckle from a ship burial at Sutton Hoo, Suffolk. Seventh century. British Museum, London. Magnus Backes & Regine Dölling, *Art of the Dark Ages*, Francisca Garvie trans. (New York: Harry N. Abrams, 1969c) 45 (Brookline Library 709.4 B12a). The artwork here is Germanic, but we can't be sure that there is not some Roman influence. Even if the Germanic peoples came into an area which the Romans had left, there was plenty of stuff around that showed what they had done.

[Armed and mounted horseman; note the serpent decoration at the bottom.] Funerary stele of horseman. Seventh century. Sandstone, height 30 3/4". From Hornhausen (west of Magdeburg, probably Saxon at this time or Thuringian). Landesmuseum für Vorgeschichte. Halle. Backes, p. 34 (suggests Roman influence). There seems to be considerable disagreement about date and function. It is now being argued that it comes from a church screen. *Origins of Medieval Architecture 600-900*. What is clear is that comes from an area that the Romans never reached.

Detail of Helmut Plaque of Agilulf, King of the Lombards [first real king, unites the dukes in opposition to the Franks, 591-616], gilt copper, late 6th c. Museo Nazionale del Bargello, Florence. [A king guarded by warriors, Agilulf, ruler of the Lombards, is shown holding court in this hammered relief of gilded copper.] Gerald Simons, *Barbarian Europe*, Great Ages of Man: A history of the world's cultures (New York: Time-Life Books, 1968) 10 (Brookline Library 940.1 S58b). (Also in H&C p. 77, with winged victories on the sides and cities bringing tribute.)

Cesena Bird Brooch, Ostrogothic, gold and precious stones, cloisonné technique with almandines, early 6th c., Germanishes National Museum, Nuremberg, Germany. [The pin combines the stylized bird motif popular among Germanic peoples with a Christian cross; the filigreed metal work, set with garnets, was undoubtedly borrowed from Byzantine art work.] Simons, p. 54.

Tomb of Theodoric the Great. Before 526. Ravenna. Backes, p. 13. Roman elements put together to make something that is not Roman. (Inside much more Roman)

Votive crown of King Recceswinth [653 X 672], Visigothic, gold filigree with pearls and sapphires, 7th c., National Archaelogical Musuem, Madrid. [The opulent Visigothic crown reveals a barbarian admiration of massive precious stones as well as some refinements of Eastern design; the gold filigree, encrusted with sapphires and pears, and the dangling pendants of rock crystal are of Byzantine origin. The hanging letters spell the name of King Recceswinth, a ruler in Spain during the Seventh Century. He is believed to have given the crown to the Church that converted him.] Simons, p. 55.