OUTLINE — LECTURE 12

CUSTUMALS OF TOURAINE-ANJOU AND BEAUMANOIR

Usatges de Barcelona 3 points made in Lecture 11:

1. The first hundred or so chapters probably contain a considerable amount of material redacted in the mid-12th century. This 12th-century recension probably contains some material that dates back to the mid-11th century and represents an attempt to integrate feudal institutions into the _wegeld_ system of the Visigothic Code.

2. Our 12th-century redactor is hostile toward the use of battle and ordeal as methods of proof. He seems to suggest that the usages abolished them, a statement that is shown to be a considerable exaggeration on the basis of what remains in the document.

3. The document does, however, contain material that clearly indicates attempts to move away from the older methods of proof toward a form of procedure more like that which we find in Tancred. We argued that some of this material probably dates from the late 12th century or early 13th, and the some of it probably dates from the mid-13th century.

Touraine-Anjou (Contains 165 articles, ranging in length from a paragraph to about a page. The editor dates the custom to 1246. It survives in two 14th-century mss., but it also forms the heart of a mid-13th-century treatise known as _Les Établissements de Saint Louis_ from which the rubrics are taken.)

Beaumanoir (Contains 70 chapters, c.2000 articles. This is a large work by Philippe de Rémi, sire de Beaumanoir, courtier and royal bailiff of the customary jurisdiction of Clermont en Beauvaisis. The work is dated in 1283, and there’s no reason to doubt that.)

1. Organization
   a. Touraine-Anjou
      1–17 inheritance and marital property
      18–35 criminal justice
      36–37 parage
      38–74 feudal obligations and feudal justice
      75–165 miscellaneous all mixed in
      What do we make of this?
   b. Beaumanoir
      1–11 basic procedure (complaint and non-appearance)
      c. 1 Office of the bailiff
      c. 2 Summons and summoners
      c. 3 essoins and of countermands [fifteen-day adjournments]
c. 4 Proctors

c. 5 Advocates

c. 6 Complaints

c. 7 Defenses (exceptions), replications, denials

c. 8 Time within which to bring an action

c. 9 The view

c. 10 Non-feudal jurisdiction of the count

c. 11 Ecclesiastical jurisdiction

12–23 inheritance and marital property

24–33 feudal rights and wrongs (including feudal justice)

34–38 contracts

39–44 proof and procedure (great hunk of stuff on pp. XI–23 to XI–26)

   c. 39 Proofs and false witnesses

   c. 40 Inquistiors, auditors, appraisals, and examining witnesses

   c. 41 Arbiters and arbitration

   c. 42 Stipulated penalties

   c. 43 Pledges

   c. 44 Reclamations [rescousse]s of inheritances and exchanges

46–57 status obligations and their enforcement

58–67 procedure again (war and appeal)

   c. 58 High and low justice

   c. 59 [Private] wars

   c. 60 Truces and assurances

   c. 61 Appeals

   c. 62 Appeals for deafault of right

   c. 63 Defenses for those who are appealed

   c. 64 Presentations made in gages in arms and words, and oaths after battle

   c. 65 Delays before judgment

   c. 66 Refusing judges

   c. 67 Judgments and the manner of making judgment

68–70 miscellaneous

Beaumanoir’s basic scheme is that of the ordo.

c. The Paris custom of 1580 (XIV–4)

   Tit. 1—On Fiefs (art. 1–72)—The longest title is the one that deals with fiefs,
which is, of course, a type of property unknown to Roman law.

Tit. 2—On Quit-rents (censives) and seigneurial rights (73–87). French customary law distinguishes between two types of payments that a tenant owes rente and cens. The distinction between them is subtle, but the cens is regarded as more feudal; it issues, it is said, out of the land, whereas the rente is more personal. At least to start off with, it is the personal obligation of the tenant.

Tit. 3—Which goods are movable and which immovables (88–95)

Tit. 4—On Plaint in case of seisin and of novelty and simple seisin (96–98). As is true in English law in this period, seisin is roughly equivalent to possession of land with a claim to ownership. Novelty is roughly the equivalent of the English action of novel disseisin, and the action of simple seisin is what one brings when the action of novel disseisin is not available.

Tit. 5—On Personal actions and on hypothèque (99–112). A hypothèque is roughly the equivalent of our mortgage. The term is derived from Roman law, but it does not necessarily work in customary law the way it does in Roman.

Tit. 6—On Prescription (113–128). The term is Roman, and it refers to the acquiring of rights by long peaceable possession.

Tit. 7—On retrait lignagier (129–159). A customary institution that has no parallel in Roman law. It allows the heirs of a man who has sold ancestral property to buy it back at the price at which he sold it.

Tit. 8—Judgments, executions, gages (160–183).

Tit. 9—On Servitudes and reports of sworn [experts] (184–219). Servitudes is a Roman law term that is roughly equivalent to our easements. Perhaps the articles on sworn experts were placed here because they were frequently used in cases involving servitudes.

Tit. 10—Community of goods (220–246). This is the well-known community property between husband and wife in French law. French customary community property by this period is a community of moveables and acquests. Landed property that one of the couple inherited was not included in the community, but landed property that they acquired during the marriage was part of the community. We will see that the ancestor of this system is clearly reflected in both the custom of Touraine-Anjou and in Beaumanoir.

Tit. 11—On Dower (247–264). This is a life estate that a widow has in her deceased husband’s lands.

Tit. 12—On Guardianship of nobles and bourgeois (265–271)

Tit. 13—On Gifts and mutual gift (272–288)

Tit. 14—On Testaments and their execution (289–298)

Tit. 15—Of Succession in the direct line and in the collateral (299–344)

Tit. 16—Of Public proclamations [criées] (345–362). This is a title concerning public law that is added somewhat awkwardly at the end of the custumal. There is otherwise no public law in it, nor is there any criminal law.
There’s no parallel to the order of either Beaumanoir or of Touraine-Anjou. The absence of an agreed-upon organization for this type of material is going to haunt them in the 16th century.

2. Wild Animals in Touraine-Anjou and Beaumanoir:
   a. *TA c.44 and 162 only provisions on animals. The point about this, of course, is that poaching is on a level with feudal treason.

   *44. If a man . . . fishes in [his lord’s] lake, insulting him; or if he steals his rabbits in his warren; or if he lies with his wife or his daughter, provided she be a maid, he loses his fee, provided that it be proven of him.

   162. If a man has bees and they swarm, and the person to whom they belong sees them fly off and follows them by sight, and without losing sight of them, and they alight in another place, at the dwelling of some other man, and the person on whose grounds they alight collects them before the first man arrives, and the latter says afterward: “These bees are mine,” and the other party says: “I don’t believe you,” and the [first] party goes before the judge in whose jurisdiction this is, and says to him: “Sir, such-and-such a man has captured my bees,” the lord must send for him to appear before him, and the plaintiff must say to him: “Sir, I had some bees that swarmed out of my swarm [essemerent de mon essaim], and I followed them until I saw them light in this man’s [preudome] land who collected them and will not give them back to me; and I am ready to do whatever your court rules,1 for they are mine and I followed them by sight and without losing sight of them”; and if the other party says: “I don’t believe him, and I want him to do whatever he has to do to be believed,” then it may be ruled that he must swear with his hand on the saints that the bees are his, and that they left his swarm, in his sight and knowledge, without his losing sight of them, and [went] as far as the place where the other party collected them. And upon this, he can have his bees; and he must give the other party the value of the container he collected them in.

   1. Akehurst notes that this phrase probably means that the plaintiff is willing to provide whatever proof the court requires.

   This is, of course, not too far away from what Justinian has on the topic, and, yet, I’m reluctant to see any necessary influence here. Like many things that arise normally in the case of agriculture, the ox that gored might be another example, the possible solutions to the problem are not infinite. The wise men of Touraine-Anjou could well have come up with a resolution similar to that of the Roman law without knowing the Roman law on the topic.

   b. Beaumanoir c. 935 wild animals

   [935] Some think that if someone is taken in present misdeed, taking rabbits or other large wild beasts in someone else’s ancient warren, that he cannot be hanged, but that they can be if they are taken by night, for it appears that they came with the intention of taking away [par courage d’emblé]. But if they come by day, as sport leads some to do stupid things, they can get away with a fine of money: that is to say, 60 lb. for gentlemen and 60 s. for commoners. And just as we have said for warrens, we say for fish that are in enclosures or
2. Akehurst adds in brackets “I say.”
   Roman law has, of course, nothing to do with this.

3. Marital property
      A gentleman keeps for his life that which has been given him at the door of the
      church in marriage, after the death of his wife, even though he has no heir,
      because he had one who cried and bawled, so long as his wife was given to him
      as a maid; for if she were a widow or if she were not a maid, he will keep
      nothing of it.

      There is a parallel institution in English law of this period which is known as
      ‘tenancy by the curtesy of England’. A widower was entitled to a life estate in
      all of his deceased wife’s land. As in Touraine-Anjou, this entitlement only
      existed if the couple had a child who ‘cried to the four walls’. In England,
      however, there was no requirement that the land be given him at the church
door. The only mention of gifts at the church door that we find in England are
      gifts of dower lands, in which the surviving widow has a life estate. Nor is
      there any requirement in England that the deceased wife have been a virgin at
      the time of the marriage.

   b. TA cc. 56–7 marriage negotiations, wonderful dialogue—we’ll do this in
      section.

   c. TA c. 108 more on marriage gifts
      If it comes about that any gentle man marries his daughter, and the father
      comes to the door of the church, or the mother if she has no father, or her
      brothers, or anyone who has power to marry her, and the father or any of those
      whom we have mentioned above comes to the door of the church and says:
      “Sir, I give you this young lady and so much of my land, to you both and to
      your heirs issuing from you two.” If it is such that they have heirs, and the lord
      [husband] dies, and the woman takes another lord and has heirs, and the woman
dies and the children of the latter husband say to the oldest of the first husband:
      “Partition the land of our mother”, and the eldest says, “I do not want you to
      have anything, for it was given to my father and to my mother and to the heirs
      which would issue of the two, and this I am quite ready to prove”, and if the
      younger say that they do not believe the older, he should bring people who
      were at the marriage, at least three respectable men [preudes homes] or four
      who will swear on the health of their hand that the marriage [portion] was
      given to the father and the mother, and they should name them, and to them and
to their heirs which would issue from the two, in their view and knowledge,
      and thus it will remain to the eldest. And if it cannot be proven, a third part will
      remain to the younger of the other husband, and the elder will hold it in parage.

...
The institution being described here is similar to the English institution known as *maritagium*. The inheritance of the *maritagium* goes to the heir of the couple who has received the *maritagium* even though the longer-lived of the couple has a life estate in the property. What it to happen if it is not shown to be *maritagium* is a bit unclear. It looks as if the eldest male of the first bed gets 2/3 and the children of the second bed get 1/3, but exactly how the co-tenancy works is not described clearly.

d. TA *129, 132 more than hints of community property

129. If any man and his wife buy land together, the one who lives longer keeps the purchases and the conquests. And thus if they have no heir, and the woman dies first, the man keeps the purchases for his life just as the woman does if she lives longer than the man. And when they are both dead, the purchases return, half to the lineage of the woman and the other half to the lineage of the man.

132. If a man who has great movable takes a woman who has nothing, and the man dies, without their having any heir, the woman will have half of the movable. And if a quite rich woman takes a quite poor man and she dies, he will have half of the movable. And thus one can understand that the movable are common [*communal*]. And if it is thus that when the rich man has taken the poor woman and she has an heir of him and the man dies and she takes another lord and they have an heir, and he dies and the mother dies, and the child of the first and of the second husband wish to partition the movable between them, the child of the first husband should have of all the movable that shall be found extant, be they barrels or vessels or bedclothes or beasts or chests which were of the first husband, one half by himself, and the other half by reason of the mother should be divided between the first and second; in such manner the children of the first [read second?] father will have half of the movable and the other half will be divided between the first and latter by reason of the mother as we have said above. But the profits of land will be common because they have gained them together; and one will make account and each one will have as much as the others. And thus there will be partition made between the first and latter of the movable which the woman has gained after the death of the father and with the latter lord; and all together they will each have in it one as much as the others.

e. Beaumanoir cc. 487–8, a real case. [This is too complicated to do in class but it would be great fun to work out for a paper.]

f. Beaumanoir cc. 621–628 the varieties of *compagnie*—we’ll do this one in section.

4. Substantive law of marriage.

a. Beaumanoir cc. 598–600 canon law rules more or less accurately stated—a provision on separation when the couple decide to espouse the religious life and two on bastardy. We’ll do this in section. We should note here that the deference to the church’s rules here is quite complete.

b. Beaumanoir chapter 57, which deals with separations, shows far less deference
to the church’s rules:

[1626] We see that often ill-will arises between husband and wife who are together by marriage, so that they cannot endure to remain together, and there is not reason for separating the marriage so that they can remarry. Nevertheless, they hate each other so much that they do not wish to remain together, and sometimes it is by the blows of one, and sometimes by the blows of both. And when such a state of affairs comes about, cognizance belongs to holy church, if a plea is brought there. But nevertheless, sometimes women have come to us to require that they be given their common goods for their life and sustenance, and sometimes the husband does not agree, because he says that he is lord of the things and that it is not by his blows that the woman is not with him. And because such complaints come every day into the lay court, we will treat in this chapter of what one ought to do according to our custom with such request.

The formal canon law on separations was, in this period, something of a mess. It was clear that adultery was a ground for separation, but it was not completely clear that cruelty was. (This changed later in the Middle Ages.) Beaumanoir’s chapter is too long to translate in full, but it makes it clear that the lay court in Beauvaisis had a quite well developed fault-based jurisprudence for determining whether a separation of goods should be made.

[1639] When marriages are separated between husband and wife for reasonable cause witnessed by holy church, one ought to know that if there were acquests while they were together each one ought to take one half; and if they have movable, each one ought to take a half; and of the inheritances, each one ought to take his own. If they have children who have passed seven years, the fathers ought to have ward of half of the children; if there is only one, he has it if he wishes and the mother ought to provide half its nourishment [au nourir]; and if the children are under seven years, the ward ought to be bailed to the mother, and the father ought to pay half their reasonable sustenance. And all such cases when they arise ought to be supervised by the estimation of lawful judges.

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3. This paragraph is clearly speaking of a divorce a vinculo, i.e., an annulment.

5. There’s nothing in TA specifically on proof, though matters concerning proof are scattered throughout the custumal (e.g., art. 108, which we just read). There’s nothing that requires that the author have been familiar with the ordines. So far as Beaumanoir is concerned, it’s a quite different story. Chapter 39, which B. tells us “speaks of proofs and false witnesses, of negation and affirmation [espurgement],” and of the danger which is threatened, and of speaking against witnesses, and what cases can fall in proof,” contains 77 articles. The arrangement of the material is quite similar to that of Tancred, though of course is deals with some institutions, such as trial by battle, which Tancred does not recognize. They are too long to read, but they would make an excellent paper. Indeed, Beaumanoir may have written the proof section as a commentary on how Tancred was and was not being followed in Beauvaisis. Ch.1175 shows that he’s tougher on women witnesses, saying that they don’t do what the church courts do:

4. Akehurst translates this entire phrase as “alibis.”

5. Akehurst translates “can be put to proof.” The disagreement depends on whether we should understand cheoir en
[1175] Ladies [many mss. read ‘women’] who are brought to witness ought not be received if they are challenged by him against whom they are brought in, whatever estate they have, widows, married, or maids, except for one case only: when a matter lies in testimony about the birth of a child or proving its age, for example, where a woman has two male twin children and the elder wishes to assert his right of age, one can not know which is the elder without the testimony of women, and for this they ought to be believed in such a case.