

PART X. CUSTOMS AND CUSTUMALS

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A. USATICI BARCHINONE (USATGES DE BARCELONA)

ed. R. d'Abadal i Vanyals and Ferràn Valls Taberner, *Usatges de Barcelona*,
Textes de Dret Català, 1 (Barcelona: Caritat, 1913)¹ [CD trans.]²

[In marked contrast to most of the Spanish *fueros* and French *coutumes*, this work exists in both Catalan and Latin versions, of which the Latin seems to be the older. The earliest ms. dates from the late 13th century. In the early 15th century an “official” version of the *Usatici* was adopted. The *Usatici* purports to have been promulgated by the count of Barcelona, Raymond Berenger I and his wife Almodis, and a 12th century chronicle gives the date as 1068. Most scholars today believe that the version we have dates from the middle of the 12th century (with some later additions), though it may well include older elements. The order of the original manuscripts is somewhat chaotic, and we make no attempt here to make sense of it. There are 174 numbered paragraphs in the official version with no rubrics. Some of the paragraphs are quite short, as can be seen below; the longest (an elaborate form of oath for a Jew to take if he is to testify against a Christian) runs about four printed pages. By and large, the lower-numbered paragraphs seem to be earlier. We give the first few articles, and all of those relevant to marriage, witnesses and wild animals. CD trans. from the Latin, following C. Poumarède, *Les Usages de Barcelone* (Thesis, Toulouse, 1920) [abbreviated below as *P.*] and R. d'Abadal i Vinyals and F. Valls Taberner, above. Where parallel passages are known, they are given in brackets following the paragraph; where there is a strong verbal similarity, the parallel passage is marked with a (*).]

1 [1]. Before the usages were issued, so that all misdeeds might always be emended if they could not be ignored, the judges used to judge by oath and by battle or by cold or hot water, saying thus: “I (name) swear to you (name) by Jesus God and these four holy gospels that the evil that I have done to you I have done by my right and your wrong (*a mon dret et ton tort*); and I would stand to battle about this or to one of the above-said judgments, of cold or hot water.”

2. Homicide and adultery which cannot be neglected were adjudged according to the laws and customs and emended or vindicated.

3 [2]. When the lord Raymond Berenguer the old, count and marquis of Barcelona and subjugator of Spain, had the honor, he saw and recognized that the Gothic laws could not be observed in all causes or businesses of this country. He also saw many quarrels and pleas which these laws did not specifically treat or adjudge. With the advice and counsel of his upright men, along with his most prudent and most wise wife, Almodis, he constituted and published usages by which all quarrels and evils inserted in them were controlled,³ pleaded, judged, and also emended and vindicated. The count did this by authority of the *Fuero Juzgo* which says: “Clearly, the prince shall have license to add to the laws if just cause of novelty requires it.” “And let it be treated by the discretion of royal power how the new case shall be inserted into the laws.”⁴ “Only the royal power shall alone be free in all things whatsoever penalty he commands be put in the pleas.”⁵

And the usages that he issued begin thus:

4 [3]. These are the practices (*usualia*) of court usage that the lord Raymond the old, count of Barcelona, and his wife Almodis constituted to be held forever in their country, with the assent and acclaim of the magnates of the land, to wit: [Nineteen names follow, three viscounts and sixteen men described as “judges.”]

¹ A more recent edition by J. Bastardas [“JB”], *Usatges de Barcelona: El Codi a mitjan segle XII* (Barcelona, 1984) does not differ greatly in the substance of the items quoted. JB, however, omits a number of items and relegates some items quoted below to appendices. He believes that he has reconstructed the original of the *Usatges*, which he dates to the mid-twelfth century. We give JB’s numbering in square brackets below.

² The full translation of JB’s text by D. Kagay [“DK”], *The Usatges of Barcelona: The Fundamental Law of Catalonia* (Philadelphia, 1994), should be used with caution.

³ “submitted to judgment.” DK.

⁴ *Fuero juzgo* 2.1.13.

⁵ *Fuero juzgo* 2.5.8.

[4]. Whoever kills a viscount or wounds or dishonors him in any way shall make amends to him as for two *comdors*⁶ and a *comdor* like two vavassors.

5. Concerning a vavassor who had five knights, he shall emend for his death with 60 ounces of seared gold⁷ and for a wound with 30 ounces. If he has more knights, the composition shall grow according to the number of knights.

Whoever kills a knight shall give 12 ounces of seared gold in composition. Whoever wounds shall emend to him with 6.

[Marriage]

108 [85]. If anyone violently corrupts a virgin, he shall either marry her if she and her parents wish and give her *exovar* [roughly, “dowry” or “bride-price”], or he shall give her a husband of her worth. If anyone violently commits adultery⁸ with a woman who is not a virgin and impregnates her, likewise. [Parallels: Petrus, c. 54; Exod. 22:16–17 in X 5.16.1 (Ivo, Decret. 5.292–3); JI.4.18.4; Fuero juzgo 3.4.7; P. 284.]⁹

109 [86]. Concerning the things and faculties of peasants who are *exorchs* [one ms. glosses as “sterile”], those who have left this world, their lords shall have that part of their goods that their children [perhaps “sons”] would have had if such had survived.

110 [87]. Similarly, concerning the things and possessions of adulteresses, if the adultery was committed their husbands unwilling, they and their lords shall divide the entire portion of the adulteress equally. If, on the other hand—may it never happen—the adultery was done by the will, order or assistance of their husbands, the lords shall have right and justice entirely. [Parallel: Fuero juzgo 2.4.12; P. 285.]

111 [88]. If women do this not of their own free will but out of fear of and by the order of their husbands, they shall be immune from their husbands and lords and shall not lose any of their own goods, and if it pleases the same women they may separate from their husbands in such a way that they do not lose their dowry [*dos*] nor their spousal gifts [*sponsalicia*]. [Parallel: Fuero juzgo 3.6.5; P. 285.]

⁶ A member of a line of middle-ranking Catalan nobility. DK.

⁷ A Muslim coin of the late 10th century which was minted in Cordova but circulated in all the Christian realms of the Peninsula. DK.

⁸ *adulterium* in the text. DK translates “If anyone violently ravishes a woman who [etc.]” In any case, we may doubt whether “adultery” in either the Roman or the modern sense is meant. DuCange, s.v., reports that the word *adulterium* is frequently used in the early middle ages as the equivalent of Latin *stuprum*, a word that normally often means corruption of a virgin, but that does not seem to be what is involved here. Compare *Fuero juzgo* 3.4.7, where the word *adulterium* is used where we would expect *fornicatio*.

⁹ We offer for this passage the texts of the suggested parallels:

Exceptiones Petri, c. 54 [The work is a handbook of Roman law for practitioners probably compiled in the early 12th century]: “If anyone violates a virgin without using force, or even if she consents, or seduces a widow of respectable character, if he who does this is of reputable condition, the punishment is confiscation of half his fortune; if a mean person, flogging and relegation.” *Exodus* 22:16–17: “When a man seduces a virgin who is not engaged to be married, and lies with her, he shall give the bride-price for her and make her his wife. But if her father refuses to give her to him, he shall pay an amount equal to the bride-price for virgins.” This passage appears in the *Decretals of Gregory IX* (1234) (X 5.16.1); it also appears in a canonical collection of the late 11th century attributed to Ivo of Chartres (*Decretum* 5.292–3).

Justinian, *Institutes* 4.18.4: “The *lex Iulia*, passed for the repression of adultery, punishes with death not only defilers of the marriage-bed, but also men who indulge in criminal intercourse with those of their own sex, and inflicts penalties on anyone who without using violence seduces a virgin or a widow of a respectable character. If the seducer be of reputable condition, the punishment is confiscation of half his fortune; if a mean person, flogging and relegation.”

The Visigothic Code (Forum iudicum, Fuero juzgo), 3.4.7 [the provision is probably derived from the Code of Euric (466 X 484)]: “If a freeborn girl, or a widow, should go to the house of another for the purpose of committing adultery, and the man who is implicated should wish to marry her, and her parents, if she has any, should acquiesce; he shall give to the parents of the girl as large a sum as they may demand, or as much as shall be agreed upon between him and the woman herself. But the woman shall not share with her brothers in the inheritance of her parents, unless the latter desire.”

But this does not exhaust the possible parallels. One might consider, for example, consider cc. 82–4 of Aethelberht’s Code (above, § 4A), or the Burgundian Code, tit. 12 (above, § 4B). The question, then, is what is likely to have been in the mind of the compiler of the *Usages*: Roman law? Canon law? “Germanic” law? All three? None of the above?

112 [89]. Husbands can accuse their wives of adultery by suspicion, and they ought to purge themselves by an *avagant* [champion]¹⁰ by oath and by battle, if there are manifest *indicia* and competent signs in it: the wives of knights by oath and also by a knight, the wives of citizens and burgesses and noble bailiffs by a foot-soldier, the wives of peasants [*rusticorum*] by their own hands by the cauldron. If the wife wins, her husband shall retain her honorably and shall pay her all the expenses that her friends and relatives made in the plea and in the battle and the damage to the champion. If she loses, she shall come into her husband's hand with all the goods that she has. [Parallel: Ivo, Decret. 4.20.si mulier; P. 319; Fuero juzgo 3.4.3; P. 285–6.]

147 [C4]¹¹. If a widow lives honestly and chastely in her honor after the death of her husband, she shall have her husband's substance so long as she remains without a husband. If she commits adultery and violates the bed of her husband, she shall lose her honor and all the property of her husband, and the honor shall come to the power of her children [perhaps "sons"] if they are of age or of their relatives, in such a way, however, that she shall not forfeit her property (*suum*), if she appears to have a present interest in it (*si in presenti apparuerit avere*), nor shall she lose her spousal gift [*sponsalium*] so long as she lives; afterwards it shall return to the children or the relatives. [Parallels: Fuero juzgo 3.2.8, 4.2.14, 3.2.1; P. 289–90.]

[Witnesses]

57 [54]. Fees which knights hold, if their lords deny that have given them to them, they shall aver them by oath and by battle and shall have them. Those which they do not hold and claim,¹² they shall either prove by witnesses or by writing that they acquired them from their lords, or they shall abandon them.

85 [B2]. We command in order that perjuries be guarded against [that] witnesses not be admitted to take an oath before they are examined. If they cannot otherwise be examined, they shall be separated from each other and examined singly. The accuser may not chose witnesses in the absence of the accused. In no way shall anyone shall be admitted to the oath and to testimony unless he is entirely fasting.¹³ If a witness is recused, let him who is recusing say or prove why he ought not be received. Witnesses shall be chosen from this territory and not from another, unless the case must be investigated far from the county. If anyone is convicted of perjury, let him lose his hand or redeem it with 100 shillings. [Parallels: C.3.20.14; C.22 q.5 c.6; X 2.20.2; MGH, *Capitularia regum francorum* 1.124 (805); P. 310–12.]

86 [B3]. Before witnesses are interrogated about the case, they shall be constrained by an oath that they will say nothing other than the truth. We also order this, that faith shall be admitted to more honest rather than more vile witnesses.¹⁴ The testimony of one, however, however splendid and suitable a person he might seem, shall never be heard. [Parallels: Petrus 4.36; Brev. Alaric 11.14.2 (interp.); Benedict the Levite 1.283; Ivo, Decret. 16.204; Panorm. 55.21; P. 312–13.]

87 [B4]. If someone is proven to have made an unjust appeal, he ought to be forced to recompense the expenses that he compelled his adversary to bear, not in simple but in four-fold. Two or three suitable witnesses suffice to prove all matters. The testimony of one is disapproved by the laws and the canons. [Parallels: Petrus 4.30 (s. 2–3);* Brev. Alaric 5.39 (s. 1);* Epit. Aegidii (epitome of the Breviary of Alaric);* C.3.20.9; C.2 q.6 c.27; Ivo, Decret. 5.285; Ivo, Pan. 4.131; P. 313–15.]

88 [B5]. No one shall ever presume to be at once accuser, judge and witness, since in every judgment it is necessary that four persons be present, i.e., chosen judges, suitable accusers, appropriate defenders and legitimate witnesses. Judges moreover ought to use equity, accusers claim to amplify the cause, defenders

¹⁰ JB emends to *averamentum*, in which case translate "by their affirmation, by oath and by battle."

¹¹ Chapters that begin with a letter are those that JB regards as later additions.

¹² Neither DK nor I can make much sense of this. Perhaps it means "those they do not hold but claim."

¹³ DK's translation of this is just wrong.

¹⁴ An awkward sentence. Perhaps *fides adhibeatur* ("faith shall be placed on") rather than *fides admittatur* is meant. A meaning of *fides* as "oath" is also possible ("the more honest should be admitted to the oath in preference to the more vile").

extenuation to diminish the cause; witnesses ought to prove the truth. [Parallels: Petrus 4.7, 12; Benedict the Levite 3.339;* C.4 q.4 c.1; Ps. Isid. Epistle of Fabian;* Ivo, Pan. 4.81; Ivo, Decret. 7.321; P. 315–17.]

89 [B6]. Accusers and witnesses cannot be those who a day or two before were enemies, lest in their wrath they seek to harm and lest the injured seek to avenge themselves. An unoffended affect [*inoffensus effectus*] is to be sought in accusers and witnesses, not a suspect one. Suitable witnesses are not those who can be ordered to be witnesses. [Parallels: D.22.5.3, .5; P. 317.]

143.¹⁵ Because we have frequently received complaint by our subjects that truth is obscured and repressed by the corruption of witnesses, following in this part the imperial laws, we order that if any witness be produced by anyone he shall be bound by oath that no money or anything else was given or promised to him nor, to his knowledge, to anyone subject to him. Further, to put an end to the slipperiness of witnesses¹⁶ by which the contrary to the truth is put forward, we order that anyone litigating before us or anyone delegated by us who knowingly produces a false witness or corrupts a witness shall lose his cause and shall incur the publication [*sic*, probably means a type of forced sale] of all his movable goods, of which one-half shall be assigned to his lord and the other half shall be kept in our treasury. The same penalty of publication of goods shall be incurred by anyone convicted of having borne false testimony, and above that he shall lose his hand and his tongue, and the possessions [does this mean immovables?] of both shall devolve on those who are called to their goods by right of succession. [Parallels: D.22.5.5, .16, .3; P. 320–1.]

144.¹⁵ Because we have frequently received complaint by our subjects that frequently in the courts cases are brought and defended calumniously; then appeals are taken from interlocutory [sentences], and as a result the matter at stake is long protracted and long suspended, so that scarcely or never can it finally be concluded; wishing therefore to counter this fraud and malice with a royal antidote and desiring to impose an end to quarrels, and so that the parties not be unjustly exhausted with labors and expenses, with the counsel and approval of the nobles and magnates and also of our citizens who at that time were present in our court we think that it ought to be laid down as follows: that from henceforth in all cases the oath of calumny shall be taken by both the plaintiff and defendant and that there be no appeal from interlocutory sentences, except from manifest harm, or unless it plainly contains error, or unless it is pronounced against right [*jus*]. In which cases, it shall be determined within three days about the aforesaid sentence and corrected as it ought, and so not only litigation but also calumniators shall be diminished.

Item. By foresighted deliberation we lay down that every judge ordinary shall compel the named witness to take an oath to bear testimony to the truth, and that any party for supporting his claim [can compel] the other party to exhibit instruments that he asks for and have them solemnly copied, even though in the case or court in which they are asked it is not customary to use instruments, since frequently the truth is hidden for failure of witnesses.

Item. We order that it be observed in an unbreakable fashion that when it happens that a traveler or stranger has a case with any of our subjects that that case be brought to a fitting end quickly and without delay. For it would be wicked if such persons who expose themselves frequently to the fortune of roads and rivers should be seen to make too long a stay in any place against their wishes. [Parallels: D.49.5.12; D.22.5.21; P. 321.]

148 [C8]. If anyone shows in plea a testament or a firm charter about any contention and cannot by witnesses or firm writings overcome [what was contended] on the other side (*de alia parte*),¹⁷ the judge shall decide what seems to him to be right and each of them shall preserve his right.

162.¹⁵ If anyone says or makes false testimony against his neighbor [*proximus*] in any case, he shall lose as much of his property [*avere*] as his neighbor would have lost if he had spoken the truth in testifying against him. [Parallel: Fuero juzgo 2.4.6;* P. 271–2.]

¹⁵ JB omits because it is not in his early mss.

¹⁶ The same phrase (*testium facilitate*) is the incipit of CJ.4.20.18pr.

¹⁷ DK suggests “and the case of the other party cannot be proven either by witnesses or validated documents.” The text seems corrupt.

163.¹⁵ No man or woman can testify until s/he has finished fourteen years. Two suitable witnesses suffice for proving anything. [This last sentence is not in all mss.] [Parallel: Fuero juzgo 2.4.11; P. 272.]

164.¹⁵ Homicides, witches, thieves, poisoners, the sacrilegious, adulterers, those who have committed incest and all criminals shall not be received to give testimony. Those anathematized, excommunicates, heretics, saracens, and jews cannot testify against christians. Blood relatives cannot testify against strangers, but if they wish and agree among themselves they may testify among themselves and not against others. [Parallels (of both 163 and 164): Petrus 4.31–2; D.22.5.3; C.22 q.? c.16; Ivo, Pan. 4.85; Fuero juzgo 2.4.1, .12, .4; P. 272.]

165.¹⁵ It is required that citation having been made a witness be compelled at the mandate of the judge to bear witness to the truth. Whoever conceals the truth, even if he is silent for fear of death or wounding, thereafter shall not be received in testimony. [Parallel: Fuero juzgo 2.4.2; P. 273.]

[Other mss. offer this version:] It is required that all men and women testify to the truth that they know, and it is fitting that the judge call them to do this; but if someone, having been warned by the judge to say what he knows refuses to give testimony, or even says that he doesn't know and refuses to swear to it, and by grace or venality suppresses the truth, unless he is silent because of fear of death or wound to his body, his testimony shall not be further received, because he is no less guilty who suppresses the truth than he who makes up falsehoods.

167.¹⁵ Father cannot be witness against son nor son against father even if both consent. Similarly neither can be witness for the other, because domestic testimony is reprovved in its own matter [i.e., in a domestic matter]. In another matter there is no harm if many witnesses from one house testify to another's matter. In his own matter no one can be either witness or judge. In the matter of the son, if both litigants consent, the father can be judge and similarly the son in the matter of the father. If the other does not consent, the trial is not probable [?provable]. [Parallels: Petrus, 40.4;* D.22.5.9; P. 323; Fuero juzgo 2.4.12; P. 290.]

B. COUTUME DE TOURAINE-ANJOU

ed. P. Viollet, in *Les Établissements de Saint Louis* 3 (Paris: Renouard, 1883) 3–104 [CD trans.]¹

[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. All the rubrics are given, interspersed with chapters that are relevant to our concerns.]

1. Of the gift of a gentleman to his children and how they ought to partition if their father dies without assigning to them.

2. Of making partitions.

3. Of partitions made for *frasesche* among sisters.

4. Of the marriage gift at the door of the church and to keep it for his life since his heir has cried and bawled.

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.

5. Of a foolish gentlewoman.

6. Of the partition had as eldest.

If a gentlewoman is heir of land and her ancestors are dead and she has heirs and she wishes to take dower in the land of her husband, that is the third part, her oldest son will thus take the third part of hers.

¹ A full translation by F. Akehurst [FA], *The Etablissements de Saint Louis: Thirteenth-Century Law Texts from Tours, Orléans, and Paris*, (Philadelphia, 1996), has been compared.

7. Of purchases and conquests.

Gentlewomen have but a third in dower from the land of their husbands, but their husbands can give them their purchases and conquests to do with what they will, and if fathers have made a purchase in fee, the eldest son will have it upon rendering the sum that his father put on it.

8. Of paying the debts of her lord [husband].

9. Of the right of gentlewomen and keeping their dower in good estate.

Gentlewomen ought to have the house of their husbands after their death, until he who ought to have the return of the land makes an appropriate lodging for her. And she ought to keep it in good estate, and if she does not so keep it, he can oust her by right, because it was her fault that the manor was worsened. And still she will be held to amend the damages, and if she cannot amend, he can oust her from the land by right and keep it in his hand, for she has contempt for the dower; she ought to lose it by right. And she ought to keep it all in good estate, vines and fruit trees, if she has them in her dower, without cutting or mistreating them.

10. Of keeping the wardship in good estate until the heir be of age.

11. Of plea of land.

A gentlewoman can well plead for her dower in the court of the king or in the court of him in whose castelry it will be or in the court of holy Church; it is her choice. And so can a gentleman for his marriage which has been given him at the door of the church.

12. Of the gift of a knight in marriage.

If a gentleman marries his son, he ought to make over to him a third of his land, and also when he becomes a knight; but he does not make him a part of that which has been given to him at the door of the church in marriage, because his wife is not heir of the land. And if he has a wife who is an heiress of land, he will make to him thus a third of the land of his mother.

13. Of partitioning the escheats of a grandfather and grandmother.

14. Of escheats of brothers.

15. Of repurchase of parage.

16. Of taking villainage.

17. Of partitioning baronies.

18. Of the high justice of barony, of murder, rape and abortion.

19. Of summoning and forbanning a malfeator and of the coming then of the forbann and making ravage.

Of suspicion and summons for justice in the lay court.

20. Of hot melee.

21. Of assurance required in lay court and of truce broken.

22. Of stealing a beast or horse and of losing one's members by one's misdeed.

23. Of high justice by reason of treason within the family.

24. Of the justice of the vassal.

25. Of women who have company with robbers or murderers.

26. Of consenting to murderers or to robbers.

27. Of the company of murderers.

28. Of punishing the suspected by office of the provost.

29. Of the evil-doing of women and of those accustomed to it.

30. Of willing homicide without doing more.

31. Of threatening and refusing assurance before justice and of the request to the sovereign by justice, doing right to the parties.

32. Of the justice of a vassal.

33. Of releasing a robber and of his purging himself of suspicion.

34. Of requiring one's court and its obedience, doing right, and leading by the hand a justiciable man into one's court legally.

35. Of taking and following a murderer or robber.

36. Of paragers.

37. Of tenure in parage.

38. Of showing the lineage to the lord and of tenure in parage without rendering the steed of service.

39. How a man ought to behave himself toward his lord when he perceives that he is going to lose his inheritance.

40. Of showing one's fee before one's liege lord.

41. Of cutting in the forest.

42. Of laying hands on one's lord by evil spite and of defending one's lineage by one's right before one's right liege lord without losing one's fee.

43. Of summoning one's man to go fight against the king.

44. Of taking back one's gage from one's lord and of falsifying measures and of fishing in a lake and of taking and of hunting rabbits in warrens and of lying with a woman by force.

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.

45. Of deflowering a woman by force who is in wardship or guardianship.

46. Of denying right and the judgment of one's court to one's liege man and to another's.

47. Of legally making guard or castle to one's liege lord.

48. Of the movables of gentlemen when they lose their own.

49. Of complaint made of one's lord in the court of the king without making amends to one's lord.

50. Of showings made by justice.

51. Of the prince's right.

52. Of a robber and of a murderer.

53. Of a gentleman's franchise.

54. Of franchising a sergeant.

55. Of summoning men to go to the king's palace.

56. Of taking to the lord the issues of the land for redemption and of redemption when a lady marries.

No lady makes redemption if she does not [re]marry; but if she marries her husband makes redemption to the lord of him whose wife she was. And if the lord does not like what is offered, he can only take the issues of her fee for one year. And if there are woods which the lady had begun to sell and which her lord otherwise assented that she could sell, by right and by reason of the redemption the husband can sell them at the same price at which they had begun to be sold, but he cannot make greater market than had been made before.

57.² Of the surety given for suspicion of marriage to one's liege lord and of doing honor and the proof on behalf of the unmarried lady made by her relatives.

When a lady remains a widow and she has a daughter, and she (the lady) is getting old, and her lord comes to her, to whom she was liege lady, and requires her: "Lady, I wish that you give surety that you not marry your daughter without my counsel, nor without the counsel of the lineage of her father; for she is the daughter of my liege man, and because of that, I do not wish that she be outcounselled." ; it is fitting that the lady give him surety for it by right. And when the maid is of age to marry, if the lady finds someone who asks her of her, she ought to go to her lord and to the lineage on the side of the girl's father and speak to them in this manner: "Sir, someone is asking me to give my daughter, and I do not wish to give her without your counsel, nor ought I. Now give me good and lawful counsel, for such a man asks her of me (and she ought to name him)." And if the lord says, "I do not wish that he have her, because such a man asks her of me, who is more rich and more gentle than he of whom you speak, and he will take her willingly (and he ought to name her)", and if the lineage on the father's side says, "We know someone still more rich and gentle than any of those whom you have named to us (and it ought to name him)", then they ought to look to the best of the three and the most profitable for the young lady. And he who is said to be the best of the three ought to exceed the others so that no one could rightfully misunderstand it. And if the lady marries her without the counsel of the lord and without the counsel of the lineage on the side of the father, as she ought to have, she will lose her movable. And the lord can distrain her by faith or by pledges, if necessary, before she leaves her fee or her faith; and she should swear to tell truly about her movable even before she loses them by judgment; and when they have all been taken away from her, there ought to remain to her a dress for every day and a dress for adornment, and suitable jewels for adornment, if she has them, and her bed and her carriage, and her war horse which suffices for her affairs, since she has no husband, and her palfrey, if she has one.

58. Of keeping the heritage without diminution and of the gift of a gentleman.

59. Of novel disseisin and of keeping things safely, doing right to the parties, and of rendering costs and damages.

60. Of postponement by justice.

61. Of requiring one's man and of entering in faith of the lord without any default.

62. Of the thing adjudged in judgment.

63. Of rendering damages.

64. Of wrong done and default of justice.

65. Of the right of a peer (ber) to be judged by his peers.

66. Of the privilege of a knight.

67. Of the age of guardianship without making reply and of proving one's age.

68. Of counting one's lineage and of showing it to the lord.

69. Of service in parage.

70. Of tenure in parage without rendering service to one's lord.

Of keeping guardianship in good state without doing homage to the lord.

71. Of false judgment and of tenure for good and for legal.

72. Of requiring one's right from the king.

73. How one ought to demand amendment of judgment and of requiring the same day.

74. Of appealing one's lord of false judgment.

² [I think my numbering may be off here. This corresponds to no. 56 in Viollet, *Établissements*, 3:33. CD]

75. Of battle between a knight and a villein.
76. Of breach of prison.
77. Of the cognizance of clerks and of rendering crusaders to holy Church.
78. Of punishing heretics and miscreants.
79. Of combating usurers.
- 80, 81. Of the stranger and of the man who kills himself.
82. Of the man who dies unconfessed.
83. Of discovery of fortune.
84. Of having one's warranty of stolen goods.
85. Of rendering costs and expenses about a matter adjudged.
86. Of seisin breached and of refusing oath.
87. Of taking and keeping a villein's pasture.
88. Of heritage tallageable to a gentleman.
89. Of a stranger.
90. Of the escheat of bastards.
91. Of the sale of the heritage of bastards.
92. Of bastards and of lands at terrage.
93. Of measuring lands at cens.
94. Of service wronged and of taking for default of men.
95. Of the essoin of sickness and of establishing one's son as proctor for one's self.
96. Of the plaintiff and of the evil-doing term pendant.
97. Of appealing a man of murder and of treason, without rendering and without renouncing, and of making equal seizure.
98. On divers misdeeds and of divers contents.
99. Of requiring a party by justice, doing right.
100. Of millers and mills.
101. How one ought to use a part of a mill.
102. Of the right of the vassal and the baron.
103. Of milling at a mill by ban.
104. Of justicing generally by barons the fees which are enclosed in their castleries and of making homage and obeisance of fees.
105. Of the right of the prince for his debt acknowledged and proved.
106. Of the gift of the king to a man, to him and to his heir born of legal marriage.
107. Of gift between husband and wife.
[Gifts by wives are generally prohibited, exception being made for a third of her inheritance at marriage, at death, when she is sick, or when she has no male heir.]
108. Of the gift of marriage.

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 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. ...

109. Of the gift of faith for fraresche to one's brother and of making two obeisances for one fee.

110. Of bail in fee and of bailing the wardship of a child in a hand suspect for the perils which could come to it.

111. How a man ought to guarantee his pledge and of requiring one's principal debtor before the pledge.

112. Of appealing a man of default and of losing seisin after showing.

113. Of the essoin of sickness and of being appealed in the court of the sovereign.

114. How one renders damage for one's beast, doing right.

115. Of the deed of the father that belongs to the heir and of proving his debt.

116. Of forcing excommunicates to come to amendment and of punishment afterwards.

117. Of arra of marriage.

118. Of gift to religion in dead hand.

119. Of the warranty in parage and of doing service to one's lord.

120. Of running water.

121. Of plaint in court baron of a man of the king.

122. Of Jews.

123. Of knighthood.

124. How one ought to render ransom of service to one's lord.

125. Of partition among brothers of the descent from the father and mother.

126. Of keeping dower in good state and of pleading.

127. Of parts bounded by justice and of doing justice one's self.

128. Of partitioning fraresche.

129. Of escheat without an heir.

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 not 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.

130. Of the bail of a customer.

131. Of falsifying judgment.

132. Of the marriage of a poor woman and a rich man.

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 first³ 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.

133. Of foolish children.

134. Of demanding another's heritage without return.

135. Of the age of people in villeinage.

136. Of faith in villeinage.

137. Of tolls trespassed.

138. Of trespassing one's toll and being arrested outside the boundaries.

139. Of the merchant on water.

140. Of false measure and of false cloth.

141. Of the judgment of false merchandise of cloth.

142. Of the married woman merchant and of the response of a married woman merchant.

143. Of appealing an unlawful man and woman also.

144. Of having warranty for a term.

145. Of laying hands on one's lord by evil spite.

146. Of beating the justice or the provost or the sergeant.

147. Of breaching the seisin of one's lord and of fishing in his lakes.

148. Of seisin.

149. Of sales.

150, 151. Of the return to the lineage (*retrait de lignage*) and of challenging sales within a year and day by *retrait*.

152. Of offering money before the justice for *retrait* and of making amendment after the offer.

153. Of having one's things put on *retrait* at one's proof.

154. Of the taking by the lord by default of the lineage.

155. Of calling back one's heritage without rendering any sales.

156. Of swearing legal costs and legal things put on *retrait*.

157. Of respite of sales made by justice.

158. Of *retrait* between brothers and sisters.

³ This is what the text says. It might make more sense if this were a mistake for "second."

159. Of rendering one's dues at a certain day.
160. Of taking tarrage by the lord for his profit.
161. Of appealing a man of murder or of treason.
162. Of lost bees and of following them without losing the view by oath.

⁴If 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 essain*], 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,⁵ 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.⁶

163. Of a woman's having right to dower and of keeping fixed the deed of an ordinary judge and of something that is done by the power of her husband and by force.
164. Of battle between brothers.
165. Of changing champions in battle for murder on the ground of apparent mutilation.

⁴ I follow the Akehurst translation here. (His numbering is ten higher than mine because includes the *ordonnances* of St. Louis at the beginning in his basic numbering.) Akehurst notes a similar rule in Beaumanoir c. 1967. Compare JI.2.1.14, above, p. I-8. Should we be thinking here of borrowing?

⁵ Akehurst notes that this phrase probably means that the plaintiff is willing to provide whatever proof the court requires.

⁶ As Akehurst notes, an eighteenth century commentator explains this provision as being necessitated by the fact that the owner will take the bees away in the container.

C. PHILIPPE DE BEAUMANOIR, COUTUMES DE BEAUVAISIS

ed. A. Salmon, 2 vols. (Paris, 1900; repr. Paris: Pichard, 1970) [CD trans.]¹

[The work of Philippe de Rémi, sire de Beaumanoir, courtier, poet (perhaps), and royal bailiff of the customary jurisdiction of Clermont en Beauvaisis. The work is dated in 1283. It is divided into seventy rather long chapters. The numbering of the paragraphs is modern. What follows gives the tables of the chapters from paragraph [10] interspersed with some of the more interesting paragraphs.]

[10] Let everyone know that in this book are contained seventy chapters which speak of the matters which follow:

c.1 speaks of the office of bailiffs, who they ought to be and how they ought to behave themselves in their office.

c.2 speaks of summonses and summoners, and of those who do not obey summonses, and how one ought to summon.

c.3 speaks of essoins and of countermands [fifteen-day adjournments] that can be made by custom.

c.4 speaks of proctors and of those put in others' places, and who can make a proctor, and which proxies are valid and which not, and how proctors ought to perform in their office.

c.5 speaks of advocates, how they ought to be received and how they ought to behave themselves in their office, and which can be excluded.

c.6 speaks of complaints, how one ought to formulate one's complaint before justice, and of requests and denunciations; and in which cases drunkenness or ignorance can excuse; and of the oath of truth.

c.7 speaks of the defenses which defendants can put against the petitions that have been made against them, what the clerks call exceptions; and of replications and of denials.

c.8 speaks of those who come too late to make their complaint, and of what time peaceable tenure suffices in a complaint for a movable, and of what time for an inheritance.

c.9 speaks of cases for which there are days of view and how one ought to except in a lay court and how view ought to be shown, and that witnesses may have a day for consultation if they ask for it.

c.10 speaks of the cases in which the counts of Clermont are not held to render court to their men [i.e., their vassals], so that one waits for cognizance [i.e., of the count] by reason of sovereignty.

c.11 speaks of the cases in which the cognizance pertains to holy church and in which to court lay, and in which cases the one ought to assist the other, and of the difference between a holy place and a religious place, and in what cases holy church cannot warrant, and of the seizure of clerks.

c.12 speaks of testaments, which are valid and which not; and what one can leave in testament, and how one ought to contest a testament or diminish it; and that one sustains them for the profit of souls; and how executors ought to behave with regard to executions, and the form for making a testament.

c.13 speaks of dowers, how they ought to be delivered to women, and how they ought to keep them, and how they ought to partition after the death of their lords [husbands].

c.14 speaks of descent and of collateral escheat² and of partition of inheritances;³ and of hotchpot [*raporter*]; and of gifts that cannot be allowed; and of doing homage.

¹ A full translation by F. Akehurst, *The Coutumes de Beauvaisis* of Philippe de Beaumanoir (Philadelphia, 1992), has been compared. Akehurst's translation offers more by way of interpretation. His interpretations are, in many cases, probably correct, and are offered below in the notes where I have translated more literally.

² The chapter makes clear that this term refers to inheritance by collaterals in the absence of descendants.

³ The word normally refers to real property and probably does so here.

[487] A knight and lady during their marriage, bought a fief in the inheritance of the knight;⁴ they had children. After the mother died, the children sought half of the fief by reason of the acquist of their mother, and the knight who was their father, within a year and a day from the death of the mother, retrieved it [*le retraist*] from his children for money, and the lord from whom the fief was held demanded two homages from the fief: one by reason of the half which he [the knight] had in his own right by his purchase, and the other by reason of the other half which he retrieved from his children for money. And the knight replied that he ought have but one homage, for the children had no right of inheritance in it, since he wanted to have it back for money, and since he is the man of the whole fief and no one took anything except him, he was not obliged to do two homages; and on this point they were at issue.

[488] It was adjudged that he ought have but one homage. But it is true that if the children had taken half by reason of the conquest of their mother, that the father had not had *retrait* by money, he would have had two homages for it.

c.15 speaks of bails and of ward of underage children,⁵ and of the difference between bail and ward; and at what time a child has reached majority under the custom of Beauvaisis.

c.16 speaks of underage children, how and in what case they can lose or gain; and how they can revoke a transaction when they are deceived; and how their ages can be proved; and how partition can be made against them.

c.17 speaks of tutors who are bailed to underage children to guard and to administer their needs.

c.18 speaks of which heirs are legal to hold inheritances and which can be excluded for bastardy and how bastardy can be proven; and which marriages are good and which not.

[598] Sometimes it happens that two gentle persons who are married separate by their will and with the permission of holy church for no evil reason; as when they wish to vow chastity or enter religion. But this separation cannot be made without the agreement of the two parties, for the man cannot do it without the agreement of the woman nor the woman without the agreement of her husband; and if they have children, they do not cease for this reason to be legal, nor for this reason [fail] to come to succeed their father and mother.

[599] Those who it is certain are bastards and adulterine can in no way be legal so far as coming to the descent of inheritances of the father and mother. But those who are only bastards can be made legal heirs by being placed under the veil [*paile*] at the espousals, as we have said below. Adulterines are those who are engendered in married women by another other than their lords, the married man. Therefore if it happens that a man has a child in adultery⁶ of a woman who has a husband and the husband dies and the man who is living takes her to wife, the children which are born after the marriage or who were engendered or born when she was a widow can be made legal, but those who were engendered or born in adultery when she had another husband cannot be made legal for succession to the father nor to the mother. But we have seen those who by the apostolic grace became clerks or held goods of holy church,⁷ but in these things the lay courts are not to mingle, for the administration of holy church pertains to the apostolic see and to prelates.

[600] One ought not doubt that when a man has company with a woman outside of the bond of marriage, and he marries her when the children are born or when she is pregnant, if the children are placed under the cloth (*drap*)—which cloth it is the custom to place over those who marry solemnly in holy church—they are not legal until they are put with the father and mother making the marriage; and after that, the children are

⁴ Akehurst translates “which was part of the knight’s realty.” I think what happened here is that couple agreed that this would be inherited in the line of the knight (rather than in the line of his wife, to the extent that the two diverged). The two did not diverge, however, because they had children, though the children seem to have had a claim even before the knight died.

⁵ Akehurst translates “custodianships and guardianships.” It is clear that we are dealing here with two different forms of what we would call “guardianship.”

⁶ Akehurst translates “in concubinage.” The phrase (*en soignantage*) can mean either.

⁷ The reference may be Innocent III’s famous decretal *Per venerabilem*. X 4.17.13.

not bastards but are heirs and can inherit as if they were legal children born in marriage. And by this grace which holy church and custom accords to all sorts of children, it frequently happens that fathers marry mothers for pity of the children, so that less evil is done them.

c.19 speaks of the degrees of kinship [*lignages*] by which everyone can know how nearly or how farly they are related to each other, for that can be necessary for⁸ war or for forcible recovery of inheritances.

c.20 speaks of those who hold inheritances or other things in good faith, how they ought to be kept from harm and how those who wrongfully and for bad cause hold another's property ought to be punished, and how certain partitions cannot be made in any case.

c.21 speaks of partnership [*compagnie*] and how partnership is made by custom and how one can lose or gain in partnership, and how partnership is fails; and how one can get a child out of bail.

[621] Many gains and many losses arise often by partnership⁹ which ought to be called partnership according to our custom, and for this reason one ought to take care with whom he places himself in partnership and whom he receives as partner. And these partnerships of which we wish to speak are those which by reason of the partnership the property is partitioned when the partnership fails, and such partnerships are formed in several ways. ...

[622] Everyone knows that partnership is made by marriage, because as soon as marriages are made the goods of the one and the other are common by virtue of the marriage. But the truth is that as long as they live together the man is the administrator [*mainburnisseres*] of it, and the woman must allow and obey insofar as concerns their movables and the profits of their inheritances; even if the woman may clearly sees a loss of it, she still must suffer the will of her lord. But the truth is that the underpinning [*tresfons*] of the inheritance on the side of the woman the husband cannot sell without the permission and will of the woman, nor his own either unless she renounces her dower that she will not take her dower if she survives him. And of the partition that ought to be made of the partnership of marriage when marriages fail, we spoke of them in the chapter that speaks of dower, and we pass over it here.

[623] The second way in which partnerships are made is by merchandise¹⁰

[624] The third way in which partnerships are made is by agreement

[625] The fourth way by which partnership is made is the most dangerous and in which I have seen more people deceived; for partnership is made according to our custom simply by staying together at one bread and at one pot a year and day when the movable of each are mingled together. ...

[628] The fifth way of partnership is made between commoners [*gens de pooste*] when a man or a woman marries two or three or more times, and there are children of each marriage, and the children of the first marriage stay with their step-father or step-mother without leaving and without a fixed agreement to hold of them;¹¹ in such a case they can lose or gain by reason of partnership with their father and their step-mother or their mother and their step-father. ...

c.22 speaks of the other kind of partnership, which one calls partnerships of inheritance,¹² which ones can be partitioned and which ones not, and how one ought to behave in all partnerships.

c.23 speaks of which things are movable and which things are inheritance according to the custom of Beauvaisis.

⁸ Akehurst adds "private" here in brackets.

⁹ Akehurst translates "association" here, though the French uses the same word (*compaigne*). Clearly, Beaumanoir is distinguishing between *compaigne* in a loose sense and *compaigne* in a technical sense.

¹⁰ Akehurst translates "through a business [*marcheandise*]."

¹¹ Akehurst translates "to look after them." This may well be what it means, but I have preferred the more literal translation, with its decidedly feudal connotations.

¹² Akehurst translates "capital property partnerships."

c.24 speaks of which things are custom and which things are usage, and of the difference between custom and usage and what usage is valid and what not; and of leaving land at *cens* [a kind of rent-charge];¹³ and of buildings.

c.25 speaks of roads, of what width they ought to be and how they ought to be maintained without damage or diminution, and to whom the justice of them pertains, and of the passage of pilgrims and merchants; and of that which is found at roads and of crossings and of other common conveniences (*aisemens*).

c.26 speaks of measures and of weights, and how one ought to weigh and measure and how those who badly measure ought to be punished.

c.27 speaks of esplees that can come to lords of inheritances which move from them as if they were repurchases or sales, and of the taking¹⁴ of inheritances.

c.28 speaks of how one ought to provide one's lord with a farm-horse of service by reason of fief and of the harm to them who do not provide as they ought.

c.29 speaks of the services that are done by rent [*louier*] or by command or by will, and of accounts to sergeants and of the other services that one ought to do by reason of fief; and demanding back arrears when one has paid too much.

c.30 speaks of misdeeds and what vengeance ought to be taken for each misdeed, and what fines are at will; and of banns;¹⁵ and of banished and false witnesses; and how gage ought to be guarded, and of conspiracies [*alliances*], and in what case one is released on one's oath, and of what one is held to render to another for harm, and of taking through another seignory, and of those who are appealed or imprisoned for a case of crime, and of those who lead away the wife or daughter of another; of *lais dis* [? spoken poems, i.e., magic chants]¹⁶ and of melees.

[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, but¹⁷ 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'emblor*]. 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 vivaria. And by this we can see that they are put in the position of those who are taken for thieves when they do the deed at night and not when they when the deed is done by day

c.31 speaks of open thefts and those that are in doubt, and how thefts are proven.

c.32 speaks of novel disseisin and of force, and of new trouble,¹⁸ and how one ought to behave about it; and of the obedience that middle-status men [*ostes*] owe to their lord.

c.33 says that that which is done by force or by trickery or by too great fear ought not be maintained.

c.34 speaks of agreements, which are to be kept and which not; and of markets and farms;¹⁹ and of the things that are obligated without agreement; and how payment is proved without witnesses and what force is and of frauds.

¹³ Akehurst translates "abandoning land instead of paying quit-rent." The relevant section concerns a tenant who leaves land that he holds subject to a *cens*.

¹⁴ Akehurst translates "price."

¹⁵ Akehurst translates "boundary markers."

¹⁶ Akehurst translates "insults."

¹⁷ Akehurst adds in brackets "I say."

¹⁸ Akehurst translates "nuisance."

¹⁹ Akehurst translates "deals and leases."

c.35 speaks of obliging one's self by writing and how one ought to make them hold²⁰ and how one can speak against them, and of the form of making writings.

c.36 speaks of things that are bailed to ward and how one ought to keep them and render to those who bailed them.

c.37 speaks of things that are loaned and how one who has borrowed can use them.

c.38 speaks of things bailed for rent and of farms and of gaging.²¹

c.39 speaks of proofs and false witnesses, of negation and affirmation [*espurgement*],²² and of the danger which is threatened, and of speaking against witnesses, and what cases can fall in proof.²³

[1146] In our opinion, according to our custom there are eight modes of proof: the first is when he against whom the complaint is made acknowledges the complaint

[1147] The second mode of proof is by writings

[1148] The third mode of proof is by gages of battle

[1149] The fourth mode of proof is by witnesses, as when something is denied and the demandant offers to prove it by witnesses. In this proof there must be at least two lawful witnesses, who agree with each other without variance on the questions that are put them after their oaths. And how one ought to examine witnesses we will say later on in the chapter that comes after this one.

[1150] The fifth mode of proof is by record²⁴

[1154] The sixth mode of proof is when some matter is presented in court and it is neither denied nor contested by the [other] party

[1155] The seventh mode of proof is when the matter that one has to prove is so clear of itself that no other witness is necessary for it

[1156] The eighth mode of proof is by presumptions. ...

[1170] He who wishes to prove by witnesses ought to bring them in, good and lawful, those who know for certain what they will say in their testimony after their oath, all being such that one cannot find within them something by which they can be excluded. And since there are many ways by which they can be excluded, we will say afterwards which can be excluded and how one can and should exclude them.

[1174] In every case in which one can raise²⁵ witnesses and put to gages [of battle], if a clerk is called to be a witness, he can be excluded, for he cannot be forced [? *tret*]²⁶ nor put to gages. And for this reason he ought not be received in a case in which he can be excluded.

[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

²⁰ Akehurst translates "validate."

²¹ Akehurst translates "leases," which seems a bit loose.

²² Akehurst translates this entire phrase as "alibis."

²³ Akehurst translates "can be put to proof." The disagreement depends on whether we should understand *cheoir en preuve* should be taken as meaning "fall in proof" (i.e., fails of proof) or "fall into proof." Since the chapter speaks of both, it is hard to tell precisely which is meant. Supporting the Akehurst translation is the relatively common phrase *cheoir en povreté*, "to fall into poverty."

²⁴ Akehurst translates "recall from memory." This emphasizes, as seems to have been the case, that the "record" spoken of here is not written.

²⁵ Akehurst translates "removed."

²⁶ Akehurst translates "called."

not know which is the elder without the testimony of women, and for this they ought to be believed in such a case.

[1176] Bastards and serfs ought to be excluded from testimony if the case is not against a serf or a bastard, for they cannot exclude those of their own condition. But if they are brought in against a free person and they are challenged, they ought not be heard.

[1177] Lepers ought not be heard in testimony, for custom accords that they be excluded from commerce with other people.

[1178] Those who are of my bread and my pot,²⁷ or in my administration [*mainburnie*], bail or ward, or who lose or gain with me by reason of partnership, ought not be heard in testimony for me, if they are challenged on the other side, for the presumption is against them, that they will say something other than the truth for love of me, even though it is true that no one should perjure himself, even for his father.

[1179] Nothing should be heard or received in testimony of him who wishes to testify for his profit or for his deliverance, as when someone wishes to testify that a debt of which he is pledge has been paid, one can well exclude him from his testimony, for if the payment be proved by him, he will be quit of his pledge and thus he would testify for his profit, which would not be reasonable. And by this case one can understand all the others in which one could have profit by his testimony, be it present or future profit; for if I am called to testify about an inheritance which is being demanded, of which I am right heir, I can reasonably be excluded from my testimony.

[1180] Those who are at war or at such hate²⁸ that they will not speak to the one against whom they are called to testify, can well be excluded from their testimony, for it would be a cruel thing if those who are at war against me or at such great hate that they will not speak to me be heard against me in testimony.

[1181] If anyone is called against me to testify, such that he has threatened to do grief or damage to me, I can exclude him from his testimony, nor ought he be heard against me, for by threat is proven the bad will that he has against me.

[1182] When anyone is accused of any case of crime by which he could lose his body if he is attainted of it, and witnesses are to be heard to know the truth of the matter, no one who is of his house or of his lineage, nor his wife ought to be believed in his deliverance for there is danger that they perjure themselves to rescue him from shame and save him from death. And if they testify to his detriment, they ought to be believed as much or more than any other, for it is clear that lawfulness moved them to speak the truth rather than perjuring themselves.

[1183] No child under age, nor natural fool, nor one out of his senses ought be brought to testimony. This is so much so that if he against whom they are brought is so nice²⁹ that he does not challenge them, the judge ought not receive them. And if they are received because they are not excluded and the auditors do not know it when they are examined, if the matter comes to the cognizance of the judges,³⁰ their statements ought not be put in judgment. But if this does not come to the cognizance of the judges, and if they are not excluded by the party, and the case is adjudged on their saying, the judgment will hold, and the party cannot appeal the judgment by the saying of the witnesses. And by this you can understand that everything that can be said against the witnesses ought to be proposed in judgment, indeed, before they have sworn, as was said above [1171].

[1185] One can challenge witnesses for other reasons than those given above, as when I offer to prove that he who is brought in to testify against me has payment or promise for testifying against me. If I can

²⁷ Akehurst translates "my dependants."

²⁸ Akehurst translates "feud [*haine*]."

²⁹ Akehurst translates "stupid [*nices*]."

³⁰ Akehurst translates "jurors," emphasizing that the *juges* of this court are not the presiding officer.

show this, he can and should be excluded from testimony by reason, and custom accords, for it would be likely that he who received gift or promise would say something other than the truth by covetousness.

[1186] Other types of people can be excluded from testimony: those who are attainted or condemned in a case of crime or of false testimony which they gave at another time or who are perjured. All such types of people cannot give testimony if a party wishes to exclude them at the time and place at the point where one can exclude witnesses, as is said above. And the reason why they ought not be believed is this: one ought not believe him who by his bad conduct has been held to be blameworthy³¹ of evil [*a este repris de vilain cas*], and it is always said that judged men cannot judge. Nevertheless, it is a good practice for justice, when it takes a man attainted and condemned of a case of evil, that it seek from him who are his companions and full of evil ways, because the bad know each other more frequently than the good do the bad, because they keep company in their badness. But for anything that they say, if other proof or other clear presumption is not found with their saying, no one, on the ground of their saying alone, ought to receive death for it; but well one ought take them and keep them in prison for the presumption which one has against them until one knows if one will be able to know more clearly, either by their acknowledgement or by another means of proof, for he who does not seize them on such an accusation gives great security to the bad and they would not fear when one seized their companions; and because one takes them on the ground of such accusations, they fear and cease doing much bad.

[1187] In some cases one ought to believe someone on the testimony of his household, only with the presumption of good reputation, as in private cases which can happen to householders [*osteus*] about which care is not taken³² and which are not expected to arise. As when I am at home living far from others and robbers come by night, and I or my household perceives them and run after them³³ to take them and we take them or kill them because they turned to defense; in such a case, if I am of good reputation, I ought to be believed by the testimony of my household. But if I live near to people, as in a town, and I or my household do not raise the cry by which the neighbors hear it, there would be a danger that one could hold me guilty.³⁴ Nevertheless, if one fails to raise the cry for any reason that seems reasonable, such as if I am at war or at hate with my neighbors for plea or contestation or because they are of bad reputation, in such case I could be excused from the cry.

[Further examples of “private cases” omitted. There follows a discussion of the problem of proving the negative.]

[1197] We have said in this title above that women are received in testimony to prove the age of children, and they are also heard according to our custom in a case being determined by inquest, because it may happen that they know what is being inquired about and men do not know it, and if they were not believed in such a case, some truths about it could be concealed. Nevertheless cases of crime are excepted, for in a case in which there is danger of death or mutilation women are not to be heard in testimony, if it is not to a notorious fact, which was done before so many respectable people [*preudommes*] that it is openly known, as before six of good reputation or more; and also women are heard in testimony when maidenhood is to be proved, as happens in some cases in pleas of Christianity, but since there is no occasion for that in court lay, we do not allow it at all.³⁵

[1198] Everyone knows that those who are underage cannot bear witness when they are underage, nevertheless when they are of age, they can well give testimony to that which they saw or heard at the time when they were underage, as when something was done when they were only ten or twelve, because some people remember well what they saw in their childhood at the age of ten or twelve.

³¹ Akehurst translates this as “convicted.”

³² Akehurst translates “which were unexpected.”

³³ Akehurst translates “attack them [*courons sus*].”

³⁴ This could also mean “it would be dangerous if one could not hold me guilty.”

³⁵ Akehurst translates “we’ll say no more about it.”

[1199] Proctors, advocates and counselors cannot give testimony in cases in which they were proctors advocates or counselors.

[1200] One custom is not current but used to be according to what we hear from those who know the law, that no witness however much he knows of the matter is worth anything unless he is called by the parties to the action to give testimony about what was done, if necessary. But now it is quite other, for those who were at the thing done or who heard it recorded are heard in testimony if they are not excluded for some reason other than that they were not called, and the other reasons are explained above.

[There follows material on proof by writing.]

[1206] He ought not be put to testimony who is outside of the Christian faith, as is a Jew. Also there ought not be received in testimony those who are excommunicated and aggravated.³⁶ But since we are speaking of Jews, if the plea is of one Jew against another, Jews who have to prove something can prove it by other Jews, for they are not accustomed to call, nor would we wish that they were, Christians for their bad agreements and bad trading. And when Jews must be heard in any testimony, they ought to made to swear on their law that they will speak the truth, and then be examined in the manner which we have said for Christians, according as necessity requires.

[There follows material on penalties for false testimony.]

[1209] We have said that serfs ought to be excluded from giving testimony, but we understand this in all quarrels of cases of crime and in all quarrels in which they can be put to gage in some court other than the court of their lord, for if they entered into gage, one could oust their lord in whatever court he found him,³⁷ and therefore they are not to be received. And they are not to be received in testimony in any quarrel that concerns their lord, for the lord cannot bring in his serf on his side when the other side wishes to exclude him. But in quarrels that are brought for movable for chattels and for inheritances—such quarrels do not concern their person nor the person of their lord, and in those in which there is no notion of putting them to gage, because the quarrels are small or the lord holds his court according to the establishment of the king in which gages are prohibited—in such quarrels and in such cases they are well received in testimony, whether in court or before auditors or inquisitors; and thus they can testify in cases brought about small misdeeds in which there is no danger of losing life or member.

[1210] Proctors and advocates are not received in testimony for their masters in the case in which they are proctors or advocates, but in other quarrels they can be.

[1211] No man of religion and no woman of religion of whatever order ought be received in testimony for their church in lay court nor against a lay person. But when they plead against each other in court Christian, it is not fitting that we speak of it, because we do not intend to speak about anything except the customs of the lay court.

[There follows material on testimony about proving fairs and markets.]

[1223] We have said generally that no one ought be received to be a witness in his own quarrel. Nevertheless we will see three special cases in which every lawful man can prove by his own oath without other proof. The first case is that of those who sell penny meals for people's sustenance [*des queles l'en doit vivre*], for the seller is believed up to the value of 5 s. and 1 d., when the acknowledge that they have received some amount of the other's goods. The second case is those who have letters from their debtors in which is contained that they ought to be believed about costs and damages by their oath. The third case is if someone who is not my lord breaks my chest or my room, for the force and for the contempt and for the damage which is done me by force and against right, I can sue him for my damages; and because

³⁶ Akehurst translates "under ordinary or aggravated excommunication." It may be, however, that the lay court spoken of here excluded only those subject to aggravated excommunication.

³⁷ Akehurst translates "his lord could remove him from it in whatever court he found him." That certainly makes more sense but does not seem to be what the French says.

customarily one does not voluntarily reveal what is in chests or secret places to strangers,³⁸ it is out of the ordinary [*fors chose*] to have witnesses, and for this reason I ought be believed concerning the damage by my own oath. Nevertheless, the amount of the damages [stated] could be so outrageous, as when common reputation testifies that I am not worth 100 *l.* and I wish to swear my damage at 500 or 1000, I would not be believed, so that the damages would be assessed by lawful inquest according to what is fitting my estate and what one could think that a man of my riches might have lost by the misdeed that was done me.

c.40 speaks of inquisitors and auditors; and of appraisals, and of examining witnesses and of the difference between an appraisal and an inquest, and of contesting witnesses.

c.41 speaks of arbiters and of the power which they have and which are valid and which not, and how arbitrations fail, and of what cases on can put to arbitration.

c.42 speaks of penalties that are stipulated, in which cases they are to be paid and in which not, and of the difference between a bodily penalty and a monetary penalty.

c.43 speaks of pledges and how and in what manner one ought to deliver³⁹ one's pledges and of the damages which one ought to render in court lay, and who can pledge; and which days everyone ought to have.

c.44 speaks of reclamations [*rescousses*] of inheritances and of exchanges; and that fraud [*barat*] will not be allowed.

c.45 speaks of avowals and disavowals and of servitudes and franchises; and of the danger of disavowing, and how one ought to pursue those who disavow.

[1452] We have spoken of two estates, to wit, gentlemen and commoners, and the third estate is that of serfs. And this type of person are not all of one condition, but there are many conditions of servitude. For some sorts of serfs are so subject to their lords that their lords can take whatever they have in life or death, and keep their bodies in prison whenever it pleases them, rightly or wrongly, and are not held to reply for it to anyone except God. And the others maintain themselves more freely [*debonairement*], for as long as they live their lords cannot require anything of them if they do no wrong, except thei, *cens*, rents and returns which they are accustomed to pay for their servitude. And when they die or when they marry free women whatever they have escheats to their lords, movable and inheritances; for if they marry out [*formarient*], they must fine at the will of their lord. And if they die, they have no heir other than their lord, and the child of the serf has nothing in it if he does not buy it again from the lord as if it were another's property. And this latter custom, that of dead hand and formarriage, of which we have spoken, applies among the serfs of Beauvaisis quite generally; and of the other conditions among serfs in other places we had better keep silent, because our book concerns the customs of Beauvaisis.

c.46 speaks of the ward of churches and how one ought to punish those who do wrong to them; and of the two esplees, on temporal and the other spiritual; and what harm a church can have from disavowing its lord's right.

c.47 speaks of how fiefs can be alienated from and return to their lords⁴⁰ according to the custom of Beauvaisis and that the tenant take care not to partition against custom.

c.48 speaks of how a commoner [*homme de pooste*] can hold a fief in faith and homage and how he ought to do service for it.

c.49 speaks of *établissements* and to what extent or which custom should not be kept by reason of future⁴¹ necessity.

³⁸ Akehurst translates "strongbox [*exrins*] to other people."

³⁹ Akehurst translates "discharge."

⁴⁰ Akehurst translates "can be held more or less directly from their lords."

⁴¹ Akehurst omits this word.

c.50 speaks of the men of good towns and their rights and how they ought to be regarded and justified so that they can live in peace.

c.51 speaks of for what reasons a lord may take [property] and keep in his hands and how they ought to work it to the profit of their subjects and keep their right in it.

c.52 speaks of forbidden things and seizures which are made for misdeeds or for harms, and how one ought to take and work the seizure and of inheritances sold by force and of sales⁴².

c.53 speaks of replevin [*recreance*] and in what case one ought to make replevin and what not and how replevin ought to be sought and how it ought to be made in cases in which it is required.

c.54 speaks of how one ought to pay the creditors and keep [the immovables] from harm; and the manner of taking [a debtor's goods] in houses; and for what case and how one ought to set guard over another's [goods]⁴³ and who the guards ought to be.

c.55 speaks of reclamation,⁴⁴ which are made rightly and which wrongly and how the lord ought to work them.

c.56 speaks of those who ought not hold inheritance and what one ought to do with the foolish and the mad; and of the ward of poor houses and hospitals and to whom the ward and the justice belong.

c.57 speaks of the ill-will between husband and wife who are married, how the lord ought to behave with regard to it, and for what causes it is permissible to separate on from the other.

[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 chapter is too long to translate in full, but it makes it clear that the court 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,⁴⁵ 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.

c.58 speaks of high and low justice, and of the cases that pertain to one justice and to the other; and of those who go armed by another's justice;⁴⁶ and that peace is not to be allowed in a case of evil;⁴⁷ and that the sovereign⁴⁸ can take the fortresses of their subjects.

⁴² Akehurst adds "taxes."

⁴³ Akehurst takes this as referring to persons.

⁴⁴ Akehurst translates "follow-up suits [for debt]."

⁴⁵ This paragraph is clearly speaking of a divorce *a vinculo*, i.e., an annulment.

⁴⁶ Akehurst translates "through another's jurisdiction."

⁴⁷ Akehurst translates "how a settlement may not be accepted in serious crimes."

c.59 speaks of wars⁴⁹ and how war is done by custom and how it fails and how one can aid one's self of the right of war.

c.60 speaks of truces and assurances and who can be put outside of them and of the danger of breaking them.

c.61 speaks of appeals, and how one ought to form one's appeal and of what case one can appeal and of pursuit of appeal; and of banns;⁵⁰ and with what arms one fights.

c.62 speaks of appeals that are made for default of right and how one ought to summon one's lord before one has a good appeal against him for default of right.

c.63 speaks of which defenses can avail for those how are appealed to nullify the gages and of the cases for which gage is not to be received.

c.64 speaks of the presentations which ought to be made on a plea of gages in arms and in words, and of the oaths, and of things that follow until the end of the battle.

c.65 speaks of the delays that custom gives and of the respites that men can take before they can or ought to render judgment.

c.66 speaks of refusing the judges and in which cases one sole witness is believed and that the lord shall have vigorously and put in execution what is adjudged and passed without appeal.

c.67 speaks of judgments and of the manner of making judgments, and how one ought to judge, and who can judge and how lords ought to send to know the right that their men do, and how one can falsify a judgment, and how the sergeants ought to be sent to render account.

c.68 speaks of usury and termor, and how one can defend by reason of usury against usurers.

c.69 speaks of accidents that came by mischance, in which cases pity and mercy ought more to have place than rigorous justice.

c.70 speaks of outrageous gifts which by reason ought not to be held and of those that are to be held, which one cannot and ought not challenge.

⁴⁸ Akehurst translates "lords."

⁴⁹ Akehurst adds "private" in brackets.

⁵⁰ Akehurst translates "banished persons."